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Focus

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FEATURE COMMENT: The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part I

On Nov. 25, 2015, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2016 (S. 1356). See P.L. 114-92. As with every NDAA since FY 2010, the FY 2016 NDAA stalled in Congress before being enacted well after the start of its fiscal year. However, unlike other recent NDAA legislation, on Oct. 22, 2015, the president vetoed the initial version of the FY 2016 NDAA passed by Congress (H.R. 1735), because, among other reasons, the bill failed to authorize funding for defense-related spending "in a fiscally responsible manner." See *www.whitehouse.gov/the-press-office/2015/10/22/veto-message-hr-1735* (President Obama's Oct. 22, 2015 veto message*);* see also *www.whitehouse.gov/the-press-office/2015/11/25/statement-president* (President Obama's Nov. 25, 2015 signing statement for the FY 2016 NDAA).

The president's FY 2016 budget request exceeded the discretionary spending caps imposed by the Budget Control Act of 2011, P.L. 112-25, 125 Stat. 240, but included a proposal to avert sequestration by increasing the caps and offsetting the increased spending through tax law changes. H.R. 1735 would have authorized essentially the full amount of defense appropriations requested by the president, but would have done so without changing the discretionary spending caps. In his veto message, the president contended that the bill "relie[d] on an irresponsible budget gimmick" that would have avoided breaking the spending cap by using $38 billion in Overseas Contingency Operations (OCO) funding, which is exempt from the spending caps, to fund the president's requested defense base budget. The president rejected the bill due to his concern that use of OCO funding to support the defense base budget would "not provide the stable, multi-year budget upon which sound defense planning depends." The president also objected that the bill's circumvention of defense spending caps without providing similar relief for nondefense spending "further harms our national security by locking in unacceptable funding cuts for crucial national security activities carried out by non-defense agencies." Accordingly, the president vetoed this initial version of the FY 2016 NDAA.

The Bipartisan Budget Act of 2015 (BBA), signed into law by the president on Nov. 2, 2015, resolved this impasse. See P.L. 114-74. The BBA raises the FY 2016 and FY 2017 discretionary spending caps for both defense and nondefense programs and adjusts the discretionary spending limit for OCO appropriations for both national defense and international relations. Following the BBA's enactment, the FY 2016 NDAA was amended to reflect the funding changes and accommodate the president's objections. Accordingly, the amended FY 2016 NDAA, S. 1356, which did not change any of the procurement reform provisions included in the earlier, vetoed FY 2016 NDAA (i.e., H.R. 1735), was signed into law. The enacted FY 2016 NDAA provides for total defense-related discretionary appropriations of $606.9 billion, about $5 billion less than the president requested and than had been approved by Congress in the vetoed H.R. 1735.

The FY 2016 NDAA includes significant procurement-related reforms and changes, most (but not all) of which are included, as usual, in "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters." The FY 2016 NDAA contains substantially more procurement-related provisions than other recent NDAA legislation. More specifically, Title VIII includes 77 provisions addressing procurement issues as compared to 37 provisions in the FY 2015 NDAA, 13 provisions in the FY 2014

NDAA, 44 in the FY 2013 NDAA and 49 in the FY 2012 NDAA. Some of these FY 2016 NDAA changes will not become effective until the Federal Acquisition Regulation and Defense FAR Supplement (and, depending upon the circumstances, other regulations) are amended. As in past years, provisions in other titles of the FY 2016 NDAA are also important to procurement law. Because of the volume and importance of the procurement changes in the FY 2016 NDAA, this FEATURE COMMENT is divided into two parts. Part I addresses §§ 801–855. Part II, which will be published on Jan. 27, 2016, addresses §§ 856–1645.

Section 801: Required Review of Acquisition-Related Functions of the Armed Forces' Chiefs of Staff—This section requires the chiefs of staff of the Army and Air Force, the chief of naval operations and the Marine Corps commandant to review their individual statutory authorities and "other relevant statutes and regulations related to defense acquisitions for the purpose of developing such recommendations as the Chief concerned or the Commandant considers necessary to further or advance" his role "in the development of [Department of Defense] requirements, acquisition processes, and the associated budget practices." No later than March 1, 2016, each of these officers must submit to the congressional defense committees a report containing their recommendations, as well as any actions being taken to implement them.

Section 802: Service Chiefs' Role in the Acquisition Process—Section 802 specifies that the "objective of the defense acquisition system" is "to meet the needs of its customers in the most cost-effective manner practicable." The "customer" is "the armed force that will have primary responsibility for fielding the system or systems acquired," and is represented by the "Secretary of the military department concerned and the Chief of the armed force concerned." Section 802 also reinforces the responsibilities of the chiefs of staff for "balancing resources against priorities on the acquisition program and ensuring that appropriate trade-offs are made among cost, schedule, technical feasibility, and performance on a continuing basis throughout the life of the acquisition program." As Congress' joint explanatory statement notes, this section is designed to "*enhance the role of Chiefs of Staff in the defense acquisition process* [and] reinforce the role and responsibilities of the Chiefs of Staff in decisions regarding … major defense acquisition programs." See *armedservices.house.gov / index.cfm?a=Files.Serve&File_id=E0B05DFB-B970-4D0C-92EA-26FD566B7E3B* (emphasis added); see also § 825, infra (discussing transfer of certain significant milestone procurement authority from secretary of defense to military departments).

Section 803: Expansion of Rapid Acquisition Authority—This provision expands the rapid acquisition authority granted by § 806(c) of the FY 2003 NDAA, as amended by § 811 of the FY 2005 NDAA, by allowing the secretary of defense to use rapid acquisition authority for two new categories of supplies and associated support services. Specifically, in addition to the pre-existing authority to use rapid acquisition to acquire supplies and services that are "urgently needed to eliminate a documented deficiency that has resulted in combat casualties, or is likely to result in combat casualties," § 803 now provides that the secretary may use rapid acquisition procedures for supplies and associated support services that the secretary determines are (1) "urgently needed to eliminate a documented deficiency that impacts an ongoing or anticipated contingency operation and that, if left unfulfilled, could potentially result in loss of life or critical mission failure"; or (2) "urgently needed to eliminate a deficiency that as the result of a cyber attack has resulted in critical mission failure, the loss of life, property destruction, or economic effects, or if left unfilled is likely to result in critical mission failure, the loss of life, property destruction, or economic effects." "Cyber attack" is defined as "a deliberate action to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information or programs resident in or transiting these systems or networks."

Under this section, the secretary "shall designate a senior [DOD] official … to ensure that the needed supplies and associated support services are acquired and deployed as quickly as possible, with a goal of awarding a contract for the acquisition of the supplies and associated support services within 15 days." The secretary "shall authorize that official to waive any provision of law, policy, directive, or regulation described in subsection (d) that such official determines in writing would unnecessarily impede the rapid acquisition and deployment of the needed supplies and associated support services." Subsection (d) authorizes the waiver of "any provision of law, policy, directive or regulation addressing" "(A) the establishment of the requirement for the supplies and associated support services"; "(B) the research, development, test, and evaluation

of the supplies and associated support services"; or "(C) the solicitation and selection of sources, and the award of the contract, for procurement of the supplies and associated support services." This section authorizes up to $200 million per fiscal year in acquisitions using rapid acquisition procedures for each of the three authorized categories of supplies and associated support services. Rapid acquisitions under this section "shall transition to the normal acquisition system not later than two years after the date on which the Secretary makes the determination" to use the rapid acquisition authority.

Section 804: Middle Tier of Acquisition for Rapid Prototyping and Rapid Fielding—Within 180 days of the FY 2016 NDAA's enactment, the undersecretary of defense for acquisition, technology, and logistics (AT&L) must "establish guidance" that provides for an expedited and streamlined "middle tier" of acquisition programs that are intended to be completed within two to five years. The joint explanatory statement indicates that these programs are intended to be "distinctive from 'rapid acquisitions' that are generally completed within 6 months to 2 years and 'traditional' acquisitions that last much longer than 5 years." The DOD guidance established under this section must cover "two acquisition pathways": (1) the "rapid prototyping pathway," which "shall provide for the use of innovative technologies to rapidly develop fieldable prototypes to demonstrate new capabilities and meet emerging military needs"; and (2) the "rapid fielding pathway," which "shall provide for the use of proven technologies to field production quantities of new or upgraded systems with minimal development required."

This guidance "shall provide for a streamlined and coordinated requirements, budget, and acquisition process that results in the development of an approved requirement for each program in a period of not more than six months from the time that the process is initiated." The guidance may provide for the appointment by the service acquisition executive of each military department of a program manager for each program "from among candidates from among civilian employees or members of the Armed Forces who have significant and relevant experience managing large and complex programs."

Section 805: Use of Alternative Acquisition Paths to Acquire Critical National Security Capabilities—This section requires the DOD secretary to establish procedures within 180 days of the FY 2016 NDAA's enactment "for alternative acquisition pathways to acquire capital assets and services that meet critical national security needs." The procedures must (1) "be separate from existing acquisition procedures"; (2) "be supported by streamlined contracting, budgeting, and requirements processes"; (3) "establish alternative acquisition paths based on the capabilities being bought and the time needed to deploy these capabilities"; and (4) "maximize the use of flexible authorities in existing law and regulation." This provision apparently is intended to address the concern that DOD is in danger of losing its technological advantage in many areas and is no longer accessing the most innovative parts of the U.S. industrial base.

Section 806: DOD Secretary Waiver of Acquisition Laws to Acquire Vital National Security Capabilities—Section 806 permits the DOD secretary "to waive" certain acquisition laws or regulations "for the purpose of acquiring a capability that would not otherwise be available to the Armed Forces" "upon a determination that" (1) "acquisition of the capability is in the vital national security interest of the United States"; (2) "application of the law or regulation to be waived would impede the acquisition of the capability in a manner that would undermine the national security of the United States"; and (3) "the underlying purpose of the law or regulation to be waived can be addressed in a different manner or at a different time."

The secretary "is authorized to waive any provision of law or regulation addressing" (A) "the establishment of a requirement or specification for the capability to be acquired"; (B) "research, development, test, and evaluation of the capability to be acquired"; (C) "production, fielding, and sustainment of the capability to be acquired"; or (D) "solicitation, selection of sources, and award of contracts for the capability to be acquired." In contrast to § 803, supra, which permits the secretary to waive three categories of laws or regulations, this section adds a fourth category of waiver authority (i.e., laws or regulations addressing "production, fielding, and sustainment of the capability to be acquired"), which is related to this section's application to the "acquisition of capabilit[ies]." The secretary must notify the congressional defense committees at least 30 days before exercising the waiver authority and designate a senior official who shall be personally responsible and accountable for the rapid and effective acquisition and deployment of the needed capability.

Section 807: Acquisition Authority of the Commander, U.S. Cyber Command—This section

specifically provides the U.S. Cyber Command with the authority to acquire cyber services and equipment, and provides a cyber operations procurement fund of up to $75 million for each fiscal year from 2016 through 2021. The joint explanatory statement indicates that the intent of this section is to provide Cyber Command with "limited acquisition authority to fulfill cyber operations-peculiar and cyber capability-peculiar requirements the [military] services are unable to meet to ensure" that DOD can defend and respond to cyber threats. This section should enable CYBERCOM to move more nimbly to fulfill its requirements than it can when wholly dependent on the military services' acquisition authorities. The authority under this section terminates on Sept. 30, 2021.

The joint explanatory statement further explains:

> We maintain that this limited authority should not be construed to replace the acquisition responsibilities of the military services to fulfill their man, train and equip requirements. We believe successful demonstration of these acquisition authorities will require implementation of memoranda of agreement with the military services to define enduring responsibilities and [provide] more explicit definition[s] [of] cyber operations-peculiar and cyber capability-peculiar requirements.

Section 808: Report on Linking and Streamlining Requirements, Acquisition, and Budget Processes within the Armed Services—Within 180 days of the FY 2016 NDAA's enactment, the chiefs of staff of the Army and Air Force, the chief of naval operations, and the Marine Corps commandant must each submit to the congressional defense committees "a report on efforts to link and streamline the requirements, acquisition, and budget processes within the Army, Navy, Air Force, and Marine Corps, respectively." The reports must include specific descriptions of

> (A) the management actions the Chief concerned or the Commandant has taken or plans to take to link and streamline the requirements, acquisition, and budget processes of the Armed Force concerned; (B) any reorganization or process changes that will link and streamline the requirements, acquisition, and budget processes of the Armed Force concerned; and (C) any cross-training or professional development initiatives of the Chief concerned or the Commandant.

For each of these categories, the report must include "(i) the specific timeline associated with implementation; (ii) the anticipated outcomes once implemented; and (iii) how to measure whether or not those outcomes are realized." The joint explanatory statement unsurprisingly comments that the chiefs and commandant are engaging in these "efforts to leverage their existing statutory authorities in a manner that links and streamlines their services' requirements, acquisition, and budget processes *in order to foster improved outcomes*." (Emphasis added.)

Section 809: Advisory Panel on Streamlining and Codifying Acquisition Regulations—Within 180 days of the FY 2016 NDAA's enactment, the secretary of defense must establish a panel composed of at least nine "recognized experts in acquisition and procurement policy" to advise DOD "on streamlining acquisition regulations," including eliminating unnecessary regulations. The panel is similar to the "Section 800 Panel" established by the FY 1991 NDAA. The panel's duties include (1) reviewing DOD acquisition regulations "with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage" and (2) making "recommendations for the amendment or repeal of regulations that the panel considers necessary, as a result of such review." The panel is not subject to Federal Advisory Committee Act. Although the panel is not required to submit a final report to the secretary until two years following its establishment, the secretary must report to the congressional defense committees on interim panel findings, once within six months of the FY 2016 NDAA's enactment, and a second time within 18 months of enactment. The "final report" is required to contain "a detailed statement of the findings and conclusions of the panel, including" "(A) *a history of each current acquisition regulation and a recommendation as to whether the regulation and related law (if applicable) should be retained, modified, or repealed*; and (B) such additional recommendations for legislation as the panel considers appropriate." (Emphasis added.) A history of, and recommendation concerning, "each current acquisition regulation" will require a very substantial amount of work by the panel.

Section 812: Applicability of Cost and Pricing Data and Certification Requirements—This section provides an exception to the requirement under the Truth in Negotiations Act, 10 USCA § 2306a, to provide cost and pricing data for indirect offsets provided by contractors to foreign governments in connection with foreign military sales. "The

term 'offset' means the entire range of industrial and commercial benefits provided to foreign governments as an inducement or condition to purchase military goods or services, including benefits such as coproduction, licensed production, subcontracting, technology transfer, in-country procurement, marketing and financial assistance, and joint ventures." Defense Offsets Disclosure Act of 1999, P.L. 106-113, 113 Stat. 1501, 1501A-501; DFARS Procedures, Guidance and Instructions (PGI) 225.7303-2(a)(3). There are two types of offsets: (1) offsets that are directly related to the item being purchased (e.g., the contractor making the sale agrees to contract with local manufacturers to produce components of the item being sold); and (2) indirect offsets, which are unrelated to the item being purchased (e.g., the contractor making the sale agrees to purchase agricultural commodities from the foreign government or producers within that country). See DFARS 225.7306; DFARS 225.7303-2(a)(3); DFARS PGI 225.7303-2(a)(3). Foreign military sales are often delayed due to contractors' inability to obtain cost and pricing data associated with indirect offsets. This provision should help alleviate delays in finalizing such foreign sales. This section also comports with DOD's June 2, 2015 interim rule that eliminates the requirement for contracting officers to determine the price reasonableness of indirect offset costs incurred by U.S. defense contractors in connection with foreign military sales, and provides that such costs are deemed reasonable as long as the contractor submits to the CO an offset agreement or other substantiating documentation. See 80 Fed. Reg. 31309 (amending DFARS 225.7303-2(a)(3)).

Section 813: Rights in Technical Data—This section clarifies that, with respect to technical data, 10 USCA § 2321(f)(1)'s presumption that a commercial item was developed exclusively at private expense applies to (1) a commercial subsystem or components of major weapon systems or subsystems that were acquired as commercial items, and (2) any other component that is "a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements." This section also requires DOD to establish a Government-industry advisory panel within 90 days of enactment to review existing laws regarding rights in technical data. Industry members of the advisory panel must "include independent experts and individuals appropriately representative of the diversity of interested parties, including large and small businesses, traditional and non-traditional government contractors, prime contractors and subcontractors, suppliers of hardware and software, and institutions of higher education." The advisory panel's final report and recommendations are due Sept. 30, 2016.

Section 815: Amendments to Other Transaction Authority—This section makes permanent DOD's authority under § 845 of the FY 1994 NDAA (P.L. 103-160), as modified most recently by § 812 of the FY 2015 NDAA (P.L. 113-291), to use transactions other than FAR-covered contracts ("other transaction authority" or "OTA") for certain "prototype projects" when at least one of the following conditions is met: (A) "at least one nontraditional defense contractor [is] participating to a significant extent" in the project; (B) "[a]ll significant participants in the transaction other than the Federal Government are small businesses or nontraditional defense contractors"; (C) "[a]t least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government"; or (D) the agency's senior procurement executive determines "that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract." The joint explanatory statement indicates that § 815 seeks to "ensure that innovative small business firms are authorized to participate in other transactions under section 845 [of the FY 1994 NDAA] without the requirement for a cost-share (except where the small business is partnered with a large business in a transaction)" by specifying that OTA may be used where all significant participants in the transaction are either small businesses or nontraditional contractors.

This section provides that "a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction" "without the use of competitive procedures," provided that "competitive procedures were used for the selection of parties for participation in the transaction" and "the participants in the transaction successfully completed the prototype project." This section also expands the definition of nontraditional defense contractor. Under the pre-amendment

definition, a "nontraditional defense contractor" was "an entity that is not currently performing and has not performed, for at least the one-year period preceding the [DOD] solicitation": (i) a DOD contract or subcontract that is subject to full Cost Accounting Standards coverage and (ii) any other DOD contract in excess of $500,000 under which the contractor is required to submit certified cost or pricing data. See 10 USCA § 2302(9)(B) (2014). The amended definition eliminates the second requirement. Thus, only performance of a DOD contract subject to full CAS coverage during the year preceding the DOD solicitation in question would preclude a contractor from being considered a nontraditional defense contractor.

Within 180 days of the FY 2016 NDAA's enactment, DOD must issue guidance on § 815's requirements and "submit to the congressional defense committees an assessment of … the benefits and risks of removing the cost-sharing requirement of subsection (d)(1)(C)," which is quoted two paragraphs above, as (C), in its entirety. The joint explanatory statement observes that Congress believes that "expanded use of OTAs" under this section "will support [DOD] efforts to access new source[s] of technical innovation, such as Silicon Valley startup companies and small commercial firms."

Section 816: Amendment to Acquisition Threshold for Special Emergency Procurement Authority—This section raises the simplified acquisition threshold for special emergency procurements, i.e., procurements of property or services to be used (i) "in support of a contingency operation," or (ii) "to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States," from $250,000 to $750,000 for contracts to be awarded and performed, or purchases to be made, inside of the U.S. and from $1 million to $1.5 million for contracts to be awarded and performed, or purchases to be made, outside of the U.S. Originally, this section included an across-the-board increase in the simplified acquisition threshold from $100,000 to $500,000, but that provision was not included in the final statute.

Section 825: Designation of Milestone Decision Authority—This section designates the service acquisition executive of the relevant military department as the milestone decision authority for each major defense acquisition program reaching milestone A (i.e., the technology maturation and risk reduction phase) after Oct. 1, 2016. The term "milestone decision authority," with respect to a major defense acquisition program, means the DOD official with the overall responsibility and authority for acquisition decisions for the program, including authority to approve entry of the program into the next phase of the acquisition process. Section 825 permits the secretary of defense to designate a different official as the milestone decision authority for programs that (i) the secretary determines address "a joint requirement"; (ii) the secretary determines would be "best managed by a Defense Agency;" (iii) have "incurred a unit cost increase greater than the significant cost threshold or critical cost threshold" under 10 USCA § 2433; (iv) are "critical to a major interagency requirement or technology development effort, or halved significant international partner involvement"; or (v) for which the secretary determines that designating a different milestone decision authority "will best provide for the program to achieve desired cost, schedule, and performance outcomes." The section also creates a framework for transitioning the milestone decision authority back to the service acquisition executive "upon request of the Secretary of the military department concerned" and approval by the secretary of defense.

If the service acquisition executive of the military department managing the program is the milestone decision authority, the secretary must "limit outside requirements for documentation to an absolute minimum." The joint explanatory statement notes that this section "require[s] the Secretary of Defense to review the acquisition oversight process for major defense acquisition programs and limit outside requirements for documentation to an absolute minimum on those service managed programs." This provision will almost certainly decentralize decision-making on weapon system milestones and limit the secretary of defense's oversight of significant service-unique acquisition programs. As a result, both the White House and DOD secretary strongly opposed this provision. See *www.whitehouse.gov/sites /default/files/omb/legislative/sap/114/saps1376s_20150602.pdf* at 3. More specifically, in an Oct. 14, 2015 letter to the director of the Office of Management and Budget, the secretary of defense stated that DOD

> remains concerned about section 825, which is intended to largely remove the Office of the Secretary of Defense from the acquisition chain of command for Service programs which start after October 1, 2016, by making the Service

> Acquisition Executives, rather than [AT&L], the Milestone Decision Authority (MDA) for [DOD's] most costly and complicated weapons programs. Although I have the ability to designate an alternate MDA under specified circumstances, the Secretaries of the military departments can request that the authority revert back to the Service Acquisition Executives, and a denial of this request is required to be reported back to the congressional defense committees. *Section 825 has the potential to significantly affect my ability to oversee Service programs and overcome the very strong incentives and inherent bias within the military departments to be overly optimistic in their planning, particularly when budgets are tight (as they are now)*. Additionally, section 825 would likely hinder the ability of [AT&L], on my behalf, to take a necessary leadership role within the defense acquisition community and institute systemic improvements across [DOD]. In our view, section 825 would ultimately undermine my ability to exercise authority, direction, and control over [DOD] programs and activities by excluding me and [AT&L] … from meaningfully participating in the decision-making process on programs for which the Service Acquisition Executive is the MDA.

eangus.org/wp-content/uploads/sites/6/2015/10/20151020_Sec_Carter_NDAA_Letter.pdf at 2-3 (emphasis added). See also § 802, supra. The secretary must submit a plan for implementing this section to the congressional defense committees within 180 days of the FY 2016 NDAA's enactment. Not later than Oct. 1, 2016, DOD shall issue guidance, which "shall be designed to ensure a streamlined decision-making and approval process and to minimize any information requests," to implement this section.

Section 828: Penalty for Cost Overruns—Beginning with FY 2015, this section assesses a "cost overrun penalty" of "three percent [per fiscal year] of the cumulative amount of cost overruns" "on the covered major defense acquisition programs of the military department" in question. "The cumulative amount of cost overruns for a military department in a fiscal year is the sum of the cost overruns and cost underruns for all covered major defense acquisition programs of the department in the fiscal year," including cost overruns or underruns allocated to the military department for joint programs of multiple departments. "The amount of the cost overrun or underrun on any major defense acquisition program" "is the difference between the current program acquisition unit cost" and the program acquisition unit cost "as shown in the original Baseline Estimate for the program," "multiplied by the quantity of items to be purchased under the program."

Within 60 days of the end of the fiscal year, the secretary of each military department is required to reduce "the research, development, test, and evaluation account" of that department by an amount equal to that department's cost overrun penalty. Funds collected under this provision will be credited to the rapid prototyping fund established in § 804 of the FY 2016 NDAA. The major defense acquisition programs covered by this section are limited to those for which the original baseline estimate was established, in accordance with 10 USCA § 2435(d)(1) or (2), on or after the May 22, 2009 enactment of the Weapon Systems Acquisition Reform Act of 2009 (P.L. 111-23).

Section 845: Independent Study of Implementation of Defense Acquisition Workforce Improvement Efforts—No later than Dec. 25, 2015, DOD must enter into a contract with an "independent research entity" to conduct "a comprehensive study" of DOD's "strategic planning" "related to the defense acquisition workforce." "The study shall provide a comprehensive examination of the Department's efforts to recruit, develop, and retain the acquisition workforce." The entity with which DOD must contract to conduct the study must be either a "not-for-profit entity or a federally funded research and development center with appropriate expertise and analytical capability." No later than Nov. 25, 2016, the independent research entity must provide to the secretary of defense "the results of the study" and "such recommendations to improve the acquisition workforce as the independent research entity considers to be appropriate."

Section 851: Procurement of Commercial Items—Under this section, the secretary of defense shall (i) establish and maintain a centralized and properly resourced capability to oversee the making of commercial item determinations for DOD procurements, and (ii) provide public access to such determinations. This section also allows COs to presume that a prior DOD commercial item determination serves as a determination for subsequent procurements of such items. If a CO wants to depart from the commercial items precedent, she must request review of the commercial item determination by the head of the contracting activity. Within 30 days of receiving such

a request, the head of the contracting activity must either "(i) confirm that the prior determination was appropriate and still applicable; or (ii) issue a revised determination with a written explanation of the basis for the revision."

The determination as to whether or not a defense article or component may be acquired under FAR pt. 12 (Acquisition of Commercial Items), rather than FAR pt. 15 (Contracting by Negotiation), often takes months or even years. This section is designed to eliminate or curtail the time-consuming practice of re-determining the appropriateness of using FAR pt. 12, sometimes within the same military service.

Section 852: Modification to Information Required to be Submitted by Offeror in Procurement of Major Weapon Systems as Commercial Items—The section provides DOD increased authority to purchase a major weapon system (or a component thereof) as a commercial item without a price reasonableness determination, provided that the secretary of defense has determined that the system is a commercial item and that such treatment is necessary for national security. To the extent a price reasonableness determination is required, this section provides that before requiring cost or pricing data, DOD accept, if available, information about: (i) "prices for the same or similar items sold under different terms and conditions," (ii) "prices for similar levels of work or effort on related products or services," (iii) "prices for alternative solutions or approaches," and (iv) "other relevant information that can serve as the basis for a price assessment."

Section 853: Use of Recent Prices Paid by the Government in the Determination of Price Reasonableness—The section requires a CO to consider evidence presented by an offeror of recent purchase prices paid by the Government for the same or similar commercial items in establishing price reasonableness, provided the CO is satisfied that such prices "remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions."

Section 854: Report on Defense-Unique Laws Applicable to the Procurement of Commercial Items and Commercially Available Off-the-Shelf Items—Within 180 days of the enactment of the FY 2016 NDAA, DOD must submit to the congressional defense committees a report "identifying the defense-unique provisions of law that are applicable for procurement of commercial items or commercial off-the-shelf items, both at the prime contract and subcontract level." This report shall discuss the impact: "(A) of limiting the inclusion of clauses in contracts for commercial items or commercial off-the-shelf items to those that are required to implement law or Executive orders or are determined to be consistent with standard commercial practice; and (B) of limiting flow down of clauses in subcontracts for commercial items or commercial off the shelf-items to those that are required to implement law or Executive order." The report is also required to include a list "of all standard clauses used in [FAR] Part 12 contracts, including a justification for the inclusion of each." Since the passage of the Federal Acquisition Streamlining Act of 1994, there has been a significant increase in Government-unique requirements tied to commercial item procurements. This report likely represents an effort to expose and potentially address this increase.

Section 855: Market Research and Preference for Commercial Items—Within 90 days of the FY 2016 NDAA's enactment, AT&L must issue guidance to ensure that defense acquisition officials "fully comply" with 10 USCA § 2377, which establishes a preference for commercial items and which requires the use of appropriate market research related thereto. The guidance shall, at a minimum, prohibit the award of a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the agency determines in writing that no commercial items are suitable to meet the agency's needs.

Within 180 days of the FY 2016 NDAA's enactment, the joint chiefs of staff, in consultation with AT&L, "shall review Chairman of the Joint Chiefs of Staff Instruction 3170.01, the Manual for the Operation of the Joint Capabilities Integration and Development System, and other documents governing the requirements development process" and "revise these documents" to ensure that DOD "fully complies" with the requirements of 10 USCA § 2377(c) and FAR 10.001 "to conduct appropriate market research before developing new requirements."

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FEATURE COMMENT: The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part II

The National Defense Authorization Act for Fiscal Year 2016 (S. 1356), signed into law Nov. 25, 2015, includes major procurement-related reforms. See P.L. 114-92. Most (but not all) of the procurement related provisions are included, as usual, in Title VIII—Acquisition Policy, Acquisition Management, and Related Matters. Title VIII includes 77 provisions specifically addressing procurement issues, which is substantially more than other recent NDAA legislation. Because of the volume and importance of the procurement changes in the FY 2016 NDAA, this FEATURE COMMENT is divided into two parts. Part I of this FEATURE COMMENT addressed NDAA §§ 801–855. See 58 GC ¶ 20. Part II addresses §§ 856–1645.

Section 856: Limitation on Conversion of Procurements from Commercial Acquisition Procedures—The provision requires that, prior to converting a Federal Acquisition Regulation pt. 12 commercial items procurement over $1 million to a non-commercial acquisition (under FAR pt. 15), the contracting officer must make a written determination that the earlier use of commercial acquisition procedures was in error or based on inadequate information, and that the Department of Defense will realize a cost savings from switching to FAR pt. 15. For procurements over $100 million, a contract may not be awarded pursuant to such conversion until the head of the contracting activity approves the written determination described above and provides the determination to the office of the undersecretary of defense for acquisition, technology, and logistics (AT&L). This provision is closely related to § 851.

Within 180 days of the FY 2016 NDAA's enactment, DOD "shall develop procedures to track conversions of future contracts and subcontracts for improved analysis and reporting and shall revise the [Defense FAR Supplement] to reflect the" § 856 requirements. Within one year of the FY 2016 NDAA's enactment, "the Secretary of Defense shall submit to the congressional defense committees a report on the implementation of" these requirements, "including any procurements converted as described" therein. The requirements of this section "shall terminate" Nov. 25, 2020.

Section 857: Treatment of Goods and Services Provided by Nontraditional Defense Contractors as Commercial Items—The section authorizes DOD to treat certain items and services provided by nontraditional defense contractors (as defined by 10 USCA § 2302(9)) as commercial items, which will allow for the use of streamlined acquisition procedures and reduce burdens to, e.g., provide detailed cost and pricing data. The definition of "nontraditional defense contractor" in 10 USCA § 2302(9) was modified by § 815(b) of the FY 2016 NDAA. Under the amended definition, a "nontraditional defense contractor" is "an entity that is not currently performing and has not performed, for at least the one-year period preceding the [DOD] solicitation," a DOD contract or subcontract that is subject to full Cost Accounting Standards coverage. See FY 2016 NDAA § 815(b). Prior to this amendment, performance within one year of "any other DOD contract in excess of $500,000 under which the contractor is required to submit certified cost or pricing data" also prevented an entity from being a nontraditional defense contractor. The goal of this section, of course, is to encourage nontraditional defense contractors to do business with DOD.

Section 861: Amendments to Mentor-Protégé Program—The section clarifies the eligibility requirements, forms of assistance, and reporting re-

quirements associated with the DOD mentor-protégé program, extends the authorization for firms to enter into mentor-protégé agreements through FY 2018, and extends the secretary of defense's authority to reimburse mentor firms for the costs of assistance furnished to protégé firms through 2021. This section also limits protégé firms' participation in the program to the five-year period beginning on the date the protégé firm enters into its first mentor-protégé agreement. Additionally, to be eligible to participate in the program, a mentor firm must not be affiliated with a protégé firm prior to approval of the mentor-protégé agreement, and the mentor must demonstrate that it

> (A) is qualified to provide assistance that will contribute to the purpose of the program; (B) is of good financial health and character and does not appear on a Federal list of debarred or suspended contractors; and (C) can impart value to a protégé firm because of experience gained as a [DOD] contractor or through knowledge of general business operations and government contracting.

The existing requirement that mentor-protégé agreements contain "[a] developmental program for the protégé firm, in such detail as may be reasonable," which must include "factors to assess the protégé firm's developmental progress under the program," has been expanded to require that the developmental program also include (i) "a description of the quantitative and qualitative benefits to [DOD] from the agreement, if applicable" and (ii) "goals for additional awards that [the] protégé firm can compete for outside the Mentor-Protégé Program."

Prior to the FY 2016 NDAA's enactment, mentor firms were permitted to provide assistance to protégé firms in the form of "[c]ash in exchange for an ownership interest in the protégé firm, not to exceed 10 percent of the total ownership interest." This form of assistance is now prohibited. Additionally, although the secretary is still permitted to reimburse mentor firms for the costs of providing assistance to protégé firms, § 861 now expressly prohibits the secretary from reimbursing mentor firms for "any fee assessed by the mentor firm" for assistance obtained by the mentor firm for the protégé firm from (i) "small business development centers"; (ii) "entities providing procurement technical assistance pursuant to chapter 142 of title 10, United States Code"; or (iii) "a historically Black college or university or a minority institution of higher education." The secretary is also prohibited from reimbursing mentor firms "for business development expenses incurred by the mentor firm under a contract awarded to the mentor firm while participating in a joint venture with the protégé firm."

Under § 861, mentor firms are now required to submit annual reports to DOD containing, among other items, detailed information about the assistance provided by the mentor to the protégé and the work performed by the protégé. The DOD Office of Small Business Programs must review annual reports submitted by mentors and, "if the Office finds that the mentor-protégé agreement is not furthering the purpose of the Mentor-Protégé Program, decide not to approve any continuation of the agreement."

The section amends the definition, for purposes of the mentor-protégé program, of "disadvantaged small business concern" to mean "a firm that has less than half the size standard corresponding to its primary North American Industry Classification System [NAICS] code", and "is not owned or managed by individuals or entities that directly or indirectly have stock options or convertible securities in the mentor firm." Firms meeting these first two requirements must also (A) be a small business that "(i) is a nontraditional defense contractor"; or "(ii) currently provides goods or services in the private sector that are critical to enhancing the capabilities of the defense supplier base and fulfilling key [DOD] needs"; or (B) fulfill at least one of the seven existing criteria (e.g., is "a small business concern owned and controlled by socially and economically disadvantaged individuals"). By permitting nontraditional defense contractors less than half the size standard corresponding to their primary NAICS codes to qualify as "disadvantaged" for purposes of the mentor-protégé program, even where such contractors are not owned by disadvantaged individuals, this section seeks to increase participation of nontraditional defense contractors in DOD procurements.

The joint explanatory statement directs the secretary of defense to report to the Senate and House Armed Services Committees, within 90 days of the FY 2016 NDAA's enactment, "on changes to program policy and metrics that would ensure the program meets the goal of enhancing the defense supplier base in the most effective and efficient manner." See armedservices.house.gov /index. cfm?a=Files.Serve&File_id=E0B05DFB-B970- 4D0C-92EA-26FD566B7E3B. The joint explanatory statement also directs the Government Accountability Office to report to the House and Senate Armed Services Committees by Nov. 25, 2016, "with an assessment of the efficacy of

the DOD Mentor-Protégé pilot program," recommendations on "harmoniz[ing] the DOD Mentor-Protégé pilot program with the Small Business Administration's Mentor-Protégé program," and assessment of "whether the reimbursement mechanism for the DOD Mentor-Protégé pilot program should be maintained." These reporting requirements are not included in the statute and only appear in the explanatory statement.

Section 863: Notice of Contract Consolidation for Acquisition Strategies—Section 863 provides that, if the "head of a contracting agency determines that an acquisition plan for a procurement involves a substantial bundling of contract requirements," the head of the contracting agency must publish a notice of such a determination on a public website no later than seven days after the determination is made. "Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published." When the solicitation is published, the head of the contracting agency must also publish a justification for the determination.

Section 864: Clarification of Requirements Related to Small Business Contracts for Services—This section effectively overturns the U.S. Court of Federal Claims' decision in *Rotech Healthcare Inc. v. U.S.*, 118 Fed. Cl. 408 (2014); 56 GC ¶ 325, by clarifying that small businesses with construction or service contracts are exempt from the SBA's non-manufacturer rule (NMR). The Small Business Act and SBA regulations require that, on supply contracts set aside for small businesses, a small business must perform at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials). The NMR is an exception to this performance requirement, and provides that a firm that is not a manufacturer may qualify as a small business on supply contracts set aside for small businesses if, among other items, it supplies the product of a small business located in the U.S. See 13 CFR § 121.406(b)(3) & (4). Section 864 amends the Small Business Act to provide that the NMR "shall not apply to a contract that has as its principal purpose the acquisition of services or construction." According to the joint explanatory statement, the NMR "was established to ensure that, when competition for a contract for goods is restricted to small businesses, the goods ultimately purchased were indeed the product of a small business. However, we are concerned that the NMR is being applied to services and construction contracts and could limit small business participants contracting for services and construction to the Federal Government." This section was enacted to address this concern.

Section 866: Modifications to Requirements for Qualified Historically Underutilized Business Zone Small Business Concerns Located in a Base Closure Area—Section 866 extends the length of time that covered base closure areas may participate in the HUBZone program for a period of either eight years or until SBA makes a final determination as to which areas will qualify for the HUBZone program after the results of the next decennial census following the base closure are released. This provision also expands the definition of "base closure area" to include not only the area within the external boundaries of the base that was closed, but also (i) the census tract or nonmetropolitan county in which the closed base is wholly contained; and (ii) "a census tract or nonmetropolitan county the boundaries of which intersect" the area within the external boundaries of the closed base. Additionally, HUBZone small businesses located in a base closure area are permitted to meet the program's employment requirements by hiring 35 percent of their employees from any qualified HUBZone.

Section 866 also authorizes the inclusion of qualified disaster areas in the HUBZone program. Like base closure areas, qualified disaster areas may participate in the HUBZone program for a period of eight years or until SBA makes a final determination as to which areas will qualify for the HUBZone program according to the results of the next decennial census conducted after the area was designated as a qualified disaster area. The section also provides that Native Hawaiian Organizations qualify as HUBZone companies.

Section 867: Joint Venturing and Teaming—For bundled and consolidated contracts, § 867 requires that, when evaluating offers from small business prime contractors that include teaming arrangements, contracting agencies must consider the past performance and capabilities of first-tier subcontractors as the capabilities and past performance of the small business prime contractor. Similarly, in evaluating offers from joint ventures, if a joint venture does not demonstrate sufficient capabilities or past performance to be considered for award, contracting agencies must consider the capabilities and past performance of each individual member of the joint venture as the capabilities and past performance

of the joint venture as a whole. This provision will preclude the Government from engaging in acquisition strategies for bundled, consolidated and related multiple award contracts, see FAR 7.104(d)(1) & (2); FAR 7.107(e), that do not allow joint ventures or teams to obtain credit for the past performance of the individual team members.

Section 869: Formal Establishment of SBA's Office of Hearings and Appeals (OHA); Petitions for Reconsideration of Size Standards—This section codifies the existence of OHA, i.e., the office responsible for hearing size appeals, and requires OHA to comply with the requirements of the Administrative Procedure Act. Section 869 also authorizes OHA to receive and decide on petitions for reconsideration of size standards and certain other matters (e.g., Freedom of Information Act and Privacy Act issues). This section provides a formal administrative mechanism to challenge whether SBA adhered to federal laws and regulations in determining the appropriate dollar value or cap on the number of employees that will be used to determine whether a company qualifies as a small business for a NAICS code. Petitions for reconsideration of size standards must be filed with OHA within 30 days of SBA's issuance of a final rule containing the size standard at issue. Even if a party wishing to challenge a size standard fails to file a petition for reconsideration within this 30-day period, that party may still seek judicial review of the size standard. Section 869 provides that submission of a petition for reconsideration of a size standard is not required to obtain judicial review of the size standard.

Section 873: Pilot Program for Streamlining Awards for Innovative Technology Projects—This section exempts from the Truth In Negotiations Act's requirements to provide cost or pricing data for DOD contracts, subcontracts and modifications valued at less than $7.5 million and "awarded to a small business or nontraditional defense contractor pursuant to" "(1) a technical, merit-based selection procedure, such as a broad agency announcement, or (2) the Small Business Innovation Research Program." This exemption does not apply if "the head of the agency determines that submission of cost and pricing data should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award." This section also exempts such contracts, but not subcontracts or modifications, from certain Defense Contract Audit Agency record examination and audit requirements (under 10 USCA § 2313(b)) "unless the head of the agency determines that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award." The exceptions under this section terminate on Oct. 1, 2020.

Section 875: Review of Government Access to Intellectual Property Rights of Private Sector Firms—Within 30 days of the FY 2016 NDAA's enactment, DOD must enter into a contract with an independent entity with appropriate expertise to review (1) DOD "regulations, practices, and sustainment requirements related to Government access to and use of intellectual property rights of private sector firms"; and (2) DOD "practices related to the procurement, management, and use of intellectual property rights to facilitate competition in sustainment of weapon systems throughout their life-cycle." This section may lead to a sole-source contract award by DOD. In conducting the review, the independent entity shall consult with the National Defense Technology and Industrial Base Council. This section also requires the secretary of defense to submit "a report on the findings of the independent entity, along with a description of any actions that the Secretary proposes to revise and clarify laws or that the Secretary may take to revise or clarify regulations related to intellectual property rights," to the congressional defense committees not later than March 1, 2016.

Section 881: Consideration of Potential Program Cost Increases and Schedule Delays from Defense Oversight—This section provides that the DOD

> Director of Operational Test and Evaluation, the Deputy [DOD] Chief Management Officer, the Director of the Defense Contract Management Agency, the Director of the Defense Contract Audit Agency, the Inspector General of the Department of Defense, and the heads of other defense audit, testing, acquisition, and management agencies *shall ensure* that policies, procedures, and activities implemented by their offices and agencies in connection with defense acquisition program oversight *do not result in unnecessary increases in program costs or cost estimates or delays in schedule or schedule estimates.*

(Emphasis added.) While this section's goal is laudable, this provision will be very difficult to enforce and, therefore, is close to meaningless.

Section 885: Amendments Concerning Detection and Avoidance of Counterfeit Electronic Parts—This section amends § 818(c)(2)(B) of the FY 2012 NDAA to expand contractors' eligibility to include costs associated with rework and corrective action related to counterfeit electronic parts as allowable costs under DOD contracts. While this amendment expands the scope of allowable costs, contractors must meet all three of the statute's requirements. Specifically, (1) the contractor must have "an operational system to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts," which has been "reviewed and approved by" DOD; (2) the parts must be either "provided to the contractor as Government property" or obtained by the contractor from "trusted suppliers"; and (3) the contractor must "discover[] the counterfeit or suspect counterfeit parts and provide[] timely notice to the Government."

Sec. 887: Effective Communication Between Government and Industry—Within 180 days of the FY 2016 NDAA's enactment, the FAR Council "shall prescribe a regulation making clear that agency acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry, so long as those exchanges are consistent with existing law and regulation and do not promote an unfair competitive advantage to particular firms." This section appears to be an outgrowth of the Office of Federal Procurement Policy's Feb. 2, 2011 memorandum, entitled " 'Myth-Busting': Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process," and its May 7, 2012 memorandum, entitled " 'Myth-Busting 2': Addressing Misconceptions and Further Improving Communication During the Acquisition Process."

Section 888: Standards for Procurement of Secure Information Technology and Cyber Security Systems—The secretary of defense must assess the application of the Open Trusted Technology Provider Standard or "similar public, open technology standards" to DOD procurements for IT and cybersecurity acquisitions and brief the House and Senate Armed Services Committees by Nov. 25, 2016.

Section 889: Unified Information Technology Services—No later than Nov. 25, 2016, the DOD deputy chief management officer, the DOD chief information officer and AT&L must conduct a "business case analysis to determine the most effective and efficient way to procure and deploy" common IT services for DOD. This analysis shall assess whether DOD should (a) either "acquire a unified set of commercially provided common or enterprise" IT services or "allow the military departments and other [DOD] components ... to acquire such services separately," (b) either acquire such IT services "from a single provider that bundles all of the services" or "require that each common service be independently defined and use open standards to enable continuous adoption of best commercial technology," and (c) enable "availability of multiple versions of each type of service and application to enable choice and competition while supporting interoperability where necessary."

Section 890: DOD Cloud Strategy—In consultation with relevant senior DOD officials (e.g., the undersecretary for intelligence), the DOD CIO must develop a cloud strategy for DOD's Secret Internet Protocol Router Network (SIPRNet). The strategy must address (A) "[s]ecurity requirements," (B) "[t]he compatibility of applications currently utilized within [SIPRNet] with a cloud computing environment," (C) "[h]ow a [SIPRNet] cloud capability should be competitively acquired," and (D) "[h]ow a [SIPRNet] cloud system for the Department would achieve interoperability with the cloud systems of the intelligence community ... operating at the security level Sensitive Compartmented Information." The section also requires the CIO to: (i) "develop a consistent pricing policy and cost recovery process for the use by [DOD] components of the cloud services provided through the Intelligence Community Information Technology Environment"; and (ii) "assess the feasibility and advisability of imposing a minimum set of open standards for cloud infrastructure, middle-ware, metadata, and application programming interfaces to promote interoperability, information sharing, ease of access to data, and competition" across all DOD cloud computing systems and services.

Section 891: Development Period for DOD Information Technology Systems—Section 2445b of Title 10, U.S. Code requires DOD to provide Congress with an annual cost, schedule and performance report on major automated information system programs. Section 891 revises § 2445b to require that, if a revision of such a program that is not a national security system causes the period "from the time of program initiation to the time of a full deployment decision" to last more than five years, the report must "include a written determination by the senior [DOD] official responsible for the program justifying the need for the longer period."

Section 893: Improved Auditing of Contracts—Section 893 provides that, effective Nov. 25, 2015, DCAA "may not provide audit support for non-Defense agencies unless the Secretary of Defense certifies that the backlog for incurred cost audits is less than 18 months of incurred cost inventory." DCAA has performed contract audits for civilian agencies since its inception in 1965. In December 2014 testimony before the House Committee on Science, Space and Technology, the DCAA director stated that audits for civilian agencies represented nine to 11 percent of DCAA's budget, or $50 to $64 million in funding. As the language of the provision suggests, this section is the result of DCAA's substantial backlog of incurred cost audits (i.e., contractor indirect cost rate proposals), which are submitted annually pursuant to FAR 52.216-7(d). See FAR 42.705-1(b). According to a 2012 GAO Report, DCAA does not even consider an incurred cost audit to be "backlogged" until a proposal has been awaiting review for two years. See GAO-13-131, *DOD Initiative to Address Audit Backlog Shows Promise, but Additional Management Attention Needed to Close Aging Contracts* at 1 (Dec. 18, 2012), available at *www.gao.gov /assets/660/650970.pdf*. The Senate Armed Services Committee recommended this section based on its conclusion that "DCAA management should not be distracted by directing and managing the audit responsibilities of other agencies until its own house is completely in order." See S. Rep. 114-49 at 189 (2015).

A potential result of this provision is that DCAA will have more resources available to focus on audits of DOD contracts, which could mean an increase in audits for defense contractors. Conversely, contractors that do business primarily with civilian agencies may see a decrease in audit activity. In fact, DCAA has already begun turning down audit work for civilian agencies, including stopping performance of civilian audit work that was underway. Civilian agencies' inability to rely on DCAA will almost certainly lead some agencies to increase reliance on private contractors to perform audit services.

Currently, civilian agencies must pay DCAA for audit work. However, § 893 also provides that "[t]he amount appropriated and otherwise available to the Defense Contract Audit Agency for a fiscal year beginning after September 30, 2016, shall be reduced by an amount equivalent to any reimbursements received by the Agency from non-Defense Agencies for audit support provided." This provision may require DCAA to reduce spending, which could lead to reductions in audit staff. The potential effect of such a reduction is that DCAA's audit backlog could actually increase rather than decrease.

This section requires DCAA to report on the percentage of DCAA "questioned costs" "sustained or recovered" by the Government. Many believe that a very substantial percentage of DCAA's reported findings are not upheld or sustained by the contracting activities. The section also requires DCAA to describe its "outreach actions toward industry to promote more effective use of audit resources." It will be very interesting to see what outreach efforts occur and how they are received by industry. Finally, § 893 provides that the secretary of defense "shall review [DOD's] oversight and audit structure … with the goals of—(A) enhancing the productivity of oversight and program and contract auditing to avoid duplicative audits; and (B) streamlining of oversight reviews." By Nov. 25, 2016, the secretary must provide a report "on actions taken to avoid duplicative audits and streamline oversight reviews," which is specifically and duplicatively referenced in this section four different times.

Section 894: Sense of Congress on Evaluation Method for Procurement of Audit or Audit Readiness Services—This section expresses "the sense of Congress that, before using the lowest price, technically acceptable [LPTA] evaluation method for the procurement of audit or audit readiness services, the Secretary of Defense should establish the values and metrics for evaluating companies offering audit services, including financial management and audit expertise and experience, personnel qualifications and certifications, past performance, technology, tools, and size." This "sense of Congress" is based on the findings that (A) "the audits of military service financial statements will ... be a complex challenge for companies selected to provide audit services," and (B) "LPTA is generally appropriate for commercial or noncomplex services or supplies where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal." This second finding echoes statements in a March 4, 2015 memo issued by AT&L emphasizing the "limited" role that LPTA should play in the DOD acquisition process. See *bbp.dau.mil/docs/Appropriate_Use_of_Lowest_Priced_Technically_Acceptable_Source_Selec_Process_Assoc_Con_Type.pdf* at 1.

Section 895: Mitigating Potential Unfair Competitive Advantage of Technical Advisors to

Acquisition Programs—Within 180 days of the FY 2016 NDAA's enactment, AT&L "shall review" "policy guidance pertaining to the identification, mitigation, and prevention of potential unfair competitive advantage conferred to technical advisors to acquisition programs" and, if necessary, revise such guidance or issue new guidance. According to the joint explanatory statement, such "technical advisors" "include contractors, federally funded research and development centers, university-affiliated research centers, non-profit entities, and federal laboratories that provide systems engineering and technical direction, participate in technical evaluations, support preparation of specifications or work statements, or otherwise provide technical advice to acquisition officials on the conduct of defense acquisition programs." The joint explanatory statement expresses the belief that "potentially unfair competitive advantage" "includes unequal access to acquisition officials responsible for award decisions or allocation of resources, or to acquisition information relevant to award decisions or allocation of resources." Finally, Congress "expect[s] the Secretary to develop metrics and processes for collecting and evaluating complaints and concerns relating to examples of the exploitation of unfair competitive advantage by technical advisors."

Section 896: Survey on the Costs of Regulatory Compliance—This section requires DOD to conduct a survey of defense "contractors with the highest level of reimbursements for cost-type contracts" during FY 2014 "to estimate industry's cost of regulatory compliance (as a percentage of total costs) with Government-unique acquisition regulations and requirements in the categories of quality assurance, accounting and financial management, contracting and purchasing, program management, engineering, logistics, material management, property administration, and other unique requirements not imposed on contracts for commercial items." The secretary of defense must submit to the congressional defense committees a report on the survey findings within 180 days of the FY 2016 NDAA's enactment. This provision was recommended by the Senate Armed Services Committee, which stated "that it will be more difficult to make decisions about achieving the right balance in oversight requirements on large defense programs without adequate data on the costs of oversight compliance." S. Rep. 114-49 at 190 (2015).

Section 1086: Reform and Improvement of Personnel Security, Insider Threat Detection and Prevention, and Physical Security—Within 270 days of the FY 2016 NDAA's enactment, this section requires the secretary of defense to develop standards for physical and logical access to secured facilities and information systems. Within 180 days of the FY 2016 NDAA's enactment, OMB must formalize the security, suitability and credentialing line of business to ensure adequate oversight and efficient investments are made across the enterprise. Also within 180 days of the FY 2016 NDAA's enactment, the Performance Accountability Council chair, along with the security and suitability executive agents and the secretary of defense, must jointly develop a plan to ensure implementation of uniform self-reporting requirements for all personnel who hold a clearance, including contractors. The joint explanatory statement indicates that this last "provision mandates that reported information be shared with those who have a need to know, to ensure that individuals with derogatory information are not allowed to move around the government without the negative information being known."

Section 1086 also revises 5 USCA § 9101 (access to criminal history records for national security and other purposes). The section (1) updates the list of covered agencies to which criminal history record information must be made available, and expands the "covered agency" definition to include contractor background investigators working on behalf of covered agencies; (2) revises the applicable purposes of investigation to include basic suitability or fitness assessments, credentialing under Homeland Security Presidential Directive 12, Transportation Security Administration security threat assessment programs, and Federal Aviation Administration checks required by federal statute; and (3) requires contractors who conduct background investigations on behalf of a covered agency to comply with necessary security requirements when accessing an automated information delivery system to request criminal history record information. Additionally, within one year of the FY 2016 NDAA's enactment, this section requires GAO to submit to the congressional defense committees and the House and Senate Homeland Security Committees a report summarizing the major characteristics of federal critical infrastructure protection access controls, as well as background check and credentialing standards for the protection of critical infrastructure and key resources.

Section 1110: Pilot Program on Temporary Exchange of Financial Management and Acqui-

sition Personnel—Section 1110 authorizes DOD to establish a "pilot program to assess the feasibility and advisability of" temporarily assigning DOD financial management and acquisition personnel to nontraditional defense contractors, as defined by 10 USCA § 2302(9) (as amended by FY 2016 NDAA § 815(b)) and, conversely, of temporarily assigning financial management and acquisition employees of nontraditional defense contractors to DOD. No assignment of an employee under this section may commence after Sept. 30, 2019. The duration of any assignment will be for three months to one year. The joint explanatory statement observes that "any exchange of government personnel with industry designed to improve skills and knowledge of finance and acquisition should be with those types of firms that do not traditionally do business with [DOD] and as such may offer different business management approaches to address similar problems. These firms also do not pose the same potential conflict of interest concerns that any exchange with a traditional defense contractor would pose."

Section 1641: Codification and Addition of Liability Protections Relating to Reporting on Cyber Incidents or Penetrations of Networks and Information Systems of Certain Contractors—This section provides limited cybersecurity liability protections for "cleared" and "operationally critical" contractors who are required by § 941 of the FY 2013 NDAA to report cyber incidents and network penetrations (collectively, "cyber incidents") to DOD. Specifically, this section prohibits lawsuits against such contractors in connection with required reports of cyber incidents. However, these protections are not available if a "cleared" or "operationally critical" contractor "engaged in willful misconduct in the course of complying with" the reporting requirements. Additionally, the liability protections provided by this section shall not be construed to "undermine or limit the availability of otherwise applicable common law or statutory defenses." A party claiming that § 1641's liability protections do not apply has the "burden of proving by clear and convincing evidence the willful misconduct by each cleared defense [or 'operationally critical'] contractor subject to such claim" and that the misconduct proximately caused the injury.

This section also expands permissible Government dissemination of information reported by contractors in connection with cyber incidents. Section 941(c)(3) of the FY 2013 NDAA prohibited DOD from disseminating information that was "obtained or derived" from required reports of cyber incidents if the information in question was "not created by or for" DOD, unless DOD obtained the "approval of the contractor providing such information." Section 1641 amends this prohibition by permitting DOD to disseminate reported information to "entities" (including private entities) (1) "with missions that may be affected by such information"; (2) "that may be called upon to assist in the diagnosis, detection, or mitigation of cyber incidents"; (3) "that conduct counterintelligence or law enforcement investigations"; or (4) "for national security purposes, including cyber situational awareness and defense purposes." It is unclear how this section will interact with (i) DOD's Aug. 26, 2015 interim rule implementing FY 2013 NDAA § 941, see 80 Fed. Reg. 51739–48, which currently does not include any liability protection; and (ii) the Cybersecurity Act of 2015, enacted Dec. 18, 2015, as Division N of the Consolidated Appropriations Act, 2016.

Section 1645: Designation of Military Department Entity Responsible for Acquisition of Critical Cyber Capabilities—Within 90 days of the FY 2016 NDAA's enactment, the secretary of defense shall "designate an entity within a military department to be responsible for the acquisition of" the "critical cyber capabilities," which "are the cyber capabilities that the Secretary considers critical to [DOD's] mission …, including:" "(A) [t]he Unified Platform described in the [DOD] document titled 'The Department of Defense Cyber Strategy' dated April 15, 2015"; "(B) [a] persistent cyber training environment"; and "(C) [a] cyber situational awareness and battle management system."

Within 90 days of the FY 2016 NDAA's enactment, the secretary must submit to the congressional defense committees a report on critical cyber capabilities. The report shall include

> (A) Identification of each critical cyber capability and the entity of a military department responsible for the acquisition of the capability. (B) Estimates of the funding requirements and acquisition timelines for each critical cyber capability. (C) An explanation of whether critical cyber capabilities could be acquired more quickly with changes to acquisition authorities. (D) Such recommendations as the Secretary may have for legislation or administrative action to improve the acquisition of, or to acquire more quickly, [such] critical cyber capabilities.

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