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How new regulations will affect government contractors in the Dayton area

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Increased military spending is good news for Dayton-area defense contractors, but new regulations and uncertainty about the nation's free trade agreements may affect the way local companies do business with the federal government.

The National Defense Authorization Act for fiscal 2018, which was signed into law in December, changes the way companies file protests for defense contracts — a practice employed by those who believe the government made a mistake during the bidding process.

For the first time since the government began contracting with private businesses in the 1950s, companies will be charged a fee to file a protest. The \$350 fee will be charged for each protest, which can be filed only online — another change included in this year's NDAA.

Suzanne Sumner, a government contracting attorney and partner at Taft, Stettinius & Hollister's Dayton law office, said the fees are likely to hit small businesses the hardest.

"A large business probably wouldn't care about \$350 when they're bidding on a \$50 million or a \$200 million contract," Sumner said. "But smaller businesses might have to pick and choose when they really want to spend the money to file a bid protest to challenge the award."

And these protests will prove even more costly when a large company loses a protest.

As part of a new pilot program in the NDAA, contractors with more than \$250 million in revenue during the previous year will be required to reimburse the Department of Defense for the costs it incurred to process the protest.

"The whole way that companies have learned over time to challenge an award is going to be radically changed in the next two to three months," said [Barbara Duncombe](#), who is also a government contracting attorney and partner at the law firm. "People are just going to have to get used to a whole different way of doing it."

There are two places where businesses can go to challenge an award — the Government Accountability Office and the Court of Federal Claims. Historically, somewhere around 95 percent of cases were handled by the GAO because it was "easy, free and informal," Duncombe said. But that may change under the new regulations.

"These changes only affect the GAO, so what you might end up seeing is a shift in precedent toward the Court of Federal Claims," she said.



Suzanne Sumner is a government contracting attorney and partner at Taft, Stettinius & Hollister's Dayton law office.

In the past, petitioning the Court has been more expensive and time-consuming for companies than the GAO. Since the process takes longer, attorney fees are often higher, which is why more people filed protests with the GAO, Duncombe explained.

However, now that contractors who lose a protest must pay the government's attorney fees in addition to their own, it may be worth the investment to file with the Court instead of the GAO.

"If you're looking at potentially paying the government's attorney fees, particularly if you're a large business, I'd rather just pay for my own attorney and go through a more formal process," Sumner said. "If I didn't win, at least I don't have to pay the government's attorneys as well."

The new regulations, coupled with the fact that only around 17 percent of cases are actually won, could mean less protests in the future. And even if a contractor wins, all it means is they get the chance to recompete for the award.

"You're just getting another shot at it, you're not getting the contract awarded to you," Sumner said.

In addition to changes in this year's NDAA, the question of whether or not the U.S. will pull out of the North American Free Trade Agreement also hangs over the head of federal contractors.

President Trump has expressed his distaste for NAFTA on several occasions, and though nothing has happened yet, if the U.S. were to pull out of the agreement it could spell trouble for businesses that have operations in Mexico or Canada.

"There's been threats out there from Canada and other countries about withdrawing from NAFTA," Sumner said. "If they do, you're (government contractors) not going to be compliant with your products that come from those countries. So companies really need to consider where else they can manufacturer these items they have to supply to the government if something happens to NAFTA."

Sumner recommends that companies have backup plans in place, such as finding another space in the U.S. where they can manufacturer goods, or increasing the number of hours in which products are made.

"Maybe start running your (manufacturing) lines 24 hours a day instead of eight hours," she said. "They would need to do something, because the government is probably not going to be real forgiving. They might give you a little bit of a delay time but probably not a whole lot."

While new regulations and concern over free trade looms large, contractors in the Dayton area still have the benefit of Wright-Patterson Air Force Base and all the money being pumped into it through a surge in defense spending.

Under the NDAA, some \$692 billion has been recommended for defense spending in fiscal year 2018. That number may change, however, as the actual funding will be set with the Congressional appropriations bill, which is still pending.

Nonetheless, both Sumner and Duncombe expect local defense contractors to benefit greatly.

"I think that (defense funding) will trickle down and help all these government contractors," Duncombe said. "The more money that Wright-Patt gets, the more money that flows into the Dayton region."

John Bush
Staff Reporter
Dayton Business Journal

