

## Top 7 Gov't Contracting Policy Changes In 2019

By **Daniel Wilson**

*Law360 (December 20, 2019, 1:30 PM EST)* -- Federal contractors have been affected by several big policy developments this year, including a ban on some Chinese parts and the Justice Department's planned crackdown on collusion in federal procurement.

Here are seven of the biggest government contracting policy changes from 2019.

### **Ban on Chinese Tech Products**

Driven by Section 889 of the 2019 National Defense Authorization Act, the Federal Acquisition Regulatory Council banned federal agencies from purchasing certain Chinese-made telecommunication and video surveillance products in an August interim rule. The measure was one of several similar rules across various agencies.

The rule is particularly aimed at Huawei Technologies Co. Ltd. and ZTE Corp. to address concerns that their ties to the Chinese government could open up an avenue for their products to be used for espionage. The ban is part of what Holland & Knight LLP partner Eric Crusius called "obviously a multifront war" between the U.S. and China.

Although the rule applies to the agencies themselves, it also has a big impact on contractors, which are required to scrutinize their supply chains so they can certify they are not selling any of the banned products to federal agencies.

That's a big undertaking for many businesses, particularly given what they have described as a lack of clarity in several areas of the interim rule as well as "unrealistic" reporting burdens, like a one-day deadline to tell the government if they discover banned products in their supply chains.

Both Section 889 and a Federal Communications Commission rule barring Huawei products from FCC-funded programs have sparked lawsuits, with the Chinese telecommunications giant pursuing the rarely litigated strategy of arguing it has been hit with a bill of attainder, effectively being judged guilty of a crime by Congress rather than the courts.

Bills of attainder have been litigated "only a handful of times in the last 50 or 60 years," Crusius said. "You can't go and open the Yellow Pages and find a bill of attainder attorney, because there really are none."

Another rule mandated under Section 889, which is expected to follow in August 2020, will require federal contractors not only to stop selling the Chinese products to federal agencies, but also to stop using them for their own operations.

### **Guidance on FCA Cooperation**

After several speeches from U.S. Department of Justice officials hinting at the move, the DOJ issued formal guidance in May setting out the circumstances in which it would credit False Claims Act defendants for cooperating with FCA investigations.

That could include, for example, companies self-reporting suspected FCA violations or identifying the individuals primarily responsible for a violation. In return, companies could see a reduction in penalties to as low as single damages plus costs, as opposed to the treble damages the FCA allows, as well as other potential benefits such as assistance resolving a related qui tam FCA case, the DOJ said.

The reaction has been mixed, with some contractors welcoming the idea of a potential reduction in damages and a better idea of what the DOJ values from defendants, but also left with open questions on issues such as the lack of specified potential benefits for particular types or levels of cooperation. The level of credit granted is still up to the discretion of the DOJ.

In addition, required disclosures, such as those made under the Federal Acquisition Regulation mandatory disclosures requirement, won't count, nor will those made when there is a threat of "imminent" discovery or investigation, lawyers have told Law360.

And similar cooperation principles are "very much embedded within the government contracting community already," which may further dull the practical impact of the guidance, said Blank Rome LLP government contracts practice group co-chair Justin Chiarodo.

Nonetheless, the potential reduction to single damages plus interest and costs offers a "significant change from standard practice," according to Chiarodo.

"That kind of carrot could really meaningfully impact how you see voluntary disclosures and cooperation taking deeper root," he said.

### **Antitrust Violations in Spotlight**

In November, the DOJ announced the formation of the Procurement Collusion Strike Force, a cooperative effort among the department's Antitrust Division, U.S. attorneys offices, the FBI and several inspectors general, that aims to cut down on collusion between ostensible competitors for federal contracts and grants.

That move followed DOJ deals with five South Korean oil companies to resolve allegations of bid-rigging on contracts to supply fuel to U.S. military bases in South Korea, an enforcement action that resulted in hundreds of millions of dollars in criminal fines and civil settlements. About a third of the department's more than 100 ongoing antitrust investigations involved government procurement issues, the DOJ said when it announced the task force.

The strike force is indicative of what Covington & Burling LLP government contracts practice co-chair

Fred Levy said he perceived as a broader trend in government contracts over roughly the last year: the “criminalization of the procurement process.” The change comes after years of the DOJ making the civil False Claims Act its tool of choice for combating procurement fraud except in the most egregious cases, he said.

“It creates a lot more risk and a lot more leverage for the government in pursuing its remedies,” Levy said. “That includes not only the civil divisions and criminal division of DOJ that act independently, but you also have to interact with the audit agencies ... suspension and debarment officials, and you have to deal with your customers. It’s much more of a balancing act, and it’s a much more difficult process for companies to endure.”

But BakerHostetler partner Jeffrey Martino, former chief of the New York office of the DOJ's Antitrust Division, said that the DOJ had been “pretty consistent” in the past two decades in pursuing criminal bid-rigging and procurement fraud cases, pointing to task forces formed in the wake of natural disasters like Hurricane Katrina.

The main difference with the new antitrust strike force is that it creates more formalized cooperation among U.S. attorneys, who are often “more in the loop on what’s going on in their district [and] may be the first to see or hear about the potential allegations,” Martino said.

Either way, the strike force highlights the need for federal contractors to make sure they’re aware of the antitrust rules governing procurement, that they’re in compliance and that their staffers are properly trained, according to Martino.

“They’ve also got to take a hard look at who their suppliers are and their clients that are providing subcontract work for them, and make sure they’re also compliant,” he said.

### **Counterfeit Reporting Rule Finalized**

More than five years after the rule was initially proposed, the Federal Acquisition Regulatory Council unexpectedly issued a final rule in November that expands the scope of federal contractors that must report counterfeit items in their supply chains and the items that they must report.

A previous reporting requirement applied only to U.S. Department of Defense contractors and only to electronic parts. The new rule extends to all federal contractors and subcontractors, covering parts used in “complex items with critical applications.”

Coming as part of the broader government blitz on supply chain security issues that includes the Huawei ban, the rollout of the rule may be difficult, attorneys told Law360 when the expanded measure was first released.

As with the Huawei rule, there are a number of unaddressed questions on issues such as what counts as a “major” or “critical” nonconformance in a particular part that needs to be reported and how to “flow down” requirements to subcontractors, they said.

Also, the new regulation will not only require many contractors to step up their supply chain scrutiny, but potentially open them up to liability, as it doesn’t offer a “safe harbor” for contractors that abide by the rule's reporting requirements only to have a supplier challenge a report as damaging to business, those attorneys said.

## **Use of LPTA Contracts Limited**

The DOD issued a raft of new acquisition rules and tweaks in 2019, from draft cybersecurity rules set to be finalized in 2020 to measures tying progress payments to performance and implementing a preference for fixed-price contracts.

Another significant change — and certainly one of the most popular among contractors — is the Pentagon's September rule severely curtailing the use of lowest-price, technically-acceptable contracts after a directive from Congress.

LPTA requires bidders to meet a certain minimal technical threshold, with the contract awarded to the lowest-priced bidder that has met that technical minimum, with no additional credit given for exceeding the minimum.

“The government has recognized that LPTA is good in some instances, but that it shouldn’t be applied broadly across acquisition because all it does is really limit the government’s ability to buy a better mousetrap ... if that mousetrap is a penny more,” Crusius said.”

Contractors have criticized the DOD for using LPTA inappropriately at times, such as in buying complex information technology products and systems, when it is better suited for procurements when the department’s needs are clear and simple, like purchasing a commercial item where all proposals are essentially the same.

Like many ideas in federal contracting, LPTA had been a “pendulum ... someone gets a good idea and it goes a little too far and it’s got to be brought back,” Duane Morris LLP partner Michael Barnicle, a former contracting attorney in the U.S. Army’s Judge Advocate General's Corps, said. In some cases, it meant the DOD “wasn’t getting the most bang for the buck,” he said.

“I saw how LPTA worked in some scenarios really well, and worked in other scenarios not OK, or it just doesn’t work at all,” Barnicle said. “Just because something is the fastest way doesn’t mean it’s the best.”

In the long run, the restrictions on LPTA should not only benefit contractors but also the DOD itself, focusing the department both on picking the right contract option and trading off upfront cost against long-term cost, Barnicle said.

A similar rule that would extend across the government has also been proposed by the FAR Council and is likely to be finalized in 2020.

## **Sometimes Smaller Is Better**

The Small Business Administration was another agency that made a host of sweeping changes to its rules in 2019, including consolidating its mentor-protégé programs, tightening subcontracting requirements and overhauling its HUBZone program for small businesses operating in areas “historically underutilized” by the federal government.

But as with the DOD’s LPTA rule, a relatively simple change is among the most impactful — a final rule altering the calculation of eligibility for small business set-aside contracts to use an average of the last

five years of revenue, instead of the last three.

The implementation of the rule had been contentious, with Congress and the SBA clashing over whether it was meant to go into effect immediately, or only once the agency had implemented a related rule, with the final rule issued in December.

What it means in practice is that one outsize year has less chance of putting a contractor outside small business limits, and that more businesses can stay eligible for small business contracts for longer, giving them more time to adjust to the prospect of “sizing out” of small business programs. The rule has been viewed “very favorably” by small businesses, said Bradley Arant Boult Cummings LLP partner Aron Beezley.

The leap from a small business to a “midtier” business is often difficult for many companies, with only about 2.5% of companies that grow past the small business set-aside limit continuing to receive federal contracts, according to a September U.S. Government Accountability Office report.

In one final change, the SBA sweetened the rule even further for contractors, allowing current small businesses that would be disadvantaged under the five-year rule, but not the three-year rule, to choose which standard to use through to the start of 2022, Beezley noted.

“The SBA, to their credit, heard these critiques, and what they did in [the final rule], adopted a transition period through Jan. 6, 2020 ... I think that’s a really sensible approach,” Beezley said.

### **Acquisition Changes Blast Off**

As is typical for the sweeping annual defense policy and budget bill, the fiscal year 2020 National Defense Authorization Act, scheduled to be signed into law by President Donald Trump on Friday night, contains a number of clauses addressing defense acquisition issues.

Some are reactions to problems with specific programs, such as clauses tightening the reins on military housing contractors after a scandal over substandard on-base housing and repairs.

Others dovetail with ongoing concerns about “great power” rivals like Russia and China, seeking to improve risk assessment, such as through better identification of foreign ownership issues and reducing reliance on foreign sources for items like microelectronics and rare-earth minerals.

And then there are more general acquisition clauses, such as those directing the DOD to redesign the way it educates and certifies its acquisition workforce by leveraging “nationally and internationally recognized standards” as well as telling the department to establish research groups that use outside experts to study innovative acquisition processes.

The bill also directs changes to intellectual property evaluations for acquisition programs and a software-specific acquisition process, and creates improved pathways for small businesses to commercialize products they create for the DOD, a move intended to encourage more commercial tech firms to do business with the military.

In a major policy change, the 2020 NDAA also created a U.S. Space Force, the first new military branch since the U.S. Air Force was established in the 1940s, a somewhat contentious move that opens up new contracting opportunities and that will likely be viewed as obvious in hindsight, Barnicle said.

“There was a time that everyone thought the establishment of an Air Force was silly, and it wasn’t,” he said. “I think that [the Space Force] reflects what’s in other aspects of the NDAA, like the focus on cyber. ... Space Force will augment cyber capabilities and information security.”

--Editing by Jill Coffey and Alanna Weissman.

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