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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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2019 NDAA Analysis: Commercial Item Contracting

*By Mitchell A. Bashur and Amy L. Fuentes**

This article analyzes the commercial item contracting provisions of the 2019 National Defense Authorization Act.

The 2019 National Defense Authorization Act (“NDAA”)¹ contains several provisions reforming commercial item contracting. As discussed below, these changes include:

1. Revision of the definition of commercial items for purposes of federal acquisition statutes;
2. Limitations on the applicability to U.S. Department of Defense (“DoD”) commercial contracts of certain provisions of law;
3. Modifications to procurement through commercial e-commerce portals; and
4. Review of federal acquisition regulations on commercial products, commercial services, and commercially available off-the-shelf items.

Several federal acquisition statutes and regulations exist that impact commercial item contracting. The two most prominent examples are the Federal Acquisition Streamlining Act (“FASA”) and Part 12 of the federal acquisition regulation (“FAR”). Before Congress passed FASA in 1994, many contractors did not conduct business with the U.S. government due to demanding terms and conditions and additional costs or risks associated with government specifications. FAR Part 12 establishes a mandatory preference for the U.S. government to purchase products and services available in the commercial marketplace using commercial terms and conditions. From time to time, Congress revises these statutes and regulations in response to shifts in policy considerations and market conditions.

The 2019 NDAA works again to reform commercial item contracting. These revisions are important for government contractors operating in the commercial item contracting space to know. Each of these reforms is discussed below.

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¹ <https://www.congress.gov/bill/115th-congress/house-bill/5515/text>.

SECTION 836: REVISION OF THE DEFINITION OF COMMERCIAL ITEMS

Section 836 of the 2019 NDAA revises the definition of “commercial items” for the purpose of federal acquisition statutes. Most notably, it eliminates the definition of “commercial item” and replaces it with two separate definitions for “commercial products” and “commercial services.” In addition, the revisions expressly include sales to local and state governments as establishing commerciality.

Under Section 836’s new definition, a “commercial product” is defined as any of the following:

1. A product, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes and has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public;
2. A product described above that evolved through advances in technology or performance and is not yet available in the commercial marketplace but will be available in the commercial marketplace in time to satisfy the delivery requirements under a federal government solicitation;
3. A product that would meet either of the definitions above, except for modifications typically available in the commercial marketplace or minor modifications made to meet federal government requirements;
4. A combination of the above that are of a type customarily combined and sold in combination to the general public;
5. A product, or combination of products, referred to in paragraphs (1) through (4), even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; and
6. A nondevelopmental item if the procuring agency determines, in accordance with conditions in the FAR, the product was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.

Additionally, under Section 836’s new definition, a “commercial service” is defined as any of the following:

1. Installation services, maintenance services, repair services, training services, and other services if those services are procured for support of a commercial product, regardless of whether the services are provided by the same source or at the same time as the commercial product; and

the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government.

2. Services of a type offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices or specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.
3. A service described in paragraph (1) or (2), even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

Section 836 also includes conforming amendments that modify impacted statutes to cover the new definitions of commercial products and/or commercial services, as applicable. Although there are certain statutes under which “commercial item” is replaced with only commercial products or commercial services, instead of both, the concepts remain largely the same.

The new definitions will take effect on January 1, 2020. However, the DoD had to submit its implementation plan to Congress no later than April 1, 2019, including a timeline for implementation of the new definitions, a review of recommendations by the Section 809 panel pertaining to commercial items, and an analysis of the extent the DoD should treat commercial service contracts and commercial products in a similar manner.

SECTION 837: LIMITATIONS ON THE APPLICABILITY OF CERTAIN PROVISIONS TO DOD COMMERCIAL CONTRACTS

In the 2017 NDAA, Congress amended 10 U.S.C. § 2375 to require that a “provision of law or contract clause” enacted after January 1, 2015 shall not apply to commercial item purchases by the DoD, unless there is a written determination that it would not be in the best interest of the DoD to exempt contracts for the procurement of commercial items from the applicability of the provision or contract clause requirement. On June 29, 2018, the DoD issued a proposed rule² determining which laws and clauses should not apply to commercial item procurements, in accordance with the 2017 NDAA directive. The regulations have not been finalized.

Section 837 of the 2019 NDAA replaces the applicable date of this requirement January 1, 2015 with October 13, 1994. This date corresponds with FASA, which as discussed above, instituted a mandatory preference for the U.S. government to purchase commercial items. The revision of the applicable

² <https://www.govinfo.gov/content/pkg/FR-2018-06-29/pdf/2018-14043.pdf>.

date will result in further review by the DoD as to which laws and clauses are eligible for exemption from the preference for commercial items and services.

SECTION 838: MODIFICATIONS TO PROCUREMENT THROUGH COMMERCIAL E-COMMERCE PORTALS

Section 838 amends certain provisions of the 2018 NDAA that involved the commercial e-commerce portal. In particular, Section 838 clarifies that procurement of a product through the e-commerce portal satisfies the requirements for full and open competition if offers are received from two or more suppliers of a product or similar product from the online marketplace. Additionally, Section 838 provides that information provided by vendors shall not be used “for pricing, marketing, competitive, or other purposes, any information, including any government-owned data. . . .” Information subject to this protection includes “purchasing trends or spending habits, related to a product from a third-party supplier featured on the commercial e-commerce portal or the transaction of such product, except as necessary to comply with the requirements of the program established in subsection.”

Finally, Section 838 clarifies congressional intent in implementing the e-commerce portal. First, it explains that the implementation of commercial e-commerce portals will be done to enhance competition, expedite procurement, and ensure the reasonable pricing of commercial products. Congress next delineates that the implementation of the e-commerce portal will be completed with multiple contracts with multiple commercial e-commerce portal providers. Lastly, Congress recommends that the Administrator of the U.S. General Services Administration require e-commerce portal providers to take necessary precautions in safeguarding data of all other e-commerce portal providers and any third-party suppliers.

SECTION 839: REVIEW OF FEDERAL ACQUISITION REGULATIONS ON COMMERCIAL PRODUCTS, COMMERCIAL SERVICES, AND COMMERCIALY AVAILABLE OFF-THE-SHELF ITEMS

Section 839 requires the FAR Council, within one year of enactment of the 2019 NDAA, to review each determination not to exempt commercial products, commercial services, and commercially available off-the-shelf item contracts or subcontracts from laws and requirements. It also requires the FAR Council to propose revisions to the FAR to exempt such contracts from those laws and requirements unless the FAR Council determines that there is a specific reason not to provide the exemptions.

CONCLUSION

The 2019 NDAA indicates Congress’ continued interest and prioritization in encouraging commercial products and services contractors to participate in

federal procurements. By streamlining and simplifying the requirements for commercial acquisitions, the federal acquisition system should further the congressional goal of maximizing the use of commercial products and services.