2022 Annual Review

Statutes, Regulations, Executive Orders, and Policies Panel

Supplementary Materials

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FEDERAL PROCUREMENT STATUTORY DEVELOPMENTS FOR 2021

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I. FEDERAL ADVANCE CONTRACTS ENHANCEMENT ("FACE") ACT, PUB. L. NO. 116-272, 134 STAT. 3349 (DEC. 31, 2020)

On December 31, 2020, President Trump signed into law the Federal Advance Contracts Enhancement Act or the "FACE Act". The purpose of the Act is to amend the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-296, 120 Stat. 1394 (Oct. 4, 2006) ("PKEMRA"), to implement GAO's recommendations to improve use and management of advance contracts entered into before disasters in order to ensure that goods and services are in place to help FEMA rapidly mobilize resources in immediate response to disasters. PKEMRA requires FEMA to use advance contracts to ensure that contracts are awarded using full and open competition in advance of disasters, thereby avoiding the need to make, for example, awards on a non-competitive basis under the unusual and compelling urgency exception to full and open competition in the wake of a disaster. Following a review of FEMA's use of advance contracts for 2017 disasters, GAO found that "outdated strategy and lack of guidance to contracting officers resulted in confusion about whether and how to prioritize and use advance contracts to quickly mobilize resources in response to" the 2017 disasters reviewed. GAO recommended that FEMA update its strategy and guidance to clarify whether and under what circumstances advance contracts should be used, improve the timeliness of its acquisition planning activities, improve record keeping, revise its methodology for reporting disaster contracting actions to congressional committees, and provide more consistent guidance and information to contracting officers to coordinate with and encourage states and local governments to establish advance contracts. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-93, 2017 DISASTER CONTRACTING: ACTION NEEDED TO BETTER ENSURE MORE EFFECTIVE USE AND MANAGEMENT OF ADVANCE CONTRACTS (2018), *https://www.gao.gov/assets/700/695829.pdf*.

The FACE Act required FEMA to submit to Congress an updated report with a strategy that "clearly defines—(A) the objectives of advance contracts; (B) how advance contracts contribute to disaster response operations of the Agency; (C) how to maximize the award of advance contracts to small business concerns …; and (D) whether and how advance contracts should be prioritized in relation to new post-disaster contract awards." The Act further requires the FEMA Administrator to "ensure that the head of contracting activity of the Agency" ("HCA") updates "the Disaster Contracting Desk Guide of the Agency to provide specific guidance—(i) on whether and under what circumstances contracting officers should consider using existing advance contracts … prior to making new post-disaster contract awards" and provide semi-annual training to contracting officers on this guidance; and "(ii) for contracting officers to perform outreach to State and local governments on the potential benefits of establishing their own pre-negotiated advance contracts." The HCA must also: (1) revise "the reporting methodology of the Agency to ensure that all disaster contracts are included in each quarterly report submitted to the appropriate congressional committees … on disaster contract

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actions;" (2) identify "a single centralized resource listing advance contracts … and ensure[] that source is current and up to date and includes all available advance contracts;" and (3) communicate "complete and up-to-date information on available advance contracts to State and local governments to inform their advance contracting efforts." The FEMA Administrator must "update and implement guidance for Agency program office and acquisition personnel to (A) identify acquisition planning time frames and considerations across the entire acquisition planning process of the Agency; and (B) clearly communicate the purpose and use of a master acquisition planning schedule."

II. AMERICAN RESCUE PLAN ACT OF 2021, PUB. L. NO. 117-2, 135 STAT. 4 (MARCH 11, 2021)

On March 11, 2021, President Biden signed into law the $1.9 trillion American Rescue Plan Act of 2021 ("ARP Act"), which is COVID-19 pandemic relief and economic stimulus legislation that has substantially increased funding available for certain government contracts, grants and cooperative agreements at the Federal, state, and local levels (and will continue to do so in 2022 and thereafter). The ARP Act includes stimulus funding accessible to federal contractors, subcontractors and/or grantees on vaccine and pharmaceutical research, production and distribution; other aspects of healthcare, including testing, COVID-19 contact tracing and medical supplies; personal protective equipment; public transportation projects; cybersecurity; information technology; broadband; and certain professional services. For example, ARP Act § 3101 appropriated an additional $10 billion to carry out various Defense Production Act ("DPA") related objectives (under DPA Titles I, III & VII), principally with respect to "the purchase, production (including the construction, repair, and retrofitting of government-owned or private facilities as necessary), or distribution" of COVID-19-related medical supplies, tests and equipment.

Section 4015 of the ARP Act extended the effective date of § 3610 of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act to Sept. 30, 2021. This extension allows federal agencies to potentially reimburse contractors for 6 additional months of paid-leave costs if employees are unable to access worksites to perform their duties and unable to telework during the pandemic. More specifically, § 3610 provides federal agencies the authority to modify contracts or agreements, without consideration, to reimburse contractors, under limited circumstances, for paid or sick leave a contractor provides employees or subcontractors to maintain a "ready state," including to protect the life and safety of Government and contractor personnel. *See* DOD Class Deviation-CARES Act Section 3610 Implementation (2020-O0013, Revision 4, March 23, 2021), https://www.acq.osd.mil/dpap/policy/policyvault/USA000594-21-DPC.pdf; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-21-475, COVID-19 CONTRACTING: CONTRACTORS PAID LEAVE REIMBURSEMENTS COULD PROVIDE LESSONS LEARNED FOR FUTURE EMERGENCY RESPONSES (July 28, 2018), https://www.gao.gov/assets/gao-21-475.pdf.

Without this extension, § 3610 relief would have ended on March 31, 2021. This extension (like the original § 3610 legislation and previous extensions) does not provide funding for this relief, but agencies are authorized to use available funds. Although this relief expired on Sept. 30, 2021, the Joint Explanatory Statement ("JES") to the FY 2022 National Defense Authorization Act ("FY 2022 NDAA"), which is discussed in detail below, states that "[w]e are keen to understand the extent to which the authority provided in section 3610 of the CARES Act was, and

continues to be, used on [DOD] contracts and whether providing a similar authority to [DOD] permanently is in the national security interest." As a result, the JES "direct[ed] the Secretary of the Defense to provide a briefing, not later than March 1, 2022, and a report not later than April 1, 2022, to the congressional defense committees regarding [DOD's] use of section 3610[.]"

Under Section 5001(d)(2) of the ARP Act, the SBA's Paycheck Protection Program ("PPP") received another $7.25 billion in direct appropriations, and under Sections 5001(a) and 5001(b), PPP eligibility was expanded to include certain additional types of organizations, including certain nonprofits (i.e., "additional covered nonprofit entity") and certain internet-only news and periodical publishers. *See* https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program. Finally, ARP Act § 5002(b) appropriated an additional $15 billion for the SBA's Economic Injury Disaster Loan program. *See* https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl/covid-19-eidl.

III. CONSTRUCTION CONSENSUS PROCUREMENT IMPROVEMENT ACT OF 2021, PUB. L. NO. 117-28, 135 STAT. 304 (JULY 26, 2021)

On July 26, 2021, President Biden signed into law the Construction Consensus Procurement Improvement Act of 2021 ("Act"), which places substantial limitations on Federal agencies' ability to procure certain construction services through reverse auctions. The Act explains that "[i]n contrast to a traditional auction in which the buyers bid up the price, sellers bid down the price in a reverse auction." The Act defines "reverse auction" to mean "a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for a supply or service contract, or a delivery order, task order, or purchase order under the contract, with the ability to submit revised lower bids at any time before the closing of the auction."

Notably, the Act, which amends the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182 (Dec. 27, 2020), provides that "[n]ot later than 270 days after" its enactment (i.e., approximately April 26, 2022), the **FAR "shall be amended to prohibit the use of reverse auctions for awarding contracts for complex, specialized, or substantial design and construction services**." (Emphasis added.) This reverse auction prohibition "shall apply only to acquisitions above the simplified acquisition threshold," i.e., generally, above $250,000, "for [FAR Part 36] construction and design services."

The Act further requires that "[n]ot later than 180 days after" its enactment (i.e., approximately Jan. 26, 2022), the FAR shall be amended to define "complex, specialized, or substantial design and construction services," which shall include: "(1) site planning and landscape design; (2) architectural and engineering services … ; (3) interior design; (4) performance of substantial construction work for facility, infrastructure, and environmental restoration projects; and (5) construction or substantial alteration of public buildings or public works." The Act makes the "finding" that reverse auctions, "while providing value for the vast majority of Federal acquisitions, including certain construction related acquisitions, are limited in value for complex, specialized, or substantial design and construction services." The Army Corps of Engineers made a similar determination concerning the use of reverse auctions for construction contracts. *See* USACE, Final Report Regarding the USACE Pilot Program on Reverse Auctioning 34-37 (2004), cited in "Contracting & the Industrial Base," Hearing Before the Committee on Small Business, U.S. House of Representatives (114-001, Feb. 12, 2015), at nn.13-15 & accompanying text,

available at https://www.govinfo.gov/content/pkg/CHRG-114hhrg93326/html/CHRG-114hhrg93326.htm; Statement of Major Gen. Ronald L. Johnson, Deputy Commanding General, USACE in "Are New Procurement Methods Beneficial to Small Business Contractors?," Committee on Small Business, U.S. House of Representatives (110-77, March 6, 2008), *available at* https://www.govinfo.gov/content/pkg/CHRG-110hhrg39791/html/CHRG-110hhrg39791.htm. Certain states have also restricted the use of reverse auctions in construction contracts. *See, e.g.*, 30 ILCS § 500/20-10(j) (Illinois law excluding the use of reverse auctions for state "contracts for construction projects, including design professional services"); Tenn. Code Ann. § 12-3-513(c) (Tennessee law excluding the use of reverse auctions for the state's procurement of construction, architectural or engineering services). The Act, however, does not "restrict the use of reverse auctions for the procurement of other goods and services except" for complex, specialized, or substantial design and construction services.

Finally, not later than July 26, 2023, the GSA Administrator "shall submit to the" Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Reform a "report on the effectiveness of" the Act "in delivering complex, specialized, or substantial design and construction services to the" Government.

IV. INFRASTRUCTURE INVESTMENT & JOBS ACT, PUB. L. NO. 117-58, 134 STAT. 429 (NOV. 15, 2021)

Signed into law on Nov. 15, 2021 by President Biden, the Infrastructure Investment and Jobs Act ("IIJA"), also known as the Bipartisan Infrastructure Bill, is a $1.2 trillion act that includes $550 billion in new funds directed at modernizing and improving U.S. infrastructure. The IIJA includes funds for, among other items, highways, roads and bridges; public transit; rail; airports and ports; transportation safety and research programs; power grid reliability, resilience and security; broadband access; drinking and wastewater infrastructure; clean energy programs (e.g., electric vehicle charging stations); and flooding and climate resiliency. One commentator concluded that "[i]nitial review of the text of the bipartisan infrastructure law … reveals that no more than $125 billion of its funds are available for procurement. Roughly one-third of that amount will be spent in a mix of contract obligations and grant disbursal, bringing the total amount of federal prime contract-available spending below that ceiling." Furthermore, "[n]early 80% of the $550 billion [referenced above] law will go to projects funded entirely or predominately by grants." *See* https://news.bloomberglaw.com/federal-contracting/expect-scramble-for-contracts-amid-infrastructure-fanfare?usertype=External&bwid=0000017d-ca1%E2%80%A6.

The IIJA includes the "Build America, Buy America Act" ("BABA Act"). Part 1 of the BABA Act focuses on Buy America Act issues arising out of Federal Financial Assistance instruments (e.g., grants, cooperative agreements). *See* 2 C.F.R. § 200.1. Part II focuses on Buy Americ**a**n Act issues arising out of Federal procurements. "*Buy America requirements as they relate to transportation date to the Surface Transportation Assistance Act of 1978 (P.L. 95-599) and are distinct from requirements under the Buy American Act of 1933, which is specific to direct procurement by the federal government*." Christopher D. Watson, CONG. RESEARCH SERV., IF11989, CONGRESS EXPANDS BUY AMERICA REQUIREMENTS IN THE INFRASTRUCTURE INVESTMENT AND JOBS ACT (Pub. L. No. 117-58), at 1 (2021) (emphasis added).

The BABA Act applies Buy America domestic preference policies to Federal financial assistance programs for infrastructure, including to programs not currently subject to such laws, and to those already subject to Buy America laws but previously limited to specific products or materials. The BABA Act's authority is not limited to the funds authorized or appropriated in the IIJA. It permanently extends Buy America laws to Federal financial assistance for infrastructure programs.

Specifically, in BABA Act Part I, § 70914(a) provides that "[n]ot later than 180 days after [IIJA's] enactment," i.e., by about May 15, 2022, each Federal agency head must apply "domestic content procurement preference[s]" to "**Federal financial assistance program[s] for infrastructure**," which means that "**none of the funds made available for**" such programs "**may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States**." "[P]roduced in the United States" means: (A) for "iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;" (B) for "manufactured products," that—(i) such products were "manufactured in the United States; and (ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product," unless another standard has been established "under applicable law or regulation;" and (C) for "construction materials, that all manufacturing processes for the construction material occurred in the" U.S. IIJA, § 70912(6). OMB must define "[a]ll manufacturing processes" by May 2022. *See* IIJA, § 70915(b); CONG. RESEARCH SERV., IF11989, CONGRESS EXPANDS BUY AMERICA REQUIREMENTS IN THE INFRASTRUCTURE INVESTMENT AND JOBS ACT (Pub. L. No. 117-58), at 1 (2021).

A Federal agency head who applies a "domestic content procurement preference" "may waive the application of that preference" where she/he "finds that":

> (1) applying the domestic content procurement preference would be inconsistent with the public interest; (2) types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or (3) the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent.

Before issuing such a waiver, a Federal agency head "shall": (1) "make publicly available in an easily accessible location on" an OMB designated website and "on the website of the Federal agency a detailed written explanation for the proposed determination to issue the waiver;" and (2) provide "not less than 15 days for public comment on the proposed waiver."

Not later than Jan. 14, 2022, section 70913 requires each agency head to "submit to [OMB] and to Congress … a report that identifies each Federal financial assistance program for infrastructure administered by the Federal agency" and to publish the report in the Federal Register. "[F]or each Federal financial assistance program," the report shall: (i) "identify all domestic content procurement preferences applicable to the Federal financial assistance;" (ii) "assess the applicability of the domestic content procurement preference requirements," (iii) "provide details on any applicable domestic content procurement preference requirement" and

any waivers issued thereunder; and (iv) include "a description of the type of infrastructure projects that receive funding under the program[.]"

In the report, each Federal agency head "shall include a list of Federal financial assistance programs for infrastructure … for which a domestic content procurement preference requirement": (a) "does not apply in a manner consistent with section 70914;" or (b) "is subject to a waiver of general applicability not limited to the use of specific products for use in a specific project."

BABA Act Part II focuses on the Buy American Act, 41 U.S.C. Chapter 83, and Federal procurements. Section 70922 amends the Buy American Act to provide that "iron and steel are deemed manufactured in the United States only if all manufacturing processes involved in the production of such iron and steel, from the initial melting stage through the application of coatings, occurs in the United States." This is substantially the same definition applicable to Federal financial assistance programs (under the Buy America Act) described in § 70912(6), above. In addition, the general procurement exception for commercially available off-the-shelf items is inapplicable to "all iron and steel articles, materials, and supplies."

Pursuant to § 70922(c), not later than March 2023, and annually for 4 years thereafter, the OMB Director, in consultation with the GSA Administrator, shall submit to Congress "a report on the total amount of acquisitions made by Federal agencies in the relevant fiscal year of articles, materials, or supplies acquired from entities that mine, produce, or manufacture [them] … outside the United States." Not later than Nov. 15, 2022, under § 70923(c), the OMB Director is required to submit to Congress a somewhat similar, but retrospective report on the 3 fiscal years prior to IIJA's enactment concerning "articles, materials, or supplies acquired by the Federal Government [that] were mined, produced, or manufactured outside the United States," including an "itemized list of all waivers."

IIJA § 70922(e) amends the Buy American Act to provide an exception or waiver where the "acquisition" of U.S. articles, materials or supplies is found by the agency head to be "inconsistent with the public interest, their cost to be unreasonable, or that the articles, materials, or supplies of the class or kind to be used, or the articles, materials, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality."

Section 70923 statutorily establishes within OMB the Made in America Office ("MAO"), with the OMB Director appointing the MAO Director. *See* E.O. 14005, Ensuring the Future is Made in All of America by All of America's Workers, § 4 (Jan. 2021) (establishing the MAO), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/; CONG. RESEARCH SERV., IF11989, CONGRESS EXPANDS BUY AMERICA REQUIREMENTS IN THE INFRASTRUCTURE INVESTMENT AND JOBS ACT (Pub. L. No. 117-58), at 1-2 (2021). The MAO Director's responsibilities include (i) maximizing and enforcing "compliance with domestic preference statutes," and (ii) developing and implementing "procedures to review waiver requests or inapplicability requests related to domestic preference statutes." "[D]omestic preference statutes" include the Buy American Act, a Buy America law (as that term is broadly defined in section 70916(a)), and "any other law, regulation, rule, or executive order relating to Federal financial

assistance awards or Federal procurement, that requires, or provides a preference for, the purchase or acquisition of goods, products, or materials produced in the United States[.]"

Not later than Nov. 15, 2022, § 70921 requires the OFPP Administrator to "promulgate final regulations or other policy or management guidance" "to standardize and simplify how Federal agencies comply with, report on, and enforce the Buy American Act." At a minimum, they must include:

> (1) Guidelines for Federal agencies to determine, for the purposes of applying [41 U.S.C. §§ 8302(a) & 8303(b)(3) of the Buy American Act], the circumstances under which the acquisition of articles, materials, or supplies mined, produced, or manufactured in the United States is inconsistent with the public interest.
>
> (2) Guidelines to ensure Federal agencies base determinations of non-availability on appropriate considerations, including anticipated project delays and lack of substitutable articles, materials, and supplies mined, produced, or manufactured in the United States, when making determinations of non-availability under [41 U.S.C. § 8302(a)(1)].
>
> (3)(A) Uniform procedures for each Federal agency to make publicly available, in an easily identifiable location on the [agency] website …: (i) A written description of the circumstances in which the [agency head] may waive the requirements of the Buy American Act[; and] (ii) Each waiver made by the [agency head] within 30 days after making such waiver, including a justification with sufficient detail to explain the basis for the waiver. …
>
> (5) An increase to the price preferences for domestic end products and domestic construction materials.

As to (5) above, § 70921(c) provides that it is "the sense of Congress that the [FAR] Council should amend the [FAR] to increase the domestic content requirements for domestic end products and domestic construction material to 75 percent, or, in the event of no qualifying offers, 60 percent."

With respect to waiver guidelines, § 70921(b) provides that, for the public interest waiver exception, the OFPP Administrator "shall seek to minimize waivers related to contract awards that—(i) result in a decrease in employment in the United States, including employment among entities that manufacture the articles, materials, or supplies; or (ii) result in awarding a contract that would decrease domestic employment." Section 70921(b) establishes a new requirement that, to the extent permitted by law, "before granting a waiver in the public interest to the guidelines … with respect to a product sourced from a foreign country, a Federal agency shall assess whether a significant portion of the cost advantage of the product is the result of the **use of dumped**" or "**injuriously subsidized**" "steel, iron, or manufactured goods." (Emphasis added.)

IIJA includes the BuyAmerican.gov Act of 2021 at §§ 70931-41. Section 70936 requires, by Nov. 15, 2022, the GSA Administrator to "establish an Internet website" at "BuyAmerican.gov that will be publicly available and free to access. The website shall include": (i) "information on all waivers of and exceptions to Buy American laws since [Nov. 15, 2021]

that have been requested, are under consideration, or have been granted by executive agencies and be designed to enable manufacturers and other interested parties to easily identify waivers;" and (ii) the "results of routine audits" to determine "Buy American law violations after the award of a contract."

Section 70937(b) requires that "[p]rior to granting a request to waive a Buy American law," an agency head "shall submit a request to invoke a Buy American waiver to the [GSA] Administrator …, [who] shall make the request available on or through the public website [i.e., BuyAmerican.gov] for public comment for not less than 15 days." This requirement "does not apply to a request for a Buy American waiver to satisfy an urgent contracting need in an unforeseen and exigent circumstance." However, "[n]o Buy American waiver for purposes of awarding a contract may be granted if … (A) information about the waiver was not made available [at BuyAmerican.gov]; or (B) no opportunity for public comment concerning the request was granted."

The IIJA stresses that this legislation and its amendments "shall be applied in a manner consistent with United States obligations under international agreements." IIJA, §§ 70914(e), 70925, 70940. Thus, Federal procurements currently open to products and materials of other countries that are a party to these trade agreements will remain open. But, IIJA § 70934 requires that an assessment of "the impacts in a publicly available report of all United States free trade agreements, the World Trade Organization Agreement on Government Procurement, and Federal permitting processes on the operation of Buy American laws" be issued by April 2022.

IIJA also includes the "Make PPE in America Act," IIJA §§ 70951-53, which is intended to address vulnerabilities in the United States supply chain for, and lack of domestic production of, personal protective equipment ("PPE") exposed by the COVID-19 pandemic. The Act seeks to foster a domestic PPE supply chain by "[i]ssuing a strategy that provides the government's anticipated needs over the next three years" to "enable suppliers to assess what changes, if any, are needed in their manufacturing capacity to meet expected demands," creating "a strong and consistent demand signal from the Federal Government" to provide "the necessary certainty to expand production capacity investment in the United States," and incentivizing "investment in the United States and the re-shoring of manufacturing" through long-term contracts "no shorter than three years in duration." The Act provides that "[t]o accomplish this aim, the United States should seek to ensure compliance with its international obligations, such as its commitments under the World Trade Organization's ["WTO"] Agreement on Government Procurement and its free trade agreements, including by invoking any relevant exceptions to those agreements, especially those related to national security and public health." It further requires the "President or the President's designee" to "take all necessary steps, including invoking the rights of the United States under Article III of the [WTO's] Agreement on Government Procurement and the relevant exceptions of other relevant agreements …, to ensure that the international obligations of the United States are consistent with" the Act's requirements.

PPE covered by the Act includes "surgical masks, respirator masks and powered air purifying respirators and required filters, face shields and protective eyewear, gloves, disposable and reusable surgical and isolation gowns, head and foot coverings, and other gear or clothing used to protect an individual from the transmission of disease."

Section 70953 provides that any contract for the procurement of PPE entered into by the secretaries of homeland security, of health and human services ("HHS"), and/or of veterans affairs ("VA") (the "covered Secretar[ies]") or a designee, "shall—(1) be issued for a duration of at least 2 years, plus all option periods necessary, to incentivize investment in the production of [PPE] and the materials and components thereof in the United States; and (2) be for [PPE], including the materials and components thereof, that is grown, reprocessed, reused, or produced in the United States." The long-term contract and domestic source requirements will not apply to PPE items, or components or materials thereof, "if, after maximizing to the extent feasible sources consistent" with the requirements above, the covered secretary (A) "maximizes sources for [PPE] that is assembled outside the United States containing only materials and components that are grown, reprocessed, reused, or produced in the United States;" and (B) "certifies every 120 days that it is necessary to procure [PPE] under alternative procedures to respond to the immediate needs of a public health emergency."

Additionally, the requirements described immediately above will not apply to PPE items, or components or materials thereof, if such item or material is, or includes, a material listed in FAR 25.104 as an item for which a non-availability determination has been made, or "as to which the covered Secretary determines that a sufficient quantity of a satisfactory quality that is grown, reprocessed, reused, or produced in the United States cannot be procured as, and when, needed at United States market prices." If this exception applies, the covered Secretary must "certify every 120 days that [it] … is necessary to meet the immediate needs of a public health emergency."

No later than May 2022, the OMB Director, in consultation with the covered secretaries, must "submit to the chairs and ranking members of the appropriate congressional committees a report on the procurement of" PPE. The report must include "(A) The United States long-term domestic procurement strategy for PPE produced in the United States, including strategies to incentivize investment in and maintain United States supply chains for all PPE sufficient to meet the needs of the United States during a public health emergency"; "(B) An estimate of long-term demand quantities for all PPE items procured by" the government; "(C) Recommendations for congressional action required to implement" the procurement strategy; and "(D) A determination whether all notifications, amendments, and other necessary actions have been completed to bring the United States existing international obligations into conformity with the" Act.

The Act permits covered secretaries to transfer excess PPE acquired under long-term contracts with domestic sources to the Strategic National Stockpile established under section 319F‑2 of the Public Health Service Act (42 U.S.C. § 247d‑6b). The Act also amends 42 U.S.C. 247d–6b(a) to permit the HHS secretary, in coordination with the homeland security secretary, to "sell drugs, vaccines and other biological products, medical devices, or other supplies maintained in the stockpile … to a Federal agency or private, nonprofit, State, local, tribal, or territorial entity for immediate use and distribution" if the items are (1) "within 1 year of their expiration date;" or (2) "determined by the Secretary to no longer be needed in the stockpile due to advances in medical or technical capabilities."

Additionally, the Act amends Title V of the Homeland Security Act of 2002 to include a new § (i.e., § 529) to permit the Homeland Security Secretary to transfer to HHS, "on a reimbursable basis, excess [PPE] or medically necessary equipment in the possession of the"

department of homeland security ("DHS") during public health emergencies. Before requesting the transfer, the HHS secretary must determine whether the PPE or medically necessary equipment is otherwise available. Before initiating the transfer, the homeland security secretary, in consultation with the heads of each DHS component, must determine whether the equipment requested is excess equipment and certify that the transfer will not adversely impact the health or safety of DHS officers, employees, or contractors. The homeland security secretary, acting through the DHS chief medical officer, must maintain an inventory of all PPE and necessary medical equipment in DHS' possession, and make the inventory available to the HHS secretary and relevant congressional committees.

Division K of the IIJA is the "Minority Business Development Act of 2021" (the "MBD Act"). The Minority Business Development Agency ("MBDA") was originally established within the U.S. Department of Commerce as the Office of Minority Business Enterprise ("MBE") by President Nixon in March 1969 through Executive Order 11458. In 1971, Executive Order 11625 expanded the scope of the Office of MBE and its minority business programs by authorizing grants to public and private organizations to provide technical and management assistance to minority business enterprises. The Office was renamed the MBDA in 1979. The MBD Act provides statutory authorization for the MBDA, and creates the senior position of Under Secretary of Commerce for Minority Business Development to lead the Agency. The MBD Act also codifies existing MBDA programs. In particular, the MBD Act codifies the MBDA Business Center Program, the purpose of which is "to create a national network of public-private partnerships that—(1) assist minority business enterprises in—(A) accessing capital, contracts, and grants; and (B) creating and maintaining jobs; (2) provide counseling and mentoring to minority business enterprises; and (3) facilitate the growth of minority business enterprises by promoting trade." It also provides for the establishment of MBDA Rural Business Centers to provide Business Center Program services in rural areas. The Act further establishes a Minority Business Enterprises Advisory Council "to advise and assist the Agency." The Council will be "composed of 9 members of the private sector and 1 representative from each of not fewer than 10 Federal agencies that support or otherwise have duties that relate to business formation, including duties relating to labor development, monetary policy, national security, energy, agriculture, transportation, and housing." Among other requirements, the new undersecretary will be required to conduct a study and make recommendations on "ways in which minority business enterprises can meet gaps in the supply chain of the United States."

Section 11305 of the IIJA amends 23 U.S.C. § 201 ("Federal lands and tribal transportation programs") and 23 U.S.C. § 308 ("Cooperation with Federal and State agencies and foreign countries") to permit the Secretary of Transportation to use any contracting method available to a State, notwithstanding the FAR or any other law. These "alternative contracting methods" must "include, at a minimum—(A) project bundling; (B) bridge bundling; (C) design-build contracting; (D) 2-phase contracting; (E) long-term concession agreements; and (F) any method tested, or that could be tested, under an experimental program relating to contracting methods carried out by the Secretary." In carrying out an alternative contracting method, the Secretary must, "in consultation with the applicable Federal land management agencies, establish clear procedures that are … applicable to the alternative contracting method" and consistent with the requirements for federal procurements to the maximum extent practicable. The Secretary must also "solicit input on the use of the alternative contracting method from the affected

industry prior to using the method," and "prepare an evaluation of the use of the alternative contracting method."

V. NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2022, PUB. L. NO. 117-81 (DEC. 27, 2021)

On Dec. 27, 2021, nearly three months after the Oct. 1, 2021 start of Fiscal Year ("FY") 2022, the National Defense Authorization Act ("NDAA") for FY 2022, Pub. L. No. 117-81, was signed into law by President Biden, becoming the 61st consecutive FY that a NDAA has been enacted. Unfortunately, it has become common practice for the NDAA to be enacted well after the start of its FY. In the last 46 fiscal years, the NDAA has been enacted on average 42 days after the fiscal year began. *See* CRS In Focus IF11833 (Dec. 30, 2021), *FY2022 NDAA: Status of Legislative Activity*, at 3. Recently, this trend has become more pronounced, with three of the prior five NDAAs becoming law in December (the FY 2020, FY 2018, and FY 2017 NDAAs) and the FY 2021 NDAA became law on Jan. 1, 2021. The FY 2019 NDAA is the only NDAA since 1997 to become law before the start of its fiscal year, which we view as a testament to Sen. John McCain, for whom the law was named.

As late as the NDAAs have been, they have been more timely than the annual defense appropriations acts. From FY 2010 to FY 2021, a defense budget was only enacted on time once and the late budgets were delayed on average by over 120 days. *See* CSIS Report (Nov. 2021), *Financing the Fight: History and Assessment of DoD Budget Execution Processes*, at 49.

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

In President Biden's signing statement, he took issue with several provisions in the FY 2022 NDAA that he believes raise "constitutional concerns." *See* https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/27/statement-by-the-president-on-s-1605-the-national-defense-authorization-act-for-fiscal-year-2022/. None of these provisions, which concern (among other issues) limitations on the transfer of Guantánamo Bay detainees, possible disclosure of classified information, and possible restrictions on Executive Branch voting in international organizations, is likely to have a significant impact on procurement law or policy.

The FY 2022 NDAA broadly focuses on China, cybersecurity, the Defense Industrial Base, and seeking ways to streamline the acquisition process. These themes can be seen in various procurement-related provisions. The FY 2022 NDAA's procurement-related reforms and changes are primarily located (as usual) in the Act's "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters," which includes 57 provisions addressing procurement matters. This is modestly less than the past four NDAAs: FYs 2021, 2020, 2019, and 2018 NDAAs, respectively, contained 63, 78, 71, and 73 Title VIII provisions. Although the impact and importance of a NDAA on Federal procurement should not be measured simply on the total number of procurement provisions, the FY 2022 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAAs (37, 13 and 49 provisions, respectively, in FYs 2015, 2014 and 2013). *See* CRS Report R45068 (Jan. 19, 2018), *Acquisition Reform in the FY2016–FY2018 National Defense Authorization Acts (NDAAs)*, at 1-2, & App. A. As discussed below, certain provisions in other titles of the FY 2022 NDAA are very important to procurement law and some of them could have been included in Title VIII. Significantly, some of the FY 2022 NDAA's provisions will not become effective until the FAR or DFARS (and, depending on the circumstances, possibly other regulations, including from the SBA) are amended or new provisions are promulgated, which sometimes can take 2 to 4 years or more. The debate concerning the FY 2023 NDAA is likely to be dominated by the same general themes applicable to the FY 2022 NDAA, i.e., China, cybersecurity, streamlining acquisition processes, and the industrial base (with a focus on supply chains, strategic reshoring, and the role of working with allied nations).

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

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

We begin our review of specific FY 2022 NDAA procurement provisions with Title VIII, "Acquisition Policy, Acquisition Management, and Related Matters," and then turn to certain sections in other titles.

Section 802, Prohibition on Acquisition of Personal Protective Equipment from Non-Allied Foreign Nations—This section adds 10 U.S.C. § 2533e, which prohibits DOD from "procur[ing] any covered item [generally, personal protective equipment ("PPE")] from" North Korea, China, Russia and Iran. More specifically, "covered item" means "an article or item of":

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

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

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

More specifically, this section amends Title 10 to add new § 2380c under which the Secretaries of Defense and of the Military Departments "may acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals." "Use of [such] general solicitation competitive procedures" is "considered to be use of competitive procedures for purposes of" 10 U.S.C. Chapter 137, including the "full and open competition" requirements of 10 U.S.C. § 2304(a)(1). Contracts awarded under this authority "shall be": (i) "fixed-price, including fixed-price incentive fee contracts," and (ii) "treated as commercial products or commercial services" notwithstanding the definitions in 10 U.S.C. § 2376(1).

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

When "using this authority," DOD: (a) "may not enter into a contract or agreement in excess of $100,000,000" "without a written determination from the Under Secretary of Defense

for Acquisition and Sustainment or the relevant service acquisition executive of the efficacy of the effort to meet mission needs," and (b) "shall notify," within 45 days after the award of such a contract exceeding $100,000,000, "the congressional defense committees of such award."

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

Section 804, Modifications to Contracts Subject to Cost or Pricing Data Certification—This section modifies 10 U.S.C. § 2306a(a)(6) to make conforming changes consistent with § 814 of the FY 2021 NDAA, which increased the threshold for submitting cost or pricing data under the Truthful Cost or Pricing Data statute (commonly known as the Truth in Negotiations Act or TINA) for contract modifications and subcontracts to $2 million. Prior to the FY 2022 NDAA's enactment, 10 U.S.C. 2306a(a)(6) provided that contracts entered into on or before June 30, 2018 must be modified to reflect the current TINA thresholds for contract modifications and subcontracts related to prime contracts entered into prior to July 1, 2018 "[u]pon the request of a contractor that was required to submit cost or pricing data." This section now requires DOD to modify "as soon as practicable" all prime contracts entered into on or before June 30, 2018 to reflect the changes made by FY 2021 NDAA § 814.

Section 805, Two-Year Extension of Selected Acquisition Report Requirement—Section 805 amends 10 U.S.C. § 2432(j) to extend DOD's Selected Acquisition Report (SAR) requirement through FY 2023. *See* https://acqnotes.com/acqnote/acquisitions/selected-acquisition-report-sar (explaining SAR process for DOD submission to Congress of summaries of Major Defense Acquisition Programs and including links to SAR database); https://www.acq.osd.mil/asda/ae/ada/docs/PDAS%202019%20Excerpts_Final%20-cleared.pdf (DOD 2019 SARs Update). It further requires that no later than March 1, 2022, and every 6 months thereafter, the secretary of defense "provide to the congressional defense committees a demonstration of the capability improvements necessary to achieve the full operational capability of the reporting system that will replace the [SAR] requirements under" 10 U.S.C. § 2432. This must include a "demonstration of the full suite of data sharing capabilities of the reporting system" "that can be accessed by authorized external users, including the congressional defense committees, for a range of covered programs across acquisition categories," including those selected under FY 2020 NDAA § 831. The goal is to replace the SAR with a more robust system that will support more effective DOD decision making for major defense acquisition programs.

Section 806, Annual Report on DOD's Highest & Lowest Performing Acquisition Programs—Not later than Jan. 31, 2023, and then annually for the following 3 years, § 806 requires "the Component Acquisition Executive of each [DOD] element or organization" to "rank each covered acquisition program based on" certain "criteria" and "submit to the congressional defense committees a report that contains a ranking of the five highest performing and five lowest performing covered acquisition programs for such element or organization[.]" Each Component Acquisition Executive, in consultation with other DOD officials (as she/he determines

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

A "covered acquisition program" is a "major defense acquisition program," *see* 10 U.S.C. § 2430(a), including an acquisition program (which is not for an automated information system) that is estimated "to require an eventual total expenditure" "for research, development, test, and evaluation of" between $300 Million and $1.8 Billion (in FY 1990 constant dollars). *See* 10 U.S.C. § 2430(a)(1)(B).

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

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

Not later than April 26, 2022, the Under Secretary and the Chairman "shall brief the congressional defense committees on the results of the required assessment and any actions undertaken to improve compliance with the statutory preference for commercial products and commercial services, including any recommendations" for Congressional action. This section is yet another attempt by Congress to get DOD to procure more commercial products and services. Repeated congressional efforts in this area, including various studies, reports and pilot programs, have resulted in modest success. *See, e.g.*, FY 2021 NDAA § 816; FY 2019 NDAA §§ 836, 837, 839; FY 2018 NDAA §§ 848, 849; FY 2017 NDAA §§ 874, 875, 876, 879, 880; FY 2016 NDAA §§ 851, 852, 854, 855.

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

Section 808, Briefing on Transparency for Certain Domestic Procurement Waivers— Under this section, not later than June 25, 2022, DOD "shall brief the congressional defense committees on the extent to which information relating to the use of domestic procurement waivers by [DOD] is publicly available." The JES notes "that there are efforts underway to make such waivers available on a public website for all executive branch agencies. Specifically, Executive Order 14005, 'Ensuring the Future Is Made in All of America by All of America's Workers,' … requires" GSA to "develop a public website to which the status of agencies' proposed waivers to Made in America laws, to include [DOD], will be posted. We understand this website is planned to be operational in fiscal year 2022 and expect the [DOD] to provide appropriate information." In fact, a U.S. Government website identifying "Nonavailability Waivers" "reviewed by the Made in America Office" is operational at https://www.madeinamerica.gov/waivers/.

The JES overlooks the fact that there is a directly relevant Nov. 2021 Act of Congress on this issue. Specifically, on Nov. 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. No. 117-58, which is discussed above in detail and includes the BuyAmerican.gov Act of 2021 at §§ 70931-41. Section 70936 requires, by Nov. 15, 2022, the GSA Administrator to "establish an Internet website" at "BuyAmerican.gov that will be publicly available and free to access. The website shall include": (i) "information on all waivers of and exceptions to Buy American laws since [Nov. 15, 2021] that have been requested, are under consideration, or have been granted by executive agencies and be designed to enable manufacturers and other interested parties to easily identify waivers;" and (ii) the "results of routine audits" to determine "Buy American law violations after the award of a contract."

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

Section 809, Report on Violations of Certain Domestic Preference Laws—Pursuant to this section, not later than Feb. 1 of 2023, 2024, and 2025, the Secretary of Defense, "in coordination with the" Secretaries of the Military Departments, "shall submit to the congressional defense committees a report on violations of certain domestic preference laws reported to [DOD] and the military departments. Each report shall include such violations that occurred during the previous fiscal year[.]" For this section, "certain domestic preference laws" "means any provision of [10 U.S.C. §§] 2533a [concerning the Berry Amendment] or 2533b [concerning specialty metals], or [41 U.S.C.] chapter 83 [concerning the Buy American Act]," "that requires or creates a preference for the procurement of goods, articles, materials, or supplies, that are grown, mined, reprocessed, reused, manufactured, or produced in the United States." For DOD's implementation of: (i) the Berry Amendment, *see* DFARS 225.7002; (ii) specialty metals provisions, *see* DFARS 225.7003; and (iii) the Buy American Act, *see, e.g.*, DFARS Subparts 225.1, 225.2 and 225.5.

"[F]or each reported violation," the report "shall include": "(1) The name of the contractor. (2) The contract number. (3) The nature of the violation, including which of the certain domestic

preference laws was violated. (4) The origin of the report of the violation. (5) Actions taken or pending by the Secretary concerned in response to the violation. (6) Other related matters deemed appropriate by the Secretary concerned." The report potentially provides a roadmap for, or may lead to, breach of contract, suspension and debarment, and/or False Claims Act actions against contractors. The JES observes that the House bill included a provision, that did not make it into the enacted NDAA, which would have required "contracting officer[s] to refer to the appropriate suspension or debarment official any current or former [DOD] contractor if the contracting officer believes the contractor has egregiously violated the domestic preference requirements of" 10 U.S.C. §§ 2533a or 2533b.

Section 811, Certain Multiyear Contracts for Acquisition of Property: Budget Justification Materials—Section 811 requires the Defense Secretary to include a proposal in the budget justification materials submitted to Congress for DOD's FY 2023 budget (and each FY thereafter) for each multiyear contract that the Secretaries of Defense or of a Military Department intend to cancel or reduce (e.g., through a total or partial termination for convenience) the quantity of end items to be procured (referred to as a covered modification). The proposal to cancel or "effect a covered modification" of a multiyear contract must include "(1) A detailed assessment of any expected termination costs associated with the proposed cancellation or covered modification"; "(2) An updated assessment of estimated savings of" cancelling the contract or carrying it out as modified by the covered modification; "(3) An explanation of the proposed use of previously appropriated funds for advance procurement or procurement of property planned under the multiyear contract before such cancellation or covered modification"; and "(4) An assessment of expected impacts of the proposed cancellation or covered modification on the defense industrial base, including workload stability, loss of skilled labor, and reduced efficiencies."

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

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

> For a prime contractor that subcontracts with a small business concern, [DOD] shall, to the fullest extent permitted by law, establish an accelerated payment date with a goal of 15 days after receipt of a proper invoice for the amount due if the

> prime contractor agrees ***or proposes*** to make payments to the subcontractor in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor. [Emphasis added.]

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

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

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

Section 815 also amends the budget information for services contracts that DOD must submit to Congress under 10 U.S.C. § 2329 and delays DOD's first submission of such budget information to Congress from Oct. 1, 2021 to Feb. 1, 2023. In addition to the existing requirements for budget information on services contracts required under 10 U.S.C. § 2329(b)(1)-(3), section 815 provides that the budget information that DOD submits for services contracts must: (i) "be informed by the review of the inventory required by" 10 U.S.C. § 2330a(c) (which requires "an annual inventory … of activities performed during the preceding fiscal year pursuant to staff augmentation contracts and contracts closely associated with inherently governmental functions on behalf of" DOD) "using standard guidelines developed" pursuant to 10 U.S.C. § 2329(d), as amended by FY 2022 NDAA § 815; and (ii) "clearly and separately identify the amount requested and projected for the procurement of contract services for each Defense Agency, [DOD] Field Activity, command, or military installation for the budget year and the subsequent four fiscal years in the future-years defense program submitted to Congress under [10 U.S.C. §] 221." Section 815 repeals 10 U.S.C. § 235 ("Procurement of Contract Services: Specification of Amounts Requested in Budget"), which was generally incorporated into DOD's budget information requirements.

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

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

Section 817, Repeal of DOD Preference for Fixed-Price Contracts—This section repeals DOD's preference for fixed-price contracts (including fixed-price incentive fee contracts) established by FY 2017 NDAA § 829, which required approval by a senior DOD official (e.g., senior acquisition executive) for the use of certain cost-type contracts in excess of $25 million. As a result, to implement the repeal, the DFARS will need to be modified, including DFARS 216.102(1) (to remove its stated preference for fixed-price contracts), DFARS 216.301-3(2) (to remove a reference to FY 2017 NDAA § 829 and likely an approval requirement), and DFARS 235.006 (same).

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

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

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

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

Section 825, Reporting Requirement for Certain Defense Acquisition (i.e., OTAs & Task Orders) Activities—Section 825 requires DOD to "establish procedures to identify organizations performing on individual projects" for: (1) "Other transaction agreements" pursuant to 10 U.S.C. §§ 2371 and 2371b, including where applicable consortium members; and (2) "Individual task orders awarded under a task order contract," *see* 10 U.S.C. § 2304d, including "individual task orders issued to a federally funded research and development center" ("FFRDC"). Not later than Dec. 27, 2022, and not less than annually thereafter, DOD "shall submit to the congressional defense committees a report on the use" of such agreements and activities, and associated funding. Finally, not later than Dec. 27, 2022, DOD "shall establish procedures to collect information on" such "individual agreements and activities … and associated funding in an online, public, searchable database," unless such disclosure is "inappropriate for individual agreements based on national security concerns."

Section 831, Technology Protection Features Activities—Section 831 amends 10 U.S.C. § 2357, which requires the Secretary of Defense to "carry out activities to develop and incorporate technology protection features in a designated system during the research and development phase of such system." 10 U.S.C. § 2357 defines "technology protection features" to mean "technical modifications necessary to protect critical program information, including anti-tamper technologies and other systems engineering activities intended to prevent or delay exploitation of critical technologies in a designated system." 10 U.S.C. § 2357(b) requires that "[a]ny contract for the design or development of a system resulting from" the activities described above "for the purpose of enhancing or enabling the exportability of the system, either for the development of program protection strategies for the system or the design and incorporation of exportability

features into the system, shall include a cost-sharing provision that requires the contractor to bear half of the cost of such activities, or such other portion of such cost as the Secretary considers appropriate upon showing of good cause." Section 831 provides that the Secretary may deem the portion of the costs that the contractor must bear to be "allowable independent research and development [(IR&D)] costs [*see* FAR 31.205-18] under the regulations issued under" 10 U.S.C. § 2372 if the system at issue received Milestone B approval and DOD determines that treating the costs as allowable IR&D costs would further the purposes of 10 U.S.C. § 2357.

Section 832, Modification of Enhanced Transfer of Technology Developed at DOD Laboratories—This section extends to Dec. 31, 2026 the authority under FY 2014 NDAA § 801 (as amended by FY 2016 NDAA § 818) permitting the Secretaries of Defense and the Military Departments to authorize DOD laboratory heads to "grant nonexclusive, exclusive, or partially exclusive licenses, royalty free or for royalties or for rights to other intellectual property, for computer software and its related documentation developed at a DOD laboratory." Section 832 also amends FY 2014 NDAA § 801 to require the Defense Secretary to "develop and implement a plan to collect and analyze data on the use of" the authority under FY 2014 NDAA § 801 to develop and share best practices and provide information to the secretary and congress on the use of the authority and related policy issues. The Secretary must report to the congressional defense committees on the use of the FY 2014 NDAA § 801 authority by Dec. 31, 2025.

Section 833, Pilot Program on Acquisition Practices for Emerging Technologies—By June 25, 2022, the Secretary of Defense, acting through the Under Secretary for Acquisition and Sustainment, must establish a pilot program "to develop and implement unique acquisition mechanisms for emerging technologies in order to increase the speed of transition of emerging technologies into acquisition programs or into operational use." In carrying out the program, the Under Secretary must: "identify, and award agreements to, not less than four new projects supporting high-priority defense modernization activities, consistent with the National Defense Strategy, with consideration given to—(A) offensive missile capabilities; (B) space-based assets; (C) personnel and quality of life improvement; (D) energy generation and storage;" and (E) other activities as determined by the Under Secretary. For each such project, the Under Secretary must "develop a unique acquisition plan … that is significantly novel from standard [DOD] acquisition practices," including the use of: (i) alternative price evaluation, independent cost estimation, and market research methods; (ii) "continuous assessment of performance metrics to measure project value for use in program management and oversight;" (iii) "alternative intellectual property strategies, including activities to support modular open system approaches … and reduce life-cycle and sustainment costs;" and (iv) "other alternative practices." The Under Secretary must execute the "significantly novel" acquisition plans and award agreements in an expedited manner, and notify the congressional defense committees if agreements awarded under the pilot program are to be terminated 30 days before such termination. Additionally, the Under Secretary must determine if existing authorities are sufficient to carry out the § 833 pilot program and, if not, submit recommendations for statutory reforms to the congressional defense committees.

The Under Secretary must also "establish mechanisms … to waive, upon request, regulations, directives, or policies of [DOD], a military service, or a Defense Agency with respect to a project awarded an agreement under" the pilot program if the Under Secretary determines that the waiver will further the purposes of the pilot program, unless the waiver would be prohibited by federal statute or common law. Section 833 further requires the Under Secretary to establish a

pilot program advisory group to advise on the "selection, management and elements of projects," the collection of data on use of the program, and the termination of agreements under the program.

The pilot program cannot be established until after completion of a plan to collect and analyze data on its execution, and evaluate lessons learned from the program. Beginning in June 2022, DOD must brief the congressional defense committee on the development of the program's plans and its execution. The program will terminate on the earlier of the date on which each project has been completed or had all agreements awarded to such project terminated, or Dec. 27, 2026.

Section 834, Pilot Program to Accelerate the Procurement & Fielding of Innovative Technologies—Subject to availability of appropriations, this section requires the Secretary of Defense to "establish a competitive, merit-based pilot program to accelerate the procurement and fielding of innovative technologies by … (1) reducing acquisition or life-cycle costs;" (2) "addressing technical risks; (3) improving the timeliness and thoroughness of test and evaluation outcomes; and (4) rapidly implementing such technologies to directly support defense missions." No later than Dec. 27, 2022, the Secretary must issue guidelines for operation of the program, which must provide for: (1) "[t]he issuance of one or more solicitations for proposals" by DOD, with a priority for technologies developed by small businesses or nontraditional defense contractors; and (2) a process for review of the proposals received by DOD, "the merit-based selection of the most promising cost-effective proposals," and "the procurement of goods or services offered by such a proposal through contracts, cooperative agreements, other transaction authority, or by another appropriate process." Awards under the pilot program with a value greater than $50 million require approval from the Secretary or designee. The Secretary may not provide funding under the pilot program until after DOD completes a plan for carrying out data collection and submits the plan to the congressional defense committees.

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

Section 835, Independent Study on Technical Debt in Software-Intensive Systems—By May 1, 2022, the Defense Secretary must "enter into an agreement with a federally funded research and development center ["FFRDC"] to study technical debt in software-intensive systems." "Technical debt" "means an element of design or implementation that is expedient in the short term, but that would result in a technical context that can make a future change costlier or impossible." The study must "include analyses and recommendations, including actionable and specific guidance and any recommendations for statutory or regulatory modifications, on": (1) "[q]ualitative and quantitative measures which can be used to identify a desired future state for software-intensive systems" and "assess technical debt"; (2) "[p]olicies for data access to identify and assess technical debt and best practices for software-intensive systems to make such data appropriately available for use;" (3) "[f]orms of technical debt which are suitable for objective or subjective analysis"; (4) "[c]urrent practices of [DOD] software-intensive systems to track and use

data related to technical debt"; (5) "individuals or organizations that should be responsible for the identification and assessment of technical debt, including the organization responsible for independent assessments"; (6) "[s]cenarios, frequency, or program phases during which technical debt should be assessed"; (7) "[b]est practices to identify, assess, and monitor the accumulating costs [of] technical debt"; (8) "[c]riteria to support decisions by appropriate officials on whether to incur, carry, or reduce technical debt"; and (9) "[p]ractices for [DOD] to incrementally adopt to initiate practices for managing or reducing technical debt."

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

Section 836, Cadre of DOD Software Development & Acquisition Experts—Pursuant to this section, not later than Jan. 1, 2023, DOD is required to "establish a cadre of personnel who are experts in software development, acquisition, and sustainment to improve the effectiveness of [DOD's] … programs or activities" in those areas. The Under Secretary for Acquisition & Sustainment shall: (1) "ensure the cadre has the appropriate number of members;" (2) "establish an appropriate leadership structure and office within which the cadre shall be managed;" and (3) "determine the appropriate officials to whom members of the cadre shall report." "In establishing the cadre, the Under Secretary shall give preference to [DOD] civilian employees[.]" Funding, career path and training are provided for cadre members by this section.

FY 2018 NDAA § 802 provided for the establishment of a *cadre* of DOD personnel who are *experts in Intellectual Property* (IP) matters. DOD, however, was slow to establish the cadre and implement § 802's other IP requirements, which caused Congress to include in the FY 2020 NDAA a provision requiring a report on the cadre's progress and threatening to withhold certain funding to DOD if sufficient progress was not promptly made. See "Defense Acquisitions: DOD Should Take Additional Actions to Improve How It Approaches Intellectual Property," GAO-22-104752 (Nov. 30, 2021), https://www.gao.gov/assets/gao-22-104752.pdf. As a result, it appears likely that Congress will carefully monitor DOD's progress with respect to this new cadre.

Section 841, Modernization of Acquisition Processes to Ensure Integrity of Industrial Base—This section amends 10 U.S.C. § 2509, which requires DOD to "streamline and digitize" its "approach for identifying and mitigating risks to the defense industrial base." See FY 2020 NDAA § 845. Section 2509 requires that DOD "assess the extent to which existing systems of record relevant to risk assessments and contracting" produce, expose and maintain "valid and reliable data for the purposes of [DOD's] continuous assessment and mitigation of risks in the defense industrial base." Section 841 adds an additional element to the assessments under 10 U.S.C. § 2509, which provides that, in connection with these assessments, DOD must "develop capabilities to map supply chains and to assess risks to the supply chain for major end items by

business sector, vendor, program, part, and other metrics." This requirement responds to the recommendations of the House Armed Services Committee, Defense Critical Supply Chain Task Force (July 2022), https://armedservices.house.gov/2021/7/defense-critical-supply-chain-task-force-releases-final-report.

The JES further observes that:

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

The JES also recommends that DOD "consider the development of a database to integrate the current disparate data systems that contain defense supply chain information, and to help provide for consistent availability, interoperability, and centralized reporting of data to support efficient mitigation and remediation of identified supply chain vulnerabilities."

Section 841 eliminated FY 2020 NDAA § 845's requirement for DOD to submit an implementation plan and report on implementation framework, which were due on March 20, 2020, and March 20, 2021, respectively. However, the JES states that congress continues to "await receipt of the plan and report" that were due on March 20, 2020 and March 20, 2021, and directs the secretary to "provide a briefing, not later than June 1, 2022, to the congressional defense committees with an update on the framework implementation as required" by 10 U.S.C. § 2509, and the assessment required by subsection (e)(B)(ii) of that section, as amended by FY 2022 NDAA § 841.

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

Section 842, Modification to Analyses of Activities for Action to Address Sourcing & Industrial Capacity—Section 842 amends FY 2021 NDAA § 849, which requires the secretary of defense, acting through the Under Secretary for Acquisition & Sustainment and other appropriate officials, to perform analyses of certain items to determine and develop appropriate actions with respect to sourcing (e.g., restricting sources to U.S. suppliers or prohibiting procurement from certain sources or nations) or investment to increase domestic industrial

capacity and explore ways to encourage critical technology industries to move production to the U.S. for national security purposes, consistent with the policies, programs, and activities required under 10 U.S.C. Chapter 148 ("National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion"), the Buy American Act, and the Defense Production Act. See FY 2021 NDAA § 849. Section 842 expands the list of high priority goods and services for analyses and recommended actions to include beef products, molybdenum and molybdenum alloys, optical transmission equipment (including optical fiber and cable equipment), armor on tactical ground vehicles, graphite processing, and advanced AC-DC power converters. No later than Jan. 15, 2023, § 842 requires DOD to provide an interim brief to the congressional defense committees on DOD's analyses, recommendations, and "descriptions of specific activities undertaken as a result of the analyses, including schedule and resources allocated for any planned actions" for items that were added to the high priority list by § 842.

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

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

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

> We find that the ongoing abuses against Uyghurs and members of other ethnic and religious minority groups constitute genocide … and crimes against humanity … and attribute these atrocity crimes … to the People's Republic of China, under the direction and control of the Chinese Communist Party. We condemn this genocide and these crimes against humanity in the strongest terms and call upon the President to direct the U.S. Permanent Representative to the United Nations to [take appropriate action] … [including] all possible actions to bring this genocide and these crimes against humanity to an end and hold the perpetrators of these atrocities accountable under international law.

Section 851, Modifications to Printed Circuit Board Acquisition Restrictions—Section 851 amends 10 U.S.C. § 2533d, which prohibits DOD from acquiring certain printed circuit boards from China, Russia, Iran, or North Korea. § 851 delays the prohibition's

implementation from Jan. 1, 2023 to Jan. 1, 2027. § 851 also changes the definition of a covered printed circuit board from a partially manufactured or complete bare printed circuit board or fully or partially assembled printed circuit board designated by the Defense Secretary based on a determination that the designation is required to support national security to a "specified type" of partially manufactured or complete bare printed circuit board or fully or partially assembled printed circuit board that is a component of "(i) a defense security system; or (ii) a system, other than a defense security system, that transmits or stores information and which the Secretary identifies as national security sensitive in the contract under which such printed circuit board is acquired."

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

The Secretary may exempt commercial products and services and commercially available off-the-shelf items from the requirements of 10 U.S.C. § 2533d through regulations. Section 851 further provides that, in carrying out § 2533d, the Secretary must, to "the maximum extent practicable, avoid imposing contractual certification requirements with respect to the acquisition of commercial products, commercial services, or commercially available off-the-shelf items."

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

Section 853, Additional Testing of Commercial E-commerce Portal Models—Section 846 of the FY 2018 NDAA directed the GSA Administrator to "establish a program to procure commercial products through commercial e-commerce portals for purposes of enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products." *See also* FY 2020 NDAA § 827 (amending FY 2018 NDAA § 846(c)).

Under § 853, FY 2018 NDAA § 846(c) is amended by adding certain requirements to the Government's program to procure commercial products through E-commerce portals. First, not later than June 25, 2022, the GSA Administrator "shall": (A) "begin testing commercial e-commerce portal models (other than any such model selected for the initial proof of concept)[;]" and (B) submit to the congressional defense (and other relevant) committees, "a report that

includes": "(i) a summary of the assessments conducted … with respect to [the previously identified] commercial e-commerce portal model; "(ii) a list of the types of commercial products that could be procured using models [previously] tested pursuant to [§ 846(c)(2)(A)]; "(iii) an estimate of the amount that could be spent by" an agency "under the program;" and "(iv) an update on the models [previously] tested pursuant to [§ 846(c)(2)(A)] and a timeline for [testing] completion."

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

> (A) an assessment and comparison of commercial ecommerce portal models with respect to[:] (i) price and quality of the commercial products supplied … ; (ii) supplier reliability and service; (iii) safeguards for the security of Government information and third-party supplier proprietary information; (iv) protections against counterfeit commercial products; (v) supply chain risks, particularly with respect to complex commercial products; and (vi) overall adherence to Federal procurement rules and policies; and
>
> (B) an analysis of the costs and benefits of the convenience to the Federal Government of procuring commercial products from each such commercial e-commerce portal model.

Section 854, Requirement for Industry Days & Requests for Information to be Open to Allied Defense Contractors—Under this section, by March 27, 2022, "each service acquisition executive shall implement a requirement that industry days and requests for information regarding [DOD] acquisition programs and research and development efforts," "to the maximum extent practicable," "shall be open to defense contractors of the national technology and industrial base [(NTIB)]." As the JES notes, the NTIB is comprised of the U.S., the U.K., Canada, and Australia. *See* 10 U.S.C. § 2500(1); *see also* FY 2021 NDAA §§ 846, 848, 849 (discussing NTIB).

This openness to non-U.S. NTIB "defense contractors" is subject to "reciprocal access for United States companies to equivalent information related to contracting opportunities in the associated country that is part of the [NTIB]." This section also applies "when such [NTIB] contractors are acting as subcontractors in partnership with a United States contractor[.]"

On this subject, the JES states (emphasis added) that:

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

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

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

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

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

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

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

Section 873, Independent Study on Environmental/Resource Efficient Acquisition Practices & Policies—Under this section, no later than March 27, 2022, DOD "shall enter into an agreement with a [FFRDC] under which such [FFRDC] shall conduct a study on [certain] acquisition practices and policies[.]" The study "shall identify the knowledge and tools needed for the [DOD] acquisition workforce" to: (1) "engage in acquisition planning practices that assess the cost, resource, and energy preservation differences resulting from selecting environmentally preferable goods or services … ;" (2) "engage in acquisition planning practices that promote the acquisition of resilient and resource-efficient goods and services and that support innovation in environmental technologies;" (3) "employ source selection practices that promote the acquisition of resilient and resource-efficient goods and services and that support innovation in environmental technologies;" and (4) "consider external effects, including economic, environmental, and social, arising over the entire life cycle of an acquisition when making acquisition planning and source selection decisions." Not later than Dec. 27, 2022, the FFRDC "shall submit" to the secretary of defense "a report on the results of the study," which the secretary then must submit "an unaltered copy" of to the congressional defense committees within 30 days "along with any comments" the secretary may have concerning the report.

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

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

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

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

* * *

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

* * *

The following is a review of certain non-Title VIII FY 2022 NDAA provisions important to procurement law:

Section 146, Review & Briefing on Fielded Major Weapon Systems—This section requires DOD, by March 1, 2023, to conduct a review and brief the congressional defense committees on how DOD manages risk to ensure fielded major weapon systems funded in the most recent future-years defense program meet current and emerging threats, and how it identifies

systems for modernization or replacement. The JES directs DOD to provide information on fielded major weapon systems replaced or divested since Jan. 1, 2010, expected to be divested by Dec. 31, 2025, and planned for upgrade and replacement over the same (2010-2035) period. The JES also directs GAO to assess and report on DOD's briefing to Congress.

Section 232, Pilot Program on Data Repositories to Facilitate DOD's Development of Artificial Intelligence ("AI") Capabilities—This section authorizes DOD (through the Joint Artificial Intelligence Center (JAIC) and its Chief Data Officer) to conduct a pilot program establishing data libraries containing DOD data sets related to developing AI software and technology and to allow public and private sector organizations to access the libraries to help develop AI models and software for DOD. The section further requires DOD to brief the congressional defense committees by Sept. 2022 on the status of this pilot program.

Section 334, DOD's Climate Resilience in Planning, Engagement Strategies, Infrastructure, & Force Development—This section requires DOD to incorporate current and emerging climate and environmental concerns in acquisition, budgeting, sustainment, force development, and other functions. It also requires DOD to assess the impact of climate and extreme weather on missions, and to submit a report to the House and Senate Armed Services Committees not later than Dec. 27, 2022 (and every 5 years thereafter) on the strategic and operational impacts of "extreme weather".

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

FY2022 NDAA Requires DOD to Closely Review its Legacy & Duplicative IT Systems:

- *Section 1003, Plan for Consolidation of Information Technology Systems Used in DOD Planning, Programming, Budgeting, & Execution (PPBE) Process,* requires DOD to submit to the congressional defense committees a plan to consolidate the IT systems used to manage the PPBE process.
- *Section 1522, Legacy Information Technologies & Systems Accountability*, requires the military departments to: (i) initiate identification of legacy applications, software, and IT and eliminate those that are no longer needed, and (ii) submit a report to the congressional defense committees detailing the identified technology that is no longer required and the plan for discontinuing the use and funding of the obsolete technology.
- *The Joint Explanatory Statement, Report on Duplicative Information Technology Contracts,* at 209, directs DOD (no later than May 31, 2022) to submit a report to the congressional defense committees on efforts to reduce duplicative IT contracts.

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

Title XV—Cyberspace-Related Matters—The FY2022 NDAA includes 39 sections in Title XV. A number of these sections are related to defense acquisition and the Defense Industrial Base. Significantly, provisions in the House FY 2022 NDAA Bill that would have required notification of cyber breaches were not included in the final NDAA.

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

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

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

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

Section 1533, Report on the Cybersecurity Maturity Model Certification (CMMC) Program—Section 1533 requires DOD to submit a report to the House and Senate Armed Services Committees on CMMC, to include the rulemaking strategy, required budget, and responsibilities of prime contractors for managing subcontractor cybersecurity. Notably, the report

"shall include" plans for: (i) reimbursing small and non-traditional businesses for CMMC cybersecurity compliance expenses, and (ii) ensuring that those seeking a DOD contract "for the first time are not required to expend funds to acquire cybersecurity capabilities and a [CMMC] certification required to perform under a contract as a precondition for bidding" "without reimbursement in the event that" no contract is received.

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

Section 1607, Programs of Record of Space Force & Commercial Capabilities—This section requires that prior to establishing a program of record, the service acquisition executive ("SAE") for space systems shall determine whether existing or planned commercially available capabilities could meet all or part of the program requirements. If it is determined that commercial capabilities can fulfill at least some of the requirements, the SAE must submit a notification of the results of determination to the congressional defense committees. The section clarifies that DOD "may not rely solely on the use of commercial satellite services and associated systems to carry out operational requirements" necessary to conduct strategic and tactical operations unless DOD mitigates the vulnerability of relying solely on commercial capabilities. The section further requires the Air Force to have a FFRDC, which "is not closely affiliated with the Air Force or the Space Force," assess the extent of DOD's reliance on commercial satellite systems.

Section 1684, Determination on Certain Activities with Unusually Hazardous Risks—This section requires DOD to report to Congress on contractor requests for indemnification for contracts with "unusually hazardous risks" that are received for FY 2022 and 2023. "Unusually hazardous risk" is defined as "risk of burning, explosion, detonation, flight or surface impact, or toxic or hazardous material release associated with" specified products or programs, including hypersonics, rocket propulsion, high-energy propellants, and certain classified programs. According to the JES, "this provision seeks to ensure that [DOD] gives full consideration to appropriate requests for indemnification of programs with unusually hazardous risks[.]"

President Biden's Executive Orders Affecting Federal Contractors

President Biden issued 77 Executive Orders in 2021. A number of these are directed in whole or material part at Federal contractors and the procurement process, including:

1. E.O. 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" - this E.O. revoked President Trump's September 22, 2020 Executive Order 13950, Combating Race and Sex Stereotyping, which prohibited Federal contractors, federal agencies, those receiving federal funds and members of the United States Uniformed Services from providing diversity training.

2. E.O. 14005, "Ensuring the Future is Made in All of America by All of America's Workers" -- this E.O. lays out Biden Administration policies and priorities for domestic production of goods, including those subject to the Buy American Act and certain aspects of the Buy America Acts.

3. E.O. 14026, "Increasing the Minimum Wage for Federal Contractors" -- this E.O. requires Federal contractors to pay their workers an hourly wage of at least $15.00 and was recently adopted in regulations promulgated by the U.S. Department of Labor.

4. E.O. 14028, "Improving the Nation's Cybersecurity" - Provided additional guidance and direction on cybersecurity and includes several provisions aimed at Federal contractors and the Federal procurement process.

5. E.O. 14030, "Climate-Related Financial Risk" -- this E.O. requires major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets, and requires the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions. (Covered in another portion of this program).

6. E.O. 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors" - the so-called Federal contractor vaccine mandate; currently subject to extensive litigation.

7. E.O. 14055, "Nondisplacement of Qualified Workers Under Service Contracts" - this E.O. revokes President Trump's previous E.O which itself had previously revoked the Nondisplacement of Qualified Workers FAR clause and now requires the clause to be included.

Each of these E.O.s is discussed in more detail in the chart below and highlighted in **bold**. The chart also includes a brief synopsis of other E.O.'s which may have implications for Federal government contractors.

E.O.	Date	Title	Brief Synopsis
13985	**01/20/21**	**Advancing Racial Equity and Support for Underserved Communities Through the Federal Government**	**Revokes President Trump's September 22, 2020 Executive Order 13950, Combating Race and Sex Stereotyping, which prohibited federal contractors, federal agencies, those receiving federal funds and members of the United States Uniformed Services from providing diversity training.**

E.O.	Date	Title	Brief Synopsis
			Federal contractors, subcontractors, and grant recipients no longer must comply with the requirements of Executive Order 13950, including the contract clause previously applicable to Federal contractors and subcontractors. ***Promoting Equitable Delivery of Government Benefits*. The order directs all agency heads, within one year of the order, to create a plan for addressing any barriers to equal participation in federal programs or barriers to federal contracting opportunities.**
13991	01/20/21	Protecting the Federal Workforce and Requiring Mask-Wearing	On-duty or on-site Federal employees, on-site Federal contractors, and other individuals in Federal buildings and on Federal lands should all wear masks, maintain physical distance, and adhere to other public health measures, as provided in CDC guidelines. This E.O. served as a precursor to E.O. 14042, discussed below.
14005	**01/25/21**	**Ensuring the Future is Made in All of America by All of America's Workers**	**It is the policy of my Administration that the United States Government should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States. The United States Government should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America's workers thrive.** **On July 30, 2021, the Federal Acquisition Regulatory (FAR) Council published a proposed rule revising the regulations implementing the Buy American Act (BAA).**

E.O.	Date	Title	Brief Synopsis
			On August 30, 2021, DoD published a proposed rule to amend the DFARS to implement the E.O.
14017	02/24/21	America's Supply Chains	On September 8, 2021, DoD published a Notice of Request for Comments on Barriers Facing Small Businesses in Contracting With the Department of Defense related to Executive Orders ("E.O.") 14017, "America's Supply Chains"; E.O. 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"; and E.O. 14036, "Promoting Competition in the American Economy."
14026	**04/27/21**	**Increasing the Minimum Wage for Federal Contractors**	**Raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs. Accordingly, ensuring that Federal contractors pay their workers an hourly wage of at least $15.00 will bolster economy and efficiency in Federal procurement.** **On November 24, 2021, the Department of Labor published a final rule, effective January 30, 2022, establishing standards and procedures for implementing and enforcing the minimum wage protections of the Executive order.**
14028	**05/12/21**	**Improving the Nation's Cybersecurity**	**18-pages** **White House Fact Sheet** **Section 2 of EO 14028 mandates a review and update of the Federal Acquisition Regulations (FAR) and Defense Federal Acquisitions Regulation Supplement (DFARS) to ensure government service providers (1) collect and preserve relevant information to prevent, detect, respond to, and investigate such events, (2) share this information with appropriate federal agencies, (3) share this information using industry-recognized formats (i.e., APIs or other approved mechanisms), and (4)**

E.O.	Date	Title	Brief Synopsis
			provide support and collaborate with the appropriate federal cybersecurity agencies.
14030	05/20/21	Climate-Related Financial Risk (Addressed Separately in this Program)	The Federal Acquisition Regulatory Council, in consultation with the Chair of the Council on Environmental Quality and the heads of other agencies as appropriate, shall consider amending the Federal Acquisition Regulation (FAR) to: (i) require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets; and (ii) ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions. On October 15, 2021, the FAR Council published an advance notice of proposed rulemaking which indicates the FAR is considering amending the Federal Acquisition Regulation (FAR) to ensure that major Federal agency procurements minimize the risk of climate change. DoD, GSA, and NASA are seeking public input on a potential FAR amendment to ensure that major Federal agency procurements minimize the risk of climate change.
14031	05/28/21	Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders	Section 3, establishes a White House Initiative on Asian Americans (AA), Native Hawaiians, and Pacific Islanders (NHPI), a Federal interagency working group to advance efforts to: (xi) *improve the equitable allocation of Federal resources, including through Federal funds, contracts, grants, and awards, to AA and NHPI communities and AA and NHPI-serving organizations*

E.O.	Date	Title	Brief Synopsis
14034	06/09/21	Protecting American's Sensitive Data from Foreign Adversaries	The increased use in the United States of certain connected software applications designed, developed, manufactured, or supplied by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary, which the Secretary of Commerce acting pursuant to E.O. 13873 has defined to include the People's Republic of China, among others, continues to threaten the national security, foreign policy, and economy of the United States. The Secretary of Commerce shall evaluate on a continuing basis transactions involving connected software applications that may pose an undue risk of sabotage or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology or services in the United States; pose an undue risk of catastrophic effects on the security or resiliency of the critical infrastructure or digital economy of the United States; or otherwise pose an unacceptable risk to the national security of the United States or the security and safety of United States persons. On November 26, 2021, the Department of Commerce published a proposed rule for Securing the Information and Communications Technology and Services Supply Chain; Connected Software Applications.
14036	07/09/21	Promoting Competition in the American Economy	This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity. It is also the policy of my Administration to enforce the antitrust laws to meet the challenges

E.O.	Date	Title	Brief Synopsis
			posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects. The Secretary of Defense is charged under EO 14036 with improving competition in the defense industrial base in government procurements White House Fact Sheet Related Action: On September 8, 2021, DoD published a Notice of Request for Comments on Barriers Facing Small Businesses in Contracting With the Department of Defense related to Executive Orders ("E.O.") 14017, "America's Supply Chains"; E.O. 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"; and E.O. 14036, "Promoting Competition in the American Economy."
14042	**09/09/21**	**Ensuring Adequate COVID Safety Protocols for Federal Contractors**	(See Attached Memorandum)
14055	**11/18/21**	**Nondisplacement of Qualified Workers Under Service Contracts**	**Each agency shall, to the extent permitted by law, ensure that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts and include the Nondisplacement of Qualified Workers clause.** **Executive Order 13897 of October 31, 2019 (Improving Federal Contractor Operations by Revoking Executive Order 13495), is revoked** **White House Fact Sheet**

FEDERAL REGULATORY AND CLIMATE INITIATIVES IMPACTING GOVERNMENT CONTRACTORS

By Fred Wagner, Venable LLP, frwagner@venable.com

The inauguration of Joseph Biden on January 20, 2021 triggered a dramatic reversal of U.S. policy from the previous four years related to climate issues and managing greenhouse gas (GHG) emissions from all sectors of the economy. While many of the most impactful regulatory actions are still going through the administrative process, and Congress has deadlocked over major climate provisions in the proposed Build Back Better legislation, the Biden administration has advanced many Executive Orders that will have a profound impact on federal procurement activities and the obligations of all entities doing business with the federal government.

This presentation summarizes those key Executive Orders (EO) and identifies the main issues that federal contractors will need to address moving forward at least during the remainder of this presidential term.

PRIMARY EXECUTIVE ORDERS WITH DIRECT IMPLICATIONS FOR GOV'T CONTRACTORS

- *Tackling the Climate Crisis at Home and Abroad*, EO 14008; January 27, 2021

This far-reaching EO places climate policy at the center of all government domestic and foreign policies. Combining traditional environmental protection and enforcement policies with a greater emphasis on environmental justice than ever before, the President announced a goal of achieving "net-zero" GHG emissions, economy-wide, by no later than 2050. The scope of this EO is best captured by this aspirational statement: "Together, we must combat the climate crisis with bold, progressive action that combines the full capacity of the Federal Government with efforts from every corner of our Nation, every level of government, and every sector of our economy."

As with many other domestic policy initiatives, the EO calls upon the wide-ranging power of federal government activities to lead by example. This is perhaps no better demonstrated than through the section of this EO labeled: "Use of the Federal Government's Buying Power and Real Property and Asset Management." The provisions articulated in this section of the EO aim to "catalyze private sector investment into, and accelerate the advancement of America's industrial capacity to supply domestic clean energy, buildings, vehicles, and other necessary product and materials."

The EO's goals are ambitious. With respect to the generation of electricity and vehicle procurement, Section 205 aims to "achieve or facilitate" a carbon pollution-free electricity sector no later than 2035 and a clean and zero-emission federal fleet.

The impact of these policies on federal contractors is profound. Section 206 summarizes goals for all procurement standards, many of which will require subsequent regulatory action. Specifically, this section states that all federal agencies must adhere to the full suite of "Made in America" laws "in making clean energy, energy efficiency, and clean energy procurement decisions." These policies also reflect a strong enforcement of prevailing wage and benefit requirements, as well as regulatory amendments to be advanced by the White House Council on Environmental Quality (CEQ) "to promote increased contractor attention on reduced carbon emission and Federal sustainability." And lest there by any misunderstanding of the administration's commitment to its vision of net-zero carbon emissions,

Section 209 states that all agencies, under the supervision of the new National Climate Advisor, "…take steps to ensure that, to the extent consistent with applicable law, Federal funding is not directly subsidizing fossil fuels." Moreover, fossil fuel subsidies shall be eliminated from the fiscal year 2022 budget request and thereafter.

This EO released during the first week of the administration set the stage for numerous subsequent EOs and regulatory efforts impacting federal procurement.

- *Climate-Related Financial Risk*, EO 14030; May 20, 2021

In yet another far-reaching EO, the Biden administration announced policies to "advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk" and other financial policies to reach the net-zero emission economy by 2050. While many of the EO's objectives implicate the Department of the Treasury's analysis and assessment of financial risks associated with climate change, federal procurement is also directly impacted.

Section 5 of the EO requires the Federal Acquisition Regulatory Council, in coordination with the White House CEQ, to consider amending the Federal Acquisition Regulations (FAR) in two major ways: (1) requiring "major Federal suppliers to publicly disclose GHG and climate-related financial risk and to set science-based reduction targets, and (2) to "ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of GHG emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of GHG emissions."

With these clear goals in mind, the EO ordered all agencies sustainability heads to submit to the OMB Director and the Federal Chief Sustainability Office (part of the White House CEQ) "actions to integrate climate-related financial risk into their respective agency's procurement process…" Finally, OMB and the Federal Chief Sustainability office must provide to all federal agencies guidance on existing voluntary standards for use in agency sustainability plans.

EO 14030 was followed up, in part by the Department of Defense/General Services Administration/NASA Advanced Notice of Proposed Rulemaking (ANPRM), titled *"Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions,"* 86 *Fed. Reg.* 57404, October 15, 2021. This ANPRM gave notice of potential amendments to the FAR and requested input (by a December 14, 2021 deadline) on eight major topics impacting procurement regulation. These topics address fundamental contractor preference issues, reporting requirements, and tools used across the economy to measure GHG emissions and emissions reduction policies. Comments were requested on the following issues:

1. How can GHG emissions best be qualitatively and quantitatively considered in Federal procurement decisions, and how might that vary across different economic sectors?
2. What are the most usable and respected GHG emissions methodologies over the lifecycle of products procured or leased or of services performed?
3. How can the Federal Government mitigation climate-related financial risk and how might it mitigate for such risk in its procurement decisions?
4. How do companies currently provide GHG emission data for contract proposals?
5. How can GHG emissions reporting methods be best standardized?
6. How can the Federal Government give preference to bids or proposals to achieve reductions in GHG emissions?

7. How might the Federal Government consider contractor commitments to reduce or mitigate GHG emissions?
8. How would the consideration of all these factors impact small and disadvantaged businesses?

- *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*, EO 14057, December 8, 2021

Just before the holidays, the administration released an EO that attempted to put finer points on its climate goals and policies. These goals are laid out in the context of what is termed "a coordinated whole-of-government approach…" to "use the scale and procurement power" of the Federal Government to achieve the following:

- 100 percent carbon-pollution free electricity by 2030
- 100 percent zero-emission vehicle acquisition by 2035 (including 100 percent light-duty vehicle acquisition by 2027 – just 5 years from now)
- Net-zero emissions building portfolios by 2045 (with a 50 percent reduction target by 2032)
- Net-zero emissions from Federal procurement, including a "Buy Clean" policy to promote construction materials with lower embodied emissions

Section 208 of this EO establishes a far-reaching policy for "sustainable acquisition and procurement" that would impact every sector of the economy. It states that "Agencies shall reduce emissions, promote environmental stewardship, support resilient supply chains, drive innovation, and incentivize markets for sustainable products and services by prioritizing products that can be reused, refurbished, or recycled; maximizing environmental benefits and cost savings through use of full lifecycle cost methodologies; purchasing products that contain recycled content, are biobased, or are energy and water efficient… and, to the maximum extent practicable, purchasing sustainable products and services identified or recommended by the U.S. EPA." All that also applies to the Federal food supply chain. That's just in one section of the EO!

Section 303 of the EO elaborates on the "Buy Clean" policy to expand consideration of emissions and pollutants of construction materials in both Federal procurement AND federally funded projects. Reporting requirements are paramount here, addressing existing data and environmental product declarations. In addition a new Buy Clean Task Force will recommend ways to "increase transparency of embodied emissions, including supplier reporting; procedures for auditing environmental product declarations and verifying accuracy of reported emissions data; and recommendation for grants, loans, technical assistance, or alternative mechanisms to support domestic manufacturers in enhancing capabilities to report and reduce embodied emissions in priority materials they produce."

Importantly, "embodied emissions" are defined in Section 603 as "the quantity of emissions, accounting for all stages of production including upstream processing and extraction of fuels and feedstocks, emitted to the atmosphere due to the production of a product per unit of such product. (Emphasis added.) An accompanying White House Fact Sheet further describes this concept in the context of GSA contractors, requiring them to disclose "the embodied carbon of building materials for new buildings and major modernization contracts." It further clarifies that "embodied carbon" means GHG emissions "resulting from the mining, harvesting, processing, manufacturing, transportation, and installation of materials." (Emphasis added.)

No doubt, this most recent EO will be subject of further guidance from all federal agencies, as the scope of data collection and reporting (and an effort to determine its accuracy) is truly remarkable.

OTHER EOs THAT ADDRESS CLIMATE INITIATIVES AND POLICIES

- *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, EO 13990, January 20, 2021; (key issues referenced in subsequent ANPRM is consideration of the "social cost of carbon" or estimated monetized damages associated with incremental increases in greenhouse gas emissions)
- *Strengthening American Leadership in Clean Cars and Trucks*, EO 14037; August 5, 2021
- *Implementation of the Infrastructure Investment and Jobs Act*, EO 14052; November 15, 2021

KEY ISSUES FOR CONTRACTORS RELATED TO EO CLIMATE POLICIES/SUBSEQUENT ACTIONS

The range of operational and practical issues facing Federal contractors in light of all these action is daunting. Among other concerns, contractors must consider:

- Tracking and disclosing GHG emissions throughout supply chain and manufacturing processes and being prepared to defend audits of those disclosures!
- Availability and implementation of contractor sustainability plans; if you don't have one already, you will need to create one.
- Addressing the different emphasis in procurement procedures than existing SEC disclosure requirements; the SEC focuses more on risks to the company, whereas the EOs and related policies focus on risks to the world
- Agency priorities will vary across the federal government – buildings, construction materials, acquisition of vehicles, etc.
- The administration's emphasis on climate policies will likely lead to scoring preferences
- How will all these issues be quantified? The EOs mention both qualitative and quantitative measures. Contractors should be prepared to defend both methodologies.
- How will goal of achieving net zero emissions be implemented in reality? We have already seen news of a major exemption for DOD activities, and of course, military actions account for the vast majority of Federal expenditures!
- Lack of federal resources (staffing, especially) to address even a fraction of the goals/objectives stated in the various EOs. For instance, the CEQ is a very small White House office, and they have been given tremendous responsibilities.

FUTURE LEGISLATIVE/REGULATORY ACTION

2022 may yet bring action on the Build Back Better legislation, which includes many more climate-related provisions in its current form. If passed, even in a scaled-down version, would likely include authorization for large federal expenditures to promote the administration's climate policies, as well as potentially even more regulatory requirements to advance procurement reforms related to GHG

emissions reductions and climate resiliency. In addition, the Infrastructure and Jobs Act will require a large number of regulatory actions from the variety of agencies that will be managing the huge investment in physical infrastructure, much of which implicates the administration's climate policies (especially the electrification of the transportation sector and improvements to the electric grid to promote renewable energy).

In sum, the Biden administration laid the groundwork in 2021 for its climate policies; 2022 will be all about implementing these very aggressive goals. Federal contractors will play an oversized role in how these goals are implemented and whether they can be realized.

PubKLaw Annual Review 2022

2021 Regulatory Update

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Federal Contractor Vaccination Class Deviations

- In September and October 2021, numerous defense and civilian agencies issued Class Deviations to implement Executive Order (EO) 14042, the so-called mandate for COVID-19 vaccination for federal contractors.
- The Class Deviations generally required the affected contractor to comply with the guidance of the Safer Federal Workforce Task Force and to flow the clause down to covered subcontractors. It is the Task Force Guidance, not the EO, that requires vaccination unless a legitimate accommodation applies. The FAR Council Class Deviation is an example. The FAR Council and other similar agency-issued Class Deviations are available at https://www.acquisition.gov/content/caac-letters (other agency deviations are in a drop down menu).
- The legal enforceability of the EO and the Class Deviation clauses are the subject to a host of legal challenges, including a nationwide injunction as of early December 2021. The legal landscape is fluid given the various challenges to the EO, and many agencies (and the Office of Management and Budget) have issued updated instructions in light of the injunction to halt implementation (as of early December 2021).

FAR Council Final and Proposed Rules

Buy American

- **Buy American, Final Rule, 86 Fed. Reg. 6180 (Jan. 19, 2021).**
  - The FAR Council issued a final rule to implement EO 13881, issued by the prior Administration. The rule was allowed to go into effect, presumably because President Biden also issued an EO that increased domestic preference requirements.
  - The final rule increases the percentage of domestic content that an end product (other than iron or steel) must contain to qualify as a "domestic end product." Consistent with the EO, the new rule increases the domestic content requirement from 50% to 55% (other than iron/steel), meaning that an end product must consist of more than 55% of U.S.-origin components (by cost) to be considered domestic for purposes of the Buy American Act. A higher percentage applies to iron or steel products.
  - The final rule also increases the price evaluation preference for offerors of domestic end products to 20% for large businesses and 30% for small businesses. DOD has separate preference rules that were not affected, discussed below.
- **Buy American, Proposed Rule, 86 Fed. Reg. 40980 (July 30, 2021).**
  - The FAR Council issued a proposed rule to modify the FAR to implement the Biden Administration's Buy American EO, EO 14005.
  - The proposed rule initially increases the domestic preference threshold for non-iron and steel products from 55% to 60%. After two years, the threshold would increase to 65%,

and again increase five years later to 75%. The proposed rule requires contractors to comply with the threshold that is in existence when the product is delivered.
    - The proposed rule increases the price preference for "critical items" and "critical components," which are not defined in the proposed rule but refer to definitions in EO 14017, the Biden Administration EO on America's Supply Chain, and imposes a reporting requirement for contractors that supply critical items or products containing critical components.

Small Business

- **Revision of Limitations on Subcontracting, Final Rule, 86 Fed. Reg. 44233 (Aug. 11, 2021)**.
    - The FAR Council issued a final rule to align the FAR with SBA rules issued in 2016. The rule harmonizes the FAR with the SBA regulations regarding the calculation of the limitations on subcontracting, also known as the "50% Rule."
    - Like the 2016 SBA rule, the FAR final rule changes the methodology for calculating whether a small business prime contractor performed the required amount of the work on a set-aside contract. Instead of basing the calculation on the cost of contract performance, revised FAR 52.219-14 focuses on the amount paid by the Government to the prime contractor and the amount the prime contractor pays to subcontractors.
    - The FAR Council acknowledged the delay between issuance of SBA rules and corresponding changes in the FAR and announced that going forward, it would not wait for final SBA rules before starting the FAR process to promulgate implementing rules and clauses.
- **Accelerated Payments Applicable to Contracts with Certain Small Businesses**, **Proposed Rule, 86 Fed. Reg. 53923 (Sept. 29, 2021)**
    - The FAR Council issued a proposed rule to amend the FAR to implement Section 873 of the FY2020 NDAA that provides for accelerated payments to small business contractors and subcontractors. Section 873 provided for accelerated payments to small business prime contractors to the fullest extent permissible by law, with a goal of payment within 15 days of a proper invoice. Section 873 also included provisions for accelerated payments to prime contractors that subcontract with small businesses, so long as a specific payment date is not established by contract and the prime contractor agreed to make accelerated payments to the subcontractor without further consideration or fees. This provision also expressed a goal of payment to the prime within 15 days.
    - The proposed rule further signaled that the FAR Council is interested in and considering additional ways to improve cashflow and access to the federal marketplace for small businesses.
- **Update to HUBZone Program Rules, Proposed Rule, 86 Fed. Reg. 31468 (June 14, 2021).**
    - The FAR Council issued a proposed rule to align the FAR with 2019 SBA rules that updated various HUBZone requirements. The proposed changes would update definitions and terminology, revise the process for HUBZone status protests, remove obsolete text, and remove text in the FAR that would be inconsistent with SBA's rule changes.

- **Certification of Women-Owned Small Businesses, Proposed Rule, 86 Fed. Reg. 55769 (Oct. 7, 2021)**
    - The FAR Council issued a proposed rule to align the FAR with a 2020 SBA rule that requires women-owned small businesses to be certified by SBA, another federal agency, a state government, or an approved third-party certifier to be eligible for sole source or set-aside awards. Prior to the SBA rule changes, such businesses could "self-certify."

Miscellaneous

- **Low Price Technically Acceptable Source Selections, Final Rule, 86 Fed. Reg. 3679 (Jan. 14, 2021)**
    - The FAR Council issued a final rule to implement Section 880 of the FY2019 NDAA. The final rule amends the FAR to provide criteria that must be met to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation. FAR 15.101-2(c) identifies the criteria for use of LPTA, and subsection (d) states that contracting officers are to avoid using LPTA in procurements predominantly for the acquisition of certain services and equipment, including information technology services; cybersecurity services, personal protective equipment; or knowledge-based training or logistics services in contingency operations or other operations outside the United States**.**
- **Application of Micro-Purchase Threshold to Task and Delivery Orders, Final Rule, 86 Fed. Reg. 31073 (June 10, 2021)**
    - The FAR Council issued a final rule to implement Section 826 of the FY2020 NDAA, which increased the threshold for requiring fair opportunity to compete on orders under multiple-award contracts from $2,500 to the "micro-purchase threshold," which is currently $10,000. The FAR Council anticipated that this rule change, combined with increased use of Governmentwide commercial purchase cards, will reduce the burden on Government and streamline procurements for FAR Part 16 orders under the micro-purchase threshold.
- **Section 508-Based Standards in Information and Communication Technology, Final Rule, 86 Fed. Reg. 44229 (Aug. 11, 2021)**
    - The FAR Council issued a final rule to implement final rules issued by the U.S. Access Board, also known as the Architectural and Transportation Barriers Compliance Board, in January 2017, arising from the Board's "refresh" of Section 508 Accessibility Standards. The final FAR rule is intended to strengthen FAR requirements for accessibility to electronic and information technology (now generally referred to as ''information and communication technology'' or ''ICT'') provided by the Government and ensure that the updated standards are considered in federal ICT acquisitions. The final rule includes a "safe harbor" for "legacy" ICT in place and not altered prior to January 18, 2018, the date for compliance identified in the Board's final rules.
- **Revised Definition of Commercial Item, Final Rule, 86 Fed. Reg. 61017 (Nov. 4, 2021)**
    - The FAR Council issued a final rule to implement Section 836 of the FY2019 NDAA. That provision separates the definition of "commercial item" at 41 U.S.C. § 103 into separate definitions for "commercial products" and "commercial services," at 41 U.S.C. §§ 103 and 103a.

- The change was recommended by the Section 809 panel, which studied acquisition reform and streamlining in 2018 to 2019 and issued three reports with hundreds of recommendations. The FAR Council noted that the revised definitions are intended to provide clarity and are not intended to expand or increase the universe of products or services that can be procured under FAR Part 12.

- **OCI Rulemaking Formally Withdrawn, Withdrawal, 86 Fed. Reg. 14863 (Mar. 19, 2021)**
  - The FAR Council formally withdrew a rulemaking to update the FAR's organizational conflict of interest (OCI) provisions. The proposed rule had been published in April 2011 at 76 Fed. Reg. 23236. The FAR Council withdrew the proposed rule based upon the amount of time that had elapsed.

Department of Defense Final and Proposed Rules

National Security

- **Covered Defense Telecommunications Equipment or Services, Final Rule, 86 Fed. Reg. 3832 (Jan. 15, 2021)**
  - The Department of Defense (DOD) issued a final rule, finalizing a prior interim rule (84 Fed. Reg. 72231 (Dec. 31, 2019) that prohibits the use of telecommunications equipment or services from certain Chinese entities and from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by, or otherwise connected to, the government of the People's Republic of China or the Russian Federation, as a substantial or essential component of any system, or as a critical technology as a part of any equipment, system, or service used to carry out DOD's nuclear deterrence or homeland defense missions.
  - The interim and final rule are in response to Section 1656 of the FY2018 NDAA, which differs from Section 889(a)(1)(A) of the FY2019 NDAA, by targeting systems that carry out DOD's nuclear deterrence and homeland security missions, using different definitional terms, excluding exceptions, and vesting the Secretary of Defense with waiver authority. DOD asserted in the preamble to its interim rule that the rule is structured to align with the FAR Council's implementation of rules regarding Section 889(a)(1)(A).
  - The final rule makes two changes to the interim rule in response to public comment by amending DFARS clause 252.204-7018 to (1) extend the reporting time for discovery of covered defense telecommunications equipment or services from one to three days; and (2) extend the reporting time to submit information on mitigation actions from 10 to 30 days.
- **Improved Energy Security for Main Operating Bases in Europe, Final Rule, 86 Fed. Reg. 48336 (Aug. 30, 2021)**
  - The DOD issued a final rule amending the DFARS to implement Section 2821 of the FY2020 NDAA, which prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe. The prohibition applies to all forms of energy "furnished to a covered military installation" as that term is defined in the statute. DOD had issued a proposed rule in January 15, 2021, 86 Fed. Reg. 3935; no public comments were received and so the final rule reflects the proposed rule.

Buy American

- **Maximizing Use of American Made Goods, Proposed Rule, 86 Fed. Reg. 48370 (Aug. 30, 2021)**
    - The DOD issued a proposed rule to implement the prior Administration "Buy American" EO, EO 13881, which as noted above, had been implemented by the FAR Council in a final rule issued in January 2021. As noted above, EO 13881 is superseded where it is inconsistent with the Biden Administration's "Buy American" EO, EO 14005. The proposed rule proposes DFARS amendments related to definitions of domestic end products and domestic construction material to reflect the heightened content requirements, but does not propose changes related to the price preference for domestic products as DOD uses a 50% factor that is higher than the EO percentage factor.

Cost and Pricing

- **Requiring Data Other than Certified Cost or Pricing Data, Proposed Rule, 86 Fed. Reg. 48368 (Aug. 10, 2021)**
    - The DOD issued a proposed rule to amend the DFARS to implement Section 803 the FY2020 NDAA. This provision prohibits contracting officers from determining that a contract or subcontract price is fair and reasonable based solely on historical prices the Government has paid. Further, Section 803 provides that when an offeror fails to make a good faith effort to submit pricing data, the contracting officer may find the offeror ineligible for award if the contracting officer is unable to determine by other means that the proposed prices are fair and reasonable (subject to an override by the head of the contracting activity (HCA) that an award to the contract is in the best interests of the Government).
    - The proposed rule proposes amending DFARS 215.403-3(a) and 215.404-1 to address the prohibition on reliance solely on historical data to determine reasonableness. The FAR includes provisions regarding the refusal to provide data to assist with determining reasonableness at FAR 15.403-3(a)(4). The proposed rule further proposes amending DFARS 242.1502 to instruct contracting officers to put a notation in the Contract Performance Assessment Report System (CPARS) past performance evaluation for contractors that have denied multiple requests for submission of data other than cost or pricing data over the last three years but nevertheless received an award (unless exempted by the HCA).
- **Treatment of Incurred IR&D Costs, Proposed Rule, 86 Fed. Reg. 53927 (Sept. 29, 2021)**
    - The DOD issued a proposed rule to amend the DFARS to implement Section 824 of the FY2017 NDAA regarding the treatment of independent research and development (IR&D) expenditures and to require DCAA to provide an annual report to Congress on IR&D and bid and proposal (B&P) expenditures. Section 824 requires DOD to adopt regulations that do not infringe on the independence of a contractor to choose which technology to pursue in its IR&D programs if the contractor CEO determines the IR&D expenditures will advance the needs of DOD technology and capability. Prior versions of the NDAA, and prior attempted DFARS amendments, had placed various attempted controls on allowable IR&D activities.

- The proposed rule also decouples the terms IR&D and B&P in various DFARS provisions consistent with statutory changes.

- **Requirement for Firms Used to Support DoD Audits, Proposed Rule, 86 Fed. Reg. 59947 (Oct. 29, 2021)**
  - The DOD issued a proposed rule to amend the DFARS to implement Section 1006 of the FY2019 NDAA, amended by Section 1011 of the FY2020 NDAA, that require accounting firms that provide financial statement auditing or audit remediation services in support of the Financial Improvement and Audit Remediation Plan to provide DOD a statement setting forth the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm.
  - The proposed rule would extend this disciplinary reporting requirement to firms other than accounting firms that perform audit remediation services, consistent with DOD policy.

Miscellaneous

- **Enhanced Post-award Debriefings, Proposed Rule, 86 Fed. Reg. 27354 (May 20, 2021)**
  - The DOD issued a proposed rule to amend the DFARS to implement enhanced debriefing rights in FY2018 NDAA § 818. Since enactment of the FY2018 NDAA, enhanced debriefing rights have been governed by a Class Deviation, Class Deviation No. 2018-O0011. The proposed rule is intended to replace the Class Deviation and provide certain rights, such as receipt of a redacted source selection decision document for procurements over $10 million for small businesses and $100 million for large businesses.
  - The proposed implementing clauses have some internal inconsistencies and conflicts, including with regard to Federal Circuit precedent, which I wrote about upon the issuance of the proposed rule (https://www.wiley.law/newsletter-Enhanced-Debriefings-A-Rocky-Road-From-the-Class-Deviation-to-DODs-Proposed-DFARS-Implementation)
- **Past Performance of Subcontractors and Joint Venture Partners, Proposed Rule, 86 Fed. Reg. 27358 (May 20, 2021)**
  - The DOD issued a proposed rule to amend the DFARS to implement Section 823 of the FY2019 NDAA which requires performance evaluations in accordance with specified conditions for individual partners of joint ventures for construction and architect-engineer (A&E) services contracts with an estimated value above $750,000; and for first-tier subcontractors performing a portion of a construction or A&E services contract exceeding the threshold set forth in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher.
- **Contract Closeout Authority for DoD Services Contracts, Proposed Rule, 86 Fed. Reg. 48366 (Aug. 30, 2021)**
  - The DOD issued a proposed rule to amend the DFARS to implement Section 820 of the FY2021 NDAA, which expands expedited contract closeout authority to certain contracts or groups of contracts that were awarded at least 7 or 10 fiscal years before the current

fiscal year and have completed performance or delivery at least four years prior to the current fiscal year.
    - The current DFARS permits expedited closeout for certain contracts entered into 17 years before the current fiscal year. The proposed rule reduces the age requirement from 17 years to 10 years for military construction and shipbuilding and seven years for all other contract actions. The rule provides that the contracts must be physically complete at least four years prior to the current fiscal year.
- **Contract Authority for Development and Demonstration of Prototypes, Proposed Rule, 86 Fed. Reg. 59951 (Oct. 29, 2021)**
    - The DOD issued a proposed rule to amend the DFARS to implement Section 831(a)(2) of the FY2021 NDAA, which revises the type of contract line items or options that may be included, without additional competition, in contracts initially awarded from the competitive selection of a proposal resulting from a broad agency announcement (BAA).
    - Section 831(a)(2) amends 10 U.S.C. § 2302e(a). As revised, Section 2302e(a) permits the inclusion of certain contract line items or options that would not otherwise be covered by the general solicitation authority of a BAA. The line items or options must be for certain services related to the technology developed under the BAA contract or the delivery of initial or additional items created as a result of the work performed under the BAA contract, and are subject to quantity, term, and dollar value limits in 10 U.S.C. § 2302e(b).
    - The preamble states that these procedures are intended to help streamline moving technology into production and enable faster fielding by allowing certain work to continue while a follow-on or production contract is awarded.

Small Business Administration Final and Proposed Rules

- **Extension of Participation in 8(a) Business Development Program, Interim Final Rule, 86 Fed. Reg. 2529 (Jan. 13, 2021)**
    - The Small Business Administration (SBA) issued an interim final rule to implement Section 330 of the 2021 Consolidated Appropriations Act and Section 869 of the FY2021 NDAA, both of which provide that any small business participating in the 8(a) BD program as of September 9, 2020 has the option to extend its participation for one year from the end of its program term.
    - These provisions are COVID-19 pandemic related. In implementing the directives, SBA interpreted that Congress extended the term of participation in the 8(a) BD program because it believed that the pandemic has adversely affected 8(a) concerns and their ability to participate in and receive the full benefits of the program. Thus, in determining which businesses would be eligible (as "before" September 9, 2020 was not defined), SBA determined it reasonable to conclude that any firms participating in the program as of March 13, 2020, the date a national disaster was declared due to the COVID-19 pandemic, should receive the program term extension.

- **Definition of Surviving Spouse for Service-Disabled Veteran-Owned Small Businesses and Change to 8(a) Business Development Contracting Thresholds, Direct Final Rule, 86 Fed. Reg. 61670 (Nov. 8, 2021)**
    - The SBA issued a direct final rule to confirm its regulations to statutory changes in the FY2020 NDAA. The direct final rule amends SBA's ownership requirement for small businesses owned and controlled by service-disabled veterans. It also adopts changes to the treatment of certain surviving spouses, pursuant to the FY2020 NDAA. The rule also incorporates changes to the dollar thresholds for certain contracting actions authorized for the 8(a) Business Development (BD) program made in the FY2020 NDAA, and it adjusts the competitive threshold dollar levels authorized for SBA's contracting programs to correspond to FAR changes made in response to inflation.
    - By way of background, the FY2020 NDAA created a 10-year time period to remain eligible in the case of a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability, and a three-year time period in the case of a surviving spouse of a veteran with a service-connected disability rated as less than 100 percent disabling who does not die as a result of a service-connected disability. SBA's rules, among other things, were updated to match these new time periods.
- **HUBZone Program Map Freeze Extension, Direct Final Rule, 86 Fed. Reg. 23863 (May 5, 2021)**
    - The SBA issued a direct final rule to extend the HUBZone map freeze mandated by the FY2018 NDAA from December 31, 2021, to June 30, 2023. The NDAA required that certain certified HUBZone small business concerns maintain their HUBZone status until the HUBZone map is updated following the results of the 2020 census. SBA issued a rule to implement the requirement and "freeze" the HUBZone map until December 31, 2021. SBA subsequently learned that data necessary to update the HUBZone map to reflect the 2020 census will not be available until December 2022. Accordingly, the direct final rule extends the HUBZone freeze'' through June 30, 2023, to allow SBA to process the data, update the HUBZone map, and provide adequate notice to the HUBZone small business community.
- **Small Business Size Standards, Proposed Rule, 86 Fed. Reg. 60396 (Nov. 2, 2021).**
    - The SBA issued proposed rules to implement Section 863 of the FY2021 NDAA, which changed the averaging period for SBA's employee-based size standards from 12 to 24 months. The change would affect businesses seeking to qualify as small under an employee-based NAICS code, such as those applicable to manufactured products.
    - The proposed rule would not necessarily help all small businesses. Those that are growing would benefit from a longer period of averaging that includes their early days, with presumably fewer employees. Conversely, small businesses that were once larger and have contracted in size may find that they are no longer small when their larger, past workforce is also captured.
- **Past Performance Ratings for Small Business Joint Venture Members and Small Business First-Tier Subcontractors, Proposed Rule, 86 Fed. Reg. 64410 (Nov. 18, 2021).**
        - The SBA issued proposed rules to implement Section 868 of FY21 NDAA. The proposed rule provides two new methods for small businesses to obtain qualifying past performance. First, a small business can use past performance of a joint venture of which it is a member so long as the small business worked on the joint venture's contract or contracts. Second, small businesses may use past performance obtained as a first-tier subcontractor on a prime contract with a subcontracting plan. The NDAA authorizes the small business to seek a past performance rating from its prime contractor to submit with small business

offers/proposals, and the proposed rule would require the prime to provide that rating within 15 days of request.

**The SBA also issued numerous interim rules (and a final rule) related to the Paycheck Protection Program (PPP). A sample of those rules include:

- Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, 86 Fed. Reg. 3712 (Jan. 12, 2021)
- Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, 86 Fed. Reg. 3692 (Jan. 14, 2021) (consolidating prior interim rules related to the PPP)
- Business Loan Program Temporary Changes; Paycheck Protection Program-Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act, 86 Fed. Reg. 8283 (Feb. 5, 2021)
- Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by American Rescue Plan Act, 86 Fed. Reg. 15083 (Mar. 18, 2021)
- Business Loan Program Temporary Changes; Paycheck Protection Program-COVID Revenue Reduction Score, Direct Borrower Forgiveness Process, and Appeals Deferment, 86 Fed. Reg. 40921 (July 30, 2021)
- Borrower Appeals of Final SBA Loan Review Decision Under the Paycheck Protection Program, Final Rule, 86 Fed. Reg. 51589 (Sept. 16, 2021). The final rule sets forth procedures for PPP borrowers and lenders on the process for a PPP borrower to appeal certain final SBA loan review decisions under the PPP to the SBA Office of Hearings and Appeals (OHA). The interim final rule supplemented the interim final rule on Loan Review Procedures and Related Borrower and Lender Responsibilities posted on SBA's and Treasury's websites in May 2020, as revised by the interim final rules posted on SBA's and Treasury's websites in June 2020, October 2020, and January 2021.

Department of Labor Final Rule

- **Minimum Wage for Contractors, Final Rule, 86 Fed. Reg. 67126 (Nov. 24, 2021)**
  - The Department of Labor (DOL) issued a final rule implementing EO 14026, which raises the federal contractor minimum wage to $15/hour. The new wage rate will take effect January 30, 2022, but will not automatically be applied to contracts on that date. The final rule is substantially similar to the proposed rule issued in July 2021. There, DOL proposed keeping the existing rules that implement the original minimum wage EO, EO 13658, at 29 C.F.R. Part 10 largely unchanged, while proposing implementation of EO 14026 in an entirely new 29 C.F.R. Part 23. The proposed rule created a new, EO 14026-specific contract clause.
  - Further, DOL proposed applying EO 14026's $15/hour minimum wage to contracts when, among other times, an agency exercises an option period unilaterally. This trigger was not included in how DOL originally implemented EO 13658: that implementation had excluded unilateral option exercises from the list of events triggering coverage by the then-new contractor minimum wage.
  - The DOL rules will be implemented in the FAR through FAR Case 2021-014, which, as of December 23, 2021, appears to contemplate issuance of an interim rule.

General Services Administration Interim and Proposed Rules

- **Ownership Disclosure for High-Security Leased Space, Interim Rule, 86 Fed. Reg. 34966 (July 1, 2021) and Proposed Rule, 86 Fed. Reg. 73219 (Dec. 27, 2021)**
    - The General Services Administration (GSA) issued an interim rule to amend the GSA Acquisition Regulation (GSAR) to implement Sections 3 and 5 of the Secure Federal Leases from Espionage and Suspicious Entanglements Act (Secure Federal LEASEs Act). The Act imposes disclosure requirements regarding the foreign ownership, particularly ''beneficial ownership,'' of prospective lessors of ''high-security leased space'' (*i.e.*, property leased to the Government having a security level of III or higher). Sections 3 and 5 of the Act regarding immediate and highest-level ownership applies to a lease or lease novation for high-security leased space entered into six months after the date of the enactment of the Act.
    - In a proposed rule published at 86 Fed. Reg. 73219 (Dec. 27, 2021), GSA issued a proposed rule to amend the GSAR to implement Section 4 of the Secure Federal LEASEs Act which requires disclosure of "beneficial ownership."
- **FSS Contract Extension, Proposed Rule, 86 Fed. Reg. 48617 (Aug. 31, 2021)**
    - The GSA issued a proposed rule to amend the GSAR to incorporate an internal GSA policy of extending Federal Supply Schedule (FSS) orders for five years beyond the term of an FSS contract. FSS clause I–FSS–163, Option to Extend the Term of the Contract (Evergreen), has been in use by the FSS program since 2000 and is currently implemented through internal GSA policy and incorporated into FSS solicitations and contracts. The amendments to the GSAR are intended to incorporate the clause into regulation to provide greater transparency and consolidated FSS regulations.
- **Contract Requirements for GSA Information Systems, Proposed Rule, 86 Fed. Reg. 50689 (Sept. 10, 2021)**
    - The GSA issued a proposed rule to streamline and update requirements for contracts that involve GSA information systems. The proposed rule will require GSA contracting officers to include GSA cybersecurity requirements into contractual statements of work. GSA states the proposed rule has three categories of changes: (1) streamlining GSA IT security requirements; (2) consolidating existing agency non-security IT policies; and (3) eliminating duplicative and outdated GSAR provisions.

Department of Veterans Affairs Proposed Rule

- **Phased Update to VA Acquisition Regulation (VAAR); Information Security Requirements, Proposed Rule, 86 Fed. Reg. 64132 (Nov. 17, 2021)**
    - The Department of Veterans Affairs (VA) is proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the FAR, to remove and move internal procedural guidance to the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies.
    - This rulemaking revises the VAAR by adding a part covering acquisition of information technology and revising coverage concerning other contracts for goods and services involving mandatory information, privacy, and security requirements to include policy

concerning VA Sensitive Personal Information, information security, and liquidated damages requirements for data breach. The proposed rule adds a new VAAR part 839 relating to the acquisition of information technology as well as other VAAR revisions.