

SESSION 13

STATUTES, REGULATIONS, EOs, AND POLICIES

THURSDAY, JANUARY 28, 2021

2:00 PM to 4:00 PM

Pub K

PUBLIC CONTRACTS



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Procurement-Related Statutes Enacted Jan. 20-21

- Payment Integrity Information Act of 2019, Pub. L. No. 116-117 (Mar. 2, 2020)
- Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136 (Mar. 27, 2020)
- Department of Veterans Affairs Contracting Preference Consistency Act of 2020, Pub. L. No. 116-155 (Aug. 8, 2020)
- Protecting Business Opportunities for Veterans Act of 2019, Pub. L. No. 116-183 (Oct. 30, 2020)
- Internet of Things Cybersecurity Improvement Act of 2020, Pub. L. No. 116-207, 134 Stat. 1001 (Dec. 4, 2020)
- Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020)
- William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (Jan. 1, 2021)

Payment Integrity Information Act of 2019

- Annually, Federal Govt makes \$175 billion in improper payments.
- “Improper payment” is:
 - ▶ “any payment that should not have been made or that was made in an incorrect amount, including an overpayment or underpayment, under a statutory, contractual, administrative, or other legally applicable requirement” and includes
 - ▶ “(i) any payment to an ineligible recipient; (ii) any payment for an ineligible good or service; (iii) any duplicate payment; (iv) any payment for a good or service not received, except for those payments where authorized by law; and (v) any payment that does not account for credit for applicable discounts.”

Payment Integrity Information Act of 2019

- Congress has passed “piecemeal bills” including the Improper Payments Information Act of 2002, the Recovery Audit Act of 2002, the Improper Payments Elimination and Recovery Act of 2010, the Improper Payments Elimination and Recovery Improvement Act of 2012, and the Fraud Reduction and Data Analytics Act of 2015.
- However, the “statutory requirements concerning Federal improper payments [we]re scattered throughout the U.S. Code, some ... were not incorporated into the U.S. Code as positive law,” and the statutes in total lacked coherence.
- Act’s purpose “is to improve efforts to identify and reduce Government-wide improper payments” by “codifying, updating, and improving previous improper payments laws.”

Coronavirus Aid, Relief, & Economic Security Act ("CARES Act")

- § 3610 allows Federal agencies to modify contracts impacted by COVID-19, without consideration, to reimburse contractors, under limited circumstances, for paid or sick leave that a contractor provides employees or subcontractors to maintain a "ready state," including to protect the life and safety of Govt and contractor personnel.

CARES Act

- Relief is subject to following statutory requirements or restrictions:
 - ▷ (1) Reimbursement is discretionary.
 - ▷ (2) Subject contracts must be modified to provide for reimbursement.
 - ▷ (3) Reimbursement is limited to the minimum contract billing rates and cannot exceed an average of 40 hours per week for paid leave, including sick leave.
 - ▷ (4) Reimbursed expenses must be used to retain employees (or subcontractors) in a ready state.
 - ▷ (5) Reimbursable expenses are limited to those between March 27, 2020-March 31, 2021.

CARES Act

- ▶ (6) Reimbursable expenses are limited to those employees and subcontractors that cannot perform work on a federally approved site due to facility closures or other restrictions, and who cannot telework because their jobs can't be performed remotely during COVID-19.
 - ▶ (7) Contractor must offset reimbursements by any credits contractor receives under other sections of CARES Act & under the Families First Coronavirus Response Act, P.L. 116-127.
- Reimbursement subject to availability of appropriations under CARES Act and/or other relevant acts.
 - Critical to review agency guidance (e.g., DOD, GSA, DOE, NSA)

CARES Act

- DOD's use of § 3610 through Sept. 30, 2020 has been limited:
 - ▶ Obligated \$18.3m as of July 20, 2020 under § 3610
 - ▶ Reimbursed contractors \$68.3m in leave costs thru Sept. 30 and plans to reimburse at least \$49.9m more
- DOD IG determined that only 96 of 781 DOD affected contractors received assistance through § 3610
- DOD IG found DOD's use of § 3610 limited "because COs were flexible and creative, the defense industrial base was declared a critical infrastructure, there was no appropriation of funds specifically for § 3610, & contractors used other forms of COVID-19 assistance."

CARES Act

- **§ 4017:** Amends Defense Production Act to expand authority by temporarily removing certain funding limitations on purchases and commitments to create, maintain, protect, expand or restore domestic industrial base capabilities.
- **§ 3301:** Provides expanded Other Transaction Agreement (OTA) authority to HHS' Biomedical Advanced Research and Development Authority (BARDA). § 13006 relaxes statutory restrictions and requirements applicable to certain DOD OTAs.

CARES Act

■ § 3102:

- ▶ Amends statutory authority providing for procurements for the Strategic National Stockpile and Security Countermeasure.
- ▶ Expands definition of materials to be maintained in the National Stockpile to include “[PPE], ancillary medical supplies & other applicable supplies required for the administration of drugs, vaccines & other biological products, medical devices, & diagnostic tests.”

Department of Veterans Affairs Contracting Preference Consistency Act of 2020

- Act “clarifies the relationship between the AbilityOne Program and the Department of Veterans Affairs’ (VA) Veterans First Program.”
- Congress passed Act because of concern that *PDS Consultants, Inc. v. U.S.*, 907 F.3d 1345, 1360 (Fed. Cir. 2018) would lead to the “destruction of employment & employment opportunities for individuals who are blind or disabled.”

Department of Veterans Affairs Contracting Preference Consistency Act of 2020

- Amends 38 U.S.C. § 8127 by providing that VA “Rule of Two” analysis generally not mandated for those requirements added to the AbilityOne Procurement List before VBA’s Dec. 22, 2006, enactment & in effect on day before enactment of the Consistency Act (Aug. 7, 2020)
- Provides exception to protect some requirements that VA had transitioned to VOSBs and SDVOSBs

Protecting Business Opportunities for Veterans Act of 2019

- VA has identified as major issues “pass-through schemes” and, in particular, SDVOSBs and VOSBs obtaining contracts reserved for those entities but performing little (if any) of the work
- Act intended to help VA identify instances where SDVOSBs or VOSBs improperly pass through work on prime contracts set aside for SDVOSBs and VOSBs to ineligible entities, and to take action against entities that fail to perform minimum work as prime contractor.

Protecting Business Opportunities for Veterans Act of 2019

- Amends 38 U.S.C. § 8127 to add a new subsection (k), “Limitations on Subcontracting.”
- When VA COs restricts competition to SDVOSBs/VOSBs, VA is required to obtain certification from offeror that it will comply with subcontracting limitations and acknowledge that certification subject to criminal penalties for false statements.
- If VA determines that contractor awarded contract under § 8127 did not act in good faith with respect to subcontracting restrictions, the contractor shall be subject to: (1) referral to VA S&D Committee, (2) fine under 15 U.S.C. § 645(g)(1), and/or (3) criminal prosecution under 18 U.S.C. § 1001.

Internet of Things (“IoT”) Cybersecurity Improvement Act of 2020

- NIST must establish standards and guidelines for agencies on appropriate use and management of IoT devices owned or controlled by Federal agencies and connected to agency information systems, including minimum information security requirements for managing cybersecurity risks associated with such devices.
 - ▶ IoT devices have at least one transducer (sensor or actuator) for interacting directly with the physical world, have at least one network interface, are not conventional Information Technology devices (such as smartphones and laptops) and can function on their own (not just as component of another device).
- OMB must issue policies and procedures to ensure agency information security policies are consistent with NIST standards and guidelines.
- FAR to be revised to implement Act’s standards and guidelines.

Internet of Things (“IoT”) Cybersecurity Improvement Act of 2020

- NIST must issue guidelines for agencies, contractors providing agencies with information systems (including IoT devices), and subcontractors providing such information systems to prime contractors: on reporting, coordinating, receiving and disseminating information about potential security vulnerabilities relating to the information system and the resolution of security vulnerabilities.
- By Dec. 4, 2022, OMB Director, in consultation with DHS Secretary, must develop and oversee implementation of policies, principles, standards, or guidelines to address security vulnerabilities of information systems (including IoT devices).
- FAR must be amended as necessary to implement same.
- On Dec. 15, 2020, NIST released 4 new draft publications to begin providing guidance as mandated by the Act, i.e., NIST Special Publication 800-213 and NIST Interagency Reports 8259B, 8259C and 8259D.

Internet of Things (“IoT”) Cybersecurity Improvement Act of 2020

- Prohibits agency heads “from procuring or obtaining, renewing a contract to procure or obtain, or using” IoT device if the agency’s CIO determines that its use “prevents compliance” with the security standards and guidelines for agencies on IoT device use and management or the disclosure guidelines for security vulnerabilities relating to information systems.
 - ▶ Applies equally to acquisitions below and above the simplified acquisition threshold. Prohibition effective Dec. 4, 2022.
 - ▶ May be waived if agency’s CIO determines that a waiver is necessary for national security or research purposes, or if the “device is secured using alternative and effective methods appropriate to the function of such device.”

Consolidated Appropriations Act, 2021

- **§ 330:** Permits 8(a) certified business that was in 8(a) Program “on or before Sept. 9, 2020” to extend its participation in the program by 1 year.
 - ▶ SBA must issue implementing regulations within 15 days of this Act’s enactment, without regard to APA’s rulemaking requirements.
 - ▶ Substantively identical provision included as § 869 of FY 2021 NDAA

Consolidated Appropriations Act, 2021

- **§ 1002:** Extends potentially reimbursable contractor paid leave under CARES Act § 3610 to that incurred between March 27, 2020 and March 31, 2021.
- **§ 8131:** Establishes pilot program for software development with significant budget flexibility: Appropriated funds “may be used for expenses for the agile research, development, test and evaluation, procurement, production, modification, and operation and maintenance” for 8 “Software and Digital Technology Pilot programs.”

William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

- FY21 NDAA became law on Jan. 1, 2021, three months after the Oct. 1, 2020 start of FY 2021, when Congress overrode President's veto.
- Unfortunately, NDAAs are commonly enacted well after the start of Govt fiscal year.
- This is the 60th fiscal year in a row that a NDAA has been enacted.

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- FY 2021 NDAA's procurement-related reforms and changes are primarily located (as usual) in the Act's "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters," which contains 63 procurement provisions.
- Past 4 NDAA's: FYs 2020, 2019, 2018, and 2017 NDAA's, respectively, contained 78, 71, 73, and 88 Title VIII provisions.
- Certain provisions in other FY 2021 NDAA titles are very important to procurement law.
- Some provisions will not become effective until FAR, DFARS or other regulations are issued/amended, which sometimes can take 2 to 4 years or more

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§ 806, Definition of Material Weakness for Contractor Business Systems

- ▶ Amends § 893 of FY2011 NDAA by replacing “significant deficiency” with respect to a contractor business system with “material weakness.”
 - ▶ “Significant deficiency” is a “shortcoming in the system that materially affects the ability of officials of [DOD] and the contractor to rely upon information produced by the system that is needed for management purposes”
 - ▶ “Material weakness” is defined by § 806 as a “deficiency or combination of deficiencies in the internal control over information in contractor business systems, such that there is a reasonable possibility that a material misstatement of such information will not be prevented, or detected and corrected, on a timely basis.”
- ▶ § 809 Panel recommended change after finding DOD’s definition of significant deficiency was inconsistent with “internal control deficiencies used in generally accepted auditing standards.”

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■ § 814, Cost or Pricing Data Reporting Requirements for DOD Contracts

- ▶ Modifies the Truthful Cost or Pricing Data statute (TINA), which generally applies to contracts without adequate price competition that are not commercial products and/or services
- ▶ Establishes standard \$2.0M threshold for application of TINA's requirements with respect to subcontracts and price adjustments
- ▶ Provision's purpose, as explained by Joint Explanatory Statement (JES), is "to streamline the administration of cost accounting, and to reduce inefficiencies associated with the need to maintain dual accounting systems, not to reduce governmental oversight over contracts beneath the applicable threshold"

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■ § 815, Prompt Payment of DOD Contractors

- ▶ Amends 10 U.S.C. § 2307(a)(2) to “strengthen the requirement that [DOD] establish a goal to pay small business” primes & small business first-tier subs “within 15 days of receipt of” a proper invoice.
- ▶ JES recognizes DLA’s Nov. 2019 decision to move from 15-day to 30-day payment term may negatively impact small businesses’ ability to continue to do business with Govt.

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■ § 816, Documentation Pertaining to Commercial Item Determinations

- ▶ In determining whether a “product or service offered by a contractor meets the definition of a commercial product or commercial service,” 10 U.S.C. § 2380 amended to provide that a DOD CO “may”: (A) “request support from” DCMA, DCAA “or other appropriate [DOD] experts;” and (B) consider views of “appropriate public and private sector entities.”
- ▶ Requires DOD COs within 30 days of contract award to submit written memo summarizing commercial product or service determination, including providing “detailed justification”

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- § 818, Repeal of Program for Qualified Apprentices for Military Construction Projects
 - ▶ § 865 of FY 2020 NDAA required offerors for DOD military construction contract to “certify ... that, if awarded such a contract, the offeror will” “(1) establish a goal that not less than 20 percent of the total workforce employed in the performance of such a contract are qualified apprentices”; and “(2) make a good faith effort to meet or exceed such goal.”
 - ▶ Just over 1 year after its passage, this section repeals § 865, and its implementing statute, 10 U.S.C. § 2870.

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■ § 819, Modifications to Mitigating Risks Related to FOCI of DOD Contractors & Subs

- ▶ Builds upon FY 2020 NDAA § 847, which directed DOD to “improve its processes and procedures for the assessment and mitigation of risks related to foreign ownership, control, or influence (FOCI) of [DOD] contractors and subcontractors.”
- ▶ Requires procedures “responding to changes in covered contractor or subcontractor beneficial ownership status based on changes in disclosures of their beneficial ownership and whether they are under FOCI”
- ▶ By July 1, 2021, DOD required to revise relevant guidance, training, and policies, including DFARS, to implement this section’s requirements.
- ▶ JES directs DOD “to establish contract administration procedures for appropriately responding to changes in contractor or subcontractor beneficial ownership status.”

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■ § 833, Listing of Other Transaction Authority Consortia

- ▶ By April 2021, DOD must publish and maintain on beta.SAM.gov (or successor), “list of the consortia used by [DOD] to announce” other transactions opportunities or otherwise make such opportunities available.
- ▶ JES directs GAO to submit a report to congressional defense committees by Dec. 1, 2021 on the “nature and extent” of DOD’s use of consortia for other transactions.

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- § 837, Safeguarding Defense-Sensitive US IP, Technology, & Other Data & Information
 - ▶ Requires DOD to “identify policies and procedures protecting defense-sensitive US intellectual property, technology, and other data and information, including hardware and software, from acquisition by the government of China,” and to develop additional policies and procedures if SecDef determines that existing policies and procedures are insufficient.
 - ▶ SecDef must review existing authorities under which DOD employees “may be subject to post-employment restrictions with foreign governments and with organizations subject to” FOCI and identify additional measures that may be necessary.

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- § 837, Safeguarding Defense-Sensitive US IP, Technology, & Other Data & Information
 - ▶ SecDef required to “consider mechanisms to restrict current or former employees of [DOD] contractors or subcontractors ... that contribute significantly and materially to” a critical national security technology “from working directly for companies wholly owned by the government of China, or for companies that have been determined ... to be under the ownership, control, or influence of the government of China.”

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- § 846, Improving Implementation of Policy Pertaining to the National Technology & Industrial Base
 - ▶ Requires SecDef to:
 - ▶ “[A]ssess [R&D], manufacturing, & production capabilities of the national technology and industrial base ... and other allies and partner countries.”
 - ▶ “[D]evelop and promulgate acquisition policy and guidance” “germane to the use of the [R&D], manufacturing, and production capabilities” related to “National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion”
 - ▶ “[E]stablish a process for considering whether to include additional member countries in the national technology and industrial base.”

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■ § 848, Supply of Strategic & Critical Materials for DOD

- ▶ Requires SecDef “to the maximum extent practicable, to acquire strategic and critical materials required to meet ... defense, industrial, and essential civilian needs” from sources in the following order: (i) “sources located within U.S.”; (ii) “sources located within national technology & industrial base,” & (iii) “other sources as appropriate.”

■ § 849, Analyses of Certain Activities for Action to Address Sourcing & Industrial Capacity

- ▶ Requires SecDef “to determine and develop appropriate actions with respect to sourcing or investment to increase domestic industrial capacity and explore ways to encourage critical technology industries to move production to the U.S. for national security purposes”

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- § 862, Transfer of Verification of Small Business Concerns Owned & Controlled by Veterans or Service-Disabled Veterans to SBA
 - ▶ Transfers responsibility for verifying VOSB & SDVOSB status from VA to SBA.
 - ▶ Eliminates VA's separate certification program through Center for Verification & Evaluation and requires all SDVOSBs and VOSBs, working with VA or other Federal agency, to be certified through SBA.
 - ▶ VA remains responsible for verifying status as veteran or service-disabled veteran. SBA will also take over responsibility for maintaining a database of eligible SDVOSBs and VOSBs.

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■ § 863, Employment Size Standard Requirements for Small Businesses

- ▶ Increases measurement period for employee-based size standards for manufacturers from 12 to 24 months.
- ▶ Company will be small if average of its employees for each pay period during prior 24 months is below applicable size standard, which is designed to help businesses continue to qualify as small despite temporary increases in the number of employees.
- ▶ This change could cause a business that would have qualified as small *if* the number of employees were measured over a 12-month period to be ineligible if business had a very high average number of employees in the first 12 months of the two years used for measurement.

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§ 868, Past Performance Ratings of Certain Small Businesses

- ▶ Allows small businesses bidding on Federal prime contracts that have previously participated in a JV, but have no relevant past performance information of their own, to use JV's past performance
- ▶ CO required "to consider the past performance of the joint venture when evaluating the past performance of the small business concern, giving due consideration to the information" regarding the duties and responsibilities that the small business carried out for JV
- ▶ Requires primes that have performed contracts that require small business subcontracting plans to provide first tier small business subs with a past performance record of their performance on the contract upon request from the first-tier small business sub

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■ § 869, Extension of Participation in 8(a) Program

- ▶ Permits 8(a) certified business that was in the 8(a) Program “on or before September 9, 2020” to extend its participation in the program by an additional year.
- ▶ Requires SBA to issue implementing regulations within 15 days of FY 2021 NDAA’s enactment, without regard to the APA’s rulemaking requirements.
- ▶ Substantively identical language included in § 330 of the Consolidated Appropriations Act, 2021, which President Trump signed into law on Dec. 27, 2020.

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■ § 883, Prohibition on Awarding of DOD Contracts to Contractors that Require NDAs Relating to Waste, Fraud, or Abuse

- ▶ DOD “may not award a contract for the procurement of goods or services to a contractor unless the contractor represents that”: (1) “it does not require its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a [DOD] contract to” “investigative or law enforcement representatives of DOD;” and (2) “it will inform its employees” of these “limitations on confidentiality agreements and other statements.”
- ▶ DOD CO “may rely on the representation of a contractor” as to these requirements in awarding a contract unless the CO “has reason to question the accuracy of the representation.”

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■ § 885, Disclosure of Beneficial Owners in Database for Federal Agency Contract and Grant Officers

- ▶ Requires identification and disclosure in FAPIIS of “beneficial owners” of a “corporation” bidding on or awarded a federal contract or grant; “corporation” is interpreted broadly.
- ▶ “Beneficial Owner” is “determined in a manner that is not less stringent than the manner set forth in” 17 C.F.R. § 240.13d-3, which provides “a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security.”

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§ 886, Repeal of Pilot Program on Payment of Costs for Denied GAO Protests

- ▶ Repeals FY 2018 NDAA § 827, which required DOD to establish “pilot program to determine the effectiveness of requiring contractors to reimburse” DOD “for costs incurred in” a “bid protest that was—(1) denied in an opinion issued by [GAO]; (2) filed by a party with revenues in excess of \$250,000,000;” & (3) filed between Oct. 1, 2019-Sept. 30, 2022.
- ▶ JES directs SecDef to undertake a detailed study of bid protests, including elements “for which the RAND National Defense Research Institute was unable to obtain full and complete data during” its study in response to FY 2017 NDAA, and to study agency level protests.
- ▶ By Sept. 1, 2021, SecDef to “provide Congressional defense committees with a report detailing the results and recommendations of the study, together with such comments as the Secretary determines appropriate.”

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§ 888, Revision to Requirement to Use Firm Fixed-Price Contracts for Foreign Military Sales

- ▶ § 830 of FY 2017 NDAA required DOD to prescribe regulations to require the use of firm-fixed price contracts for foreign military sales. This provision is repealed.

§ 890, Identification of Certain Contracts Relating to Construction or Maintenance of a Border Wall

- ▶ Requires DOD to identify on FPDS (or successor system) contracts (including task orders and contract modifications) “relating to the construction or maintenance of a barrier along the international border between the United States and Mexico that have an estimated value greater than or equal to \$7,000,000.”

§ 901, Repeal of DOD Office of Chief Management Officer

- ▶ Repeals statutory requirement for CMO and Deputy CMO. CMO established by § 910 of the FY 2018 NDAA.

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■ NDAA Title XVII, Cyberspace-Related Matters

- ▶ This title contains 52 provisions focused on a variety of cybersecurity issues effecting government operations and the defense industrial base.
- ▶ Some of these provisions came from the Cyberspace Solarium Commission, established by FY 2019 NDAA § 1652, which was tasked “with developing consensus on a strategic approach to defending the Nation in cyberspace against cyber attacks.”

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■ § 1738, Assistance for Small Manufacturers in the Defense Industrial Base Supply Chain on Matters Relating to Cybersecurity

- ▶ DOD may “provide funds to Manufacturing Extension Partnership Centers for the provision of cybersecurity services to small manufacturers.”
- ▶ Such assistance can be provided only if DOD publishes on grants.gov (or successor) “criteria for selecting recipients” for the program, and funds can only be used for specific purposes, including compliance with DFARS cybersecurity requirements and the Cybersecurity Maturity Model Certification framework.

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■ § 1742, DOD Cyber Hygiene and Cybersecurity Maturity Model Certification Framework

- ▶ Requires DOD to assess by March 1, 2021 “each Department component against” the CMMC framework and “submit to congressional defense committees a report that identifies each such component’s CMMC level and implementation of the cybersecurity practices and capabilities required in each of the levels of the CMMC framework.”
- ▶ Not more than 60% of funds appropriated for FY 2021 to implement CMMC “may be obligated or expended until” Under Secretary for Acquisition and Sustainment “delivers to the congressional defense committees a plan for implementation of the CMMC via requirements in procurement contracts”

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- Title XVIII, Transfer and Reorganization of Defense Acquisition Statutes (FY 2021 NDAA §§ 1801-85)
 - ▶ Transfers, reorganizes, redesignates, and consolidates defense acquisition statutes into Part V of subtitle A, *Acquisition*, of Title 10 of the U.S. Code.
 - ▶ Creates a more rational organization of DOD acquisition statutes, loosely following FAR's structure.
 - ▶ Reorganization is intended to have no policy impact & not intended to change meaning of impacted statutes.

William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

- Title XVIII, Transfer and Reorganization of Defense Acquisition Statutes (FY 2021 NDAA §§ 1801-85)
 - ▶ By March 15, 2021, SecDef required to submit to congressional defense committees report evaluating Title XVIII & its amendments
 - ▶ Title XVIII effective Jan. 1, 2022
 - ▶ By Jan. 1, 2023, SecDef required to amend the DFARS and other relevant authorities to reflect the changes made by Title XVIII.
 - ▶ From Jan. 1, 2022 until DFARS is updated (but by Jan. 1, 2023), DOD “shall apply the law as in effect on December 31, 2021, with respect to contracts entered into during” that period.



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SMALL BUSINESS-RELATED RULES: FAR COUNCIL

- **Apr. 27, 2020, 85 Fed. Reg. 23299, Proposed Rule: Consolidation and Substantial Bundling:** FAR Council proposed to amend the FAR to implement § 863 of the FY16 NDAA, which requires contracting entities to provide public notices of determinations for substantial bundling and consolidation of contract requirements.
- **June 3, 2020, 85 Fed. Reg. 34155, Proposed Rule: Good Faith Effort to Follow Subcontracting Plan:** FAR Council proposed to amend the FAR to implement § 1821 of the FY17 NDAA and reflect SBA regulations that provide examples of activities that would be considered a failure to make a good faith effort to comply with small business subcontracting plans.
- **June 5, 2020, 85 Fed. Reg. 34561, Proposed Rule: Policy on Joint Ventures:** FAR Council proposed to amend the FAR to reflect changes regarding joint ventures in SBA final rules published in 2016. The proposed rule would require contracting officers to consider the past performance of a joint venture and the past performance of each party to a joint venture if the joint venture does not have demonstrated past performance.

SMALL BUSINESS-RELATED RULES: DEPARTMENT OF DEFENSE

- **Apr. 8, 2020, 85 Fed. Reg. 19692, Final Rule: Prompt Payments of Small Business Contractors:** DoD issued a final rule amending the DFARS to implement § 852 of the FY2019 NDAA, which provided accelerated payments to small business contractors and subcontractors, including by accelerating payments to their prime contractors regardless of size.
- **June 5, 2020, 85 Fed. Reg. 34528, Final Rule: Justification and Approval Threshold for 8(a) Contracts:** DoD issued a final rule amending the DFARS to implement § 823 of the FY2020 NDAA which increased the threshold for requiring a justification and approval to award a sole source contract to a participant in the 8(a) program to actions exceeding \$100 million. The previous threshold was \$22 million.

SMALL BUSINESS-RELATED RULES: SMALL BUSINESS ADMINISTRATION

- **Apr. 2 – Oct. 26, 2020, Interim Final Rule: Business Loan Program Temporary Changes; Paycheck Protection Program-Requirements:** SBA posted its first interim final rule in April announcing the implementation of the CARES Act. The Act temporarily added the “Paycheck Protection Program” (“PPP”) to SBA’s Loan Program under § 7(a) of the Small Business Act. Over subsequent months, the SBA issued guidance on the PPP through multiple interim rules, including rules released with the Treasury Department.
- **May 8, 2020, 85 Fed. Reg. 27290, Final Rule: Regulatory Reform Initiative—Small Disadvantaged Businesses:** SBA issued a final rule removing 16 regulations that were no longer necessary because they are either redundant or obsolete, in response to Executive Order 13777, Enforcing the Regulatory Reform Agenda, under which SBA initiated a review of its regulations to determine which might be revised or eliminated.

SMALL BUSINESS-RELATED RULES: SMALL BUSINESS ADMINISTRATION

- **Oct. 16, 2020, 85 Fed. Reg. 66146, Final Rule: Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments:** SBA issued a final rule consolidating the 8(a) and All-Small Mentor-Protégé Programs. The rule eliminated the 8(a) version of the program, including its unique requirements and separate review process for 8(a) mentor-protégé agreements.
- **May 11, 2020, 85 Fed. Reg. 27650, Final Rule: Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification:** SBA issued a final rule amending its regulations at 13 C.F.R. Parts 124, 125, 126, and 127 to implement a statutory requirement to certify Women-Owned Small Business Concerns and Economically Disadvantaged Women-Owned Small Business Concerns participating in the WOSB Contract Program.

SMALL BUSINESS-RELATED RULES: GENERAL SERVICES ADMINISTRATION

- **Apr. 10, 2020, Class Deviation on Payments to Small Business Contractors:** GSA issued a class deviation to allow GSA to provide accelerated payments to small business contractors, with a goal of 15 days after receipt of a proper invoice.

FOREIGN SUPPLIES AND COMPANIES

July 14, 2020, 85 Fed. Reg. 42665; August 27, 2020, 85 Fed. Reg. 53126, Interim Rules: Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment:

- ▶ The FAR Council amended the FAR through an interim rule to implement § 889(a)(1)(B) of the FY2019 NDAA, which prohibits executive agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services (e.g., Huawei) as a substantial or essential component of any system, or as critical technology as part of any system, on or after Aug. 13, 2020, unless an exception applies or a waiver is granted.
- ▶ The FAR Council issued a second interim rule amending the FAR to implement § 889(a)(1)(B) by requiring an offeror to represent annually, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.

FOREIGN SUPPLIES AND COMPANIES

Aug. 30, 2020, 85 Fed. Reg. 51596, Final Rules: Bureau of Industry and Security: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List: BIS issued two final rules ramping up the export restrictions on Huawei, its affiliates, and other prohibited parties.

Collectively, the rules added additional Huawei companies to BIS's Entity List; removed the Temporary General License that formerly allowed certain transactions with Huawei and replaced it with certain more limited authorizations; tightened loopholes in BIS's special foreign direct product rule applicable to Huawei and its affiliates; and amended the Entity List to make clear that the prohibitions apply when such entities are acting as a purchaser, intermediate consignee, ultimate consignee, or end-user.

Domestic Preference (NEW!)

- Jan. 15, 2020: The FAR Council issued a final rule implementing Executive Order 13788. Final rule (i) increases percentage of domestic content an end product must contain to be a domestic end product; (ii) imposes higher domestic content requirement for iron and steel; (iii) increases the price evaluation preference for offerors of domestic end products (DoD 50% preference not changed)

CYBERSECURITY AND NATIONAL SECURITY

- **Sept. 29, 2020, 85 Fed. Reg. 61505, Interim Rule: Assessing Contractor Implementation of Cybersecurity Requirements:** DoD issued an interim rule to implement two frameworks for verifying contractor compliance with cybersecurity requirements: (1) NIST SP 800-171 DOD Assessment Methodology and (2) the Cybersecurity Maturity Model Certification, which adds a comprehensive and scalable certification element to verify implementation of processes and practices associated with achievement of cybersecurity maturity levels.
- **Dec. 21, 2020, 85 Fed. Reg. 83300, Final Rule: National Industrial Security Program Operating Manual (NISPOM):** DoD added the National Industrial Security Program Operating Manual (NISPOM) to the Code of Federal Regulations (CFR).

MISCELLANEOUS FAR RULEMAKINGS: FAR COUNCIL

- **Apr. 1, 2020, 85 Fed. Reg. 18181, Proposed Rule: Construction Contract Administration:** FAR Council proposed amending the FAR to implement § 855 of the FY2019 NDAA, requiring agencies to provide a notice to prospective offerors including information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts.
- **May 6, 2020, 85 Fed. Reg. 27087, Final Rule: Revocation of Executive Order on Nondisplacement of Qualified Workers:** FAR Council issued final rule removing rules that had implemented EO 13495 in response to EO 13897.
- **July 2, 2020, 85 Fed. Reg. 40068, Final Rule: Evaluation Factors for Multiple-Award Contracts:** FAR Council issued a final rule amending the FAR to implement § 825 of the FY2017 NDAA, which modified the requirement to consider price or cost as an evaluation factor for the award of certain multiple-award task-order contracts issued by DoD, NASA, and the Coast Guard.

MISCELLANEOUS FAR RULEMAKINGS: FAR COUNCIL

- **July 2, 2020, 85 Fed. Reg. 40071, Final Rule: Modifications to Cost or Pricing Data Requirements:** FAR Council issued final rule amending the FAR to implement § 811 of the FY2018 NDAA to increase the threshold for requiring certified cost or pricing data from \$750,000 to \$2 million for contracts entered after June 30, 2018.
- **Oct. 15, 2020, 85 Fed. Reg. 65610, Proposed Rule: Revision of Definition of “Commercial Item”:** FAR Council proposed amending the FAR to change the definition of “commercial item” at FAR 2.101, so that the regulatory definition conforms to statutory changes in § 836 of the FY2019 NDAA.

MISCELLANEOUS RULEMAKINGS: DEPARTMENT OF DEFENSE

- **Apr. 8, 2020, 85 Fed. Reg. 19719, Proposed Rule, Expediting Contract Closeout:** DoD proposed amending the DFARS to provide for expedited contract closeout through a waiver by the contractor and Government of entitlement to any residual dollar amounts that are due to either party at the time of final contract closeout.
- **June 5, 2020, 85 Fed. Reg. 34530, Final Rule: Market Research and Consideration of Value for the Determination of Price:** DoD issued a final rule amending the DFARS to implement several sections of the FY17 NDAA to address how COs may require offerors to submit relevant information to support market research for price analysis and allow offerors to submit information relating to a commercial item's value to aid in the determination of the reasonableness of the price of such item.

MISCELLANEOUS RULEMAKINGS: DEPARTMENT OF DEFENSE

- **June 5, 2020, 85 Fed. Reg. 34535, Final Rule: Notification of Anticipated Contract Termination or Reduction:** DoD issued a final rule amending the DFARS to modify the text of DFARS clause 252.249-7002, Notification of Anticipated Contract Termination or Reduction, to make various updates to the clause.
- **Nov. 23, 2020, 85 Fed. Reg. 74636, Proposed Rule:** DoD proposed amending the DFARS to implement § 848 of the FY18 NDAA, which 48 modified 10 U.S.C. § 2380(b), regarding commercial item determinations.

MISCELLANEOUS RULEMAKINGS: DEPARTMENT OF LABOR

- **July 2, 2020, 85 Fed. Reg. 39834, Final Rule: Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors: TRICARE Providers:** DOL issued a final rule amending its regulations at 41 C.F.R. Parts 60-1, 60-300, and 60-741 pertaining to its authority over TRICARE health care providers, confirming that OFCCP lacked jurisdiction over health care providers whose sole government contract is based on the providers' participation in TRICARE.
- **Dec. 9, 2020, 85 Fed. Reg. 79324, Final Rule: Religious Exemption for Gov't Contractors:** OFCCP issued a final rule expanding the religious exemption from antidiscrimination for federal contractors.

Coming Down the Pike!

- FAR Case 2019-015: Revisions to FAR to improve consistency between the procurement and non-procurement procedures for suspension and debarment
- FAR Case 2020-0008: Revisions to FAR to implement FY2020 NDAA prohibiting criminal history inquiries prior to conditional employment offer



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Executive Orders: Defense Production Act Reform

- Mar. 18, 2020: EO 13909, Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19:
 - ▶ Delegated to HHS priorities and allocation authority over “health and medical resources needed to respond to the spread of COVID-19”
- Mar. 23, 2020: EO 13910, Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19
 - ▶ Delegated to HHS DPA § 102 authority to prevent hoarding of COVID-19 Health and Medical Resources
- Mar. 30, 2020: HHS issued list of “scarce” or “threatened” PPE and other medical resources. (85 Fed. Reg. 17592)

Executive Orders: Defense Production Act Reform

■ Mar. 27, 2020: EO 13911, Delegating Additional Authority under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19:

- ▶ Delegated to **DHS** priorities and allocation authority over COVID-19 Health and Medical Resources
- ▶ Delegated to **DHS** DPA § 102 authority to prevent hoarding of COVID-19 Health and Medical Resources
- ▶ Delegated to **HHS & DHS** DPA Title III authority to provide assistance to expand productive capacity and supply of COVID-19 Health and Medical Resources
- ▶ Delegated to **HHS & DHS** DPA § 708 authority to form “voluntary agreements” with industry.

Executive Orders: Defense Production Act Reform

- Mar. 27, 2020: Presidential Memorandum directs HHS to issue priority rated order to General Motors Company for ventilators.
- Apr. 2, 2020: Presidential Memorandum directs FEMA to issue priority rated order to 3M Company for N95 respirators.
- Apr. 7, 2020: FEMA Issues Allocation Order for Certain Scarce or Threatened Health and Medical Resources for Domestic Use (85 Fed. Reg. 20195; 44 C.F.R. pt. 328):
 - ▶ Prohibited export from the United States of Covered Personal Protective Equipment without prior approval of FEMA
 - ▶ Limited exemption for certain manufacturers with continuous export agreements
 - ▶ Criminal penalty for willful violations (50 U.S.C. § 4513)

Executive Orders: Defense Production Act Reform

- Apr. 28, 2020: EO 13917, Delegating Authority Under the [DPA] with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19
 - ▶ Delegates authority to **USDA** to ensure meat and poultry processors continue operations with guidance from CDC and OSHA
- May 13, 2020: FEMA Interim Rule establishing Emergency Management Priorities and Allocations System (EMPAS) (85 Fed. Reg. 28500; 44 C.F.R. pt. 333)
 - ▶ FEMA establishes standards and procedures by which it may issue priority rated orders and allocate materials, services, and facilities.
 - ▶ Modeled and closely tracks the DPAS regulations at 15 C.F.R. pt. 700 and the HRPAS regulations at 45 C.F.R. pt. 101.
 - ▶ **Final rule issued** on Jan. 8, 2021 (86 Fed. Reg. 1288)

Executive Orders: Temporary Foreign Labor or Offshoring Practices

Aug. 3, 2020: EO 13940, Aligning Federal Contracting and Hiring Practices With the Interests of American Workers

- ▶ Each Agency reviews contracts awarded in FY18 and FY19 to assess:
 - ▶ Contractors' use of temporary foreign labor to perform contracts
 - ▶ Contractors' performance of services in foreign countries that was previously performed in the U.S. (offshoring).
- ▶ Each agency will assess any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of Federal procurement and on national security and propose corrective action.

Executive Orders: Improve Domestic Production of Essential Medicines and Medical Countermeasures

- Aug. 6, 2020: EO 13944, Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs are Made in the U.S.
 - ▶ Sec. 2 – Maximizing Domestic Production in Procurement of Essential Medicines (EMs), Medical Countermeasures (MCs), and Critical Inputs (CIs) that are produced in the United States.
 - ▶ Sec. 3 – Identifying Vulnerabilities in Supply Chains for CMs, MCs, and CIs
 - ▶ Sec. 4 – Streamlining EPA Regulatory Requirements for development of Advanced Manufacturing Facilities for CMs, MCs, and CIs.
 - ▶ Sec. 5 – HHS will prioritize performance of Federal contracts for CMs, MCs, and CIs.

Executive Orders: Combating Race and Sex Stereotyping

- **Sept. 22, 2020: EO 13950, Combating Race and Sex Stereotyping**
 - ▶ Contractors shall not use workplace training that includes race or sex stereotyping or scapegoating.
 - ▶ Contractors shall notify labor unions of this requirement
 - ▶ Clause is required flow down to “every subcontract or purchase order” unless exempted by DoL rules.
 - ▶ Enforcement by OFCCP
- **Dec. 30, 2020: N.D.Ca. issued nationwide preliminary injunction** barring the Government from enforcing EO 13950 on First Amendment grounds. OFCCP is complying with the injunction.
- **Jan. 20, 2021: EO 13950 Revoked by President Biden**

Executive Orders: Biden Administration

Jan. 20, 2021: EO 13992, Revocation on Certain EOs Concerning Federal Regulation

- ▶ Revokes EO 13771 of Jan. 30, 2017 (Reducing Regulation and Controlling Regulatory Costs)
- ▶ Revokes EO 13777 of Feb. 24, 2017 (Enforcing the Regulatory Reform Agenda)

Jan. 20, 2021: Presidential Action - Regulatory Freeze Pending Review

- ▶ Freezes all pending rules until reviewed and approved by an agency or department head appointed by President Biden.
- ▶ Applies to final rules not yet published in the Federal Register and rules published in the FR by have not yet taken effect.
- ▶ Applies to any pending or new proposed rules.

Executive Orders: Biden Administration

Jan. 20, 2021: EO 13991, Protecting the Federal Workforce and Requiring Mask-Wearing

- ▶ Agencies shall immediately require compliance with CDC guidelines with respect to wearing masks, maintaining physical distance, and other public health measures by on-duty or on-site Federal employees; **on-site Federal contractors**

Jan. 20, 2021: EO 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

- ▶ Each agency must produce a plan for addressing barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities.
- ▶ Revokes EO 13950 (Combating Race and Sex Stereotyping)

Key Policy Developments

- ▶ DOJ's Criminal Enforcement and the Procurement Collusion Strike Force
- ▶ GSA - Category Management and Consolidated Schedule
- ▶ GSA makes three awards in e-commerce e-marketplace pilot
- ▶ DoD Guidance regarding government credit for costs paid for with forgiven PPP loans.
- ▶ DOD - Change to the Delegation of Authority for Use of Other Transactions for Prototype Projects in Response to Coronavirus Disease 2019
- ▶ OMB Guidance for Grants and Agreements

Challenge Question



Submit your answer to craig@pubklaw.com
Subject line: Panel 13 Challenge Question