

Gov't Contracts Policy To Watch In 2018

By **Daniel Wilson**

Law360, Nashville (January 1, 2018, 3:04 PM EST) -- Between regulatory streamlining and a “Buy American” focus from the administration perhaps finally coming to fruition, to newly sharpened focuses on national security issues and improving federal information technology, federal contractors have a broad range of policy issues to look out for in 2018.

The Trump administration has made it clear that it is intent on paring back and streamlining regulations, and although those plans have so far mostly been talk, 2018 may be the year that the rubber will actually hit the road.

A recently introduced national security strategy also has the potential to affect defense contractors and their suppliers, and Congress could step in to address some recent buzz topics in ways that may have an impact on contractors, alongside several expected changes from federal agencies.

Here are some consequential policy changes — or potential policy changes — that contractors should keep their eye on in 2018.

Regulatory Repeals and Federal Attrition

President Donald Trump, shortly after taking office, introduced a “two-for-one” strategy on federal regulations, directing agencies to roll back at least two existing regulations for every new regulation they introduce. And in December, the president said that the government “blew our target out of the water,” eliminating — whether through delay, repeal or cancellation — 22 regulations for every new rule in 2017.

But many of those deregulatory actions are preliminary and still subject to review, and beyond rolling back the widely unpopular Fair Pay and Safe Workplaces rule in March, the actual impact on the federal contracting world has been minimal so far, attorneys say.

“In response to the presidential memorandum and subsequent Department of Commerce report on streamlining permitting and reducing burdens on domestic manufacturing, each agency is supposed to prepare and submit an action plan to the administration responding to the report and the industry feedback to date on perceived regulatory obstacles ... and it’s going to be really telling to see what the impact of that is,” said Dentons partner Jeniffer De Jesus Roberts.

But while many contractors would welcome some additional relief from what they perceive as over-regulation and particularly from overly burdensome regulations, any such repeals need to be properly considered and targeted, with the nature of federal acquisition regulation not necessarily lending itself to wholesale changes, attorneys noted.

“I think that decreased regulations will come as a welcome sign for many contractors,” McCarter & English LLP government contracts practice co-lead Franklin Turner said. “But I also question the extent to which you can effectively deregulate increasingly complicated markets without creating more confusion. I don’t know how, in reality, contractors are going to deal with a more expensive, more technically complex procurement with fewer regulations to actually guide source selection decisions and guide acquisition professionals.”

Alongside regulatory repeals, another method proposed by the administration to reduce the purportedly bloated federal bureaucracy has been to draw down the size of the federal workforce, and the impact this could have on contractors is also substantial — and likely negative — attorneys say.

“[There’s] this whole idea within the administration that the government workforce is overpaid and that there are too many of them,” said Jessica Abrahams, chair of Dentons’ U.S. government contracts practice. “Now, you could argue the merits of all of that, but if government salaries are frozen or even if they’re decremented ... there is a concern that this will have an adverse impact on the procurement workforce as the people most likely to quit are the most qualified, as they are most easily able to get other jobs.”

This could impact not only what is already widely believed in the contracting community to be an insufficient number of qualified federal procurement officials, but also exacerbate issues such as an already-lengthy backlog on background check for workers who need federal security clearances, Abrahams noted.

Buy American Requirements

Another high-profile announcement early in the Trump administration’s first year was a push to rigorously enforce “Buy American” requirements, ensuring that federal agencies and contractors purchase from U.S.-based sources, and use U.S. national workers, wherever possible. Unlike the regulatory repeal push, the move to put teeth into Buy American directives has received both Democratic and Republican support.

But 2017 has effectively only been a study year for agencies, giving them a chance to look at their Buy American compliance and use of waivers. Any related regulations or guidance are instead coming in 2018, when contractors will find out where they really stand on issues such as whether they will have to significantly make over their supply chains. And as with potential regulatory repeal, the devil will be in the details, Abrahams noted.

“You can’t put the toothpaste back in the tube with regard to a global economy,” she said. “At this point in time when so many companies, for example, are dependent on a global supply chain, you can’t all of a sudden disavow trade agreements,” Abrahams said. “This [executive order] has put so many of our clients and so many government contractors into a bit of a tailspin in terms of future location of manufacture and supply chain.”

The New National Security Strategy and Infrastructure Plan

In line with the protectionist stance the Trump administration has taken with Buy American, Hire American and other 2017 moves such as national security-focused reviews of certain trade markets, the National Security Strategy introduced by the president on Dec. 18 also takes an “America First” approach that could further inform how contractors approach their supply chains.

While the strategy is largely vague, aspects of it are likely to form the basis for new, more concrete regulations and guidance, and contractors should pay attention to a number of aspects of the plan, including a push to modernize federal information technology.

This is part of a broader focus on cybersecurity issues, which will also include giving federal IT and cybersecurity personnel more authority to acquire products and services to prevent cyber attacks, and a focus on providing for cyber and technology research and development, and protecting “national security innovation” and the defense industrial base — all pointing to potential opportunities for contractors.

Information Technology Modernization

The National Security Strategy isn’t the only federal plan calling for improvements to federal IT. Many federal agencies have publicly acknowledged that much of their IT infrastructure is old and creaky and costs significant amounts of money to maintain, spurring efforts to modernize their IT, creating potentially lucrative opportunities for technology contractors.

The recent passage of the Modernizing Government Technology, or MGT, Act as part of the 2018 National Defense Authorization Act is one such example, giving agencies access to funds that they can use to upgrade, returning related savings to the fund to spur additional improvements across the government.

As computing moves more and more toward the cloud — a move that has been prioritized by federal policy over the past decade — the Federal Risk and Authorization Management Program, or FedRAMP, is also expected to come out with cloud acquisition guidance in 2018, after having recently asked for feedback from industry about best-practice contract language and problems with existing acquisition clauses.

Further, the U.S. Department of Defense has plans to award a lucrative cloud services deal by the end of 2018, and the White House is also expected to take on board a recent report to the president by the American Technology Council, a group of tech experts. The report, issued on Dec. 13, makes 50 recommendations on how to improve government IT infrastructure, with implementation of parts of the plan beginning as soon as Jan. 1.

The National Defense Authorization Act

As one of the few annual bills to regularly attract bipartisan support, and with the DOD responsible for about half of all federal discretionary spending — and thus a significant portion of federal contracting — each year, the National Defense Authorization Act also typically includes a grab-bag of acquisition and contracting-related clauses each year.

The current Armed Services committee chairmen have both focused in recent years on trying to increase the budget available to the DOD — and by extension, opening up more opportunities for defense

contractors — while simultaneously making pushes for reforms to the acquisition system.

Those moves are likely to continue in the 2019 NDAA — which will be considered during 2018 — and if recent NDAs are any guide, bid protests, acquisition bureaucracy, and technology and research contracts are all likely candidates for some attention, as well as acquisition related to space programs, a growing area of interest as a potential new front for war.

Enhanced Scrutiny on Noncontracting Activities

Another potential move that could be made at the policy level in 2018 is a continued push to keep out, or kick out, companies from federal contracting for political reasons not directly related to their contracting performance, attorneys say, pointing to two prominent examples from 2017.

One of those examples was the U.S. Department of Homeland Security's decision to exclude the products of antivirus software company AO Kaspersky Lab from federal use, over national security concerns linked to the Russian company's alleged ties to the Russian government — a decision currently being challenged in court.

"It's interesting because we've got a pretty robust suspension, debarment, exclusion process with due process in normal course, but this is one of those [cases with] clear implications for national security where the tools may not be robust enough," said Crowell & Moring LLP partner David Robbins.

And in the second example, strong congressional scrutiny and pressure was put to bear on the Internal Revenue Service to avoid contracting with Equifax Inc., amid Equifax's revealing a massive data breach.

The recent public attention on the issue of workplace sexual harassment, catching out a number of high-profile celebrities and politicians, could also lead to new requirements for federal contractors, attorneys say.

Contractors are often the guinea pigs for attempts to nudge social changes on issues such as anti-discrimination requirements, raising the minimum wage and seeking to prevent human trafficking, they noted, and as a publicly prominent work-related social topic, sexual harassment may be next on lawmakers' agenda.

"I think that it will be interesting to see whether there's some sort of social movement to impose certain obligations on government contractors and have them figure out what the rest of business and the government haven't yet figured out," Abrahams said.

--Editing by Rebecca Flanagan and Kelly Duncan.