

ALERT

# NDAA Provisions Impacting Government Contractors and Their Supply Chains

December 18, 2024

On December 18, 2024, the Senate passed the National Defense Authorization Act for Fiscal Year 2025 (NDAA), which the House of Representatives passed the previous week. President Biden is expected to sign the bill into law soon. The NDAA contains numerous provisions that impact government contractors, either directly or indirectly. Below are highlights of the important government contracts-related provisions of the NDAA. Some of these provisions will take effect immediately upon enactment of the NDAA, but others will require implementing regulations before contractors see any changes in acquisition policies and procedures.

**Bid Protests (Section 885).** In addition to raising the threshold for bid protests of U.S. Department of Defense (DoD) task orders to \$35 million, the NDAA also requires the U.S. Government Accountability Office (GAO) and DoD to submit a proposal to Congress for notable potential changes to existing practice. First, the NDAA requests a process for enhanced pleading standards for bid protests, which GAO would apply before granting the protester access to DoD administrative records. Additionally, GAO and DoD must provide Congress a proposal for recouping certain protest costs. Specifically, they must identify: (i) benchmarks with average costs of protests to DoD and GAO based on the value of the contract being protested, as well as lost profits for the awarded contractor while contract performance is stayed due to the protest; and (ii) a process for unsuccessful protesters to pay the Government and the awarded contractor based on those benchmarks. These potential process revisions are in an early stage, but they could have a significant impact on contractors and practitioners if implemented.

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## Practice Areas

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**Streamlining Acquisition of Innovative Technologies (Sections 804, 805, 861).** To streamline the acquisition of innovative technologies, the NDAA directs DoD to establish acquisition pathways for rapid prototyping and rapid fielding of innovative technologies, as well as pathways for the efficient acquisition, development, integration, and delivery of software and commercial hardware with embedded software. The NDAA also requires DoD to establish a pilot program to accelerate the procurement and fielding of innovative technologies, with a priority for technologies developed by small businesses.

**Nontraditional Defense Contractors (Sections 815 and 864).** The NDAA amends 10 U.S.C. § 3702(a)(3) to allow nontraditional defense contractors to submit recent price history instead of cost or pricing data for subcontracts not expected to exceed \$5 million. The NDAA also requires DoD to establish a pilot program in which contracting officers can use alternative, capability-based analysis to determine whether a proposed price or fee for a commercial product or service offered by a nontraditional defense contractor is fair and reasonable.

**China (Sections 839, 851, 853).** The NDAA directs DoD to expand the requirement initiated in Section 855 of the FY 2022 NDAA and implemented in DFARS 252.225-7057 and -7058 for contractors to disclose whether employees are performing work on a DoD contract in China, including adding a requirement to identify any required vulnerability disclosures to a Chinese government entity. The NDAA also prohibits DoD procurement of certain products and services related to China. The NDAA bans DoD from procuring semiconductor products and services from companies that provide covered semiconductor products and services to Huawei or its owners, affiliates, and subsidiaries. The NDAA defines “covered semiconductor products and services” to include (i) semiconductors, (ii) equipment for manufacturing semiconductors, and (iii) tools for designing semiconductors. The Secretary of Defense can waive the ban on a case-by-case basis if the covered semiconductor products and services are available only from an entity covered by the ban and are required for DoD national security systems or priority DoD missions. Effective June 30, 2026, the NDAA also prohibits DoD from contracting with an entity, or its parents or subsidiaries, that is party to a contract with an entity that engages in lobbying activities for Chinese military companies identified on DoD’s 1260H list.

**Domestic Sourcing and Supply Chain (Sections 848, 849, 162, 1709, 1078).** Following the theme of previous NDAAAs, this NDAA again highlights Congress’s focus on domestic preferences and avoidance of acquiring goods or services from companies with ties to our adversaries. Section 848 requires DoD to develop and maintain a list of all domestic nonavailability determinations, which provide exceptions to the Berry Amendment requirement (10 U.S.C. § 4862) that DoD procure products such as food, clothing, and other fiber products from domestic sources. Within 30 days of developing the initial list, the list must be shared with Congress (and annually thereafter) and DoD must develop a plan to share the list with industry partners. The NDAA also requires the Secretary of Defense to implement policies, procedures, and tools to incentivize all DoD contractors to assess and monitor the entire DoD supply chain for potential vulnerabilities and noncompliance risks (i.e., perform supply chain illumination). Section 162 also specifically targets supply chain resiliency for small unmanned aircraft systems (sUAS). It directs DoD to establish measures to identify risks in the supply chain for sUAS and increase resiliency of the sUAS supply chain using parts supplied by domestic sources and allies, including by disassembling commercially available sUAS made by Shenzhen Da-Jiang

Innovations Sciences and Technologies Company Limited (DJI) or another manufacturer in a foreign adversary country. Further emphasizing Congress's concerns about DJI, Section 1709 creates a roadmap to DJI and Autel Robotics being added to the Federal Communications Commission's covered list and possibly other lists maintained by national security agencies, which would preclude those companies from securing from U.S. agencies equipment authorizations for new or modified models of their products. Finally, Section 1078 requires DoD to conduct a study on the Department's use of unmanned ground vehicles manufactured by an entity in a foreign adversary country, including an assessment of cybersecurity risks, and, beginning one year after enactment of the NDAA, it prohibits DoD from procuring or operating unmanned ground vehicle systems manufactured by such entities.

**Small Business (Sections 871, 874, 876).** The NDAA also requires DoD to establish pilot programs related to small business programs. For example, Section 871 amends Section 9 of the Small Business Act, 15 U.S.C. § 638, by requiring DoD to establish a pilot program that allows military research and educational institutions to participate in the Small Business Technology Transfer (STTR) program. Additionally, Section 874 requires DoD to establish a pilot program that streamlines access for small businesses and higher learning institutions to shared classified commercial infrastructure. In addition to pilot programs, Section 876 requires DoD's Small Business Integration Group to develop a Small Business Bill of Rights for DoD and its components.

**Other Notable Provisions (Sections 803, 814, 824, 881).** The NDAA amends 10 U.S.C. § 3372(b) to reflect that a unilateral price definitization by a contracting officer is a final decision that can be appealed under the Contract Disputes Act. This provision effectively reverses the Federal Circuit's 2023 decision in *Lockheed Martin Aeronautics Co. v. Secretary of the Air Force*, 66 F.4th 1329 (Fed. Cir. 2023). The NDAA amends 10 U.S.C. § 3456(c) to expand the criteria for a commercial product or service determination so that a contract or subcontract for a product or service that was previously acquired using FAR Part 12 procedures will serve as a prior commerciality determination even if there are minor modifications to the product or service after the initial determination. The NDAA extends through December 31, 2025, the temporary authority granted to DoD in the FY 2023 NDAA to modify fixed-price contracts to address the effects of inflation. The NDAA requires that FAR 9.503 be revised to require that any request for an organizational conflict of interest (OCI) waiver include a written justification for the waiver and to prohibit delegation of OCI waiver authority below the level of the deputy head of the agency.

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