

Gov't Contracts Policy Developments Of 2016: Year-In-Review

By **Daniel Wilson**

Law360, Nashville (December 13, 2016, 3:39 PM EST) -- From contentious U.S. Department of Labor rules to a big change to the federal multiple award schedules, as well as the usual swath of acquisition tweaks in the annual defense policy bill, there have been a range of significant legislative and regulatory changes for federal contractors in 2016.

Stretching across multiple federal agencies and changes made by Congress, a number of federal policy changes were made in 2016 that government contractors should be aware of.

Labor Rules and Executive Orders

Although not the first federal agency that typically comes to mind when thinking about policies that could have a significant impact on government contracts, the U.S. Department of Labor has implemented a number of contentious rules and proposed rules over the past year that are directly aimed at or will affect federal contractors.

With the Obama administration winning little cooperation from Congress on its social policy goals, it has turned to its remaining avenues — executive orders, agency guidance and related rules — as a test bed for those efforts, effectively leaving federal contractors to take the brunt, attorneys say.

The most contentious of these is the Fair Pay and Safe Workplaces Rule, also referred to as the “blacklisting” rule, requiring nearly all federal contractors and contract bidders to disclose recent violations of labor law, with any “serious, repeated, willful or pervasive” ones to be taken into account in contracting decisions.

Both the discretionary nature of the standard, as well as the fact that nonfinal administrative rulings can be taken into account when determinations are made, have had contractors up in arms, and attorneys have claimed the rule seems to be aimed at a problem that is more theoretical than actual.

“We’re really talking about here is leveraging the value of government contracts to force government contractors into settlements when claims of labor law violations are brought or threatened,” Ogletree Deakins Nash Smoak & Stewart PC shareholder James Murphy told Law360 in August, after the final rule came out.

Another highly contentious rule, finalized in September, requires federal contractors to give as much as 56 hours of paid sick leave to their employees annually. This means contractors will collectively give out

nearly 1 million additional sick leave days each year, according to DOL estimates — and that figure, if anything, is an understatement, attorneys have claimed.

These came alongside a range of broader DOL rules that will also affect government contractors, such as a May rule raising the “white collar” exemption for overtime to \$47,476 per year.

Whether all of these rules will ultimately go into effect, however, remains uncertain. Both the Fair Pay and overtime rules have seen their implementation recently blocked by courts through injunctions — with the exception of a paycheck transparency clause in the Fair Pay rule — in decisions that have been welcomed by industry.

“The implications of the [Fair Pay] regulation were really overwhelming; a lot of our clients were very concerned,” Blank Rome LLP government contracts practice group chair David Nadler said. “The decision in Texas was very welcome.”

The 2017 National Defense Authorization Act

Fulfilling its now-customary position as a broad catchall for changes to federal acquisition policy, for both defense and other spending, the 2017 NDAA includes a number of acquisition-focused clauses, such as a move to split the U.S. Department of Defense’s undersecretary of acquisition, technology and logistics position into two — one role focused on acquisition and sustainment, the other on development of technology, serving effectively as the DOD’s chief technology officer.

Other clauses in the bill would encourage more experimentation and rapid prototyping by the Pentagon, as well as directing it to give contracting preference to commercial firms in areas such as construction, “knowledge-based” services, transportation and medical services, although some funding for the DOD’s commercial technology arm, the Defense Innovation Unit Experimental or DIUx, would be held back unless and until it can prove its usefulness to skeptical lawmakers.

Another change that will be welcomed by contractors is a directive that the DOD should avoid the use of the lowest price technically acceptable model for contracts when it would prevent the Pentagon from taking advantage of potential benefits from a tradeoff between cost and technical factors.

While it’s often reasonable to use when the requirements for a procurement are clear from the outset, the LPTA model has increasingly been used for “knowledge services” and other procurements with more vague requirements, seemingly for purposes such as preemptively fending off contract challenges rather than because the model is than a “best value” deal for a particular procurement, attorneys claimed.

“I think the provision that puts a thumb on the scale against using LPTA is important, and in the long run beneficial not only to contractors but also to the DOD,” said Covington & Burling LLP partner Jay Carey.

The final \$619 billion compromise version of the bill, passed by the Senate and sent to the president’s desk on Dec. 8, also pulls back on some of the more contentious aspects of the Senate’s original version of the bill, such as penalizing the military services for using cost-plus contracts instead of fixed-price deals — although it still encourages defense agencies to use more fixed-price deals.

It also moves away from a planned Senate overhaul of the U.S. Government Accountability Office bid protest system, which would have scrapped the “American rule” on attorneys’ fees and would have penalized incumbent contractors who unsuccessfully protested a follow-on deal, by taking away their

fees for performing bridge contracts while the protest plays out.

Those initial Senate proposals seemed based on a perception that bid protests are legion and are significantly delaying many procurements — a perception that doesn't match reality — and would have undermined an important avenue for contractors to address legitimate grievances, attorneys said.

"A lot of Senate provisions were driven by a concern or a perception that some protesters, and in particular incumbent protesters, were filing frivolous protests," Carey said. "I can't say that it doesn't happen, but I can say, — at least among the sophisticated government contractors we represent — we don't see it happening. ... Most government contractors generally view filing a protest as akin to suing their customer. As a result, they tend to be very conservative about doing so."

Instead, the main change to bid protests will raise the threshold for defense agency task order protest jurisdiction from \$10 million to \$25 million, while the bill will also revive the GAO's authority over protests of civilian agency task orders, which had expired at the end of fiscal year 2016.

DOD Rules

The DOD, both individually and as part of its role on the Federal Acquisition Regulatory Council, also introduced or finalized a number of rules this year that could impact federal contractors.

These include a "network penetration" rule, released in October, requiring defense contractors to monitor and report cyberattacks on their networks, which put contractors on the hook to protect a wide range of "covered defense information," in fitting with a broader government focus on cybersecurity and data protection issues over the past few years.

"Contractors [now] need technology and legal people to work hand in hand," McCarter & English LLP government contracts & export controls group co-leader Franklin Turner said.

That rule followed a May update to the National Industrial Security Program Operating Manual giving contractors with security clearances six months to establish an "insider threat program," a response to several recent high-profile leaks of sensitive information. More than 5,000 contractors have had their plans approved so far, according to the DOD.

In another example of a broader government trend, focusing on federal contractors keeping a close watch on their supply chains in efforts intended to protect against issues such as human trafficking, a pair of August rules will also require contractors to take steps to prevent the use of counterfeit parts.

"For many [contractor] compliance officers, the number one risk area now is the supply chain," Crowell & Moring LLP government contracts group co-chair Peter Eyre said.

And the FAR Council in July introduced several rules intended to increase government subcontracting to smaller businesses, then in September finalized a rule requiring contract bidders to tell contracting officers about any unpaid tax liabilities or felony convictions, with — as in the DOL Fair Pay rule — those officers required to make a determination on whether it's in the government's interests to do continue to business with those companies.

That was followed up by November DOD rule intended to crack down on purported abuses of independent research-and-development funding by contractors, for which industry groups have asked

the department to delay implementation and provide further clarification, saying the final rule is vague and fails to appreciate the efforts needed to comply.

SBA Mentor-Protégé Program Expansion

The DOD wasn't the only federal agency to make rules intended to improve the lot of small businesses in 2016. The Small Business Administration in July made a long-awaited move by finalizing a rule expanding its previously limited mentor-protégé program to all small businesses, becoming a rare example of a regulation that has been almost universally praised.

The rule allows a small business to form a joint venture with a larger mentor business, while still maintaining their eligibility for federal small-business set-aside contracts, therefore giving the smaller business access to advice, assistance and other resources, and opening new opportunities that were previously closed to larger businesses — to the benefit of both, attorneys have said.

The GSA's Transactional Data Reporting Rule

The U.S. General Services Administration's transactional data reporting rule, issued in June, is the biggest shakeup to the Federal Supply Schedules in more than 20 years, according to both attorneys who handle FSS matters and the GSA itself.

It will require vendors to submit a monthly report to the GSA that includes certain transactional data from orders placed under the Federal Supply Schedules and other governmentwide acquisition contracts, replacing the current reporting system based on commercial pricing.

The agency has claimed it will be a win-win, for instance by increasing price competition for the government and elimination cumbersome compliance burdens for contractors, but attorneys and contractors are more concerned, raising issues such as whether the new reporting regime will actually be appropriate for all types of FSS contracts, as well as the upfront compliance issues that come along with such a major change.

"Contractors don't necessarily like it, but they're used to the [commercial sales practices] disclosures — they're concerned about the shift," Dentons partner Jack Horan said.

Civil Penalty Increases

Federal agencies increased their maximum civil penalties in 2016 across the board, after an inflation adjustment in last year's bipartisan budget agreement, which took years of back raises into account. Perhaps most relevantly to federal contractors, this included penalties arising under the False Claims Act, from a minimum per-claim penalty from \$5,500 to \$10,781 and maximum from \$11,000 to \$21,563.

The move can change the calculus for companies on deciding when to fight FCA claims and when to settle, attorneys said, with several saying the issue may eventually lead to an Eighth Amendment challenge on excessive-fine grounds, since each allegedly false invoice counts as a separate claim for FCA purposes, rapidly multiplying the potential penalties at stake.

--Editing by Rebecca Flanagan and Brian Baresch.

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