

Recent Developments in Government Contracts Law



As we approach the one-year anniversary of Donald Trump's inauguration, some clear patterns have emerged regarding the new administration's policy and funding priorities as they relate to government contracts.

Perhaps the single biggest change since January 20, 2017, is the unprecedented reduction in the number of new federal regulations. In fact, under Trump there has been an almost complete elimination of new regulations related to government contracts. This is the result Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, intended.

In terms of actual numbers, the *Federal Register* documents published by the largest contracting agencies since Trump took office add up to one Federal Acquisition Circular (containing a single rule removing the Fair Pay and Safe Workplaces rule issued by the Obama administration); three Department of Defense final rules (making technical amendments and changes to trade agreement thresholds and the list of qualifying countries for foreign acquisitions); two final rules from the National Aeronautics and Space Administration (one related to award terms and the other to remove outdated references); and zero final rules from the Department of Energy and General Services Administration.

How long this will continue is unclear. We do know that various agencies have a significant number of rules in process, some of which are scheduled for publication in the near future. For the FAR, the Civilian Agency Acquisition Council and Defense Acquisition Regulation Council published their semi-annual regulatory agenda on January 12, 2018. The agenda, which lists the rulemaking activities planned for the coming 12 months, specifies one notice of proposed rulemaking, 22 proposed rules and 16 final rules. Additionally, all executive branch agencies are in the process of reviewing existing regulations as required by E.O. 13777, Enforcing the Regulatory Reform Agenda. Once the reviews are completed, the agencies must begin the process of repealing, replacing and amending the identified regulations.

With regard to executive orders, the flurry of activity that marked the first several months of the Trump administration has died down. Although there are no new executive orders related specifically to government contracts, E.O. 13771, issued on January 30, 2017, and E.O. 13777, issued on February 24, 2017, continue to have significant impact on federal contracting initiatives.

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Going forward, we expect the Trump administration to begin a major legislative push for a large infrastructure improvement bill in early 2018. Trump has previously expressed an intent to rely heavily on public-private partnerships for this initiative, and that, combined with the estimated investment of \$550 billion, would very likely have significant implications for the government contracting community.

The following is a summary of the most significant legislative and regulatory developments related to government contracts over the past twelve months.

LEGISLATION

The **National Defense Authorization Act for Fiscal Year 2018** was signed into law on December 12, 2017 (PL 115-91) after receiving bipartisan support in Congress. The NDAA authorizes appropriations for the Department of Defense and defense-related nuclear energy programs of the Department of Energy. In addition to authorizing appropriations, the NDAA establishes defense policies and restrictions and addresses organizational administrative matters related to DoD.

The NDAA calls for \$626 billion for DoD's base budget and another \$66 billion for operations. However, unlike an appropriations bill, the NDAA does not provide budget authority for government activities. Congressional action on FY 2018 defense funding reflects an ongoing debate about the size of the defense budget given strategic environment and budgetary issues. Annual limits on discretionary spending for defense and non-defense federal activities, set by the Budget Control Act of 2011 (PL 112-25), remain in place through FY 2021. If the amount appropriated for either category exceeds the relevant cap, it would trigger near-across-the-board reductions to a level allowed by the cap; i.e., "sequestration."

The NDAA authorizes appropriations to DoD for: (1) procurement, including aircraft, missiles, weapons and tracked combat vehicles, ammunition, shipbuilding and conversion, and space procurement; (2) research, development, test, and evaluation; (3) operation and maintenance; (4) working capital funds; (5) the Joint Urgent Operational Needs Fund; (6) chemical agents and munitions destruction; (7) drug interdiction and counter-drug activities; (8) the Defense Inspector

General; (9) the Defense Health Program; (10) the Armed Forces Retirement Home; (11) overseas contingency operations; and (12) military construction.

Several provisions in the NDAA require amendments to the Defense Federal Acquisition Regulation Supplement:

- Section 801 requires the Secretary of Defense to revise the DFARS to include statements of purpose, including stating that the primary objective of the DFARS is "to acquire quality products that satisfy user needs with measurable improvements to mission capability and operational support, in a timely manner, and at a fair and reasonable price."
- Section 815 calls for a DFARS amendment to limit the use of a unilateral definitization by the contracting officer with respect to any undefinitized contractual action that has a value greater than \$50 million.
- Section 837 requires an amendment to provide for the appropriate use of the "should-cost" review process of a major weapon system in a manner that is transparent, objective, and efficient.
- Section 849 requires a review of the DFARS to assess all regulations that require a specific contract clause for a contract using commercial item acquisition procedures under FAR Part 12, except for regulations required by law or executive order.
- A number of government contract-related bills are also making their way through Congress, including the following:
 - **Federal Acquisition Savings Act of 2017**, H.R. 3071, requires each agency to consider equipment rental in any cost-effectiveness analysis for equipment acquisition. The bill calls for an amendment to the FAR to implement the bill's requirements.
 - **DHS Acquisition Review Board Act of 2017**, S.906, requires the Department of Homeland Security to establish an Acquisition Review Board to strengthen accountability and uniformity within the DHS acquisition review process. The board would review major acquisition programs estimated to require a total expenditure of at least \$300 million over their life cycle costs, and review the use of best practices.
 - **Procurement Fraud Prevention Act**, S. 938, requires notice of cost-free federal procurement

technical assistance in connection with registration of small business concerns in procurement systems.

- **Saving Federal Dollars Through Better Use of Government Purchase and Travel Cards Act of 2017**, S. 1099, provides for the identification and prevention of “improper payments” and the identification of “strategic sourcing” opportunities by reviewing and analyzing the use of federal agency charge cards. The goal is to analyze and modify an agency’s spending patterns to better leverage its purchasing power, reduce costs, and improve overall performance.
- **Ensuring Veteran Enterprise Participation in Strategic Sourcing Act**, H.R. 2781, directs the Secretary of Veterans Affairs to certify the sufficient participation of small business concerns owned and controlled by veterans and small business concerns owned by veterans with service-connected disabilities in contracts under the Federal Strategic Sourcing Initiative.
- **VA Procurement Efficiency and Transparency Act**, H.R. 2006, is intended to improve the procurement practices of the Department of Veterans Affairs. The bill sets forth requirements for recording procurement information on cost or price savings from competition and the use of standardized procurement templates.

REGULATIONS

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, imposed a regulatory cap on agencies for Fiscal Year 2017. The order states that whenever an executive department or agency proposes or issues a new regulation, it must identify at least two existing regulations to be repealed. The total incremental cost of all new regulations, including repealed regulations, cannot be greater than zero, unless otherwise required by law, or consistent with advice provided in writing by the Director of the Office of Management and Budget. Further, any new incremental costs associated with new regulations must, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.

Pursuant to the order’s directive, a number of agencies have issued requests for information from the public on identifying which of the agency’s regulations should be repealed, replaced or modified because they are obsolete, unnecessary, ineffective, or burdensome. These include:

- DFARS Subgroup to the DoD Regulatory Reform Task Force, Review of DFARS Solicitation Provisions and Contract Clauses (82 FR 28041 and 82 FR 35741);
- General Services Administration: Evaluation of Existing Acquisition Regulations (82 FR 24653 and 82 FR 35498);
- Department of State: Reducing Regulation and Public Burden, and Controlling Cost (82 FR 32493);
- Small Business Administration: Reducing Unnecessary Regulatory Burden (82 FR 38617 and 82 FR 47465);
- Evaluation of Existing Federal Management and Federal Property Management Regulations (82 FR 24651 and 82 FR 35498);
- Evaluation of Existing Federal Travel Regulation (82 FR 24652 and 82 FR 35498); and
- Evaluation of Existing Leasing Acquisition Regulations (82 FR 24652 and 82 FR 35500).

Federal Acquisition Circular 2005-96 contains a final rule, Removal of Fair Pay and Safe Workplaces Rule (FAR Case 2017-015), that amended the FAR to rescind the FAR Case 2014-025 final rule issued in FAC 2005-90. In March 2017, pursuant to the Congressional Review Act, Congress passed House Joint Resolution 37 (PL 115-11), which disapproved the FAR Case 2014-025 final rule. Also, Executive Order 13782, Revocation of Federal Contracting Executive Orders, dated March 27, 2017, rescinded prior executive orders authorizing the rule.

Accordingly, the rule removed FAR Subpart 22.20, Fair Pay and Safe Workforces, and these related contract clauses and solicitation provisions: FAR 52.222-57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), FAR 52.222-58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), FAR 52.222-59, Compliance with Labor Laws (Executive Order 13673), FAR 52.222-60, Paycheck Transparency (Executive Order 13673),

and FAR 52.222-61, Arbitration of Contractor Employee Claims (Executive Order 13673).

By statute, the FAR Case 2014-025 rule is treated as if it had never taken effect, and clauses created by the rule are unenforceable, even if they were included in a contract. The new rule directs contracting officers to modify, to the maximum

extent practicable, existing contracts to remove any solicitation provisions and contract clauses related to the FAR Case 2014-025 rule. The FAC 2005-96 final rule went into effect on November 6, 2017, and it applies to solicitations issued and contracts awarded before, on, or after the October 25, 2016, effective date of the rescinded rule.

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