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February 2018

Editor's Note
The National Defense Authorization Act

Victoria Prussen Spears*

This issue of *Pratt's Government Contracting Law Report* begins with four articles covering the National Defense Authorization Act of 2018, which contains changes that will significantly impact companies doing business with government. And we have much more!

The National Defense Authorization Act of 2018

The National Defense Authorization Act ("NDAA") of 2018 was recently signed into law. While most public attention is focused on the NDAA's authorization of spending for military programs and personnel, this year's version of the bill includes some blockbuster changes to Department of Defense procurement acquisition practices, which will impact companies doing business with government. The first article on the featured topic, "The National Defense Authorization Act of 2018," by Eric S. Crusius, David S. Black, Robert K. Tompkins, Terry L. Elling, and Rodney M. Perry, attorneys at Holland & Knight LLP, includes four separate articles describing some of the major NDAA provisions, and explores how they are likely to impact federal government contractors.

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Our next article on the topic, "What Contractors Need to Know About the 2018 NDAA," by Daniel E. Chudd, Catherine L. Chapple, and Locke Bell, attorneys at Morrison & Foerster LLP, addresses five of the most significant issues for government contractors in the FY 2018 National Defense Authorization Act—bid protests, debriefings, the space corps, other transaction authority, and software and technical data.

For Department of Defense acquisitions, the 2018 NDAA includes provisions that simplify and others that complicate contractor responsibilities. Michael R. Rizzo and Alex D. Tomaszczuk, partners at Pillsbury Winthrop Shaw Pittman LLP, discuss the NDAA's supply chain diligence requirements, changes to the definition of a "subcontractor," and the expanded definition of a commercial item and e-commerce portal, in their article, "Changes to Supply Chain Management and Commercial Item Contracting in FY 2018 NDAA."

The 2018 NDAA also includes provisions that streamline the Defense Contract Audit Agency's Incurred Cost Audit process by involving private auditors and increase the Truth in Negotiations Act threshold. In our final NDAA article, "Changes to Audit and Truth in Negotiations Act in FY 2018 NDAA," Kevin J. Slattum and James J. Gallagher, partners at Pillsbury Winthrop Shaw Pittman LLP, discuss these provisions of the act.

False Claims Act Recoveries

The U.S. Department of Justice has released a report on the total amount it recovered under the False Claims Act during the past fiscal year. In my article, "False Claims Act Recoveries Totaled More Than $3.7 Billion in Fiscal Year 2017," I discuss the results of the report.

And More . . .

We also have an "In the Courts" column by Steven A. Meyerowitz, the Editor-in-Chief of *Pratt's Government Contracting Law Report*.

Enjoy the issue!

The National Defense Authorization Act of 2018

By Eric S. Crusius, David S. Black, Robert K. Tompkins, Terry L. Elling, and Rodney M. Perry*

The National Defense Authorization Act ("NDAA") of 2018 was signed into law recently. While most public attention is focused on the NDAA's authorization of spending for military programs and personnel, this year's version of the bill includes some blockbuster changes to Department of Defense procurement acquisition practices, which will impact companies doing business with government. The following articles describe some important NDAA provisions, and explore how they are likely to impact federal government contractors.

The National Defense Authorization Act ("NDAA") of 2018 (H.R. 2810) was signed into law on December 12, 2017. While most public attention is focused on the NDAA's authorization of spending for military programs and personnel, each year's version of the bill contains provisions impacting Department of Defense ("DOD") acquisition practices and consequently, companies doing business with DOD.

The 2018 NDAA includes some blockbuster changes to DOD procurement. For example, Section 864 authorizes the General Services Administration ("GSA") to create a program to procure commercial products through commercial "e-commerce portals." Nicknamed the "Amazon" provision, this section of the bill provides that all agencies "may" procure commercial products through online marketplaces. In recognition of wide-spread impact on commercial-item suppliers, Section 864 contains a lengthy study and implementation period.

Another headliner from the 2018 NDAA is a three-year DOD pilot program, beginning in 2019, which will require all contractors with prior-year

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revenue of $250 million or more to pay for the cost of a failed contract protest. This provision has been talked about for several years, but the 2018 NDAA is the likely first step in government-wide adoption of what is called the "penalty provision."

The NDAA's other acquisition-related changes include further limitation on the use of Low Price Technically Acceptable solicitations, authorization for DOD to hire qualified private accounting firms to conduct audits of contractor incurred cost submissions, and implementation of procurement practices aimed at improving DOD's ability to retain intellectual property rights.

The following four articles describes these and other NDAA provisions, and explores how they are likely to impact federal government contractors.

ANALYSIS OF THE 2018 NDAA

Eric S. Crusius and David S. Black

The 2018 NDAA contains a couple of significant changes that will impact bid protests. First, the NDAA creates a pilot program that would require some larger unsuccessful Government Accountability Office ("GAO") protestors to pay DOD's protest costs. Second, new enhanced debriefings will become standardized across DOD. This part of the article discusses these two changes. It is important to keep in mind that these changes are not yet effective and regulations still have to be drafted to implement the changes.

Protestors to Pay DOD's Protest Costs (Sometimes)

Under the current protest system, protestors generally pay their own costs and attorneys' fees, except when a protestor prevails at GAO. Under no circumstances currently do protesters have any liability for the costs of the government in defending an unsuccessful protest. Section 827 of the 2018 NDAA would require DOD to launch a pilot program beginning in late 2019 and ending in late 2022 that would require unsuccessful DOD protestors at GAO to pay DOD's "costs incurred in processing protests." Following the end of the pilot program, DOD is required to report on the success of the pilot program. This requirement would extend only to large protestors that have had *at least* $250 million in revenue during the previous year.

There are a lot of questions unanswered, including:

- What are the "costs incurred in processing protests?" Do they include the costs for DOD attorneys to respond to protests or just the administrative costs of dealing with protests? If it is the former, how is their hourly rate determined?
- How are years defined when calculating annual revenue? Is it the contractors previous fiscal year or the calendar year? If it is the latter and

is not something already tracked by the contractor (at least prior to filing tax returns), compliance would be more difficult.

- What if there is a dispute over revenue numbers; who resolves that dispute? Does the revenue requirement cover all revenue or just revenue attributable to federal government contracts?

There is also a parity issue. While many product resellers, for instance, have high revenue numbers that would exceed $250 million, they are essentially smaller businesses with smaller margins.

Because of the lack of detail in the NDAA provision, the rulemaking supporting this provision will obviously play a key role.

Enhanced Debriefings Now Available (Sometimes)

A second NDAA provision would change debriefings for many larger procurements across all of DOD.

Currently, Federal Acquisition Regulation ("FAR") 15.506 dictates the content, form, and time limits for post-award debriefings to offerors. Minimally, debriefings are supposed to convey:

- significant weaknesses or deficiencies in the offeror's proposal;
- the "overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;"
- the overall ranking of all offerors, if applicable;
- a rationale for the award;
- the make and model of the item to be delivered by the successful offeror (in acquisitions for commercial items); and
- "[r]easonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed."

Notwithstanding those requirements, the Air Force has been running a voluntary "extended" debriefing pilot program that allowed a disappointed bidder's outside counsel to obtain source selection information so long as he or she signed an Extended Debriefing Agreement (which contains a Confidentiality and Nondisclosure Agreement). All parties, including the awardee, must consent to the extended debriefing. Following a review of the source selection documents, a bidder's outside counsel then engages in a Question and Answer session with the contracting agency. It was the Air Force's belief that an earlier disclosure of source selection information prevented some protests that may have been filed for the primary purpose of understanding the rationale of an award to a different bidder.

Section 818 of the 2018 NDAA would provide a similar program across all of DOD provided the award is greater than $100 million. Under those circumstances, DOD would be required to disclose the agency's written source selection and award decision. Such a disclosure, however, would be redacted to exclude confidential and proprietary information for other offerors—and apparently available to be viewed by the contractor as well as outside counsel. Small business and nontraditional contractors can receive the same briefing for awards greater than $10 million upon request.

In addition, regular debriefings would be required for all task orders valued in excess of $10 million no matter whether the procurement was conducted under FAR Part 15. The calculus of when contractors must file these protests will change in circumstances where debriefings were not previously mandatory.

Finally, offerors who receive debriefings would have the option of asking follow-up questions within two business days and receive a response within five business days. In those circumstances, the debriefing would be considered to remain open until the agency answers the questions.

A couple of other provisions proposed by the Senate were not adopted. They included shortening the time of GAO protests to 65 days (from 100) and requiring contractors to disgorge their profits if they unsuccessfully protested a contract on which they were the incumbent contractor.

The new provisions will significantly change how DOD protests work and the decision making process used when deciding whether to protest.

2018 NDAA ANALYSIS: DOD "AMAZON" BILL NOW LAW

Robert K. Tompkins and Rodney M. Perry

One of the most-watched provisions of this year's NDAA, Section 846, directs the General Services Administration to "establish a program to procure commercial products through commercial e-commerce portals" and to make the program available for government-wide use. However, the bill expressly calls for a series of studies and development of further recommendations to support implementation, which is likely to stretch out for years. Nevertheless, this provision has substantial implications for companies that sell commercial items to the government, who should closely monitor implementation of Section 846. It also sets up a potential clash between more traditional contractors and large e-commerce platforms.

The provision, and its implications for government contractors and e-commerce sites, is perhaps best understood through its evolution over the past six months. On May 18, 2017, House Armed Services Committee Chairman Mac Thornberry introduced the concept in Section 101 of the "Defense Acquisition Streamlining and Transparency Act." Section 101 directed the DOD to

contract with "online marketplace providers" for the purchase of commercial goods via established online marketplaces. There were several salient features of the approach that caused a number of observers to conclude that the goal was to facilitate and ultimately require DOD's use of online marketplaces like Amazon, and perhaps Amazon specifically.

Among other things, Section 101 vested DOD with the authority to establish the program and enter contracts with online marketplace providers. Section 101 specified that DOD could contract with only one such provider if it chose, that it could do so without full and open competition, and that any resulting contract would be subject to the "standard terms and conditions" of the online marketplace, not standard government procurement terms and conditions.

Section 101 also specified a number of qualifying characteristics for the marketplace, including that it must be "widely used in the private sector," provide "dynamic" selection and pricing of products, and enable offers from multiple suppliers of the same or similar products. In addition, Section 101 provided that marketplaces that were run by the government or primarily set up for government purchasing, would not qualify. This presumably included GSA's Federal Supply Schedules ("FSS") and DOD's EMALL (now "FedMall").

At one level, the online marketplace provision addressed the growing call for a return to commerciality; however, it also highlighted the difficulties in doing so. For example, companies who already sell to the government through traditional procurement contracts and who must maintain the numerous government-imposed compliance requirements applicable even to commercial product suppliers were put at a disadvantage. These existing contractors found no relief in Section 101, and instead would be required to compete with the online marketplace provider who did not bear the added burden of these compliance costs. In that sense, Section 101 did not fix the underlying problems faced by current suppliers of commercial items who were forced to absorb more than 100 additional regulatory requirements between 2008 and 2016.

Amid a substantial amount of public interest, Section 101 was included in the House version of the NDAA which passed in July, as "Section 801." Section 801 placed responsibility for the program with GSA, not DOD. Section 801 directed GSA to enter into "more than one" such contract and to make the program available government-wide. DOD's use of the marketplace remained mandatory. Section 801 preserved the online marketplace required characteristics and the requirement that GSA adopt the standard terms and conditions of the provider.

Like its predecessor, Section 101, Section 801 was silent as to the application of procurement laws as to the contract with the online marketplace itself, but identified certain federal laws that would apply to the suppliers of products through the online marketplace. These included barring suspended or debarred suppliers, making provisions of the "Berry Amendment" (a domestic sourcing requirement) applicable, and procuring items from the blind and severely disabled ("Ability One" products), where applicable. Section 801 went on to add three additional requirements including the Buy American Act, waivers under the Trade Agreements Act, and a requirement to identify "small business" suppliers.

The provision emerged from conference as Section 846, but with a number of important changes. Section 846 expressly authorizes GSA to create a program to procure commercial products through commercial "e-commerce portals." It also relaxed the original requirement that DOD procure commercial products through online marketplaces—the bill now provides that all agencies "may" procure commercial products through the online marketplaces as appropriate. The new statutory language also makes clear that GSA must enter "multiple" contracts with "multiple" commercial e-commerce portal providers, thereby allaying fears that the bill could lead to a monopolistic online marketplace provider capturing a substantial portion of the government's needs. Finally, Section 846 makes clear that "[a]ll laws," including federal procurement restrictions, apply to the online marketplace program. GSA therefore will have to enter contracts with commercial e-commerce portals through full and open competition.

Perhaps most important, the Act kicks the can down the road through future study and delayed implementation, which is set to occur in phases. Among other things, Section 846 dropped many of the specific requirements and characteristics for the e-commerce provider, deferring the definition of these pending further study. Each phase requires distinct action items and submissions:

- *Phase I* requires the Office of Management and Budget ("OMB"), in consultation with GSA, to create an implementation plan and schedule for carrying out the online marketplace program;
- *Phase II* requires OMB and GSA to prepare recommendations for any changes to—or exemptions from—laws necessary for effective implementation of the program within one year of submitting the implementation plan and schedule contemplated under Phase I;
- *Phase III* requires OMB and GSA to create guidance for the program within two years of submitting the implementation plan and schedule contemplated under Phase I.

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Given the phased implementation of Section 846, it is unlikely that the provision will have an immediate, tangible impact on federal contractors. This is amplified by the fact that Section 846 gives GSA a large degree of discretion in implementing the online marketplace program and it will undoubtedly take time to develop the regulations and guidance necessary to implement the program. However, once implemented, Section 846 could significantly impact the federal procurement marketplace.

Federal contractors who sell commercial items to the government should closely monitor developments regarding Section 846's implementation and participate in that process.

2018 NDAA ANALYSIS: THE NOOSE FURTHER TIGHTENS ON LPTA

Eric S. Crusius

Recent budget constraints resulted in lowest price technically acceptable ("LPTA") coming into vogue as a source selection technique. It forced the government to choose the lowest priced proposal that met the technical specifications no matter the benefits offered by other proposals; even if they were just one cent more expensive.[1] The severe limitations imposed by LPTA coupled with the race to the bottom mentality it encourages has caused the government to take a second look at its usefulness. DOD's 2016 Source Selection Procedures (the "2016 Procedures"),[2] the 2017 NDAA, and now the 2018 NDAA, have all sought to limit LPTA's availability to specific situations.

FAR 15.101-2 provides that LPTA is appropriate when "best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price." DOD recommended narrowing the scope further in the 2016 Procedures. It required that:

> LPTAs may be used in situations where the Government would not place any value on a product or service exceeding the Government's threshold technical or performance requirements and these requirements can be objectively defined in measurable terms. Such situations include acquisitions of commercial or non-complex services or supplies which are clearly and objectively defined.[3]

The 2016 Procedures also provided that LPTA is not appropriate when:

- The agency will need to judge the desirability of one proposal versus

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[1] *See* FAR 15.101-2.

[2] *See* FAR 15.101-2.

[3] *See* Appendix C, § C.1.

another;

- There are not well-defined standards of performance or quality;
- The source selection authority desires to conduct a tradeoff analysis among price and nonprice factors.

Dramatic limitations on the use of LPTA were written into the 2017 NDAA. That Act restricted DOD (to the "maximum extent possible") from using LPTA when purchasing "(1) information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, or other knowledge-based professional services; (2) personal protective equipment; or (3) knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq."[4]

Perhaps more important, the 2017 NDAA directed DOD to draft regulations reflecting the above restrictions and that allowed the use of LPTA only when:

1) DOD can plainly describe the minimum requirements;
2) There would be no value in exceeding the minimum requirements;
3) The desirability of an offeror's proposal requires minimal subjective judgment;
4) Higher priced offerors would offer no additional benefit to the government
5) A justification is written in the contract file; and
6) The LPTA approach still provides the lowest price when considering "full life-cycle costs."[5]

The legislation also tasked GAO with reporting annually on LPTA procurements valued in excess of $10 million. Even though the regulations were required to be written 120 days after the enactment of the 2017 NDAA (which was on December 23, 2016), draft regulations have yet to be released. Part of the delay may be attributable to a change in administrations as new regulatory action has been virtually nonexistent since the Trump administration came into power (although the regulations were already overdue by the time the new administration took over).

The 2018 NDAA has now edited the 2017 NDAA to place more limitations on the use of LPTA. It authorizes LPTA only when (1) DOD would realize

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[4] *See* Sec. 813(c).

[5] *See* Sec. 813(b).

minimal innovation if LPTA was not used and (2) when goods are purchased, "the goods are predominantly expendable in nature, nontechnical, or have a short life expectancy or short shelf life."[6] This section also lowered the reporting threshold (after the first year) to $5 million.

In addition, Section 832 of the 2018 NDAA will prohibit the use of LPTA in engineering and manufacturing contracts for major defense acquisition programs. Major defense acquisition programs are either designated as such by the Secretary of Defense or are by virtue of dollars spent: $300 million in research and development or evaluation, or $1.8 billion in total expenditures.

Congress and DOD recognize the LPTA's limitations and have continued to narrow the conditions under which it may be used. How the regulations implementing the 2017 and 2018 NDAA are written will dictate the future of this oft-maligned source selection procedure.

2018 NDAA ANALYSIS: NEW MANDATE TO USE PRIVATE ACCOUNTING FIRMS TO AUDIT INCURRED COST SUBMISSIONS

Terry L. Elling

The 2018 NDAA contains a significant change in the Department of Defense's approach to audit of Government Contractors' Incurred Cost Submissions and Final Indirect Rate Proposals. Section 803 of the NDAA amends 10 U.S.C. Chapter 137 to include a new Section 2313a, "Performance of Incurred Cost Audits."

Government contractors that hold flexibly-priced contracts are required to submit a detailed statement of their incurred direct and indirect costs, and proposed final indirect rates within six months of the end of each fiscal year. These submissions, which must be certified, are then audited by the Defense Contract Audit Agency ("DCAA"). Any costs questioned by DCAA are then negotiated between the cognizant contracting officer and the contractor. If a negotiated resolution cannot be achieved, the contracting officer issues a Final Decision which the contractor may challenge in either the U.S. Court of Federal Claims or a Board of Contract Appeals.

Unfortunately, due to years building a backlog, DCAA often does not initiate these audits until several years after they are submitted. DCAA also has the ability to postpone the audit if the auditor deems the submission not to meet the regulatory criteria for an "acceptable" incurred cost submission. This often results in protracted delays of many years before DCAA completes its audit, and further delay in the resolution of the contractor's allowable costs and final rates

[6] *See* 2018 NDAA Sec. 822.

in the event the audit report questions material amounts of direct or indirect costs. Accordingly, it can take many years for the contractor to submit its final invoices under the affected contracts, which can result in either a payment to the concerned government agencies (in the event the contractor's final direct costs and indirect cost rates turn out to be less than the rates the government agreed to during the course of contract performance) or final payments to the contractor (in the event its final direct costs and indirect cost rates turn out to be greater than those invoiced during contract performance).

In an effort to deal with the long-existing backlog of audits, the conference version of the NDAA directs DOD, and DCAA in particular, to implement a program to engage qualified private accounting firms to conduct audits of contractor incurred cost submissions. The purpose is to eliminate the current backlog by October 1, 2020. The NDAA also includes specific timelines for DOD to establish criteria for audits to be performed by qualified private auditors, a requirement that DCAA itself receive an unqualified peer review audit before it issues any incurred cost submission audits, and a provision re-affirming contracting officers' authority to resolve disputes relating to questioned costs.

Some of the more significant provisions in Section 803 are summarized below. It is important to keep in mind that these changes are not yet effective. DOD and DCAA will have to take the actions required under the NDAA in a timely fashion, and regulations may have to be drafted to implement the provision.

Requirements to Eliminate Audit Backlog Through Selection and Ongoing Use of Qualified Private Auditors

- Section 2313a(a) requires DOD and DCAA to eliminate the present incurred cost audit backlog by October 1, 2020 and to ensure that all audits are completed within one year of a "qualified incurred cost submission." A qualified submission is one that comports with DOD's requirements for a complete submission (presumably, consistent with the current FAR 52.216-7 requirement for a complete submission).
- The NDAA also requires DCAA to notify a contractor within 60 days of receipt of an incurred cost submission in the event the submission does not meet the criteria for a "qualified" submission. The NDAA also mandates that in the event an audit is *not* completed within one year of receipt of a qualified submission, the audit shall be deemed to be complete and no further audit work may be conducted. This should be a welcome change for contractors who presently may not be informed for many months (or years) that DCAA does not deem their submission to be adequate for audit purposes.

- The NDAA also sets standards for "qualified private auditors," and requires that they be free of conflicts of interests and subject to strict nondisclosure requirements with respect to the financial and other contractor data they will have access to (and subjects private auditors to criminal sanctions in the event of an unauthorized disclosure).
- The conference NDAA then requires that DOD ensure the ongoing, appropriate, mix of DCAA and qualified private auditors in order to ensure the elimination of any backlog going forward.

Timeline for Selection of Qualified Private Auditors

- The NDAA requires DOD to submit a plan for the selection of qualified private auditors not later than October 1, 2018. The plan must include a description of the audits that DOD deems appropriate for performance by private auditors (including the total number and dollar value of such audits), a projection of the number of incurred cost audits anticipated to be performed by private auditors for 2019–2025 to ensure that DOD eliminates the audit backlog, and all other elements of an acquisition plan under the FAR.
- DOD will then be required not later than April 1, 2019, to award contracts or task orders to two or more qualified private auditors.

Requirements for DCAA Unqualified Peer Review Audit and Affirmation of Contracting Officer Authority

- Effective October 1, 2022, DCAA must possess and unqualified peer review audit in order to be authorized to issue incurred cost audits. Although DCAA currently possesses an unqualified peer review audit, this has been an issue in the past. This measure should provide DCAA with a strong incentive to maintain a "clean audit" of its own.
- The NDAA also contains a provision that confirms that the cognizant contracting officer has the authority to resolve all issues relating to the resolution of questioned costs under an audit report. Although such a provision would seem unnecessary given contracting officers' broad authority to resolve cost and cost accounting standards issues, many contractors and practitioners have encountered COs who are reluctant to compromise costs questioned by DCAA without the auditors' agreement. This provision may expedite reasonable compromises of questioned costs.

The NDAA reflects the frustration that Congress, government contractors, and government contracting agencies have had over the past decade or more with the timely audit and resolution of incurred cost submissions.

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What Contractors Need to Know About the 2018 NDAA

By Daniel E. Chudd, Catherine L. Chapple, and Locke Bell*

This article addresses five of the most significant issues for government contractors in the FY 2018 National Defense Authorization Act—bid protests, debriefings, the space corps, other transaction authority, and software and technical data.

The FY 2018 National Defense Authorization Act ("NDAA") was recently signed into law. The NDAA contains numerous provisions that will affect government contractors. This article addresses five of the most significant issues for government contractors in the NDAA—bid protests, debriefings, the space corps, other transaction authority, and software and technical data.

BID PROTEST REFORMS

The FY 2018 NDAA contains potentially significant (and some would say unnecessary) bid protest reforms, though there are a number of caveats that may reduce or eliminate the reforms' significance. According to the NDAA, the Secretary of Defense is required to carry out a three-year pilot program to "determine the effectiveness of requiring contractors to reimburse the Department of Defense for costs incurred in processing covered protests." The three-year pilot program is not set to begin, however, until two years after the date of enactment of the 2018 NDAA. This will, of course, give Congress and the Department of Defense ("DOD") time to review and analyze the RAND report on the effect of protests on DOD procurements (which was required in the FY 2017 NDAA), as well as any recommendations from the Section 809 panel. Thus, it is entirely possible that, in one of the subsequent NDAAs prior to the start of the pilot program, Congress may rescind the requirement for this pilot program or propose different reforms based on those studies.

With respect to the pilot program itself, the "devil in the details" will likely be seen as the DOD develops rules and regulations to carry out the pilot program. The FY 2018 NDAA provisions may hamstring the DOD a bit,

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however. For example, "covered protests" for which costs should be reimbursed are defined as "a bid protest that was denied in an opinion issued by the Government Accountability Office." Thus, protests that are withdrawn by the protester prior to a decision, even as a result of outcome prediction, should not be considered "covered protests." Likewise, protests that are filed at the Court of Federal Claims will not be covered by the pilot program. Arguably, even protest grounds that are dismissed rather than denied by the GAO may not form a "covered protest." Contractors would be advised to keep a close eye on statements from the DOD over the next two years to learn about how the DOD intends to implement the pilot program. We will, of course, be following along here on the blog as well.

DEBRIEFINGS

Somewhat related to bid protests, though an area that may see reform in the nearer term, are the enhancements to debriefings for certain classes of contracts. The NDAA gives DOD six months to draft new provisions relating to required debriefings on DOD contracts.

Specifically, agencies will have to provide redacted versions of written source selection award determinations to offerors, but only for procurements in excess of $100 million (or, if small business or nontraditional contractors are involved and they submit a request, contracts worth between $10 million and $100 million). For contracts or task orders worth more than $10 million, agencies must provide oral or written debriefings—not both, as the Senate had proposed. The Senate had also proposed requiring agencies to provide counsel or representatives with a version of the agency record, and shortening GAO timelines for decision, but neither of these changes made it out of conference.

Finally, the NDAA ill requires agencies to allow for follow-up questions after debriefings and would keep the debriefing period open until answers were delivered. A contractor would have two days in which to send additional follow-up questions after the initial debrief, which the agency would have five days to answer. The five-day period in which to protest and receive a stay would also not begin until answers were delivered to the disappointed contractor who asked them.

SPACE

The House version contemplated setting up an entirely new Space Corps to manage defense-related space activities, but the NDAA does not go that far. Instead, Section 1601 changes the institutional structure within the Air Force by, most notably, establishing a Commander of the Air Force Space Command who would be responsible for overseeing the Air Force's space activities and certain other related activities for the broader Department of Defense. The

commander, who would have the rank of general while holding the role, would serve for six years; he or she would also serve as the service acquisition executive for defense space acquisitions. The new provisions eliminate certain Air Force positions and offices, including Principal Department of Defense Space Advisor (previously known as the Department of Defense Executive Agent for Space); Deputy Chief of Staff of the Air Force for Space Operations; and the Defense Space Council.

Moreover, the NDAA leaves open the possibility of a new, dedicated Space Corps, in the future: the new NDAA would also direct DOD to contract for independent researchers to come up with a plan for establishing a separate military department—outside of the Air Force—dedicated to space operations.

Additionally, the conferees' joint explanatory statement includes the following passage in relation to this provision:

> The conferees note that space has been designated as a warfighting domain. Recognizing the joint nature of this new domain, the conferees believe that United States Strategic Command should develop a concept of operations (CONOPs) on how to conduct warfighting in space. That CONOPs should be used to guide the Services' space capabilities development and acquisition program. The conferees expect such CONOPs to be provided to them not later than 180 days after the date of the enactment of this Act.

While this addition is not included within the statutory text, DOD is expected to respond. The development of this CONOPs will no doubt raise interesting questions of law.

OTHER TRANSACTION AUTHORITY

In July, the Senate Armed Services Committee used its report on the Senate version of the NDAA for FY18 to voice its strong support for DOD's expanded use of its other transaction authority and other transaction agreements ("OTAs"):

> [T]he committee remains frustrated by an ongoing lack of awareness and education regarding other transactions, particularly among senior leaders, contracting professionals, and lawyers. This lack of knowledge leads to an overly narrow interpretation of when OTAs may be used, narrow delegations of authority to make use of OTAs, a belief that OTAs are options of last resort for when Federal Acquisition Regulation (FAR) based alternatives have been exhausted, and restrictive, risk averse interpretations of how OTAs may be used. These behaviors force innovative projects and programs into unnecessarily restrictive con-

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tracting methods, needlessly adding bureaucracy, cost, and time.[1]

The Committee recognized that "[m]aking use of OTAs, and their associated flexibility, may require senior leaders and Congress to tolerate more risk."[2]

It appears Congress hopes to mitigate this risk through education and training of the acquisition workforce rather than any new oversight mechanisms, at least for the time being. In conjunction with doubling the dollar-value thresholds for DOD's authority to enter into OTAs for prototyping projects—and specifying that these thresholds apply to individual transactions, not overall projects—the FY18 NDAA requires the Secretary of Defense to ensure the management, technical, and contracting personnel responsible for awarding and administering OTAs maintain minimum levels of continuous experiential learning.

The FY18 NDAA institutes a preference for OTAs in the execution of "science and technology and prototyping programs." Although the Senate version of the bill would have instituted this preference outright, the final version limits it to "circumstances determined appropriate by the Secretary."

Finally, the FY 18 NDAA amends DOD's statutory OTA authority to reference OTA consortia for the first time. These consortia, built around technical focus areas and composed of often hundreds of industry and academic institutions, are an integral piece of DOD's current and future acquisition landscape. The FY18 NDAA would specify that, in any prototype subprojects awarded through a consortium to one or more of its members, DOD may provide for the award of a follow-on production contract without further competition. The codification of this authority, in conjunction with Congress' encouragement, is sure to lead to continued (and perhaps accelerated) growth in DOD's use of OTAs over traditional procurement contracts, a development the procurement community should meet with both excitement and a healthy dose of circumspection.

SOFTWARE AND TECHNICAL DATA

After the Senate proposed to upend DOD's decades-old framework for distinguishing rights in technical data and rights in software by wedging computer software into the statutory definition of technical data, the post-conference version of the NDAA for FY18 thankfully adopted a much more metered approach. Under the final version of the bill, DOD is required, in the acquisition of noncommercial computer software, to "consider, to the maxi-

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[1] S. Rept. 115–125.

[2] *Id.*

mum extent practicable," the acquisition of all software and related materials necessary to reproduce the software from source code, test the software, and deploy working binary files on system hardware. To build from this in the future, Congress mandated three pilot programs focused on iterative development and open source software.

With regard to open source software, the conference report removes Senate language that would require DOD to manage all unclassified custom-developed computer software as open source software and publish the software in a public repository, opting instead simply to implement pre-existing Office of Management and Budget policy requiring release of at least 20 percent of new custom-developed code as open source software.[3] Continued action is expected around the initiative to manage DOD software as open source software, as Congress sees "establishing an appropriate repository for open source software [as] critical for maintaining security and also to fostering a community of collaborative software experts." Although still in its early stages, Congress noted its pleasure with the success of DOD's recent Code.mil open source software initiative.

After substantial changes in last year's NDAA, the NDAA for FY18 gives DOD regulators attempting to update the technical data regulations a chance to catch their breath. The bill will implement only a requirement to negotiate price for technical data prior to selecting a contractor for the engineering and manufacturing development or production phase of a major weapon system, and institute a preference, to the maximum extent practicable, for specially negotiated licenses for technical data to support major weapon systems and subsystems.

Congress intends these provisions to "encourage program managers to negotiate with industry to obtain the custom set of technical data necessary to support each major defense acquisition program rather than, as a default approach, seeking greater rights to more extensive technical data than is necessary." A laudable goal, for sure, and one we are skeptically hopeful will play out in practice.

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[3] *See* Office of Management and Budget Memorandum M-16-21, "Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software" (Aug. 8, 2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2016/m_16_21.pdf.

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Changes to Supply Chain Management and Commercial Item Contracting in FY 2018 NDAA

By Michael R. Rizzo and Alex D. Tomaszczuk*

For Department of Defense acquisitions, the Fiscal Year 2018 National Defense Authorization Act ("NDAA") includes provisions that simplify and others that complicate contractor responsibilities. This article discusses the NDAA's supply chain diligence requirements, changes to the definition of a "subcontractor," and the expanded definition of a commercial item and e-commerce portal.

The 2018 National Defense Authorization Act ("NDAA") for Fiscal Year 2018 signed by President Trump includes changes to supply chain management, to the definition of a "subcontractor," and to commercial item contracting that may impact your business.

SUPPLY CHAIN SCRUTINY

The NDAA includes enhanced scrutiny of government contract supply chains in order to identify and ferret out threats to national security. According to Section 807 of the NDAA, within 90 days after enactment of the provision, the Department of Defense ("DOD") must "establish a process for enhancing scrutiny of acquisition decisions in order to improve the integration of supply chain management into the overall acquisition decision cycle. This process has to include tools to support commercial due diligence and intelligence; risk profiles of products or services; education and training of the acquisition work force; and periodic "assessment of software products and services on computer networks of the Department of Defense." Further, the Department of Defense must "develop Government-wide strategies for dealing with significant entities determined to be significant threats to the United States, and effectively use authorities in other departments and agencies to provide consistent, Government-wide approaches to supply chain threats."

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These provisions demonstrate that the DOD is becoming increasingly concerned about contractors and *subcontractors* that may pose security, cybersecurity or other threats to the United States. Accordingly, contractors should expect regulations in the near future that place a burden upon them to better vet their supply chain for such risks.

CHANGED DEFINITION OF A "SUBCONTRACT"

In Section 820, a change was made to 41 U.S.C. § 1906 (which lists the laws inapplicable to procurements of commercial items). The NDAA adds this language to the definition of a subcontract: "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 identifiable to any particular contract." This statute applies to the Federal Acquisition Regulation, so this change will impact both DOD and civilian contracts.

This means that a contractor's agreement with a vendor to buy, for example, "commodities" such as ball bearings or gaskets to fulfill requirements on more than one government contract *and* on one or more commercial contracts would not be a "subcontract" and, therefore, would not be subject to flow-down requirements.

PROPOSED COMMERCIAL ITEM CONTRACTING CHANGES

Section 846 of the NDAA establishes a program to procure commercial products through commercial e-commerce portals to enhance competition, expedite procurement, enable market research and ensure reasonable pricing. This program occurs over three phases; that executive agencies make purchases via the e-commerce portal beneath the simplified acquisition threshold; and that such purchases utilize standard terms and conditions to be developed.

The NDAA adds language to 41 U.S.C. § 103 to clarify that non-developmental products or services developed at a private expense and sold competitively in "substantial quantities" to "multiple foreign governments" also qualify as "commercial items." This language broadens the definition of what constitutes a commercial item, perhaps opening up the United States commercial item market to foreign vendors that regularly sell non-developmental items to foreign governments.

Changes to Audit and Truth in Negotiations Act in FY 2018 NDAA

By Kevin J. Slattum and James J. Gallagher*

For Department of Defense acquisitions, the FY 2018 National Defense Authorization Act includes provisions that streamline the Defense Contract Audit Agency's Incurred Cost Audit process by involving private auditors and increases the Truth in Negotiations Act threshold. The authors of this article discuss these provisions of the Act.

The 2018 National Defense and Authorization Act ("NDAA") leaves little question that Congress remains unhappy with the Defense Contract Audit Agency's ("DCAA") audit backlog and, therefore, mandates that DCAA personnel function more like commercial auditors in regard to audit timeliness and risk. Interestingly, however, the NDAA also rejects a controversial 2017 NDAA provision that would have allowed contractors to use private auditors of their own selection to perform Incurred Cost Proposal ("ICP") audits. This article sets forth the provisions that reflect these and other important changes contractors should anticipate.

DCAA INCURRED COST PROPOSAL AUDITS

Section 803 of the NDAA adds 10 U.S.C. § 2313b which, among other requirements, includes language that:

- Directs DCAA to comply with commercially accepted standards of risk and materiality in performing each incurred cost audit for Department of Defense ("DOD") contractors.
- Requires that DOD use "qualified private auditors" to perform a sufficient number of incurred cost audits so that backlog is eliminated by October 1, 2020.
- Requires that incurred cost audits must be completed in one year from the date the government receives a "qualified incurred cost submission." After October 1, 2020 any audit findings not issued within one year

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shall be considered "complete" and further audit work will be barred-subject to waivers that must be submitted for approval by the Director of DCAA to the Comptroller of DOD.

- Directs DOD not to differentiate between private auditors and DCAA when considering audit results.
- Requires *peer review* by a commercial auditor of DCAA's unqualified audit findings.
- Requires that DOD notify a contractor within 60 days after receipt whether its ICP is "qualified."

CONTRACTOR USE OF COMMERCIAL AUDITORS REJECTED

Section 804 of the NDAA strikes subsection (f) of NDAA 2017 Section 820(b) which was to add Section 1909 to Title 10 of US Code. Subsection (f) would have allowed contractors to use a commercial auditor and would have required the DOD to accept their findings without performing additional audits.

SIMPLIFIED ACQUISITION THRESHOLD (SAT) INCREASED

Section 805 increased the Simplified Acquisition Threshold from $100,000 to $250,000.

TRUTH IN NEGOTIATIONS ACT CHANGES

2018 NDAA Section 811 increases the Truth in Negotiations Act ("TINA") threshold significantly from $750,000 to $2 million for all contracts entered into after July 1, 2018. Section 811 also revises language in 10 USC § 2306a(d) from affirmatively requiring the contracting officer to request other than cost or pricing data to the extent necessary to requiring the contractor to provide other than cost or pricing data only "if requested by the contracting officer."

WHERE DO WE GO FROM HERE?

These provisions are fairly drastic—very possibly leading to a sea change in how DCAA will operate in the future. It is clear that Congress has tired of waiting on DCAA to police itself and eliminate the audit backlog which has been a millstone around government agencies and contractors alike. Contractors should welcome these changes—they portend less TINA application and quicker turnaround on resolution of ICPs so that contractors can resolve any issues before they include potentially disputed costs in several additional ICPs. However, there are certainly key unknowns. For example, what standard will emerge for defining a "qualified" ICP triggering the one year audit time limit—the current language appears prone to government subjectivity and possible abuse in order to prevent the running of the one year clock. Similarly,

what will be the real impact of terminating unfinished audits? It seems likely that this will force DCAA to focus on the most significant costs first and, at a minimum, complete audits of those costs. In any event, contractors should pay close attention as these changes play out and be facile enough to adjust to the unknowns.

False Claims Act Recoveries Totaled More Than $3.7 Billion in Fiscal Year 2017

By Victoria Prussen Spears*

The U.S. Department of Justice has released a report on the total amount it recovered under the False Claims Act during the past fiscal year.

The U.S. Department of Justice obtained more than $3.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending September 30, 2017, according to a report it recently released.

Of the $3.7 billion in settlements and judgments, $2.4 billion involved the health care industry, including drug companies, hospitals, pharmacies, laboratories, and physicians.

This is the eighth consecutive year that the Justice Department's civil health care fraud settlements and judgments exceeded $2 billion. The recoveries included in the $2.4 billion reflected only federal losses; in many of these cases, additional funds were recovered for state Medicaid programs.

HEALTH CARE

The largest recoveries involving the health care industry this past year—over $900 million—came from the drug and medical device industry.

Shire Pharmaceuticals LLC paid $350 million to resolve allegations that Shire and the company it acquired in 2011, Advanced BioHealing ("ABH"), induced clinics and physicians to use or overuse its bioengineered human skin substitute by offering lavish dinners, drinks, entertainment, and travel; medical equipment and supplies; unwarranted payments for purported speaking engagements and bogus case studies; and cash, credits, and rebates. In addition to these kickback allegations, the settlement also resolved allegations brought by relators that Shire and ABH unlawfully marketed the skin substitute for uses not approved by the FDA, made false statements to inflate the price of the product, and caused improper coding, verification, or certification of claims for

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the product and related services. The settlement included $343.9 million in federal recoveries, and another $6.1 million in recoveries to state Medicaid programs.

In another case, drug manufacturer Mylan Inc. paid approximately $465 million to resolve allegations that it underpaid rebates owed under the Medicaid Drug Rebate Program by erroneously classifying its patented, brand name drug EpiPen—which has no therapeutic equivalents or generic competition—as a generic drug to avoid its obligation to pay higher rebates. Between 2010 and 2016, Mylan increased the price of EpiPen by approximately 400 percent yet paid only a fixed 13 percent rebate to Medicaid during the same period based on EpiPen's misclassification as a generic drug. Mylan paid approximately $231.7 million to the federal government and $213.9 million to state Medicaid programs.

The Justice Department also recovered funds from other health care providers. Life Care Centers of America Inc. and its owner agreed to pay $145 million to settle allegations that it caused skilled nursing facilities to submit false claims for rehabilitation therapy services that were not reasonable, necessary, or skilled. This was the largest civil settlement with a skilled nursing facility chain in the history of the False Claims Act. The government alleged that Life Care instituted corporate-wide policies and practices designed to place beneficiaries in the highest level of Medicare reimbursement—known as "Ultra High"—irrespective of the clinical needs of the patients, resulting in the provision of unreasonable and unnecessary therapy to many beneficiaries. Life Care also allegedly sought to keep patients longer than necessary in order to continue billing for rehabilitation therapy.

In addition, eClinicalWorks—a national electronic health records software vendor—and certain of its employees paid $155 million to resolve allegations that they falsely obtained certification for the company's electronic health records software by concealing from its certifying entity that its software did not comply with the requirements for certification. For example, rather than programming all the required standardized drug codes into its software, the company allegedly "hardcoded" into its software only the drug codes required for testing. As a result of the deficiencies in its software, eClinicalWorks allegedly caused physicians who used its software to submit false claims for federal incentive payments. The federal government also alleged that eClinicalWorks paid unlawful kickbacks to certain customers in exchange for promoting its product.

HOUSING AND MORTGAGE RECOVERIES

The Justice Department reported settlements and judgments totaling over $543 million in connection with the housing and mortgage industry this past fiscal year.

In September 2017, a unanimous jury in Houston, Texas, found that Allied Home Mortgage Capital Corporation and Allied Home Mortgage Corporation violated the False Claims Act and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") and awarded the government over $296 million. The court also entered judgment for over $25 million against Allied's president and chief executive officer ("CEO"). At trial, the government presented evidence that Allied falsely certified that thousands of high risk, low quality loans were eligible for Federal Housing Administration ("FHA") insurance and then submitted insurance claims to the FHA when any of those loans defaulted. The jury also heard evidence that, to evade oversight and disguise default rates, Allied Capital originated FHA-insured loans from more than one hundred "shadow" branch offices without the authorization of HUD. In addition, the jury received evidence that Allied's quality control department submitted falsified quality control reports to HUD auditors and falsely certified that Allied was in compliance with HUD quality control guidelines. Allied has appealed the judgment.

In addition to the judgment against Allied, the Justice Department secured a settlement with PHH Mortgage for $65 million and Financial Freedom for $89 million. PHH Mortgage admitted that it had originated and endorsed residential mortgages as eligible for federal insurance by the FHA that did not meet underwriting requirements intended to reduce the risk of default. The government alleged that although internal reports identified high rates of underwriting deficiencies, PHH Mortgage failed to report such deficiencies to the authorities as required under the program to enable the agency to prevent continued program violations and mounting losses. By originating and endorsing ineligible loans for FHA insurance, PHH Mortgage allegedly put borrowers at risk of losing their homes, and increased its mortgage profits at taxpayer expense while incurring little or no risk of its own. The settlement with Financial Freedom concerned the servicing of reverse mortgage loans, which allow older people to access equity in their homes. The government alleged that Financial Freedom misrepresented its eligibility for certain insurance payments, thereby obtaining interest from FHA to which it was not entitled.

PROCUREMENT

In fiscal year 2017, the Justice Department pursued a variety of procurement fraud matters. For example, Agility Public Warehousing Co. KSC, a Kuwaiti company, as part of a global settlement, paid $95 million to resolve civil fraud

claims and agreed to forgo administrative claims against the United States seeking $249 million in additional payments under its military food contracts, among other terms. In its civil complaint, the United States alleged that Agility knowingly overcharged the Department of Defense for locally available fresh fruits and vegetables supplied to U.S. soldiers in Kuwait and Iraq by failing to disclose and pass through discounts and rebates it obtained from suppliers, as required by its contracts.

The Justice Department resolved two cases involving the alleged failure to follow applicable nuclear quality standards. Bechtel National Inc., Bechtel Corp., URS Corp. (the predecessor in interest to AECOM Global II LLC) and URS Energy and Construction Inc. (now known as AECOM Energy and Construction Inc.) agreed to pay $125 million to resolve allegations that they charged the Department of Energy ("DOE") for deficient nuclear quality materials, services, and testing, and improperly used federal contract funds to pay for a comprehensive, multi-year campaign to lobby Congress and other federal officials. Energy & Process Corporation ("E&P") agreed to pay $4.6 million to resolve allegations that it knowingly failed to perform required quality assurance procedures and supplied defective steel reinforcing bars (rebar) in connection with a contract to construct a DOE nuclear waste treatment facility.

CA Inc. agreed to pay $45 million to resolve allegations that it made false statements and claims in the negotiation and administration of a General Services Administration (GSA) contract for software licenses and maintenance services. The settlement resolved allegations that CA provided false information to the GSA about the discounts it gave commercial customers for its software licenses and maintenance services during contract negotiations and failed to provide government customers with additional discounts when commercial discounts improved.

OTHER RECOVERIES

The Justice Department recovered funds in a wide variety of other cases.

For example, SolarCity Corporation agreed to pay $29.5 million to resolve allegations that it submitted inflated claims to the U.S. Department of the Treasury pursuant to Section 1603 of the American Recovery and Reinvestment Act of 2009. Under the Section 1603 Program, the Treasury paid a cash grant to construct or acquire qualified renewable solar energy systems. The settlement resolved allegations that SolarCity falsely overstated the cost bases of its solar energy properties in claims for Section 1603 funds in order to receive inflated grant payments from the Treasury. As part of the settlement, SolarCity and its affiliates also released all pending and future claims against the United States for additional Section 1603 payments.

Total Call Mobile LLC agreed to pay $30 million to resolve allegations that it defrauded the Lifeline Program, a federal government subsidy program that offers discounted mobile phone services to eligible low-income consumers. Total Call and its co-defendants allegedly submitted false claims for federal payments by seeking reimbursement for tens of thousands of consumers who did not meet Lifeline Program eligibility requirements. As part of the settlement, Total Call entered into a separate administrative agreement with the Federal Communications Commission and agreed to no longer participate in the Lifeline Program.

ADS Inc. and its subsidiaries agreed to pay $16 million to settle allegations that they violated the False Claims Act by knowingly conspiring with and causing purported small businesses to submit false claims for payment in connection with fraudulently obtained small business contracts. The settlement also resolved allegations that ADS engaged in improper bid rigging relating to certain of the fraudulently obtained contracts. The settlement with ADS ranked as one of the largest recoveries involving alleged fraud in connection with small business contracting eligibility.

INDIVIDUAL ACCOUNTABILITY

Individuals also were faced with litigation brought by the Justice Department under the False Claims Act.

In some cases, individual owners and executives of private corporations agreed to be held jointly and severally liable for settlement payments with their corporations. For example, Girish Navani, Rajesh Dharampuriya, and Mahesh Navani, three of the founders of eClinicalWorks, agreed to joint and several liability for the $155 million settlement discussed above. In addition, three other eClinicalWorks employees—developer Jagan Vaithilingam and project managers Bryan Sequeira, and Robert Lynes—entered into separate settlement agreements to resolve liability for their alleged personal involvement in the conduct. Forrest Preston, the owner of Life Care Centers of America, agreed to joint and several liability for the $145 million settlement discussed above, and Nicholas and Gregory Melehov, the owners of Medstar Ambulance Inc. agreed to be jointly and severally liable for a $12.7 million settlement with their company.

The Justice Department also obtained more than $60 million in settlements and judgments with individuals under the False Claims Act that did not involve joint and several liability with the corporate entity. For example, after 21st Century Oncology LLC paid $19.75 million to resolve allegations that it billed federal health care programs for medically unnecessary laboratory tests, the Justice Department secured separate settlements with various individual urologists, including a $3.8 million settlement with Dr. Meir Daller, resolving

allegations that the physicians referred unnecessary tests to a laboratory owned and operated by 21st Century Oncology.

Other examples included Dr. Robert Windsor, a pain management physician who agreed to the entry of a $20 million consent judgment to resolve allegations that he billed federal health care programs for surgical monitoring services that he did not perform and for medically unnecessary diagnostic tests; Dr. Gary L. Marder, a physician and the owner and operator of the Allergy, Dermatology & Skin Cancer Centers in Port St. Lucie and Okeechobee, Florida, who agreed to the entry of an $18 million consent judgment in connection with the performance of radiation therapy services; Joseph Bogdan, the owner of AMI Monitoring Inc. (also known as Spectocor), who agreed to pay $1 million to resolve liability for his alleged involvement in billing Medicare for higher and more expensive levels of cardiac monitoring services than requested by ordering physicians; and Siddhartha Pagidipati, the former CEO of Freedom Health, who agreed to pay $750,000 to resolve liability for his alleged involvement in an illegal scheme to maximize payment from the Medicare Advantage program.

RECOVERIES IN WHISTLEBLOWER SUITS

Of the $3.7 billion in settlements and judgments reported by the government in fiscal year 2017, $3.4 billion related to lawsuits filed under the *qui tam* provisions of the False Claims Act. During the same period, the government paid out $392 million to the individuals who exposed fraud and false claims by filing a *qui tam* complaint.

The number of lawsuits filed under the *qui tam* provisions of the Act has grown significantly since 1986, with 669 *qui tam* suits filed this past year—an average of more than 12 new cases every week.

In the Courts

Steven A. Meyerowitz*

Three New York Diagnostic Testing Facility Owners Charged in Alleged Multi-Million Dollar Health Care Fraud

Three owners of independent diagnostic testing facilities in Brooklyn, New York, have been charged in an allegedly fraudulent scheme that involved submitting over $44 million in claims to Medicare and private insurers, which included government-sponsored managed care organizations.

Tea Kaganovich and Ramazi Mitaishvili, both of Brooklyn, were the co-owners of Sophisticated Imaging, East Coast Diagnostics, East Shore Diagnostics, East West Management, and RM Global. Syora Iskanderova, a/k/a Samira Sanders, also of Brooklyn, was the owner of Global Testing, Liberty Mobile Imaging, Liberty Mobile Testing, Med Tech Services, and Scanwell Diagnostics. The three defendants each were charged with one count of health care fraud, two counts of making false claims to a federal agency, one count of conspiracy to pay health care kickbacks, two counts of paying health care kickbacks, and four counts of money laundering.

Tea Kaganovich and Ramazi Mitaishvili also were charged with one count of conspiracy to defraud the United States by obstructing the lawful functions of the Internal Revenue Service ("IRS").

Syora Iskanderova also was charged with two counts of making false statements to federal agents.

According to the indictment, beginning in approximately January 2014 and continuing through at least December 2016, the defendants executed a scheme in which they submitted fraudulent claims to Medicare, Medicaid managed care plans, and other health care benefit programs for diagnostic testing services. As alleged, as part of the scheme, the defendants paid kickbacks for the referral of beneficiaries who submitted themselves to diagnostic testing and other purported medical services. The indictment also alleged that the beneficiaries themselves received kickbacks as part of the scheme.

The defendants allegedly submitted and caused to be submitted claims to Medicare, Medicaid managed care plans, and other health care benefit programs

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for services that misrepresented the diagnostic testing company that purportedly performed the services. The indictment further alleged that the defendants disguised their illicit payments by moving the proceeds through shell companies and engaged in financial transactions greater than $10,000 involving the proceeds of unlawful activity.

As alleged, Tea Kaganovich and Ramazi Mitaishvili falsely reported to the IRS that the illegal payments made to co-conspirators were legitimate business expenses, which caused relevant tax forms to falsely under-report business income and claim deductions. In addition, the indictment alleged that Syora Iskanderova, on two separate occasions, lied to federal agents about her role in the alleged fraud scheme.

As alleged in the indictment, the defendants submitted and caused to be submitted at least $44 million in claims to Medicare, Medicaid managed care plans, and other health care benefit programs for diagnostic testing services and were paid at least $19 million on those claims.

Charleston Dentist Sentenced to Five Years in Federal Prison for Health Care Fraud

A Charleston, West Virginia, dentist who falsely billed West Virginia Medicaid and West Virginia Medicaid managed care organizations ("MCOs") for more than $700,000 has been sentenced to five years in federal prison.

Antoine Skaff previously pleaded guilty to health care fraud. Skaff also previously entered into a civil settlement with the U.S. Attorney's Office, the Office of Inspector General for the U.S. Department of Health and Human Services, the West Virginia Department of Health and Human Resources ("DHHR"), DHHR's Bureau for Medical Services, and the West Virginia Medicaid Fraud Control Unit in which he agreed to pay treble damages of $2.2 million, or three times the loss suffered by West Virginia Medicaid.

Skaff, a dentist, fraudulently billed West Virginia Medicaid and Medicaid MCOs for dental procedures that he did not actually perform on Medicaid recipients. Skaff's scheme to defraud Medicaid and its MCOs lasted more than five years and involved upcoding and double billing, prosecutors said.

Skaff admitted that he falsely inflated his billings, a practice commonly known as upcoding, often by falsely claiming reimbursement for procedures involving impacted teeth. Typically, only wisdom teeth are impacted. However, Skaff admitted that he upcoded billings for tooth extractions by falsely informing Medicaid and its MCOs that he performed more complex procedures, such as extractions of impacted teeth, when he had actually performed simple extractions.

Because Skaff upcoded these extractions, Medicaid and its MCOs paid Skaff $172 per extraction of each tooth, rather than $80 per tooth for a simple extraction.

Skaff additionally admitted that he falsely upcoded at least 7,490 tooth extractions, billing more than $1.3 million for those procedures. He further admitted that if those extractions were medically necessary, and if had actually performed the procedures he claimed, then he should have been paid only $599,200.

Skaff also admitted that he submitted false bills and received payment twice for removing the same teeth from the same patients. Skaff first billed and received payments from Medicaid for the extraction of patients' specific teeth. He then falsely billed and received payment again from Medicaid MCOs for extraction of the same teeth. Skaff admitted that he received $56,930 from his false double billings.

Owner of Home Health Agency Sentenced in Absentia to 80 Years in Prison for Involvement in Medicare Fraud Conspiracy

The owner of a Houston home health agency has been sentenced to 80 years in prison for his role in a $13 million Medicare fraud scheme and for filing false tax returns.

Ebong Tilong, of Sugarland, Texas, was sentenced by U.S. District Judge Melinda Harmon of the Southern District of Texas.

In November 2016, after the first week of trial, Tilong pleaded guilty to one count of conspiracy to commit health care fraud, three counts of health care fraud, one count of conspiracy to pay and receive health care kickbacks, three counts of payment and receipt of health care kickbacks, and one count of conspiracy to launder monetary instruments.

In June 2017, Tilong pleaded guilty to two counts of filing fraudulent tax returns.

Tilong failed to appear for his original sentencing, which was scheduled for October 13, 2017.

According to the evidence presented at trial and Tilong's admissions in connection with his guilty pleas, from February 2006 through June 2015, Tilong and others conspired to defraud Medicare by submitting over $10 million in false and fraudulent claims for home health services to Medicare through Fiango Home Healthcare Inc., owned by Tilong and his wife, Marie Neba, also of Sugarland, Texas. The trial evidence showed that using the money that Medicare paid for such fraudulent claims, Tilong paid illegal kickbacks to patient recruiters for referring Medicare beneficiaries to Fiango for home health

services. Tilong also paid illegal kickbacks to Medicare beneficiaries for allowing Fiango to bill Medicare using beneficiaries' Medicare information for home health services that were not medically necessary or not provided, the evidence showed.

Tilong falsified medical records and directed others to falsify medical records to make it appear as though the Medicare beneficiaries qualified for and received home health services, the government asserted.

According to prosecutors, Tilong also attempted to destroy evidence, blackmail a witness, and suborn perjury from witnesses, including a co-defendant while in the federal courthouse.

According to the evidence presented at trial and his admissions to the tax offenses, from February 2006 to June 2015, Tilong received more than $13 million from Medicare for home health services that were not medically necessary or not provided to Medicare beneficiaries.

In connection with his guilty plea to the tax offenses, Tilong admitted that to maximize his gains from the Medicare fraud scheme, he created a shell company called Quality Therapy Services ("QTS") to limit the amount of tax that he paid to the IRS on the proceeds that he and his co-conspirators stole from Medicare. According to his plea agreement, in 2013 and 2014, Tilong wrote almost a million dollars in checks from Fiango to QTS, purportedly for physical-therapy services that QTS provided to Fiango's Medicare patients. The evidence showed that QTS did not provide those services. According to his plea agreement, in 2013 and 2014, Tilong's fraudulent tax scheme caused the IRS a tax loss of approximately $344,452.

To date, four others have pleaded guilty or been convicted based on their roles in the fraudulent Medicare scheme at Fiango. Nirmal Mazumdar, M.D., of Houston, Texas, the former medical director of Fiango, pleaded guilty to a scheme to commit health care fraud for his role at Fiango. Daisy Carter, of Wharton, Texas, and Connie Ray Island, of Houston, Texas, two patient recruiters for Fiango, pleaded guilty to conspiracy to commit health care fraud for their roles at Fiango. Neba was convicted after a two-week jury trial of one count of conspiracy to commit health care fraud, three counts of health care fraud, one count of conspiracy to pay and receive health care kickbacks, one count of payment and receipt of health care kickbacks, one count of conspiracy to launder monetary instruments and one count of making health care false statements.

Neba previously was sentenced to 75 years in prison and Island was sentenced to 33 months in prison. Mazumdar previously was sentenced to time served with three years of home confinement. At the time of this writing, Carter was awaiting sentencing.

Former Florida State Health Care Administration Official Sentenced to More Than Four Years in Prison for Accepting Bribes

A former employee of Florida's Agency for Health Care Administration ("AHCA") has been sentenced to 57 months in prison for accepting bribes in exchange for providing confidential information about health care facilities that received Medicare and Medicaid funds.

Bertha Blanco, of Miami, Florida, was sentenced by U.S. District Judge Ursula Ungaro of the Southern District of Florida. Judge Ungaro also ordered Blanco to pay $441,000 in restitution and to forfeit $100,000, which represents the gross proceeds traced to Blanco's commission of the offense, according to prosecutors. Blanco previously pleaded guilty to one count of bribery concerning a program receiving federal funds.

AHCA's Division of Health Quality Assurance is responsible for the licensure and regulation of health care facilities in Florida that receive Medicare and Medicaid funds, including skilled nursing facilities ("SNFs"), assisted living facilities ("ALFs") and home health agencies ("HHAs"). As part of her guilty plea, Blanco, who was employed by AHCA for approximately 30 years, admitted that, from at least 2007 through June 2015, she solicited and received thousands of dollars of cash bribes from Miami-area owners of SNFs, ALFs, and HHAs, and intermediaries working with them, in exchange for providing the purchasers with sensitive, nonpublic AHCA reports and information related to their facilities. The information included the schedules of future unannounced inspections by AHCA surveyors and previously undisclosed patient complaints filed with AHCA.

Prosecutors said that Blanco knew that the information she provided in exchange for bribes ultimately could be used to fabricate and falsify medical paperwork and to temporarily remedy deficiencies so that AHCA would not discover lapses in patient care and revoke the licenses of the facilities that had received the information.

According to prosecutors, the purchasers of information provided by Blanco included Isabel Lopez, Gustavo Mustelier, Gabriel Delgado, Guillermo Delgado, and Sila Luis. Lopez and Mustelier pleaded guilty in May 2017 to conspiracy to defraud the United States and are awaiting sentencing. Gabriel Delgado pleaded guilty in 2015 to money laundering and was sentenced to 55 months in prison. Guillermo Delgado pleaded guilty in 2015 to conspiracy to distribute a controlled substance and was sentenced to 110 months in prison. Luis pleaded guilty in June 2017 to conspiracy to commit health care fraud and was sentenced to 80 months in prison.