

The William M. (Mac) Thornberry Fiscal Year 2021 National Defense Authorization Act (PL 116-283)

Moshe Schwartz
Eherton and Associates, Inc

January 12, 2021



Eherton and Associates, Inc.

Services in Federal Relations

In-depth understanding; focused action

The FY21 NDAA

- Passed over veto January 1, 2021
 - House voted to override veto 322 – 87
 - Senate voted to override veto 81 – 13
- Three of the five prior NDAs were enacted in December and one was enacted in late November
- The John S. McCain NDAA for FY2019 is the only NDAA since 1997 to become law before the start of its fiscal year

FY21 NDAA Overview

- Bill and Statement of Managers – 2214 pages
- 63 provisions in title VIII – Acquisition Policy
 - Easily 40 more provisions affection acquisition and contracting policy in other titles
- Title XVII - Cybersecurity-related Matters
- Title XVIII – Transfer and Reorganization of Defense Acquisition Statutes
 - Sec. 809 Panel recommendation
- Also Includes:
 - Division E - National Artificial Intelligence Initiative Act of 2020
 - Division F – Anti-money Laundering
 - Division G – Elijah Cummings Coast Guard Reauthorization Act
 - Division H – Homeland Security, VA, Other Matters

FY21 NDAA Overview

China Cybersecurity Industrial Base

NDAA Acquisition Issue Categories

- Defense Industrial Base
 - Domestic base & health
 - Cybersecurity
- Software
- Sustainment
- Intellectual Property
- Commercial Items
- Streamlining
- Foreign Military Sales
- Small Business
- Bid Protests
- Security Reform
- Miscellaneous

Industrial Base

- Sec. 817. Modification to purchase threshold exception for Berry Amendment (S814)
 - Amends the Berry Amendment (10 USC 2533a), lowering the threshold for triggering domestic sourcing requirements, from the Simplified Acquisition Threshold (\$250,000) to \$150,000 (inflation adjusted every 5 years)
- Sec. 819. Modification to mitigating risks related to foreign ownership, control, or influence of DoD contractors and subcontractors (S5894)
 - Amends sec. 847 of the FY20 NDAA (to mitigate risks from foreign beneficial ownership) by requiring DoD to periodically assess contractor compliance with FOCI disclosure requirements and create procedures for addressing relevant changes in ownership
 - Requires DoD to revise policies and training by July 1, 2021 to implement sec. 847

Industrial Base

- Sec. 844. Expansion of the prohibition on acquiring certain metal products (H822/H1782)
 - Amends 10 USC 2533c by prohibiting acquisition of certain materials that are “mined, refined, separated, melted or produced” in Russia, N. Korea, China, or Iran (additions in red), effective 5 years from date of enactment
 - Would extend the prohibition of buying COTS end-item that are 50% or more of Tungsten to apply to all covered materials
- Sec. 845. Limitations on procurement of non-U.S. goods (H823/S812/S5812)
 - Amends 10 USC 2534 (requiring certain items to be purchased from the National Technology and Industrial Base-NTIB) by limiting, altering, and adding preferences for a variety of ship and auxiliary ship components
- Sec. 848. Supply of strategic and critical materials for DoD (H824/S809)
 - Requires DoD, to the extent practicable, to procure strategic and critical materials (not defined) from the following sources, in order of preference: domestic sources, NTIB, other sources
 - Requires DoD to pursue goals to ensure secure sources of supply for strategic and critical materials by January 1, 2035

Industrial Base

- Sec. 885. Disclosure of beneficial ownership in database for federal agency contract and grant officers (H815)
 - Amends 41 USC 2313 concerning examination of contractor records to require contractors' beneficial ownership information to be included in the database used by federal agency contract and grant officers (maintained by GSA) for responsibility determinations
- Sec. 891. Waivers of certain conditions for progress payments under undefinitized contracts (UCA) during COVID-19 (S5841)
 - Allows DoD to waive the 10 USC 2307 prohibition on making progress payments for more than 80% of work accomplished prior to the contract being definitized during COVID-19 if:
 - The UCA has not been definitized for 180 days from the contract start date and DoD certifies to Congress that the UCA will be definitized within 60 days of the waiver being issued
 - A contractor that previously received increased progress payments for a contract that is not a UCA demonstrates that such increased progress payments were promptly provided to subcontractors, small businesses, or suppliers
 - Conference report requires GAO to assess the extent to which DoD is ensuring that increased progress payments are flowing to subcontractors and suppliers
- Sec. 1603. Requirement to buy certain satellite component from NTIB (H1602/S813)
 - Amends 10 USC 2534 concerning miscellaneous sourcing requirements to require star tracker in satellites >400 lbs. to be purchased from NTIB sources for programs that have not received Milestone A approval prior to October 1, 2021

Industrial Base – Provisions Dropped

- House
 - Sec. 825. Enhanced domestic content requirement for Major Defense Acquisition Programs (MDAPs)
 - “The conferees note the importance of the Department working with trusted foreign partners and developing methodologies to understand beneficial ownership within the defense industrial base.”
 - Sec. 829. Domestic sourcing for aluminum

Industrial Base – Cybersecurity

- Sec. 841. Additional requirements pertaining to printed circuit boards (PCBs) (H826/S808)
 - Prohibits DoD from acquiring PCBs from China, Russia, Iran, North Korea
 - Does not apply to acquisitions below the micro-purchase threshold, commercial services or products, or non-mission critical functions (unless designated to apply by the Secretary of Defense)
 - Requires rulemaking by May 1, 2022 and implementation beginning January 1, 2023
 - Waivers permitted upon written determination and Congressional notice
 - Requires application of section 224 of the FY20 NDAA (establishing trusted supply chain standards) to the acquisition of printed circuit boards
 - Requires an independent assessment of the benefits and risks of extending the prohibition to commercial or off-the-shelf products or services
- Sec. 9001. Cybersecurity and Infrastructure Security Agency (CISA) Director (H1793/S5244)
 - Amends 5 USC 5313 and 5314, elevating the CISA Director from Level III to Level II of the Executive Schedule and amends 6 USC 652 to require certain qualifications for the Director

Industrial Base – Cybersecurity (Title XVII-52 provisions)

- Sec. 1712. Modification of requirements for the Strategic Cybersecurity Program and evaluation of cyber vulnerabilities of major weapon systems (S1630)
 - Amends sec. 1647 of the FY16 NDAA (as amended by sec. 1633 of the FY20 NDAA) by requiring DoD to establish requirements for each major weapon system to be assessed for cyber vulnerabilities and to identify priority critical infrastructures by broad weapon system mission areas
 - Amends sec. 1640 of the FY18 NDAA to require, by August 1, 2021, establishment of a Strategic Cybersecurity Program to improve systems, critical infrastructure, kill chains, and processes related to nuclear deterrence and strike, certain long-range conventional strike missions, offensive cyber operations, and homeland missile defense
- Sec. 1714. Cybersecurity Solarium Commission (H1622/S1624)
 - Amends sec. 1652 of the FY2019 NDAA by extending the life of the Cybersecurity Solarium Commission from July 2020 to November 2021, to allow the commission to provide updates to Congress on implementation, and revise, amend, or offer new recommendations
- Sec. 1716. Subpoena Authority for the Cybersecurity and Infrastructure Security Agency (H1640A)
 - Amends the Homeland Security Act of 2002 (6 USC 659) by adding to CISA's national cybersecurity and communications integration center the responsibility for "detecting, identifying, and receiving information for a cybersecurity purpose about security vulnerabilities relating to critical infrastructure in information systems and devices."
 - Grants the director of the Center the authority to subpoena information necessary to identify a specific security vulnerability in a system where the vulnerability relates to critical infrastructure, when the identify of the entity at risk is unknown. The subpoena authority does not extend to personal devices, home computers, and residential or consumer devices.
- Sec. 1736. DIB cybersecurity sensor architecture plan (S1623)
 - Requires DoD to assess the feasibility of a cybersecurity sensor architecture plan for deploying commercial off-the-shelf solutions on supplier networks to remotely monitor public-facing internet attack surfaces in the DIB

Industrial Base – Cybersecurity

- Sec. 1737. Assessment of a DIB participation in a threat information sharing program (H1623/S1631)
 - Requires DOD, within 270 days of enactment, to assess the feasibility and requirements necessary to establish a threat information sharing program between DoD and the DIB, to include controlled unclassified information
 - Requires the assessment to explore: creating cybersecurity incident reporting requirements, establishing a central DoD clearinghouse for mandatory incident reporting, incentivizing private sector participation, and prohibiting procurements from entities that do not comply with the requirements of the program
 - Requires consultation with industry
 - If the assessment determines that such a program is necessary, requires DoD to establish such a program and to promulgate regulations within 120 days of completion of the assessment
- Sec. 1738. Assistance for small manufacturers in the DIB supply chain for cybersecurity (H1633/S1642)
 - Authorizes providing financial assistance to Manufacturing Extension Program centers to help small manufacturers meet cybersecurity needs, including compliance with DFARS and CMMC certification requirements
- Sec. 1739. Assessment of a DIB cybersecurity threat hunting program (H1634/S1632)
 - Requires DoD, within 270 days of the enactment of the bill, to assess the feasibility and requirements necessary to establish a DIB threat hunting program to actively identify cybersecurity threats and vulnerabilities in the DIB, to include networks containing controlled unclassified information
 - Requires the assessment to explore: existing DIB threat hunting efforts (including CMMC), suitability of a continuous threat hunting program as a supplement to CMMC, mechanisms for DoD to share malicious information on the evolving threat landscape, incentivizing private sector participation, and prohibiting procurements from entities that do not comply with the requirements of the program
 - Requires consultation with industry
 - If the assessment determines that such a program is necessary, requires DoD to establish such a program and to promulgate regulations within 120 days of completion of the assessment

Industrial Base/Cybersecurity – Provisions Dropped

- House
 - Sec 830B. Prohibition on operating or procuring foreign-made unmanned aircraft systems

Industrial Base – Elevating Officials

- Sec 903. Assistant Secretary of Defense for Industrial Base Policy (H902)
 - Amends 10 USC 138, by adding the establishment of the Assistant Secretary of Defense for Industrial base Policy to advise the Under Secretary of Defense (A&S) on industrial base policies.
 - Sec. 1637. Critical infrastructure cyber incident reporting procedures
- Sec. 1752. National Cyber Director (H1131/1132/S1637)
 - Establishes the Office of the National Cyber Director in the Executive Office of the President as a Level II Executive Service position
 - The National Cyber Director is to advise the President on cybersecurity issues, including efforts to promote national supply chain risk management and vendor security
 - Amends the National Security Act of 1947 (50 U.S.C. 3021), to include the Director's participation in National Security Council meetings, at the discretion of the President

Software

- Sec. 812. Inclusion of software in government performance of acquisition functions (S881)
 - Amends 10 USC 1706, which is a list of acquisition functions required to be performed by government employees or military members, to apply only to designated programs or those exceeding the MDAP dollar threshold, and adding 'program lead software' to the list of covered positions
- Sec. 834. Pilot Program on using consumption-based solutions to address software-intensive warfighting capability (S834)
 - Authorizes DoD to establish a pilot program to use consumption-based solutions for software-intensive warfighting capabilities
 - Under the pilot, each military department and combatant command possessing acquisition authority is to propose between one and three initiatives, whose contracts can run up to three years
 - Consumption-based solutions are defined as any combination of software, hardware, equipment, labor, or services that "provide a seamless capability that is metered and billed based on actual usage and predetermined pricing per unit"

Software

- Sec. 835. Balancing security and innovation in software development and acquisition (S882)
 - Requires DoD to include in solicitations and bids software security criteria, including delineating processes used to secure software development lifecycle
 - Requires DoD to develop processes for security review of code

Sustainment

- Sec. 802. Improving lifecycle sustainment (H803/S862)
 - Amends 10 USC 2337 and 2441 (concerning sustainment and life-cycle support of major systems) to include programs or projects using rapid fielding or prototyping authorities under section 804 of the FY16 NDAA
 - Amends 10 USC 2337 to require an approved lifecycle sustainment plan prior to Milestone B approval that contains a product support strategy, performance goals for key sustainment, life-cycle cost estimate, factors that could affect O&S costs, and a technical data and IP product support plan
 - Amends 10 USC 2441 to require a sustainment review every five years
 - Requires congressional notifications of cost estimate breaches (akin to Nunn-McCurdy notifications for MDAP unit acquisition cost breaches)
- Sec. 811. Sustainment reform for DoD (H811)
 - Amends the duties of the Secretary of Defense in 10 USC 113 adding a requirement for the National Defense Strategy to include two strategic frameworks:
 - To prioritize and integrate sustainment of MDAPs, core logistics capabilities, commercial logistic capabilities, and the National Technology and Industrial Base
 - To address contested logistics
 - Amends 10 USC 133b to add to the duties of USD (A&S) advising SECDEF on all aspects of acquisition and sustainment relating to defense acquisition programs, core logistics capabilities, and the NTIB

Intellectual Property

- **Sec. 804. Implementation of Modular Open Systems Architecture requirements (S861)**
 - Requires regulations to facilitate DoD access to and use of modular system interfaces
 - Allows the regulations to be extend to software-based, non-weapons systems one year after the regulations are implemented (but not after 2 year from implementation)
 - Amends 10 USC 2446a to require non-MDAPs to also use MOSA to the extent practicable
 - Amends 10 USC 2320 to grant government purpose rights to a modular system interface developed wholly or in part with federal funds
 - Requires DoD to establish a central repository of interfaces and related items that can then be distributed, consistent with 10 USC 2320 (rights in technical data)
- **Sec. 837. Safeguarding defense-sensitive IP, technology, and other data (S891)**
 - The section requires:
 - DoD to ensure policies are in place to protect defense-sensitive IP, technology, and other data from being acquired by China
 - DoD to establish a list of critical technologies that may require restrictions on current or former employees, contractors, or subcontractors
 - DoD to consider mechanisms to restrict certain current and former DoD and DIB employees from working directly for companies controlled or influenced by the Chinese government

Intellectual Property

- 839. GAO report on IP acquisition and licensing (H820A/S883)
 - Requires the GAO to submit a report evaluating DoD implementation of instruction 5010.44, *Intellectual Property Acquisition and Licensing* and DoD progress is establishing a cadre of IP experts as required by 10 USC 2322
 - (Note: Does not amend 10 USC 2322 to require DoD to develop guidelines on the acquisition or licensing of IP, including model forms for specially negotiated licenses, and definitions of key terms)

Commercial Items

- Sec. 816. Documentation for commercial item determinations (H820/H820C)
 - Amends 10 USC 2380 regarding commercial product and service determinations to allow a contracting officer to request support from DoD experts or others when making a commercial product or service determination
 - Does not mandate that a prior commercial determination serves as a determination for a component of the product or service
 - Requires that within 30 days of making such a determination, the contracting officer submit a written memorandum of the determination

Streamlining

- Sec. 806. Definition of material weakness for contractor business systems (H804/S845)
 - Amends section 893 of the FY2011 NDAA regarding contractor business systems requirements by changing the standard used when reviewing contractor business systems from *significant deficiencies* to *material weakness*, defined as a deficiency in internal controls that creates a risk of a “reasonable possibility that a material misstatement” of information will not be timely prevented, detected, or corrected
 - (Note: Sec. 893 currently defines significant deficiency as a shortcoming that materially affects DOD’s ability to rely on information produced by the system)
- Sec. 807. Space-unique acquisition pathways for Space Force (H807)
 - Requires DoD to develop a tailored Space System acquisition pathway (or pathways)
 - Allows the Service Acquisition Executive for Space Systems to delegate milestone decision authority to lower levels
 - Requires DoD to report by May 15, 2021 on:
 - Application of the space-specific pathway
 - Space force budget lines for FY22
 - A list of programs requesting Multiyear Procurement

Streamlining

- Sec. 808. Acquisition Authority for the Joint Artificial Intelligence Center (JAIC) (H805)
 - Grants the Director of the JAIC acquisition authority similar to the head of an agency
 - Requires DoD to provide the JAIC full-time personnel to execute acquisitions, program management, cost analysis, and related functions
 - Acquisition authority is at \$75M through FY2025
- Sec. 820. Contract closeout authority for services contracts (H818)
 - Amends sec. 836 of the FY2017 NDAA to reduce the contract closeout period for service contracts from 17 to 7 years or less (10 years for military construction or shipbuilding), if performance was completed at least 4 years earlier, based on FAR subpart 4.7 record retention requirements for the particular contract
- Sec. 833. Listing of Other Transaction Authority (OTA) consortia (S5891)
 - Requires DoD, within 90 days of enactment, to maintain and make public a list of consortia used to disseminate OTA contracting opportunities

Foreign Military Sales

- Sec. 888. Revision to requirement to use firm fixed-price contracts for FMS (HR843)
 - Repeals sec. 830 of the FY17 NDAA that required use of firm, fixed-price contracts for FMS that are exclusively production contracts

Small Business

- Sec. 815. Prompt payment of contractors (S871)
 - Amends 10 USC 2307 by requiring an accelerated payment goal of 15 days for small business primes, and to primes that agree to pay small business subcontractors in the accelerated timeframe
 - (Note: Previously, a contract can stipulate a payment date beyond 15 days)
- Sec. 863. Employment size standard requirements (H840A)
 - Amends 15 USC 632 to increase the time used to determine if a manufacturer is a small business, from 12 to 24 months
 - Effective one year after enactment of the Act

Small Business

- Sec. 868. Past performance ratings of certain small businesses (H836)
 - Amends 15 USC 644 to require that, upon request of a small business offerer that participated in a joint venture but has no past performance of its own, the contracting officer consider the past performance of the small business as a participant in the joint venture
 - Amends 14 USC 637 to require that, upon request of a small business offeror that was a first-tier subcontractor, the contracting officer consider the past performance of the small business as a first-tier subcontractor
 - Upon such request of the small business, the prime contractor would be required to provide the small business or the contracting agency a record of past performance

Bid Protests

- Sec. 886. Repeal of bid protest pilot program (S846)
 - Repeals sec. 827 of the FY18 NDAA that established a DoD pilot program effective December 2020, that would have required a large company protestor to pay DoD costs associated with a protest in the event GAO denied the protest

Security Clearance Reform

- Sec. 1101. DoD policy on classified workspaces and job functions of personnel with pending clearances (H243)
 - Requires DoD to implement policy whereby individuals whose position requires a security clearance may perform appropriate unclassified work (or work associated with the level of clearance they possess) while awaiting final determination of their required security clearance
- Sec. 1623. Efficient use of sensitive compartmented information facilities (S1052)
 - Requires the Director of National Intelligence within 180 days of enactment to revise guidance to allow agencies and their cleared contractors to use and discuss sensitive compartmented information at previously approved facilities, without further approval by agency or by site

Security Clearance Reform – Provisions Dropped

- Senate Division F, the Intelligence Authorization Act for Fiscal Year 2021
- The Intelligence Authorization Act for Fiscal Year 2021 was included in the FY 2021 Consolidated Appropriations Act as Annex W

Miscellaneous

- Sec. 814. Truth in Negotiations Act threshold for DoD contracts (S842)
 - Amends TINA (10 USC 2306a) by increasing the threshold triggering TINA for all contract changes/modifications and for all subcontracts to \$2M, to include contracts entered into prior to July 1, 2018
 - Requires DoD to submit a report detailing the impact of this change by July 1, 2022
- Sec. 883. Prohibition on awarding contracts to contractors requiring nondisclosure agreements related to waste, fraud, or abuse (H813)
 - Prohibits DoD from awarding a contract to a contractor unless the contractor represents that it does not require employees to sign a nondisclosure agreement preventing an employee from reporting waste, fraud, or abuse related to a DoD contract

Miscellaneous

- Sec. 901. Repeal of the office of the Chief Management Officer (CMO) (H901/S911)
 - Repeals 10 USC 132a which established the office of the CMO, effective on the date of enactment of the FY21 NDAA

Reorganization of Defense Acquisition Statutes

- Title XVIII – Transfer and Reorganization of Defense Acquisition Statutes
 - Title XVIII transfers and reorganizes numerous defense acquisition statutes, in an effort to create a more rational structure and organization of acquisition statutes
 - The reorganization is intended to have no policy impact and *does not* seek to implement plain language changes
 - The reorganization follows an 809 Panel recommendation to reorganize and consolidate the acquisition statutes, the FY19 NDAA (sec. 801) added an outline for Part V of subtitle A – *Acquisition*. This title populates the Part V outline established in the FY19 NDAA
 - The title is to take effect January 1, 2022 and the DFARS is to be revised to reflect the reorganization by January 1, 2023
 - Until the DFARS is updated, the law is to be applied as in effect December 31, 2021 conformed by and the DFARS is required to be revised ;
 - DoD is required to consult with stakeholders and experts to review the proposed reorganization and submit a report by March 15, 2021
 - The report is required to include specific recommendations for modifying legislative text and a list of conforming amendments

Consolidated Appropriations Act, 2021 (PL 115-260)

- Division C—Department of Defense
 - Sec. 8131. Software and Digital Technology Pilot
 - Establishes a pilot program for software development, allowing appropriated funds under title IV (RDT&E), budget activity VIII to be used for “agile research, development, test and evaluation, procurement, production, modification, and operation and maintenance” for eight specified programs
 - Requires DoD to submit to the appropriations committees within 90 days of enactment, a plan for each program and to provide quarterly updates thereafter.

What will the FY 2022 NDAA look like?

China

Cybersecurity

Industrial Base

(domestic sourcing vs. buy US/allies)

(supply chain/sustainment)

Defense Strategy Trends

- Continued shift from low-intensity to great-power competition
- China as the pacing threat
- Supply chain security

Under a Biden Administration

- Experienced bench of qualified people to draw from
- Flat or small decrease in Defense budget (2-4% decline?)
 - Pressure from the progressive wing
- Focus on soft power
 - Rebuilding relationships with Allies
- Focus “more on unmanned capacity, cyber and IT...in certain areas the budget is going to have to be increased,” to the detriment of legacy systems
- “I would make it very clear we were not going to in fact sell more weapons to [Saudi Arabia].”
- Federal procurement process as a mechanism for promoting socio-economic policy
- Repeal Executive Orders

Questions?

Moshe Schwartz, moshe@ethertonandasociates.com



Etherton and Associates, Inc.

Services in Federal Relations

In-depth understanding; focused action