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Important FY2023 National Defense Authorization Act Provisions for Government Contractors

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NCMA Huntsville
May 18, 2023



Today's Speaker

Josh Mullen, Partner, Washington, D.C. & Nashville, TN

- Advise Government Contractors regarding:
 - Compliance with FAR, DFARS, and other agency acquisition regulations
 - Business structure and formation issues related to SBA set-aside programs (Mentor-Protégé & joint ventures, small business, etc.)
 - Size protests before SBA Area Offices and size and status appeals before the SBA Office of Hearings and Appeals
 - Bid protests before the Federal Government Accountability Office, Court of Federal Claims, contracting agencies, and state governments
 - Contract disputes before boards of contract appeals
 - Negotiation of teaming agreements, subcontracts, novation agreements, and other agreements related to government contracts

WBD's Government Contracts Practice

- **Nationwide Scope With a Local Presence, and a Deep Bench:**
 - Offices in Washington, Huntsville, and twenty-three other locations in the United States, and eight offices in the United Kingdom
 - Assisted clients in drafting and negotiating multiple joint venture agreements, teaming agreements, and subcontracts
 - Represented multiple protesters and awardees in various protests, including SBA size protests and size appeals and bid protests before the GAO and Court of Federal Claims
 - Represented multiple companies with internal investigations and management of self-disclosures relating to several different ethics and compliance issues.
 - Assisted various clients with preparation and implementation of codes of conduct and compliance training programs.

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Agenda – FY2023 NDAA Provisions Important to Government Contractors

Background On The NDAA

Why is the NDAA Important For Government Contractors?

Provisions That Are Important to Government Contractors

Questions

What is the NDAA?

- **National Defense Authorization Act**
 - **Authorization Act** – legislation passed by Congress to establish, continue, or modify an agency, program, or activity
 - It sets policy and *authorizes* Congress to later make appropriations for programs and policies
 - **Appropriations Act** – legislation that provides the actual appropriations for the previously authorized programs

What is the NDAA? (Continued)

- **James M. Inhofe National Defense Authorization Act for FY 2023 (“FY2023 NDAA”)** – signed into law on December 23, 2022
 - **FY2023 NDAA set defense funding levels at \$857.9 billion**
 - Increased the topline authorization level by \$45 billion above the President’s budget request
 - **The Consolidated Appropriations Act, 2023, P.L. 117-328** – signed into law on December 29, 2022

What is the NDAA? (Continued)

- **Uniquely Bipartisan**

- *December 8, 2023* – U.S. House of Representatives voted 350-80 to adopt the FY2023 NDAA
- *December 15, 2023* – U.S. Senate voted 83-11 to approve the same version approved by the House on December 8th
- *December 23, 2023* – Signed into law by President Biden

What is the NDAA? (Continued)

- **Where can you find out more information about the FY2023 NDAA?**
 - Explanatory Statement from the U.S. House of Representatives, Committee on Armed Services
 - <https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-bk3.pdf>
 - Summary of FY2023 NDAA from U.S. Senate Committee on Armed Services
 - https://www.armed-services.senate.gov/imo/media/doc/fy23_ndaa_agreement_summary.pdf
 - FY2023 NDAA Bill language
 - <https://www.congress.gov/bill/117th-congress/house-bill/7776/text>

When will the NDAA provisions take effect?

- **It depends on the provision**

- Some provisions will require changes to the FAR, which can take time



Source: GAO. | GAO-20-583R

- Image from <https://www.gao.gov/federal-rulemaking>

Why Is The FY2023 NDAA Important For Government Contractors?

- Authorizes the funding levels for defense spending during FY2023
- It identifies the goals and priorities of Congress for national defense
- It provides a forecast of the future funding, rules, and regulations that will be implemented in the defense sector
- It gives government contractors in the defense space knowledge about where they need to focus their compliance and growth efforts

Provisions Important for Government Contracts

- Inflation provisions
- Provisions on foreign purchase restrictions
- Supply chain improvement provisions
- Cybersecurity provisions
- Other transaction authority provisions
- Small business provisions

Inflation Provisions Background

- **Impacts of Inflation**

- 2022 - Average Inflation Rate was 8%
- 2023 – Annual inflation rate for the 12 prior months ending in April is 4.9%
 - See <https://www.usinflationcalculator.com/inflation/current-inflation-rates/>
- All businesses, including government contractors incurred significant cost increases

Inflation Provisions Background (continued)

- **DOD's 2022 Guidance Regarding Inflation**

- May 25, 2022 DOD Memo

- “[T]he treatment of cost increases as a result of economic conditions is dependent on contract type.”
- Cost-reimbursement contracts, Fixed-price incentive contracts (FPIF), and fixed-price contracts with economic price adjustment (FPEPA) could seek relief for costs due to inflation
- Firm-Fixed-Price (FFP) contracts were not entitled to relief

- September 9, 2022 DOD Memo

- Opened the door to potential relief under the FAR Part 50 for FFP contracts
- “Department will consider contractor requests to employ this authority”

Inflation Provisions Background (continued)

- **FAR Part 50.101 – Authority for Extraordinary Contractual Actions – Pub. L. 85-804, codified at 50 U.S.C. § 1431, et. seq.**
 - Empowers the President to authorize agencies 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.
 - September 9, 2022 DOD Memo - opened the door to DOD using FAR Part 50 to change FFP contracts “without regard to other provisions of law related to making, performing, amending or modifying contracts”

Inflation Provisions

- **Sec. 822 – Modification of contracts to provide extraordinary relief due to inflation impacts**
 - Expands FAR Part 50 & 50 U.S.C. § 1431 Authority for inflation
 - Provides that the DOD may amend a prime contract, including a FFP Contract
 - (A) “when, due solely to economic inflation, the cost to a prime contractor of performing such eligible contract is greater than the price of the eligible contract,” and
 - (B) “may not request consideration from such prime contractor for such amendment or modification”
 - Similar provisions for subcontracts that have similar cost issues “due solely to economic inflation”

Inflation Provisions (Continued)

- **Sec. 822 – Modification of contracts to provide extraordinary relief due to inflation impacts**
 - **Also amended 50 U.S.C. § 1431(a) to increase funding authority and decrease approval requirements**
 - Increased following language from \$50,000 to \$500,000
 - “[S]hall not be utilized to obligate the United States in an amount in excess of \$500,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, of such department or agency, or by a Contract Adjustment Board established therein.”
 - Also increased notification requirements to Congress from \$25 million to \$150,000,000

Inflation Provisions (Continued)

- **Sec. 822 – Modification of contracts to provide extraordinary relief due to inflation impacts**
 - **Key Takeaways**
 - Use Section 822 to support requests for equitable adjustment and/or claims for cost increases “due solely to economic inflation” under FFP contracts
 - Act quickly as the authority currently ends on December 31, 2023
 - Keep watching for continued guidance from DOD related to this provision
 - **FY2023 NDAA authorizes \$12.6 billion for inflation impacts on purchases**

Inflation Provisions (Continued)

- **Sec. 1003 – Annual Reports on Budgetary Effects of Inflation**
 - **Requires DOD, not later than 30 days after the date of the submission of the President’s budget, to provide a report to the congressional defense committees on observed and anticipated budgetary effects related to inflation, including:**
 - The actual inflationary budgetary effects on each appropriations account;
 - A summary of any requests for equitable adjustment, exercising of the EPA clause, or bilateral contract modifications due to inflation;
 - A summary of any methodological changes in the DOD’s cost estimation practices for inflationary budgetary effects; and
 - Anything else the Secretary deems appropriate

Foreign Purchase Restrictions

- **Sec. 5949 – Prohibition on certain semiconductor products and services**
 - Prohibits federal agencies from procuring or obtaining or entering contracts (or extending or renewing contracts) for any electronic parts, products, or services that include “**covered semiconductor products or services**”
 - “**Covered semiconductor products or services**”- A semiconductor, semiconductor product, or a service that utilizes such a product, that is designed, produced or provided by:
 - Semiconductor Manufacturing International Corporation (SMIC);
 - ChangXin Memory Technologies (CXMT);
 - Yangtze Memory Technologies Corp (YMTC); or
 - Any entity that the DOD Secretary or Commerce Secretary adds to the list

Foreign Purchase Restrictions (Continued)

- **Sec. 5949 – Prohibition on certain semiconductor products and services**
 - Prohibition applies to “**Critical Systems**,” which is a telecommunications or information system operated by the Federal Government, . . . which–
 - (A) involves intelligence activities;
 - (B) involves cryptologic activities related to national security;
 - (C) involves command and control of military forces;
 - (D) involves equipment that is an integral part of a weapon or weapons system; or
 - (E) . . . is critical to the direct fulfillment of military or intelligence missions.”
 - Federal Acquisition Security Council also can identify other “critical systems”

Foreign Purchase Restrictions (Continued)

- **Sec. 5949 – Prohibition on certain semiconductor products and services**
 - Applies to all executive agencies, not just DOD
 - FAR Council is required to issue implementing regulations by December 23, 2025 – 3 years
 - The provisions must take effect by December 23, 2027

Foreign Purchase Restrictions (Continued)

- **Sec. 817 – Modification to prohibition on operation or procurement of foreign-made unmanned aircraft systems.**
 - Prohibits contractors from providing or using unmanned aircraft systems (i.e., drones) from the following countries in the performance of a DOD contract:
 - the People’s Republic of China;
 - The Russian Federation;
 - The Islamic Republic of Iran; and
 - The Democratic People’s Republic of Korea (North Korea)
 - Prohibition becomes effective on October 1, 2024

Foreign Purchase Restrictions (Continued)

- **Sec. 857 – Procurement requirements relating to rare earth elements and strategic and critical materials**
 - Imposes disclosure requirements and supply chain tracking requirements identifying the country or countries in which any rare earth elements and strategic and critical materials used in a magnet were mined, refined into oxides, made into metals and alloys, and where the magnet was sintered or bonded and magnetized
 - It also expands prohibitions on the purchase of certain goods and services that contain strategic and critical materials, rare earth elements, or energetic materials used to manufacture missiles or munitions
 - Effective (a) 30 months after NDAA enactment (June 23, 2025); and (b) after the DOD Secretary confirms to Congress that it will not create national security risks

Foreign Purchase Restrictions (Continued)

- **Sec. 855 – Codification of prohibition on certain procurements from the Xinjiang Uyghur Autonomous Region**
 - Prohibits the use of any DOD funds from being obligated or expended to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from Xinjiang Uyghur Autonomous Region (XUAR) or from an entity that has used labor from within or transferred from XUAR
 - DOD is required to issue a policy by June 21, 2023, which will require any offeror or awardee of a DOD contract to make a good faith effort to determine that forced labor from XUAR will not be used in the performance of such contract.

Supply Chain Improvement

- **Sec. 858 – Analyses of certain activities for action to address sourcing and industrial capacity**
 - Requires the Under Secretary of Defense for Acquisition and Sustainment to review the following items to determine and develop appropriate actions to ensure secure domestic production capabilities:
 - (1) Solar components for satellites; (2) Satellite ground station service contracts; (3) Naval vessel shafts and propulsion system components (including reduction gears and propellers); (4) Infrastructure or equipment for a passenger boarding bridge at a military airport; (5) Flags of the United States; (6) Natural rubber from herbaceous plants for military applications; (7) Alternative proteins as sustainable and secure food sources; and (8) Carbon fiber.
 - Required to provide briefing to the congressional defense committees by January 15, 2024, including a list of recommendations

Supply Chain Improvement (Continued)

- **Sec. 860 – Risk management for Department of Defense Pharmaceutical Supply Chains**
 - **By December 23, 2023, DOD is required to:**
 - (1) develop and issue implementing guidance for risk management for the DOD supply chains for pharmaceutical material for DOD; and
 - (2) identify, in coordination with HHS Secretary, supply chain information gaps regarding the DOD’s reliance on foreign suppliers of drugs, including active pharmaceutical ingredients and final drug products; and
 - (3) present findings and recommendations to the Committees on Armed Services
 - **Within 1 year after the above findings and recommendations are issued, DOD must implement guidance for risk management for the DOD supply chain for pharmaceuticals**

Supply Chain Improvement (Continued)

- **Sec. 861 – Strategy for increasing competitive opportunities for certain critical technologies**
 - **By December 23, 2023, DOD is required to submit to the congressional defense committees a comprehensive strategy to:**
 - (1) increase competitive opportunities available for appropriate United States companies to transition critical technologies into major weapon systems and other programs of record; and
 - (2) enhance the integrity and diversity of the defense industrial base.
 - **Focus:** Increase opportunities for United States companies to develop end items of critical technologies for major weapon systems

Supply Chain Improvement (Continued)

- **Sec. 861 – Strategy for increasing competitive opportunities for certain critical technologies**
 - **Critical technologies include:**
 - (A) Biotechnology;
 - (B) Quantum science technology;
 - (C) Advanced materials;
 - (D) Artificial intelligence and machine learning;
 - (E) Microelectronics;
 - (F) Space technology;
 - (G) Advanced computing and software;
 - (H) Hypersonics;
 - (I) Integrated sensing and cybersecurity;
 - (J) Autonomous systems;
 - (K) Unmanned systems;
 - (L) Advanced sensing systems; and
 - (M) Advanced communications systems.

Foreign Purchase Restrictions / Supply Chain Improvement

- **Key Takeaways**

- FY2023 NDAA has a clear policy goal of increasing the domestic defense industrial base
 - Semiconductors, pharmaceuticals, critical technologies, etc.
- Be prepared for further decoupling from China, especially in areas of technology, rare metals, and pharmaceuticals
- Start implementing policies and conducting industry research now to increase domestic sources in the future, or sources available per trade agreements
- Utilize comment periods for proposed rules when FAR Council issues them

Cybersecurity

- **Sec. 1514 – Operational testing for commercial cybersecurity capabilities**
 - Not later than February 1, 2024, the DOD’s Chief Information Officer (CIO) and the CIOs of the military departments shall develop plans to ensure covered cybersecurity capabilities are appropriately tested, evaluated, and proven operationally effective, suitable, and survivable prior to operation on a DOD network
 - Covered cybersecurity capabilities include
 - Commercial products, COTS products, and Noncommercial items acquired through the Adaptive Acquisition framework that are acquired and deployed by DOD to satisfy the cybersecurity requirements of one or more DOD components

Cybersecurity (Continued)

- **Sec. 1553 – Plan for commercial cloud test and evaluation**
 - By June 21, 2023 (180 days after enactment of NDAA), the DOD, in consultation with commercial industry, shall implement a policy and plan for test and evaluation of the cybersecurity of cloud service providers that provide, or are intended to provide, storage or computing of classified data of the DOD.
 - The policy and plan shall include a requirement that future contracts with cloud service providers for storage or computing of classified data of the DOD include provisions that permit DOD to conduct independent, threat-realistic assessments of the commercial cloud Infrastructure

Cybersecurity (Continued)

- **Key Takeaways**
 - Cybersecurity is again a clear policy goal of the FY2023 NDAA
 - Cybersecurity requirements will only increase in the future
 - Contractors should continue to implement policies to become Cybersecurity Maturity Model Certification (CMMC) compliant
 - Contractors should stay aware of ongoing and updated cybersecurity requirements and threats, including staying aware of future FAR/DFARS updates

Other Transaction Authority Background

- **What is other transaction authority?**
 - 10 U.S.C. §§ 4021-4022
 - Contracts that are not FAR-based
 - Provide more flexibility for agreements with small businesses and nontraditional defense contractors because they are not required to comply with federal procurement laws
 - However, some FAR provisions often get included
 - Focused on research and prototype projects

Other Transaction Authority

- **Sec. 843 – Other transaction authority clarification**
 - **Amended 10 U.S.C. §§ 4021-4022 to expand DOD’s other transaction authority by replacing**
 - Authority to “carry out prototype projects that are directly relevant to enhancing the mission effectiveness **of military personnel and the supporting** of platforms, systems, components, or materials”
 - ***With***
 - Authority to “carry out prototype projects that are directly relevant to enhancing the mission effectiveness **of personnel of the Department of Defense or improving** platforms, systems, components, or materials”

Other Transaction Authority (Continued)

- **Sec. 843 – Other transaction authority clarification**
 - Authorizes DOD to establish a pilot program using OTA authority to carry 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
 - **Limits**
 - Not more than two prototype projects may begin to be carried out per fiscal year under such pilot program; and
 - Aggregate value of all transactions under such pilot program may not exceed \$200,000,000
 - **Sunset**
 - Except for ongoing projects, the pilot program shall terminate on September 30, 2025.

Other Transaction Authority (Continued)

- **Key Takeaways**

- Congress desires for DOD to continue to expand its use of nontraditional defense contractors
 - Serves policy goal of increasing the domestic defense industrial base
- Congress is willing to grant DOD more flexibility to obtain better and more innovative systems from nontraditional defense contractors

Small Business

- **Sec. 856 – Codification of the Department of Defense Mentor-Protégé Program**
 - Makes the DOD’s Mentor-Protégé program permanent instead of it being referenced as a pilot program
 - The permanent program statute is found at 10 U.S.C. § 4902
 - Expands eligibility for potential mentor companies by reducing the prior year defense contract and subcontract requirement from \$100,000,000 to \$25,000,000
 - This is separate from the SBA’s Mentor-Protégé program and is particular to the DOD
 - <https://business.defense.gov/Programs/Mentor-Protege-Program/>

Questions?



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