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The Fiscal Year 2024 National Defense Authorization Act: Key Provisions Government Contractors Should Know—Part I

By Adelicia R. Cliffe, Lorraine M. Campos, Maria Alejandra (Jana) del-Cerro, Olivia Lynch, Robert J. Sneckenberg, Eric Ransom and Michelle D. Coleman*

The National Defense Authorization Act for Fiscal Year 2024 makes numerous changes to acquisition policy. In this two-part article, the authors discuss the most consequential changes for government contractors. In this first part, the authors examine acquisition-related matters. In the conclusion of this article, to be published in the May 2024 issue of Pratt's Government Contracting Law Report, *the authors will review cyber-related sections of note, artificial intelligence-related sections of note, supply chain-related matters of note and trade-related sections of note, as well as the American Security Drone Act and the Federal Data Center Enhancement Act.*

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2024,[1] which President Biden signed into law on December 22, 2023, makes numerous changes to acquisition policy. This article discusses the most consequential changes for government contractors. These include changes that:

(i) Impose a new conflict of interest regime for government contractors with a connection to China;

(ii) Impose new restrictions and requirements;

(iii) Require government reporting to Congress on acquisition authorities and programs, and alter other processes and procedures to which government contractors are subject.

The FY 2024 NDAA also includes the Federal Data Center Enhancement Act, the American Security Drone Act, and the Intelligence Authorization Act for FY 2024.

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[1] https://www.congress.gov/bill/118th-congress/house-bill/2670/text.

ACQUISITION-RELATED MATTERS

Conflicts of Interest for Consultants

Section 812 prohibits the Department of Defense (DoD) from entering into contracts for consulting services under NAICS Code 5416 with contractors that are also performing active work for foreign adversaries, particularly Chinese or Russian government entities and companies under the control of the government of the People's Republic of China. Essentially, if a contractor or any affiliate cannot certify that it does not have any contracts for consulting services (defined as "advisory and assistance services" under Federal Acquisition Regulation (FAR) 2.101) with a covered foreign entity, the company must maintain a Conflict of Interest Mitigation Plan. Among other things, a Conflict of Interest Mitigation Plan requires identification of any covered contracts with a covered foreign entity and a written analysis of the plans and procedures to avoid, neutralize, or mitigate actual or potential conflicts.

If a contractor cannot make the required certification, DoD cannot award new contracts for consulting services. The provision requires DoD contracting officers to give an offeror notice and an opportunity to respond to a determination that award must be withheld due to a conflict. DoD contracting officers may also request a waiver, but waivers require congressional notification.

DoD must issue a Defense Federal Acquisition Regulation Supplement (DFARS) amendment enacting the provision within 180 days, at which time the provision will become effective.

Commercial Contracting

Section 801 amends 10 U.S.C. § 3456(b), to require contracting officers to provide, upon a contractor's or subcontractor's request, a copy of any memorandum summarizing the commerciality determination for a product or service.

Section 813 requires the Secretary of Defense to exercise at least four times per fiscal year the statutory authority at 10 U.S.C. § 3458 to acquire innovative commercial products and commercial services using general solicitation competitive procedures.

Section 875 requires DoD to conduct a study within 180 days of enactment on the feasibility and advisability of:

(1) Establishing a default determination that acquired products and services are commercial and do not need a commerciality determination;

(2) A requirement for a product or service to be determined not commercial before procedures other than those in FARPart 12 are

used; and

(3) Mandating the use of commercial procedures under FAR Part 12 unless a product or service to is determined to not be commercial.

Acquisition Policy and Management

Several provisions in the NDAA require modifications to DoD's internal processes. In particular, Section 806 directs each military department to designate a Principle Technology Transition Advisor to advise the Secretary of the military department, identify technologies to meet identified and potential warfighter requirements, consult with DoD innovation programs, make recommendations regarding technology acquisition, inform program managers of relevant technology, promote opportunities for small and non-traditional defense contractors to license technology, and develop metrics to track the outcomes of technology development activities.

Section 807 establishes a senior contracting official under the Director of the Strategic Capabilities Office, to execute and administer contracts, grants, cooperative agreements, and other transactions for that office's programs. The section also requires the Secretary of Defense to submit a plan for implementation including an assessment of the acquisition workforce needed to support this authority.

Section 811 requires development and implementation of a streamlined requirements development process, to improve alignment with modern technologies and reduce time to deliver capabilities, by October 1, 2025. The streamlined process is to include an iterative and collaborative requirements-management approach to maximize the use of commercial products and services, allow the incorporation of new technological opportunities without revalidation of requirements, and establish a process to rapidly validate the ability of commercial products and services to meet capability needs.

Cost Accounting

Section 802 amends 10 U.S.C. § 3705, which requires offerors to submit data other than certified cost or pricing data so that contracting officers may determine the price reasonableness of a contract, subcontract, or modification. The provision amends the reporting requirement under 10 U.S.C. § 3705 such that from the annual report identifying offerors that received contract awards despite denying multiple requests for uncertified cost or pricing data over the preceding three-year period, appropriate portions must be made available to the offerors named in the report.

Section 802 also requires the Under Secretary to clarify what constitutes a denial of uncertified cost or pricing data, including:

(1) Identifying situations under which denials occur;

(2) Identifying whether the denial is from the prime contractor or subcontractor; and

(3) Establishing the timeframe for when failing to comply with the request for uncertified cost or pricing data is considered a denial.

Section 827 requires that the DFARS be revised to:

(1) Exempt all DoD software contracts and subcontracts from earned value management system (EVMS) requirements;

(2) Impose EVMS requirements for cost or incentive contracts with a value between $20 million and $50 million; and

(3) Require contractors to use an EVMS for all awarded contracts with a value between $50 million and $100 million.

Inflation

Section 824 amends Section 822 of the FY 2023 NDAA, which permitted contractors and subcontractors impacted by inflation to file claims for relief under Public Law 85-804 once DoD issued the relevant regulation. This provision clarifies that DoD may use appropriated funds to pay for claims for relief for contractors and subcontractors impacted by inflation, and it extends the authority for such relief to December 31, 2024.

Section 826 permits DoD to use appropriated funds to modify the terms and conditions of a fixed-price contract with economic price adjustment, consistent with FAR 16.203-1 and 16.203-2, if funds are specifically appropriated to do so. Section 826 also requires the Under Secretary of Defense for Acquisition and Sustainment to issue implementing guidance no later than thirty days after the NDAA's enactment.

Industrial Base

Section 857 requires that the parties to a proposed merger or acquisition that are required to provide a pre-transaction filing to the Federal Trade Commission (FTC) and Department of Justice (DOJ) disclosing certain basic information about the contemplated transaction and the parties involved (i.e., Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) filings) must also "concurrently provide such information to DoD during the waiting period," prescribed under HSR (typically 30 days) when such transaction "will require a review" by DoD. In addition to the standard FTC/DOJ antitrust review, DoD's Industrial Base Policy mergers and acquisitions (M&A) office is charged with reviewing M&A deals affecting or related to the defense industrial base (DIB) and considering whether a proposed transaction would overly limit

competition, have a negative impact on national security, costs, or innovation, or otherwise adversely impact the DoD's mission. As a result of such review, the FTC or DOJ could take legal action to block transactions that the government determines might substantially lessen competition.

Although consolidation of the DIB has been an area of increased regulatory focus in recent years, the Government Accountability Office (GAO) released a report in October 2023[2] finding that DoD lacked sufficient resources and insight to perform its M&A monitoring and assessment function. GAO found that DoD reviewed an average of only 40 M&A transactions per year from FY 2018–2022, while it was estimated that approximately 400 such transactions occur annually.

Notably, from FY 2018–2022 GAO found "numerous examples of defense-related M&A that potentially presented risks" to DoD but for which DoD did not participate in antitrust review, in many cases because it appears that the FTC and DOJ may not have reached out to DoD for input and DoD was otherwise unaware of the transaction. This provision of the NDAA seems targeted at bridging the communication gap between the agencies by requiring that the parties to a proposed transaction over the HSR threshold provide a copy of their HSR filing directly to DoD.

Parties considering defense-related M&A transactions in the coming year should monitor for further developments on how the mechanics of this required concurrent notice to DoD are implemented. In particular, it is unclear what Congress intended in referring to mergers or acquisitions "that will require a review" by DoD, as there is currently no mandatory trigger for DoD review of transactions. Instead, the Industrial Base Policy M&A office merely has broad discretion to assess "covered transactions" involving "major defense suppliers" as defined in DoD's M&A policy under Directive 5000.62.[3] It remains to be seen whether, in implementing this provision of the NDAA, DoD requires all transactions involving "major defense suppliers" to provide the HSR filing to DoD or whether the trigger for providing such information will be defined in a different way.

Small Business

Section 853 modifies the Procurement Technical Assistance Program—a cooperative agreement between DoD and nonprofit entities under which those nonprofits provide procurement technical assistance to other businesses—to permit the Secretary of Defense to waive the government's maximum cost share

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[2] https://www.gao.gov/assets/gao-24-106129.pdf.

[3] https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/500062p.pdf.

percentage when it is in the best interest of the Program. The provision also authorizes procurement technical assistance providers to provide education to small businesses on the requirements of DFARS 252.204-7012, Safeguarding Covered Defense Information, and the requirements for mitigating risks related to foreign ownership, control, or influence of DoD contractors under Section 847 of the FY 2020 NDAA.

Section 862 amends the Small Business Act, specifically 15 U.S.C. 637(d)(13), to shorten the time period that must pass to trigger a notice from a prime contractor on a covered contract (i.e., one for which the prime contractor must have a small business subcontracting plan) to the contracting officer of the contract. Previously, such notice was required if the payment to a subcontractor was more than 90 days past due for goods or services provided for the covered contract for which the Federal agency had paid the prime contractor. Section 862 shortens this period from 90 to 30 days. Section 862 also provides authority for the contracting officer to enter or modify past performance information regarding the prime's unjustified failure to make a full or timely payment to a subcontractor before or after close-out of the covered contract. The SBA must update its regulations in order to carry out these amendments not later than 180 days from the NDAA's enactment.

The FY 2024 NDAA has two material amendments regarding service-disabled veteran-owned small businesses (SDVOSBs).

Section 863 amends the Small Business Act, specifically 15 U.S.C. § 644(g)(1)(A)(ii), to increase the governmentwide participation goal for SDVOSBs to not less than 5% of the total value of all prime contract and subcontract awards for each fiscal year—up from 3%. Section 864 phases out the ability of small businesses to self-certify as SDVOSBs. Currently, contractors are still able to self-certify as SDVOSBs for non-SDVOSB set-aside prime contracts as well as for subcontracts.

Section 864 provides that each prime contract award and subcontract award that is counted for the purpose of meeting SDVOSB goals must be certified by the SBA as a SDVOSB. Within 180 days of the NDAA's enactment, the SBA must issue regulations to implement this change. The requirement for SBA-certification as a SDVOSB is to take effect on October 1 of the fiscal year beginning after SBA promulgates the required regulations. Section 864 contemplates a phased approach to eliminating self-certification, providing that if a small business seeks SBA certification as a SDVOSB before the end of the 1-year period measured from the NDAA's enactment, that small business will be able to maintain its self-certification until the SBA rules on its SDVOSB certification application.

Section 865 requires the Secretary of Defense to amend DFARS 215.305 to require DoD agencies to consider affiliate companies' past performance information, if relevant, when small businesses bid on DoD contracts.

Miscellaneous

Section 872 provides a three-year extension of DoD's authority for a pilot program that permits it to award sole source follow-on contracts to businesses that are wholly-owned through an Employee Stock Ownership Plan (ESOP). This section also requires DoD to prescribe regulations for the pilot program and relaxes the restrictions on subcontracting when subcontracting to another qualified business wholly-owned through an ESOP.

Section 874 provides that the Under Secretary of Defense for Acquisition and Sustainment is to establish and implement a pilot program to incentivize contractor performance by paying covered contractors a progress payment rate that is up to 10 percent higher than the customary progress payment rate on a contract-by-contract basis. Participation in such program is to be on a voluntary basis. DoD must implement this pilot program via rulemaking and establish clear and measurable criteria for payment of higher progress payments. The authority for this pilot program will sunset on January 1, 2029.

Sections 1022 and 1023 respectively authorize the Navy to use certain authorized funds to incrementally fund contracts for the advance procurement and construction of a San Antonio-class amphibious ship and a submarine tender. Contracts for both the San Antonio-class ship and the submarine tender must include provisions stating that the total liability to the Government for the termination of the contracts is limited to the total amount of funding obligated at time of termination.

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Editor's note: The conclusion of this article will appear in the next issue of *Pratt's Government Contracting Law Report*.