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FOCUS

FEATURE COMMENT: The Impact Of The National Defense Authorization Act For Fiscal Year 2014 On Federal Procurement

In 2013, two National Defense Authorization Acts were enacted. First, on January 2, President Obama signed into law the National Defense Authorization Act for Fiscal Year *2013*. See P.L. 112-239. Subsequently, on December 26, the president signed into law the FY *2014* NDAA. See P.L. 113-66. Unfortunately, the fact that two NDAAs were passed in one year is not a sign of legislative progress or increased cooperation between the legislative and executive branches. Instead, both acts were delayed and enacted approximately three months after the start of their respective fiscal years.

Since the FY 2013 NDAA was the subject of an earlier article, see Schaengold and Deschauer, Feature Comment, "The Impact Of The National Defense Authorization Act For Fiscal Year 2013 On Federal Procurement," 55 GC ¶ 57 (2013 NDAA FC), this FEATURE COMMENT focuses on the FY 2014 NDAA and discusses its more significant procurement-related provisions.

As with many of its recent predecessors, including the FY 2012 and FY 2013 NDAAs, the FY 2014 NDAA was stalled for many months and was enacted nearly three months after the start of the 2014 fiscal year. On June 7, the House Armed Services Committee reported its version of the FY 2014 NDAA, which the House passed on June 14. On June 20, the Senate Armed Services Committee reported its version of the NDAA. On Nov. 19, the Senate finally took up consideration of the Senate NDAA but it was withdrawn without further consideration when the Senate failed to invoke cloture to limit the number of amendments to the bill that could be considered. The two Committees then drafted a new NDAA bill based on the earlier bills and amendments from the Senate. On Dec. 12, 2013, this new NDAA bill passed the House of Representatives 350–69, and it passed the Senate on December 19 by an 84–15 vote.

The administration's problems with the FY 2014 NDAA included, for example, certain provisions related to the Guantanamo Bay detention facility and the Guantanamo Bay detainees. See *www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304* (President Obama's signing statement for the FY 2014 NDAA: "Section 1033 renews the bar against using appropriated funds to construct or modify any facility in the United States, its territories, or possessions to house any Guantanamo detainee in the custody or under the control of [DOD] unless authorized by the Congress. Section 1034 renews the bar against using appropriated funds to transfer Guantanamo detainees into the United States for any purpose. I oppose these provisions, … and will continue to work with the Congress to remove these restrictions.").

The FY 2014 NDAA includes several significant procurement-related reforms and changes, most (but not all) of which are included, as usual, in "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters" of the Act. Although Title VIII includes 13 provisions specifically addressing procurement reform, this is fewer than in recent years. For example, the FY 2012 and FY 2013 NDAAs included 49 and 44 such

provisions, respectively. In large part, the reason that the FY 2014 NDAA has far fewer procurement-related provisions is that, in order to ensure its passage in late December 2013, the FY 2014 NDAA's procurement provisions were the subject of substantial compromise, with the controversial provisions generally removed. See *armedservices.house.gov/index.cfm/files/serve?File_id=8A5E9112-80EF-43E1-A4E9-9AB0C0C107D8* (congressional joint explanatory statement, at 118–27 ("Legislative Provisions Not Adopted")).

As in past years, however, certain provisions in other titles of the FY 2014 NDAA are also important to procurement law. As discussed below, the impact of the FY 2014 NDAA's procurement-related reforms varies substantially; some will cause little change to current practice, while others may require certain contractors to significantly change their practices.

Section 801: Enhanced Transfer of Computer Software Technology Developed at DOD Labs—The secretary of defense and each secretary of a military department "may authorize the heads of DOD laboratories to grant nonexclusive, exclusive, or partially exclusive licenses, royalty free or for royalties or for rights to other intellectual property, for computer software and its related documentation developed at a DOD laboratory, but only if" (a) "the computer software and related documentation would be a trade secret," see 5 USCA § 552(b)(4), "if the information had been obtained from a non-Federal party"; (b) "the public is notified of the availability of the software and related documentation for licensing and interested parties have a fair opportunity to submit applications for licensing"; (c) such licensing complies with existing law (e.g., Bayh-Dole Act) concerning the licensing of federally owned inventions; and (d) "the software originally was developed to meet [DOD's] military needs."

Section 801 further requires DOD to take precautions to protect against unauthorized disclosure of the software and its documentation. It also discusses how any royalties paid to DOD will be used, including providing certain royalties to DOD lab employees who developed the software. Congress' joint explanatory statement observes that the DOD IP at issue here does not have to be subject to a patent. The authority granted under this provision expires on Dec. 31, 2017.

Section 801 could provide opportunities for contractors that identify software (and related work) that has been developed or performed by DOD labs that would benefit contractor projects, programs or independent research and development work. Contractors may want to contact certain DOD labs to remind them of this provision, and to ascertain whether any software or related documentation will be available for use and how the lab will advise the public of its availability.

Section 802: Extension of Limitations on Contractor Services Spending by DOD—Section 802 amends § 808 of the 2012 NDAA, see P.L. 112-81; Schaengold and Deschauer, Feature Comment, "The Impact Of The National Defense Authorization Act For Fiscal Year 2012 On Federal Procurement," 54 GC ¶ 60 (2012 NDAA FC), to extend for one year (through FY 2014) the temporary limit on the funds DOD may spend for most contracts for services to the amount requested for contract services in the president's FY 2010 budget.

This section further requires that each DOD agency continue, during FY 2014, the 10-percent per fiscal year reductions in spending for contracts "for the performance of functions closely associated with inherently governmental functions," and for "staff augmentation contracts." It mandates that any unimplemented amounts of the 10-percent reductions for FYs 2012 and 2013 be implemented in FY 2014. Section 802 also amends FY 2012 NDAA § 808 to provide that DOD, when awarding new contracts, is no longer required to implement a "negotiation objective" to freeze contractors' labor and overhead rates so as to prevent them from exceeding FY 2010 levels.

Section 803: Obsolete Electronic Parts—This section requires, not later than June 24, that "the Secretary of Defense … implement a process for the expedited identification and replacement of obsolete electronic parts included in [DOD] acquisition programs." An electronic part is obsolete if "the part is no longer in production" and "the original manufacturer of the part and its authorized dealers do not have sufficient parts in stock to meet [DOD's] requirements."

At a minimum, this "expedited process" shall (1) permit contractors (or other "sources of supply") to identify to DOD "obsolete electronic parts that are included in the specifications for

[DOD] acquisition program[s] and … suitable replacements for such electronic parts"; (2) specify timelines for the expedited DOD review and validation of such information; (3) "specify procedures and timelines for the rapid submission and approval of engineering change proposals needed to accomplish the substitution of [validated] replacement parts"; (4) provide for appropriate "incentives for contractor participation in the expedited process"; and (5) provide that "product support manager[s] for a major weapon system shall work to identify obsolete electronic parts that are included in the specifications for [DOD] acquisition program[s] and approve suitable replacements for such electronic parts."

Although § 803's requirements are principally directed at DOD, it is possible that contractors will see an increase in solicitation requirements to provide mitigation (or related) plans concerning electronic parts obsolescence.

Section 803 is probably most notable for certain language, which some found to be controversial, that was not included. The House FY 2014 NDAA bill contained a provision that would have amended FY 2012 NDAA § 818 to provide that "the costs associated with the use of counterfeit electronic parts, and the subsequent cost of rework or corrective action that may be required to remedy the use of inclusion of such parts, are allowable costs under [DOD] contracts if the counterfeit electronic parts were procured from an original manufacturer or its authorized dealer, or from a trusted supplier." See *armedservices.house.gov/index.cfm/files/serve?File_id=8A5E9112-80EF-43E1-A4E9-9AB0C0C107D8* (joint explanatory statement, at 120 (under "Legislative Provisions Not Adopted")); see id. at 113. This section continues Congress' recent efforts, see, e.g., 2013 NDAA FC, 55 GC ¶ 57 (citing FY 2013 NDAA §§ 807, 833, 1603), to prevent the use of counterfeit electronic parts in DOD contracts.

Section 811: Government-Wide Caps on Allowable Costs for Compensation—Prior to the Dec. 26, 2013 passage of both the FY 2014 NDAA and the Bipartisan Budget Act of 2013 (BBA), P.L. 113-67, the compensation cap for federal contractor employees was $763,029, which applied to all contractor employees performing DOD, NASA and Coast Guard contracts, as well as to the five highest-paid executives performing under other federal agency contracts. Pursuant to the then-existing survey-based statutory formula, in early December, the Office of Federal Procurement Policy announced that the cap would increase to $952,308 for costs incurred after January 1, 2012. See 78 Fed. Reg. 72930 (Dec. 4, 2013); Federal Acquisition Regulation 31.205-6(p).

FY 2014 NDAA § 811 provides that the "[c]osts of compensation of any contractor employee" for a federal fiscal year that "exceeds $625,000" are unallowable. However, the relevant agency "may establish exceptions for positions in the science, technology, engineering, mathematics, medical, and cybersecurity fields and other fields requiring unique areas of expertise upon a determination that such exceptions are needed to ensure that the" agency "has continued access to needed skills and capabilities." The $625,000 ceiling is to be adjusted annually using the Bureau of Labor Statistics (BLS) employment cost index for "total compensation for private industry workers, by occupational and industry group not seasonally adjusted."

Unfortunately for contractors, the Government will no doubt maintain that the cap should be substantially lower than the $625,000 called for by the FY 2014 NDAA. This is because BBA § 702, the language of which is somewhat similar to FY 2014 NDAA § 811, makes unallowable "contractor and subcontractor" employee compensation in excess of $487,000 per federal fiscal year.

Although the BBA was passed by Congress and received by the president a day earlier than the FY 2014 NDAA, the president signed the FY 2014 NDAA first, and then subsequently (but on the same day) signed the BBA. (This is reflected, for example, by the public law numbers for the two statutes, i.e., P.L. 113-66 for the FY 2014 NDAA, and P.L. 113-67 for the BBA.) Consequently, the Government will argue that the BBA cap of $487,000 controls because the BBA was the subsequently signed statute.

While there is case law that supports this proposition, see *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996) ("To the extent there is a conflict [between statutes], the most recently passed statute … prevails."); *Boudette v. Barnette*, 923 F.2d 754 (9th Cir. 1991) (ruling that a Federal Rule of Civil Procedure prevails over an earlier passed, but

conflicting, U.S. Code provision because "when two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will") (citation omitted); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Auto Glass Emps. Fed. Credit Union*, 72 F.3d 1243 (6th Cir. 1996); *Gargoyles, Inc. v. U.S.*, 45 Fed. Cl. 139 (1999), *appeal dismissed*, 232 F.3d 910 (Fed. Cir. 2000); see also Singer and Singer, 1A *Sutherland Statutory Construction* (7th ed. 2009), § 23.18, at 513–14 and nn.7–9 (citing cases), that case law is based, at least in part, on the proposition that "the statute last in time prevails *as the most recent expression of the legislature's will*." *Boudette*, 923 F.2d at 757 (emphasis added); see *State Dep't—Assistance for Lebanon*, Comp. Gen. Dec. B-303268, Jan. 3, 2005, 2005 WL 41632, ("The [last in time] rule presumes that the interpretation and application of statutes should reflect the most recent expression of Congress's intent."); *Sutherland Statutory Construction* (7th ed. 2009), § 23.18, at 513–14 ("the latest expression of legislative will prevails"). As noted, here, the FY 2014 NDAA is arguably the statute last in time with respect to Congress' will because Congress passed it after it passed the BBA.

In contrast to the annual BLS adjustment to the cap called for by the FY 2014 NDAA, the BBA ceiling is to be adjusted annually using a different measure, i.e., the BLS employment cost index "for all workers." The BBA, which also has different exception language than the FY 2013 NDAA has, provides in this regard that a federal agency head "may establish one or more narrowly targeted exceptions [to the ceiling] for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities." Unlike the FY 2014 NDAA, which applies to "any contractor employee," the BBA explicitly applies to both "contractor *and subcontractor* employees."

The BBA and FY 2014 NDAA compensation caps "apply only with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of" those acts, i.e., on or after June 24. These caps, of course, do not limit the amount that a contractor can pay its employees. Instead, these statutes identify salary costs above their respective caps as "unallowable" under a "covered contract."

Covered contracts include federal agency contracts "for an amount in excess of $500,000 …, except that the term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items." Once the FAR is modified to take into account the cap change, the new cap should also apply to, for example, modifications to firm, fixed-price, non-incentive contracts. The new caps control only the amount of contractor employees' salaries a contractor can charge to covered contracts awarded on or after June 24.

Pursuant to § 864 of the FY 2013 NDAA, the U.S. Comptroller General submitted a June 2013 report to Congress on the impact of reducing the allowable cap to the president's ($400,000) or vice president's ($230,700) salary. See Government Accountability Office, *Defense Contractors: Information on the Impact of Reducing the Cap on Employee Compensation Costs* (GAO-13-566), available at *www.gao.gov/assets/660/655319.pdf*. GAO's report, which made no recommendations and lacked relevant data from three of the largest DOD contractors, resulted in DOD recommending further "research" and observing that "we must avoid a policy that serves to drive away the very talent that we need to maintain our strategic advantage and national industrial base." Id.

In this regard, the BBA requires the Office of Management and Budget and DOD, within 90 days of the BBA's passage, to "report to Congress on alternative benchmarks and industry standards for compensation, including whether any such benchmarks or standards would provide a more appropriate measure of allowable compensation." OMB is also required to report annually to certain congressional committees on the number of and duties performed by the "scientists, engineers, or other specialists" that are subject to an agency head's exception to the cap.

Section 813: Public Accessibility to Compelling Reasons for DOD to Waive Suspension or Debarment—Prior to the enactment of § 813 of the FY 2014 NDAA, 10 USCA § 2393(b) provided that if a secretary of a military department determined that that there was a "compelling reason" to waive a suspension or

debarment "by another Federal agency," the secretary was required to "transmit a notice" to the General Services Administration "describing the determination," and GSA would maintain the determination "in a file available for public inspection." The 2014 NDAA amends this provision to make such determinations more easily accessible by requiring that GSA make them available "on a publicly accessible website to the maximum extent practicable."

Section 821: Decertification of Cryptographic Systems for Major Defense Acquisitions—Section 821 requires that the milestone decision authority for Milestone B of a major defense acquisition program, i.e., the initiation of "system development and demonstration," include a certification that "there is a plan to mitigate and account for any costs in connection with any anticipated de-certification of cryptographic systems and components during the production and procurement of" a "major defense acquisition program." Although § 821's requirements are principally directed at DOD, it is possible that contractors will see an increase in solicitation requirements to provide mitigation (or related) plans concerning decertification of cryptographic systems. This revision applies to "major defense acquisition programs which are subject to Milestone B approval on or after the date occurring six months after the date of the enactment of this Act," i.e., June 24.

Section 822: DOD Required to Compare Dedicated Ground Control System to Shared Ground Control System to Receive Milestone B Approval for Satellites—Section 822 implements certain Comp. Gen. recommendations, with which DOD concurred, for improving planning and efficiency for DOD's satellite control networks. See GAO, *Satellite Control: Long-Term Planning and Adoption of Commercial Practices Could Improve DOD's Operations* (GAO-13-315), available at *www.gao.gov/assets/660/654011.pdf*. More specifically, a major defense acquisition program, which is also "a space system" (such as a satellite control network), "may not receive Milestone B approval until the milestone decision authority" "performs a cost benefit analysis for any new or follow-on satellite system using a dedicated ground control system instead of a shared ground control system." Thus, DOD is required to consider the technical advantages and additional costs of procuring a dedicated ground control system vis-à-vis the potentially less-expensive option of integrating the satellite into an existing shared ground control system. No such cost-benefit analysis is required to be performed for Milestone B approval of a space system after Dec. 31, 2019.

In addition, "[n]ot later than one year after the date of the enactment of this Act," i.e., December 26, the secretary of defense shall (1) "develop a [DOD]-wide long-term plan for satellite ground control systems, including" the Air Force Satellite Control Network; and (2) "brief the congressional defense committees on such plan."

Section 824: Comp. Gen. Review of DOD Processes and Procedures for Acquiring Weapon Systems—Section 824 requires the Comp. Gen., not later than Jan. 31, 2015, to "carry out a comprehensive review of [DOD's] processes and procedures … for the acquisition of weapon systems." The review's objective is "to identify processes and procedures for the acquisition of weapon systems that provide little or no value added or for which any value added is outweighed by cost or schedule delays without adding commensurate value." At a minimum, the resulting Comp. Gen. report shall include (1) a "statement of any processes, procedures, organizations, or layers of review that are recommended by the Comptroller General for modification or elimination, including the rationale for the modification or elimination recommended"; and (2) "[s]uch other findings and recommendations, including recommendations for legislative or administrative action, as the Comptroller General considers appropriate."

Section 831: Prohibition on Contracting with the Enemy—FY 2014 NDAA § 831 builds upon, and expands the applicability and scope of, § 841 of the FY 2012 NDAA. Section 831 requires the secretary of defense to "establish in each covered combatant command a program to identify persons or entities," that (A) "provide funds received under a [DOD] contract, grant, or cooperative agreement … directly or indirectly to a covered person or entity"; or (B) "fail to exercise due diligence to ensure that none of the funds received under a [DOD] contract, grant, or cooperative agreement … are provided directly or indirectly to a covered person or entity." A "covered person or entity" is "a person or entity that

is actively opposing United States or coalition forces involved in a contingency operation in which members of the armed forces are actively engaged in hostilities." However, according to the joint explanatory statement, a covered person or entity "would not mean a person or entity that is engaged in speech activities but rather actions involving hostile opposition to United States or coalition forces." A "covered combatant command" means the "United States Central Command, United States European Command, United States Africa Command, United States Southern Command, or United States Pacific Command," which include each of the geographical U.S. combatant commands outside of North America.

After receipt of notice of the identification of such persons or entities, and after consultation with certain senior DOD officials, the commander of the relevant combatant command "*may ... notify* the heads of appropriate contracting activities, in writing, of such identification and *request* that the heads of such contracting activities" take certain remedial actions "with respect to any contract, grant, or cooperative agreement that provides funding directly or indirectly to the person or entity covered by the notice" (emphasis added). These remedial actions, which will be implemented in the Defense FAR Supplement, include the (1) "prohibit[ion], limitat[ion], or otherwise plac[ing] restrictions on the award of any [DOD] contract, grant, or cooperative agreement to a person or entity identified" in (A) in the above paragraph; (2) the "terminat[ion] for default [of] any [DOD] contract, grant, or cooperative agreement awarded to a person or entity identified" in (B) in the above paragraph ; or (3) the void[ing] "in whole or in part [of] any [DOD] contract, grant, or cooperative agreement awarded to a person or entity identified" in (A) in the above paragraph . A "contract, grant, or cooperative agreement that is void is unenforceable as contrary to public policy." See also FAR subpt. 3.7, Voiding and Rescinding Contracts. Any remedial action taken is required to be reported on the Federal Awardee Performance and Integrity Information System. See also FAR subpt. 42.15, Contractor Performance Information. No reference is made in the statute to suspension or debarment.

In contrast to FY 2012 NDAA § 841, FY 2014 NDAA § 831 provides some protections to a contractor, or grant or cooperative agreement recipient, against whom action is taken under § 831. More specifically, the DFARS is to be revised to (a) require written notice to the contractor, or recipient of the grant or cooperative agreement, of the action; and (b) "permit" the contractor, or recipient of a grant or cooperative agreement, subject to such action "an opportunity to challenge the action by requesting administrative review within 30 days after receipt of notice of the action." Although no details are provided as to the form of the administrative review or as to who will conduct such a review, § 831(e) recognizes that, if classified information is involved, a contractor may review it only if a "court of competent jurisdiction established under Article I or Article III" issues an appropriate protective order.

Section 831 further requires that the DFARS be revised to add a clause that: (1) requires the contractor, or the grant or cooperative agreement recipient, "to exercise due diligence to ensure that none of the funds received under" those instruments "are provided directly or indirectly to a covered person or entity"; and (2) notifies the contractor, or the grant or cooperative agreement recipient, "of the authority of the head of the contracting activity to terminate or void the contract, grant, or cooperative agreement, in whole or in part." This clause is required to "be included in each covered [DOD] contract, grant, and cooperative agreement … that is awarded on or after the date of the enactment of this Act." Further, "to the maximum extent practicable, each covered [DOD] contract, grant, and cooperative agreement … that is awarded before the date of the enactment" of the NDAA shall be modified to include this clause. A covered contract, grant, or cooperative agreement means "a contract, grant, or cooperative agreement with an estimated value in excess of $50,000."

Not later than March 1 each year through 2019, the secretary of defense is required to report to the defense congressional committees on the use of § 831 in the previous year. Section 831 ceases to be effective Dec. 31, 2018.

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The FY 2014 NDAA also includes provisions in other titles that affect contractors doing business with DOD and other federal agencies. These provisions address, among other subjects, cloud computing, software license and the use of small businesses in federal procurements.

Section 913: Space Acquisition Strategy—Section 913 states that "[i]t is the sense of Congress" that (a) "commercial satellite services, particularly communications, are needed to satisfy [DOD] requirements"; (b) DOD "predominately uses one-year leases to obtain commercial satellite services, which are often the most expensive and least strategic method to acquire necessary commercial satellite services"; and (c) "consistent with the required authorization and appropriations, Congress encourages [DOD] to pursue a variety of methods to reduce cost and meet the necessary military requirements, including multi-year leases and procurement of Government-owned payloads on commercial satellites." The undersecretary of defense for acquisition, technology, and logistics (USDAT&L), in consultation with DOD's chief information officer (CIO), "shall establish a strategy to enable the multi-year procurement of commercial satellite services."

Section 935: Additional Requirements for DOD Software Licenses—No later than Sept. 30, 2015, DOD's CIO is required to submit "a plan for the inventory of all [DOD] software licenses … for which a military department spends more than $5,000,000 annually on any individual title, including a comparison of licenses purchased with licenses in use." This submission must "include plans for implementing an automated solution capable of reporting [DOD's] software license compliance position … and providing a verified audit trail."

If DOD's CIO determines that the number of DOD software licenses "for an individual title for which a military department spends greater than $5,000,000 annually exceeds [DOD's] needs … for such software licenses, or the inventory discloses that there is a discrepancy between the number of software licenses purchased and those in actual use," DOD's CIO "shall implement a plan to bring the number of such software licenses into balance with [DOD's] needs … and the terms of any relevant contract."

Section 938: DOD Cloud Computing—Acting through other senior DOD officials (e.g., the USDAT&L), the secretary of defense is required to supervise (1) the "[r]eview, development, modification, and approval of requirements for cloud computing solutions for data analysis and storage by the Armed Forces and the Defense Agencies, including requirements for cross-domain, enterprise-wide discovery and correlation of data stored in cloud and non-cloud computing databases, relational and nonrelational databases, and hybrid databases"; and (2) the "[r]eview, development, modification, approval, and implementation of plans for the competitive acquisition of cloud computing systems or services," "including plans for the transition from current computing systems to systems or services acquired."

The secretary, who must insure that these systems and services are "interoperable and universally accessible and usable through attribute-based access controls," is required to provide direction on these subjects by March 15. The secretary is also required to "coordinate with the Director of National Intelligence to ensure that activities under this section are integrated with the" intelligence community "to achieve interoperability, information sharing, and other efficiencies."

Section 1024: Resolution of the A-12 Litigation—Section 1024(b) authorizes the secretary of the Navy "to accept and retain the following consideration in lieu of a monetary payment for purposes of the settlement of A-12 aircraft litigation arising from the default termination of Contract No. N00019-88-C-0050": (a) "[f]rom General Dynamics Corporation, credit in an amount not to exceed $198,000,000 toward the design, construction, and delivery of the steel deckhouse, hangar, and aft missile launching system for the DDG 1002"; and (b) "[f]rom the Boeing Company," at no cost to the Navy, "three EA-18G Growler aircraft, with installed Airborne Electric Attack kits, valued at an amount not to exceed $198,000,000." The joint explanatory statement notes that "the Secretary of the Navy is authorized to enter into agreements to modify contracts in order to effect a settlement to the [A-12] litigation."

In this regard, on Jan. 23, GD, Boeing and the Government filed with the U.S. Court of Federal Claims a "stipulation of dismissal with prejudice," whereby the parties "stipulate to the dismissal, with prejudice, of this [A-12] case in accordance with the Settlement Agreement reached by the parties. Each party will bear its own costs, attorneys' fees and expenses." See *The Boeing Co. v. U.S.*, Fed Cl. No. 91-1204C (Jan. 23, 2014). The settlement agreement apparently was consistent with §

1024(b), and did not include any payments by the Government to the contractors.

Thus ends the A-12 litigation, which started with the Navy's default termination of the contractors in 1991, the contractors' filing of suit in the COFC later that year, several U.S. Court of Appeals for the Federal Circuit decisions, and a decision by the U.S. Supreme Court. See *McDonnell Douglas Corp. v. U.S.*, 567 F.3d 1340 (Fed. Cir. 2009) ("This American version of *Jarndyce* and *Jarndyce* has entered its eighteenth year of litigation."), vacated and remanded, *Gen. Dynamics Corp. v. U.S.*, 131 S. Ct. 1900 (2011), on remand, 425 Fed. Appx. 899 (Fed. Cir. 2011).

Section 1216: Withholding of Assistance to Afghanistan Based on Its Taxation of DOD Assistance—This section requires the secretary of defense to withhold an "amount equivalent to 100 percent of the total taxes assessed during fiscal year 2013 by the Government of Afghanistan on all [DOD] assistance … from funds appropriated for such assistance for fiscal year 2014," to the extent that the secretary certifies that "such taxes have not been reimbursed by the Government of Afghanistan to [DOD] or the grantee, contractor, or subcontractor concerned." The requirement may be waived "if the Secretary determines that such a waiver is necessary to achieve United States goals in Afghanistan." This section terminates after the U.S. and Afghanistan sign a bilateral security agreement and such agreement has entered into force.

Section 1601: IG Scrutiny of Berry Amendment Procurement Practices and Policy—Under this section, the DOD inspector general is required to "conduct periodic audits of contracting practices and policies related to procurement under" 10 USCA § 2533a, which is the Berry Amendment. With certain exceptions, this amendment requires DOD to procure certain items—including food, clothing, tents, cotton, woven silk, wool, hand or measuring tools, and specialty metals—from domestic sources. See DFARS 225.7002-1, 225.7003. Not surprisingly, contractors should expect to see additional scrutiny in this area.

Section 1611: Advancing Small Business Growth—Section 1611 mandates that DOD include a clause in each covered contract awarded by DOD that (1) "requires the contractor to acknowledge that acceptance of the contract may cause the business to exceed the applicable small business size standards (established pursuant to section 3(a) of the Small Business Act) for the industry concerned and that the contractor may no longer qualify as a small business concern for that industry," and (2) "encourages the contractor to develop capabilities and characteristics typically desired in contractors that are competitive as an other-than-small business in that industry."

A "covered contract" means "a contract (A) awarded to a qualified small business concern" (as defined by § 3(a) of the Small Business Act); and "(B) with an estimated annual value—(i) that will exceed the applicable receipt-based small business size standard; or (ii) if the contract is in an industry with an employee-based size standard, that will exceed $70,000,000."

Section 1614: Credit for Certain Small Business Contractors—Section 1614 amends § 8(d) of the Small Business Act, 15 USCA § 637(d), to require prime contractors (and "subcontractors required to maintain subcontracting plans") to (1) "review and approve subcontracting plans submitted by their subcontractors," (2) "monitor subcontractor compliance with their approved subcontracting plans," (3) ensure that required subcontracting reports are timely submitted, (4) compare their subcontractors' performance "to subcontracting plans and goals," and (5) "discuss performance with subcontractors when necessary to ensure" that they "make a good faith effort to comply with their subcontracting plans." In certain circumstances, this section permits the inclusion of lower-tier subcontractors for purposes of a prime contractor's satisfaction of its small business "percentage goals."

While there are also intermediate deadlines with respect to plans to implement this section, the FAR and the Small Business Administration regulations are required to be amended within 18 months of the act's passage, with these amendments applying "to contracts entered into after the last day of the fiscal year in which the regulations are promulgated."

Section 2711: Prohibition on an Additional BRAC Round—Section 2711 states that "[n]othing in this Act shall be construed to authorize an additional Base Realignment and Closure (BRAC) round." The joint explanatory statement observes that the FY 2014 NDAA "also

reduces the budget request by $8.0 million in Operation and Maintenance, defense-wide requested by [DOD] to 'develop recommendations and manage a new BRAC round.' "

Section 3113: DOE Authority to Manage Supply Chain Risk—Under this section, the secretary of energy may, "notwithstanding any other provision of law, limit, in whole or in part, the disclosure of information relating to the basis for carrying out" certain procurement actions (e.g., contract awards) for which there is a supply chain risk. A "supply chain risk" means "the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of a covered system or covered item." The secretary can only use this authority where it is "necessary to protect national security by reducing supply chain risk" for a Department of Energy procurement. According to the statute, the secretary's actions under this section are not "subject to review in any Federal court."

As noted by the joint explanatory statement, (a) the secretary's authority here is similar to the authority provided to the secretary of defense in § 806 of the FY 2011 NDAA, and (b) "this authority is intended to be used when existing supply chain management authorities are not sufficient to protect the national security of the United States. Use of this authority by DOE is expected to be limited in frequency." This section becomes effective "180 days after the date of the enactment of" the FY 2014 NDAA, i.e., on June 24, and applies to contracts and task and delivery orders issued on or after that day. This section expires in June 2018.

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