

# 2022 Defense Bills Propel Recent Acquisition Policy Trends

By **Joseph Berger and Thomas Mason** (October 27, 2021)

The annual National Defense Authorization Act authorizes funding and provides legal authorities and policy for the U.S. Department of Defense and military forces. The U.S. House of Representatives has finalized its NDAA bill for fiscal year 2022 and the U.S. Senate bill is pending before the full Senate, awaiting amendments.

DOD contracting offices and contractors can expect enactment of a host of new statutory requirements and subsequent developments, as well as support for new technology priorities, resulting from the bills' acquisition policy provisions.

The bills' recurring policy themes include support for the DOD's contracting capabilities, commercial acquisition procedures and rapid acquisition of emerging technologies, as well as for supply chain stability and security, small businesses and the industrial base.

The House and Senate versions of the acquisition policy provisions included in Title VIII of the NDAA share these themes, and these issues, expected to be emphasized in the final bill.

Many of this year's Title VIII policy provisions would subtly change the law, but taken together with numerous Title VIII provisions enacted in recent years, they are part of a trend increasing the DOD's speed and flexibility in acquiring new technologies. While some acquisition policy provisions seek to speed and simplify the acquisition process, however, others will impose new regulatory hurdles for both government and contractors, identifying enforcement priorities.

The Senate version has a number of provisions focusing on commercial products and services, and on other transaction authorities. The House version has a series of provisions on supply chains, along with numerous amendments on diverse topics, including small business issues.

Once the House and Senate pass their versions of the bill, the two will be reconciled in the conference committee.

While any of the policy provisions may be amended or omitted by the conference committee, many of the House and Senate Title VIII provisions are consistent with the other chamber's bill because they are driven by the strategic global economic and geopolitical competition that both chambers seek to address. The conference committee can be expected to prioritize these strategic concerns.

Select policy provisions of Title VIII in each bill are summarized below.[1]

## Senate Version

The Senate Armed Services Committee, or SASC, completed its markup of the fiscal year 2022 NDAA and issued its committee report in July. On Sept. 22, the report and bill were released and filed for consideration by the full Senate, which will consider amendments



Joseph Berger



Thomas Mason

before passing the bill.[2]

The bill supports a top-line total of about \$778 billion in fiscal year 2022 funding for national defense, including \$740 billion for the DOD budget.

According to the executive summary released by the committee, strategic competition with near-peer rivals "is likely to intensify due to shifts in the military balance of power and diverging visions of governance models between China and Russia and the West," and this competition is now unfolding amid the introduction of disruptive technologies.[3]

Among its technology provisions, the NDAA authorizes an increase of more than \$1 billion in funds available for science and technology programs that fund research and prototyping activities at universities, small businesses, defense labs and contractors, including in cutting-edge areas such as artificial intelligence, microelectronics, advanced materials, 5G and biotechnology.

### ***Acquisition Policy and Management***

Section 801 of the Senate bill would repeal the preference for fixed-price contracts established by Section 829 of the NDAA for fiscal year 2017. The Senate report notes that the preference for fixed-price contracts was an effort to control cost growth on large acquisition programs, but as the SASC recognized, the fixed-price contract type may not be suitable for all acquisitions.

The amendment would permit the DOD to select contract types that are appropriate for the product or service being acquired. The fixed-price contract type is appropriate when technical risks are minimal and understood and for commercial items. The House bill includes a similar provision — Section 818 — so this statutory change should be expected in the final bill.

The repeal of the preference for fixed-price contracts is necessary policy for the DOD, which will benefit from having more flexibility when selecting contract types for complex acquisitions. The selection of cost-type contract vehicles will often result in more transparency for the DOD, and it may be the most efficient way for the DOD to accomplish certain work or objectives.

For contractors, more cost-type contracts will result in more frequent application of the Federal Acquisition Regulation's extensive cost regulations and additional significant compliance obligations and audit risks.

### ***Commercial Products and Services, and Emerging Technologies***

Section 803 of the Senate bill would require the DOD to assess impediments to and incentives for fulfilling the goals of statutory provisions on the preference for commercial products and services. The objective is to enhance the DOD's innovation strategy and to compete more effectively against peer adversaries by rapidly adopting commercial technology advances.

DOD leaders require this ability to capitalize quickly on commercial technology advances in areas such as AI, machine learning, cloud computing, cloud-based enterprise services, and software products and services. The SASC stated that the DOD too often contracts for custom solutions when mature commercial capabilities exist that can meet DOD requirements.

The DOD would be permanently authorized under Section 816 to use commercial solutions openings to solicit and acquire innovative commercial items, technologies or services. This authority, which does not fall under the FAR, was established in the NDAA for fiscal year 2017, and has been used to support work with commercial sector firms and COVID-19 response work.

With similar goals, Section 804 would establish a pilot program to develop unique contracting mechanisms for emerging technologies that seek to increase the speed and flexibility of the DOD acquisition process to transition emerging technologies into operational use. This continues a trend. While Congress has taken many avenues toward these goals in recent years, it adopts provisions every year intended to improve DOD acquisition processes and outcomes.

### ***General Contracting Authorities***

Section 811 of the Senate bill would require the DOD to review current regulations and policies on the use of other transaction authorities and make recommendations to Congress on modifications or expansions to these authorities. The use of other transaction authority has increased significantly over the last few years, and the SASC expressed its concern there has been inconsistent application within the DOD.

Section 817 would require the DOD to establish procedures to identify all agreements awarded through the use of other transactions, other transaction consortia, individual task orders under task order contracts, and task orders issued to federally funded research and development centers. This provision would also require the DOD to publicize these awards.

The House bill includes a similar provision intended to increase the transparency of other transaction awards.

These provisions reflect congressional intent to provide oversight, accountability and support for use of the flexible, non-FAR other transaction authority to reduce regulatory burdens and increase speed in development and deployment. These provisions anticipate continued growth in the DOD's reliance on other transaction authorities.

### ***Industrial Base and Small-Business Matters***

The DOD would be prohibited from procuring personal protective equipment manufactured in nonallied foreign nations under Section 832 of the Senate bill. The House version includes a similar provision. At the same time, the separate infrastructure bill pending in Congress contains extensive provisions that would require most PPE to be made in America. The infrastructure bill would establish incentives for domestic PPE production, while the NDAA would create consistent prohibitions against certain foreign sourcing.

Among the small-business provisions, Section 843 of the Senate bill would create a pilot program to incentivize employee ownership in defense contracting. This would encourage the use of employee stock ownership plans, an increasingly popular mechanism among small contractors. This is consistent with many congressional initiatives supporting small businesses as a key component of the industrial base.

## **House Version**

The House passed its version of the NDAA for fiscal year 2022 on Sept. 23, after adding many amendments to Title VIII.[4] The House Committee on Armed Services issued House Report 117-118[5] on Sept. 10 to accompany the House bill, H.R. 4350.

The summary below highlights certain of the House bill's Title VIII provisions.

### ***Acquisition Policy and Management***

Section 801 of the House bill, on acquisition workforce educational partnerships, would direct the Defense Acquisition University to partner with outside entities to augment the university's curriculum with experiential learning opportunities. The program would establish a formal partnership with outside faculty and require an annual report on emerging acquisition policy issues. This will expand university's role in training DOD personnel and shaping annual acquisition reforms.

Section 802 would create special emergency authority for the DOD to reimburse contractors for certain costs of paid leave during a covered emergency — including a declared pandemic — to keep employees in a ready state. This authority is modeled on the similar authority Congress first provided in response to the COVID-19 pandemic in March 2020 and demonstrates the value of this program to the government's mission.

Section 804 would establish a \$15 per hour minimum wage for covered employees of DOD contractors, consistent with the president's executive order.

While this provision is consistent with the president's executive order instituting the same minimum wage broadly across agency contracting, the NDAA provision would set this minimum wage for the DOD by statute, binding future administrations.

While not yet included in the Senate version, this provision could be added by Senate amendments

Section 805 would require covered contractors to submit annual reports regarding diversity and inclusion within their workforces, and require the DOD to submit an annual report on the consolidated findings.

While many major companies already prepare such reports and make them public, this provision would likely increase government and public scrutiny of those reports, which may lead many contractors to increase the resources they devote to employment and affirmative action requirements.

The Senate bill has a provision that would require internal training materials to be made public; that provision is more intrusive, and less likely to be adopted by the conference committee.

Concerning domestic procurement, Section 806 would require the DOD to establish a public website to publish information related to each waiver granted under "Buy American" sourcing requirements.

This follows similar requirements advanced by the Biden administration via executive order. It signals increased government and public scrutiny of the enforcement of Buy American principles.

Section 807 would require a contracting officer to refer any current or former DOD contractor the officer believes has egregiously violated domestic preference requirements to the appropriate suspension or debarment official. This provision, like section 806, will increase enforcement efforts focused on Buy American principles, would increase potential consequences of noncompliance, and should also reinforce the value of robust compliance efforts.

### ***Supply Chain Security***

Numerous provisions relating to supply chain security indicate the continuing importance of this topic within the annual NDAA legislative framework.

For example, Section 831 would require the DOD to prioritize alternative technologies for the extraction, processing and recycling of critical minerals. Section 833 would require a plan to reduce reliance on certain materials obtained from sources in geographic areas controlled by foreign adversaries.

Enhanced thresholds for domestic content requirements for major defense acquisition programs would be established by Section 834, consistent with the administration's executive orders and stated priorities on Buy American principles.

### ***Industrial Base and Other Matters***

The General Services Administration would be directed by Section 845 to begin testing additional e-commerce portal models — in addition to those currently under assessment — and provide a report to congressional defense committees with a summary of findings and testing results.

This adds to current GSA efforts begun under the NDAA for fiscal year 2018, which will ultimately permit the DOD and other agencies to make certain purchases through commercial website portals, an overdue reform.

Section 842 would establish a pilot program to more effectively transition Small Business Innovation Research and Small Business Technology Transfer programs into their next phase. This provision reflects continuing congressional and DOD support for the programs and for small business as an essential element of the industrial base.

Supporting career development, Section 844 would require the establishment of a coalition among institutions to focus on career pathways in manufacturing, a goal consistent with congressional commitments to support domestic manufacturing.

The DOD would be required to assemble a cadre of software development and acquisition experts under Section 854, signaling the importance of software acquisition to DOD programs.

### ***House Amendments***

Numerous amendments — now located primarily in Subtitle E — were approved in connection with the passage of the final House bill. Some may be less likely to be included in the final bill by the conference committee, but several of these amendments are more far-reaching than the original provisions. Many relate to congressional support for small business contracting.

Section 861 includes an amendment to the government wide goals for contracting with small business concerns. It would amend the Small Business Act to increase the government's prime contracting goal for small business awards from 23% to 25%, with related increases for various set-aside categories. This would be good for all small businesses and reflects confidence in this key pillar of the DOD's contracting base.

Another amendment, in Section 873, would increase the sole source thresholds for certain small business socioeconomic categories — including the 8(a) and the Historically Underutilized Business Zones program, and the service-disabled veteran-owned and women-owned small business programs. This would permit higher award amounts — \$8 million or \$10 million for manufacturing — and afford greater flexibility to the government when issuing awards within these categories.

An amendment concerning the Cybersecurity Maturity Model Certification program in Section 848 would require the DOD to submit a report on the effects of the CMMC framework on DOD small business concerns, including the estimated costs of compliance with each level of the framework, and how the DOD will mitigate any negative effects on small businesses.

This reflects the challenging balance between the costs imposed on small business and DOD's critical cybersecurity needs throughout the supply chain.

Commercial items are addressed in Section 857, which would require a report on commercial item determinations, including training on FAR Part 12 procedures for the acquisition workforce, consistent with congressional support for commercial procedures and requirements.

This would reinforce the Senate bill's provisions supporting the preference for commercial products and services.

Consolidations among DOD contractors are addressed in Section 863 that would require the U.S. Government Accountability Office to submit to Congress a report on the impact of mergers and acquisitions of defense contractors. This may lead to more scrutiny of these mergers by Congress and the DOD.

Debarment proceedings for persons with a certain number of willful or repeated violations of the Fair Labor Standards Act would be established by Section 865, which would increase the consequences of proceedings under the FLSA.

This would establish another priority for enforcement, which would require increased contractor attention to compliance.

The Commission on Wartime Contracting would be reestablished by Section 868, which would revive this significant congressional investigatory mechanism to study, audit and report on contracting in the wartime theaters in Iraq and Afghanistan. The independent, bipartisan CWC was established in 2008 and closed its work in 2011; reestablishing such a commission may open the subsequent years to its independent scrutiny, adding to the historical record and the recommendations issued by the CWC for reforms to contingency contracting.

The U.S. policy on combating trafficking in persons is addressed by Section 870, which would require a DOD analysis concerning enforcement of requirements that apply to

contracting officers and contractors, including compliance plans, reporting of investigations and acquisition-specific training. As in other priority areas, contractors should expect increased enforcement.

An amendment to the Small Business Act in Section 871 would create U.S. Small Business Administration jurisdiction for appeals from protest determinations in connection with status as a qualified Historically Underutilized Business Zones program small business, supporting increased attention to this program.

The Boots to Business program would be adopted by another amendment to the Small Business Act, Section 879, which would provide entrepreneurship training to transitioning members of the U.S. Armed Forces, an important addition to the House bill.

### ***House Armed Services Committee Report Items of Special Interest***

The Sept. 10 House Report also addressed more than 25 "Items of Special Interest" on diverse topics related to supply chains and the industrial base, usually calling for reports to Congress without proposing specific legislative changes.[6]

#### *Artificial Intelligence*

The House armed services committee observed that advancements in AI will have an outsized impact on national security. The committee stated that to ensure technological and military superiority, the DOD must lead in both developing and quickly integrating AI capability into its systems and operational concepts, particularly its major defense acquisition programs, to make them more reliable, networked and effective. The committee requested a briefing by the DOD no later than March 2022. This reflects the quickly growing role of AI in the greater global technology competition.

#### *E-Commerce Portals*

The committee noted that when Congress established a program to procure commercial products through commercial e-commerce portals in the NDAA for fiscal year 2018, it stated that the purpose of the pilot was to enhance competition, enable market research and ensure reasonable pricing. In addition, Congress expressed its expectation that the DOD would participate in the initial rollout phase of the e-commerce portal.

In June 2020, GSA awarded contracts to three e-marketplace platform providers for a proof-of-concept, but according to the House Report, no DOD acquisition offices had volunteered to participate in the program. The House Armed Services Committee stated its expectation that the DOD will collaborate with the GSA to educate its acquisition professionals on the availability, operation and intent of the GSA Commercial Platforms Initiative, Congress is indicating its support and encouragement for GSA and DOD to move forward with the planned e-marketplace platforms, still in the proof-of-concept stage, currently limited to commercial products within the micro-purchase threshold, with the potential for significant future expansion.

#### *Enhanced Post-Award Debriefings*

The House armed services committee stated that more should be done to address findings made in the RAND Corporation report, commissioned by the NDAA for FY 2017, concerning evasive or adversarial debriefings, and the committee noted the legislative changes in the NDAA for FY 2018. The committee emphasized "the demonstrated value of meaningful, in-

person debriefings to avoid unnecessarily costly and time-consuming bid protests." [7]

Therefore, the committee directed the DOD to provide a briefing by Dec. 30 on its efforts to implement enhanced debriefings with disappointed offerors, to conduct training for contracting officers, and on the resulting impact on the number of post-award bid protest filings. The briefing must include an assessment of the costs and benefits of revising DOD policy to require post-award debriefings, on contracts over \$500 million, to be conducted in-person. Contractors would likely support at least the option for such an in-person debriefing which has the potential for a more meaningful exchange of information.

## **Conclusion**

The conference committee will determine which of the House and Senate provisions will be included in the final NDAA bill signed by the president. While conflicts may arise over other parts of the bill, there appears to be little major conflict between the House and Senate Title VIII provisions, likely because both chambers are focused on global economic competition and the current geopolitical environment, which require the DOD to adapt to the evolution of commercial technologies with the best possible speed.

The final bill can be expected to retain congressional focus on DOD capabilities, commercial acquisitions, innovative procurement procedures, emerging technologies and support for supply chain security, small businesses and the defense industrial base, all in collective support of the DOD mission.

---

*Joseph R. Berger is counsel at Thompson Hine LLP.*

*Thomas O. Mason is a partner and leader of the government contracts practice group at the firm.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Each year, acquisition policy and management provisions are located in the NDAA's Title VIII. These are in addition to the many contracting-related provisions concerning specific procurements (Division A, Title I); research, development, testing and evaluation (Title II); operation and maintenance (Title III); cyberspace (Title XV); and space activities, strategic programs and intelligence matters (Title XVI), as well as military construction (Division B) and Department of Energy authorizations (Division C).

[2] S. Rep. No. 117-39, available at [FY22 NDAA Report.pdf \(senate.gov\)](#) and <https://www.congress.gov/117/crpt/srpt39/CRPT-117srpt39.pdf>; S. 2792, available at <https://www.congress.gov/117/bills/s2792/BILLS-117s2792rs.pdf> and <https://www.congress.gov/117/bills/s2792/generated/BILLS-117s2792rs.html>.

[3] SASC Fiscal Year 2022 NDAA Executive Summary at 1, available at [FY22 NDAA Executive Summary.pdf \(senate.gov\)](#).

[4] H.R. 4350, available at <https://www.congress.gov/117/bills/hr4350/BILLS->



117hr4350eh.pdf and <https://www.congress.gov/117/bills/hr4350/generated/BILLS-117hr4350eh.html>.

[5] H.R. Rep. No. 117-118, available at CRPT-117hrpt118.pdf (congress.gov).

[6] See H.R. Rep. No. 117-118 at 192-207.

[7] See *id.* at 197-98.