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FEATURE COMMENT: The Significant Impact Of The FY 2017 National Defense Authorization Act On Federal Procurement—Part I

On Dec. 23, 2016, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2017 (S. 2943). See P.L. 114-328, 130 Stat. 2000 (Dec. 23, 2016). As with every NDAA since FY 2010, the FY 2017 NDAA stalled in Congress before being enacted well after the start of its fiscal year. In his signing statement, the president objected to or criticized several provisions of the FY 2017 NDAA (e.g., for "impos[ing] extensive organizational changes on" DOD and for the failure to close the detention facility at Guantanamo Bay). See *obamawhitehouse.archives.gov/the-press-office/2016/12/23/statement-president-signing-national-defense-authorization-act-fiscal*.

The FY 2017 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." More specifically, Title VIII includes 88 provisions addressing procurement issues, as compared to 77 provisions in the FY 2016 NDAA, 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 2017 NDAA statutory changes will not become effective until the Federal Acquisition Regulation and Defense FAR Supplement (and, depending on the circumstances, certain other regulations) are amended. As discussed below, provisions in other titles of the FY 2017 NDAA are also important to procurement law.

Sen. John McCain (R-Ariz.), chair of the Senate Armed Services Committee, stated that the FY 2017 NDAA "firmly establishes innovation as a primary mission of the Department of Defense, and delivers bold reforms on defense acquisition." See *www.mccain.senate.gov/public/index.cfm/press-releases?ID=9DAA6A8F-4F3F-4274-8ED8-87670353CF57*. He further observed that "[t]he NDAA authorizes a total of $619.0 billion for defense discretionary spending, which is $3.2 billion above President Obama's budget request." Id.

Because of the volume and significance of the procurement changes in the FY 2017 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I addresses §§ 213–830 below. Part II, which will be published on Feb. 1, 2017, addresses §§ 831–1835.

Section 213: Permanent Authority for Defense Research and Development Rapid Innovation Program—This section repealed the sunset provision for the Defense Research and Development Rapid Innovation Program and made the program permanent. Section 1073 of the 2011 NDAA (P.L. 111-383, 124 Stat. 4137, 4366–67) established the program "to stimulate innovative technologies and reduce acquisition or lifecycle costs, address technical risks, improve the timeliness and thoroughness of test and evaluation outcomes, and rapidly insert such products directly in support of primarily major defense acquisition programs, but also other defense acquisition programs that meet critical national security needs." According to DOD, as of August 2016, under this program it had received and evaluated 14,853 white paper proposals (FY 11–16), received and evaluated 771 proposals (FY 11–15), and made 450 contract awards (FY 11–14). See *www.defenseinnovationmarketplace.mil/resources/RIF_Overview(Aug2016).pdf* at 7. Of those awards, 401 (89 percent) were to small businesses. Id.; see *DOD Rapid Innovation Program: Some Technologies Have Transitioned to Military Users, but Steps Can Be Taken to Improve Program Metrics and*

Outcomes (GAO-15-421), available at *www.gao.gov/products/GAO-15-421;* 57 GC ¶ 157.

Section 803: Modernization of Services Acquisition—Within 180 days of the FY 2017 NDAA's enactment, the secretary of defense shall review and, if necessary, revise DOD Instruction 5000.74 (Jan. 5, 2016), the Acquisition of Services Instruction, and other guidance pertaining to the acquisition of services. In conducting the review, the secretary

> shall examine—(1) how the acquisition community should consider the changing nature of the technology and professional services markets, particularly the convergence of hardware and services; and (2) the services acquisition portfolio groups referenced in the Acquisition of Services Instruction and other guidance in order to ensure the portfolio groups are fully reflective of changes to the technology and professional services market.

Also within 180 days of the FY 2017 NDAA's enactment, the secretary must "issue guidance addressing the training and development of the [DOD] workforce engaged in the procurement of services, including those personnel not designated as members of the acquisition workforce." FY 2017 NDAA § 803(b)(1). As noted in the joint explanatory statement, this amendment expands "the workforce to be developed and trained on the acquisition of services" "from the acquisition workforce to all [DOD] employees engaged in the procurement of services." H.R. Rep. No. 114-840, at 1091 (2016) (Conf. Rep.).

Section 805: Modular Open System Approach in Major Weapon Systems—This section (which will be codified as new Chapter 144B of 10 USCA Subtitle A, Part IV) clarifies when programs are required to start using a modular open system approach (MOSA). Specifically, a major defense acquisition program that receives milestone A or milestone B approval after Jan. 1, 2019, shall be "designed and developed, to the maximum extent practicable, with a modular open system approach to enable incremental development and enhancement competition, innovation, and interoperability."

MOSA means,

> with respect to a major defense acquisition program, an integrated business and technical strategy that—(A) employs a modular design that uses major system interfaces between a major system platform and a major system component, between major system components, or between major system platforms; (B) is subjected to verification to ensure major system interfaces comply with, if available and suitable, widely supported and consensus-based standards; (C) uses a system architecture that allows severable major system components at the appropriate level to be incrementally added, removed, or replaced throughout the life cycle of a major system platform to afford opportunities for enhanced competition and innovation while yielding—(i) significant cost savings or avoidance; (ii) schedule reduction; (iii) opportunities for technical upgrades; (iv) increased interoperability, including system of systems interoperability and mission integration; or (v) other benefits during the sustainment phase of a major weapon system; and (D) complies with the technical data rights set forth in [10 USCA § 2320].

This section further defines major system interface as a "shared boundary between a major system platform and a major system component, between major system components, or between major system platforms, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements" that is "characterized clearly in terms of form, function, and the content that flows across the interface in order to enable technological innovation, incremental improvements, integration, and interoperability." Section 805 also establishes 10 USCA § 2446b, which, among other things, mandates that acquisition strategies required under 10 USCA § 2431a for major defense acquisition programs that use MOSA "clearly describe the approach to systems integration and systems-level configuration management to ensure mission and information assurance."

Section 808: Transparency in Major Defense Acquisition Programs—Section 808 provides that, no later than 15 days after granting milestone A, B or C approval for a major defense acquisition program, the milestone decision authority must submit a brief summary report on that milestone to the congressional defense committees, and, in the case of intelligence or intelligence-related activities, to the congressional intelligence committees.

All three reports must include the program's cost and schedule estimates established by the military department concerned, and the independent estimated cost and schedule established by the DOD director of cost assessment and program evaluation

pursuant to 10 USCA § 2334(a)(6). The milestone A and B reports must also include (1) information on the program cost and fielding targets established by the secretary of defense under 10 USCA § 2448a(a); (2) a "summary of the technical or manufacturing risks associated with the program, as determined by the military department concerned, including identification of any critical technologies or manufacturing processes that need to be matured"; and (3) a "summary of the independent technical risk assessment conducted or approved under section 2448b of this title, including identification of any critical technologies or manufacturing processes that need to be matured."

Additionally, the milestone A report must include a "summary of any sufficiency review conducted by the Director of Cost Assessment and Program Evaluation of the analysis of alternatives performed for the program (as referred to in [10 USCA §] 2366a(b)(6) ...)." The milestone B report must include a "statement of whether a modular open system approach is being used for the program." And the milestone C report must include a "summary of any production, manufacturing, and fielding risks associated with the program." The milestone decision authority will be required to submit additional information at the request of the congressional defense or intelligence committees, as applicable.

Section 809: Amendments Relating to Technical Data Rights—Section 809(b)(5) amends 10 USCA § 2320 to provide that the U.S. "shall have government purpose rights in technical data pertaining to an interface between an item or process and other items or processes that was developed in part with Federal funds and in part at private expense." However, DOD may negotiate rights that extend beyond Government-purpose rights "in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiation of different rights in such technical data would be in the best interest of the United States."

Section 809(b)(5) also (a) revises 10 USCA § 2320 to provide that the U.S. "shall have government purpose rights in technical data pertaining to a major system interface developed exclusively at private expense or in part with Federal funds and in part at private expense and used in a [MOSA] pursuant to" the new 10 USCA § 2446a established by FY 2017 NDAA § 805(a), and (b) authorizes the secretary to negotiate for "different rights in such technical data" if the secretary determines that doing so would be in the best interest of the U.S. The joint explanatory statement clarifies the purpose of this section: since "MOSA relies upon the ability of major system components to be added, removed, or replaced as needed throughout the life cycle of the major weapon system due to evolving technology, threats, sustainment, and other factors ...[,] major system interfaces that share a boundary between major system components and major system platforms are critical, and it is imperative that the government have appropriate access to the technical data of such interfaces." H.R. Rep. No. 114-840, at 1094 (2016) (Conf. Rep.).

Section 809(b)(5) further provides that major system interfaces in which the Government asserts rights must be identified in solicitations and in the contracts awarded pursuant to such solicitations. "For technical data pertaining to a major system interface developed exclusively at private expense for which the United States asserts government purpose rights, the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data." Id.

The joint explanatory statement notes that "in the case of privately funded major system interfaces for which the Department asserts government purpose rights it is necessary to explicitly require negotiation for compensation." H.R. Rep. No. 114-840, at 1093 (2016) (Conf. Rep.). However, it provides that the addition of an express requirement for the secretary to negotiate with contractors to establish appropriate and reasonable compensation for privately funded major system interfaces for which DOD asserts Government-purpose rights should not be interpreted as eliminating DOD's "standard practice of negotiating prices for technical data" rights in items or processes that are not related to privately funded major system interfaces. Id. Rather, "the conferees expect the standard practice of negotiating prices for technical data to continue for all other categories of rights and circumstances set forth in [10 USCA §] 2320." Id.

Section 809 also amends § 813 of the FY 2016 NDAA, which established a Government-industry advisory panel to review 10 USCA §§ 2320 and 2321, regarding rights in technical data and their implementing regulations. See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part 1," 58 GC ¶ 20. Pursuant to FY 2017 NDAA § 809(f), the panel is now tasked not only with reviewing 10 USCA §§ 2320 and 2321 "for the purpose of ensuring that such statutory and regulatory require-

ments are best structured to serve the interests of the taxpayers and the national defense," FY 2016 NDAA § 813(b), but also with "develop[ing] recommendations for changes to sections 2320 and 2321 ... and the regulations implementing such sections." 2017 NDAA § 809(f)(1). Section 809(f) also requires the panel to ensure that DOD and DOD contractors "have the technical data rights necessary to support the modular open system approach requirement set forth in" 10 USCA § 2446a (which was established by FY 2017 NDAA § 805).

Section 811: Modified Restrictions on Undefinitized Contractual Actions—Section 811 amends 10 USCA § 2326 to provide that "[n]o undefinitized contractual action [UCA] may extend beyond 90 days without a written determination by the Secretary of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable) that it is in the best interests of the military department, the Defense Agency, the combatant command, or the [DOD], respectively, to continue the action." A UCA is "a new procurement action entered into by the head of an agency for which the contractual terms, specifications, or price are not agreed upon before performance is begun under the action." 10 USCA § 2326; see DFARS 217.7401(d).

Section 811 amends the definition of UCA to include foreign military sales, and, consistent with the existing requirements of 10 USCA § 2326, it prohibits DOD contracting officers from entering into UCAs for foreign military sales "unless the contractual action provides for agreement upon contractual terms, specifications, and price" by the end of the 180-day period following the contractor's submission of a qualifying proposal for definitization. See DFARS 217.7404-3 (definitization schedule). As amended by FY 2017 NDAA § 811, 10 USCA § 2326 provides that a "qualifying proposal" is "a proposal that contains sufficient information to enable [DOD] to conduct a meaningful audit of the information contained in the proposal." Several provisions of the UCA regulations in DFARS subpt. 217.74 will need to be amended to reflect § 811's changes to 10 USCA § 2326. E.g., DFARS 217.7401(c) (defining qualifying proposal); DFARS 217.7402(a)(1) (providing that foreign military sales are not subject to DFARS subpt. 217.74).

Section 813: Lowest Price Technically Acceptable Source Selection—Section 813(a) states that "[i]t shall be [DOD] policy … to avoid using lowest price technically acceptable [LPTA] source selection criteria in circumstances that would deny [DOD] the benefits of cost and technical tradeoffs in the source selection process."

More specifically, under § 813(b), within 120 days of the FY 2017 NDAA's enactment, "the Secretary of Defense shall revise the [DFARS] to require that, for solicitations issued on or after" 120 days following the NDAA's enactment, LPTA source selection criteria will be "used only in situations in which" the following six factors are fulfilled:

> (1) [DOD] is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers; (2) [DOD] would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal; (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal; (4) the [SSA] has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to [DOD]; (5) the contracting officer has included a justification for the use of a [LPTA] evaluation methodology in the contract file; and (6) [DOD] has determined that the lowest price reflects full life-cycle costs, including for operations and support.

Section 813(c) further provides that

> [t]o the maximum extent practicable, the use of [LPTA] source selection criteria shall be avoided in the case of a procurement that is predominately for the acquisition of—(1) information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, or other knowledge-based professional services; (2) personal protective equipment; or (3) knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq.

Finally, § 813(d) requires that "[n]ot later than December 1, 2017, and annually thereafter for three years, the Comptroller General ... shall submit to the congressional defense committees a report on the

number of instances in which [LPTA] source selection criteria is used for a contract exceeding $10,000,000, including an explanation of how the situations listed in [§ 813(b)] were considered in making a determination to use [LPTA] source selection criteria." Clearly, in § 813, Congress has made it clear that LPTA is a disfavored procurement method.

Section 814: Procurement of Personal Protective Equipment—Section 814 requires that not later than 90 days after the FY 2017 NDAA's enactment, the DFARS "shall be revised—(1) to prohibit the use by [DOD] of reverse auctions or [LPTA] contracting methods for the procurement of personal protective equipment if the level of quality or failure of the item could result in combat casualties; and (2) *to establish a preference for the use of best value contracting methods for the procurement of such equipment*." (Emphasis added.) This last statement is somewhat odd and reflects a lack of understanding of the FAR, which provides that a LPTA "source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price." FAR 15.101-2. In other words, under the FAR, LPTA is a form of best value. See FAR 15.101. However, under LPTA procurements, tradeoffs (e.g., cost-technical) are not permitted. See FAR 15.101-2(b)(2). The preference that the drafters apparently meant to establish was for best-value procurements that include cost-technical tradeoffs. See FAR 15.101-1.

The joint explanatory statement somewhat clarifies this language when it observes that "both LPTA and reverse auctions are appropriate contracting methods and price discovery methods. However, the conferees do not believe that such methods are appropriate for equipment that provides personal protection to members of the Armed Services." H.R. Rep. No. 114-840, at 1096 (2016) (Conf. Rep.).

Section 815: Amendments Related to Detection and Avoidance of Counterfeit Electronic Parts—This section amends § 818 of the FY 2012 NDAA (P.L. 112-81; 10 USCA § 2302 note); see Schaengold and Deschauer, Feature Comment, "The Impact Of The FY 2012 NDAA On Federal Procurement," 54 GC ¶ 60, by replacing "trusted suppliers" with "suppliers that meet applicable anticounterfeiting requirements." The joint explanatory statement provides that the purpose of this change is to "clear up confusion about the term, which refers to the specific category of microelectronics supplies that have been accredited by the Defense Microelectronics Activity." H.R. Rep. No. 114-840, at 1096 (2016) (Conf. Rep.).

Section 816: Amendments to Special Emergency Procurement Authority—This section amends 41 USCA § 1903(a) to expand the special emergency procurement authority, which permits agencies to use micropurchase and simplified acquisition procedures for higher-value procurements than permitted in procurements that are not "special emergency procurements." For example, the simplified acquisition threshold is raised for special emergency procurements from $250,000 to $750,000 for contracts to be awarded and performed, or purchases to be made, inside 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. See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part 1," 58 GC ¶ 20.

As a result of § 816's amendment to 41 USCA § 1903, in addition to supporting contingency operations or "to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack," § 816 provides that executive agencies may use the special emergency procurement authority to procure services or supplies in support of: (1) "a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance pursuant to chapter 9 of part I of the Foreign Assistance Act of 1961 (22 USCA § 2292 et seq.)," or (2) "an emergency or major disaster (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 USCA § 5122))."

The joint explanatory statement directs the Comptroller General, not later than four years after the enactment of the FY 2017 NDAA, to submit to the congressional committees on armed services "a review of all procurement activities conducted under the authorities provided by this provision." H.R. Rep. No. 114-840, at 1096–97 (2016) (Conf. Rep.). However, this requirement does not appear in the statute. The joint explanatory statement further directs "any agency making use of this expanded authority to closely consult with the Congress on its use, especially its use over extended periods of time; the establishment of mechanisms to ensure proper oversight over its use; and the monitoring of its impact on industry,

especially small and disadvantaged businesses." Id. at 1097.

Section 817: Compliance with Domestic Source Requirements for Military Footwear—This section amends 37 USCA § 418 to require that, upon the initial entry of enlisted military members into the armed forces, the secretary of defense must directly furnish such enlisted members with "athletic footwear" "instead of providing a cash allowance to the members for the purchase of such footwear." See DFARS subpt. 225.70. The footwear must comply with the requirements to buy certain articles from U.S. sources, as established in the Berry Amendment, 10 USCA § 2533a, "without regard to the applicability of any simplified acquisition threshold under chapter 137 of title 10 (or any other provision of law)." Section 817's requirement that footwear acquired for enlisted members comply with the Berry Amendment appears to be the result of lobbying efforts of New Balance Athletics Inc., a shoe manufacturing company that makes running shoes in the U.S. See *www.bostonglobe.com/business/2016/05/01/bill-force-pentagon-shift-made-sneakers-may-help-new-balance/QZsGHcC2aVPwKRnwd9wltL/story.html*.

For two years following the FY 2017 NDAA's enactment, the secretary must also procure "additional athletic footwear" to provide new enlisted members "with sufficient choices in athletic shoes so as to minimize the incidence of athletic injuries and potential unnecessary harm and risk to the safety and well-being of members in initial entry training." The separation of the two-year period during which the secretary must procure "additional footwear" from the general requirement to procure footwear from domestic sources in accordance with the Berry Amendment suggests that the "additional footwear" acquired during the two-year period may be acquired from non-domestic sources. However, the joint explanatory statement states that "[d]uring those two years, the conferees expect the Secretary, to the maximum extent practicable, to furnish footwear from domestic sources while taking appropriate steps to minimize the incidence of athletic injuries." H.R. Rep. No. 114-840, at 1097 (2016) (Conf. Rep.).

Section 820: Defense Cost Accounting Standards—Section 820(a) amends 41 USCA § 1501 to establish certain duties for the Cost Accounting Standards Board. Specifically, the CAS Board shall

> (1) ensure that the cost accounting standards used by Federal contractors rely, to the maximum extent practicable, on commercial standards and accounting practices and systems; (2) within one year after the date of enactment of this subsection, and on an ongoing basis thereafter, review any cost accounting standards established under section 1502 of [title 41] and conform such standards, where practicable, to Generally Accepted Accounting Principles; and (3) annually review disputes involving such standards brought to the boards [of contract appeals] established in section 7105 of [title 41] or Federal courts, and consider whether greater clarity in such standards could avoid such disputes.

Additionally, the CAS Board now must meet at least once per quarter and "publish in the Federal Register notice of each meeting and its agenda before such meeting is held." The section also requires the CAS Board to submit an annual report to Congress "describing the actions taken during the prior year—to (1) to conform the cost accounting standards established under section 1502 of [title 41] with Generally Accepted Accounting Principles; and (2) to minimize the burden on contractors while protecting the interests of the Federal Government." Further, the section also amends 41 USCA § 1502(b)(3)(A) by increasing the value of contracts eligible for a waiver of cost accounting standards from $15 million to $100 million.

Effective Oct. 1, 2018, § 820(b) establishes the Defense Cost Accounting Standards Board, an independent board in the Office of the Secretary of Defense. The Defense CAS Board will include (a) the DOD chief financial officer or designee, who serves as the Defense CAS Board chair; (b) three DOD representatives appointed by the secretary of defense; and (c) three private-sector individuals, also appointed by the secretary. The Defense CAS Board members other than the CFO must "have experience in contract pricing, finance, or cost accounting." One of the private-sector representatives must be from a public accounting firm. This position may be challenging to fill. Because qualified representatives of public accounting firms (or their firms) likely have clients that they advise on cost accounting standards, serving on the Defense CAS Board may create a conflict of interest. Notably, the non-defense CAS Board has a vacancy for the position reserved for an individual from the private sector who is "particularly knowledgeable about cost accounting problems and systems." 41 USCA § 1501(b)(1)(B)(ii); see *obamawhitehouse.archives.gov/omb/procurement/casb_index_members* (as of Jan. 5, 2017, the account-

ing member on the CAS Board is vacant). Additionally, one of the private-sector representatives must be a representative of a nontraditional defense contractor (as defined in 10 USCA § 2302(9)).

The Defense CAS Board

> (1) shall review cost accounting standards established under section 1502 of title 41 and recommend changes to such cost accounting standards to the [non-defense CAS Board]; (2) has exclusive authority, with respect to [DOD], to implement such cost accounting standards to achieve uniformity and consistency in the standards governing measurement, assignment, and allocation of costs to contracts with [DOD]; and (3) shall develop standards to ensure that commercial operations performed by Government employees at [DOD] adhere to cost accounting standards (based on cost accounting standards established under section 1502 of title 41 or Generally Accepted Accounting Principles) that inform managerial decisionmaking.

This language is somewhat unclear about whether the Defense CAS Board could implement its own cost accounting standards, which could cause confusion and difficulty for contractors that contract with both DOD and civilian agencies.

Additionally, this section establishes that DOD contractors may present, and the Defense Contract Audit Agency

> shall accept without performing additional audits, a summary of audit findings prepared by a commercial auditor if—(A) the auditor previously performed an audit of the allowability, measurement, assignment to accounting periods, and allocation of indirect costs of the contractor; and (B) such audit was performed using relevant commercial accounting standards (such as Generally Accepted Accounting Principles) and relevant commercial auditing standards established by the commercial auditing industry for the relevant accounting period.

Additionally, DCAA may audit direct costs of DOD cost contracts and "shall rely on commercial audits of indirect costs without performing additional audits, except that in the case of companies or business units that have a predominance of cost-type contracts as a percentage of sales, the Defense Contract Audit Agency may audit both direct and indirect costs." The joint explanatory statement also encourages the DCAA director "to examine the potential for electronic quality management systems to improve the ability of DCAA to conduct thorough and timely audits." H.R. Rep. No. 114-840, at 1098 (2016) (Conf. Rep.).

No later than Dec. 31, 2019, GAO must report to congressional defense committees on "the adequacy of the method used by the" non-defense CAS Board "to apply cost accounting standards to indirect and fixed price incentive contracts."

Section 821: Increased Micropurchase Threshold Applicable to DOD Procurements—Section 821 raises the micropurchase threshold for DOD procurements to $5,000. Under the FAR, the micropurchase threshold for most agencies and nonconstruction acquisitions is $3,500. See FAR 2.101 (definition of micropurchase threshold). This increase is significant because micropurchases do not require the use of most FAR clauses, and competition is not required if the authorized purchaser considers the price reasonable. To the extent practicable, micropurchases must be distributed equitably among qualified suppliers. See FAR 13.203(a).

Section 822: Enhanced Competition Requirements—This section amends 10 USCA § 2306a, Cost or Pricing Data: Truth in Negotiations, to narrow the circumstances in which an offeror for a prime contract entered into pursuant to 10 USCA Subtitle A, Part IV, Chapter 137 is required to submit cost or pricing data before contract award. Prior to the FY 2017 NDAA's enactment, § 2306a(a)(1)(A) required submission of cost or pricing data prior to award of prime contracts worth over $500,000 "entered into using procedures other than sealed-bid procedures." FY 2017 NDAA § 822 limits the requirement to submit cost and pricing data before award to prime contracts entered into using procedures other than sealed bidding in which there is an expectation that only one bid will be received. Section 822 also amends 10 USCA § 2306a(b)(1)(A)(i) to clarify that

> [s]ubmission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract ... for which the price agreed upon is based on ... adequate competition that results in at least two or more responsive and viable competing bids.

Section 822 also amends 10 USCA § 2306a to clarify the role of the prime contractor in determining whether a subcontract is exempt from the requirement to submit cost or pricing data because (a) there was adequate competition resulting in at least two responsive

and viable competing bids; or (b) the acquisition is for commercial items. Specifically, § 822 adds a new subsection (6) to 10 USCA § 2306a(b), providing that prime contractors required to submit certified cost or pricing data "shall be responsible for determining whether a subcontract under such contract qualifies for an exception under paragraph (1)(A) from such requirement." Despite the statute's placement of responsibility for making such a determination on prime contractors, the joint explanatory statement states that it "recognize[s] that the government retains the right to review determinations made by prime contractors." H.R. Rep. No. 114-840, at 1099 (2016) (Conf. Rep.).

Section 824: Treatment of Independent Research and Development (IR&D) Costs on Certain Contracts—Section 824 establishes 10 USCA § 2372a, which requires the secretary of defense to establish regulations governing DOD payment of bid and proposal costs. The regulations must provide that "expenses incurred for bid and proposal costs shall be reported independently from other allowable indirect costs." More specifically, bid and proposal costs must now be reported separately from independent research and development (IR&D) costs under 10 USCA § 2372. The regulations to be prescribed pursuant to § 824 must also provide that "bid and proposal costs shall be allowable as indirect expenses on covered contracts" (as covered contract is defined in 10 USCA § 2324(l)) "to the extent that those costs are allocable, reasonable, and not otherwise unallowable by law" or the FAR. These regulations "shall apply to indirect costs incurred on or after October 1, 2017."

Section 824 also requires the secretary to establish for each fiscal year a DOD-wide goal of limiting the amount of reimbursable bid and proposal costs paid by DOD to no more than one percent of total aggregate industry sales to DOD. However, "[t]o achieve such goal, the Secretary may not limit the payment of allowable bid and proposal costs for the covered year." The joint explanatory statement clarifies that the intent of § 824 is not for DOD "to achieve this goal by arbitrarily limiting the amount of bid and proposal costs contractors may have reimbursed, but to instead address the factors driving bid and proposal costs." H.R. Rep. No. 114-840, at 1099 (2016) (Conf. Rep.).

If DOD fails to meet the one-percent goal for a fiscal year, within 180 days after exceeding the goal, the secretary must establish an advisory panel pursuant to the Federal Advisory Committees Act (5 USCA app.) to "review laws, regulations, and practices that contribute to the expenses incurred by contractors for bids and proposals in the fiscal year concerned and recommend changes to such laws, regulations, and practices that may reduce" these expenses. The secretary must appoint to the panel nine "recognized experts in acquisition and procurement policy" with "diverse experiences in the public and private sector[s]." The panel must submit to the secretary and congressional defense committees: (1) an interim report on the panel's findings no later than six months after the panel is established, and (2) a final report no later than one year after the panel is established.

Additionally, no later than 90 days after the FY 2017 NDAA's enactment, the secretary of defense must "enter into a contract with an independent entity to study the laws, regulations, and practices relating to expenses incurred by contractors for bids and proposals." Within 180 days after receiving such contract, the independent entity must submit to DOD and the congressional defense committees "a report on the laws, regulations, or practices relating to expenses incurred by contractors for bids and recommendations for changes to such laws, regulations, or practices that may reduce" these expenses. Section 824 also requires DCAA, in its annual report to the congressional defense committees (see 10 USCA § 2313a), to provide summaries, both by dollar amount and percentage, of indirect costs incurred by contractors in the previous fiscal year for (a) IR&D, and (b) bid and proposal costs.

Section 825: Exception to Requirement to Include Cost or Pricing to the Government for Certain Multiple-Award Task or Delivery Order Contracts—This section amends 10 USCA § 2305(a)(3) to provide that,

> if the head of an agency issues a solicitation for multiple task or delivery order contracts under [10 USCA §] 2304a(d)(1)(B) for the same or similar services and intends to make a contract award to each qualifying offeror ([1]) cost or price to the Federal Government need not, at the Government's discretion, be considered ... as an evaluation factor for the contract award;

and (2) if cost or price to the Government is not an evaluation factor, the requirement under 10 USCA § 2305(a)(3)(A)(iii) for the agency to disclose "whether all evaluation factors other than cost or price, when combined, are" "(I) significantly more important than cost or price; (II) approximately equal in importance to cost or price; or (III) significantly

less important than cost or price," shall not apply. Additionally, in such circumstances, "cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to [10 USCA §] 2304c(b) ... of a task or delivery order under any contract resulting from the solicitation." Section 825 defines qualifying offeror as an offeror that "(i) is determined to be a responsible source; (ii) submits a proposal that conforms to the requirements of the solicitation; and (iii) the contracting officer has no reason to believe would likely offer other than fair and reasonable pricing."

Section 825 does "not apply to multiple task or delivery order contracts if the solicitation provides for sole source task or delivery order contracts pursuant to section 8(a) of the Small Business Act (15 USCA 637(a))." As explained in the joint explanatory statement, this is because, in this situation, there would be no expectation of competition at the time of the task or delivery order award. H.R. Rep. No. 114-840, at 1100 (2016) (Conf. Rep.). Section 825(b) also amends 10 USCA § 2304c(b) to provide that a task or delivery order may be awarded on a sole-source basis if the task or delivery order satisfies one of the exceptions in 10 USCA § 2304(c) that permit the award of a stand-alone contract on a sole-source basis.

Section 829: DOD Preference for Fixed-Price Contracts—Within 180 days of the FY 2017 NDAA's enactment, the DFARS "shall be revised to establish a preference for fixed-price contracts, including fixed-price incentive fee contracts, in the determination of contract type." Significantly, a DOD CO "may not enter into a [covered] cost-type contract … unless the contract is approved by the service acquisition executive of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable)." A covered contract is (1) a cost-type contract, entered into between Oct. 1, 2018 and Sept. 30, 2019, worth over $50 million; or (2) a cost-type contract, entered into on or after Oct. 1, 2019, worth over $25 million.

On this subject, in a press release concerning the FY 2017 NDAA, McCain remarked that "[t]he overuse of 'cost-type' contracts, and the complicated and expensive government bureaucracy that goes with them, serves as a barrier to entry for commercial, non-traditional, and small businesses that are driving the innovation our military needs." See *www.mccain.senate.gov/public/index.cfm/press-releases?ID=9DAA6A8F-4F3F-4274-8ED8-87670353CF57*.

Section 829 adds another layer to the existing limitations on a CO's ability to select a cost-reimbursement contract type set forth in FAR 16.301-2 and 16.301-3. Specifically, FAR 16.301-2 permits the use of cost-reimbursement contracts "only when—(1) [c]ircumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract ... ; or (2) [u]ncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract." Additionally, for a cost-reimbursement contract to be used, FAR 16.301-3 requires that (1) "[a] written acquisition plan has been approved and signed at least one level above the contracting officer"; (2) "[t]he contractor's accounting system is adequate for determining costs applicable to the contract or order"; and (3) "[p]rior to award of the contract or order, adequate Government resources are available to award and manage a contract other than firm-fixed-priced (see [FAR] 7.104(e))." Adequate resources include "appropriate Government surveillance during performance in accordance with [FAR] 1.602-2, to provide reasonable assurance that efficient methods and effective cost controls are used." FAR 16.301-3 also prohibits the use of cost-reimbursement contracts for the acquisition of commercial items.

Section 830: Requirement to Use Firm Fixed-Price Contracts for Foreign Military Sales—Within 180 days of the NDAA's enactment, the "Secretary of Defense shall prescribe regulations to require the use of firm fixed-price contracts for foreign military sales." These regulations "shall include exceptions that may be exercised if the foreign country that is the counterparty to a foreign military sale—(1) has established in writing a preference for a different contract type; or (2) requests in writing that a different contract type be used for a specific foreign military sale."

These regulations "shall include a waiver that may be exercised by the Secretary of Defense or his designee if the Secretary or his designee determines on a case-by-case basis that a different contract type is in the best interest of the United States and American taxpayers."

The joint explanatory statement directs the secretary "to develop a process to determine the contracting preferences of foreign counterparties and to brief the [congressional] Committees on Armed Services … on the elements of the process" no later than six months after the FY 2017 NDAA's enact-

ment. H.R. Rep. No. 114-840, at 1102 (2016) (Conf. Rep.). The joint explanatory statement further provides that the conferees "expect that the Secretary shall waive the requirement for firm fixed-price contracts only in exceptional cases," and that DOD

> will not interfere in the process of the host nation selecting a contract type. If a contract type other than firm fixed-price is selected at the request of a country, the Secretary of Defense shall be prepared to notify Congress that the [DOD] did not encourage the country in the decision to pursue that contract type.

Id.

Section 830(d) provides that the

> Secretary of Defense shall establish a pilot program to reform and accelerate the contracting and pricing processes associated with full rate production of major weapon systems for no more than 10 foreign military sales contracts by—(A) basing price reasonableness determinations on actual cost and pricing data for purchases of the same product for [DOD]; and (B) reducing the cost and pricing data

required "to be submitted." This pilot program expires on Jan. 1, 2020.

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FEATURE COMMENT: The Significant Impact Of The FY 2017 National Defense Authorization Act On Federal Procurement—Part II

On Dec. 23, 2016, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2017, P.L. 114-328 (NDAA), which includes significant procurement changes. Because of the volume and importance of the procurement changes in the FY 2017 NDAA, this Feature Comment is divided into two parts. Part I of this Feature Comment addressed NDAA §§ 213–830. See 59 GC ¶ 18. Part II addresses §§ 831–1835.

Section 831: Preference for Performance-Based Contract Payments—Section 831 amends 10 USCA § 2307(b), Contract Financing, to establish a preference for performance-based contracting wherever practicable. Performance-based acquisitions are those "structured around the results to be achieved as opposed to the manner by which the work is to be performed." Federal Acquisition Regulation 2.101. Section 831 requires the secretary of defense to ensure that "nontraditional defense contractors and other private sector companies are eligible for performance-based payments, consistent with best commercial practices." The joint explanatory statement provides that "this section re-establishes the policy objective" set forth at FAR 32.1001, which recognized "performance-based payments as the preferred Government financing mechanism." H.R. Rep. No. 114-840, at 1102 (2016) (Conf. Rep.).

Section 832: Contractor Incentives to Achieve Savings and Improve Mission Performance—Within 180 days after the enactment of the FY 2017 NDAA, the Defense Acquisition University must implement a training program for Department of Defense acquisition personnel "on fixed-priced incentive fee contracts, public-private partnerships, performance-based contracting" and other authorities that "give incentives to contractors to achieve long-term savings and improve administrative practices and mission performance."

Section 833: Sunset and Repeal of Certain Contracting Provisions—This section establishes a Sept. 30, 2018 sunset date for 10 USCA § 2220, Performance Based Management: Acquisition Programs, which requires the secretary of defense to establish cost, performance and schedule goals for major defense acquisition programs and for each phase of the acquisition cycle of such programs, and requires the undersecretary of defense (comptroller) to evaluate the cost goals proposed for each major defense acquisition program.

Section 833 also repeals 10 USCA § 2245a, Use of Operation and Maintenance Funds for Purchase of Investment Items, which prohibited the use of funds appropriated to DOD for operation and maintenance from being used to purchase any item (including any item to be acquired as a replacement) that has an investment item unit cost greater than $250,000.

Section 835: Protection of Task Order Competition—Pursuant to § 835, the Government Accountability Office's jurisdiction over protests of civilian agency task and delivery orders valued over $10 million is now permanent. This provision of § 835 directly overlaps with the GAO Civilian Task and Delivery Order Protest Authority Act of 2016, P.L. 114-260 (Dec. 14, 2016) (signed into law nine days before the passage of the FY 2017 NDAA), which had already made permanent GAO's jurisdiction over protests of civilian agency task and delivery orders valued over $10 million. This jurisdiction had lapsed as of Oct. 1, 2016 pursuant to § 813 of the FY 2012 NDAA, P.L. 112-81, 125 Stat. 1298, 1491. See Schaengold and Deschauer, Feature Comment, "The Impact Of The FY 2012 NDAA On Federal Procurement," 54 GC ¶ 60. As a result, from

Oct. 1, 2016 to the signing of the GAO Civilian Task and Delivery Order Protest Authority Act of 2016, GAO denied protests of civilian task and delivery order awards due to lack of jurisdiction. See, e.g., *Wyle Labs., Inc.*, Comp. Gen. Dec. B-413989, 2016 CPD ¶ 345. For a detailed discussion of the history of GAO's task order jurisdiction, see *HP Enter. Servs. LLC*, Comp. Gen. Dec. B-413382.2, 2016 CPD ¶ 343, at 3; 58 GC ¶ 429 (Note 2). The permanent restoration of GAO's jurisdiction over civilian task and delivery order awards over $10 million is significant because, as GAO observed in its Annual Bid Protest Report for FY 2016, nearly 14 percent (375 out of 2,734) of bid protest cases closed in FY 2016 are attributable to GAO's bid protest jurisdiction over civilian and DOD task or delivery orders. See *www.gao.gov/assets/690/681662.pdf*.

Section 835 also increases the threshold for protests of DOD task and delivery orders, which did not lapse, from $10 million to $25 million, through an amendment to 10 USCA § 2304c(e)(1)(B). The U.S. Court of Federal Claims and contracting agencies still lack jurisdiction over civilian and DOD task or delivery order protests, see 41 USCA § 4106(f)(2); 10 USCA § 2304c(e)(2). However, the COFC, contracting agencies and GAO separately have protest jurisdiction over DOD and civilian agency task or delivery orders where it is alleged that an order increases the scope, period or maximum value of the underlying indefinite-delivery, indefinite-quantity contract. See id. § 4106(f)(1)(A); 10 USCA § 2304c(e)(1)(A).

The unpassed Senate version of the FY 2017 NDAA originally proposed to (1) eliminate contractors' ability to protest DOD task and delivery orders if DOD determined it had established an appropriate internal review and oversight process (through an ombudsman); (2) require a large contractor filing a GAO bid protest on a DOD contract to cover the cost of processing the protest if all of the protest elements are denied in a GAO decision; and (3) "withhold … payments above incurred costs on any bridge or temporary contract to an incumbent contractor who submits a protest and that protest results in the issuance of a bridge or temporary contract. The distribution of this withhold [above incurred costs] would be dependent on the outcome of the protest." Instead of making these proposed Senate changes, Congress agreed to conduct a comprehensive study of the bid protest system, which is discussed in the summary of § 885, below.

Section 844: Review and Report on Sustainment Planning in the Acquisition Process—This section requires the secretary of defense, through an agreement with an independent entity, to "conduct a review of the extent to which sustainment matters are considered in decisions related to the requirements, research and development, acquisition, cost estimating, and programming and budgeting processes for major defense acquisition programs." Not later than August 1, the secretary must submit to Congress a copy of the independent entity's report

> along with comments on the report, proposed revisions or clarifications to laws related to life-cycle management or sustainment planning for major weapon systems, and a description of any actions the Secretary may take to revise or clarify regulations and practices related to life-cycle management or sustainment planning for major weapon systems.

Section 847: Revisions to the Definition of Major Defense Acquisition Program—This section revises the definition of major defense acquisition program to exclude an acquisition program or project that is carried out using the rapid fielding or rapid prototyping acquisition pathway under § 804 of the FY 2016 NDAA (P.L. 114-92; 10 USCA § 2302 note). The "rapid prototyping pathway" provides "for the use of innovative technologies to rapidly develop fieldable prototypes to demonstrate new capabilities and meet emerging military needs"; the "rapid fielding pathway" provides "for the use of proven technologies to field production quantities of new or upgraded systems with minimal development required." See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part I," 58 GC ¶ 20.

Section 851: Reporting of Small Business Participation on DOD Programs—By March 31 each year the secretary of defense must report to the congressional defense committees on the attainment of small business prime contract and subcontracting goals, as established by § 15(g)(1)(A) of the Small Business Act (15 USCA § 644(g)(1)(A)). Additionally, for the prime contract and subcontract goals negotiated with DOD pursuant to § 15(g)(2) of the Small Business Act (15 USCA § 644(g)(2)), the secretary must report to the congressional defense committees: (1) the information DOD reported to the Small Business Administration pursuant to § 15(h)(1) of the Small Business Act (15

USCA § 644(h)(1)); and (2) separately on DOD's "small business use after excluding certain types of contracts that may not be suitable for award to small businesses." H.R. Rep. No. 114-840, at 1107 (2016) (Conf. Rep.). This requirement sunsets after the secretary submits the report covering FY 2020.

Section 871: Market Research for Determination of Price Reasonableness—This section amends 10 USCA § 2377 to require DOD procurement officials to "conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation." To support such market research, a procurement official may, in the case of items other than major weapon systems, which can be treated as commercial items pursuant to 10 USCA § 2379 (discussed in § 872, below), "require the offeror to submit relevant information."

Section 872: Value Analysis for the Determination of Price Reasonableness—This section expands the information that a contractor may submit, and that a contracting officer may consider, when determining price reasonableness for major weapon systems procured as commercial items. 10 USCA § 2379(a) permits DOD to treat a major weapons system as a commercial item, or to purchase such system as a commercial item, if "(1) the Secretary of Defense determines that—(A) the major weapon system is a commercial item, as defined in section 103 of title 41; and (B) such treatment is necessary to meet national security objectives; and (2) the congressional defense committees are notified at least 30 days before such treatment or purchase occurs." See also 10 USCA § 2379(b) (permitting subsystems of major weapon systems (other than commercially available off-the-shelf items) to be treated as a commercial item and purchased under procedures for the procurement of commercial items if "(1) the subsystem is intended for a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (a); or (2) the contracting officer determines in writing that the subsystem is a commercial item, as defined in section 103 of title 41.").

Prior to the FY 2017 NDAA's enactment, to determine price reasonableness for major weapon systems or subsystems procured as commercial items, COs were required to use information submitted pursuant to 10 USCA § 2379(d). Such information includes "(A) prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers"; (B) if the CO determines that the offeror does not have access to and cannot provide such information, information on "(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"; and "(C) if the contracting officer determines that the information submitted pursuant to subparagraphs (A) and (B) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates." Section 872 amends 10 USCA § 2379(d) to provide that, in addition to this information, "an offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. A [CO] may consider such information or analysis in addition to" historic pricing data.

Section 874: Inapplicability of Certain Laws and Regulations to the Acquisition of Commercial Items and Commercially Available Off-the-Shelf Items—Section 874 amends 10 USCA § 2375 to require the establishment in the Defense FAR Supplement of "a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to" (1) "contracts for the procurement of commercial items"; (2) "subcontracts under a [DOD] contract or subcontract for the procurement of commercial items"; and (3) "contracts for the procurement of commercially available off-the-shelf items."

All laws and contract clause requirements "that the Under Secretary of Defense for Acquisition, Technology, and Logistics determines set[] forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government" must be included in these lists unless the provisions or clauses (a) "provide[] for criminal or civil penalties"; (b) "require[] that certain articles be bought from American sources pursuant to" the Berry Amendment, 10 USCA § 2533a, "or require[] that strategic materials critical to national security be bought from American sources pursuant to" 10 USCA § 2533b; or (c) "specifically

refer[] to" 10 USCA § 2375 (as amended by FY 2017 NDAA § 874) "and provide[] that, notwithstanding this section, [they] shall be applicable to contracts for the procurement of commercial items."

Section 875: Use of Commercial or Non-Government Standards in Lieu of Military Specifications and Standards—This section requires that DOD "use[] commercial or non-Government specifications and standards in lieu of military specifications and standards, including for procuring new systems, major modifications, upgrades to current systems, non-developmental and commercial items, and programs in all acquisition categories, unless no practical alternative exists to meet user needs." Section 875(b) permits the appropriate milestone decision authority, the appropriate service acquisition executive, or the undersecretary of defense for acquisition, technology and logistics (USD AT&L) to issue a waiver permitting the use of military specifications in procurements if necessary "to define an exact design solution when there is no acceptable commercial or non-Government standard or when the use of a commercial or non-Government standard is not cost effective."

Not later than 180 days following the FY 2017 NDAA's enactment, the DFARS must be revised "to encourage contractors to propose commercial or non-Government standards and industry-wide practices that meet the intent of the military specifications and standards." Additionally, the USD AT&L must (1) "form partnerships with appropriate industry associations to develop commercial or non-Government standards for replacement of military specifications and standards where practicable"; and (2) "negotiate licenses for standards to be used across [DOD] and ... maintain an inventory of such licenses that is accessible to other [DOD] organizations."

Section 876: Preference for Commercial Sales—Within 90 days after the FY 2017 NDAA's enactment, the secretary of defense must revise the guidance issued pursuant to § 855 of the FY 2016 NDAA (P.L. 114-92; 10 USCA § 2377 note). Section 855 of the FY 2016 NDAA required the secretary of defense to issue guidance to ensure that defense acquisition officials "fully comply" with 10 USCA § 2377, which established a preference for commercial items and requires the use of appropriate market research related thereto. See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part I," 58 GC ¶ 20.

The guidance must be revised to require a written determination indicating that market research was conducted before DOD may award a contract that exceeds the simplified acquisition threshold for facilities-related services, knowledge-based services (except engineering services), construction services, medical services, or transportation services that are not commercial services, and that no commercial services are suitable to meet the agency's needs. For contracts between the simplified acquisition threshold and $10 million, the CO must make the written determination. For contracts over $10 million, the service acquisition executive, the head of a defense agency, the combatant commander, or the USD AT&L must make the written determination.

Section 879: Defense Pilot Program to Acquire Innovative Commercial Items, Technologies and Services Using General Solicitation Competitive Procedures—Section 879(a) authorizes the secretaries of defense and the military departments to carry out a "defense commercial solutions opening pilot program" through which the appropriate secretary "may acquire innovative commercial items, technologies, and services" on a fixed-price basis "through a competitive selection of proposals, resulting from a general solicitation and the peer review of such proposals." Within six months of the FY 2017 NDAA's enactment, the secretary of defense, in consultation with the Office of Management and Budget director, must issue guidance for the implementation of the pilot program within DOD. See FY 2017 NDAA § 879(d).

For purposes of § 879, innovative "means—(1) any technology, process, or method, including research and development, that is new as of the date of submission of a proposal; or (2) any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date." FY 2017 NDAA § 879(f). The general solicitation and peer-review procedures used for procurements under the pilot program will be considered competitive procedures for purposes of 10 USCA, Chapter 137. FY 2017 NDAA § 879(b); see 10 USCA § 2304(a). The items, technologies and services acquired under the pilot program "shall be treated as commercial items" even if they do not strictly comply with the definition set forth in 10 USCA § 2376(1). FY 2017 NDAA § 879(c)(3); see 41 USCA § 103 (defining commercial item).

A contract worth over $100 million may not be awarded under the pilot program unless the USD

AT&L, or the relevant service acquisition executive, makes a written determination "of the efficacy of the effort to meet mission needs." FY 2017 NDAA § 879(c)(1). Additionally, the secretary of defense must notify the congressional defense committees within 45 days after the award under the pilot program of a contract exceeding $100 million. The pilot program will end on Sept. 30, 2022.

Section 880: Pilot Programs to Acquire Innovative Commercial Items Using General Solicitation Competitive Procedures—The secretary of homeland security and the General Services Administration administrator may carry out a "commercial solutions pilot program." This pilot program is similar to, but in many respects different from, the DOD pilot program established by § 879. The pilot program under § 880 is only for innovative commercial items, whereas the one established by § 879 is for commercial items, technologies and services. Further, unlike the defense pilot program under § 879, contracts entered into under the § 880 pilot program may not exceed $10 million. FY 2017 NDAA § 880(c).

Additionally, within three years after the FY 2017 NDAA's enactment, the secretary of homeland security and the GSA administrator must report to the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform on the activities each agency carried out under the pilot program. FY 2017 NDAA § 880(e). The report must include "(A) [a]n assessment of the impact of the pilot program on competition[;] (B) [a] comparison of acquisition timelines for—(i) procurements made using the pilot program; and (ii) procurements made using other competitive procedures that do not use general solicitations[;] and (C) [a] recommendation on whether the authority for the pilot program should be made permanent." Id. No similar report is required for the defense commercial solutions pilot program.

Section 885: Report on Bid Protests—Within 270 days of the FY 2017 NDAA's enactment, § 885(a) mandates that the secretary of defense "shall enter into a contract with an independent research entity that is a not-for-profit entity or a federally funded research and development center" to perform a "comprehensive study on the prevalence and impact of bid protests on [DOD] acquisitions, including protests filed with contracting agencies, the [GAO], and the Court of Federal Claims." Section 885(d) provides that, within one year after the FY 2017 NDAA's enactment, the "entity that conducts the [bid protest] study … shall provide to the Secretary of Defense and the congressional defense committees a report on the results of the study, along with any related recommendations."

If the statutory language of § 885 is strictly implemented, this bid protest report will indeed be "comprehensive." Unlike many statutes, § 885 was clearly drafted by someone with relevant experience and expertise in the statute's subject matter (here, bid protests). This is demonstrated by the large number of directly relevant "elements" to be studied and included in the final report. Given the amount of information and analysis required by the report, however, it is questionable whether one year will be sufficient time to complete the report.

Specifically, the report will cover DOD contracts and include, among other things, the following "elements":

(1) The extent and manner in which the bid protest system affects or is perceived to affect the decisions of COs, program executive officers and program managers with respect to: "(A) the development of a procurement to avoid protests rather than improve acquisition; (B) the quality or quantity of preproposal discussions, discussions of proposals, or post-award debriefings; (C) the decision to use lowest price technically acceptable procurement methods; (D) the decision to make multiple awards or encourage teaming; (E) the ability to meet an operational or mission need or address important requirements; (F) the decision to use sole source award methods; and (G) the decision to exercise options on existing contracts."

(2) With respect to a company bidding on contracts or task or delivery orders, how the bid protest system affects or is perceived to affect its decisions with respect to bidding and filing protests.

(3) "A description of trends in the number of bid protests filed with agencies, the [GAO], and Federal courts, the effectiveness of each forum for contracts and task or delivery orders, and the rate of such bid protests compared to contract obligations and the number of contracts."

(4) "An analysis of bid protests filed by incumbent contractors, including—(A) the rate at which

such protesters are awarded bridge contracts or contract extensions over the period that the protest remains unresolved; and (B) an assessment of the cost and schedule impact of successful and unsuccessful bid protests filed by incumbent contractors on contracts for services with a value in excess of $100,000,000."

(5) "An assessment of the cost and schedule impact of successful and unsuccessful bid protests filed on contracts valued in excess of $3,000,000,000."

(6) "An analysis of how often protestors are awarded the contract that was the subject of the bid protest."

(7) "A summary of the results of protests in which the contracting agencies took unilateral corrective action, including—(A) at what point in the bid protest process the agency agreed to take corrective action; (B) the average time for remedial action to be completed; and (C) a determination regarding—(i) whether or to what extent the decision to take the corrective action was a result of a determination by the agency that there had been a probable violation of law or regulation; or (ii) whether or to what extent such corrective action was a result of some other factor."

(8) "A description of the time it takes agencies to implement corrective actions after a ruling or decision, and the percentage of those corrective actions that are subsequently protested, including the outcome of any subsequent protest."

(9) An analysis of instances in which protesters that are dissatisfied with the outcome of a protest in one forum file a second protest in a different forum, including any difference in the protest outcome.

(10) "An analysis of the effect of the quantity and quality of debriefings on the frequency of bid protests."

(11) "An analysis of the time spent at each phase of the procurement process attempting to prevent a protest, addressing a protest, or taking corrective action in response to a protest, including the efficacy of any actions attempted to prevent the occurrence of a protest."

The study required by this section, along with the reports required by §§ 886 (indefinite-delivery contracts) and 887 (contractual flow-down provisions), discussed below, may foreshadow significant future changes to the bid protest and procurement processes.

Section 886: Report on Indefinite-Delivery Contracts—By March 31, 2018, the U.S. Comptroller General is required to report to Congress on DOD's use of indefinite-delivery contracts entered into during FYs 2015–2017. The report, among other requirements, shall include a review of DOD policies for use of indefinite-delivery contracts and guidance, if any, on the appropriate number of vendors that should receive multiple-award indefinite-delivery contracts. The report must also include "[r]ecommendations for potential changes to current law or [DOD] acquisition regulations or guidance to promote competition with respect to indefinite delivery contracts."

Section 887: Review and Report on Contractual Flow-Down Provisions—Pursuant to § 887, the secretary of defense is required to conduct, through a contract with an independent entity "with appropriate expertise," "a review of contractual flow-down provisions related to major defense acquisition programs on contractors and suppliers, including small businesses, contractors for commercial items, nontraditional defense contractors, universities, and not-for-profit research institutions." No later than August 1, the secretary must report to Congress the findings of the independent entity, "along with a description of any actions that the Secretary proposes to address the findings of the independent entity." See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part I," 58 GC ¶ 20 (section 854: discussing 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).

Section 888: Requirement Relating to Use Of Brand Names or Brand-Name or Equivalent Descriptions in Solicitations—Section 888 requires the secretary of defense to "ensure that competition in [DOD] contracts is not limited through the use of specifying brand names or brand-name *or equivalent* descriptions, or proprietary specifications or standards, in solicitations unless a justification for such specification is provided and approved in accordance with" 10 USCA § 2304(f) (which specifies the justification and approval requirements for awarding a contract using procedures other than competitive procedures) (emphasis added). FAR 6.302-1(c)(2) provides that "[b]rand-name or equal descriptions, and other purchase

descriptions that permit prospective contractors to offer products other than those specifically referenced by brand-name, provide for full and open competition and do not require justifications and approvals to support their use." Section 888, however, will now require justification and approval for both brand name only and brand name or equal purchase descriptions.

Additionally, not later than 180 days after the FY 2017 NDAA's enactment, the USD AT&L must "conduct a review of the policy, guidance, regulations, and training related to specifications included in information technology acquisitions to ensure current policies eliminate the unjustified use of potentially anti-competitive specifications." This review must "examine the use of brand names or proprietary specifications or standards in solicitations for procurements of goods and services, as well as the current acquisition training curriculum related to those areas." The undersecretary must brief the House and Senate armed services committees on the results of this review no later than 270 days after the FY 2017 NDAA's enactment, and must revise policies, guidance and training to incorporate appropriate recommendations within one year after the FY 2017 NDAA's enactment.

Section 889: Inclusion of Information on Common Grounds for Sustaining Bid Protests in Annual GAO Reports to Congress—This section requires the Comp. Gen. to "include in the annual report to Congress on [GAO] each year a list of the most common grounds for sustaining protests relating to bids for contracts during such year." However, § 867 of the FY 2013 NDAA, implemented at 31 USCA § 3554(e)(2), already requires the Comp. Gen.'s annual bid protest report to Congress to "include a summary of the most prevalent grounds for sustaining protests during [the] preceding year." See Schaengold and Deschauer, Feature Comment, "The Impact Of The FY 2013 NDAA On Federal Procurement," 55 GC ¶ 57. As a result, while the statutory language is not exactly identical, it will lead to the same result. Perhaps this demonstrates that the presumption that Congress is aware of its prior legislation, see *Mississippi ex rel. Hood v. AU Optronics Corp*., 134 S.Ct. 736 (2014), is not really accurate!

Section 891: Authority to Provide Reimbursable Auditing Services to Certain Non-Defense Agencies—Pursuant to § 893(a) of the FY 2016 NDAA, effective Nov. 25, 2015, the Defense Contract Audit Agency "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." See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part II," 58 GC ¶ 28. Section 891 of the FY 2017 NDAA amends § 893(a) (P.L. 114-92; 10 USCA § 2313 note) of the FY 2016 NDAA to permit DCAA to provide audit support on a reimbursable basis for the National Nuclear Security Administration.

Section 901: Organization of the Office of the Secretary of Defense—This section eliminates the USD AT&L effective Feb. 1, 2018, and replaces the position with two new civilian roles: an undersecretary of defense for research and engineering, and an undersecretary of defense for acquisition and sustainment.

The undersecretary of defense for research and engineering will serve as DOD's chief technology officer "with the mission of advancing technology and innovation for the armed forces" and DOD. As chief technology officer, the undersecretary will be responsible for (1) "establishing policies on, and supervising, all defense research and engineering, technology development, technology transition, prototyping, experimentation, and developmental testing activities and programs, including the allocation of resources for defense research and engineering, and unifying defense research and engineering efforts across [DOD]"; and (2) "serving as the principal advisor to the Secretary on all research, engineering, and technology development activities and programs in [DOD]." The individual serving as USD AT&L as of Feb. 1, 2018 may serve as undersecretary of defense for research and engineering commencing on that date without further appointment.

The undersecretary of defense for acquisition and sustainment will serve as DOD's "chief acquisition and sustainment officer" "with the mission of delivering and sustaining timely, cost-effective capabilities for the armed forces" and DOD. As chief acquisition and sustainment officer, the undersecretary will be responsible for, among other things, (a) "establishing policies on, and supervising, all elements of [DOD] relating to acquisition (including system design, development, and production, and procurement of goods and services) and sustainment (including logistics, maintenance, and materiel readiness)"; (b) "establishing policies for access to, and maintenance of, the defense industrial base and materials critical to national security, and policies

on contract administration"; and (c) "overseeing the modernization of nuclear forces and the development of capabilities to counter weapons of mass destruction, and serving as the chairman of the Nuclear Weapons Council and the co-chairman of the Council on Oversight of the National Leadership Command, Control, and Communications System." The statute also makes clear that the undersecretary has "the authority to direct the Secretaries of the military departments and the heads of all other [DOD] elements … with regard to matters for which the Under Secretary has responsibility."

The joint explanatory statement explains that the chief technology officer and chief acquisition officer should be separated because "the technology and acquisition missions and cultures are distinct." H.R. Rep. No. 114-840, at 1130 (2016) (Conf. Rep.). Thus, the undersecretary of defense for research and engineering is expected to "take risks, press the technology envelope, test and experiment, and have the latitude to fail, as appropriate," while the undersecretary of defense for acquisition and sustainment is expected "to focus on timely, cost-effective delivery and sustainment of products and services, and thus seek to minimize any risks to that objective." Id. The separation is supposed to create "a healthy tension" that will allow the secretary of defense to balance the input of the undersecretary of defense for research and engineering, who will drive innovation, against the input of the undersecretary of defense for acquisition and sustainment, who will "challenge any advanced technology ideas that the Under Secretary cannot confidently deliver on within cost, schedule, and performance objectives, and shape those efforts appropriately." Id.

Section 901(c) also establishes (effective Feb. 1, 2018) a DOD chief management officer "with the mission of managing the business operations of the Department." Section 901 repeals FY 2015 NDAA § 901(a) (P.L. 113-291; 128 Stat. 3462), which was supposed to replace the deputy chief management officer with an undersecretary of defense for business management and information effective February 1.

As part of § 901's reorganization of the Office of the Secretary of Defense, the following positions have been eliminated: the assistant secretary of defense for acquisition; assistant secretary of defense for logistics and materiel readiness; assistant secretary of defense for research and engineering; assistant secretary of defense for energy, installations, and environment; deputy assistant secretary of defense for developmental test and evaluation; deputy assistant secretary of defense for systems engineering; deputy assistant secretary for manufacturing and industrial base policy.

In his signing statement for this Act, President Obama observed that he

> remain[s] deeply concerned about the Congress's use of the National Defense Authorization Act to impose extensive organizational changes on the Department of Defense, disregarding the advice of the Department's senior civilian and uniformed leaders. The extensive changes in the bill are rushed, the consequences poorly understood, and they come at a particularly inappropriate time as we undertake a transition between administrations. These changes not only impose additional administrative burdens on the Department of Defense and make it less agile, but they also create additional bureaucracies and operational restrictions that generate inefficiencies at a time when we need to be more efficient.

See *www.whitehouse.gov/the-press-office/2016/12/23/statement-president-signing-national-defense-authorization-act-fiscal*.

In a press release on the Act, Senator McCain observed that

> innovation cannot be an auxiliary office at [DOD]. It must be the central mission of its acquisition system. Unfortunately, that is not the case with the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (AT&L). It has grown too big, tries to do too much, and is too focused on compliance at the expense of innovation. … Therefore, the conference report disestablishes AT&L by February 2018, and divides its duties between two new offices: a new Under Secretary of Defense for Research and Engineering and an Under Secretary for Acquisition and Sustainment. The job of Research and Engineering will be developing defense technologies that can ensure a new era of U.S. qualitative military dominance. The job of Acquisition and Sustainment will focus on the execution of acquisition functions, ensuring compliance, and lowering risks to taxpayers.

See *www.mccain.senate.gov/public/index.cfm/press-releases?ID=9DAA6A8F-4F3F-4274-8ED8-87670353CF57*.

Section 1832: **Uniformity in Service-Disabled Veterans Definitions**—This section amends the Small Business Act (15 USCA § 632(q)(3)) and 38 USCA § 8127 (VA veteran-owned small business

contracting goals and preferences) to standardize the definitions for VOSBs and service-disabled VOSBs. The VA will now be required to use the definition of "small business concern owned and controlled by veterans" set forth in the Small Business Act, as amended by FY 2017 NDAA § 1832, and the VA secretary is prohibited from issuing regulations "related to the status of a concern as a small business concern and the ownership and control of such small business concern." This will likely result in the revision or repeal of VA's ownership regulations (38 CFR 74.3) and control regulations (38 CFR 74.4).

Section 1832 makes three important changes to the Small Business Act's ownership and control criteria for SDVOSBs. First, this section specifies that stock owned by an employee stock ownership plan (ESOP) is *not* considered when either the SBA or VA determines whether service-disabled veterans own at least 51 percent of the business's stock. This effectively overturns an SBA Office of Hearings and Appeals (OHA) decision, which was upheld by the COFC, that previously ruled that ESOP stock with sufficient voting rights can be considered a "class of voting stock," and thus, pursuant to SBA regulations requiring that a service-disabled veteran own at least 51 percent of *each class* of voting stock, see 13 CFR § 125.9(d), a service-disabled veteran must own at least 51 percent of the total outstanding stock *and* at least 51 percent of the ESOP stock to qualify as a SDVOSB. See *Matter of Precise Sys., Inc.,* SBA No. VET-243 (2014), SBA No. VET-246 (2015); 57 GC ¶ 124; *Precise Sys., Inc. v. U.S.*, 120 Fed. Cl. 586 (2015); see 38 CFR § 74.3(b)(3) ("[A]t least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more veterans or service-disabled veterans.").

Second, a spouse or permanent caregiver of a veteran with "permanent and severe disability" is now permitted to control the "management and daily business operations" of the business on behalf of the service-disabled veteran owner. Third, § 1832 adds to the Small Business Act definition of SDVOSB a provision similar to the former 38 USCA § 8127(l)(2)(B), which permits a business to qualify as a SDVOSB if it is 51-percent owned by "one or more service-disabled veterans with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern." Unlike SDVOSBs owned by veterans with "permanent and severe" disabilities, there is no restriction on who can manage an SDVOSB 51 percent or more owned by a veteran (or veterans) with "permanent and total" disabilities.

Section 1832 also adopts the now-eliminated 38 USCA § 8127(h), which specifies the conditions in which a surviving spouse may continue to operate a company as a SDVOSB. The only difference between former § 8127(h) and FY 2017 NDAA § 1832 in this regard is that § 1832 expressly requires that, for a surviving spouse to operate a business as a SDVOSB, "immediately prior to the death of such veteran, ... the small business concern was included in" the VA's database of veteran-owned businesses (VetBiz).

If a small business is not included in VetBiz because the VA secretary "does not verify" the status of the concern as a small business or "does not verify" that a veteran owns and controls the concern, the concern may appeal the "denial of verification" to the SBA OHA. OHA will also hear and decide challenges to a concern's inclusion in VetBiz from "interested parties," which include COs and disappointed bidders. OHA's decision on such an appeal will be considered a final agency action.

Section 1835: Issuance of Guidance on Small Business Matters—Section 1835 requires the SBA administrator and VA secretary to issue guidance on the FY 2017 NDAA's amendments to the Small Business Act and 38 USCA § 8127 within 180 days of the FY 2017 NDAA's enactment.

Conclusion—The FY 2017 NDAA has a more significant impact on Federal procurement than other recent NDAAs. In addition to the substantial changes to procurement law and policy, the FY 2017 NDAA requires reports on bid protests, indefinite-delivery contracts, and contractual flow-down provisions. These reports may foreshadow significant future changes to these procurement areas and, in particular, bid protests.

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