

Top 4 Gov't Contracting Policies To Watch In 2023

By **Daniel Wilson**

Law360 (January 2, 2023, 12:02 PM EST) -- An overhaul to the Pentagon's cybersecurity requirements and a pending rule that will require many contractors to report their greenhouse gas emissions for the first time headline a slate of significant policy initiatives for government contractors to watch this year.

Here, Law360 previews the top four upcoming changes that will affect government contractors.

The DOD's Cybersecurity Maturity Model Certification Program

After years in the making, the U.S. Department of Defense is expected to release an interim rule implementing "Version 2.0" of its Cybersecurity Maturity Model Certification, or CMMC, program in May, a sweeping cybersecurity program that will eventually attach minimum cybersecurity requirements to all defense contracts.

The DOD has said that cyberattacks against the defense industrial base, or DIB, have grown both more common and more sophisticated over time, and will require more than 300,000 defense contractors, subcontractors and suppliers in the DIB to assess and certify their cybersecurity programs.

After many complaints about the initial version of CMMC as too prescriptive, the DOD started over with a simplified draft "Version 2.0" model in November 2021. Among other changes, it compressed five proposed CMMC cybersecurity levels into three, and brought the expected cybersecurity standards more in line with existing standards set by the National Institute of Standards and Technology.

Level 1, for contractors with basic cybersecurity requirements, will allow for self-certification. The more advanced Level 2 will track NIST's Special Publication 800-171 cybersecurity standard, and will be split into two, with self-certification allowed for some companies, and third-party certification required for contractors who handle "mission-critical" programs.

Those who handle particularly sensitive or important information and contracts will need to get a Level 3 certification, with more advanced, more proactive requirements including SP 800-171 and parts of NIST's more advanced SP 800-172 cybersecurity standard.

While the DOD has slowly laid out related guidance over the years on how it will implement CMMC, there are still open questions ahead of the interim rule's release, such as whether there will be enough assessors — C3PAOs in CMMC terms — ready to timely assess those who aren't eligible for self-assessments, the specific subset of SP 800-172 controls that will apply at Level 3, and where the DOD

will draw the line on what counts as mission-critical programs for Level 2 certification.

But contractors should start implementing CMMC now if they haven't already, based on the information they do have available such as those NIST standards, as there is unlikely to be much leeway once the interim rule is released, said Greenberg Traurig LLP shareholder Jeffery Chiow.

"Unfortunately, if you're — certainly a defense contractor — but any government contractor, really, I think there's a pretty strong expectation that once the CMMC program comes out in 2023, with real regulations ... once we get to that rulemaking process, the rules of the game are pretty much going to be set," he said.

Compliance with the interim rule will be particularly important for contractors because of the increased potential for False Claims Act liability under the U.S. Department of Justice's Civil Cyber-Fraud Initiative launched in 2021. The DOJ said it would put an increased focus on contractors that put federal information or systems at risk through lax cybersecurity practices.

"There are quite a few investigations that are ongoing at the moment [under that initiative]," said K&L Gates LLP partner Sheila Armstrong. "And so I think we're going to start seeing more settlements, and ... it's going to be interesting to see how industry responds."

Contractors Required To Reveal Greenhouse Gas Emissions

The Federal Acquisition Regulatory Council — which includes the DOD, General Services Administration, and NASA — could finalize another sweeping rule that applies to broad swaths of federal contractors in 2023, the Federal Supplier Climate Risks and Resilience Rule.

The rule is part of a broader trend of the Biden administration of bringing environmental- and climate change-related policy into the contracting space, such as through trying to cut down on single-use plastics and make the federal government net-zero on carbon emissions.

"It does seem that the government's really trying to leverage its power as a purchaser to achieve some emission reductions that it might not be able to achieve in a different way," said Ellie Dawson, counsel in Crowell & Moring's environment and natural resources group.

Under the terms of a proposed version of the rule, introduced in November, "major" federal contractors who receive more than \$50 million in federal contracts each year would have to publicly disclose their direct greenhouse gas, or GHG, emissions and their climate-related financial risks, and set emissions reduction targets.

They would also have to disclose indirect GHG emissions from the electricity they use, as well as some other types of indirect emissions such as from the extraction and production of purchased materials and transportation of purchased fuels.

The rule, which is open for comment until Feb. 13, would also partially apply to smaller "significant" contractors with annual federal contract awards between \$7.5 million and \$50 million, who would have to report their direct and indirect GHG emissions. Those who don't comply will be treated by contracting officers as "nonresponsible," effectively unable to be chosen for federal contracts.

For many federal contractors, particularly those who aren't publicly traded companies already subject to

a similar U.S. Securities and Exchange Commission rule introduced earlier in the year, this is likely the first time they will have to track GHG emissions.

That will be a particularly difficult task for small businesses in the "significant" contractor pool, many of whom "don't have [the] luxury" to dedicate people specifically to tracking GHG emissions or the clout to easily get information on indirect emissions from third parties, said Shaun Kennedy, chair of Holland & Hart LLP's government contracts practice group.

"There may be noble reasons for this [rule], and good reasons for this," he said. "But I think the way the proposed rule is set out is clumsy. And ... I think small businesses are going to struggle with this."

COVID-19 Vaccine Mandate

Courts have issued several injunctions against the federal mandate requiring effectively all employees of federal contractors to get vaccinated against COVID-19, generally finding that the government overreached on its authority under procurement law, but the government has continued to insist it could still try to implement the mandate.

Those injunctions cover various states and specific parties, and had culminated in a nationwide injunction issued by a Georgia federal judge in December 2021. But the Eleventh Circuit in an August 2022 decision, although keeping the injunction in place for the specific plaintiffs involved in the suit, rolled back its nationwide scope.

U.S. Circuit Judge Britt C. Grant criticized the "growing trend" of "drastic" nationwide injunctions against federal actions, saying they "push against the boundaries of judicial power, and very often impede the proper functioning of our federal court system."

The Biden administration in the wake of the Eleventh Circuit's ruling had said it had no immediate plans to try to enforce the mandate, citing factors such as the complexities of the several injunctions in place.

But on Oct. 14, just ahead of the circuit court's official mandate kicking in, the Safer Federal Workforce Task Force and Office of Management and Budget opened the door to imposing the mandate in states and on parties that weren't covered by the injunction, saying it would soon issue related guidance.

From a practical point of view, that would be "such a quagmire for the government to take these different orders in different state jurisdictions and reconcile the scope of those injunctions," said Holland & Hart's Kennedy.

Practical considerations would include, for example, how to address contractor employees who work in a state covered by an injunction, but need to travel to another work site in a state where the mandate is in place, according to Kennedy.

"I think it puts contractors in a really untenable position to do it effectively, [and the government] would have to come up with myriad circumstantial guidance," he said.

There is also the issue of likely pushback from lawmakers, who recently moved to repeal the DOD's vaccine mandate for the military in the recent 2023 National Defense Authorization Act, especially with Republicans set to take over the majority in the house.

But although the administration has told agencies not to take any steps toward implementing the mandate as of October, it continues to defend the mandate in court, and the Safer Federal Workforce Task Force has not signaled that it has any intent of formally withdrawing the mandate.

Possible Revival Of 'Blacklisting' Policy

The Biden administration has revived a number of Obama-era policies related to federal procurement that were either rescinded or left idle under the Trump administration and has also implemented a number of policies at the intersection of labor and contracting policy, but one glaring omission that covers both areas is a potential policy similar to the contentious Fair Pay and Safe Workplaces rule, also known as the "blacklisting" rule.

The Obama-era rule had required contractors to disclose violations of labor law going back three years when bidding on contracts for non-commercial items worth \$500,000 or more, and was heavily criticized by contractors and their attorneys. They argued, for example, that some companies could be effectively excluded from federal contracting based not only on final determinations, but also on alleged violations of labor law that were not yet fully adjudicated.

The rule was blocked by a Texas federal court in October 2016 and rescinded by Congress in 2017 under the Congressional Review Act, or CRA.

While disapproval under the CRA is supposed to bar the FAR Council from implementing any new rule that is "substantially the same," the administration has shown it could try other ways to implement similar requirements without specifically reviving the rescinded rule, with the U.S. Department of Agriculture for example having proposed its own similar rule in early 2022.

There is a lot of nervousness from contractors about a return of a rule similar to the Obama-era rule, which carried "a lot of heavy burdens for contractors," said Crowell & Moring LLP labor and employment group co-chair Trina Fairley Barlow, who frequently helps government contractors navigate labor and employment issues.

"I think everyone is holding their breath on that one," she said. "And I would expect that if there is a proposal, we would see a lot of activity in the comments when there's a proposed rule issued. Frankly, depending on what the rule looks like, I would not be surprised to see more litigation like we saw before, unless the rule is streamlined ... in a way that is more manageable, with some definitional issues fleshed out a bit more."

--Additional reporting by Juan Carlos Rodriguez. Editing by Alyssa Miller.