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### Regulatory updates for government contractors

#### **Federal Acquisition Regulation (FAR)/ Other Agencies/Supplements Proposed Rules**

- [Small Business Administration \(SBA\) Proposed Rule; Small Business Size Standards; Adoption of 2017 North American Industry Classification System for Size Standards; 82 FR 18253; April 18, 2017](#)
  - The SBA proposes to amend its small business size regulations to incorporate the US Office of Management and Budget's (OMB) North American Industry Classification System (NAICS) revision for 2017, identified as NAICS 2017, into its table of small business size standards
  - NAICS 2017 created 21 new industries by reclassifying, combining or splitting 29 existing industries under changes made to NAICS in 2012
  - SBA proposes to adopt these changes effective October 1, 2017 and the SBA must receive comments to this proposed rule on or before June 19, 2017

#### **Defense Contract Audit Agency (DCAA) and Defense Contract Management Agency (DCMA) Audit Alert/Guidance/Programs**

- [DCAA Report to Congress on FY 2016 Activities; March 31, 2016](#)
  - The report highlights DCAA's audit performance, recommendations to improve the audit process, industry outreach activities and key accomplishments. According to the report:

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- DCAA audits resulted in a savings for contract officials of \$3.6 billion in defense spending in 2016
  - DCAA examined nearly \$287 billion in defense contractor costs, issued over 4,200 audit reports, and identified over \$9.9 billion in audit exceptions
  - Audit backlog was reduced to an average age of 17.6 months
  - This backlog was expected to be cleared by FY18, but due to the 2017 hiring freeze, DCAA is reassessing its projects
- [DCAA Memorandum for Regional Directors \(MRD\) 17-PIC-004\(R\); Audit Alert on DMIS Data for Low-Risk Memorandum Incurred Cost Assignments; April 25, 2017](#)
  - The purpose of the audit alert is to provide general guidance on the entrance conference date and the type of documentation required in Livelink for all low-risk memorandum incurred cost assignments
- [DCAA MRD 17-PIC-005\(R\); Audit Alert Regarding National Aeronautics and Space Administration's \(NASA\) Participation in DCAA's Risk-Based Sampling Process for Incurred Cost Proposals; May 2, 2017](#)
  - Effective immediately, NASA will no longer accept low-risk determinations issued by DCAA on contractors where the preponderance of the work relates to NASA contracts
  - Field Audit Offices (FAO) are directed to cease issuing low-risk determinations on behalf of NASA for these contractors
  - For authorized audits where NASA does not have the preponderance of the work, audit teams must coordinate with NASA to determine whether any issues/concerns exist on NASA contracts before issuing the low-risk determination

## **Government Publications/Reports/Press Releases**

- [Office of Management and Budget \(OMB\), Office of Information and Regulatory Affairs Memorandum; M-17-21: Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs;" April 5, 2017](#)
    - This guidance in the form of Questions and Answers (Q&As), addresses the requirements of Executive Order (EO) 13771, titled "Reducing and Controlling Regulatory Costs," which applies to FY17 and beyond
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- This guidance supplements the OMB interim guidance issued on February 2, 2017, titled “Interim Guidance Implementing Section 2 of the EO of January 2017, Titled “Reducing Regulation and Controlling Regulatory Costs”
  - The EO directs heads of agencies to identify at least two existing regulations to be repealed for each new regulation being proposed
  - The EO also requires all costs associated with new regulations and repealed regulations finalized in 2017 to be no greater than zero, and all costs associated with new regulations should be offset by reduced costs with the elimination of at least two regulations
  - The Q&A provides additional clarification including definitions, scope, accounting, and process questions
  
  - [Testimony of Anita F. Bales, Director, Defense Contract Audit Agency; House Armed Services Subcommittee on Oversight and Investigations; April 6, 2017](#)
    - Anita Bales provided testimony on DCAA, its mission, its approach to auditing, and its audit efforts
    - Ms. Bales expressed concerns about the inefficiencies with introducing Independent Public Auditors (IPAs) into the contract administration process
    - Ms. Bales suggested reaching out to industry, the Services, Defense Procurement and Acquisition Policy, DCMA, and other stakeholders to ascertain the appropriate use of IPAs
  
  - [Testimony of David Berteau, President & CEO, Professional Services Council \(PSC\); House Armed Services Subcommittee on Oversight and Investigations; April 6, 2017](#)
    - David Berteau provided testimony on behalf of the PSC and provides recommendations on the roles and responsibilities of DCAA
    - Mr. Berteau offered priorities and criteria that PSC would urge the committee to consider, including:
      - Defining proper materiality and relevance standards for contract audits
      - Sustaining a robust contractor base
      - Ensuring vendors remain interested in bidding
      - Helping the government’s acquisition processes provide better access to innovation
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- [Testimony of John Panetta, Financial Executives International's Committee on Government Business \(FEI-CGB\); House Armed Services Subcommittee on Oversight and Investigations; April 6, 2017](#)
    - John Panetta provided testimony on behalf of the FEI-CGB on topics of defense contract auditing, including the pace and schedule of audits, costs, and DCAA standards and processes
    - Mr. Panetta recommended that direction and training be provided to DCAA to adopt the materiality and risk management practices common to the public accounting profession
    - Mr. Panetta noted his support for initiatives to utilize independent public accounting firms to supplement performance of contract audit requirements, as is currently being done in other government agencies
    - Mr. Panetta stated that the introduction of competition to perform audit services regarding government contract costs will serve as a catalyst to motivate DCAA to evolve from a culture of “risk avoidance” to one of “risk management”
  
  - [Testimony of James Thomas, Assistant Vice President for Policy, National Defense Industrial Association \(NDIA\); House Armed Services Subcommittee on Oversight and Investigations; April 6, 2017](#)
    - James Thomas provided testimony on behalf of NDIA and identified five key elements that have had a significant effect on the defense contract audit process, including:
      - DCAA's mission
      - Implications of DCAA audit behavior for industry
      - How to measure “success” in the defense contract audit process
      - DCAA management
      - DCAA workforce
    - Mr. Thomas stated that DCAA should place greater emphasis on improving its customer service role, and be held accountable to improve the quality and timeliness of its audit services for the benefit government procurement and the warfighter
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- [Office of Management and Budget Memorandum; M-17-22: Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce; April 12, 2017](#)
    - The Memorandum outlines actions proposed by President Trump to make the government lean, accountable, and more efficient:
      - On January 23, 2017, the President issued a Memorandum (Hiring Freeze PM) imposing a Federal “Hiring Freeze,” which was taken to halt growth of the Federal workforce until a “long-term plan to reduce the size of the Federal Government’s workforce” is put in place
      - On March 13, 2017, the President issued a Reorganization EO directing OMB to submit a comprehensive plan to reorganize Executive Branches departments and agencies
      - On March 16, 2017, the President submitted his Budget Blueprint to Congress proposing to eliminate funding for programs that are unnecessary, outdated, or not working
    - The Memorandum provides agencies guidance on fulfilling the requirements of the Hiring Freeze PM and Reorganization EO while aligning those initiatives with the Federal budget and performance planning processes
  
  - [Advisory Panel on Streamlining and Codifying Acquisition Regulations: Section 809 Panel Interim Report; May 2017](#)
    - Interim report for the 809 Panel, which was tasked with identifying ways to streamline and improve the defense acquisition process, includes the following five main sections to guide the panel’s future work and recommendations:
      - Adapt at the Speed of a Changing World
      - Leverage the Dynamic Defense Marketplace
      - Allocate Resources Effectively
      - Simplify Acquisition
      - Enable the Workforce
  
  - Council of Defense and Security Industry Associations; Commercial Item Guidebook (DRAFT) Comments on Commercial Item Determinations (Part A) and Pricing Commercial Items (Part B); May 1, 2017
    - The Council of Defense and Security Industry Associations (CODSIA) offered comments on the Commercial Item Guidebook (DRAFT)
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- The comments state that CODSIA is encouraged by the way the Guidebook addresses commercial item determinations and pricing commercial items determination or evaluating a commercial price
- The comments also state that CODSIA believes the Guidebook occasionally lacks clarity, and it contains some guidance and examples that address concepts that are not directly relevant to making a commercial items determination or evaluating a commercial price

## Court Rulings

- [Appeal of Exelis Inc.; Armed Services Board of Contract Appeals \(ASBCA\); ASBCA No. 58966; March 29, 2017](#)
    - Exelis appealed a contracting officer's final decision that Exelis included unallowable and expressly unallowable costs in a certified indirect cost proposal
    - ASBCA determined that Exelis' total stakeholder return (TSR) compensation costs are unallowable under the FAR 31.205-6(i) and the contracting officer properly imposed a penalty on the disallowable costs because they were expressly unallowable
    - ASBCA denied the appeal
  - [Appeals of Raytheon Corporation; Armed Services Board of Contract Appeals; ASBCA Nos. 57743, 57798, 58280; April 17, 2017](#)
    - Raytheon appealed under the Contract Disputes Act (CDA) three final decisions of the DCMA contracting officers (COs)
    - In ASBCA No. 57433, DCMA's corporate administrative CO (CACO) had demanded the return of alleged government payments of allegedly expressly unallowable costs including penalties
      - ASBCA sustained part of and denied part of Raytheon's appeal
    - In ASBCA Nos. 57798 and 58280, DCMA's divisional administrative CO (DACO) had assessed penalties and interest against Raytheon for including alleged expressly unallowable consultant costs in the incurred cost rate proposals for its Integrated Defense System (IDS) business segment for 2004 and 2005
      - ASBCA sustained Raytheon's appeal because the government has not met its burden to prove the unallowable costs were expressly unallowable
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