

NDAA for FY 2021 will include numerous provisions affecting acquisition programs and cybersecurity requirements

By **Tracye Winfrey Howard, Esq., Megan L. Brown, Esq., Kendra Perkins Norwood, Esq., and Nicholas L. Perry, Esq., Wiley***

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Congress is currently negotiating the final version of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021, which sets funding levels and outlines policy priorities for the U.S. Department of Defense (DOD).

Given the law's size and scope, it is not surprising that the U.S. House and Senate versions of the FY21 NDAA address many areas of importance to government contractors, including acquisition policy and management, supply chain and industrial base matters, cybersecurity, and small business issues.

Among other important proposed developments, these bills would expand transparency and reporting requirements for contractors, repeal a pilot program that required large contractors to reimburse DOD for the cost of responding to unsuccessful bid protests, expand the industrial base for certain industries and types of products, and implement numerous provisions from the Cyberspace Solarium Commission Report.

This article summarizes by topic the most relevant proposed provisions for government contractors, and their effect if enacted into law. Provisions in the House and Senate versions often evolve or fall out of the consolidated version of the NDAA that emerges from conference, so it is likely not all of these proposals will be included in the final law.

1. HOUSE BILL

Acquisition policy and management

Modification to the definition of nontraditional defense contractor (Sec. 802): Under 10 U.S.C. § 2371, DOD could exercise its Other Transaction Authority (OTA) for a prototype project when there is at least one nontraditional defense contractor (defined in 10 U.S.C. § 2302) or nonprofit research institution participating in the project.

This provision would expand the definition of "nontraditional defense contractor" to include a corporation whose stock is owned entirely by an employee stock ownership plan.

Alternative Space Acquisition System for Space Force (Sec. 807): This provision would direct DOD to develop an Alternative Space

Acquisition System "that is specifically tailored for space systems and programs in order to achieve faster acquisition and more rapid fielding of critical systems."

If a prime contractor awards a subcontract to a small business that has a principal office within the same state as, or within 60 miles of, the location of work to be performed under the prime contract, the value of the subcontract would be doubled for purposes of small business usage goals.

The goal of this alternative acquisition system "shall be to quickly and effectively acquire space warfighting capabilities needed to address the requirements of the national defense strategy."

Amendments to general contracting authorities, procedures, and limitations

Contractor whistleblower protections relating to nondisclosure agreements (Sec. 813): The House bill would clarify that the contractor/subcontractor/grantee employee whistleblower protections at 10 U.S.C. § 2409 (for DOD and National Aeronautics and Space Administration (NASA) contracts) and 41 U.S.C. § 4712(a) (for civilian agency contracts) apply whether or not the employee has signed, or is subject to, a nondisclosure agreement or policy with the contractor/subcontractor/grantee.

Disclosure of beneficial owners in database for federal agency contract and grant officers (Sec. 815): This provision would amend 41 U.S.C. § 2313, which establishes the Government's database of information regarding federal contractor integrity and performance (now maintained at SAM.gov), to require the database to also include identifying information on the "beneficial owner" of any listed corporation.

Guidelines and resources on the acquisition or licensing of intellectual property (Sec. 820A): This provision would add a subsection to 10 U.S.C. § 2322, *Management of intellectual property*

matters within the Department of Defense, providing that DOD shall develop guidelines and resources on the acquisition or licensing of intellectual property.

Among other things, this provision would require that DOD develop key terms, examples, and case studies that explain the differences between three important Defense Federal Acquisition Regulation Supplement (DFARS) terms: “detailed manufacturing and process data,” “form, fit, and function data,” and “data required for operations, maintenance, installation, and training.”

Requirements concerning Department of Defense officials and lobbying activities (Sec. 820B): This provision would add a new section to Title 10, § 2410t, requiring contractors to submit an annual report identifying certain former DOD officials compensated by the contractor during the preceding calendar year, if those officials were employed by DOD in the preceding four years.

This reporting requirement would apply to any contract for the procurement of goods or services in excess of \$10 million, other than a contract for commercial products or commercial services.

Commercial product determination applies to components and support services (Sec. 820C): In the current version of 10 U.S.C. § 2306(b), contracts for commercial products or commercial services are exempt from the requirement in subsection 2306(a) that contractors furnish cost or pricing data, and the contracting officer is allowed to presume that a prior commercial product or commercial service determination also serves as a determination for subsequent procurements of such product or service. Section 820C would expand this presumption to include procurements of (i) a component of the commercial product, and (ii) a service for maintenance or repair of the commercial product.

Industrial base matters

The House version of the FY21 NDAA includes numerous sections relating to industrial base security and supply chain risk, including these prominent provisions:

Reports on industrial base policy: The House bill includes several provisions that would require DOD to report on industrial base policy matters.

These include the following industry reports: Report on Aluminum Refining, Processing, and Manufacturing (Sec. 830); Briefing on the Supply Chain for Small Unmanned Aircraft System Components (Sec. 830A); Sense of Congress on Gaps or Vulnerabilities in the National Technology and Industrial Base (Sec. 830C); and Report on Partnerships for Rare Earth Material Supply Chain Security (Sec. 830D). As discussed below, the Senate bill includes additional provisions of this type.

Requirement that certain ship components be manufactured in the National Technology and Industrial Base (Sec. 823): This provision would add certain components for auxiliary ships to the list of items at 10 U.S.C. 2534 that DOD must procure through the National Technology and Industrial Base (NTIB) (as defined at 10 U.S.C. § 2500(1)).

Preference for sourcing rare earth materials from the National Technology and Industrial Base (Sec. 824): The bill would create an order of precedence for DOD’s acquisition of certain materials deemed “strategic and critical” to defense, industrial, and essential civilian needs of the United States, prioritizing sources within the United States, followed by sources in the NTIB, and then any other sources.

Enhanced domestic content requirement for major defense acquisition programs (Sec. 825): This provision would increase over time the percentage of parts that must be manufactured in the United States for a major acquisition program (as defined at 10 U.S.C. § 2430) to be considered “American” under the Buy American Act (BAA) – from the current 50% to 100% percent by October 2026.

Additional requirements pertaining to printed circuit boards (Sec. 826): This provision would require contractors and subcontractors providing printed circuit boards to DOD to certify that a certain percentage of the printed circuit boards (increasing over the next decade) were manufactured in the United States or certain foreign countries. The Senate bill (Section 808) includes a similar provision.

Domestic sourcing requirements for aluminum (Sec. 829): The House bill would add aluminum and aluminum alloys to the list of specialty metals at 10 U.S.C. § 2533b(l).

With exceptions, this statute would prohibit DOD from acquiring aircraft, missile and space systems, ships, tank and automotive items, weapon systems, ammunition, or components thereof containing a specialty metal that is not melted or produced in the United States, and prohibit DOD and prime contractors from purchasing a specialty metal that is not melted or produced in the United States.

Prohibition on procurement or operation of foreign-made unmanned aircraft systems (Sec. 830B): This provision would forbid DOD from operating or acquiring commercial off-the-shelf unmanned aircraft systems (UAS) manufactured or assembled by a covered foreign entity, which includes entities designated by the Secretary of Commerce or the Director of National Intelligence, entities deemed a national security risk by the Secretary of Homeland Security, or entities “subject to influence or control” by the People’s Republic of China.

Small business matters

Transfer of verification of small business concerns owned and controlled by veterans or service-disabled veterans to the Small Business Administration (Sec. 831): The House bill would require the transfer of the verification program for

veteran-owned and service-disabled veteran-owned small business designations from the U.S. Department of Veterans Affairs' (VA) Center for Verification and Evaluation to the U.S. Small Business Administration (SBA) within two years of the law's passage (but it would allow the VA and SBA to jointly extend the transfer deadline for up to six months an unlimited number of times).

Equitable adjustments to certain construction contracts (Sec. 832): The changes clause in the Federal Acquisition Regulations (FAR) permits contractors to submit a request for equitable adjustment (REA) when an agency changes the scope of work to be performed. *See, e.g.*, FAR 52.243-1.

This section of the House bill would insert a new section pertaining to construction contracts into the Small Business Act, requiring an agency, upon receipt of a REA from a small business, to provide an interim partial payment of at least 50% of the costs identified in the REA.

In the Senate's continued efforts to improve the bid protest process, the bill would require DOD to conduct a study of agency-level bid protest processes and provide recommendations "to improve the expediency, timeliness, transparency, and consistency of agency-level bid protests."

This section also includes a flow-down provision that would direct the prime contractor to pay a first-tier subcontractor the portion of the interim partial payment that is attributable to the subcontractor's work, and require subcontractors at any tier that receive a portion of the interim partial payment to do the same for their own subcontractors and suppliers.

Extension of participation in 8(a) program (Sec. 835): The House bill would require the SBA to ensure that small business concerns participating in the 8(a) program on or before March 13, 2020, may elect to extend such participation by one year, regardless of whether the concern previously elected to suspend its participation pursuant to SBA's guidance.

Past performance ratings of certain small business concerns (Sec. 836): For small business concerns that previously participated in a joint venture, this provision would direct the SBA to establish regulations requiring contracting officers to consider the past performance record of the joint venture when evaluating the concern's past performance and requiring the concern to inform the contracting officer of its duties and responsibilities in the joint venture.

In addition, upon request by a small business concern that performed as a first-tier subcontractor on a covered contract and is submitting an offer in another solicitation, the prime

contractor from the covered contract would be required to submit past performance records to the contracting agency.

Modifications to supervision and award of certain contracts (Sec. 841): The House bill would amend Section 15 of the Small Business Act to incentivize prime contractors to work with local small businesses.

If a prime contractor awards a subcontract (at any tier) to a small business that has a principal office within the same state as, or within 60 miles of, the location of work to be performed under the prime contract, the value of the subcontract would be doubled for purposes of small business usage goals.

Section 841 would also add a new section to 10 U.S.C. § 2851a for military construction contracts – requiring DOD, "to the extent practicable," to give preference to local firms and individuals within the same locality of a construction project.

Small Business Industrial Base Resiliency Program (Sec. 844): This provision would direct the Assistant Secretary of Defense for Industrial Base Policy to establish the "Small Business Industrial Base Resiliency Program," under which DOD will enter into contracts with small business concerns to respond to the COVID-19 pandemic.

These transactions would be used to "address critical issues in the industrial base relating to urgent operational needs," help "maintain, protect, expand, or restore the industrial base," and "address supply chain vulnerabilities related to" the pandemic.

Miscellaneous

Prohibition on contracting with persons with willful or repeated violations of the Fair Labor Standards Act (FLSA) of 1938 (Sec. 848): This provision would direct the heads of federal agencies to initiate debarment proceedings against entities with four or more willful or repeated violations of the FLSA that are within the parameters for a criminal, civil, or administrative proceeding outlined in 41 U.S.C. § 2313(c)(1).

1. SENATE BILL

Industrial base matters

Similar to the House bill, the Senate version of the FY21 NDAA includes numerous sections relating to industrial base security and supply chain risk, including these prominent provisions:

Reports on industrial base policy: The Senate bill includes several provisions that would require DOD to report on industrial base policy matters.

These include the following industry reports: Policy Recommendations for Implementation of EO 13806 (Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency) (Sec. 801); Assessment of National Security Innovation Base (Sec. 802); Improving Implementation of Policy Pertaining

to the National Technology and Industrial Base (Sec. 803); Modification of Framework for Modernizing Acquisition Processes to Ensure Integrity of Industrial Base (Sec. 804); Assessment of Industrial Base Capabilities and Capacity (Sec. 805); Analyses of Certain Materials and Technology Sectors for Action to Address Sourcing and Industrial Capacity (Sec. 806); Statement of Policy with Respect to Supply of Strategic Minerals and Metals for Department of Defense Purposes (Sec. 809); Report on Strategic and Critical Minerals and Metals (Sec. 810); and Stabilization of Shipbuilding Industrial Base Workforce (Sec. 811).

Microelectronics manufacturing strategy (Sec. 807): The Senate bill would require DOD to develop a strategy by January 1, 2021, to manufacture microelectronics in the United States within three to five years.

Use of domestically sourced star trackers in national security satellites (Sec. 813): Beginning October 1, 2021, any star tracker system included in the design of national security satellites would need to be domestically sourced, unless no domestic source exists, the domestic source is unreasonably priced, or an “urgent and compelling national security need exists.”

Modification to small purchase threshold exception to sourcing requirements for certain articles (Sec. 814): The Senate bill would decrease from \$250,000 to \$150,000 the small purchases exception included in the Berry Amendment, 10 U.S.C. § 2533a, which requires DOD to purchase food, clothing, fabric, and other items that have been grown or produced in the United States.

Safeguarding defense-sensitive United States intellectual property, technology, and other data and information (Sec. 891): The Senate bill would direct DOD to “establish, enforce, and track” actions DOD is taking to protect defense-sensitive intellectual property, technology, hardware and software, and other data from acquisition by China.

As a part of this effort, DOD would be required to “establish and maintain a list of critical national security technology.” Section 891 also would direct DOD to develop mechanisms to restrict employees and former employees of the defense industrial base whose work is related to the above-mentioned critical national security technology from working for companies owned by the Chinese government.

Amendments to general contracting authorities, procedures, and limitations

Authority to acquire innovative commercial products and services using general solicitation competitive procedures (Sec. 841), and Contract Authority for Advanced Development of Initial or Additional Prototype Units (Sec. 844): The Senate bill would permanently authorize a program that first appeared in the FY17 NDAA permitting DOD to use “a competitive selection of proposals resulting from a general solicitation and the peer review of such

proposals” — commonly known as Commercial Solutions Openings — to acquire innovative commercial items, technologies, or services.

The bill defines “innovative” as “any technology, process, or method, including research and development, that is new as of the date of submission or proposal,” or “any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.”

Relatedly, the Senate bill would amend 10 U.S.C. § 2302e, which allows a contract awarded through a Commercial Solutions Opening to include a line item or contract option for “the provision of advanced component development, prototype, or initial production of technology developed under the contract.”

Section 844 would expand DOD’s authority to contract in this area by replacing “advanced component development” in the text of 10 U.S.C. § 2302e(a)(1) with “development and demonstration.”

Repeal of pilot program on payment of costs for denied GAO bid protests (Sec. 846): Section 827 of the FY18 NDAA (Pub. Law 115-91) included a provision requiring DOD to conduct a pilot program testing the effectiveness of requiring contractors whose U.S. Government Accountability Office (GAO) bid protests are denied to reimburse DOD for the costs incurred in litigating the protests.

The Senate bill would repeal that provision of the FY18 NDAA because, as explained in the accompanying report language, “the pilot program is unlikely to result in improvements to the bid protest process given the small number of bid protests captured by the pilot criteria and lack of cost data.”

In the Senate’s continued efforts to improve the bid protest process, the bill would require DOD to conduct a study of agency-level bid protest processes and provide recommendations “to improve the expediency, timeliness, transparency, and consistency of agency-level bid protests.”

Provisions related to software acquisition

Implementation of modular open systems architecture requirements (Sec. 861): The Senate bill would direct DOD to prescribe regulations and issue guidance that (i) facilitate DOD’s access to and utilization of system, major sub-system, and major component software-defined interfaces, and (ii) define the interest of the United States and contractor or subcontractor in interface software.

Balancing security and innovation in software development and acquisition (Sec. 882): This provision would require the Under Secretary for Acquisition and Sustainment to develop solicitation requirements regarding appropriate software security criteria, including “delineation of what processes were or will be used for a secure software development lifecycle, including management of supply

chain and third-party software sources and component risks,” and “an associated vulnerability management plan or tools.”

Also, building off a provision in the FY18 NDAA that required DOD to develop an open source software pilot program, this provision would require the Under Secretary and DOD’s Chief Information Officer to “develop processes for security review of code.”

Pilot program exploring the use of consumption-based solutions to address software-intensive warfighting capability (Sec. 884): The Senate bill would authorize DOD to establish a pilot program to explore the use of consumption-based solutions to address software-intensive warfighting capability.

The initiatives selected for the program “shall focus on software-defined or machine-enabled warfighting applications,” and may include applications that “rapidly analyze sensor data,” “secure warfighting networks,” “swiftly transport information across various networks and network

modalities,” or “otherwise enable joint all-domain operational concepts.”

This provision defines “consumption-based solution” as “any combination of software, hardware or equipment, and labor or services that provides a seamless capability that is metered and billed based on actual usage and predetermined pricing per resource unit, and includes the ability to rapidly scale capacity up or down.”

Wiley’s Government Contracts and Telecom, Media & Technology practices closely track these NDAA proposed provisions and are prepared to update and help clients navigate any of the issues addressed by these bills.

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ABOUT THE AUTHORS



(L-R) **Tracye Winfrey Howard** is a partner and co-chair of **Wiley’s** National Security Practice and an adjunct professor of government contracts at George Mason University. She represents government contractors and subcontractors in bid protests, contractor claims and compliance. She can be reached at twhoward@wiley.law. Partner **Megan L. Brown**

represents technology companies and government contractors in regulatory matters. She is a former senior Justice Department official and is the associate director for cybersecurity at George Mason University’s National Security Institute. She can be reached at mbrown@wiley.law. **Kendra Perkins Norwood**, a senior associate, represents government contractors, subcontractors and grant recipients, and counsels clients on procurement compliance. She can be reached at knorwood@wiley.law. **Nicholas L. Perry**, an associate, counsels government contractors and subcontractors in bid protests, contract claims and disputes, and compliance. He can be reached at nperry@wiley.law. All of the authors are based in Wiley’s Washington, D.C., office. This article was originally published in October 2020 on the firm’s website. Republished with permission.

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