

Gov't Contracts Legislation And Regulation To Watch In 2016

By **Daniel Wilson**

Law360, Washington (December 24, 2015, 8:37 PM ET) -- A torrent of recent federal regulations and some related legislation, including cybersecurity and labor provisions, as well as a trend toward strong regulatory and legal enforcement, will give government contractors plenty to chew on in 2016.

From the wide range of federal rules, proposed rules and guidance documents issued in the past several years, a number of prominent trends have emerged with the potential to shape significant portions of contractors' work.

Here are several broad developments and some specific regulations and legislation that government contracts attorneys told Law360 they will be watching in 2016.

Cybersecurity

The past several years have seen a series of hacks and data breaches that have affected both private industry — such as those of retailer Target Corp. and electronics giant Sony Corp. — and the federal government, most prominently the U.S. Office of Personnel Management breach that saw the details of around 21.5 million current, former and prospective government employees leaked.

In response, various agencies have issued a range of cybersecurity, data security and other related rules and proposed rules, many of which will affect government contractors, or be open to further shaping, during 2016.

These include the National Institute of Standards and Technology's guidance on data security for nonclassified information, targeted at companies that do business with the federal government. That guidance, Special Publication 800-171, was issued in June 2015.

That was swiftly followed by a number of related rules, including interim Defense Federal Acquisition Regulation Supplement cloud computing security and network penetration reporting rules issued in August aimed at contractors and subcontractors, and the White House's October Cybersecurity Strategy and Implementation Plan, which, although aimed at government agencies, will nonetheless impact contractors, attorneys said.

Although the DFARS rules are only interim rules, they went into effect immediately and are likely to both become permanent in future and to possibly lead to similar rules being adopted within the broader Federal Acquisition Regulation, or FAR, several attorneys noted.

"It's a huge trend," Thompson Hine LLP partner Larry Prosen said. "We are getting more and more calls from contractors of all size, shape and type of business on that issue. It is very, very, very much an area in transition and in flux. They've really been throwing rules, and rulemakings and [interim] rulemakings out quicker than we can keep up with them."

Also relevant is the recent passage of the Cybersecurity Act by Congress, recently signed into law after being tucked into the \$1.15 trillion omnibus appropriations bill for fiscal 2016.

The Cybersecurity Act, originally known as the Cybersecurity Information Sharing Act, or CISA, had gone through various iterations over several years and in its final form offers a limited legal and antitrust safe harbor for companies — including government contractors — to share information on cyberattacks among themselves and with the government.

While some informal information-sharing groups exist, contractors and other companies are typically loath to admit when they've been hacked, for reasons ranging from liability to potential competitive disadvantage, and the Cybersecurity Act could finally open the door to more formal information sharing, attorneys said.

Compliance and Enforcement Crackdowns

Another key regulatory trend that government contractors should be aware of involves increased oversight over their activities, both on the civil and criminal side, attorneys said.

These efforts include the U.S. Department of Justice's memorandum on "Individual Accountability for Corporate Wrongdoing," more commonly known as the Yates memo, after Deputy Attorney General Sally Quillian Yates unveiled the directive.

The memo signaled that the DOJ would make increased efforts to hold individuals responsible for alleged corporate wrongdoing, both criminally and civilly, which contractors must now take into account every time they determine how to approach a dispute or case, attorneys noted.

"If you talk to the white collar bar, [they say] ... if you're a company and you want to settle, under this new directive and this new policy, you're going to have to throw your executives, or the culprits, under the bus to get your settlement," Bradley Arant Boult Cummings LLP partner Beth Ferrell said. "So there's a lot of concern that is going to increase the liability of individuals."

But the Yates memo is not the only sign of an increased emphasis on scrutinizing wrongdoing or potential wrongdoing by government agencies, attorneys said, pointing to several other recent initiatives.

These include an interim rule, set to take effect in February, amending the FAR to require government contractors and potential contractors to reveal any delinquent tax liability or prior felony convictions.

If a contractor does have such issues in their record, the relevant agency can consider debarment or suspension, if deemed necessary to protect the government. But as drafted, the rule is unclear on a number of fronts as to exactly what is required to be reported, attorneys claimed.

"I do think that is something that government contractors will be watching closely," Crowell & Moring

LLP partner Peter Eyre said. "There are some unanswered questions about how it will be implemented. For contractors that have a felony conviction or are on the path to settling [a case], that's certainly something to keep an eye on."

And another recent move contractors should pay close attention to is a proposed expansion of the Federal Awardee Performance and Integrity Information System, or FAPIIS, Eyre noted.

Contractors are required to disclose certain types of proceedings through the system, after which contracting agencies must assess those disclosures for potential effects on contract eligibility. These considerations are currently limited only to the direct contractor, but under the December proposal, would have to include immediate owners, subsidiaries and certain predecessor companies as well.

"It will certainly be a compliance challenge for companies," Eyre said.

Employment and Labor Regulations

The Obama administration has also taken to making a number of labor-related executive orders targeted specifically at contractors that will have an impact on their businesses in 2016, attorneys said.

These include the proposed Fair Pay and Safe Workplaces guidelines, issued in May by the U.S. Department of Labor and Federal Acquisition Regulatory Council on the back of a 2014 executive order, EO 13673, with a final order expected in early 2016.

Among other clauses, the proposal requires companies hoping to secure federal contracts worth more than \$500,000 to disclose any violations of federal labor law from the previous three years, as determined by arbitration, administrative or court rulings, and list the steps they've taken to address these issues.

Contractors must also make similar disclosures for their subcontractors on any subcontracts worth more than \$500,000, unless buying commercially available items, and any "serious, repeated, willful or pervasive" labor problems would need to be taken into account in the contracting process.

Contractors have been up in arms about the order, saying it adds both a significant new business risk and builds upon a series of other recent executive orders directed at them that impose significant burdens without significant impacts on the purported problems they are meant to solve.

Several industry groups have asked the administration to hold off on future executive orders, and were given some relief in the omnibus appropriations bill, which does not include requested funds to implement aspects of the order.

But that does not mean the rule is necessarily dead, and the administration has also forged ahead on other labor-related EOs, including one issued in September, requiring federal contractors to provide paid sick leave to employees.

Regulations regarding that order are expected in 2016, ahead of a 2017 implementation date, and contractors should start preparing now for possible impacts, attorneys said.

National Defense Authorization Act

The sweeping National Defense Authorization Act, passed annually, broadly sets out the U.S. Department of Defense's budget and policy goals and limits — though the 2016 bill encountered more hiccups than usual, as the first version was vetoed.

With the DOD responsible for a little more than half of the annual federal discretionary budget, the monetary implications of the bill alone are extremely important to many government contractors, but the policy implications are also very relevant, attorneys noted, pointing for instance to the proposed FAPIIS expansion and several of the cybersecurity rules issued in 2015, which stem from provisions in recent NDAAs.

"[Lawmakers have] used it in the last few years to advance a lot of cybersecurity objectives, but they're not limited to that — they can put in anything — [and] a lot of times stuff gets put in at the last minute," Ferrell said. "So watching that is important."

Among other policy provisions, the 2016 NDAA continues with the cybersecurity theme, for instance through a clause that offers limited cyberliability protections for defense contractors who comply with related DOD regulations.

Senate Armed Services Committee Chairman John McCain, R-Ariz., has also claimed that the bill includes what are the most sweeping defense acquisition changes in several decades, for instance seeking to shorten the decision chain on procurements and give service chiefs more control, another issue which will come into play for contractors.

SBA Rule on Universal Mentor-Protege Joint Ventures

While many regulatory and legislative changes may seem to add ever more burdens to contractors' already heavy loads, not all regulatory changes are necessarily negative, attorneys said.

One change many contractors should and will welcome, for example, is the Small Business Administration's universal mentor-protege program, proposed in February 2015.

The program will allow small businesses to team up with larger mentor companies in joint ventures while still remaining eligible for small business set-aside contracts, expanding on a limited existing mentor-protege program covering businesses involved in the SBA's 8(a) Business Development Program.

"That's a long time coming," Prosen said. "I think it's great."

Final regulations implementing that program are expected early in 2016, SBA officials testified at a recent congressional hearing, and the final form of the program will likely look very similar to the current 8(a) program, attorneys claimed.

"I think you're going to see increased participation in this program, and it's going to be something attorneys are going to be hearing a lot more about," Bradley Arant's Aron Beezley said.

--Editing by Katherine Rautenberg and Patricia K. Cole.
