

Government Contracts Regulatory and Legislative Update December 2019

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Executive Orders

President Trump Issues Executive Order 13897, “Improving Federal Contractor Operations by Revoking Executive Order 13495”

On October 31, 2019, President Trump [issued](#) Executive Order (EO) 13897, “Improving Federal Contractor Operations by Revoking Executive Order 13495.” EO 13495, which had been in effect since January 2009, required successor contractors to offer employment to non-displaced “qualified” workers from the predecessor contract on a right of first refusal basis. This Executive Order went into immediate effect on October 31, 2019.

Regulations

DOL Issues Proposed Rule Modifying Authority over TRICARE Health Care Providers

On November 6, 2019, the U.S. Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFCCP) issued a [proposed rule](#) to amend its regulations to reflect OFCCP’s new legal position that it lacks jurisdiction over TRICARE health care providers. In the alternative, OFCCP proposes to exempt such providers with agreements to furnish medical services and supplies to individuals participating in TRICARE from Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974. To do so, OFCCP seeks to revise the regulations’ definition of “subcontractor” to exclude the designated health care providers. Comments are due by December 6, 2019.

SBA Issues Proposed Rule to Consolidate Mentor Protégé Programs and Amend

Multiple Award Contract Requirements

On November 8, 2019, the U.S. Small Business Administration (SBA) issued a [proposed rule](#) to consolidate the 8(a) Business Development Mentor-Protégé Program with the All Small Mentor-Protégé Program. This proposed rule also eliminates the SBA requirement for prior approval of all 8(a) contract-related joint ventures.

The proposed rule suggests the following amendments to Multiple Award Contracts (MACs):

- Require business concerns to recertify size and/or socioeconomic status for unrestricted MAC set-aside orders
- Require business concerns to recertify socioeconomic status for MAC set-aside orders that require a different socioeconomic status from the underlying contract
- Allow contractors to protest size and/or socioeconomic status at the order-level for unrestricted MAC set-aside orders, or for MAC set-aside orders with a different socioeconomic status from the underlying contract

Comments are due by January 17, 2020.

USAID Issues Final Rule to Establish Incentive Awards Program for Personal Services Contractors

On November 14, 2019, the U.S. Agency for International Development (USAID) issued a [final rule](#) to amend the Agency for International Development Acquisition Regulation (AIDAR) appendices D and J to allow USAID to provide incentive awards to Personal Services Contractors (PSCs) who demonstrate extraordinary performance of services under their contract.

SBA Issues Final Rule to Include Governor-Designated Covered Areas in HUBZone Program

On November 15, 2019, the SBA issued a [final rule](#) to amend the HUBZone Program regulations to include “Governor-designated covered areas,” as required in the National Defense Authorization Act (NDAA) for Fiscal Year 2018. This rule amends § 126.103 to define “Governor-designated covered area” and adds § 126.104 to implement the statutory process to designate such areas as qualified HUBZone areas. The rule is effective on January 1, 2020.

FAR Council Issues Final Rule to Amend FAR Reporting Requirements of Nonconforming Items to GIDEP

On November 22, 2019, the FAR Council issued a [final rule](#) to amend the Federal Acquisition Regulation (FAR) to require federal contractors and subcontractors to report certain counterfeit or suspected counterfeit parts and nonconformances to the Government-Industry Data Exchange Program (GIDEP). The rule adds FAR clause 52.246-26, *Reporting Nonconforming Items*, which requires contractors to (i) screen GIDEP reports for counterfeit or suspected counterfeit items as well as common items that may have critical or major nonconformances, and (ii) provide written notice to GIDEP and the contracting officer within 60 days of becoming aware or having reason to suspect

counterfeit or suspected counterfeit items for delivery to, or for, the Government. These requirements apply to contracts that require higher-level quality standards in accordance with FAR 52.246-11, for critical items, or for electronic parts by or for DoD. The rule is effective December 23, 2019.

DOL Issues Final Rule Amending Procurement Authority for Job Corps Contracts

On November 25, 2019, the DOL issued a [final rule](#) to amend its Workforce Innovation and Opportunity Act (WIOA) Job Corps regulations to authorize the Secretary of Labor to designate procurement authority as it relates to the Job Corps center operation, outreach and admissions, career transitional services, and other operational support services. This rule amends Title 20 CFR §§ 686.310(a) and 686.340(a) to reflect the statutory language of WIOA section 147(a). This rule is effective December 26, 2019.

SBA Issues Final Rule Updating HUBZone Program Regulations

On November 26, 2019, the SBA issued a [final rule](#) to comprehensively revise HUBZone Program regulations and procedures. Key revisions include the following:

- Amend § 126.200(d), the HUBZone residency requirement, such that “employee” now includes an employee who resides in a HUBZone at the time of the HUBZone concern’s certification or recertification, so long as the individual remains a firm employee.
- Amend § 126.500 to “require only annual recertification at the time of every offer for a HUBZone contract award.” When competing for additional HUBZone opportunities, contractor eligibility relates back to its certification or recertification date.
- Implement NDAA 2018, Section 1701(i) to permit certain certified HUBZone entities to maintain their status until 2021.
- Implement NDAA 2018, Section 1701(h) to require HUBZone application decisions be made within 60 days. If found ineligible, business entities will have 30 days to demonstrate eligibility with documentation.

This rule is effective on December 26, 2019.

DoD Issues Final Rule to Manage Should-Cost Review Process

On November 27, 2019, the DoD issued a [final rule](#) to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to appropriately use the should-cost review process of a major weapon system. This rule implements NDAA 2018, Section 837 and creates the new clause DFARS 252.215-7015, *Program Should-Cost Review*, to be used in all solicitations and contracts for major weapon system development or production. In addition, DFARS 215.407-4 now describes the should-cost review process features, establishes a method for appropriate contractor participation, and establishes review process requirements. This rule became effective November 27, 2019.

DoD Issues Final Rule to Mandate Use of “Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles” Clause

On November 27, 2019, the DoD issued a [final rule](#) to require that DFARS clause 252.228-7005, *Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles*, be used in all applicable solicitations and contracts. This rule also amends DFARS 228.370 to reflect that this is now a mandatory requirement. This rule became effective November 27, 2019.

DoD Issues Final Rule to Repeal Temporary Statutory Authorities

On November 27, 2019, the DoD issued a [final rule](#) to amend the DFARS to repeal two obsolete statutes in accordance with NDAA 2019, Section 812. This rule repealed NDAA 2007, Section 842(b), implemented at DFARS 225.7003-4, which contained expired authorities for contracted security functions at military installations or facilities. This rule also repealed the USA Patriot Act of 2001, Section 1010, implemented at DFARS 237.102-70(c), which temporarily waived the specialty metals clause under certain circumstances at DFARS 225.7003-4. This rule became effective November 27, 2019.

DoD Issues Final Rule to Require Preference for Fixed-Price Contracts

On November 27, 2019, DoD issued a [final rule](#) to amend the DFARS to require a preference for fixed-price contracts as well as to require the use of firm-fixed-price contracts for foreign military sales. This rule implements the statutory requirements of NDAA 2017, Section 829, which requires contracting officers first consider fixed-price contracts in the determination of contract price and obtain head of the contracting activity approval for cost-reimbursement contracts that exceed \$25 million. The rule also implements NDAA 2017, Section 830 to require firm-fixed-price contracts for all foreign military sales, unless subject to an exception or waiver. This rule became effective on November 27, 2019.

DoD Issues Proposed Rule to Treat Certain Items as Commercial Items

On November 27, 2019, DoD issued a [proposed rule](#) to amend the DFARS to implement statutory requirements related to commercial item acquisitions. This rule proposes to amend DFARS 212.102(a) to implement Section 848 of the FY 18 NDAA, which clarifies that FAR Part 12 procedures may be used to acquire items that do not meet the FAR “commercial item” definition or require a prior commercial item determination, but that must be treated as commercial items per statutory requirements. Contracts for items acquired using FAR Part 12 procedures shall serve as a prior commercial item determination, unless a written determination is made that commercial item acquisition procedures are inappropriate.

This rule also proposes to add DFARS 212.102(a)(iv)(B) requiring agencies treat services provided by nontraditional defense contractors as commercial services, to the extent such services use the same employee pool as for commercial customers and are priced using similar methodologies.

Finally, this rule proposes to amend DFARS clause 252.244-7000, *Subcontracts for Commercial Items*. The amended clause will require contractors to treat as commercial items “any items valued at less than \$10,000 per item that were purchased by the Contractor for use in the performance of multiple contracts with [DoD] and other parties and are not identifiable to any particular contract when purchased.” Such items must meet all other applicable contract terms and conditions. Comments are due by January 27, 2020.

SBA Issues Final Rule to Update Small Business Government Contracting

Regulations

On November 29, 2019, the SBA issued a [final rule](#) amending Section 125 of the SBA regulations in order to clarify that contracting officers have authority to request contractor information demonstrating compliance with the limitations on subcontracting clause. This rule also establishes limitations on subcontracting clause exceptions for certain set-aside service contracts that require the substantial use of other-than-small subcontractors to fully perform, including certain contracts performed outside the United States and environmental remediation contracts.

Furthermore, SBA's revisions to Section 125 provide that other-than-small prime contractors with a commercial subcontracting plan must now account for indirect costs in its subcontracting goals. Failure to timely provide subcontracting reports now constitutes a material contract breach, opening other-than-small contractors to liquidated damages. Finally, this rule removes the "kit assembler" exception to the non-manufacturer rule, thus requiring agencies to request a waiver in accordance with existing regulations. This rule is effective December 30, 2019.

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