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FEATURE COMMENT: The FY 2023 National Defense Authorization Act's Impact On Federal Procurement Law—Part I

On Dec. 23, 2022, nearly three months after the Oct. 1, 2022 start of Fiscal Year 2023, the James M. Inhofe National Defense Authorization Act (NDAA) for FY 2023, P.L. 117-263, was signed into law by President Biden, becoming the 62nd consecutive fiscal year that a NDAA has been enacted. Signing the NDAA in December is not unusual, with five of the last seven NDAAs becoming law in December and the FY 2021 NDAA becoming law even later—on Jan. 1, 2022. In the last 47 fiscal years, the NDAA has been enacted on average 43 days after the fiscal year began, see Congressional Research Service (CRS) Insight IN11985 (Dec. 29, 2022), *FY2023 NDAA: Status of Legislative Activity*, at 3, and the FY 2023 NDAA (enacted 86 days after the beginning of FY 2023) increased the average delay. The FY 2019 NDAA is the only NDAA since 1997 to become law before the start of its fiscal year, which we like to view as a testament to Senator 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.

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*; see CRS In Focus IF10515, *Defense Primer: The NDAA Process* (Nov. 23, 2022), at 1. The FY 2022 and FY 2023 NDAAs had a more pronounced influence on the appropriations process than usual. In both years, the House Appropriations Committee voted out a defense budget that hewed closely to the president's budget request. The initial NDAA bills that were passed by the House and reported out of the Senate Armed Services Committee (SASC) for FYs 2022 and 2023 called for defense spending increases, as subsequently did the Senate Appropriations Committee. The authorized budgets contained in the enacted NDAAs ultimately proved to be close to where the final appropriations bill ended up. The FY 2023 NDAA authorized defense spending of approximately $45 billion higher than the president's budget request. The Consolidated Appropriations Act, 2023, P.L. 117-328, which the president signed into law on Dec. 29, 2022, followed suit, also appropriating approximately $45 billion above the president's request.

Another similarity between the FY 2022 and FY 2023 NDAAs is that in both years the House passed its version of the NDAA but the Senate was unable to pass the bill that was reported out favorably by the SASC. As a result, there was no formal conference and the committees held an "informal conference," with the basis of negotiations being the House-passed bill, the Senate bill as reported out of the SASC, and filed Senate amendments agreed to by the SASC's Chair and Ranking Member that would likely have been in a Manager's Package.

This year's NDAA could also be referred to as the Omnibus Authorization Act. Of the 4,408 pages in the bill, 2,543 pages (58 percent) are dedicated to authorizations and legislation for other federal agencies not traditionally in a NDAA.

The FY 2023 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 55 provisions addressing procurement matters. This is modestly less than the past four NDAAs: the FY 2022, 2021, 2020, and 2019 NDAAs contained 57, 63, 78, and 71 Title VIII provisions, respectively. Although the impact and importance of a NDAA on federal procurement law should not be measured simply on the total number of procurement provisions, the FY 2023 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAAs (e.g., 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 below, certain provisions in other titles of the FY 2023 NDAA are very important to procurement law.

Some of the FY 2023 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, 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.

As to major themes, the FY 2023 NDAA broadly focuses on China, the Defense Industrial Base, cybersecurity and software, and efforts to streamline the acquisition process (including commercial buying). These themes can be seen in various procurement-related provisions and are a continuation of themes in last year's NDAA. These themes were driven in part by the bipartisan and bicameral focus on China. This focus is about more than security, it is about decoupling, and is driving policy from industrial base and supply chain to cybersecurity and software acquisition.

Industrial base and supply chain are among the most prominent themes of the NDAA, with provisions focused on industrial mobilization and supply chain management (§ 859), stockpiling strategic and critical materials (§§ 1412 and 1414), gaining visibility into supply chains (§ 857), and prohibiting purchases from China, Russia, North Korea, and Iran (§§ 817, 855, 857, and 5949). Within the industrial base, this year's NDAA portrayed a subtle shift from a "Buy American" to a more "buy allies" policy approach (§§ 851 and 852). This shift appears to be consistent with DOD and administration actions (i.e., adding Lithuania and seeking to add Austria as qualifying countries for purposes of the Buy American Act), if not completely consistent with the administration's rhetoric on Buy American as a pillar of U.S. policy.

Another area of focus is cybersecurity (§§ 1514, 1553 and 5921) and software (§§ 241 and 846), but some of the more aggressive provisions were dropped from the final bill. Streamlining efforts focused primarily, but not exclusively, on other transaction authority (§§ 842 and 843) and commercial buying (§§ 153, 161, and 803). There was more legislation relating to major systems than in recent years, with provisions aimed at readiness and life-cycle costs (§§ 351 and 806), contract types (§§ 808 and 815) and reporting requirements on portfolio management and modular open systems architecture in the Senate report to accompany S. 4543.

In his signing statement, President Biden took issue with several provisions in the FY 2023 NDAA that he believes raise "concerns" or "constitutional concerns or questions of construction." See www.whitehouse.gov/briefing-room/statements-releases/2022/12/23/statement-by-the-president-on-h-r-7776-the-james-m-inhofe-national-defense-authorization-act-for-fiscal-year-2023/. None of these provisions, which concern (among other issues) limitations on the transfer of Guantánamo Bay detainees, possible disclosure of classified and other highly confidential information, and possible interference with the exercise of the president's "authority to articulate the positions of the United States in international negotiations or fora," is likely to have a significant impact on procurement law or policy.

Because of the substantial volume of procurement law changes in the FY 2023 NDAA, this Fea-

ture Comment summarizes the more significant changes in two parts. Part I addresses §§ 801–843 (plus § 525), below. Part II, which will be published on Jan. 25, 2023, addresses §§ 846–884, plus sections in Titles I, III, IX, XII, XIV, XV and LIX.

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 2023 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," but as they also did last year, "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 2023 NDAA] bill. Instead, leaders of the" House and Senate Armed Services Committees "negotiated a bicameral agreement based on the two versions." CRS Insight IN11985 (Dec. 29, 2022), *FY2023 NDAA: Status of Legislative Activity*, at 1. Nevertheless, FY 2023 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[.]"

Section 525, Rescission of COVID-19 Vaccination Mandate—Before reviewing the more important procurement law related sections, we briefly address § 525, which has received considerable media attention. While not directly related to procurement policy or law, it provides that within 30 days of the FY 2023 NDAA's enactment, "the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 *pursuant to the memorandum dated August 24, 2021, regarding 'Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members.'* " (Emphasis added.) We quote in large part (and italicize part of) this provision because, one way to read it (admittedly, literally) is that, while the secretary must rescind the COVID-19 vaccination requirement within 30 days, the secretary could potentially reinstate it in the future through a new memorandum. While the FY 2023 NDAA provides no such relief to federal contractors and subcontractors, federal agencies are not currently enforcing the vaccine mandate against contractors/subcontractors. See www.saferfederalworkforce.gov/contractors/.

Section 803, Data Requirements for Commercial Products for Major Weapon Systems—Section 803 amends 10 USCA § 3455 by granting the DOD authority to obtain significantly more data to support commercial product determinations for aspects of major weapon systems. For subsystems, components, or spare parts of major weapon systems proposed as commercial products that have not been previously determined commercial, the offeror must (i) "identify the comparable commercial product the offeror sells to the general public or nongovernmental entities that serves as the basis for" asserting that the product is "of a type customarily used … for purposes other than governmental purposes"; (ii) submit a comparison of the physical characteristics and functionality of the proposed subsystem, components or spare part and the comparable commercial product to serve as the basis for the "of a type" assertion; and (iii) provide the national stock number for the comparable commercial product and the proposed subsystem, component, or spare part. "If the offeror does not sell a comparable commercial product … that can serve as the basis for an 'of a type' assertion," the offeror must (1) "notify the contracting officer in writing"; and (2) submit a comparison of the physical characteristics and functionality of the proposed subsystem, component, or spare part and "the most comparable commercial product" to serve as the basis of the "of a type" assertion.

For procurements where certified cost or pricing data is required because there was not adequate price competition that resulted in at least two viable bids, an offeror must submit or provide access to "a representative sample" of prices paid for the same or similar commercial products under comparable terms and conditions by both Government and commercial customers, as well as "the terms and conditions of such sales" to the extent necessary to determine the reasonableness of the price for a major weapon system or subsystem, component, or spare part thereof. If the CO determines that the offeror does not have access to and cannot provide information meeting these requirements sufficient to determine price reasonableness, the offeror must submit "a representative sample … of the prices paid for the

same or similar commercial products sold under different terms and conditions, and the terms and conditions of such sales."

If the CO determines that the sales data submitted is insufficient to determine price reasonableness, the offeror may be required to submit other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

The JES states that COs "need access to sufficient information to assess commercial item assertions and price reasonableness determinations" to make decisions related to firm-fixed price sole source contracts. The JES notes that "Senate Report 116-48 accompanying S. 1790," which was the FY 2020 NDAA, required the under secretary for acquisition and sustainment "to submit an annual report detailing instances where potential contractors have denied contracting officer requests for uncertified cost or pricing data to allow for the determination of fair and reasonable pricing of DOD acquisitions." The JES states Congress has "found these 'data denials' reports to be illuminating[.]" The JES directs the under secretary to continue submitting this annual report to the congressional defense committees and to make "appropriate portions of these reports available to the leadership of companies named in such reports" so they are "(1) Aware they are named in the report; (2) Have an opportunity to provide amplifying information to [DOD] related to such reported instances; and (3) Take timely corrective actions to address internal compliance procedures as appropriate." The JES indicates that Congress believes this transparency about the reports could be "instrumental to breaking down barriers of communication between industry and DOD officials at various levels of responsibility." See DFARS 242.1502 (requiring DOD past performance evaluations in the Contractor Performance Assessment Reporting System to "include a notation on contractors that have denied multiple requests for submission of data other than certified cost or pricing data over the preceding 3-year period, but nevertheless received an award").

Section 804, Revision of Authority to Allow DOD Rapid Acquisition and Deployment of Capabilities Needed Under Specified High-Priority Circumstances—This section codifies and resolves inconsistencies between the rapid acquisition authorities from FY 2003 NDAA § 806 and FY 2011 NDAA § 804, as amended. Consistent with FY 2011 NDAA § 804, the procedures for urgent acquisition and deployment of capabilities needed in response to urgent operational needs may be used for capabilities that "(i) can be fielded within a period of two to 24 months; (ii) do not require substantial development effort; (iii) are based on technologies that are proven and available; and (iv) can appropriately be acquired under fixed-price contracts." The procedures also can be used for capabilities "that can be developed or procured under" the "rapid fielding acquisition pathway or the rapid prototyping acquisition pathway authorized under" FY 2016 NDAA § 804. 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. In certain situations, this section has a "goal of awarding a contract for the acquisition of the capability within 15 days" and provides the authority for the waiver of certain laws or regulations that "would unnecessarily impede the urgent acquisition and deployment of such capability."

Section 805, Treatment of Certain Clauses Implementing Executive Orders—Section 805 amends 10 USCA § 3862 ("Requests for Equitable Adjustment or Other Relief: Certification") to clarify that "unilateral insertion" of a clause implementing an executive order into an existing DOD contract or other transaction agreement by a CO is considered a directed change subject to the Changes clause in the underlying contract or other transaction agreement. The description of these changes as a "directed change" is in contrast to an "administrative change," which is defined at FAR 43.101 to "mean[] a unilateral (see [FAR] 43.103(b)) contract change, in writing, that does not affect the substantive rights of the parties (*e.g.,* a change in the paying office or the appropriation data)." This section confirms that contractors are entitled to submit a request for equitable adjustment for compensation and/or a schedule adjustment for the cost of compliance when new clauses implementing EOs are unilaterally incorporated into their existing DOD contracts.

Section 805 defines the "Changes clause" to mean "the clause described in [FAR] part 52.243-4 … or any successor regulation." This may cause some

confusion because, while other transaction agreements may (but often do not) include some form of a Changes clause, the FAR does not apply to such agreements and they may not include FAR 52.243-4.

This section was an effort to address the challenges surrounding the Government's attempted insertion into certain federal contracts of COVID-19 contractor/subcontractor vaccination requirements (e.g., FAR 52.223-99; DFARS 252.223-7999) pursuant to EO 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (Sept. 9, 2021). As a result of court injunctions and other issues, current administration guidance is that federal agencies should not enforce contract clauses implementing EO 14042.

Section 805 also requires the secretary of defense to revise the DFARS and applicable policy guidance on other transactions to implement this requirement by April 2023.

Section 807, Amendments to Contractor Employee Protections from Reprisal for Disclosure of Certain Information—Section 807 clarifies that the whistleblower protections for contractor employees under 10 USCA § 4701 and 41 USCA § 4712 also apply to grantees, subgrantees, and personal services contractors. The JES indicates that § 807 "expand[s] the applicability" of those statutes to include grantees, subgrantees, and personal services contractors. Both statutes already prohibited employees of contractors, subcontractors, grantees, subgrantees, and personal service contractors from being "discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to" certain persons or entities (including an office of inspector general) gross mismanagement of a contract or grant, a gross waste of federal funds, an abuse of authority or violation of law, rule, or regulation related to a contract or grant, or a substantial and specific danger to public health or safety. However, certain parts of 10 USCA § 4701 only specified that they applied to contractors, and certain parts of 41 USCA § 4712 did not include personal services contractors. The amendments clarify that contractors, subcontractors, grantees, subgrantees, and personal service contractors are subject to all of the provisions in both statutes. Additionally, this section amends both statutes to permit agencies to consider disciplinary or corrective action against Government officials as a remedy for an unlawful reprisal.

The JES notes that "questions have emerged" as to whether the whistleblower protections apply to disclosures made to the Council of the Inspectors General on Integrity and Efficiency (CIGIE) Integrity Committee, Pandemic Response Accountability Committee (PRAC), and Special Inspector General for Pandemic Recovery. "Given this ambiguity," the JES directs the Government Accountability Office "to review the extent to which such protections apply to disclosures to the PRAC, Special Inspector General for Pandemic Recovery, and the CIGIE Integrity Committee." The JES directs that the review include analysis of "(1) The number and disposition of disclosures received by the PRAC, Special Inspector General for Pandemic Recovery, and the CIGIE Integrity Committee since March 2020; and (2) Whether any of the whistleblowers who made such disclosures have also claimed retaliation and the outcomes of those claims." The JES directs GAO to brief the congressional armed services committees on the results of the review by September 2023.

Section 811, Inclusion in Budget Justification Materials of Enhanced Reporting on Proposed Cancellations and Modifications to Multiyear Contracts—Section 811 amends 10 USCA § 239c(b), which requires the secretary of defense to include in DOD's budget justification materials a proposal for any multiyear DOD contract authorized under 10 USCA § 3501 that an agency head intends to cancel or enter into a "covered modification" (i.e., a modification that will reduce the quantity of end items to be procured). Section 811 requires that any such proposal include a "detailed explanation of the rationale for the proposed cancellation or covered modification of the multiyear contract."

Section 813, Extension of Defense Modernization Account Authority—Section 813 permanently extends the authority for the Defense Modernization Account.

Section 814, Clarification to Fixed-Price Incentive Contract References—This section amends 10 USCA § 3458(c)(2) ("Authority to Acquire Innovative Commercial Products and Commercial Services Using General Solicitation Competitive Procedures") and FY 2017 NDAA § 832 ("Contractor Incentives to Achieve Savings and Improve Mission Performance"). 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 FY 2017 NDAA § 832). As the JES explains, the amendment is intended to "correct the imprecise use of the term 'fixed-price incentive fee' contract and replace it with 'fixed-price incentive,' " which is used at FAR 16.204 and throughout the DFARS.

Section 815, Modification of Reporting Requirement for Requests for Multiyear Procurement Authority for Large Defense Acquisitions—Section 815 amends 10 USCA § 3501(i)(2) to eliminate the requirement that DOD include in requests to carry out multiyear defense acquisition procurements a confirmation that the preliminary agency head findings supporting the use of multiyear procurement contracts were supported by a preliminary cost analysis conducted by DOD's director of cost assessment and program evaluation.

Section 816, Modification of Provision Relating to Determination of Certain Activities with Unusually Hazardous Risks—FY 2022 NDAA § 1684, Determination on Certain Activities with Unusually Hazardous Risks, required, among other things, DOD to report to Congress on contractor indemnification requests for contracts with "unusually hazardous risks" received by DOD for FYs 2022 and 2023 and to provide a detailed study of various indemnification and insurance issues related thereto. See Schaengold, Schwartz, Prusock and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part I," 64 GC ¶ 17. Section 816 extends (i) this requirement to include FY 2024, and (ii) the DOD report due date to Congress on certain DOD indemnification issues, depending upon the circumstances, to as late as December 2024.

The JES observed that:

> *We remain concerned with the lack of resolution regarding open indemnification requests* related to the Conventional Prompt Strike program, other weapons programs, and the associated planned employment platforms. We note these delays *could lead to significant delivery delays for both Navy and Army hypersonic weapons programs, the next block of Virginia-class submarines, and other programs.*
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> We are also concerned with inconsistencies across the military services regarding implementation of [10 USCA § 2354, renumbered as 10 USCA § 3861, "Research and Development Contracts: Indemnification Provisions"], and EO 10789 [providing authority for certain P.L. 85-804, see 50 USCA Chap. 29, extraordinary contractual actions]. Further, *we note that the report provided to the congressional defense committees by the Under Secretary of Defense for Acquisition and Sustainment did not fully respond to the requirements of section 1684 of the [FY 2022 NDAA]*, particularly regarding:
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> > (1) A determination of the extent to which each Service Secretary is implementing [10 USCA § 3861], and [EO] 10789 consistently, and
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> > (2) Identification of discrepancies across the military departments with respect to such implementation. [Emphasis added.]

As a result, the JES "direct[ed] the Secretary of Defense to provide a report to the congressional defense committees not later than February 28, 2023, that fully responds to these requirements." The JES to FY 2022 NDAA § 1684 requires GAO to research and submit a comprehensive report on DOD's indemnification of programs that include unusually hazardous risks, including all aspects of the insurance market (e.g., availability of such insurance). This report, which is due by Feb. 1, 2023, could be of significant interest to those defense (and other) contractors impacted by "unduly hazardous risks," plus DOD, NASA, Department of Homeland Security, Department of Energy and insurance companies and other interested parties (e.g., investors) and counsel.

Section 817, Modification to Prohibition on Operation or Procurement of Foreign-Made Unmanned Aircraft Systems—Section 817 amends FY 2020 NDAA § 848 ("Prohibition on Operation or Procurement of Chinese Unmanned Aircraft Systems"), 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, by expanding the prohibition on operating or procuring unmanned aircraft systems to include Russia, Iran, and North Korea (in addition to China). This will prevent contractors from providing or using unmanned aircraft systems from these prohibited countries in a DOD contract. It also prohibits DOD from contracting with an

entity that (i) operates equipment that is from DaJiang Innovations (or any subsidiary or affiliate); (ii) produces or provides unmanned aircraft systems and is included on the Consolidated Screening List, see www.trade.gov/consolidated-screening-list; or (iii) domiciles in, or is subject to the control or influence of, China, Russia, Iran, or North Korea. No later than June 2023, DOD is required to issue a policy for due diligence review and an appeal process for affected contractors. The prohibition becomes effective on Oct. 1, 2024.

Section 818, Extension of Pilot Program to Accelerate Contracting and Pricing Processes—Section 818 extends FY 2019 NDAA § 890's pilot program for an additional year, from Jan. 2, 2023 to Jan. 2, 2024. FY 2019 NDAA § 890, as amended by FY 2021 NDAA § 1831(j)(7) and FY 2020 NDAA § 825, required DOD to "establish a pilot program to reform and accelerate the contracting and pricing processes associated with contracts in excess of" $50 million by (1) "basing price reasonableness determinations on actual cost and pricing data for purchases of the same or similar products for" DOD, and (2) "reducing the cost and pricing data to be submitted in accordance with" 10 USCA Chap. 271. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part II," 60 GC ¶ 340 (discussing FY 2019 NDAA § 890).

Section 820, Extension and Modification of Never Contract with the Enemy—FY 2015 NDAA §§ 841–43 address requirements for never contracting with the enemy. FY 2015 NDAA § 841 requires the secretary of defense to "establish in each covered combatant command a program to identify persons or entities," that (1) "provide funds received under a covered contract, grant, or cooperative agreement … directly or indirectly to a covered person or entity [i.e., the enemy]"; or (2) "fail to exercise due diligence to ensure that none of the funds received under a covered contract, grant, or cooperative agreement … are provided directly or indirectly to a covered person or entity." Section 841 further provides authority to prevent contracting with the enemy and severely penalize those contractors, subcontractors, grantees and subgrantees that do so. The origins and substance of Never Contract with the Enemy are discussed in detail in Schaengold, Ralph and Prusock, Feature Comment, "The Impact Of The FY 2015 National Defense Authorization Act On Federal Procurement—Part II," 57 GC ¶ 58.

Section 820: (i) reauthorizes § 841 through Dec. 31, 2025; (ii) reestablishes, starting with FY 2023, the Office of Management and Budget's reporting requirements to Congress on the use of § 841 with reporting expanded to include (a) "[s]pecific examples where the authorities … cannot be used to mitigate national security threats posed by vendors" supporting DOD "because of the restriction on using such authorities only with respect to contingency operations," and (b) a "description of the policies ensuring that oversight of the use of the authorities … is effectively carried out by a single office [under the under secretary for acquisition and sustainment]"; and (iii) amends FY 2015 NDAA § 842 to reestablish for each of FYs 2023 through 2025 OMB's duty to report to Congress on the use of § 842's authority, which concerns the Government's access to "examine any records of the contractor, the recipient of a grant or cooperative agreement, or any subcontractor or subgrantee … to the extent necessary to ensure that funds, including goods and services, available under the contract, grant, or cooperative agreement are not provided directly or indirectly to a covered person or entity." See DFARS 252.225.7993, Prohibition on Providing Funds to the Enemy; DFARS 252.225.7975, Additional Access to Contractor and Subcontractor Records; 2 CFR pt. 183, Never Contract with the Enemy; Special Inspector General for Afghanistan Reconstruction, "Contracting with the Enemy: DOD Has Not Fully Implemented Processes Intended to Prevent Payments to Enemies of the United States" (SIGAR 22-29 Audit Report, June 2022), www.sigar.mil/pdf/audits/SIGAR-22-29-AR.pdf.

Section 822, Modification of DOD Contracts to Provide Extraordinary Relief Due to Inflation Impacts—P.L. 85-804, which is codified at 50 USCA §§ 1431–35, "empowers the President to authorize agencies [principally DOD] exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense." FAR 50.101-1(a). The FAR further refers to P.L. 85-804 as "extraordinary authority," FAR 50.101-2(b), that

may involve an "amendment without consideration that increases the contract price or unit price." FAR 50.102-1(c); see FAR 50.103-2(a); see also DFARS subpt. 250.1.

Section 822, which amends 50 USCA § 1431, is limited to DOD contracts. More specifically, this section provides that the secretary of defense, "acting pursuant to a Presidential authorization": (i) "may … make an amendment or modification to an eligible [i.e., DOD] contract *when, due solely to economic inflation, the cost to a prime contractor of performing such eligible contract is greater than the price of such eligible contract*," and (ii) "*may not request consideration from such prime contractor for such amendment or modification*." (Emphasis added.)

Section 822 further provides that a "prime contractor may submit" a "request for an amendment or modification to" a DOD contract "*when, due solely to economic inflation, the cost to a covered subcontractor of performing an eligible [DOD] subcontract is greater than the price of such" subcontract*. (Emphasis added.) The prime contractor is required to certify that it: (a) "will remit to" the "subcontractor the difference … between the original price of such eligible contract and the price of such eligible contract if … an amendment or modification" is made, and (b) "will not require" the "subcontractor to pay additional consideration or fees related to such amendment or modification." If for some reason a prime contractor does not or will not make such a request, "a covered subcontractor may submit to a [DOD] contracting officer" such a request.

"Any adjustment or modification made" to a contract or subcontract shall (i) "be contingent upon the continued performance, as applicable, of such" contract or subcontract; and (ii) "account only for the actual cost of performing such" contract or subcontract, which may include "indirect costs of performance, as the Secretary of Defense determines appropriate." "Only amounts specifically provided by an appropriations Act for the purposes detailed in" the section can be used to fund these economic inflation adjustments or modifications. Not later than 90 days after the enactment of such an Appropriations Act, DOD is required to issue implementing guidance. This inflation adjustment or modification authority is effective from Dec. 23, 2022 through Dec. 31, 2023. This section also increases the dollar thresholds above which senior agency official approval is required.

Relatedly, FY 2023 NDAA § 1003, Annual Report on Budgetary Effects on Inflation, requires DOD to provide a report to the congressional defense committees on "observed and anticipated budgetary effects related to inflation" within 30 days of submission of the president's budget, and to brief these committees within 60 days of the mid-year budget review. These reports are required to include, inter alia, a "summary of any requests for equitable adjustment, exercising of economic price adjustment [EPA] clauses, or bilateral contract modifications to include an EPA, including the contract type[.]"

As to § 822, the JES provides:

> We recognize that higher than anticipated economic inflation continues to challenge the budgeting and execution processes of [DOD] and defense industrial base (DIB). *The ability of [DOD] and DIB to adapt to economic conditions is a critical factor in maintaining the health of the DIB, especially when economic conditions are unusually volatile and in regard to firm fixed price contracts where industry bears the predominant financial risk.*
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> While it is important for [DOD] to uphold and enforce contractual terms and conditions, *we believe [DOD] should be provided tailored authority to engage extraordinary measures to address extraordinary economic impacts. …* When unanticipated extraordinary economic events disrupt those [financial] plans and decisions, the result can be catastrophic for the DIB, including economic hardship, bankruptcy, and consolidation.
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> In order to support a robust DIB, we believe [DOD] needs additional temporary authorities to respond to the effects of recent and current inflation levels. We believe these authorities coupled with funding to mitigate inflation impacts will enable [DOD] to provide a measure of relief to the DIB where appropriate. [Emphasis added.]

Section 835, Curricula on Software Acquisitions and Cybersecurity Software or Hardware Acquisitions for Covered Individuals—Section 835 requires the Defense Acquisition University (DAU) president to develop "training curricula related to software acquisitions and cybersecurity software or hardware acquisitions and

offer such curricula … to increase digital literacy related to such acquisitions by developing the ability of … covered individuals to use technology to identify, critically evaluate, and synthesize data and information related to such acquisitions." By June 2023, the secretary of defense, in consultation with the DAU president, must submit to Congress a comprehensive plan to implement the curricula, which must be offered to covered individuals (i.e., DOD personnel in positions designated as "acquisition positions" pursuant to 10 USCA § 1721 "who are regularly consulted for software acquisitions or cybersecurity software or hardware acquisitions") by DAU within one year after plan submission.

Section 841, Guidelines and Resources on the Acquisition or Licensing of Intellectual Property—This section amends 10 USCA § 3791 to require the secretary of defense, through the under secretary for acquisition and sustainment, to develop guidelines and resources for acquiring or licensing intellectual property (IP). The guidelines and resources must include (A) strategies and other mechanisms supporting the use of modular open system approaches; "(B) evaluation and negotiation of [IP] licenses in competitive and non-competitive awards;" and "(C) models and best practices for specially negotiated licenses, including specially negotiated licenses" for technical data to support the product support strategy of a major weapon system or subsystem. Additionally, the guidelines and resources must include "definitions, key terms, examples, and case studies that clarify differences between—(i) detailed manufacturing and process data; (ii) form, fit, and function data; (iii) data required for operations, maintenance, installation, and training; (iv) modular system interfaces"; and "(v) technical data pertaining to an interface between an item or process and other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process (or a functionally equivalent item or process) with, other items or processes." In developing the guidelines and resources, DOD must "review the applicable statutory and regulatory history, including among the definitions and key terms in" 10 USCA § 3771, "to ensure consistency" and "regularly consult with appropriate government and industry persons and organizations."

Section 842, Modification of DOD's Authority to Carry Out Certain Prototype Projects—This section clarifies that non-competitive follow-on production contracts or transactions for prototype projects may be awarded even if the solicitations for the prototype project did not explicitly state that non-competitive follow-on production contracts or transactions could be awarded, provided that (1) competitive procedures were used for the selection for participation in the transaction for the prototype project; and (2) the participants successfully completed the prototype project. Section 842 also lowers the level of approval required for follow-on production contracts or transactions in excess of $100 million. The approving officials include "(A) a service acquisition executive; (B) the Director of the Defense Advanced Research Projects Agency; (C) the Director of the Missile Defense Agency;" and (D) the under secretaries for acquisition and sustainment, and for research and engineering. Prior to the FY 2023 NDAA's enactment only those under secretaries could approve follow-on production contracts or transactions in excess of $500 million.

Section 843, Other Transaction Authority Clarification—This section amends 10 USCA § 4022 to expand DOD's other transaction authority by substituting "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of *personnel of the [DOD] and improving [platforms*]" for the more limiting "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of *military personnel and the supporting [platforms]*." (Emphasis added.) As a result of this italicized substitution, these other transaction agreements can be used to enhance "mission effectiveness" of all DOD personnel with respect to carrying out "prototype projects." Prototype projects are broadly defined, with the JES observing that "[t]he list of prototype project types … is not meant to be restrictive, and should not be read to change the intent or purpose of the glossary entry in the [DOD] Other Transaction Guide."

This section also provides that the secretary of defense, or of a military department, "may establish a pilot program under which" DOD "carr[ies] out prototype projects that are directly relevant to enhancing the ability of [DOD] to prototype the design, development, or demonstration of new construction techniques or technologies to improve military installations or facilities[.]" In carrying

out such prototype projects, "not more than two prototype projects may begin to be carried out per fiscal year" and "the aggregate value of all transactions entered into under [this] pilot program may not exceed $200,000,000." Except with respect to protype projects being "carried out" (i.e., in progress) on Sept. 30, 2025, this authority expires on that date.

Notably, the JES for this section further states:

> To make the best use of the authority in this section, we strongly encourage [DOD] *to invest in continuous and experiential education for management, technical, and contracting personnel, as well as attorneys, to understand how to effectively and innovatively use other transaction authority and explore flexible means to achieve mission results more quickly and with more value added.* [Emphasis added.]

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FEATURE COMMENT: The FY 2023 National Defense Authorization Act's Impact On Federal Procurement Law—Part II

On Dec. 23, 2022, President Biden signed into law the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, P.L. 117-263. Because of the substantial volume of procurement law changes in the FY 2023 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I, which was published in the Jan. 18, 2023 issue of THE GOVERNMENT CONTRACTOR, 65 GC ¶ 7, addressed §§ 801–843 (plus § 525). Part II addresses §§ 846–884, plus sections in Titles I, III, IX, XII, XIV, XV and LIX.

Section 846, Report on Software Delivery Times—Not later than December 2023, the under secretary of defense for acquisition and sustainment, in consultation with the Department of Defense chief information and chief digital and artificial intelligence officers, must submit a report to the congressional defense committees that describes "covered software" delivered during the fiscal year "that is being developed using iterative development, including a description of the capabilities delivered for operational use." "Covered software" means software that is being developed that (A) was acquired using a "software acquisition pathway" established 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; "or (B) is a covered defense business system," as defined in 10 USCA § 2222(i). For covered software being developed using iterative development, the report must include "the frequency with which capabilities of such covered software were delivered," broken down by covered software for which capabilities were delivered in (i) less than three months; (ii) more than three months and less than six months; (iii) more than six months and less than nine months; (iv) more than nine months and less than twelve months. With respect to covered software using iterative development for which capabilities were not delivered in less than twelve months, the report must explain why such delivery did not occur. Additionally, for covered software that was not developed using iterative development, the report must explain why it was not used and describe the development method used.

For purposes of § 846, "iterative development" has the same meaning as "agile or iterative development" under FY 2018 NDAA § 891 (i.e., "acquisition pursuant to a method for delivering multiple, rapid, incremental capabilities to the user for operational use, evaluation, and feedback not exclusively linked to any single, proprietary method or process," and that involves "the incremental development and fielding of capabilities" and "continuous participation and collaboration by users, testers, and requirements authorities.").

A related provision, § 241, Costs Associated with Underperforming Software and Information Technology, requires DOD to submit annual reports to the congressional defense committees describing software delivered during the preceding year, to include whether software was developed iteratively

and the software delivery times. These reports are required to be submitted starting in December 2023 through Dec. 31, 2028.

Section 851, Modification to the National Technology and Industrial Base—This section adds New Zealand to the list of countries included in the national technology and industrial base (NTIB), which was previously limited to the U.S., Canada, United Kingdom, and Australia. See Schaengold, Schwartz, Prusock and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II," 64 GC ¶ 22 (discussing FY 2022 NDAA §§ 854 & 1411).

Section 852, Modification to Miscellaneous Limitations on the Procurement of Non-U.S. Goods—Section 852 amends 10 USCA § 4864, which limits certain procurements (e.g., for buses, components for naval vessels and auxiliary ships, satellite components) to domestic or NTIB sources. See Schaengold, Schwartz, Prusock and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II," 64 GC ¶ 22 (discussion of NTIB in FY 2022 NDAA §§ 854 & 1411); 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). Section 852 requires DOD to review the limitations on procuring specified items, and submit to the congressional defense committees a determination of whether such limitations should be continued, modified, or terminated. The determination should include the findings from the review and key justifications for the recommendation. The first review should be conducted by Nov. 1, 2024, and subsequently every five years. The review must include the criticality of the item reviewed to a military unit's mission accomplishment or other national security objectives, the extent to which such item is fielded in current programs of record, the number of such items to be procured by such current programs, and whether cost and pricing data for such item has been deemed fair and reasonable.

Section 855, Codification of Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Section 855 amends 10 USCA Chap. 363 and codifies much of FY 2022 NDAA § 848, see Schaengold, Schwartz, Prusock and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II," 64 GC ¶ 22, making permanent the prohibition on DOD procuring certain items from the Xinjiang Uyghur Autonomous Region (XUAR). Specifically, "[n]one of the funds authorized to be appropriated by a [NDAA] or any other Act, or otherwise made available for any fiscal year 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." See CRS In Focus IF10281, *China Primer: Uyghurs* (Jan. 6, 2023).

FY 2022 NDAA § 848 required DOD to "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." Section 855 removes the certification requirement, but retains the requirement that offerors must make a good faith effort to determine that forced labor from XUAR will not be used in contract performance. By June 2023, DOD shall issue a policy requiring offerors or awardees to "make a good faith effort to determine that forced labor from XUAR … will not be used in the performance of such contract."

A related provision, § 651, Prohibition of the Sale of Certain Goods from the Xinjiang Uyghur Autonomous Region in Commissaries and Exchanges, prohibits DOD from knowingly allowing commissaries or military exchanges to sell items that are mined, produced, or manufactured by forced labor from the XUAR region, or to sell items from entities that use certain types of labor (i.e., as part of a "poverty alleviation" or "pairing assistance" program) within the XUAR region.

Section 856, Codification of DOD Mentor-Protégé Program—This section makes permanent the defense mentor-protégé program, which was originally authorized as a pilot program in FY 1991 NDAA § 831 and has been extended multiple times. 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 (discussing

FY 2020 NDAA § 872); Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part II," 58 GC ¶ 28 (discussing FY 2016 NDAA § 861). The now permanent program will be codified at 10 USCA § 4092. The amendments to the DOD Mentor-Protégé program by § 856 do not apply to mentor-protégé agreements entered into before the FY 2023 NDAA's enactment.

Section 856 reduces the value of DOD contracts that a mentor firm must have during the fiscal year preceding the fiscal year in which the mentor firm enters into a mentor-protégé agreement from $100 million to $25 million. Section 856 also reinstates the three-year program participation term that was in place prior to the FY 2020 NDAA's enactment, which reduced it to two years. 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 (discussing § 872).

Section 856 further requires that, no later than July 1, 2023, the DOD director of the Office of Small Business Programs "establish a pilot program under which a protege firm may receive up to 25 percent of the reimbursement for which the mentor firm of such protege firm is eligible under the Mentor-Protege Program for a covered activity." A "covered activity … is an engineering, software development, or manufacturing customization that the protege firm implements in order to ensure that a technology developed by the protege firm will be ready for integration with a" DOD program or system. The pilot program will terminate five years after it is established.

Section 857, Procurement Requirements Relating to Rare Earth Elements and Strategic and Critical Materials—Section 857 implements requirements relating to rare earth elements and strategic and critical materials. "Strategic and critical materials" are materials designated as such under § 3(a) of the Strategic and Critical Materials Stock Piling Act (50 USCA § 98b(a)) and include materials needed to supply U.S. military, industrial and essential civilian needs during a national emergency, and which are not found or produced in the U.S. in sufficient quantities to meet such need. See 50 USCA § 98h-3(1).

Section 857 directs the secretary of defense to require contractors to provide the origin of permanent magnets containing rare earths or strategic and critical minerals that are in systems delivered to DOD. Contractors must make a commercially reasonable inquiry and disclose where the materials were mined, refined into oxides, made into metals and alloys, and processed (i.e., sintered or bonded) and magnetized. If a contractor is unable to obtain that information, it has 180 days from delivery to DOD to institute a tracking system to make such disclosures "to the fullest extent possible," taking into account the possible refusal of foreign entities to provide information. This requirement comes into effect within 30 months of the NDAA's enactment and only after DOD certifies to the congressional armed services committees that collecting the data does not pose a national security risk.

The secretary may waive the requirements to disclose and institute a supply chain tracking system for not more than 180 days if the secretary certifies to the congressional armed services committees that the continued procurement of the system is necessary to meet the demands of a national emergency or that a contractor that cannot currently make the disclosure is "making significant efforts to comply" with the disclosure requirements. The waiver can be renewed with an updated certification to the armed services committees.

Section 857 expands the prohibition on procuring certain items from Communist Chinese military companies, found in FY 2006 NDAA § 1211, by adding rare earth elements, strategic and critical minerals or energetic materials for missiles and munitions to the prohibited items list. It also expands the covered entities to include those covered by Executive Order 13959 ("Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies"); FY 2021 NDAA § 1206H ("Reporting of Chinese Military Companies Operating in the US"); or other Chinese companies certified as covered entities by DOD. This provision will take effect 180 days after the secretary "certifies to the congressional defense committees that a sufficient number of commercially viable providers exist outside of" China "that collectively can provide [DOD] with satisfactory quality and sufficient quantity of such goods or services as and when needed at [U.S.] market prices."

Section 858, Analyses of Certain Activities for Action to Address Sourcing and Industrial Capacity—Section 858 requires the

under secretary for acquisition and sustainment to review items identified in the section and develop appropriate actions to ensure their secure domestic production and acquisition, consistent with the Defense Production Act. The items include solar components for satellites, satellite ground station service contracts, naval vessel shafts and propulsion system components, infrastructure or equipment for a passenger boarding bridge at military airports, U.S. flags, natural rubber for military applications, alternative proteins as sustainable and secure food sources, and carbon fiber. DOD is required to undertake an analysis for each item and develop recommendations, considering national security, economic, and treaty implications, as well as impacts on current and potential suppliers. By Jan. 15, 2024, DOD is required to submit to the congressional defense committees a summary of the findings, relevant recommendations, and descriptions of specific activities taken as a result of the analyses. The recommendations may include (1) restricting procurement to U.S. suppliers, suppliers in the NTIB, suppliers in other allied nations, or other suppliers; (2) increasing investment through use of research and development or procurement activities to expand production capacity, diversify sources of supply, or promote alternative approaches for addressing military requirements; or (3) prohibiting procurement from selected sources or nations.

Section 860, Risk Management for DOD Pharmaceutical Supply Chains—Section 860 implements reporting requirements for the under secretary for acquisition and sustainment and the Defense Health Agency (DHA) director. First, by December 2023, the under secretary is required to (1) develop and issue implementing guidance for risk management of DOD pharmaceutical supply chains; (2) identify, in conjunction with the Department of Health and Human Services, supply chain information gaps regarding DOD's reliance on foreign suppliers of drugs, including active pharmaceutical ingredients and final drug products; and (3) submit a report to the congressional armed services committees about the information available to assess DOD's reliance on high-risk foreign suppliers of drugs and vulnerabilities in the DOD drug supply chain. The report should also include any recommendations to address information gaps and risks related to DOD's reliance on foreign suppliers. Second, the DHA director, by one year after the actions taken by the under secretary, is required to develop and publish implementing guidance for risk management of the DOD pharmaceutical supply chain. The director should establish a working group to assess the risks to DOD's pharmaceutical supply chain, identify the pharmaceuticals most critical to beneficiary care at military treatment facilities, and establish policies for allocating DOD's scarce pharmaceutical resources if supply is disrupted.

Section 861, Strategy for Increasing Competitive Opportunities for Certain Critical Technologies—Section 861 requires DOD to submit by December 2023 to the congressional defense committees a "comprehensive strategy" to "(1) increase competitive opportunities available for appropriate United States companies to transition critical technologies into major weapon systems and other programs of record, and (2) enhance the integrity and diversity of the defense industrial base." "Appropriate United States Company" means a nontraditional defense contractor or "a prime contractor that has entered into a cooperative agreement with a nontraditional defense contractor … to pursue funding authorized by" 10 USCA §§ 4021–22 "in the development, testing, or prototyping of critical technologies." "Critical technology" means technology identified by the secretary as critical, including "(A) Biotechnology. (B) Quantum science technology. (C) Advanced materials. (D) Artificial intelligence and machine learning. (E) Microelectronics. (F) Space technology. (G) Advanced computing and software. (H) Hypersonics. (I) Integrated sensing and cybersecurity. (J) Autonomous systems. (K) Unmanned systems. (L) Advanced sensing systems. (M) Advanced communications systems."

The strategy must describe "methods to increase opportunities for appropriate United States companies to develop end items of critical technologies for major weapon systems, rapidly prototype such end items, and conduct activities that would support the transition of such end items into major weapon systems and programs of record."

Section 871, Codification of Small Business Administration Scorecard—This section codifies at 15 USCA § 644(y) the annual scorecard program for evaluating federal agency compliance with small business contracting goals. See www.sba.gov/document/support-small-business-procurement-scorecard-overview; www.sba.gov/agency-scorecards/.

Section 871 also requires additional information to be included on federal agency and Governmentwide scorecards with respect to prime contracts, including: the "number (expressed as a percentage) and total dollar amount of awards made to" women-owned small businesses, Historically Underutilized Business Zone small businesses, service-disabled veteran-owned small businesses, and 8(a) small businesses through sole-source contracts and competitions restricted to those categories of small businesses. The data for 8(a) small businesses must be "disaggregated by awards made to such concerns that are owned and controlled by individuals and awards made to such concerns that are owned and controlled by an entity."

Section 872, Modifications to the SBIR and STTR Programs—This section amends the SBIR and STTR Extension Act of 2022 (Extension Act), which President Biden signed into law on Sept. 30, 2022. Specifically, 15 USCA § 638 is amended in two places. First, as noted in Thomson Reuters Government Contracts Year in Review Conference Briefs Covering 2022, the Extension Act provided that each federal agency, which is "required to" have a Small Business Innovation Research (SBIR) or Small Business Technology Transfer (STTR) program, shall "require" each small business submitting a proposal "for a federally funded award to disclose," among other items, "whether the small business concern is wholly owned in [China] or another foreign country *of concern*." (Emphasis added.) Section 872 amends the above language by striking "of concern" (italicized above) from Subparagraph (D), which results in an assessment for that Subparagraph beyond "foreign country of concern"— defined as China, North Korea, Russia, Iran "or any other country determined to be a country of concern by the Secretary of State"—to include all "foreign countries."

Second, as also noted in the Thomson Reuters Government Contracts Year in Review Conference Briefs Covering 2022, pursuant to the Extension Act, each agency "required to" have an SBIR or STTR program "shall establish and implement a due diligence program *to assess security risks presented by small business concerns* ***seeking a federally funded award***." These due diligence programs must "assess": (a) "the cybersecurity practices, patent analysis, employee analysis, and *foreign ownership of a small business concern* ***seeking an award***, including the financial ties and obligations … of the small business concern and employees of the small business concern to a foreign country, foreign person, or foreign entity; and (b) "*awards* ***and proposals or applications*** … including through the use of open-source analysis and analytical tools, for the nondisclosures of information required under [15 USCA § 638(g)(13) concerning, e.g., various forms of foreign affiliation, including with China, Russia, North Korea and Iran]." (Emphasis added.) This statutory language requires a "due diligence program to assess security risks presented by small business concerns seeking" an award and involves the assessment of "awards and proposal or applications" by such small businesses.

Section 872 provides that "in carrying out" this "due diligence program" DOD "shall perform the assessments required" in the paragraph above: (A) "only with respect to small business concerns ***selected … as the presumptive recipient of an award***"; and (B) "prior to notifying the small business" that it has been selected for the award. (Emphasis added.) This limitation of the due diligence program to small business awardees or presumed awardees expires when the under secretary for research and engineering certifies to the" House and Senate Armed Services Committees "that an automated capability for performing the assessments required under the due diligence program" "with respect to all small business concerns seeking an award" "is operational."

Section 875, Demonstration of Commercial Due Diligence for Small Business Programs—Not later than Dec. 31, 2027, the secretary of defense must "establish a program to carry out a demonstration of commercial due diligence tools, techniques, and processes in order to support small businesses in identifying attempts by malicious foreign actors to gain undue access to, or foreign ownership, control, or influence over [(FOCI)]" a small business or any technology it is developing for DOD. The program must include (1) "identification of one or more entities to be responsible for the commercial due diligence tools, techniques, and processes" included in the demonstration and "a description of the interactions required between such entity, small businesses, and the government agencies that enforce such tools, techniques, and processes"; (2) "[a]n assessment of commercial due

diligence tools, techniques, and processes already in use by" DOD, the Army, Navy, and Air Force Offices of Small Business Programs; (3) "development of methods to analyze the commercial due diligence tools, techniques, and processes" to monitor and assess attempts by malicious foreign actors to gain undue access to, or FOCI over a small business or any technology it is developing for DOD, and "provide information on such attempts to applicable small businesses"; and (4) "development of training and resources for small businesses that can be shared directly with such businesses or through a procurement technical assistance program."

Not later than April 1, 2023, DOD must provide the congressional defense committees an interim briefing on the program and no later than March 1, 2028, DOD must submit to those committees a report on the program, including any identified attempts by malicious foreign actors, lessons learned, and recommendations for legislative actions.

Section 882, Security Clearance Bridge Pilot Program—This section requires the secretary of defense, in consultation with the director of national intelligence, to conduct a pilot program permitting the Defense Counterintelligence and Security Agency (DCSA) to sponsor personal security clearances of employees of "innovative technology companies" performing DOD contracts while the Government completes the adjudication of the companies' facility clearance applications. Section 882 defines "innovative technology company" as a nontraditional defense contractor that "provides goods or services related to" "(i) one or more of the 14 critical technology areas described in" the under secretary's Feb. 1, 2022 memorandum entitled "[Under secretary of defense for research and engineering] Technology Vision for an Era of Competition"; or "(ii) information technology, software, or hardware that is unavailable from any other entity that possesses a facility clearance." The pilot program is limited to 75 companies. Participants will be selected by the under secretary for research and engineering, in consultation with the under secretary for acquisition and sustainment and the cognizant service acquisition executive. If a participant is granted a facility clearance, DCSA will transfer the personal security clearances of its employees to the company within 30 days after the facility clearance is granted. If a participant is denied a facility clearance, DCSA will release (i.e., no longer sponsor) the personal security clearances of the participant's employees that are being held by DCSA. The pilot program terminates on Dec. 31, 2028.

Section 883, Existing Agreement Limits for Operation Warp Speed—Section 883 provides that the value of modifications to, or orders under, a contract or other agreement by DOD "on or after March 1, 2020, to address the COVID–19 pandemic through vaccines and other therapeutic measures" will not count towards "any limit established prior to March 1, 2020, on the total estimated amount of all projects to be issued under the contract or other agreement." The value of any such modification or order will still count towards meeting any guaranteed minimum value under the contract or agreement.

Section 884, Incorporation of Controlled Unclassified Information (CUI) Guidance into Program Classification Guides and Program Protection Plans—Section 884 requires the secretary of defense, acting through the under secretaries for intelligence and security, and for research and engineering, to ensure that all program classification guides for classified programs and program protection plans for unclassified programs include guidance for marking CUI. See www.dcsa.mil/mc/isd/cui/. The Joint Explanatory Statement (JES) to the FY 2023 NDAA acknowledges that DOD's "uneven application of CUI markings is particularly problematic for industry." In particular, Congress is concerned that ineffective training and oversight has led to "over-classification of entire documents and a lack of clear portion markings within documents." As a result, when programs reach their "next regularly scheduled update," guidance requiring the use of document portion markings and providing a process to ensure proper and consistent use of such markings should be added to the program classification guides and protection plans. All updates must be completed before Jan. 1, 2029. The above-referenced under secretaries must establish (1) a process to monitor progress that includes tracking all program classification guides and protection plans and the dates when updates are completed, (2) updated training for Government and contractor personnel to ensure consistent application of document portion marking guidance, and (3) a process to ensure that any identified gaps or lessons learned are incorporated into guidance and training instructions.

* * *

Certain non-Title VIII FY 2023 NDAA provisions important to procurement law include the following:

Section 153, Digital Transformation Commercial Software Acquisition—This section authorizes the Air Force to contract for commercial digital engineering and software tools and requires the Air Force to include in the FY 2024 budget request a program element for procuring and managing commercial engineering software tools. The Air Force is also required to conduct a review of commercial digital engineering and software tools and identify any commercial products that have "the potential to expedite the progress of digital engineering initiatives across the weapons system enterprise." The section further requires the Air Force to provide a report to the congressional defense committees on digital engineering and software tools by March 1, 2023.

Section 161, Increasing Air Force and Navy Use of Used Commercial Dual-Use Parts in Certain Aircraft and Engines—Section 161 requires both the Air Force and the Navy to create a process, within 180 days of the FY 2023 NDAA's enactment (i.e., by June 2023), to use remanufactured or used commercial dual-use parts for certain aircraft and engines. When acquiring such parts, the military departments are required to use full and open competition among suppliers providing Federal Aviation Administration approved parts.

Section 351, Resources for Meeting Materiel Readiness Metrics for Major Defense Acquisition Programs—This section amends 10 USCA § 118 to require DOD's director of cost assessment and performance evaluation to provide the congressional defense committees, within five days of the secretary of defense's submission of materials in support of the president's annual budget request, an estimate of operation and maintenance budget requirements (at the subactivity group level) necessary to meet materiel readiness objectives across the "Future Years Defense Program." See Congressional Research Service In Focus IF10831, *Defense Primer: Future Years Defense Program (FYDP)* (Dec. 23, 2022), at 1. This requirement is to be phased in over the next two years, and fully implemented for all major weapon systems within five days of DOD providing Congress supporting materials for the FY 2026 budget request.

Section 1244, Temporary Authorizations Related to Ukraine and Other Matters—In this section, Congress gives DOD specific authorities that can be used for contracts, subcontracts, transactions, or modifications to provide support to Ukraine, support to allies providing support to Ukraine, or to build or replenish stocks. According to the JES, DOD "would benefit from temporary acquisition flexibilities to increase [DOD's] stocks of critical munitions, provide material and related services to allies and partners that have supported Ukraine, and provide material and services to Ukraine." These authorities include using the special emergency procurement authority in 41 USCA § 1903, waiving the provisions in 10 USCA § 3372(a) & (c) related to undefinitized contractual actions, and exempting (as appropriate) certified cost and pricing data requirements in 10 USCA § 3702. These authorities terminate Sept. 30, 2024.

Section 1244 also provides multiyear procurement authority for specified munitions and as additions to existing contracts. According to the JES,

> providing multi-year procurement authority for certain munitions programs is essential to increase [DOD's] stocks of such munitions, improve warfighting readiness, provide the defense industrial base with predictable production opportunities and firm contractual commitments, ensure consistent funding across the [DOD's] Future Years Defense Program, increase and expand defense industrial capacity, and coordinate the timing and funding for capital expenditures with defense contractors.

The JES requires the agency head (i.e., the secretary of defense or of a military department) to notify the congressional defense committees in writing within 30 days of using the procurement authorities in this section.

Notably, these authorities expire at the end of FY 2024 and do not seek to address the fundamental challenges to the industrial base or the acquisition process that hamper the ability to provide support or replenish stocks without extraordinary authorities. Nor are comprehensive or far-reaching efforts to address these challenges found elsewhere in the NDAA.

Section 1412, Modification to Authorities Under the Strategic and Critical Materials Stockpiling Act—Section 1412 amends the Strategic and Critical Materials Stockpiling Act,

see 50 USCA § 98d, by expanding the authority of the national defense stockpile manager to make purchases for the stockpile (including, in certain circumstances, where the "Stockpile Manager determines there is a shortfall of such materials in the stockpile"), and extending the obligation authority period from two years to "until expended." Section 1412 also amends 50 USCA § 98b by only requiring the president to notify Congress when planning to acquire materials *to increase* stockpile quantities (previously, notification was required for any quantity change) and shortening the required waiting period between notification to Congress and when the acquisition may occur (from 45 to 30 days).

Section 1414, Authority to Acquire Material for the National Defense Stockpile—This section authorizes the national defense stockpile manager to spend up to $1,003,500,000 of authorized appropriations through FY 2032 to procure strategic or critical materials that are identified in § 1414 or are identified in the most recent strategic and critical materials report submitted to Congress pursuant to 50 USCA § 98h-5. This section identifies the following as "strategic and critical materials required to meet the [U.S.] defense, industrial, and essential civilian needs": neodymium oxide, praseodymium oxide, and neodymium iron boron magnet black; titanium; energetic materials; isomolded graphite; grain-oriented electric steel; tire cord steel; and cadmium zinc telluride. The authority applies to purchases during FYs 2023 to 2032.

Section 5949, Prohibition on Certain Semiconductor Products and Services—Section 5949 prohibits federal agencies (i.e., Government-wide) from (i) acquiring or contracting for electronic parts, products, or services that include covered semiconductor products or services; or (ii) contracting with an entity to procure or obtain electronic parts or products that use any electronic parts or products that include covered semiconductor products or services. The second prohibition only applies to critical systems. Covered semiconductors are from Semiconductor Manufacturing International Corp. (SMIC); ChangXin Memory Technologies (CXMT); Yangtze Memory Technologies Corp. (YMTC); or other entities as determined by the secretaries of defense or commerce. Given how this section was written, it is not clear what some of the clauses or terms mean, leaving it up to the regulatory process to clarify.

This provision takes effect five years from enactment (i.e., in Dec. 2027), permits waivers to be granted under certain circumstances, and grandfathers in systems containing covered semiconductors on the day before the prohibition effective date. The Federal Acquisition Regulation is required to be revised within three years, and must include certain flow-down requirements and a certification of non-use by contractors. Contractors can rely on the certification of compliance from subcontractors and developers of semiconductor designs based on U.S. technology or software. There is a safe harbor stating that when a contractor makes the required notifications in good faith and in accordance with the applicable requirements, and where it is later discovered that prohibited items are contained in the items delivered to the Government, the contractor will not be subject to civil liability or a determination of not being a responsible contractor based solely on violation of this prohibition if the contractor has taken "comprehensive and documentable efforts to remove covered semiconductors from the Federal supply."

The JES notes that "in serving federal supply chains, federal contract recipients and their suppliers (including domestic and foreign subsidiaries, affiliates, distributors, and intermediaries) should not utilize companies connected to foreign countries of concern that threaten national security," such as SMIC, YMTC, and CXMT, "or any other company identified under this section (including any affiliate, subsidiary, successor, distributor, or intermediary thereof)." According to the JES, when contemplating issuing a waiver under this section "critical national security interests of the United States may include protecting the Nation's economic security and its technological competitiveness relative to strategic competitors."

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The FY 2023 NDAA included the following cybersecurity-related provisions of interest to the procurement community:

Section 901, Increase in Authorized Number of Assistant and Deputy Assistant Secretaries of Defense—This section establishes the office of the assistant secretary of defense for cyber policy.

Section 1553, Plan for Commercial Cloud Test and Evaluation—This section requires DOD, in consultation with industry, to implement a plan

for testing and evaluating the cybersecurity of the clouds of commercial cloud service companies providing DOD storage or computing of classified data (including penetration testing). The plan is required to include that new contracts with cloud providers grant DOD the right to conduct independent threat-realistic assessments of the commercial cloud infrastructure, to include "the storage, compute, and enabling elements" (including the control plane), and supporting systems used to fulfill the mission set forth in the contract. The plan is required to be implemented and submitted to the armed services committees within 180 days of the FY 2023 NDAA's enactment (i.e., by June 2023).

The section authorizes DOD to include in the policy and regulations a waiver of the testing requirements specifically listed in § 1553 if such waiver is approved by the DOD chief information officer and the operational test and evaluation director.

Section 5921, FedRAMP Authorization Act—This section codifies the Federal Risk and Authorization Management Program (FedRAMP) that is run by the General Services Administration. According to the JES, FedRAMP "provides a standardized, reusable approach to security assessment and authorization for cloud computing products and services that process unclassified information used by agencies." Codification of the program makes mandatory many of the goals the FedRAMP program sought to achieve, particularly after a 2019 Government Accountability Office report found that many agencies were not obtaining cloud services from FedRAMP authorized entities. This section makes several changes to the FedRAMP program, including establishing a board whose members must have certain technical qualifications; iterating a "presumption of adequacy" for cloud services that have achieved FedRAMP authorization; and requiring that third parties who advise on FedRAMP requirements or assessments disclose FOCI. The section establishes a Federal Security Cloud Advisory Committee to oversee agency adoption, use, authorization, monitoring, acquisition, and security of cloud computing products and services. This section also requires GSA, starting in December 2023, to submit to the appropriate congressional committees an annual report on FedRAMP.

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The FY 2024 NDAA—Based on current trends and how the provisions in the FY 2023 NDAA are written, the debate concerning the FY 2024 NDAA is likely to be dominated by the same general themes applicable to the FY 2023 NDAA, i.e., China, cybersecurity (focused on China), streamlining acquisition processes (to speed up procurement timelines and access to private industry technology), and the industrial base (with a focus on China and supply chains). Another potential theme may be International Traffic in Arms Regulations and Foreign Military Sales reform, born out of frustrations with the timelines to deliver weapon systems to allies in support of Ukraine and Taiwan. It is unlikely that the FY 2024 NDAA will contain many provisions seeking to use the procurement process to promote general public or socioeconomic policies.

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