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Focus

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FEATURE COMMENT: The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part I

On Nov. 9, 2017, Congress released its conference report on the Fiscal Year 2018 National Defense Authorization Act (NDAA). On November 14 and 16, respectively, the House and Senate agreed to the conference report. On November 30, H.R. 2810, the FY 2018 NDAA, was presented to the president. On Dec. 12, 2017, the president signed the FY 2018 NDAA into law. See P.L. 115-91.

The president's signing statement took issue with a substantial number of provisions of the FY 2018 NDAA and even stated that it will "treat" one NDAA section "as non-binding." The president objected to certain provisions because they allegedly infringe on the constitutional authority of the executive branch, including, for example, restrictions on detainee transfers from the U.S. prison in Guantanamo Bay and the requirement for congressional notice in advance of certain military actions. Nevertheless, the signing statement should have limited impact on procurement-related issues. See *www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-2810/*. No doubt, these and other issues contributed to the FY 2018 NDAA being enacted well after the start of its Oct. 1, 2017 fiscal year.

The FY 2018 NDAA includes very significant procurement-related reforms and changes, most (but not all) of which are included in "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters." More specifically, Title VIII includes 73 provisions addressing procurement issues, as compared to 88 provisions in the FY 2017 NDAA, 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. See M. Schwartz, "Acquisition Reform in the FY2016-FY2018 National Defense Authorization Acts (NDAAs)" (CRS Jan. 4, 2018), at 1–2, & Appendix. Some of these FY 2018 NDAA statutory changes will not become effective until the Federal Acquisition Regulation or the Defense FAR Supplement (and, depending on the circumstances, possibly other regulations) are amended. As discussed in this Feature Comment, certain provisions in other titles of the FY 2018 NDAA are also very important to procurement law.

Because of the volume and significance of the procurement changes in the FY 2018 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I addresses §§ 801–843 below. Part II, which will be published on Jan. 17, 2018, addresses §§ 846–1714.

Section 801, Statements of Purpose for DOD Acquisition—Under § 801, within 180 days of the NDAA's passage, the DFARS must be amended to state that the "*primary objective* of Department of Defense acquisition is to acquire *quality* ***products*** that satisfy user needs with measurable improvements to mission capability and operational support, in a timely manner, and at a fair and reasonable price" (emphasis added).

While Congress has finally identified the "primary objective" of DOD acquisition policy, the "primary objective" only refers to "products" and fails to mention "services." Congress appears to have forgotten that about 53 percent of DOD's annual procurement budget is expended on services. See *Contracting Data Analysis: Assessment of Government-wide Trends* (GAO-17-244SP), at 5, 59 GC ¶ 72; available at *www.gao.gov/assets/690/683273.pdf*; *DOD Service Acquisition: Improved Use of Available Data Needed to Better Manage and Forecast Service Contract Requirements* (GAO-16-119), at 1 ("In 2014, [DOD] obligated over $156 billion on contracted services, constituting more than half of DOD's total contract spending."), available at *www.gao.gov/assets/680/675276.pdf*; 58 GC ¶ 67.

Section 802, Management of DOD IP Matters—Section 802 requires the future undersecretary of defense for acquisition and sustainment (a position that is created as of February 2018) to "develop policy on the acquisition or licensing of intellectual property [IP]—(1) to enable coordination and consistency across the military departments and [DOD] in strategies for acquiring or licensing IP"; (2) "to ensure that program managers are aware of the rights afforded the Federal Government and contractors in IP and that program managers fully consider and use all available techniques and best practices for acquiring or licensing IP"; and (3) "to encourage customized IP strategies for each system" based on the unique nature of the system and its components, the system's product support strategy, the organic industrial base strategy and the commercial marketplace.

The FY 2018 NDAA's joint explanatory statement observed that

> [t]he conferees expect the Under Secretary to foster communications with industry and designate a central point of contact within [DOD] for communications with contractors on [IP] matters. As part of such communications, [DOD] shall regularly engage with appropriately representative entities, including large and small businesses, traditional and nontraditional Government contractors, prime contractors and subcontractors, and maintenance repair organizations.

This sounds like typical congressional language to which lip service will be paid but which will have little impact. However, what makes this different is that § 802 also requires the undersecretary to "establish a cadre of personnel who are experts in [IP] matters. The purpose of the cadre is to ensure a consistent, strategic, and highly knowledgeable approach to acquiring or licensing [IP] by providing expert advice, assistance, and resources to the acquisition workforce on [IP] matters, including acquiring or licensing [IP]." Notably, § 802 provides authority for the establishment of a separate DOD IP office with appropriate staff and other resources (including provisioning for recruitment, retention and training).

Section 803, Performance of Incurred Cost Audits—Section 803 provides that DOD

> shall use qualified private auditors to perform a sufficient number of incurred cost audits of [DOD] contracts … to—(A) eliminate, by October 1, 2020, any backlog of incurred cost audits of the Defense Contract Audit Authority; [and] (B) ensure that incurred cost audits are completed not later than one year after the date of receipt of a qualified incurred cost submission.

By April 1, 2019, DOD "or a Federal agency authorized by [DOD] shall award a contract or issue a task order under an existing contract to two or more qualified private auditors to perform incurred cost audits of costs associated with [DOD contracts]."

Not later than Oct. 1, 2020, "if audit findings are not issued within one year after the date of receipt of a qualified incurred cost submission, the audit shall be considered to be complete and no additional audit work shall be conducted." The undersecretary of defense (comptroller) "may waive this requirement on a case-by-case basis if the DCAA Director submits a written request." The DCAA Director shall submit annually to Congress the total number of waivers granted and the reason for each waiver.

Section 803: (1) directs DCAA to comply with commercially accepted standards of risk and materiality in performing each incurred cost audit for DOD contractors; and (2) prohibits DOD from differentiating between private auditors and DCAA when considering audit results.

Consequently, § 803 permits independent, third-party audits to help DCAA reduce the incurred cost backlog and mitigate the wide-ranging and negative impact the backlog has on DOD and Government contractors. The somewhat surprising development here is that if audit findings are not issued within one year after receipt of a "qualified incurred cost submission," the audit shall be considered to be complete. One year seems like a short period of time, so this will probably lead to disputes over what constitutes "qualified incurred cost submission" and other gamesmanship to provide DOD extra time. While this section could benefit contractors by reducing the allotted time to close out and complete incurred cost audits due to increased staffing by private auditors, it is also possible that contractors may face increased audit scrutiny because the private auditors may not be as overburdened as DCAA's auditors and may employ different audit tactics and methodologies.

Section 805, Increase Simplified Acquisition Threshold—The simplified acquisition threshold is increased Government-wide from $150,000 (which has been inflation adjusted) to $250,000.

Section 806, Increased Micro-Purchase Threshold—With the exception of DOD, the micro-purchase threshold is increased Government-wide

from $3,500 (which has been inflation adjusted) to $10,000. See M. Schwartz, "Acquisition Reform in the FY2016-FY2018 National Defense Authorization Acts (NDAAs)" (CRS Jan. 4, 2018), at 3. For DOD, the micro-purchase threshold remains at $5,000. See id.; 10 USCA § 2338.

Section 807, Process for Enhanced Supply Chain Scrutiny—Under this section, not later than 90 days after the FY 2018 NDAA's enactment, the secretary of defense "shall establish a process for enhancing scrutiny of acquisition decisions in order to improve the integration of supply chain risk management into the overall acquisition decision cycle." This process shall include, but not be limited to: (a) designation of a senior DOD official responsible for overseeing the development and implementation of the supply chain risk management process; (b) "development or integration of tools to support commercial due-diligence, business intelligence, or otherwise analyze commercial activity to understand business relationships with entities determined to be threats" to the U.S.; (c) development of risk profiles of products or services based on commercial due-diligence tools and data services; (d) integration "with intelligence sources to develop threat profiles" of entities determined to be threats to the U.S.; (e) periodic review and assessment of software products and services on DOD computer networks "to remove prohibited products or services"; and (f) "coordination with interagency, industrial, and international partners" "to share information, develop Government-wide strategies for dealing with significant entities determined to be significant threats" to the U.S., and "effectively use authorities in other" federal agencies to combat supply chain threats. See also DFARS subpt. 239.73, Requirements For Information Relating To Supply Chain Risk.

Section 811, Modifications to Cost or Pricing Data and Reporting Requirements—Section 811 increases the Truth in Negotiation Act (TINA) certified cost and pricing data threshold from $750,000 (which has been inflation adjusted) to $2 million for all contracts entered into on or after July 1, 2018. The threshold for the submission of certified cost and pricing data for legacy contracts will increase from $100,000 to $750,000. Pursuant to 41 USCA § 1908, these new thresholds will be subject to periodic updating for inflation. Section 811 also revises language in 10 USCA § 2306a(d), which previously required the contracting officer to request other than cost or pricing data to the extent necessary, to require the contractor to provide other than cost or pricing data only "if requested by the Contracting Officer." These changes should reduce the number of contracts, subcontracts and modifications thereto that are subject to TINA, which is now known as the Truthful Cost or Pricing Data statute.

Section 815, Limitation on Unilateral CO Definitization—For any undefinitized DOD contractual action exceeding $50 million, "if agreement is not reached on contractual terms, specifications, and price," the CO "may not unilaterally definitize those terms, specifications, or price over the objection of the contractor" until (1) "the service acquisition executive for the military department that awarded the contract, or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a Defense Agency," "approves the definitization in writing"; (2) the CO provides a copy of the written approval to the contractor; and (3) 30 calendar days have "elapsed after the written approval is provided to the contractor." See also DFARS subpt. 217.74, Undefinitized Contract Actions; DFARS PGI 217.74. This section (a) suggests that Congress expects the contracting parties to reach a bilateral definitization, and (b) provides an incentive to the CO to compromise rather than seek senior DOD management approval for a unilateral definitization.

Section 818, Enhanced Post-Award Debriefing Rights—Section 818 provides that not later than 180 days after the FY 2018 NDAA's enactment, the DFARS shall be revised to "require that all required post-award debriefings" include, at a minimum: "(1) In the case of a contract award in excess of $100,000,000, a requirement for disclosure of the agency's written source selection award determination, redacted to protect the confidential and proprietary information of other offerors" and, "in the case of a contract award in excess of $10,000,000 and not in excess of $100,000,000 with a small business or nontraditional contractor, an option for" such contractors "to request such disclosure"; "(2) A requirement for a written or oral debriefing for all contract awards and task or delivery orders valued at $10,000,000 or higher"; and "(3) Provisions ensuring that both unsuccessful and winning offerors are entitled to" the same disclosures and debriefing.

Significantly, disappointed offerors for DOD contracts will have the opportunity "to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing" with the agency required to "respond in writing

to any additional question … within five business days" of its receipt. The debriefing shall not be considered "to be concluded," for purposes of triggering a Government Accountability Office bid protest (including the automatic stay of contract performance), "until the agency delivers its written responses to the disappointed offeror."

The actual scope of DOD's redactions to the source selection decision document, which is provided to the disappointed offeror, will significantly impact the relevance and usefulness to disappointed offerors of this section and could cause awardee concern that its proprietary materials will be inadvertently released through less than vigilant DOD redactions. In a GAO or U.S. Court of Federal Claims bid protest, an unredacted source selection decision document is ordinarily part of the agency report or administrative record where a protective order has issued.

Section 820, Change to Definition of Subcontract in Certain Circumstances—Section 820 adds the following italicized language to the definition of "subcontract" in 41 USCA § 1906(c)(1):

> In this subsection [which lists laws inapplicable to procurements of commercial items], the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. *The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Federal Government and other parties and are not identifiable to any particular contract.*

[Emphasis added.]

This new language should clarify that commodity purchase agreements, which are not identified with a particular Government contract and which support both Federal Government contracts and other parties, are not "subcontracts" for purposes of federal procurement requirements. As a result, a substantial number of these agreements should be excluded from flow-down and other subcontract requirements and permit commodity acquisition under standard industry terms.

Section 822, Use of LPTA Source Selection Process—Congress' war against DOD's use of lowest-priced, technically acceptable (LPTA) source selection continues. Under this section, the situation where an LPTA procurement may be used has been further narrowed by adding two more limitations to § 813(b) of the FY 2017 NDAA. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Significant Impact of the FY 2017 National Defense Authorization Act on Federal Procurement—Part 1," 59 GC ¶ 18. In addition to previous restrictions, LPTAs may only be used where (7) DOD "would realize no, or minimal, additional innovation or future technological advantage by using a different methodology", and (8) for contracts for the "procurement of goods, the goods procured are predominantly expendable in nature, nontechnical, or have a short life expectancy or short shelf life."

Section 827, Pilot Program on Payment of Costs for Denied GAO Bid Protests—The secretary of defense is required to establish a "pilot program to determine the effectiveness of requiring contractors to reimburse" DOD "for costs incurred in processing covered protests." A covered protest is a "bid protest that was—(1) denied in an opinion issued by [GAO]; (2) filed by a party with revenues in excess of $250,000,000" during the previous year and in 2017 dollars; and "(3) filed on or after October 1, 2019 and on or before September 30, 2022."

The pilot program begins two years after the FY 2018 NDAA's enactment and ends five years later. Not later than 90 days after the end of this pilot program, the secretary shall provide a report to the House and Senate armed services committees assessing the feasibility of making permanent this pilot program.

As noted, the pilot program will not begin until two years after the 2018 NDAA's passage (i.e., December 2020). This will provide time for DOD, Congress and the Government contracting community to review the RAND research report—entitled "Assessing Bid Protests of U.S. Department of Defense Procurements"—on the impact of protests on DOD procurements (which was required by the FY 2017 NDAA and which became public in January 2018), as well as recommendations from the § 809 panel (which was established by the FY 2016 NDAA, as amended by the FY 2017 NDAA). Consequently, it is entirely possible that in a future NDAA (or other legislation), Congress may rescind the pilot program or propose different reforms based on these studies.

DOD will have to develop regulations to implement the pilot program. There is no definition included in § 827 as to what DOD should consider "costs incurred in processing covered protests." "Covered protests" for which costs should be reimbursed are defined as "a bid protest that was *denied* in an *opinion* issued by the

GAO." This means that protests that are withdrawn prior to an opinion or decision or that are "dismissed" as opposed to "denied," even as a result of GAO outcome prediction, should not be considered "covered protests." Moreover, protests that are filed at the COFC, which are frequently more costly and time-consuming than GAO protests, will not be covered by the pilot program.

If the pilot program does go into effect without any changes, large companies may (a) file protests at GAO to obtain the automatic stay of contract performance, receive documents, learn as much as possible about the case and assess their likelihood of prevailing; (b) request outcome prediction and/or subsequently dismiss their GAO protests and refile at the COFC to avoid the possibility of being assessed costs; or (c) simply avoid GAO and file at the COFC. It will be interesting to see how the pilot program will affect DOD's decisions to take corrective actions versus litigating a protest to a GAO decision.

Section 832, Prohibition on Use of LPTA Source Selection Process for Major Defense Acquisition Programs—Section 832 prohibits DOD from using "a lowest price technically acceptable source selection process for the engineering and manufacturing development [prime] contract of a major defense acquisition program." This prohibition applies starting with the budgetary authority for FY 2019.

Section 835, Licensing of Appropriate IP to Support Major Weapon Systems—This section creates 10 USCA § 2439, which requires that "before selecting a contractor for the engineering and manufacturing development of a major weapon system, or for the production of a major weapon system," DOD must "negotiate[] a price for technical data to be delivered under a contract for such development or production." This requirement will apply to solicitations issued on or after Dec. 12, 2018 (i.e., one year after the FY 2018 NDAA's enactment). Relatedly, § 835 also amends 10 USCA § 2366b to preclude major defense acquisition programs from receiving Milestone B approval until the milestone decision authority determines in writing that "appropriate actions have been taken to negotiate and enter into a contract or contract options for the technical data required to support the program." (Milestone B initiates the engineering and manufacturing development phase of the acquisition process.)

Section 835 also establishes a new subsection (f) of 10 USCA § 2320, which provides that the secretary of defense shall, "to the maximum extent practicable, negotiate and enter into a contract with a contractor for a specially negotiated license for technical data to support the product support strategy of a major weapon system or subsystem of a major weapon system." In assessing the long-term technical data needs of major weapon systems and subsystems, and establishing corresponding acquisition strategies, program managers "shall consider the use of specially negotiated licenses to acquire customized technical data appropriate for the particular elements of the product support strategy."

Section 843, Reports on Possible Improvements to Acquisition Workforce Hiring and Training—Section 843 requires several reports on the workforce involved in federal acquisitions. First, not later than June 30, 2019, the U.S. Comptroller General "shall submit to the congressional defense committees a report on the effectiveness of hiring and retention flexibilities for the acquisition workforce." This report shall include: (1) "A determination of the extent to which [DOD] experiences challenges with recruitment and retention of the acquisition workforce," including review of "postemployment restrictions"; (2) "A description of the hiring and retention flexibilities available to" DOD "to fill civilian acquisition positions and the extent to which" DOD has used such "flexibilities" "to target critical or understaffed career fields"; (3) "A determination of the extent to which" DOD possesses the "necessary data and metrics" on its use of civilian acquisition workforce hiring and retention "flexibilities" "to strategically manage the use of such flexibilities"; (4) "[I]dentification of the factors that affect the use of hiring and retention flexibilities for the civilian acquisition workforce"; (5) "Recommendations for any necessary changes to [DOD] hiring and retention flexibilities" in order "to fill civilian acquisition positions"; and (6) "A description of the flexibilities available to" DOD "to remove underperforming" acquisition workforce members and the extent to which any such flexibilities are used.

Next, not later than June 30, 2019, the Comptroller General "shall submit to the congressional defense committees a report on acquisition-related training for personnel working on acquisitions but not considered to be part of the acquisition workforce" (i.e., "non-acquisition workforce personnel"). This report shall include, but not be limited to, review of (a) "The extent

to which non-acquisition workforce personnel play a significant role in defining requirements, conducting market research, participating in source selection and contract negotiation efforts, and overseeing contract performance"; (b) "The extent to which" DOD "is able to identify and track non-acquisition workforce personnel performing" such "significant roles"; (c) The extent to which non-acquisition workforce personnel receive acquisition training; and (d) "The extent to which additional acquisition training is needed for non-acquisition workforce personnel," including the types of training, the positions that need training, and any challenges to delivering such training.

Finally, the undersecretary of defense for acquisition and sustainment shall conduct an assessment of: (1) "The effectiveness of industry certifications, other industry training programs, including fellowships, and training and education programs at educational institutions outside of the Defense Acquisition University available to defense acquisition workforce personnel"; and (2) "Gaps in knowledge of industry operations, industry motivation, and business acumen in the acquisition workforce." Not later than Dec. 31, 2018, the undersecretary shall submit to the House and Senate committees on armed services a report containing the results of this assessment.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Mike Schaengold *(schaengoldm@gtlaw.com),* Melissa Prusock *(prusockm@gtlaw.com) and* Danielle Muenzfeld *(muenzfeldd@gtlaw.com) of Greenberg Traurig, LLP (GT). Mike, a shareholder, is co-chair of GT's Government Contracts & Projects Practice and serves on the advisory councils to the U.S. Court of Federal Claims and U.S. Court of Appeals for the Federal Circuit. Melissa and Danielle are associates in GT's Government Contracts & Projects Practice Group. Part II of "The Fiscal Year 2018 NDAA Significant Impact On Federal Procurement Law" will appear in the next issue of THE GOVERNMENT CONTRACTOR.

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Focus

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FEATURE COMMENT: The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part II

On Dec. 12, 2017, President Trump signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2018, P.L. 115-91, which includes significant procurement changes. Because of the volume and significance of the procurement changes in the FY 2018 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I, which appeared in the January 10 issue of THE GOVERNMENT CONTRACTOR, addressed §§ 801–843. See 60 GC ¶ 1. Part II addresses §§ 846–1714.

Section 846, Procurement through Commercial E-Commerce Portals—Under this section, the General Services Administration administrator "shall establish a program to procure commercial products through commercial e-commerce portals for purposes of enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products." This program will be (1) carried out "through multiple contracts with multiple commercial e-commerce portal providers," and (2) "implemented in phases with the objective of enabling Government-wide use of such portals."

"Commercial product" means a commercially available off-the-shelf (COTS) item, but does not include services. "Commercial e-commerce portal" means a "commercial solution providing for the purchase of commercial products aggregated, distributed, sold, or manufactured via an online portal," but does not include "an online portal managed by the Government for, or predominantly for use by, Government agencies." Consequently, Fed Mall and GSA Advantage! do not qualify.

The joint explanatory statement (a) directs "the [GSA] Administrator to take great care in selecting which federal agencies … participate in the initial rollout," "with the expectation" that the Department of Defense will be included; and (b) "encourage[s]" the GSA administrator "to resist the urge to make changes to the existing features, terms and conditions, and business models of available e-commerce portals, but rather demonstrate the government's willingness to adapt the way it does business." In this regard, the GSA administrator is directed "to be judicious in requesting exceptions."

The program will include three principal phases:

(1) *Phase I: Implementation Plan*: Not later than 90 days after the FY 2018 NDAA's enactment, the OMB director, in consultation with the GSA administrator, must submit to Congress "an implementation plan and schedule for carrying out the program … including … recommendations regarding whether any changes to, or exemptions from, laws [concerning] the procurement of property or services by the Federal Government are necessary."

(2) *Phase II: Market Analysis & Consultation*: Not later than one year after the implementation plan's submission, the OMB director, in coordination with the GSA administrator, must submit to Congress

> recommendations for any changes to, or exemptions from, laws necessary for effective implementation of [the program], and information on the results of …: (A) Market analysis and initial communications with potential commercial e-commerce portal providers on technical considerations of how the portals function (including the use of standard terms and conditions of the portals by the Government), the degree of customization that can occur without creating a Government-unique portal, … and potential fees, if any, to be charged by [GSA], the portal provider, or the suppliers[;]

> (B) Consultation with affected … agencies about their unique procurement needs, such as supply chain risks for health care products, information technology, [etc.;] (C) An assessment of the products … that are suitable for purchase on the commercial e-commerce portals … [and] (E) A review of standard terms and conditions of commercial e-commerce portals in the context of Government requirements.

(3) *Phase III: Program Implementation Guidance*: Not later than two years after the implementation plan's submission, the OMB director, in consultation with the GSA administrator, must issue "guidance to implement and govern the use of the program …, including protocols for oversight of procurement …, and compliance with laws pertaining to supplier and product screening requirements, data security, and data analytics."

The GSA administrator is required to

> consider commercial e-commerce portals for use under the program … that are widely used in the private sector and have or can be configured to have features that facilitate the execution of program objectives, including features related to supplier and product selection that are frequently updated, an assortment of product and supplier reviews, invoicing payment, and customer service.

Unless otherwise provided in § 846, all laws, including procurement laws, apply to the program. A procurement of a product through a commercial e-commerce portal under this program: (a) is "an award of a prime contract for purposes of the goals established under" the Small Business Act "if the purchase is from a supplier that is a small business concern"; (b) "shall be made, to the maximum extent practicable, under the standard terms and conditions of the portal relating to purchasing on the portal"; and (c) shall not exceed the simplified acquisition threshold. Notably, § 846 provides no discussion on protests of orders under this program.

Section 848, DOD Commercial-Item Determinations—Under § 848, DOD's acquisition of a commercial item under Federal Acquisition Regulation pt. 12 (i.e., using commercial-item acquisition procedures) "shall serve as a" binding "prior commercial item determination" for future DOD acquisitions of that item" "unless the senior procurement executive of the military department or [DOD] determines in writing that it is no longer appropriate to acquire the item using commercial item acquisition procedures."

Section 848 further provides that DOD-appropriated funds or funds otherwise made available to DOD "may not be used for" a FAR pt. 15 negotiated procurement "of an item that was previously acquired under a contract using [FAR pt. 12] commercial item acquisition procedures" unless a "written determination by" (1) "the head of the contracting activity" states that "the use of such procedures was improper," or (2) the senior procurement executive of the military department or DOD finds that "it is no longer appropriate to acquire the item using such procedures."

These statutory modifications are designed to improve DOD consistency for commercial-item determinations and to streamline the determination process for future DOD commercial-item acquisitions. As the joint explanatory statement observes, the scope of this section is limited to prime contracts.

Section 849, Review of Commercial-Item Regulations—Section 849 makes clear that Congress wants DOD to reduce the number of regulations and contract clauses applicable to DOD commercial-item and COTS acquisitions. As a result, by December 2018, the secretary of defense must undertake a comprehensive review: (a) of FAR Council determinations not to apply commercial-item or COTS exemptions to certain contracts and subcontracts for commercial items and COTS; (b) to assess all Defense FAR Supplement clauses and regulations that "require a specific contract clause for a contract using [FAR pt. 12] commercial item acquisition procedures," "except for regulations required by law or Executive order"; and (c) to assess all DFARS clauses and regulations that "require a prime contractor to include a specific contract clause in a subcontract for commercially available off-the-shelf items unless the inclusion of such clause is required by law or Executive order." The secretary must propose additional exemptions or DFARS revisions to eliminate regulations, unless the secretary determines that there is a specific reason not to provide the exemption or eliminate the regulation.

Section 851, Improvement of Planning for Service Acquisitions—This section provides mild disincentives to DOD's use of bridge contracts "to provide for continuation of a service to be performed through a services contract" by requiring, "to the extent practicable," for "plan[ning] appropriately before the date of need of a service." "Such planning shall include allowing time for a requirement to be validated, a services contract to be entered into, and funding for the

services contract to be secured." Failure to do so will lead to notice to senior DOD officials.

Section 854, Pilot Program for Longer-Term Multiyear Service Contracts—Under this section, DOD must "carry out a pilot program under which" DOD may "enter into up to five [service] contracts for periods of not more than 10 years." Each such contract "may be extended for up to five additional one-year terms." Within 90 days of the FY 2018 NDAA's enactment, DOD "shall enter into an agreement with an independent organization with relevant expertise to study best practices and lessons learned from using services contracts for periods longer than five years by commercial companies, foreign governments, and State governments, as well as" the Federal Government. DOD must submit this report to the congressional defense committees by December 2018. Finally, by December 2022, the U.S. Comptroller General must "submit to the congressional defense committees a report on" this pilot program.

Section 863, Education and Training for Transactions Other than Contracts and Grants—Section 863 provides that the secretary of defense "shall (1) ensure that [DOD] management, technical, and contracting personnel" "involved in the award or administration of" other transactions or "other innovative forms of contracting are afforded opportunities for adequate education and training; and (2) establish minimum levels and requirements for continuous and experiential learning for such personnel, including levels and requirements for acquisition certification programs." See also 10 USCA § 2371.

Section 864, Other Transactions Authority for Certain Prototype Projects—This section expands the authority for other transactions prototype projects by amending 10 USCA § 2371b to double the cost range in which DOD may exercise the authority of that section from a cost range that is expected to be over $50 million, but not over $250 million, to one that is expected to be over $100 million, but not over $500 million. Other transactions (for a prototype project) are now measured by the size of the transaction rather than the size of the project.

Section 867, Preference for Use of Other Transactions and Experimental Authority—Under § 867, "[i]n the execution of science and technology and prototyping programs," the secretary of defense should "establish a preference … for using" (a) "transactions other than contracts, cooperative agreements, and grants entered into pursuant to" 10 USCA §§ 2371, 2371b, and (b) "authority for procurement for experimental purposes pursuant to" 10 USCA § 2373.

Section 871, Noncommercial Computer Software Acquisition Considerations—Section 871 creates 10 USCA § 2322a, which requires that, in negotiating the acquisition of noncommercial computer software, DOD must consider "to the maximum extent practicable" acquiring a complete package for the software that would enable DOD to: (1) "reproduce, build, or recompile the software from original source code and required libraries"; (2) "conduct required computer software testing"; and (3) "deploy working computer software system binary files on relevant system hardware." Additionally, § 871 requires that the software or related materials: (a) be delivered in a "usable, digital format"; (b) "not rely on external or additional software code or data, unless such software code or data is included in the items to be delivered"; and (c) "in the case of negotiated terms that do not allow for the inclusion of dependent software code or data, [include] sufficient documentation to support maintenance and understanding of interfaces and software revision history." DOD is required to issue updated guidance to implement these requirements within 180 days of the FY 2018 NDAA's enactment.

DFARS 252.227-7014 already provides DOD rights in noncommercial computer software that should include access to and the ability to modify noncommercial software source code. The new provision's delivery requirements may reflect that the materials DOD has obtained in noncommercial computer software acquisitions have been insufficient for DOD to make use of these rights in practice.

Section 872, Defense Innovation Board Analysis of Software Acquisition Regulations—Within 30 days of the FY 2018 NDAA's enactment, the secretary of defense must direct the Defense Innovation Board "to undertake a study on streamlining software development and acquisition regulations." The study shall (A) "review the acquisition regulations applicable to, and organizational structures" within DOD to streamline and make software acquisition more effective and efficient for "maintain[ing] defense technology advantage"; (B) "review ongoing software development and acquisition programs" "in order to identify case studies of best and worst practices currently in use within" DOD; and (C) produce specific and detailed recommendations necessary to: "(i) streamline development and procurement of software; (ii) adopt or adapt best practices from the private sector applicable

to Government use; (iii) promote rapid adoption of new technology; (iv) improve the talent management of the software acquisition workforce, including by providing incentives for the recruitment and retention of such workforce within [DOD]; (v) ensure continuing financial and ethical integrity in procurement; and (vi) protect the best interests of" DOD.

The secretary of defense must "submit a report to or brief the congressional defense committees on the interim findings of the study" within 150 days after the FY 2018 NDAA's enactment, and the board must send its final report to the secretary within one year after the secretary directs the board to conduct the study. Together with the FY 2018 NDAA's provisions regarding agile software development, § 871's attempts to streamline software development suggest that traditional methods of software development are not meeting DOD's needs.

Section 873, Pilot Program to Use Agile or Iterative Development Methods to Tailor Major Software-Intensive Warfighting Systems and Defense Business Systems—Within 30 days of the FY 2018 NDAA's enactment, the secretary of defense must "establish a pilot program to tailor and simplify software development requirements and methods for major software-intensive warfighting systems and defense business systems." An implementation plan for the program must be developed within 120 days of the FY 2018 NDAA's enactment. The implementation plan must require that DOD select for inclusion in the pilot program one major software-intensive warfighting system per armed force, one defense-wide system (including "at least one major defense acquisition program or major automated information system"), and between two and eight defense business systems. The secretary must prioritize systems that (1) "have identified software development as a high risk" (major software-intensive warfighting systems only); (2) "have experienced cost growth and schedule delay"; (3) "did not deliver any operational capability within the prior calendar year"; and (4) are underperforming compared to other similar business systems.

Within 60 days after a system is selected for the pilot program, the secretary shall "develop a plan for realigning the system by breaking down the system into smaller increments using agile or iterative development methods." "Agile or iterative development" of software is defined as "acquisition pursuant to a method for delivering multiple, rapid, incremental capabilities to the user for operational use, evaluation, and feedback not exclusively linked to any single, proprietary method or process"; and involves "(A) the incremental development and fielding of capabilities, commonly called 'spirals', 'spins', or 'sprints', which can be measured in a few weeks or months; and (B) continuous participation and collaboration by users, testers, and requirements authorities."

Additionally, the realignment plan for each selected system "shall include a revised cost estimate that is lower than the cost estimate for the system that was current as of the date of the enactment of" the FY 2018 NDAA. The realignment must "ensure that the acquisition strategy for the realigned system favors outcomes-based requirements definition and capability as a service, including the establishment of technical evaluation criteria as outcomes to be used to negotiate service-level agreements with vendors"; and "consider options for termination of the relationship with any vendor unable or unwilling to offer terms that meet the requirements of this section." The pilot program will sunset on Sept. 30, 2023; however, any system that is selected for the pilot program "shall continue after that date through the execution of its realignment plan."

The joint explanatory statement for § 873 notes the conferees' concerns that (1) DOD "is behind other federal agencies and industry in implementing best practices for acquisition of software and information technologies, to include agile and incremental development methods"; and (2) DOD's "organizational culture and tradition of acquiring capabilities using a hardware-dominant approach impedes effective tailoring of acquisition approaches to incorporate agile and incremental development methods."

The conferees expect that DOD will (1) "[u]se tools, resources, and experience of digital and innovative organizations" in DOD; (2) use GSA's Technology Transition Service, Office of 18F, and (3) "[l]everage the science, technology, and innovation activities established pursuant to section 217 of the [FY 2016 NDAA]." The concerns identified in the joint explanatory statement may explain the repeated references to the use of agile or iterative practices in multiple FY 2018 NDAA provisions.

Section 874, Software Development Pilot Program Using Agile Best Practices—This section requires another pilot program similar to that required by § 873. Within 30 days of the FY 2018 NDAA's enactment, the secretary of defense must identify between two and eight software develop-

ment activities within DOD or military departments "to be developed in a pilot program using agile acquisition methods" ("acquisition using agile or iterative development"). Section 874 requires that DOD develop "streamlined processes" for activities in the pilot program that do not incorporate typical contract or transaction requirements, including " (1) [e]arned value management (EVM) or EVM-like reporting[,] (2) [d]evelopment of integrated master schedule[,] (3) [d]evelopment of integrated master plan[,] (4) [d]evelopment of technical requirement document[,] (5) [d]evelopment of systems requirement documents[,] (6) [u]se of information technology infrastructure library agreements[, and] (7) [u]se of software development life cycle (methodology)." DOD must develop a plan, a program schedule and oversight metrics for each activity under the pilot.

The program schedule requires

> (1) award processes that take no longer than three months after a requirement is identified; (2) planned frequent and iterative end user validation of implemented features and their usability; (3) delivery of a functional prototype or minimally viable product in three months or less from award; and (4) follow-on delivery of iterative development cycles no longer than four weeks apart, including security testing and configuration management as applicable.

Section 874 prohibits the use of lowest-priced, technically acceptable or cost-plus contracting methods in the pilot program, and requires the secretary to "encourage the use of existing streamlined and flexible contracting arrangements." DOD must report to the congressional defense committees not later than 30 days before commencement of a software development activity under the pilot program, as well as within 60 days after the completion of a pilot activity. The joint explanatory statement notes that § 874 is intended to address concerns similar to those that led to the creation of the § 873 pilot program.

Section 875, Pilot Program for Open Source Software—Not later than 180 days after the FY 2018 NDAA's enactment, the secretary of defense must initiate the DOD "open software pilot program established by the Office of Management and Budget Memorandum M-16-21 titled 'Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software' and dated August 8, 2016." This memorandum (a) encourages reuse of custom-developed source code and improvement of the quality of custom-developed source code through public participation, and (b) seeks to accomplish the second of these two goals by establishing a three-year pilot program that requires agencies to release at least 20 percent of their new custom-developed code as open source software. The joint explanatory statement notes that establishing "an appropriate repository for open source software will be critical for maintaining security and also to fostering a community of collaborative software experts."

Within 60 days after the enactment of the FY 2018 NDAA, the secretary must report to Congress on the pilot program's implementation plan, and identify "candidate software programs, selection criteria, intellectual property and licensing issues, and other matters determined by the Secretary." The Government Accountability Office must review and report on the implementation of the pilot program not later than June 1, 2019. The joint explanatory statement attempts to establish requirements not included in the statute, including (1) requiring DOD to "establish guidance to ensure that [DOD] applies the appropriate Open Source Initiative approved licenses to its source code" within 180 days of the FY 2018 NDAA's enactment; and (2) requiring the secretary to "submit to the congressional defense committees a report that identifies methods by which [DOD] could reverse engineer legacy software for which source code is unavailable" within one year after the FY 2018 NDAA's enactment.

Section 1077, Establishment of Agency IT Systems Modernization and Working Capital Funds—In §§ 1076–1078, the FY 2018 NDAA incorporates the Modernizing Government Technology Act (H.R. 2227, S. 990). Under § 1077, each agency covered by the Chief Financial Officers Act, 31 USCA § 901(b), "may establish" "an information technology system modernization and working capital fund" which "may only be used": (a) "to improve, retire, or replace existing information technology systems … to enhance cybersecurity and to improve efficiency and effectiveness"; (b) "to transition legacy information technology systems … to commercial cloud computing and other innovative commercial" technologies; (c) "to assist and support … efforts to provide adequate, risk-based, and cost-effective information technology capabilities that address evolving threats to information security"; (d) to reimburse funds trans-

ferred to the agency from the Technology Modernization Fund (of § 1078) with the approval of the chief information officer, in consultation with the CFO; and (e) "for a program, project, or activity or to increase funds for any program, project, or activity that has not been denied or restricted by Congress." The agency head shall "prioritize funds within" the agency IT working capital fund "to be used initially for cost savings activities approved by the" agency CIO.

Section 1078, Establishment of Technology Modernization Fund and Board—Section 1078 establishes in the Department of the Treasury a "Technology Modernization Fund for technology-related activities, to improve information technology [and] to enhance cybersecurity across the Federal Government." In consultation with the Chief Information Officers Council and with the approval of the OMB director, the GSA administrator shall administer the fund.

The GSA administrator shall use the fund to (1) transfer amounts to an agency "for the acquisition of products and services, or the development of such products and services" "to improve, retire, or replace existing Federal information technology systems to enhance cybersecurity and privacy"; (2) transfer amounts to an agency "for the operation and procurement of information technology products and services, or the development of such products and services and acquisition vehicles for use by agencies to improve Governmentwide efficiency and cybersecurity"; (3) "provide services or work performed in support of" these activities; and (4) "fund only programs, projects, or activities or to fund increases for any programs, projects, or activities that have not been denied or restricted by Congress." The agency receiving amounts from the fund is required to reimburse the fund for any amounts transferred to that agency.

This section also establishes a "Technology Modernization Board," comprising seven voting members (who are federal employees), "to evaluate proposals submitted by agencies for funding authorized under the Fund." This section authorizes $250 million each year for FYs 2018 and 2019 for Federal Government IT modernization, but it does not appropriate such funds. Assuming these funds are actually appropriated (which will require further congressional action), the Act could present significant business opportunities for IT contractors. Collectively, these provisions authorize funding for modernizing federal legacy IT and provide incentives for federal IT savings.

Section 1644, Cyber Posture Review—Section 1644 provides that, "to clarify the near-term policy and strategy of the United States with respect to cyber deterrence, the secretary of defense shall conduct a comprehensive review of [U.S.] cyber posture" for December 2022 through December 2027. The secretary of defense "shall conduct" this review "in consultation," "as appropriate," with "the Director of National Intelligence, the Attorney General, the Secretary of Homeland Security, and the Secretary of State." The secretary of defense must submit to the congressional defense committees a report on the results of the cyber posture review, which may be in classified and/or unclassified form. This report will include, but not be limited to: (a) a "review of the law, policies, and authorities relating to, and necessary for the United States to maintain, a safe, reliable, and credible cyber posture for responding to cyber attacks and for deterrence in cyberspace"; and (b) "[p]roposed norms for the conduct of offensive cyber operations for deterrence and in crisis and conflict."

Section 1646, Briefing on Cyber Applications of Blockchain Technology—Within 180 days of the FY 2018 NDAA's enactment, the secretary of defense, in consultation with the heads of such other federal departments and agencies as the secretary deems appropriate, "shall provide to the appropriate committees of Congress a briefing on the cyber applications of blockchain technology." This briefing shall include (1) "a description of potential offensive and defensive cyber applications of blockchain technology and other distributed database technologies"; (2) "an assessment of efforts by" foreign powers, extremist organizations and organized crime to use such technologies; (3) "an assessment of the use or planned use of such technologies by the Federal Government and critical infrastructure networks"; and (4) "an assessment of the vulnerabilities of critical infrastructure networks to cyber attacks." Although this briefing will be unclassified, it may include a classified supplement. Blockchain technology is still in a relatively early developmental stage and the range of its potential applications is not well understood. Nevertheless, use of the technology is coming to the Federal Government, and there likely will be significant potential procurement opportunities in this area.

Section 1701, Amendments to the Small Business Act's HUBZone provisions—Section 1701 makes significant changes to the Small Business Administration's Historically Underutilized Business

Zone (HUBZone) program. This section requires the SBA to "develop a publicly accessible online tool that depicts HUBZones." While the SBA already has a publicly available online HUBZone map tool, the new tool must (i) "clearly and conspicuously provide access to the data used" "to determine whether or not an area is a HUBZone in the year in which the online tool was prepared"; and (ii) include "a notification of the date on which the online tool, and the data used to create the online tool, will be updated." Section 1701 also changes the time model for updating the HUBZone map. Starting Jan. 1, 2020, the tool must be updated every five years for qualified census tracts and nonmetropolitan counties. The five-year time increments will create more stability for contractors by guaranteeing that qualified census tracts and nonmetropolitan counties designated as HUBZones will remain HUBZones for a minimum of five years. The five-year time model only applies to qualified census tracts and nonmetropolitan counties, however. For "redesignated areas" (i.e., census tracts or nonmetropolitan counties that no longer meet the HUBZone criteria, but that are permitted to retain their HUBZone status "for a period of 3 years after the date on which the census tract or nonmetropolitan county ceased to" qualify as a HUBZone), base closure areas, qualified disaster areas, and the newly added "Governor-designated covered areas" (discussed below), the tool must be updated immediately.

As noted, the five-year intervals for updating the new HUBZone map tool will not begin until Jan. 1, 2020. In the meantime, § 1701 ensures that any "HUBZone small business concern that was qualified pursuant to" the pre-FY 2018 NDAA HUBZone statute "on or before Dec. 31, 2019, shall continue to be considered as a qualified HUBZone small business concern during the period beginning on Jan. 1, 2020, and ending on the date that the" SBA administrator "prepares the online tool depicting qualified areas."

Section 1701 expands the definition of HUBZones to enable more areas to qualify. For example, this section establishes a new category of HUBZones called "Governor-designated covered areas." Effective Jan. 1, 2020, state governors can petition the SBA to designate as HUBZones certain "covered areas" that do not meet the HUBZone criteria. A "covered area" for which HUBZone status may be requested is limited to an area (i) "located outside of an urbanized area"; (ii) "with a population of not more than 50,000"; and (iii) "for which the average unemployment rate is not less than 120 percent of the average unemployment rate of the United States or of the State in which the covered area is located." Governors may only submit one petition per calendar year, but may include multiple areas in the petition. However, the number of areas for which HUBZone status is requested "may not exceed 10 percent of the total number of covered areas in the State." Section 1701 also expands the number of areas that qualify as HUBZones by changing the formula for qualifying nonmetropolitan counties as HUBZones. Previously, a nonmetropolitan county could qualify as a HUBZone only if its median household income was less than 80 percent of the median household income for all *nonmetropolitan* counties in the state. Beginning Jan. 1, 2020, the median household income of nonmetropolitan counties will be compared to the statewide median household income, including metropolitan counties. According to the joint explanatory statement, "this would allow more than 1,000 more HUBZone areas to qualify for the program." Additionally, base closure areas will be able to retain their HUBZone status for a period of eight years from the date on which the SBA designates it as a base closure area (which occurs after the base closes), rather than measuring the eight-year period from the date that the base actually closed.

In addition, effective Jan. 1, 2020, § 1701 requires the SBA to: (i) "publish performance metrics designed to measure the success of the HUBZone program"; (ii) verify the eligibility of HUBZone applicants within 60 days of receiving "sufficient and complete documentation" from the applicant; (iii) verify that each "HUBZone small business concern remains a qualified HUBZone small business concern" every three years; and (iv) "conduct program examinations of qualified HUBZone small business concerns, using a risk-based analysis to select which concerns are examined, to ensure that any concern examined meets the" HUBZone small business eligibility criteria. If a firm loses certification due to an examination, it will have 30 days to submit documentation to the SBA reestablishing certification.

Section 1709, Requirements Relating to Competitive Procedures and Justification for Awards Under the SBIR and STTR Programs—This section amends 15 USCA § 638(r) to: (A) provide that the issuance of Phase III awards to Small Business Innovation Research and Small Business Technology Transfer award recipients who developed the technology satisfies the requirements under the Competition in Contracting Act "and any other applicable competition require-

ments"; and (B) permit federal agencies and federal prime contractors to issue Phase III awards to the firm that received the SBIR or STTR award "without further justification." The provision is intended to clarify that: (i) issuance of Phase III awards should give preference to the SBIR and STTR award recipients who developed the technology; and (ii) contracting officials are not required to recompete (or justify why they did not recompete) a Phase III award if it is made to the company that developed the technology.

Section 1710, Pilot Program for Streamlined Technology Transition from DOD's SBIR and STTR Programs—Not later than 180 days after the FY 2018 NDAA's enactment, the secretary of defense must establish a pilot program under which DOD will "award multiple award contracts to covered small business concerns for the purchase of technologies, supplies, or services that the covered small business concern has developed through the SBIR or STTR program." A "covered" small business that can participate in the pilot program is a small business that either (i) "completed a Phase II award under" the DOD SBIR or STTR program; or (ii) "completed a Phase I award under" the DOD "SBIR or STTR program and was recommended by a DOD contracting officer for inclusion in the pilot program. The secretary of defense "may establish procedures to waive" provisions of the Competition in Contracting Act to carry out this program.

Section 1711, Pilot Program on Strengthening Defense Industrial Base Manufacturing—Section 1711 requires the secretary of defense to "carry out a pilot program to assess the feasibility and advisability of increasing the capability of the defense industrial base to support—(1) production needs to meet military requirements; and (2) manufacturing and production of emerging defense and commercial technologies." Activities under the pilot program may include: (i) using "contracts, grants, or other transaction authorities to support manufacturing and production capabilities in small- and medium-sized manufacturers"; (ii) purchasing "goods or equipment for testing and certification purposes"; (iii) providing "[i]ncentives, including purchase commitments and cost sharing with nongovernmental sources, for the private sector to develop manufacturing and production capabilities in areas of national security interest"; (iv) "[i]ssuing loans or providing loan guarantees to small- and medium-sized manufacturers to support manufacturing and production capabilities in areas of national security interest"; (v) making "awards to third party entities to support investments in small- and medium-sized manufacturers working in areas of national security interest, including debt and equity investments that would benefit missions of" DOD; or (vi) "other activities as the Secretary determines necessary." The pilot program will terminate four years after the FY 2018 NDAA's enactment (i.e., December 2021), and the secretary of defense must brief the congressional armed services committees on its results no later than Jan. 31, 2022.

Section 1714, Report on Utilization of Small Business Concerns for Federal Contracts—Not later than 180 days after the FY 2018 NDAA's enactment, the SBA administrator must report to the congressional small business committees on whether: (A) small business concerns, including certain categories of such concerns, "are being utilized in a significant portion of the multiple award contracts awarded by the Federal Government, including—(i) whether awards are reserved for concerns in 1 or more of those categories; and (ii) whether concerns in each such category are given the opportunity to perform on multiple award contracts"; and (B) existing "performance requirements for multiple award contracts" "are feasible and appropriate for small business concerns."

Section 1714 indicates that this report will be required as a result of the following interesting findings by Congress: (1) since the Nov. 21, 2011 passage of the Budget Control Act of 2011, "many Federal agencies have started favoring longer-term Federal contracts, including multiple award contracts, over direct individual awards"; (2) "these multiple award contracts have grown to more than one-fifth of Federal contract spending, with the fastest growing multiple award contracts each surpassing $100,000,000 in obligations for the first time between 2013 and 2014"; (3) in FY 2017, "17 of the 20 largest Federal contract opportunities are multiple award contracts"; (4) "while Federal agencies may choose to use any or all of the various socioeconomic groups on a multiple award contract," the SBA "only examines the performance of socioeconomic groups through the small business procurement scorecard and does not examine potential opportunities for those groups"; and (5) Congress and the Department of Justice "have been clear that no individual socioeconomic group shall be given preference over another."

Conclusion—The FY 2018 NDAA will have a very significant impact on federal procurement law, particularly with respect to bid protests, intellectual property and technology procurements, incurred cost audits, and the procurement of commercial items including through the use of commercial e-commerce portals. The various pilot programs that must be established under the FY 2018 NDAA suggest that there will be additional changes in the future to the procurement laws and policies affected by these programs.

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This Feature Comment was written for The Government Contractor by **Mike Schaengold** ***(schaengoldm@gtlaw.com),*** **Melissa Prusock** ***(prusockm@gtlaw.com) and*** **Danielle Muenzfeld** ***(muenzfeldd@gtlaw.com) of Greenberg Traurig, LLP (GT). Mike, a shareholder, is co-chair of GT's Government Contracts & Projects Practice and serves on the advisory councils to the U.S. Court of Federal Claims and U.S. Court of Appeals for the Federal Circuit. Melissa and Danielle are associates in GT's Government Contracts & Projects Practice Group. Part I of "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law" appeared in the Jan. 10, 2018 issue of The Government Contractor.***

