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FEATURE COMMENT: The FY 2022 National Defense Authorization Act's Ramifications On Federal Procurement Law—Part I

On Dec. 27, 2021, nearly three months after the Oct. 1, 2021 start of Fiscal Year 2022, the National Defense Authorization Act (NDAA) for FY 2022, P.L. 117-81, was signed into law by President Biden, becoming the 61st fiscal year in a row that a NDAA has been enacted. Unfortunately, it has become common practice for the NDAA to be enacted well after the start of its fiscal year. In the last 46 fiscal years, the NDAA has been enacted on average 42 days after the fiscal year began. See Congressional Research Service In Focus IF11833 (Dec. 30, 2021), *FY2022 NDAA: Status of Legislative Activity*, at 3. In recent years, this trend has become more pronounced, with three of the prior five NDAA's becoming law in December (the FY 2020, FY 2018, and FY 2017 NDAA's) and the FY 2021 NDAA became law on Jan. 1, 2021. The FY 2019 NDAA is the only NDAA since 1997 to become law before the start of its fiscal year, which we think is a testament to Sen. John McCain, 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.

As late as the NDAA's have been, they have been more timely than the annual defense appropriations acts. From FY 2010 to FY 2021, a defense budget was only enacted on time once and the late budgets were delayed on average by over 120 days. See Center for Strategic & International Studies

Report (Nov. 2021), *Financing the Fight: History and Assessment of DoD Budget Execution Processes*, at 49.

The NDAA is primarily a policy bill and does not provide budget authority for the Department of Defense to spend, but it does authorize the appropriation of budget authority. The amounts authorized by the NDAA are not binding on the appropriations process but can influence appropriations and serve as "a reliable indicator of congressional sentiment on funding for particular items." CRS Report R46714 (March 28, 2021), *FY2021 National Defense Authorization Act: Context and Selected Issues for Congress*. This year, the NDAA has had a more pronounced influence on the appropriations process than usual. The President's Budget Request, which was sent to Congress on May 28, 2021, included \$715 billion for DOD (excluding military construction). The House Appropriations Committee voted out a DOD Appropriations Act, 2022 (H.R. 4432) on July 13, 2021, that was closely aligned to the budget request. However, the initial NDAA's for FY 2022 that were passed by the House and reported out of the Senate Armed Services Committee called for defense spending that was about \$25 billion above the budget request. (House-\$739.5B; SASC-\$740.3B. The Final NDAA authorized \$740.3B.) The Senate Appropriations Committee included an increase of almost \$25 billion above the budget request in the chairman's mark for defense spending on October 18, making it all but certain that any defense appropriation for FY 2022 will incorporate a similar increase in spending.

In his signing statement, President Biden took issue with several provisions in the FY 2022 NDAA that he believes raise "constitutional concerns." See www.whitehouse.gov/briefing-room/statements-releases/2021/12/27/statement-by-the-president-on-s-1605-the-national-defense-authorization-act-for-fiscal-year-2022/. None of these provisions, which concern (among other issues) limitations on the transfer of Guantánamo Bay detainees, possible

disclosure of classified information, and possible restrictions on Executive Branch voting in international organizations, is likely to have a significant impact on procurement law or policy.

The FY 2022 NDAA broadly focuses on China, cybersecurity, the Defense Industrial Base, and seeking ways to streamline the acquisition process. These themes can be seen in various procurement-related provisions. The FY 2022 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 57 provisions addressing procurement matters. This is modestly less than the past four NDAs: FYs 2021, 2020, 2019, and 2018 NDAs, respectively, contained 63, 78, 71, and 73 Title VIII provisions. Although the impact and importance of a NDAA on federal procurement should not be measured simply on the total number of procurement provisions, the FY 2022 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAs (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 (NDAs)*, at 1–2, & App. A. As discussed below, certain provisions in other titles of the FY 2022 NDAA are very important to procurement law and some of them could have been included in Title VIII. Significantly, some of the FY 2022 NDAA's provisions will not become effective until the Federal Acquisition Regulation or Defense FAR Supplement (and, depending on the circumstances, possibly other regulations, including from the Small Business Administration) are amended or new provisions are promulgated, 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. The debate concerning the FY 2023 NDAA is likely to be dominated by the same general themes applicable to the FY 2022 NDAA, i.e., China, cybersecurity, streamlining acquisition processes, and the industrial base (with a focus on supply chains, strategic reshoring, and the role of working with allied nations).

Because of the substantial volume of procurement law changes in the FY 2022 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I addresses §§ 801–833, below. Part II, which will be published on Jan. 26, 2022, addresses

§§ 834–877, plus sections in Titles I, II, III, X, XIV, XV and XVI.

As in our past NDAA Feature Comments, we look to the Joint Explanatory Statement (JES), which accompanies the NDAA as "legislative history," to help "explain[] the various elements of the [House and Senate] conferees' agreement" that led to the enacted FY 2022 NDAA. CRS In Focus IF10516, *Defense Primer: Navigating the NDAA* (Dec. 2021), at 2; CRS Rept. 98-382, *Conference Reports and Joint Explanatory Statements* (June 11, 2015), at 1, 2. However, "[u]nlike in most years, the House and Senate did not establish a conference committee to resolve differences between the two [i.e., House and Senate] versions of the [FY 2022 NDAA] bill. Instead, leaders of the" House and Senate Armed Services Committees "negotiated a bicameral agreement based on the two versions." CRS Insight IN11833 (Dec. 30, 2021), *FY2022 NDAA: Status of Legislative Activity*, at 1. Nevertheless, FY 2022 NDAA § 5 provides that "[t]he explanatory statement regarding this [NDAA] ... shall have the same effect with respect to the implementation of this [NDAA] as if it were a joint explanatory statement."

Before specifically reviewing the more important sections for procurement law, we observe that a number of the FY 2022 NDAA provisions extend or make permanent existing reporting requirements, including § 241 (making permanent the annual report by the DOD Director of Operational Test and Evaluation), § 805 (extending DOD's Selected Acquisition Report requirements through FY 2023), and § 1064 (requiring DOD to continue submitting annual reports on the National Technology and Industrial Base (see 10 USCA § 2504) and Strategic and Critical Materials Stock Piling Act (see 50 USCA § 98h-5)). Another important feature of this NDAA is the approach taken to many reporting obligations, where DOD is required to develop data collection plans (see §§ 833, 871, 872) and, in some cases, is barred from initiating pilot programs until such data collection plans are submitted to Congress (see §§ 803, 834, 874). This evidence-based policy philosophy appears to be aimed at giving Congress data upon which to determine the effectiveness of various programs and pilots.

Section 802, Prohibition on Acquisition of Personal Protective Equipment from Non-Allied Foreign Nations—This section adds 10 USCA § 2533e, which prohibits DOD from "procur[ing] any covered item [generally, personal protective equip-

ment (PPE)] from” North Korea, China, Russia and Iran. More specifically, “covered item” means “an article or item of”:

- (A) personal protective equipment for use in preventing spread of disease, such as by exposure to infected individuals or contamination or infection by infectious material (including nitrile and vinyl gloves, surgical masks, respirator masks and powered air purifying respirators and required filters, face shields and protective eyewear, surgical and isolation gowns, and head and foot coverings) or clothing, and the materials and components thereof, other than sensors, electronics, or other items added to and not normally associated with such personal protective equipment or clothing; or
- (B) sanitizing and disinfecting wipes, testing swabs, gauze, and bandages.

This prohibition applies to “prime contracts and subcontracts at any tier,” but does not apply: (i) if DOD “determines that covered materials of satisfactory quality and quantity” “cannot be procured as and when needed from nations other than” North Korea, China, Russia or Iran “to meet requirements at a reasonable price”; (ii) to the “procurement of a covered item for use outside of the United States”; or (iii) to “[p]urchases for amounts not greater than \$150,000.”

Section 803, Authority to Acquire Innovative Commercial Products and Commercial Services Using General Solicitation Competitive Procedures—This section makes permanent FY 2017 NDAA § 879(d)’s pilot program. 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 (discussing § 879). As the JES observes, § 803 “permanently authorize[s]” DOD “to use what are commonly known as commercial solutions openings to solicit and acquire innovative commercial items, technologies, or services.”

More specifically, this section amends Title 10 to add new § 2380c under which the secretaries of defense and of the military departments “may acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals.” “Use of [such] general solicitation competitive procedures” is “considered to be use of competitive procedures for purposes of”

10 USCA Chapter 137, including the “full and open competition” requirements of 10 USCA § 2304(a)(1). Contracts awarded under this authority “shall be”: (i) “fixed-price, including fixed-price incentive fee contracts,” and (ii) “treated as commercial products or commercial services” notwithstanding the definitions in 10 USCA § 2376(1).

“Innovative” means: “(1) any technology, process, or method, including research and development, that is new as of the date of submission of a proposal;” or “(2) any application that is new as of the date of submission of a proposal of” an “existing” “technology, process, or method.”

When “using this authority,” DOD: (a) “may not enter into a contract or agreement in excess of \$100,000,000” “without a written determination from the Under Secretary of Defense for Acquisition and Sustainment or the relevant service acquisition executive of the efficacy of the effort to meet mission needs,” and (b) “shall notify,” within 45 days after the award of such a contract exceeding \$100,000,000, “the congressional defense committees of such award.”

Finally, DOD is required to “collect and analyze data on the use of” this authority “for the purposes of”: (i) “developing and sharing best practices for achieving the objectives of the authority;” (ii) “gathering information on the implementation of the authority and related policy issues;” and (iii) “informing the congressional defense committees on the use of the authority.” DOD is prohibited from exercising this authority “beginning on October 1, 2022, and ending on the date on which [DOD] submits to the congressional defense committees a completed plan for carrying out the data collection.”

Section 804, Modifications to Contracts Subject to Cost or Pricing Data Certification—This section modifies 10 USCA § 2306a(a)(6) to make conforming changes consistent with § 814 of the FY 2021 NDAA, which increased the threshold for submitting cost or pricing data under the Truthful Cost or Pricing Data statute (commonly known as the Truth in Negotiations Act or TINA) for contract modifications and subcontracts to \$2 million. See Schaengold, Schwartz, Prusock and Muenzfeld, Feature Comment, “The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part I,” 63 GC ¶ 20 (discussing § 814). Prior to the FY 2022 NDAA’s enactment, 10 USCA § 2306a(a)(6) provided that contracts entered into on or before June 30, 2018 must be modified to reflect the cur-

rent TINA thresholds for contract modifications and subcontracts related to prime contracts entered into prior to July 1, 2018 “[u]pon the request of a contractor that was required to submit cost or pricing data.” This section now requires DOD to modify “as soon as practicable” all prime contracts entered into on or before June 30, 2018 to reflect the changes made by FY 2021 NDAA § 814.

Section 805, Two-Year Extension of Selected Acquisition Report Requirement—Section 805 amends 10 USCA § 2432(j) to extend DOD’s Selected Acquisition Report (SAR) requirement through FY 2023. See *acqnotes.com/acqnote/acquisitions/selected-acquisition-report-sar* (explaining SAR process for DOD submission to Congress of summaries of Major Defense Acquisition Programs and including links to SAR database); *www.acq.osd.mil/asda/ae/ada/docs/PDAS%202019%20Excerpts_Final%20cleared.pdf* (DOD 2019 SARs Update). It further requires that not later than March 1, 2022, and every six months thereafter, the secretary of defense must “provide to the congressional defense committees a demonstration of the capability improvements necessary to achieve the full operational capability of the reporting system that will replace the [SAR] requirements under” 10 USCA § 2432. This must include a “demonstration of the full suite of data sharing capabilities of the reporting system ... that can be accessed by authorized external users, including the congressional defense committees, for a range of covered programs across acquisition categories,” including those selected under FY 2020 NDAA § 831. The goal is to replace the SAR requirements with a more robust system that will support more effective DOD decision making for Major Defense Acquisition Programs.

Section 806, Annual Report on DOD’s Highest and Lowest Performing Acquisition Programs—Not later than Jan. 31, 2023, and then annually for the following three years, § 806 requires “the Component Acquisition Executive of each [DOD] element or organization” to “rank each covered acquisition program based on” certain “criteria” and “submit to the congressional defense committees a report that contains a ranking of the five highest performing and five lowest performing covered acquisition programs for such element or organization.” Each Component Acquisition Executive, in consultation with other DOD officials (as she/he determines appropriate), shall “select the criteria for ranking each covered acquisition program,” which “specific ranking

criteria” shall be identified in the report submitted to the congressional defense committees. Unless there are DOD-wide “criteria,” which the statute does not appear to call for but the ambiguously worded JES may suggest is a possibility, it may be difficult for DOD and Congress to compare the various reports, each of which could use various different and disparate criteria for ranking the programs.

A “covered acquisition program” is a “major defense acquisition program,” see 10 USCA § 2430(a), including an acquisition program (which is not for an automated information system) that is estimated “to require an eventual total expenditure” “for research, development, test, and evaluation of” between \$300,000,000 and \$1,800,000,000 (in FY 1990 constant dollars). See 10 USCA § 2430(a)(1)(B).

For “each of the five acquisition programs ranked as the lowest performing,” the report shall include: “(1) A description of the factors that contributed to the ranking of the program as low performing”; “(2) An assessment of the underlying causes of the [program’s] poor performance”; and “(3) A plan for addressing the challenges of the program and improving performance, including specific actions that will be taken and proposed timelines for completing such actions.”

Section 807, Assessment of Impediments and Incentives to Improving the Acquisition of Commercial Products and Services—Under § 807, the under secretary of defense for acquisition and sustainment and the chairman of DOD’s Joint Requirements Oversight Council are required to “jointly assess impediments and incentives to fulfilling the [statutory] goals” “regarding preferences for commercial products and commercial services to”: “(1) enhance the innovation strategy of [DOD] to compete effectively against peer adversaries;” and “(2) encourage the *rapid adoption of commercial advances in technology*.” (Emphasis added.) See 10 USCA § 2377; 41 USCA § 3307; see also FAR 12.000 (FAR pt. 12 “implements the Federal Government’s preference for the acquisition of commercial products and commercial services contained in 41 U.S.C. 1906, 1907, and 3307 and 10 U.S.C. 2375-2377 by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial products and commercial services.”).

Not later than April 26, 2022, the under secretary and the chairman “shall brief the congressional defense committees on the results of the required assessment and any actions undertaken to improve compliance

with the statutory preference for commercial products and commercial services, including any recommendations” for congressional action. This section is yet another attempt by Congress to get DOD to procure more commercial products and services. Repeated congressional efforts in this area, including various studies, reports and pilot programs, have resulted in modest success. See, e.g., Schaengold, Schwartz, Prusock and Muenzfeld, Feature Comment, “The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part I,” 63 GC ¶ 20 (discussion of FY 2021 NDAA § 816); Schaengold, Prusock and Muenzfeld, Feature Comment, “The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part I,” 60 GC ¶ 334 (discussion of FY 2019 NDAA §§ 836, 837, 839); Schaengold, Prusock and Muenzfeld, Feature Comment, “The Fiscal Year 2018 NDAA’s Significant Impact On Federal Procurement Law—Part II,” 60 GC ¶ 9 (discussion of FY 2018 NDAA §§ 848, 849); 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 (discussion of FY 2017 NDAA §§ 874, 875, 876, 879, 880); Schaengold, Broitman and Prusock, Feature Comment, “The FY 2016 National Defense Authorization Act’s Substantial Impact On Federal Procurement—Part I,” 58 GC ¶ 20 (discussion of FY 2016 NDAA §§ 851, 852, 854, 855).

Relatedly, arising out of an unpassed House FY 2022 NDAA provision (§ 857), the JES, at 205, directs DOD to submit a report to the congressional defense committees by Jan. 1, 2023 that includes an analysis of the training available for the DOD acquisition workforce related to commercial item (and price reasonableness) determinations.

Section 808, Briefing on Transparency for Certain Domestic Procurement Waivers—Under this section, not later than June 25, 2022, DOD “shall brief the congressional defense committees on the extent to which information relating to the use of domestic procurement waivers by [DOD] is publicly available.” The JES notes “that there are efforts underway to make such waivers available on a public website for all executive branch agencies. Specifically, Executive Order 14005, ‘Ensuring the Future Is Made in All of America by All of America’s Workers,’ ... requires” the General Services Administration to “develop a public website to which the status of agencies’ proposed waivers to Made in America laws, to include [DOD], will be posted. We understand this website

is planned to be operational in fiscal year 2022 and expect the [DOD] to provide appropriate information.” In fact, a U.S. Government website identifying “Nonavailability Waivers” “reviewed by the Made in America Office” is operational at www.madeinamerica.gov/waivers/.

The JES, however, overlooks the fact that there is a directly relevant Nov. 2021 Act of Congress on this issue. More specifically, on Nov. 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), P.L. 117-58, which includes the BuyAmerican.gov Act of 2021 at §§ 70931–41. Section 70936 requires, by Nov. 15, 2022, GSA administrator to “establish an Internet website” at “BuyAmerican.gov that will be publicly available and free to access. The website shall include”: (i) “information on all waivers of and exceptions to Buy American laws since [Nov. 15, 2021] that have been requested, are under consideration, or have been granted by executive agencies and be designed to enable manufacturers and other interested parties to easily identify waivers”; and (ii) the “results of routine audits” to determine “Buy American law violations after the award of a contract.”

IIJA § 70937(b) requires that “[p]rior to granting a request to waive a Buy American law,” an agency head “shall submit a request to invoke a Buy American waiver to the [GSA] Administrator,” who “shall make the request available on or through the public website [i.e., *BuyAmerican.gov*] for public comment for not less than 15 days.” See IIJA § 70921(a)(3); IIJA § 70914(c) (applying similar requirements for Buy America Act and related federal financial assistance waivers). “No Buy American waiver for purposes of awarding a contract may be granted if ... (A) information about the waiver was not made available [at *BuyAmerican.gov*]; or (B) no opportunity for public comment concerning the request was granted.” IIJA § 70937(c).

Section 809, Report on Violations of Certain Domestic Preference Laws—Pursuant to this section, not later than Feb. 1 of 2023, 2024, and 2025, the secretary of defense, “in coordination with the” secretaries of the military departments, “shall submit to the congressional defense committees a report on violations of certain domestic preference laws reported to [DOD] and the military departments. Each report shall include such violations that occurred during the previous fiscal year.” For this section, “certain domestic preference laws” “means

any provision of [10 USCA §§] 2533a [concerning the Berry Amendment] or 2533b [concerning specialty metals], or [41 USCA] chapter 83 [concerning the Buy American Act], “that requires or creates a preference for the procurement of goods, articles, materials, or supplies, that are grown, mined, reprocessed, reused, manufactured, or produced in the United States.” For DOD’s implementation of: (i) the Berry Amendment, see DFARS 225.7002; (ii) specialty metals provisions, see DFARS 225.7003; and (iii) the Buy American Act, see, e.g., DFARS subpts. 225.1, 225.2 and 225.5.

“[F]or each reported violation,” the report “shall include”: “(1) The name of the contractor. (2) The contract number. (3) The nature of the violation, including which of the certain domestic preference laws was violated. (4) The origin of the report of the violation. (5) Actions taken or pending by the Secretary concerned in response to the violation. (6) Other related matters deemed appropriate by the Secretary concerned.” The report potentially provides a roadmap for, or may lead to, breach of contract, suspension and debarment, and/or False Claims Act actions against contractors. The JES observes that the House bill included a provision that did not make it into the enacted NDAA, which would have required “contracting officer[s] to refer to the appropriate suspension or debarment official any current or former [DOD] contractor if the contracting officer believes the contractor has *egregiously violated* the domestic preference requirements of” 10 USCA §§ 2533a or 2533b. (Emphasis added.)

Section 811, Certain Multiyear Contracts for Acquisition of Property: Budget Justification Materials—Section 811 requires the secretary of defense to include a proposal in the budget justification materials submitted to Congress in support of the DOD budget for FY 2023 (and each fiscal year thereafter) for each multiyear contract that the secretaries of defense or of the military departments intend to either cancel or reduce (e.g., through a total or partial termination for convenience) the quantity of end items to be procured (referred to as a covered modification). The proposal to cancel or “effect a covered modification” of a multiyear contract must include “(1) A detailed assessment of any expected termination costs associated with the proposed cancellation or covered modification”; “(2) An updated assessment of estimated savings of” cancelling the contract or carrying it out as modified by the covered modification; “(3) An explanation of

the proposed use of previously appropriated funds for advance procurement or procurement of property planned under the multiyear contract before such cancellation or covered modification”; and “(4) An assessment of expected impacts of the proposed cancellation or covered modification on the defense industrial base, including workload stability, loss of skilled labor, and reduced efficiencies.”

Section 813, Office of Corrosion Policy and Oversight Employee Training Requirements—This section amends 10 USCA § 2228 to require that the director of DOD’s Office of Corrosion Policy and Oversight “ensure that [DOD] contractors” “carrying out activities for the prevention and mitigation of corrosion of [DOD’s] military equipment and infrastructure” “employ for such activities a substantial number of individuals who have completed, or who are currently enrolled in, a qualified training program.” A “qualified training program” “means a training program in corrosion control, mitigation, and prevention that is”: “(A) offered or accredited by an organization that sets industry corrosion standards; or (B) an industrial coatings applicator training program registered under the” “National Apprenticeship Act, 29 U.S.C. 50 et seq.” Finally, this section authorizes the director to “require that any training or professional development activities for military personnel or civilian employees of [DOD] for the prevention and mitigation of corrosion of [DOD’s] military equipment and infrastructure” “are conducted under a qualified training program that trains and certifies individuals in meeting corrosion control standards that are recognized industry-wide.”

Section 814, Modified Condition for Prompt Contract Payment Eligibility—Prior to the FY 2022 NDAA’s enactment, 10 USCA § 2307(a)(2)(B) provided that:

For a prime contractor that subcontracts with a small business concern, [DOD] shall, to the fullest extent permitted by law, establish an accelerated payment date with a goal of 15 days after receipt of a proper invoice for the amount due if the prime contractor agrees *or proposes* to make payments to the subcontractor in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor. [Emphasis added.] This section deletes “or proposes,” which is highlighted in the quote above, from the

statute's text. As a result, for a prime contractor subcontracting with a small business, DOD is required to "establish an accelerated payment date with a goal of 15 days after receipt of a proper invoice" only "if the prime contractor agrees to make payments to the subcontractor" by "the accelerated payment date." Proposing to make such payments by the accelerated payment date is no longer sufficient.

Section 815, Modification to Procurement of Services: Data Analysis and Requirements Validation—Section 815 requires the secretary of defense to "establish and issue standard guidelines within [DOD] for the evaluation of requirements for services contracts." Section 815 repeals FY 2018 NDAA § 852, which provided that DOD "shall encourage," but not require, "the use of standard guidelines within [DOD] for the evaluation of requirements for services contracts." The guidelines must be (A) "consistent with the 'Handbook of Contract Function Checklists for Services Acquisition' issued by [DOD] in May 2018, or a successor or other appropriate policy;" and (B) "updated as necessary to incorporate applicable statutory changes to total force management policies and procedures and any other guidelines or procedures relating to the use of [DOD] civilian employees to perform new functions and functions that are performed by contractors." The JES also directs that the secretary "base these guidelines on current DOD instructions or appropriate policy, including DOD Instruction 5000.74."

This section further requires the acquisition decision authority for each services contract to certify that task orders or statements of work comply with the standard guidelines described above, "that all appropriate statutory risk mitigation efforts have been made," and that task orders or statements of work "do not include requirements formerly performed by DOD civilian employees." The DOD inspector general may conduct annual audits to ensure compliance with the service contract requirements evaluation provisions (including the standard guidelines for such evaluations and certifications) in 10 USCA § 2329(d), as amended by § 815.

Section 815 also amends the budget information for services contracts that DOD must submit to Congress under 10 USCA § 2329 and delays DOD's first submission of such budget information to Congress from Oct. 1, 2021 to Feb. 1, 2023. In addition to the existing requirements for budget information on services contracts required under 10 USCA

§ 2329(b)(1)–(3), § 815 provides that the budget information that DOD submits for services contracts must: (i) "be informed by the review of the inventory required by" 10 USCA § 2330a(c) (which requires "an annual inventory ... of activities performed during the preceding fiscal year pursuant to staff augmentation contracts and contracts closely associated with inherently governmental functions on behalf of" DOD) "using standard guidelines developed" pursuant to 10 USCA § 2329(d), as amended by FY 2022 NDAA § 815; and (ii) "clearly and separately identify the amount requested and projected for the procurement of contract services for each Defense Agency, [DOD] Field Activity, command, or military installation for the budget year and the subsequent four fiscal years in the future-years defense program submitted to Congress under [10 USCA §] 221." Section 815 repeals 10 USCA § 235 ("Procurement of Contract Services: Specification of Amounts Requested in Budget"), which was generally incorporated into DOD's budget information requirements.

The JES directs: (i) the secretary "to submit to the congressional defense committees a plan to implement this provision not later than June 1, 2022;" and (ii) the Government Accountability Office to review DOD's "Services Requirements Review Board process" and "provide a briefing to the congressional defense committees not later than July 1, 2022, and a report at a mutually agreed upon date."

Section 816, Limitation on Procurement of Welded Shipboard Anchor and Mooring Chain for Naval Vessels—This section amends 10 USCA § 2534 to require that all welded shipboard anchor and mooring chain procured by DOD be manufactured in the national technology and industrial base. The national technology and industrial base, defined at 10 USCA § 2500(1), means "the persons and organizations that are engaged in research, development, production, integration, services, or information technology activities conducted within" the U.S., the U.K., Australia, and Canada.

Section 817, Repeal of DOD Preference for Fixed-Price Contracts—This section repeals DOD's preference for fixed-price contracts (including fixed-price incentive fee contracts) established by FY 2017 NDAA § 829, which required approval by a senior DOD official (e.g., senior acquisition executive) for the use of certain cost-type contracts in excess of \$25 million. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Significant Impact Of The

FY 2017 National Defense Authorization Act On Federal Procurement—Part I,” 59 GC ¶ 18. As a result, to implement the repeal, the DFARS will need to be modified, including DFARS 216.102(1) (to remove its stated preference for fixed-price contracts), DFARS 216.301-3(2) (to remove a reference to FY 2017 NDAA § 829 and likely an approval requirement), and DFARS 235.006 (same).

Section 821, Modification of Other Transaction Authority for Research Projects—Section 821 eliminates the requirement under 10 USCA § 2371 for DOD to issue implementing regulations for DOD’s other transaction authority for research projects and replaces it with a more flexible requirement for DOD to issue guidance on the subject. Section 821 also eliminates 10 USCA § 2371(e)(2), which authorized the use of cooperative agreements containing a recovery of funds provision or other transaction agreements to be used for research projects when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate.

Section 822, Modification of Prize Authority for Advanced Technology Achievements—This section amends 10 USCA § 2374a, which provides that DOD “may carry out programs to award cash prizes and other types of prizes ... to recognize outstanding achievements in basic, advanced, and applied research, technology development, and prototype development that have the potential for application to [military mission] performance.” Section 822 clarifies that prizes may include “procurement contracts and other agreements.”

Prior to the FY 2022 NDAA’s enactment, the fair market value (FMV) of prizes that could be awarded under § 2374a was limited to \$10 million. Section 822 amends this provision to provide that prizes may exceed \$10 million with the approval of the under secretary of defense for research and engineering. If a procurement contract or other agreement with a FMV exceeding \$10 million is awarded as a prize, within 15 days of the award, DOD must submit to the congressional defense committees a written award notification, which must include (A) the value of the agreement, including all options; (B) “a brief description of the research result, technology development, or prototype for which such procurement contract or other agreement” “was awarded;” and (C) an explanation of how the award will benefit the performance of DOD’s military mission.

Section 824, Recommendations on the Use of Other Transaction Authority—Section 824 requires DOD to review “the current use, and the authorities, regulations, and policies related to the use, of other transaction authority under” 10 USCA §§ 2371 and 2371b “and assess the merits of modifying or expanding such authorities with respect to” (A) the inclusion of force majeure provisions in other transaction agreements; (B) “the determination of the traditional or nontraditional status of an entity based on the parent company or majority owner of the entity” or “based on the status of an entity as a qualified business[] wholly owned through an Employee Stock Ownership Plan;” (C) DOD’s ability to award (i) prototype agreements “with all of the costs of the prototype project provided by private sector partners of the participant ... to allow for expedited transition into follow-on production agreements for appropriate technologies,” (ii) “agreements for procurement” or “sustainment of capabilities,” “including without the need for prototyping,” (iii) “agreements to support the organic industrial base,” and (iv) “agreements for prototyping of services or acquisition of services;” (D) “the need for alternative authorities or policies to more effectively and efficiently execute agreements with private sector consortia;” and (E) DOD’s ability “to monitor and report on individual awards made under consortium-based other transactions.” In conducting the review, DOD must “identify relevant issues and challenges” with using other transaction authority, “discuss the advantages and disadvantages of modifying” the authority to address the above issues and challenges, and “identify policy changes that will be made” and “make recommendations to the congressional defense committees for new or modified statutory authorities.” A report “describing activities undertaken pursuant to” § 824, “as well as issues identified, policy changes proposed, justifications for such proposed policy changes, and recommendations for legislative changes,” must be submitted to the congressional defense committees by Dec. 31, 2022.

Section 825, Reporting Requirement for Certain Defense Acquisition (i.e., Other Transaction Agreements and Task Orders) Activities—Section 825 requires DOD to “establish procedures to identify organizations performing on individual projects” for: (1) “Other transaction agreements” pursuant to 10 USCA §§ 2371 and 2371b, including, where applicable, consortium members; and

(2) “Individual task orders awarded under a task order contract,” see 10 USCA § 2304d, including “individual task orders issued to a federally funded research and development center” (FFRDC). Not later than Dec. 27, 2022, and not less than annually thereafter, DOD “shall submit to the congressional defense committees a report on the use” of such agreements and activities, and associated funding. Finally, not later than Dec. 27, 2022, DOD “shall establish procedures to collect information on” such “individual agreements and activities ... and associated funding in an online, public, searchable database,” unless such disclosure is “inappropriate for individual agreements based on national security concerns.”

Section 831, Technology Protection Features Activities—Section 831 amends 10 USCA § 2357, which requires the secretary of defense to “carry out activities to develop and incorporate technology protection features in a designated system during the research and development phase of such system.” Section 2357 defines “technology protection features” to mean “technical modifications necessary to protect critical program information, including anti-tamper technologies and other systems engineering activities intended to prevent or delay exploitation of critical technologies in a designated system.” Section 2357(b) requires that “[a]ny contract for the design or development of a system resulting from” the activities described above “for the purpose of enhancing or enabling the exportability of the system, either for the development of program protection strategies for the system or the design and incorporation of exportability features into the system, shall include a cost-sharing provision that requires the contractor to bear half of the cost of such activities, or such other portion of such cost as the Secretary considers appropriate upon showing of good cause.” Section 831 provides that the secretary may deem the portion of the costs that the contractor must bear to be “allowable independent research and development [(IR&D)] costs [see FAR 31.205-18] under the regulations issued under” 10 USCA § 2372 if the system at issue received Milestone B approval and DOD determines that treating the costs as allowable IR&D costs would further the purposes of 10 USCA § 2357.

Section 832, Modification of Enhanced Transfer of Technology Developed at DOD Laboratories—This section extends to Dec. 31, 2026 the authority under FY 2014 NDAA § 801 (as amended by FY 2016 NDAA § 818) permitting

the secretaries of defense and the military departments to authorize DOD laboratory heads to “grant nonexclusive, exclusive, or partially exclusive licenses, royalty free or for royalties or for rights to other intellectual property, for computer software and its related documentation developed at a DOD laboratory.” Section 832 also amends FY 2014 NDAA § 801 to require the secretary of defense to “develop and implement a plan to collect and analyze data on the use of” the authority under FY 2014 NDAA § 801 to develop and share best practices and provide information to the secretary and congress on the use of the authority and related policy issues. The secretary must report to the congressional defense committees on the use of the FY 2014 NDAA § 801 authority by Dec. 31, 2025.

Section 833, Pilot Program on Acquisition Practices for Emerging Technologies—By June 25, 2022, the secretary of defense, acting through the under secretary of defense for acquisition and sustainment, must establish a pilot program “to develop and implement unique acquisition mechanisms for emerging technologies in order to increase the speed of transition of emerging technologies into acquisition programs or into operational use.” In carrying out the program, the under secretary must: “identify, and award agreements to, not less than four new projects supporting high-priority defense modernization activities, consistent with the National Defense Strategy, with consideration given to—(A) offensive missile capabilities; (B) space-based assets; (C) personnel and quality of life improvement; (D) energy generation and storage;” and (E) other activities as determined by the under secretary. For each such project, the under secretary must “develop a unique acquisition plan ... that is significantly novel from standard [DOD] acquisition practices,” including the use of: (i) alternative price evaluation, independent cost estimation, and market research methods; (ii) “continuous assessment of performance metrics to measure project value for use in program management and oversight;” (iii) “alternative intellectual property strategies, including activities to support modular open system approaches ... and reduce life-cycle and sustainment costs;” and (iv) “other alternative practices.” The under secretary must execute the “significantly novel” acquisition plans and award agreements in an expedited manner, and notify the congressional defense committees

30 days before termination if agreements awarded under the pilot program are to be terminated. Additionally, the under secretary must determine if existing authorities are sufficient to carry out the § 833 pilot program and, if not, submit recommendations for statutory reforms to the congressional defense committees.

The under secretary must also “establish mechanisms ... to waive, upon request, regulations, directives, or policies of [DOD], a military service, or a Defense Agency with respect to a project awarded an agreement under” the pilot program if the under secretary determines that the waiver will further the purposes of the pilot program, unless the waiver would be prohibited by federal statute or common law. Section 833 further requires the under secretary to establish a pilot program advisory group to advise on the “selection, management and elements of projects,” the collection of data on use of the program, and the termination of agreements under the program.

The pilot program cannot be established until after completion of a plan to collect and analyze data

on its execution, and evaluate lessons learned from the program. Beginning in June 2022, DOD must brief the congressional defense committees on the development of the program’s plans and its execution. The program will terminate on the earlier of the date on which each project has been completed or had all agreements awarded to such project terminated, or Dec. 27, 2026.



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FEATURE COMMENT: The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II

On Dec. 27, 2021, President Biden signed into law the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021, P.L. 117-81. Because of the substantial number of procurement law changes in the FY 2022 NDAA, this Feature Comment summarizes the more important changes in two parts. Part I, which appeared in the January 19 issue of THE GOVERNMENT CONTRACTOR, addressed §§ 801–833. See 64 GC ¶ 17. Part II addresses §§ 834–877, plus certain procurement law related sections that appear in Titles I, II, III, X, XIV, XV and XVI of the FY 2022 NDAA.

Section 834, Pilot Program to Accelerate the Procurement and Fielding of Innovative Technologies—Subject to availability of appropriations, this section requires the secretary of defense to “establish a competitive, merit-based pilot program to accelerate the procurement and fielding of innovative technologies by ... (1) reducing acquisition or life-cycle costs; (2) addressing technical risks; (3) improving the timeliness and thoroughness of test and evaluation outcomes; and (4) rapidly implementing such technologies to directly support defense missions.” No later than Dec. 27, 2022, the secretary must issue guidelines for operation of the program, which must provide for: (1) “[t]he issuance of one or more solicitations for proposals” by the Department of Defense, with a priority for technologies developed by small busi-

nesses or nontraditional defense contractors; and (2) a process for review of the proposals received by DOD, “the merit-based selection of the most promising cost-effective proposals,” and “the procurement of goods or services offered by such a proposal through contracts, cooperative agreements, other transaction authority, or by another appropriate process.” Awards under the pilot program with a value greater than \$50 million require approval from the secretary or designee. The secretary may not provide funding under the pilot program until after DOD completes a plan for carrying out data collection and submits the plan to the congressional defense committees.

On or before March 1 and September 1 of each program year, DOD must submit a biannual report to the congressional defense committees on the pilot program. The Joint Explanatory Statement (JES) directs DOD “to ensure that each biannual report include: (1) [a]n explanation of how grants, contracts, or other agreements made under the pilot met mission requirements ... , including the value of each grant, contract, or other agreement; a description of the technology funded ... ; and the estimate of future costs for the successful transition of such technology to implementation” within DOD; (2) a “description of the capabilities tested ... and the proposed path to implement such capabilities;” and (3) a “list and detailed description of lessons learned from the pilot.”

Section 835, Independent Study on Technical Debt in Software-Intensive Systems—By May 1, 2022, the secretary of defense must “enter into an agreement with a federally funded research and development center [FFRDC] to study technical debt in software-intensive systems.” “Technical debt” “means an element of design or implementation that is expedient in the short term, but that would result in a technical context that can make a future change costlier or impossible.” The study must “include

analyses and recommendations, including actionable and specific guidance and any recommendations for statutory or regulatory modifications, on”: (1) “[q]ualitative and quantitative measures which can be used to identify a desired future state for software-intensive systems” and “assess technical debt”; (2) “[p]olicies for data access to identify and assess technical debt and best practices for software-intensive systems to make such data appropriately available for use;” (3) “[f]orms of technical debt which are suitable for objective or subjective analysis”; (4) “[c]urrent practices of [DOD] software-intensive systems to track and use data related to technical debt”; (5) “individuals or organizations that should be responsible for the identification and assessment of technical debt, including the organization responsible for independent assessments”; (6) “[s]cenarios, frequency, or program phases during which technical debt should be assessed”; (7) “[b]est practices to identify, assess, and monitor the accumulating costs [of] technical debt”; (8) “[c]riteria to support decisions by appropriate officials on whether to incur, carry, or reduce technical debt”; and (9) “[p]ractices for [DOD] to incrementally adopt to initiate practices for managing or reducing technical debt.”

The JES expects “that this study will both inform future guidance for programs on the current ‘software acquisition pathway’ as well as for all programs to support adoption of modern, iterative software approaches.” No later than March 1, 2022, DOD must provide the congressional defense committees an initial briefing “on activities undertaken and planned to conduct the study ..., including any barriers to conducting such activities and the resources to be provided to conduct such activities.” DOD must also provide an interim briefing on the analyses and recommendations resulting from the study no later than 12 months after entering into an agreement with a FFRDC to conduct the study. Additionally, within 18 months after entering into that agreement, DOD must submit to the congressional defense committees a report on the study, and subsequently must provide these committees a final briefing.

Section 836, Cadre of DOD Software Development and Acquisition Experts—Pursuant to this section, not later than Jan. 1, 2023, DOD is required to “establish a cadre of personnel who are experts in software development, acquisition, and sustainment to improve the effectiveness of [DOD’s] ...

programs or activities” in those areas. The under secretary of defense for acquisition and sustainment shall: (1) “ensure the cadre has the appropriate number of members;” (2) “establish an appropriate leadership structure and office within which the cadre shall be managed;” and (3) “determine the appropriate officials to whom members of the cadre shall report.” “In establishing the cadre, the under secretary shall give preference to [DOD] civilian employees.” Funding, career path and training are provided for cadre members by this section.

As we previously reported, FY 2018 NDAA § 802 provided for the establishment of a cadre of DOD personnel who are *experts in intellectual property* (IP) matters. See Schaengold, Prusock and Muenzfeld, Feature Comment, “The Fiscal Year 2018 NDAA’s Significant Impact On Federal Procurement Law—Part I,” 60 GC ¶ 1. DOD, however, was slow to establish the cadre and implement § 802’s other IP requirements, which caused Congress to include in the FY 2020 NDAA a provision requiring a report on the cadre’s progress and threatening to withhold certain funding to DOD if sufficient progress was not promptly made. 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; see also “Defense Acquisitions: DOD Should Take Additional Actions to Improve How It Approaches Intellectual Property,” GAO-22-104752 (Nov. 30, 2021), www.gao.gov/assets/gao-22-104752.pdf. As a result, it appears likely that Congress will carefully monitor DOD’s progress with respect to this new cadre.

Section 841, Modernization of Acquisition Processes to Ensure Integrity of Industrial Base—This section amends 10 USCA § 2509, which requires DOD to “streamline and digitize” its “approach for identifying and mitigating risks to the defense industrial base.” 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 (discussing FY 2020 NDAA § 845). Section 2509 requires that DOD “assess the extent to which existing systems of record relevant to risk assessments and contracting” produce, expose and maintain “valid and reliable data for the purposes of [DOD’s] continuous assessment and mitigation of risks in the defense industrial base.” Section 841 adds an additional element to the assessments under 10 USCA §

2509, which provides that, in connection with these assessments, DOD must “develop capabilities to map supply chains and to assess risks to the supply chain for major end items by business sector, vendor, program, part, and other metrics.” This requirement responds to the recommendations of the House Armed Services Committee, Defense Critical Supply Chain Task Force (July 2022), https://armedservices.house.gov/_cache/files/e/5/e5b9a98f-9923-47f6-a5b5-ccf77ebbb441/7E26814EA08F7F701B16D4C5FA37F043.defense-critical-supply-chain-task-force-report.pdf.

The JES further observes that:

We expect the assessment to include the extent to which technologies can provide for a map of supply chains that supports analysis, monitoring, and reporting with respect to high-risk subcontractors and risks to such supply chains; and technologies [that] could assist in the assessment of risks to the supply chains by business sector, vendor, program, part, service, or technology. The assessment should also identify the organizations responsible for implementation of and overall operation of the system and for data collection, management, and analyses; a schedule and milestones for procurement and deployment of technologies; resources required for procurement and deployment of technologies, including personnel and funding; implementation risks for procurement and deployment of technologies and plans to mitigate risks to the defense industrial base; and identification of any required updates to policy, guidance, or legislation to support efficient and effective execution of activities under this section.

The JES also recommends that DOD “consider the development of a database to integrate the current disparate data systems that contain defense supply chain information, and to help provide for consistent availability, interoperability, and centralized reporting of data to support efficient mitigation and remediation of identified supply chain vulnerabilities.” The JES notes that the secretary “should ensure that the systems are scalable so as to support multiple users, include robust cybersecurity capabilities, and are optimized for information-sharing and collaboration.”

Section 841 eliminated FY 2020 NDAA § 845’s requirement for DOD to submit an implementation plan and report on implementation framework, which

were due on March 20, 2020, and March 20, 2021, respectively. However, the JES states that Congress continues to “await receipt of the plan and report” that were due March 20, 2020 and March 20, 2021, and directs the secretary to “provide a briefing, not later than June 1, 2022, to the congressional defense committees with an update on the framework implementation as required” by 10 USCA § 2509, and the assessment required by subsection (e)(B)(ii) of that section, as amended by FY 2022 NDAA § 841.

Section 841 also eliminated FY 2020 NDAA § 845’s requirement for the Government Accountability Office to provide a briefing and submit periodic assessments to the congressional defense committees. But the JES directs GAO “to submit to the congressional defense committees the two remaining periodic assessments of [DOD’s] progress in implementing the framework ... not later than March 15, 2022, and March 15, 2024, as originally required” under FY 2020 NDAA § 845.

Section 842, Modification to Analyses of Activities for Action to Address Sourcing and Industrial Capacity—Section 842 amends FY 2021 NDAA § 849, which 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 (e.g., restricting sources to U.S. suppliers or prohibiting procurement from certain sources or nations) 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 10 USCA Chapter 148 (“National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion”), the Buy American Act, and the Defense Production Act. See Schaengold, Schwartz, Prusock and Muenzfeld, Feature Comment, “The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part II,” 63 GC ¶ 24 (discussing FY 2021 NDAA § 849). Section 842 expands the list of high priority goods and services for analyses and recommended actions to include beef products, molybdenum and molybdenum alloys, optical transmission equipment (including optical fiber and cable equipment), armor on tactical ground vehicles, graphite processing, and advanced AC-DC power converters. No later than Jan. 15, 2023, § 842 requires DOD to provide an interim brief to the

congressional defense committees on DOD’s analyses, recommendations, and “descriptions of specific activities undertaken as a result of the analyses, including schedule and resources allocated for any planned actions” for items that were added to the high priority list by § 842.

Section 847, Plan and Report on Reduction of Reliance on Services, Supplies, or Materials from North Korea, China, Russia, and Iran—Under this section, in consultation with the State Department, DOD “shall develop and implement a plan to” (1) “reduce the reliance of the United States on services, supplies, or materials obtained from sources located in geographic areas controlled by” North Korea, China, Russia, and Iran; and (2) “mitigate the risks to national security and the defense supply chain arising from the reliance of the United States on such sources for services, supplies, or materials to meet critical defense requirements.” Not later than Dec. 27, 2023, the “Secretary of Defense shall submit to the congressional defense committees a report describing the plan.”

Section 848, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region (XUAR) of China—Under this section, “[n] one of the funds authorized to be appropriated by [the FY 2022 NDAA] or otherwise made available for [FY] 2022 for” DOD “may be obligated or expended to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of a ‘poverty alleviation’ or ‘pairing assistance’ program.” Not later than May 28, 2022, DOD “shall issue rules to require a certification from offerors for [DOD] contracts ... stating the offeror has made a good faith effort to determine that forced labor from XUAR ... was not or will not be used in the performance of such contract.”

On this subject, the JES issued scathing comments about the Chinese government:

We find that the ongoing abuses against Uyghurs and members of other ethnic and religious minority groups constitute genocide ... and crimes against humanity ... and attribute these atrocity crimes ... to the People’s Republic of China, under the direction and control of the Chinese Communist Party. We condemn this genocide and these crimes against humanity in the strongest terms and call upon the President to direct the U.S. Permanent Representative to the

United Nations to [take appropriate action] ... [including] all possible actions to bring this genocide and these crimes against humanity to an end and hold the perpetrators of these atrocities accountable under international law.

Section 851, Modifications to Printed Circuit Board Acquisition Restrictions—Section 851 amends 10 USCA § 2533d, which prohibits DOD from acquiring certain printed circuit boards from China, Russia, Iran, or North Korea. Section 851 delays the implementation of this prohibition from Jan. 1, 2023 to Jan. 1, 2027. Section 851 also changes the definition of a covered printed circuit board from a partially manufactured or complete bare printed circuit board or fully or partially assembled printed circuit board designated by the secretary of defense based on a determination that the designation is required to support national security to a “specified type” of partially manufactured or complete bare printed circuit board or fully or partially assembled printed circuit board that is a component of “(i) a defense security system; or (ii) a system, other than a defense security system, that transmits or stores information and which the Secretary identifies as national security sensitive in the contract under which such printed circuit board is acquired.”

“Defense security system” “means an information system (including a telecommunications system) used or operated by” DOD, a DOD contractor, or another organization on behalf of DOD, “the function, operation, or use of which” involves “command and control of an armed force” or “equipment that is an integral part of a weapon or weapon system,” or “is critical to the direct fulfillment of military missions,” not including systems that will “be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).” “The term ‘specified type’ means a printed circuit board that is—(A) a component of an electronic device that facilitates the routing, connecting, transmitting or securing of data and is commonly connected to a network, and (B) any other end item, good, or product specified by the” secretary through regulations, which must provide for notice and comment of not less than 12 months.

The secretary may exempt commercial products and services and commercially available off-the-shelf items from the requirements of 10 USCA § 2533d through regulations. Section 851 further provides that, in carrying out § 2533d, the secretary

must, to “the maximum extent practicable, avoid imposing contractual certification requirements with respect to the acquisition of commercial products, commercial services, or commercially available off-the-shelf items.”

Section 851 also amends FY 2021 NDAA § 841 by modifying the “Independent Assessment” requirements. Not later than March 27, 2022, DOD must enter into a contract under which an assessment is conducted of the benefits and risks of expanding the prohibition in 10 USCA § 2533d(a) and the definitions in 10 USCA § 2533d(c) to include printed circuit boards in commercial products or services, or in commercially available off-the-shelf products or services. The assessment must also include analysis and recommendations regarding the types of systems, other than defense security systems, that should be subject to the prohibition in 10 USCA § 2533d(a).

Section 853, Additional Testing of Commercial E-commerce Portal Models—Section 846 of the FY 2018 NDAA directed the General Services Administration administrator to “establish a program to procure commercial products through commercial e-commerce portals for purposes of enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products.” See Schaengold, Prusock and Muenzfeld, Feature Comment, “The Fiscal Year 2018 NDAA’s Significant Impact On Federal Procurement Law—Part II,” 60 GC ¶ 9 (quoting § 846(a)); see also 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 (concerning FY 2020 NDAA § 827’s amendment of FY 2018 NDAA § 846(c)).

Under § 853, FY 2018 NDAA § 846(c) is amended by adding requirements to the Government’s program to procure commercial products through e-commerce portals. First, not later than June 25, 2022, the GSA administrator “shall”: (A) “begin testing commercial e-commerce portal models (other than any such model selected for the initial proof of concept)[;]” and (B) submit to the congressional defense (and other relevant) committees, “a report that includes”: “(i) a summary of the assessments conducted ... with respect to [the previously identified] commercial e-commerce portal model”; “(ii) a list of the types of commercial products that could be procured using models

[previously] tested pursuant to [§ 846(c)(2)(A)]”; “(iii) an estimate of the amount that could be spent by” an agency “under the program”; and “(iv) an update on the models [previously] tested pursuant to [§ 846(c)(2)(A)] and a timeline for [testing] completion.”

Second, “[u]pon completion of” the “testing” discussed above and “before taking any action with respect to the commercial e-commerce portal models tested,” the GSA administrator shall submit to the congressional defense (and other relevant) committees “a report on the results of such testing that includes”:

(A) an assessment and comparison of commercial e-commerce portal models with respect to: (i) price and quality of the commercial products supplied ... ; (ii) supplier reliability and service; (iii) safeguards for the security of Government information and third-party supplier proprietary information; (iv) protections against counterfeit commercial products; (v) supply chain risks, particularly with respect to complex commercial products; and (vi) overall adherence to Federal procurement rules and policies; and

(B) an analysis of the costs and benefits of the convenience to the Federal Government of procuring commercial products from each such commercial e-commerce portal model.

Section 854, Requirement for Industry Days and Requests for Information to be Open to Allied Defense Contractors—Under this section, by March 27, 2022, “each service acquisition executive shall implement a requirement that industry days and requests for information regarding [DOD] acquisition programs and research and development efforts,” “to the maximum extent practicable,” “shall be open to defense contractors of the national technology and industrial base [(NTIB)].” As the JES notes, the NTIB is comprised of the U.S., the U.K., Canada, and Australia. See 10 USCA § 2500(1); see also Schaengold, Schwartz, Prusock and Muenzfeld, Feature Comment, “The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part II,” 63 GC ¶ 24 (discussion of NTIB in FY 2021 NDAA §§ 846, 848, 849).

This openness to non-U.S. NTIB “defense contractors” is subject to “reciprocal access for United States companies to equivalent information related to con-

tracting opportunities in the associated country that is part of the [NTIB].” This section also applies “when such [NTIB] contractors are acting as subcontractors in partnership with a United States contractor.”

On this subject, the JES states that:

We support deeper, more meaningful expansion of the [NTIB], comprised of the United States, Canada, the United Kingdom, and Australia. [DOD] should leverage the NTIB to shape policy and partnerships with allies. The value of such broad collaboration with the NTIB allies goes beyond acquisition; the network can be a test bed for closer international cooperation and supply chain resiliency. *NTIB countries and other close allies and partners face challenges with over-reliance on Chinese and Russian suppliers.* Effective policy to reduce the associated supply chain vulnerabilities requires meaningful, sustained dialogue and collaboration. [Emphasis added.]

Section 855, Employment Transparency Regarding Individuals Who Perform Work in China—Under this section, which becomes effective on July 1, 2022, DOD “shall require each covered entity to disclose to the Secretary of Defense if the entity employs one or more individuals who will perform work in the People’s Republic of China [PRC] on a” DOD contract or subcontract valued in excess of \$5 million “when the entity submits a bid or proposal for such covered contract.” For FYs 2023 and 2024, each DOD covered contractor will be required to “disclose” if it “employs one or more individuals who perform work in the [PRC] on any such contract.” Such disclosure shall include a “description of the physical presence in the” PRC “where work on the covered contract will be performed” and the “total number of such individuals” performing such work in the PRC.

A “covered entity” means “any corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity, including any subsidiary thereof, performing work on a” DOD contract or subcontract valued in excess of \$5 million “in the [PRC], including by leasing or owning real property used in [contract] performance” in the PRC. Such disclosure, however, (i) does not apply to “contracts for commercial products or services,” and (ii) “shall not be required to the extent that the Secretary determines that such disclosure would not be in the interest of national security.”

DOD is prohibited from awarding “a covered contract to, or renew[ing] a covered contract with, a covered entity unless such covered entity has submitted” these disclosures. Beginning in January 2023, the secretary “shall provide to the congressional defense committees semi-annual briefings that summarize the disclosures received by [DOD] over the previous 180 days.”

Section 863, Protests and Appeals Relating to Eligibility of Business Concerns—Under this section, not later than two days after a “final determination” is made “that a business concern does not meet the requirements of the status”—e.g., size, Historically Underutilized Business Zone (HUBZone), veteran-owned, women-owned—“such concern claims to hold,” “such concern or the [Small Business Administration] Administrator, as applicable,” “shall update” the concern’s status “in the System for Award Management.” To the extent that “such concern fails to [timely] update” its “status,” “not later than 2 days after such failure the [SBA] Administrator shall make such update.” A “concern required to make [such] an update ... shall notify a contracting officer for each contract with respect to which such concern has an offer or bid pending of the determination,” “if the concern finds, in good faith, that such determination affects the eligibility of the concern to perform such a contract.” It will be interesting to see how often business concerns and the SBA are able to fulfill these two-day deadlines.

Section 864, Authority for the Office of Hearings and Appeals to Decide Appeals Relating to Qualified HUBZone Small Business Concerns—Under this section, no later than Dec. 27, 2022, the SBA administrator “shall issue a rule authorizing [SBA’s] Office of Hearings and Appeals [OHA] to decide all appeals from formal protest determinations in connection with the status of a concern as a qualified HUBZone small business concern.” Pursuant to 13 CFR § 126.805, HUBZone appeals currently are decided by the SBA’s associate administrator, Office of Government Contracting and Business Development (AA/GC&BD) or her/his designee. This change ensures such appeals will be decided by an Administrative Judge and that a body of (publicly available) case law is developed. As a result of this section, all four of the SBA’s major socioeconomic preference programs (i.e., 8(a), service-disabled veteran-owned small business, women-owned small business/economically disadvantaged

WOSB and HUBZone) will allow for appeals to OHA.

Section 866, Report on Cybersecurity Maturity Model Certification (CMMC) Effects on Small Business—Under this section, not later than June 25, 2022, “DOD shall submit to the congressional defense” and small business committees “a report on the effects of [DOD’s] CMMC ... on small business concerns.” This report shall include: (1) “the estimated costs of complying with each level of the framework based on verified representative samples of actual costs of compliance [for] small business concerns and an explanation of how these costs will be recoverable by such small business concerns;” (2) “the estimated change in the number of small business concerns that are part of the defense industrial base resulting from the implementation and use of the framework;” (3) “explanations of how [DOD] will—(A) mitigate negative effects to such small business concerns resulting from the implementation and use of the framework;” (B) “ensure small business concerns are trained on the requirements for passing a third-party assessment, self-assessment, or Government-assessment” “for compliance with the relevant level of the framework;” and (C) “work with small business concerns and nontraditional defense contractors” “to enable” them “to bid on and win [DOD] contracts ... without first having to risk funds on costly security certifications;” and (4) DOD’s “plan” for “oversight of third parties conducting assessments of compliance with the applicable protocols under the framework.”

Section 873, Independent Study on Environmental/Resource Efficient Acquisition Practices and Policies—Under this section, no later than March 27, 2022, DOD “shall enter into an agreement with a [FFRDC] under which such [FFRDC] shall conduct a study on [certain] acquisition practices and policies.” The study “shall identify the knowledge and tools needed for the [DOD] acquisition workforce” to: (1) “engage in acquisition planning practices that assess the cost, resource, and energy preservation differences resulting from selecting environmentally preferable goods or services;” (2) “engage in acquisition planning practices that promote the acquisition of resilient and resource-efficient goods and services and that support innovation in environmental technologies;” (3) “employ source selection practices that promote the acquisition of resilient and resource-efficient goods and services and that support innovation in

environmental technologies”; and (4) “consider external effects, including economic, environmental, and social, arising over the entire life cycle of an acquisition when making acquisition planning and source selection decisions.” Not later than Dec. 27, 2022, the FFRDC “shall submit” to the secretary of defense “a report on the results of the study,” which the secretary then must submit “an unaltered copy” of to the congressional defense committees within 30 days “along with any comments” the secretary may have concerning the report.

Section 875, Guidance, Training, and Report on Place of Performance Contract Requirements—Under this section, no later than July 1, 2022, DOD “shall”: (1) “issue guidance on covered contracts [i.e., DOD contracts specifying the place of performance] to ensure that, to the maximum extent practicable,” such contracts “avoid specifying an unnecessarily restrictive place of performance[;]” (2) “implement any necessary training for appropriate individuals relating to the guidance[;]” and (3) submit to the congressional defense committees a report on such covered contracts. The report “shall include”: (A) “A description of the criteria that is considered when [DOD] specifies a particular place of performance in a” contract; (B) The number of covered contracts awarded during each of FY 2016 through FY 2020; and (C) “An assessment of the extent to which revisions to guidance or regulations related to the use of covered contracts could improve [DOD’s] effectiveness and efficiency ..., including a description of such revisions.”

Section 877, Report on Requests for Equitable Adjustment in Department of the Navy—No later than Feb. 25, 2022, this section requires “the Secretary of the Navy [to] submit to the congressional defense committees a report describing in detail the processing of requests for equitable adjustment [REAs] by” the Navy between Oct. 1, 2011 and Dec. 27, 2021, including “progress by components within the” “Navy in complying with the covered directive.” The “covered directive” refers to the March 20, 2020 “directive of the Assistant Secretary of the Navy for Research, Development, and Acquisition,” entitled “(Intent and Direction) Withholds and Retentions During COVID-19,” which “requir[es]”: (1) “payment to contractors of all settled [REAs];” and (2) “the expeditious resolution of all outstanding [REAs].”

At a minimum, the report “shall include”: (1) “The number of [REAs] submitted between”

Oct. 1, 2011 and Dec. 27, 2021. (2) “The components within the Department of the Navy to which each such [REA] was submitted.” (3) “The number of [REAs] outstanding as of [Dec. 27, 2021].” (4) “The number of [REAs] settled but not paid as of [Dec. 27, 2021,] including a description of why each such [REA] has not been paid.” (5) “A detailed explanation of the efforts by the Secretary of the Navy to ensure compliance of components within” the Navy “with the covered directive.”

This section is directed at the timeliness of the Navy’s processing, review, resolution and payment of REAs since and because of the advent of Covid-19. However, the more than 10-year period of REA review required suggests that Congress may be concerned about Navy problems with processing, reviewing, resolving and paying REAs outside of and that predate Covid-19. Historically, some would argue that the Navy has had some issues with resolving on the merits and paying REAs. See, e.g., *Bath Iron Works Corp. v. U.S.*, 27 Fed. Cl. 114 (1992); 34 GC ¶ 724, *aff’d*, 20 F.3d 1567 (Fed. Cir. 1994); 36 GC ¶ 171.

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A review of certain non-Title VIII FY 2022 NDAA provisions important to procurement law follows:

Section 146, Review and Briefing on Fielded Major Weapon Systems—This section requires DOD, by March 1, 2023, to conduct a review and brief the congressional defense committees on how DOD manages risk to ensure fielded major weapon systems funded in the most recent future-years defense program meet current and emerging threats, and how it identifies systems for modernization or replacement. The JES directs DOD to provide information on fielded major weapon systems replaced or divested since Jan. 1, 2010, expected to be divested by Dec. 31, 2025, and planned for upgrade and replacement over the same (2010-2025) period. The JES also directs GAO to assess and report on DOD’s briefing to Congress.

Section 232, Pilot Program on Data Repositories to Facilitate DOD’s Development of Artificial Intelligence (AI) Capabilities—This section authorizes DOD (through the Joint Artificial Intelligence Center (JAIC) and its Chief Data Officer) to conduct a pilot program establishing data libraries containing DOD data sets related to developing AI software and technology and to allow public and private sector organizations to access

the libraries to help develop AI models and software for DOD. The section further requires DOD to brief the congressional defense committees by September 2022 on the status of this pilot program.

Section 334, DOD’s Climate Resilience in Planning, Engagement Strategies, Infrastructure, and Force Development—This section requires DOD to incorporate current and emerging climate and environmental concerns in acquisition, budgeting, sustainment, force development, and other functions. It also requires DOD to assess the impact of climate and extreme weather on missions, and to submit a report to the House and Senate Armed Services Committees not later than Dec. 27, 2022 (and every five years thereafter) on the strategic and operational impacts of “extreme weather.”

Section 1004, Commission on Planning, Programming, Budgeting, and Execution (PPBE) Reform—Section 1004 establishes an independent commission in the legislative branch consisting of civilians (not employed by the Federal Government) who are appointed by the chairs and ranking members of the Armed Services Committees, Appropriations Committees, House and Senate leadership, and DOD. The commission is charged with examining the “effectiveness of” the PPBE and related processes, and making legislative and policy recommendations to improve such practices. The commission is required to submit an interim report by Feb. 6, 2023, and a final report by Sept. 1, 2023.

FY2022 NDAA Requires DOD to Closely Review Its Legacy and Duplicative IT Systems—

- *Section 1003, Plan for Consolidation of Information Technology Systems Used in DOD PPBE Process*, requires DOD to submit to the congressional defense committees a plan to consolidate the IT systems used to manage the PPBE process.
- *Section 1522, Legacy Information Technologies and Systems Accountability*, requires the military departments to: (i) initiate identification of legacy applications, software, and IT and eliminate those that are no longer needed, and (ii) submit a report to the congressional defense committees detailing the identified technology that is no longer required and the plan for discontinuing the use and funding of the obsolete technology.
- *The JES, Report on Duplicative Information Technology Contracts*, at 209, directs DOD (no

later than May 31, 2022) to submit a report to the congressional defense committees on efforts to reduce duplicative IT contracts.

Section 1411, Acquisition of Strategic and Critical Materials from the NTIB—This section amends the Strategic and Critical Materials Stock Piling Act, 50 USCA § 98 et seq., by requiring that if domestic sources are unavailable for stocking the strategic and critical materials stockpile, priority for sourcing should be given to the non-U.S. countries in the NTIB (i.e., the U.K., Canada and Australia).

Title XV—Cyberspace-Related Matters—The FY 2022 NDAA includes 39 sections in Title XV. A number of these sections are related to defense acquisition and the Defense Industrial Base. Significantly, provisions in the House FY 2022 NDAA bill that would have required notification of cyber breaches were not included in the final NDAA.

Section 1526, Assessment of Controlled Unclassified Information Program—This section requires DOD to develop a new framework to enhance cybersecurity for the Defense Industrial Base. The framework is to include the extent to which DOD identifies whether information is Controlled Unclassified Information (CUI) via a contracting vehicle (and marking such information clearly) and under what circumstances commercial information is considered CUI.

Section 1521, Enterprise-wide Procurement of Cyber Data Products and Services—This section requires DOD to designate an executive agent and establish a program office to manage DOD-wide procurements of cyber data products and services. Program office responsibilities include conducting market research, developing model contract language for acquisitions, procuring cyber data products and services for DOD, and implementing relevant DOD and U.S. Cyber Command policies related to acquisition of cyber data products and services. Notably, beginning in June 2023, § 1521 generally prohibits DOD components from independently procuring cyber data products or services without approval of the new program office.

Section 1525, Cybersecurity of Weapon Systems—Section 1525 requires DOD to submit annual reports on the Strategic Cybersecurity Program, see FY 2018 NDAA § 1640, starting no later than Aug. 30, 2022, with the reporting requirement sunset in 2024.

Section 1528, Zero Trust Strategy, Principles, Model Architecture, and Implementation Plans—This section requires DOD, no later than September 2022, to develop a zero trust strategy and a model architecture to be implemented across DOD's information network, including classified networks, operational technology, and weapon systems. Within one year of the zero trust strategy, principles, and model architecture being finalized, the section requires the head of each military department and DOD component to submit to the DOD Chief Information Officer and the Commander of Joint Forces Headquarters-DOD Information Network a draft plan to implement the strategy, principles, and model architecture across their networks. Each military service is also required to include in the annual budget certification an assessment of the adequacy of funding to implement the zero trust strategy. The section requires multiple briefings to the congressional defense committees through Jan. 1, 2030.

Section 1533, Report on the CMMC—Section 1533 requires DOD to submit a report to the House and Senate Armed Services Committees on CMMC, to include the rulemaking strategy, required budget, and responsibilities of prime contractors for managing subcontractor cybersecurity. Notably, the report “shall include” plans for: (i) reimbursing small and nontraditional businesses for CMMC cybersecurity compliance expenses, and (ii) ensuring that those seeking a DOD contract “for the first time are not required to expend funds to acquire cybersecurity capabilities and a [CMMC] certification required to perform under a contract as a precondition for bidding” “without reimbursement in the event that” no contract is received.

Section 1548, CyberSentry Program at the Cybersecurity and Infrastructure Security Agency (CISA)—This section amends Title XXII of the Homeland Security Act of 2002 by requiring CISA to establish a “CyberSentry” program to provide continuous monitoring and detection of cybersecurity risks to critical infrastructure and requires CISA, by Dec. 27, 2022, to provide a report to the congressional Homeland Security Committees on implementation of the program.

Section 1607, Programs of Record of Space Force and Commercial Capabilities—This section requires that prior to establishing a program of record, the service acquisition executive (SAE) for space systems shall determine whether existing or

planned commercially available capabilities could meet all or part of the program requirements. If it is determined that commercial capabilities can fulfill at least some of the requirements, the SAE must submit a notification of the results of determination to the congressional defense committees. The section clarifies that DOD “may not rely solely on the use of commercial satellite services and associated systems to carry out operational requirements” necessary to conduct strategic and tactical operations unless DOD mitigates the vulnerability of relying solely on commercial capabilities. The section further requires the Air Force to have a FFRDC, which “is not closely affiliated with the Air Force or the Space Force,” assess the extent of DOD’s reliance on commercial satellite systems.

Section 1684, Determination on Certain Activities with Unusually Hazardous Risks—

This section requires DOD to report to Congress on contractor requests for indemnification for contracts with “unusually hazardous risks” that are received for FY 2022 and 2023. “Unusually hazardous risk” is defined as “risk of burning, explosion, detonation, flight or surface impact, or toxic or hazardous material release associated with” specified products or programs, including hypersonics, rocket propulsion, high-energy propellants, and certain classified programs. According to the JES, “this provision seeks to ensure that [DOD] gives full consideration to appropriate requests for indemnification of programs with unusually hazardous risks.”

Unpassed § 802 of the House FY 2022 NDAA Bill, Special Emergency Reimbursement Authority—Section 802 of the House version of the NDAA contained a provision that would have created a permanent authority similar to that contained in § 3610 of the CARES Act (P.L. 116-136), by granting DOD the authority to cover certain contractor costs that keep key personnel in a ready state when they are unable, through no fault of their own, to perform work due to a declared pandemic. While the provision was not adopted in the final FY 2022 NDAA, the JES directed DOD to provide a briefing and a report to the congressional defense committees regarding DOD’s use of § 3610 of the CARES Act, to include “[a]n assessment of the extent to which making permanent this authority or similar authority would be in the national security interest.”



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