

Statutes, Regulations, Executive Orders & Policies



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Statutes

Procurement-Related Statutes Enacted Dec. 2018- Dec. 2019

- Small Business Runway Extension Act of 2018, Pub. L. No. 115-324 (Dec. 17, 2018)
- The Federal Acquisition Supply Chain Security Act of 2018, Title II of Pub. L. No. 115-390 (Dec. 21, 2018)
- Good Accounting Obligation in Government Act, Pub. L. No. 115-414 (Jan. 3, 2019)
- Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115-425 (Jan. 8, 2019)
- The National Defense Authorization Act for FY 2020?

Small Business Runway Extension Act of 2018

- Changes formula for determining whether revenue-based small business size standards are met by calculating average annual receipts for 5 years rather than 3 years
 - Does not change any revenue limits or impact size standards for manufacturing contracts, which are based on employee count
- Purpose of change is to prevent firms from prematurely becoming ineligible for small business programs because of spikes in revenue
- As written, Act could hurt certain businesses that have experienced decreasing revenues over 5 years; under 5 year calculation, a business might not be considered small, while under a 3 year calculation, the business would be small; contrary to its apparent intent, Act may not help all businesses to stay small for a longer period

Small Business Runway Extension Act of 2018

- Act does not specifically require implementing regulations or specify an effective date. As a result, the formula change arguably should have immediate effect
- SBA issued a notice (effective Dec. 21, 2018) stating “change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process.” GAO and OHA have declined to overturn this decision
- The House Committee on Small Business, Subcommittee on Contracting and Infrastructure held a March 26, 2019 hearing, “Cleared for Take-off? Implementation of the Small Business Runway Extension Act”

Small Business Runway Extension Act of 2018

- April 18, 2018: Introduction of H.R. 2345, Clarifying the Small Business Runway Extension Act, “to address the delay in implementation of the Small Business Runway Extension Act.” In mid-July 2019, the legislation passed the House and was referred to the Senate Committee on Small Business and Entrepreneurship, where it remains pending
- On June 24, 2019 and December 5, 2019, the SBA issued proposed and final rules implementing this Act

Federal Acquisition Supply Chain Security Act of 2018

- Intended to reduce or eliminate “supply chain risk” by permitting agencies to exclude or remove certain “sources” or “covered articles” from the supply chain
- “Covered articles” include information and communications technology and services
- Legislative history indicates that the statute is intended to address the threat of cyberattacks and espionage by China and Russia
- Exclusion, removal or covered procurement action must not be based solely on foreign ownership of source

Federal Acquisition Supply Chain Security Act of 2018

- Establishes Federal Acquisition Security Council comprised of representatives from OMB (Chair), GSA, DHS, ODNI, DOJ/FBI, DOD/NSA and Commerce/NIST.
- Responsible for:
 - Developing a Government-wide strategy for addressing and managing supply chain risks in covered article procurements;
 - Facilitating information sharing within the Government and with the private sector;
 - Serving as the Government-wide resource for the development of best practices and mitigation activities associated with supply chain risk;
 - Recommending exclusion and removal orders

Federal Acquisition Supply Chain Security Act of 2018 - Federal Acquisition Security Council

- “Exclusion orders”
 - Requires “the exclusion of sources or covered articles from executive agency procurement actions”
- “Removal orders”
 - Requires the “removal of covered articles from executive agency information systems”
- Source named in exclusion or removal order recommendation must receive notice that provides 30 days to submit information in opposition to the recommendation
- Basis for the recommendation may be withheld for law enforcement or national security reasons

Federal Acquisition Supply Chain Security Act of 2018 - “Covered Procurement Actions”

- Based on joint recommendation of chief acquisition officer and chief information officer, agency head may exclude source from a single “covered procurement” or a class of “covered procurements”
- Covered procurement action includes (A) excluding a source that fails to meet supply chain risk related “qualification requirements” (for testing or quality assurance) in the acquisition or use of covered articles; (B) excluding a source from a covered article procurement if the source “fails to achieve an acceptable rating” for a supply chain risk evaluation factor; (C) determining a source is not responsible based on supply chain risk considerations; or (D) deciding “to withhold consent for a contractor to subcontract with a particular source or to direct a contractor to exclude a particular source from consideration for a subcontract”
- Source must receive notice and opportunity to respond within 30 days of receipt before covered procurement action taken, unless urgent national security interests exist

Federal Acquisition Supply Chain Security Act of 2018 - Judicial Review

- DC Circuit has exclusive jurisdiction to review exclusion and removal orders and covered procurement actions
- Standard of review similar to the APA
- Appeal must be filed within 60 days of source receiving notice of exclusion or removal order or covered procurement action

The Federal Acquisition Supply Chain Security Act of 2018

- Applies to “contracts awarded before, on, or after” March 21, 2019 effective date
- The Act’s exclusion, removal and covered procurement act provisions sunset on Dec. 21, 2023
- Council is required to issue an implementing interim final rule by Dec. 21, 2019 with a final rule due on Dec. 21, 2020
- FAR Case No. 2019-018 has also been opened to implement the Act, presumably with a focus on the “covered procurement actions”
- Due date for proposed implementing FAR provision has been extended to Dec. 18, 2019

Good Accounting Obligation in Government Act

- In the “annual budget justification submitted to Congress,” which accompanies the President’s budget, each agency must include:
 - “a report listing each public” GAO “recommendation” “designated by GAO as ‘open’ or ‘closed, unimplemented’” that has been pending for at least 1 year; and
 - “a report listing each public recommendation for corrective action from” the OIG of an agency that has been pending for at least 1 year, and for which no final action has been taken.

Good Accounting Obligation in Government Act

- In annual budget justification, each agency shall also include “a report on the implementation status” of the above-referenced GAO and OIG public recommendations. The report shall include:
 - (A) for GAO recommendations that the agency has decided not to implement or failed to act upon, “a detailed justification for the decision,” or where “the agency has decided to adopt [the recommendation], a timeline for full implementation;” and
 - (B) for OIG recommendations for corrective action “for which no final action or action not recommended has been taken, an explanation of the reasons why,” or where the agency has decided to adopt an unimplemented recommendation, a timeline for implementation.

Good Accounting Obligation in Government Act

- For first 12 months after a GAO or OIG recommendation is made, “if the agency is determining whether to implement the public recommendation,” the agency is exempt from compliance with the report issuance requirements in (A) and (B), above
- Senate Report: “By disclosing open recommendations and being required to explain the lack of implementation in an agency’s budget request, agencies will be held more accountable for unimplemented recommendations and Congress and the public can more readily scrutinize an agency’s funding request in light of unfulfilled efficiency improvements that may yield cost savings.”
- Act is designed to increase the transparency of outstanding GAO and OIG recommendations and improve agency accountability for tracking and resolving them

Good Accounting Obligation in Government Act

- 31 U.S.C. § 720(b): When GAO “makes a report that includes a recommendation to” an agency head, he/she “shall submit a written statement on action taken or planned on the recommendation”
- Act increases from 60 days to 180 days the period for submission of such statement to Congressional Committees. This additional time will enable agencies to “plan substantive action in response to GAO’s recommendations and will result in responses that are more useful to Congressional Committees and GAO in following up on agencies’ implementation of the recommendation.”

Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act

- Amends the Trafficking Victims Protection Act of 2000, requires certain changes to FAR Subpart 22.17, Combating Trafficking in Persons
- § 101, “Grants to Assist in the Recognition of Trafficking”: HHS Secretary “may award grants to local educational agencies” “to establish, expand, and support programs”:
 - (i) “to educate school staff to recognize and respond to signs of labor and sex trafficking;” and
 - (ii) “to provide age-appropriate information to students on how to avoid becoming victims” of such trafficking

Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act

- § 111, which does not apply to DOD, requires GSA Administrator to “ensure that any contract for” “air transportation with a domestic carrier requires that the carrier submit to” GSA Administrator, Transportation Secretary, TSA Administrator, Labor Secretary, and Customs & Border Protection Commissioner “an annual report” concerning: (i) “the number of personnel trained in the detection and reporting of potential human trafficking;” (ii) “the number of notifications of potential human trafficking victims received from staff or other passengers;” and (iii) “whether the air carrier notified the National Human Trafficking Hotline or law enforcement at the relevant airport of the potential human trafficking victim for each such notification of potential human trafficking, and if so, when the notification was made.”
- FAR Case No. 2019-017 has been opened to implement this Section

Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act

- § 112, “Ensuring United States Procurement Does Not Fund Human Trafficking,” amends the Trafficking Victims Protection Act of 2000 by adding subsection (k), “Agency Action To Prevent Funding Of Human Trafficking”
- This new provision requires Secretaries of State and Labor, AID Administrator and OMB Director annually “to each submit a report to the GSA Administrator” that describes agency and contractor actions to ensure compliance with the various laws and regulations relating to prohibiting, preventing, investigating and penalizing human trafficking, including training and education related thereto, and information on investigations into contractors/subcontractors that may have violated such laws and regulations and any remedial or law enforcement actions taken

Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act

- § 113 requires that any acquisition workforce curriculum used by the Federal Acquisition Institute “shall include at least 1 course, lasting at least 30 minutes, regarding the law and regulations relating to human trafficking and contracting with the Federal Government.”

The National Defense Authorization Act for FY 2020?

- A National Defense Authorization Act (“NDAA”) has been passed for each of the last 58 years. As of Dec. 10, the FY 2020 NDAA has not been passed by Congress or presented to the President, but an agreed upon Conference Report issued late on Dec. 9
- This Conference Report is more than 3,400 pages
- 2020 NDAA is not “Skinny” and includes 78 acquisition related provisions in Title VIII plus more elsewhere
- In recent years, NDAA passage has occasionally been delayed until as late as January of the relevant Fiscal Year

DOD's Implementation of NDAA Provisions: GAO Report

- In its Report accompanying the FY 2019 NDAA, the House Armed Services Committee sought recommendations on how to reduce the timeline between NDAA statutory enactment and issuance of regulations in the DFARS and to “ensure that previously enacted statutory provisions are not disregarded in regulation.”
- As a result, the Committee directed GAO to submit a report on the subject, which it did (more than 4 months late) on March 1, 2019: GAO-19-489, DEFENSE ACQUISITIONS: DOD NEEDS TO IMPROVE HOW IT COMMUNICATES THE STATUS OF REGULATION CHANGES

DOD's Implementation of NDAA Provisions: GAO Report

- GAO observed that DOD has several methods for implementing acquisition-related NDAA provisions, including through formal rulemaking for certain DFARS; in an interim DFARS; in a DFARS class deviation; in the DFARS Procedures, Guidance, and Information; or in acquisition guidance (e.g., a DOD Instruction)
- DOD agreed with GAO's analysis and developed a matrix to communicate to stakeholders the implementation status of acquisition-related NDAA provisions. This is available at <https://www.acq.osd.mil/dpap/dars/index.html>

DOD's Implementation of NDAA Provisions: GAO Report

- Many NDAA provisions are implemented within 1 year of the NDAA's passage
- A very substantial number of NDAA provisions, however, require well in excess of 1 year (some taking 2 to 4 years or more to be implemented)
 - As of July 2019, some NDAA provisions from the FY 2011, 2012, 2013 and 2015 NDAAs were unimplemented
- Congressional implementation deadlines (which often are unrealistically short) frequently are not met
 - For example, FY 2016 NDAA § 851 implementation took nearly 800 days when it was required to be completed within 180 days of the NDAA's passage

Regulations

NEW Regulations

- Nov. 22, 2019, 84 Fed. Reg. 64680, Final Rule: The FAR Council released a final rule that expands the requirement to report counterfeit electronic parts in a contractor's supply chain. The requirement, which previously applied to defense contractors, now applies to all contractors and requires them to report to the Government-Industry Data Exchange Program (GIDEP) any counterfeit/potentially counterfeit parts used in "complex items with critical applications" and nonconforming parts that do not meet contract specifications.
- Small Business Rules: (1) 84 Fed. Reg. 21256, Dec. 5, 2019, Final Rule (SBA modification to method for calculating annual average receipts used to prescribe size standards for all SBA receipt-based size standards, and for other agencies' proposed receipts-based size standards, from a 3-year to a 5-year averaging period. Proposed rule discussed in written materials); (2) 84 Fed. Reg. 65647, Nov. 29, 2019, Final Rule (SBA rules to implement FY2016 and FY2017 NDAA's, RISE Act, and address other small business subcontracting issues); (3) 84 Fed. Reg. 65222, Nov. 26, 2019 Final Rule (comprehensive revision to HUBZone Program)

Small Business-Related Regulations

- April 11, 2019, 84 Fed. Reg. 14587, Notice: SBA advised the public that it revised its size standards methodology white paper explaining how it establishes, reviews, or revises small business size standards.
- May 14, 2019, 84 Fed. Reg. 21256, Proposed Rule: SBA proposed to amend its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (WOSB) and Economically Disadvantaged Women-Owned Small Business Concerns (EDWOSB) participating in the Women-Owned Small Business Contract Program.
- May 31, 2019, 84 Fed. Reg. 25225, Proposed Rule: DoD proposed to amend the DFARS to implement Section 852 of the FY 2019 NDAA which provides for accelerated payments to small business contractors and subcontractors by accelerating payments to their prime contractors.

Small Business-Related Regulations

- June 26, 2019, 84 Fed. Reg. 30071, Proposed Rule: The FAR Council proposed to revise the FAR to implement Section 1614 of the FY 2014 NDAA, as implemented by the SBA in its final rule published in 2016.
- Aug. 12, 2019, 84 Fed. Reg. 39793, Proposed Rule: The FAR Council proposed to amend the FAR to support the SBA's policy of including overseas contracts in agency small business contracting goals.

Commercial Terms/Items

- Sept. 13, 2019, 84 Fed. Reg. 48513, Advance Notice of Proposed Rulemaking: DoD is seeking information from the public to assist in developing DFARS revisions to implement FY 2019 NDAA § 865, which repeals several years of congressional adjustments to the statutory presumption of development at private expense for commercial items.
- Sept. 26, 2019, 84 Fed. Reg. 50812, Proposed Rule: DoD proposed to amend the DFARS to implement FY 2017 NDAA §§ 871-872 to address how contracting officers may require offerors to submit relevant information to support market research for price analysis for the acquisition of commercial items.
- Oct. 10, 2019, 84 Fed. Reg. 54760, Final FAR Rule: The FAR Council issued a final rule amending the FAR to change the definition of “commercial item” at FAR 2.101 so that the regulatory definition conforms to statutory changes made to the definition by FY 2018 NDAA § 847.

Lowest Price Technically Acceptable (LPTA)

- Sept. 26, 2019, 84 Fed. Reg. 50785, Final Rule: DoD issued a final rule amending the DFARS to implement sections of the FY 2017 and 2018 NDAA that established limitations and prohibitions on the use of the LPTA source selection process.
- Oct. 2, 2019, 84 Fed. Reg. 52425, Proposed Rule: The FAR Council proposed to amend the FAR to implement a section of the FY 2019 NDAA which specified the criteria that must be met to include LPTA source selection criteria in a solicitation and required procurements predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable.

Foreign Companies

- May 31, 2019, 84 Fed. Reg. 25188, Final Rule: The DoD adopted an interim rule as a final rule amending the DFARS to implement sections of the FY 2017 and 2018 NDAA. These NDAA provisions impose prohibitions regarding acquisition of certain foreign commercial satellite services; expand the definition of “covered foreign country” to include Russia; and prohibit purchase of items originating China that meet the definition of goods and services controlled as munitions items when moved to the Commerce Control List of the Export Administration Regulations.
- Aug. 13, 2019, 84 Fed. Reg. 40216, Interim Rule: The FAR Council issued an interim rule amending the FAR to implement Section 889(a)(1)(A) of the FY 2019 NDAA. This interim rule prohibits agencies from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system, on or after August 13, 2019.

Department of Labor Regulations

- Aug. 15, 2019, 84 Fed. Reg. 41677, Proposed DoL Rule: The DoL Office of Federal Contract Compliance Programs is proposing regulations to clarify the scope and application of the religious exemption contained in section 204(c) of Executive Order 11246, as amended.
- Sept. 27, 2019, 84 Fed. Reg. 51230, Final Rule: DoL issued a final rule that raises the minimum salary level necessary to exempt executive, administrative, professional, outside sales, and computer employees from the Fair Labor Standards Act's minimum wage and overtime pay requirements.

Other Regulations

- May 6, 2019, 84 Fed. Reg. 19835, Final Rule: The FAR Council issued a final rule amending the FAR to implement sections of the FY 2017 NDAA to expand special emergency procurement authorities for acquisitions of supplies or services that facilitate defense against or recovery from cyber-attack, provide certain international disaster assistance, or support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.
- May 31, 2019, 84 Fed. Reg. 25228, Proposed Rule: DoD proposed a rule to amend the DFARS to establish a higher DoD contractor purchasing system review dollar threshold (\$50 million).

Other Regulations

- June 12, 2019, 84 Fed. Reg. 27494, Final Rule: The FAR Council issued a final rule amending the FAR to provide guidance to DoD, NASA, and the Coast Guard, consistent with Section 882 of the FY 2017 NDAA. Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received.
- June 24, 2019, 84 Fed. Reg. 29389, Temporary Rule and Request for Comments: VA is amending the VAAR to implement the Federal Circuit's mandate in *PDS Consultants, Inc., v. United States*, 907 F.3d 1345 (Fed. Cir. 2018).

Other Regulations

- June 28, 2019, 84 Fed. Reg. 30947, Final Rule: The DoD amended the DFARS to partially implement a section of the FY 2017 NDAA that addresses the requirement for additional cost or pricing data when only one offer is received in response to a competitive solicitation. This supplements the FAR rule published in 84 Fed. Reg. 27494.
- Aug. 9, 2019, 84 Fed. Reg. 39204, Final Rule: The DoD amended the DFARS to implement Section 811 of the FY 2017 NDAA and Section 815 of the FY 2018 NDAA regarding undefinitized contractual actions.

Other Regulations

- Sept. 26, 2019, 84 Fed. Reg. 50811, Proposed Rule: The DoD proposed a rule to amend the DFARS to implement a section of the FY 2016 NDAA regarding other transaction agreements that modifies DoD's authority to carry out certain prototype other transactions and the criteria required to exempt from competition certain follow-on productions contracts to a participant in the transaction.
- Oct. 2, 2019, 84 Fed. Reg. 52428, Proposed Rule: The FAR Council proposed a rule to amend the FAR to implement a section of the FY 2018 NDAA to increase the threshold for requiring certified cost or pricing data from \$750,000 to \$2 million for contracts entered into after June 30, 2018.

Executive Orders and Policies

New Domestic Preference Executive Orders

- EO 13858 – Strengthening Buy-American Preferences for Infrastructure Projects (January 31, 2019)
- EO 13873 – Securing the Information and Communications Technology and Services Supply Chain (May 15, 2019)
- EO 13811 – Maximizing Use of American-Made Goods, Products, and Materials (July 15, 2019)

New Technology and Cybersecurity Executive Orders:

- EO 13859 – Maintaining American Leadership in Artificial Intelligence (February 11, 2019)
 - In February 2019, DoD released strategy on AI
 - In August 2019, NIST released Plan for U.S. Leadership in AI as called for in EO
- EO 13870 – America's Cybersecurity Workforce (May 2, 2019)

DoD Cybersecurity Maturity Model Certification (CMMC):

- Unified cybersecurity standard for all DoD acquisitions, assessing capabilities of contractors who handle CUI
- Practices and processes to qualify for maturity levels (Levels 1-5)
- Independent, third-party auditors overseen by non-profit accreditation body
- Final version expected January 2020; certification levels expected in DoD RFPs in fall 2020

New Guidance Document Executive Orders:

- EO 13891 – Promoting the Rule of Law Through Improved Agency Guidance Documents (October 9, 2019)
 - Guidance documents generally non-binding
 - Must index on agency website
 - Requirements for public notice and comment

New Guidance Document Executive Orders:

- EO 13892 – Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication (October 9, 2019)
 - Enforcement actions should not tie to guidance
 - Cannot regulate new subject areas without notice and publication

DOJ Guidance on Compliance Program Evaluations (April 30, 2019):

- Programs must be tailored
- Three questions:
 - Is the program well designed?
 - Is the program effectively implemented?
 - Does the program work in practice?

Compliance Program Design:

- Focus on high risk areas
- Maintain Code of Conduct and internal controls
- Tailor training
- Provide anonymous reporting
- Manage third-party relationships
- Address in M&A

Compliance Program Implementation:

- Promote tone at the top
- Keep compliance function independent
- Refine misconduct practices

Compliance Program Practice:

- Reevaluate program
- Incorporate employee feedback
- Establish and fund investigations program
- Analyze root causes

DoD Other Transactions (OT) Guide (December 3, 2018):

- Broader definition of “prototype project”
- Inclusion of FAR clauses and topics
- Limited GAO jurisdiction