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FEATURE COMMENT: The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part I

On January 1, three months after the Oct. 1, 2020 start of fiscal year 2021, the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for FY 2021, P.L. 116-283, was enacted into law after Congress overrode a presidential veto. While this is the 60th fiscal year in a row that a NDAA has been enacted, it was delayed by certain partisan congressional disputes over its proposed contents and by the president's Dec. 23, 2020 veto, which was overridden in the House (on Dec. 28, 2020) and in the Senate (on Jan. 1, 2021).

Unfortunately, it has become common practice for the NDAA to be enacted well after the start of its fiscal year. For example, over the last five years, three NDAAs became law in December (the FY 2020, FY 2018 and FY 2017 NDAAs) and the FY 2016 NDAA became law in late November (after initially being vetoed by President Obama largely for budgetary and funding reasons and then being amended, 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 FY 2019 NDAA is the only NDAA since 1997 to become law before the start of its fiscal year, a testament in part to Sen. John McCain (R-Ariz.), for whom the law was named. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part I," 60 GC ¶ 334. Like the FY 2021 NDAA, the FY 2013 NDAA also did not become law until three months after the start of its fiscal year, i.e., in early January. See Schaengold and Deschauer, Feature Comment, "The Impact Of The National Defense Authorization Act For Fiscal Year 2013 On Federal Procurement," 55 GC ¶ 57.

According to the president, his veto was based on, among other issues, the NDAA's failure to repeal Section 230 of the Communications Decency Act (which, in general, shields technology and social media companies from liability for content posted to their platforms), its requirement for the renaming of certain military installations honoring Confederate leaders, its alleged unconstitutional interference with the president's authority to withdraw troops from overseas, its "slow down [of] the rollout of nationwide 5G," and its restrictions on the president's "ability to preserve our Nation's security by arbitrarily limiting the amount of military construction funds that can be used to respond to a national emergency," i.e., the southern border wall. See Dec. 23, 2020 Presidential Veto Message, available at *www.whitehouse.gov/briefings-statements/presidential-veto-message-house-representatives-h-r-6395/#:~:text=I%20oppose%20endless%20wars%2C%20as%20does%20the%20American%20public.&text=I%20will%20not%20approve%20this,of%20Representatives%20without%20my%20approval*. Although the border wall provision will likely impact the amount of military construction funds spent on the U.S. southern border wall, none of these provisions is otherwise likely to have a significant impact on procurement law or policy.

The FY 2021 NDAA broadly focuses on China, cybersecurity and the defense industrial base. These themes can be seen in some of the procurement-related provisions. The FY 2021 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 63 provisions addressing procurement matters. This is modestly less than the past four NDAAs: FYs 2020, 2019, 2018 and 2017 NDAAs, respectively, contained 78, 71, 73 and 88 Title VIII provisions. Although the importance of a NDAA

and its impact on federal procurement should not be measured simply on the total number of procurement provisions, the FY 2021 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 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 Part II of this Feature Comment, certain provisions in other titles of the FY 2021 NDAA are very important to procurement law and some of them could have been included in Title VIII (and have been in past NDAAs). Significantly, some of the FY 2021 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 new provisions are promulgated or amended, which sometimes can take two to four years or more. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II," 62 GC ¶ 14.

Certain parts of the FY 2021 NDAA, including § 806 and Title XVIII, 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 *section809panel.org/about/*. 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 had only a modest impact on the FY 2021 NDAA (and on the FY 2020 NDAA). In any event, although the FY 2021 NDAA has 63 procurement-related provisions in Title VIII (plus others elsewhere), its actual impact (with certain specific exceptions) on procurement law is generally relatively modest. Finally, certain FY 2021 NDAA provisions relating to cybersecurity, e.g., §§ 1744, 1745, 1870, were recommended in whole or in part by the Cyberspace Solarium Commission, which was established by § 1652 of the FY 2019 NDAA.

The debate concerning the FY 2022 NDAA is likely to be dominated by the same general themes applicable to the FY 2021 NDAA, i.e., China, cybersecurity, and the defense industrial base (with a focus on strategic reshoring and, as emphasized in several FY 2021 NDAA provisions discussed in this Feature Comment, the role of working with allied nations).

Because of the substantial volume of procurement law changes in the FY 2021 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I addresses §§ 801–839 below. Part II, which will be published on Jan. 27, 2021, addresses §§ 846–891, plus sections in Titles IX, XVI, XVII and XVIII.

Section 801, Report on Acquisition Risk Assessment and Mitigation as Part of Adaptive Acquisition Framework Implementation—This section requires each service acquisition executive to submit to the secretary of defense, the under secretary of defense for acquisition and sustainment, the under secretary of defense for research and engineering, and the Department of Defense chief information officer (CIO) a report on how the service acquisition executive is assessing, mitigating, and reporting (within DOD and to Congress) on the following acquisition program risks: (1) "Technical risks in engineering, software, manufacturing and testing"; (2) "Integration and interoperability risks, including complications related to systems working across multiple domains while using machine learning and artificial intelligence capabilities to continuously change and optimize system performance"; (3) "Operations and sustainment risks, including as mitigated by appropriate sustainment planning earlier in the lifecycle of a program, access to technical data, and intellectual property rights"; (4) "Workforce and training risks, including consideration of the role of contractors as part of the total workforce"; and (5) "Supply chain risks, including cybersecurity, foreign control and ownership of key elements of supply chains, and the consequences that a fragile and weakening defense industrial base, combined with barriers to industrial cooperation with allies and partners, pose for delivering systems and technologies in a trusted and assured manner." By March 31 the under secretary for acquisition and sustainment must submit to the congressional defense committees a report on the input received from the service acquisition executives and the under secretary's views on the five acquisition program risks identified in this section (described above).

The FY 2021 NDAA's joint explanatory statement indicates that, while the "conferees continue to appreciate the careful consideration paid by [DOD] to its Adaptive Acquisition Framework, which implements the acquisition reforms legislated over the last 5 years," they "believe that [DOD] can no longer afford to use cost, schedule, and performance thresholds as simple prox-

ies for" acquisition program risks. The joint explanatory statement notes that "[e]xclusive attention to cost, schedule, and performance of major defense acquisition programs and other development programs obscures myriad other risks in programs, large and small, any one of which could be single points of failure for successful acquisitions." The language concerning cost, schedule and performance is identical to that used in the joint explanatory statement for FY 2020 NDAA § 836, Report on Realignment of the DOD Acquisition System to Implement Acquisition Reforms. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part I," 62 GC ¶ 6.

Section 804, Implementation of Modular Open Systems Approaches—This section requires that, within one year of the FY 2021 NDAA's enactment, DOD prescribe regulations and issue guidance facilitating access to and use of modular system interfaces for program offices "responsible for the prototyping, acquisition, or sustainment of a new or existing weapon system." "Not earlier than 1 year before, and not later than 2 years after the regulations and guidance … are issued for weapon systems," the regulations may be extended to software-based, non-weapon systems. This section also amends 10 USCA § 2446a, which addresses requirements for modular open systems approaches in acquisition programs, to require non-major defense acquisition programs to also use modular open systems approaches to the extent practicable and amends 10 USCA § 2320(a)(2)(G), which covers rights in technical data, to grant Government purpose rights to a modular system interface developed wholly or in part with federal funds. Previously, 10 USCA § 2320(a)(2)(G) permitted DOD to assert Government purpose rights in "major system interfaces." Finally, the section requires DOD to establish a central repository of interfaces and related items that can then be distributed, consistent with 10 USCA § 2320.

According to the joint explanatory statement, the intent of this section is to "expand the use of modularity in the design of weapon systems, as well as business systems and cybersecurity systems, to more easily enable competition for upgrades as well as sustainment throughout a product's lifecycle, while protecting the proprietary intellectual property embodied within the modules of modular systems."

Section 806, Definition of Material Weakness for Contractor Business Systems—This section amends § 893 of the FY 2011 NDAA by replacing the term "significant deficiency" with respect to a contractor business system (defined as "a shortcoming in the system that materially affects the ability of officials of [DOD] and the contractor to rely upon information produced by the system that is needed for management purposes") with the term "material weakness." FY 2021 NDAA § 806 provides that " 'material weakness' means a deficiency or combination of deficiencies in the internal control over information in contractor business systems, such that there is a reasonable possibility that a material misstatement of such information will not be prevented, or detected and corrected, on a timely basis." A "reasonable possibility exists when the likelihood of an event occurring" is either "probable" or "more than remote but less than likely."

The joint explanatory statement indicates that the purpose of this change is to eliminate confusion about the seriousness of deficiencies in DOD contractor business systems and provide for "a more nuanced approach to classifying" such deficiencies by aligning the standards used to evaluate contractor business systems with generally accepted auditing standards. The joint explanatory statement observes that the "Section 809 Panel[] … recommended this terminology change after finding [DOD's] definition of 'significant deficiency' was inconsistent with the two-tiered characterization of internal control deficiencies used in generally accepted auditing standards." The joint explanatory statement directs DOD "to ensure definitions for associated terms are also updated or incorporated [in the DFARS] as appropriate and in line with generally accepted auditing standards, including: 'significant deficiency,' 'material misstatement,' and 'acceptable contractor business system.' " The current (and presumably to be amended) DFARS may be found at DFARS subpt. 242.70, Contractor Business Systems, and DFARS 252.242-7005, Contractor Business Systems.

Section 807, Space System Acquisition and the Adaptive Acquisition Framework—Section 807 directs DOD to ensure that its "adaptive acquisition framework (as described in [DOD] Instruction 5000.02, 'Operation of the Adaptive Acquisition Framework') includes one or more pathways specifically tailored for Space Systems Acquisition in order to achieve faster acquisition, improve synchronization and more rapid fielding of critical end-to-end capabilities (including by using new commercial capabilities and services), while maintaining accountability for effective programs that are delivered on time and on

budget." This section further provides that there must be an Air Force service acquisition executive for Space Systems "[b]efore implementing the application of the adaptive acquisition framework to a Space Systems Acquisition pathway." The service acquisition executive may delegate milestone decision authority to an appropriate program executive officer for major defense acquisition programs of the Space Force, who "may further delegate authority over major systems to an appropriate program manager."

By May 15, the secretary of defense is required to "submit to the congressional defense committees a report on the application of the adaptive acquisition framework to any Space Systems Acquisition pathway" that includes (A) "Proposed United States Space Force budget line items for fiscal year 2022"; (B) "Proposed revised, flexible, and streamlined options for joint requirements validation in order to be more responsive and innovative, while ensuring the ability of the Joint Chiefs of Staff to ensure top-level system requirements are properly prioritized to address joint-warfighting needs"; (C) A list of Space Force acquisition programs for which multiyear contracting authority is recommended; (D) "A list of space systems acquisition programs for which alternative acquisition pathways may be used"; (E) "Policies or procedures for potential new pathways in the application of the adaptive acquisition framework to a Space Systems Acquisition with specific acquisition key decision points and reporting requirements for development, fielding, and sustainment activities that meet the requirements of the adaptive acquisition framework"; (F) "An analysis of the need for updated determination authority for procurement of useable end items that are not weapon systems"; (G) "Policies and a governance structure, for both the Office of the Secretary of Defense and each military department, for a separate United States Space Force budget topline, corporate process, and portfolio management process"; and (H) "An analysis of the risks and benefits of the delegation of the authority of the head of contracting activity authority to the Chief of Space Operations in a manner that would not expand the operations of the" Space Force. Within 60 days after the secretary submits this report, the Government Accountability Office must review it and submit an analysis and recommendations based on the report to the congressional defense committees.

Section 814, Cost or Pricing Data Reporting Requirements for DOD Contracts—This section modifies the Truthful Cost or Pricing Data statute (commonly known as the Truth in Negotiations Act or TINA), which generally applies to contracts without adequate price competition (e.g., sole source) that are not commercial products and/or services (i.e., as still referred to in the FAR, "commercial items"). Under this section and subject to these exceptions: (1) a DOD prime contractor is required to submit cost or pricing data before the pricing of a change or modification to the "contract if the price adjustment is expected to exceed $2,000,000"; (2) an offeror for a subcontract (at any tier) under a DOD prime contract shall be required to submit cost or pricing data before the subcontract award if the prime contractor (and, if applicable, each higher-tier subcontractor) have been required to make available cost or pricing data under this "section and the price of the subcontract is expected to exceed $2,000,000"; and (3) the subcontractor for a subcontract covered by (2), above, shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract "if the price adjustment is expected to exceed $2,000,000."

The joint explanatory statement notes that this provision "establish[es] a standard $2.0 million threshold for application of the requirements of [TINA] with respect to subcontracts and price adjustments." Prior to this section's passage, for prime contracts entered into on or before June 30, 2018, price adjustments, modifications and subcontracts had been subject to a $750,000 TINA threshold. See also May 31, 2018 DOD Class Deviation-Threshold for Obtaining Certified Cost or Pricing Data (providing opportunity in certain circumstances for contractors to opt for a $2 million TINA threshold for contracts entered into on or before June 30, 2018), available at *www.acq.osd.mil/dpap/policy/policyvault/USA001197-18-DPAP.pdf*. The joint explanatory statement further observes that:

> [DOD] and the military services have represented … that the authority in this provision will promote efficiency, improve acquisition timelines, and reduce administrative costs associated with executing certain contracts with lengthy periods of performance. The … purpose of this provision is to streamline the administration of cost accounting, and to reduce inefficiencies associated with the need to maintain dual accounting systems, not to reduce governmental oversight over contracts beneath the applicable threshold. As [DOD] uses the flexibility associated with this authority, the conferees emphasize the importance of rigorous oversight by acquisition

> executives to mitigate risks of paying higher prices that are neither fair nor reasonable.

Not later than July 1, 2022, the secretary of defense, in consultation with the secretaries of the military departments, "shall provide to the congressional defense committees a report analyzing the impact, including any benefits to the Federal Government, of the amendments made by this section."

Section 815, Prompt Payment of DOD Contractors—As the joint explanatory statement explains, this section amends 10 USCA § 2307(a)(2) to "strengthen the requirement that [DOD] establish a goal to pay small business contractors" and small business first-tier subcontractors "within 15 days of receipt of" a proper invoice. On this issue, the joint explanatory statement appeared to be both critical and complimentary of DOD when it observed that:

> the Defense Logistics Agency decision in November 2019 to move from 15-day payment terms to 30-day terms may have a detrimental effect on small businesses' ability to continue to do business for the U.S. Government, especially during economic downturns. The conferees further note that modern invoicing and payment systems should be able to support expedited review and payment of invoices, and therefore support [DOD's] efforts to leverage existing commercial systems to facilitate the prompt payments. The conferees are aware that during the COVID-19 pandemic, [DOD] has supported its contractors by taking steps to improve the timeliness of payments.

Section 816, Documentation Pertaining to Commercial Item Determinations—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. Section 836 of the FY 2019 NDAA removed the ambiguity by replacing "commercial item" with two new phrases, "commercial product" and "commercial service," see Schaengold, Prusock and Muenzfeld, Feature Comment, "The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part I," 60 GC ¶ 334, and revised numerous other parts of statutes that referred to "commercial items." Id. In the title of § 816 (see above), Congress forgot about this change but, fortunately, in the text of this new provision Congress got it right. If a procurement is for a commercial product or service, it is subject to substantially fewer regulations.

"In making a determination whether a particular product or service offered by a contractor meets the definition of a commercial product or commercial service," this section amends 10 USCA § 2380 to provide that a DOD contracting officer "may": (A) "request support from" the Defense Contract Management Agency, the Defense Contract Audit Agency, "or other appropriate [DOD] experts" "to make a determination whether a product or service is a commercial product or commercial service;" and (B) "consider the views of appropriate public and private sector entities." Within 30 days of a contract award, the DOD CO "shall … submit a written memorandum summarizing the [commercial product or service] determination," "including a detailed justification for such determination."

The joint explanatory statement observes that 10 USCA § 2380 "requires" DOD "to maintain a centralized capability, necessary expertise, and resources to provide assistance in making commercial product and commercial service determinations, and to provide access to previous commercial product and commercial service determinations." On this subject, the joint explanatory statement was "encouraged by the Secretary of Defense's support for the Commercial Items Group within [DCMA]," but noted that DOD "has failed to fully comply with statutory requirements and internally manage commercial product and commercial service determinations to ensure consistency across [DOD]." As a result, the secretary of defense is directed "to provide a briefing to the congressional defense committees by March 1, 2021, describing [DOD's] process for making the written memoranda determination summaries available for use by contracting officers, and [DOD's] plan for compliance with commercial product and commercial service statutes." See DFARS PGI 212.102.

Section 817, Modification to Small Purchase Threshold Exception to the Berry Amendment—The Berry Amendment, 10 USCA § 2533a, provides that DOD funds (appropriated or otherwise) "may not be used for the procurement of" certain items "if the item is not grown, reprocessed, reused, or produced in the United States." Those items generally include food; clothing and the materials and components thereof; tents (and the structural components thereof), tarpaulins, or covers; cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials; hand or measuring tools; stainless steel flatware; and dinnerware. See DFARS 225.7002.

This section modifies 10 USCA § 2533a(h) to make its prohibition inapplicable "to purchases for amounts not greater than $150,000," which decreases the previous exception which was for amounts "not greater than the simplified acquisition threshold," which currently is $250,000 (but is also subject to certain exceptions that may increase that amount). The statute warns that a "proposed procurement of an item in an amount greater than $150,000 may not be divided into several purchases or contracts for lesser amounts in order to qualify for this exception." Finally, every five years (starting in 2025), DOD "may adjust the dollar threshold" "based on changes in the Consumer Price Index." As a result of § 817, more DOD procurements should be restricted to domestic sources for the covered items identified above.

Section 818, Repeal of Program for Qualified Apprentices for Military Construction Projects—Section 865 of the FY 2020 NDAA required each offeror for a DOD military construction contract 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." See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II," 62 GC ¶ 14. This section repeals § 865, and its implementing statute, 10 USCA § 2870.

Section 819, Modifications to Mitigating Risks Related to Foreign Ownership, Control, or Influence of DOD Contractors and Subcontractors—This section builds upon FY 2020 NDAA § 847, which directed 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." We comprehensively analyzed § 847 in our review last year of the FY 2020 NDAA. See Schaengold, Prusock and Muenzfeld, Thomson Reuters Conference Briefs for 2019, "2019 Statutes Update," at 5-16–5-18; Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II," 62 GC ¶ 14.

With respect to § 819, the joint explanatory statement "direct[s]" DOD "to establish contract administration procedures for appropriately responding to changes in contractor or subcontractor beneficial ownership status." More specifically, the "process and procedures for the assessment and mitigation of risk relating to" FOCI is amended by this section to add a "requirement for" DOD "to require reports and conduct examinations on a periodic basis of covered contractors or subcontractors in order to assess compliance with the requirements of" FY 2020 NDAA § 847. Covered contractors or subcontractors include "a company that is an existing or prospective [DOD] contractor or subcontractor … on a contract or subcontract" "in excess of $5,000,000."

This section also adds a requirement for "[p]rocedures for appropriately responding to changes in covered contractor or subcontractor beneficial ownership status based on changes in disclosures of their beneficial ownership and whether they are under FOCI," which is tied to the new requirement (discussed in the paragraph immediately above) for "reports and examinations."

Not later than March 1, DOD "shall provide to the congressional defense committees a plan and schedule for implementation of" FY 2020 NDAA § 847, as amended by this section, including: (A) "a timeline for issuance of regulations, development of training for appropriate officials, and development of systems for reporting of beneficial ownership and FOCI by covered contractors or subcontractors"; and (B) "the designation of officials and organizations responsible for such implementation." Finally, not later than July 1, DOD "shall revise relevant directives, guidance, training, and policies, including revising the [DFARS], to fully implement the requirements of such section 847." Currently, the FAR and DFARS do not specifically reference "FOCI" or "foreign ownership, control, or influence."

Section 831, Contract Authority for Development and Demonstration of Initial or Additional Prototype Units—This section enhances DOD's authority under 10 USCA § 2302e to streamline the process for moving certain technologies into production by permitting certain activities to be performed under the same contract as the technology matures. Prior to the FY 2021 NDAA's enactment, 10 USCA § 2302e provided that a science and technology contract could include a line item or contract option for "the provision of advanced component development, prototype, or initial production of technology developed under the contract." Section 831 expands this provision by replacing "provision of advanced component development, prototype" with "development and demonstration." It also adds a

new subsection to 10 USCA § 2302e, which directs the secretary of defense to "establish procedures to collect and analyze information on the use and benefits of the authority under this section and related impacts on performance, affordability, and capability delivery." The joint explanatory statement states that the conferees believe this provision will "help to implement the National Defense Strategy as a reform effort to enable greater performance and affordability, capability delivery at the speed of relevance, and rapid, iterative approaches from development to fielding," and "direct[s] the Secretary of Defense to report by March 31, 2021, on the use of the authority under [10 USCA § 2302e]."

Section 832, Extension of Pilot Program for Streamlined Awards for Innovative Technology Programs—Section 832 provides for a three-year extension of a pilot program established by FY 2016 NDAA § 873, which provided an exemption from TINA's requirements to provide cost or pricing data for DOD contracts, subcontracts and modifications valued at less than $7.5 million and "awarded to a small business or nontraditional defense contractor pursuant to" "(1) a technical, merit-based selection procedure, such as a broad agency announcement, or (2) the Small Business Innovation Research Program." 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. This exemption does not apply if the agency head "determines that submission of cost and pricing data should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award." FY 2016 NDAA § 873 also exempts such contracts, but not subcontracts or modifications, from certain DCAA record examination and audit requirements (under 10 USCA § 2313(b)) "unless the head of the agency determines that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award."

The joint explanatory statement indicates that the extension of this pilot program "has the potential to accelerate the awards of Small Business Innovation Research contracts and other contracts to innovative non-traditional defense contractors." Additionally, the joint explanatory statement "direct[s] the Secretary of Defense to provide a briefing no later than March 1, 2021 on the use and benefits of this authority and a recommendation on the extension or permanent authorization of the pilot program." It further states that:

> [t]he conferees expect the briefing to include a description of the mechanisms by which [DOD] is collecting data and analyzing the benefits of the authority and the best practices for its use. The conferees note that unless [DOD] collects data and demonstrates the value of authorities that enable streamlined acquisition practices, the conferees are unlikely to extend such authorities in the future.

Section 833, Listing of Other Transaction Authority Consortia—Within 90 days of the FY 2021 NDAA's enactment, the secretary of defense must publish and maintain on *beta.SAM.gov* (or successor system) "a list of the consortia used by the Secretary to announce" other transactions opportunities or otherwise make such opportunities available.

The joint explanatory statement notes that there is limited information available on DOD's use of consortia for other transaction awards. Accordingly, in addition to making a list of consortia used by DOD for other transactions opportunities, the joint explanatory statement directs GAO to submit a report to the congressional defense committees by December 1 on the "nature and extent" of DOD's use of consortia for other transactions. The report must "assess the number and dollar value of other transaction awards through consortia, the benefits and challenges of using consortia, how [DOD's] use of consortia compares to other Federal agencies with other transaction authority, and any other matters the Comptroller General determines to be appropriate."

Section 835, Balancing Security and Innovation in Software Development and Acquisition—This section requires the under secretary of defense for acquisition and sustainment, in coordination with the DOD CIO, to "develop requirements for appropriate software security criteria to be included in solicitations for commercial and developmental solutions" "including a delineation of what processes were or will be used for a secure software development life cycle." These requirements include:

> (1) establishment and enforcement of secure coding practices; (2) management of supply chain risks and third-party software sources and component risks; (3) security of the software development environment; (4) secure deployment, configuration, and installation processes; and (5) an associated vulnerability management plan

> and identification of tools that will be applied to achieve an appropriate level of security.

The under secretary, in coordination with the DOD CIO, must develop procedures for the security review of code and "other procedures necessary to fully implement the pilot program required under" FY 2018 NDAA § 875. The requirements and procedures developed under this section must be in coordination with DOD efforts "to develop new cybersecurity and program protection policies and guidance that are focused on cybersecurity in the context of acquisition and program management and on safeguarding information."

According to the joint explanatory statement, this provision is intended to ensure the security of software and address "the risks posed by reliance—whether known or inadvertent—on code produced by or within adversary nations." The joint explanatory statement expresses concern about DOD's "non-compliance" with FY 2018 NDAA § 875, which required DOD to initiate the DOD "open software pilot program established by the Office of Management and Budget Memorandum M-16-21 titled 'Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software' and dated August 8, 2016." 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 § 875). The joint explanatory statement notes that DOD has cited security concerns as a reason for not complying with FY 2018 NDAA § 875. However, the joint explanatory statement observes that DOD has "no comprehensive Department-wide process for conducting security reviews of code or parts of code and that the National Security Agency, which should have similar security concerns to [DOD] as a whole, has such a process for the purpose of maximizing appropriate public release" of code. The joint explanatory statement (a) "encourage[s DOD] to pursue the appropriate balance of innovation and security in developing, acquiring, and maintaining software"; and (b) directs the under secretary and DOD CIO "to develop a roadmap with milestones that will enable [DOD] to require and effectively manage the submission by contractors of a software bill of materials."

The joint explanatory statement further directs the under secretary "to update [DOD's] policy defining a Software Pathway to more clearly demonstrate compliance with" FY 2020 NDAA § 800, which required 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." See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part I," 62 GC ¶ 6. In particular, the joint explanatory statement directs DOD to more clearly demonstrate compliance with FY 2020 NDAA § 800's requirements to "[e]nsure applicability to defense business systems" and to "[p]rovide for delivery of capability to end-users not later than 1 year after funds are obligated noting that other Government-wide policy and best practices call for updates no less frequently than once every 6 months."

Section 836, Digital Modernization of Analytical and Decision-Support Processes for Managing and Overseeing DOD Acquisition Programs—This section directs the secretary of defense to develop and implement direct digital modernization of analytical and decision-support processes for managing and overseeing DOD acquisition programs. The joint explanatory statement notes that several GAO "reports have cited the need for improved data management processes surrounding [DOD's] overall management framework." It further explains that:

> that while most relevant data is Government-owned and authorized for [DOD]-wide use, there is no enterprise mechanism facilitating the discovery, access, correlation or integration, and use of acquisition-related data across organizational boundaries; instead, each functional organization has established and locally optimized its own data and analytic processes for its own needs, and in many cases even these local practices are highly manual and inefficient.

The joint explanatory statement indicates that DOD has not implemented certain GAO recommendations "pertaining to the roles, responsibilities, and activities to execute portfolio management of acquisition programs" because it partially disagreed with the recommendations. It further states that §§ 830 and 836 directed DOD "to update its decision-support processes to facilitate holistic, comprehensive management and oversight of acquisition programs under the new adaptive acquisition framework." While the joint explanatory statement indicates that the conferees are "encouraged by [DOD's] expansion of its Advanced Analytics (ADVANA) system to provide analytics and

decision support for certain of [DOD's] processes, the conferees are concerned that, notwithstanding ADVANA, [DOD] is squandering opportunities to reshape management and oversight, and expect [DOD] to take seriously the direction under this section."

Section 837, Safeguarding Defense-Sensitive United States Intellectual Property, Technology, and Other Data and Information—Section 837 requires the secretary of defense, "in coordination with relevant departments and agencies," to "identify policies and procedures protecting defense-sensitive United States intellectual property, technology, and other data and information, including hardware and software, from acquisition by the government of China;" and to develop additional policies and procedures if the secretary determines that existing policies and procedures are insufficient. In developing the policies, the secretary must (1) "Establish and maintain a list of critical national security technology that may require certain restrictions on current or former" DOD "employees, contractors, or subcontractors (at any tier)" "that contribute to such technology"; (2) "Review the existing authorities under which" DOD employees "may be subject to post-employment restrictions with foreign governments and with organizations subject to foreign ownership, control, or influence"; and (3) "Identify additional measures that may be necessary to enhance" the existing authorities. This section further requires the secretary to "consider mechanisms to restrict current or former employees of [DOD] contractors or subcontractors (at any tier) … that contribute significantly and materially to" a critical national security technology "from working directly for companies wholly owned by the government of China, or for companies that have been determined by a cognizant Federal agency to be under the ownership, control, or influence of the government of China."

Section 838, Comptroller General Report on Implementation of Software Acquisition Reforms—By March 15, GAO must brief the congressional defense committees on the secretary of defense's implementation of "required acquisition reforms with respect to acquiring software for weapon systems, business systems, and other activities that are part of the defense acquisition system." GAO will also be required to submit to the congressional defense committees "one or more reports based on such briefing," to be jointly determined by the committees and GAO. The briefing and any subsequent reports must include an assessment of the extent to which the secretary has implemented the recommendations set forth in (a) the final report of the Defense Innovation Board submitted to the congressional defense committees under FY 2018 NDAA § 872, see Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part II," 60 GC ¶ 9; (b) "the final report of the Defense Science Board Task Force on the Design and Acquisition of Software for Defense Systems described in" FY 2019 NDAA § 868; and (c) "other relevant studies on" DOD "software research, development, and acquisition activities."

The report must also include an assessment of the extent to which DOD has "carried out software acquisition activities, including programs required under" 10 USCA § 2322a ("Requirement for consideration of certain matters during acquisition of noncommercial computer software") and FY 2018 NDAA § 875 ("Pilot Program for Open Source Software"). See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part II," 60 GC ¶ 9. Additionally, the report must assess whether DOD has used the authority provided under FY 2020 NDAA § 800 ("Authority for Continuous Integration and Delivery of Software Applications and Upgrades to Embedded Systems"). See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part I," 62 GC ¶ 6. The report must further assess whether DOD has carried out software acquisition pilot programs, including pilot programs required under FY 2018 NDAA §§ 873 ("Pilot Program to Use Agile or Iterative Development Methods to Tailor Major Software-Intensive Warfighting Systems and Defense Business Systems") and 874 ("Software Development Pilot Program Using Agile Best Practices"). See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part II," 60 GC ¶ 9. Each report submitted by GAO must include an evaluation of the extent to which DOD software acquisition policy, guidance, and practices reflect implementation of relevant recommendations from software studies and pilot programs and directives from congressional defense committees.

Section 839, Comptroller General Report on Intellectual Property Acquisition and Licensing—By October 1, GAO must submit to the congressional defense committees a report evaluating the implementation of DOD Instruction 5010.44

relating to intellectual property acquisition and licensing (or successor instruction). The report must assess (1) the extent to which DOD "is fulfilling the core principles established in such Instruction"; (2) the extent to which the Defense Acquisition University and the elements of DOD identified in 10 USCA § 111(b)(1)–(10) are carrying out the requirements of such Instruction; (3) the secretary of defense's progress "in establishing a cadre of intellectual property experts" (as required under 10 USCA § 2322(b)), "including the extent to which members of such cadre are executing their roles and responsibilities"; (4) the secretary's performance in assessing and demonstrating the implementation of such Instruction, including the effectiveness of the cadre of intellectual property experts; (5) the effectiveness of the cadre of intellectual property experts in providing resources on the acquisition and licensing of intellectual property; (6) the "effect implementation of such Instruction has had on particular acquisitions"; (7) the extent to which feedback from appropriate stakeholders was incorporated, including large and small businesses, traditional and nontraditional defense contractors, and maintenance and repair organizations; and (8) any other matters GAO determines to be appropriate. There appears to be congressional concern that DOD has not fully implemented the statutory requirements related to the cadre of DOD intellectual property experts. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part I," 60 GC ¶ 9 (discussing § 802's requirement for a "cadre" of IP experts).

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FEATURE COMMENT: The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part II

On January 1, the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, P.L. 116-283, was enacted into law after Congress overrode a presidential veto. Because of the substantial number of procurement law changes in the FY 2021 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I, which appeared in the January 20 issue of THE GOVERNMENT CONTRACTOR, addressed §§ 801–839. See 63 GC ¶ 20. Part II addresses §§ 846–91, plus sections that appear in cetain other titles.

Section 846, Improving Implementation of Policy Pertaining to the National Technology and Industrial Base—This section requires that in developing a national security strategy for the national technology and industrial base pursuant to 10 USCA § 2501, in carrying out the program for analysis of the national technology and industrial base required by 10 USCA § 2503, and in preparing selected assessments of the capability of the national technology and industrial base pursuant to 10 USCA § 2505, the secretary of defense, in consultation with the under secretaries for acquisition and sustainment, and research and engineering, must "assess the research and development, manufacturing, and production capabilities of the national technology and industrial base … and other allies and partner countries." 10 USCA § 2500(1) defines "national technology and industrial base" as "the persons and organizations that are engaged in research, development, production, integration, services, or information technology activities conducted within the United States, the [UK], Australia, and Canada." Additionally, this section requires that the "map of the industrial base described in" 10 USCA § 2504 must "highlight specific technologies, companies, laboratories, and factories of, or located in, the national technology and industrial base of potential value to current and future Department of Defense plans and programs."

Section 846 also amends 10 USCA § 2440 by requiring the secretary to "develop and promulgate acquisition policy and guidance to the service acquisition executives, the heads of the appropriate Defense Agencies and [DOD] Field Activities, and relevant program managers" that is "germane to the use of the [R&D], manufacturing, and production capabilities" under 10 USCA chapter 148 ("National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion") "and the technologies, companies, laboratories, and factories in specific [DOD R&D], international cooperative research, procurement, and sustainment activities."

Notably, this section also requires the secretary, in consultation with relevant agency heads, to establish a process for considering whether to include additional member countries in the national technology and industrial base. The process must consider the national security, foreign policy, and economic costs and benefits of including additional member countries.

The joint explanatory statement expresses concern that the National Technology and Industrial Base Council (including the secretaries of defense, energy, commerce, and labor and other officials appointed by the president, see 10 USCA § 2502(b)) "is not convening regularly, particularly at the level of principals." The joint explanatory statement "strongly encourage[s] persistent periodic meetings" and directs the secretary of defense "to report on the frequency and level at which the Council convenes, as part of" otherwise required quarterly briefings.

Section 848, Supply of Strategic and Critical Materials for DOD—Under § 848, the secretary of defense must, "to the maximum extent practicable, acquire strategic and critical materials required to meet … defense, industrial, and essential civilian needs" from sources in the following order of preference: (a) "sources located within the United States"; (b) "sources located within the national technology and industrial base," as defined by 10 USCA § 2500(1), i.e., the U.S., the UK, Australia and Canada, see supra regarding § 846; and (c) "other sources as appropriate." While § 848 does not define "strategic and critical materials," § 851 states that "strategic and critical materials" are materials, including rare earth elements, that are necessary to meet national defense and national security requirements, including requirements relating to supply chain resiliency, and for the economic security of the United States." See also § 849, which requires an assessment of "[s]trategic and critical materials, including rare earth materials."

Section 848 requires the secretary to pursue three goals. The first is "ensuring access to secure sources of supply for strategic and critical materials that will—(i) fully meet the demands of the domestic defense industrial base; (ii) eliminate the dependence … on potentially vulnerable sources of supply for strategic and critical materials; and (iii) ensure [DOD] is not reliant upon potentially vulnerable sources of supply for the processing or manufacturing of any strategic and critical materials" that the secretary deems "essential to national security." The second goal is to "[p]rovide incentives for the defense industrial base to develop robust processing and manufacturing capabilities in the United States to refine strategic and critical materials" for DOD. The third goal is to "[m]aintain secure sources of supply for strategic and critical materials required to maintain current military requirements in the event that international supply chains are disrupted." The secretary may use various methods to achieve these goals, including "development of guidance in consultation with appropriate officials of the Department of State, the Joint Staff, and the Secretaries of the military departments," "continued and expanded use of existing programs, such as the National Defense Stockpile," authority under the Defense Production Act, or other methods that the secretary deems appropriate.

Section 849, Analyses of Certain Activities for Action to Address Sourcing and Industrial Capacity—This section requires the secretary of defense, acting through the under secretary for acquisition and sustainment and other appropriate officials, to perform analyses of certain items to determine and develop appropriate actions with respect to sourcing or investment to increase domestic industrial capacity and explore ways to encourage critical technology industries to move production to the U.S. for national security purposes, consistent with the policies, programs, and activities required under chapter 148 of title 10 ("National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion"), the Buy American Act, and the Defense Production Act. Analyses must be performed with respect to: (1) "Goods and services covered under existing restrictions, where a waiver, exception, or domestic non-availability determination has been applied"; (2) Microelectronics; (3) Pharmaceuticals, including active ingredients; (4) "Medical devices"; (5) "Therapeutics"; (6) "Vaccines"; (7) "Diagnostic medical equipment and consumables, including reagents and swabs"; (8) "Ventilators and related products"; (9) "Personal protective equipment"; (10) "Strategic and critical materials, including rare earth materials"; (11) "Natural or synthetic graphite"; (12) "Coal-based rayon carbon fibers"; and (13) "Aluminum and aluminum alloys." The analyses must "consider national security, economic, and treaty implications, as well as impacts on current and potential suppliers of goods and services." According to the joint explanatory statement, the impetus for this provision is continuing concern "about overreliance on non-domestic sources of supply for certain technologies and products that are critical to the national defense," and the "significant supply chain vulnerability" that "has further been demonstrated by the recent COVID-19 pandemic."

Actions that DOD may take based on its analyses include: (a) restricting procurement to U.S. suppliers, national technology and industrial base suppliers, suppliers in other allied nations, or other suppliers (subject to "appropriate waivers for cost, emergency requirements, and non-availability of suppliers"); (b) "increasing investment through use of [R&D] or procurement activities and acquisition authorities to" "expand production capacity," "diversify sources of supply," or "promote alternative approaches for addressing military requirements;" or (c) "prohibiting procurement from selected sources or nations." DOD may also take a combination of the above actions, or take no action where appropriate.

By Jan. 15, 2022, the secretary must submit to the congressional defense committees "a summary of the findings of the analyses undertaken for each item" listed above, "relevant recommendations resulting from the analyses," and "descriptions of specific activities undertaken as a result" thereof, "including schedule and resources allocated for any planned actions." Additionally, the secretary must include the analyses, recommendations, and descriptions of activities in each of nine different types of reports and guidance documents "submitted during the 2022 calendar year."

Section 850, Implementation of Recommendations for Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency—Within 540 days of the FY 2021 NDAA's enactment, the under secretary of defense for acquisition and sustainment must submit to the secretary of defense recommendations regarding U.S. industrial policies "to fully implement the recommendations of the report of the Interagency Task Force (established by [DOD] pursuant to section 2 of Executive Order 13806 (82 Fed. Reg. 34597; July 21, 2017)) titled 'Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States: Report to President Donald J. Trump by the Interagency Task Force in Fulfillment of Executive Order 13806' (September 2018)" (the Interagency Task Force Report). The additional recommendations must "consist of specific executive actions, programmatic changes, regulatory changes, and legislative proposals and changes, as appropriate." The recommendations must "aim to expand the defense industrial base to leverage contributions and capabilities of allies and partner countries," "identify and preserve the viability of domestic and trusted international suppliers," and "strengthen the domestic industrial base, especially in areas subject to the risk archetypes" (e.g., sole source, foreign dependency) identified in the Interagency Task Force Report. In developing the recommendations, the under secretary may consult with the Defense Science Board, the Defense Innovation Board, the Defense Business Board, entities representing industry interests, and entities representing labor interests. The secretary must submit the under secretary's recommendations (and any supplemental views or recommendations) to the president within 30 days of receiving the recommendations. Within 30 days of submitting the recommendations to the president, the secretary must "submit to and brief the congressional defense committees on such recommendations."

Section 862, Transfer of Verification of Small Business Concerns Owned and Controlled by Veterans or Service-Disabled Veterans to the Small Business Administration—This section transfers the responsibility for verifying veteran-owned small business (VOSB) status and service-disabled veteran-owned small business (SDVOSB) status from the Department of Veterans Affairs to the Small Business Administration. Section 1832 of the FY 2017 NDAA required SBA and VA to standardize their definitions for VOSBs and SDVOSBs by directing VA to use SBA's regulations to determine ownership and control of those entities. 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 ¶ 26. FY 2021 NDAA § 862 completes the consolidation of the two programs by eliminating VA's separate certification program through the Center for Verification and Evaluation and requiring all SDVOSBs and VOSBs, working with VA or any other federal agency, to be certified (and periodically recertified) through SBA. VA will still be responsible for verifying an individual's status as a veteran or service-disabled veteran, but SBA will be responsible for verifying the ownership and control of business concerns and their small business status. SBA will also take over responsibility for maintaining a database of eligible SDVOSBs and VOSBs. The transfer will become effective two years after the FY 2021 NDAA's enactment. SBA and VA must report to the relevant congressional committees on the transition within one year of the FY 2021 NDAA's enactment and every six months thereafter until the transfer is complete.

The SBA administrator must "establish procedures relating to" "the filing, investigation, and disposition" of challenges to a VOSB's or SDVOSB's status "including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to [SBA]," and verification of the accuracy of any certification made or information provided to SBA by a VOSB or SDVOSB.

This section also phases out self-certification of SDVOSB status. Once the transfer to SBA is complete (i.e., two years after the FY 2021 NDAA's enactment), SDVOSBs pursuing contracts with agencies other than VA will have a one-year grace period to apply to SBA for certification. SDVOSBs pursuing non-VA

work that apply within the one-year grace period may continue to rely on self-certification until SBA decides whether to grant their application. SDVOSBs pursuing non-VA work that fail to submit an application within the grace period will "lose, at the end of such 1-year period, any self-certification of the concern as a" SDVOSB. SBA must notify self-certified SDVOSBs of these requirements.

Section 863, Employment Size Standard Requirements for Small Business Concerns—On Dec. 17, 2018, President Trump signed into law the Small Business Runway Extension Act of 2018, P.L. 115-324. See Schaengold, Prusock and Muenzfeld, Thomson Reuters Conference Briefs for 2018, "2018 Statutes Update," at 5-4–5-5. The Runway Extension Act changed 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. However, the Act did not impact size standards for manufacturing contractors, which are based on employee count. Section 863 amends the Small Business Act to extend the period of measurement for employee-based size standards for manufacturers from 12 months to 24 months.

This means a company would be small if the average of its employees for each pay period during the prior 24 months is below the applicable size standard, which should help businesses continue to qualify as small despite temporary increases in the number of employees. However, it could also cause a business that would have qualified as small if the number of employees were measured over a 12-month period to be ineligible if the business had a very high average number of employees in the first 12 months of the two years used for measurement. In other words, if a business has shrunk over the previous 24 months, which does not seem to be an unreasonable development given COVID-19, this provision could hurt that business by preventing it from qualifying as small (even though it would have qualified as small if measured over only the previous 12 months). This section becomes effective on Jan. 1, 2022.

Section 868, Past Performance Ratings of Certain Small Businesses—This section amends § 15(e) of the Small Business Act (15 USCA § 644(e)) to add a new subsection entitled "Past Performance Ratings of Joint Ventures for Small Business Concerns," which allows small businesses bidding on prime contracts that have previously participated in a joint venture (JV), but have no relevant past performance information of their own, to use the past performance of the JV for evaluation purposes. If the small business elects to use the JV's past performance, it is required: "(i) to identify to the contracting officer the joint venture of which the small business concern was a member; and (ii) to inform the contracting officer what duties and responsibilities the small business concern carried out as part of the joint venture." The CO must "consider the past performance of the joint venture when evaluating the past performance of the small business concern, giving due consideration to the information" regarding the duties and responsibilities that the small business carried out under the JV. This section allows small businesses to use the past performance of the JV without regard to whether the other JV member was a small business.

This section also amends § 8(d)(17) of the Small Business Act (15 USCA § 637(d)(17)) to provide that prime contractors that have performed contracts that require small business subcontracting plans to provide first-tier small business subcontractors with a past performance record of their performance on the contract upon request from the first-tier small business subcontractor. "If a small business concern elects to use such record of past performance, a contracting officer shall consider such record of past performance when evaluating an offer for a prime contract made by such small business concern."

While the statute provides no guidance on how prime contractor past performance reviews will work in practice, the SBA administrator is required to issue rules carrying out this section within 120 days after the FY 2021 NDAA's enactment.

Section 869, Extension of Participation in 8(a) Program—Section 869 permits any 8(a) certified business that was in the 8(a) Program "on or before September 9, 2020" to extend its participation in the program by an additional year (allowing for up to 10 years in the 8(a) Program). The extension appears to be a response to the difficulties experienced by many small businesses due to COVID-19. The SBA administrator must issue regulations implementing this section within 15 days of the FY 2021 NDAA's enactment, without regard to the Administrative Procedure Act's rulemaking requirements.

This one-year extension of participation in the 8(a) Program and the emergency rulemaking requirement also were included in substantively identical

language in § 330 of the Consolidated Appropriations Act, 2021, which President Trump signed into law on Dec. 27, 2020. Therefore, based on the Dec. 27, 2020 passage of the Consolidated Appropriations Act, 2021, the rulemaking implementing the extension was due no later than January 11. SBA issued it on January 13.

Section 883, Prohibition on Awarding of DOD Contracts to Contractors that Require Nondisclosure Agreements Relating to Waste, Fraud, or Abuse—Pursuant to this section, DOD "may not award a contract for the procurement of goods or services to a contractor unless the contractor represents that": (1) "it does not require its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a [DOD] contract to" investigative or law enforcement representatives of DOD "authorized to receive such information;" and (2) "it will inform its employees" of these "limitations on confidentiality agreements and other statements." This section further provides that a DOD CO "may rely on the representation of a contractor" as to these requirements in awarding a contract unless the CO "has reason to question the accuracy of the representation."

The joint explanatory statement directs the secretary of defense "to provide a briefing to the" House and Senate Armed Services committees "not later than 180 days after" the NDAA's enactment, detailing DOD's "plan and mechanism for ensuring contractor compliance with the statutory prohibition against reprisal against an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor for disclosing information that the employee reasonably believes is evidence of gross mismanagement of a DOD contract or grant; an abuse of authority; a violation of law, rule, or mismanagement related to a [DOD] contract or grant; or a substantial and specific danger to public health or safety."

Certain Federal Acquisition Regulation clauses already exist to address some of these issues. See FAR 52.203-18, "Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation (Jan 2017)"; FAR 52.203-19, "Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017)." Relying on "section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts," FAR 3.909-1(a) prohibits the "Government" "from using fiscal year 2015 and subsequent fiscal year funds for a contract with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse." FAR 3.909-2 further provides that "to be eligible for contract award, an offeror must represent that it will not require its employees or subcontractors to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General)." Significantly, "[a]ny offeror that does not so represent is ineligible for award of a contract." Finally, the CO "may rely on an offeror's representation" on this subject "unless the contracting officer has reason to question the representation."

Section 885, Disclosure of Beneficial Owners in Database for Federal Agency Contract and Grant Officers—This section amends 41 USCA § 2313(d) to require identification and disclosure in the Federal Awardee Performance and Integrity Information System (FAPIIS) database of the "beneficial owners" of a "corporation" that is bidding on or awarded a federal contract or grant. See FAR 9.104-6 (applying FAPIIS to contract awards above the simplified acquisition threshold). The term "corporation" is interpreted broadly to mean "any corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity." The term "beneficial owner" is "determined in a manner that is not less stringent than the manner set forth in" SEC regulation 17 CFR § 240.13d-3, "Determination of beneficial owner" (as in effect on Dec. 20, 2019), which provides that "a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security."

Section 886, Repeal of Pilot Program on Payment of Costs for Denied GAO Protests—In a controversial and also ambiguous provision, § 827 of the FY 2018 NDAA required the secretary of defense to establish a "pilot program to determine the effectiveness of requiring contractors to reimburse" DOD "for costs incurred in processing covered protests." A covered protest was defined as a "bid protest that was—(1) denied in an opinion issued by the Government Accountability Office; (2) filed by a party with revenues in excess of $250,000,000" during the previous year and in 2017 dollars; and "(3) filed on or after October 1, 2019 and on or before September 30, 2022." See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part I," 60 GC ¶ 1. The pilot program was scheduled to begin in December 2020. Section 886, however, repeals FY 2018 NDAA § 827 and its pilot program.

The joint explanatory statement noted "that the pilot program is unlikely to result in improvements to the bid protest process given the small number of bid protests captured by the pilot criteria and lack of cost data." It further "direct[ed] the Secretary of Defense to undertake a study through the Center for Acquisition Innovation Research, to examine elements of" FY 2017 NDAA § 885 "for which the RAND National Defense Research Institute was unable to obtain full and complete data during its analysis." See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Significant Impact Of The FY 2017 National Defense Authorization Act On Federal Procurement—Part II," 59 GC ¶ 26. This study shall address:

> (1) The rate at which protestors are awarded the contract that was the subject of the bid protest; (2) A description of the time it takes [DOD] to implement corrective actions after a ruling or decision, the percentage of those corrective actions that are subsequently protested, and the outcomes of those protests; (3) Analysis of the time spent at each phase of the procurement process attempting to prevent a protest, addressing a protest, or taking corrective action in response to a protest, including the efficacy of any actions attempted to prevent the occurrence of a protest; and (4) Analysis of the number and disposition of [agency-level] protests filed within [DOD].

The joint explanatory statement "emphasize[d] the potential benefits of a robust agency-level bid protest process." As a result, it directed the study to

> evaluate the following factors for agency-level bid protests: prevalence, timeliness, outcomes, availability, and reliability of data on protest activities; consistency of protest processes among the military Services; and any other challenges that affect the expediency of such protest processes. In doing so, the study should review existing law, the [FAR], and agency policies and procedures and solicit input from across the DOD and industry stakeholders. The conferees note that an academic study recently examined the agency-level bid protest process at various federal agencies, including [DOD], and reported on that study to the Administrative Conference of the United States. [See Yukins, "Stepping Stones to Reform: Making Agency Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government," *https://www.acus.gov/sites/default/files/documents/ACUS%20Agency%20Bid%20Protest%20Report%20-%20FINAL.pdf.*] The conferees direct [DOD] to consider these recommendations among those it might make to improve the expediency, timeliness, transparency, and consistency of agency-level bid protests.

Finally, not later than Sept. 1, 2021, the secretary "shall provide the congressional defense committees with a report detailing the results and recommendations of the study, together with such comments as the Secretary determines appropriate."

Section 888, Revision to Requirement to Use Firm-Fixed-Price Contracts for Foreign Military Sales—This section repeals § 830 of the FY 2017 NDAA, which had required the secretary of defense to prescribe regulations to require the use of firm-fixed-price contracts for foreign military sales. 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 ¶ 26.

Section 890, Identification of Certain Contracts Relating to Construction or Maintenance of a Border Wall—This section requires the secretary of defense to identify on the Federal Procurement Data System (or successor system) any contracts (including any task orders and contract modifications) entered into "relating to the construction or maintenance of a barrier along the international border between the United States and Mexico that have an estimated value greater than or equal to $7,000,000."

Section 891, Waivers of Certain Conditions for Progress Payments Under Certain Contracts During the COVID-19 National Emergency—In certain circumstances related to an undefinitized contractual action (UCA), this section authorizes the secretary of defense to waive 10 USCA § 2307(e)(2), which restricts progress payments to not "more than 80 percent of the work accomplished under a defense contract so long as [DOD] has not made the contractual terms, specifications, and price definite." Specifically, the secretary may waive this restriction if the secretary determines that it "is necessary due to the national emergency for [COVID-19] and—(1) a contractor performing the contract for which a UCA is entered into has not already received increased progress payments from [DOD] on contractual actions other than UCAs; or (2) a contractor performing the contract for which a UCA is entered into, and that has received increased progress payments from [DOD] on contractual actions other than UCAs, can demonstrate that the contractor has promptly provided the amount of the increase to any subcontractors (at any tier), small business concerns …, or suppliers of the contractor."

If a UCA has "not been definitized for a period of 180 days beginning on the date on which such UCA was entered into, the Secretary of Defense may only use the waiver authority … if the Secretary (or a designee at a level not below the head of a contracting activity) provides a certification to the congressional defense committees that such UCA will be definitized within 60 days after the date on which the waiver is issued." For each use of the waiver authority, the secretary is required to "submit to the congressional defense committees an estimate of the amounts to be provided to subcontractors (at any tier), small business concerns, and suppliers, including an identification of the specific entities receiving an amount from an increased progress payment described under" this section.

In the joint explanatory statement, the conferees acknowledged their support for DOD's "actions to increase cash flow to the defense industry during the ongoing pandemic, which included increasing the rate of progress payments from 80 percent up to 95 percent for certain companies, and guidance on the use of advance payments in certain cases, among others." See also 2020-O0010, Rev. 1, Class Deviation—Progress Payment Rates (April 16, 2020), available at *www.acq.osd.mil/dpap/policy/policyvault/USA000801-20-DPC.pdf*.

The joint explanatory statement also expresses concern about whether and how companies that received funds from the increased progress payment rates are increasing the rate for progress payments for their subcontractors and suppliers, who "are in many cases small and medium sized firms that were potentially more at risk during this period." Accordingly, the joint explanatory statement directs GAO to assess DOD's actions "to provide and monitor the use of advance payments and the increased rate of progress payments." It further requires GAO to brief the congressional defense committees by September 30 on certain, specified matters regarding advanced payments or increased rates of progress payments and to provide a final report to the congressional defense committees at a mutually agreed-upon date following the briefing.

Section 901, Repeal of the Office of the Chief Management Officer (CMO)—This section repeals 10 USCA § 132a, which established the office of the CMO, effective immediately (i.e., January 1). The position of CMO was established by § 910 of the FY 2018 NDAA. Prior to the FY 2018 NDAA, 10 USCA § 132a had already established the position of the deputy CMO, who reported to the deputy secretary of defense. With the repeal of 10 USCA § 132a, there will be no statutory requirement for either a CMO or a deputy CMO.

Section 1603, Requirements to Buy Certain Satellite Components from the National Technology and Industrial Base—This section amends 10 USCA § 2534, concerning miscellaneous sourcing requirements, to require that a star tracker used in a satellite weighing more than 400 pounds and whose primary purpose is national security or intelligence, shall be purchased from national technology and industrial base sources for all programs receiving Milestone A approval on or after October 1. The joint explanatory statement directs the secretary of defense to submit to the congressional defense committees by July 1, "a report on implementation of this provision, including whether and how the waiver authority will be used. In addition, the report shall include an analysis of potential impacts on domestic suppliers of star trackers." The report must also include an analysis of the impact the provision has on domestic suppliers, the mission capability of the satellites, and the impact on relations with U.S. allies and partners.

Section 1623, Efficient Use of Sensitive Compartmented Information Facilities—According to the joint explanatory statement, this section requires

the Director of National Intelligence, in consultation with the secretary of defense, "to issue revised guidance" within 180 days of the FY 2021 NDAA's enactment, authorizing and directing Government agencies and their appropriately cleared contractors "to process, store, use, and discuss sensitive compartmented information at facilities previously approved to handle such information, without need for further approval" by agency or by site. The revised guidance is to apply to controlled access programs of the intelligence community and special access programs of DOD.

NDAA Title XVII, Cyberspace-Related Matters—This title contains 52 provisions that focus on a variety of cybersecurity issues affecting Government operations and the defense industrial base. Some of these provisions came from the Cyberspace Solarium Commission, established by FY 2019 NDAA § 1652, and which, according to the joint explanatory statement, was tasked "with developing consensus on a strategic approach to defending the Nation in cyberspace against cyber attacks of significant consequences."

Section 1712, Modification of Requirements for the Strategic Cybersecurity Program and Evaluation of Cyber Vulnerabilities of Major Weapon Systems—This section amends § 1647 of the FY 2016 NDAA (as amended by § 1633 of the FY 2020 NDAA) by requiring DOD to establish requirements "for each major weapon system, and the priority critical infrastructure essential to the proper functioning of major weapon systems in broader mission areas," to be assessed for cyber vulnerabilities. It also amends § 1640 of the FY 2018 NDAA to require, by August 1, establishment of a Strategic Cybersecurity Program to improve systems, critical infrastructure, kill chains, and processes related to nuclear deterrence and strike, certain long-range conventional strike missions, offensive cyber operations, and homeland missile defense.

Section 1714, Cyberspace Solarium Commission—This section extends the life of the commission by amending § 1652 of the FY 2019 NDAA to change its termination date from "the end of the 120-day period beginning on the date on which the final report" was submitted to Congress (i.e., July 2020) to "20 months after" the report was submitted to Congress (i.e., November 2021). The commission was extended for various purposes, including "collecting and assessing comments and feedback from the Executive Branch, academia, and the public on the analysis and recommendations contained in the Commission's report" and "providing an annual update … regarding any such revisions, amendments, or new recommendations."

Section 1716, Subpoena Authority for the Cybersecurity and Infrastructure Security Agency (CISA)—This section adds to CISA's national cybersecurity and communications integration center the responsibility for "detecting, identifying, and receiving information for a cybersecurity purpose about security vulnerabilities relating to critical infrastructure in information systems and devices." The section also grants the center's director authority to "issue a subpoena for the production of information necessary to identify and notify such entity at risk, in order to carry out" the added responsibilities. The authority to issue a subpoena is limited to "a device or system commonly used to perform industrial, commercial, scientific, or governmental functions or processes that relate to critical infrastructure." Personal devices, home computers, and residential or consumer devices are not covered by the subpoena authority.

Section 1736, Defense Industrial Base Cybersecurity Sensor Architecture Plan—This section requires DOD, within 180 days of the FY 2021 NDAA's enactment, to assess "the feasibility, suitability, and resourcing required to establish a Defense Industrial Base Cybersecurity Sensor Architecture Program, responsible for deploying commercial-off-the-shelf solutions to remotely monitor the public-facing internet attack surface of the defense industrial base."

Section 1737, Assessment of Defense Industrial Base Participation in a Threat Information Sharing Program—This section requires DOD, within 270 days of enactment, to assess the "feasibility and suitability of, and requirements for, the establishment of a defense industrial base threat information sharing program, including cybersecurity incident reporting requirements applicable to the defense industrial base" that extend beyond current incident reporting requirements and establish "a single [DOD] clearinghouse for all mandatory cybersecurity incident reporting." The assessment is required to include recommendations on "incentives for defense industrial base entities to participate in the threat information sharing program" and prohibiting procurements from entities that do not comply with the requirements of the program. The secretary of defense must consult with and solicit recommendations from representative industry stakeholders across the de-

fense industrial base in conducting the assessment. If the assessment determines that such a program is necessary, the section requires DOD to establish the program and to promulgate regulations within 120 days of completion of the assessment.

Section 1738, Assistance for Small Manufacturers in the Defense Industrial Base Supply Chain on Matters Relating to Cybersecurity—According to the joint explanatory statement, this section allows DOD, subject to availability of appropriated funds, to "provide funds to Manufacturing Extension Partnership Centers for the provision of cybersecurity services to small manufacturers." Such assistance can only be provided if DOD publishes on *grants.gov* (or successor website) "criteria for selecting recipients" for the program, and funds could only be used for specific purposes, including compliance with Defense FAR Supplement cybersecurity requirements and the Cybersecurity Maturity Model Certification (CMMC) framework. The authority to provide funds under this section terminates five years from enactment.

Section 1739, Assessment of a Defense Industrial Base Cybersecurity Threat Hunting Program—This section requires DOD, within 270 days of the FY 2021 NDAA's enactment, to assess the "feasibility, suitability, definition of, and resourcing required to establish a defense industrial base cybersecurity threat hunting program to actively identify cybersecurity threats and vulnerabilities within the defense industrial base," including networks containing controlled unclassified information. The assessment is also required to examine existing defense industrial base threat hunting policies and programs, "suitability of a continuous threat hunting program, as a supplement to the cyber-hygiene requirements of the Cybersecurity Maturity Model Certification," mechanisms for DOD to share malicious information on the evolving threat landscape, incentivizing private sector participation, and prohibiting procurements from entities that do not comply with the requirements of the program. The section requires DOD to consult with industry during the assessment. If the assessment determines that such a program is necessary, the section requires DOD to establish it and to promulgate regulations within 120 days of completion of the assessment.

Section 1742, DOD Cyber Hygiene and CMMC Framework—This section requires that, by March 1, DOD "assess each Department component against" the CMMC framework and "submit to the congressional defense committees a report that identifies each such component's CMMC level and implementation of the cybersecurity practices and capabilities required in each of the levels of the CMMC framework." This section further requires DOD to provide a briefing to the congressional defense committees on how it plans to implement a variety of specified cybersecurity recommendations. Finally, this section states that of the funds authorized to be appropriated for FY 2021 to implement CMMC, "not more than 60 percent of such funds may be obligated or expended until the Under Secretary of Defense for Acquisition and Sustainment delivers to the congressional defense committees a plan for implementation of the CMMC via requirements in procurement contracts" to include "a timeline for pilot activities, a description of the planned relationship between DOD and the auditing or accrediting bodies, a funding and activity profile for the Defense Industrial Base Cybersecurity Assessment Center, and a description of efforts to ensure that the service acquisition executives and service program managers are equipped to implement the CMMC requirements and facilitate contractors' meeting relevant requirements."

Title XVIII, Transfer and Reorganization of Defense Acquisition Statutes (FY 2021 NDAA §§ 1801–85)—Title XVIII transfers, reorganizes (including making conforming changes), redesignates, and consolidates defense acquisition statutes into Part V of subtitle A, *Acquisition*, of Title 10 of the U.S. Code. Title XVIII also creates a more rational organization of acquisition statutes, loosely following the FAR's structure. The reorganization is "not" intended to "result in policy changes," see joint explanatory statement for Title XVIII, or to change the meaning of the impacted statutes. The genesis of Title XVIII stems, in large part, from a Section 809 Panel recommendation to consolidate and reorganize all DOD-related acquisition statutes into a single Part V because the then-existing statutory structure was cumbersome, haphazardly arranged, confusing and difficult to navigate. See Section 809 Panel Report, Vol. 2 (June 2018), at EX-4, 171-177, available at *https://section809panel.org/wp-content/uploads/2019/01/Sec809Panel_Vol2-Report_JUN2018_012319.pdf*. Congress implemented a version of this recommendation when it established a new Part V in the FY 2019 NDAA, in § 801—Framework for New Part V of Subtitle A, and §§ 806–809—Redesignation of Numerous DOD Statutes. See Schaengold, Prusock and

Muenzfeld, Feature Comment, "The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part I," 60 GC ¶ 334. The FY 2019 NDAA did not transfer statutes into the newly created Part V of Title 10. Title XVIII of the FY 2021 NDAA transfers existing Title 10 acquisition statutes into the Part V shell. Notably, the joint explanatory statement observes that this reorganization "sets the conditions for future reform."

Not later than March 15, the secretary of defense must submit to the congressional defense committees a report evaluating Title XVIII and its amendments to include: (1) "Specific recommendations for modifications to the legislative text of [Title XVIII] and [its] amendments …, along with a list of conforming amendments to law required by" Title XVIII and its amendments; (2) "[A]n assessment of the effect" of Title XVIII and its amendments "on related [DOD] activities, guidance, and interagency coordination"; and (3) "An implementation plan for updating the regulations and guidance relating to" Title XVIII and its amendments.

Title XVIII has an effective date of Jan. 1, 2022. According to the joint explanatory statement "the intention of the 1-year enactment delay is to provide time for [DOD] and for other stakeholders to identify adjustments and specific and actionable recommendations to address them. Further, the conferees note the implementation delay is intended to provide [DOD] a reasonable amount of time to make necessary administrative updates to implement the transfer and reorganization."

By Jan. 1, 2023, the secretary is required to amend the DFARS and other relevant authorities to reflect the changes made by Title XVIII. From Jan. 1, 2022 until the DFARS is updated (but no later than Jan. 1, 2023), DOD "shall apply the law as in effect on December 31, 2021, with respect to contracts entered into during" that period.

Title XVIII (including amendments made by it) "is intended only to reorganize title 10, United States Code, and may not be construed to alter": (1) "the effect of a provision of title 10" "including any authority or requirement therein;" (2) a DOD or agency "interpretation with respect to title 10;" or (3) "a judicial interpretation with respect to title 10." Finally, any "regulation, order, or other administrative action in effect under a provision of title 10" "redesignated by [Title XVIII] continues in effect under the provision as so redesignated."

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