

# What to Expect in 2025 Government Contracting

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## Your Panelists:



Bill Walter

Managing Director

GovCon Contracting

P: 703.970.0509

[bill.walter@us.forvismazars.com](mailto:bill.walter@us.forvismazars.com)

**Jason Workmaster**

Member

P: 202.626.5893

[jworkmaster@milchev.com](mailto:jworkmaster@milchev.com)





## Agenda

1. Introductions
2. Legislative Branch
3. Executive Branch
4. Judicial Branch

# 01

## Legislative Branch

Impact of legislation on government contracts.



# 2025 National Defense Authorization Act (NDAA)

## Authorizes \$895 billion in funding for Department of Defense (DoD)

- Acquisition & Contracting Provisions
- Sec. 803: amends 10 U.S.C. § 3372(b) to clarify that a unilateral price definitization by a contracting officer is an appealable final decision under the Contract Disputes Act
- Sec. 804: codifies the middle tier acquisition pathway, authorizing continuous iterative prototyping and fielding for that product for an unlimited number of 5-year periods
- Sec. 805: codifies and streamlines DoD's existing software acquisition pathway
- Sec. 814: clarifies that a DoD contract or subcontract for a product or service acquired under FAR part 12 shall serve as a prior commercial product or commercial service determination, even when subject to minor modifications

# 2025 National Defense Authorization Act (NDAA)

## Acquisition & Contracting Provisions (cont'd)

- Sec. 815: permits nontraditional defenses contractors to submit recent prices paid instead of cost or pricing data for subcontracts not expected to exceed \$5 million
- Sec. 817: clarifies that a follow-on production award may be provided for in an other transaction (OT) for a prototype project, and that a follow-on production project may be awarded through one or more separate contracts, OTs, or combination thereof
- Sec. 824: extends temporary authority to modify contracts based on effects of inflation until December 31, 2025

# 2025 National Defense Authorization Act (NDAA)

## Supply Chain and Domestic Sourcing Provisions

- Sec. 848: directs DoD to develop and maintain a list of all domestic nonavailability determinations for items under the Berry Amendment
- Sec. 849: directs DoD to develop and implement policies to incentivize DoD contractors to assess and monitor their entire supply chain for goods and services provided to DoD

## Industrial Base Provisions

- Sec. 861: codifies and revises pilot program to accelerate the procurement and fielding of innovative technologies
- Sec. 863: extends pilot program for streamlining awards for innovative technology projects to small businesses and nontraditional defense contractors (NDCs)
- Sec. 864: establishes pilot program authorizing DoD contracting officers to use alternative capability-based analysis to determine whether the proposed price of a commercial product or commercial service offered by a NDC is fair and reasonable

# 2025 National Defense Authorization Act (NDAA)

## Artificial Intelligence (AI) Provisions

- Secs. 236 and 237: establish two pilot programs to evaluate the feasibility of developing AI for national security-related biotechnology applications and the optimization of certain DoD workflows and operations
- Sec. 1007: permits DoD to utilize AI technology to facilitate the audit of DoD financial statements
- Sec. 1087: directs DoD to establish a working group to develop AI initiatives for defense with U.S. allies

## Misc. Provisions

- Sec. 885: directs GAO to submit a proposal that includes (i) a process for enhanced pleading standards, (ii) benchmarks demonstrating the average costs of protests to DoD and GAO, and the costs of the lost profits rates of the contract awardee while performance is stayed due to the protest, and (iii) a process for payment by an unsuccessful protester to the Government and the awardee based on the benchmarks



# Congressional Review Act

The CRA, 5 U.S.C. §§ 801-808, was enacted as part of the Small Business Regulatory Enforcement Fairness Act in 1996

- Two Functions
  - Requires federal agencies to report their rulemaking activities to Congress and GAO before taking effect; and
  - Provides Congress with a set of procedures to disapprove of certain rules
- Includes final and interim final rules, but also agency interpretive rules, statements, and guidance documents

# Congressional Review Act

## Once a rule is submitted to Congress, any member can introduce a Joint Resolution of Disapproval

- A simple majority in both the House and Senate is needed for the measure to head to the President's desk
- If the President vetoes a resolution, a two-thirds majority in both chambers is necessary to override the veto

## If successfully disapproved:

- The rule in question is prohibited from either going into effect or continuing in effect immediately and “shall be treated as though the rule had never taken effect”
- The promulgating federal agency is prohibited from “reissuing” the same regulation in the future or developing a regulation that is “substantially” similar

# Congressional Review Act

- Typically, Congress has 60 days from when a rule is published in the Federal Register to use the disapproval procedure
- Lookback provision: gives Congress an additional chance to review rules issued in the period starting 60 working days before the end of a session of Congress through the beginning of the subsequent session of Congress
- Last year, the Congressional Research Service estimated that the lookback period will enable the 119th Congress to review all final rules published after August 1, 2024

# Congressional Review Act

## Over 250 joint resolutions of disapproval have been introduced in Congress

- CRA use trending upwards over time, with a spike at beginning of President Trump's first term
- 20 resolutions have resulted in successful repeal of a final rule
- 2017: 115th Congress repealed 16 final rules promulgated during end of President Obama's Administration
- 2021: 117th Congress repealed 3 final rules promulgated during end of President Trump's Administration
- 2025: ?

# 02

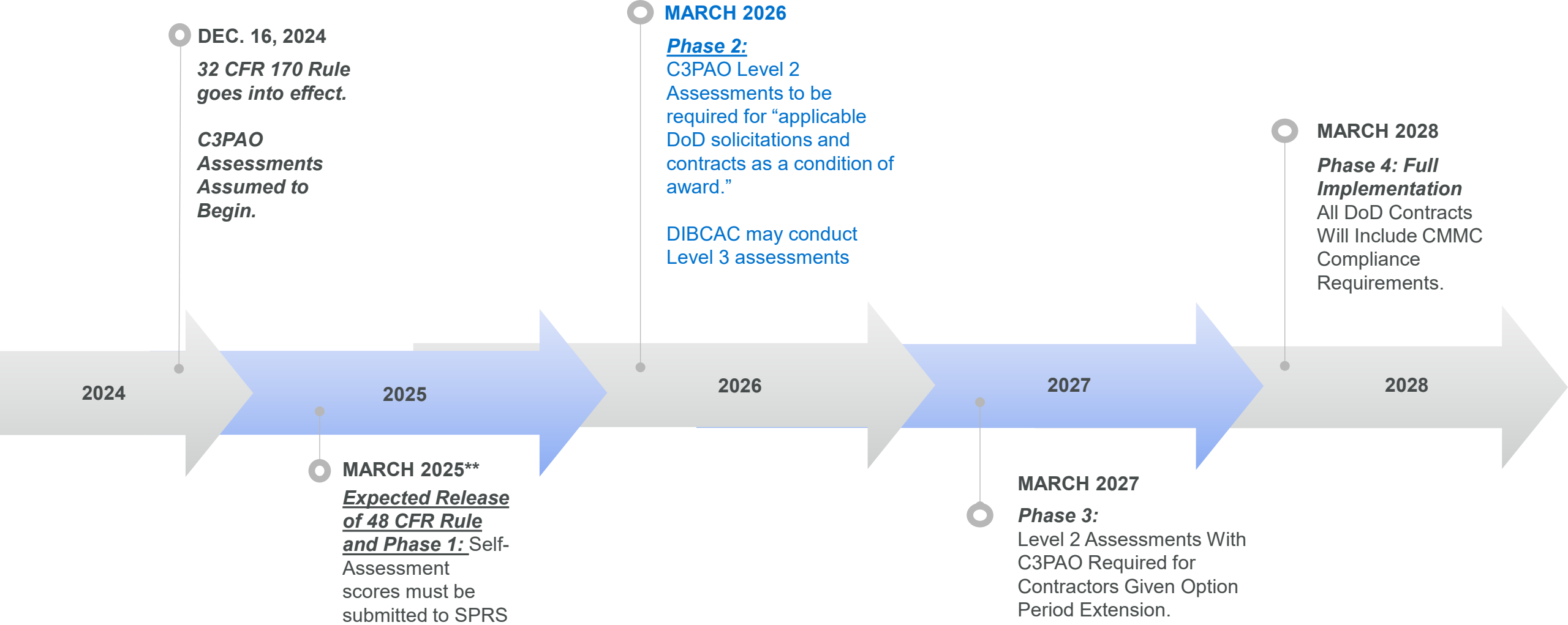
## Legislative Branch

Potential impact of new regulations and enforcement actions.



# CMMC Rollout Timeline

The Final 32 CFR 170 and Proposed 48 CFR rules have laid out key milestones for the requirement of CMMC compliance.



\*\*All dates assume March 2025 issuance of the 48 CFR rule.

# CMMC Program Levels

CMMC Model 2.0		Model	Assessment
<b>LEVEL 3</b> Expert	<b>110+</b> practices based on NIST SP 800-172	Triennial government-led assessments	
<b>LEVEL 2</b> Advanced	<b>110</b> practices aligned with NIST SP 800-171	Triennial third-party assessments for critical national security information; Annual self-assess- ment for select programs	
<b>LEVEL 1</b> Foundational	<b>17</b> practices	Annual self-assessment	

## Level 1

- Contractors handling Federal Contract Information (FCI)
- Represents “Foundational” security practices

## Level 2

- Contractors processing, storing, or handling CUI as part of a DoD contract
- Represents “Advanced” security practices

## Level 3

- Applicable to contractors processing, storing, or handling CUI associated with the most sensitive DoD programs

# Highlights of the 32 CFR Part 170 CMMC Rule

***Joint Surveillance Voluntary Assessments (JSVAs) Convert to CMMC Level 2 Certifications.*** Assessments that were performed under the JSVA program with DCMA will convert to Level 2 certifications with a standard three-year lifecycle, effective from the completion date of the assessment.

***The JSVA program is now retired.*** DCMA has indicated that no more JSVAs will be scheduled through the rest of the year. Contractors needing a CMMC Level 2 certification will need to engage with a C3PAO directly in order to schedule and conduct the assessment. These are likely to begin at the end of 2024 or early 2025.

***Revision 2 of NIST 800-171 Lives On ... For Now.*** The aging version of the NIST 800-171 will continue to be used as the basis for CMMC assessments and certification at Level 2. Though revision 3 has been released, DoD has not incorporated the newer requirements into the CMMC program, but could in the future, using a class deviation from the rule.

***CMMC Certifications Are Required Every Three Years.*** As expected CMMC certifications at Levels 1 and 2 carry a three-year life cycle. For Level 2 certifications, the “off years” 2 and 3 will necessitate the contractor to “affirm” that they remain compliant with all requirements of their CMMC certification, including compliance with NIST 800-171 Rev. 2.



# Highlights of the 32 CFR Part 170 CMMC Rule

***Managed Service Providers (MSPs) may no longer be required to obtain a CMMC certification.*** Where MSPs have no direct access to CUI, a CMMC certification matching that of their customer will no longer be required. Instead, MSPs can provide a Shared Responsibility Matrix and be included in the scope of their customers CMMC assessment. External Service and Cloud Service Providers who do transmit, process, or store CUI on behalf of a contractor will still be required to achieve the requisite certification level.

***Endpoints Accessing Virtual Desktop Infrastructure (VDIs) From Outside the CUI Boundary May Not Be in Scope:*** Organizations using endpoints to access virtual desktops from outside environments where CUI is stored finally have clarity on the inclusion of those endpoints. The final rule indicates that, if proper boundary segmentation requirements are met, those external endpoints are not in scope for the requirements of NIST 800-171.

# Controlled Unclassified Information

## CUI is at the heart of cybersecurity rules – including CMMC

- FAR Case 2017-016 – “Implements the National Archives and Records Administration (NARA) Controlled Unclassified information (CUI) program of E.O. 13556, which provides implementing regulations to address agency policies for designating, safeguarding, disseminating, marking, decontrolling, and disposing of CUI”
- OMB Office of Information and Regulatory Affairs (OIRA) concluded its regulatory review of the FAR CUI Rule
- Waiting for publication in the Federal Register

# FY2023 DoJ Report – Procurement Settlements

In FY 23, government and whistleblowers were party to 543 settlements and judgments, the highest number of settlements and judgments in a single year. Highlighted in Report:

- Booz Allen Hamilton - \$377 million to resolve allegations that it improperly billed its government contracts for indirect costs benefitting its commercial and international contracts, that either had no relationship to government contracts or were allocated to those contracts in disproportionate amounts
- L3 Technologies Inc. - \$21.8 million to resolve allegations that in cost proposals, the company included the cost of certain items, such as nuts and bolts, twice
- Boeing - \$8.1 million to resolve allegations that it submitted false claims and made false statements in connection with the V-22 Osprey. The government alleged that Boeing failed to comply with certain contractual manufacturing specifications in fabricating composite components, including failing to perform monthly testing on autoclaves used in the composite cure process

# Raytheon Settlement

## October 16, 2024

### Settlement: Defective Pricing, Foreign Bribery, and Export Control Schemes

- \$950,000,000 settlement – includes QuiTam relator who received \$4,200,000
- Three-year deferred prosecution agreement
- Raytheon admitted to engaging in two separate schemes to defraud the DoD
- Activities occurred between 2009 and 2020
- Included bribery of a Qatar military official
- Patriot missile systems and a radar system

# 03

## Judicial Branch

Impact of legal decisions on government contracts.



## ACLR, LLC v. United States, No. 2023-1190 (Fed. Cir. 2024)

- ACLR was awarded a commercial items contract by CMS to identify and seek to recover overpayments made under the Medicare Part D program
- Contract incorporated FAR 52.212-4(I) which provides that a contractor terminated for convenience (T4C) is entitled to recover:
  - “a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate[,] to the satisfaction of the ordering [agency] using its standard record keeping system, have resulted from the termination.”
- After termination, ACLR sought \$5.9M
- COFC held ACLR was not entitled to recover under because their record keeping system was not “standard” or “systematic”

## ACLR, LLC v. United States, No. 2023-1190 (Fed. Cir. 2024)

- On appeal, Federal Circuit agreed with the COFC that “[t]o find that plaintiff’s records are sufficient to recover pursuant to FAR 52.212-4(I) would be to read both ‘standard’ and ‘system’ out of the regulation”
- Federal Circuit admitted that FAR 52.212-4(I) does not “impose any broad prescription as to precisely how every government contractor must maintain its books and records” and that a standard record keeping system does not need to be “specific” or “overly sophisticated,” but nonetheless agreed that ACLR had failed to “contemporaneously track and allocate its costs,” thus barring recovery

## ACLR, LLC v. United States, No. 2023-1190 (Fed. Cir. 2024)

- By failing to articulate what constitutes a “systematic” or “organized” system, the courts have left contractors to figure out what is an acceptable method of tracking costs that qualifies as a standard record keeping system
- Necessary conclusion is that commercial item contractors must now track their costs in real time, likely a significant (and costly) change in their accounting and recording practices



## Avue Techs. Corp. v. Sec of HHS, 96 F.4th 1340 (Fed. Cir. 2024)

- FDA obtained a license to Avue's software through a task order under Carahsoft's Federal Supply Schedule contract
- Avue claimed damages resulting from the FDA's alleged misappropriation of data in violation of a software end user agreement (EUA)
- Civilian Board of Contract Appeals (CBCA) dismissed for lack of jurisdiction, finding EUA was not a procurement contract within the meaning of the CDA

## Avue Techs. Corp. v. Sec of HHS, 96 F.4th 1340 (Fed. Cir. 2024)

- On appeal, Federal Circuit reversed the CBCA, holding that a third-party may be considered a “contractor” for purposes of the CDA under certain circumstances
- To establish the Board’s jurisdiction over a claim, “a party need only allege, non-frivolously, that it has a contract (express or implied) with the federal government.”
- Federal Circuit concluded that Avue’s allegations that it had a procurement contract were non-frivolous and satisfied the jurisdictional threshold

Allard Nazarian Group, Inc. dba Granite State Manufacturing  
*ASBCA Nos. 62413, 62414, January 31, 2024*

- Request for reconsideration of a July 27, 2023 decision
- CO issued decrements against T&M Labor rates for failure to provide ICPs
- Failure to submit ICP does not provide the government with a basis to assess a decrement on direct labor costs
- Government appealed:
- The Board committed a “manifest legal error” concluding that FAR 52.216-7 did not apply to the direct labor costs;
- The Board erred in finding that the government applied “unilaterally-established final indirect cost rates as a decrement” to direct labor hour rates; and
- The Board erred by applying FAR 16.307(a)(1) into the contract
- The governments motion for reconsideration was denied

# International Development Solutions, LLC vs Sec. of State

*US Court of Appeals for the Federal Circuit – 2022–1992, June 26, 2024*

- Appeal of a CBCA decision denying reimbursement of Afghanistan tax payments made by related corporate entities
- IDS was an armed security services company with several affiliated entities performing work in Afghanistan
- The parent company was responsible for paying and filing all Afghanistan tax returns, including those of its multiple subsidiaries
- FAR 31.201-1, Composition of total cost, inherently requires a contractor to have first incurred a cost that is allocable to the contract
- The CBCA found that IDS did not incur the claimed tax costs – the parent company and an affiliate paid the taxes
- The CoFC affirmed the Board’s decision that IDS is not entitled to reimbursement

**Questions?**

# Contact

## Forvis Mazars

### Bill Walter

Managing Director

P: 703.970.0509

[bill.walter@us.forvismazars.com](mailto:bill.walter@us.forvismazars.com)

### Jason Workmaster

Member

P: 202.626.5893

[jworkmaster@milchev.com](mailto:jworkmaster@milchev.com)

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