

The FY 2020 National Defense Authorization Act: What Government Contractors Should Watch For

Congress is moving closer toward passage of the Fiscal Year 2020 National Defense Authorization Act (NDAA). Although key differences remain between the House and Senate versions of the bill, the legislation is ultimately likely to include authorization for new investments by the Department of Defense (DoD) in software and cybersecurity, and potential changes in areas relevant to government contractors, such as commercial items, data rights, and cost or pricing data.

On June 27, 2019, the Senate passed its version of the NDAA, [S 1790](#), which would authorize \$750 billion in DoD spending for FY 2020. On July 12, 2019, the House of Representatives passed its version of the bill, [H.R. 2500](#), which would authorize \$733 billion. The process of reconciling those bills and passing a final NDAA for the president's signature appears likely to be a lengthy one. No Republicans voted in favor of the House bill, which the Trump administration has threatened to veto, in large part because it falls short of the administration's \$750 billion budget request.

Following is a preview of the key procurement-related provisions of the 2020 NDAA that government contractors and others should watch for as the legislative process continues.

New Opportunities for Rapid Software Acquisitions

The House and Senate appear to agree that the DoD should be given new authority to acquire software. The House and Senate bills would each direct the Secretary of Defense to establish new software acquisition pathways to procure software applications and upgrades that are intended to be fielded within one year, creating new opportunities for software contractors:

- The Senate bill would require the DoD to establish guidance authorizing the rapid acquisition of software using two pathways: (1) an applications pathway for software running on commercial commodity hardware operated by the DoD; and (2) an embedded systems pathway for software embedded in weapons systems and other military-unique hardware systems (Sec. 852). The DoD must engage with the user community and consider feedback as it develops requirements for these software acquisitions.
- Similarly, the House bill would require the DoD to establish a new acquisition pathway to acquire software applications using "commercially available hardware" to be acquired using "rapid development and implementation" and software upgrades for embedded weapons systems or other hardware systems solely used by the DoD (Sec. 801). Like the Senate bill, the House bill specifies two pathways: (1) an applications pathway for use with commercially available hardware; and (2) an upgrades pathway for embedded weapon systems and other hardware solely used by the DoD.

Cybersecurity, U.S. Cyber Command and the DoD's Cloud Strategy

Both the House and Senate bills would provide significant investments in cybersecurity and cyber operations, including funding to the U.S. Cyber Command. The bills reflect a response to the DoD's 2018 Cyber Strategy

and Posture Review ("Cyber Strategy"), which calls for the United States to take an offensive stance in cybersecurity by "defending forward" and confronting threats before they reach U.S. networks and using cyberspace to "amplify military lethality." The House and Senate bills also each address the relationship between the U.S. Cyber Command and the National Security Agency (NSA):

- Currently, the Director of the NSA simultaneously serves as the Commander of the Cyber Command. The Senate bill would modify the conditions that must exist before the government can terminate the "dual-hat" arrangement, specifying, for example, that the Secretary of Defense and Chairman of the Joint Chiefs of Staff must certify, among other things, that the Cyber Command has "achieved full operational capability" (Sec. 1640). The Senate Armed Service Committee's report on the bill notes that the Cyber Command is "still maturing" and that eliminating the NSA Director's dual-hat role "would be premature at this time."
- The House bill lacks similar provisions but would require quarterly briefings on the status of the NSA/Cyber Command partnership (Sec. 1632).

The Senate bill would also require the DoD's Chief Information Officer and Chief Data Officer, in consultation with others, to develop and issue policy to implement the transition of DoD data to the cloud (Sec. 1035). The Senate bill would also require the Secretary of Defense to "reorient the Big Data Platform" to align with the DoD's Cyber Strategy by establishing a common baseline and security classification scheme for the collection, querying, analysis and accessibility of metadata across the DoD's Information Network, in order to discover, track and remediate cybersecurity threats (Sec. 1631).

Supply Chain Risks

The Senate bill would require the DoD to "streamline and digitize" its approach towards mitigating risks to the defense industrial base across the acquisition process (Sec. 831). The bill would require the Under Secretary of Defense for Acquisition and Sustainment, in coordination with the Defense Security Service, to develop a framework to mitigate the DoD's acquisition risk, including supply chain risks related to material sources and fragility, counterfeit parts and cybersecurity of contractors.

Sole-Source Contracts to 8(a) Firms

The Senate and House bills both would modify existing law to eliminate the requirement for a DoD justification and approval (J&A) for sole-source contracts under \$100 million awarded by the DoD to 8(a) firms, which include certain Native communities (S 1790 Sec. 842, H.R. 2500 Sec. 830).

- These provisions would increase the current threshold for requiring J&A, which the FY 2010 NDAA set at \$20 million.
- Previously, no justification was required for sole-source 8(a) awards of any amount. According to a 2016 Government Accountability Office (GAO) report, sole-source awards to 8(a) firms over \$20 million have steadily decreased since the FY 2010 NDAA J&A requirement took effect. The FY 2020 NDAA appears to be intended to combat that trend by eliminating the J&A requirement and therefore streamlining the DoD's ability to award certain sole-source contracts.

No Significant Provisions Related to Bid Protests

Notwithstanding recent recommendations by the Section 809 Panel to reform the bid protest system by, for example, eliminating GAO and U.S. Court of Federal Claims protests for procurements valued at less than \$75,000, neither the House nor the Senate bill contains provisions specifically related to bid protests. The Senate bill would, however, reduce the size of the award triggering enhanced post-debriefing rights from \$100 million to \$50 million (Sec. 828). The bills' silence concerning bid protests stands in contrast with the FY 2019 NDAA, which adopted various bid protest provisions.

Data Rights and Intellectual Property

The House bill also would repeal a provision in the FY 2019 NDAA that allowed the government to exercise rights in technical data pending the resolution of a contractor's legal challenge related to the scope and nature of the DoD's data rights by an agency Board of Contract Appeals or the U.S. Court of Federal Claims (Sec. 812):

- Section 866 of the FY 2019 NDAA allowed the DoD to "authorize use" of disputed technical data while an appeal of a contracting officer's decision is pending before an agency Board of Contract Appeals or the U.S. Court of Federal Claims, as long as the Secretary determines in writing that "compelling mission readiness requirements will not permit awaiting" a board or court decision. Section 866, however, has yet to be implemented in the Defense Federal Acquisition Regulation Supplement (DFARS).
- The House proposal would revoke Section 866 and restore pre-existing limits on the government's rights to use contractors' technical data during litigation, thereby eliminating the risk to contractors that their data might be disclosed before a dispute is resolved. The Senate bill lacks such a provision, and it is unclear whether it will become law.

As to intellectual property generally, the Senate bill would require that the DoD jointly carry out a pilot program to assess mechanisms to evaluate intellectual property in acquisitions, such as "technical data deliverables and associated license rights" and "commercially available intellectual property valuation analysis and techniques," to "better understand the benefits" associated with these techniques (Sec. 801). The bill would require that the pilot program establish criteria to "ensure the appropriate consideration of commercial items and non-developmental items as alternatives to items to be specifically developed[.]"

Modified Requirements for Task and Delivery Orders

Under existing law (10 U.S.C. § 2304a(d)(3)), no task or delivery order contracts of more than \$100 million may be awarded to a single source unless the head of the agency makes certain determinations in writing, including that only one source is qualified and capable of performing the work. The Senate bill would eliminate this requirement, meaning that single-award task or delivery order contracts over \$100 million will not need additional agency head approval when they are already authorized under one of the exceptions to full and open competition (Sec. 803).

Provisions Related to Commercial Items

The Senate bill would amend existing law to require that, when procuring commercial products and services, DoD agencies must document their market research at a level "appropriate to the size and complexity of the acquisition" (Sec. 809).

In addition, the House bill calls for the creation of pilot programs aimed at promoting and simplifying commercial items acquisitions:

- The House bill would require the Administrator of the General Services Administration to establish a five-year program to test three models for commercial e-commerce portals, including an e-commerce model, an e-marketplace model and an e-procurement model, to determine which model is "the most effective" (Sec. 891).
- The House bill also would create a pilot program within the DoD to encourage engagement with commercial technology companies through the Small Business Innovation Research Program and the Small Business Technology Transfer Program, which are conducted under the Small Business Act, 15 U.S.C. § 638 (Sec. 878).

Cost or Pricing Data in Sole-Source Contracts

The House bill would amend 10 U.S.C. § 2306a, frequently referred to as the Truth in Negotiations Act or "TINA," in several important respects that would make it easier for the government to obtain a contractor's cost or pricing data.

Under the bill, if the head of a DoD contracting activity makes a determination based on market research that only the DoD will procure a commercial item, the offeror of such a product "shall provide cost or pricing data to the contracting officer" (Sec. 803). The bill would require the DoD to revise the DFARS to require offerors in sole-source procurements to submit "data other than certified cost or pricing data . . . for purposes of determining the reasonableness" of the contractor's price (Sec. 803). Significantly, the bill expressly specifies that a contractor that fails to comply with these requirements may be suspended or debarred.

The House bill also would allow contracting officers (rather than the "head of the contracting agency," as currently provided under TINA) to request certified cost or pricing data from a contractor when necessary to determine price reasonableness (Sec. 804).

Review of Fixed-Price Contracts

The Senate bill requires the DoD to review how it decides to use fixed-price contracts to support its acquisition objectives to ensure that its decisions are strategic and consistent (Sec. 806). The Senate Armed Services Committee's report on the bill notes that it is "concerned about the extent to which the Department is using fixed-price contracts in situations in which other contract types would be more appropriate." Relatedly, the bill would require GAO to prepare a report on the DoD's use of fixed-price contracts, to include assessments of the effects of those decisions and their effect on contract closeout.

The House version lacks these requirements.

Small Business Issues

The Senate and House bills would each require the DoD's Office of Small Business to set performance goals and would expand the definition of "Disadvantaged Small Business Concern" (S 1790, Sec. 841, H.R. 2500, Sec. 881). Both bills also would permanently authorize the DoD's Mentor-Protégé Program, which is intended to increase participation of small businesses by encouraging mentorships with DoD contractors. Despite its

perceived success, the program has operated as a "pilot" since its inception. Both bills remove the "pilot" label, confirming Congress's support for small business participation in DoD contracts through the Mentor-Protégé program.

The House bill also would amend the Small Business Act to require the Small Business Administration (SBA) to report information regarding "best-in-class" awards to small business and socioeconomic set-aside businesses as part of its report to the president and Congress (Sec. 874). Presumably, this change would allow the SBA to confirm whether small businesses are receiving a fair portion of "best-in-class" contracts, which offer the best pricing and terms and condition and reflect the strongest contract management practices.

We will continue to monitor developments on the 2020 NDAA—[subscribe here](#) for future updates.

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Authors



[Alexander O. Canizares](#)

Partner

ACanizares@perkinscoie.com [202.654.1769](tel:202.654.1769)



[Julia M. Fox](#)

Counsel

JuliaFox@perkinscoie.com

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