

THE GOVERNMENT CONTRACTOR®



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 62, No. 2

January 15, 2020

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FEATURE COMMENT: The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part I

On Dec. 20, 2019, more than 11 weeks after the October 1 start of Fiscal Year 2020, the president signed the National Defense Authorization Act (NDAA) for FY 2020, P.L. 116-92. While this is the 59th fiscal year in a row that a NDAA has been enacted, it was delayed (as discussed in more detail below) by significant partisan disputes over its proposed contents. In 2018, when the president signed the John S. McCain NDAA for FY 2019 on the unusually early date of August 13 (which was more than 10 weeks before the start of the FY), we cautioned that “the FY 2019 NDAA’s unusually early enactment probably is not a harbinger of a more efficient NDAA process going forward” and explained why it likely was an anomaly. See Schaengold, Prusock, and Muenzfeld, Thomson Reuters Conference Briefs for 2018, “2018 Statutes Update,” at 5-5; see also Schaengold, Prusock, and Muenzfeld, Feature Comment, “The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part I,” 60 GC ¶ 334 (“this unusual efficiency [i.e., the August 2018 passage of FY 2019 NDAA] should not be considered a harbinger of a long-term, streamlined legislative process.”).

The FY 2020 NDAA’s passage was delayed because of very substantial partisan disagreement in Congress over various subjects, including, for example, (i) funding and reprogramming of funds for the border wall; (ii) establishment of a U.S. Space Force; (iii) proposed Environmental Protection Agency regulation of PFAS, or per- and polyfluoro-

alkyl substances, as Superfund hazardous substances and proposed requirements to promulgate PFAS drinking water standards, see “Congress Takes Initial Steps to Address PFAS in the National Defense Authorization Act Conference Report,” available at www.gtlaw-environmentalandenergy.com/2019/12/articles/emerging-contaminants/pfas/congress-takes-initial-steps-to-address-pfas-in-the-national-defense-authorization-act-conference-report/; (iv) antidiscrimination protections for transgender military personnel; and (v) 12 weeks of paid parental leave for federal civilian employees. See Congressional Research Service (CRS) Report R46144 (Jan. 2, 2020), *FY2020 National Defense Authorization Act: P.L. 116-92 (H.R. 2500, S. 1790)*, at 9, 14–15, 21–23. In his signing statement, the president took issue with a significant number of other provisions enacted in the FY 2020 NDAA that he believes raise “constitutional concerns.” See www.whitehouse.gov/briefings-statements/statement-by-the-president-34/. None of these provisions, however, is likely to have a significant impact on procurement law.

The FY 2020 NDAA’s procurement-related reforms and changes are primarily located (as usual) in the Act’s “Title VIII—Acquisition Policy, Acquisition Management, and Related Matters,” which includes 78 provisions addressing procurement matters. This is roughly the same as the past four NDAA’s: FYs 2019, 2018, 2017 and 2016 NDAA’s, respectively, contained 71, 73, 88 and 77 Title VIII provisions. Although the impact and importance of a NDAA on federal procurement should not be measured simply on the total number of procurement provisions, the FY 2020 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAA’s (37, 13 and 49 provisions, respectively, in FYs 2015, 2014 and 2013). See CRS Report R45068 (Jan. 19, 2018), *Acquisition Reform in the FY2016–FY2018 National Defense Authorization Acts (NDAAs)*, at 1–2, & App. A. As discussed in this Feature Comment, certain

provisions in other titles of the FY 2020 NDAA are also very important to procurement law. Significantly, some of the FY 2020 NDAA's provisions will not become effective until the Federal Acquisition Regulation or Defense FAR Supplement (and, depending on the circumstances, possibly other regulations) are amended or promulgated (which, as we explain below, sometimes can take two to four years or more).

Certain FY 2020 NDAA provisions, e.g., §§ 810, 861, 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, Prusock and Muenzfeld, Feature Comment, "The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part I," 60 GC ¶ 334; Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part I," 58 GC ¶ 20; *discover.dtic.mil/section-809-panel*. In January and February of 2019, respectively, the Section 809 Panel issued a "Volume 3 Report" and a "Roadmap to the Section 809 Panel Reports." As compared to its impact on the FY 2019 NDAA, the Section 809 Panel only had a modest impact on the FY 2020 NDAA, and most of its significant 2019 proposals (e.g., certain bid protest reforms) were not acted upon. In part, this is likely the result of the partisan disputes over various provisions in the draft 2020 NDAA, some of which did not make it into the enacted FY 2020 NDAA. In any event, although the FY 2020 NDAA has 78 procurement-related provisions in Title VIII (plus others elsewhere), its actual impact on procurement law is generally more modest than other recent NDAAs. There are indications that the FY 2021 NDAA will consider, and may include, some of the Section 809 Panel's recommendations that have not been acted on to date.

Because of the substantial volume of the procurement changes in the FY 2020 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I addresses §§ 800–847 below. Part II, which will be published on Jan. 22, 2020, addresses §§ 848–891, plus sections in Titles II, IX, XVI and LXVI.

Section 800, Authority for Continuous Integration and Delivery of Software Applications and Upgrades to Embedded Systems—This section requires the secretary of defense to "establish"

at least two and "as many pathways as the Secretary deems appropriate" "to provide for the efficient and effective acquisition, development, integration, and timely delivery of secure software." Such pathways "shall provide for the use of proven technologies and solutions to continuously engineer and deliver capabilities in software" and do so on an expedited or rapid basis. Under this section, the secretary is required to consider how the use of such pathways will (i) "initiate the engineering of new software capabilities quickly"; (ii) "demonstrate the viability and effectiveness of such capabilities for operational use not later than one year after" funds become available to acquire or develop such software; and (iii) "allow for the continuous updating and delivery of new capabilities not less frequently than annually."

On this subject, the joint explanatory statement (which is the principal legislative history for this NDAA) bluntly expresses frustration with the Department of Defense:

The conferees emphasize that the ability to deliver meaningful [software] capability for operational use within one year is foundational to the establishment of this authority and associated procedures. The conferees remind [DOD] that delivery of increments of useful software capability no less frequently than every six months is not only a best practice for software-intensive systems but it has also been a standing government-wide requirement for years. *Overcoming [DOD's] institutional and cultural resistance to delivering in a year or less requires ruthless prioritization of features, which hinges on more effective cooperation among stakeholders.* The conferees also believe that cost estimation and assessment and program evaluation methods are critical to well-informed program oversight, and note that, for software initiatives, such approaches [in DOD] remain nascent.

(Emphasis added.)

Initial guidance is due from DOD by March 2020 and, if final guidance is not issued by October 2021, the secretary cannot use this section's authority to (i) "establish a new pathway to acquire or develop software"; or (ii) "continue activities to acquire or develop software using a pathway established under" the initial guidance.

Section 803, Failure to Provide Other than Certified Cost or Pricing Data Upon Request—This section amends 10 USCA § 2306a(d) to add that

(i) “Contracting officers shall not determine the price of a contract or subcontract to be fair and reasonable based solely on historical prices paid by the Government”; and (ii) if the CO “is unable to determine proposed prices are fair and reasonable by any other means, an offeror who fails to make a good faith effort to comply with a reasonable request to submit [cost or pricing] data ... is ineligible for award unless the head of the contracting activity ... determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of pertinent factors,” some of which are identified in this section. See also FAR 15.403-3; DFARS 215.403-3.

The undersecretary of defense for acquisition and sustainment is required to produce “an annual report identifying offerors that have denied multiple requests for submission of uncertified cost or pricing data over the preceding three-year period, but nevertheless received an award.” This section authorizes the secretary of defense to include an appropriate “notation on such offerors in the system used by the Federal Government to monitor or record contractor past performance.” The undersecretary is directed to “assess the extent to which these offerors are sole source providers within the defense industrial base and shall develop strategies to incentivize new entrants into the industrial base to increase the availability of other sources of supply for the product or service.”

Section 804, Comptroller General Report on Price Reasonableness—Not later than March 31, 2021, the U.S. Comptroller General is required to submit a report to certain congressional committees, including the defense committees, “on the efforts of the Secretary of Defense to secure data relating to the price reasonableness of offers from offerors.” The report shall include a review of: (i) “the number of, and justification for, any” “waiver of” or “exception to” “the requirements for submission of certified cost or pricing data for [certain] sole source contracts for spare parts issued during fiscal years 2015 through 2019”; (ii) “the number of contracts awarded for which a request for cost or pricing data, including data other than certified cost or pricing data, to determine price reasonableness was denied by an offeror”; and (iii) “actions taken by the Secretary if an offeror refused to provide requested data,” including (A) whether the CO included an appropriate notation in the Government’s past performance system “regarding the refusal of an offeror to provide

such data”; and (B) “any strategies developed by the Secretary to acquire the good that was the subject of a contract for which the offeror refused to provide such data in the future without the need for such a waiver.”

Section 805, Limitation on Transfer of Funds Related to Cost Overruns and Cost Underruns—As explained in this section’s joint explanatory statement, “effective beginning in fiscal year 2020,” § 805 repeals the “annual requirement for the Secretary of each military department to pay penalties for cost overruns on major defense acquisition programs, which were then credited to the Rapid Prototyping Fund.” This requirement was established by § 828 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.

Section 806, Standardizing Data Collection and Reporting on Use of Source Selection Procedures by Federal Agencies—This section repeals the requirements established by § 813 of the FY 2017 NDAA and § 880 of the FY 2019 NDAA for the Comptroller General to provide annual reports on the Government’s use of lowest-price technically acceptable (LPTA) source selection procedures. 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; Schaengold, Prusock and Muenzfeld, Feature Comment “The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part II,” 60 GC ¶ 340. In addition, not later than June 17, 2020, the General Services Administration administrator (in coordination with the Office of Federal Procurement Policy administrator) is required to revise the Federal Procurement Data System (FPDS) “to facilitate the collection of complete, timely, and reliable data on the source selection processes used by Federal agencies for the contract actions being reported in the system.” Data collected must be “(1) at a minimum, on the usage of the lowest price technically acceptable contracting methods and best value contracting methods process”; and “(2) on all applicable contracting actions, including task orders or delivery orders issued under indefinite delivery-indefinite quantity contracts.”

Section 807, DOD Use of Fixed-Price Contracts—This section requires the undersecretary of defense for acquisition and sustainment to “review how [DOD] informs decisions to use fixed-price contracts to support broader acquisition objectives to

ensure that such decisions are made strategically and consistently.” This review “should include decisions on the use of the various types of fixed price contracts, including fixed-price incentive contracts.” The undersecretary must brief the congressional defense committees on the findings of the review not later than Feb. 1, 2020.

Additionally, not later than Feb. 1, 2021, the Comptroller General is required to submit to the congressional defense committees a report on DOD’s “use of fixed-price contracts, including different types of fixed price contracts.” This report is required to include “(A) A description of the extent to which fixed-price contracts have been used over time and the conditions in which they are used”; “(B) An assessment of the effects of the decisions to use fixed-price contract types, such as any additional costs or savings or efficiencies in contract administration”; and “(C) An assessment of how decisions to use various types of fixed-price contracts affects the contract closeout process.”

Finally, this section delays the implementation of regulations requiring the use of fixed-price contracts for foreign military sales, which were prescribed pursuant to § 830(a) 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 I,” 59 GC ¶ 18. These regulations, which were supposed to become effective in June 2017, “shall not take effect until December 31, 2020.” The regulations are required to “take into account the findings of the review conducted” by the undersecretary and discussed in the first paragraph, above.

Section 808, Repeal of Continuation of Data Rights During Challenges—This section repeals § 866 of the FY 2019 NDAA, which modified 10 USCA § 2321 to permit DOD to exercise certain rights in technical data during the pendency of a dispute over the scope and nature of DOD’s data rights before the U.S. Court of Federal Claims or a board of contract appeals upon the written determination by the secretary of defense or of a military department that “compelling mission readiness requirements” will not permit waiting for the COFC’s or board’s decision. See Schaengold, Prusock and Muenzfeld, Feature Comment “The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part II,” 60 GC ¶ 340. This section restores the pre-FY 2019 NDAA language at 10 USCA § 2321(i), which means that now DOD can exercise

such rights in technical data only if the secretary of defense or of a military department determines that “urgent and compelling circumstances” exist that will not permit waiting for the COFC or board decision. This is a more difficult standard for DOD to meet than the “compelling mission readiness requirements” standard under FY 2019 NDAA § 866. The joint explanatory statement explains the conferees’ understanding “that the Under Secretary of Defense for Acquisition and Sustainment is working with industry to address possible policy modifications related to technical data rights and their disposition during challenges,” and “encourages the Under Secretary ... to continue these engagements and keep the Congress informed of progress with respect to these matters.”

Section 809, Repeal of Authority to Waive Acquisition Laws to Acquire Vital National Security Capabilities—This section repeals § 806 of the FY 2016 NDAA, which allowed the secretary of defense to waive any provision of acquisition law or regulation in certain circumstances. 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. According to the joint explanatory statement, DOD never used this waiver. This raises some interesting questions because DOD not infrequently complains about being strangled by red tape in conducting high-priority procurements. Why has DOD never used this authority? If DOD never used this provision, why did Congress choose to repeal it now? Did Congress become afraid that DOD might use this authority?

Section 810, Repeal of the Defense Cost Accounting Standards Board—This section repeals the authority for the Defense Cost Accounting Standards Board, which was established by § 820 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 I,” 59 GC ¶ 18. In an April 2019 letter to Congress containing legislative proposals for potential inclusion in the FY 2020 NDAA, the Office of Management and Budget called for the repeal of “the statutory requirement to manage a Defense Cost Accounting Standards Board and avoid the creation of a more complicated regulatory framework for cost accounting standards (CAS).” See www.whitehouse.gov/wp-content/uploads/2019/05/NDAA-Transmittal-of-

OFPP-Proposals-Summary-MPence-Entire-Leg-Pkg-Final-2.pdf. The Section 809 Panel also made this recommendation. See Sec. 809 Panel Report, Vol. II at 121, available at discover.dtic.mil/section-809-panel.

Section 816, Modification of Written Approval Requirement for Task and Delivery Order Single Contract Awards—This section amends 10 USCA § 2304a(d)(3) to permit a “task or delivery order contract in an amount estimated to exceed \$100,000,000 (including all options) [to] be awarded to a single source without the written determination otherwise required under [10 USCA § 2304a(d)(3)(A)],” i.e., that the task or delivery orders expected under the contract are so integrally related that only a single source can efficiently perform the work, provided the agency head “has made a written determination pursuant to [10 USCA § 2304(c)] that procedures other than competitive procedures may be used for the awarding of such contract.” As the joint explanatory statement observes, this amendment “eliminate[s] the requirement that single award task or delivery order contracts over \$100.0 million receive additional approval when already authorized under one of the exceptions to full and open competition.”

Section 818, Documentation of Market Research Related to Commercial Item Determinations—As explained by the joint explanatory statement, this section amends 10 USCA § 2377(c) and 41 USCA § 3307(d), respectively, “to require that market research for commercial products and services be documented [by the agency head] in a manner appropriate to the size and complexity of the acquisition.” See also FAR pt. 10.

Section 819, Availability of Data on the Use of Other Transaction Authority and Report on the Use of Authority to Carry Out Prototype Projects—Not later than Dec. 31, 2019, and annually thereafter through Dec. 31, 2023, this section directs the secretary of defense to “submit to the congressional defense committees a report on the use of other transaction authority to carry out prototype projects during the preceding fiscal year.” As explained by the joint explanatory statement, this section further “require[s] data on the use of other transactions [to be] accessible to any official designated by the Secretary of Defense.”

Section 822, Extension of Never Contract with the Enemy—This section amends a previous extension to § 841(n) of the FY 2015 NDAA to fur-

ther extend the program through Dec. 31, 2023. See Schaengold, Ralph and Prusock, Feature Comment, “The Impact Of The FY 2015 National Defense Authorization Act On Federal Procurement—Part II,” 57 GC ¶ 58.

Section 823, Modification of Justification and Approval Requirements for Certain DOD Contracts—This section increases the threshold for DOD justification and approval for certain 8(a) program sole-source awards to \$100 million and provides that the approving authority is the head of procuring activity or a designee. Implementing DOD guidance is due in March 2020. The section also requires DOD to track the use of the authority and make the data available to the Comptroller General, who is required (not later than March 1, 2022) to submit a report to the congressional defense committees on the use of the authority, which shall include “(A) a review of the financial effect of the change to the justification and approval requirement ... on the native corporations and businesses and associated native communities”; “(B) a description of the nature and extent of contracts excluded from the justification and approval requirement by [the increase in the threshold]”; and “(C) other matters the Comptroller General deems appropriate.”

Section 826, Uniformity in Application of Micro-Purchase Thresholds to Certain Task or Delivery Orders—Under 41 USCA § 4106(c), “[w]hen multiple contracts are awarded” for the same or similar services or property, “all contractors awarded the contracts shall be provided a fair opportunity to be considered ... for each task or delivery order in excess of \$2,500.” Section 826 replaces \$2,500 with “the micro-purchase threshold,” which under 41 USCA § 1902(a) is currently \$10,000.

Section 827, Requirement for Cost Estimates on Models of Commercial E-Commerce Portal Program—Section 846 of the FY 2018 NDAA directed the GSA administrator 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 (quoting § 846). “In implementing section 846” of the FY 2018 NDAA, § 827 directs the GSA administrator to “submit to the appropriate congressional commit-

tees, not later than one year after the first contract is awarded pursuant to such section, a cost estimate for the three models for commercial e-commerce portals identified in section 4.1 of 'Procurement Through Commercial E-Commerce Portals Phase II Report: Market Research & Consultation' issued by the Administrator in April 2019." See *interact.gsa.gov/document/gsa-and-omb-phase-2-deliverable-attached*. The joint explanatory statement adds that "[i]n implementing this section [827], the conferees do not intend to require the [GSA] Administrator to provide independent government cost estimates, but rather a range of potential costs or a general order of magnitude for each model."

Section 836, Report on Realignment of the Defense Acquisition System to Implement Acquisition Reforms—This section requires the secretary of defense to include with the FY 2021 budget, as submitted to Congress, "a report on the progress of implementing acquisition reform initiatives that have been enacted into law through [DOD] regulations, Directives, Instructions, or other guidance."

The report must "include a description of" "(1) how the Secretary will identify, quantify, assess, and manage acquisition program risks"; "(2) what changes have been made to systems for collecting and sharing data on acquisition programs, including how access to acquisition program data is managed"; and "(3) updates to, or the implementation of, procedures for tailoring acquisition methods, including alternative acquisition pathways such as" "(A) the use of the 'middle tier' of acquisition programs described under section 804 of the [FY 2016 NDAA]"; "(B) the alternative acquisition pathways established under section 805 of the [FY 2016 NDAA]"; "(C) a software acquisition pathway described under section 800 of [the FY 2020 NDAA]"; and "(D) the use of procedures to respond to urgent operational needs."

According to the joint explanatory statement, the report "should look ahead to consider the implications of these changes for the acquisition of non-developmental items and the implications of the shift in acquisition of capabilities through development, to acquisition of capabilities 'as-a-service.'" Considering the report and "the important role of the Comptroller General's annual weapons assessment in enabling the congressional defense committees' detailed oversight of the Defense Acquisition System, the conferees also direct the Comptroller General ... to brief the committees on how [DOD's] efforts are informing the refresh of that annual report."

The joint explanatory statement recognized DOD's "careful consideration" in implementing acquisition reforms legislation through the NDAs "over the last five years." The conferees, however, noted that (i) DOD "can no longer afford to use cost, schedule, and performance thresholds as simple proxies for risk when designating the path an acquisition program travels through the Defense Acquisition System, and in organizing how programs are managed and overseen"; and (ii) exclusive attention to those areas "obscures a myriad of other risks in programs large and small, any one of which could be single points of failure for successful acquisition" and identified various examples of such risks.

Section 837, Report and Limitation on the Availability of Funds Relating to the "Middle Tier" of Acquisition Programs—This section provides that "[n]ot later than December 15, 2019"—*five days before the president signed the FY 2020 NDAA*—the DOD undersecretary for acquisition and sustainment "shall submit to the congressional defense committees a report that includes the guidance required under [FY 2016 NDAA §] 804(a)." The Feature Comment analyzing § 804 of the FY 2016 NDAA observed that under that section:

[No later than May 2016,] the undersecretary of defense ... must "establish guidance" that provides for an expedited and streamlined "middle tier" of acquisition programs that are intended to be completed within two to five years. The joint explanatory statement indicates that these programs are intended to be "distinctive from 'rapid acquisitions' that are generally completed within 6 months to 2 years and 'traditional' acquisitions that last much longer than 5 years." The DOD guidance [to be] established under this section must cover "two acquisition pathways": (1) the "rapid prototyping pathway," which "shall provide for the use of innovative technologies to rapidly develop fieldable prototypes to demonstrate new capabilities and meet emerging military needs"; and (2) the "rapid fielding pathway," which "shall provide for the use of proven technologies to field production quantities of new or upgraded systems with minimal development required."

See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part I," 58 GC ¶ 20.

Section 837(b)(1) provides that “[b]eginning on December 15, 2019,” which predates the signing of the FY 2020 NDAA, “if the Under Secretary of Defense for Acquisition and Sustainment has not submitted the report [including the required guidance], not more than 75 percent of the funds” “authorized to be appropriated by this Act or otherwise made available for fiscal year 2020 for [DOD]” “may be obligated or expended until the date on which the report ... has been submitted.” The funds restricted from use are for (i) “any acquisition program established pursuant to the guidance required under [FY 2016 NDAA] section 804(a)” and (ii) the operations of the offices of the undersecretary for research and engineering, the undersecretary for acquisition and sustainment, the director of cost analysis and program evaluation, and the service acquisition executives of the military departments.

The FY 2020 NDAA joint explanatory statement explains that this section is designed to “expand the limitation of funds beyond acquisition programs, to the organizations which are parties to the disagreements that are preventing the guidance from being finalized.” The joint explanatory statement confirms that these organizations include those named in the paragraph immediately above and states that the “inability of the [DOD] parties to reach agreement on the use of this authority threatens the momentum of the very initiatives that would most benefit from it [and] encourage[s] the parties to focus immediately on the most critical issues, bring them to resolution, and publish the guidance required by [FY 2016 NDAA] section 804.” On Dec. 30, 2019, DOD finally issued its guidance for the processes governing middle-tier acquisition. See DOD Instruction 5000.80, Operation of the Middle Tier of Acquisition (MTA), available at www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/500080p.PDF?ver=2019-12-30-095246-043.

Section 838, Report on Intellectual Property Policy and the Cadre of Intellectual Property Experts—As with § 837, this provision exhibits congressional frustration with DOD. Pursuant to § 838, § 802 of the FY 2018 NDAA is amended by requiring that “[n]ot later than December 15, 2019”—*five days before the President signed the FY 2020 NDAA*—the undersecretary for acquisition and sustainment “submit to the congressional defense committees a report that includes” “(1) the policy required in [10 USCA § 2322(a)];” “(2) an identification of each member of the

cadre of intellectual property [IP] experts required in [10 USCA § 2322(b)] and the office to which such member belongs”; “(3) a description of the leadership structure and the office that will manage the cadre of intellectual property experts”; and “(4) a description of the specific activities performed, and programs and efforts supported, by the cadre of [IP] experts during the 12-month period preceding the date of the report.”

Our Feature Comment analyzing the FY 2018 NDAA observed that § 802 (through the newly created 10 USCA § 2322(a)) required the undersecretary to “develop policy on the acquisition or licensing of [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.

See Schaengold, Prusock and Muenzfeld, Feature Comment, “The Fiscal Year 2018 NDAA’s Significant Impact On Federal Procurement Law—Part I,” 60 GC ¶ 1.

Apparently, DOD has not developed this policy or fulfilled other requirements of FY 2018 NDAA § 802, for which the joint explanatory statement provided for the “establish[ment of] a cadre of [DOD] 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].” *Id.* We said that § 802 “sounds like typical congressional language to which lip service will be paid but which will have little impact” but thought it would be distinguishable because of § 802’s creation of the IP cadre and its provisioning of authority for the establishment of a separate DOD IP office with appropriate staff and other resources (including provisioning for recruitment, retention and training). *Id.* (emphasis added). Apparently, our lip service analysis turned out to be correct.

As a result of DOD's inaction, § 838 provides that "[o]f the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2020 for [DOD], not more than 75 percent may be obligated or expended for" the offices of the undersecretary of defense for acquisition and sustainment, the assistant secretary of the Army for acquisition, logistics, and technology, the assistant secretary of the Navy for research, development, and acquisition, and the assistant secretary of the Air Force for acquisition, technology, and logistics until FY 2018 NDAA § 802's requirements are fulfilled.

Section 845, Modernization of Acquisition Processes to Ensure Integrity of Industrial Base—The secretary of defense is directed to "streamline and digitize the existing [DOD] approach for identifying and mitigating risks to the defense industrial base across the acquisition process, creating a continuous model that uses digital tools, technologies, and approaches designed to ensure the accessibility of data to key [DOD] decision-makers."

The DOD undersecretary for acquisition and sustainment must "[d]evelop an analytical framework for risk mitigation across the acquisition process" that includes (i) "[c]haracterization and monitoring of supply chain risks" (e.g., "the extent to which sources, items, materials, and articles are mined, produced, or manufactured within or outside the United States," "counterfeit parts," "cybersecurity"); (ii) "[c]haracterization and monitoring of risks posed by contractor behavior that constitute violations of laws or regulations" (e.g., "fraud," "ownership structures," "foreign influence"); (iii) "characterization and assessment of [DOD] acquisition processes and procedures" (e.g., "responsibility determinations," "facility clearances," "contract administration, contract management, and oversight"); and (iv) "[c]haracterization and monitoring of the health and activities of the defense industrial base" (e.g., "balance sheets, revenues, profitability, and debt," "investment, innovation, and technological and manufacturing sophistication," "corporate governance, leadership, and culture of performance"). Various assessments, reports, reviews, briefings (including by the Comptroller General) and an implementation plan are required by this section.

The joint explanatory statement provides critical insight into this section:

[C]ontracting is the mechanism by which [DOD] operationalizes its relationship with the defense

industrial base/national security innovation base. [DOD's] ability to maintain awareness of the sources of procured items or materials, including the degree to which the sources are foreign or domestic, are critical elements for understanding supply chain risks. ... The conferees believe that certain risks to the defense industrial base are not being appropriately considered. These include but are not limited to risks associated with: insufficient insight into ownership structures, fragile sources of supply, and cybersecurity concerns, as well as contractors' violations of law pertaining to fraud, human trafficking, and worker health and safety. ... [E]ven where risks may be a high priority, the existing acquisition processes and procedures are not effective or timely in mitigating such risks. As such, the provision would require [DOD] to rigorously optimize the policy, processes, and procedures throughout the contracting life cycle, beginning with market research, responsibility determination, technical evaluation/award, mobilization, contract administration, contract management and oversight (to include contractor business systems reviews), and contract audit for closeout. It is critical that this optimization incorporate modern sources of data and methods to conduct appropriate and continuous risk assessment for contractors doing business with DOD.

(Emphasis added.)

Section 847, Mitigating Risks Related to Foreign Ownership, Control, or Influence of DOD Contractors or Subcontractors—"In developing and implementing the analytical framework for mitigating risk relating to [contractor and subcontractor] ownership structures, as required by [FY 2020 NDAA § 845]," this section directs DOD to "improve its processes and procedures for the assessment and mitigation of risks related to foreign ownership, control, or influence (FOCI) of [DOD] contractors and subcontractors." As explained in the joint explanatory statement, the conferees "are concerned by the growing threat to the integrity of the defense industrial base from strategic competitors, like the Russian Federation, the People's Republic of China, and their proxies, seeking to gain access to sensitive defense information or technology through contractors or subcontractors." While this threat seems obvious and clearly has existed for a long time, the conferees

now believe (correctly, we think) that “the acquisition community must have greater visibility into all cleared and uncleared potential contractors and subcontractors seeking to do business with [DOD]” and that DOD “must ensure that contractors and subcontractors do not pose a risk to the security of sensitive data, systems, or processes such as personally identifiable information, cybersecurity, or national security systems.”

Under this section, DOD is required to develop “process and procedures for the assessment and mitigation of risk relating to ownership structures,” which include three elements: (A) assessment of FOCI; (B) consideration of FOCI risks as part of responsibility determinations; and (C) contract requirements, administration, and oversight relating to FOCI. As to (A), “covered contractors and subcontractors,” which include “a company that is an existing or prospective [DOD] contractor or subcontractor ... on a contract or subcontract” “in excess of \$5,000,000,” are required “to disclose to the Defense Counterintelligence and Security Agency ... their beneficial ownership[,] whether they are under FOCI” and “to update such disclosures when changes occur.” If such “covered contractors and subcontractors” are “determined to be under FOCI,” they must “disclose contact information for each of its foreign owners that is a beneficial owner.” Such disclosures must “be provided at the time the contract or subcontract is awarded, amended, or renewed, but in no case later than one year after the Secretary prescribes [implementing] regulations” for this section.

As to (B), above, DOD is required to consider “FOCI risks as part of responsibility determinations,” including “(i) whether to establish a special standard of responsibility relating to FOCI risks for covered contractors or subcontractors”; “(ii) procedures for contracting officers making responsibility determinations regarding whether covered contractors and subcontractors may be under [FOCI] and for determining whether there is reason to believe that such [FOCI] would pose a risk or potential risk to national security or potential compromise because of sensitive data, systems, or processes, such as personally identifiable information, cybersecurity, or national security systems involved with the contract or subcontract”; and “(iii) modification of policies, directives, and practices to provide that an assessment that a covered contractor or subcontractor is under

FOCI may be a sufficient basis for a contracting officer to determine that a contractor or subcontractor is not responsible.”

As to (C), above, the process and procedures must include “(i) Requirements for contract clauses providing for and enforcing disclosures related to changes in FOCI or beneficial ownership during performance of the contract or subcontract” and “necessitating the effective mitigation of risks related to FOCI throughout the duration of the contract or subcontract”; “(ii) [D] esignation of the appropriate [DOD] official responsible to approve and to take actions relating to award, modification, termination of a contract, or direction to modify or terminate a subcontract due to an assessment” “that a covered contractor or subcontractor under FOCI poses a risk to national security or potential risk of compromise”; (iii) “A requirement for the provision of additional information regarding beneficial ownership and control of any covered contractor or subcontractor on the contract or subcontract”; and (iv) “Other measures as necessary to be consistent with other relevant practices, policies, regulations, and actions, including those under the National Industrial Security Program.” See www.dcsa.mil/mc/ctp/nisp/. Currently, the FAR and DFARS do not include provisions concerning or referencing FOCI.

The requirements under (A) and (C), above, “[do] not apply to a contract or subcontract for commercial products or services,” unless a designated senior DOD official specifically requires their applicability “based on a determination” “that the contract or subcontract involves a risk or potential risk to national security or potential compromise because of sensitive data, systems, or processes, such as personally identifiable information, cybersecurity, or national security systems.” Consideration of FOCI risk in responsibility determinations, i.e., (B), above, applies to commercial products and services. DOD is also required to ensure that this section’s requirements “are applied to research and development and procurement activities, including for the delivery of services.”

No later than June 17, 2020, DOD is required to “establish a process to update” information in the Federal Awardee Performance and Integrity Information System (FAPIIS) and the Commercial and Government Entity (CAGE) databases “to improve the assessment and mitigation of risks associated with FOCI through the inclusion and updating of all appropriate associated uniquely identifying information about the contracts and contractors and subcon-

tracts and subcontractors.” Information required to be disclosed by this section is not to be made public, is to be “made available via the FAPIIS and CAGE databases,” and is to be made available to appropriate Government agencies.



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THE GOVERNMENT CONTRACTOR®



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 62, No. 3

January 22, 2020

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FEATURE COMMENT: The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II

On Dec. 20, 2019, President Trump signed the Fiscal Year 2020 National Defense Authorization Act (NDAA), P.L. 116-92. Because of the volume of the procurement changes in the FY 2020 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I of this Feature Comment, which appeared in the January 15 issue of THE GOVERNMENT CONTRACTOR, addressed §§ 800–847. See 62 GC ¶ 6. Part II addresses §§ 848–91, plus sections in Titles II, IX, XI and LXVI.

Section 848, Prohibition on Operation or Procurement of Chinese Unmanned Aircraft Systems—This section prohibits the secretary of defense from operating, entering into or renewing a contract for the procurement of “a covered unmanned aircraft system [‘UAS’],” including “any related services and equipment,” that “(A) is manufactured in,” “or by an entity domiciled in,” the People’s Republic of China (PRC); “(B) uses flight controllers, radios, data transmission devices, cameras, or gimbals manufactured in,” or “by an entity domiciled in,” the PRC; “(C) uses a ground control system or operating software developed in,” “or by an entity domiciled in,” the PRC; or “(D) uses network connectivity or data storage located in or administered by an entity domiciled in” the PRC.

The secretary is further prohibited from operating, entering into or renewing a contract for “a system manufactured in” “or by an entity domiciled in” the PRC “for the detection or identification of covered unmanned aircraft systems.” The Department

of Defense “is exempt from this restriction if the operation or procurement is for” “(1) Counter-UAS surrogate testing and training”; or “(2) intelligence, electronic warfare, and information warfare operations, testing, analysis, and training.” The secretary is authorized to waive the restrictions “on a case by case basis by certifying in writing ... that the operation or procurement is required in the [U.S.] national interest.” The joint explanatory statement, which is the FY 2020 NDAA’s principal legislative history, further “encourage[s] the [secretary] to take such action as necessary to strengthen” “domestic [small UAS] production.”

Section 854, Addition of Domestically Produced Stainless Steel Flatware and Dinnerware to the Berry Amendment—This section amends 10 USCA § 2533a(b) to temporarily reinstate stainless steel flatware and dinnerware as covered items, requiring that DOD procure them only from domestic sources. The FY 2007 NDAA removed flatware as a “covered item” under the Berry Amendment. See P.L. 109-364, § 842. The requirement to purchase domestic flatware and dinnerware “appl[ies] with respect to contracts entered into on or after [Dec. 20, 2020] and is repealed effective September 30, 2023.” The secretary of defense is required to submit to the congressional defense committees by Oct. 1, 2020 a “report that provides a market survey, cost assessment, description of national security considerations, and a recommendation regarding whether the procurement of dinnerware and stainless steel flatware should be limited to [U.S.] sources.”

Section 860, Establishment of Defense Civilian Training Corps—“For the purposes of preparing selected students for public service in [DOD] occupations relating to acquisition, science, engineering, or other” critical “civilian occupations” and “to target critical [DOD] skill gaps,” this section directs the secretary of defense to “establish and maintain a Defense Civilian Training Corps program” at “any accredited civilian educational institution” that grants “baccalaureate degrees.”

According to the summary accompanying the FY 2020 NDAA Conference Report, at 8, “[j]ust like [Reserve Officer Training Corps] trains individuals for the Armed Forces, for the first time, the Defense Civilian Training Corps will train civilians for public service in [DOD].” This section further requires the secretary to establish criteria for (i) “a member of the program to receive financial assistance from DOD” and (ii) the term of service as a DOD employee “to receive such financial assistance.”

By Feb. 15, 2020, DOD is required to “submit to the congressional defense committees a plan and schedule to implement the Defense Civilian Training Corps program ... at one accredited civilian educational institution” by Aug. 1, 2021. Next, no later than Dec. 31, 2020, DOD must submit to the congressional defense committees “an expansion plan and schedule to expand the Defense Civilian Training Corps program to five accredited civilian educational institutions” by Aug. 1, 2022. Finally, by Dec. 31, 2021, DOD must submit to the congressional defense committees “a full implementation plan and schedule to expand the Defense Civilian Training Corps program to at least 20 accredited civilian educational institutions with not fewer than 400 members enrolled in the program not later than August 1, 2023.”

Section 861, Defense Acquisition Workforce Certification, Education and Career Fields—In general, as observed by the summary accompanying the FY 2020 NDAA Conference Report, at 8, the 2020 NDAA “directs DOD to redesign the Acquisition Workforce certification, education, and career fields by leveraging nationally and internationally recognized standards.” More specifically, no later than June 2020, this section requires the secretary of defense to “implement a certification program” providing “for a professional certification requirement for all members of the [DOD] acquisition workforce.” Except where third-party accredited standards do not exist (in which case DOD will establish appropriate standards), this “certification requirement for any acquisition workforce career field shall be based on standards developed by a third-party accredited program based on nationally or internationally recognized standards.”

This section also terminates the DOD “Acquisition Corps” established by 10 USCA § 1731(a) and generally replaces it with a DOD “acquisition workforce” or “acquisition positions.” This section further requires that the Defense Acquisition University

(DAU) faculty “include individuals from civilian colleges or universities that are not owned or operated by the Federal Government, commercial learning and development organizations, industry, or federally funded research and development centers.” Not later than Sept. 1, 2021, at least “five full-time visiting [DAU] professors” must be from “such civilian colleges or universities.” Similarly, by Sept. 1, 2022, “not less than ten full-time visiting professors” must be from such institutions.

Section 862, Software Development and Software Acquisition Training and Management Programs—This section requires the secretary of defense to “establish software development and software acquisition training and management programs for all software acquisition professionals, software developers, and other appropriate individuals ..., to earn a certification in software development and software acquisition.” This section’s goals include (A) ensuring that senior DOD acquisition, information technology and program officials receive training and gain experience in (i) “continuous software development” and (ii) “acquisition pathways available to acquire software”; and (B) “ensur[ing] that appropriate [DOD] program managers” (i) “have demonstrated competency in current software processes”; (ii) “have the skills to lead a workforce that can quickly meet challenges, use software tools that prioritize continuous or frequent upgrades as such tools become available, take up opportunities provided by new innovations, and plan software activities in short iterations to learn from risks of software testing”; and (iii) “have the experience and training to delegate technical oversight and execution decisions.”

The secretary is required to submit to the congressional defense committees an initial report (not later than March 2020) and a final report (not later than December 2020), which shall include (A) “the status of implementing the software development and software acquisition training and management programs established” under this section; (B) “a description of the requirements for certification, including the requirements for competencies in current software processes”; (C) “a description of potential [DOD] career paths in software development and software acquisition”; (D) “an independent assessment conducted by the Defense Innovation Board of the progress made on implementing the programs established” under this section; and (E) “any recom-

mendations for changes to existing law to facilitate the implementation” of these programs.

Section 863, Modification of Temporary Assignments of DOD Employees to a Private-Sector Organization—Under 10 USCA § 1599g, “with the agreement of a private-sector organization and the consent of the employee, [DOD may] arrange for the temporary assignment of an employee to such private-sector organization, or from such private-sector organization to a” DOD organization. Section 863 clarifies that a “private-sector organization that is temporarily assigned a member of the [DOD] acquisition workforce under this section shall not be considered to have a conflict of interest with [DOD] solely because of [its] participation in th[is] program.” Interestingly, the joint explanatory statement for FY 2016 NDAA § 1110, which involved similar exchanges of DOD financial management and acquisition personnel to nontraditional defense contractors, stated that nontraditional defense contractors “do not pose the same potential conflict of interest concerns that any exchange with a traditional defense contractor would pose.” See Schaengold, Broitman and Prusock, Feature Comment, “The FY 2016 National Defense Authorization Act’s Substantial Impact On Federal Procurement—Part II,” 58 GC ¶ 28.

Section 865, Use of Qualified Apprentices by Military Construction Contractors—Under this section, DOD must “require each offeror for a contract for a military construction project to certify ... that, if awarded such a contract, the offeror will” “(1) establish a goal that not less than 20 percent of the total workforce employed in the performance of such a contract are qualified apprentices”; and “(2) make a good faith effort to meet or exceed such goal.” The Defense Federal Acquisition Regulation Supplement is required to be amended so that “the system used by the Federal Government to monitor or record contractor past performance includes an analysis of whether the contractor has made a good faith effort to meet or exceed the [20 percent qualified apprentices] goal ..., as part of the past performance rating of such contractor.” This section’s “amendments ... apply with respect to [DOD] contracts awarded on or after” June 17, 2020.

Section 870, Requirements Relating to Credit for Certain Small Business Subcontractors—This section amends § 8(d)(16) of the Small Business Act, 15 USCA § 637(d)(16), to clarify that,

in certain circumstances, large prime contractors now can receive credit towards their subcontracting goals for subcontracts with small businesses at lower tiers. More specifically, “if the subcontracting goals pertain only to a single contract with a Federal agency, the prime contractor may elect to receive credit for small business concerns performing as first tier subcontractors or [lower tier] subcontractors ... in an amount equal to the total dollar value of any subcontracts awarded to such small business concerns.” However, “if the subcontracting goals pertain to more than one [Federal] contract,” or “to one contract with more than one Federal agency, the prime contractor may only receive credit for first tier subcontractors that are small business concerns.”

The head of each contracting agency is required to “ensure that the agency” “(i) collects and reports data on the extent to which prime contractors ... meet the goals and objectives set forth in [their] subcontracting plans”; and “(ii) periodically reviews data collected and reported ... for the purpose of ensuring that such contractors comply in good faith with” their subcontracting goals. Finally, a prime contractor’s subcontracting plan is required to include “a recitation of the types of records” it “will maintain to demonstrate that procedures have been adopted to substantiate” its subcontracting credit.

Section 872, Reauthorization and Improvement of DOD Mentor-Protege Program—This section extends the DOD Mentor-Protege Program by authorizing new DOD mentor-protege agreements through Sept. 30, 2024. These agreements, however, are now limited to two years, instead of three years. Reimbursements under such agreements may be paid and credit toward subcontracting goals may be granted for costs incurred through Sept. 30, 2026. These amendments do not take effect until the secretary of defense “submits to Congress the small business strategy required under” 10 USCA § 2283.

This section requires that DOD’s Office of Small Business Programs “establish performance goals consistent with the stated purpose of the Mentor-Protege Program and outcome-based metrics to measure progress in meeting those goals” and submit a report to Congress, no later than Feb. 1, 2020, “on progress made toward implementing these performance goals and metrics, based on reviews of the procedures used to approve mentor-protege agreements.” Section 872 further requires reports to the congressional defense committees (i) on the Mentor-

Protege Program’s “effectiveness” by the Defense Business Board by March 31, 2022, and (ii) from the secretary of defense by June 2020 (and annually thereafter through Sept. 30, 2024) with respect to “(1) each [DOD] mentor-protege agreement ..., disaggregated by the type of disadvantaged small business concern”; “(2) the type of assistance provided to protege firms ... under each such agreement”; “(3) the benefits provided to mentor firms ... under each such agreement”; and “(4) the progress of protege firms under each such agreement with respect to competing for Federal prime contracts and subcontracts.” See also DFARS subpt. 219.71, Pilot Mentor-Protege Program, & DFARS App. I; Congressional Research Service (CRS) Report R41722 (Oct. 18, 2019), *Small Business Mentor-Protégé Programs*, at 14-18; *business.defense.gov/Programs/mentor-protege-program/*.

Significantly, § 872 amends the definition of “disadvantaged small business concern,” which specifies the various types of small businesses which can participate in the DOD Mentor-Protege Program, to change it from “has less than half the size standard corresponding to its primary North American Industry Classification System [NAICS] code” to “is not more than the size standard corresponding to its primary [NAICS] code.”

Section 873, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns under the Prompt Payment Act—“[T]o the fullest extent permitted by law” and assuming that “a specific payment date is not established by contract,” this section amends 31 USCA § 3903(a) to (i) accelerate the payment date for small business prime contractors by requiring that the agency head “establish an accelerated payment date with a goal of 15 days after a proper invoice ... is received” and (ii) require, “for a prime contractor that subcontracts with a small business,” that the agency head “establish an accelerated payment date with a goal of 15 days after a proper invoice ... is received,” provided “such prime contractor agrees to make payments” to the small business subcontractor “in accordance with such accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to such subcontractor.”

Section 874, Postaward Explanations for Unsuccessful Offerors for Certain Contracts—By June 17, 2020, the FAR “shall be revised to require that” for “an offer for a task order or delivery

order ... greater than the simplified acquisition threshold [currently, \$250,000] and less than or equal to \$5,500,000 issued under an indefinite delivery, indefinite quantity contract, the contracting officer” “shall, upon written request from an unsuccessful offeror, provide a brief explanation as to why such offeror was unsuccessful.” This explanation shall include “a summary of the rationale for the award and an evaluation of the significant weak or deficient factors in the offeror’s offer.” This is not the equivalent of a debriefing, which offerors are entitled to after an award of an order exceeding \$5.5 million. See FAR 16.505(b)(1)(iv)(e), (b)(6). Nor does it provide authority to protest.

Section 879, Alignment of the DOD Small Business Innovation Research Program and Small Business Technology Transfer Program with the National Defense Science and Technology Strategy—Section 879 requires the secretary of defense and of the military departments to “align,” “to the extent practicable, ... the research topics selected for activities conducted under the Small Business Innovation Research Program and Small Business Technology Transfer Program” “with the National Defense Science and Technology Strategy developed under” FY 2019 NDAA § 218.

Section 887, Comptroller General Report on Contingency Contracting—Pursuant to this section, by Dec. 20, 2020, the Comptroller General “shall submit to the congressional defense committees a report on the use of contractors to perform work supporting contingency operations, including the logistical support for such operations, since January 1, 2009.” This report “shall include”: “(1) an evaluation of the nature and extent to which [DOD] has used contractors to perform such work”; “(2) an evaluation of the processes for tracking and reporting on the use of such contractors”; “(3) an evaluation of the extent to which recommendations made by the Wartime Contracting Commission established [in FY 2008 NDAA § 841] have been implemented in policy, guidance, education and training,” see *cybercemetery.unt.edu/archive/cwc/20110929213815/http://www.wartimecontracting.gov/*; and “(4) any other issues the Comptroller General determines to be appropriate.” According to the joint explanatory statement, the House version of the FY 2020 NDAA contained a provision, which was not enacted, reauthorizing the Commission on Wartime Contracting.

Section 891, Report on the Combating Trafficking in Persons Initiative—By June 17, 2020, the secretary of defense is required to submit to the congressional defense committees a report “containing an analysis of the progress of [DOD] in implementing the Combating Trafficking in Persons initiative described in [DOD] Instruction 2200.01 (... revised on June 21, 2019).” See *www.esd.whs.mil/Directives/issuances/dodi/* (click on “DoDI 2200.01”).

The joint explanatory statement directs the Comptroller General to “submit a report to the congressional defense committees on [DOD’s] overall efforts to combat human trafficking not later than January 31, 2021.” That report “shall evaluate” “(1) the processes and procedures to combat human trafficking in [DOD’s] contracting and supply chain policy, regulation, and practices, to include the implementation of title [17, ‘Ending Trafficking in Government Contracting’] of the [FY 2013 NDAA] and Executive Order 13627 [‘Strengthening Protections Against Trafficking In Persons In Federal Contracts’], as well as the nature and extent of training for contracting officers on how to evaluate compliance plans, monitor contractor adherence to the plans, and respond to reports of noncompliance”; “(2) the progress of the current trafficking in persons office within [DOD] in leading [DOD] to address all forms of human trafficking, the efficacy of such office in identifying, tracking, and managing any and all trafficking in persons cases, and what, if any, improvements should be made to the office”; “(3) the process used by contracting officers to evaluate compliance plans with regards to preventing human trafficking and a description of the remedies imposed by contracting officers in cases where an allegation of human trafficking has been substantiated”; and “(4) the process for reporting instances of human trafficking to the [DOD] Inspector General and the disposition of those cases.”

* * *

As noted in Part I, certain provisions outside of the FY NDAA 2020’s Title VIII, Acquisition Policy, Acquisition Management, and Related Matters, are very relevant to procurement law. In fact, as explained below, the most historic provisions in the FY 2020 NDAA are in Title IX and concern the U.S. Space Force. These additional provisions include:

Section 224, Requiring Defense Microelectronics Products and Services Meet Trusted Supply Chain and Operational Security Stan-

dards—The secretary of defense must ensure “that each microelectronics product or service that [DOD] purchases on or after” Jan. 1, 2023 “meets the applicable trusted supply chain and operational security standards established pursuant to” this section. The purpose of this section is “[t]o protect the United States from intellectual property theft and to ensure national security and public safety in the application of new generations of wireless network technology and microelectronics.” Section 224 permits DOD to purchase microelectronics products or services that do not meet applicable trusted supply chain and operational security standards if “(1) no such product or service is available for purchase that meets such standards; or (2) no such product or service is available for purchase” that “(A) meets such standards; and (B) is available at a price that the Secretary does not consider prohibitively expensive.”

The secretary of defense must establish trusted supply chain and operational standards no later than Jan. 1, 2021. A “trusted supply chain and operational security standard”:

- (i) is a standard that systematizes best practices relevant to—(I) manufacturing location; (II) company ownership; (III) workforce composition; (IV) access during manufacturing, suppliers’ design, sourcing, manufacturing, packaging, and distribution processes; (V) reliability of the supply chain; and (VI) other matters germane to supply chain and operational security; and (ii) is not a military standard (also known as “MILSTD”) or a military specification (also known as “MILSPEC”) for microelectronics that—(I) specifies individual features for [DOD] microelectronics; or (II) otherwise inhibits the acquisition by [DOD] of securely manufactured, commercially available products.

According to the joint explanatory statement, “MILSPEC style standards ... would inhibit [DOD’s] flexibility.” The joint explanatory statement further provides that “the standardization of best practices is intended to strike a balance between security and the cost-effectiveness of commercial solutions.”

Section 224 permits the secretary to “establish tiers and levels of trust and security within the supply chain and operational security standards” for microelectronics products and services. In developing these standards, the secretary must consult with

various Government and industry stakeholders. In consultation with these stakeholders, the secretary must annually review the standards and update or modify them as necessary.

The secretary must, “to the greatest extent practicable, ensure that suppliers of microelectronics products and services” subject to the DOD trusted supply chain and operational security standards “are able and incentivized to sell products commercially and to governments of allies and partners of the United States that are produced on the same production lines as the microelectronics products supplied to [DOD].” Additionally, the secretary must take necessary and appropriate actions to “maintain the health of the defense industrial base, to ensure that” “(1) providers of microelectronics products and services that meet the” trusted supply chain and operational security standards “are exposed to competitive market pressures to achieve competitive pricing and sustained innovation”; and “(2) the industrial base of microelectronics products and services that meet the” trusted supply chain and operational security standards “includes providers manufacturing in the United States or in countries that are [its] allies or partners.”

Sections 951–61, U.S. Space Force Act—The most historic aspect of the FY 2020 NDAA is its establishment of a sixth branch of the U.S. armed forces, the U.S. Space Force within the Department of the Air Force. The NDAA specifically redesignates the existing Air Force Space Command as the U.S. Space Force. The Space Force is commanded by the Chief of Space Operations (CSO), who is a four-star general and who is nominated by the President, confirmed by the Senate and reports to the secretary of the Air Force. In December 2020, the CSO will become a member of the Joint Chiefs of Staff (JCS), which is significant because, as a JCS member, the CSO may (i) provide advice directly to the president, without going through the Air Force chain of command, after informing the JCS and the secretary of defense; and (ii) make recommendations to Congress, after informing the secretary of defense. See CRS Report R46144 (Jan. 2, 2020), *FY2020 National Defense Authorization Act: P.L. 116-92 (H.R. 2500, S. 1790)*, at 14.

The secretary of the Air Force is required to assign members of the Air Force to the Space Force without an increase in the Air Force’s manpower. While the establishment of the Space Force is a sig-

nificant development, since it will be within the Air Force, it will not be the separate entity originally proposed by the president but will be analogous to the status of the Marine Corps as a separate service within the Department of the Navy. Nor will it include, as originally proposed by the Trump administration, the transfer into the Space Force of personnel currently assigned to all of DOD’s space-oriented organizations.

Section 954 establishes, within the Office of the Secretary of the Air Force, the “Space Force Acquisition Council,” which will be chaired by the assistant secretary of the Air Force for space acquisition and integration, a position created by this NDAA. This council, which is required to meet at least monthly and report quarterly (through the first quarter of FY 2025) to the congressional defense committees on its activities, will “oversee, direct, and manage acquisition and integration of the Air Force for space systems and programs in order to ensure integration across the national security space enterprise.”

Section 956 provides that the assistant secretary of the Air Force for space acquisition and integration (i) is “responsible for all architecture and integration of the Air Force for space systems and programs, including in support of the Chief of Space Operations”; (ii) will “[a]dvice the service acquisition executive of the Air Force with responsibility for space systems and programs ... on the acquisition of such systems and programs by the Air Force”; (iii) will “[o]versee and direct” “The Space Rapid Capabilities Office,” “The Space and Missile Systems Center,” and “The Space Development Agency”; (iv) will “[a]dvice and synchronize acquisition projects for all space systems and programs of the Air Force”; and (v) effective Oct. 1, 2022, will become “the Service Acquisition Executive [‘SAE’] of the Department of the Air Force for Space Systems and Programs,” which will be a second SAE for the Air Force.

The joint explanatory statement adds that this assistant secretary will “serve as the senior architect for space systems and programs across [DOD]” and “direct[s] the Secretary of the Air Force to provide to the congressional defense committees a report on whether and, if so, how to implement an alternative acquisition system, due not later than March 31, 2020. The report should include an assessment of the feasibility of a new acquisition system specifically tailored for space systems and programs, including with respect to procuring space vehicles, ground segments relating to such

vehicles, and satellite terminals.” The joint explanatory statement also references a “space cadre” and a potential “space acquisition career field.”

Finally, § 955 establishes the position of “Assistant Secretary of Defense for Space Policy,” whose “principal duty ... shall be the overall supervision of [DOD] policy ... for space warfighting.”

Section 1647, Use of National Security Agency Cybersecurity Expertise to Support Evaluation of Commercial Cybersecurity Products—This section requires the National Security Agency (NSA) to “advise and assist [DOD] in its evaluation and adoption of cybersecurity products and services from industry, especially the commercial cybersecurity sector.” The NSA director must “establish a permanent program consisting of market research, testing, and expertise transmission, or augments to existing programs, to improve the evaluation by [DOD] of cybersecurity products and services.” Under the program, the NSA director, “independently and at the request of DOD components,” must “test and evaluate commercially available cybersecurity products and services”; “develop and establish standard procedures, techniques, and threat-informed metrics to perform the testing and evaluation”; and “advise the [DOD] Chief Information Officer and [DOD] components ... on the merits and disadvantages of evaluated cybersecurity products.” The program “may not” “(A) be used to accredit cybersecurity products and services for [DOD] use; (B) create approved products lists; or (C) be used for the procurement and fielding of cybersecurity products” on behalf of DOD.

Section 1648, Framework to Enhance Cybersecurity of the U.S. Defense Industrial Base—This section directs the secretary of defense to “develop a consistent, comprehensive framework to enhance cybersecurity for the United States defense industrial base” by Feb. 1, 2020.

This framework must include (i) “[i]dentification of unified cybersecurity standards, regulations, metrics, ratings, third-party certifications, or requirements to be imposed on the defense industrial base for the purpose of assessing the cybersecurity of individual contractors”; (ii) the roles and responsibilities within DOD and the military departments for “[e]stablishing and ensuring compliance with cybersecurity standards, regulations, and policies,” “[d]econflicting existing cybersecurity standards, regulations, and policies,” “[c]oordinat-

ing with and providing assistance to the defense industrial base for cybersecurity matters,” and “[m]anagement and oversight of the acquisition process, including responsibility determination, solicitation, award, and contractor management, relating to cybersecurity standards, regulations, metrics, ratings, third-party certifications, or requirements”; (iii) “[t]he responsibilities of the prime contractors, and all subcontractors in the supply chain, for implementing the required cybersecurity standards, regulations, metrics, ratings, third-party certifications, and requirements”; (iv) “[d]efinitions for ‘Controlled Unclassified Information’ (CUI) and ‘For Official Use Only’ (FOUO), as well as policies regarding protecting information designated as either”; and (v) “[a] plan to provide implementation guidance, education, manuals, and, as necessary, direct technical support or assistance, to contractors on matters relating to cybersecurity.”

In developing the framework, the secretary must consider 17 enumerated matters and consult with industry groups, contractors in the defense industrial base, the National Institute of Standards and Technology director, the secretary of energy, the Director of National Intelligence, and relevant federal regulatory agencies. The secretary must provide (1) a briefing on the framework to congressional defense committees not later than March 11, 2020, and (2) quarterly briefings thereafter until Feb. 1, 2022 (coordinated with quarterly cyber operations briefings pursuant to 10 USCA § 484(a)) on the status of the framework, the “efforts undertaken by the Secretary to evaluate the [17 enumerated] matters,” and “[t]he current status of any pilot programs the Secretary is carrying out to develop the framework.”

Section 1657, Cyber Governance Structures and Principal Cyber Advisors on Military Cyber Force Matters—By Sept. 15, 2020, “each of the secretaries of the military departments” “shall appoint an independent Principal Cyber Advisor for each service to act as the principal advisor to the relevant secretary on all cyber matters affecting that military service.” Each principal cyber advisor must “be independent of the relevant service’s chief information officer” and “exclusively occupy the Principal Cyber Advisor position and not assume any other position or responsibility in the relevant military department.” Each principal cyber advisor “shall be responsible for advising ... and implementing the [DOD] Cyber Strategy within [the relevant]

service by coordinating and overseeing the execution of the service’s [cybersecurity] policies and programs,” including those relevant to the recruitment, resourcing, training, assessment, and maintenance of military cyberspace operations forces; “[a]cquisition of offensive, defensive, and [DOD] Information Networks cyber capabilities for military cyberspace operations”; “[a]cquisition of cybersecurity tools and capabilities, including those used by cybersecurity service providers”; and “[c]ybersecurity and related supply chain risk management of the industrial base.”

Section 1658, Designation of Test Networks for Testing and Accreditation of Cybersecurity Products and Services—By April 1, 2020, the secretary of defense must “designate, for use by the Defense Information Systems Agency and such other [DOD] components ... as the Secretary considers appropriate, three test networks for the testing and accreditation of cybersecurity products and services.” These designated networks must “(1) be of sufficient scale to realistically test cybersecurity products and services; (2) feature substantially different architectures and configurations; (3) be live, operational networks; and (4) feature cybersecurity processes, tools, and technologies that are appropriate for test purposes and representative of the processes, tools, and technologies that are widely used throughout [DOD].”

Sections 6601–13, Security Clearances—Although there has been significant recent focus on improving the federal security clearance process, see, e.g., *Securely Expediting Clearances Through Reporting Transparency Act of 2018*, P.L. 115-173, 132 Stat. 1291 (summarized in Schaengold, Prussock and Muenzfeld, Thomson Reuters Conference Briefs for 2018, “2018 Statutes Update,” at 5-2–5-4), and the federal security clearance system has been largely centralized in the Defense Counterintelligence and Security Agency, see Executive Order 13869; 61 GC ¶ 138(e); 61 GC ¶ 206(b), §§ 6601–13 recognize that, while progress has been made, major issues remain. For example, § 6602 states that it is the “sense of Congress” that (i) “the current system for background investigations for security clearances, suitability and fitness for employment, and credentialing lacks efficiencies and capabilities to meet the current threat environment, recruit and retain a trusted workforce, and capitalize on modern technologies”; and (ii) “the President and Congress

should prioritize the modernization of the personnel security framework to improve its efficiency, effectiveness, and accountability.”

While there is insufficient space to summarize all of the relevant sections, § 6603 is entitled “Improving the Process for Security Clearances.” Section 6604, “Goals for Promptness of Determinations Regarding Security Clearances,” requires the Security, Suitability, and Credentialing Performance Accountability Council (Council) to “reform the security clearance process with the objective that, by December 31, 2021,” 90 percent of all determinations (with certain exceptions related to reinvestigations) regarding security clearances (i) “at the secret level are issued in 30 days or fewer”; (ii) “at the top secret level are issued in 90 days or fewer”; and (iii) “reciprocity of security clearances [between Federal agencies] at the same level are recognized in 2 weeks or fewer.” The Council is further required to “reform the security clearance process with the goal that by December 31, 2021, reinvestigation on a set periodicity is not required for more than 10 percent of the population that holds a security clearance.” The section provides the Council the authority to develop and use its own metrics that achieve “substantially equivalent outcomes.” No later than June 17, 2020, the Council is required to submit to specified congressional committees and make available to appropriate industry partners “a plan to carry out this section. Such plan shall include recommended interim milestones for the goals ... for 2019, 2020, and 2021.”

* * *

DOD’s Implementation of NDAA’s Acquisition-Related Provisions—Despite diligent effort by various DOD officials (e.g., the Defense Acquisition Regulations System (DARS) staff and the Defense Acquisition Regulations Council), the implementation of the NDAA’s procurement changes in the DFARS and elsewhere (e.g., in acquisition guidance) often is delayed, fails to meet specifically prescribed congressional deadlines (which are frequently unrealistic), and has been difficult to track. In May 2018, this led the House Armed Services Committee to observe in its report accompanying the FY 2019 NDAA that:

despite recent legislative reform to the acquisition system there has been a significant delay between statutory enactment and issuance of regulations in the [DFARS]. For example, a final rule on procurement of commercial items (issued

in January 2018) amended the DFARS based upon requirements from as long ago as the [FY 2013 NDAA]. As a result, the acquisition and contracting communities within and outside the Federal Government are unable to take full advantage of recent reforms and improvements to acquisition and contracting procedures. The committee is concerned that the momentum generated by congressional acquisition reform initiatives has been lost as a result of delayed, and potentially incomplete, revision of regulations The committee seeks recommendations on how to reduce that timeline and ensure that previously enacted statutory provisions are not disregarded in regulation.

H.R. Rep. No. 115-676, at 142. As a result, the committee directed the Government Accountability Office to submit a report on this subject, see *id.*, which GAO did more than four months after the committee's March 1, 2019 deadline. See *Defense Acquisitions: DOD Needs to Improve How It Communicates the Status of Regulation Changes* (GAO-19-489), available at www.gao.gov/products/GAO-19-489.

GAO observed that DOD has several methods for implementing acquisition-related NDAA provisions, including through formal rulemaking for certain DFARS, see 41 USCA § 1707, FAR subpt. 1.5; in an interim DFARS; in a DFARS class deviation; in the DFARS Procedures, Guidance, and Information (PGI)); or in acquisition guidance, such as in a DOD Instruction. See GAO-19-489, at 4–5, 7–9, 12. While the report observes that many NDAA provisions are implemented within one year of the NDAA's passage, see *id.*, at 11–12, a very substantial number of NDAA provisions take well in excess of one year, see *id.* at 12–16, with some taking two to four years or more to be implemented. See *id.* at 14–16. In fact, as of July 2019, some NDAA provisions from the FY 2011, 2012, 2013 and 2015 NDAs remained unimplemented. See *id.* at 12. Frequently, congressional implementation deadlines, which are often unrealistically short, see *id.* at 16 (30 days allowed for DFARS changes for FY 2012 NDAA §§ 841, 842), are not met. See *id.* at 14–15 (FY 2016 NDAA § 851 implementation took nearly 800 days when it was required to be completed within 180 days of the NDAA's passage), 16 (32 NDAA provisions “had statutory deadlines, ranging from 30 to 365 days after enactment. The ... DARS staff prioritized these NDAA provisions by noting the deadlines, but gener-

ally did not implement them by the deadline.”). In this regard, “some of the implementation deadlines in [the NDAs] were shorter than the time periods that DARS generally allows for the rulemaking process, including public comment and outside agency review.” *Id.* at 11.

GAO concluded that:

DOD does not have a mechanism to clearly communicate to Congress, industry, and other interested parties the status of regulatory or other changes based on NDAA provisions. ... [I]t is difficult for an interested party to find the implementation status of any given acquisition-related NDAA provision. This is because no single DOD source communicates the status of regulatory or other changes in a manner that links the changes to specific NDAA provisions. As a result, interested parties are not always aware of what provisions have been implemented and when. This information is important for congressional oversight and to industry for planning and compliance purposes.

Id., at Highlights; see *id.* at 17.

DOD agreed with GAO's July 2019 analysis and stated that it “will develop a matrix to communicate to all stakeholders the implementation status of acquisition-related NDAA provisions, particularly those provisions that direct a change or consideration of a change to the DFARS. The matrix will be posted and updated regularly on the Defense Pricing and Contracting public website located at www.acq.osd.mil/dpap/dars/index.html” (click on “NDAA Implementation”).

DOD's “NDAA Implementation Tracker” or matrix is currently 11 pages long and covers FY 2010 through FY 2019. It shows that there are still “open,” i.e., unimplemented, NDAA provisions from at least the FY 2012, 2016, 2017, 2018 and 2019 NDAs. It also appears to allow for the tracking of NDAA implementation through non-DFARS methods. However, the full name of the Tracker—“Defense Federal Acquisition Regulation Supplement (DFARS): NDAA Implementation Tracker (FY10 - Present)” —could suggest that NDAA provisions that are never under DOD consideration for DFARS implementation would not be tracked by that document. However, the Tracker has entries, such as “No DFARS or PGI revisions needed due [to] planned inclusion in the next revision of DoDI 5000.74, Defense Acquisition of Services,” which

show that non-DFARS implementation is being tracked. See Tracker, at 2 (“Notes on Implementation” for FY 2018 NDAA § 851).



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