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Aerospace & Defense:

Key Provisions of the FY 2023
National Defense Authorization Act
for Government Contractors

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Through Aerospace & Defense Insights, we share with you the top legal and political issues affecting the aerospace and defense (A&D) industry.

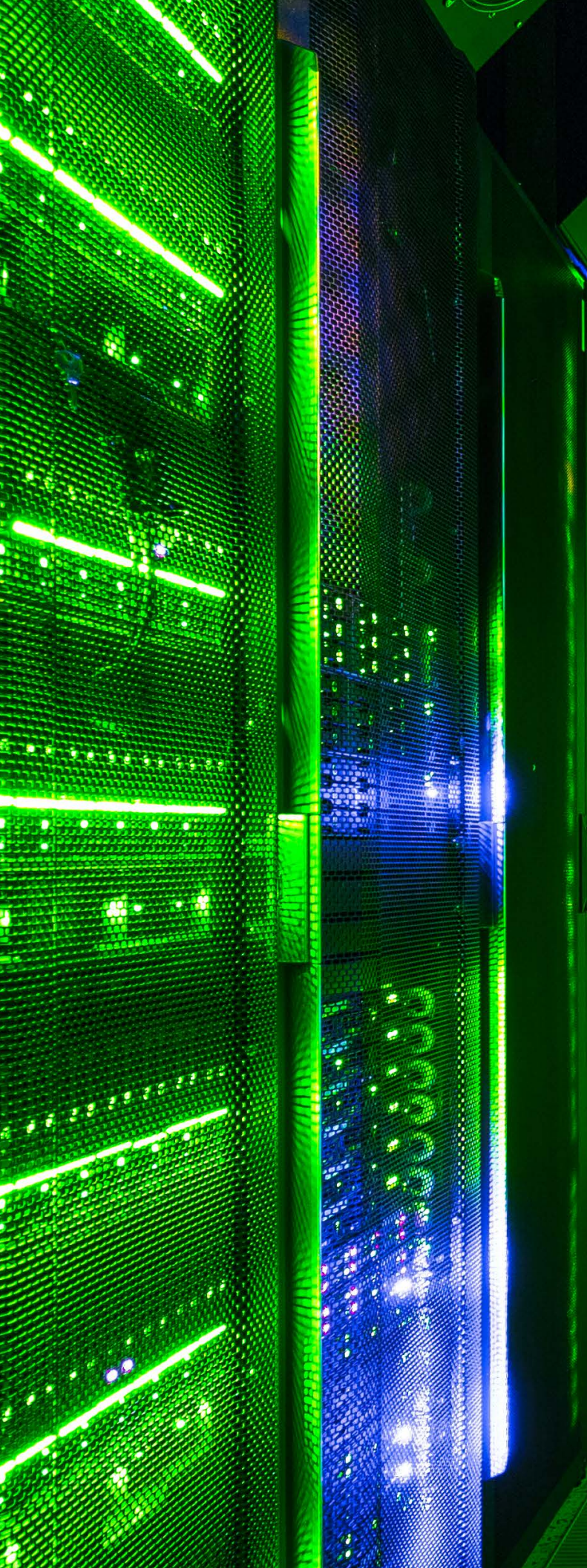
Our A&D industry team monitors the latest developments to help our clients stay in front of issues before they become problems, and seize opportunities in a timely manner.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 was signed into law on 23 December 2022 and contains significant provisions that will drive the federal government's short- and long-term acquisition priorities and policies. In this Aerospace & Defense Insights we address the NDAA provisions that are consequential for federal contractors across several key areas, including enhanced supply chain and cybersecurity restrictions, innovative procurement of technology, expanded Other Transaction (OT) authorities, inflationary relief, and small business contracting.

Supply chain security and domestic preferences

As with years past, the NDAA included a litany of provisions that seek to bolster supply chain security for critical defense products, strengthen domestic manufacturing capabilities, and limit reliance on semiconductors, magnets, and certain other products from China and other foreign adversaries,

- **Section 5949** further restricts executive agencies from procuring, obtaining, or contracting with entities for any electronic parts, products, or services that use covered semiconductor products or services. The NDAA defines "covered semiconductor parts or services" to include semiconductor products that are designed, produced, or provided by (i) Semiconductor Manufacturing International Corporation (SMIC), (ii) ChangXin Memory Technologies (CXMT), and (iii) Yangtze Memory Technologies Corp. (YMTC). The prohibition extends to affiliates and subsidiaries of these entities, as well as any other entity identified by the Secretary of Defense or Commerce as a



risk to national security. Waivers are available (i) if in the critical national security interests of the United States, or (ii) if there is no compliant product or service available at a reasonable cost and such waiver would not compromise U.S. critical national security interests. The prohibition takes effects five years from the NDAA's enactment (December 2027), although the Federal Acquisition Regulatory Council must prescribe implementing regulations, including a flowdown requirement to subcontractors and suppliers, no later than December 2025.

- **Section 817** expands the FY2020 NDAA prohibition on procuring foreign-made unmanned aircraft systems (UAS) from China to now include Russia, Iran, and North Korea.
- **Section 855** prohibits DoD from using appropriated funds to procure products mined, produced, or manufactured wholly or in part by forced labor from the Xinjiang Uyghur Autonomous Region (XUAR) or from an entity that has used labor from within or transferred from XUAR under a “poverty alleviation” or “pairing assistance” program. Within 180 days of the NDAA's enactment, DoD must develop a policy requiring offerors and awardees to make a good faith effort to determine whether XUAR forced labor will be used in performance of the associated DoD contract.
- **Section 857** requires DoD contractors that provide systems including a permanent magnet that contains rare earth elements or strategic and critical materials to disclose the provenance of the magnet with delivery of the system. Contractors must undertake a commercially reasonable inquiry prior to making the required disclosure. The required disclosures must identify the country where (i) any rare earth elements and strategic and critical materials used in the magnet were mined; (ii) such elements and minerals were refined into oxides; (iii) such elements and minerals were made into metals and alloys; and (iv) the magnet was sintered or bonded and magnetized. Contractors who cannot make the required disclosure must establish and implement a supply chain tracking system in order to make the disclosure “to the fullest extent possible”

within 180 days. The Secretary of Defense may waive the tracking requirement if the system is necessary to meet national emergency demands or if a contractor that cannot currently make the disclosure is making “significant efforts” towards compliance. The disclosure requirement goes into effect beginning thirty months from the NDAA's enactment (or June 2025).

- **Section 858** directs DoD to review certain procured items—such as satellite solar components, naval vessel propulsion system components, alternative proteins, and carbon fiber—and provide recommendations to (i) restrict procurement of such items to domestic sources; (ii) increase investment to expand production capacity and diversity sources of supply; and (iii) prohibit procurement of such items from selected sources or nations. The recommendations must consider national security and economic implications.

Cybersecurity

The NDAA advances several cybersecurity initiatives, including protection of critical infrastructure, development of roadmaps and strategies for cyber warfighting, and the much-awaited codification of the Federal Risk and Authorization Management Program (FedRAMP).

- **Section 1506** requires DoD to align its cybersecurity cooperation enterprise and its cyberspace operational partnerships with (i) the 2022 national defense strategy; (ii) DoD's FY 2023 Cyber Strategy; and (iii) DoD's International Cyberspace Security Cooperation Guidance.
- **Section 1509** requires DoD, in consultation with the Commander of the United States Cyber Command, to establish a Joint Cyber Warfighting Architecture (JCWA) program executive office and subordinate offices within the United States Cyber Command. The section defines JCWA as “the range of joint cyber warfighting systems and capabilities that support the full spectrum of military cyber operations, as designated by the Commander of the United States Cyber Command.”
- **Section 1511** allows the President to authorize DoD, acting through the U.S. Cyber Command,

to conduct military cyber activities in foreign cyberspace to deter or defend against foreign cyberattacks if the President determines that there is an active, systematic, and ongoing campaign of attacks in cyberspace by a foreign power against the government or the critical infrastructure of the United States. “Critical infrastructure” means “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”

- **Section 1514** requires the Chief Information Officers (CIOs) of the DoD and military departments to develop and submit plans to ensure that “covered cybersecurity capabilities” are tested, evaluated, and proven operationally effective, suitable, and survivable prior to operation on a DoD network no later than February 1, 2024. “Covered cybersecurity capabilities” include commercial and commercially available off-the-shelf (COTS) items utilized by DoD, as well as certain noncommercial items acquired through the Adaptive Acquisition Framework and deployed by DoD to satisfy the cybersecurity requirements of one or more DoD components.
- **Section 1553** directs DoD to consult with the commercial industry to create and implement a policy and plan to test and evaluate the cloud cybersecurity of commercial cloud service providers that provide, or are intended to provide, storage or computing of classified data of the DoD within 180 days after the NDAA’s enactment. The policy and plan must include a requirement that future contracts with cloud service providers for storage or computing of classified DoD data include provisions that permit DoD to conduct independent, threat-realistic assessments of the commercial cloud infrastructure. The policy and plan must also describe how DoD will amend existing contracts for this requirement, as well as identify and describe any tiered-test and evaluation requirements that align with different impact and classification levels.
- **Section 5921**, the “FedRAMP Authorization Act,” codifies the General Services Administration’s FedRAMP, a government-wide cloud-service provider security assessment and certification program. The Act sets forth a number of statutory mandates and standards to improve efficiency and transparency while reducing costs. Required actions include establishing a “presumption of adequacy” for FedRAMP-certified products and services, as well as establishing a FedRAMP Board and public-private “Federal Secure Cloud Advisory Committee” to streamline implementation and foster stakeholder coordination.

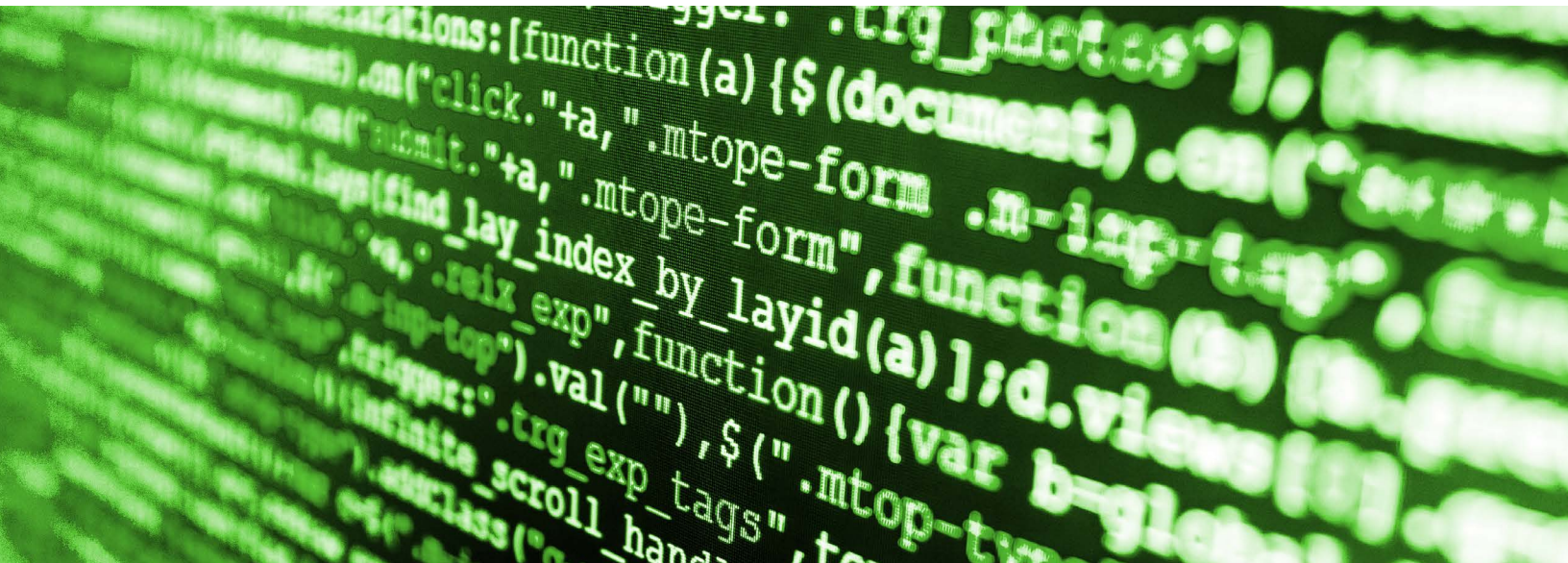
Innovative technology and software procurement

Several provisions in this year’s NDAA aim to improve DoD’s capabilities to procure innovative and critical technologies, advance software acquisition pathways, and negotiate intellectual property (IP) licenses.

- **Section 841** amends 10 U.S.C. § 3791 to require DoD to develop guidelines and resources for IP acquisition and licensing. The new guidance must include: (i) IP strategies to support the use of modular open system approaches; (ii) evaluation and negotiation of IP licenses in competitive and non-competitive awards; and (iii) models and best practices for specially negotiated licenses. DoD must also create definitions, key terms, examples, and case studies to clarify differences between (a) detailed manufacturing and process data; (b) form, fit, and function data; (c) data required for operations, maintenance, installation, and training; (d) modular system interfaces; and (e) technical data pertaining to an interface between an item or process and others necessary to segregate or reintegrate that item or process with other items and processes.
- **Section 846** requires DoD to annually report to Congress on covered software, defined as software developed using a software acquisition pathway established under Section 800 of the FY 2020 NDAA that is delivered during the prior fiscal year. The report must describe covered software being developed using iterative

development as well as the frequency such covered software was delivered. It also must explain why iterative development was not used for any delivered covered software, if applicable.

- **Section 861** directs DoD to develop a comprehensive strategy to (i) increase competitive opportunities available for appropriate U.S. companies to transition critical technologies into major weapon systems and other programs of record; and (ii) enhance integrity and diversity of the defense industry base. “Appropriate U.S. company” means a nontraditional defense contractor, or a prime contractor that has entered into a cooperative agreement with a nontraditional defense contractor with the express intent to seek funding to develop, test, or prototype critical technologies. DoD must provide the comprehensive strategy to congress within one year of the NDAA’s enactment.
- **Section 882** requires DoD to conduct a five-year Security Clearance Bridge Pilot Program to permit the Defense Counterintelligence and Security Agency (DCSA) to sponsor personal security clearances for innovative technology company employees that are performing a DoD contract while company’s facility security clearance is adjudicated. The personal clearances will be transferred to the company upon its receipt of a facility clearance. The section defines “innovative technology company” as a nontraditional defense contractor that (i) provide goods or services related to 14 identified critical technology areas or to information technology, software, or hardware that is unavailable from another cleared entity; or (ii) is selected by DoD to participate. Participation in the pilot program is limited to no more than 75 innovative technology companies.
- **Section 1513** requires DoD to establish priority enterprise projects for data management, artificial intelligence (AI), and digital solutions for business efficiency and warfighting capabilities intended to accelerate decision advantage within DoD. To instill data science and technology as core DoD disciplines, DoD component heads must develop and implement actions to acquire, preserve, and grow the population of government and contractor personnel with expertise in data management, AI, and digital solutions. DoD must also develop and implement cybersecurity and AI solutions including preventative and mitigative technical solutions, red team assessments, and protection of AI systems, data, development processes, and applications from adversary actions.
- **Section 1554** requires the DoD CIO and the U.S. Cyber Command to coordinate with the DoD Chief Digital and Artificial Intelligence Officer, DARPA, NSA, and the Under Secretary of Defense for Research and Engineering, to jointly develop a five-year roadmap and implementation plan for rapidly adopting and acquiring AI systems, applications, and supporting data and data management processes for DoD’s Cyberspace Operations Forces.



Other Transaction Authority

Within the context of continued significant growth of the DoD's use of "Other Transaction" authority, the FY2023 NDAA contains a number of provisions that expand OT authority for basic, applied, and advanced research projects and prototype projects.

- **Section 717** expands DoD's OT authority to carry out studies and demonstration projects relating to the health care delivery system.
- **Section 7227** extends the Department of Homeland Security's OT authority for prototype projects through September 30, 2024.
- **Section 8160** revises the Water Resources Development Act of 1988 to grant the Secretary of the Army OT authority for prototype projects "to support basic, applied, and advanced research activities that are directly relevant to the civil works missions and authorities of the Corps of Engineers."
- **Section 842** amends 10 U.S.C. § 4022 to require a "covered official's" written approval to carry out certain prototype OT projects. Specifically, for follow-on production contracts or transactions expected to exceed \$100 million (including all options), the covered official must determine that (i) the transaction meets the requirements for use of prototype OT authority; and (ii) the use of this authority is essential to meet critical national security objectives. The covered official must also provide written notice to congressional defense committees when exercising this authority. The NDAA defines "covered official" to mean (i) a service acquisition executive; (ii) the Director of the Defense Advanced Research Projects Agency (DARPA); (iii) the Director of the Missile Defense Agency; (iv) the Undersecretary of Defense for Research and Engineering (USDR&E); or (v) the Undersecretary of Defense for Acquisition and Sustainment (USDA&S).
- **Section 843** expands the definition of "prototype project" to include projects that address: (i) proof of concepts, models, or processes, including business processes; (ii) reverse engineering to address obsolescence; (iii) pilot or novel applications of commercial



technologies for defense purposes; (iv) agile development activities; (v) the creation, design, development, or demonstration of operational utility; or (vi) any combination thereof.

Moreover, DoD may establish a pilot program for prototype projects that enhance DoD's ability to prototype the design, development, or demonstration of new construction techniques or technologies to improve military installations or facilities. The NDAA limits pilot participation to no more than two prototype projects that begin each fiscal year, and the aggregate value of all transactions under the pilot program cannot exceed \$200 million. The pilot program will terminate on September 30, 2023.

- **Section 6711** amends 50 U.S.C. § 3024(n) to authorize the Director of National Intelligence (DNI) to exercise DoD's research and development and prototype OT authority to carry out basic, applied, and advanced research projects and prototype projects in support of intelligence activities. The DNI must delegate these authorities to the heads of the intelligence community elements. The section also imposes additional criteria for follow-on production contracts, including intelligence community consultation with government users of the proposed production product or service. Moreover, annually for six years, the DNI must assess and report on whether to provide additional transaction authority (such as the National Aeronautics and Space Administration and the Transportation Security Administration's less restrictive transaction authorities) to the intelligence community heads.

Inflationary relief

Inflation continues to be a concern facing government contractors despite some government efforts in 2022 to provide relief. For instance, in March of 2022, the General Services Administration (GSA) issued a memorandum addressing how contractors performing on firm-fixed-price (FFP) contracts can secure relief by lifting a cap on the number of Economic Price Adjustments (EPA) a company could request. The memorandum granted Contracting Officers (CO) with broader

authority to award EPAs and provided for reviews on a contract-to-contract basis.

In May of 2022, the DoD released its own memorandum, noting certain adjustments the government could make for contractors with cost reimbursement or fixed-price incentive type contracts, but also acknowledging that contractors performing under FFP contracts generally must bear the risk of cost increases, including those due to inflation. In further addressing this issue, DoD released additional guidance advising COs about the range of approaches available to them to make potential accommodations including schedule relief and amending contractual requirements, and in extraordinary circumstances, the use of Extraordinary Contractual Relief for FFP contracts.

In furtherance of these efforts, the NDAA added a new section addressing inflationary relief for DoD contractors and subcontractors:

- **Section 822** temporarily authorizes the DoD to provide inflationary relief to defense contractors through economic price adjustments. Contractors and subcontractors may request inflationary relief for fixed-price contracts when, "solely" due to economic inflation, actual performance costs exceeded the contract or subcontract price. Price adjustments are contingent upon specific congressional appropriations to fund DoD's new inflationary relief authority, and DoD implementation guidance is required within 90 days of such appropriations. DoD's newly granted authority sunsets on December 31, 2023. Section 882 also increases thresholds for approval of any DoD contract adjustment to \$500,000 (from \$50,000) for secretarial level approvals and to \$150 million (from \$25 million) for Congressional notice.

Small business contracting

This year's NDAA contains several provisions of particular interest to small business contractors and businesses that are interested in participating in DoD's Mentor-Protégé Program:

- **Section 856** codifies the DoD Mentor-Protégé Program, which partners small business proteges with "large" defense contractor mentors. The

section seeks to increase program participation by lowering the mentor eligibility threshold from \$100 million to \$25 million in DoD contract and subcontract awards during the prior fiscal year, and extending program participation from two to three years. The section further establishes a five-year pilot Protégé Technical Reimbursement Program to encourage protégé participation in engineering, software development, or manufacturing customization contracts. Participating protégé firms are eligible to receive up to 25 percent of the reimbursement for which the corresponding mentor form is eligible.

- **Section 871** codifies and expands the SBA’s annual Scorecard, which evaluates federal agencies’ success towards achieving their small business contracting goals. Further scorecard reporting requirements now include information regarding sole-source and set-aside awards made to service-disabled veteran-owned small businesses (SDVOSBs), women-owned small businesses (WOSBs), 8(a) small disadvantaged businesses, and businesses located in Historically Underutilized Business Zones (HUBZones).
- **Section 872** clarifies that DoD must implement a due diligence program to assess security risks presented by small businesses identified as the presumptive recipient of a Small Business Innovation Research (SBIR) or Small Business Technology Transfer (STTR) award. The assessment must occur prior to notifying the small business it was selected to receive award, and must scrutinize the entity’s cybersecurity practices as well as any financial ties and obligations to foreign entities.
- **Section 875** directs DoD, by December 31, 2027, to establish a program to assess commercial due diligence tools, techniques, and processes to support small businesses in identifying attempts by malicious foreign actors to gain undue access to, or foreign ownership, control, or influence over small business concerns or technologies. DoD must brief Congress on the program’s status by April 1, 2023, and provide a final report no later than March 1, 2028.

- **Section 7112**, the “Homeland Procurement Reform Act,” requires that, to the maximum extent possible, at least one-third of funds obligated to procure covered items for “frontline operational components” are domestically manufactured or supplied by small business concerns. Additionally, the Department of Homeland Security must provide recommendations to bolster the domestic supply chain for national security-related items.

Looking ahead

The NDAA provides insight into the government’s priorities across cyber and supply chain security, domestic preference requirements, acquisition authorities, and small business contracting, among others. The NDAA also establishes new and expanded opportunities and complex compliance obligations for federal contractors that do business with DoD, military departments, and the Intelligence Community. Contractors that monitor the NDAA’s implementation will be best positioned to navigate the ever-changing regulatory landscape while capitalizing on new and potentially lucrative contracting opportunities.



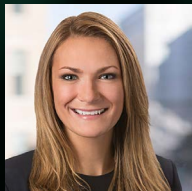
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References

1. See Open FAR Case No. 2023-008, Prohibition on Certain Semiconductor Products and Services, which implements section 5949(a) of the NDAA for FY 2023 (Pub. L. 117-263) to prohibit executive agencies from: 1) procuring or obtaining, or extending or renewing a contract to procure or obtain, any electronic parts, products, or services that include covered semiconductor products or services; or from 2) entering into a contract, or extending or renewing a contract, with an entity to procure or obtain electronic parts or products that include covered semiconductor products or services.
2. See Open DFARS Case No. 2023-D012, Prohibition on Procurement of Foreign-Made Unmanned Aircraft Systems, implementing section 848 of the NDAA for FY 2020 (Pub. L. 116-92), as amended by section 817 of the FY 2023 NDAA (Pub. L. 117-263), to prohibit the procurement of certain foreign-made unmanned aircraft systems by the DoD.
3. See Open DFARS Case No. 2023-D015, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region, which implements section 855 of the NDAA for FY 2023 (Pub. L. 117-263). This new interim rule will address the public comments received in response to the 2022-D008 interim rule which was published at 87 Fed. Reg. 76980 on 16 December 2022.
4. See Open DFARS Case No. 2023-D003, Procurement Requirements for Rare Earth Elements and Strategic Critical Materials, which implements section 857(a) and (b) of the NDAA for FY 2023 (Pub. L. 117-263), to require any contractor that provides a system with a permanent magnet, that contains rare earth elements or strategic and critical materials disclose, after undertaking commercially reasonable inquiry, to safeguard such disclosures in accordance with the applicable classification level required by the associated programs.
5. See Open DFARS Case No. 2023-D006, Modification of Authority of the Department of Defense to Carry Out Certain Prototype Projects, which implements section 842 of the NDAA for FY 2023 (Pub. L. 117-263) which removes a requirement for an other transaction solicitation and agreement to include provisions for a follow on contract in order to qualify for the exception at DFARS 206.001-70.

Face Tracking and Recognition

Debug mode: Enabled

Analyzing video input...
Tracking facial features...
Tracking eye movement.

```

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        CPU[CPU]
        GPU[GPU]
      end
      subgraph Core
        Processor[Processor]
      end
      subgraph Outputs
        Display[Display]
        Audio[Audio]
      end
      Cam --> Processor
      CPU --> Processor
      GPU --> Processor
      Processor --> Display
      Processor --> Audio
  
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Video Output	1080i30
Audio Output	1080i30

Debug Output

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14 ur viverra dictum.
15
16   a enim, sit amet sollicitudin nisi tincidunt at. Quisque quis turpis sit amet nisi euismod dictum in
17
18
19 sed arcu. Vestibulum sed ultrices ligula. Pellentesque
20 >volutpat imperdiet fringilla. Phasell
21
22
23
  
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Output Results

Input 1, Input 2, Output 1, Output 2

Debug Log

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Track Interrupted		skip
Recognition successful		skip
No Errors Recorded		skip
Track Interrupted		skip
Recognition successful		skip
No Errors Recorded		skip
Track Interrupted		skip
Recognition successful		skip
No Errors Recorded		skip
Track Interrupted		skip
Recognition successful		skip

Network Monitoring

System | Analysis

```

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local PageName = info PageName == "http://www.1000.com/"
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local PageName = info PageName == "http://www.1000.com/"
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return PageName
  
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Johannesburg
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Paris
Philadelphia
Riyadh*
Rome
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