



March 21, 2023

Ms. Jennifer Johnson
Editor/ Publisher, Defense Acquisition Regulations System
Office of the Under Secretary of Defense for Acquisition and Sustainment
3060 Defense Pentagon
Washington, DC 20301

Re: Notice, Defense Acquisition Regulations System, Department of Defense (DoD); Early Engagement opportunity regarding the implementation of the National Defense Authorization Act for Fiscal Year 2023 (88 Fed. Reg. 2,073-2,074, January 12, 2023)

Dear Ms. Neilson:

The U.S. Chamber of Commerce) welcomes the opportunity posed by the Department of Defense (Department) on January 12, 2023, for early engagement on the implementation of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 as it pertains to acquisition regulation. On behalf of the Chamber's industrial base members participating in contracting and supplier relationships with the Department and across the federal government, we offer the following questions and concerns regarding Section 314, Section 803, Section 814, Section 822, Section 2872, and Section 5949.

I. DATA REQUIREMENTS FOR COMMERCIAL PRODUCTS ON MAJOR DEFENSE ACQUISITION PROGRAMS | Sec. 803(b)

Sec. 803(b) of the NDAA for FY23 adds additional requirements for specific definitions that get asserted, which undermines the Department's ability to acquire commercial products and services, thereby disincentivizing commercial tier 1 suppliers and prime contractors from working with the Department.¹ Adding new requirements that would further restrict commercial contracting on major weapons systems before utilizing the new regulatory authority the Department received in December would be counterproductive.² Contracting officers have the authority to require a "relevant" sample of pricing and sales and terms and conditions, but without identifying expectations and best practices, this remains a suggestive and vague request. The industrial base needs clear guidance on what is considered a representative sample size for data requests.

¹ 4 November 2022 Letter to the Committee on Armed Services from Congress regarding section 802 of the House-passed version and sections 822 of the Senate-reported version of the FY23 NDAA.

² Ibid.

II. ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES | Subpart 212.1 (As it relates to Sec. 814 of the NDAA for FY23)

Earlier this year, the Department proposed to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to amend Sec. 814 of the NDAA for FY23³ that authorizes the Department to acquire innovative commercial products and commercial services using general solicitation competitive procedures.⁴ Although it has been long-standing policy for the Department to use commercial items, services, and software, it continues to use outdated and inefficient customized development software to manage business operations when commercial software can provide more efficiency and cost savings. This results in increased security risk, cost, and lower quality than what is available on the competitive commercial market. Congress has long recognized that commercial solutions are generally the best value proposition for government, delivering better performance and quality, faster delivery times, and lower costs. This recognition led Congress to create a statutory preference for commercial items and services in 10 U.S.C §3453 and 41 U.S.C. §3307. The FY 2009 National Defense Authorization Act underscored this preference by stating,

“The Secretary of Defense shall ensure that contracting officials identify and evaluate, at all stages of the acquisition process ... opportunities for the use of commercial computer software and other non-development software.”⁵

To improve efficiency, enhance performance, and reduce long-term costs, the Department should identify opportunities to leverage commercial solutions. Given the highly competitive nature of the commercial software industry, such an approach should provide opportunities to reduce operating costs and gain efficiency in multiple business areas key to Department operations.

III. PROCEDURES APPLICABLE TO PURCHASES BELOW MICRO-PURCHASE THRESHOLD | Sec. 1902(a)(1) of title 41 (As it relates to Sec. 822 of the NDAA for FY23)

The micro-purchase threshold (MPT) of \$10,000, outlined in section 1902(a)(1) of title 41, United States Code, was last updated in Section 806 of the NDAA FY 2018.⁶ The MPT currently in effect does not give procurement officers sufficient flexibility for simple, low risk purchases vital to the Department’s operations. As is often the case, requirements for military force elements needed in crisis or conflict exceed the current MPT. The requirement would then be purchased via contract. Contracting timelines can be lengthy, and requirements may change as the situation unfolds in contingency or emergent operations. Also, this procurement method requires action by four separate individuals at the time of the purchase, further slowing the timeliness of contract awards.⁷ Additional

³ Pub. L. 117-263.

⁴ Docket DARS-2023-0002.

⁵ Pub. L. 110-417, §803.

⁶ Pub. L. 111-350, §3.

⁷ Defense Pricing and Contracting. *Defense Contingency Contracting Handbook*. E. 5. P138 (2017). Arlington, Virginia.

pressure on the economy as a result of the COVID-19 pandemic and heightened inflation— 7% in 2021 and 6.5% in 2022⁸— minimizes the purchasing power of the current threshold. This proposal builds upon the modification of contracts to provide extraordinary relief due to inflation impacts in Sec. 822 of the NDAA for FY23 to address the impact of inflation on federal contractors.

IV. PROPOSED RULE, FEDERAL ACQUISITION REGULATION: DISCLOSURE OF GREENHOUSE GAS EMISSIONS AND CLIMATE-RELATED FINANCIAL RISK | FAR Case 2021-015; 87 Fed. Reg. 68312-68334 (As it relates to Sec. 314 and Sec. 2872 of the NDAA for FY23)

In late 2022, the Federal Acquisition Regulatory (FAR) Council issued a proposed rule that would affect more than 6,000 federal contractors. The rule would require that all contractors report their estimated greenhouse gas (GHG) emissions and would require some to make disclosures concerning climate-related financial risk, as well as set science-based targets to reduce their GHG emissions. The NDAA for FY23 references a number of climate-related initiatives, including efforts to gauge the Department’s climate resiliency in Sec. 314, resilience pilot projects in Sec. 2872, and other country-specific climate collaborative efforts. However, the statute does not contemplate the level of funding and resources needed to absorb the increase in contractor costs required just for the reporting aspects of the proposed rule, let alone to redesign products, systems, and services that would be needed to meet the GHG reduction targets.

Companies are increasingly reporting more information publicly about their efforts to reduce GHG emissions. Many have also made forward-looking statements and commitments to reduce their emissions over time. While industry is making significant progress, regulatory decisions must always be informed by a careful analysis of the available alternatives, outcomes, and cost-benefit trade-offs to ensure that optimal policies are implemented. We are concerned that the proposed rule is an inappropriate and inefficient means of mitigating the potential effects of global climate change for several reasons, including

- Such regulatory decisions must be made within the bounds of agencies’ legal authorities. While the FAR Council (Council) can promulgate specific, output-related standards to help ensure that the government acquires the goods and services it needs at appropriate prices, the Council lacks the authority to use government contracts as a vehicle for furthering climate policies.
- The proposed rule would impose immense costs on government contractors of all sizes, and those costs would be passed on to the government and ultimately to taxpayers, undermining the goal of an economic and efficient system of contracting that underpins federal acquisition statutes.

⁸ Current US inflation rates: 2000-2023: US inflation calculator. US Inflation Calculator |. (2023, February 14). Retrieved March 2, 2023, from <https://www.usinflationcalculator.com/inflation/current-inflation-rates>

- The government’s acquisition costs would rise because of the proposed rule’s requirements, and some contractors and companies in the supply chain would likely drop out of the market entirely, weakening the competitive forces that keep prices down. A disproportionate burden would also be imposed on small businesses, both directly as federal contractors and indirectly as suppliers of major contractors, likely reducing their participation in the federal contracting marketplace.
- The proposal also raises significant issues under the U.S. Constitution as it would compel contractors to speak on matters of significant public debate and force contractors to associate with, and likely follow, the speech guidelines of certain private organizations. This would violate contractors’ First Amendment rights.
- The proposal would also transgress long-standing legal limitations on delegating legislative and rulemaking authority to private entities as much of the standard setting and verification of GHG emissions disclosures is delegated to private organizations.

Given the concerns expressed in this letter and others raised in more detail in the U.S. Chamber of Commerce’s public comments,⁹ the Council should abandon this flawed rule entirely. However, if the Council elects to re-propose the rule, the Council must revise its assessment of the rule’s justification and of its costs and benefits to focus on the benefits that the rule would have for the economy and efficiency of the procurement process. The Council must weigh those benefits against the rule’s costs. Any rule of this kind must be predicated on the benefits that Congress authorized the Council to pursue, not objectives beyond the Council’s authority. This would require a thorough reassessment of the proposed rule’s justification, resulting in a very different approach that would need to be presented in a new round of notice and comment.

V. PROHIBITION ON CERTAIN SEMICONDUCTOR PRODUCTS AND SERVICES | Sec. 5949

Regarding Sec. 5949 of the NDAA, Chamber members requested clarification on subsections (a), (j), (a)(2), (b)(1), (c), (e), (f), and (g). The specific questions raised are detailed below.

Prohibition on Use or Procurement | Sec. 5949(a); Sec. 5949(j)

This provision prohibits federal agencies from purchasing (1) electronic parts, products, or services that include covered semiconductor products or services; and, for a “critical system,” (2) electronic parts or products that “use” electronic parts or products that include covered semiconductor products or services.

Regarding the prohibition on use or procurement, the Chamber asks the following:

⁹ U.S. Chamber of Commerce comments, <https://www.regulations.gov/comment/FAR-2021-0015-0254>. Full comment available in appendix.

- How does the federal government, including the Department, intend to define “electronic parts, products, or services”? Would it be correct to interpret this as electronic parts, electronic products, or electronic services?
- How does the government intend to define “covered semiconductor products or services”? Will the government provide a list of any subsidiary or affiliate of the covered entities?
- Will Sec. 5949 prohibitions apply to commercial items?
- Will an acquisition threshold apply when determining when the prohibition applies to a procurement; by extension, will there be an acquisition threshold for subcontracts?
- In what cases does the government envision that one part or product will “use” another part or product? Will “include” and “use” be defined?
- What considerations will be given to whether or how the definition of a “critical system” may be expanded by the FAR Council?

Rule of Construction | Sec. 5949(a)(2)

This provision says that nothing in Sec. 5949(a)(1) shall require any covered semiconductor products or services included in equipment, systems, or services purchased before the effective date of this provision be removed or replaced; prohibit or limit the utilization of covered semiconductor products or services throughout the life cycles of existing equipment; and compel recipients of federal contracts, grants, loans, or loan guarantees to replace covered semiconductor products or services. This provision is meant to grandfather electronic equipment, etc., that includes covered semiconductor products or services before the prohibition goes into effect.

Regarding this process, the Chamber asks the following:

- How does the government plan to communicate its expectations for documentation so that contractors can demonstrate that covered semiconductor products or services were resident in electronic equipment before a certain date?

Waiver Authority | Sec. 5949(b)(1)

The secretary of Defense, among other federal officials, is granted the authority to provide a waiver on a date later than the effective date of the prohibitions (December 23, 2027) if it is in the critical national security interests of the U.S.

With regard to this authority, the Chamber presents the following questions:

- How does the government plan to approach the granting of waivers?
- How does the government plan to define U.S. “critical national security interests”?
- What guidance will be issued relating to waivers, and when will such guidance be released?
- Will waivers be delegable to officials lower than the secretary of Defense?
- Will waivers apply to classes of products rather than to particular products?

Effective Dates and Regulations | Sec. 5949(c)

No later than three years after the date of enactment of the NDAA for FY23 (December 23, 2025), the FAR Council shall prescribe regulations implementing the prohibitions under subsection (a), including a requirement for prime contractors to incorporate the substance of the prohibitions into contracts for the supply of electronic parts or products.

The Chamber seeks additional clarification on the following:

- Will the FAR Council seek early public comment opportunities, such as public meetings and/or the issuance of an advanced notice of proposed rulemaking before issuing any rules?
- Will the FAR Council issue a proposed rule to allow the public to comment on any potential regulations—if so, when will such a rule be released?
- Given the complexity of the electronics supply chain and potential challenges implementing this regulation on the prescribed timeline, how does the FAR Council plan to (i) identify all the potential sources of electronic parts or products subject to the prohibitions, (ii) ensure that all prime contractors are aware of and comply with the regulations, and (iii) establish sufficient interagency coordination to develop an effective enforcement strategy?
- Given the complexity of the electronics supply chain and potential challenges implementing this regulation on the prescribed timeline, how does the FAR Council plan to identify all the potential sources of electronic parts or products subject to the prohibitions, ensure that all prime contractors are aware of and comply with the regulations, and establish sufficient interagency coordination to develop an effective enforcement strategy?

Analysis, Assessment, and Strategy | Sec. 5949(e)

The Secretary of Commerce, in coordination with the Secretaries of Defense, Homeland Security, Energy, and the director of National Intelligence, is required to analyze and assess aspects of the semiconductor supply chain.

With regard to this requirement, the Chamber poses the following questions:

- What opportunities will exist for industry to offer subject matter expertise and input on this study? How and when will such engagement occur?
- How broadly does the government plan to analyze and assess supply chain risks related to nonfederal systems?

Government-Wide Traceability and Diversification Initiative | Sec. 5949(f)

No later than two years after the date of enactment of the NDAA for FY23, the secretary of commerce, in coordination with the secretaries of Homeland Security and Defense and the directors of National Intelligence, OMB, and the Office of Science and Technology Policy—and in consultation with industry—is directed to establish a microelectronics traceability and diversification initiative. This initiative is expected to coordinate the analysis and response to the federal government with respect to microelectronics supply chain vulnerabilities, to which the Chamber asks the following:

- Has the government conducted or participated in a traceability and diversification initiative comparable to the one that is required for microelectronics?
- How will the assessment framework inform federal decisions on sourcing microelectronics be implemented? How will consistency in approaches across agencies be ensured?
- How does the government interpret “in consultation with industry”? Will the government establish a stakeholder engagement plan to ensure that industry perspectives are incorporated in the initiative while it is developed? Will the government develop a common assessment framework across agencies to help ensure the same criteria inform federal decisions on sourcing microelectronics?
- How will the initiative account for the fact that the government may not be able to obtain information from suppliers that are not in a contract with a contractor/entity, particularly sub-tier suppliers?

- How does the government plan to leverage existing and future technologies (e.g., fostering research and development) and industry-led standards and commercial best practices to enable traceability?

Federal Acquisition Security Council | Sec. 5949(g)

No later than two years after enactment of the NDAA for FY23, the FAR Council is directed to coordinate with the Secretaries of Commerce, Defense, Energy, Homeland Security, and the Director of National Intelligence—and after engaging with the private sector—to issue recommendations to mitigate supply chain risks relevant to the federal government’s acquisition of semiconductor products or services and any necessary regulations, among other considerations.

The Chamber asks the following:

- How will engagement with industry occur, and will industry have an opportunity to comment on recommendations before they are finalized?

Thank you for your time and consideration. We look forward to continuing our partnership with your department and remain available for further discussion. If you have any questions or need more information, do not hesitate to contact Keith Webster (KWebster@USChamber.com, 571-215-1961) or Matthew Eggers (meggers@uschamber.com, 202-463-5619).

Sincerely,



Keith Webster
President
Defense and Aerospace Council
U.S. Chamber of Commerce



Matthew Eggers
Vice President
Cybersecurity Policy
U.S. Chamber of Commerce

**U.S. Chamber of Commerce's comments on
FAR Case 2021-015; 87 Fed. Reg. 68312-68334**

Congress of the United States
Washington, DC 20515

November 4, 2022

The Honorable Jack Reed
Chairman
Committee on Armed Services
U.S. Senate
Washington, DC 20515

The Honorable Adam Smith
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable James Inhofe
Ranking Member
Committee on Armed Services
U.S. Senate
Washington, DC 20515

The Honorable Mike Rogers
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Reed, Chairman Smith, Ranking Member Inhofe, and Ranking Member Rogers:

We write to express our serious concerns with section 802 in the House-passed version of the Fiscal Year 2023 National Defense Authorization Act (FY23 NDAA) and section 822 in the Senate-reported version of the FY23 NDAA. As written, these provisions would significantly erode our Defense Industrial Base (DIB) and dissuade new commercial companies from working with the U.S. Department of Defense (DOD).

At a time when Congress, DOD, and industry have all been calling for greater utilization of commercial products acquisition to harness private sector research and development (R&D), promote innovation, accelerate procurement timelines, address obsolescence in our defense systems, and broaden and diversify our industrial base, these provisions would do just the opposite. They would disincentivize commercial tier 1 suppliers and prime contractors from working with DOD. Specifically, the language would undermine the Department's ability to acquire commercial products and services under Federal Acquisition Regulation (FAR) Part 12.

Congress has already taken action to address gaps in the Department's ability to receive all necessary information to ensure fair pricing under FAR Part 12 with the impending publication of the final regulations for DFARS Case 2020-D008, as directed by the FY20 NDAA. It would be premature to add onerous new requirements that will further restrict commercial contracting on major weapons systems prior to reviewing the results of forthcoming studies and leveraging the new regulatory authority that Congress provided to the Department.

The Defense Industrial Base is the bedrock upon which American military strength is built, drawing from the economic and industrial power of the greater U.S. economy. In recent years, however, the DIB has become increasingly detached from the greater U.S. economic base, as private industry increasingly opts not to work with the federal government in general, and U.S.

Department of Defense in particular, due to added regulatory burdens and related shortcomings by the federal government.

According to the Government Accountability Office (GAO), from FY11 to FY20, the number of small businesses receiving DOD contract awards decreased by 43 percent even as obligations to small businesses increased by approximately 15 percent. This trend extends across the entire business sector: GAO also found that the number of larger businesses receiving contract awards fell by 7.3 percent per year on average from 2011-2020.¹ This data indicates a shrinking federal industrial base as larger and fewer contracts are being awarded to fewer companies.

Private industry's drift away from the Department of Defense coincides with the federal government's increasing reliance upon commercial technologies. In 2022, DOD's list of 14 technology areas critical to national security identified only three that are defense-specific (hypersonics, directed energy, and integrated sensing and cyber). The other 11 technologies are either the result of "existing vibrant commercial sector activity" or emerging technologies being developed in the private sector or in collaboration with the DOD.

In some cases, the U.S. is behind the technology curve and must ramp up innovation and R&D to catch up to current and emerging adversaries. Commercial buying procedures are critical to DOD maintaining its technological and operational edge. As the Congressionally mandated 809 Panel on acquisition reform stated:

"Commercial buying represents an important component of the DoD acquisition process. For more than 2 decades, Congress and DoD have sought to encourage use of commercial buying by easing the statutory, regulatory, and procedural framework for buying commercial goods and services, as well as broadening the scope of goods and services that are eligible for revised commercial buying policies."²

Yet, recent statutes, regulations, and proposals are making commercial buying more bureaucratic and cumbersome. Section 802 in the House-passed version of the FY23 NDAA and section 822 in the Senate-reported version of the FY23 NDAA will further dissuade commercial companies from working with DOD.

It is incumbent upon us to reverse these trends and strengthen, expand, and revitalize the Defense Industrial Base. DOD and Congress should make it easier, not harder, for companies to work with the Department. As Secretary of Defense Lloyd Austin said at the December 2021 Reagan National Defense Forum, "for far too long, it's been far too hard for innovators and entrepreneurs to work with the Department."³

¹ Government Accountability Office, "Small Business Contracting: Actions Needed to Implement and Monitor DOD's Small Business Strategy," GAO-22-104621, October 2021, <https://www.gao.gov/assets/gao-22-104621.pdf>.

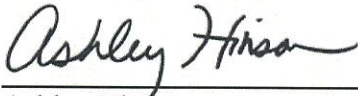
² Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Volume 1 or 3, January 2018, https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume1/Recommendation_01.pdf.

³ The Honorable Secretary of Defense Lloyd J. Austin III, Speech at the Reagan National Defense Forum, December 4, 2021, <https://www.defense.gov/News/Speeches/Speech/Article/2861931/remarks-by-secretary-of-defense-lloyd-j-austin-iii-at-the-reagan-national-defen/>.

To preserve the Department's ability to harness private-sector innovation, we encourage the committee not to include, as currently written, section 802 in the House-passed version of the FY23 NDAA or section 822 in the Senate-reported version of the FY23 NDAA as it negotiates the final Conference version of the FY23 NDAA.

Our warfighters are relying on us to give them every possible tool and resource available to win the mission, defend our freedoms, and come home. We have the opportunity to ensure they have those resources.

Sincerely,



Ashley Hinson
Member of Congress



Steve Womack
Member of Congress



Michael R. Turner
Member of Congress



Guy Reschenthaler
Member of Congress



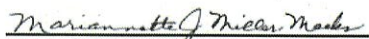
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