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PUBLIC CONTRACTS

Annual Review 2022

January 24 – 27, 2022

DAY 4

12:00 p.m. FCA/FCPA: Fraud & Enforcement

2:00 p.m. Statutes, Regulations, Executive Orders & Policies

THURSDAY, JANUARY 27, 2022

12:00 PM to 4:00 PM

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Alan Chvotkin
President, Pub K
Partner, Nichols Liu LLP

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SESSION 12

STATUTES, REGULATIONS, EXECUTIVE ORDERS, AND POLICIES

THURSDAY, JANUARY 27, 2022

2:00 PM to 3:50 PM

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Michael Schaengold, Shareholder and Chair

GT GreenbergTraurig



Kara M. Sacilotto, Partner

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Robert K. Tompkins, Partner and Co-Chair

Holland & Knight



Fred Wagner, Partner

VENABLE LLP

STATUTES

Procurement-Related Statutes Enacted Jan. 21-22

- Federal Advance Contracts Enhancement (“FACE”) Act, Pub. L. No. 116-272, 134 Stat. 3349 (Dec. 31, 2020)
- American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (Mar. 11, 2021)
- Construction Consensus Procurement Improvement Act of 2021, Pub. L. No. 117-28, 135 Stat. 304 (July 26, 2021)
- Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 134 Stat. 429 (Nov. 15, 2021)
- National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81

American Rescue Plan Act of 2021

- Provides stimulus funding accessible to federal contractors, subcontractors and/or grantees on vaccine and pharmaceutical research, production and distribution; other aspects of healthcare, including testing, COVID-19 contact tracing and medical supplies; PPE; public transportation projects; cybersecurity, information technology, and broadband; and certain professional services.
- § 3101 – appropriates additional \$10 billion to carry out Defense Production Act (“DPA”) related objectives, primarily related to “the purchase, production (including the construction, repair, and retrofitting of government-owned or private facilities as necessary), or distribution” of COVID-19-related medical supplies, tests and equipment.

American Rescue Plan Act of 2021

- § 4015 – extends effective date of CARES Act § 3610 to September 30, 2021.
 - ▶ Potential for agencies to reimburse contractors for six additional months of paid-leave costs if employees cannot access worksites or telework during the pandemic.
 - ▶ ARP Act does not provide funding for this relief. Agencies are authorized to use any available funds.
- § 5001 – additional \$7.25 billion for SBA’s Paycheck Protection Program (“PPP”). PPP eligibility expanded to additional types of organizations, including certain nonprofits and certain internet-only news and periodical publishers.
- § 5002 – additional \$15 billion for the SBA’s Economic Injury Disaster Loan program.

Construction Consensus Procurement Improvement Act of 2021

- By April 26, 2022, FAR must be amended to prohibit the use of reverse auctions for awarding contracts for complex, specialized, or substantial design and construction services.
- Applies to construction and design services above the simplified acquisition threshold (\$250,000).
- By January 26, 2022, FAR must be amended to define “complex, specialized, or substantial design and construction services,” which must include site planning and landscape design, A&E services, interior design, performance of substantial construction work for facility, infrastructure, and environmental restoration projects, and construction or substantial alteration of public buildings or public works.
- By July 26, 2023, the GSA Administrator must report to relevant congressional committees a report on the effectiveness of the Act.

Infrastructure Investment and Jobs Act

- \$1.2 trillion in funding that includes \$550 billion to modernize and improve U.S. infrastructure.
- Includes “Build America, Buy America Act” (“BABA Act”).
 - ▶ Part I - Buy America Act issues for Federal Financial Assistance instruments (e.g., grants, cooperative agreements).
 - ▶ Part II - Buy American Act issues for Federal procurements.

Infrastructure Investment and Jobs Act

- Part I – Buy America Act (assistance)
 - ▶ Requires domestic content procurement preference for federal financial assistance programs for infrastructure – no funds made available for such programs may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used are produced in the US

Infrastructure Investment and Jobs Act

Produced in US

- ▶ Iron and steel – all manufacturing processes, from the initial melting stage through the application of coatings, occurred in US
- ▶ Manufactured products – manufactured in US and the cost of the components that are mined, produced, or manufactured in the US is greater than 55% of the total cost of all components, unless another standard applies
- ▶ Construction materials – all manufacturing processes in US

Infrastructure Investment and Jobs Act

- Waiver authority if–
 - ▶ Applying the domestic content procurement preference would be inconsistent with the public interest;
 - ▶ Insufficient quantity or quality produced in US; or
 - ▶ Inclusion of domestically produced iron, steel, manufactured products, or construction will increase the cost of the overall project by more than 25%.
- Potential waivers must be posted on public website with minimum 15 days for comment.
- Each agency must report to OMB and Congress on domestic content procurement preferences applicable to federally assisted infrastructure programs

Infrastructure Investment and Jobs Act

Part II- Buy American Act (procurement)

▷ § 70922

- ▷ Amends the Buy American Act to provide that iron and steel are deemed manufactured in the US only if all manufacturing processes involved in the production, from the initial melting stage through the application of coatings, occurs in the US.
- ▷ Exception to Buy American Act for commercially available OTS items inapplicable to iron and steel articles, materials, and supplies.
- ▷ Exception or waiver available if agency head finds acquisition of U.S. articles, materials or supplies inconsistent with the public interest, their cost to be unreasonable, or there is insufficient quantity and quality of materials or supplies mined, produced, or manufactured in the US.

Infrastructure Investment and Jobs Act

■ § 70923 – establishes the Made in America Office within OMB. Responsibilities include (i) maximizing and enforcing “compliance with domestic preference statutes,” and (ii) developing and implementing “procedures to review waiver requests or inapplicability requests related to domestic preference statutes.”

■ § 70921 – requires the OFPP Administrator to “promulgate final regulations or other policy or management guidance” “to standardize and simplify how Federal agencies comply with, report on, and enforce the Buy American Act.”

- Guidelines to determine when application of domestic preference is inconsistent with public interest and ensure non-availability determinations based on appropriate considerations;
- Uniform procedures for making circumstances in which domestic preference requirements can be waived, and details on each waiver made, available on public websites;

Infrastructure Investment and Jobs Act

- ▶ Increase to price preferences for domestic end products and domestic construction materials (suggested 75%, or if no qualifying offers, 60%)
- ▶ OFPP Administrator must seek to minimize public interest waivers that result in a decrease in employment in the US.
- ▶ To the extent permitted by law, before granting a public interest waiver for foreign products, agencies must assess whether a significant portion of the cost advantage is the result of the use of “dumped” or “injuriously subsidized” steel, iron, or manufactured goods.

Infrastructure Investment and Jobs Act

§§ 70931-41 – BuyAmerican.gov Act of 2021

- ▶ § 70936 – requires GSA Administrator to establish website with information on all waivers of and exceptions to Buy American laws since Nov. 15, 2021 that have been requested, are under consideration, or have been granted by executive agencies and the results of routine audits to determine Buy American law violations after the award of a contract.
- ▶ § 70937 – requires agencies to submit requests for waivers to GSA Administrator to post on BuyAmerican.gov for public comment for at least 15 days. Does not apply to a request for a Buy American waiver to satisfy an urgent contracting need in an unforeseen and exigent circumstance.
- ▶ § 70934 – requires public report by April 2022 assessing impacts of all US free trade agreements, the WTO Agreement on Government Procurement, and Federal permitting processes on the operation of Buy American laws.

Infrastructure Investment and Jobs Act

Make PPE in America Act

- ▶ Incentivizes investment in domestic PPE production by requiring DHS, HHS, and VA secretaries to procure PPE through long-term contracts (at least 2 years plus options) for PPE (including materials and components thereof) grown, reprocessed, reused, or produced in the US.
- ▶ Does not apply if there is a nonavailability determination for the item or its components/materials listed in FAR 25.104 or if the relevant secretary determines there is insufficient quantity or quality of domestically produced items or materials.
- ▶ Requires a long-term domestic procurement strategy for PPE.
- ▶ HHS and DHS secretaries can sell drugs, vaccines and other biological products, medical devices, or other supplies from the National Stockpile for immediate use and distribution if the items are within a year of expiration date and no longer needed due to advances in medical or technical capabilities.

Infrastructure Investment and Jobs Act

Minority Business Development Act of 2021

- ▶ Provides statutory authorization for Minority Business Development Agency (established by Executive Order in 1969).
- ▶ Creates new undersecretary position, the Under Secretary of Commerce for Minority Business Development, to lead the Agency.
- ▶ Establishes MBE Advisory Council composed of 9 members of the private sector and 1 representative from each of not fewer than 10 Federal agencies that support or have duties related to business formation, including labor development, monetary policy, national security, energy, agriculture, transportation, and housing.
- ▶ Requires new undersecretary to conduct a study and make recommendations on “ways in which minority business enterprises can meet gaps in the supply chain of the United States.”

Infrastructure Investment and Jobs Act

§ 11305 – Alternative Contracting Methods for Certain DOT Projects

- ▶ Amends 23 USCA § 201 and § 308 to permit DOT Secretary to use contracting methods available to States for certain projects, notwithstanding the FAR or any other law.
- ▶ Alternative contracting methods must include, at a minimum (A) project bundling; (B) bridge bundling; (C) design-build contracting; (D) 2-phase contracting; (E) long-term concession agreements; and (F) any method tested, or that could be tested, under an experimental program relating to contracting methods carried out by the Secretary.
- ▶ Secretary must establish clear procedures for alternative contracting methods that are consistent with the requirements for federal procurements to the maximum extent practicable.
- ▶ Secretary must solicit input from the affected industry prior to using an alternative method and prepare an evaluation of the method's use.

FY 2022 National Defense Authorization Act

- Signed into law nearly 3 months after Oct. 1 start of FY 2022.
 - ▷ 61st consecutive fiscal year that a NDAA has been passed.
 - ▷ In last 46 fiscal years, NDAA enacted on average 42 days after start of fiscal year.
- Broadly focuses on China, cybersecurity, the Defense Industrial Base, and ways to streamline the acquisition process, including through innovative pilot and other programs.
- Procurement-related reforms & changes are primarily located in the Act's "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters," which includes 57 provisions addressing procurement law.

FY 2022 National Defense Authorization Act

Section 802, Prohibition on Acquisition of Personal Protective Equipment from Non-Allied Foreign Nations

- ▶ Adds 10 USC § 2533e, which prohibits DOD from “procur[ing] any personal protective equipment and related items [e.g., sanitizing wipes] from” North Korea, China, Russia and Iran.
- ▶ Prohibition applies to “prime contracts and subcontracts at any tier,” but does not apply: (i) if DOD “determines that covered materials of satisfactory quality and quantity” “cannot be procured as and when needed from nations other than” North Korea, China, Russia or Iran “to meet requirements at a reasonable price;” (ii) to the procurement of a covered item for use outside of the US; or (iii) to purchases of \$150,000 or less.

FY 2022 National Defense Authorization Act

Section 803, Authority to Acquire Innovative Commercial Products and Commercial Services Using General Solicitation Competitive Procedures

- ▶ Makes permanent FY 2017 NDAA § 879(d)'s pilot program to use "commercial solutions openings" to solicit/acquire "innovative commercial items, technologies, or services."
- ▶ Adds new 10 USC § 2380c under which DOD "may acquire innovative commercial products and services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals." Use of these "general solicitation competitive procedures" is "considered to fulfill "full and open competition" requirements of 10 USC § 2304(a)(1).
- ▶ Contracts awarded under this authority "shall be": (i) "fixed-price, including fixed-price incentive fee contracts," and (ii) "treated as commercial products or services" notwithstanding the definitions in 10 USC § 2376(1).

FY 2022 National Defense Authorization Act

Section 804, Modifications to Contracts Subject to Cost or Pricing Data Certification

- ▶ Modifies 10 USC § 2306a(a)(6) to make conforming changes consistent with § 814 of the FY 2021 NDAA, which increased threshold for submitting cost or pricing data under the Truthful Cost or Pricing Data statute (aka TINA) for contract modifications and subcontracts to \$2 million.
- ▶ Prior to FY 2022 NDAA, contracts entered into on or before June 30, 2018 had to be modified to reflect the current TINA thresholds for modifications and subcontracts “[u]pon the request of a contractor that was required to submit cost or pricing data.” Section 804 requires DOD to modify “as soon as practicable” all prime contracts entered into on or before June 30, 2018 to reflect the current TINA thresholds.

FY 2022 National Defense Authorization Act

Section 806, Annual Report on DOD's Highest and Lowest Performing Acquisition Programs

- ▶ By Jan. 31, 2023, & annually for 3 subsequent years, Component Acquisition Executive of each DOD element/organization to “rank” each covered acquisition program and submit to congressional defense committees a report that ranks 5 highest performing & 5 lowest performing acquisition programs for each DOD element/organization.
- ▶ For each of 5 programs ranked “lowest performing,” report shall include: (1) description of factors that led to that ranking; (2) assessment of causes of poor performance; & (3) plan for addressing challenges & improving performance.

FY 2022 National Defense Authorization Act

Section 807, Assessment of Impediments and Incentives to Improving the Acquisition of Commercial Products and Services

- ▶ Under Secretary for Acquisition & Sustainment & Chairman of DOD's Joint Requirements Oversight Council required to assess impediments & incentives to fulfilling goals regarding preferences for commercial products/services to: (1) enhance DOD's innovation strategy to compete effectively against adversaries; and (2) "encourage the rapid adoption of commercial advances in technology."
- ▶ By April 25, 2022, Under Secretary & Chairman shall brief congressional defense committees on required assessment & any actions undertaken to improve compliance with statutory preference for commercial products/services, including any recommendations for Congressional action.

FY 2022 National Defense Authorization Act

Section 808, Briefing on Transparency for Certain Domestic Procurement Waivers

- ▶ By June 25, 2022, DOD shall brief congressional defense committees on public availability of information on DOD domestic procurement waivers
- ▶ According to the Joint Explanatory Statement, “efforts underway to make such waivers available on a public website for all executive branch agencies. We understand this website is planned to be operational in FY 2022 and expect [DOD] to provide appropriate information.”
- ▶ Website identifying “Nonavailability Waivers” “reviewed by the Made in America Office” is operational at <https://www.madeinamerica.gov/waivers/>.

FY 2022 National Defense Authorization Act

Section 809, Report on Violations of Certain Domestic Preference Laws

- ▷ No later than Feb. 1 of 2023, 2024, and 2025, DOD shall submit to congressional defense committees a report on violations of Berry Amendment, specialty metals statute & Buy American Act related to DOD procurements
- ▷ For each violation, the report shall include:
 - ▷ Contractor name;
 - ▷ Contract number;
 - ▷ Nature of violation, including domestic preference laws violated;
 - ▷ Origin of violation report;
 - ▷ DOD's Response.

FY 2022 National Defense Authorization Act

Section 811, Certain Multiyear Contracts for Acquisition of Property: Budget Justification Materials

- ▶ Requires SecDef to include proposal in budget justification materials submitted to Congress for the DOD budget for FY 2023 (and succeeding FYs) for each multiyear contract that DOD intends to cancel or reduce (e.g., through partial or total T4C).
- ▶ Proposal to cancel/reduce multiyear contract must include: (1) detailed assessment of expected termination costs; (2) updated assessment of estimated savings of cancelling/reducing contract; (3) explanation of proposed use of previously appropriated funds before such cancellation/reduction; & (4) assessment of expected DIB impacts of proposed cancellation/reduction, including workload stability, loss of skilled labor, reduced efficiencies.

FY 2022 National Defense Authorization Act

- ***Section 815, Modification to Procurement of Services: Data Analysis and Requirements Validation***—Requires SecDef to issue standard guidelines for evaluation of requirements for DOD services contracts and acquisition decision authority for each services contract to certify that task orders or statements of work comply with DOD’s guidelines, all appropriate statutory risk mitigation efforts have been made, & task orders or statements of work do not include requirements formerly performed by DOD civilian employees.
- ***Section 817, Repeal of DOD Preference for Fixed-Price Contracts***—Repeals DOD’s preference for fixed-price contracts (including fixed-price incentive fee contracts) established by FY 2017 NDAA § 829.
- ***Section 821, Modification of Other Transaction Authority for Research Projects***—Eliminates requirement under 10 USC § 2371 for DOD to issue implementing regulations for its other transaction authority for research projects; replaces it with a more flexible requirement for DOD to issue guidance.

FY 2022 National Defense Authorization Act

- **Section 822, Modification of Prize Authority for Advanced Technology Achievements**—Amends 10 USC § 2374a to clarify that cash & other prizes awarded by DOD “to recognize outstanding achievements in basic, advanced, and applied research, technology development, and prototype development” may include “procurement contracts and other agreements.” FMV of prizes under § 2374a may exceed \$10 million with the approval of Under Secretary for Research & Engineering.
- **Section 825, Reporting Requirement for Certain Defense Acquisition (i.e., OTAs and Task Orders) Activities**—Requires DOD to establish procedures to identify organizations performing on individual projects for: (1) Other Transaction Agreements, including where consortium members are participating; and (2) Individual Task Orders awarded under a task order contract. By Dec. 27, 2022, DOD shall establish procedures to collect information on such individual agreements in an online, public, searchable database.

FY 2022 National Defense Authorization Act

Section 831, Technology Protection Features Activities

- ▶ Amends 10 USC § 2357, which requires that “[a]ny contract for the design or development of technology protection features in a “designated system” include cost-sharing provision that requires contractor to bear 50% of cost
 - ▶ “Technology protection features” include “technical modifications necessary to protect critical program information, including anti-tamper technologies and other systems engineering activities intended to prevent or delay exploitation of critical technologies.”
- ▶ Section 831 provides that DOD may deem portion of costs that contractor must bear to be allowable IR&D costs if the system received Milestone B approval.

FY 2022 National Defense Authorization Act

- **Section 832, Modification of Enhanced Transfer of Technology Developed at DOD Laboratories**—Extends to Dec. 31, 2026 authority under FY 2014 NDAA § 801 permitting DOD to authorize DOD laboratory heads to “grant nonexclusive, exclusive, or partially exclusive licenses, royalty free or for royalties or for rights to other intellectual property, for computer software developed at a DOD laboratory.”
- **Section 836, Cadre of DOD Software Development and Acquisition Experts**—By Jan. 1, 2023, DOD must “establish a cadre of personnel who are experts in software development, acquisition, and sustainment” to improve effectiveness of DOD programs or activities in those areas.

FY 2022 National Defense Authorization Act

■ **Section 847, Plan and Report on Reduction of Reliance on Services, Supplies, or Materials from North Korea, China, Russia, and Iran**—In consultation with DOS, DOD shall develop & implement plan to: (1) reduce US reliance on services, supplies, or materials from sources “in areas controlled by” North Korea, China, Russia, and Iran; & (2) mitigate national security & defense supply chain risks arising from US reliance on such sources.

■ **Section 851, Modifications to Printed Circuit Board Acquisition Restrictions**—Amends 10 USC § 2533d, to delay implementing prohibition on DOD from acquiring certain printed circuit boards from China, Russia, Iran, or North Korea from Jan. 1, 2023 to Jan. 1, 2027.

▷ Section 851 also changes the definition of a covered printed circuit board and allows the SecDef to exempt commercial products and services from 10 USC § 2533d.

FY 2022 National Defense Authorization Act

Section 854, Requirement for Industry Days and Requests for Information to be Open to Allied Defense Contractors—By March 27, 2022, each service acquisition executive shall implement requirement that industry days and RFIs for DOD acquisition programs and R&D, to maximum extent practicable, “be open to defense contractors of the national technology and industrial base” (NTIB, i.e., U.S., U.K., Canada & Australia).

- ▶ Openness to non-U.S. NTIB “defense contractors” subject to “reciprocal access” for U.S. companies to equivalent information in associated NTIB country.
- ▶ Applies to subcontracts.

FY 2022 National Defense Authorization Act

Section 855, Employment Transparency Regarding Individuals Who Perform Work in China—Contractors required to disclose employment of individuals who perform work in China on DOD contract/subcontract valued > \$5 million when entity submits bid/proposal for contract.

- ▶ For FYs 2023/2024, DOD contractor to disclose if it employs individuals who perform work in China. Disclosure includes description of physical presence in China where work will be performed & total number in China.
- ▶ Disclosure (i) does not apply to commercial products/services contracts, & (ii) shall not be required if SecDef determines that disclosure would not be in national security interest.
- ▶ DOD prohibited from awarding such contracts to, or renewing contracts with, covered entity unless it has submitted these disclosures.

FY 2022 National Defense Authorization Act

Section 863, Protests & Appeals Relating to Eligibility of Business Concerns—No later than 2 days after “final determination” made that business does not meet requirements of claimed status -- e.g., size, HUBZone, veteran-owned, women-owned -- business “shall update” its status in SAM.

- ▶ If business fails to timely update its status, SBA shall make update no later than 2 days after such failure.
- ▶ Business required to make update shall provide notice of determination to CO for each contract where it has an offer/bid pending if business finds, “in good faith,” such determination affects its performance eligibility.

Section 864, Authority for the Office of Hearings and Appeals to Decide Appeals Relating to Qualified HUBZone Small Business Concerns—By Dec. 27, 2022, SBA shall issue rule authorizing OHA to decide appeals from HUBZone status protests. Ensures appeals decided by Administrative Judge (instead of SBA Associate Administrator, Office of Government Contracting & Business Development) & body of case law is developed.

FY 2022 National Defense Authorization Act

Section 866, Report on Cybersecurity Maturity Model Certification Effects on Small Business—By June 25, 2022, DOD shall submit report on impact of DOD's CMMC framework on small businesses. Report must include:

- ▶ Estimated costs of complying with CMMC for small businesses & explanation of how costs will be recoverable by small businesses;
- ▶ Estimated change in number of small businesses that are part of DIB resulting from CMMC;
- ▶ Explanation of how DOD will: (A) mitigate negative impact to small businesses resulting from CMMC; & (B) work with small businesses & nontraditional defense contractors to enable them to bid on and win DOD contracts without first having to risk funds on costly security certifications
- ▶ NDAA § 1533 requires a similar report

FY 2022 National Defense Authorization Act

- **Section 875, Guidance, Training, and Report on Place of Performance Contract Requirements**—By July 1, 2022, DOD must issue guidance on specifying place of performance to ensure that, to maximum extent practicable, DOD contracts avoid specifying an unnecessarily restrictive place of performance.
- **Title XV—Cyberspace-Related Matters**—Includes 39 sections, many related to defense acquisition & Defense Industrial Base. Provisions in House FY 2022 NDAA Bill that would have required notification of cyber breaches not included in final NDAA.

FY 2022 National Defense Authorization Act

Section 1684, Determination on Certain Activities with Unusually Hazardous Risks—Requires DOD to report to Congress on contractor indemnification requests for contracts with “unusually hazardous risks” received for FYs 2022/2023.

- ▶ “Unusually hazardous risk” is “risk of burning, explosion, detonation, flight or surface impact, or toxic or hazardous material release associated with” specified products or programs, including hypersonics, rocket propulsion, high-energy propellants, & certain classified defense programs.
- ▶ Joint Explanatory Statement indicates “intent is to provide a more transparent framework for [DOD] and its contractors to address such financial risks” & “ensure that [DOD] gives full consideration to appropriate requests for indemnification of programs with unusually hazardous risks.”
- ▶ Joint Explanatory Statement requires GAO to prepare comprehensive report on DOD’s indemnification of programs that include unusually hazardous risks, including insurance market, by Feb. 1, 2023

EXECUTIVE ORDERS

- President Biden issued 77 Executive Orders in 2021.
- A number of these are directed in whole or material part at Federal contractors and the procurement process.
- The Federal Contractor Vaccine Mandate (E.O. 14042) is providing a keen test of Executive Branch authority.

Procurement-Related Executive Orders

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1. E.O. 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"
2. E.O. 14005, "Ensuring the Future is Made in All of America by All of America's Workers"
3. E.O. 14026, "Increasing the Minimum Wage for Federal Contractors" (*Covered by Ms. Sacilotto)
4. E.O. 14028, "Improving the Nation's Cybersecurity"
5. E.O. 14030, "Climate-Related Financial Risk" (*Covered by Mr. Wagner)
6. E.O. 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors"
7. E.O. 14055, "Nondisplacement of Qualified Workers Under Service Contracts"

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E.O. 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government”

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- Revoked President Trump’s September 22, 2020 Executive Order 13950, Combating Race and Sex Stereotyping, which prohibited Federal contractors, federal agencies, those receiving federal funds and members of the United States Uniformed Services from providing diversity training.

E.O. 14005, “Ensuring the Future is Made in All of America by All of America’s Workers”

Holland & Knight

- Lays out Biden Administration policies and priorities for domestic production of goods, including those subject to the Buy American Act and certain aspects of the Buy America Acts.

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E.O. 14026, “Increasing the Minimum Wage for Federal Contractors”

Holland & Knight

- Requires Federal contractors to pay their workers an hourly wage of at least \$15.00 and was recently adopted in regulations promulgated by the U.S. Department of Labor.
- Addressed in Ms. Sacilotto’s portion of this program.

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E.O. 14028, “Improving the Nation’s Cybersecurity”

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- Provided additional guidance and direction on cybersecurity.
- Includes several provisions aimed at Federal contractors and the Federal procurement process.

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E.O. 14030, "Climate-Related Financial Risk"

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- Requires major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets.
- Requires the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions.
- Addressed in Mr. Wagner's portion of this program.

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E.O. 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors”

Holland & Knight

- One of several Executive Branch actions to mandate certain COVID Safety Protocols, most notably vaccinations.
- Facing several legal challenges which as of this presentation are yet to be resolved.
- Beyond the vaccine mandate itself these cases raise significant questions about Executive Branch authority, particularly in the context of procurement.

- September 9, 2021 – Executive Order 14042 (published Sept. 14)
 - ▷ Issued under the Federal Property and Administrative Services Act (“FPASA”)
 - ▷ Requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with guidance published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>
- September 30, 2021 – FAR Council Deviation (published Oct. 4)
 - ▷ Provides agencies with initial direction for the incorporation of the FAR clause mandated by the E.O. (FAR 52.223-99)
 - ▷ FAR clause mandates compliance with “...all guidance, including guidance conveyed through Frequently Asked Questions, as amended...” published by the Task Force
- Agencies rolled out their own Deviations which generally mirror the FAR Council with some subtle distinctions

- Task Force's Guidance requires (1) COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation; (2) compliance by individuals (employees and visitors) with making and physical distancing requirements while in covered contractor workplaces; (3) designation of a person or persons to coordinate COVID-19 workplace safety efforts.
 - ▶ Covered employees must be "fully vaccinated" no later than Jan. 18, 2022 (meaning employees must receive either the single-dose Johnson & Johnson vaccine or the second dose of the Pfizer or Moderna vaccine by Jan. 4, 2022).
- A requirement for most contract types – but "encouraged" for contracts below the Simplified Acquisition Threshold (\$250,000) and contracts for the manufacture of products.
 - ▶ If you are a product manufacturer, consider proactively engaging your customer to present a business case as to why they should exercise their discretion not to issue the modification.

E.O. 14042 – Litigation Abounds

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- Numerous state Attorneys Generals have brought lawsuits challenging the E.O.
- Parallel Lawsuits over the OSHA rule applicable to employers with 100 or more employees have resulted in at least one injunction – but these are separate from the E.O.
- Some states have anti-mandate laws in place which are in conflict with the E.O.
- Employee litigation against employers passing down the mandate.

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Summary of Litigation over E.O. 14042

Holland & Knight

- Eight lawsuits filed by the states in federal district courts
 - ▶ Of the eight lawsuits, five have resulted in the issuance of preliminary injunctions
 - ▶ Gov't has filed appeals to the 11th, 8th, 6th, and 5th Circuits
 - ▶ Briefing likely to conclude end of Feb. at the earliest
- Enforcement of the E.O. is currently stayed nationwide due to a preliminary injunction issued by Georgia district court (Jan. 25 the Georgia court clarified that the injunction applies to the vaccine mandate only).

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Summary of Litigation over E.O. 14042

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States' primary arguments

- ▶ The president exceeded his statutory and constitutional authority in promulgating the E.O. (particularly, authority under Federal Property and Administrative Services Act (FPASA), nondelegation doctrine, and federalism/10th Amendment)
- ▶ The FAR Council & OMB failed to follow proper administrative procedures & acted arbitrarily and capriciously

Gov't's arguments in response

- ▶ Nexus between the vaccine mandate and economy and efficiency in procurement (per FPASA) is "self-evident"
- ▶ FAR Council Guidance and OMB Determination not "final agency action" subject to review under the Administrative Procedure Act ("APA")

The judges in *Kentucky* and *Georgia* cases found the states were likely to prevail on their merits of the argument that the president exceeded his authority under FPASA in issuing the E.O.

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Summary of Litigation over E.O. 14042

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- The federal contractor vaccine mandate is separate & distinct from –
 - ▷ The COVID vaccination mandate for federal employees
 - ▷ The OSHA Emergency Temporary Standard (“ETS”) (employers with 100 employees or more)
 - ▷ The CMS COVID vaccination requirement for staff at Medicare- and Medicaid-certified providers
- On Jan. 13, the Supreme Court blocked the OSHA ETS, but allowed the CMS mandate to go into effect.
- As noted, the federal contractor vaccine mandate is presently stayed pursuant to a nationwide injunction.
- On Jan. 21, a federal judge in Texas enjoined the federal employee vaccine mandate.
- On Jan. 25, the Biden Administration announced it was withdrawing the OSHA ETS

Summary of Litigation over E.O. 14042

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- Both the 6th and 11th Circuits have denied motions from the Gov't to stay the injunction pending appeal
- Briefing schedule –
 - ▷ 6th Circuit
 - ▷ 31 Jan. 2022: Government's initial brief due
 - ▷ 2 Mar. 2022: Appellee's (Kentucky et al.'s) initial brief due
 - ▷ 23 Mar. 2022: Government's reply brief due
 - ▷ 11th Circuit
 - ▷ 18 Jan. 2022: Government's initial brief due
 - ▷ 8 Feb. 2022: Appellee's (Georgia et al.'s) initial brief due
 - ▷ 22 Feb. 2022: Government's reply brief due

E.O. 14042 – FAR Deviation – If it survives litigation...

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■ FAR Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols For Federal Contractors

■ (a) Definition. As used in this clause - United States or its outlying areas means—

- ▶ (1) The fifty States;
- ▶ (2) The District of Columbia;
- ▶ (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- ▶ (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- ▶ (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

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- (b) Authority. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).
- (c) Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.
- (d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

[(End of clause)]

E.O. 14042 – FAR Deviation – Key Definitions

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- Covered contractor employee – means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.
- Covered contractor workplace – means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee's residence.

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E.O. 14042 – Who is going to pay for all this?

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- The Executive Order claims, without support, that this will save contractors money
- In reality, it is proving very costly for contractors to comply, including
 - ▷ Administrative costs for implementing the mod and tracking compliance
 - ▷ Employee costs, such as PTO for time to get vaxed, counseling, alternative measures such as testing
 - ▷ Potential lost productivity and schedule impacts
 - ▷ Severance costs for non-compliant employees and potentially legal expenses if employees bring suit (i.e. for state law violations)
 - ▷ Recruiting costs of finding replacement employees, which could prove difficult
- The requirements are also uncertain and subject to change

What Should Contractors Do?

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- Beware of “no-cost” or “Release of Claims” modifications and pushback on those
- Consider the Changes clause in your contract and the processes associated with it
- Among other things the requirements continue to change so you can't be certain of the costs
- Track costs and schedule impacts internally
- Communicate the impacts to your contracting officer in anticipation of a request for adjustment to contract costs and/or schedule

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What should Contractors do (cont.)?

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- Take stock of your situation and figure out if and to what extent you can comply.
- There may be some workarounds for employees who won't get vaccinated, short of terminating them, including having them work from home.
- Consider the cost and performance impacts the clause will have and review your contract to determine if you can seek cost and schedule adjustments as part of the bilateral modification process.
- Keep an eye on the Task Force Guidance and what others in industry are doing.
- Be open and upfront with the Government – do NOT run the risk of False Claims Act exposure by claiming compliance when you are not compliant.
- Document everything!!!

E.O. 14055, “Nondisplacement of Qualified Workers Under Service Contracts”

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- Revokes President Trump’s previous E.O which itself had previously revoked the Nondisplacement of Qualified Workers FAR clause (52.222-17) and E.O. 13495 (2009)
- Directs the Dept. of Labor to promulgate new regulations within 180 days, and the FAR Council to amend the FAR 60 days thereafter
- Remains to be seen whether the “new” regulations will differ from the previous regulations
- E.O. 13495 remains revoked

CLIMATE EOs and MORE

Climate Policy Impacts on Federal Contractors

VENABLE^{LLP}

- Biden Administration made climate policies focused on reducing Greenhouse Gas (GHG) emissions a major priority literally on Day One
- Washington, DC gridlock means most policies reflected in numerous Executive Orders(EOs)
- So far, limited regulatory actions addressing federal contracting – but more to come

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EO 14008, January 27, 2021 – “Tackling the Climate Crisis at Home and Abroad”

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- Stresses federal government’s buying power and property portfolio to advance climate initiatives
- Section 206 summarizes procurement standard goals, including promoting “increased contractor attention on reduced carbon emission and Federal sustainability”

EO 14030, May 20, 2021 – “Climate-Related Financial Risk”

VENABLE^{LLP}

- Section 5 requires Federal Acquisition Regulatory Council and CEQ to consider amending Federal Acquisition Regulations by:
 - 1) requiring disclosure of climate and GHG financial risks and to set GHG reduction targets, and
 - 2) ensuring contracting decisions consider climate and GHG emissions issues and potentially giving preference to bids with suppliers with a lower “social cost of GHG emissions”

Follow-up ANPRM, October 21, 2021 – “Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions”

VENABLE^{LLP}

- Rulemaking notice asks many questions on a variety of contractor preference, reporting, and GHG reduction policies and tracking methodologies

EO 14507, December 8, 2021 – “Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability”

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- Section 208 “sustainable acquisition and procurement” policy impacts virtually every sector of the economy
- Section 303 “Buy Clean” policy considers lifecycle emissions and pollutants for materials used in Federal procurements AND federally funded projects
- Section 603 definition of “embodied emissions”

Key Actions Yet to Come Based on Administration Policies For Contractors, Many Challenges Await

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- Tracking
- Reporting/Disclosure
- GHG Reduction and Sustainability Plans
- How will all this be implemented??

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REGULATIONS

FAR Council: Buy American



- **Jan. 19, 2021, 86 Fed. Reg. 6180, Final Rule, Buy American:** FAR Council issued a final rule to implement EO 13881 from prior Administration on increasing domestic content of goods. Final rule increases percentage of domestic content for end products (other than iron/steel) from 50 to 55%; for iron/steel, percentage increased from 90 to 95%. It also increases price evaluation preference for domestic offerors to 20% (large businesses) and 30% (small businesses).
- **July 30, 2021, 86 Fed. Reg. 40980, Proposed Rule, Buy American:** FAR Council issued a proposed rule to implement EO 14005 from Biden Administration. Increases domestic content from 55-60%, with increases after 2 and 5 years. Higher price preference for “critical items” and “critical components.”

- **Aug. 11, 2021, 86 Fed. Reg. 44233, Final Rule, Limitations on Subcontracting:** FAR Council issued a final rule to align FAR with SBA changes made in 2016 regarding the calculation of the limitations on subcontracting, also known as the “50% Rule.”
- **June 14, 2021, 86 Fed. Reg. 31468, Proposed Rule: Update to HUBZone Program:** FAR Council issued a proposed rule to update the FAR consistent with 2019 SBA rules that updated and clarified HUBZone program rules. Proposed rule updates terminology, definition of HUBZone small business, and procedures for filing/processing HUBZone protests.

- **Sept. 29, 2021, 86 Fed. Reg. 53923, Proposed Rule, Accelerated Payment to Small Business Prime/Subcontractors:** FAR Council issued a proposed rule to implement § 873 of the FY2020 NDAA which provided for accelerated payments to small business prime contractors and, under certain conditions, to other prime contractors who subcontract with small businesses.
- **Oct. 7, 2021, 86 Fed. Reg. 55769, Proposed Rule, Women-Owned Small Business Certification:** FAR Council issued a proposed rule to align the FAR with SBA rules that eliminated self-certification for women-owned small businesses. SBA requires certification by SBA, other identified governmental entities, or approved third-party assessor.

FAR Council: Miscellaneous

- **Jan. 14, 2021, 86 Fed. Reg. 3679, Final Rule, Low Price Technically Acceptable Source Selection:** FAR Council issued a final rule to implement § 880 of the FY2019 NDAA which heightened the requirements for use of LPTA and discourages LPTA for certain procurements.
- **June 10, 2021, 86 Fed. Reg. 31073, Final Rule, Micropurchase Threshold for Task/Delivery Orders:** FAR Council issued a final rule to implement § 826 of the FY2020 NDAA, which increased threshold for requiring fair opportunity to compete on orders under multiple-award contracts from \$2,500 to “micro-purchase threshold,” which is currently \$10,000.

- **Aug. 11, 2021, 86 Fed. Reg. 44229, Final Rule, Section 508 for Information & Communication Technology:** FAR Council issued a final rule to implement final rules issued by the Architectural and Transportation Barriers Compliance Board, in January 2017, issued as part of the Board’s “refresh” of Section 508 Accessibility Standards.
- **Nov. 4, 2021, 86 Fed. Reg. 61017, Final Rule, Revised Definition of Commercial Item:** FAR Council issued a final rule to implement § 836 of the FY2019 NDAA, which called for separate definitions of commercial items and services.
- **Mar. 19, 2021, 86 Fed. Reg. 14863, OCI Proposed Rule Withdrawal:** FAR Council formally withdrew rulemaking to update OCI provisions of the FAR given passage of time since 2011 proposed rule.

Department of Defense: National Security



- **Jan. 15, 2021, 86 Fed. Reg. 3832, Final Rule, Covered Defense Telecommunications Equipment & Services:** DOD issued a final rule that prohibits the use of telecommunications equipment/services from certain Chinese entities and other entities Sec'y Defense finds owned/controlled by China or Russia.
- **Aug. 30, 2021, 86 Fed. Reg. 48336, Final Rule, Energy Security for Bases in Europe:** DOD issued a final rule to implement § 2821 of the FY2020 NDAA, which prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe.

- Aug. 30, 2021, 86 Fed. Reg. 48370, Proposed Rule, Maximizing Use of American Made Goods: DOD issued a proposed rule to implement the prior Administration “Buy American” EO 13881. The proposed rule includes DFARS amendments related to definitions of domestic end products and domestic construction material to reflect the heightened content requirements; it does not propose changes related to the price preference for domestic products as DOD uses a 50% factor that is higher than the EO percentage factor.

Department of Defense: Cost and Pricing



- **Aug. 10, 2021, 86 Fed. Reg. 48368, Proposed Rule, Requiring other than Cost or Pricing Data:** DOD issued a proposed rule to implement § 803 of the FY2020 NDAA which prohibits contracting officers from determining that a price is fair and reasonable based solely on historical prices the Government has paid and places restrictions on awards to contractors that fail to make a good faith effort to submit pricing data, in certain circumstances.
- **Sept. 29, 2021, 86 Fed. Reg. 53927, Proposed Rule, IR&D Costs:** DOD issued a proposed rule to implement § 824 of the FY2017 NDAA which requires DOD to adopt regulations that do not infringe on the independence of a contractor to choose which technology to pursue in IR&D programs if contractor CEO determines IR&D expenditures will advance DOD technology and capability needs.

- Oct. 29, 2021, 86 Fed. Reg. 59947, Proposed Rule, Auditing Firms: DOD issued a proposed rule to implement § 1006 of the FY2019 NDAA, amended by § 1011 of the FY2020 NDAA. These provisions require certain reporting by accounting firms that perform audit remediation services of disciplinary matters, and the proposed rule would extend reporting requirements to other than accounting firms that perform audit remediation services.

Department of Defense: Miscellaneous

- **May 20, 2021, 86 Fed. Reg. 27354, Proposed Rule, Enhanced Post-award Debriefings:** DOD issued a proposed rule to implement enhanced debriefing rights in FY2018 NDAA § 818. Since enactment of that provision enhanced debriefing rights have been governed by Class Deviation No. 2018-00011. The proposed rule is intended to replace the Class Deviation.
- **May 20, 2021, 86 Fed. Reg. 27358, Proposed Rule, Subcontractor/JV Past Performance:** DOD issued a proposed rule to implement § 823 of the FY2019 NDAA which requires performance evaluations in accordance with specified conditions for individual partners of joint ventures and subcontractors for construction and architect-engineer (A&E) services.

Department of Defense: Miscellaneous

- **Aug. 30, 2021, 86 Fed. Reg. 48366, Proposed Rule, Contract Closeout:** DOD issued a proposed rule to implement § 820 of the FY2021 NDAA, which expands expedited contract closeout authority to certain contracts/groups of contracts that were awarded at least 7 or 10 fiscal years before the current fiscal year and have completed performance or delivery at least 4 years prior to the current fiscal year.
- **Oct. 29, 2021, 86 Fed. Reg. 59951, Proposed Rule, Contract Authority for Development & Demonstration of Prototypes:** DOD issued a proposed rule to implement § 831(a)(2) of the FY2021 NDAA, which revised the type of contract line items or options that may be included, without additional competition, in contracts initially awarded through a broad agency announcement (BAA).

- Jan. 13, 2021, 86 Fed. Reg. 2529, Interim Final Rule: Extension of Participation in 8(a) BD Program: SBA issued an interim final rule to implement provisions of 2021 Consolidated Appropriations Act and FY2021 NDAA providing option to extend 8(a) participation for one year.
- May 5, 2021, 86 Fed. Reg. 23863, Direct Final Rule, HUBZone Map Freeze: SBA issued direct final rule to extend the HUBZone Map freeze from Dec. 31, 2021 to June 30, 2023.
- Nov. 8, 2021, 86 Fed. Reg. 61670, Direct Final Rule, Definition of Surviving Spouse for SDVOSB: SBA issued a direct final rule to conform its regulations to statutory changes in the FY2020 NDAA.

- **Nov. 2, 2021, 86 Fed. Reg. 60396, Proposed Rule, Small Business Size Standards:** SBA issued a proposed rule to implement § 863 of the FY2021 NDAA. This NDAA provision extends the averaging period for SBA's employee-based size standards from 12 to 24 months.
- **Nov. 18, 2021, 86 Fed. Reg. 64410, Proposed Rule: Past Performance Ratings for Small Business JVs and First Tier Subcontractors:** SBA issued a proposed rule to implement two requirements from § 868 of the FY2021 NDAA that facilitate small business past performance qualification. Provision allows small business to use JV experience so long as small business participated and experience as first tier subcontractor.
- Throughout 2021, SBA issued *many* regulations related to Paycheck Protection Program.

- **Nov. 24, 2021, Final Rule, Minimum Wage for Contractors:** DOL issued a final rule implementing EO 14026, which raises the federal contractor minimum wage to \$15/hour. The final rule is substantially similar to proposed rule issued in July 2021, which proposed keeping existing rules that implement EO 13658 at 29 C.F.R. Part 10 largely unchanged and implementing EO 14026 in new 29 C.F.R. Part 23.
- **Jan. 26, 2022, 87 Fed. Reg. 4117, Interim Rule:** FAR Council issued interim rule to implement DOL rules.

- **July 1 & Dec. 27, 2021, 86 Fed. Reg. 34966; 86 Fed. Reg. 73219, Interim & Proposed Rules, Ownership Disclosure for High-Security Leased Space:** GSA issued interim and proposed rules to implement §§ 3-5 of the Secure Federal Leases from Espionage and Suspicious Entanglements Act (Secure Federal LEASEs Act).
- **Aug. 31, 2021, 86 Fed. Reg. 48617, Proposed Rule, FSS Contract Extension:** GSA issued a proposed rule to amend the GSAR to incorporate an internal GSA policy of extending Federal Supply Schedule (FSS) orders for 5 years beyond term of an FSS contract.
- **Sept. 10, 2021, 86 Fed. Reg. 50689, Proposed Rule, GSA IT Systems:** GSA issued a proposed rule to streamline and update contract requirements that involve GSA information systems.

- Nov. 17, 2021, 86 Fed. Reg. 64132, Proposed Rule, Phased Update to VAAR (Information Security Requirements): The VA issued proposed rules to amend and update the VAAR. Along with several housekeeping measures, the proposed rule adds a part covering acquisition of IT and revisions related to other contracts for goods/services involving mandatory information, privacy, and security requirements.

THANK YOU!

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Thank you!

See you in 2023 for the next Pub K Annual Review



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