

# **PwC Government Contract Compliance Quarterly Review**

Providing critical regulatory updates to Government contracts and compliance professionals

## **PwC Government Contracts Practice**

### **Q1 Government fiscal year 2013 – January 15, 2013**

#### **National Defense Authorization Act for Fiscal Year 2013 Passed by Congress and Signed into Law**

The National Defense Authorization Act for Fiscal Year 2013 was passed by both houses of Congress in late December and signed into law by the President on January 2, 2013. The Act contains provisions affecting defense contractors, but contractors avoided some significant impacts of provisions that were contained in the Senate version of the bill, but changed through negotiations prior to final passage by both houses.

Provisions impacting large numbers of contractors include:

##### *Sec. 832 - Department of Defense access to, use of, and safeguards and protections for contractor internal audit reports*

Provision requires the DCAA to issue revised guidance on access to defense contractor internal audit reports incorporating new contractor safeguards and protections. Provision requires that DCAA 1) document a determination that access to such reports is necessary to complete required evaluations of contractor business systems; 2) maintain a copy of the request to the contractor for access; and 3) maintain a record of the contractor response, including rationale or justification if access to requested reports was not granted. Provision further requires that the guidance shall include appropriate safeguards and protections to ensure that contractor internal audit reports cannot be used by the DCAA for any purpose other than evaluating and testing the efficacy of contractor internal controls and the reliability of associated contractor business systems. (The final version of the bill did not expand the DOD's access rights to internal audit reports and supporting materials, as provided for in Section 843 of the Senate version.)

##### *Sec. 864 - Report on allowable costs of compensation of contractor employees*

Provision requires the Comptroller General of the United States to submit to Congress a report on the effect of reducing the allowable costs of contractor compensation of employees to the amount payable to the President under section 102 of title 3, United States Code, or to the amount payable to the Vice President under section 104 of such title. (The final version of the bill did not impose a contractor allowable compensation limit of \$230,700 per year, as included in Section 842 of the Senate version of the proposed bill.)

##### *Sec. 802 – Review and justification of pass-through contracts*

Requires contracting officers to evaluate cases where a contractor subcontracts for more than 70% of work under a contract, task order or delivery order and consider contracting directly with subcontractor(s) performing the work.

##### *Sec. 833 - Contractor responsibilities in regulations relating to detection and avoidance of counterfeit electronic parts*

Provision cites that the cost of counterfeit electronic parts and suspect counterfeit electronic parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts are not allowable costs under DOD contracts, unless: (i) the covered contractor has an operational system to detect and avoid counterfeit parts and suspect counterfeit electronic parts that has been reviewed and approved by the DOD; (ii) the counterfeit electronic parts or suspect counterfeit electronic parts were provided to the contractor as Government property in accordance with part 45 of the Federal Acquisition Regulation; and (iii) the covered contractor provides timely notice to the Government.

##### *Sec. 811 - Limitation on use of cost-type contracts*

The provision prohibits the DOD from entering into cost-type contracts for the production of major defense acquisition programs. Underlying terms, scope and exceptions are defined in the provision. Applies to contracts entered into on or after October 1, 2014.

Expect these legislated changes to be interpreted and embodied in the regulations by one or both of the FAR Councils. Ref. 112th Congress, H.R.4310 -- National Defense Authorization Act for Fiscal Year 2013.

#### **Final Rule on Nondisplacement Qualified Workers Under Service Contracts**

Effective January 18, 2013. The final rule amends the FAR to implement Executive Order 13495 for nondisplacement of qualified workers under service contracts. A new clause is added to the FAR, 52.222-17, to require service contractors and their subcontractors under successor contracts to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified. The regulation applies to service contracts that succeed contracts for the same or similar services at the same location. A job offer made to a qualified employee on the predecessor contract must allow not less than 10 days for an employee response, during which time the contractor is prohibited from offering employment on the contract to any other person. The offer does not need to be for a position similar to the one the employee previously held, but may be for another position for which the employee is qualified, and even if it is subject to different employment terms and conditions, including changes to pay or benefits. Exceptions and other important requirements apply. The rule is applicable to solicitations issued on or after January 18, 2013. Ref. FAR Case 2011-028, FAC 2005-64, 77 Fed. Reg. 75776.

## Final Rule Amends DFARS to Update Definition of Cost or Pricing Data

December 31, 2012. A final rule was published that updates the DFARS for consistency with FAR changes addressing the definition of cost or pricing data which clarified the distinction between “certified cost or pricing data” and “data other than certified cost or pricing data” as well as the requirements for the submission of cost or pricing data. (The FAR was updated by a final rule published at 75 Fed. Reg. 53135 on August 30, 2010). The changes in the FAR and DFARS are intended to align the definition of these key terms with TINA and reduce confusion. Ref. 77 Fed. Reg. 76939.

## DFARS Business Systems Rule Implementation Update

Meetings between DOD procurement and acquisition policy management, DCMA, DCAA and industry representatives in November 2012 yielded the following updates regarding the implementation of the DFARS Contractor Business Systems rule:

- The DCMA panel established to review DACO business system determinations had conducted nineteen reviews, received fifteen recommendations for disapproval, and had “non-concurred” with all but five
- \$42M had been withheld from five contractors
- The 3% withholding differential between the initial 5% withholding and the 2% withholding rate applied after the submission of an acceptable remediation plan will not be released until after the respective system is corrected

## Preliminary DOD Better Buying Power 2.0 Guidance Memorandum Released for Comment

November 13, 2012. The DOD issued a memorandum, “Better Buying Power 2.0: Continuing the Pursuit for Greater Efficiency and Productivity in Defense Spending”, extending the guidance to the DOD acquisition community on how to “do more without more”. BBP 2.0 embodies seven focus areas and thirty-six underlying initiatives. After a two-month review and comment period for industry and government stakeholders, more detailed guidance on specific goals and objectives for each initiative is expected to be released.

Initiatives of significant interest to contractors include:

### *Implement “should cost” based management*

This initiative includes setting cost targets below independent cost estimates and managing to them. Related should cost guidance and DCMA Cost Monitoring instructions have included tactical guidance such as challenging the basis for contractor indirect costs, including IR&D expenditures and unfavorable indirect rate variances.

### *Better define value in “best value” competitions*

This initiative targets providing better definition of cost/quality trade-offs above minimum quality levels.

### *When LPTA is used, define Technically Acceptable to ensure needed quality*

This initiative is focused on ensuring that minimum technically acceptable decision criteria is defined to avoid the competition defaulting to the lowest price bidder independent of quality.

Ref. Memorandum for Defense Acquisition Workforce, “Better Buying Power 2.0: Continuing the Pursuit for Greater Efficiency and Productivity in Defense Spending”, November 11, 2012.

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