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

On Dec. 23, 2022, nearly three months after the Oct. 1, 2022 start of Fiscal Year 2023, the James M. Inhofe National Defense Authorization Act (NDAA) for FY 2023, P.L. 117-263, was signed into law by President Biden, becoming the 62nd consecutive fiscal year that a NDAA has been enacted. Signing the NDAA in December is not unusual, with five of the last seven NDAA's becoming law in December and the FY 2021 NDAA becoming law even later—on Jan. 1, 2022. In the last 47 fiscal years, the NDAA has been enacted on average 43 days after the fiscal year began, see Congressional Research Service (CRS) Insight IN11985 (Dec. 29, 2022), *FY2023 NDAA: Status of Legislative Activity*, at 3, and the FY 2023 NDAA (enacted 86 days after the beginning of FY 2023) increased the average delay. The FY 2019 NDAA is the only NDAA since 1997 to become law before the start of its fiscal year, which we like to view as a testament to Senator McCain, for whom the law was named. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part I," [60 GC ¶ 334](#).

The NDAA is primarily a policy bill and does not provide budget authority for the Department of Defense to spend, but it does authorize the appropriation of budget authority. The amounts au-

thorized by the NDAA are not binding on the appropriations process but can influence appropriations and serve as "a reliable indicator of congressional sentiment on funding for particular items." CRS Report R46714 (March 28, 2021), *FY2021 National Defense Authorization Act: Context and Selected Issues for Congress*; see CRS In Focus IF10515, *Defense Primer: The NDAA Process* (Nov. 23, 2022), at 1. The FY 2022 and FY 2023 NDAA's had a more pronounced influence on the appropriations process than usual. In both years, the House Appropriations Committee voted out a defense budget that hewed closely to the president's budget request. The initial NDAA bills that were passed by the House and reported out of the Senate Armed Services Committee (SASC) for FYs 2022 and 2023 called for defense spending increases, as subsequently did the Senate Appropriations Committee. The authorized budgets contained in the enacted NDAA's ultimately proved to be close to where the final appropriations bill ended up. The FY 2023 NDAA authorized defense spending of approximately \$45 billion higher than the president's budget request. The Consolidated Appropriations Act, 2023, P.L. 117-328, which the president signed into law on Dec. 29, 2022, followed suit, also appropriating approximately \$45 billion above the president's request.

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

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

The FY 2023 NDAA's procurement-related reforms and changes are primarily located (as usual) in the Act's "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters," which includes 55 provisions addressing procurement matters. This is modestly less than the past four NDAs: the FY 2022, 2021, 2020, and 2019 NDAs contained 57, 63, 78, and 71 Title VIII provisions, respectively. Although the impact and importance of a NDAA on federal procurement law should not be measured simply on the total number of procurement provisions, the FY 2023 NDAA includes more Title VIII provisions addressing procurement matters than some other recent NDAs (e.g., 37, 13 and 49 provisions, respectively, in FYs 2015, 2014 and 2013). See CRS Report R45068 (Jan. 19, 2018), *Acquisition Reform in the FY2016–FY2018 National Defense Authorization Acts (NDAs)*, at 1–2, & App. A. As discussed below, certain provisions in other titles of the FY 2023 NDAA are very important to procurement law.

Some of the FY 2023 NDAA's provisions will not become effective until the Federal Acquisition Regulation or Defense FAR Supplement (and, depending on the circumstances, possibly other regulations) are amended or new provisions are promulgated, which sometimes can take two to four years or more. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II," [62 GC ¶ 14](#).

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

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

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

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

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

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

As in our past NDAA Feature Comments, we look to the Joint Explanatory Statement (JES), which accompanies the NDAA as “legislative history,” to help “explain[] the various elements of the [House and Senate] conferees’ agreement” that led to the enacted FY 2023 NDAA. CRS In Focus IF10516, *Defense Primer: Navigating the NDAA* (Dec. 2021), at 2; CRS Rept. 98-382, *Conference Reports and Joint Explanatory Statements* (June 11, 2015), at 1, 2. However, “[u]nlike in most years,” but as they also did last year, “the House and Senate did not establish a conference committee to resolve differences between the two [i.e., House and Senate] versions of the [FY 2023 NDAA] bill. Instead, leaders of the” House and Senate Armed Services Committees “negotiated a bicameral agreement based on the two versions.” CRS Insight IN11985 (Dec. 29, 2022), *FY2023 NDAA: Status of Legislative Activity*, at 1. Nevertheless, FY 2023 NDAA § 5 provides that “[t]he explanatory statement regarding this [NDAA] ... shall have the same effect with respect to the implementation of this [NDAA] as if it were a joint explanatory statement[.]”

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

not currently enforcing the vaccine mandate against contractors/subcontractors. See www.saferfederalworkforce.gov/contractors/.

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

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

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

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

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

Section 804, Revision of Authority to Allow DOD Rapid Acquisition and Deployment of Capabilities Needed Under Specified High-Priority Circumstances—This section codifies and resolves inconsistencies between the rapid

acquisition authorities from FY 2003 NDAA § 806 and FY 2011 NDAA § 804, as amended. Consistent with FY 2011 NDAA § 804, the procedures for urgent acquisition and deployment of capabilities needed in response to urgent operational needs may be used for capabilities that “(i) can be fielded within a period of two to 24 months; (ii) do not require substantial development effort; (iii) are based on technologies that are proven and available; and (iv) can appropriately be acquired under fixed-price contracts.” The procedures also can be used for capabilities “that can be developed or procured under” the “rapid fielding acquisition pathway or the rapid prototyping acquisition pathway authorized under” FY 2016 NDAA § 804. See Schaengold, Broitman and Prusock, Feature Comment, “The FY 2016 National Defense Authorization Act’s Substantial Impact On Federal Procurement—Part I,” [58 GC ¶ 20](#). In certain situations, this section has a “goal of awarding a contract for the acquisition of the capability within 15 days” and provides the authority for the waiver of certain laws or regulations that “would unnecessarily impede the urgent acquisition and deployment of such capability.”

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

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

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

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

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

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

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

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

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

Section 814, Clarification to Fixed-Price Incentive Contract References—This section amends 10 USCA § 3458(c)(2) (“Authority to Acquire Innovative Commercial Products and Commercial Services Using General Solicitation Competitive Procedures”) and FY 2017 NDAA § 832 (“Contractor Incentives to Achieve Savings and Improve Mission Performance”). See Schaengold, Prusock and Muenzfeld, Feature Comment, “The Significant Impact Of The FY 2017 National

Defense Authorization Act On Federal Procurement—Part II,” [59 GC ¶ 26](#) (discussing FY 2017 NDAA § 832). As the JES explains, the amendment is intended to “correct the imprecise use of the term ‘fixed-price incentive fee’ contract and replace it with ‘fixed-price incentive,’” which is used at FAR 16.204 and throughout the DFARS.

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

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

The JES observed that:

We remain concerned with the lack of resolution regarding open indemnification requests related to the Conventional Prompt Strike program, other weapons programs, and the associated planned employment platforms. We note these delays could lead to significant delivery delays for both Navy and Army hypersonic weapons programs, the next block of Virginia-class submarines, and other programs.

We are also concerned with inconsistencies across the military services regarding imple-

mentation of [10 USCA § 2354, renumbered as 10 USCA § 3861, “Research and Development Contracts: Indemnification Provisions”], and EO 10789 [providing authority for certain P.L. 85-804, see 50 USCA Chap. 29, extraordinary contractual actions]. Further, *we note that the report provided to the congressional defense committees by the Under Secretary of Defense for Acquisition and Sustainment did not fully respond to the requirements of section 1684 of the [FY 2022 NDAA], particularly regarding:*

- (1) A determination of the extent to which each Service Secretary is implementing [10 USCA § 3861], and [EO] 10789 consistently, and
- (2) Identification of discrepancies across the military departments with respect to such implementation. [Emphasis added.]

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

Section 817, Modification to Prohibition on Operation or Procurement of Foreign-Made Unmanned Aircraft Systems—Section 817 amends FY 2020 NDAA § 848 (“Prohibition on Operation or Procurement of Chinese Unmanned Aircraft Systems”), see Schaengold, Prusock and Muenzfeld, Feature Comment, “The FY 2020 National Defense Authorization Act’s Substantial Impact On Federal Procurement Law—Part II,” [62 GC ¶ 14](#), by expanding the prohibition on operating or procuring unmanned aircraft systems to include Russia, Iran, and North Korea (in addition to China). This will prevent contractors from providing or using unmanned aircraft systems from these prohibited countries in a DOD contract. It also prohibits DOD from contracting with an

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

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

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

Defense Authorization Act On Federal Procurement—Part II,” [57 GC ¶ 58](#).

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

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

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

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

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

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

increases the dollar thresholds above which senior agency official approval is required.

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

As to § 822, the JES provides:

We recognize that higher than anticipated economic inflation continues to challenge the budgeting and execution processes of [DOD] and defense industrial base (DIB). *The ability of [DOD] and DIB to adapt to economic conditions is a critical factor in maintaining the health of the DIB, especially when economic conditions are unusually volatile and in regard to firm fixed price contracts where industry bears the predominant financial risk.*

While it is important for [DOD] to uphold and enforce contractual terms and conditions, *we believe [DOD] should be provided tailored authority to engage extraordinary measures to address extraordinary economic impacts. ...* When unanticipated extraordinary economic events disrupt those [financial] plans and decisions, the result can be catastrophic for the DIB, including economic hardship, bankruptcy, and consolidation.

In order to support a robust DIB, we believe [DOD] needs additional temporary authorities to respond to the effects of recent and current inflation levels. We believe these authorities coupled with funding to mitigate inflation impacts will enable [DOD] to provide a measure of relief to the DIB where appropriate. [Emphasis added.]

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

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

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

Section 842, Modification of DOD’s Authority to Carry Out Certain Prototype Projects—This section clarifies that non-

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

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

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

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

Notably, the JES for this section further states:

To make the best use of the authority in this section, we strongly encourage [DOD] to invest in continuous and experiential education for management, technical, and contracting personnel, as well as attorneys, to understand how to effectively and innovatively use other transaction authority and explore flexible means to

achieve mission results more quickly and with more value added. [Emphasis added.]



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