

The State of the Statutory Compensation Cap for Federal Contractors

Well, folks, here's where we are with Executive Compensation for 2014...

WHO KNOWS?

At this point, it's not just unknown, it's unknowable.

The current cap is \$952,308 and applies to all contractor employees for DOD, NASA and Coast Guard contracts, but only to the "top five" on Civilian agency contracts.

The National Defense Authorization Act (NDAA), H.R. 3304, reset the cap to \$625,000 and applies the cap to all contractor employees on all contracts regardless of funding source.

The Murray/Ryan Budget Compromise, House Joint Resolution 59, reset the cap to \$487,000 and also applies the cap to all contractor employees on all contracts regardless of funding source.

So far, so good. We have competing provisions in separate bills, but at least the language is identical in both bills and it addresses the issue of to whom the cap applies.

Both bills passed the House and the Senate.

Both bills were signed by the President.

Conventional wisdom is that the last bill signed is the one that counts. The way both of these were written, that makes sense. The first one signed would repeal the current cap of \$952,308 and replace it. The second bill signed would then repeal THAT cap and replace it.

Both bills were signed on the same day, December 26, 2013.

Of course, one bill WAS signed before the other, but THERE IS NO OBJECTIVE LEGAL EVIDENCE OF WHICH ONE. In an email to the membership on January 2, 2014, Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council, stated definitively that "Since the president signed the BBA after the NDAA, the provisions of Section 702 of the BBA override the earlier enacted provision in the NDAA." The full text of PSC's statement may be viewed [here](#).

Alan may be right, but not everyone agrees. Congressional actions on bills are recorded to the minute and hour. Presidential signings are recorded only by the date. One pundit commented that the Administration "would just get to choose which cap it wanted."

That doesn't seem likely. And, there is no indication how this might be resolved.

Whichever cap we get, the issues don't end there.

Both bills contain language that would make the cap effective “*only with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act.*” That date is June 24, 2014. Presumably, the old cap of \$952.3K (and change) would apply up until then AND CONTINUE to apply to contracts entered into prior to that date. Only contracts “entered into” on or after June 24, 2014 would be subject to the new cap (whatever THAT is). In effect, the amount of compensation allocable to contracts awarded prior to June 24, 2014 would be capped at the old amount and on new contracts at the new amount. Given the long life of many of today’s contracts, contractors may be calculating two different indirect rates for years to come. Worse, the old cap only applied to the top five employees for Civilian agencies, but to all employees for DOD, NASA and the Coast Guard.

At the end of 2014, many companies may find themselves computing one G&A rate for Civilian agency contracts awarded before June 24, 2014, another for DOD contracts awarded prior to June 24, 2014 and yet another for all contracts awarded on or after June 24, 2014. And, that assumes the date of award to be the determining factor. If the Government decides to interpret the language of the statute to mean “the date the funds were obligated,” the mess just gets worse. We could end up with one rate for part of a contract and another for the same year for other parts of the same contract.

If a company is large enough to trigger the cap in pools other than G&A, multiple rates may be required there as well. And, if the cap is triggered by a direct charge employee...

Well, it’s just a mess.

Stay tuned.