

Continuing the series of articles exploring the 2018 NDAA, courtesy of Bob Antonio's [annual analysis](#)

of the final language. As noted in the prior article, we are not going to talk about every single little thing. We're going to talk about stuff that interests us. You may want to do your own research, using the link above. Today's article is going to focus on stuff related to Intellectual Property.

As you may know, 2016 and 2017 saw a number of attempts by the DoD to attack contractors' ownership and control of their IP rights. Let's see how the 2018 NDAA reacts to those attempts.

Section 803 requires the Secretary of Defense and the USD (A,T&L) to—

... develop policy on the acquisition or licensing of intellectual property--(1) to enable coordination and consistency ...in strategies for acquiring or licensing intellectual property and communicating with industry; (2) to ensure that program managers are aware of the rights afforded the Federal Government and contractors in intellectual property and that program managers fully consider and use all available techniques and best practices for acquiring or licensing intellectual property early in the acquisition process; and (3) to encourage customized intellectual property strategies for each system based on, at a minimum, the unique characteristics of the system and its components, the product support strategy for the system, the organic industrial base strategy of the military department concerned, and the commercial market.

What all that seems to mean is that we should expect to see DFARS rule-making focusing on IP decisions “early in the acquisition process,” and acknowledging that one size does not fit all in these matters.

Section 803 further requires SECDEF to “establish a cadre of personnel who are experts in intellectual property matters [so as to] ensure a consistent, strategic, and highly knowledgeable approach to acquiring or licensing intellectual property by providing expert advice, assistance, and resources to the acquisition workforce on intellectual property matters ...”

There is very explicit direction in Section 803 telling SECDEF and USD (A,T&L) how to go about creating this cadre of IP experts, and what they should be doing, and how they should be doing it.

Almost as if Congress doesn't trust DoD in this area.

Section 835 requires the DOD “to work with contractors to determine prices for technical data the Department plans to acquire or license before selecting a contractor for the engineering and manufacturing development phase or the production phase of a major weapon system. Additionally, this provision would encourage program managers to negotiate with industry to obtain the custom set of technical data necessary to support each major defense acquisition program rather than, as a default approach, seeking greater rights to more extensive, detailed technical data than is necessary.”

In our view, Section 835 seems to complement Section 803 nicely.

Section 871 focuses on technical data in acquisition of software. Section 872 directs SECDEF to have the Defense Innovation Board initiate a study on “streamlining software development and acquisition regulations.” The DIB report is due one year after SECDEF provides direction to the DIB.

Congress is (apparently) so concerned about software development that Sections 873, 874, and 875 each provide for “pilot programs” to streamline the process and (by direction) lower program costs. What's up with all this concern? According to the Conference Report—

The conferees note that the Department of Defense's warfighting, business, and enterprise capabilities are increasingly reliant on or driven by software and information technology. The conferees note with concern that the Department is behind other federal agencies and industry in implementing best practices for acquisition of software and information technologies, to include agile and incremental development methods. The conferees note that existing law and acquisition regulation provide significant flexibility to the Department and that the Department has explicitly provided for tailoring in its acquisition directives and instructions. The conferees note with concern that the organizational culture and tradition of acquiring capabilities using a hardware-dominant approach impedes effective tailoring of acquisition approaches to

The 2018 National Defense Authorization Act—IP Stuff

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incorporate agile and incremental development methods.

As always, we strongly suggest you do your own research. The three separate articles we've authored this year are what caught our eyes; perhaps you will find something we missed. If so, feel free to bring it to our attention.