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Top 5 Gov't Contracting Policies Of 2020: Year In Review

By **Daniel Wilson**

Law360 (December 21, 2020, 5:19 PM EST) -- This year has seen several big and contentious policy changes affecting government contractors, including the rollout of the Pentagon's sweeping new cybersecurity rule and restrictions on anti-bias training affecting contractors' workforces.

Here are five areas of policy change that have made an impact on government contracting in 2020.

Contractor Call for Flexibility Under New Cybersecurity Program

The U.S. Department of Defense's sweeping Cybersecurity Maturity Model Certification program, or CMMC, will require all defense contractors and subcontractors to have their cybersecurity programs assessed and rated, with a minimum cybersecurity requirement to be attached to all DOD contracts by 2025.

Developed iteratively over several drafts, with a version 1.0 plan introduced in January and an interim rule in September, CMMC is the most comprehensive cybersecurity requirement yet imposed by any federal agency.

The Pentagon has said it expects that about 300,000 contractors and suppliers will need to be certified over the next few years, with estimated compliance costs in the billions of dollars. Other agencies have also considered using CMMC as a basis for their own cybersecurity requirements.

Contractors and industry groups have continued to weigh in on the interim rule over the past few months, urging the DOD to be more flexible on how contractors can make sure their supply chain complies with the rule and to adopt a more risk-based approach to compliance rather than the interim rule's "one-size-fits-all concept."

Although the infrastructure for third-party assessments is still a work in progress, contractors have been conducting self-assessments, and there has been confusion among some companies regarding exactly what they need to do and in some cases there has been tension between prime contractors and their suppliers as the requirements get "flowed down" the supply chain, said Hogan Lovells senior associate Stacy Hadeka.

"For instance, I've heard that some prime contractors are actually requiring their suppliers to provide screenshots of what their score is and that it is actually in the [DOD Supplier Performance Risk System

database]," she said. "And so that, of course, causes a lot of back and forth and concern between suppliers and prime contractors, because how much information do you want to give away?"

Comments on the interim rule will remain open until Jan. 4.

New Anti-Bias Training Policies Create Compliance Uncertainty

The White House and the U.S. Department of Labor's Office of Federal Contract Compliance Programs, or OFCCP, released several high-profile rules this year affecting contractor workforces, most prominently an executive order on "Combating Race and Sex Stereotyping."

The September order is directed at what President Donald Trump called "anti-American" sensitivity training by contractors on issues such as systemic racism, for example, training that says "men and members of certain races are inherently sexist and racist" or ascribes "privileges" to some individuals because of their race or sex.

OFCCP chief Craig Leen said in October that would include training on "white privilege and white fragility."

Attorneys told Law360 in October that the order, even after the OFCCP issued related guidance, has left many contractors uncertain about what they should be doing to comply.

And it has also faced a significant backlash from groups as diverse as the NAACP and U.S. Chamber of Commerce, which, among several other criticisms, argued it would "lead to non-meritorious investigations."

"If you look at the look at the standard that's in there, what it does is it encourages anyone who disagrees with the content of a training that they receive to contact OFCCP and file a complaint, and to swing the sword above the head of contractor with respect to potential penalties," said Franklin Turner, co-chair of the government contracts practice group at McCarter & English LLP.

The reason the backlash has been widespread is that diversity and inclusion training is extremely common in the corporate world, and those trainings are "meant to reflect the reality of the world and to teach people about certain things, not to sugarcoat the situation," Turner said.

In August, the president issued another executive order aimed at contractor workforces, part of his "Hire American" efforts, requiring agencies to look into their contractors' use of foreign temporary workers and whether they have displaced U.S. nationals and to make related recommendations.

And on Dec. 7, the OFCCP also released a controversial final rule — after the proposed version attracted more than 100,000 comments — that would ease anti-discrimination restrictions on religious companies that contract with the government.

Federal contractors are typically subject to broad nondiscrimination requirements, but the rule would give religious contractors the same carveout that churches, religious schools and other nonsecular employers are given.

That followed a November OFCCP final rule introducing stricter evidentiary thresholds for evaluating workplace bias claims against federal contractors, beyond statistical analysis, which civil rights groups

said could hurt legitimate discrimination claims.

Supply Chains Affected by Ban on Huawei Ties

Section 889 of the 2019 National Defense Authorization Act, often referred to as the Huawei Ban after the telecommunications equipment giant, formalized government efforts to keep technology made by Chinese suppliers seen as having close links to the Chinese government out of the federal supply chain amid concerns about espionage and other security risks.

Part (a)(1)(A) of Section 889 applied to federal government agencies, barring them from buying or using those products, and went into effect in 2019. Part (a)(1)(B) — Part B — applies to federal contractors and went into effect Aug. 13 under an interim rule.

Another rule flagged as having billions of dollars in related compliance costs, Part B is a broad provision, extending the ban down contractors' supply chains and applying to contracts that are typically exempt from similar requirements, such as purchases below $10,000 and commercial off-the-shelf items. It also applies to systems that contractors use for their commercial business, even if that commercial arm never does government work.

The rule also includes a number of terms that contractors and attorneys have criticized as vague, such as the requirement to make a "reasonable inquiry" into whether banned equipment is being used within a supply chain and what the term "use" of a covered piece of equipment or service itself actually means.

"If your accountant uses a Huawei smartphone, are you then in turn using a service that uses covered telecommunications equipment?" said K&L Gates LLP associate Amy Hoang.

The rule's broad applicability means it extends to those who may not typically take such issues into account, such as companies that deliver packages for or rent parking space to federal agencies or occasionally supply commercial services, said Marcia Madsen, chair of the government contracts practice at Mayer Brown LLP.

"It's complex. It's hard for people to figure out sort of beyond the obvious things. Take out your Chinese surveillance cameras — that's easy, right?" she said. "Don't let people plug their Huawei phone into your network, that's easy. But if you get much further than that for commercial companies, it gets really complicated."

Ahead of the interim rule's release, contracting industry groups had urged the government to delay its implementation by at least six months and to focus first on addressing disruptions caused by COVID-19, but to no avail.

In the meantime, ahead of a final rule, contractors will "need to document and memorialize their understanding and interpretation of the poorly defined terms," so they can demonstrate that they have tried to make a reasonable interpretation of those terms, said Alex Major, co-chair of the McCarter & English government contracts practice group.

Mentor-Protegé Programs Get a Face-Lift

In an October rule, the Small Business Administration merged its two mentor-protegé programs, also making a host of quality-of-life changes for joint ventures formed under those arrangements.

The programs were already seen by contractors as a mutually beneficial way for small businesses to leverage the experience of larger businesses, while giving larger businesses the opportunity to compete for small business set-aside contracts through related joint ventures.

But small business contractors had also chafed at issues such as having two separate mentor-protegé programs, one "all small" program open to all small businesses and one specifically for 8(a) businesses owned by the socially or economically disadvantaged.

The 8(a) companies could use the all small program, and both programs had the same aims, meaning the existence of the two programs had caused "needless confusion in the small business community," the SBA said.

The 8(a) program also came with an additional restriction, requiring related joint ventures to be approved by an SBA district office, a process that had no strict time limit and often left companies waiting for months for approval.

"I think most people have welcomed the merging of the two programs because it really just simplifies things for contractors and the government alike," said Aron Beezley, co-leader of the government contracts practice group at Bradley Arant Boult Cummings LLP.

Among other changes, such as allowing small businesses to use the past experience of first-tier subcontractors if needed to help win deals — a boon particularly for new federal contractors — the SBA also eliminated its "three in two" rule, which had limited mentor-protegé joint ventures to three contracts in their two-year lifespan, beyond which the two companies would be considered "associated" and no longer eligible for small businesses deals.

That was mostly a bureaucratic hurdle that affected only the unwary, attorneys had told Law360, as the mentor-protegé partners could simply continue to form new joint ventures.

Defense Budget Bill Expected to Survive Veto Threat

[TKTK -- SECTION MAY NEED UPDATING DEPENDING ON TRUMP'S NEXT MOVE]

The annual defense policy and budget bill, one of the few "must-pass" bills considered by Congress each year, has become somewhat of a catchall for proposed acquisition policy changes, and the $740.5 billion fiscal 2021 version continued that tradition.

The bill was overwhelmingly approved by the House and Senate in mid-December despite Trump's veto threat over a provision to rename military installations honoring Confederates and the absence of a repeal of a liability shield for internet companies for user-generated content. The bill passed Congress with more than the two-thirds majority needed to overridea veto.

In addition to setting out the budget for the Pentagon, which is responsible for more than half of all federal contract spending each year, the final bill has about 50 acquisition-related clauses, including a number aimed at addressing supply chain vulnerabilities highlighted by the COVID-19 pandemic.

The DOD has been directed to assess supply chain risks for "high-priority" items like medical devices, pharmaceuticals and aluminum and to limit sourcing for certain strategic and critical materials such as

microelectronics and printed circuit boards in a move to avoid Chinese entities. The Pentagon will need to brief Congress each quarter on efforts to eliminate vulnerabilities in its technology and industrial bases.

Federal contractors will also be required to reveal their beneficial owners, a bid by lawmakers to expose the true owners behind shell corporations.

A 2019 U.S. Government Accountability Office report had said that shell companies in the defense supply chain had led to illusory competition between multiple companies owned by the same entity and to foreign companies being able to illegally export sensitive military data.

One clause could also help shed more light on how the DOD uses Other Transaction Authority agreements, a streamlined method for rapidly acquiring prototype technology that is not subject to many of the requirements that apply to typical acquisitions and has grown in use in recent years.

Under that provision, the DOD would be required to list the outside consortia it often uses to announce and award OTA opportunities, information that has often been opaque.

"Some of those consortia are big businesses. They have a lot of money flowing through them," said Madsen of Mayer Brown. "Who's responsible for these decisions? How are they getting made? Getting the list will be really interesting ... and are they making decisions that government should be making?"

--Additional reporting by Anne Cullen. Editing by Brian Baresch and Jill Coffey.