

# LEGAL ADVISOR



## A PilieroMazza Update for Federal Contractors and Commercial Businesses

### Reading the Tea Leaves — NDAA 2018

By John Shoraka



Some of the provisions in the latest NDAA are pretty clear to understand and the overall impact can be easily determined. Others are more like seeds planted today for a harvest to come in the future. What gives us heartburn though is that the seeds planted today generally will bear fruit for large contractors at the cost of small government contractors.

To be sure, there are several provisions in the NDAA that will help dollars flowing to the smaller firms. Section 805 of the NDAA increases the simplified acquisition threshold to \$250,000; since acquisitions within the threshold are supposed to be reserved exclusively for small businesses, this bodes well for firms playing in this sandbox. But clearly, this is only for the more nascent and less sophisticated small business contractor. In addition, Section 806 increases the micro-purchase threshold to \$10,000, again good for some small businesses, but clearly not where most of the government spend occurs.

Having been in the trenches and having battled the likes of OMB, DoD, and OFPP as an advocate for small business spending and the establishment of robust small business goals, I am more than concerned about the numerous “seeds” planted throughout the latest NDAA. For one, Section 801 revises the DFARS statement of purpose to emphasize quality, timeliness, and reasonableness of price. To me, these are code words to de-emphasize small business spending, as it is argued by some that small businesses add cost and increase acquisition timeframes. Now, when I was responsible for negotiating small business goals with the department of defense, I had no problem accepting that the DoD’s number one objective was to support

the warfighter; but my counterparts at the DoD clearly understood that engaging small business in that process not only benefited the warfighter, but it also benefitted the U.S. economy and the industrial base. In other words, we agreed that there was significant overlap in the three complementary objectives of supporting the warfighter, developing the U.S. economy, and developing the nation’s industrial base. Unfortunately, it seems that Section 801 emphasizes one objective at the cost of the latter two; and in the long run, the lack of a consistent effort to spend DoD funds in a manner that supports the industrial base and develops the economy will, in fact, negatively impact the one objective that is most critical (i.e., supporting the Warfighter).

Another amendment that is of concern is the so-called “Amazon Amendment.” Section 846 of the NDAA directs the Administrator of the GSA to establish a program to procure commercial products through commercial e-commerce portals. Implementation will occur in multiple phases and is scheduled to be completed within two years. How this will affect current resellers and small business manufacturers is hard to tell; furthermore, how this will not be a duplication of the GSA’s current schedules and category management “hallways” is hard to decipher as well. What is clear is that this does not bode well for current federal government resellers, at a minimum they will have to transition out of schedules on to a new platform. In the worst case scenario, margins will be driven down to such an extent that many will not see the benefit of doing business with the federal government.

Finally, Section 827 of the NDAA directs the DoD to carry out a pilot program to determine the effectiveness

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of requiring contractors to reimburse the department for costs incurred in processing GAO protests. To be fair, this is only a pilot, it is only for the DoD and it only affects contractors with revenues in excess of \$250M. However, if this provision is ever fully launched and the revenue thresholds are significantly reduced, it will adversely impact smaller businesses who do not have war chest reserves for protest purposes, and who would become reluctant to file protests even when a protest may be the best course of action.

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