

Recent Developments in Acquisition Policy

February 25, 2020

Jon Etherton

Etherton and Associates, Inc.



Etherton and Associates, Inc.

Services in Federal Relations

In-depth understanding; focused action

Agenda

- FY20 NDAA issues
- Current DoD approach to acquisition reform
- Regulatory developments
- Outlook for 2020

Acquisition and related policy issues in the FY20 NDAA

- Supply Chain Risk
- Data Rights
- Software Acquisition
- Debriefing and Bid Protest
- Truth in Negotiations Act
- Commercial Acquisition
- Acquisition Workforce
- Contract Type
- Socio-economic Issues
- Streamlining and Miscellaneous
- Security Clearance Reform

Supply Chain Risk (Industrial Base)

- Sec. 847. Mitigating risks relating to foreign ownership, control, or influence of Department of Defense contractors or subcontractors. (S833)
 - Requires DoD to amend and regulation to enhance the process for assessing and mitigating risks related to foreign ownership, control or influence (FOCI), including:
 - a requirement for covered contractors and subcontractors determined to be under FOCI to disclose contact information for each of its foreign owners that is a beneficial owner, and
 - procedures for contracting officers making responsibility determinations regarding whether covered contractors and subcontractors may be under FOCI and for determining whether there is reason to believe that such FOCI would pose a risk or potential risk to national security or potential compromise because of sensitive data, systems, or processes, such as personally identifiable information, cybersecurity, or national security systems involved with the contract or subcontract.

Supply Chain Risk (Industrial Base)

- Sec. 848. Prohibition on operation or procurement of foreign-made unmanned aircraft systems. (H854/H899D/S863)
 - Prohibits DoD from operating, or entering into or renewing a contract for a UAV system, including related services and equipment, that is manufactured or uses components, software, or network connectivity manufactured or domiciled in China.
 - Exempts from the restriction the operation or procurement of a covered UAV system for purposes of counter-UAS surrogate testing and training, or intelligence, electronic warfare operations, testing analysis and training.
 - Grants DoD national interest waiver authority from the restriction on a case-by-case basis.

Supply Chain Risk (Cyber)

- Sec. 1633. Evaluation of cyber vulnerabilities of major weapon systems of the Department of Defense. (H1625)
 - Modifies section 1647 of the FY16 NDAA (requiring evaluations of cyber vulnerabilities of each major weapon system by December 31, 2019) to require a notification and justification for not meeting the deadline.
 - Requires the USD (A&S) to provide Congress a comprehensive report upon completion of the evaluation of cyber vulnerabilities for each major weapon system to include vulnerabilities identified requiring mitigation, mitigation efforts, leveraging lessons learned across DoD and the incorporation of lessons learned to address the likelihood of cyber vulnerabilities in major weapon systems through changes earlier in the acquisition cycle.

Supply Chain Risk (Cyber)

- Sec. 1648. Framework to enhance cybersecurity of the United States defense industrial base. (H1631/S1634)
 - Requires DoD to develop a consistent, comprehensive framework to enhance the cybersecurity of the U.S. defense industrial base by February 1, 2020 and to brief Congress on the framework by March 11, 2020.
 - Requires DoD, in developing the framework, to consult with industry groups and contractors as well as the Director of the National Institute of Standards and Technology (NIST).
 - The framework is required to include:
 - Identification of cybersecurity standards and requirements imposed on the defense industrial base;
 - Responsibilities of the prime contractor and all subcontractors in the supply chain for implementing those standards and requirements;
 - A plan to provide cybersecurity guidance and assistance to contractors; and
 - Methods and programs for defining and managing controlled unclassified information.
 - Requires that DoD
 - Provide a plan that includes direct technical support or assistance to contractors in complying with the new framework;
 - Consider how to tailor cybersecurity requirements for small contractors based on risk;
 - Consider how to provide additional assistance to small companies; and
 - Evaluate both incentives and penalties for prime contractors and subcontractors for cybersecurity performance.
 - Requires DoD to provide quarterly updates on the status of the development and implementation of the framework.
- Sec. 1651. Reorientation of Big Data Platform program. (S1631)
 - Requires DoD to reorient its Big Data Platform program by establishing a common baseline and security classification scheme for the collection, querying, analysis, and accessibility of a common and comprehensive set of metadata from sensors, applications, and systems deployed across the Department of Defense Information Network.

Data rights

- Sec. 801. Pilot program on intellectual property evaluation for acquisition programs. (H861(b)/S801)
 - Authorizes DoD and the Services within 180 days of the enactment of the NDAA to carry out a pilot program to assess mechanisms to evaluate intellectual property, such as technical data deliverables and associated license rights, including commercially available intellectual property valuation analysis and techniques, in acquisition programs to better understand the benefits on:
 - the development of cost-effective intellectual property strategies, and
 - assessment and management of the value and costs of intellectual property during acquisition and sustainment activities (including source selection evaluation factors) throughout the acquisition lifecycle.
 - Authorizes the following activities under the pilot:
 - Establishing a team of Department of Defense and private sector subject matter experts to identify at each milestone intellectual property evaluation techniques to obtain analysis related to the value of intellectual property during all program system acquisition phases.
 - Assessment of commercial valuation techniques for intellectual property for use by the Department of Defense.
 - Assessment of the feasibility of agency-level oversight to standardize intellectual property evaluation practices and procedures.
 - Assessment of contracting mechanisms to speed delivery of intellectual property to the Armed Forces or reduce sustainment costs.
 - Assessment of acquisition planning to ensure procurement of intellectual property deliverables and intellectual property rights necessary for Government-planned sustainment activities.
 - Engagement with the commercial industry to:
 - Support the development of strategies and program requirements to aid in acquisition and transition planning;
 - Support the development and improvement of intellectual property strategies as part of life-cycle sustainment plans; and
 - Propose and implement alternative and innovative methods of intellectual property valuation, prioritization, and evaluation techniques for intellectual property.
 - Recommending to the program manager evaluation techniques and contracting mechanisms for implementation into the acquisition and sustainment activities of that program.
 - Requires that the pilot program provide criteria to ensure the appropriate consideration of commercial items and non-developmental items as alternatives, including benefits of reduced risk in cost, schedule, and performance associated with such items, products, and services.
 - Requires annual pilot program assessments to the defense committees beginning in November 2020 through 2023.

Data rights

- Sec. 808. Repeal of continuation of data rights during challenges. (H812)
 - Repeals sec. 866 of the FY19 NDAA that provides that, upon filing of a suit or appeal under the contract dispute statute by a contractor or subcontractor in an agency Board of Contract Appeals or United States Claims Court related to a decision made by a contracting officer to challenge restrictive IP markings, the Secretary of Defense, or a Secretary of a military department for programs for which milestone decision authority has been delegated, may, following notice to the contractor or subcontractor, authorize use of the technical data in dispute if such Secretary determines in writing that compelling mission readiness requirements will not permit awaiting the final decision by the agency Board or Claims Court.

Software Acquisition

- Sec. 800. Authority for continuous integration and delivery of software applications and upgrades to embedded systems. (H801/S852)
 - Requires DoD within 180 days of enactment of the NDAA to establish pathways to provide for the efficient and effective acquisition, development, integration, and timely delivery of secure software, including the use of proven technologies and solutions to continuously engineer and deliver capabilities in software.
 - Requires such new pathways to use expedited acquisition and requirements processes.
 - Requires the pathways provide for the use of rapid development and implementation of software applications to be used with commercially commodity hardware or upgrades for embedded weapon systems or other military unique hardware system.
 - Requires pathway contracts to be exempt from Joint Capabilities Integration and Development System Manual and treatment as a major program under Department of Defense Directive 5000.01.
 - Requires DoD to issue implementation guidance within 90 days of the enactment of the NDAA and provide a report to Congress by 10/15/20 on the use of the authority.

Debriefing and Bid Protest

- Sec. 874. Postaward explanations for unsuccessful offerors for certain contracts. (H884)
 - Requires that the Federal Acquisition Regulation be revised to require that with respect to an offer for a task order or delivery order in an amount greater than the simplified acquisition threshold (currently \$250K) and less than or equal to \$5.5M issued under an IDIQ, the contracting officer, upon written request from an unsuccessful offeror, provide a brief explanation why such offeror was unsuccessful that includes a summary of the award rationale and an evaluation of the significant weak or deficient factors in the offeror's offer.

Commercial acquisition (e-commerce)

- Sec. 827. Requirement for cost estimates on models of commercial e-commerce portal program. (H891)
 - Amends section 846 of the FY18 NDAA to require GSA to submit to Congress within one year of the initial e-marketplace contract award a cost estimate for the three commercial e-commerce portals identified in section 4.1 of “Procurement Through Commercial E-Commerce Portals Phase II Report: Market Research & Consultation” issued by the Administrator in April 2019.

Contract Type

- Sec. 807. Department of Defense use of fixed-price contracts. (S807)
 - Requires the USD (A&S) to review how DoD uses fixed-price contracts, including fixed-price incentive contracts, to support acquisition objectives with a requirement to brief Congress on the results of the review by 2/1/21.
 - Requires GAO by February 1, 2021 to submit a report to Congress on DoD use of fixed-price contracts over time, to include costs, incentives, duration, and close-out procedures, to the congressional defense committees.
 - Delays implementation of regulations requiring the use of fixed-price contracts for foreign military sales until 12/31/20.

Socio-economic issues

- Sec. 823. Modification of justification and approval requirement for certain Department of Defense contracts. (H830/S842)
 - Would increase from \$20M to \$100M the contract value threshold requiring a formal justification and approval for DoD sole source contract awards to Alaskan Native and Hawaiian Native Corporations.
 - Requires a GAO report to Congress by 3/1/22 on the impact of the change on the Alaskan Native and Hawaiian Native Corporations.
- Sec. 870. Requirements relating to credit for certain small business programs. (H873)
 - Amends 15 USC 637(d) to clarify that large prime contractors have the ability to receive subcontracting credit for small businesses at lower tiers under the following formula:
 - Contractors under the comprehensive small business subcontracting plan may claim credit for the value of small subcontracts at the first tier.
 - Contractors with single contract subcontracting plans may claim credit for the value of subcontracts at ant tier.
 - Strengthens the agency's ability to collect and review data regarding prime contractors' achievement of their subcontracting plans.
 - Requires the prime contractor to keep and maintain records to demonstrate subcontracting credit claimed.

Socio-economic issues

- Sec. 870. Requirements relating to credit for certain small business programs. (H873)
 - Reauthorizes new agreements under the DoD Mentor-Protege pilot program through the end of FY24, but limits them to two-year duration.
 - Permits cost reimbursement and subcontract credits for mentor firms through FY26.
 - Requires DoD to put in place more explicit performance metrics for the program.
- Sec. 873. Accelerated payments applicable to contracts with certain small business concerns under the Prompt Payment Act. (H883)
 - Amends 31 USC 3903 to incorporate the accelerated pay requirements in 10 USC 2307 for contracts and subcontracts with small business.
- Sec. 875. Small business contracting credit for subcontractors that are Puerto Rico businesses. (H888/889)
 - Amends amend 15 USC 644(x) to provide a double credit to prime contractors for the award of subcontracts to small businesses in Puerto Rico, US Virgin Islands, American Samoa, Guam, or the Northern Mariana Islands.

Streamlining and miscellaneous

- Sec. 810. Repeal of the Defense Cost Accounting Standards Board. (H834)
 - Repeals 10 USC 190 establishing the Defense Cost Accounting Board.
- Sec. 816. Modification of written approval requirement for task and delivery order single contract awards.(S803)
 - Amends 10 USC 2304a(d)(3) to eliminate the requirement that single award task or delivery order contracts over \$100M receive additional approval when already authorized under one of the exceptions to full and open competition.

Security clearance reform

- Sec. 5402. Making certain policies and execution plans relating to personnel clearances available to industry partners.(S9314)
 - Requires the Security Executive Agent and the Director of the NISP within 90 days after the enactment of the NDAA to jointly develop policies and procedures by which appropriate industry partners (a contractor, licensee, or grantee participating in the National Industrial Security Program) with proper security clearances and a need to know can have access to the policies and plans that directly affect them.
 - Requires each head of a Federal agency to share policies and plans relating to security clearances with appropriate industry partners directly affected by such policies and plans in a manner consistent with the protection of national security as well as the goals and objectives of the National Industrial Security Program.

Security clearance reform

- Sec. 6602. Reports and plans relating to security clearances and background investigations. (S10602)
 - Requires the interagency Performance Accountability Council to develop and provide plans to Congress and industry within 90 days of the enactment of the bill to reduce the background investigation inventory to 200K by the end of 2020 and a plan to consolidate the conduct of background investigations associated with the processing for security clearances in the most effective and efficient manner in the Defense Counterintelligence and Security Agency.
 - Requires the DNI to notify Congress and appropriate industry partners quarterly status of the disposition of requests received from Federal agencies for a change to, or approval under, the Federal investigative standards, the national adjudicative guidelines, continuous vetting, or other national policy regarding personnel security.
- Sec. 6603. Improving the process for security clearances. (S10603)
 - Requires the DNI within 180 days of the enactment of the bill to provide a report to Congress and appropriate industry partners on a mandated review of the Questionnaire for National Security positions (SF-86) and the Federal Investigative Standards to determine potential unnecessary information required and assessment of whether revisions are necessary to account for insider threats and the establishment, in coordination with the Council, of policies on interim clearances and consistency between the clearance process for contract and government personnel.
- Sec. 6604. Goals for promptness of determinations regarding security clearances. (S10604)
 - Requires the PAC to develop and implement a plan by December 31, 2021 to be able to process 90 percent of clearance requests at the Secret level in 30 or fewer days, and at the Top Secret level in 90 or fewer days.
 - Requires the PAC to reform the process by December 31, 2021 reinvestigation on a set periodicity is not required for more than 10 percent of the population that holds a security clearance.

Security clearance reform

- Sec. 6606. Report on unified, simplified, Governmentwide standards for positions of trust and security clearances.(S10606)
 - Directs the Security Executive Agent and the Credentialing Executive Agent within 90 days after the enactment of the NDAA to report jointly to congress and appropriate industry partners on the advisability and implications of consolidating the tiers for positions of trust and security clearances from five to three tiers.
- Sec. 6607. Report on clearance in person concept. (S10607)
 - Requires the Security Executive Agent to submit a report within 90 days of the enactment of the NDAA to Congress and appropriate industry partners on a concept whereby an individual can maintain eligibility for access to classified information for up to three years after access may lapse.

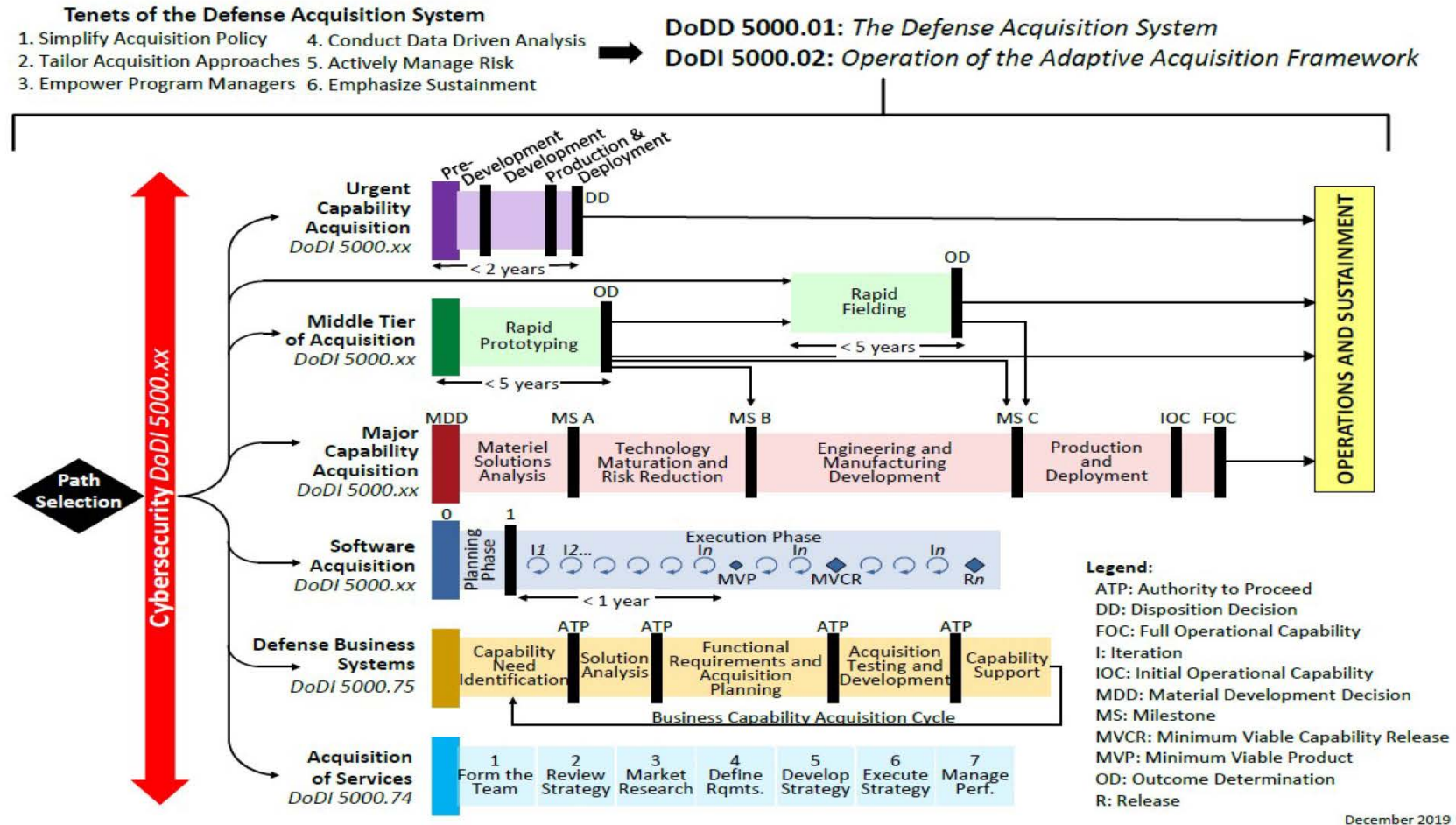
Security clearance reform

- Sec. 6608. Reports on reciprocity for security clearances inside of departments and agencies. (S10609)
 - Requires each federal agency to submit a annual report to the Security Executive Agent that identifies the number of clearances that take more than two weeks to reciprocally recognize and set forth the reason for any delays.
 - Requires the Security Executive Agent each year to submit a report to Congress and appropriate industry partners of such information across Federal agencies.
- Sec. 6609. Intelligence community reports on security clearances. (S10610)
 - Requires the DNI to submit a report on each IC element's security clearance metrics, segregated by Federal employees and contractor employees.
- Sec. 6611. Information sharing program for positions of trust and security clearances. (S10611)
 - Requires the Security Executive Agent and the Suitability and Credentialing Executive Agents within 90 days of the enactment of the NDAA to implement a program with appropriate privacy safeguards to share information between and among government agencies and appropriate industry partners to inform decisions about positions of trust and security clearances.

DoD – New Approaches to Reform

- Speed for relevance
 - Maximum use of middle tier of acquisition, rapid prototyping, OTAs
 - Rewrite 5000 series to force MDAP requirements to minimum and create on-ramps for OTAs and sec. 804 Middle Tier starts
 - Collapse requirements and acquisition processes (Futures Command)
- Capturing Innovation
 - Reorient industry to development versus sustainment (Air Force)
 - Rapid software development pathway
 - Interface with Silicon Valley (DIU)
 - Additive manufacturing
- Management savings
 - Reliance on private sector systems (JEDI, E-commerce portals)
 - Focus reducing sustainment costs
 - Fourth Estate review
- Secure the supply chain
 - Cyber/CUI/CMMC
 - Exclusion of foreign technology
 - Trusted capital marketplace
- Scalability of solutions

Figure 1. Adaptive Acquisition Framework



DoD 5000 Rewrite - Adaptive Acquisition Framework

In addition to releasing instruction 5000.02 – *Operation of the Adaptive Acquisition Framework* on 1/23/20, DoD has issued updated policy for five of the six pathways:

- *Operation of Middle-tier of Acquisition (5000.80) – 12/30/19*
- *Urgent Capability Acquisition and Software Acquisition Interim Policy (5000.81) – 12/31/19*
- *Interim Software Acquisition Pathway (memorandum) – 1/3/20*
- *Defense Acquisition of Services (5000.74) – 1/10/20*
- *Business Systems Requirements and Acquisition (5000.75 Change 2) – 1/24/20*

DoD 5000.02 - Operation of the Adaptive Acquisition Framework on Transition

Transition from Rapid or Middle Tier to Major Capability Acquisition assigned to the Program Manager, who is responsible for:

- Defining the transition points from one pathway to another pathway.
- Anticipating, developing, and coordinating the information requirements required at the new pathway entry point.
- Ensuring a smooth transition.

Regulatory developments

- FAR
 - Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (Sec. 889 (a)(1)(a))– proposed rule 8/13/19
 - Proposed rule on companies using that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system (Sec. 889 (a)(1)(b)) - pending
- DFARS
 - OTA Follow-on Production – proposed rule 9/26/19
 - LPTA – Final rule 9/28/19
 - Technical Data Rights – Public meetings on 11/15/19, 11/21/19, 12/20/19, and 2/18/20 with more in pipeline
 - DoD public meeting on FY19 NDAA section 889 (a)(1)(b) implementation on 3/2/20.
- DoD
 - Release of the Cybersecurity Maturity Model Certification (CMMC) version 1.0 – 1/31/20
 - DoDI 5010.44 on IP acquisition and licensing – 10/16/19
- GSA
 - Mass Modification for All Schedule Contracts to Add New Clauses Prohibiting Use of Covered Telecommunications Equipment – 9/9/19
 - Solicitation for e-marketplace portal – 10/1/19

Bloomberg's Top Five Trends That will Shape Federal Contracting in 2020

- Best in Class: IT Consolidation
- Multiple Award Schedule Consolidation
- Government Buying “As a Service”
- Small Business Runway Extension Act Will Begin Affecting Contracts
- Cybersecurity Will Become the Cost of Doing Business

Congressional policy outlook for 2020 – Reform Fatigue?

- Early FY21 NDAA markups in House and Senate Armed Services Committees.
 - HASC – April 22-30.
 - SASC – May 19-21
- Rep. Thornberry will have another draft reform bill in late March.
- Issues
 - PPBES reform
 - Requirements process
 - IP
 - Sec. 809 Panel, DIB SWAP, Sec. 813 Panel recommendations
 - Flexible contracting (OTA, etc.)