



Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Top Government Contracts Policies Of 2023: Midyear Review

By **Daniel Wilson**

Law360 (July 18, 2023, 9:32 PM EDT) -- Government contractors have been faced with a range of new policy requirements in the first half of 2023, headlined by a ban on TikTok that extends to employees' personal devices and proposed changes to guidelines underpinning many federal cybersecurity requirements.

Here, Law360 explores policy changes and pending policy changes from the first half of 2023 that could significantly affect government contractors.

FTC Seeks To Ban Noncompetes

Just a few days into the new year, the Federal Trade Commission issued a notice of proposed rulemaking that would effectively block all employers from imposing noncompete agreements on their staffers, a measure that could have an outsized effect on federal contractors.

The FTC said that noncompetes were often forced onto workers by employers. FTC Chair Lina Khan said the agreements "block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand." According to the commission, about one in five U.S. workers is subject to a noncompete agreement.

Business groups heavily criticized the proposal, claiming it misrepresented how noncompetes were being used and exceeded the FTC's authority, with the U.S. Chamber of Commerce calling the proposal "blatantly unlawful."

Aron Beezley, co-leader of Bradley Arant Boult Cummings LLP's government contracts practice, said, "I think that when this rule becomes final, depending on what it actually says, this could have a big impact on contractors."

There is often only a relatively small pool of workers with the necessary skills for the contract, and, in some cases, the required certifications and clearances, he said. Although rank-and-file workers can usually move freely among employers — and regularly do when a new contractor replaces an incumbent contractor — key personnel are often the deciding factor for agencies when assessing contract bids and are often tightly locked down.

"It's a really small and incestuous community," Beezley said.

Comments on the proposal closed in March. According to the Biden administration's most recent regulatory agenda, the FTC has not set a specific date for when it expects to issue a final rule.

Labor Dept. Rescinds Carveout for Faith-Based Contractors

The U.S. Department of Labor's Office of Federal Contract Compliance Programs in February rescinded a contentious rule finalized in the waning days of the Trump administration that had eased anti-discrimination restrictions for religious federal contractors, effectively allowing those employers to make employment decisions based on their faith.

The rule was a divisive measure that civil rights groups and LGBTQ+ advocates alleged effectively allowed for taxpayer-funded discrimination. Backers of the measure, such as Republican lawmakers, had argued that it had provided reasonable protections for faith-based contractors and would lead to increased competition for federal contracts.

According to the Office of Federal Contract Compliance Programs, the now-rescinded rule had "increased confusion and uncertainty about the religious exemption" from a related executive order that bars contractors from discriminating based on factors such as religion, race and sex, and had "weakened discrimination protections for workers." The agency returned to a previous standard.

The move is yet another example of the regular back and forth as administrations switch from Democratic to Republican and back again, each seeking to implement its own social policy agenda by implementing new contracting policies and rolling back policies from the previous administration.

"It's one of the things that, frankly, that keeps folks like us in jobs ... It swings back and forth at least every four years and usually more often than that," said Jeffrey Chiow, co-chair of Greenberg Traurig LLP's government contracts practice.

A proposed rulemaking modernizing affirmative action requirements for contractors is also expected later this year and is also likely to be contentious and potentially subject to court challenges, particularly in the wake of the recent U.S. Supreme Court decision striking down affirmative action in higher education.

Changes Proposed to Key Cybersecurity Guidance

The National Institute of Standards and Technology in May issued a draft version of a third proposed revision to Special Publication 800-171, its guidelines for how contractors should handle sensitive unclassified federal information. The document underpins most of the federal government's current and pending cybersecurity frameworks.

NIST said the draft proposal was intended to help federal agencies and contractors "more consistently implement cybersecurity requirements" for controlled unclassified information and better reflect current best cybersecurity practices.

The draft would change the 110 security controls included in SP 800-171 by removing or consolidating some older requirements, providing additional explanations and details for certain existing controls, and adding several new requirements.

While the new draft is both more informative and easier to understand than the current version of SP

800-171, the increased specificity in the draft may also make it harder for at least some contractors to comply with the revised requirements, attorneys had told Law360 when the draft was first issued.

But NIST may look to more finely balance the inherent tension between contractors that want more flexibility and those seeking more prescriptive requirements that they can follow to the letter in a future version of the guidance.

The agency said that it expects to issue at least one more updated draft version of the new revision before releasing a final version in early 2024. Updates that lay out the process for assessing security requirements and provide enhanced security requirements for certain systems will follow, it said.

DHS Issues Long-Delayed CUI Rule

The U.S. Department of Homeland Security **issued** its own long-awaited final rule on controlled unclassified information for contractors in June, more than six years after first issuing a proposed rule, leaving contentious aspects of the proposed rule intact despite criticism from contractors.

The intent of the rule is to ensure that federal CUI is adequately protected when being accessed, collected or maintained on behalf of DHS or a component agency. The belated push to finalize the rule stemmed from "an urgent need to protect CUI and respond appropriately when DHS contractors experience incidents with DHS information," the agency said.

Despite industry criticism that the proposed rule had diverged from the broader government approach to CUI, because of provisions such as DHS-specific definitions for certain types of CUI, and very short reporting deadlines for related cybersecurity incidents — eight hours from discovery or one hour if personally identifiable information is involved — the final rule remained largely unchanged from the long-delayed proposal.

DHS said it had coordinated with other agencies when developing its rule, and its agency-specific CUI requirements were both reasonable and necessary to meet its specific needs.

Alongside those DHS-specific requirements, another important aspect of the rule is that not all the agency's requirements are explicitly listed in the rule's text, with related security controls instead listed on a DHS website, according to Holland & Knight LLP partner Eric Crusius.

"They can really change at any time, and contractors need to stay on top of it," Crusius said. "Because their requirements may change without the rule changing."

The rule goes into effect on July 21.

TikTok Banned on Contractor Devices

The Federal Acquisition Regulatory Council issued an interim rule in June blocking federal contractors from using or installing the popular Chinese-owned TikTok video application on their "covered information technology" devices, a move with a seemingly unprecedented reach regarding the devices that are covered.

The rule was mandated by the 2023 Consolidated Appropriations Act and is part of a broader push by lawmakers to bar agencies and contractors from buying and using certain technologies made by Chinese

companies seen to have close links to the Chinese government. The effort is driven by concerns about those technologies being used as a potential vector for espionage or misinformation.

"It's consistent with the flurry of activity around supply chain security that we've seen [that] started around 2018 and has been ramping up over several years," Addie Cliffe, co-chair of Crowell & Moring LLP's government contracts practice, told Law360.

Unlike those other recent policies, however, the TikTok ban extends not only to government- and contractor-owned devices but also to employee-owned devices that are used for work on a contract, a not entirely clear and likely unprecedented provision that could create compliance headaches for contractors.

"TikTok is an incredibly popular app for people to have on their cellphones, so I think there's a real tension here for companies between trying to understand and get in compliance with the restriction and anticipating some pushback if they apply it too broadly, particularly vis-à-vis their employees' own phones," Cliffe said.

Although previous Office of Management and Budget guidance on how the statutory TikTok ban — which also applies to federal agencies — should be implemented had suggested that there would be exceptions for equipment that is used for purposes only incidental to a federal contract, the way the FAR Council rule is written seems to broadly cover information technology devices used to any extent in connection with a federal contract.

Comments on the interim rule are open until Aug. 1, and the FAR Council has not yet released an estimated deadline for a final rule to be released.

--Editing by Jill Coffey and Jay Jackson Jr.