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Top 4 Gov't Contracting Policies Of 2021: Midyear Report

By **Daniel Wilson**

Law360 (July 16, 2021, 10:17 PM EDT) -- The first half of this year has seen major policy changes affecting federal contractors, including presidential executive orders aimed at improving federal cybersecurity and increasing the minimum wage, as well as a Pentagon rule expanding debriefings for unsuccessful bidders.

Here, Law360 breaks down four major policy initiatives that have affected government contracting so far in 2021.

Biden's Flurry of Executive Orders

Beginning on his first day in office in January, President Joe Biden has issued a spate of executive orders to implement campaign promises and outline the intended direction of his administration, addressing issues such as improving federal cybersecurity and raising the minimum wage for contractor employees.

Although not necessarily directed at federal contracting specifically, many of those executive orders will have an impact on contractors, such as the May order intended to shore up the cybersecurity of federal networks in the wake of high-profile hacks such as a massive breach of SolarWinds Corp.'s software that had affected several agencies.

"The EO is explicitly aggressive," Crowell & Moring LLP partner Kate Growley said. "It calls for, and I quote, 'bold changes and significant investments' in how the federal government needs to not just meet but also exceed what the EO spells out, and what it spells out is quite extensive."

That includes significant requirements for contractors, such as collecting and sharing information on cyber threats, including security breaches on their own networks, and making sure "critical software" being sold to the government meets certain security requirements.

The order is yet to filter into contractual clauses or regulations, although some related guidance has since been issued, with the National Institute of Standards and Technology, for example, providing a definition of critical software based more on functionality than the system it is being used in, said Hogan Lovells LLP senior associate Stacy Hadeka.

"That's different from what we've seen in the past, where agencies kind of ad hoc determine that they have a sensitive system where they're using certain software," Hadeka said.

Also relevant to contractors are first-day executive orders directing the increased use of the Defense Production Act to address the COVID-19 pandemic and asking agencies to "advance equity" for minorities and underserved communities.

That equity order required agencies to look at potential barriers preventing people in those groups from accessing federal contracting opportunities. It was followed by a June 1 pledge from the president to double the number of federal contracts awarded to minority-owned small businesses over the next five years, a $100 billion increase over that period.

A Jan. 27 order intended to address climate change pushes federal agencies to give preference to electric vehicles in future procurements, while a Feb. 24 order seeking to address vulnerabilities in certain key U.S. supply chains — active pharmaceutical ingredients, critical minerals, semiconductors and large capacity batteries — could be implemented into contractual requirements by agencies.

There have also been several executive orders more specifically targeted at contractors, who often serve as the vanguard for intended wider policy changes using the executive branch's wide authority to set federal procurement policy.

An April 27 order directs agencies to require contractors to implement a $15 minimum wage for federal contractor employees with cost-of-living increases over time, beginning in 2022. The current minimum is $10.95 — the result of periodic increases after being raised to $10.10 under the Obama administration. The impact of the order is likely to be felt most strongly in Southern and Midwestern states, where wages are typically lower, attorneys told Law360 when the order was issued.

The minimum wage order followed a "Made in America" executive order released on Jan. 25, a continuation of the Trump administration's push to increase the government's use of U.S. sourcing and bolster domestic industry. The order is intended to make domestic content requirements for goods and services purchased by federal agencies more stringent, and to close loopholes for determining country of origin, according to the White House.

But although the language in that order and a similar Trump-era order is broad, their implementation has been more limited, focusing so far on the "easiest area of reform," the Buy American Act, or BAA, and related regulations, said K&L Gates LLP partner Amy Hoang.

"The text of the statute is very broad in describing the limitations on procuring foreign products," Hoang said. "So there's a lot of wiggle room for an administration to further limit the acquisition of foreign products by, for example, increasing the domestic content required for a product to be considered domestic, or changing the evaluation for when a domestic product cost is determined unreasonable, which are the exact changes [we've seen so far]."

The renewed focus placed on Buy American compliance is likely to at least lead to increased numbers of enforcement actions and False Claims Act cases, especially given the complexity of related requirements, which leave "room for interpretation and therefore room for whistleblowers to allege noncompliance," Hoang said.

A bigger issue for contractors is if the administration tries to move beyond making tweaks to the BAA, and seeks to address procurements covered under the Trade Agreements Act, Hoang said.

The TAA effectively allows items from foreign countries that have signed trade agreements with the U.S.

to be sold to the government as if they are domestic products. Any changes to the TAA regime — with the caveat that that would require "lengthy negotiations" to undo parts of the related trade deal — would affect a broader swath of contractors than BAA tweaks, Hoang said.

The Rollback of Trump Administration Policies

While Buy American and Made in America requirements are among the policy areas where the Trump and Biden administrations have been most in accord, the new administration has not followed every aspect of former President Donald Trump's domestic sourcing push.

For example, it has withdrawn a November 2020 proposal seeking to exempt critical medicines from a World Trade Organization government procurement agreement, after Trump had announced he wanted to "onshore" the manufacturing of "essential medicines," drawing opposition from other WTO members, including important U.S. allies such as the United Kingdom and European Union.

Biden has also sought to reject other Trump administration policies and priorities that had affected federal contractors, including by repealing an emergency declaration that had allowed U.S. Department of Defense funding to be redirected to border wall construction, and relatedly halting billions of dollars in contracts to build the wall.

Another prominent rollback of Trump administration policy affecting contractors was the repeal of the September 2020 executive order that had barred contractors from conducting certain types of racial sensitivity training in the workplace.

That order had drawn criticism and lawsuits from both civil rights and business groups and led to a California federal judge granting an injunction in December, ruling the prohibitions in the order were too vague and violated free speech rights.

That order had posed a "significant concern for many federal contractors," given issues such as how broadly it seemed to define what could be considered training, said Crowell & Moring labor and employment group co-chair Trina Fairley Barlow.

"It had a very aggressive enforcement mechanism, with things that would have included contract termination, suspension and debarment," Barlow said. "And the executive order prohibited the types of diversity training that had been routinely considered core concepts of diversity, equity and inclusion training — things like unconscious bias, for example, were prohibited."

Biden revoked the order on his first day in office, calling it a "damaging executive order which limited critical diversity and inclusion training in the workplace."

It is also possible that the president will effectively seek to repudiate Trump administration policies by reimplementing certain Obama administration policies that affected contractor employees, Barlow said, pointing to a July executive order aimed at promoting competition across the U.S. economy.

The order directed federal agencies to make procurement and spending decisions that promote greater competition, particularly by improving the "competitiveness of small businesses and businesses with fair labor practices," which could include resurrecting the Obama-era Fair Pay and Safe Workplaces rule, also known as the "blacklisting" rule, rescinded by Congress in 2017.

That rule required contractors to disclose violations of labor law going back three years when bidding on federal contracts, with contracting officers able to consider "serious, repeated, willful or pervasive" violations when deciding whether to award or extend contracts.

Contractors had argued before the rule's repeal that contracting officers were given too much discretion in how the rule could be applied and that the regulation as written meant they could be effectively excluded from federal contracting based on alleged violations not yet fully adjudicated.

"This executive order suggests we will see some form of that [rule]; whether it will be on an agency-by-agency basis or some broader executive order remains to be seen," Barlow said.

New FAR Council Rules

As Hoang mentioned, the Federal Acquisition Regulatory Council issued a final rule in January, just before the end of the Trump administration, seeking to increase the percentage of materials made in the U.S. in goods purchased under federal contracts, leading into Biden's later executive order on the same issue.

The FAR Council includes the DOD, NASA and the U.S. General Services Administration and issues procurement rules broadly applicable across the government.

The Buy American Act requires agencies to purchase domestic products unless they come at a significant price premium to foreign products, and the rules implementing the act have varied over time; the January final rule requires goods to contain at least 55% domestic material to be classified as U.S.-origin, up from 50%, or 95% domestic content for steel or iron. It also increases the price premium leeway given to domestic products before agencies can consider foreign products.

The FAR Council also issued a final rule in February discouraging federal agencies from using the lowest-price, technically acceptable, or LPTA, model for certain types of complex acquisitions.

LPTA deals make price the only distinguishing factor as long as bidders meet a certain minimum technical standard, with no premium placed on exceeding the technical minimum, unlike best-value deals, where agencies may pay more for what they deem to be a superior product or service.

Contractors had long complained that the LPTA model was being used inappropriately for technically complex contracts, such as where differences in technical approach matter or where the government doesn't have clearly defined requirements, at least in part to try to ward off potential bid protests.

The DOD had implemented a similar Defense Federal Acquisition Regulation Supplement, or DFARS, rule in 2019, and Bradley Arant Boult Cummings LLP government contracts practice co-leader Aron Beezley said he has seen a reduction in the use of LPTA contracts by the DOD since then. He noted that the new FAR rule imposed similarly strict restrictions for civilian agencies, heavily discouraging the use of LPTA for buying complex items such as cybersecurity services.

"Accordingly, government contractors should be on the lookout for improper inclusion of the LPTA methods in solicitations, as well as agency misuse of the LPTA method during proposal evaluations," Beezley said.

The DOD Codifies Enhanced Debriefings

Another long-running complaint for contractors is a belief that federal agencies are often stingy with the information they give out to unsuccessful contract bidders.

This perception has helped to trigger protests from those companies seeking to find out why their bid wasn't chosen, and Congress in the 2018 National Defense Authorization Act directed the DOD — the largest federal contracting agency — to start providing enhanced debriefings on many of its contracts.

The department implemented that requirement using an interim class deviation in 2018, and in May, it sought to codify the enhanced debriefing requirement, issuing a related proposed DFARS rule.

The rule allows unsuccessful bidders to request an "enhanced" post-award debriefing for competitive defense contracts and task and delivery orders worth $10 million or more. Small businesses and "nontraditional" defense contractors are also able to request that the DOD provide a copy of the document explaining its source selection decision at that $10 million threshold, while the document must be disclosed in debriefings for deals worth $100 million or more, according to the rule.

The DOD's rule comes alongside a General Services Administration pilot for an enhanced debriefing program, which has also been in place since 2018. With the DOD and GSA having led the way, Beezley said he "would not be surprised if this trend continues and redefines governmentwide minimum debriefing standards."

--Additional reporting by Hailey Konnath. Editing by Marygrace Murphy and Jay Jackson Jr.
