
This material from *The Government Contractor* has been reproduced with the permission of the publisher, Thomson Reuters. Further use without the permission of the publisher is prohibited. For further information or to subscribe, call 1-800-328-9352 or visit <https://legal.thomsonreuters.com>. For information on setting up a Westlaw alert to receive *The Government Contractor* in your inbox each week, call your law librarian or a Westlaw reference attorney (1-800-733-2889).

THE GOVERNMENT CONTRACTOR[®]

Information and Analysis on Legal Aspects of Procurement

JUNE 17, 2026 | VOLUME 68 | ISSUE 23

¶ 146 FEATURE COMMENT: A Field Guide To NDC Status: Identifying The Defense Industry's Newest (And Oldest) Protected Species

Section 1826 of the FY 2026 NDAA created the most valuable classification in defense contracting and most of the companies that qualify don't know it yet and, in fairness, neither do most of the contracting officers who will be asked to honor it. Bring binoculars.

Every so often, Congress quietly reclassifies the fauna of the defense industrial base, and it takes the rest of us a season or two to notice. Well, it happened in December 2025. Section 1826 of the Fiscal Year 2026 National Defense Authorization Act, modestly titled “Exemptions for Nontraditional Defense Contractors” (NDCs), took effect upon enactment, with no implementing regulation required, no dollar threshold attached, and remarkably little fanfare. Five months on, the Defense Federal Acquisition Regulation Supplement is still catching up, the CO corps is largely unaware, and the field offices that administer overseas audits have, by most accounts, not yet absorbed what the statute actually did to their jurisdiction.

What it did is this—for Department of Defense contracts, subcontracts, and agreements, products and services provided by “nontraditional defense contractors” shall be exempt from three of the heaviest compliance regimes in federal procurement:

Certified cost or pricing data under the Truthful Cost or Pricing Data statute (10 USCA § 3702), with its defective-pricing tail, is out.

The FAR pt. 31 cost principles, the entire rulebook of allowability, allocability, and reasonableness, at any dollar value, are out.

And the DFARS contractor business systems architecture is out: the accounting system clause (DFARS 252.242-7006), earned value management (252.234-7002), cost estimating (252.215-7002), material management and accounting (252.242-7004), property management (252.245-7003), purchasing (252.244-7001), the business systems clause itself (252.242-7005), and the special cost-or-pricing provisions of DFARS 215.407 along with them. All gone.

Now, of course, the Government may claw any of this back, but Congress made the clawback deliberately uncomfortable by requiring a written determination at the head-of-contracting-activity level, a justification

explaining why reimposing the requirement serves the Government's interest, and notification to Congress within 60 days, including a description of DOD's efforts to adapt its approach before resorting to a waiver. One could expect that few contracting activities will volunteer for that kind of correspondence over a routine award. Put simply, the exemption is the rule, and the old rules are the exception.

All of which raises the question that determines who feasts and who watches: what, exactly, is a nontraditional defense contractor?

Reading the Definition Like a Naturalist—

The statute borrows its definition from 10 USCA § 3014: an entity that is not currently performing, and has not performed for at least the one-year period preceding the solicitation, any DOD contract or subcontract subject to full coverage under the Cost Accounting Standards.

Notice what is absent from that sentence. There is no size standard. There is no revenue cap. There is no nationality requirement, no founding-date requirement, no requirement that the company be new to defense, new to Government, or new to anything at all. "Nontraditional" is a label, not a test. The test is a narrow, technical question of CAS history, and it contains four load-bearing terms:

"Entity." The test runs at the legal-entity level, not the corporate-family level. CAS coverage itself attaches contract by contract and is administered segment by segment; nothing in § 3014 aggregates affiliates. A corporate family is not one organism for this purpose. It is an ecosystem, and each member gets its own classification.

"Full coverage." Only the full nineteen-standard CAS regime, with its Disclosure Statement, disqualifies. Modified coverage (the four-standard regime) does not count against you. Neither does any CAS-exempt award.

"One-year period." Status is not a permanent trait. It is a rolling, twelve-month condition, which means it can be lost, and, more interestingly, regained.

"Contract or subcontract." Performance at any

tier counts, both for disqualification and, as we will see, for the reach of the exemption itself.

With the definition in hand, we can proceed to the field. Four species dominate the habitat. Two are obvious. Two are not, and the two that are not are where the strategic value lives.

Species No. 1: The Commercial Native (*Vendor vulgaris*)—

- Habitat: Software, AI, space, dual-use technology, and the entire small business population.
- Identifying marks: Has never seen a Disclosure Statement. May believe "CAS" is a typo.
- Conservation status: Abundant.

This is the species Congress had in its mind's eye: the startup or commercial firm that historically avoided the defense market because Government-unique cost accounting was an admission fee it declined to pay. Small businesses are categorically exempt from CAS (48 CFR § 9903.201-1(b)), so every small business qualifies as an NDC automatically. Commercial-item awards, sealed-bid awards, and competitively awarded firm-fixed-price contracts are likewise CAS-exempt, so a commercial firm of any size whose Government book consists of such work qualifies as well.

There is little to say about the Commercial Native because everyone has already said it. The firm alerts have been written; the webinars have been held. Section 1826 lowers this species' barrier to entry, and that is genuinely important policy. But it is the least interesting entry in this guide, because the Commercial Native was never the hard case.

Species No. 2: The Foreign-Concern Parent (*Procella peregrina*)—

- Habitat: Allied defense industrial bases. Often observed supplying a U.S. subsidiary.
- Identifying marks: Enormous. Decades of defense revenue. Qualifies anyway.
- Conservation status: Hiding in plain sight.

Here is the entry that, to our knowledge, no published commentary has yet written up, and the one most likely to make a CO's coffee go cold.

THE GOVERNMENT CONTRACTOR

Recall that the § 3014 test asks whether the entity holds, or recently held, a contract subject to full CAS coverage. Now consult the CAS applicability rules themselves: under 48 CFR § 9903.201-2(e), contracts and subcontracts with foreign concerns are subject only to CAS 401 and CAS 402 (the two consistency standards) and nothing more. Contracts with foreign governments or their instrumentalities are exempt from CAS entirely (48 CFR § 9903.201-1(b)). A foreign concern, in other words, cannot hold a full-CAS-covered contract. The regulation forbids it.

Run that ceiling through the definition, and the conclusion follows with uncomfortable tidiness: a foreign concern qualifies as a nontraditional defense contractor by regulatory construction; permanently, regardless of size, regardless of how many decades it has supplied DOD, regardless of how much negotiated work flows through it. The largest, most established defense manufacturers in allied nations are, as a matter of statutory text, “nontraditional.”

Is that what Congress meant? Probably not in the sense that anyone drafted the provision while picturing a multibillion-dollar allied prime. But the test Congress chose is the test Congress chose, and it is nationality-blind only in the sense that it never mentions nationality; its mechanics, layered on the CAS regulations, produce a categorical answer for foreign concerns. Expect the first COs who encounter the argument to reach for “this can’t be right.” Expect, also, that the text gives them very little to reach with. The argument’s vulnerability is not legal; it is receptional—and receptional vulnerabilities are cured with paper, patience, and the one-page explainer discussed below.

The practical consequence is largest where this species most often appears in the wild: as a subcontractor or inter-organizational supplier to a U.S. affiliate. Hold that thought for the section on migration through the supply chain.

Species No. 3: The Clean-Portfolio Subsidiary (*Filia americana*)—

- Habitat: Domestic. Frequently the U.S. prime-contracting arm of a global parent, though plenty of purely domestic mid-tier firms share the niche.

- Identifying marks: A book of business built on competitive firm-fixed-price, commercial items, and production work. May not realize its own pedigree.
- Conservation status: Under-identified. Requires careful examination to confirm.

Unlike the Foreign-Concern Parent, the domestic subsidiary or mid-tier company enjoys no categorical ceiling. It is fully exposed to CAS, so its classification is an empirical question: does the entity currently perform, or has it performed within the trailing twelve months, even one DOD prime contract or subcontract under full CAS coverage?

The answer is frequently, and surprisingly, no. Firm-fixed-price awards based on adequate price competition are CAS-exempt. Commercial product and service awards are CAS-exempt. Awards below the applicable threshold are CAS-exempt. A company can be a household name in the defense market, with a nine-figure DOD book, and never have triggered full coverage, because its portfolio happens to consist entirely of exempt award types. Such a company has been an NDC all along; it simply never had a reason to check.

The fieldwork here is a portfolio audit, and it must be done at the legal-entity level, across every tier. Map each active and recently completed DOD award, primes and subcontracts, against the CAS coverage rules. Document the determination contemporaneously, with counsel’s review, before asserting status in a proposal. The entity-level point bears repeating: a corporate family operating through multiple legal entities (a common arrangement, particularly under foreign-ownership mitigation structures) may find that some entities qualify and others do not. That is not a defect. That is a feature, and a planning opportunity.

Species No. 4: The One-Bad-Contract Hold-out (*Patiens duodecim*)—

- Habitat: The waiting room.
- Identifying marks: Identical to the Clean-Portfolio Subsidiary except for a single legacy cost-type or sole-source award. Visibly counting the days.

- Conservation status: Recovering.

Because the lookback is twelve months, NDC status is not a life sentence in either direction. An entity disqualified by one full-CAS-covered award rejoins the flock one year after that performance ends. The strategic implication has gone almost entirely unremarked: requalification is a date, and dates can be calendared, planned around, and accelerated by ordinary portfolio decisions.

The analysis for this species is simple to describe and valuable to do. Identify the disqualifying award or awards. Identify when performance ends. Mark the requalification date. Then look hard at every pursuit between now and that date and ask whether anything in the pipeline would reset the clock and whether it must. Which brings us to the most important migratory development in the habitat.

Migration Patterns: The \$35 Million Tailwind—Section 1826 did not arrive alone. Section 1806(d) of the same NDAA raises the contract-level CAS applicability threshold from \$2.5 million to \$35 million and effectively eliminates the old trigger-contract mechanism, with regulatory implementation due by mid-2026. Read together, the two provisions transform NDC status from an accident of history into a manageable variable.

Under the old thresholds, a growing contractor stumbled into CAS coverage more or less inevitably. Under the new one, full coverage becomes something a capture organization can see coming and, in many cases, structure around: compete where competition is available, price commercially where commerciality is supportable, mind the threshold where neither is. None of this is gamesmanship. Every one of those award structures is one the Government itself prefers and the NDAA's commercial-buying provisions actively promote. But it does mean that, going forward, "are we an NDC?" is a question for the pipeline review, not just the compliance department. Status, once lost, is easier than ever to regain; once held, easier than ever to keep.

The Subcontract Pipe: Where the Exemption Actually Travels—Now the second underwritten point, and for corporate families the more

lucrative one. Section 1826's operative language exempts products and services provided by NDCs across DOD "contracts, subcontracts, or agreements." The exemption attaches to the NDC's scope, which means it travels down the supply chain and applies at the subcontract tier even when the prime contractor is not an NDC and the prime contract is otherwise fully encumbered.

Consider a structure that exists throughout the transatlantic defense industry: a U.S. entity primes; an affiliated foreign-concern manufacturer supplies major content through inter-organizational transfers. Even if the U.S. prime fails the § 3014 test, the foreign affiliate (an NDC by construction, per Species No. 2) can assert the exemption for its subcontract scope. On that scope, the consequences stack up quickly. No certified cost or pricing data on the intercompany proposal, and therefore no defective-pricing exposure on the transfer price, historically the single scariest audit risk in inter-organizational work. No FAR pt. 31 scrutiny of the transfer-cost basis, which is to say no FAR 31.205-26(e) battle over whether the inter-organizational price may rest on something other than cost. And no business-systems flow-downs reaching the overseas affiliate's accounting, estimating, or purchasing systems.

Readers who have spent careers managing overseas assist audits will recognize what just happened: a substantial portion of the statutory foundation for that oversight, as applied to NDC-provided scope, has been removed. The audit agencies' overseas field offices do not appear to have noticed yet. They will. The contractors who have documented their position before that moment will be having a very different conversation than the ones who haven't.

Hazards of the Habitat—A field guide that mentions only the charismatic features is a brochure. Four genuine hazards deserve equal billing.

The self-inflicted waiver: The fastest way to lose a statutory exemption is to keep complying with the requirement it removed. Proposal teams run on muscle memory: templates that certify cost or pricing data, subcontract packages that flow down

THE GOVERNMENT CONTRACTOR

business-systems clauses, pricing volumes built on FAR pt. 31 architecture nobody asked for. Every voluntary certification recreates the precise liability Congress just eliminated, and a contractor that certifies data is held to that certification regardless of whether it had to provide one. Scrub the templates now. This is the cheapest risk reduction available in Government contracting this year.

Pricing without a floor: Here is the caution nobody else has issued: exemption from the cost principles is not exemption from price reasonableness. The CO still must determine the price fair and reasonable, only now through commercial-style price analysis rather than cost analysis. A contractor that strips out FAR pt. 31 and then shows up with a cost-built proposal and no market story has not simplified the negotiation; it has walked into one without a vocabulary. NDC status obligates you to develop what commercial companies have always had: comparable sales, catalog and market pricing, parametric support, value-based justification. Build that muscle before the first exempt negotiation, not during it.

The affiliate-aggregation question: The statute says “entity,” and segment-based CAS practice supports entity-by-entity treatment. But the DFARS implementation is still being written, and rulemaking could attempt to aggregate corporate families; the one interpretive move that would genuinely damage the multi-entity strategies described above. Two responses: document entity-level determinations now, because positions asserted and accepted on contract actions before rulemaking carry more weight (and better grandfathering arguments) than positions asserted after; and participate in the rulemaking when the case opens. Similarly situated contractors share this interest, and coordinated comments are more persuasive than solitary ones.

The credibility gap: A large, established company asserting “nontraditional” status will, at least once, face a CO whose first reaction is disbelief. Do not treat that reaction as an obstacle; treat it as the predictable cost of being early, and arm yourself accordingly.

What to Hand Your CO—Because the exemp-

tions are self-executing but the DFARS has not caught up, the burden of “up-education” currently falls on the contractor. To facilitate that effort, the following framework, adapted to your facts, should be able to do most of the work:

Section 1826 of the FY 2026 NDAA provides that, for DOD contracts, subcontracts, and agreements, products and services provided by nontraditional defense contractors “shall be exempt from” the Truthful Cost or Pricing Data statute (10 U.S.C. § 3702), FAR Part 31, and the enumerated DFARS business-systems requirements. The provision is statutory and took effect upon enactment in December 2025; it does not await DFARS implementation. [Entity] qualifies as a nontraditional defense contractor under 10 U.S.C. § 3014 because it is not currently performing, and has not performed in the preceding one-year period, any DOD contract or subcontract subject to full CAS coverage. [State the basis: foreign-concern status under 48 C.F.R. 9903.201-2(e), or the entity-level portfolio determination, documentation available upon request.] The exemptions may be set aside only through a written waiver determination at the head-of-contracting-activity level with congressional notification within 60 days. Absent such a waiver, inclusion of the exempted requirements in this action would be inconsistent with the statute.

Two framing notes for the conversation that follows. First, honoring the exemption is not a favor or a risk the CO is taking. It is compliance with current law, and the waiver mechanism exists precisely so that departures from the exemption, not applications of it, receive senior review. Second, the CO is not going out on a limb; they are executing DOD’s own loudly stated acquisition-reform agenda, of which § 1826 is a centerpiece. Frame it that way, in writing, early in the procurement, not as a dispute after clauses have been inserted.

A Closing Note on Seasons—Every classification in this guide is accurate as of this writing, and that caveat is doing real work. The statute is in force; the regulations are in motion; the interpretive questions (foreign-concern qualification at scale, affiliate aggregation, the treatment of DOD orders under civilian vehicles) will be answered within the next few procurement cycles, either by

rulemaking or by the accumulated weight of positions asserted in the field. The contractors asserting documented positions now are not just claiming exemptions. They are writing the precedent everyone else will live under.

The birds, in short, are still where the birdwatchers aren't. And that never lasts.



This Feature Comment was written for THE

GOVERNMENT CONTRACTOR by Alex Major and Franklin Turner. Mr. Turner and Mr. Major are Partners in the Washington, D.C. office of McCarter & English, LLP, where they serve as Co-Leaders of the Government Contracts Practice Group. The authors routinely teach courses on a variety of Government contracts issues and can be reached at amajor@mccarter.com and fturner@mccarter.com.