Government Contracts Legislative and Regulatory Update - November

November 23, 2020

Our November edition of “Government Contracts Legislative and Regulatory Update” offers a summary of the relevant changes that took place during the month of October.

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Legislative Update

National Defense Authorization Act

House Armed Services Committee ("HASC") and Senate Armed Services Committee ("SASC") staff have been conferencing the National Defense Authorization Act ("NDAA"), Congress' annual defense polity bill, since mid-August. The Big Four--aka the respective Chairmen and Ranking Members of HASC and SASC--met in late October for the first time to begin to negotiate the major sticking points between the competing versions of the bill. On November 18, 2020, the NDAA Conference Committee convened formally for the first time.

The House version of the bill (H.R. 6395) contains many significant provisions affecting government contractors. Some of these provisions include:

- Modification to the definition of "nontraditional defense contractor" to include a corporation all of the stock of which is owned by an employee stock ownership plan (Sec. 802);
- Revising statutory authority concerning "Approval or Disapproval of Business Systems" that would expand the scope of contractor business systems' review and disapproval to include the review for, identification of, and disapproval of a business system where a "material weakness" is found to exist. Currently, the statutory authority providing for such review and approval of contractor business systems (Section 893 of the 2011 NDAA and 10 U.S.C. § 2302) only extends to the review for, identification of, and disapproval of the system where a "significant deficiency" is found to exist.
- "Material weakness" is defined as "a deficiency or combination of deficiencies in the internal control of a contractor business system used to comply with contracting requirements of the Department of Defense, or other shortcomings in such system, such that there is a reasonable possibility that a material noncompliance with contracting requirements will not be prevented, or detected and corrected, on a timely basis." (Sec. 804);
- Alternative space acquisition system for the Space Force "that is specifically tailored for space systems and programs in order to achieve faster acquisition and more rapid fielding of critical systems (including by using new commercial capabilities and services), while maintaining accountability for effective programs that are delivered on time and on budget." (Sec. 807);
- Additional lobbying reporting requirements concerning certain Department of Defense officials (Sec. 820B);
- Application of commercial product determinations to components and support devices (Sec. 820C);
- Domestic preference and sourcing requirements, including requirements related to certain ship components (Sec. 823), sourcing of rare earth metals (Sec. 824), Major Defense Acquisition programs (Sec. 825), printed circuit boards (Sec. 826), and unmanned aircraft systems (Sec. 8320B);
- Small business program modifications, including verification of certain veteran-owned businesses (Sec. 831) and extension of the 8(a) business development programs (Sec. 835).

The Senate version of the bill (S.B. 4049) also contains many significant provisions affecting government contractors,

including.

- Domestic preference and sourcing requirements pertaining to printed circuit boards (Sec. 808) and star trackers in national security satellites (Sec. 813);
- Permanent authority to acquire innovative commercial products and services using general solicitation competitive procedures, the DoD program commonly known as Commercial Solutions Openings (authorized by Section 879 of the 2017 NDAA), to acquire innovative commercial items, technologies, or services (Sec. 841);
- Revising statutory authority concerning “Approval or Disapproval of Business Systems” that would expand the scope of contractor business systems’ review and disapproval to include the review for, identification of, and disapproval of a business system where a “material weakness” is found to exist. Currently, the statutory authority providing for such review and approval of contractor business systems (Section 893 of the 2011 NDAA and 10 U.S.C. § 2302) only extends to the review for, identification of, and disapproval of the system where a “significant deficiency” is found to exist.
- “Material weakness” is defined as “a deficiency, or combination of deficiencies, in internal control over risks related to Government contract compliance or other shortcomings in the system, such that there is a reasonable possibility that a material noncompliance will not be prevented, or detected and corrected, on a timely basis. A reasonable possibility exists when the likelihood of an event occurring is either reasonably possible, meaning the chance of the future event occurring is more than remote but less than likely, or is probable” (Sec. 845);
- Safeguarding defense-sensitive United States intellectual property, technology, and other data and information from acquisition by the Government of the People's Republic of China. This includes the requirement that the Secretary of Defense to (i) establish, enforce, and track actions being taken to protect defense-sensitive information, (ii) establish and maintain a list of critical national security technology; and (iii) provide for mechanisms to restrict employees or former employees of the defense industrial base that contribute to the technology referenced above from working directly for companies wholly owned by, or under the direction of, the Government of the Peoples Republic of China. (Sec. 891).

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Foreign Agents Registration & Lobbying Disclosures

On October 22, 2020, Senator Tom Cotton (R-AR) and Representative Mike Gallagher (R-WI) introduced legislation in the Senate and House, respectively, that would amend the Foreign Agents Registration Act (“FARA”) and the Lobbying Disclosure Act of 1995 (“LDA”) to target advocacy before the US Government on behalf of Chinese companies. The Chinese Communist Party Influence Transparency Act would repeal certain exemptions from registration under FARA and LDA for persons providing certain representation, including lobbying representation, for certain business organized under the laws or having their principal place of business in the People’s Republic of China.

Specifically, the bill would make the exemption for persons engaging or agreeing to engage in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal inapplicable to a “covered Chinese business organization” as defined in the bill. The bill defines a “covered Chinese business organization” as (1) an entity (e.g., partnership, association, corporation, organization, as described under Section 1(b)(3) under the FARA) which is organized under the laws of, or has its principal place of business in, the People’s Republic of China (including any subsidiary or affiliate of such an entity), except that such term does not include a subsidiary or affiliate of an entity which is organized under the laws of, and has its principal place of business in, a country other than the People’s Republic of China; or (2) an entity designated by the Attorney General as subject to the extrajudicial

direction of the Chinese Communist Party.

Although the legislation is unlikely to pass Congress this year, because of widespread bipartisan support in Washington for a strong US posture toward China, elements of the legislation, if not the bill in its entirety, could receive more serious consideration during the next Congress, which is set to begin on January 3, 2021.

The text of the proposed bill is located here.

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Regulatory Update

FAR Council Proposes Rule Separating Definition of “Commercial Item" into Definitions of “Commercial Product” and “Commercial Service”

On October 15, 2020, DoD, GSA, and NASA (collectively the “FAR Council”) issued a proposed rule amending the Federal Acquisition Regulation (“FAR”) to implement Section 836 of the John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year (“FY”) 2019, Pub. L. 115-232, which changes the definition of a “commercial item” under FAR part 2, *Definitions of Words and Terms*. The current FAR definition of “commercial item” in FAR part 2 was established under FAR Case 94-790, *Acquisition of Commercial Items*, published at 60 Fed. Reg. 48, 231 (Sept. 18, 1995), which implemented the revised statutory authorities in Title VIII of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355.

The change under FAR Case 2018-018 separates the definition of “commercial item” at 41 U.S.C. § 103 into the definitions of “commercial product” and “commercial service,” at 41 U.S.C. §§ 103 and 103a. The proposed rule separates, the definition of “commercial item” into the definitions of “commercial product” and “commercial service” to better “reflect the significant roles services and commercial services play today in the DoD procurement budget” based on the recommendation of an independent panel created by Section 809 of the NDAA for FY 2016, Pub. L. 114-92, (the “Section 809 Panel”). *See* Recommendations on pages 29 to 30 (available here) of Volume 1 of 3 dated January 2018 of the Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations. In its January 2018 Report, the Section 809 Panel states that the “acquisition workforce has faced issues with inconsistent interpretations of policy, confusion over how to identify eligible commercial products and services.” *Id*. In addition, the Report states that bifurcating the definition of “commercial item” into “commercial product” and “commercial service” is a way to provide clarity for the acquisition workforce, which may result in greater engagement with the commercial marketplace.

The proposed rule underscores that the separation of the term “commercial item” into “commercial product” and “commercial service” does not expand or shrink the universe of products or services that the Government may procure using FAR part 12, *Acquisition of Commercial Items*, nor does it change the terms and conditions to which vendors must comply.

Comments on the proposed rule are due by December 14, 2020. (85 Fed. Reg. 65,610 , Oct. 15, 2020).

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FAR Council Proposes Rule for Application of the Micro-purchase Threshold to Task and Delivery Orders

On October 22, 2020, the FAR Council issued a proposed rule amending the FAR to implement Section 826 of the NDAA for FY 2020, Pub. L. 116-92, which raised the threshold for fair opportunity on certain task and delivery orders

from $2,500 to the “micro-purchase threshold.” The proposed rule provides that the fair opportunity provisions relevant to orders under multiple award contracts apply to orders exceeding the threshold unless an exception applies. *See* FAR 16.505(b)(1). Importantly, proposed rule essentially removes the specifically-stated monetary threshold and instead applies a word-based threshold, i.e. the “micro-purchase threshold.” Such a change is intended to ensure continued alignment with the periodic changes to the threshold that regularly occur over time, e.g., the changes that occur as a result of the inflation adjustments described at FAR 1.109.

Comments on the proposed rule are due by December 21, 2020. (85 Fed. Reg. 67,327 , Oct. 22, 2020).

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FAR Council Publish Final Rule Regarding Prohibition of Covered Funds to Higher Education Institutions that Prohibit ROTC Unit or Military Recruiting on Campuses

On October 23, 2020, the FAR Council published a final rule amending the FAR to implement 10 U.S.C. § 983. 10 U.S.C. § 983 prohibits the award of certain federal contracts with covered funds to institutions of higher education that prohibit Reserve Officer Training Corps (“ROTC”) units or military recruiting on campus. Section 983 also prohibits covered funds from being provided to covered institutes that prohibit or prevent the Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses for military recruiting if the recruiter is not given access that is at least equal in quality and scope to the access to campuses provided to any other employer or access to certain student information.

In accordance with 10 U.S.C. § 983, the final rule adds FAR 9.110 through 9.110-5 to FAR Part 9. FAR 9.110-5 (Contract clause) contains the contractual language to be inserted into solicitations and contracts with institutions of higher education, when using funds from a covered agency, as defined in FAR 9.110-1.

The final rule is effective November 23, 2020. (85 Fed. Reg. 67,619, Oct. 23, 2020).

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FAR Council Issues Final Rule Regarding Notification of US and NATO Contractors Exemptions from Afghanistan Taxes

On October 23, 2020, the FAR Council issued a final rule amending the FAR by adding two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges for certain contracts performed in Afghanistan. This rule provides notice to contractors about the exemptions from liability for Afghanistan taxes, customs, duties, fees or similar charges under the Security and Defense Cooperation Agreement (the “Agreement”) and Status of Forces Agreement (“SOFA”). The Agreement exempts United States Forces, contractors, and subcontractors from paying any tax or similar charges assessed by the Government of Afghanistan within Afghanistan. Similarly, the SOFA exempts NATO Forces, contractors, and subcontractors from paying such taxes or similar charges.

This rules creates two new clauses: (1) FAR 52.229-13, Taxes—Foreign Contracts in Afghanistan, and (2) FAR 52.229-14, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement). The purpose of these clauses is to notify contractors of the exemptions that apply to certain contracts as discussed above.

The final rule is effective November 23, 2020. (85 Fed. Reg. 67,623 , Oct. 23, 2020).

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FAR Council Publishes Final Rule Requiring Agencies to Document Results of

Market Research in a Manner Appropriate to the Size and Complexity of the Acquisition

On October 23, 2020, the FAR Council issued a final rule amending the FAR to implement Section 818 of the NDAA for FY 2020. Section 818 amends 10 U.S.C. § 2377(c) and 41 U.S.C. § 3307(d) to require the head of the agency to document the results of market research in a manner appropriate to the size and complexity of the acquisition.

FAR 10.002 paragraph (e) currently states that agencies *should* document the results of market research in a manner appropriate to the size and complexity of the acquisition. This final rule will make that mandatory. Similar changes were made to FAR 12.101 as applicable to acquisitions of commercial items.

The final rule is effective November 23, 2020. (85 Fed. Reg. 67,623 , Oct. 23, 2020).

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FAR Council Issues Final Rule Regarding Agencies Internal Procedures on Locating and Disposing of Excess Personal Property

On October 23, 2020, the FAR Council issued a final rule amending the FAR to update internal Government procedures on how agencies can locate excess personal property and to remove obsolete requirements. Agencies are required to satisfy their requirements for supplies from the excess personal property of other agencies, when practicable, before initiating a contract action. This rule updates FAR subpart 8.1 which notifies the acquisition workforce of the Government's policies and where to locate information on the Government's use of excess personal property.

Amended FAR subpart 8.1 merely serves as a notice to contractors of the changes to internal agency procedures with regards to disposing of and locating excess personal property and does not impose any new requirements on government contractors.

The final rule is effective November 23, 2020. (85 Fed. Reg. 67,617 , Oct. 23, 2020).

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DoD Announces Virtual Public Meeting for DFARS Amendment Regarding Acquisition of Technical Data, Computer Software, and Associated License Rights

On October 28, 2020, the Department of Defense ("DoD") announced that it will host a virtual public meeting to obtain views of experts and interested parties, from both the Government and private sector, regarding changes to the Defense Federal Acquisition Regulation Supplement ("DFARS") for the acquisition of technical data, computer software, and associated license rights. The virtual public meeting will take place on Thursday, November 19, 2020, from 10 a.m. to 1 p.m. Eastern time.

The changes to the DFARS are intended to implement the requirements of Section 865 of the NDAA for FY 2019, Pub. L. 115-232, which repeals years of congressional adjustments to the statutory presumption of development at private expense for commercial items at paragraph (f) of 10 U.S.C. § 2321, *Validation of proprietary data restrictions*. This virtual meeting follows a proposed rule issued by DoD on August 31, 2020 under DFARS Case 2018-D069 that previously sought comment on the implementation of these statutory requirements. (85 Fed. Reg. 53,755 , Aug. 31, 2020).

Individuals wishing to participate in the virtual meeting must register before November 12, 2020 by sending the following information via email to *osd.dfars@mail.mil*, with subject "Public Meeting, DFARS Case 2018-D069":

- Full name,
- Valid email address, which will be used for admittance to the meeting,
- Valid telephone number, which will serve as a secondary connection method,
- Company or organization name, and
- Whether the individual desires to make a presentation.

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Labor Department Revises Definition of Independent Contractor Status Under the Fair Labor Standards Act

On September 25, 2020, the U.S. Department of Labor (the "DOL") issued a proposed rule to revise its interpretation of independent contractor status under the Fair Labor Standards Act ("FLSA" or "Act") in order to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy. The proposed rule is expected to be an Executive Order 13771 deregulatory action.

As relevant to the proposed rule, the FLSA currently requires covered employers to pay nonexempt employees at least the federal minimum wage for every hour worked, pay overtime for every hour worked over 40 in a workweek, and keep certain records regarding their employees. A worker who performs services as an independent contractor, however, is not considered a covered employee under the FLSA, but the Act does not define the term "independent contractor." The proposed rule seeks to clarify the uncertainty among the regulated community that has resulted from the lack of a clear definition.

Historically, courts and the DOL have evaluated the extent of the worker's economic dependence on the employer and have developed a multifactor test in determining whether an individual is an employee or an independent contractor for purposes of FLSA. The focus of the economic dependence test has primarily focused on whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).
Significantly, the proposed rule introduces a new part to DOL's regulations that implement the FLSA's requirements, which are located in Title 29 of the Code of Federal Regulations ("CFR"). This part would provide how the DOL will determine whether a worker is an "employee" or an independent contractor under the FLSA. Specifically, the DOL proposes to sharpen the relevant inquiry into five distinct factors, instead of the five or more overlapping factors used previously. In addition, the proposed rule will emphasize that two of the five factors—the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss—are more probative of the question of economic dependence or lack thereof, and will be afforded greater weight than any of the other factors.

According to the DOL, the proposed rule would constitutes its sole and authoritative interpretation of independent contractor status under the FLSA. Further, the rule would also replace DOL's previous interpretations of independent contractor status under the Act in certain other contexts, including independent contractor status for tenants and sharecroppers (29 CFR § 780.330) and for certain forestry and logging workers (29 CFR 788.16(a)).

Comments on the proposed rule were due October 26, 2020 (85 Fed. Reg. 60,600 , Sept. 25, 2020).

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SBA Issues Final Rule Regarding Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments

On October 16, 2020 the Small Business Administration ("SBA") issued a final rule merging the 8(a) Business

Development (“BD”) Mentor-Protégé Program and the All Small Mentor-Protégé Program (“ASMP”) into a single program. SBA also made several changes to other small business programs and functions, including the revision joint venture (“JV”) rules, certifications under multiple award contracts (“MAC”), the impact of mergers and acquisitions on pending proposals, and certain requirements for Alaska Native Corporations (“ANC”), Indian Tribes and Native Hawaiian Organizations (“NHO”). For JVs, the rule eliminated requirements that 8(a) participants seeking award of 8(a) contracts as a JVs submit the joint venture agreement to SBA for review and approval prior to contract award. Additionally, the final rule requires a business concern to recertify its size and/or socioeconomic status for all set-aside orders under unrestricted MACs unless the contract authorized limited pools of concerns for which size and/or status was required.

The final rule is effective November 16, 2020. (85 Fed. Reg. 66,146 , Oct. 16, 2020).

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Industry Updates

OFCCP Issues Guidance and Seeks Comments on President Trump’s Executive Order on Combating Race and Sex Stereotyping

The Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) issued guidance in the form of Frequently Asked Questions (“FAQs”) on Executive Order (“EO”) 13950, Combating Race and Sex Stereotyping issued on September 22, 2020. The EO is effective immediately, but compliance requirements for federal contractors and subcontractors apply to contracts entered into 60 days after the date the executive order was signed, November 21, 2020. The guidance further provides that any individual or group may file a complaint via a new hotline for reporting race and sex stereotyping and scapegoating at 202-343-2008 or at OFCCPComplaintHotline@dol.gov. Contractors found to be noncompliant are subject to having their contracts, canceled, terminated, or suspended in whole or in part. Noncompliance may also result in a contractor being declared ineligible for further government contracts.

OFCCP’s guidance may be found here: https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950.

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