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THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

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¶ 11 FEATURE COMMENT: The Significance Of The Fiscal Year 2025 National Defense Authorization Act To Federal Procurement Law—Part I

On Dec. 23, 2024, nearly three months after the Oct. 1, 2024 start of Fiscal Year 2025, President Biden signed into law the "Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025" (FY 2025 NDAA), P.L. 118-159, becoming the 64th consecutive fiscal year that a NDAA has been enacted. Unfortunately, signing the NDAA in December is not unusual, with seven of the last nine NDAAs becoming law in December and the FY 2021 NDAA becoming law even later—on Jan. 1, 2021. In the last 49 fiscal years, the NDAA has been enacted on average 44 days after the fiscal year began, and the FY 2025 NDAA (enacted 84 days after the beginning of FY 2025) 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), *FY2021 National Defense Authorization Act: Context & Selected Issues for Congress*. The FY 2025 NDAA adhered to the Biden administration's budget request, rejecting the Senate Armed Services Committee's (SASC) effort (through S. 4638) that "would have authorized approximately $25.1 billion more than [the president's] requested" amount of $883.67 billion for national security. The SASC's effort to increase defense spending, however, has gained momentum, including as a result of the recent elections and the use of reconciliation to adjust appropriations.

For the FY 2025 NDAA, the House passed its version of the NDAA, but the Senate was unable to pass the bill that was reported out favorably by the SASC. As a result, there was no formal conference, and the committees held an "informal conference," with the basis of negotiations being the House-passed bill, the Senate bill as reported out of the SASC and filed Senate amendments agreed to by the SASC's Chair and Ranking Member. This departure from regular procedures has increased in recent years; over the last four years, only the FY 2024 NDAA followed the process of both the House and Senate passing their respective versions of the bill and the holding of a conference (albeit truncated) to reconcile the two bills.

The FY 2025 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 72 provisions addressing procurement matters. This is an increase over the past four NDAAs—the FY 2024, 2023, 2022, and 2021 NDAAs contained 47, 55, 57, and 63 Title VIII provisions, respectively—but not an unusually high number. For example, the 2020, 2019 and 2018 NDAAs contained, respectively, 78, 71 and 73 Title VIII provisions. The impact and importance of a NDAA on federal procurement law, however, should not be measured simply on the total number of procurement provisions. Moreover, certain provisions in other titles of the FY 2025 NDAA are also very important to procurement law. See 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 2025 NDAA's provisions will not become effective until the Federal Acquisition Regulation or Defense FAR Supplement (and possibly other (e.g., Small Business Administration) regulations) are amended or new provisions are promulgated, which can sometimes take two to four years or more. Certain other provisions include delayed effective dates.

The incoming Trump Administration has stated that it intends to dramatically slash the number of federal regulations, see, e.g., E. Musk & V. Ramaswamy, "The DOGE Plan to Reform Government," The Wall Street Journal (Nov. 20, 2024) ("the use of executive orders to roll back regulations that wrongly bypassed Congress is legitimate and necessary to comply with the Supreme Court's recent mandates"), which could potentially delay or effectively eliminate the implementation of certain NDAA implementing regulations (at least under the incoming Trump Administration). It also could potentially lead to the Trump Administration's issuance of executive orders to attempt to make certain favored regulations, rules, or laws effective immediately (or in very short time periods), while "repealing" or nullifying others, without compliance with notice and comment periods or other traditional administrative rulemaking requirements. See, e.g., 41 USCA § 1707; FAR subpt. 1.5; FAR 1.301(b). For example, during the first Trump Administration, on Sept. 22, 2020, the president issued Executive Order 13950, "Combating Race and Sex Stereotyping," which, among other actions, prohibited federal contractors and subcontractors from providing certain workplace diversity, equity and inclusion training and programs. This EO was "*effective immediately*, except that the requirements of section 4 ["Requirements for Government Contractors"] of this order *shall apply to [federal] contracts entered into 60 days after the date of this order*," which meant that federal contractors were required to comply in 60 days, whether or not regulations had been issued. See 85 Fed. Reg. 60683 (emphasis added). Notably, the EO did not require or reference standard FAR Council rulemaking, which did not occur, to implement it or receive public comment.

On the other hand, the Supreme Court's overruling of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), arguably could make it harder for Trump Administration agencies to advance substantially different interpretations of the same statutory language, particularly if a previous administration's existing regulatory interpretations track the statute. Because agency leadership ordinarily changes with turnover in the party holding the presidency, *Chevron* created a situation where successive administrations from different parties (and occasionally from the same party) sometimes advanced significantly different constructions of the same statute, which created uncertainty, i.e., "regulatory whiplash," for regulated parties. See *Loper Bright Enters. v. Raimondo,* 603 U.S. 369, 411 (2024) ("But statutory ambiguity … is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."). Under *Loper*, the courts, rather than administrative agencies, have the ultimate authority for statutory interpretation, poten-

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tially limiting the possibility of changing statutory interpretations. However, it will likely take a long time to resolve these issues because litigation will be required with inevitable delays, including appeals and the possibility of varying interpretations in different district and circuit courts.

Major themes of the FY 2025 NDAA are China, the Defense Industrial Base, supply chains, readiness, and technology (including advanced manufacturing, cybersecurity, and artificial intelligence (AI)). It also takes steps to streamline the acquisition process (including commercial buying) and rationalize the location and structure of the acquisition statutes in Title 10 of the U.S. Code. These themes are in various procurement-related provisions and are a continuation of themes in recent NDAAs, which are 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.

Industrial base and supply chain are among the most prominent themes, with provisions focused on expanding sources of production (§§ 857, 865 & 882), strengthening investments in the industrial base (§ 905), contested logistics and supply chains (§§ 162, 218, 356, 821, 841, 849 & 883), and prohibiting purchases from and/or certain interactions with entities in China, Russia, North Korea, and/or Iran (§§ 162, 164, 839, 851, 853, 1078, 1082, 1346 & 1709).

Within the industrial base focused sections, this year's NDAA slightly strengthened "Buy-American" or "Buy Allies" policies (§§ 845, 846 & 848) and strengthened stockpiles (§§ 1411 & 1412). A number of provisions focused on certified cost and pricing data or commercial acquisition processes (§§ 161, 814, 815, 834, 863 & 864). Cybersecurity (§§ 1501, 1502, 1522 & 1612) and AI (§§ 237, 1087 & 1533) are also areas of focus, but some of the more aggressive provisions were dropped from the final bill.

In his signing statement, President Biden took issue with several provisions in the FY 2025 NDAA that he believes raise "concerns," including "constitutional" concerns. See www.whitehouse.gov/briefing-room/statements-releases/2024/12/23/statement-from-president-joe-biden-on-h-r-5009-servicemember-quality-of-life-improvement-and-national-defense-authorization-act-for-fiscal-year-2025/. None of these provisions, which concern (among other issues) limitations on the transfer of Guantánamo Bay detainees, possible disclosure of classified and other highly confidential information (for which the Biden Administration "presume[s]" preventive measures were incorporated into the NDAA), and possible interference with the exercise of the president's "constitutional 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. Notably, the president signed the NDAA into law even though his "Administration strongly opposes … section 708 of the Act," which as passed will prevent the military health system (i.e., TRICARE) "from covering 'medical interventions for the treatment of gender dysphoria that could result in sterilization' for beneficiaries under 18 years of age." CRS Insight IN12401 (Jan. 10, 2025), *FY2025 NDAA: TRICARE Coverage of Gender-Affirming Care*, at 3.

Because of the substantial volume of procurement law changes in the FY 2025 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I addresses §§ 803–853, below. Part II, which will be published on Jan. 29, 2025, addresses §§ 854–888, plus sections in Titles I, II, III, IX, XIII, XIV, XV, XVI, XVII and LII. For an outstanding online review of the FY 2025 NDAA, see Christopher Yukins, "National Defense Authorization Act for Fiscal Year 2025—Procurement Summary," *http://publicprocurementinternational.com/ndaa-fy2025-summary/*.

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 2025 NDAA. CRS In Focus IF10516, *Defense Primer: Navigating the NDAA* (Dec. 2021), at 2; CRS Rept. 98-382, *Conference Reports and Joint Explanatory Statements* (June 11, 2015), at 1, 2. However, unlike in most years (except for the FY 2022 and 2023

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NDAAs), "the House and Senate did not establish a conference committee to resolve differences between the two [i.e., House and Senate] versions of the bill. Instead, [House Armed Services Committee] and SASC leaders negotiated a bicameral agreement based on the two versions." CRS Insight IN12405 (Jan. 8, 2025), *FY2025 NDAA: Status of Legislative Activity*, at 2. Nevertheless, FY 2025 NDAA § 5 provides that "[t]he joint explanatory statement regarding this [NDAA] ... shall have the same effect with respect to the implementation of this [NDAA] as if it were a joint explanatory statement of a committee of conference."

Section 803, Treatment of Unilateral Definitization of a Contract as a Final Decision—Section 803 amends 10 USCA § 3372(b) to provide that a unilateral price definitization by a contracting officer is a final decision under the Contract Disputes Act that can be appealed to the Court of Federal Claims or the Armed Services Board of Contract Appeals. This section effectively overrules the Federal Circuit's decision to the contrary in *Lockheed Martin Aeronautics Co. v. Sec'y of the Air Force*, 66 F.4th 1329 (Fed. Cir. 2023); 65 GC ¶ 121. Notably, this amendment does not apply to civilian (i.e., non-DOD) procurements.

Section 804, Middle Tier of Acquisition for Rapid Prototyping & Rapid Fielding—This section codifies and revises the expedited and streamlined "middle tier" of acquisition for programs or projects intended to be completed within two to five years, which was established by FY 2016 NDAA § 804. See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part I," 58 GC ¶ 20. The "middle tier" includes two acquisition pathways: (1) "rapid prototyping," which uses "innovative technologies to rapidly develop fieldable prototypes to demonstrate new capabilities and meet emerging military needs"; and (2) "rapid fielding," which uses "proven technologies to field production quantities of new or upgraded systems with minimal development required." The objective of acquisition programs under the rapid prototyping pathway is "to field a prototype that can be demonstrated in an operational environment and provide for a residual operational capability within five years of the development of an approved requirement." For acquisitions under the rapid fielding pathway, the objective is "to begin production within six months and complete fielding within five years of the development of an approved requirement." Section 804 provides that a program manager for "middle tier" acquisitions "may seek an expedited waiver from any regulatory requirement, or in the case of a statutory requirement, a waiver from Congress, that the program manager determines adds cost, schedule, or performance delays with little or no value to the management of such program or project."

Section 814, Modifications to Commercial Product & Commercial Service Determinations—10 USCA § 3456 provides that a contract for a product or service acquired using FAR pt. 12 commercial acquisition procedures serves as a prior commercial product or service determination with respect to such product or service. Section 814 amends this provision to provide that a subcontract for a product or service acquired under FAR pt. 12 also serves as a commercial product or service determination. It also amends this section to provide that a prior acquisition of "a product without a part number or a product with a prior part number that has the same functionality as the product had with the prior part number" under FAR pt. 12 serves as prior commercial product or service determination. Section 814 further provides that a product or service can be deemed to have a prior commercial product or service determination, even if the product or service was subject to minor modifications. However, section 814 amends 10 USCA § 3456 to provide that a contract or subcontract issued under FAR pt. 12 will *not* be considered a prior commercial product or service determination if the prior determination was not issued or approved by a DOD contracting officer.

Section 815, Application of Recent Price History to Cost or Pricing Data Requirements—Section 815 amends 10 USCA § 3702 ("Required Cost or Pricing Data and Certification"), which requires that "[a]n offeror for a subcontract (at any tier) of a contract" must "submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data [under the Truthful Cost or

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Pricing Data Act] and the price of the subcontract is expected to exceed $2,000,000." Section 815 creates an exception to this requirement for nontraditional defense contractors by permitting them to submit prices paid for the goods and services they would provide under the subcontract if "the prices to be submitted are prices that were paid for the same goods and services" and "the price of such subcontract is not expected to exceed $5,000,000." The "[s]ubmission of prices paid … shall be deemed to be the submission of cost or pricing data … if a [DOD] contracting officer … determines that the prices submitted … are fair and reasonable based on supported cost or pricing data within the last 12 months." The exception to the requirement to submit cost or pricing data will provide some flexibility for nontraditional defense contractors, but its value is relatively limited because (i) the exception only applies to relatively small dollar value subcontracts; (ii) to the extent acquisitions from nontraditional defense contractors are for commercial products and services, they are already exempt from providing cost or pricing data; and (iii) it overlaps with the FY 2016 NDAA § 873 pilot program, which was extended to 2029 by FY 2025 NDAA § 863 and is discussed in Part II of this article.

Section 816, Modifications to Authority to Carry Out Certain Prototype Projects Using Other Transaction Authority—This section amends 10 USCA § 4022 to change the approval authority for use of other transaction authority for certain prototype projects. For prototype projects with an expected cost of between $100 million and $500 million, the approval authority is changed from the agency's senior procurement executive to the head of the contracting activity. For prototype projects with an expected cost in excess of $500 million, the approval authority is changed from the under secretary of defense for research and engineering or the under secretary for acquisition and sustainment to the agency's "senior procurement executive … or, for the Defense Advanced Research Projects Agency, the Defense Innovation Unit, or the Missile Defense Agency," the agency director. This approval authority cannot be delegated.

Section 817, Clarification of Other Transaction Authority for Follow on Production—10 USCA § 4022 provides that other transaction agreements for prototype projects "may provide for the award of a follow-on production contract or transaction to the participants in the transaction." Section 817 defines "follow-on production contract or transaction" as "a contract or transaction to produce, sustain, or otherwise implement the results of a successfully completed prototype project for continued or expanded use by" DOD. It also clarifies that "[a] follow-on production award may be provided for in a transaction entered into under this section for a prototype project, awarded with respect to such a transaction as one or more separate awards, or a combination thereof."

Section 818, Clarification of Other Transaction Authority for Facility Repair—10 USCA § 4022(i) authorizes the establishment of a pilot program for carrying out "prototype projects that are directly relevant to enhancing the ability of [DOD] to prototype the design, development, or demonstration of new construction techniques or technologies to improve military installations or facilities[.]" The authorization for the pilot program provides that (i) "not more than two prototype projects may begin to be carried out per fiscal year under such pilot program"; and (ii) "the aggregate value of all transactions entered into under such pilot program may not exceed $300,000,000." Section 818 clarifies that these limitations do not apply to "projects carried out for the purpose of repairing a facility." It also extends the authority for the pilot program to September 2030.

Section 821, Inclusion of Japan & South Korea in Contested Logistics Demonstration & Prototyping Program—Section 821 adds Japan and South Korea to the Contested Logistics Demonstration & Prototyping Program. The secretary of defense (secretary) was directed to establish this program by FY 2024 NDAA § 842 "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." See Prusock, Schwartz, Ross, and Schaengold, Feature Comment, "The Significance Of The FY 2024 NDAA To Federal Procurement Law—Part II," 66 GC ¶ 13. The program requirements included assessment of effective approaches to meet the product support requirements of

the U.S. and covered nations (Australia, Canada, New Zealand, and the UK). Section 821 adds Japan and South Korea to the list of covered nations.

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 (which is 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": (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.

FY 2024 § 824 further amended 50 USCA § 1431 to extend this authority for an additional year, i.e., to Dec. 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. FY 2024 § 824 added that "[i]f any such amounts are so specifically provided, the Secretary may use them for such purposes." 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. FY 2025 § 824 again amends 50 USCA § 1431 to extend this authority for an additional year, i.e., to Dec. 31, 2025.

Section 834, Performance Incentives Related to Commercial Product & Service Determinations—Section 834 provides that agency heads, to the maximum extent practicable, shall "establish criteria in performance evaluations for appropriate personnel to reward risk-informed decisions that maximize the acquisition of commercial products, commercial services, or non-developmental items other than commercial products." The JES provides that this provision clarifies that DOD officials should "adhere to the commercial item preference, where possible."

Section 837, Modifications to Contractor Employee Protections from Reprisal for Disclosure of Certain Information—This section amends the whistleblower protections in 10 USCA § 4701, which provide that "an employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing" to certain persons and entities information that the employee reasonably believes is evidence of (i) gross mismanagement of a DOD or NASA contract or grant, (ii) gross waste of NASA or DOD funds, (iii) an abuse of authority related to a DOD or NASA contract or grant, (iv) a violation of law, rule, or regulation related to a DOD or NASA contract or grant, or (v) a substantial and specific danger to public health or safety. Individuals who believe they have been subjected to a prohibited reprisal may submit complaints to the NASA or DOD Office of Inspector General (OIG) (as applicable). Unless the OIG determines that the complaint is frivolous, fails to allege a violation, or has already been addressed, the OIG must investigate the complaint and submit a report of its findings to the complainant, the entity alleged to be responsible for the prohibited reprisal, and the agency head.

Section 837 enhances these protections for whistleblowers by ensuring that whistleblowers are informed of the disposition of their complaint. Specifically, it requires that, no later than 30 days after receiving the OIG's report on the investigation, the agency head must notify the complainant and the OIG in writing of either the actions ordered to address the reprisal or the decision to deny relief. If the agency head changes the actions ordered or decision to deny relief after making this notification, the agency head must provide written notification to the complainant and the OIG within 30 days after the change.

Section 839, Employment Transparency Regarding Individuals Who Perform Work in, for, or Are Subject to the Laws or Control of People's Republic of China—Section 839 amends FY 2022 NDAA § 855, which provides that DOD "shall require each covered entity to disclose … if the entity employs one or more individuals who will perform work in the People's Republic of China [PRC] on" certain DOD

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contracts or subcontracts. See Schaengold, Schwartz, Prusock, and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part II," 64 GC ¶ 22 (discussion of § 855). Section 839 amends this provision to require disclosure to DOD if the entity employs one or more individuals who will perform work in, "for, or are subject to the laws or control of" the PRC. Section 839 also amends the definition of a "covered contract" to cover "any [DOD] contract or subcontract for, or including, any information and communications technology, including contracts for commercial products or services."

A covered entity must "disclose" if it "employs any individuals who will perform work in, for, or are subject to the laws or control of" the PRC on a covered contract. The disclosure must identify the number of individuals performing such work, provide a description of the physical presence in the PRC where work will be performed, and state "whether an agency or instrumentality of the [PRC] or any other covered entity has requested access to data or otherwise acquired data from the covered entity required to make a disclosure" pursuant to PRC law. If a covered entity is performing a covered contract for services dealing with commercial or noncommercial computer software and must make a disclosure, that disclosure must "describe the process for disclosing a cybersecurity vulnerability, if such covered entity is also required to disclose" such vulnerability to the PRC "Ministry of Industry and Information Technology or any other [PRC] agency or instrumentality" and "provide any information related to how a United States affiliate is notified of a vulnerability" required to be disclosed to a PRC instrumentality.

A "covered entity" is "any corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity, including any subsidiary thereof, performing work on a covered contract in, for, or subject to the laws or control of the [PRC], including by leasing or owning real property used in the performance of the covered contract in the [PRC]."

DOD is required to amend the DFARS not later than June 2025 to require an individual or entity performing work on a covered contract in the PRC to "notify the covered entity within 48 hours of such individual or entity reporting any software vulnerability related to such covered contract to the [PRC] Ministry of Industry and Information Technology or any other [PRC] agency or instrumentality." The covered entity will be required to "retain and furnish to [DOD] information regarding any cybersecurity vulnerability reported to" any PRC instrumentality or agency.

Section 845, Amendment to Requirement to Buy Strategic Materials Critical to National Security from American Sources—This section amends 10 USCA § 4863, which prohibits DOD from acquiring certain specialty metals or end items containing certain specialty metals not melted or produced in the U.S. There is an exception to the prohibition for agreements with foreign governments where the acquisition is necessary to comply with: (1) offset agreements, or (2) agreements with foreign governments in which both governments agree to remove barriers to purchases of supplies, and where the agreement with the foreign government complies, where applicable, with the requirements of the Arms Export Control Act and 10 USCA § 2457. Section 845 modifies this provision to clarify that the exemption applies where the acquisition is necessary "in furtherance of agreements with qualifying foreign governments[.]" It also adds a new definition for "qualifying foreign government" which means "the government of a country with which the [U.S.] has … a reciprocal defense procurement agreement or memorandum of understanding[.]"

Section 848, Domestic Nonavailability Determinations List—Not later than June 2025, this section requires the under secretary for acquisition and sustainment (under secretary) to "develop and maintain a list of all domestic nonavailability determinations," which refers to the availability exception provided under the Berry Amendment for determinations by the secretary of defense or of a military department that "satisfactory quality and sufficient quantity" of any article or item "cannot be procured as and when needed at [U.S.] market prices." After the under secretary establishes the required list, DOD has 30 days to submit it to Congress and develop a plan for sharing the list with

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industry partners. Each year, the under secretary must "submit to Congress a list of all domestic nonavailability determinations made during the" prior year.

Section 849, Supply Chain Illumination Incentives—Not later than April 1, 2026, this section requires the secretary to "develop and implement policies, procedures, and tools to incentivize each [DOD] contractor … to assess and monitor the entire supply chain of goods and services provided to [DOD] by such contractor to identify potential vulnerabilities and noncompliance risks." By Sept. 30, 2025, the secretary "shall provide" to the congressional armed services committees "a briefing on the development and implementation of" such "policies, procedures, and tools."

Section 850, Report & Updated Guidance on Continued Risk Management for DOD Pharmaceutical Supply Chains—This section follows up on FY 2023 NDAA § 860, which required the under secretary and the director of the Defense Health Agency (DHA) to develop and issue implementing guidance for DOD pharmaceutical supply chain risk management; identify supply chain information gaps regarding DOD's reliance on foreign drug suppliers; and submit a report to the congressional armed services committees identifying DOD's reliance on high-risk foreign suppliers of drugs and vulnerabilities in DOD's pharmaceutical supply chain. 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 (discussion of § 860). Based on this report, which DOD published in November 2023, see www.warren.senate.gov/imo/media/doc/FY23%20NDAA%20sec%20860%20Risk%20management%20for%20DoD%20Pharmceuticals1.pdf, the DHA director was required to develop and publish implementing guidance for risk management of the DOD pharmaceutical supply chain.

Section 850 now requires the under secretary to submit a report to the congressional armed services committees by December 2026 on "existing information streams within the Federal Government, if any, for excipients and key starting materials for final drug products that may be used to assess the reliance by [DOD] on high-risk foreign suppliers" and "active pharmaceutical ingredients, final drug products, and respective excipients and key starting materials … that are manufactured in a high-risk foreign country." The report must identify any limitations on the secretary's ability to obtain and analyze such information; to monitor the temperature of active pharmaceutical ingredients, final drug products, and respective excipients and key starting materials throughout DOD's supply chain; and to use data analytics to monitor vulnerabilities in DOD's pharmaceutical supply chain.

Section 851, Prohibition on Contracting with Covered Entities that Contract with Lobbyists for Chinese Military Companies—This section adds 10 USCA § 4663, which prohibits DOD from entering into "a contract with an entity," or its parent or a subsidiary, that "is a party to a contract with a covered lobbyist." The term "covered lobbyist" means "an entity that engages in lobbying activities for any entity determined to be a Chinese military company" identified by DOD pursuant to FY 2021 NDAA § 2060H. The term "lobbying activities" means "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." The prohibition, which takes effect on June 30, 2026, may be waived by the secretary upon notification to Congress. The JES directs the Government Accountability Office "to submit a report to the congressional defense committees, not later than [December 2025], on the national security risks posed by consulting firms who simultaneously contract with [DOD] and the Chinese government or its proxies or affiliates."

Section 853, Prohibition on Procurement of Covered Semiconductor Products & Services from Companies Providing Them to Huawei—No later than Sept. 2025, this section prohibits DOD from entering into or renewing "a contract for the procurement of any covered semiconductor products and services for [DOD] with any entity that knowingly provides covered semiconductor products and services to Huawei." The term "covered semiconductor products and services" means "semiconductors; equipment for manufacturing semiconductors; and tools for design-

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ing semiconductors." The term "Huawei" includes a subsidiary, owner, beneficial owner, affiliate, or successor of Huawei Technologies Company, as well as "any entity that is directly or indirectly controlled by" that company. By the prohibition's effective date, the secretary must "develop and implement a process requiring each entity seeking to provide covered semiconductor products and services to [DOD] to certify … that [it] is not an entity covered by such prohibition." The prohibition may be waived by the secretary "on a case-by-case basis as may be necessary in the interest of national security" if the covered semiconductor products and services are (1) "only available from an entity otherwise covered by such prohibition," and (2) "required for [DOD] national security systems or priority missions."

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¶ 19 FEATURE COMMENT: The Significance Of The Fiscal Year 2025 National Defense Authorization Act To Federal Procurement Law—Part II

On Dec. 23, 2024, President Biden signed into law the "Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025" (FY 2025 NDAA), P.L. 118-159. Because of the substantial volume of procurement law changes in the FY 2025 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I, which was published in the Jan. 22, 2025 issue of THE GOVERNMENT CONTRACTOR, 67 GC ¶ 11, addressed FY 2025 NDAA §§ 803–853. Part II addresses §§ 861–888, plus certain procurement law related sections in Titles I, II, III, IX, XIII, XV, XVI, XVII and LII.

Section 861, Codification & Modification of Pilot Program to Accelerate the Procurement & Fielding of Innovative Technologies—This section codifies a pilot program established by FY 2022 NDAA § 834 to accelerate the procurement and fielding of innovative technologies. See Schaengold, Schwartz, Prusock, and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II," 64 GC ¶ 22. Section 861 modifies the FY 2022 NDAA § 834 pilot program by requiring that the program provide for the "issuance of not more than two solicitations for proposals by the Department of Defense in support of the program each fiscal year for innovative technologies from entities that, during the one-year period preceding the issuance of the solicitation, have not performed" DOD contracts or subcontracts under which DOD's aggregate obligation to such entity exceeds $400,000,000.

Section 863, Extension of Pilot Program for Streamlining Awards for Innovative Technology Projects—Section 863 amends FY 2016 NDAA § 873, which provided exemptions from requirements to provide cost or pricing data under the Truthful Cost or Pricing Data Act for DOD contracts, subcontracts, and modifications valued at less than $7.5 million "awarded to a small business or nontraditional defense contractor pursuant to" "(1) a technical, merit-based selection procedure, such as a broad agency announcement, or (2) the Small Business Innovation Research Program." See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part II," 58 GC ¶ 28. Section 863 extends these exemptions to multiyear contracts (as defined in 10 USCA § 3501), block buys, or multi-ship buys authorized by Congress. The section also extends the termination date for the exemptions to Oct. 1, 2029.

Section 875, Accessibility & Clarity in Covered Notices for Small Businesses—Section 875 requires covered notices, which are notices published by the secretary of defense (Secretary) or of a military department on *SAM.gov* marketing federal contract opportunities that pertain to small businesses (such as a sources sought notice or solicitation restricted to small businesses), to be written in a manner that is clear, concise and well-organized. The section also requires covered notices, to the maximum extent practicable, to "follow[] other best practices appropriate to the subject or field of the covered notice and the intended audience[.]" Each covered notice must, "to the maximum extent practicable, include key words in the description … such that small business concerns seeking contract opportunities" on *SAM.gov* can easily identify and understand the notice. The secretary is required to issue rules implementing this section no later than March 2025.

Section 876, Small Business Bill of Rights—Section 876 requires the secretary ("acting through the Small Business Integration Group" led by the under secretary for acquisition and sustainment (under secretary)) to develop a Small Business Bill of Rights no later than December 2025. The bill of rights is intended to ensure a healthy partnership between DOD and the defense industrial base and encourage small businesses to contract with DOD by ensuring that customer service issues and conflicts between the parties are resolved expeditiously and that small businesses are aware of their rights to assistance under federal law in resolving such issues. The under secretary must provide a detailed briefing to the congressional armed services committees on implementation of the bill of rights by June 2025.

The bill of rights must (1) authorize DOD's director of small business programs to establish a resolution process for conflicts that will apply throughout DOD; (2) authorize DOD's director of small business programs, each such director for a military department, and members of DOD's small business professional workforce to request assistance with customer service issues and conflicts from members of their component's acquisition workforce, require timely responses from such members, and establish a framework providing for fair and reasonable resolution of complaints by small businesses for issues between them and DOD; (3) ensure that small businesses are informed of (a) their rights to assistance under the Small Business Regulatory Enforcement Act, Small Business Act, and other laws, (b) how to contact each task and delivery order ombudsman responsible for reviewing contractor complaints, (c) how to contact DOD and military department offices of small business programs, and (d) how to contact each DOD advocate for competition; (4) establish guidance for DOD personnel on small business rights and DOD personnel responsibilities under the bill of rights; and (5) coordinate assistance with other regulatory compliance assistance to small businesses, current and desired sets of authorities, roles, and responsibilities across the Offices of Small Business Programs, APEX Accelerators, members of DOD's small business professional workforce, and other relevant DOD officials. DOD's Office of Small Business Programs must develop annual metrics on the submission of complaints under the bill of rights and provide annual briefing on the metrics to the congressional armed services committees.

Section 881, Clarification of Waiver Authority for Organizational & Consultant Conflicts of Interest—Federal Acquisition Regulation subpt. 9.5 prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest (OCIs). FAR 9.503 permits an agency head or designee to waive OCIs if it is in the Government's best interest to do so. Section 881 requires that FAR 9.503 be revised so that (1) any request for an OCI waiver include a written justification; and (2) an agency head may not delegate the waiver authority below the deputy agency head.

Section 882, Reverse Engineering or Reengineering for Production of Items—Not later than December 2025, the under secretary "shall establish a process to" "identify items for which" (i) "technical data is *not* available;" or (ii) "rights in such technical data does *not* allow for manufacturing of the item;" *and*, for such items, "create streamlined procedures for [their] production" "through reverse engineering or reengineering" under the following circumstances:

(A) if production of the item may be required for

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point of use manufacturing or for a contested logistics environment …;

(B) if the manufacturer of the item will not meet the schedule for delivery required … to maintain weapon system readiness or responsiveness in the event of mobilization; or

(C) with respect to a item for which a head of the contracting activity [HCA] can only acquire by … sole source contract, if such [HCA] submits … a written determination that such reverse engineering or re-engineering is beneficial to sustain training or operations of [DOD] with respect to such item.

Section 885, Proposal for Payment of Costs for Certain Government Accountability Office Bid Protests—Not later than June 2025, the Comptroller General, "in coordination with the Secretary of Defense, shall submit" to the congressional defense committees, the House Oversight and Accountability Committee, and the Senate Homeland Security and Governmental Affairs Committee "a proposal" for (1) a "process for enhanced pleading standards," "as developed by" GAO in coordination with DOD, for when a bid protester is "seeking access to [DOD] administrative records;" (2) two "benchmarks," i.e., (i) a "chart of the average costs to [DOD and GAO] of a" "protest based on the value of the contract" protested, and (ii) a "chart of the costs of the lost profit rates of the contractor awarded a contract" that is protested "after such award;" and (3) a "process for payment by an unsuccessful" protester "to the Government and the" awardee. The "lost profit rates," which would appear to be difficult to calculate, "shall be equal to the profit that the contractor … would have earned if the contractor ha[d] performed under such contract during the period" contract performance was suspended under the Competition in Contracting Act. See 31 USCA § 3553(d). No further guidance is provided with respect to "enhanced pleading standards," which appear to be designed to make it more difficult for a protester to receive "specific documents" requested as part of its protest under GAO Rules, see 4 CFR § 21.3(c), and possibly "relevant documents" that ordinarily accompany an Agency Report or are provided as part of the standard GAO protest process. See 4 CFR § 21.3(d).

Presumably, § 885 and its "proposal" will only apply to GAO protests involving DOD contracts but that is not 100 percent certain because § 885(e)'s definitions of "covered protest," "interested party" and "protest" are not limited to GAO protests of DOD contract awards. It would appear that, when submitted, the "proposal" will require an Act of Congress to implement, although it is possible that GAO and/or DOD may propose to implement it without further legislative action. If it is somehow the latter, notice and comment as to the proposed regulations should be required. See 41 USCA § 1707; FAR 1.501-2; FAR 1.301(b).

If the proposal in response to § 885, which is due in June 2025, is implemented, it will likely create new risks associated with filing a GAO protest as protesters will have to assess the potential of having to reimburse the Government (i.e., DOD and GAO) for costs associated with the protester's "unsuccessful" litigation of the protest and the awardee for its lost profits. Moreover, the higher pleading standard could reduce the likelihood of a successful protest because of the potential for reduced availability of agency records to the protester.

Finally, § 885(f) amends 10 USCA § 3406(f)(1)(B) to raise GAO's task and delivery order protest jurisdictional threshold for DOD, NASA and the Coast Guard from $25 million to $35 million. As a result, a larger number of these task and delivery order awards will not be reviewable by GAO or elsewhere (because the Court of Federal Claims generally lacks such jurisdiction and agency level protests are not authorized). The current $10 million threshold for protesting a task or delivery order awarded by a civilian agency is unchanged.

Section 888, Tracking Awards Made Through Other Transaction Authority—This section provides that, no later than December 2025, the under secretary must "establish a process to track the number and value of awards to small businesses and nontraditional defense contractors performing on transactions using other transaction authority, including transactions carried out through consortia." In collecting this data, the under secretary must minimize the reporting requirements on small businesses and nontraditional defense contractors and maximize, to the extent practicable, the use of existing DOD data collection processes.

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Non-Title VIII FY 2025 NDAA provisions important to procurement law include:

Section 162, Measures to Increase Supply Chain Resiliency for Small Unmanned Aerial Systems (sUAS)—Section 162 requires DOD, no later than May 2025, to develop a supply chain framework to assess the risk of each sUAS component in DOD networks or operations and identify manufacturers of components based in China, Russia, Iran and North Korea, and evaluate risk mitigation measures. No later than June 2025, this section further requires DOD to identify sources of supply outside of those countries and to develop a plan to increase manufacturing capacity of such suppliers. In so doing, DOD is directed to disassemble a Chinese drone aircraft and create a taxonomy of components. DOD is required to submit the full strategy to congressional armed services committees, to include a list of components in the taxonomy.

Section 164, Prohibition on Operation, Procurement, & Contracting Related to Foreign-Made Light Detection & Ranging Technologies—Beginning on June 30, 2026, this section prohibits DOD from operating or procuring light detection and ranging technology that (i) is manufactured in, or the manufacturer is domiciled in, China, Russia, North Korea, or Iran; (ii) uses operating software developed in or by an entity domiciled in those countries; or (iii) uses network connectivity or data storage located in or administered by an entity in those countries. Section 164 further prohibits DOD from operating or procuring systems incorporating interfaces with such light detection ranging technology. The section allows for waivers on a case-by-case basis, upon written notification by DOD to the congressional defense committees.

Section 218, Modification to Consortium on Use of Additive Manufacturing for Defense Capability Development—This section amends FY 2024 NDAA § 223(c), which required DOD to establish a consortium to facilitate additive manufacturing for developing capabilities. Section 218 now adds to the consortium's mission a requirement to "develop a process to certify new materials and processes for 'flight critical parts' and initiate planning for a 'rapidly deployable additive manufacturing system' " "capable of fabricating replacement safety-critical parts for military aircraft and" drones when "access to 'traditionally manufactured replacement parts' is 'severely restricted.' "

Section 233, Management & Utilization of Digital Data to Enhance Maintenance Activities—Section 233 requires the under secretary, in consultation with the secretaries of the military departments and DOD's chief digital and artificial intelligence officer, to implement policies to use digital data systems to enhance maintenance for aircraft, ships, and ground vehicles. The section requires the policies to include "investment in advanced and scalable data infrastructure," using "*vendor-agnostic*, government-owned tagging and interoperable systems" whenever possible. No later than December 2025, the under secretary is required to brief the congressional armed services committees on the status of implementing the policies.

Section 316, Extension of Prohibition on DOD Requiring Contractors to Disclose Greenhouse Gas Emissions Information—FY 2024 NDAA § 318 prohibited DOD, for one year, from requiring contractors to provide information on greenhouse gas emissions as a condition of being awarded a DOD contract. Section 316 extends the prohibition for an additional two years (until Dec. 22, 2026). (For non-traditional contractors, this prohibition was made permanent last year.) This extension appears to be moot because, on Jan. 13, 2025, the Biden Administration withdrew the proposed rule that would have required such disclosure.

Section 319, Prohibition on Implementation of Regulation Minimizing Climate Change Risk—This section prohibits FY 2025 funds available to DOD from being "used to finalize or implement any rule based on advanced notice of proposed rulemaking titled 'Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions' (Oct. 15, 2021; 86 Fed. Reg. 57404)." Like FY 2025 § 316, this section prohibits certain Biden Administration environmental policies, which appear to be antithetical to the policies of the incoming Trump Administration.

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Section 356, Program for Advanced Manufacturing in Indo-Pacific Region—No later than June 2025, this section requires the Navy secretary, in consultation with the U.S. Indo-Pacific Command (INDOPACOM), to establish an advanced manufacturing facility within INDOPACOM to support shipbuilding and defense activity industrial bases (including unmanned vehicles and maintenance capabilities). This section further requires the Navy secretary to submit a report to the congressional armed services committees on the program's activities by December 1 of the year after the year in which the facility is established. Advanced manufacturing is defined as using the following techniques: additive manufacturing, wire-arc additive manufacturing, powder bed fusion, and other similar manufacturing capabilities.

Section 902, Establishment of DOD Performance Improvement Officer—Section 902 establishes the DOD Performance Improvement Officer (PIO), appointed by the secretary from the senior career civil service. The PIO's responsibilities include updating and implementing DOD's Strategic Management Plan, chairing the Defense Performance Improvement Framework (see 10 USCA § 125a), co-chairing "the Defense Business Council," overseeing DOD's "transformational business modernization and business process re-engineering," and overseeing DOD efforts to address GAO's "High-Risk List." See *www.gao.gov/high-risk-list*.

Section 905, Modifications to Office of Strategic Capital—In December 2022, the secretary established the Office of Strategic Capital to "attract and scale investment to national security priorities" by leveraging U.S. capital markets. See *www.cto.mil/osc/about/*. Congress authorized the office in FY 2024 NDAA § 903 and created a pilot program that, subject to available appropriations, allows the office to provide loans, loan guarantees or technical assistance to eligible entities in specified technology categories. Section 905 moves the pilot program into 10 USCA § 149 and adds two technology categories but retains the Oct. 1, 2028 sunset of the authority to make loans, loan guarantees or provide technical assistance.

Section 924, Establishment of Office of Expanded Competition—Similar to FY 2025 NDAA § 905, § 924 focuses on ways to invest in and protect the U.S. defense industrial base. Section 924 establishes (within the Air Force) the Office of Expanded Competition, whose responsibilities are generally DOD-wide and include analyzing adversarial capital flowing into industries or businesses relevant to DOD; identifying and prioritizing promising critical technologies in need of capital assistance; and funding, providing loans or loan guarantees, or giving technical assistance to such prioritized investments.

Section 1346, Modification of Public Reporting of Chinese Military Companies Operating in the U.S.—This section substantially amends FY 2021 NDAA § 1260H, including by requiring DOD to submit a justification for each entity included in the required report and by expanding the definition of Chinese military companies to include wholly-owned or controlled subsidiaries or affiliates, entities affiliated or controlled by specified Chinese organizations, and entities controlled by law enforcement, border control, the ministry of state security, and other specified Chinese government entities. This section requires the list and justifications to be published at least annually (vice ongoing reporting), and for DOD to submit biannual reports to the congressional armed services committees (from Dec. 31, 2026 through Dec. 31, 2031) on the listed entities and updates on implementing DOD procurement restrictions on the listed entities. For any judicial review, which right is not conferred or implied, of determinations under this section, classified information is permitted to be submitted to the court ex parte and in camera.

Section 1601, Modification of Space Contractor Responsibility Watch List—FY 2018 NDAA § 1612 established a watch list of "contractors with a history of poor performance on space procurement contracts," from whom the Space Force may not solicit offers (or permit certain subcontracts). Section 1601 moves the law into 10 USCA § 2271a and also elevates responsibility for the list from the commander of the Air Force Space & Missile System Center to the Air Force assistant secretary for space acquisition & integration. The section also clarifies that a company *or division thereof* can be placed on the list, and that the basis for being

placed on the list is poor performance on one or more space procurement contracts; award fee scores below 50 percent; inadequate management, operational or financial controls or resources; inadequate security controls or resources (including Foreign Ownership, Control, or Influence); or "other failure of controls or performance … so serious or compelling as to warrant placement" on the list. This section expands the list's effect to cover virtually all transactions (not just contracts), requires that contractors being considered for the list be given notice and an opportunity to respond, and permits authority to place a company on the list to be delegated to the Air Force suspension and debarment official. This section states that it "shall [not] be construed as preventing the suspension or debarment of a contractor, but inclusion on the watch list shall not be construed as a punitive measure or de facto suspension or debarment."

Section 1709, Analysis of Certain Unmanned Aircraft Systems Entities—Not later than December 2025, this section requires "an appropriate national security agency" (see 47 USCA § 1608) to determine if any "[c]ommunications or video surveillance equipment or services produced by" Shenzhen Da-Jiang Innovations Sciences and Technologies Co. Ltd. or Autel Robotics (or their subsidiaries, affiliates, partners, or joint ventures) pose an unacceptable risk to U.S. national security. If the appropriate national security agency fails to make a such a determination by December 2025, the Federal Communications Commission must "add all [such] communications equipment and services" to the covered list. This section also requires that agency, within 30 days of making any determination, to place the equipment or services on the covered list specified in 47 USCA § 1601 (Determination of Communications Equipment or Services Posing National Security Risks).

Section 5203, Administrative False Claims Act of 2023—This section revitalizes and expands the authority of the somewhat moribund Program Fraud Civil Remedies Act (PFCRA), P.L. 99-509, which is renamed the Administrative False Claims Act (AFCA). Agencies now have expanded authority to pursue and settle up to $1 million (up from $150,000 under the PFCRA) in fraud claims and false statements, which amount will be adjusted in the future for inflation, that were made to the Government. Agencies can also now recoup their costs for investigating and prosecuting these false claims and statements. The AFCA does *not* include any qui tam provisions but does permit double damages (as opposed to treble damages under the civil False Claims Act).

The AFCA will almost certainly lead to closer agency scrutiny and enforcement of allegedly fraudulent but smaller dollar claims and statements, which increases risks associated with Government contracting. Moreover, since agency inspectors general have responsibility for enforcing the AFCA, which will involve administrative proceedings, and receiving contractor's mandatory disclosures under FAR 52.203-13, see id. at 52.203-13(b)(3)(i), FAR 3.1003(b)(1), contractors need to be aware of the heightened scrutiny and potential related enforcement that could result from making (or failing to make) such disclosures, including suspension and debarment referrals. It appears likely that the AFCA will complement the FCA, particularly since (in contrast to the FCA) the AFCA includes liability for written false statements in the absence of any claim. As a result, it will likely be advisable for contractors to include releases of potential AFCA claims in FCA settlement agreements with the Government.

Agencies are empowered, if they "do[] not employ an available presiding officer," to use a cognizant board of contract appeals judge to conduct hearings on matters subject to the AFCA. No later than June 2025, agencies (including the boards) shall promulgate regulations implementing the AFCA. Finally, the AFCA statute of limitations provides that "notice to the person alleged to be liable with respect to a claim or statement shall be mailed or delivered … not later than the later of" (i) "6 years after the date on which the violation … is committed;" or (ii) "3 years after the date on which facts material to the action are known or reasonably should have been known by the [Government], but in no event more than 10 years after the date on which the violation is committed." This language is similar to that in the FCA, see 31 USCA § 3731(b), except that notice is triggered by its mailing or delivery as opposed to the filing of a lawsuit.

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The AFCA, however, may be vulnerable under *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), where the Supreme Court ruled that when the SEC seeks civil monetary penalties for securities fraud, the Seventh Amendment to the Constitution entitles a defendant to a jury trial. Although the Supreme Court's ruling is limited to securities fraud, the AFCA, which provides for civil fraud penalties and a hearing before a "presiding officer" or board of contract appeals judge (but not a jury trial), could be found to be covered by the *Jarkesy* decision.

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The FY 2025 NDAA includes artificial intelligence/cloud/software & cybersecurity-related provisions of interest to the procurement community:

Artificial Intelligence/Cloud/Software

Section 237, Pilot Program on Use of Artificial Intelligence for Certain Workflow & Operations Tasks—This section requires DOD, not later than February 2025, to establish a pilot (or designate an existing initiative) to assess using artificial intelligence (AI) to improve (i) operations for depots, shipyards, and other DOD-run manufacturing facilities, and (ii) contract administration. It further requires DOD to use "best in breed software platforms," "consider industry best practices in the selection of software programs," "implement the program based on human centered design practices to best identify the business needs for improvement," and "demonstrate connection to enterprise platforms of record with authoritative data sources." It does not require or articulate a preference for commercial systems. No later than one year after the commencement of the pilot program, DOD must submit a report to the congressional armed services committees that evaluates "each software platform used in the pilot program," analyzes "how workflows and operations were modified as part of the pilot program," and quantitatively assesses "the impact the software had at each location in which the pilot program was carried out."

Section 1521, Usability of Antiquated & Proprietary Data Formats for Modern Operations—No later than September 2025, § 1521 requires DOD to develop a strategy to implement "modern data formats" "as the primary method" for "electronic communication for command and control" and for "weapon systems." The strategy is required to be accompanied by a five-year implementation roadmap. The definition of "modern data formats" includes "JavaScript Object Notation," "Binary JavaScript Objection Notation," and "Protocol Buffers data formats." Upon completion of the strategy and roadmap, DOD must submit the strategy to the congressional armed services committees. Within 60 days of the strategy being completed, DOD and the military departments must each establish a pilot program for using modern data formats "to improve the usability and functionality" of data "stored in antiquated data formats," and brief the armed services committees within 180 days on the progress of the pilot program, including "specific examples of the use of modern data formats" "to improve the usability and functionality of information stored or produced in antiquated data formats." The pilot program sunsets in December 2030.

Notably, the Joint Explanatory Statement (JES) observed that "the diversity, age and complexity of" DOD's information technology systems "poses a unique challenge to creating a truly integrated, interoperable and efficient information network capable of operating at speeds and with the adaptability to outpace and out-decide our adversaries. … We believe that a better understanding of where DOD IT systems are reliant on such ['outmoded and antiquated data'] formats and a concerted plan to identify and address the risks from such formats is" "critical."

Cybersecurity

Section 1501, Modification of Prohibition on Purchase of Cyber Data Products or Services Other than Through the Program Management Office for DOD-wide Procurement of Cyber Data Products & Services—This section amends FY 2022 NDAA § 1521, which required DOD cyber data products or services to be procured through a centralized program management office. See Schaengold, Schwartz, Prusock, and Levin, Feature Comment, "The Fiscal Year 2022 National Defense Authorization Act's Ramifications for Federal Procurement Law—Part II," 64 GC

¶ 22. Section 1501 creates an exception to the requirement to acquire cyber data products or services through a central program office when a DOD component submits a justification based on a compelling need, and either an urgent need or the need to ensure competition within the market supports an independent procurement.

Section 1612, Cyber Intelligence Capability—Section 1612 adds 10 USCA § 430d, which requires DOD, by Oct. 1, 2026 (in consultation with the Director of National Intelligence), to ensure it has "a dedicated cyber intelligence capability" to support "military cyber operations" throughout DOD. In so doing, DOD is directed to include funding requests for such cyber capabilities in each budget request, beginning with the FY 2027 request, with funding for the program available from the U.S. Cyber Command under the Military Intelligence Program. "The National Security Agency may not provide information technology services for the dedicated cyber intelligence capability" "unless such services are provided under the Military Intelligence Program or the Information Systems Security Program." Not later than Jan. 1, 2026, DOD shall submit to the congressional defense committees and the House Permanent Select Committee on Intelligence a report containing "an implementation plan for ensuring the dedicated cyber intelligence capability." That plan shall include the "requirements for such capability," an estimate of the "initial budget," and an "initial staffing" plan. Within 60 days of delivering the report, DOD will provide a briefing. The JES notes the committees' "continued support for the establishment of a cyber intelligence capability within [DOD]."

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Peering Ahead to the FY 2026 NDAA—2025 may see more substantial changes in acquisition than is typical. Most of the public attention has focused on the Department of Government Efficiency (DOGE), led by Elon Musk. While DOGE has called for substantial deregulation and significant disruption to the current way acquisition is executed Government-wide, its focus now appears to be on "modernizing Federal technology and software to maximize governmental efficiency and productivity." See *www.whitehouse.gov/presidential-actions/2025/01/establishing-and-implementing-the-presidents-department-of-government-efficiency/*. Perhaps overlooked are the efforts underway or being planned in Congress to streamline, improve, and refocus defense acquisition.

In December 2024, Sen. Roger Wicker (R–Miss.), chair of the Senate Armed Services Committee, introduced a major acquisition reform bill, the FoRGED Act (S. 5618–Fostering Reform and Government Efficiency in Defense). The bill seeks to repeal more than 300 acquisition-related provisions and amend or enact more than 50 provisions of law. This bill may drive debate on streamlining and deregulating acquisition. Rep. Mike Rogers (R–Ala.), chair of the House Armed Services Committee, has stated that acquisition reform is a top three priority going into the FY 2026 NDAA. In addition, on January 3, the House voted to renew the Select Committee on the Strategic Competition Between the U.S. and the Chinese Communist Party for the new (119th) Congress. In light of these events, the debate around the FY 2026 NDAA will likely include efforts to substantially streamline acquisition, strengthen and expand the defense industrial base, seek more insight into security of supply chains (including buy allies, more investment, and harmonization of statutes), and China. Many of these efforts appear aimed at readiness and operating in a contested logistics environment with a peer or near-pear adversary.

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