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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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AUTHORIZATION ACT**

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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,” the expanded definition of a commercial item, and the 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, cyber-security 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.