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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

A Comprehensive Review Of The Fiscal Year 2024 National Defense Authorization Act's Federal Procurement Law Provisions

*By Melissa Prusock, Moshe Schwartz, Eleanor Ross, and Mike Schaengold**

On December 22, 2023, nearly three months after the October 1, 2023, start of fiscal year 2024, President Biden signed into law the National Defense Authorization Act for Fiscal Year 2024 (FY 2024 NDAA), Pub. Law No. 118-31, 137 Stat. 136, becoming the 63rd consecutive fiscal year that an NDAA has been enacted. Unfortunately, signing the NDAA in December is not unusual, with four of the last five NDAAs becoming law in December and the FY 2021 NDAA, Pub. L. No. 116-283, becoming law even later—on January 1, 2022. In the last 48 fiscal years, the NDAA has been enacted on average 43 days after the fiscal year began,[1] and the FY 2024 NDAA (enacted 85 days after the beginning of FY 2024) increased the average delay. The FY 2019 NDAA, Pub. L. No. 115-232, is the only NDAA since 1997 to become law before the start of its fiscal year.[2]

The FY 2024 NDAA And The NDAA Process

The NDAA is primarily a policy bill and does not provide budget authority for the Department of Defense (DOD) 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."[3] The FY 2022 NDAA, Pub. L. No. 117-81, and the FY 2023 NDAA, Pub. L. No. 117-263, had a more pronounced influence on the appropriations process than usual. The authorized budgets contained in those enacted NDAAs ultimately proved to be close to where the final appropriations bill ended up. The FY 2024 NDAA, however, is

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having a less pronounced influence on the appropriations process than usual.

Another difference between this year's NDAA compared to the FY 2022 and 2023 NDAAs is the return to a more regular legislative process. For the FY 2022 and 2023 NDAAs, the House passed its version of the NDAA but the Senate was unable to pass the bill that was reported out favorably by the Senate Armed Services Committee (SASC). As a result, there was no formal conference and the committees held an "informal conference,"[4] 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. For the FY 2024 NDAA, both the House and Senate passed their respective versions of the bill, and a conference was held to reconcile the two bills (albeit a truncated formal conference).[5]

The FY 2024 NDAA includes authorizations and legislation for other federal agencies that are not within the traditional jurisdiction of the NDAA or the Armed Services Committees, including the Department of State Authorization Act of 2023, the Intelligence Authorization Act for FY 2024, and an extension of Title VII of the Foreign Intelligence Surveillance Act.

The FY 2024 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,"[6] which includes 47 provisions addressing procurement matters. This is modestly less than the past four NDAAs: the FY 2023, 2022, 2021, and 2020 NDAAs contained 55, 57, 63, and 78 Title VIII provisions, respectively. Although the impact and importance of an NDAA on federal procurement law should not be measured simply on the total number of procurement provisions, the FY 2024 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAAs (e.g., 37 and 13 provisions, respectively, in FYs 2015 and 2014).[7] As discussed below, certain provisions in other titles of the FY 2024 NDAA are also very important to procurement law.[8]

Some of the FY 2024 NDAA's provisions will not become effective until the Federal Acquisition Regulation (FAR) or Defense FAR Supplement (DFARS) (and, depending on the circumstances, other regulations) are amended or new provisions are promulgated, which sometimes can take two to four years or more.[9]

As to major themes, the FY 2024 NDAA broadly focuses on China, the Defense Industrial Base, supply chain, cybersecurity and artificial intelligence (AI), and efforts to streamline the acquisition process (including commercial buying). These themes can be seen in various procurement-related provisions, are a continuation of themes in last year's NDAA, and were driven in part by the bipartisan and bicameral focus on China. This focus is about more than security, it is about decoupling, and it is driving policy from industrial base and supply chain to cybersecurity and software acquisition. The FY 2024 NDAA also contains a number of provisions related to small businesses.

Industrial base and supply chain are among the most prominent NDAA themes, with provisions focused on multiyear procurement (§ § 152 and 820), pilot programs for product support in contested logistics and for

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analyzing supply chains (§ § 842 and 856), and prohibiting purchases from China, Russia, North Korea, and/or Iran (§ § 154, 244, 804, 805, and 825). The FY 2024 NDAA also includes the American Drone Security Act (see Title XVIII, subtitle B), which falls into the general category of prohibiting or limiting procurement from China and certain other countries.

Within the industrial base focused sections, this year's NDAA slightly strengthened "Buy-American" policies (§ § 833 and 835) but also expanded the definition of domestic for purposes of Title III of the Defense Production Act (§ 1080).

Another area of focus is cybersecurity (§ § 1502, 1511, and 1553) and AI (§ § 1521, 1522, 1541, and 1544), but some of the more aggressive provisions were dropped from the final bill. Several provisions focused on supporting allies, including foreign military sales (§ § 873 and 1204) and Ukraine authorities (§ § 1241 and 1242).

In his signing statement, President Biden took issue with provisions in the FY 2024 NDAA that he believes raise "concerns" or "constitutional concerns or questions of construction."[10] With the possible exception of FY 2024 NDAA § 1555, "Certification Requirement Regarding Contracting for Military Recruiting," which is discussed in this BRIEFING PAPER, none of these provisions, which otherwise concern (among other issues) limitations on the transfer of Guantánamo Bay detainees, possible disclosure of classified and other highly confidential information (for which the Biden Administration "presume[s]" preventive measures were incorporated into the NDAA), 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.[11]

As in our past NDAA *Feature Comments* in THE GOVERNMENT CONTRACTOR and *Procurement Review* BRIEFING PAPERS, we look to the Joint Explanatory Statement (JES) of the Committee of Conference,[12] which accompanies the NDAA as "legislative history," to help "explain[] the various elements of the [House and Senate] conferee's agreement" that led to the enacted FY 2024 NDAA.[13] We now examine relevant provisions in Title VIII.

Important Provisions In The FY 2024 NDAA's Title VIII—Acquisition Policy, Acquisition Management, And Related Matters

Section 801, Commercial Nature Determination Memo Available To Contractor

Section 3456(b) of Title 10, U.S. Code, provides for DOD contracting officers (COs) to "mak[e] a determination whether a particular product or service offered by a contractor meets the definition of a commercial product or commercial service" and requires the determination to be memorialized in a memorandum with a detailed justification of the determination.[14] Section 801 amends 10 U.S.C.A. § 3456(b)(2) to require that "[u]pon the request of the contractor or subcontractor offering the product or service [to DOD] for which such [commercial product or service] determination is summarized in such memorandum," the CO "shall provide" the memo to the contractor or subcontractor. The JES adds that the "Office of Defense Pricing and Contracting ['would'] provide companies documentation about positive or negative commercial item determinations to increase transparency around those decisions."[15]

Memoranda documenting commercial item determinations are not required in all circumstances. 10 USCA § 3456(c) provides that, subject to certain exceptions, "[a] contract for a product or service acquired using commercial acquisition procedures under part 12 of the [FAR] shall serve as a prior commercial product or service determination with respect to such product or service."[16]

Section 802, Modification Of Truthful Cost Or Pricing Data Submissions And Report

Under 10 U.S.C.A. § 3705(a), when certified cost or pricing data are not required to be submitted for a DOD contract, subcontract, or modification thereto, "if requested by the [CO]," the offeror is nevertheless "required to submit to the [CO] *data other than certified cost or pricing data . . ., to the extent necessary to determine the reasonableness of the price.*" (Emphasis added.) 10 U.S.C.A. § 3705(b) provides that if the CO is unable to determine "by any other means" that the proposed prices are "fair and reasonable," "an offeror

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who fails to make a good faith effort to comply with a reasonable request to submit [other than certified cost or pricing] data" is "ineligible for award unless the head of the contracting activity . . . determines that it is in the best interest of the Government to make the award to that offeror."

10 U.S.C.A. § 3705(b) further requires that the DOD Under Secretary for Acquisition and Sustainment (Under Secretary) "produce an annual report identifying offerors that have denied multiple requests for submission of uncertified cost or pricing data over the preceding three-year period, but nevertheless received an award." Section 802 amends § 3705(b) to require that DOD "make appropriate portions of the report available to the leadership of the offerors named in such report." Section 802 further requires the Under Secretary to "develop a framework for revising what constitutes a denial of uncertified cost or pricing data, including" (1) "identifying situations under which such denials occur to exclude situations outside the control of the offeror or Federal Government"; (2) "identifying whether such denial is from the" prime or subcontractor; and (3) "developing" the "timeframe for requiring submission of uncertified cost or pricing data before a request for such data is considered a denial, including a standardized determination of a starting point and conclusion for such requests." As the JES succinctly observes, Section 802 "direct[s]" the Under Secretary "to develop a framework for refining the parameters of what would constitute a denial of uncertified cost or pricing data under [10 U.S.C.A. §] 3705."[17]

We have previously reported related congressional efforts.[18] The JES to § 803 of the FY 2023 NDAA, Pub. L. No. 117-263, notes that "Senate Report 116-48 accompanying S. 1790," which was the FY 2020 NDAA, Pub. L. No. 116-92, required the Under Secretary "to submit an annual report detailing instances where potential contractors have denied [CO] requests for uncertified cost or pricing data to allow for the determination of fair and reasonable pricing of DOD acquisitions." That JES directed 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."[19]

Section 803, Prohibition On The Transfer Of Certain Data On DOD Employees To Third Parties

Section 803 amends Title 10 to add a new § 4622, which provides that each DOD contract entered into "on or after" December 22, 2023 "shall include a provision prohibiting the contractor" and subcontractors thereunder "from selling, licensing, or otherwise transferring covered individually identifiable [DOD] employee data to any individual or entity other than the Federal Government, except to the extent required to perform such contract or a subcontract" thereunder and "that would be permissible pursuant to statute or guidance from the Director of the Office of Management and Budget." "Covered individually identifiable [DOD] employee data" refers to such data obtained by a contractor or subcontractor in its contract or subcontract performance, while "individually identifiable [DOD] employee data" means "information related to [a DOD] employee . . ., including a member of the Armed Forces," that "(A) identifies such employee"; or "(B) which may be used to infer, by either direct or indirect means, the identity of such an employee to whom the information applies." The Secretary of Defense (Secretary) may waive this requirement.

Section 804, Prohibition On Contracting With Persons That Have Fossil Fuel Operations With The Russian Government Or The Russian Energy Sector

Section 804 prohibits DOD from contracting with any natural gas, oil, and coal company operating in Russia. Specifically, it prohibits DOD from "enter[ing] into a contract for the procurement of goods or services with any person that is or that has fossil fuel business operations with a person that is" at least "50 percent owned, individually or collectively, by—(A) an authority of the Government of the Russian Federation; or (B) a fossil fuel company that operates in the Russian Federation[.]" Fossil fuel companies transporting oil or gas through

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Russia for sale outside Russia extracted from another country against which the President has not imposed sanctions are exempt from the prohibition. For purposes of the prohibition, a "fossil fuel company" is a person or entity that works in oil, gas, or coal, including exploration, development, production, processing/refining, or construction of facilities related to Russian oil, gas, or coal. For purposes of the exception, the origin of oil and gas is the location of extraction specified in the certificate of origin or other documentation, unless the person seeking the exemption has reason to know that the documentation is inaccurate. The prohibition took effect on December 22, 2023, and applies to any contract entered into on or after that date. The section sunsets on December 31, 2029.

A waiver of the prohibition is available under certain circumstances. First, the Secretaries of Defense and State may jointly issue a waiver for a contract that (1) is necessary for purposes of providing humanitarian assistance to people in Russia or providing disaster relief and other urgent life-saving measures; (2) is vital to the military readiness, basing, or operations of the United States or the North Atlantic Treaty Organization; (3) is vital to U.S. national security interests; or (4) was a business operation with a fossil fuel company in a country other than Russia that was entered into prior to December 22, 2023. If such a waiver is obtained, various congressional committees must be notified.

The prohibition does not apply to a person or entity that has a valid license to operate in Russia from the Office of Foreign Asset Control or is otherwise authorized to operate in Russia by the Federal Government notwithstanding the imposition of sanctions.

Section 805, Prohibition Of DOD Procurement Related To Entities Identified As Chinese Military Companies Operating In The United States

Subject to certain exceptions described below, effective June 30, 2026, § 805 prohibits DOD from entering into, renewing, or extending a contract for goods, services, or technology with (1) a Chinese military company operating in the United States, as defined by § 1260H of the FY 2021 NDAA, Pub. L. No. 116-283; or (2) an entity subject to the control of a Chinese military company operating in the United States. Additionally, effective June 30, 2027, § 805 prohibits DOD from entering into, renewing, or extending a contract for the procurement of goods or services produced or developed by Chinese military companies operating in the United States or any entities subject to their control. For purposes of § 805, "control" has the meaning set forth in 31 C.F.R. § 800.208.

Section 805 specifies that these prohibitions will not prevent DOD from "from entering into, renewing, or extending a contract for the procurement of goods, services, or technology to provide a service that connects to the facilities of a third party, including backhaul, roaming, or interconnection arrangements." The prohibitions will not apply to "existing contracts for goods, services, or technology, including when such contracts are modified, extended, or renewed, [or] entered into prior to the" implementation dates. And they will not apply to "components," defined in 41 U.S.C.A. § 105 as "an item supplied to the Federal Government as part of an end item or of another component." Section 805 also provides that the President is not required to "apply or maintain" § 805's prohibitions "for activities subject to the reporting requirements under title V of the National Security Act of 1947," 50 U.S.C.A. § 3901 et seq., "or to any authorized intelligence activities of the United States."

No later than December 2024, the Secretary must amend the DFARS to implement the prohibition on entering into, renewing, or extending a contract for goods, services, or technology with Chinese military companies or entities subject to their control (which, as explained above, will go into effect June 30, 2026). Additionally, no later than 545 days (i.e., June 19, 2025) after the FY 2024 NDAA's enactment, the Secretary must amend the DFARS to implement the prohibition on entering into, renewing, or extending a contract for the procurement of goods or services that include goods or services produced or developed by Chinese military companies or entities subject to their control (which § 805 provides will be effective June 30, 2027).

Section 805 provides that the Secretary may waive, in certain circumstances, the prohibition on contracting with Chinese military companies or entities subject to their control, as well as the prohibition on procuring

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goods or services produced by Chinese military companies or entities subject to their control. Entities requesting such a waiver must provide the Secretary with (1) "a compelling justification for the additional time to implement" § 805's prohibitions; and (2) "a phase-out plan to eliminate goods, services, or technology produced or developed" by Chinese military companies or entities subject to their control. If the Secretary grants a waiver, it may remain in effect until the Secretary "determines that commercially viable providers exist outside of the People's Republic of China that can and are willing to provide [DOD] with quality goods and services in the quantity demanded."

While the goods and services prohibition will not go into effect until June 30, 2027, and DOD's implementing regulations are not due until June 19, 2025, DOD contractors should start performing due diligence to determine whether there are any goods or services (other than components) produced or developed by Chinese military companies (or entities controlled by Chinese military companies) in their supply chains, and, if there are, begin making plans to eliminate those goods or services from their supply chains.

Section 808, Pilot Program For The Use Of Innovative Intellectual Property Strategies

Section 808 requires the Secretary to "establish a pilot program for the use of innovative intellectual property strategies . . . to acquire the necessary technical data rights required for the operation, maintenance, and installation of, and training [i.e., OMIT] for, covered programs." Such innovative intellectual property strategies "may include" "(1) The use of an escrow account to verify and hold intellectual property data"; "(2) The use of royalties or licenses"; "(3) Other strategies, as determined by the Secretary." Covered program "means an acquisition program under which procurements are conducted using a pathway of the adaptive acquisition framework (as described in [DOD] Instruction 5000.02, 'Operation of the Adaptive Acquisition Framework')." Technical data rights "has the meaning given" in 10 U.S.C.A. § 3771, which is implemented in DFARS Subparts 227.71 and 227.72.[20]

With respect to this pilot program, not later than May 1, 2024, the Under Secretary and the Secretary of each military department shall each designate one covered program under their respective jurisdictions. Not later than June 2024, the Under Secretary, in coordination with the Secretaries of the military departments, shall provide a briefing to the House and Senate Armed Services Committees "with a detailed plan to implement the pilot program." The Under Secretary, again in coordination with these Secretaries, shall also provide annual reports to these committees on (1) "the effectiveness of the pilot program in acquiring the necessary technical data rights necessary to support timely, cost-effective maintenance and sustainment of the" covered programs; and (2) "any recommendations for the applicability of lessons learned from the pilot program." The "authority to carry out" this pilot program "shall terminate" on December 31, 2028.

DOD's substantial problems with acquiring sufficient technical data necessary for future operation and maintenance, which if not done properly "can lead" and has led "to surging ['sustainment'] costs" and "reduced mission readiness," has been discussed in Congressional Research Service (CRS) and Government Accountability Office (GAO) reports.[21] At least one recent NDAA has included a pilot program for intellectual property, i.e., § 801, "Pilot Program on Intellectual Property Evaluation for Acquisition Programs," of the FY 2020 NDAA, Pub. L. No. 116-92. A February 2022 DOD report to Congress on this pilot program considers technical data rights in some detail.[22]

Section 809, Pilot Program For Anything-As-A-Service

Section 809 requires the Secretary to establish a pilot program to explore the use of "anything-as-a-service" delivery models to address defense needs. In general, "anything-as-a-service," or XaaS, refers to information technology offerings that are customizable, scalable, and only require organizations to pay for what they use. Examples include software as a service (SaaS), platform as a service (PaaS), and infrastructure as a service (IaaS).

Section 809 defines "anything-as-a-service" as "a model under which a technology-supported capability is provided to [DOD] and may utilize any combination of software, hardware or equipment, data, and labor or services that provides a capability that is metered and billed

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based on actual usage at fixed price units." The pilot program will test whether these "consumption-based solutions" can feasibly "provide users on-demand access, quickly add newly released capabilities, and bill based on actual usage at fixed price units." The JES observes that the goal of the pilot program is to promote "continuous competition and better business practices at" DOD.[23]

Notices regarding opportunities to participate in the pilot program must be made publicly available for at least 60 days. To the extent practicable, the Secretary must enter into a contract or other agreement for anything-as-a-service no later than 100 days after a notice of opportunity to participate is made publicly available. Contracts or other agreements for anything-as-a-service entered into under the pilot program must "require the outcomes of the capability to be measurable, including the cost and speed of delivery in comparison to using processes other than anything-as-a-service, at the regular intervals that are customary for the type of solution provided." Contracts or other agreements entered into under the pilot program will be exempt from the requirement to submit certified cost or pricing data under 10 U.S.C.A. § 3702. Additionally, modifications "to add new features or capabilities in an amount less than or equal to 25 percent of the total value of such contract or other agreement" are exempt from the requirements for full and open competition under 10 U.S.C.A. § 2302. The Secretary must provide a briefing to the congressional defense committees on the implementation of the pilot program by June 30, 2024.

Section 810, Updated Guidance On Planning For Exportability Features For Future Programs

By December 22, 2024, the Under Secretary must ensure that program guidance for major defense acquisition programs (as defined in 10 U.S.C.A. § 4201) and acquisition programs or projects carried out using rapid fielding or rapid prototyping pathways under FY 2016 NDAA, Pub. L. No. 114-92, § 804 is revised to integrate planning for exportability features under 10 U.S.C.A. § 4067.[24] Exportability features are technology protection features that facilitate foreign sales of defense systems or subsystems to allied and friendly nations.[25] For major defense acquisition programs, the revised guidance must provide for "an assessment of such programs to identify potential exportability needs." For technologies under projects or programs "carried out using the rapid fielding or rapid prototyping acquisition pathway that are transitioned to a major capability acquisition program," the guidance must provide for "an assessment of potential exportability needs of such technologies not later than one year after the date of such transition." Section 810 also requires that the Under Secretary must revise guidance for program protection plans to integrate a requirement to determine exportability for the programs covered by such plans by no later than December 2026.

Section 812, Preventing Conflicts Of Interest For Entities That Provide Certain Consulting Services To DOD

Under § 812, by June 2024, the Secretary must amend the DFARS to require that, prior to entering into a contract for consulting services with DOD, any entity that provides consulting services and for which the work is assigned a North American Industry Classification System (NAICS) code beginning with 5416 (Management, Scientific, and Technical Consulting Services), must certify that "(A) neither the entity nor any [of its] subsidiaries or affiliates . . . hold a contract for consulting services with one or more covered foreign entities; *or* (B) the entity maintains a Conflict of Interest Mitigation plan . . . that is auditable by a contract oversight entity." (Emphasis added.) Section 812 provides that "consulting services" has the same meaning as the term "advisory and assistance services" in FAR 2.101, except that it "does not include the provision of products or services related to—(A) compliance with legal, audit, accounting, tax, reporting, or other requirements of the laws and standards of countries; or (B) participation in a judicial, legal, or equitable dispute resolution proceeding."

"Covered foreign entity" is defined to include the Chinese government and certain Chinese companies (including entities on the "Non-SDN Chinese Military-Industrial Complex Companies List" maintained by Treasury's Office of Foreign Asset Control and Communist Chinese Military Companies, as defined by FY 1999 NDAA, Pub. L. No. 105-261, § 1237(b)),[26] the Russian government and certain entities sanctioned as a result of Russia's invasion of Ukraine, governments supporting

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terrorism (as determined by the State Department), and other entities included on certain lists maintained by the Commerce Department. Section 812 defines a "covered contract" subject to its requirements as "a contract of the [DOD] for consulting services." However, in some places, the section refers to "covered contracts" with "covered foreign entities," suggesting that the term is being used more generally to refer to contracts for consulting services.

Conflict of interest mitigation plans must include (1) identification of any contracts for consulting services with a covered foreign entity (if such identification is not prohibited by law or regulation); "(2) a written analysis, including a course of action for avoiding, neutralizing, or mitigating the actual or potential conflict of interest. . ."; "(3) a description of the procedures adopted by an entity to ensure that individuals who will be performing" a DOD contract for consulting services "will not, for the duration of such contract, also provide any consulting services to any covered foreign entity"; and "(4) a description of the procedures by which an entity will submit to the contract oversight entities a notice of an unmitigated conflict of interest with respect to a" contract with DOD for consulting services "within 15 days of determining that such a conflict has arisen." If an entity is unable to identify covered foreign entities in its conflict of interest mitigation plan due to confidentiality obligations, the mitigation plan should identify such covered foreign entities as an entity described in § 812's definition of "covered foreign entity."

The "contract oversight entities" that will audit conflict of interest mitigation plans and receive notices of unmitigated conflicts include the CO, the CO's representative, the Defense Contract Management Agency, the Defense Contract Audit Agency, the DOD Office of Inspector General (OIG) or any subcomponent thereof, and/or GAO.

DOD generally may not enter into contracts for consulting services with entities that cannot make the certification required by § 812. However, § 812 provides the Secretary with authority to waive its requirements "on a case-by-case basis as may be necessary in the interest of national security." The Secretary may not delegate this waiver authority to an official who has not been presidentially appointed and confirmed by the Senate.

If DOD intends to withhold an award of a DOD consulting contract based on a conflict of interest under § 812 that cannot be avoided or mitigated, the CO must notify the offeror of the reasons for withholding the award "and allow the offeror a reasonable opportunity to respond." If, after receiving the offeror's response, the CO "finds that it is in the best interests of the United States to award the contract notwithstanding such a conflict of interest, a request for waiver" must be submitted in accordance with FAR 9.503. The waiver request and decision must be included in the contract file.

If the Secretary issues a waiver under § 812, the Secretary must provide notice of the waiver to the congressional armed services committees within 30 days of its issuance. The notice must include (1) the justification for the waiver; (2) identity of the covered foreign entity that is the subject of the waiver; (3) the number of bidders for the contract for which the Secretary granted the waiver; (4) the number of bidders for that contract that did not request a waiver; and (5) the total dollar value of the contract.

Section 820, Amendments To Multiyear Procurement Authority

Section 820 amends 10 U.S.C.A. § 3501(a)(1) to expand the justifications for the use of multiyear contracting authority to include a determination by an agency head that use of a multiyear contract will result in "necessary defense industrial base stability not otherwise achievable through annual contracts," in addition to a determination by an agency head that use of a multiyear contract will result in significant savings.

Section 821, Modification Of Approval Authority For Certain Follow-On Production Contracts Or Transactions

Section 821 amends 10 U.S.C.A. § 4022 to clarify that follow-on production contracts or other transaction agreements (OTAs) over $100 million may be entered into with the participants in a prototype project authorized under § 4022 if the requirements of § 4022(d) were met for the prior transaction for the prototype project, and if all of the requirements of § 4022(f) (permitting

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the noncompetitive award of follow-on production contracts or transactions to the participants in a prototype project transaction if the prior transaction was awarded using competitive procedures and the participants in the transaction successfully completed the prototype project) will be met. Under § 4022(d), prototype projects awarded under this section must meet one of the following conditions: "(A) [t]here is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project"; "(B) [a]ll significant participants in the transaction other than the Federal Government are small businesses . . . or nontraditional defense contractors"; or "(C) [a]t least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the Federal Government." Section 821 clarifies that these requirements only apply to the prototype project transaction, and not to the follow-on production contract or transaction.

Section 822, Clarification Of Other Transaction Authority For Installation Or Facility Prototyping

Section 822 clarifies the pilot program under 10 U.S.C.A. § 4022(i) authorizing the award of OTAs for prototype projects "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[.]"[27] Before the FY 2024 NDAA's enactment, § 4022(i) stated that no more than two prototype projects could be started each fiscal year under the pilot program. Section 822 clarifies that projects carried out for the purpose of repairing a facility are not subject to this limitation. Section 822 further specifies that the Secretaries of Defense and the military departments may carry out prototype projects under the pilot program for installation or facility prototyping using amounts available to such Secretaries for military construction, operation and maintenance, or research, development, test, and evaluation, notwithstanding the limits in (1) 10 U.S.C.A. ch. 169, subchapters I ("Military Construction") and III ("Administration of Military Construction and Military Family Housing"); and (2) 10 U.S.C.A. chs. 221 ("Planning and Solicitation Generally") and 223 ("Other Provisions Relating to Planning and Solicitation Generally").

Section 824, Modification And Extension Of Temporary Authority To Modify Certain Contracts And Options Based On The Impacts Of Inflation

As we reported in some detail last year,[28] § 822 of the FY 2023 NDAA, Pub. L. No. 117-263, amended 50 U.S.C.A. § 1431 (which is part of Pub. L. No. 85-804)[29] to provide that the Secretary, "acting pursuant to a Presidential authorization": (1) "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 (2) "may not request consideration from such prime contractor for such amendment or modification." Section 822 provides for similar "economic inflation" relief for DOD subcontractors.

Section 824 of the FY 2024 NDAA further amends 50 U.S.C.A. § 1431 to extend this authority for an additional year, i.e., to December 31, 2024. In addition, FY 2023 NDAA § 822 states that "[o]nly amounts specifically provided by an appropriations Act for" these purposes can be used to fund such economic inflation adjustments, amendments, or modifications. Section 824 now adds that "[i]f any such amounts are so specifically provided, the Secretary may use them for such purposes."

Section 825, Countering Adversary Logistics Information Technologies

Section 825 prohibits DOD from entering "into a contract with an entity that provides data to covered logistics platforms," and adds 46 U.S.C.A. § 50309, which prohibits covered entities from using covered logistics platforms. A "covered logistics platform" means a data exchange platform that uses or provides, in part or whole (1) the national transportation logistics public information platform (commonly referred to as LOGINK) provided by China or its governmental entities; (2) any national transportation logistics information platform provided by or sponsored by China, or a controlled commercial entity; or (3) a similar system provided by Chinese state-affiliated entities.

Section 825 prohibits DOD from contracting with an entity that provides data to covered logistics platforms.

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The prohibition becomes effective in June 2024. The Secretary may waive this prohibition for a specific contract if the Secretary determines that the waiver is vital to U.S. national security and submits a report to Congress justifying the waiver. In December 2024, and annually thereafter for three years, the Secretary shall submit to Congress a report on the implementation of this section.

Section 825 adds a new section, i.e., 46 U.S.C.A. § 50309, relating to grants for maritime transportation, which prohibits covered entities from using covered logistics platforms. A "covered entity" means: (1) a domestic port authority that receives funding after December 22, 2023 from the port infrastructure development program, the maritime transportation system emergency relief program, or any federal grant funding program; (2) any marine terminal operator located on property owned by a port authority or at a seaport; (3) any U.S. state or Federal Government agency; or (4) a commercial strategic seaport within the National Port Readiness Network. A covered entity that uses a covered logistics platform is ineligible to receive federal grants while it uses the covered logistics platform. The Secretary of Transportation, in consultation with the Secretary of Defense, Secretary of the department with responsibility for the Coast Guard, Secretary of State, and Secretary of Commerce, must notify covered entities of the prohibition and publish, and regularly update, a list of covered logistics platforms subject to the prohibition. The Secretary of Transportation (in consultation with the Secretary of Defense) may waive the prohibition if a waiver is vital to U.S. national security and a report to Congress justifying the waiver is submitted.

Section 825 requires the Secretary of State "to seek to enter into negotiations with" U.S. ally and partner countries if the President determines that ports or other entities operating within the jurisdiction of such ally or partner countries are using, or are considering using, a covered logistics platform. Negotiations must be conducted with all countries that are party to a collective defense treaty or defense arrangement with the United States, plus India and Taiwan. The negotiations shall urge governments to terminate the use of any covered logistics platforms, describe the threats posed by them, develop counters to attempts by foreign adversaries to have international standards adopted that incorporate a covered logistics platform, and attempt to establish an international prohibition on the use of covered logistics platforms. No later than December 2024, the Secretary of State shall report to Congress on U.S. efforts in the negotiations, and their results, including any actions taken by U.S. allies and partners.

Section 826, Modification Of Contracts And Options To Provide Economic Price Adjustments

FAR 16.203-2 provides that a "fixed-price contract with economic price adjustment may be used when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract." FAR 16.203-1(a) states that a "fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. Economic price adjustments are of three general types: (1) Adjustments based on established prices. . . . (2) Adjustments based on actual costs of labor or material. . . . [and] (3) Adjustments based on cost indexes of labor or material." FAR 16.203-3 states that a "fixed-price contract with economic price adjustment shall not be used unless the [CO] determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices."

Under § 826(a), "[a]mounts authorized to be appropriated by" the NDAA "may be used" by DOD "to modify the terms and conditions of" an existing "contract or option to provide an economic price adjustment consistent with [FAR] 16.203-1 and 16.203-2 . . . during the relevant period of performance . . . and as specified in [FAR] 16.203-3 . . ., to the extent and in such amounts as specifically provided in advance in appropriations Acts for the purposes of this section." The Under Secretary must issue implementing guidance no later than January 21, 2024, which, not surprisingly, does not appear to have occurred as of this date.

The JES states that the Senate amendment to this pro-

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vision "clarif[ies] that [*DOD*] *may seek consideration when considering whether to modify contracts to include an economic price adjustment clause*."[30] This JES statement is not reflected in the plain language of § 826. Instead, the statute is silent as to requiring—or not requiring—consideration for modifying the terms of an existing contract (or option) to provide an economic price adjustment.

Section 831, Emergency Acquisition Authority For Purposes Of Replenishing United States Stockpiles

We reported last year about certain important revisions to 10 U.S.C.A. § 3601, "Procedures for urgent acquisition and deployment of capabilities needed in response to urgent operational needs or vital national security interest," required by FY 2023 NDAA § 804, Pub. L. No. 117-263.[31] Those FY 2023 NDAA revisions included procedures for the urgent acquisition and deployment of capabilities needed in response to urgent operational needs that "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 FY 2023 NDAA also stated that such procedures 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, Pub. L. No. 114-92, § 804.

FY 2024 NDAA § 831 now allows the use of these urgent acquisition procedures, where "the United States is not a party" to an armed attack, to: (1) "replenish[] United States stockpiles of defense articles when such stockpiles are diminished as a result of the United States providing defense articles in response to" an "armed attack by a country of concern [i.e., China, Russia, Iran, North Korea, Cuba, and Syria] against" a U.S. ally or partner; or (2) "contract[] for the movement or delivery of defense articles transferred to such ally or partner through the President's drawdown authorities under . . . the Foreign Assistance Act of 1961 (22 U.S.C. 2318(a)(1) and 2364) in connection with such response." In summary, the JES observes that § 831 "amend[s 10 U.S.C.A. § 3601] to provide for emergency acquisition authority for the purposes of replenishing United States stockpiles of defense articles."[32]

Section 833, Amendment To Requirement To Buy Certain Metals From American Sources

Section 833 amends 10 U.S.C.A. § 4863, which requires DOD to buy specialty metals (e.g., certain steel, titanium, zirconium and zirconium base, and other metal alloys) from domestic sources. The statute contains an exception to this requirement where necessary to further agreements with foreign governments in which both governments agree to remove barriers to purchases of supplies produced in the other country. Section 833 amends this exception to require that any specialty metal procured as a mill product or incorporated into a component other than an end item must be melted or produced in the United States, in the country from which the product is milled or component is procured, or in another country that has such an agreement with the United States. Section 833 also requires that for any system or component for which the source of materials must be tracked to comply with flight safety regulations, the supplier must inform the government if any of the materials were known to be manufactured or processed in China, Iran, North Korea, or Russia. Not later than March 31 of each year, the Secretary must submit to the congressional defense committees a report indicating how much specialty metal has been acquired and placed into DOD systems from China, Iran, North Korea, and Russia. The new requirements become effective in December 2025.

Section 834, Acquisition Of Sensitive Material Prohibition Exception Amendment

Section 834 amends 10 U.S.C.A. § 4872's exception to the prohibition on the acquisition of sensitive materials from certain countries. Subject to certain exceptions, § 4872 prohibits the Secretary from procuring "any covered material melted or produced in any covered nation, or any end item that contains a covered material manufactured in any covered nation." "Covered materials" encompassed by § 4872's prohibition include: "(A) samarium-cobalt magnets; (B) neodymium-iron-boron magnets; (C) tungsten metal powder; (D) tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy; and (E) tantalum metals

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and alloys."[33] Covered nations are North Korea, China, Russia, and Iran.[34]

Prior to the FY 2024 NDAA's enactment, there was an exception to this prohibition if the Secretary "determines that covered materials of satisfactory quality and quantity, in the required form, cannot be procured as and when needed at a reasonable price." FY 2024 NDAA § 834 amends this exception to require that the Secretary identify a "specific end item for which a specific covered material" of satisfactory quality and quantity cannot be procured as and when needed and at a reasonable price. Section 834 also adds an additional requirement that, if this exception is used, the Secretary must waive the prohibition in 10 U.S.C.A. § 4872 "for such specific end item and such specific covered material for a period not exceeding 36 months."

Section 835, Enhanced Domestic Content Requirement For Major Defense Acquisition Programs

Section 835 requires the Secretary to submit to the congressional defense committees a report assessing the domestic source content of procurements carried out in connection with a "major defense acquisition program" and to establish an information repository for the collection and analysis of information related to domestic source content for critical products, where such information can be used for continuous data analysis and program management activities. Section 835 also increases the domestic content requirements for manufactured articles, materials, or supplies procured in connection with a major defense acquisition program, which is defined by 10 U.S.C.A. 4201, as a not highly sensitive classified program that (1) is designated by the Secretary as a major defense acquisition program or (2) is not a program for an automated information system and is estimated to require an eventual total expenditure for research, development, test, and evaluation of more than $300,000,000, or an eventual total expenditure for procurement, including all planned increments or spirals, of more than $1,800,000,000. Between December 22, 2023, and January 1, 2024, 60% of the cost of the manufactured articles, materials, or supplies must be mined, produced, or manufactured in the United States. On or after January 1, 2024, the domestic source requirement increases to 65% and starting January 1, 2029, the requirement will increase to 75%. These revised domestic content thresholds apply to contracts entered into on December 22, 2023, or thereafter. They do not apply to manufactured articles that consist wholly or predominantly of iron, steel, or a combination of iron and steel; articles manufactured in countries that have executed a reciprocal defense procurement Memorandum of Understanding with the United States pursuant to 10 U.S.C.A. § 4851; or articles manufactured in a country that is a member of the national technology and industrial base.

Not later than June 2024, the Secretary must issue rules for a 55% domestic content threshold to be used if (1) the application of the higher domestic content threshold results in an unreasonable cost, or (2) no offers are submitted to supply manufactured articles, materials, or supplies manufactured substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. The rules allowing the 55% domestic content threshold no longer apply on January 1, 2031.

Section 842, Demonstration And Prototyping Program To Advance International Product Support Capabilities In A Contested Logistics Environment

Section 842 requires the Secretary to "establish a contested logistics demonstration and prototyping program to identify, develop, demonstrate, and field capabilities for product support in order to reduce or mitigate the risks associated with operations in a contested logistics environment." A "contested logistics environment" is an environment in which the armed forces engage in conflict with an adversary that presents challenges in all domains and directly targets logistics operations, facilities, and activities in the United States, abroad, or in transit from one location to the other.[35] The program is intended to identify ways to capitalize on interoperability, commonality, and interchangeability of platforms and information systems; determine best practices to reduce repair time for equipment; explore opportunities to expand the ability to store materials for surge capacity and to support operations in contested logistics environments; develop and field effective and efficient means of conducting repairs away from permanent repair facilities; explore flexible approaches to contracting and partnership agreements to use or develop capabilities to provide product support to combat com-

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manders and allies in contested logistics environments; identify resources to reduce or mitigate risks in contested logistics environments; identify and document impediments to the performance of product support, including impediments created by statute, regulation, policy, guidance, or limitations on expenditure, transfer, or receipt of funds for product support in contested logistics environments; and identify and document any statutory and regulatory waivers or exemptions applicable to or necessary for product support in a contested logistics environment.

In establishing the program, the Secretary is authorized to establish product support arrangements, which are contracts, task orders, or any other type of agreement or arrangement for performance-based logistics, sustainment support, contractor logistics support, lifecycle product support, and weapon system product support. A product support arrangement can be based on other transaction authorities outlined in 10 U.S.C.A.: cross-servicing agreements (10 U.S.C.A. § 2342), centers of industrial and technical excellence (10 U.S.C.A. § 2474), procedures for urgent acquisition and deployment (10 U.S.C.A. § 3601), research projects—other than contracts and grants (10 U.S.C.A. § 4021), and authority for certain prototype projects (10 U.S.C.A. § 4022). No later than June 2024, the Secretary must issue guidance implementing the program.

Not later than December 2025, the Secretary must submit a report on the program to Congress summarizing the activities conducted; identifying any impediments, waivers, or exemptions; and recommending improvements to the program, including whether to extend or make the program permanent. The authority under this section will terminate in December 2026.

Section 843, Special Authority For Rapid Contracting For Commanders Of Combatant Commands

Section 843 provides that the "*commander of a combatant command*, upon providing a written determination to a senior [DOD] contracting official," "*may request use of*" certain "*special authorities*" "*for contracting . . . to rapidly respond to time-sensitive or unplanned emergency situations*" (1) "in support of a contingency operation";[36] (2) "to facilitate the defense against or recovery from a cyber attack, nuclear attack, biological attack, chemical attack, or radiological attack against the United States"; (3) "in support of a humanitarian or peacekeeping operation";[37] and (4) "for purposes of protecting" U.S. "national security interests" "during directed operations that are below the threshold of traditional armed conflict." (Emphasis added.)

The "special authorities" for rapid contracting are:

(1) "Procedures applicable to purchases below micro-purchase threshold," *which is ordinarily $10,000*,[38] "with respect to a single contracting action" "for a contract to be awarded and performed, or purchase to be made" (a) in the United States for "less than $15,000"; or (b) outside the United States for "less than $25,000."

(2) "Simplified acquisition procedures," applicable to acquisitions not exceeding the simplified acquisition threshold, *which is ordinarily $250,000*,[39] "with respect to a single contracting action" "for a contract to be awarded and performed, or purchase to be made" (a) in the United States for "less than $750,000"; or (b) outside the United States for "less than $1,500,000."

(3) Under 10 U.S.C.A. § 3205(a)(2), "special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than $5,000,000" exist "with respect to which the [CO] reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial products or commercial services." Section 843 increases the $5,000,000 ceiling to $10,000,000.

(4) "The property or service being procured may be treated as a commercial product or a commercial service for the purpose of carrying out the procurement."

Not later than January 15, 2025, and annually thereafter for four years, the Chairman of the Joint Chiefs of Staff, in coordination with the Under Secretary, "shall submit to the congressional defense committees a report on the use of" this authority "for the fiscal year preceding the date of" the report's submission. This authority terminates on September 30, 2028.

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Section 851, Additional National Security Objectives For The National Technology And Industrial Base

Section 851 amends 10 U.S.C.A. § 4811, which requires the Secretary to develop a national security strategy for the national technology and industrial base (NTIB). The strategy must "be based on a prioritized assessment of risks and challenges to the defense supply chain" and must ensure that the NTIB can achieve certain objectives. Prior to the FY 2024 NDAA's enactment, one of those objectives was "[e]nsuring reliable sources of materials that are critical to national security, such as specialty metals, essential minerals, armor plate, and rare earth elements." Section 851 expands this objective to include ensuring that there are reliable sources of services and supplies, in addition to materials, that are critical to national security. Section 851 further expands this objective to provide that "[e]nsuring reliable sources of services, supplies, and materials that are critical to national security" should include "reducing reliance on potential adversaries for such services, supplies, and materials to the maximum extent practicable."

Section 852, Department Of Defense Mentor-Protégé Program

Section 852 amends the DOD Mentor-Protégé Program under 10 U.S.C.A. § 4902 to provide that mentor-protégé agreements between mentor and protégé firms may be in the form of a "contract, cooperative agreement, or a partnership intermediary agreement."[40]

Section 856, Pilot Program To Analyze And Monitor Certain Supply Chains

Section 856 requires the Under Secretary to establish and carry out a pilot program to analyze, map, and monitor supply chains for up to five covered weapons platforms. A "covered weapons platform" is any weapons platform identified in the annual reports submitted to Congress under FY 2021 NDAA, Pub. L. No. 116-283, § 1251(d)(1) relating to the Pacific Deterrence Initiative.[41] The pilot program may use a combination of commercial and DOD tools to (1) identify impediments to, and opportunities to expand, the production of components of such a covered weapons platform; (2) identify potential risks to and vulnerabilities of suppliers for such covered weapons platforms and ways to mitigate such risks; and (3) identify critical suppliers for such covered weapons platforms. The program must be established by March 2024, which appears to be a very optimistic start date. Not later than December 2024, the Under Secretary must submit a report (a) listing the vulnerabilities of the supply chain for each covered weapons platform, categorized by the severity of the threat; (b) describing each vulnerability, whether such vulnerability has been resolved, and, if resolved, the time from identification to resolution; and (c) providing an assessment of any efficiencies achieved by addressing impediments to the supply chain. The authority to carry out the pilot program will terminate on January 1, 2028.

Section 857, DOD Notification Of Certain Transactions

Section 857 provides that the "parties to a proposed merger or acquisition that will require a review by [DOD] who are required to file the [pre-merger] notification and provide supplementary information to the Department of Justice or the Federal Trade Commission under section 7A of the Clayton Act (15 U.S.C. 18a) shall concurrently provide such information to [DOD] during the waiting period under" 15 U.S.C.A. § 18a. The JES "clarifies that [DOD] shall receive information on proposed mergers and acquisitions within the defense industrial base for which it will be asked to review and comment on such notifications, *but at the same time as the Federal Trade Commission and Department of Justice, in order to facilitate that review in a timely manner*."[42]

An October 2023 GAO report identified various deficiencies in DOD's review of proposed mergers or acquisitions impacting the U.S. defense industrial base.[43] For example, the report concluded that "DOD's insight into defense [mergers and acquisitions (M&A)] is limited. [The very small DOD M&A office plus other DOD stakeholders] assessed an average of 40 M&A per year in fiscal years 2018 through 2022, which represents a small portion [about 10%] of defense M&A." DOD "focuses its resources on assessing high-dollar-value M&A for competition risks in support of antitrust reviews."[44]

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Section 860, Amendments To Defense Research And Development Rapid Innovation Program

Section 860 amends 10 U.S.C.A. § 4061 related to the Defense Research and Development Rapid Innovation Program. The program is intended to help small businesses accelerate the commercialization of technologies, including critical technologies developed pursuant to phase II Small Business Innovation Research Program projects and Small Business Technology Transfer Program projects, technologies developed by defense laboratories, capabilities developed through competitively awarded prototype agreements, and other innovative technologies. Section 860 clarifies the goal of the program, i.e., "to enable and assist small businesses to accelerate the commercialization of various technologies, including critical technologies." It also amends § 4061 to add "capabilities developed through competitively awarded prototype agreements" to the list of covered technologies. Section 860 provides that candidate proposals should be accepted "in support of primarily major defense acquisition programs, but also other defense acquisition programs." Section 860 also amends the funding provisions. In the previous version of the statute, if a total amount of awards greater than $3,000,000 was made under the program in a fiscal year, then the value of the awards could not exceed 25% of the amount made available to carry out such program during the same fiscal year. Section 860 increases this threshold to $6,000,000.

Section 862, Payment Of Subcontractors

Section 862 modifies the Small Business Act to strengthen the remedies in 15 U.S.C.A. § 637(d)(13) against prime contractors who fail to timely pay their small business subcontractors. For example, a prime contractor is now required to "notify in writing the [CO]" if a payment is past due to a small business subcontractor by more than 30 days under a covered contract "for which the Federal agency has paid the prime." Prior to the passage of the FY 2024 NDAA, this notice period was 90 days. Section 862 further adds that the CO "may enter or modify past performance information of the prime contractor in connection with the unjustified failure to make a full or timely payment to a subcontractor . . . before or after close-out of the covered contract." A "covered contract" means a contract under which the "prime contractor is required to develop a subcontracting plan."[45]

Under § 862, "[o]nce a [CO] determines," with respect to the prime contractor's past performance, "that there was an unjustified failure by the prime . . . to make a full or timely payment to a subcontractor," "the prime contractor is required to cooperate with the [CO], who shall consult with" the cognizant small business and other Government officials, "regarding correcting and mitigating" this "unjustified failure." Notably, the prime contractor's "duty of cooperation" "continues until the subcontractor is made whole or" the CO's determination "is no longer effective," "regardless of" the contract's "performance or close-out status."

Not later than June 2024, the SBA administrator must "submit to the Federal Acquisition Regulatory Council proposed revisions to regulations" "to carry out" these amendments.

Section 863, Increase In Governmentwide Goal For Participation In Federal Contracts By Small Business Concerns Owned And Controlled By Service-Disabled Veterans

Section 863 amends 15 U.S.C.A. § 644(g)(1)(A)(ii) to increase the governmentwide goal for participation in federal contracts by service-disabled veteran-owned small businesses (SDVOSBs) from 3% of all prime and subcontracts awarded each fiscal year to 5%.

Entities planning to take advantage of these increased opportunities should ensure they are familiar with the requirements to qualify both as a small business and a SDVOSB. There are significant risks associated with ineligible entities obtaining contracts set aside, reserved, or otherwise classified as intended for award to small and SDVOSBs, including the "presumption of loss" rule, which provides that there is a presumption that the government's damages are equal to the entire value of the contracts awarded if a business that did not qualify as small willfully sought and received awards intended for small business through misrepresentation. With the False Claims Act's treble damages provision,[46] this means that the government or a qui tam relator could seek damages of up to three times the value of all

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contracts awarded to an ineligible business that misrepresented its status, plus significant per invoice penalties, as a result of an alleged misrepresentation. In addition, ineligible companies that seek contracts intended for award to SDVOSBs could face suspension and debarment risk, both under the FAR and the Department of Veterans Affairs (VA) statutory debarment authority, see 38 U.S.C.A. § 8127(g), which requires the VA to debar entities that willfully and intentionally misrepresent themselves as SDVOSBs or veteran-owned small businesses (VOSBs) from contracting with the VA for five years. The VA has generally taken a broad view of the meaning of "willful and intentional," and while the debarment is technically limited to contracting with the VA, it will still appear as an exclusion in the System for Award Management (SAM). Prime and subcontractors that do business with ineligible SDVOSBs could also be at risk of False Claims Act liability and suspension and debarment. Contractors doing business with SDVOSBs should take steps to ensure that they only work with eligible SDVOSBs and that they comply with the Small Business Administration (SBA) affiliation rules.[47]

Section 864, Eliminating Self-Certification For Service-Disabled Veteran-Owned Small Businesses

Section 864 eliminates self-certification for SDVOSBs for all prime and subcontract awards that are counted by federal agencies towards participation goals for SDVOSBs in procurement contracts. FY 2021 NDAA, Pub. L. No. 116-283, § 862 eliminated self-certification for SDVOSBs seeking sole-source contracts or contracts set aside for SDVOSBs from agencies other than the VA. (Prior to the FY 2021 NDAA's enactment, VA had a separate certification program for contracts with the VA.[48]) In its final rule establishing regulations to implement FY 2021 NDAA § 862's requirements, SBA considered comments requesting that self-certification be completely eliminated.[49] However, it decided to continue allowing SDVOSBs that are not seeking SDVOSB set-aside or sole-source contracts to self-certify their SDVOSB status and to continue allowing agencies to count prime and subcontracts awarded to self-certified SDVOSBs toward agency goals for SDVOSB awards (provided those prime and subcontracts were not SDVOSB set-aside or sole-source contracts).[50] SBA's rationale for this decision was that "eliminating all forms of self-certification at this time would be contrary to its overarching goal of harmonizing its small business certification programs, which largely allow self-certification for purposes of subcontracts and goaling."[51] FY 2024 NDAA § 864 overturns SBA's regulations by requiring all prime or subcontracts that are counted towards SDVOSB contracting goals to be awarded to a business certified as a SDVOSB by SBA.

The elimination of self-certification is supposed to take effect on October 1 of the fiscal year beginning after the SBA Administrator promulgates regulations implementing § 864. Section 864 requires implementing regulations to be promulgated no later than 180 days after the FY 2024 NDAA's enactment. Assuming implementing regulations are issued before the end of FY 2024, the elimination of self-certification for SDVOSBs should take effect on October 1, 2024.

Section 864 provides for a one-year grace period for self-certified SDVOSBs to apply to SBA for certification. Self-certified SDVOSBs that file certification applications with SBA within one year of enactment of the FY 2024 NDAA (i.e., before December 22, 2024) can maintain their self-certification until the SBA makes a determination on their certification applications. Self-certified SDVOSBs that do not file a certification application within one year of the FY 2024 NDAA's enactment will lose their SDVOSB status.

Under FY 2021 NDAA § 862, SDVOSBs seeking sole-source or set-aside contracts were required to apply to SBA for certification no later than January 1, 2024. FY 2021 NDAA § 862 required the transfer of responsibility for verifying VOSB and SDVOSB status from the VA to the SBA and defined the "transfer date" for these responsibilities as two years after the FY 2021 NDAA's enactment (i.e., January 1, 2023).[52] Self-certified SDVOSBs seeking sole-source or set-aside contracts were given a one-year grace period from the "transfer date" (until January 1, 2024) to apply for self-certification, and permitted businesses that applied within the one-year grace period to retain their self-certified SDVOSB status until SBA decides whether to grant their application.

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Section 865, Consideration Of The Past Performance Of Affiliate Companies Of Small Businesses

Section 865 provides that not later than July 1, 2024, DOD "shall amend" DFARS 215.305, "Proposal evaluation" (or any successor regulation) "to require that when small business concerns bid on [DOD] contracts, the past performance evaluation and source selection processes shall consider, if relevant, the past performance information of affiliate companies of the small business concerns." On this issue, the JES states that the DFARS amendment must "require that, when evaluating a bid from a small business concern, the [CO] shall consider the past performance information of affiliates of such concern as the past performance of such concern."[53] This means that a small business may be evaluated by "the company it keeps," i.e., its affiliates, and not just by how that specific small business performed on previous contracts. If a small business has problematic affiliate past performance, the small business needs to be prepared to account for this reality in the competition (and in its offers).

Section 873, Program And Processes Relating To Foreign Acquisitions

Section 873 addresses improvements to the process of foreign acquisitions of U.S. defense articles through (1) a pilot program for combatant commands to hire acquisition specialists as advisors; (2) a foreign defense acquisition industry day; (3) a DOD senior-level industry advisory group; (4) establishment of DOD points of contact for foreign military sales (FMS); and (5) establishment of combatant command needs for exportability. First, under the pilot program, each combatant command may hire up to two acquisition professionals or COs to advise on FMS and DOD security cooperation processes. Second, not later than March 1, 2024, and not less frequently than annually thereafter, DOD must conduct an annual industry day to raise awareness with foreign governments and private sector participants regarding FMS and security cooperation opportunities. In conducting each industry day, DOD must focus on increasing participation while minimizing cost by ensuring that information for the industry day is unclassified, making the industry day accessible virtually, and posting any supporting materials on a publicly accessible website. Third, not later than June 2024, the Secretary, in coordination with defense industrial base representatives, shall establish an advisory group of senior-level individuals in the defense industrial base to focus on the role of DOD in FMS and the security cooperation process. Fourth, the Under Secretary and the Secretary of each military department will assign a single point of contact to coordinate information and outreach on FMS and respond to inquiries from the defense industrial base and partner countries. Fifth, no later than July 1, 2024, and annually thereafter, the Under Secretary, in consultation with the commander of each geographic command unit, the Director of Strategy, Plans, and Policy on the Joint Staff, each Secretary of a military department, and the Secretary of State, will provide a list of systems relating to research and development, procurement, or sustainment that would benefit from investment for exportability features in support of the security cooperation objectives in the regional theaters. The requirements and authorities in this provision terminate on December 31, 2028.

Section 874, Pilot Program To Incentivize Progress Payments

Section 874 requires the Under Secretary to establish a pilot program "to incentivize contractor performance by paying covered contractors a progress payment rate that is up to 10 percent higher than the customary progress payment rate." The Under Secretary will develop and establish the criteria for payment to contractors of higher progress payments using notice and comment rulemaking.[54] Participation in the pilot program is voluntary and it appears to be directed largely at non-small businesses. Not later than September 30, 2024, and annually thereafter, the Under Secretary will report to Congress on the implementation and activities of the pilot program, including a list of contractors that received increased progress payments under the pilot program and the contracts with respect to which such increased progress payments were made. This provision terminates on January 1, 2029. Existing contracts subject to the increased progress payments at the time of the provision's termination will continue to be subject to the increased progress payments, until the contract terminates, expires, or is no longer subject to progress payments.

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Section 875, Study On Reducing Barriers To Acquisition Of Commercial Products And Services

Under § 875, DOD (through the Under Secretary) "shall conduct a study on the feasibility and advisability of": (1) "establishing a default determination that products and services acquired by [DOD] are commercial and do not require [a] commercial determination" "under" 10 U.S.C.A. § 3456; (2) "establishing a requirement for a product or service to be determined not to be a commercial product or service prior to the use of procedures other than" in FAR Part 12, "Acquisition of Commercial Products and Commercial Services"; and (3) "mandating the use of commercial procedures under [FAR Part 12] unless a justification for a determination that a product or service is not a commercial product or service is" made.

Not later than June 2024, DOD "shall submit to the congressional defense committees a report on the findings of th[is] study." The report "shall include specific findings with relevant data and proposed recommendations, including any necessary and desirable modifications to applicable statute for any changes [DOD] seeks to make" as a result of this study.

Non-Title VIII FY 2024 NDAA Provisions Important To Procurement Law

Section 151, Report On Divestment Of Major Weapon Systems

Section 151 requires DOD, within 10 days of the President's budget request being sent to Congress, to annually provide a report to the congressional defense committees on the major weapon systems DOD plans to divest or retire over the next five years.

Section 152, Multiyear Procurement (MYP) Authority For Critical Minerals

Section 152 grants DOD MYP authority for critical minerals processed domestically, subject to the requirements in 10 U.S.C.A. § 3501, "Multiyear contracts: acquisition of property," and subject to appropriations for the National Defense Stockpile Transaction Fund. Domestic source is defined as the countries listed in the Defense Production Act, 50 U.S.C.A. § 4552, which includes Canada. Processed is defined as "processing or recycling of a critical mineral or magnet, including the separation, reduction, metallization, alloying, milling, pressing, strip casting, and sintering of a critical mineral." Contracts executed using this authority are considered acquisitions under the Strategic and Critical Materials Stock Piling Act, 50 U.S.C.A. § 98 et seq.

Section 152 also authorizes advance procurement for the MYP of critical minerals authorized under this section. Contract payments made after FY 2024 for such MYPs are subject to the availability of appropriations or funds specifically for such purpose and for such fiscal year.

Section 154, Prohibiting Use Of Funds To Procure Battery Technology From Specified Chinese Companies

Section 154 prohibits DOD from procuring batteries produced by six specified Chinese entities (and their successors), beginning on October 1, 2027. The specified entities are: "(1) Contemporary Amperex Technology Company, Limited (also known as 'CATL')[;] (2) BYD Company, Limited[;] (3) Envision Energy, Limited[;] (4) EVE Energy Company, Limited[;] (5) Gotion High Tech Company, Limited[; and] (6) Hithium Energy Storage Technology Company, Limited." The prohibition includes batteries assembled by, or where the majority of the components are from, the specified entities. The JES requires DOD to brief the congressional defense committees by March 1, 2025, on efforts to establish a DOD-wide battery strategy and on the battery supply chain.[55]

Section 223, Consortium On Additive Manufacturing For Defense Capability Development

Section 223 requires the Secretary, in coordination with the secretaries of the military departments, to establish a consortium by June 2024 to facilitate the use of additive manufacturing for developing capabilities. In additive manufacturing, producers transmit computer data to industrial 3D printers. In turn, these machines build parts on-demand from digital models. The consortium is also required, if directed by a DOD organization

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included in the consortium, to reverse engineer critical parts that have limited sources of supply. The consortium, to be called the *Consortium on Additive Manufacturing for Defense Capability Development,* must include military department labs, industry, and educational institutions.

Section 244, Prohibiting The Procurement Of Chemical Materials For Munitions From Specified Countries

Section 244 prohibits DOD from procuring specified chemical materials for munitions from China, Russia, Iran, or North Korea. The prohibited chemicals are listed under *Task 1: Domestic Production of Critical Chemicals* in section 3.0E of DOD's "Statement of Objectives (SOO) for Critical Chemicals Production," dated December 5, 2022. The prohibition takes effect on the date determined by the Secretary or September 30, 2028, whichever is earlier. According to the conference report, the conferees "understand that Defense Production Act (DPA) title III authorities are being leveraged to establish domestic sources for materials sourced from China" and encourages the Army "to analyze locations named in the Army's Organic Industrial Base Modernization Implementation Plan, as well as Army depots not specifically named, for domestic production of materials currently sourced from China."[56]

Section 318, Prohibiting DOD From Requiring Contractors To Provide Information On Greenhouse Gas Emissions

Section 318 prohibits DOD, for a period of one year through December 22, 2024, from requiring contractors, as a condition of being awarded a contract, to "disclose a greenhouse gas inventory or any other report on greenhouse gas emissions." For non-traditional contractors, the DOD prohibition on requiring greenhouse gas (GHG) emission information is permanent. DOD can waive the prohibition on a contract-by-contract basis if disclosure is "directly related to the performance of the contract." Section 318 also includes certain exceptions, which could require certain contractors to disclose emissions to verify other reports or disclosures.

This section is a response to a controversial FAR Council November 2022 proposed rule[57] that would require that certain contractors make disclosures about their GHG emissions and climate-related financial risk and would require for certain contractors the establishment of targets to reduce their GHG emissions.[58]

Section 1080, Modifying The Definition Of Domestic Source For The Defense Production Act Title III

Section 1080 amends 50 U.S.C.A. § 4552, expanding the definition of domestic source for DPA Title III to include a business in Australia or the United Kingdom. The expanded definition only applies if a U.S. or Canadian business is unable to fulfill a requirement for a defense article (as broadly defined in 22 U.S.C.A. § 2403) or material critical to national defense or security (as defined by 50 U.S.C.A. § 98h-1).

This section also amends 50 U.S.C.A. § 4531, "Presidential authorization for the national defense," by requiring an agency head to submit a report to, and brief, the appropriate congressional committees within 30 days of using these authorities. However, for businesses in the U.K. or Australia, the report and briefing must occur at least 30 days prior to using the authorities.

Section 1085, Commercial Integration Cells Within Combatant Commands

Section 1085 requires five specified geographic U.S. combatant commanders, no later than March 2024, to develop a plan to potentially establish both a commercial integration cell to integrate public and private entities with relevant capabilities and a chief technology officer. The section further requires each specified combatant commander to brief the congressional armed services committees on the feasibility of establishing a commercial integration cell.

Section 1204, Modifying The Security Cooperation Workforce Development Program And Establishing Defense Security Cooperation University

Section 1204, amending 10 U.S.C.A. § 384, requires the Secretary, acting through the Under Secretary of Defense for Policy and the Director of the Defense Security Cooperation Agency, to designate the Defense Security Cooperation University as the lead entity for

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managing and implementing the workforce development program. Section 1204 also requires DOD to direct one of its educational institutions to serve as an FMS Center of Excellence to research and promote best practices in accelerating and improving the FMS process and to improve the curricula for the FMS workforce.

Section 1241, Extending The Ukraine Security Assistance Initiative

Section 1250 of the FY 2016 NDAA, Pub. L. No. 114-92, authorized funding for security assistance and intelligence support to Ukraine. Section 1241 amends § 1250 of the FY 2016 NDAA, extending the authority by an additional two years, through December 31, 2026, and authorizes funding of $300 million for FY 2024 and another $300 million for FY 2025.

Section 1242, Extending And Modifying Temporary Authorities Related To Ukraine

In § 1244 of the FY 2023 NDAA, Pub. L. No. 117-263, Congress gave DOD specific contracting authorities to provide support to Ukraine, allies providing support to Ukraine, and to replenish stocks that were drawn down to support Ukraine.[59] These authorities include using the Special Emergency Procurement Authority in 41 U.S.C.A. § 1903, waiving the provisions in 10 U.S.C.A. § 3372(a) & (c) related to undefinitized contractual actions, and exempting (as appropriate) certified cost and pricing data requirements in 10 U.S.C.A. § 3702. Section 1244 also provided MYP authority for specified munitions and as additions to existing contracts.

Section 1242 amends § 1244 of the FY 2023 NDAA by extending these contracting authorities to Taiwan and Israel, requiring DOD to base price reasonableness determinations for certain contracts on actual cost and pricing data from prior actual similar purchases, and extending the authorities by four years, to September 30, 2028. Section 1242 also amended § 1244 of the FY 2023 NDAA by extending the MYP authority to include FY 2024, expanding the list of munitions that can use MYP authorities, and authorizing DOD to use the authority for "systems, items, services, and logistics support associated with" the listed munitions.

Section 1414, Critical Mineral Independence

Section 1414 requires the Under Secretary, no later than December 2024, to submit to the congressional Armed Services Committees a strategy for developing secure supply chains for mining and processing critical minerals that are not dependent on Russia, China, North Korea, or Iran. The strategy must be submitted in classified form, with an unclassified summary. "Critical minerals" are defined in the Energy Act of 2020, 30 U.S.C.A. § 1606.

Section 1525, Prize Competitions For Business Systems Modernization

Section 1525 requires DOD to establish, no later than September 2024, at least one prize competition to support business system modernization. The prize competition(s) must consider AI, machine learning, data analytics, supply chain visibility, financial systems, or other specified issues. The competition is to be conducted under the authority of 10 U.S.C.A. § 4025, "Prizes for advanced technology achievements." DOD must brief the congressional defense committees on this subject by June 2024, and annually thereafter, until the authority expires on September 30, 2028.

Section 1537, Requirements For Implementing User Activity Monitoring And Least Privilege Access For Cleared Personnel

Section 1537 requires DOD components to fully implement policies and requirements for user activity monitoring and least privilege access controls, including for contractors. In addition to this requirement, the House Report required six different reports relating to security clearances and related issues, including reports on modernizing the classified information network, the feasibility of creating secure spaces for small businesses, and the security clearance process.[60] These reports could be the basis for further legislation in the FY 2025 NDAA or Intelligence Authorization Act.

Section 1555, Certification Requirement Regarding Contracting For Military Recruiting

Under § 1555, prior to DOD entering into or extending, renewing or modifying "any contract or other agreement" "for the purpose of" "placing military recruit-

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ment advertisements on behalf of [DOD],” the Secretary “shall require” that the entity with which DOD contracts “certify” that it “does not place advertisements in news sources based on personal or institutional political preferences or biases, or determinations of misinformation.”

The Secretary shall submit a notification to the congressional defense committees and congressional leadership each time DOD “enters into a contract related to the placement of recruitment advertising with” (1) “NewsGuard Technologies Inc.”; (2) “the Global Disinformation Index,” incorporated in the U.K. as “Disinformation Index LTD”; and (3) “any similar entity.” If “such entities are used,” DOD must explain “how they are used.” This requirement terminates in December 2024.

As to § 1555, the President’s signing statement observed that:

> Section 1555(a) . . . requires recipients of certain Department of Defense (the “Department”) advertising contracts to certify that they “[do] not place advertisements in news sources based on personal or institutional political preferences or biases, or determinations of misinformation.” The Department will comply with this provision by requiring recipients of such contracts to certify that they will not place the Department’s advertisements based on the enumerated grounds. But the Department must also comply with the First Amendment, which limits the Government in “leverag[ing] funding to regulate speech outside the contours of the [governmental] program itself” (Agency for International Development v. Alliance for Open Society International, Inc.). The Department of Defense will implement the certification required by section 1555(a) consistent with the First Amendment.[61]

Section 5101, Prohibition Of Demand For Bribe

Section 5101, which is the Foreign Extortion Prevention Act, amends 18 U.S.C.A. § 201 to establish a criminal offense for “any foreign official or person selected to be a foreign official to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value personally or for any other person or nongovernmental entity” from any U.S.-connected person or entity. This provision makes it unlawful for any foreign official to seek or accept anything of value from a U.S. person or entity in exchange for performing or omitting any official act or otherwise conferring an improper business advantage. While the Foreign Corrupt Practices Act addresses the payment of bribes to foreign officials (“supply side” bribery), this provision attempts to expand jurisdiction to allow prosecution of foreign officials who request or require bribes (“demand side” bribery). The provision is subject to extraterritorial jurisdiction, although the prohibited action must take place in the United States or the bribe must be solicited from a U.S. person or entity. Any person who violates the prohibition may be fined not more than $250,000 or three times the monetary equivalent of the bribe, imprisoned for not more than 15 years, or both. No later than December 22, 2024, and annually thereafter, the Attorney General and Secretary of State must submit to the applicable congressional committees and post publicly a report detailing the major actions taken and penalties imposed under this section, the effectiveness of enforcement, and what resources are required to ensure adequate enforcement of the statute. The report must also include information on efforts by foreign governments to prosecute such cases and address U.S. diplomatic efforts to protect entities domiciled or incorporated in the United States from foreign bribery and the effectiveness of those efforts.

FY2024 NDAA AI-Related Provisions Of Interest To The Procurement Community

Section 1521, Control And Management Of DOD Data And Establishing The CDAO Governing Council

Section 1521 authorizes the DOD Chief Digital and Artificial Intelligence Office (CDAO) to access and control all data within DOD. This section also establishes a CDAO Governing Council consisting of specified senior DOD officials. The Council is required, by June 2024 and every 18 months thereafter, to submit a report on its activities to the Secretary and the congressional defense committees.

Section 1522, Modifying DOD-Wide Procurement Of Cyber Products

Section 1521 of the FY 2022 NDAA, Pub. L. No.117-81, required an executive agent to manage DOD-wide procurements of cyber data products and services. Sec-

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tion 1522 amends § 1521 of the FY 2022 NDAA by requiring the executive agent to evaluate "emerging cyber technologies," including AI-enabled security tools.

Section 1541, Modifying The Acquisition Authority Of The Senior Official With Principal Responsibility For AI And Machine Learning

Section 1541 amends § 808 of the FY 2021 NDAA, Pub. L. No. 116-283, by extending the contracting authority of the Chief Digital and Artificial Intelligence Officer, and the $75 million cap on the authority, by four years, to October 1, 2029. The Chief Digital and Artificial Intelligence Officer, by March 2024, must provide a demonstration of operational capabilities delivered through the acquisition authority, and an analysis of the challenges and benefits of the various acquisition authorities.

Section 1544, Plans, Strategies, And Other Matters Relating To AI

Section 1544 requires DOD to periodically review its existing AI strategy to assess implementation of the strategy and to issue guidance on adoption, ethical use, and bias of AI; develop a strategic plan for using AI; assess workforce and training needs; and identify commercially available large language models (and make such models available on classified networks). DOD must brief the congressional defense committees, by May 2024, on progress in implementing this section.

FY2024 NDAA Cybersecurity-Related Provisions Of Interest To The Procurement Community

Section 1502, Creating The Strategic Cybersecurity Program And Related Matters

Section 1502 creates a "Strategic Cybersecurity Program" and a program office within the Cybersecurity Directorate of the National Security Agency to support the Strategic Cybersecurity Program. The program office is charged with identifying threats to, vulnerabilities in, and remedies for, specified mission elements (including nuclear and long-range conventional strike). Section 1502 also requires DOD to submit an annual report to the congressional defense committees on the cybersecurity program no later than December 31 of each year. The report is to include evaluations of specified cyber vulnerabilities and program activities required in prior NDAAs. Concurrent with the President's budget request, DOD must provide the congressional defense committees a consolidated budget justification display covering the specified programs and activities. According to the JES, part of the intent of § 1502 is to "align and harmonize efforts and requirements for matters related to operational technologies found in [DOD] networks, weapon systems, and base infrastructure" that are found in seven prior NDAAs.[62]

Section 1553, Report On Contract For Cybersecurity

Section 1533 requires the DOD Chief Information Officer (CIO), by June 2024, to submit a report to the congressional defense committees, to include future plans to use a competitive process allowing multiple vendors to compete for the acquisition of integrated and interoperable cybersecurity tools. The CIO is also required, no later than February 2024, to brief the congressional defense committees on plans to ensure competition. In the JES, the conferees direct the CIO to notify the congressional armed services committees "of any future plans to alter [DOD's] current policy of utilizing third-party vendors to independently scan the [DOD] Information Network for both internal and external cyber vulnerabilities."[63]

House And Senate Procurement-Related Bill Provisions Not Adopted In The FY 2024 NDAA

Some procurement-related provisions of note in the House (H.R. 2670, 118th Cong.) and Senate (S. 2226, 118th Cong.) bills that were not adopted in the FY 2024 NDAA may be in play again in the FY 2025 NDAA or other legislation. Of particular note are:

- H.R. 2670 § 804, *Pilot Program on Payment of Costs for Denied Government Accountability Office Bid Protests*, which sought to resurrect a similar pilot program that was enacted as part of the FY 2018 NDAA[64] but subsequently repealed

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before it took effect.[65] This type of loser-pays idea seems to be considered every few years.

- S. 2226 § 868, *Modifications to Rights in Technical Data,* which would have amended 10 U.S.C.A. § 3771, "Rights in technical data: regulations," by adding that for technical data developed exclusively at private expense, the United States may release such data or detailed manufacturing or process data that is necessary for wartime or contingency operations, if the agency head determines that the original supplier of data is unable to meet the readiness or operational needs for such operations. While the provision was not adopted, the JES reiterated the Senate Report requirement that GAO report on data rights. Technical data rights will likely remain an issue of congressional concern over the next year. In the JES, the conferees "note intellectual property (IP), including technical data rights and rights to computer software, is critically important to [DOD's] ability to modernize capabilities and maintain technological superiority."[66]

- S. 2226 § 1085, *Protection of Covered Sectors,* which would have required U.S. entities to notify the Secretary of the Treasury when undertaking certain business activities occurring in China, Russia, North Korea, or Iran.

- S. 2226 § 1702, *Cyber Intelligence Center*, which would have required DOD to establish a cyber intelligence capability to support DOD-wide cyber requirements.

- S. 2226 § 1715, *Cyber Incident Reporting*, which would have required the DOD CIO to determine "what actions need to be taken to encourage more complete and timely mandatory cyber incident reporting" from the defense industrial base.

- Some provisions that sought to use the procurement system to promote domestic preference and socioeconomic policies also were not adopted, including, for example, H.R. 2679 § 842*, Inclusion of Titanium Powder in Definition of Specialty Metals Exempted From Certain Domestic Sourcing Requirements* at 10 U.S.C.A. § 4863, and S. 2226 § 866, *Enhanced Domestic Content Requirement for Navy Shipbuilding Programs.*

Peering Ahead To The FY 2025 NDAA

Based on current trends and how the provisions in the FY 2024 NDAA are written, the debate concerning the FY 2025 NDAA is likely to contain some familiar themes, including China, cybersecurity (largely focused on China), the industrial base, and potentially security clearance processes. Other potential themes may include International Traffic in Arms Regulations and FMS reform, in response to frustrations with timelines to deliver weapon systems to allies in support of Ukraine and Taiwan.

The Report accompanying the House version of the NDAA included reporting requirements relating to supply chain security and visibility, including reports on AI-facilitated supply chain visibility, supply chains of major weapon systems, and securing supply chains for tungsten.[67] The sheer number of required reports in these areas may set the stage for provisions in the FY 2025 NDAA.

ENDNOTES:

[1]See Congressional Research Service (CRS) Insight IN12210, FY2024 NDAA: Status of Legislative Activity 3 (Jan. 4, 2024), https://crsreports.congress.gov/product/pdf/IN/IN12210.

[2]See Schaengold, Prusock & Muenzfeld, "Feature Comment: The Impact of the FY 2019 NDAA on Federal Procurement Law—Part I," 60 GC ¶ 334; see also Schaengold et al., "2018 Procurement Review," 19-2 Briefing Papers 1 (Jan. 2019).

[3]CRS Report R46714, FY2021 National Defense Authorization Act: Context and Selected Issues for Congress (Mar. 28, 2021), https://crsreports.congress.gov/product/pdf/R/R46714; see CRS In Focus IF10515, Defense Primer: The NDAA Process 1 (Nov. 23, 2022), https://crsreports.congress.gov/product/pdf/IF/IF10515.

[4]See CRS Insight IN11985, FY2023 NDAA: Status of Legislative Activity 2 (Dec. 29, 2022), https://crsreports.congress.gov/product/pdf/IN/IN11985 ("Similar to the FY2022 NDAA, the House and Senate did not reach a stage at which a conference committee could be established to reconcile two versions of the [FY 2023 NDAA] bill. Instead, [House and Senate Armed Services Committee] leaders negotiated a bicameral agreement based on the two versions.").

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[5]H.R. Conf. Rep. No. 118-301 (Dec. 6, 2023); see CRS Insight IN12210, FY2024NDAA: Status of Legislative Activity 2 (Jan. 4, 2024), https://crsreports.congress.gov/product/pdf/IN/IN12210 ("Unlike for the FY2022 and FY2023 [NDAA] bills, the House and Senate agreed to convene a conference committee to reconcile the two versions of the FY2024 NDAA").

[6]See CRS Insight IN12225, FY2024 NDAA: Department of Defense Acquisition Policy 1 (Jan. 16, 2024), https://crsreports.congress.gov/product/pdf/IN/IN12225.

[7]See CRS Report R45068, Acquisition Reform in the FY2016-FY2018 National Defense Authorization Acts (NDAAs) 1-2 & App. A (Jan. 19, 2018), https://crsreports.congress.gov/product/pdf/R/R45068/6.

[8]See CRS Insight IN12225, FY2024 NDAA: Department of Defense Acquisition Policy 1 (Jan. 16, 2024), https://crsreports.congress.gov/product/pdf/IN/IN12225 ("Congress may incorporate provisions related to the defense acquisition process or individual acquisition programs in multiple titles in an NDAA.").

[9]See Schaengold, Prusock & Muenzfeld, "Feature Comment: The FY 2020 National Defense Authorization Act's Substantial Impact on Federal Procurement Law—Part II," 62 GC ¶ 14 (DOD's Implementation of NDAA's Acquisition-Related Provisions).

[10]See https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/22/statement-from-president-joe-biden-on-h-r-2670-national-defense-authorization-act-for-fiscal-year-2024/.

[11]Id.

[12]For the text of the JES, see Conference Report To Accompany H.R. 2670, H.R. Conf. Rep. No. 118-301, at 993 (Dec. 6, 2023); see also https://www.armed-services.senate.gov/imo/media/doc/fy24_ndaa_joint_explanatory_statement.pdf.

[13]CRS In Focus IF10516, Defense Primer: Navigating the NDAA 2 (Nov. 23, 2022), https://crsreports.congress.gov/product/pdf/IF/IF10516; CRS Report 98-382, Conference Reports and Joint Explanatory Statements 1, 2 (June 11, 2015), https://crsreports.congress.gov/product/pdf/RS/98-382.

[14]See FAR 2.101 (definitions of commercial product and commercial service).

[15]H.R. Conf. Rep. No. 118-301, at 1128 (Dec. 6, 2023).

[16]See also DFARS 212.102 and DFARS Procedures, Guidance and Information (PGI) 212.02 (including discussion of "making a commercial product or commercial service determination" and "referencing DOD Commercial Item Database at https://piee.eb.mil").

[17]H.R. Conf. Rep. No. 118-301, at 1129 (Dec. 6, 2023).

[18]See Prusock, Schwartz, Ross & Schaengold, "Feature Comment: The FY 2023 National Defense Authorization Act's Impact on Federal Procurement Law—Part I," 65 GC ¶ 7 (discussion of § 803).

[19]Joint Explanatory Statement To Accompany the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, at 183, https://www.armed-services.senate.gov/imo/media/doc/fy23_ndaa_joint_explanatory_statement.pdf; see DFARS 242.1502(g) (requiring DOD past performance evaluations in the Contractor Performance Assessment Reporting System to, "unless exempted by the head of the contracting activity, 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") (implementing 10 U.S.C.A. § 3705(b)).

[20]See also, e.g., DFARS 252.227-7013, "Rights in Technical Data—Other Than Commercial Products and Commercial Services," & DFARS 252.227-7015, "Technical Data—Commercial Products and Commercial Services."

[21]CRS In Focus IF12083, Intellectual Property and Technical Data in DOD Acquisitions (Apr. 22, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12083; Government Accountability Office (GAO), GAO-22-104752, Defense Acquisitions: DOD Should Take Additional Actions To Improve How It Approaches Intellectual Property (Nov. 30, 2021), https://www.gao.gov/products/gao-22-104752.

[22]Office of the Under Secretary of Defense for Acquisition and Sustainment, Report to Congress on Pilot Program on Intellectual Property Evaluation for Acquisition Programs Section 801 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92) (Feb. 2022), https://www.dau.edu/sites/default/files/Migrated/CopDocuments/20220303_Section%20801%20Annual%20RTC%20on%20IP%20Evals%20for%20Acq%20Prgms%20_Rpt%20and%20Enclosures%20Only.pdf.

[23]H.R. Conf. Rep. No. 118-301, at 1130 (Dec. 6, 2023).

[24]For a discussion of FY 2016 NDAA § 804, see Schaengold, Broitman & Prusock, "Feature Comment: The FY 2016 National Defense Authorization Act's Substantial Impact on Federal Procurement—Part I," 58 GC ¶ 20.

[25]See, e.g., https://www.acq.osd.mil/ic/def.html.

[26]See https://ofac.treasury.gov/consolidated-sanctions-list/ns-cmic-list.

[27]See Prusock, Schwartz, Ross & Schaengold, "Feature Comment: The FY 2023 National Defense Authorization Act's Impact on Federal Procurement Law—Part I," 65 GC ¶ 7 (discussion of § 843, Other transaction authority clarification).

[28]See Prusock, Schwartz, Ross & Schaengold, "Fea-

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ture Comment: The FY 2023 National Defense Authorization Act's Impact on Federal Procurement Law—Part I," 65 GC ¶ 7.

[29]See FAR Subpart 50.1, "Extraordinary Contractual Actions."

[30]H.R. Conf. Rep. No. 118-301, at 1132 (Dec. 6, 2023) (emphasis added).

[31]See Prusock, Schwartz, Ross & Schaengold, "Feature Comment: The FY 2023 National Defense Authorization Act's Impact on Federal Procurement Law—Part I," 65 GC ¶ 7.

[32]H.R. Conf. Rep. No. 118-301, at 1133 (Dec. 6, 2023).

[33]10 U.S.C.A. § 4872(d)(1).

[34]10 U.S.C.A. § 4872(d)(2).

[35]10 U.S.C.A. § 2926(h).

[36]See 10 U.S.C.A. § 101(a).

[37]See 10 U.S.C.A. § 3015(2).

[38]See 41 U.S.C.A. § 1902; FAR 2.101 (definition of micro-purchase threshold); FAR subpt. 13.2.

[39]See 41 U.S.C.A. § 1901; FAR 2.101 (definition of simplified acquisition threshold); FAR subpt. 13.3.

[40]See also https://business.defense.gov/Programs/Mentor-Protege-Program/; DFARS subpt. 219.71.

[41]See https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2024/FY2024_Pacific_Deterrence_Initiative.pdf.

[42]H.R. Conf. Rep. No. 118-301, at 1136 (Dec. 6, 2023) (emphasis added).

[43]See GAO, GAO-24-106129, Defense Industrial Base: DOD Needs Better Insight into Risks From Mergers and Acquisitions (Oct. 17, 2023), https://www.gao.gov/assets/d24106129.pdf.

[44]Id. at 13.

[45]15 U.S.C.A. § 637(d)(13)(A); see also FAR 19.702(a).

[46]31 U.S.C.A. § 3729(a)(1).

[47]See Schaengold & Prusock, "The Small Business Jobs Act's Presumption of Loss: It's Rebuttable on the Basis of Value Received by the Government," 29 Nash & Cibinic Rep. NL ¶ 67 (Dec. 2015).

[48]See Schaengold, Schwartz, Prusock, & Muenzfeld, "Feature Comment: The Significance of the FY 2021 National Defense Authorization Act to Federal Procurement Law—Part II," 63 GC ¶ 24 (discussing § 862).

[49]See Veteran-Owned Small Business and Service-Disabled Veteran-Owned Small Business-Certification, 87 Fed. Reg. 73,400 (2022).

[50]13 CFR § 128.200(c)(2); 87 Fed. Reg. 73,400 & 73,402.

[51]87 Fed. Reg. 73,400.

[52]See Schaengold, Schwartz, Prusock & Muenzfeld, "Feature Comment: The Significance of the FY 2021 National Defense Authorization Act to Federal Procurement Law—Part II," 63 GC ¶ 24.

[53]H.R. Conf. Rep. No. 118-301, at 1137 (Dec. 6, 2023).

[54]See DFARS subpt. 232.5.

[55]H.R. Conf. Rep. No. 118-301, at 1002 (Dec. 6, 2023).

[56]H.R. Conf. Rep. No. 118-301, at 1013 (Dec. 6, 2023).

[57]87 Fed. Reg. 68,312 (Nov. 14, 2022).

[58]See FAR Cases 2021-015 & 2021-016, https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf, both of which are, as of this writing, under administrative review.

[59]See Prusock, Schwartz, Ross & Schaengold, "Feature Comment: The FY 2023 National Defense Authorization Act's Impact on Federal Procurement Law—Part II," 65 GC ¶ 12.

[60]See H.R. Rep. No. 118-125, at 243, 246, 275–76 (June 30, 2023).

[61]See https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/22/statement-from-president-joe-biden-on-h-r-2670-national-defense-authorization-act-for-fiscal-year-2024/.

[62]H.R. Conf. Rep. No. 118-301, at 1279 (Dec. 6, 2023).

[63]H.R. Conf. Rep. No. 118-301, at 1289–90 (Dec. 6, 2023).

[64]See Schaengold, Prusock & Muenzfeld, "Feature Comment: The Fiscal Year 2018 NDAA's Significant Impact on Federal Procurement Law—Part I," 60 GC ¶ 1 (discussion of § 827).

[65]See "Feature Comment: The Significance of the FY 2021 National Defense Authorization Act to Federal Procurement Law—Part II," 63 GC ¶ 24 (discussion of § 866).

[66]H.R. Conf. Rep. No. 118-301, at 1148 (Dec. 6, 2023).

[67]See H.R. Rep. No. 118-125, at 226–27, 247–48, 250–51 (June 30, 2023).

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