THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

JANUARY 17, 2024 | VOLUME 66 | ISSUE 2

¶ 8 FEATURE COMMENT: The Significance Of The FY 2024 NDAA To Federal Procurement Law—Part I

On Dec. 22, 2023, nearly three months after the Oct. 1, 2023 start of Fiscal Year 2024, President Biden signed into law the National Defense Authorization Act (NDAA) for FY 2024, P.L. 118-31, becoming the 63rd consecutive fiscal year that a 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 becoming law even later–on Jan. 1, 2022. In the last 48 fiscal years, the NDAA has been enacted on average 43 days after the fiscal year began, and the FY 2024 NDAA (enacted 85 days after the beginning of FY 2024) increased the average delay.

The NDAA is primarily a policy bill and does not provide budget authority for the Department of Defense to spend, but it does authorize the appropriation of budget authority. The amounts authorized by the NDAA are not binding on the appropriations process but can influence appropriations and serve as "a reliable indicator of congressional sentiment on funding for particular items." Congressional Research Service Report R46714 (March 28, 2021), *FY 2021 National Defense Authorization Act: Context & Selected Issues for Congress*. The FY 2022 and 2023 NDAAs had a more pronounced influence on the appropriations process than usual. The authorized budgets contained in the enacted NDAAs ultimately proved to be close to where the final appropriations bill ended up. This year, however, the FY 2024 NDAA is 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," 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. For the FY 2024 NDAA, both the House and Senate passed their respective versions of the bill, and a conference (albeit truncated) was held to reconcile the two bills. See also CRS Insight IN12210 (Jan. 4, 2024), *FY2024 NDAA: Status of Legislative Activity*, at 2 ("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").

This year's NDAA included 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," see CRS Insight IN12225 (Aug. 17, 2023), *FY2024 NDAA: Department of Defense Acquisition Policy*, at 1, 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 a 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). Certain provisions in other titles of the FY 2024 NDAA are also very important to procurement law. See also CRS Insight IN12225 (Aug. 17, 2023), *FY2024 NDAA: Department of Defense Acquisition Policy*, at 1 ("Congress may incorporate provisions related to the defense acquisition process or individual acquisition programs in multiple titles in an NDAA.").

Some of the FY 2024 NDAA's provisions will not become effective until the Federal Acquisition Regulation or Defense FAR Supplement (and possibly other regulations) are amended or new provisions are promulgated, which sometimes can take two to four years or more. Other provisions explicitly provide for the future date in which they are to become effective, such as § 833, which includes an effective date two years from the FY 2024 NDAA's enactment, i.e., Dec. 22, 2025.

As to major themes, the FY 2024 NDAA broadly focuses on China, the defense industrial base, supply chain, cybersecurity and artificial intelligence (AI), efforts to streamline the acquisition process (including commercial buying) along with various small business provisions. 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 is driving policy from industrial base and supply-chain to cybersecurity and software acquisition.

Industrial base and supply chain are among the most prominent NDAA themes, with provisions focused on multiyear procurement (§§ 152 & 820), pilot programs for product support in contested logistics and for analyzing supply chains (§§ 842 & 856), and prohibiting purchases from China, Russia, North Korea, and/or Iran (§§ 154, 244, 804, 805 & 825). The FY 2024 NDAA also includes the American Security Drone Act of 2023 (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 & 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 & 1553) and AI (§§ 1521, 1522, 1541 & 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 & 1204) and expanding Ukraine authorities (§§ 1241 & 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." See *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/*. With the possible exception of FY 2024 NDAA § 1555, "Certification Requirement Regarding Contracting for Military Recruiting," which is discussed in this Feature Comment, none of these provisions—which otherwise concern (among other issues) limitations on the transfer of Guantànamo 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.

Because of the substantial volume of procurement law changes in the FY 2024 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I addresses §§ 801–831. Part II, which will be published on Jan. 24, 2024, addresses §§ 833–875, plus sections in Titles I, II, III, X, XII, XIV, XV and LI.

As in our past NDAA Feature Comments, we look to the Joint Explanatory Statement (JES), which accompanies the NDAA as "legislative history," to help "explain[] the various elements of the [House and Senate] conferees' agreement" that led to the enacted FY 2024 NDAA. CRS In Focus IF10516, *Defense Primer: Navigating the NDAA* (Dec. 2021), at 2; CRS Rept. 98-382, *Conference Reports and Joint Explanatory Statements* (June 11, 2015), at 1, 2.

Section 801, Commercial Nature Determination Memo Available to Contractor—Section 3456(b) of title 10, U.S. Code provides for DOD contracting officers 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. See FAR 2.101 (definitions of commercial product and commercial service). Section 801 amends 10 USCA § 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 contracting officer shall provide" the memo to the contractor or subcontractor. The JES adds that the intent of the amendment is 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."

Memorandums documenting commercial item determinations are not always required. Section 3456(c) of title 10, U.S. Code provides that, subject to certain exceptions, "[a] contract for a product or service acquired using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation shall serve as a prior commercial product or service determination with respect to such product or service." See also DFARS 212.102 and DFARS Procedures, Guidance and Information 212.102 (including discussion of "making a commercial product or commercial service determination" and "referencing DoD Commercial Item Database at *piee.eb.mil*").

Section 802, Modification of Truthful Cost or Pricing Data Submissions and Report—Under 10 USCA § 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 contracting officer," the offeror is nevertheless "required to submit to the contracting officer *data other than certified cost or pricing data …, to the extent necessary to determine the reasonableness of the price.*" (Emphasis added.) If the CO is unable to determine "by any other means" that the proposed prices are "fair and reasonable," "an offeror 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."

Section 3705(b) further requires that the DOD undersecretary for acquisition and sustainment (undersecretary) "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 undersecretary to "develop a framework for revising what

constitutes a denial of uncertified cost or pricing data, including" (i) "identifying situations under which such denials occur to exclude situations outside the control of the offeror or Federal Government;" (ii) "identifying whether such denial is from the" prime or subcontractor; and (iii) "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."

The JES to FY 2023 NDAA § 803 notes that "Senate Report 116-48 accompanying S. 1790," which was the FY 2020 NDAA, required the undersecretary "to submit an annual report detailing instances where potential contractors have denied contracting officer requests for uncertified cost or pricing data to allow for the determination of fair and reasonable pricing of DOD acquisitions." That JES directed the undersecretary 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." 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 USCA § 3705(b)).

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 Russia for sale outside Russia extracted from another country against which the president has not imposed sanctions are exempt from the prohibition. The prohibition took effect on Dec. 22, 2023, and applies to any contract entered into on or after that date. The section sunsets on Dec. 31, 2029.

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 U.S. or NATO; (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 Dec. 22, 2023.

Section 805, Prohibition of DOD Procurement Related to Entities Identified as Chinese Military Companies Operating in the U.S.—Subject to certain exceptions, effective June 30, 2026, § 805 prohibits DOD from entering into, renewing, or extending a contract for goods, services, or technology with either (i) a Chinese military company operating in the U.S.; or (ii) an entity subject to the control of a Chinese military company operating in the U.S. 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 U.S. or any entities subject to their control.

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, entered into prior to the" implementation dates. And they will not apply to "components," defined in 41 USCA § 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 USCA § 3901 et seq., "or to any authorized intelligence activities of the United States."

No later than Dec. 22, 2024, the secretary of defense is required to amend the DFARS to implement the prohibition on contracting with Chinese military companies or entities subject to their control. Additionally, no later than June 19, 2025, the secretary must amend the DFARS to implement the prohibition on procuring 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 these prohibitions in certain circumstances. Entities requesting such a waiver must provide the secretary with (A) "a compelling justification for the additional time to implement" § 805's prohibitions; and (B) "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 them) 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 (IP) 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 IP 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 USCA § 3771, which is implemented in DFARS subpts. 227.71 & 227.72. See also, e.g., DFARS Clauses 252.227-7013, "Rights in Technical Data—Other Than Commercial Products and Commercial Services," and 252.227-7015, "Technical Data—Commercial Products and Commercial Services."

Not later than May 1, 2024, the undersecretary and the secretary of each military department shall each designate one covered program under their respective jurisdictions. Not later than June 2024, the undersecretary, in coordination with the military department secretaries, shall provide a briefing to the congressional armed services committees "with a detailed plan to implement the pilot program." Section 808 requires 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." Authority to carry out the pilot program ends Dec. 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," is discussed in CRS, In Focus IF12083 (April 22, 2022), *Intellectual Property & Technical Data in DOD Acquisitions*, and Government Accountability Office Report, *Defense*

Acquisitions: DOD Should Take Additional Actions to Improve How It Approaches Intellectual Property (GAO-22-104752), available at *www.gao.gov/products/gao-22-104752*.

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 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.

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 notice of the opportunity to participate in the pilot program 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. 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 USCA § 2302.

Section 810, Updated Guidance on Planning for Exportability Features for Future Programs—By Dec. 22, 2024, the undersecretary must ensure that program guidance for major defense acquisition programs and acquisition programs or projects carried out using rapid fielding or rapid prototyping pathways under FY 2016 NDAA § 804 is revised to integrate planning for exportability features under 10 USCA § 4067. See Schaengold, Broitman, and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part I," 58 GC ¶ 20 (discussion of § 804). Exportability features are technology protection features that facilitate foreign sales of defense systems or subsystems to allied and friendly nations. See *www.acq.osd.mil/ic/def.html*. 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 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.)

"Covered foreign entity" is defined to include the Chinese government and certain Chinese companies, the Russian government and certain entities sanctioned as a result of Russia's invasion of Ukraine, governments supporting 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" as a DOD contract 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" DOD contract for consulting services "within 15 days of determining that such a conflict has arisen."

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.

Section 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."

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.

If the secretary issues a waiver under § 812, the secretary must provide notice to the congressional armed services committees within 30 days.

Section 820, Amendments to Multiyear Procurement Authority—This section amends 10 USCA § 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 an agency head determination that use of a multiyear contract will result in significant savings.

Section 822, Clarification of Other Transaction Authority for Installation or Facility Prototyping—This section clarifies the pilot program under 10 USCA § 4022(i) authorizing the award of other transaction agreements (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." See Prusock, Schwartz, Ross, and Schaengold, Feature Comment, "The FY 2023 National Defense Authorization Act's Impact On Federal Procurement Law—Part I," 65 GC ¶ 7 (discussion of § 843, OTA Clarification). Before the FY 2024 NDAA's enactment, § 4022(i) stated that no more than two prototype projects could begin to be carried out per 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 certain statutes.

Section 824, Modification and Extension of Temporary Authority to Modify Certain Contracts and Options Based on the Impacts of Inflation—FY 2023 NDAA § 822 amended 50 USCA § 1431 (part of P.L. 85-804, see FAR subpt. 50.1, "Extraordinary Contractual Actions") to provide that the secretary, "acting pursuant to a Presidential authorization," (i) "may … make an amendment or modification to an eligible [i.e., DOD] contract when, due solely to economic inflation, the cost to a prime contractor of performing such eligible contract is greater than the price of such eligible contract," and (ii) "may not request consideration from such prime contractor for such amendment or modification." See 65 GC ¶ 7 (discussion of § 822). Section 822 provides for similar "economic inflation" relief for DOD subcontractors. Section 824 now amends 50 USCA § 1431 to extend this authority to Dec. 31, 2024.

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." A "covered logistics platform" means a data exchange platform that uses or provides (1) the national transportation logistics public information platform (i.e., LOGINK) provided by China or its government; (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.

The prohibition is effective in June 2024. The secretary may waive this prohibition for a specific contract if the waiver is vital to national security. 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 46 USCA § 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 Dec. 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 using it. The secretary of transportation 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.

Section 826, Modification of Contracts and Options to Provide Economic Price Adjustments—FAR 16.203-1, 16.203-2, and 16.203-3 include requirements for using a fixed-price contract with economic price adjustment. Section 826(a) provides that "[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 undersecretary is required to issue implementing guidance no later than Jan. 21, 2024, which is highly unlikely to occur by that date.

The JES states that the Senate amendment to this provision "clarif[ies] that [DOD] **may seek consideration** when considering whether to modify contracts to include an economic price adjustment clause." (Emphasis added.) This JES statement is not reflected in the plain language of § 826. The statute is silent on 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 U.S. Stockpiles—We previously reported about certain important revisions to 10 USCA § 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. See 65 GC ¶ 7.

FY 2024 NDAA § 831 allows the use of these urgent acquisition procedures, where the U.S. is not a party to an armed attack, to (1) "replenish" U.S. "stockpiles of defense articles when such stockpiles are diminished as a result of the [U.S.] 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 … in connection with such response."

This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Melissa Prusock *(prusockm@gtlaw.com)*, Moshe Schwartz *(moshe@ethertonandassociates.com)*, Eleanor Ross *(eleanor.ross@gtlaw.com)*, and Mike Schaengold *(schaengoldm@gtlaw.com). Melissa is a Shareholder in Greenberg Traurig's (GT's) Government Contracts Group. Moshe is President of Etherton and Associates, and the former Executive Director of the Section 809 Panel. Elle is a Senior Associate in GT's Government Contracts Group. Mike, a Shareholder, is Co-Chair of GT's Government Contracts Practice.

THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

JANUARY 24, 2024 | VOLUME 66 | ISSUE 3

¶ 13 FEATURE COMMENT: The Significance Of The FY 2024 NDAA To Federal Procurement Law—Part II

On Dec. 22, 2023, President Biden signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2024, P.L. 118-31. Because of the substantial volume of procurement law changes in the FY 2024 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I, published on Jan. 17, 2024, addressed §§ 801–831. See Prusock, Schwartz, Ross, and Schaengold, Feature Comment, "The Significance Of The FY 2024 NDAA To Federal Procurement Law—Part I," 66 GC ¶ 8. Part II addresses §§ 833–875, plus sections in Titles I, II, III, X, XII, XIV, XV and LI.

Section 833, Amendment to Requirement to Buy Certain Metals from American Sources—Section 833 amends 10 USCA § 4863, which requires the Department of Defense 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 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 U.S., in the country from which the product is milled or component is procured, or in another country that has such an agreement with the U.S. 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 of defense is required to 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 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. Between Dec. 22, 2023, and Jan. 1, 2024, 60 percent of the cost of the manufactured articles, materials, or supplies must be mined, produced, or manufactured in the U.S. On and after Jan. 1, 2024, the domestic source requirement increases to 65 percent and starting Jan. 1, 2029, the requirement will increase to 75 percent. These revised domestic content thresholds apply to contracts entered into on Dec. 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 U.S. pursuant to 10 USCA § 4851; or articles manufactured in a country that is a member of the national technology and industrial base (NTIB).

Not later than June 2024, the secretary is required to issue rules for a 55 percent 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 U.S. The rules allowing the 55 percent domestic content threshold expire on Jan. 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 U.S., abroad, or in transit from one location to the other.

In establishing the program, the secretary is authorized to establish product support arrangements, which are a contract, task order, 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. This arrangement can be based on other transaction authorities outlined in 10 USCA: cross-servicing agreements (§ 2342), centers of industrial and technical excellence (§ 2474), procedures for urgent acquisition and deployment (§ 3601), research projects—other than contracts and grants (§ 4021), and authority for certain prototype projects (§ 4022). The authority under this section will terminate in December 2026.

Section 843, Special Authority for Rapid Contracting for Commanders of Combatant Commands—This section 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;" (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;" 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," see 41 USCA § 1902; Federal Acquisition Regulation 2.101 (definition of micro-purchase threshold, **which is ordinarily $10,000**); FAR subpt. 13.2, "with respect to a single contracting action" "for a contract to be awarded and performed, or purchase to be made" (A) in the U.S. for "less than $15,000;" or (B) outside the U.S. for "less than $25,000."

(2) "Simplified acquisition procedures," see 41

USCA § 1901; FAR 2.101 (definition of simplified acquisition threshold, **which is ordinarily $250,000**); FAR subpt. 13.3, "with respect to a single contracting action" "for a contract to be awarded and performed, or purchase to be made" (A) in the U.S. for "less than $750,000;" or (B) outside the U.S. for "less than $1,500,000."

(3) Under 10 USCA § 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 contracting officer 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."

This authority terminates on Sept. 30, 2028.

Section 851, Additional National Security Objectives for the National Technology and Industrial Base—This section amends 10 USCA § 4811, which requires the secretary to develop a national security strategy for the 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. In addition, § 851 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, DOD Mentor-Protégé Program—Section 852 amends the DOD Mentor-Protégé Program under 10 USCA § 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."

Section 857, DOD Notification of Certain Transactions—This section provides that the "parties to a proposed merger or acquisition that will require a review by [DOD] who are required to file the [premerger] 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 USCA § 18a. The Joint Explanatory Statement (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**." (Emphasis added.)

The Government Accountability Office has recently identified various deficiencies in DOD's review of proposed mergers or acquisitions impacting the U.S. defense industrial base. See *Defense Industrial Base: DOD Needs Better Insight into Risks from Mergers and Acquisitions* (GAO-24-106129), *www.gao.gov/assets/d24106129.pdf*. For example, the report concluded that "DOD's insight into defense 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 percent] of defense M&A." DOD "focuses its resources on assessing high-dollar-value M&A for competition risks in support of antitrust reviews." Id.

Section 860, Amendments to Defense Research And Development Rapid Innovation Program—Section 860 amends 10 USCA § 4061 related to the

Defense R&D 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 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." In addition, in the previous version of the statute, if a total amount of awards greater than $3,000,000 was made in a fiscal year, then the value of the awards could not exceed 25 percent 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—This section modifies the Small Business Act to strengthen the remedies against prime contractors who fail to timely pay their small business subcontractors. Prime contractors must "notify in writing the contracting officer" if a payment is past due to a small business subcontractor by more than 30 days under a covered contract for which the prime has been paid. Prior to this NDAA's enactment, this 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." See also FAR 19.702(a).

"Once a contracting officer 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 contracting officer, who shall consult with" the cognizant small business and other Government officials, "regarding correcting and mitigating" this "unjustified failure." 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." The Small Business Administration is required to submit proposed revisions to regulations implementing these changes to the FAR Council by June 2024.

Section 863, Increase in Governmentwide Goal for Participation in Federal Contracts by Small Business Concerns Owned And Controlled By Service-Disabled Veterans—This section increases the Government-wide goal for participation in Federal contracts by service-disabled veteran-owned small businesses (SDVOSBs) from three percent of all prime and subcontracts awarded each fiscal year to five percent. While increasing contracting opportunities for SDVOSBs is a laudable goal, entities planning to take advantage of these increased opportunities should familiarize themselves with applicable SBA regulations and be cognizant of the substantial risks of False Claims Act liability and suspension/debarment for misrepresenting SDVOSB status. Large businesses could face these risks as well by, for example, knowingly or recklessly violating SBA's affiliation rules or knowingly or recklessly relying on ineligible businesses to meet subcontracting goals.

Section 864, Eliminating Self-Certification for SDVOSBs—Section 864 eliminates self-certification for SDVOSBs for all prime and subcontract awards that are counted by federal agencies towards participation goals for SDVOSBs. FY 2021 NDAA § 862 eliminated self-certification for SDVOSBs seeking sole source contracts or contracts set aside for SDVOSBs from agencies other than the Department of Veterans Affairs. (Prior to the FY 2021 NDAA's enactment, the VA had a separate certification program for contracts with the VA, which was transferred to SBA under FY 2021 NDAA § 862.) See Schaengold, Schwartz, Prusock and Muenzfeld, Feature Comment, "The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part II," 63 GC ¶ 24 (discussing § 862). In its final rule

implementing FY 2021 NDAA § 862's requirements, SBA considered comments requesting that self-certification be completely eliminated but 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). 13 CFR § 128.200(c)(2); 87 Fed. Reg. 73,400, 73,400 & 73,402. 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 Oct. 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 by Dec. 22, 2024, can maintain their self-certification until SBA makes a determination on their certification applications. Self-certified SDVOSBs that do not file a certification application by Dec. 22, 2024, 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 Jan. 1, 2024.

Section 865, Consideration of the Past Performance of Affiliate Companies of Small Businesses—By July 1, 2024, DOD is required to amend Defense FAR Supplement 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 COs to consider affiliate past performance to be the past performance of the small business bidder. This means that a small business may be evaluated by "the company it keeps," i.e., its affiliates, and not just how that specific small business performed on previous contracts.

Section 873, Program and Processes Relating to Foreign Acquisitions—Section 873 addresses improvements to the process of foreign acquisitions of U.S. defense articles. First, under this pilot program, each combatant command may hire up to two acquisition professionals or COs to advise on foreign military sales and DOD security cooperation processes. Second, not later than March 1, 2024, and at least 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 shall establish an advisory group of senior-level individuals in the defense industrial base to focus on DOD's role in FMS and the security cooperation process. Fourth, the undersecretary of defense for acquisition and sustainment 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 undersecretary, 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 R&D, procurement, or sustainment that would benefit from investment for exportability features in support of the security cooperation objectives in the regional theaters. This section terminates on Dec. 31, 2028.

Section 874, Pilot Program to Incentivize Progress Payments—Section 874 requires the undersecretary 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 undersecretary will develop and establish the criteria for payment to contractors of higher progress payments using notice and comment rulemaking. See DFARS subpt. 232.5. Participation in the pilot program is voluntary and it appears to be directed largely at non-small businesses. Not later than Sept. 30, 2024, and annually thereafter, the undersecretary will report to Congress on the pilot program, including a list of contractors that received increased progress payments under the pilot program and the contracts for which increased progress payments were made. This provision terminates on Jan. 1, 2029.

Section 875, Study on Reducing Barriers to Acquisition of Commercial Products and Services—Under § 875, the undersecretary "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 USCA § 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 pt. 12; and (3) "mandating the use of commercial procedures under [FAR pt. 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.

* * *

A review of certain non-Title VIII FY 2024 NDAA provisions important to procurement law follows:

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—This section grants DOD MYP authority for critical minerals processed domestically, subject to the requirements in 10 USCA § 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 (DPA), 50 USCA § 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 USCA § 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 Oct. 1, 2027. 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.

Section 223, Consortium on Additive Manufacturing for Defense Capability Development—This section requires DOD to establish a consortium by June 2024 to facilitate the use of additive manufactur-

ing for developing capabilities. The consortium is also required, if directed by a DOD organization 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,* is required to 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 § 3.0E of DOD's "Statement of Objectives for Critical Chemicals Production," dated Dec. 5, 2022. See *Appendix VI - Call 012 Statement of Objectives.pdf - Defense Production Act (DPA) Title III FA8650-19-S-5010 CALL 012 - Critical Chemicals Production (govtribe.com)*. The prohibition takes effect on the date determined by the secretary of defense or Sept. 30, 2028, whichever is earlier. According to the JES, the conferees "understand that [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."

Section 318, Prohibiting DOD from Requiring Contractors to Provide Information on Greenhouse Gas Emissions—This section prohibits DOD, for a period of one year through Dec. 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 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, see, e.g., 87 Fed. Reg. 68312, that would require that certain contractors make disclosures about their greenhouse gas emissions and climate-related financial risk, and would require the establishment of targets to reduce their emissions. See FAR Cases 2021-015 & 2021-016, *www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf,* both of which as of this writing are under administrative review.

Section 1080, Modifying the Definition of Domestic Source for the Defense Production Act Title III—Section 1080 amends 50 USCA § 4552, expanding the definition of domestic source for DPA Title III to include a business in Australia or the UK. The expanded definition only applies if a U.S. or Canadian business is unable to fulfill a requirement for a defense article or material critical to national defense or security.

Section 1241, Extending the Ukraine Security Assistance Initiative—Section 1250 of the FY 2016 NDAA 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 Dec. 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, 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. See Prusock, Schwartz, Ross and Schaengold, Feature Comment, "The FY 2023 National Defense Authorization Act's Impact On Federal Procurement Law—Part II," 65 GC ¶ 12. These authorities include using the special emergency procurement authority in 41 USCA § 1903, waiving the provisions in 10 USCA § 3372(a) and (c) related to undefinitized contractual actions, and providing exemptions from requirements to provide certified cost and pricing data. 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 Sept. 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—This section requires the undersecretary, 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. Critical minerals are defined in the Energy Act of 2020, 30 USCA § 1606.

Section 1537, Requirements for Implementing User Activity Monitoring and Least Privilege Access for Cleared Personnel—This section 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. 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 this section, prior to DOD entering into or extending, renewing or modifying "any contract or other agreement" "for the purpose of" "placing military recruitment 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" (i) "NewsGuard Technologies Inc.;" (ii) "the Global Disinformation Index," incorporated in the UK as "Disinformation Index LTD;" and (C) "any similar entity." If "such entities are used," DOD must explain "how they are used." This requirement terminates in December 2024.

Section 5101, Prohibition of Demand for Bribe—Section 5101, which is the Foreign Extortion Prevention Act, amends 18 USCA § 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 U.S. 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.

* * *

The FY 2024 NDAA includes artificial intelligence (AI) and cybersecurity-related provisions of interest to the procurement community.

- AI

Section 1521, Control and Management of DOD Data and Establishing the CDAO Governing Council—This provision 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 1541, Modifying the Acquisition Authority of the Senior Official with Principal Responsibility for AI and Machine Learning—This section amends the FY 2021 NDAA § 808, by extending the contracting authority of the CDAO, and the $75 million cap on the authority, by four years, to Oct. 1, 2029. The CDAO, by March 2024, is required to 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, & 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. DOD is required to brief the congressional defense committees, by May 2024, on progress in implementing this section.

- Cybersecurity

Section 1502, Creating the Strategic Cybersecurity Program and Related Matters—This section 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 is required to 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.

Section 1553, Report on Contract for Cybersecurity—Section 1533 requires the DOD chief information officer, 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."

* * *

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 (focused largely on China), the industrial base, and potentially security clearance processes. Other potential themes may be 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. The sheer number of required reports in these areas may set the stage for certain provisions in the FY 2025 NDAA.

This Feature Comment was written for The Government Contractor by **Melissa Prusock** ***(prusockm@gtlaw.com)***, **Moshe Schwartz** ***(moshe@ethertonandassociates.com)***, **Eleanor Ross** ***(eleanor.ross@gtlaw.com), and*** **Mike Schaengold** ***(schaengoldm@gtlaw.com). Melissa is a Shareholder in Greenberg Traurig's (GT's) Government Contracts Group. Moshe is President of Etherton and Associates, and the former Executive Director of the Section 809 Panel. Elle is a Senior Associate in GT's Government Contracts Group. Mike, a Shareholder, is Co-Chair of GT's Government Contracts Practice.***