NDIA Manufacturing Division Legislative and Regulatory Update

February 24, 2018

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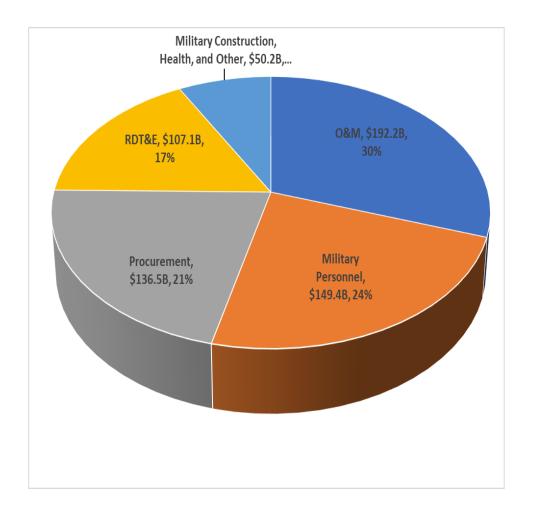
Agenda

- FY21 Update
 - FY21 Appropriations
 - FY21 NDAA
- What's on Tap for 2021
 - The 117th Congress
 - The Biden Administration
- Regulatory Landscape
- Policy Items
 - Manufacturing
 - Section 3610 of the CARES Act
 - Buy American

Consolidated Appropriations Act, 2021 (PL 116-260)

By Appropriations Title

FY21 vs. FY 20 Enacted



Account	Enacted	vs. FY20	vs. Request
Operation and Maintenance	\$192.2B	-\$7.2R	-\$4.4B
Military Personnel		+\$7.0B	-\$1.1B
Procurement	\$136.5B	+\$2.7B	+\$5.7B
RDT&E	\$107.1B	+\$2.7B	+\$0.9B
Defense Heath	\$33.7B	-\$0.4B	+\$1.0B

Defense Division Provides \$696 Billion

Agency/Program (in billions)	FY 2020	FY2021	FY21 vs. FY20
Defense Department (base)			
Operation and maintenance	\$199.4	\$192.2	-\$7.2
• Personnel	\$142.4	\$149.4	\$7.0
• Procurement	\$133.9	\$136.5	\$2.7
• RDT&E	\$104.4	\$107.1	\$2.7
Overseas Contingency Operations	\$70.7	\$68.7	-\$2.0

Highlights:

- Fully funds the 3.0 percent military pay raise.
- Funds active duty end strength of 1,348,600, an increase of 9,100
- Bars funds for use of force against Iran without congressional authorization

Manufacturing Technology Appropriations

	FY21 ManTech Funding		
DoD Component \ \$, K	РВ	Enacted	
Army Budget (0708045A)	\$61,012	\$133,012	
Navy Budget (0603680N)	\$60,122	\$60,122	
Air Force Budget (0603030F)	\$40,401	\$139,001	
DMS&T Budget (PE 0603680D8Z)	\$93,817	\$245,817	
DLA Budget (0603680S)	\$40,025	\$64,015	
Total DoD ManTech Budget	\$295,377	\$641,967	

Homeland Security Division Provides \$69.0 Billion

Agency (in billions)	FY 2020	FY2021	FY21 vs. FY20
Customs and Border Protection	\$14.9	\$15.3	\$0.4
Coast Guard	\$12.0	\$12.8	\$0.8
Federal Emergency Management Agency	\$22.3	\$21.7	-\$0.6
Immigration and Customs Enforcement	\$8.1	\$8.0	-\$0.1
Transportation Security Administration	\$5.0	\$8.0	\$0.144

CISA – Provides \$2.0 billion for CISA, \$9.4 million above the FY2020 enacted level and \$267.2 million above the President's budget request, including:

- \$92.8 million to advance Cyber Operations, including \$43.9 million for threat hunting
- \$43.3 million for the Continuous Diagnostics and Mitigation program
- \$21.2 million for the National Cybersecurity Protection System

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

The FY21 NDAA

- Passed over veto January 1, 2021
- Three of the five prior NDAAs 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
- Bill and Statement of Managers 2214 pages
 - Title VIII Acquisition Policy (63 provisions)
 - Title XVII Cybersecurity-Related Matters (52 provisions)

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 (\$5894)
 - 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 (ad litions in red), effective 5 years from date of enactment
 - Would extend the prohibition of buying COTS end-items 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. 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

Industrial Base — Cybersecurity (Title XVII-52 provisions)

- Sec. 1704. Clarification relating to protection from liability of operationally critical contractors (S1635)
 - Amends 10 USC 391 to modify the statutory protection from liability by incorporating DFARS clause 252.204-7012 (controlled unclassified information) contract requirements, instead of expanding the authority of the armed forces to access information and equipment related to cyber attacks on operationally critical contractors
- Sec. 1705. Strengthening Federal Networks; CISA Cybersecurity Support to Agencies (H1639/H1640C)
 - Amends 44 USC 3553 by authorizing CISA to conduct threat and vulnerability hunting on Federal information systems (without notice to the agency), and allow CISA to provide services, IT, and sensors to other agencies upon request
- 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 (п1622/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

Industrial Base – Cybersecurity

- 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 identity 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 (\$1623)
 - 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
- Sec. 1737. Assessment of 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

Industrial Base – Cybersecurity

- 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 (H1654/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
- Sec. 1742. DoD Cyber Hygiene and CMMC Framework
 - Requires assessing each DoD component against the CMMC framework
 - Prohibits expending more than 60% of funds appropriated for CMMC implementation until the Under Secretary of Defense (A&S) provides the defense committees "a plan for implementation of the CMMC via requirements in procurement contracts"

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. 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
- 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

Sustainment

- Sec. 341. National Defense Sustainment and Logistics Review (H351)
 - Requires DoD to conduct a "comprehensive review of the sustainment and logistics requirements necessary to support "the National Defense Strategy
 - A report is to be submitted to the congressional defense committees in the February following the fiscal year in which a National Defense Strategy is submitted
- Sec. 345. Independent advisory panel on weapon system sustainment (H355)
 - Requires the Secretary of Defense to establish an independent advisory panel to conduct a review and make recommendations related to the weapon systems sustainment ecosystem

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, lifecycle 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 (similar 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 logistics 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 extended 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 evaluate DoD's implementation of instruction 5010.44,
 Intellectual Property Acquisition and Licensing, and DoD's progress in
 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)

Foreign Military Sales

- Sec. 887. Amendments to submissions to Congress relating to certain Foreign Military Sales (H842/S5893)
 - Amends the reporting requirements of sec. 887 of the FY18 NDAA to apply only to FMS processes within DoD, and extend the quarterly notification and annual report requirements to December 31, 2022
- Sec. 888. Revision to requirement to use firm fixed-price contracts for FMS (H843)
 - 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 for large primes that agree to pay small business subcontractors in the accelerated timeframe
 - Previously, a contract could 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 offeror 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

FY20 protest cases filed are down 2% from FY19: From FY16-FY20, protests filed decreased 23% (from 2,734 to 2,149)

GAO annual report December 23, 2020

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

What's on Tap for 2021

The 117th Congress

Key Dates

- March COVID stimulus bill vote Expected (unemployment expires March 14)
- May 4 President's Budget Request to Congress Expected
- July 4 House to complete action on their version of the NDAA Expected
- August 1 Debt limit

Nominations – an ongoing process

New to Congress

- Cyber, Innovative Technologies, and Information Systems Subcommittee
 - Chair Jim Langevin (RI); Ranking Elise Stefanik (NY)
- Intelligence and Special Operations Subcommittee
 - Chair Ruben Gallego (Ariz); Ranking Trent Kelly (MS)

What will the FY 2022 NDAA look like?

China Cybersecurity

(Ranking member Rogers: Time to establish a Cyber Academy)

Industrial Base

(domestic sourcing vs. buy US/allies) (supply chain/sustainment)

Changes in Congress

- The margin of control is very thin
- How partisan will it be?
 - Rep. Marjorie Taylor Greene
- Will earmarks return?
- Reconciliation for budgeting
 - But will still have an appropriations process
- Will the filibuster survive?
- How much spending?
 - Defense

The Biden Administration

Administration Priorities

COVID-19

- Move quickly to contain the COVID-19 crisis.
- Launch a national vaccination program.

Climate

Tackle the climate emergency.

Racial Equity

 Put equity at the center of the agenda with a whole of government approach to embed racial justice across Federal agencies, policies, and programs.

Economy

- Address inequities and provide relief to those who are struggling during the COVID-19 pandemic.
- "Build our economy back better from the pandemic."
- Strengthen small businesses and invest in jobs of the future.

Health Care

- Protect and expand Americans' access to quality, affordable health care.
- Build on the Affordable Care Act to meet the health care needs created by the pandemic, reduce health care costs, and make our health care system less complex to navigate.

Immigration

Reform long-broken and chaotic immigration system.

Restoring America's Global Standing

 Strengthen U.S. national security workforce, rebuild democratic alliances across the globe, champion America's values and human rights, and equip American middle class to succeed in a global economy.

source: White House, https://www.whitehouse.gov/priorities/

Administration Defense Priorities

- Modernization
- Cybersecurity
 - "Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records"
 - COVID Stimulus Fact Sheet: "launch the most ambitious effort ever to modernize and secure federal IT and networks"
- Focus more on unmanned capacity, advanced technology (hypersonics, AI)
 - "in certain areas the budget is going to have to be increased"
- Rebuild relationships with allies
 - "I would make it very clear we were not going to in fact sell more weapons to [Saudi Arabia]"
- Efforts likely to continue
 - Audit
 - IT modernization
 - Data science and analytics
 - Space
 - Adaptive Acquisition Framework

Under a Biden Administration

- Democrats are drawing on a deep bench of qualified people
- Flat or small decrease in Defense budget
 - Pressure from the progressive wing
- Focus on soft power
 - Rebuilding relationships with Allies
- Foreign military sales will include humanitarian considerations
 - "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 socioeconomic policy
- Aggressive Biden stamp on government

Executive Orders

- President Biden signed 30 Executive Orders (as of 2/16/21)
 - Executive Orders related to COVID-19
 - Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (EO 13985), 01/20/2021
 - Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (EO 13988), 01/20/2021
 - Revocation of Certain Executive Orders Concerning Federal Regulation (EO 13992), 01/20/2021
 - Tackling the Climate Crisis at Home and Abroad (EO 14008), 01/27/2021
 - Sec. 206. Procurement Standards. "...shall consider additional administrative steps and guidance to assist the Federal Acquisition Regulatory Council in developing regulatory amendments to promote increased contractor attention on reduced carbon emission and Federal sustainability."
 - Ensuring the Future Is Made in All of America by All of America's Workers (EO 14005), 01/25/2021
- Not waiting for Congress or hesitating to use authority
- Using defense procurement to promote public policy goals

Regulatory Landscape

- FY19 NDAA Section 889 Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment
 - Part A Effective August 13, 2019, the Government cannot obtain (through a contractor or other instrument) certain telecommunications equipment or services provided by Huawei, ZTE, Hytera, Hikvision, Dahua or their affiliates
 - Part B Effective August 13, 2020, the Government cannot contract with an entity that uses telecommunications equipment or services produced by the same Chinese companies (Interim Rule issued July 14)
- Cybersecurity Maturity Model Certification (CMMC)
 - Interim Rule issued September 29, 2020; Effective November 30, 2020
 - Amends DFARS subpart 204.73 Safeguarding Covered Defense Information and Cyber Incident Reporting to implement NIST SP 800–171 DoD Assessment Methodology
 - DoD Assessment good for three years
- The Federal Acquisition Security Council (FASC)
 - Established by the Federal Acquisition Supply Chain Security Act of 2018
 - Interim Rule issued and effective September 1, 2020
 - Developing uniform criteria for supply chain risk management and process for identifying, assessing, and responding to Information and Communication Technology risk, including recommending exclusion and removal of ICT sources
- DoD identified 44 Companies as "Communist Chinese military companies" Pursuant to Sec. 1237 of the FY99 NDAA
 - Sec. 1237 authorizes the President to impose sanctions under the International Emergency Economic Powers Act (IEEPA) on listed entities appear on the list.
- Executive Order 13881 on Maximizing Use of American-Made Goods (Applies as of Feb. 22, 2021)

Manufacturing

- Defense Production Act
 - DoD awarded a \$30 technology investment agreement to Lynas Rare Earths, to help establish domestic processing capabilities for light rare earth elements
 - DOD announced a \$1 million agreement With American Apparel, Inc. to strengthen the domestic clothing and textile industrial base
 - Microelectronics? Semiconductors?
- Truth in Negotiations Act
 - DoD IG and GAO reports
- How do you square attracting commercial companies with security rules and other regulations?

Section 3610 of the CARES ACT

- Authority expires March 31, 2021
- Significant industry support for extending the authority
- Significant industry support for creating a permanent authority for emergencies

Buy American vs Buy Allies

Questions?



Etherton and Associates, Inc.

Services in Federal Relations

In-depth understanding; focused action