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Top Government Contracting Policies Of 2023: Year In Review

By **Daniel Wilson**

Law360 (December 19, 2023, 7:19 PM EST) -- Federal contractors have seen sweeping policy changes this year, headlined by a raft of new cybersecurity and information security requirements, and the biggest change to prevailing wage requirements for construction contractors in four decades.

Here, Law360 examines several significant policy changes from 2023 that will affect government contractors:

Cybersecurity, Information and Supply Chain Security

Federal agencies and the White House have imposed or proposed a raft of new security-related requirements in 2023 that both individually and collectively are likely to have a big impact on federal contractors' operations.

The U.S. Department of Homeland Security, for example, issued a long-awaited final rule in June, imposing cybersecurity requirements for the protection of controlled unclassified information, or CUI.

That was followed by the Federal Acquisition Regulatory Council proposing a pair of intertwined rules in October, one standardizing contractual cybersecurity requirements for "unclassified federal information systems," the other requiring contractors to share information on cybersecurity threats and report incidents to the government.

Then, just days later, the council issued an interim rule to prohibit federal purchases of certain yet-to-be-determined information and communications technology "covered articles" considered risky to national security.

Rounding out a busy October, the Office of Management and Budget issued a draft update to its implementation guidance for the Federal Risk and Authorization Management Program, or FedRAMP, which sets out authorization, security and continuous monitoring requirements for cloud services used by federal agencies. The new guidance is intended to address the significant changes to the cloud marketplace since OMB last issued guidance more than a decade ago, it said.

Many of the policies share the same broad goals, but differences in how they're implemented will present challenges for contractors who work with different agencies, said Townsend Bourne, a partner at Sheppard Mullin Richter & Hampton LLP.

"Right now, between the FAR proposed rule, [the Department of Defense's] regulations, DHS regulations, and expected regulations from [the Cybersecurity and Infrastructure Security Agency] for critical infrastructure entities, we've got at least two or three different time periods for reporting [cybersecurity] incidents, and different definitions for what constitutes an incident," she said. "So there's certainly some overlap, but there's not consistency."

AI's Explosive Growth

Recognizing the explosive recent growth in the use of artificial intelligence, President Joe Biden signed an executive order in October imposing new standards for protecting safety, security and innovation related to the emerging technology.

The order applies to federal agencies and across a broad range of industries that encompasses many federal contractors, and also has several provisions specifically related to acquisition.

For example, it directs federal agencies to take steps "to facilitate access to federal government-wide acquisition solutions for specified types of AI services and products, such as through the creation of a resource guide," and urges the FAR Council to consider rules related to identifying and labeling "synthetic content" generated by AI.

While setting a broad plan of action, the AI executive order is only a starting point for the government in an area where there is a "very large number, and growing rapidly, of entities who are innovating solutions," and where technology will evolve much faster than regulations can be created, said Robert Metzger, chair of Rogers Joseph O'Donnell's cybersecurity and privacy practice group.

"The challenge and opportunity of AI is that these solutions will be upon us for decision, or use, much faster than we are likely to get new regulations or multiagency processes, or statutes," Metzger said. "And what that means, I think, is that individual agencies will need to take it upon themselves to come up with a stepped or agile approach to address, evaluate, test, assess and then use more broadly, AI."

"Build America, Buy America" Domestic Sourcing Requirements

A key push by the Biden administration, carried over from the Trump administration, is a desire to boost domestic production and bring back aspects of production and supply chains previously moved outside the U.S.

In line with that, there have been several recent rules and laws imposing higher domestic content requirements for federal procurement and federally funded projects, with the massive Infrastructure Investment and Jobs Act enacted in November 2021, for example, including a requirement that federally funded infrastructure projects use iron, steel and other construction materials made in America.

The Office of Management and Budget finalized a rule and related guidance in August explaining how those "Build America, Buy America," or BABA, provisions should be implemented, such as the specific materials that are covered, and how to determine the percentage of a product produced in the U.S.

The guidance also laid out the circumstances when a waiver from Buy America requirements is allowed and, clarifying an issue that had come up frequently in comments on earlier guidance, specifically stated that BABA requirements "will be applied in a manner consistent with U.S. obligations under international agreements" — although not all questions raised by contractors have been answered in

the guidance.

"It provided some helpful clarity, and in other ways has really punted," said Addie Cliffe, co-chair of Crowell & Moring LLP's government contracts practice. "Industry was saying, 'We need harmonization on things like what type of certifications are required' ... and I read the final rule from OMB as saying: 'Look, on some key issues, we're going to give you harmonization. But [because] these projects are so different, we're really going to give [the funding agencies] substantial discretion.'"

Gov't Goes Back to the Future With Prevailing Wage Change

The U.S. Department of Labor in August finalized its biggest overhaul in decades to how prevailing wages are determined under the Davis-Bacon Act, affecting thousands of contractors and more than a million workers.

The rule reverts to a standard last used in 1983, allowing the prevailing wages required to be paid to workers on federally funded construction projects to be calculated based on the wages paid to 30% of workers of a particular type in a particular geographic area — if the majority of workers don't share the same wage — before turning to a weighted average of all wages if there is no such plurality wage.

The final rule, which applies to more than \$200 billion in construction projects each year, is specifically intended to bring up wages for construction workers who are "paid less than intended by the act — and less than they deserve," the White House said in August.

The rule also expands the scope of projects and workers considered subject to the Davis-Bacon Act, and allows for a broader range of data to be used when determining prevailing wages.

"At bottom, it's consistent with part of what the Biden administration's campaign promises were, which was to increase the scope of Davis-Bacon coverage, both with respect to the types of contracts and the types of workers that would be covered," said Trina Fairley Barlow, co-chair of Crowell & Moring's labor and employment group.

The proposed version of the rule had drawn tens of thousands of comments, with labor groups arguing that it would help address issues with disparate pay rates amid fragmentation of the construction industry.

Business groups argued that the rule hadn't addressed a fundamental problem with determining prevailing wages — the voluntary survey that the Department of Labor heavily relies upon, which they said doesn't always represent the actual wages being paid in a particular area.

Acquisition Changes in Defense Policy Bill

One of the few "must-pass" bills considered by lawmakers each year, the National Defense Authorization Act usually contains a broad range of policies related to federal acquisition, and the \$886 billion 2024 NDAA passed by Congress on Dec. 14 was no exception.

Acquisition-related policies in the final bill included stricter limits on potential conflicts of interest for entities that work with the DOD, an extension of a temporary authority allowing the DOD to adjust certain contracts to account for inflation, and a clause intended to crack down on service-disabled veteran-owned small business fraud by barring agencies from counting contracts awarded to self-

certified SDVOSBs toward their small business contracting goals.

There were also several restrictions on agencies and contractors' use of foreign-made products considered to be national security risks, such as Chinese-made drones, while one of the more contentious clauses for contractors floated in the earlier House version of the bill was ultimately left out of the final legislation.

In that clause, the House had proposed a pilot "loser pays" provision for defense contractors with annual revenues exceeding \$250 million, which would have required them to pay the DOD's costs related to any unsuccessful bid protest at the U.S. Government Accountability Office.

It is not the first time lawmakers have proposed a similar pilot program in recent years, amid ongoing concerns about frivolous protests — concerns that have lingered despite independent reports showing that bid protests are both rare and rarely abused, and the consistently high annual "effectiveness rate" where a GAO protest is either sustained or leads to corrective action, according to Covington & Burling LLP partner Kayleigh Scalzo.

"It's kind of this head scratcher of why, if the data don't support the idea of there being a problem with frivolous protests, there's a [perceived] need to target what apparently is a phantom, as opposed to something that's actually showing up in the data," she said.

--Editing by Robert Rudinger.