

National Defense Authorization Act for Fiscal Year 2021 Includes Numerous Provisions Impacting Government Contractors

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The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. No. 116-283) was enacted into law on January 1, 2021, when the Senate voted to override President Trump's veto of the bill. The Senate's move, the final step in the legislative process, followed the House's earlier vote to override President Trump's veto in December 2020.

The FY21 NDAA sets funding levels and outlines policy priorities for the U.S. Department of Defense (DOD). It also addresses many areas of importance to government contractors, including acquisition policy and management, supply chain and industrial base matters, and small business issues. The final version of the NDAA produced by negotiators on the Conference Committee included provisions from earlier House and Senate versions, which we summarized in an earlier article.

This article includes our annual summary, by topic, of the most relevant provisions of the FY21 NDAA for government contractors. As detailed below, some of the provisions from the earlier House and Senate versions of the NDAA that we highlighted in our previous article were not accepted into the final version. As we've previously summarized, the NDAA also includes numerous provisions addressing cybersecurity and artificial intelligence policies with ramifications far beyond DOD, including implementing recommendations from the Cyberspace Solarium Commission's 2020 Report.

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Acquisition Policy and Management

- **Space System Acquisition and the Adaptive Acquisition Framework** (Sec. 807): This provision directs DOD to take steps to ensure the adaptive acquisition framework (as described in DOD Instruction 5000.02, “Operation of the Adaptive Acquisition Framework”) includes “one or more pathways specifically tailored for Space Systems Acquisition in order to achieve faster acquisition, improve synchronization and more rapid fielding of critical end-to-end capabilities . . . while maintaining accountability for effective programs that are delivered on time and on budget.” The goal of this provision is “to quickly and effectively acquire end-to-end space warfighting capabilities needed to address the requirements of the national defense strategy.”

Amendments to General Contracting Authorities, Procedures, and Limitations

- **Documentation Pertaining to Commercial Item Determinations** (Sec. 816): The House bill would have amended 10 U.S.C. § 2380 to require contracting officers to make binding determinations regarding whether a particular product or service meets the definition of “commercial” and to presume that a prior commercial product or commercial service determination also served as a determination for subsequent procurements. These provisions were not included in the final version of the NDAA, but Section 816 of the law permits contracting officers to request support from DOD experts and “appropriate public and private sector entities” when determining whether a product or service is “commercial.”
- **Contract Authority for Development and Demonstration of Initial or Additional Prototype Units** (Sec. 831): Section 831 amends 10 U.S.C. § 2302e, which allows a science and technology contract awarded from the “competitive selection of proposals resulting from a general solicitation and the peer review of such proposals”—commonly known as Commercial Solutions Openings—to include a line item or contract option for “development and demonstration, or initial production of technology developed under the contract.” Section 831 enhances 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.”
- **Comptroller General Report on Intellectual Property Acquisition and Licensing** (Sec. 839): The House bill would have added 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 and define key terms, such as “detailed manufacturing and process data” and “form, fit, and function data.” The final version of the NDAA did not include this provision, but Section 839 directs the Comptroller General to report on the implementation of DOD Instruction 5010.44 relating to Intellectual Property Acquisition and Licensing.
- **Prohibition on Awards to Contractors that Require Nondisclosure Agreements Relating to Whistleblower Activities** (Sec. 883): This provision prohibits the U.S. Secretary of Defense from making an award to a contractor that requires its employees to sign nondisclosure agreements that restrict them from lawfully reporting waste, fraud, or abuse within DOD. The final version of the NDAA did not

adopt a related provision in the House bill that sought to clarify that the whistleblower protections for contractor/subcontractor/grantee employees at 10 U.S.C. § 2409 (for DOD and 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. 885):** This provision amends 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.
- **Repeal of Pilot Program on Payment of Costs for Denied U.S. Government Accountability Office (GAO) Bid Protests (Sec. 886):** 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 GAO bid protests are denied to reimburse DOD for the costs incurred in litigating the protests. The FY21 NDAA repeals that provision of the FY18 NDAA because, as explained in the Conference Report, "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." Further, as part of Congress's continued efforts to improve the bid protest process, the Conference Report also directed 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."

Industrial Base Matters

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

- **Microelectronics and National Security (Sec. 276):** This provision requires DOD to submit a strategy to Congress by June 1, 2021 for "ensuring the continuing production of cutting-edge microelectronics for national security needs, including access to state-of-the-art node sizes through commercial manufacturing, heterogenous integration, advantaged sensor manufacturing, boutique chip designs, and variable volume production capabilities." The final version of the NDAA did not adopt a Senate provision that would have required DOD, by January 1, 2021, to develop a strategy to manufacture microelectronics in the United States within 3-5 years.
- **Lowering the Small Purchase Threshold Exception to Sourcing Requirements for Certain Articles (Sec. 817):** This provision decreases 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. DOD may adjust the dollar threshold based on changes in the Consumer Price Index every five years.
- **Safeguarding Defense-Sensitive United States Intellectual Property, Technology, and Other Data and Information (Sec. 837):** This provision directs DOD to "identify policies and procedures" to protect defense-sensitive intellectual property, technology, hardware and software, and other data from

acquisition by China. As a part of this effort, DOD must “[e]stablish and maintain a list of critical national security technology.” Section 837 also directs DOD to develop mechanisms to restrict employees and former employees of the defense industrial base whose work is related to these critical national security technologies from working for companies owned by the Chinese government.

- **Printed Circuit Boards** (Sec. 841): This provision bans the acquisition of covered printed circuit boards (PCBs) from North Korea, China, Russia, and Iran. It also modifies the definition of covered PCBs to “focus on products and services other than commercial products and services, unless specifically identified by the Secretary [of Defense].” Both the House and Senate bills included a provision that would have required contractors and subcontractors providing PCBs to DOD to certify that a certain percentage of the PCBs (increasing over the next decade) were manufactured in the United States or certain foreign countries. This certification provision was not included in the final NDAA.
- **Miscellaneous Limitations on the Procurement of Goods Other than United States Goods** (Sec. 845): This provision amends 10 U.S.C. 2534, which lists certain items that DOD must procure through the National Technology and Industrial Base (NTIB) (as defined at 10 U.S.C. § 2500(1)). Specifically, it eliminates the NTIB procurement requirements for chemical weapons antidote, certain components for naval vessels, valves and machine tools, and ball bearings and roller bearings. It also adds an NTIB procurement requirement for certain shipboard components.
- **Supply of Strategic and Critical Materials for DOD** (Sec. 848): Section 848 creates an order of precedence for DOD’s acquisition of 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.
- **Requirement to Buy Certain Satellite Components from National Technology and Industrial Base** (Sec. 1603): This provision requires DOD to procure star trackers for certain national security satellites from the NTIB. The NDAA did not adopt a Senate provision that would have required star trackers to be domestically sourced, unless certain conditions for waiver exist. In the NDAA Conference Report, however, the conferees directed the U.S. Secretary of Defense, in coordination with the U.S. Secretary of the Air Force and the Director of the National Reconnaissance Office, to submit a report by July 1, 2021 that showed how such a waiver authority would be used.
- **Reports on Industrial Base Policy**: The NDAA includes several provisions requiring DOD to report on industrial base policy matters. These include the following reports: Report on Nonavailability Determinations and Quarterly National Technology and Industrial Base Briefings (Sec. 842); Improving Implementation of Policy Pertaining to the National Technology and Industrial Base (Sec. 846); Analyses of Certain Activities for Action to Address Sourcing and Industrial Capacity (Sec. 849); Implementation of Recommendations for Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency (Sec. 850); Report on Strategic and Critical Materials (Sec. 851); Report on Aluminum Refining, Processing, and Manufacturing (Sec. 852); Assessment and Enhancement of National Security Innovation Base (Sec. 889).

Small Business Matters

- **Initiative to Support Small Business in the National Technology and Industrial Base** (Sec. 861): This provision directs the Assistant Secretary of Defense for Industrial Base Policy to “establish initiatives to increase the effectiveness of [DOD] in specifically leveraging small business to eliminate gaps and vulnerabilities in the [NTIB] and expand the number of small businesses in the [NTIB].” The initiatives must include a biennial update for small business strategy, a biennial implementation plan consistent with that strategy, and establishment of “policies, procedures, and information repositories to identify small business in the defense supply chain.”
- **Transfer of Verification of Small Business Concerns Owned and Controlled by Veterans or Service-Disabled Veterans to the U.S. Small Business Administration (SBA)** (Sec. 862): The NDAA requires 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 SBA within two years of the law's passage. The House bill would have permitted the VA and SBA to jointly extend the transfer deadline for up to 6 months, an unlimited number of times, but this language was not adopted in the final NDAA.
- **Past Performance Ratings of Certain Small Business Concerns** (Sec. 868): For small business concerns that previously participated in a joint venture, this provision amends the Small Business Act of 1953 and directs the SBA to establish regulations allowing small business concerns to elect to use the past performance record of the joint venture when bidding on a prime contract, if the concern has no relevant past performance of its own. The small business concern is required to inform the contracting officer of its duties and responsibilities in the joint venture. The provision also states that, upon request by a small business concern that performed as a first-tier subcontractor on a covered contract, the prime contractor from the covered contract shall submit past performance records to the small business concern, and the small business concern may rely on such record of past performance when bidding for a prime contract.
- **Extension of Participation in 8(a) Program** (Sec. 869): Section 869 requires the SBA to ensure that small business concerns participating in the 8(a) program on or before September 9, 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.

Provisions Related to Software Acquisition

- **Implementation of Modular Open Systems Approaches** (Sec. 804): The NDAA directs DOD to prescribe regulations and issue guidance that (i) “facilitate [DOD's] access to and utilization of modular system interfaces,” (ii) “facilitat[e] the implementation of modular open system approaches across major defense acquisition programs,” and (iii) “advance the efforts of [DOD] to generate diverse and recomposable kill chains.”
- **Pilot Program Exploring the Use of Consumption-Based Solutions to Address Software-Intensive Warfighting Capability** (Sec. 834): This provision authorizes 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 be “well-suited to explore consumption-based solutions, to include addressing software-intensive warfighting capability,” and may include applications that “rapidly analyze sensor data,” “secure warfighting networks,” “swiftly transport information across various networks and network modalities,” “enable joint all-domain operational concepts,” or “advance military capabilities and effectiveness.” 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.”

- **Balancing Security and Innovation in Software Development and Acquisition** (Sec. 835): This provision requires the Under Secretary of Defense for Acquisition and Sustainment to develop solicitation requirements for software security criteria to be used in procurements for commercial and developmental solutions, including “delineation of what processes were or will be used for a secure software development life cycle.” Such requirements include “establishment and enforcement of secure coding practices,” “management of supply chain risks and third-party software sources and component risks,” “security of the software development environment,” “secure deployment, configuration, and installation processes,” and “an associated vulnerability management plan and identification of tools that will be applied to achieve an appropriate level of security.” Also, building off a provision in the FY18 NDAA that required DOD to develop an open source software pilot program, this provision requires the Under Secretary and DOD’s Chief Information Officer to “develop procedures for security review of code.”

Finally, the House and Senate versions of the NDAA included numerous provisions impacting federal contractors that were left out of the final bill that was enacted into law:

- **Authority to Acquire Innovative Commercial Products and Services Using General Solicitation Competitive Procedures:** A provision in the Senate bill would have permanently authorized a program that first appeared in the FY17 NDAA and permitted DOD to use “a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals” (i.e., Commercial Solutions Openings) to acquire innovative commercial items, technologies, or services. The Conference Committee noted in its report that this program has been successfully used by DOD “to establish agreements with small businesses in technology areas relevant to supporting the current National Defense Strategy.” It also stated that it expected DOD “to provide detailed justification to reauthorize this instrument and associated flexibilities” in the future.
- **Modification to the Definition of Nontraditional Defense Contractor:** Under 10 U.S.C. § 2371, DOD can exercise its Other Transaction Authority 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. The House bill would have expanded the definition of “nontraditional defense contractor” to include a corporation whose stock is owned entirely by an employee stock ownership plan (ESOP). In its report, the Conference Committee stated that while DOD “may benefit

from the workforce talent attracted by entities" owned entirely by ESOPs, a recent GAO study showed there is no readily available data to determine what percent of an entity is owned by an ESOP. It also directed DOD to brief the congressional defense committees "on the advantages of working with ESOPs and the barriers ESOPs face in contracting with" DOD.

- **Requirements Concerning DOD Officials and Lobbying Activities:** The final bill does not include a provision from the House bill that would have added 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. The reporting requirement would have applied 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. Instead, the Conference Committee directed the U.S. Secretary of Defense to provide the congressional defense committees with a briefing assessing the impacts of prior legislation on the ability of certain former defense officials to engage in lobbying contacts and activities related to DOD.
- **Domestic Sourcing Requirements for Aluminum:** The final NDAA does not include a House provision that would have added aluminum and aluminum alloys to the list of specialty metals at 10 U.S.C. § 2533b(l). With exceptions, the current statute prohibits 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 prohibits DOD and prime contractors from purchasing a specialty metal that is not melted or produced in the United States. In the Conference Report, the conferees noted that other provisions of the FY21 NDAA already direct DOD "to conduct analyses of certain materials and technology sectors and make recommendations for action to address sourcing and industrial capacity," including specifically for aluminum.
- **Prohibition on Procurement or Operation of Foreign-Made Unmanned Aircraft Systems:** The enacted NDAA does not include a House provision that would have prohibited 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 U.S. Secretary of Commerce or the Director of National Intelligence, entities deemed a national security risk by the U.S. Secretary of Homeland Security, or entities "subject to influence or control" by the People's Republic of China. In their report, the conferees noted that DOD "has taken steps to reduce unwanted dependence on foreign unmanned aircraft systems" and encouraged it "to continue these efforts by developing mechanisms to share appropriate threat information related to the operational use of such foreign systems to appropriate Federal agencies."
- **Enhanced Domestic Content Requirement for Major Defense Acquisition Programs:** A provision in the House bill would have increased 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—from the current 50% to 100% by October 2026. Rather than adopting this provision, the Conference Report directed DOD to provide a briefing to the congressional

defense committees “on mechanisms used to track foreign involvement in individual acquisition programs” and encouraged DOD “to consider the benefits of working with allies and partners that are currently designated as ‘qualifying countries’ under the Defense Federal Acquisition Regulation Supplement (DFARS), to assist the countries’ understanding of the composition of their supply chains, and any associated risks.”

- **Equitable Adjustments to Certain Construction Contracts:** The changes clause in the Federal Acquisition Regulation (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. A provision in the House bill would have inserted a new section pertaining to construction contracts into the Small Business Act of 1953, 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. This section also included a flow-down provision directing the prime contractor to pay a first-tier subcontractor the portion of the interim partial payment that was attributable to the subcontractor’s work, and would have required subcontractors at any tier that received a portion of the interim partial payment to do the same for their own subcontractors and suppliers. The Conference Report did not explain why this provision was omitted from the final NDAA.
- **Modifications to Supervision and Award of Certain Contracts:** A provision of the House bill would have amended Section 15 of the Small Business Act of 1953 to incentivize prime contractors to work with local small businesses. If a prime contractor awarded a subcontract (at any tier) to a small business that had 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 House bill also would have added a new section to 10 U.S.C. § 2851(a) 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. While this provision was not adopted in the final version of the NDAA, the Conference Report urged “the military departments to seek opportunities to increase contracting opportunities with local entities and increase transparency and reporting of work performed by local entities.”
- **Prohibition on Contracting with Persons with Willful or Repeated Violations of the Fair Labor Standards Act (FLSA) of 1938:** A provision in the House bill would have directed 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). In their report, the conferees noted that although DOD continues to award contracts to companies cited for willful or repeated FLSA violations, these companies make up less than one-half of one percent of all companies that DOD does business with. The conferees also noted that “these companies . . . could potentially be replaced by more responsible contractors in order to improve the integrity of the industrial base, and potentially reward companies with better records of performance in these matters.”

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