What Small Business Should Know About Congress

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Overview

• Congressional Review Process for DOD Installations Programs
  • How important is the DD Form 1391?
  • What is the difference between authorizations and appropriations?
  • What are the reasons for a project not being funded?
  • What does incremental funding mean to a contractor?
  • When does a contractor know for sure that a project is going to be supported?
  • How are military construction projects added to a Bill?
  • How are amounts for Sustainment, Restoration, and Modernization determined?

• BRAC and Current Budget Update

• Recent Congressional Actions Affecting Small Business

Note: Audience questions are highly encouraged during the briefing
The Annual Federal Budget Process

1. Budget Resolution
2. Authorization
   - Requirement
   - Amount
3. Appropriations

President’s Budget Request (PB)
- Planning, Programming, and Budget (PPBES)
- Delivered in February
- Service Chief SAME
- Briefings in March

The President's budget is formulated over a year with the assistance of the Office of Management and Budget

Budget Execution
- Obligation and expenditure of funds by Department of Defense
- Award of facility projects

Proposed MILCON projects are presented to Congress by each Service and Defense Agencies
- Includes FYDP
The Congressional Budget Process (in theory)

<table>
<thead>
<tr>
<th>PHASES</th>
<th>PRE-BUDGET</th>
<th>BUDGET JUSTIFICATION &amp; HEARINGS</th>
<th>MARKS</th>
<th>APPEALS</th>
<th>POST-BUDGET</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congress Events</td>
<td>Defense Authorization Appropriations Bills (September 30)</td>
<td>State of Union</td>
<td>Auth Marks</td>
<td>Auth Conference</td>
<td>ADJOURN</td>
</tr>
<tr>
<td>YEAR</td>
<td>President’s Budget Request</td>
<td>Budget Resolution</td>
<td>Approp Marks</td>
<td>Approp Conf</td>
<td>Final Bills</td>
</tr>
</tbody>
</table>

| JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |

- Federal Government is funded annually by 12 separate Appropriations Bills
- Failure to enact all 12 in law by October 1 results in Continuing Resolution (CR)
- In recent years, absent a joint budget resolution, Congress has relied on “Omnibus” Appropriations Act combining all 12 Bills into one Trillion dollar discretionary spending bill.
- Easier to pass without amendment right before Christmas
Budget Resolution:
Sets Congressional budget at “top line/ceilings” for spending for major functions, & revenues

Defense Authorization:
Provides authorization, at a maximum ceiling level, for specific activities/”things” for which budget authority (BA) may be appropriated

Defense & MILCON Appropriations:
Provides BA for those activities/”things” authorized – permission to obligate the Government; Congressional rules generally prohibit appropriating BA for purposes not authorized
Congress and Military Construction Projects

- Title 10, United States Code, Chapter 169
  - MILCON defined (new footprint, or change in use)
  - Requires each MILCON project to be authorized and appropriated
  - Authorizes unspecified minor construction
  - Authorizes use of O&M funds for construction up to $1 million
  - Authorizes separate planning and design funds
  - Authorizes O&M funds for facility repairs (FSRM)
  - Authorizes MILCON in certain circumstances
  - Requires USACE and NAVFAC to be contracting agents
Congressional Authorization Process

- **Starts with DD Form 1391 - MILITARY CONSTRUCTION PROJECT DATA**
  - Location, Title, Cost Estimate, Scope of construction (primary facility, supporting work)
  - Description of proposed construction, requirement, current situation, Impact if not provided
  - Also includes supplemental data (design milestones, acquisition method, proposed construction schedule, need for other types of funding)
- 1391s serve as the written justification for each MILCON project included in the President’s budget (PB) request. Congress reviews each one.
- Each MILCON project requires an authorized DD Form 1391.
- For designers: The **scope** in the 1391 is a binding statutory authorized limit - Congress provides flexibility in **authorized costs** if bids are higher than estimates, but **unauthorized scope cannot be added if bids are low.**
Congressional Authorization Process

- **Four** different Congressional committees review each project
  - House and Senate Appropriations Subcommittee for Veterans Affairs and Military Construction
  - House and Senate Armed Services Committees

- Typically, **80-90%** of PB MILCON request is “marked” without changes or deletions – Marks are released in April/May

- Many projects released for solicitation after 4 good marks

- Projects authorizations are not final until committee conference reports are enacted into law (signed by POTUS)
Congressional Authorization Process

- Typical Reasons for Congress to reject a PB MILCON project
  - Does not satisfy a valid military requirement (i.e. museums, off base busstops)
  - Congress does not consider project a priority (band facility, kennel, microgrid)
  - Project is early to need for new weapon system (F-35 hangar, simulator facility)
  - Scope or Costs are excessive (HQ facility, hardened aircraft hangars)
  - Congress does not support mission requirement (SOF performance centers)
  - Project may not result in a complete and useable facility (utility expansions)
  - Mission requirement is not well defined (land acquisitions)
  - Foreign policy or political concerns (BMD interceptor/radar sites, new runways)
  - Host Nation agreements, environmental studies, or land deals are not in place
  - Service Request based on emerging need, mission change, or new information
Congressional Authorization Process

- **Authorizers** provide for each MILCON Project
  - A 3 year authorization of the requirement *(considered by contracting officers as the obligation authority)*
  - An authorization of appropriation by line item project
  - Enacted into law through the National Defense Authorization Act

- **Appropriators** provide for each MILCON Project
  - Funding for each project *(five year availability of funds for award)*

- A MILCON project without an authorization cannot be carried out
- An authorized MILCON project without an appropriation can be carried out if funds are programmed from other projects
Congressional Authorization Process

• Congress also provides each year
  – Lump sums to be used by the Services and Defense Agencies for Planning and Design services for projects in the next two years
  – Lump sums to be used for unforeseen, minor MILCON projects
  – Lump sums for Energy Conservation Investment Program (ECIP)
  – The ability to apply bid savings from awarded contracts to cover bids exceeding Govt estimate (over certain amounts – must notify Congress)
  – Explanations for decisions to cut, restrict, or defer MILCON projects
  – If warranted, additional amounts for MILCON not requested in the PB
    – AKA Congressional inserts – Committees have in the past two years been adding amounts for projects included in Unfunded Priority Lists (UPLs) submitted by Service Chiefs to Congress in March of each year for emerging, urgent needs.
Incremental Funding vs Phasing

- A **phased project** is proposed in the PB when the work will result in a complete and useable facility
  - The 1391 is required to identify all the phases
  - In some cases, the 1391 will propose the construction of more than one facility.

- An **incrementally funded project** receives in the first year an authorization of the entire scope, but only an appropriation of the estimated amount to be expended
  - Usually reserved for projects in excess of $100 million
  - Congress will ask the contracting agent for a reasonable expectation of funds to be expended in an FY. Congress will then fully authorize the requirement, but only provide partial appropriations. Allows funds to be placed towards another project as opposed to languishing for years.
Timing

• Federal Contracting Officer (USACE, NAVFAC, AFCEC) must wait for NDAA and Approps Bills to be enacted into law before awarding contracts.

• In years with CRs, appropriations are delayed beyond October 1 to January-April of the execution year.
  – Because Congress expects projects to be awarded in the year of execution - results in a shortened award period.
  – Thus the reason for IDQ’s and tense, irate contracting officers

• Need date for the project vs Congress at times drives acquisition method (DBB vs DB vs hybrid)
Facility Sustainment, Restoration, Modernization

- **FSRM** funded from Operations and Maintenance accounts authorized in the NDAA and appropriated in **Defense Appropriations Bills**.
  - Provided by Congress in lump sums by service – no specific project lists, no 1391’s
  - Averages about $9.5 B annually (MILCON is $ 8.2 B in FY17)
  - Congress allows DOD to migrate funds in/out of O&M accounts
  - Projects over $7.5 M require congressional notification

- **Sustainment funds** keep DOD’s facilities in good working order
  - DOD requirement – invest 1% of total plant replacement value annually
  - DOD goal is to budget to 90% of requirement. Fallen short in past years (74% in ‘17)

- **Restoration and Modernization funds** repairs or renovations to facilities with deteriorated or damaged conditions. Also funds demolition program
  - R&M severely underfunded as DOD is taking risk with competing priorities.
Base Operations Support

- BOS also funded from O&M accounts authorized in the NDAA and appropriated in Defense Appropriations Bills.
- Provides the resources to operate the bases, including utility system operations; installation equipment maintenance; engineering services including fire protection, crash rescue, custodial, refuse collection, snow removal, and lease of real property; security protection and law.
- 90% considered “must-pays” each year
- Historically, PB does not request full BOS amount – counts on reprogramming of funds from other O&M accounts
Base Realignment and Closures (BRAC)

**Reality**

- CinC has the standing authority to close military bases
  - Congress makes it difficult through reports in 10 USC Section 2687
  - DOD has closed domestic bases in recent years without a BRAC

- "BRAC" is a specific authorization of Congress
  - Only applies to domestic bases – not overseas
  - Establishes a Commission and process to vet DOD recommendations
  - Provides an expedited excess property disposal process (federal screening, community involvement, NEPA, Homeless, etc)
  - Provides a mechanism to assess military value vs politics
  - Authorization has been requested by DOD for the last five years
  - Rejected by Congress due to concerns about cost and national military strategy
Base Realignment and Closures (BRAC)

**Rhetoric**

- "Congress doesn’t want to close bases in their districts”
  - 5 rounds have been authorized by Congress since 1988
  - Many defense communities support BRAC – assess they will gain.
  - Top Congressional Defense Committee leaders support BRAC

- "BRAC saves money”
  - The 2005 BRAC round cost $15 billion more than estimated.
  - The amount of savings is solely dependent on the closures approved

- "DOD has too much infrastructure”
  - The recent DOD report requested by Congress did not meet the requirement to assess excess capacity against FY12 force structure
Way Forward

• Resolve concerns that significant decisions in DOD are being driven by budgets as opposed to threats and strategies
  – Force structure reductions, weapon system terminations, loss of capabilities much have a current risk assessment conducted. Only after will Congress allow a BRAC round to support strategy

• DOD needs to submit the report mandated by Congress

• Improve the legislation to ensure real savings and trust in process
  – Insert cost controls into the BRAC process
  – Accelerate the timing for completion of the recommendations
  – Improve installation data transparency for defense communities

• Most likely a BRAC round in 2019 or 2021
Current Federal Budget Status

- On March 16, The President requested FY17 Supplemental Appropriations totaling $33 Billion with the expectation that Congress will approve the funding before the end of April.
- Funding covers mostly DOD readiness accounts and the construction of a border wall.
- Includes a $236 M increase to MILCON accounts.
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FY17 Supplemental

Army
- $366 M for FSRM for both active and reserve components
- $28 M for Army MILCON P&D, $12 M for ARNG, $10M for AFR
- $646 M for emerging needs including a theater missile defense site in Korea

Navy
- $50 M for Navy MILCON P&D
- $16.7 M added to cover FY16 MILCON Cost to Complete for 4 projects
- $210 M for FSRM funding upgrades six airfields, five piers, three hangars, a fleet communications center, and a failing barracks.

Air Force
- $57.3 M to test clean drinking water for contamination due to AFFF
- $528 M for facility Restoration/Modernization
- $34 M added for USAF MILCON P&D, $9M for ANG, $7M for AFR
- $90 M added to cover FY16 MILCON Cost to Complete for 3 projects including $29 M for FY 2016 Weapon Storage Facility, F.E. Warren AFB, WY
FY18 “Skinny” Budget

• On March 16, The Office of Management and Budget released an outline of the FY18 President’s Budget request to Congress for review.
• A more detailed budget request is proposed to be delivered to Congress by June 1.
• The $1.1 Trillion discretionary budget (another $3 trillion for FY18 is considered mandatory ie social security, medicare, debt service, etc) proposes a $54 B increase to security accounts and a commensurate decrease in domestic programs.
• The outline garnered headlines for the elimination of many long-standing federal programs.
• Typically, President’s budgets are rejected by Congress and replaced with a Joint Budget Resolution.
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FY18 “Skinny” Budget

Department of Veterans Affairs

• 2018 Budget requests $78.9 billion in discretionary funding for VA, a $4.4 billion or 6 percent increase from the 2017 enacted level.

• VHA estimates $63 billion over the next 10 years to address capital needs significantly exceeding the anticipated funding level of $16–26 billion

• The average VHA building is 50 years old—five times older than the average building age of not-for-profit hospital systems in the US.

• No standard for “world class” healthcare facilities

• VHA facilities average a “C minus” score - much of the total facilities portfolio is nearing the end of its useful life.

• More than 70 percent of VHA facilities correction costs result from infrastructure and facilities that are D rated, meaning that they are at the end of their useful life.

• The VHA also has had problems with major construction management - Congress has mandated a DOD-like programming process
FY18 “Skinny” Budget
Department of Energy

- 2018 Budget requests $28 B for DOE, a $1.7 B or 5.6% decrease from the 2017 annualized CR level.
- Provides a $1.4 B increase above the 2017 annualized CR level for the National Nuclear Security Administration, an 11% increase.
- More than half of NNSA’s facilities are more than 40 years old, nearly 30% date to the Manhattan Project era, and 12% are excess.
- NNSA’s total deferred maintenance in FY 2015 was $3.67 billion.

Table 4–12. Total cost of construction for fiscal years 2022–2041

<table>
<thead>
<tr>
<th>Then-Year Dollars in Millions</th>
<th>Low</th>
<th>High</th>
<th>Midpoint</th>
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<tbody>
<tr>
<td>Total Construction Resource Planning List cost</td>
<td>11,143</td>
<td>33,847</td>
<td>20,131</td>
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</tbody>
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* The “high” estimate for construction includes provisional funding for a domestic uranium enrichment capability.
Small Business Issues

Legislation in FY2017 NDAAAs

- **Comprehensive small business contracting plans (SASC Sec. 818)**
  Codify the authority to conduct small business subcontracting plans.

- **Background**
  
  - Section 834, P.L. 101-189: Established the test program to determine if comprehensive subcontracting plans on a corporate, division or plant-wide basis would lead to increased opportunities for small businesses (SB).
  
  - Section 811, P.L. 104-106: Expanded the test program to determine if comprehensive subcontracting plans will reduce administrative burden on contractors while enhancing subcontracting opportunities for SBs and SDBs and revised contractor eligibility criteria.
  
  - Section 822, P.L. 105-85: Extended the program provide for subcontracts under DoD contracts of participating contractors to be included in comprehensive small business subcontracting plans.
Small Business Issues

Congress uses Defense Authorization Bills annually to update or change laws affecting Small Business Policy – Need to pay attention

Examples - Legislation in FY2017 NDAAAs

• **SASC- Comprehensive small business contracting plans (Sec. 818)**
  Codify the authority to conduct small business subcontracting plans.

• **Counting of major defense acquisition program subcontracts toward small business goals (Sec. 838)**
  Include first and second tier subcontracts awarded by DOD under major defense acquisition programs in the Department’s overall count of small business goals.
Small Business Issues

Examples - Legislation in FY2017 NDAAs (continued)

• SASC - Expansion of eligible small business concerns

“The committee is concerned that there is a disincentive for small businesses to grow their non-defense commercial business as they receive government contracts. The committee believes that one of the objectives of the small business contracting program should be to create entities that can eventually move beyond government contracting and compete in the broader commercial market. At the present time, a small business is penalized if it grows its commercial business by losing small business contracting benefits, and this fact serves as a disincentive to expanding into the commercial market.

The committee requests that the Secretary of Defense review the advisability of being given the authority to continue to treat those small businesses that diversify into the commercial market as small business for a limited transition period and propose any legislative proposals necessary to encourage small business to be successful in both the defense and commercial markets.
Small Business Issues

Examples - Legislation in FY2017 NDAAAs (continued)

SASC - Small business contract bundling

The committee recommends that the Secretary of Defense, where appropriate and to the maximum extent practicable, issue solicitations and task and delivery orders as set-asides for exclusive participation by small business concerns evenly across North American Industry Classification System (NAICS) codes. The committee also believes that the Secretary should limit excessive concentrations of small business within NAICS codes and limit the award of large contracts to small businesses that would force them to lose their small business status.

While the committee is pleased to see the Department of Defense (DOD) meet its overall small business prime contracting goal, it is concerned about some of the means to achieve that goal. Excessive concentration of small business contracting in some business sectors is crowding out the middle tier of contractors and leaving very little room for small business to contract with the Department after they have graduated from being a small business.

The committee is also concerned about the award of large contracts with small business that allow DOD to meet their contracting goals but are leading to a “one and done’ outcome for small business who are no longer small businesses once they receive these large contracts. The committee expects the Secretary to establish small business policies that are designed to create a more diverse and robust industrial base and create opportunities and a pathway for small businesses to grow and compete for future DOD contracts as larger entities.
Small Business Issues

Legislation in FY2017 NDAAs (continued)

- **HASC Title XVIII—Matters Relating To Small Business Procurement**
  - Nonapplicability to Defense Production Act
  - Review of Surety Bonds Required by Federal Contractors
  - Review of the Office of Government Contracting and Business Development of the Small Business Administration
  - Small Business Subcontractor Transparency
  - Section 1801—Plain Language Rewrite of Requirements for Small Business Procurements
  - Section 1802—Improving Reporting on Small Business Goals
  - Section 1803—Transparency in Small Business Goals
  - Section 1804—Uniformity in Procurement Terminology
  - Section 1811—Scope of Review by Procurement Center Representatives
  - Section 1812—Responsibilities of Commercial Market Representatives
  - Section 1813—Duties of the Office of Small and Disadvantaged Business Utilization
  - Section 1814—Improving Contractor Compliance
Small Business Issues

Legislation in FY2017 NDAAs (continued)

- **HASC Title XVIII—Matters Relating To Small Business Procurement**
  - Comprehensive small business contracting plans
  - Section 1815—Responsibilities of Business Opportunity Specialists
  - Section 1821—Good Faith in Subcontracting
  - Section 1822—Pilot Program to Provide Opportunities for Qualified Subcontractors to Obtain Past Performance Ratings
  - Section 1831—Amendments to the Mentor-Protege Program of the Department of Defense
  - Section 1832—Improving Cooperation between the Mentor-Protege Programs of the Small Business Administration and the Department of Defense
  - Section 1841—Office of Women’s Business Ownership
  - Section 1842—Women’s Business Center Program
  - Section 1843—Matching Requirements Under Women’s Business Center Program
  - Section 1851—SCORE Reauthorization
  - Section 1852—SCORE Program
Small Business Issues

Legislation in FY2017 NDAAs (continued)

• HASC Title XVIII—Matters Relating To Small Business Procurement
  – Section 1861—Improving Education on Small Business Regulations
  – Section 1862—Protecting Task Order Competition
  – Section 1863—Improvements to Size Standards for Small Agricultural Producers
  – Section 1864—Uniformity in Service-Disabled Veteran Definitions
  – Section 1865—Required Reports Pertaining to Capital Planning and Investment Control
  – Section 1866—Office of Hearings and Appeals
  – Section 1867—Issuance of Guidance on Small Business Matters
Emerging Issue

The joint proposal from DOD, GSA and NASA issued as a rule change in early 2016 requires agencies to write a report when they choose not to buy supplies or services through the Federal Strategic Sourcing Initiative (FSSI) as a program within category management reforms. OMB says the changes are needed to implement a NDAA statute.

Small businesses say that what appears to be a simple administrative change could dismantle the Small Business Act.

Currently, the House Small Business Committee is engaged with OMB to halt the implementation of Category Management

Summary

• What Congress does has an impact on the funding of projects you are targeting for facility work
• Knowing the approval processes helps your workload planning
• Small Business policies and quotas are fluid with changes occurring both within the executive branch and through legislation.
• Stay engaged and informed
Questions or Concerns?

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