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December 27, 2023

The FY 2024 National Defense Authorization Act: What Government Contractors Should Know



The Fiscal Year 2024 [National Defense Authorization Act](#) (NDAA) includes numerous provisions relevant to government contractors in areas such as artificial intelligence (AI), cybersecurity, supply chain concerns related to China and Russia, and conflicts of interest for consulting services provided to the U.S. Department of Defense (DoD).

The FY 2024 NDAA—which was signed into law by President Biden on December 22, 2023, after passage by the U.S. Senate and U.S. House of Representatives on December 13, 2023, and December 14, 2023, respectively—provides \$886.3 billion in funding for DoD, a \$28 billion increase over FY 2023.

A must-pass bill that funds DoD operations on a yearly basis, the NDAA is a frequent vehicle for legislative changes affecting DoD acquisition policies with direct implications for the Defense Industrial Base (DIB). The final version of the nearly 1,000-page FY 2024 NDAA addresses a wide range of areas relevant to procurement and will give rise to regulatory activity that will ultimately result in new contract requirements through amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) as well as changes to DoD acquisition policies.

In this Update, we summarize procurement-related provisions from the 2024 NDAA of significance to defense contractors.

### **Artificial Intelligence**

The 2024 NDAA reflects heightened attention to the implications of AI on U.S. defense and national security interests. The term "artificial intelligence" appears 192 times in the act, underscoring its outsized importance.

The NDAA directs DoD to establish plans, strategies, and procedures in various areas relevant to AI and implements certain governance changes for AI. For example, the act delegates new responsibilities to DoD's

Chief Digital and Artificial Intelligence Office (CDAO), which was established in 2022 to oversee DoD's AI strategy and creates a Governing Council to oversee the CDAO. (Section 1521). The act authorizes the CDAO to obtain "access and control" of "any data" used by a DoD component, an extraordinarily broad grant of authority that highlights the CDAO's central role in scaling AI efforts for DoD. The act specifies procurement-related responsibilities for the CDAO such as providing the "digital infrastructure and procurement vehicles necessary" to manage data assets and data analytics capabilities at scale. (Section 1523). Of note to contractors, the act also establishes a prize competition open to defense contractors to develop technology that detects and watermarks the use of generative AI. (Section 1543).

The act directs DoD to establish AI-related plans, strategies, and guidance, including requiring plans to identify "commercially available and relevant" large language models and "make such models available, as appropriate, on classified networks." (Section 1544). The act also establishes a new U.S. Department of State position—the Chief Artificial Intelligence Officer—to advise the Secretary of State on AI matters. (Sec. 6303).

### **Bid Protest Cost-Shifting Provision Dropped**

Notably, the final bill omits a provision included in an earlier House version of the bill that would have adopted a pilot program requiring a protester before the Government Accountability Office (GAO) to reimburse DoD's costs in the event that GAO denies the protest. The pilot program would have specifically applied to DoD contractors with annual revenues exceeding \$250 million. Such a fee-shifting provision would have significantly changed bid protest practice.

### **Cybersecurity and Supply Chain Risks**

As in past years, the 2024 NDAA includes provisions focusing on strengthening DoD's cybersecurity capabilities and mitigating supply chain risks for the DIB.

Notably, the FY 2024 NDAA contains a provision prohibiting DoD from procuring goods, services, or technology from entities identified in an annual list published in the *Federal Register* as "Chinese military companies operating in the United States" or entities subject to their control. (Section 805). Section 805 cites a provision in the FY 2021 NDAA (Section 1260H) requiring DoD to publish in the *Federal Register* a list of "Chinese military companies." The FY 2024 prohibition is required to take effect by June 2026 after being incorporated into the DFARS. Significantly, the provision would also prohibit DoD from procuring goods or services "that include goods or services" produced or developed by such Chinese military companies.

Contractors will want to track the implementation of the rule in anticipation of new contract requirements and certifications and be prepared to make changes to their compliance policies in response to the provision. This brings to mind Section 889 of FY 2019 NDAA imposing restrictions on contractors' use and provision to the government of certain Chinese telecommunications equipment and services.

The act also contains a requirement for domestic sourcing in the United States for manufactured articles, materials, and supplies connected with major defense acquisition programs. (Section 835).

The act also prohibits DoD from contracting with companies that maintain fossil fuel operations with the Russian government or the Russian energy sector. (Section 804). It further prohibits the government from procuring or operating unmanned aircraft systems (UAS) manufactured or assembled by covered foreign entities, a list of which will be developed by the Federal Acquisition Security Council (FASC). (Sections 1823, 1824, and 1825). The act specifies that beginning two years after the statute's enactment, no federal funds awarded through a contract, grant, cooperative agreement, or otherwise may be used to procure or operate such covered unmanned

aircraft systems. Companies involved in UAS for sale to federal agencies will want to track the government's implementation of the provision closely to assess its impact on their businesses.

### **Conflicts of Interest for Consulting Services Related to China and Russia**

Companies that provide consulting services to federal agencies will be subject to new certifications and requirements. (Section 812). Before entering into a contract with the DoD, an entity providing consulting services to DoD (with a North American Industry Classification (NAICS) code beginning with 5416) must certify that neither the entity nor any of its subsidiaries or affiliates holds a contract for "consulting services" with a "covered foreign entity." DoD is prohibited from entering into a contract with any entity that is unable to make the certification. The term "covered foreign entity" is defined to include the governments of China and Russia, the government of any other country that the Secretary of State determines has repeatedly provided support to acts of international terrorism, as well as any entity identified on other lists under certain statutes and regulations.

Also, such entities providing consulting services to DoD must maintain a "Conflict of Interest Mitigation Plan" that is "auditable by a contract oversight entity." Such a mitigation plan must identify any of the entity's contracts with foreign entities and written analysis providing a course of action for avoiding, neutralizing, or mitigating the "actual or potential conflict of interest" of such a contract with DoD and other information.

### **Inflation Relief**

The NDAA extends the temporary inflation relief authority provided in last year's NDAA for another year through December 31, 2024. (Section 824). It also allows amounts authorized under the act to be used to modify contracts to provide economic price adjustments consistent with FAR Part 16 (Section 826). DoD is required to issue guidance on the implementation of this provision.

### **Commercial Solutions Openings and Procurement Innovation**

The FY 2024 NDAA expands the use of DoD's statutory authority to use Commercial Solutions Openings (CSOs)—a competitive process for the acquisition of innovative commercial products and services—by requiring that DoD exercise its CSO authority at least four times every fiscal year. (Section 813). Section 803 of the FY 2022 NDAA provided DoD with permanent authority to use CSOs. The bill also instructs DoD to develop a streamlined process for developing its contract requirements with stated goals that include rapidly validating the ability for commercial products and services to meet DoD's needs (Section 811). Another provision establishes a pilot program to award DoD contracts for "anything-as-a-service" using capabilities that are measurable so DoD can monitor the cost and speed in delivery against other processes. (Section 809).

### **Service-Disabled Veteran-Owned Small Businesses**

The act contains a notable provision precluding companies claiming status as Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) from relying solely on self-certifications of their eligibility. (Section 864). Instead, under the act, SDVOSBs must be certified by the Small Business Administration (SBA). This change would require regulations to be implemented within 180 days of the statute's enactment.

### **Technical Data Rights**

The final NDAA contains a provision that would establish a pilot program for the use of "innovative" intellectual property rights strategies to acquire technical data rights from contractors for certain programs to be identified by DoD as "necessary" for operation, maintenance, and installation purposes (Section 808). The strategies include: (1) using an escrow account to verify and hold intellectual property data, (2) using royalties or licenses, or (3) other strategies as determined by the Secretary of Defense.

## **Other Provisions**

Other procurement-related provisions in the final bill include the following:

- A provision prohibiting, for one year, DoD from requiring that defense contractors disclose greenhouse gas (GHG) inventory or emissions as a condition of receiving a defense contract, absent a waiver. (Section 318). In November 2022, the Federal Acquisition Regulatory (FAR) Council issued a proposed rule requiring contractors to disclose GHG emissions and climate-related risks and to set targets to reduce their GHG emissions. The NDAA provision effectively bars DoD from making such GHG representations a condition of a contract award.
- A provision allowing combatant commands to request special contracting authority to respond to time-sensitive or emergency situations. (Section 843).
- A provision allowing DoD to enter into multiyear contracts for the purchase of property to promote industrial base security. (Section 820).
- A requirement for a pilot program that would increase progress payments made to contractors by up to 10% based on performance. (Section 874). This program would be applied on a contract-by-contract basis and participation is voluntary. It requires regulations to take effect.

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