



## **WHITE PAPER: Monitor Implementation of Section 1811, FY17 NDAA Department of Defense (DOD) Contracts Performed Outside the US and Its Territories**

**NACA Policy:** NACA supports overseas contracting opportunities for Federal Acquisition Regulation (FAR) Part 19 Small Businesses [8(a), Woman-Owned, Service-Disabled Veteran Owned, and HUBZone to include Native 8(a) enterprises. This benefits small businesses, expands economic development to international sources, and helps to secure and grow a more stable industrial base to support American needs. NACA fully supports mitigating the conflict between government-wide goaling in 15 USC 644(g), and the FAR 19.000(b) statement that small business programs apply only in the United States and its outlying areas. Section 1811 of the Fiscal Year (FY) 2016 National Defense Authorization Act (NDAA) seeks to accomplish this objective.

**Ask:** Rule changes sought and enacted for Section 1811 of the Fiscal Year (FY) 2016 National Defense Authorization Act (NDAA) by the Department of Defense (DOD) and the FAR Council, must reflect the Intent of Congress. Specifically, to ensure the:

- Ability to award DOD small business overseas contracts to small businesses is not precluded.
- Award of sole source contracts to qualified and capable small businesses is not precluded.
- Provision in (9)(B)(v) of Section 1811 is clearly and intentionally an “and” statement, requiring that “the place of award” and “the place of performance” are *both* conditions to be met.

**Abstract:** Through focused advocacy efforts this issue was prevented from developing into a procurement policy that would have had disastrous impacts on all small business concerns. The present outcome proves positive for small businesses however, the initial attack leaves lingering concerns. The efforts to limit the involvement of small businesses in contracts performed outside of the United States was described as an effort to preclude contract protests resulting from the disparity between relevant statutes.

**Background:** In the Senate passed version (S. 2943) of the FY 2017 NDAA, Section 884 eliminated the option for contracting officers to issue sole source awards to qualified and responsive FAR Part 19 small businesses. At that time, the Senate Armed Services Committee reported that FAR 19.000(b) directs that small business set asides are not applied to overseas contracts. This conflicts with 15 USC 644(g) which instituted *government-wide* small business goals for small disadvantaged (includes 8(a)), woman-owned, service-disabled veteran owned, and HUBZone businesses. Section 884 also eliminated funding for such contracts.

The Federal Procurement Data System (FPDS) records that small businesses were awarded over \$6B in unclassified DOD contracts between FYs 2012-2016 – 5.9% of all overseas awards. These represent opportunities potentially lost for small business participation, it destabilizes the development of an experienced industrial base, and reduces a contracting officers’ options when our national security strategy demands the flexibility that could be achieved with the right small business support of the warfighter.

NACA opposed Section 884 and developed a coalition of woman-owned and veteran-owned businesses to add their voice to our opposition.

Subsequently, the Armed Services Committees withdrew Section 884; however, consistent with their goal to mitigate the conflict between the FAR and 15 USC, they added language to Section 1811 of the 2017 NDAA which delineated specific contracts from being included in goaling if such solicitation is awarded by or for DOD and:

- Is conducted pursuant to Section 22 of the Arms Export Control Act (22 USC 2762).
- Is a Humanitarian Operation as defined in 10 USC 401(e).
- Is to be awarded pursuant to a Status of Forces agreement with a foreign government.
- Both the place of award and the place of performance are outside of the US and its territories.

Upon request for clarification, NACA confirmed with the House and Senate Armed Services staffs that in the last provision, i.e., (9)(B)(v), “and” means “and.”

NACA will monitor the Federal Registry as this rule change is proposed to ensure that the intent of Congress, as articulated by the professional staff, is achieved.