

Client Alert

National Defense Authorization Act for Fiscal Year 2022: Acquisition Policy Changes of Which Government Contractors Should Be Aware

December 30, 2021

During December 2021, the House and Senate reached agreement on a compromise National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022. On December 23, 2021, Congress presented [S. 1605](#) to President Biden, which he [signed](#) on December 27, 2021.

The FY2022 NDAA contains numerous provisions relating to acquisition policy—which provide new opportunities for government contractors, will result in the imposition of new clauses or reporting requirements on government contractors, require government reporting to Congress on acquisition authorities and programs, alter processes and/or procedures to which government contractors are subject, etc. Crowell & Moring’s Government Contracts Group discusses the most consequential changes in the FY2022 NDAA for government contractors below.

Other Transaction Authority

Title VIII Subtitle C of the FY2022 NDAA entitled “Provisions Relating to Other Transaction Authority” includes:

Section 821 revises 10 U.S.C. § 2371 concerning other transaction (OT) research projects by removing the requirement that the Department of Defense (DoD) implement regulations before exercising research OT authority and replacing it with a more flexible option of DoD only having to issue guidance to carry out that authority. It also removes 10 U.S.C. § 2371(e)(2), which authorizes a cooperative agreement or OT to be used for a research project when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate.

Section 822 revises 10 U.S.C. § 2374a concerning the award of prizes for advanced technology achievement to (1) authorize the award of “procurement contracts and other agreements” as an “other type of prize” (as in other than cash prizes); (2) permit the award of prizes, including procurement contracts and other agreements, in excess of \$10,000,000 with the approval of the Under Secretary of Defense for Research and Engineering; and (3) require DoD provide Congress with notice of an award of a procurement contract or other agreement under this program that exceeds \$10,000,000.

Section 823 launches the Pilot Program on Systems Engineering Determinations, for incorporating monitoring and measuring of system engineering-related OT agreements and other research and development procurement efforts. This section requires DoD to ensure that not later than September 30, 2023, the Defense Innovation Unit, Strategic Capabilities Office, and the Defense Advanced Research Projects Agency (“covered entities”) each enters into at least two transactions, procurements, or projects under research or prototype OT authority (10 U.S.C. §§ 2371 and 2371b), authority for procurement for experimental purposes (10 U.S.C. § 2373), or research

and development project authority (10 U.S.C. § 2358) (“covered transactions”), where the covered transactions include system engineering determinations. Although there is no specific guidance regarding the type of projects undertaken, priority is to be given to covered transactions that (1) are being initially demonstrated at one of the covered entities; (2) demonstrate a high potential of further development by a Service Systems Engineering Command^[1]; and (3) demonstrate a high potential for use in a DoD program. The system engineering determinations include: (1) an initial Discontinue, Retain or Extend, or Endorse and Refer determination after the covered transaction period of performance ends that is based on success criteria established within 30 days of entering into a covered transaction, and, following an Endorse and Refer determination, or (2) a second Discontinue, Retain or Extend, or Endorse and Refer determination based on success against a systems engineering plan^[2] developed after the initial determination. A second Endorse and Refer determination refers the covered transaction to a program executive officer.

Section 824 requires DoD to submit a report to the congressional defense committees by December 31, 2022, on the current use of OT authorities and to assess possible modification or expansion of those authorities given the increased use of OT authorities over the past few years. This section directs DoD to assess, among other things, the use of force majeure provisions, determinations of nontraditional defense contractor entity status based on the parent company or majority owner of the entity, the ability to award prototype projects with all costs of the prototype project covered by private sector partners to allow for expedited transition into follow-on production agreements, the ability to award agreements for procurement without prototyping, and alternative authorities or policies to more effectively leverage private sector partnerships or consortia. In the course of conducting this assessment, DoD is also instructed to review the present use of OT authorities and suggest recommendations for legislative and policy changes to OT authorities.

Section 825 requires DoD to establish procedures for identifying, collecting, and publicizing information about individual projects awarded using certain OT agreements and individual task orders. First, DoD is directed to establish procedures to identify required data for (1) OT agreements awarded pursuant to research or prototype OT authority (10 U.S.C. §§ 2371 and 2371b) and (2) individual task orders awarded under a task order contract (as defined in 10 U.S.C. § 2304d), including individual task orders issued to a federally funded research and development center. The General Services Administration (GSA) must update the Federal Procurement Data System to collect the data required under this section—including awardee identities, award dates, and transaction amounts—within 180 days of the NDAA. Within one year after the date of the enactment of NDAA, and at least annually thereafter, DoD must submit a report to Congress on the use of OT agreements and individual task orders covered under this section and their associated funding.

Sourcing and Supply Chain Security

Consistent with the previous years, the FY2022 NDAA continues to emphasize supply chain security and seeks to strengthen and secure key industrial bases in both the United States and the national industrial and technology base (NTIB), comprised of Australia, Canada, and the United Kingdom, as well as focus on supporting domestic manufacturing and workers.

Domestic Preference

Section 808 requires DoD to brief the congressional defense committees no later than 180 days after the FY2022 NDAA is enacted on the extent to which information relating to the use of domestic procurement waivers by DoD is publicly available.

Section 809 requires DoD to annually report violations of the Buy American Act, Berry Amendment, or Specialty Metals statute to the congressional defense committees beginning in 2023 and continuing through 2025.

Supply Chain Security

Section 841 requires DoD to develop the capability to map supply chains and assess supply chain risks for major end items (by business sector, vendor, program, part and other metrics), in order to address the ongoing lack of information to evaluate and address supply chain issues, as specifically identified in the House Defense Supply Chain Task Force June 2021 report.

Section 842 expands FY2021 NDAA § 849 list of high priority goods and services for DoD analyses, recommendations, and actions. This list now includes a review of and recommendations concerning beef products, molybdenum, optical transmission equipment (including fiber cable), armor on tactical ground vehicles, graphite processing, and advanced AC-DC power converters by the end of 2023.

Section 847 directs DoD to develop and implement a plan to (1) reduce reliance of the United States on services, supplies, or materials obtained from sources in geographic areas controlled by North Korea, China, Russia, or Iran; and (2) mitigate the risks to national security and the defense supply chain related to relying on these nations' sources for services, supplies, or materials to meet critical defense requirements. DoD must describe the plan in a report to congressional defense committees within two years of enactment of the FY2022 NDAA.

Section 848 prohibits DoD from procuring any products mined, produced, or manufactured wholly or in part by forced labor from Xinjiang Uyghur Autonomous Region of China (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. Within 90 days of the enactment of the FY2022 NDAA, DoD must issue rules to require certifications from offerors for Defense contracts addressing this prohibition.

Section 851 amends 10 U.S.C. § 2533d, which prohibits DoD from acquiring certain printed circuit boards from China, Russia, Iran, or North Korea to, among other changes, push the effective date of these restrictions from January 1, 2023 to January 1, 2027.

Section 855 requires covered entities^[3] to disclose to DoD if the entity employs one or more individuals who will perform work in the PRC on a covered contract^[4] when the entity submits a bid or proposal for such covered contract. Additionally, Section 855 requires covered entities that are a party to a covered contract to make recurring disclosures in fiscal years 2023 and 2024 regarding employees who perform work in the PRC on such contracts and restricts DoD from awarding a covered contract to or renewing a covered contract with a covered entity unless the covered entity has submitted each disclosure required. This Section takes effect on July 1, 2022.

Section 5502 requires DoD to develop within 30 days of enactment of the FY2022 NDAA a list of covered contractors with respect to which DoD should seek to avoid entering into contracts. A “covered contractor” is a provider of telecommunications, telecommunications equipment, or IT equipment that has knowingly assisted or facilitated a cyber attack or conducted surveillance against (1) the United States by or on behalf of any government or persons associated with such government listed as a cyber threat actor in the Intelligence Community’s 2017 assessment of worldwide threats to the United States; or (2) individuals for the purposes of suppressing dissent or intimidating critics on behalf of a country included in the annual country reports on human rights practices for systematic acts of political repression. DoD is to develop the list in consultation with the Director for National Intelligence and other agencies and then must maintain and update the list as frequently as appropriate.

In addition to the above provisions, the FY2022 NDAA also includes specific sourcing restrictions at §§ 802, 816, 843, 854, and 1411 and additional supply chain analysis and authorities at §§ 844 and 1411.

Software and Technology

Subtitles D and F of Title VIII of the FY2022 NDAA include sections aimed at enhancing DoD’s approach towards software and establishes a series of pilot programs at achieving various goals.

Section 831 revises 10 U.S.C. § 2357, which requires the Secretary of Defense to carry out activities to develop and incorporate technology protection features in designated systems during the research and development phase of such systems, and, absent good cause shown, for contractors to bear half of the cost of design and development contracts resulting from such activities for the purpose of enhancing or enabling the exportability of the system. This section permits the Secretary to deem the contractor’s cost-share portion as allowable independent research and development costs if the system receives Milestone B approval (*see* 10 U.S.C. § 2366(e)(7)) and the Secretary of Defense determines that doing so would further the purposes of § 2357.

Section 833 requires the Under Secretary of Defense for Acquisition and Sustainment, within 180 days, to establish a pilot program to develop and implement unique acquisition mechanisms aimed at increasing the speed of transition of emerging technologies into acquisition programs or operational use. In executing this Pilot Program, the Under Secretary must: (i) identify and award agreements to at least four new projects supporting high-priority defense modernization activities, with specific consideration given to offensive missile capabilities, space-based assets, personnel and quality of life improvement, energy generation and storage, and any other area activities the Under Secretary determines appropriate; (ii) develop a unique acquisition plan for each project that is significantly novel from standard DoD acquisition practices, including, for example, alternative price evaluation and independent costs estimation strategies or alternative intellectual property strategies such as activities to support modular open system approaches; (iii) execute acquisition plans and expeditiously award agreements; and (iv) determine if existing authorities are sufficient to carry out the activities in Section 833, and if not, submit to congressional defense committees recommendations for statutory reforms that will provide sufficient authority. The Under Secretary is also required to establish mechanisms to waive, upon request, regulations, directives, or policies of DoD with respect to a project awarded an agreement under the Pilot Program if the Under Secretary determines that such a waiver furthers the purpose of the Pilot

Program, unless prohibited by federal statute or common law. The Pilot Program will terminate on the date which each project has been completed or 5 years after the enactment of the FY2022 NDAA, whichever is sooner.

Subject to availability of appropriations, Section 834 establishes a competitive, merit-based pilot program to accelerate the procurement and fielding of innovative technologies by (i) reducing acquisition or life-cycle costs; (ii) addressing technical risks; (iii) improving the timelines and thoroughness of test and evaluation outcomes; and (iv) rapidly implementing such technologies to directly support defense missions. Within a year of enactment of the FY2022 NDAA, the Secretary of Defense shall issue guidelines for the operation of the pilot program, which at a minimum will provide for the issuance of one or more solicitations in support of the pilot program (with a priority established for technologies developed by small business concerns or nontraditional defense contractors) and a process for the review of proposals, the merit-based selection of the most promising cost-effective proposals, and the procurement of goods or services through contracts, cooperative agreements, other transaction authority, or by another appropriate process. The total amount of funding provided for any proposal awarded under the program cannot exceed \$50,000,000. This authority terminates on September 30, 2027.

Section 835 requires the Secretary of Defense by May 1, 2022 to enter into an agreement with a federally funded research and development center to study technical debt in software-intensive systems. “Technical Debt” is defined as 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 will include analysis and recommendations, including actionable and specific guidance and any recommendations for statutory or regulatory modifications, on ten elements, including qualitative and quantitative measures which can be used to identify a desired future state for software-intensive systems, forms of technical debts that are suitable for objective and subjective analysis, appropriate individuals or organizations that should be responsible for identification of technical debt, and best practices to identify, assess, and monitor the accumulating costs of technical debt.

Section 836 requires the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Sustainment, to establish, no later than January 1, 2023, a cadre of personnel who are experts in software development, acquisition, and sustainment to improve the effectiveness of software development, acquisition, and sustainment programs or activities of the DoD. The Under Secretary shall ensure that the cadre has the appropriate number of members, establish an appropriate leadership structure, and determine the appropriate officials to whom the cadre will report.

Section 853 requires the Administrator of GSA, within six months after enactment of the FY2022 NDAA, to begin testing commercial e-commerce portal models required by Section 846(e) of the NDAA for FY2018 and submit to Congress a report that includes a summary of market analysis assessments conducted. Upon completion of testing, the Administrator shall submit to Congress a report on the results of the testing that includes an assessment and comparison of commercial e-commerce portal models with respect to price and quality of the commercial products, supplier reliability and services, safeguards for the security of Government information

and third-party supplier proprietary information, protections against counterfeit commercial products, supply chain risks, and overall adherence to federal procurement rules and policies.

Miscellaneous Acquisition Policy

As in year's past, the FY2022 NDAA contains numerous provisions relating to acquisition policy aimed to introduce various special projects and initiatives as well as modify or repeal previously adopted policies.

Section 803 grants authority to DoD to acquire innovative commercial products and commercial services using fixed price contracts, including new technology, process, or method, including research and development, or a new application. Contracts above \$100 million must be supported by a prior determination on how the innovation meets DoD mission needs by the Under Secretary of Defense for Acquisition and Sustainment or the relevant service acquisition executive.

Section 807 requires the Under Secretary of Defense for Acquisition and Sustainment and the Chairman of the Joint Requirements Oversight Council to submit a report on the impediments and incentives to improving the acquisition of commercial products and services.

Section 815 amends 10 U.S.C. § 2329 (Procurement of services: data analysis and requirements validation) to require the Secretary to develop standard guidelines for the evaluation of requirements for service contracts and to require certification from acquisition decision authority that each services contract meet certain requirements. This section also repeals 10 U.S.C. § 235 (Procurement of contract services: specification of amounts requested in budget) and Section 852 of the NDAA for FY2018 (Standard guidelines for evaluation of requirements for services contracts).

Section 817 repealed 10 U.S.C. § 2306 note, which established a preference for DoD fixed-price contracts and required approval for certain cost-type contracts.

Section 873 requires the Secretary to engage a federally funded research and development center by March 30, 2022 to conduct and submit a study to identify knowledge and tools needed for the DoD acquisition workforce to engage in acquisition planning and source selection practices that promote the acquisition of resilient and resource-efficient goods and services, including specifications that diminish greenhouse gas emissions and consider risk to supply chains from extreme weather and changes in environmental conditions.

Section 874 establishes a DoD pilot program to award sole-source follow-on contracts to 100% employee-owned businesses (i.e., owned through an Employee Stock Ownership Plan) where such businesses are rated satisfactorily on the prior contract.

Small Business Matters

The FY2022 NDAA also includes various sections addressing small business matters, primarily in Subtitle G of Title VIII:

Section 814 revises 10 U.S.C. § 2307(a)(2)(B) concerning eligibility for certain prime contractors to receive accelerated payments. This section requires that for a prime contractor that subcontracts with a small business concern to be eligible for receiving accelerated (advance, partial, progress or other) payments from DoD within 15 days following the receipt of an invoice, the prime must actually “agree” to flow down such payments to the small business subcontractor by the accelerated payment date and cannot merely “propose” to make payments on such a schedule.

Section 861 amends 41 U.S.C. § 1908(b)(2) to exempt the acquisition-related dollar thresholds for payment and performance bonds and alternative payment protections (pursuant to 40 U.S.C. §§ 3131-3134) from periodic inflation adjustments. The thresholds will remain \$150,000 for payment and performance bonds and \$35,000 for alternative payment protections, as provided in FAR Part 28.

Section 862 extends the DoD pilot program for Streamlining Awards for Innovative Technology Projects to small businesses or non-traditional defense contractors until October 1, 2024. This section requires DoD to collect data regarding the pilot program for purposes of identifying best practices and to submit a recommendation to Congress, not later than April 1, 2023, with regard to any further extension of the pilot program.

Section 863 amends Section 5(i) of the Small Business Act (15 U.S.C. § 634(i)) and requires a concern to update its status in the System for Award Management within two days of the date on which a final determination is made that the concern does not meet the requirements of its claimed small business size and/or status. If a concern fails to update its status, the SBA Administrator is required to make the update itself within two days of the concern’s failure. Concerns are further required to notify contracting officers for each contract where the concern has an offer or bid pending if the concern finds, in good faith, that the determination affects the eligibility of the concern to perform such a contract.

Section 864 requires the SBA Administrator to issue a rule within one year of the enactment of the FY2022 NDAA authorizing the SBA’s Office of Hearings and Appeals to decide all appeals from formal protest determinations in connection with the status of a qualified HUBZone small business. Currently, HUBZone appeals must be filed with the SBA’s Associate Administrator, Office of Government Contracting and Business Development (AA/GCBD). Per the House Armed Services Committee summary of the FY2022 NDAA, this change ensures cases are heard by an administrative judge and a body of publicly available case law is developed.

Under Section 865, not later than 10 days after the date on which the budget of the President for fiscal years 2022 through 2032 is submitted to Congress, each Secretary of a military department and the Under Secretary of Defense for Research and Engineering is required to submit a report on unfunded priorities of DoD related to high-priority Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) projects. The report must be submitted to the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the congressional defense committees. The report shall identify no more than five unfunded priority projects, listing the projects in order of urgency.

Section 867 requires secretaries of the military departments to collect data on Phase III awards under the SBIR and STTR programs and submit such data to the President for inclusion in the budget submitted to Congress. The data is to include, among other items: (1) the cumulative funding amount for Phase III awards; (2) the

number of Phase III award topics; (3) the total funding obligated for Phase III awards by State; (4) the original Phase I or Phase II award topics and the associated Phase III contracts awarded. Additionally, each Secretary is to provide a list of the five highest performing projects.

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Crowell & Moring's Cyber Group will address the key cyber provisions from the FY2022 NDAA next week.

[1] "Service Systems Engineering Command" means the specific DoD command that reports through a chain of command to the head of a military department specializing in the systems engineering of a system, subsystem, component, or capability area.

[2] The plan includes, among other things, measurable baseline technical and transition technical capabilities, an approximate cost and schedule, identification of lifecycle sustainment needs, and identification of funding sources.

[3] "Covered entity" means any corporation, company, LLC, LP, business trust or association (including any subsidiary) performing work on a covered contract in PRC, including by leasing or owning real property used in performance of the covered contract in the PRC.

[4] "Covered contract" means any DoD contract or subcontract with a value greater than \$5M, excluding commercial products or services.

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