SESSION 5

STATUTES & REGULATIONS—PART I: 2018 STATUTES UPDATE

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I. FISA AMENDMENTS REAUTHORIZATION ACT OF 2017, PUB. L. NO. 115-118, 132 STAT. 3 (JAN. 19, 2018)

On January 19, 2018, President Trump signed into law the Foreign Intelligence Surveillance Act ("FISA") Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3. Section 110 of this Act provides whistleblower protections for individuals employed by contractors, subcontractors, grantees, subgrantees, or personal services contractors (collectively, "contractors") of the Federal Bureau of Investigation ("FBI") and "covered intelligence community element[s]." "Covered intelligence community element[s]" means the "Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office;" and any other "executive agency or unit thereof determined by the President … to have as its principal function the conduct of foreign intelligence or counterintelligence activities." 50 USCA § 3234(a)(2). It does not include the FBI. *Id.*

Covered intelligence community element contractors cannot "take or fail to take a personnel action" (e.g., terminating, refusing to promote) as a reprisal against an employee for disclosing information that the employee reasonably believes evidences: (A) "a violation of any Federal law, rule, or regulation (including … evidence of another employee or contractor employee accessing or sharing classified information without authorization)"; or (B) "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." The protections for whistleblowers that FBI contractors must provide are slightly broader—they extend to reports of violations of "any law, rule, or regulation," not just Federal laws, rules, or regulations.

For the protections to apply, whistleblowers employed by covered intelligence community element contractors must report the information to the Director of National Intelligence (or designee); the Inspector General for the Intelligence Community or the contracting agency; the head of the contracting agency (or designee); a congressional intelligence committee, or a member thereof. FBI contractor employees must report the information to a supervisor in the employee's direct chain of command, the Inspector General, the Department of Justice or FBI Offices of Professional Responsibility, the FBI Inspection Division, the Office of Special Counsel, or a designee of any of the above. Notably, Section 110 appears to protect FBI contractor employees from retaliation if they report violations internally to their supervisors, but only protects covered intelligence community element contractor employees from retaliation if they report the violations to specified government employees.

Both FBI and covered intelligence community contractors are prohibited from taking adverse personnel actions against whistleblower employees, even if the action is taken at the request of an agency official, "unless the request takes the form of a nondiscretionary directive and is within the authority" of the requesting official.

Section 110 also amends Section 3001(j) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 USCA § 3341(j), to protect contractor, subcontractor, grantee, subgrantee, and personal services contractor employees (in addition to agency employees) from having agency personnel take or fail to take, or threaten to

take or fail to take, any action related to a contractor employee's security clearance or access determination as retaliation for whistleblowing activities. Previously, there were no meaningful protections to prevent agency personnel from using adverse security clearance determinations to retaliate against contractor employees for making protected disclosures. This new protection is critical for contractor employees who would unable to keep their jobs without security clearance.

II. SECURELY EXPEDITING CLEARANCES THROUGH REPORTING TRANSPARENCY ACT OF 2018, PUB. L. NO. 115-173, 132 STAT. 1291 (MAY 22, 2018)

On May 22, 2018, President Trump signed into law the Securely Expediting Clearances Through Reporting Transparency Act of 2018 ("SECRET Act of 2018"), Pub. L. No. 115-173, 132 Stat. 1291. Section 3 of the Act requires the Director of the National Background Investigations Bureau ("Bureau") of the Office of Personnel Management ("OPM"), in coordination with the Director of National Intelligence ("DNI"), to submit quarterly reports on the backlog of personnel security clearance investigations to Congress for five years. The reports must include: (1) the size of the backlog, with specific metrics that must be reported for each sensitivity level; (2) for each sensitivity level, the average length of time it takes for the Bureau to conduct an initial investigation and a periodic reinvestigation; (3) "a discussion of the factors contributing to the average length of time to carry out an initial investigation and a periodic reinvestigation"; (4) a backlog mitigation plan; and (5) "a description of improvements in the information and data security of the Bureau." The backlog mitigation plan must identify: (A) "the cause of, and recommendations to remedy, the backlog"; (B) "the steps the Director of the Bureau shall take to reduce the backlog"; (C) process reforms to improve the efficiency and quality of background investigations; and (D) "a projection of when the backlog … will be sufficiently reduced to meet required timeliness standards."

The first quarterly report was released in September 2018 (available at https://e.clearancejobs.com/hubfs/FINAL%20SECRET%20Act%20Report%20(1).pdf). The report notes that agencies do not report sensitivity designations (e.g., non-critical sensitive, critical sensitive, special sensitive) to the Bureau. But, since such designations directly correlate with the level of investigation required for each clearance level (e.g., Secret, Top Secret), the report provides the number of pending national security clearance investigations. The Bureau reported that, as of July 2, 2018, there was a backlog of 657,000 personnel security clearance investigations. Among the pending investigations were 77,719 initial investigations and 81,257 periodic reinvestigations of federal contractor employees. The average processing time for an initial investigation was 390 days for a Top Secret clearance and 179 days for a Secret clearance. Reinvestigations take an average of 518 days for Top Secret clearances and 208 days for Secret clearances. These timeframes are significantly longer than the goal set by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 3001 (50 USCA § 3341) of completing 90 percent of all background investigations within 40 days.

Section 4 of the Act requires the Director of the Office of Administration of the Executive Office of the President ("EOP") in coordination with the DNI and the OPM Director to submit to Congress a report that "explains the process for conducting and adjudicating security clearance investigations for" EOP personnel, "including personnel of the White House Office."

Section 5 of the Act requires OPM to submit a report comparing: (i) the cost of "maintaining comprehensive background investigations capability within …

the Bureau" in addition to "a background investigations capability for Department of Defense [("DOD")] personnel" under DOD's control (as required by § 925 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. No. 115-91, 131 Stat. 1283, 1527)), with (ii) "the cost of sustaining a single Governmentwide background investigations enterprise." The report must be prepared "in consultation with the other members of the Suitability and Security Clearance Performance Accountability Council established under Executive Order 13467 (73 Fed. Reg. 38103) and the Under Secretary of Defense for Intelligence."

The September 2018 quarterly report submitted pursuant to Section 3 of the Act (discussed above) also addressed the requirements of Section 5. The report, at 9, states that the government reform plan published by EOP on June 21, 2018 (entitled "Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations") calls "for the full transfer of the background investigations program from OPM to DoD, which would remove the possibility that the background investigation systems would be bifurcated." The Bureau further stated that it "is not yet in a position to report on the costs associated with the future-state enterprise" because "the details of this initiative are still in the planning stage." If background investigations functions are consolidated at DOD, Congress' concern about the potentially duplicative costs of maintaining two investigations programs would be mitigated.

Section 6 of the Act requires the DNI to report to Congress on "the status of implementing continuous evaluation Government-wide[.]" "Continuous evaluation" uses software to conduct automated records checks to assist in the ongoing review of an individual's eligibility for access to classified information or to hold a sensitive position. The report must include (1) "the number of agencies with continuous evaluation programs and how many of those programs are currently conducting automated records checks of the required data sources as identified by the [DNI]"; and (2) "a discussion of the barriers for agencies to implement continuous evaluation programs, including any requirement under a statute, regulation, Executive Order, or other administrative requirement." The report must also include "a detailed explanation of efforts by agencies to meet requirements for reciprocal recognition to access classified information, including—(A) the range of the length of time for agencies to grant reciprocal recognition to access classified information; (B) additional requirements for reinvestigations or readjudications, by agency; and (C) any other barriers to the timely granting of reciprocity, by agency, including any requirement under a statute, regulation, Executive Order, or other administrative requirement." Additionally, the report must include "a review of whether the schedule for processing security clearances under section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 USCA § 3341) should be modified." The report was due in September 2018.

Under section 7 of the Act, by November 18, 2018, the DNI and OPM must make recommendations to Congress and the President, as appropriate, "to issue guidance to assist agencies in determining—(A) position sensitivity designation; and (B) the appropriate background investigation to initiate for each position designation." Pursuant to this guidance, the President, acting through relevant agencies, must "review and, if necessary, revise the position designation of positions within the agency" every four years. Within 30 days of completing the review, the President must report to the appropriate congressional committees on: "(1) any issues identified in the review; and (2) the number of position designations revised as a result of the review."

In his signing statement, President Trump noted that "[t]he Act purports to require various reports relating to the security clearance and background-investigation processes from executive branch officers, including the Director of the Office of Administration, within the [EOP]. … As the Supreme Court has acknowledged, … the Constitution vests in the President the authority to classify information relating to the national security and to control access to such information. Accordingly, the executive branch will construe and implement the Act in a manner consistent with this constitutional grant of authority to the President, as Commander in Chief and Chief Executive." (Citations omitted.) The President further stated that § 6 of the Act "requires a report from the [DNI] that includes 'a review of whether the schedule for processing security clearances under section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 USCA § 3341) should be modified.' The executive branch will implement this provision in a manner consistent with the principles set forth above and with the President's constitutional authority to recommend to the Congress such measures as the President considers to be necessary and expedient."

III. SMALL BUSINESS RUNWAY EXTENSION ACT OF 2018, PUB. L. NO. 115-324 (DEC. 17, 2018)

On December 17, 2018, President Trump signed into law the Small Business Runway Extension Act of 2018, Pub. L. No. 115-324. The Act changes the formula for determining whether a firm meets revenue-based small business size standards by lengthening the period for calculating average annual receipts from three years to five years. The Act does not change any revenue limits or impact size standards for manufacturing contracts, which are based on employee count. The purpose of the change is to prevent firms from prematurely becoming ineligible for small business programs because of spikes in revenue. According to the legislative history, allowing firms to average their revenue over five years for small business qualification purposes will give them more stability as they grow, more time to prepare for competition with larger companies, and a greater likelihood of success in the often difficult middle market when they graduate from small business programs. *See* H.R. Rep. 115-939, at 2 (2018). Improving newly graduated firms' ability to succeed will protect the Federal investment in small business programs and enhance competition among other-than-small contractors.

Before this law was enacted, in April 2018, the Small Business Administration "revised its white paper explaining how it establishes, reviews and modifies small business size standards." 83 Fed. Reg. 18,468 (2018). In the Federal Register notice concerning the revised white paper's publication, SBA advised that a commenter had suggested making the change implemented by the Act in December. However, SBA rejected the suggestion, stating that

> SBA believes that calculating average annual receipts over three years ameliorates fluctuations in receipts due to variations in economic conditions. SBA maintains that three years should reasonably balance the problems of fluctuating receipts with the overall capabilities of firms that are about to exceed the size standard. Extending the averaging period to five years would allow a business to greatly exceed the size standard for some years and still be eligible for Federal assistance, perhaps at the expense of other smaller businesses. Such a change is more likely to benefit successful small business graduates by allowing them to prolong their small business status, thereby reducing opportunities for currently defined small businesses.

Id. at 18,473-74. SBA's response did not mention that, at the time of the revised white paper's publication, the Small Business Act required SBA to use a three-year averaging period for size standards based on annual receipts.

The Act amends the Small Business Act to increase the measurement period to five years and overrules SBA's objection to implementing this change. The Act does not specifically require implementing regulations or specify an effective date. However, SBA issued a notice (effective Dec. 21, 2018) that states that the "change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process." The notice does not state when SBA expects to issue implementing regulations.

IV. THE JOHN S. MCCAIN FY 2019 NATIONAL DEFENSE AUTHORIZATION ACT, PUB. L. NO. 115-232 (AUG. 13, 2018)

For the first time since fiscal year 1997, and for only the second time in 33 years, the National Defense Authorization Act ("NDAA") was enacted prior to the October 1 start of the new Federal Government fiscal year. On August 13, 2018, the president signed into law the John S. McCain NDAA for FY 2019 ("FY 2019 NDAA"). See P.L. 115-232. This is the 58th year in a row that a NDAA has been enacted, and the earliest that a NDAA has become law since FY 1978, which is the last time that a NDAA was enacted before September. See Congressional Research Service, "FY2019 National Defense Authorization Act: An Overview of H.R. 5515" (IF10942, Aug. 7, 2018); CQ News, "NDAA Races Through Congress at Historic Pace" (July 27, 2018).

Unfortunately, this unusual efficiency should not be considered a harbinger of a long-term, streamlined legislative process. The likely main reason is that the defense budget cap for FY 2019 was set in February as part of the Bipartisan Budget Act of 2018, which increased the defense (and non-defense) caps for FY 2018 and 2019. See P.L. 115-123. In other words, prompt passage of the FY 2019 NDAA was facilitated by the pre-existing two-year defense budget deal (with a relatively generous ceiling).

Additionally, 2018 was an election year, so Congress and the president had an incentive to pass the NDAA before mid-term election issues became an impediment. Earlier-than-usual enactment was also aided by the inclusion of fewer major overhauls of the Department of Defense and existing laws, including relatively fewer procurement changes, than in some past years. Finally, the FY 2019 NDAA was named after Sen. John McCain (R-Ariz.), who was the Senate Armed Services Committee chair, and there was a successful bipartisan effort to pass the law while he was still alive. See, e.g., CQ News, "NDAA Races Through Congress at Historic Pace" (July 27, 2018).

In his signing statement, the president took issue with many provisions of the FY 2019 NDAA that he believes raise "constitutional concerns." See *www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-5515/*. However, none of these provisions is likely to have any significant impact on procurement law.

The FY 2019 NDAA's procurement-related reforms and changes are primarily located (as usual) in "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters," which includes 71 provisions addressing procurement matters. This is modestly fewer than the past three NDAAs: FYs 2018, 2017 and 2016 NDAAs, respectively, contained 73, 88 and 77 Title VIII provisions. Although the importance of a NDAA should not be measured

simply on the total number of procurement provisions, the FY 2019 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAAs (37, 13 and 49 provisions, respectively, in FYs 2015, 2014 and 2013). See Schwartz, "Acquisition Reform in the FY2016–FY2018 National Defense Authorization Acts (NDAAs)" (CRS Jan. 4, 2018), at 1–2, and Appendix. Some of the FY 2019 NDAA's provisions will not become effective until the Federal Acquisition Regulation or the Defense FAR Supplement (and, depending on the circumstances, possibly other regulations) are amended or promulgated (which sometimes can take several years or more). As discussed below, certain provisions in other titles of the FY 2019 NDAA are also important to procurement law.

Certain of the FY 2019 NDAA provisions, e.g., §§ 801, 806, 807, 808, 836, and 851, were recommended in whole or in part by the "Section 809 Panel," an independent advisory panel established by § 809 of the FY 2016 NDAA (as amended by FY 2017 NDAA § 863(d), and FY 2018 NDAA §§ 803(c) and 883) and tasked with finding ways to streamline and improve defense acquisition regulations. 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; https://section809panel.org/about/. The Section 809 Panel will almost certainly propose additional acquisition reforms in its final report, which is due in January 2019. Congress will probably address these additional proposed reforms in the FY 2020 NDAA.

Sections 801, 806, 807, 808 and 809, Reorganization of: (a) DOD Acquisition Statutes into New Part V of 10 USCA, and (b) Redesignation of Numerous DOD Statutes—Section 801 amends subtitle A of 10 USCA by creating a new part V, which provides numerical space for and reorganizes into one place DOD acquisition-related statutes that currently can be difficult to navigate and are somewhat haphazardly located in title 10. According to Congress' joint explanatory statement (i.e., the legislative history for the 2019 NDAA) for § 801, the reorganization addresses the "unwieldy and inadequate" structure for acquisition-related statutes in title 10. As a result of this reorganization, §§ 806–08 redesignate numerous section and chapter numbers of title 10. The joint explanatory statement for those sections observes that "[t]his restructuring [will] also enable additional growth and potential future reorganization of title 10 statutes in other subject areas outside of the acquisition code."

Section 809 amends cross-references in other statutes throughout the U.S. Code to the renumbered sections and chapters in title 10. Pursuant to FY 2019 NDAA § 800, this "restructuring effort" is to be completed by Feb. 1, 2019. While no doubt well intentioned, designed to bring some order to title 10, useful in the long-term, and recommended by the Section 809 Panel, see Section 809 Panel Report, Vol. 2 (June 2018), at EX-4, 171–77, changing the section numbers of so many established parts of title 10 will create confusion and make certain research more difficult.

Section 816, Modifying Limitations on Single-Source Task or Delivery Order Contracts—According to the joint explanatory statement, this section "clarifies" the standard for DOD to award single-source task or delivery order contracts. Prior to the FY 2019 NDAA's enactment, 10 USCA § 2304a(d)(3) provided that task or delivery order contracts worth over $100 million (including all options) could not be "awarded to a single source unless the head of the agency determines in writing that … the task or delivery orders

expected under the contract are so integrally related that only a single source can *reasonably* perform the work" (emphasis added). Section 816 replaces "*reasonably* perform the work" with "*efficiently* perform the work," but does not define "efficiently," which introduces ambiguity into the statute because it is unclear how that term will be interpreted. Additionally, since efficiency is arguably subsumed within the pre-amendment "reasonably perform the work" standard, this change potentially narrows the standard for awarding single-source task or delivery order contracts. The implementing final DFARS issued by DOD on December 21, 2018 merely repeats the text of the amended statute without explaining whether (or if) the change will impact DOD's interpretation of the standard for awarding single-source task or delivery order contracts. See Defense Federal Acquisition Regulation Supplement: Modification of the Limitations on Single-Source Task or Delivery Order Contracts, 83 Fed. Reg. 65,559, 65,560 (2018).

Section 820, Report on Clarification of Services Contracting Definitions—By Feb. 9, 2019, DOD must submit a report to the congressional defense committees clarifying the "definitions of and relationships between terms used by [DOD] related to services contracting, including the appropriate use of personal services contracts and nonpersonal services contracts, and the responsibilities of individuals in the acquisition workforce with respect to such contracts."

Section 821, Increasing the Micropurchase Threshold Applicable to DOD—Section 821 increases the micropurchase threshold for DOD from $5,000 to $10,000. Section 806 of the FY 2018 NDAA increased the threshold for all Executive branch agencies other than DOD to $10,000. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part I," 60 GC ¶ 1. FY 2019 NDAA § 821 makes DOD's micropurchase threshold consistent with the threshold for other agencies.

Section 823, Inclusion of Best Available Information Regarding Past Performance of Subcontractors and Joint Venture Partners—By Feb. 9, 2019, the secretary of defense must develop policies for DOD "to ensure the best information regarding past performance of certain subcontractors and joint venture partners is available when awarding" DOD contracts. This section is limited to DOD construction and architect-engineering contracts and subcontracts worth over $700,000. The new policies must require performance evaluations for first-tier subcontractors on construction and architect-engineer subcontracts that exceed $700,000 or 20 percent of the prime contract value, whichever is higher, provided that: (1) "the information included in rating the subcontractor is not inconsistent with the information included in the rating for the prime contractor"; (2) "the subcontractor evaluation is conducted consistent with the provisions of FAR 42.15[, Contractor Performance Information]"; (3) "negative evaluations of a subcontractor in no way obviate the prime contractor's responsibility for successful completion of the contract and management of its subcontractors"; and (4) in the contracting officer's judgment, "the overall execution of the work is impacted by the performance of the subcontractor or subcontractors."

The new policies must also require performance evaluations of individual partners of joint ventures performing construction and architect-engineer contracts that exceed $700,000 "to ensure that past performance on joint venture projects is considered in future awards to individual joint venture

partners, provided" that (a) "at a minimum, the rating for joint ventures includes an identification that allows the evaluation to be retrieved for each partner of the joint venture"; (b) "each partner, through the joint venture, is given the same opportunity to submit comments, rebutting statements, or additional information, consistent with the provisions of" FAR 42.15; and (c) "the rating clearly identifies the responsibilities of joint venture partners for discrete elements of the work where the partners are not jointly and severally responsible for the project."

Further, the policies must include processes to request exceptions from the annual evaluation requirement "where submission of the annual evaluations would not provide the best representation of the performance of a contractor, including subcontractors and joint venture partners," such as where (1) "no severable element of the work has been completed"; (2) the CO determines that, through no fault of the contractor, "an insubstantial portion of the contract work has been completed in the preceding year"; or (3) the CO "determines that there is an issue in dispute which, until resolved, would likely cause the annual rating to inaccurately reflect the past performance of the contractor." In August 2018, the Defense Acquisition Regulations Council opened a DFARS case (No. 2018-D055) to implement this requirement. A report on the proposed rule is currently due on Jan. 9, 2019.

Section 822, DOD Bid Protest Report—In response to long-standing DOD efforts to modify the U.S. Court of Federal Claims' jurisdiction to bar so-called "second bite at the apple" bid protests—i.e., an unsuccessful Government Accountability Office protest followed by a COFC protest involving the same DOD award or proposed award—§ 822 requires the secretary of defense to "carry out a study of the frequency and effects of bid protests involving the same contract award or proposed award that have been filed at both" GAO and the COFC.

The study will cover DOD contracts only and include: (1) "the number of protests that have been filed with both tribunals and results"; (2) "the number of such protests where the tribunals differed in denying or sustaining the action"; (3) the average and median time—(a) from the initial GAO filing to the COFC decision, (b) "from filing with each tribunal to decision by such tribunal," (c) from the time at which the basis of the protest is known "to the time of filing in each tribunal," and (d) if a COFC decision is appealed to the Federal Circuit, "from the date of the initial filing of the appeal to decision in the appeal"; (4) "the number of protests where [contract] performance was stayed or enjoined and for how long"; (5) if contract performance was stayed or enjoined, whether the requirement was obtained through another vehicle or in-house, or went unfulfilled, during the period of the stay; (6) separately for each tribunal, the number of protests where performance was stayed or enjoined (including the length of the stay) and the number of protests "where monetary damages were awarded" (including "the amount of monetary damages" awarded); (7) "whether the protestor was a large or small business"; and (8) "whether the protestor was the incumbent in a prior contract for the same or similar product or service."

The reference in (6), above, to the number of protests in which "monetary damages" were awarded (and the amount thereof) creates some ambiguity because only the COFC can award money (or monetary) damages which, in the context of a bid protest, is limited to "bid preparation and proposal costs." See 28 USCA § 1491(b)(2); *Naplesyacht.com, Inc. v. U.S.*, 60 Fed. Cl. 459,

478 (2004). Although GAO does not have the authority to award "monetary damages," see, e.g., GAO-18-510SP, Bid Protest at GAO: A Descriptive Guide (10th ed. May 2018), at 28, where a protest is sustained but no other relief is available, GAO generally can recommend the award of the protester's costs of preparing its bid or proposal. See id.; 31 USCA § 3554(c)(1)(B); 4 CFR § 21.8(d)(2). Of course, if a protest is sustained, GAO can also recommend that the agency pay to the protester "the costs of filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees." 31 USCA § 3554(c)(1)(A); 4 CFR § 21.8(d)(1). In more limited circumstances, the COFC also may award attorneys' fees and expenses under the Equal Access to Justice Act to certain lower net-worth successful protesters. 28 USCA § 2412(d)(2)(B); *Q Integrated Companies LLC v. U.S.*, 133 Fed. Cl. 479, 488–89 (2017).

By February 2019, the secretary of defense shall submit to Congress "a report on the results of the study, along with related recommendations for improving the expediency of the bid protest process." Notably, there is no requirement that the report or study be conducted by an outside or disinterested third party. By May 2019, DOD must establish and maintain a "data repository to collect on an ongoing basis the information described in" 1–8 above "and any additional relevant bid protest data … necessary and appropriate to allow" DOD, GAO and the COFC "to assess and review bid protests over time." At a minimum, DOD will likely use the results of this study to attempt to justify narrowing the COFC's jurisdiction over second bite at the apple protests.

Finally, by Dec. 1, 2019, the secretary of defense "shall develop a plan and schedule for an expedited bid protest process for [DOD] contracts with a value of less than $100,000." This expedited process is for agency-level bid protests and does not require (but does permit) GAO or the COFC to establish similar procedures. This process will likely increase the number of such protests.

Section 836, Replacing the Definition of "Commercial Item"—The Section 809 Panel recommended that the ambiguous phrase "commercial item" in 41 USCA § 103 be clarified. See Section 809 Panel Report, Vol. 1 (Jan. 2018), at 19–20. As Professor Ralph Nash has observed, "[t]hat term meant product in some parts and both product and services in other parts." See Nash, " 'Commercial Items:' A Welcome Clarification," 10 NC&R ¶ 43 (September 2018) at 139. Section 836 removes the ambiguity by replacing "commercial item" with two new phrases, "commercial product" and "commercial service." While the terminology is changing, the definitions of these two terms closely track the relevant prongs of the current definition of "commercial item." As Nash further observes, "[t]he change is purely semantic. It contains no substantive alterations to the requirements for qualifying as a commercial product or service. To implement it, the NDAA revises numerous other parts of the statutes that referred to 'commercial items.'" Id. at 140.

The new definitions take effect on Jan. 1, 2020. A detailed implementation plan, which is due to the congressional defense committees on April 1, 2019, must provide at a minimum: (1) "An implementation timeline and schedule, to include substantive, technical, and conforming changes to the law … to include revising definitions or categories of items, products, and services"; (2) "A review of recommendations by [the Section 809 Panel] pertaining to commercial items"; (3) "A review of commercial item provisions from" the FY 2016, FY 2017 and FY 2018 NDAAs, "and other relevant legislation"; and (4)

"An analysis of the extent to which [DOD] should treat commercial service contracts and commercial products in a similar manner." This implementation plan, including its reviews and analysis, will likely result in further reforms to "commercial item" purchasing. Furthermore, the FAR, DFARS and other agency FAR supplements will require substantial updates to incorporate the two new definitions and related changes. See, e.g., FAR 2.101 (definition of "commercial item," which will need to be replaced with definitions of "commercial product" and "commercial service").

Section 837, Limit on Applicability to DOD Commercial Contracts of Certain Provisions of Law—Prior to the enactment of the FY 2019 NDAA, 10 USCA § 2375(b)(2) provided that a "provision of law or contract clause requirement … that is enacted after *January 1, 2015*, shall be included on the [DFARS] list of inapplicable provisions of law and contract clause requirements … unless the Under Secretary of Defense … makes a written determination that it would not be in the best interest of [DOD] to exempt contracts for the procurement of *commercial items* from the applicability of the provision or contract clause requirement" (emphasis added).

Section 837 replaces the italicized date of Jan. 1, 2015 with Oct. 13, 1994, which is the date that the Federal Acquisition Streamlining Act of 1994 ("FASA") was signed into law. FASA provides a preference for, and strongly encourages, the purchase of commercial items by the Federal Government. Through its substitution of an earlier date (i.e., Oct. 13, 1994), § 837 is designed to expand the DFARS list of inapplicable provisions of law and contract requirements for commercial-item procurements to include those from Oct. 13, 1994 to the present. As noted above, the undersecretary can make a written determination to override this exemption for specific provisions of law or clause requirements. Section 837 results from the post-FASA addition of many provisions of law or clause requirements to commercial-item procurements. In addition, effective Jan. 1, 2020, FY 2019 NDAA § 836 (discussed above) replaces the italicized phrase "commercial items" with "commercial products and commercial services."

Section 838, Modifications to Procurement Through Commercial E-Commerce Portals—Section 846 of the FY 2018 NDAA directed the General Services Administration to "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." See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part II," 60 GC ¶ 9.

FY 2019 NDAA § 838 amends FY 2018 NDAA § 846 by providing that a "procurement of a product made through a commercial e-commerce portal under th[is] program" satisfies the "requirements for full and open competition" if: "(A) there are offers from two or more suppliers of such a product or similar product with substantially the same physical, functional, or performance characteristics on the online marketplace; and (B) the [GSA] Administrator establishes procedures to implement subparagraph (A) and notifies Congress at least 30 days before implementing such procedures."

This section further amends FY 2018 NDAA § 846 by increasing protection for competitive data, "including any Government-owned data," that will be available to the e-commerce portal providers. Finally, this section expresses the "sense of Congress" that: (1) the implementation of the e-commerce portal

"to procure commercial products will be done in a manner that will enhance competition, expedite procurement, and ensure reasonable pricing of commercial products"; (2) the "implementation of the e-commerce portal will be completed with multiple contracts with multiple commercial e-commerce portal providers"; and (3) e-commerce portal providers must "take the necessary precautions to safeguard data of all other e-commerce portal providers and any third-party suppliers." Notably, the requirements of (1) and (2), above, are already contained in § 846(a).

Section 839, Review of Federal Acquisition Regulations on Commercial Products, Commercial Services, and COTS Items—Along with, for example, § 837 (discussed above), this section has the potential to help significantly reduce the requirements applicable to commercial products and commercial services procurements. Whether this happens will depend on how these provisions (and other related initiatives) are implemented. Despite their potential, §§ 837 and 839 and other related initiatives, see Section 809 Panel Report, Vol. 1 (Jan. 2018), Recommendation 1, at 18–31; FY 2017 NDAA, §§ 872, 874–76, 879, 887; FY 2018 NDAA, §§ 820, 846, 848, 849, will likely lead to only a relatively modest reduction—as opposed to a sea change—in the requirements applicable to commercial products and commercial services.

Section 839 provides that, not later than August 2019, the FAR Council shall: (1) review each of its determinations "not to exempt" certain "contracts or subcontracts" for commercial products, commercial services and "commercially available off-the-shelf" items "from laws which such contracts and subcontracts would otherwise be exempt from under" 41 USCA § 1906(d); and (2) "propose revisions to the [FAR] to provide an exemption from each law subject to such determination unless the Council determines that there is a specific reason not to provide the exemptions pursuant to [41 USCA § 1906]," or the Office of Federal Procurement Policy administrator "determines there is a specific reason not to provide the exemption pursuant to [41 USCA § 1907]."

Furthermore, not later than August 2019, the FAR Council shall: (1) review the FAR "to assess all regulations that require a specific contract clause for a contract using commercial product or commercial services acquisition procedures under [FAR] part 12 [Acquisition of Commercial Items] …, except for regulations required by law or Executive order;" and (2) propose revisions to the FAR "to eliminate regulations reviewed under paragraph (1) unless the [FAR] Council determines on a case-by-case basis that there is a specific reason not to eliminate the regulation."

Similarly, not later than August 2019, the FAR Council shall: (1) review the FAR "to assess all regulations that require a prime contractor to include a specific contract clause in a subcontract for [COTS] items unless the inclusion of such clause is required by law or Executive order;" and (2) propose revisions to the FAR "to eliminate regulations reviewed under paragraph (1) unless the [FAR] Council determines on a case-by-case basis that there is a specific reason not to eliminate the regulation." Finally, by August 2019, the FAR Council shall submit to certain congressional committees a "report on the results of the reviews under" § 839.

Section 851, DOD Small Business Strategy—Not later than February 2019, § 851 directs the secretary of defense to implement a four-pronged small business strategy for DOD. First, the strategy must ensure that there is "a unified management structure" within DOD for functions relating to "(1) programs and activities related to small business concerns"; "(2) manufactur-

ing and industrial base policy"; and "(3) any procurement technical assistance program established under" 10 USCA chapter 142 ("Procurement Technical Assistance Cooperative Agreement Program").

Second, the secretary must ensure that DOD programs and activities regarding small business concerns are carried out to further national defense programs and priorities and the statement of purpose for DOD set forth in § 801 of the FY 2018 NDAA (i.e., the "primary objective of [DOD] 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"). See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part I," 60 GC ¶ 1.

Third, the secretary must clarify points of entry into the defense market for small businesses by: (a) clearly identifying DOD small business contracting opportunities, and (b) ensuring that small businesses have sufficient access to individual representatives of existing or potential Government customers (i.e., "program managers, contracting officers, and other persons" that use the small business' products or services) to inform relevant government personnel of their "emerging and existing capabilities."

Fourth, the secretary "shall enable and promote activities to provide coordinated outreach to small business concerns through any procurement technical assistance program established under" 10 USCA chapter 142 "to facilitate small business contracting with" DOD. The joint explanatory statement observes that "a unified strategy would create expanded small business engagement in the defense sector by increasing entry points for nontraditional and innovative companies." Additionally, the joint explanatory statement directs the secretary to coordinate development of the strategy with DOD's Office of Small Business Programs.

Section 852, Prompt Payments of Small Business Contractors—This section amends 10 USCA § 2307(a) to establish a goal of paying small business prime contractors no later than 15 days after receipt of a proper invoice for the amount due (unless there is a specific payment date established by contract). The section also requires the secretary to establish a 15-day prompt payment goal for payments made by other-than-small prime contractors to small business subcontractors, provided that (1) there is no specific payment date established by contract, and (2) "the prime contractor agrees to make payments to the subcontractor in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor."

Section 854, Amendments to Small Business Innovation Research Program and Small Business Technology Transfer Program—Section 854 extends the authorization for the pilot program allowing agencies to use three percent of their Small Business Innovation Research (SBIR) funds for administrative, oversight, and contract processing costs (15 USCA § 638(mm)) for SBIR and Small Business Technology Transfer (STTR) programs until 2022. Such costs may include program administration, outreach, commercialization, prevention of waste, fraud and abuse, congressional reporting, and "funding for improvements that increase commonality across data systems, reduce redundancy, and improve data oversight and accuracy," which is a new category added by § 854 of the FY 2019 NDAA.

Section 854 also extends authorization for the "Phase Flexibility" (15 USCA § 638(cc)), "Commercialization Readiness" (15 USCA § 638(gg)) and "Phase 0 Proof of Concept Partnership" (15 USCA § 638(jj)) pilot programs through 2022. Additionally, by March 30, 2019, the Small Business Administration must submit to Congress outstanding reports required under eight different provisions of 15 USCA § 638. The head of each agency responsible for any part of these reporting requirements must submit information necessary for SBA to comply with this requirement by Dec. 31, 2018.

Section 854 requires the Department of Defense to establish a new pilot program to accelerate SBIR and STTR awards by Aug. 13, 2019. Under the pilot program, DOD must

> (i) develop simplified and standardized procedures and model contracts throughout [DOD] for Phase I, Phase II, and Phase III SBIR awards; (ii) for Phase I SBIR and STTR awards, reduce the amount of time between solicitation closure and award; (iii) for Phase II SBIR and STTR awards, reduce the amount of time between the end of a Phase I award and the start of the Phase II award; (iv) for Phase II SBIR and STTR awards that skip Phase I, reduce the amount of time between solicitation closure and award; (v) for sequential Phase II SBIR and STTR awards, reduce the amount of time between Phase II awards; and (vi) reduce the award times described in clauses (ii), (iii), (iv), and (v) to be as close to 90 days as possible.

The pilot program will terminate on Sept. 30, 2022. No later than August 2019, and every year thereafter for three years, the Government Accountability Office must submit a report to Congress that provides the average and median times that each DOD component takes to decide on SBIR/STTR proposals, and that compares those times to the time it takes other federal agencies to do so. Additionally, by Dec. 5, 2021, GAO must submit a report that (1) includes the information on average and median proposal review time described above; (2) assesses where each agency could improve proposal review and award times; (3) identifies best practices for shortening proposal review and award times, "including the pros and cons of using contracts compared to grants"; and (4) analyzes the efficacy of the pilot program.

Section 854 also expands agencies' technical assistance authority to include business assistance services. Agencies can now select one or more vendors to provide business services to Phase I and II awardees. Agencies also can authorize awardees to purchase technical and business assistance services. Phase I recipients can receive up to $6,500 per year in technical and business assistance services, and Phase II awardees can receive up to $50,000 in such assistance services per project.

The SBA administrator must set a limit on the amount of technical and business assistance services that may be obtained by a recipient with multiple Phase II awards in a single fiscal year. Small businesses that receive technical and business assistance from a vendor selected by an agency must submit a report to the agency containing "a description of the technical or business assistance provided and the benefits and results of" such provided assistance. This will not require a separate report, however. Agencies must collect this information through existing reporting mechanisms. Additionally, by the end of FY 2019, SBA must survey vendors that provide technical and business assistance and the small businesses that receive it, and report to Congress on the efficacy of providing technical and business assistance.

Section 865, Validation of Proprietary and Technical Data—Section 865 amends 10 USCA § 2321(f) by deleting subparagraph (2) (and references thereto), which was added by § 913 of the FY 2016 NDAA. 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 general presumption of 10 USCA § 2321(f) is that commercial items have been developed exclusively at private expense "with the result that technical data pertaining to such items can be submitted with limited rights and the Government has the burden of asserting that they were not developed exclusively at private expense." See Nash, "Validation of Technical Data: Statutory Changes," 10 NC&R ¶ 49 (Oct. 2018) at 152. Subparagraph (2) reversed this presumption for certain major weapon systems, subsystems or components. The deletion of subparagraph (2) makes the presumption again apply for all commercial items. According to the joint explanatory statement, this provision clarifies "the application of licensing of appropriate intellectual property to support major weapons systems with regard to preferences for specially negotiated licenses." The joint explanatory statement further notes that "Specially Negotiated Licenses" are "a new concept in government technical data rights and are being interpreted in many different ways by industry and Government alike." FY 2018 NDAA § 835 revised 10 USCA § 2320 to provide for the Government and contractors to enter into a contract for specially negotiated licenses for technical data to support the product support strategy of a major weapon system or subsystem of a major weapon system. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact on Federal Procurement Law—Part II," 60 GC ¶ 9. In the joint explanatory statement, the conferees direct the under secretary of defense for acquisition and sustainment, in conjunction with the Service Acquisition Executives, "to develop guidelines, training, and policy for the usage and application of specially negotiated licenses to clarify the terms under which such licenses should be used when considering a product support strategy of a major weapon system or subsystem of a major weapon system." By Feb. 9, 2019, the undersecretary is required to brief the congressional defense committees on the resulting guidelines and other actions.

DFARS Case No. 2018-D070 was opened to implement § 865. On Aug. 23, 2018, the case was put on hold pending recommendations from the section 813 Panel, which pursuant to FY 2016 NDAA § 813 (as amended by FY 2017 NDAA § 809(f)(1)) established a Government-industry advisory panel to review 10 USCA §§ 2320 and 2321, regarding rights in technical data and their implementing regulations. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Significant Impact Of The FY 2017 National Defense Authorization Act On Federal Procurement—Part I," 59 GC ¶ 18.

Section 866, Continuation of Technical Data Rights During Challenges—This section modifies 10 USCA § 2321 to permit the DOD to exercise certain rights in technical data while a dispute over the scope and nature of DOD's data rights is pending before the U.S. Court of Federal Claims—which, 26 years after its name change, see Federal Courts Administration Act of 1992, P.L. 102-572, § 902, 106 Stat. at 4516, Congress in § 866 incorrectly identifies as the "United States Claims Court"—or a board of contract appeals, provided that the secretary of defense or of a military department, signs a written determination that "compelling mission readiness requirements" will not permit waiting for the COFC's or board's decision.

The existing standard, i.e., "urgent and compelling circumstances," is more stringent. This statutory change could provide DOD a larger exception to the

current injunctive-like relief contractors receive while resolving disputes about DOD's data use, where the situation is ordinarily "frozen" pending the COFC's or the board's decision.

Contractors that develop products, including components, using proprietary data should be aware that this change expands the situations in which DOD could release disputed technical data before the COFC or the board rules, even though the contactor's "limited rights" designation, see DFARS 252.227-7013(f); DFARS 252.227-7014(f), which usually prevents such release, may be subsequently upheld. However, the impact of this statutory change will probably be modest.

Under the current Defense Federal Acquisition Regulation Supplement, if an agency head makes a written determination that the agency cannot wait to resolve the data rights dispute due to "urgent or compelling circumstances," the agency may release or disclose the data, but a contractor retains the right to seek damages or other appropriate relief if it demonstrates that the restrictions should have been upheld. See DFARS 227.7203-13(e). Notably, agency heads have rarely invoked this approach. Further, it seems likely that an agency faced with "compelling mission readiness requirements" could demonstrate "urgent and compelling circumstances" if it chose to do so.

Although a contractor retains the right to seek damages if it prevails, its now-exclusive remedy still requires it to bear the burden of suing for and proving such damages, as opposed to receiving immediate injunctive-like relief.

No later than February 2019, the DFARS must be modified to implement these changes, which become effective at the time of the DFARS publication and "apply to [DOD] solicitations issued … after that date unless the senior procurement executive of the agency concerned grants a waiver." DFARS Case No. 2018-D070 was opened to implement § 866. On Aug. 23, 2018, the case was placed on hold, pending recommendations from the Section 813 Panel.

Section 869, Implementation of Pilot Program to Use Agile or Iterative Development Methods—This section provides additional direction to the secretary on implementing the "Pilot Program to Use Agile or Iterative Development Methods to Tailor Major Software-Intensive Warfighting Systems and Defense Business Systems" established by § 873 of the FY 2018 NDAA. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact on Federal Procurement Law—Part II," 60 GC ¶ 9. The joint explanatory statement notes that "the adoption of agile or iterative methods remains a challenge for" DOD, "despite the fact that delivery of increments of useful capability no less frequently than every six months is not only a best practice for software-intensive systems but is also a government-wide requirement for such systems."

FY 2018 NDAA § 873 required DOD to develop an implementation plan to select systems for inclusion in the pilot program (based on general criteria in the statute), but did not specify which systems must be included. FY 2019 NDAA § 869 mandates that DOD include five specific systems in the pilot, and required the secretary to identify three more systems for inclusion in the pilot program by Sept. 12, 2018. Section 869 relaxes the criteria for systems that can be included in the pilot program by adding "subsystems" and amending FY 2018 NDAA § 873 to permit DOD to select systems that meet only one of that section's criteria (instead of requiring systems to fulfill all three criteria).

Section 869 also requires DOD to establish a "Community of Practice on agile or iterative methods so that programs that have been incorporating agile or iterative methods can share with programs participating in the [§ 873] pilot the lessons learned, best practices, and recommendations for improvements to acquisition and supporting processes." The secretary must report on the status of the pilot program by Feb. 9, 2019. The report must include "(1) A description of how cost and schedule estimates in support of the program are being conducted and using what methods"; "(2) The contracting strategy and types of contracts that will be used in executing the program"; "(3) A description of how intellectual property ownership issues associated with software applications developed with agile or iterative methods will be addressed to ensure future sustainment, maintenance, and upgrades to software applications after the applications are fielded"; "(4) A description of the tools and software applications that are expected to be developed for the program and the costs and cost categories associated with each"; and "(5) A description of challenges the program has faced in realigning the program to use agile or iterative methods."

Section 873, Data, Policy and Reporting on the Use of Other Transactions—Section 873 requires DOD to collect data on the use of other transactions agreements ("OTAs"). DOD must "analyze and leverage" this data "to update policy and guidance related to the use of other transactions." The secretary of defense must report on the data to Congress on Dec. 31, 2018 and annually through 2021. The report must include a summary and detail showing "(1) organizations involved, quantities, amounts of payments, and purpose, description, and status of projects; and (2) highlights of successes and challenges using the [other transactions] authority, including case examples."

Section 875, Promotion of Government-wide and Other Interagency Contracts—Section 875 removes the requirement for agencies to complete a determination and finding that the use of an OMB-approved Government-wide (i.e., interagency) acquisition contract represents the best procurement approach prior to using such a contract. Eliminating this requirement should encourage agencies to use existing Government-wide contracts, and will likely produce savings for the Government by reducing redundant contracts. On December 4, 2018, DOD issued an immediately effective final rule revising DFARS 217.502-1 to implement this change. See Defense Federal Acquisition Regulation Supplement: Documentation for Interagency Contracts, 83 Fed. Reg. 62,501 (2018). The determination and finding requirement will be removed from FAR 17.502-1(a) under FAR Case No. 2018-015.

Section 876, Increasing Competition at the Task Order Level—Section 876 amends 41 USCA § 3306(c) to permit agencies to issue solicitations for indefinite-delivery, indefinite-quantity multiple-award contracts and certain Federal Supply Schedule contracts for services acquired on an hourly rate basis without including price or cost as an evaluation criterion. This exception applies only if the "agency intends to make a contract award to each qualifying offeror and the contract or contracts will feature individually competed task or delivery orders based on hourly rates." A "qualifying offeror" is an offeror that "(A) is determined to be a responsible source; (B) submits a proposal that conforms to the requirements of the solicitation; (C) meets all technical requirements; and (D) is otherwise eligible for award." If an agency does not include price as an evaluation factor in the solicitation for the IDIQ or FSS contract in accordance with this section, cost or price must be considered in awarding the individual task or delivery orders. This change should increase price competition at the task and delivery order level.

Section 880, Use of LPTA Source Selection—Section 880 significantly restricts the use of lowest-price technically acceptable ("LPTA") source selection criteria throughout the Government. Section 880(a) provides that "[i]t shall be the *policy of the United States Government to avoid using [LPTA] source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs* in the source selection process" (emphasis added).

Under § 880(b), no later than December 2018, the FAR "shall be revised to require that … [LPTA] source selection criteria are used only in situations in which:" (a) an agency can "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"; (b) the agency "would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal"; (c) "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"; (d) the "agency 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 the agency; (e) the contracting officer has included a justification for using LPTA in the contract file; and (f) the "agency has determined that the lowest price reflects full life-cycle costs, including for operations and support."

Under § 880(c), "[t]o the maximum extent practicable, the use of [LPTA] source selection criteria shall be avoided" for procurements that are "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, health care services and records, telecommunications devices and 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 [U.S.], including in Afghanistan or Iraq."

Not later than August 2019, and annually through 2021, the U.S. Comptroller General must "submit to the appropriate congressional committees a report on the number of instances in which [LPTA] source selection criteria is used for a contract exceeding $5,000,000, including an explanation of how the situations listed in [subsection 880(b) (discussed above)] were considered in making a determination to use [LPTA] source selection criteria."

Significantly, § 813 of the FY 2017 NDAA provided virtually identical LPTA restrictions for DOD, see Schaengold, Prusock and Muenzfeld, Feature Comment, "The Significant Impact Of The FY 2017 National Defense Authorization Act On Federal Procurement—Part I," 59 GC ¶ 18, which FY 2019 NDAA § 880 has now expanded to include all executive agencies. FY 2018 NDAA §§ 822, 832, 874, 882 and 1002 added additional restrictions on the use of LPTA for DOD procurements. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact on Federal Procurement Law—Part I," 60 GC ¶ 1; Congressional Research Service, "Defense Primer: Lowest Price Technically Acceptable Contracts" (IF10968 Sept. 4, 2018) (summarizing 2016–19 LPTA legislation); Schwartz, "Acquisition Reform in the FY2016–FY2018 National Defense Authorization Acts (NDAAs)" (CRS Jan. 4, 2018), at 4–5 (summarizing 2017 and 2018 legislation's restrictions on LPTA).

Section 881, Permanent Supply Chain Risk Management Authority—Section 881 permanently extends the authority provided in § 806 of the FY 2011 NDAA (P.L. 111-383) relating to the management of supply chain risk. See Yukins and Ittig, Feature Comment, "The Defense Authorization Act For FY 2011—A Bounded Step Forward For Acquisition Reform," 53 GC ¶ 8. This section allows the heads of covered agencies (i.e., the secretaries of defense, army, navy and air force) to exclude a source or withhold consent to contract in acquisitions for national security-related information systems and related IT (covered systems and covered items of supply, respectively) for the purpose of reducing "supply chain risk."

"Supply chain risk" means "the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of a covered system so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of such system." The agency head is required to notify the excluded source only "to the extent necessary to effectuate" the exclusion, and may withhold the reason for the exclusion for national security reasons. Section 881 also shields these decisions from bid protests at GAO and the COFC.

The agency head may exercise this authority only after (a) "obtaining a joint recommendation by the Under Secretary of Defense for Acquisition and Sustainment and [DOD's] Chief Information Officer…, on the basis of a risk assessment by the Under Secretary of Defense for Intelligence, that there is a significant supply chain risk to a covered system"; (b) making a written determination that (1) use of the authority is necessary to protect national security; (2) less intrusive measures are not reasonably available; and (3) if the covered agency head plans to limit disclosure, the risk to national security due to the disclosure of such information outweighs not disclosing it; and (c) providing notice of the determination to the appropriate congressional committees. The agency head may not delegate this authority "to an official below the level of the service acquisition executive for the agency concerned." In August 2018, DFARS Case No. 2018-D072 was opened to implement this requirement. The draft final DFARS rule was forwarded to the DARS Regulatory Control Officer for review on December 13, 2018.

Section 885, Process to Limit Foreign Access to Technology—Section 805 requires the secretary of defense to develop "a process and procedures for limiting foreign access to technology through contracts, grants, cooperative agreements, or other transactions, when such limitation is in the interest of national security." The process and procedures must be "consistent with all existing law, including laws relating to trade agreements, individual protections, export controls, and the National Technology and Industrial Base (NTIB)." The secretary must submit a report on the process and procedures to the congressional defense committees by Sept. 1, 2019. The report must include (1) an assessment of DOD's ability under "existing authorities to limit foreign access to technology through contracts, grants, cooperative agreements, or other transactions"; (2) an assessment of DOD's "need to implement a process to limit foreign access to technology"; and (3) "[r]ecommendations for penalties for violations of access, including intellectual property forfeiture."

Section 890, Pilot Program to Accelerate Contracting and Pricing Processes—This section requires DOD to "establish a pilot program to reform and accelerate the contracting and pricing processes associated

with contracts in excess of" $50 million by (1) "basing price reasonableness determinations on actual cost and pricing data for purchases of the same or similar products for" DOD, and (2) "reducing the cost and pricing data to be submitted in accordance with" 10 USCA § 2306a. The program is limited to 10 contracts, none of which can be part of a major defense acquisition program (as defined in 10 USCA § 2430). The pilot program will expire on Jan. 2, 2021. By Jan. 30, 2021, the secretary of defense must report to the congressional defense committees the results of the pilot program and assess whether the program should be continued or expanded.

* * *

As noted, certain provisions outside of FY NDAA 2019's Title VIII, Acquisition Policy, Acquisition Management, and Related Matters, are relevant to procurement law. These include:

Section 211, Modification of Authority to Carry Out Certain Prototype Projects—This section amends 10 USCA § 2371b to permit DOD to award procurement contracts or OTAs for follow-on production of a prototype without using competitive procedures once DOD "determines that an individual prototype or prototype subproject as part of a consortium is successfully completed by the participants." Section 211 provides that participants need not complete "all activities within a consortium" before DOD can award a contract or OTA for follow-on production of a successfully completed prototype or prototype subproject. This change was made in response to GAO's decision in *Oracle America, Inc.*, Comp. Gen. Dec. B-416061, 2018 CPD ¶ 180, which held that 10 USCA § 2371b(f) requires completion of all aspects of a prototype project before DOD may award a contract or OTA for follow-on production of the prototype using noncompetitive procedures.

Section 224, Codification and Reauthorization of Defense Research and Development Rapid Innovation Program—Section 224 codifies the Defense Research and Development Rapid Innovation Program at 10 USCA § 2359a. The program is a "competitive, merit-based program" established by FY 2011 NDAA § 1073 (and made permanent by FY 2017 NDAA § 213) to "accelerate the fielding of technologies developed pursuant to phase II [SBIR] Program projects, technologies developed by the defense laboratories, and other innovative technologies (including dual use technologies)." The program is intended "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." See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Significant Impact Of The FY 2017 National Defense Authorization Act On Federal Procurement—Part I," 59 GC ¶ 18.

Section 224 makes some changes to FY 2011 NDAA § 1073 (as amended by FY 2017 NDAA § 213). Specifically, § 224 provides that the secretary of defense's guidelines for the program must include "[m]echanisms to facilitate transition of follow-on or current projects carried out under the program into defense acquisition programs, through the use of the authorities of" 10 USCA § 2302e ("Contract authority for advanced development of initial or additional prototype units"), "or such other authorities as may be appropriate to conduct further testing, low rate production, or full rate production of technologies developed under the program." Additionally, § 824 provides

that "[p]rojects are selected using merit-based selection procedures" and "the selection of projects" should not "be subject to undue influence by Congress or other Federal agencies."

Section 244, Report on Defense Innovation Unit Experimental—Not later than May 1, 2019, DOD must report to Congress on Defense Innovation Unit Experimental ("DIUx"). This report will discuss the integration of DIUx into the DOD "research and engineering community to coordinate and deconflict [its] activities" "with similar [DOD] activities," including DOD "laboratories, the Defense Advanced Research Project Agency, the [SBIR] Program, and other entities." It will also discuss the "impact of [DIUx's] initiatives, outreach, and investments on [DOD] access to technology leaders and technology not otherwise accessible to [DOD,] including" (A) "identification of—(i) the number of non-traditional defense contractors with [DOD] contracts or other transactions resulting directly from [DIUx's] initiatives, investments, or outreach; and (ii) the number of traditional defense contractors with contracts or other transactions resulting directly from [DIUx's] initiatives; and (B) the number of innovations delivered into the hands of the warfighter." Finally, the report will discuss how DOD "is documenting and institutionalizing lessons learned and best practices of [DIUx] to alleviate the systematic problems with technology access and timely contract or other transaction execution."

In an Aug. 3, 2018 memorandum, then Deputy Defense Secretary Patrick Shanahan redesignated DIUx as Defense Innovation Unit ("DIU"). That memo states that "[r]emoving 'experimental' reflects DIU's permanence within the DOD. Though DIU will continue to experiment with new ways of delivering capability to the warfighter, the organization itself is no longer an experiment. DIU remains vital to fostering innovation across [DOD] and transforming the way DOD builds a more lethal force." See https://s3.amazonaws.com/fedscoopwp-media/wp-content/uploads/2018/08/09122501/REDESIGNATION-OF-THE-DEFENSE-INNOVATION-UNIT-OSD009277-18-RES-FINAL.pdf. This redesignation did not make it into language of the FY 2019 NDAA.

Section 925, Review of Functions of DCAA and DCMA—The undersecretary of defense for acquisition and sustainment and the undersecretary of defense (comptroller) are required to conduct a "joint review" of the functions of the Defense Contract Audit Agency and the Defense Contract Management Agency, including: (a) "A validation of the missions and functions of each Agency;" (b) "An assessment of the effectiveness of each Agency in performing designated functions;" (c) "An assessment of the adequacy of the resources, authorities, workforce training, and size of each Agency to perform designated functions;" (d) "An assessment of cost savings or avoidance attributable to the conduct of the activities of each Agency;" (e) "A determination whether functions performed by either Agency could be performed more appropriately and effectively by" the other Agency, any other DOD organization or element, and/or commercial providers; and (f) "A validation of the continued need for two separate Agencies with oversight for defense contracting." DOD must report to Congress on the results of this review by March 1, 2020.

Section 926, Review and Improvement of the Operations of the Defense Finance and Accounting Service—The DOD chief management officer and the undersecretary of defense (comptroller) are required to "conduct a joint review of the activities of the Defense Finance and Accounting Service." The subject of this review is similar to the review of DCAA and DCMA to be conducted under FY 2019 NDAA § 925, and also is due by March 1, 2020.

Section 1644, Assistance for Small Manufacturers in the Defense Industrial Supply Chain and Universities on Matters Relating to Cybersecurity—This section requires the secretary of defense to "take such actions as may be necessary to enhance awareness of cybersecurity threats among small manufacturers and universities working on [DOD] programs and activities." The secretary must prioritize these efforts to help reduce cybersecurity risks faced by small manufacturers and universities, and must focus on "such small manufacturers and universities as the Secretary considers critical." Activities to carry out this section include "outreach," which "may include live events with a physical presence and outreach conducted through Internet websites. Such outreach may include training, including via courses and classes, to help small manufacturers and universities improve their cybersecurity."

The secretary must also "develop mechanisms to provide assistance to help small manufacturers and universities conduct voluntary self-assessments in order to understand operating environments, cybersecurity requirements, and existing vulnerabilities, including through the Mentor Protégé Program, small business programs, and engagements with defense laboratories and test ranges." Additionally, the secretary must promote the transfer to small manufacturers and universities "of appropriate technology, threat information, and cybersecurity techniques developed in" DOD to help them "implement security measures that are adequate to protect covered defense information, including controlled unclassified information." In promoting the transfer of technology, threat information and cybersecurity techniques, the secretary "must coordinate efforts, when appropriate, with the expertise and capabilities that exist in Federal agencies and federally sponsored laboratories." The secretary must also "establish a cyber counseling certification program, or approve a similar existing program, to certify small business professionals and other relevant acquisition staff within [DOD] to provide cyber planning assistance to small manufacturers and universities."

Section 1655, Mitigation of Risks to National Security Posed by Providers of IT Products and Services Who Have Obligations to Foreign Governments—Subject to forthcoming regulations, DOD "may not use a product, service, or system procured or acquired" after the FY 2019 NDAA's August 2018 enactment "relating to information or operational technology, cybersecurity, an industrial control system, or weapons system," unless the provider discloses: (1) whether (and if so when), within five years prior to the FY 2019 NDAA's enactment, or anytime thereafter, the provider has allowed, or was/is under any obligation to allow, "a foreign government to review the code of a non-commercial product, system, or service developed for" DOD; (2) whether (and if so when), within five years prior to the NDAA's enactment, or anytime thereafter, the provider "has allowed a foreign government listed in section 1654" of the FY 2019 NDAA (which requires the secretary of defense to "create [by February 2019] a list of countries that pose a risk to the cybersecurity of United States defense and national security systems and infrastructure") "to review the source code of a product, system, or service that [DOD] is using or intends to use, or is under any obligation to allow a foreign person or government to review the source code of a product, system, or service that [DOD] is using or intends to use as a condition of entering into an agreement for sale or other transaction" with a foreign government or representative thereof; and (3) whether the provider "holds or has sought a license pursuant to the Export Administration Regulations under [15 CFR §§ 730–774], the International Traffic in Arms Regulations under [20 CFR §§ 120–130], or successor regulations, for [IT] products, components, software, or

services that contain code custom-developed for the non-commercial product, system, or service [DOD] is using or intends to use." These disclosure requirements do "not apply to open source software."

The secretary of defense must issue regulations implementing § 1655's disclosure requirements. DFARS Case No. 2018-D064 was opened on Aug. 22, 2018 and a report on the proposed DFARS rule is currently due on Jan. 9, 2019.

Procurement contracts covered by § 1655 must include a clause requiring that the information described above "be disclosed during the period of the contract if an entity becomes aware of information requiring disclosure …, including any mitigation measures taken or anticipated." And, by August 2019, the secretary must establish a registry to collect and maintain information disclosed pursuant to § 1655. Upon request, DOD must make the registry available to any agency conducting a procurement pursuant to the FAR or DFARS.

If the secretary determines that the disclosures made pursuant to § 1655 reveal "a risk to the national security infrastructure or data of the United States, or any national security system under the control of [DOD]," the secretary must take appropriate mitigation actions, including "conditioning any agreement for the use, procurement, or acquisition of the product, system, or service on the inclusion of enforceable conditions or requirements that would mitigate such risks." The secretary could also exercise authority under FY 2019 NDAA § 881 to reduce supply chain risk by excluding the provider of the products, services, or systems from participating in a procurement. Additionally, by August 2020, DOD must develop a third-party testing standard for mitigating risks that is "acceptable for commercial off the shelf (COTS) products, systems, or services to use when dealing with foreign governments."

The secretary must submit annual reports to Congress on the "number, scope, product classifications, and mitigation agreements related to each product, system, and service for which a disclosure is made under" § 1655.

The joint explanatory statement indicates that "the conferees believe that this provision is a necessary step toward minimizing the supply chain risk posed by companies like Kaspersky," but also urges the secretary "to take actions to minimize the potential injury of the non-use requirement, to both [DOD] and industry." The joint explanatory statement recognizes that, until DOD issues implementing regulations, "the non-use requirement is all-encompassing." Accordingly, it encourages the secretary "to exempt from this requirement any product, system, or service if: (1) Its source code has been exported pursuant to a license or license exception granted under the Export Administration Regulations (15 CFR §§ 730–774); (2) It is not itself, and is not a component of, a National Security System; (3) It is not a cybersecurity tool, system, or application or does not have a built-in cybersecurity tool, system, or application; or (4) It is subjected only to a de minimis disclosure under restricted access conditions, as defined by the Secretary." The joint explanatory statement also urges the secretary "to exempt any further products, systems, and services and implement this provision so as to minimize supply chain risk and advance national security."

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