

Run don't CRWL: FY25 NDAA would expand contractor responsibility watch list

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In July 2024, both the House Armed Services Committee and the Senate Armed Services Committee introduced their respective versions of the NDAA for Fiscal Year ("FY") 2025.

It is important that contractors not only avoid being placed on the CRWL, contractors must also ensure their subcontractors are not listed on CRWL.

Each version contains proposed language that would amend 10 U.S.C. 2271 and the Senate version includes language to: (1) specify the factors that would support inclusion of a contractor on the Contractor Responsibility Watch List ("CRWL"); and (2) make clear that the Air Force will not procure goods and services under prime contracts or subcontracts from contractors listed on the CRWL.

The proposed language results from a determination by the Department of the Air Force that statutory grounds, to allow essentially contractor blacklisting, are needed to ensure proper performance of space programs. Thus, it is important that contractors not only avoid being placed on the CRWL (or, if that were to occur, to take action immediately to be removed from the CRWL), contractors must also ensure their subcontractors are not listed on CRWL.

To date, this has been challenging because the CRWL is not public. Indeed, the Air Force has not confirmed whether any companies are listed on CRWL.

Factors for inclusion on the CRWL

Under the proposed language in the Senate version of the FY25 NDAA, at section 1501, the responsibility for establishing the CRWL would transition from the Commander of the Air Force Space and Missile Systems Center to the suspension and debarment official of the Department of the Air Force.

The suspension and debarment official would be responsible for "establishing and maintaining a watch list of contractors with a history of poor performance on space procurement contracts or

nonprocurement transactions such as grants and cooperative agreements."¹

While the CRWL has not been used to date, at a House Armed Services Strategic Forces Subcommittee hearing on May 1, Frank Calvelli, Assistant Secretary of the Air Force for Space Acquisition and Integration, requested that lawmakers expand the authority given to the service acquisition executive to enforce and add contractors to the CRWL.²

Currently, 10 U.S.C. 2271 provides that a contractor may be included on the CRWL for four reasons:

- Poor performance or award fee scores below 50 percent;
- Financial concerns;
- Felony convictions or civil judgments; and
- Security or foreign ownership and control issues.

The proposed factors for inclusion on the CRWL are part the Department of the Air Force's renewed focus on program underperformance.

Under the proposed language, the following factors would become relevant when determining whether to include a contractor on the CRWL:

- Inadequate management, operational or financial controls, or resources;
- Inadequate security controls or resources, including unremediated vulnerabilities arising from foreign ownership, control, or influence; and
- Any other failure of controls or performance of a nature so serious or compelling as to warrant placement of the contractor on the CRWL.³

The proposed factors for inclusion on the CRWL are part the Department of the Air Force's renewed focus on program underperformance. The increased risk for contractors lies in the expansive language used.

For example, the language regarding inadequate controls arguably could permit the Department of the Air Force to include a contractor on the CRWL because of a business system disapproval.

Expanded impacts of inclusion on the CRWL

Should the suspension and debarment official determine, based on evidence, that the ability of a contractor is meaningfully impaired, the official may place that contractor on the CRWL.

The proposed language not only expands the impacts of placement on the CRWL but would make it more difficult to avoid those impacts.

Currently, 10 U.S.C. 2271 provides only that the Commander may not solicit an offer from, or award a contract to, a contractor on the CRWL without prior approval and that a prime contractor may not enter into a subcontract valued in excess of US\$3,000,000 or five percent of the prime contract value without prior approval.

The FY25 NDAA would refine and expand the consequences faced by contractors placed on the CRWL to include:

- No consent will be granted to subcontract with a party on the CRWL;
- No execution of a nonprocurement transaction with a party on the CRWL; and
- No exercise of an option on any space procurement or nonprocurement transaction within the Department of Air Force.

Under the proposed changed language, the only way a contractor could receive an exception is if the Space Service Acquisition

Executive makes a written determination that there is a compelling reason to permit the exception.⁴ Thus, the proposed language not only expands the impacts of placement on the CRWL but would make it more difficult to avoid those impacts.

Under the proposed changed language, upon determination that a contractor should be placed on the CRWL, the Space Service Acquisition Executive will notify congressional defense committees, intelligence committees, and the Director of National Intelligence of the determination.⁵

The additional circumstances that would support placing a contractor on the CRWL and the additional impacts of such placement are also of concern because the CRWL process has limited procedural protections, unlike the protections awarded to contractors subject to debarment or suspension. Moreover, in certain situations, the SSC or Company Commander ("CC") may place a contractor on the CRWL without adhering to notice requirements.

Contractors should remain ready to implement additional requirements should the finalized version of the FY25 NDAA include language that expands the scope of the CRWL. Inclusion on the CRWL would severely impact a contractor's ability to procure goods for the Space Force. Thus, it is important that contractors not only avoid being placed on the CRWL, but also that contractors ensure that their subcontractors are not listed on the CRWL.

Notes:

¹ Public Law 115-91; 131 Stat. 1729; 10 U.S.C. 2271 note.

² STR Hearing: FY25 Budget Request for National Security Space Programs Before the H. Subcommittee on Strategic Forces, 118th Cong. (2024).

³ H.R. 2810, 115th Cong. (2017); S. 4638, 118th Cong. (2024).

⁴ S. 4638, 118th Cong. (2024).

⁵ S. 4638, 118th Cong. (2024).

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