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Simplifying Federal Purchases Of Commercial Products

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For the first time since the early 1990s, when Congress overhauled federal contracting through the federal acquisition reform and federal acquisition streamlining, House and Senate authorizers exhibited a bold willingness to simplify federal purchases of commercial products and services. While many of the proposed provisions, from direct online purchasing to the wholesale elimination of regulations, were removed or modified during conference, the 2018 National Defense Authorization Act, signed by the president on Dec. 12, 2017, made measurable strides forward and signaled a willingness to remove the regulatory burdens facing government purchasers and commercial companies. The NDAA also included some warning shots about U.S. Department of Defense's perceived lack of progress:

> The committee notes that with the passage of the [NDAA for 2016 and 2017], the Department of Defense has been provided with the most expansive legislative reform agenda on acquisition in a generation. While such reforms will take time to fully, implement, the committee is disappointed with the Department's slow rate of implementation and apparent unwillingness to embrace meaningful change in order to improve its acquisition outcomes.

From the controversial direct online purchasing requirements to the more subtle provisions moving the government-wide micro-purchase threshold from $3,500 to $10,000, the simplified acquisition threshold from $150,000 to $250,000, and the certified cost and pricing threshold from $750,000 to $2 million, significant purchases of products and services will be freed from onerous contracting practices and terms, conditions, and certifications. These changes not only open up the federal marketplace for commercial companies that were previously (and justifiably) concerned about federal contracting requirements and processes, but also give government agencies easy, cheap and efficient access to the commercial marketplace. Congress also took other significant steps forward for commercial purchasing practices, including:

- A requirement that the DOD take a hard look at further eliminating requirements and restrictions for purchasing commercial products and services.

- A mandate that if the DOD has purchased a product or service using commercial contracting practices in the past, they must continue to use commercial practices for those purchases.

- A government-wide prohibition on the inclusion on certain contract clauses and requirements in subcontracts for commercial items.

Below is a brief summary of each provision, their relationships to each other, and a discussion of the likely impact.

Procurement Through Commercial E-Commerce Portals (Section 846) and the Micro-Purchase Threshold (Section 806)

The NDAA requires the administrator of the General Services Administration to develop a three-stage implementation plan to procure commercial products through e-commerce portals. While the NDAA contemplates a two-year time frame for study and implementation, there is little to prevent the GSA from pushing implementation through the bureaucracy more quickly. With Emily Murphy as the new GSA administrator and a recent House Armed Services Committee staffer, the industry should expect implementation to be high on the agenda. However, difficult questions face the GSA in implementation, including the maintenance of the small business reserve (purchases between $10,000 and $250,000), the application of domestic preference statutes, and the use of mandatory sources such as Federal Prison Industries and AbilityOne.

While the e-commerce portals won't be fully available with the speed the House authorizers envisioned, with the micro-purchase threshold moving from $3,500 to $10,000, Congress gave an explicit stamp of approval for the use of online commercial portals for purchases less than $10,000. Notably, federal statutes and regulations require no terms or conditions for micro-purchases, making the terms and conditions of online portals acceptable for all federal purchases of commercial products and services. But see 48 C.F.R. 52.232.39, "Unenforceability of Unauthorized Transactions." Unanswered by the NDAA, however, are at least two questions: (1) whether the micro-purchase threshold is increased to $10,000 where employee wages are governed by the Service Contract Act or Davis-Bacon and (2) whether mandatory purchases from entities like Federal Prison Industries will still be required below the micro-purchase threshold.

Increased Simplified Acquisition Threshold (Section 805)

By raising the simplified acquisition threshold to $250,000, Congress gives the entire federal government greater authority to purchase supplies, services, construction or research using streamlined procedures and limited terms and conditions from small businesses. Assuming federal agencies enforce the small business reserve requirements, this is a big win for the small business community.

Certified Cost or Pricing Data Thresholds (Section 811)

One of the most significant barriers to the federal government's purchase of unique products, technologies and private sector research capability is the current requirement for companies to provide certified cost or pricing data when the government is unable to obtain adequate price competition for contracts with a value exceeding $750,000. Many, many companies with the best product, service or research capabilities are simply unwilling to sell to the federal government at the prime contract or subcontract level when required to disclose extensive pricing buildup and/or pricing/profit history. By

more than doubling the initial contract value threshold from $750,000 to $2 million, Congress is breaking down a significant barrier to accessing new and needed, but unique, technologies and research capabilities.

Review of Regulations on Commercial Items (Section 849) and Definition of a Subcontract (Section 820)

When the Federal Acquisition Streamlining Act (FASA) was enacted in 1996, it created a government-wide statute intended to prevent the wholesale application of new laws, regulations, contracts clauses and certifications to the purchase of commercial items and commercial off-the-shelf items (COTS). The statutory provision was largely unsuccessful, and over the ensuing 21 years, government unique statutes, regulations and contract clauses applicable to the purchase of commercial items amassed to historic levels, creating extraordinary inefficiencies in the purchase of commercial items and COTS. See 48 C.F.R. 52.212-3, -4, -5. As Section 849 (then 855) was proposed by the Senate, the NDAA would have simply eliminated these statutes, regulations and clauses when the DOD was purchasing COTS. In perhaps a more measured, but potentially far-reaching, fashion, Section 849 as enacted gives the DOD a year to review the application of these laws to contracts and subcontracts for commercial items and COTS and propose revisions. Indeed, this process has been well underway at the DOD on a much broader scale since at least April, including a June 20, 2017, Federal Register notice seeking public comment on solicitation provisions and contract clauses appropriate for repeal, replacement or modification. 82 Fed. Reg. 28041.

Interestingly, however, the NDAA also added a government-wide provision to FASA in an apparent attempt to exclude certain subcontracts from the application of laws, regulations or contract clauses enacted after 1996. In a somewhat cryptic fashion, the NDAA Section 820 adds the following definition of a subcontract to Section 1906(c)(1) of Title 41: "The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Federal Government and other parties and are not indentifiable to any particular contract." This addition was consistent with similar language added to 10 U.S.C. 2375 by the 2017 NDAA. Although the interpretation is not entirely clear, subcontracts for commodities not identifiable to a particular prime contract appear to be excluded from all federal contracting flow-down provisions. Of particular note, the DOD has yet to implement this provision from last year or issue a proposed rulemaking. See 48 C.F.R. 212.504.

Once a Commercial Item, Always a Commercial Item (Section 848)

Clearly unhappy with inconsistent DOD determinations that a particular product or service qualifies or does not qualify as a commercial item, Congress sent a shot across the DOD's bow. No funds appropriated and made available to the DOD can be used "for the procurement under part 15 of the Federal Acquisition Regulation of an item that was previously acquired under a contract using commercial item acquisition procedures under part 12." The Senate was particularly concerned with the DOD's failure to recognize prime contractor's determination of commerciality for subcontractors where the DOD had made a prior commerciality decision.

While many of the provisions were not as far-reaching as many House and Senate authorizers wanted, Congress sent a very clear message to the DOD, industry and federal contracting officials: It is time to make it easier for the federal government to access products and services. And, frankly, the DOD heard this message loud and clear well before this week. Transformation does take time, but it has clearly become a priority at the department.

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