



QUARTERLY UPDATE

Executive Actions and Regulatory
Compliance Requirements

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Introduction

The government has issued several rules (final, interim, and proposed) within the last few months, related to a variety of regulatory compliance requirements associated with U.S. federal government contracts. The Federal Acquisition Regulation Council (FAR Council) – defined to include the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA), and the General Services Administration (GSA), issued the majority of these rules. The Department of Homeland Security (DHS), the Small Business Administration (SBA), and the DoD issued rules as well. Lastly, the new administration has issued executive actions that may directly affect government contractors

Further discussion of recent and noteworthy government contract compliance requirements and guidance items are summarized below.

1 Freeze on Regulations

Synopsis

The Office of the Press Secretary for the White House issued January 20, 2017 a memorandum to heads of executive agencies and departments directing the freeze of regulations not already in effect as of January 20, 2017. The purpose of this executive action is to provide the new administration time to review the previously published regulations. Regulations arising from court ordered or statutory sources are not subject to this memorandum.

Key provisions of this memorandum include:

- A 60-day suspension (from January 20th) of published regulations not yet in effect
- The withdrawal of regulations submitted to the Federal Register that have not yet been published
- The prohibition of submitting new regulations to the Federal Register, except for matters related to emergencies or urgent situations

Takeaway

It is too early to tell the effect of this directive on contractors as the outcome of these previously proposed regulations is unknown. Subsequent to the 60-day suspension, the applicable regulations may go into effect as is or be subject to further review or possible rescindment. Several regulations proposed towards the end of the previous administration were made effective January 19, 2017 – one day before the freeze was directed. Those regulations are not affected by this memorandum.



Takeaway

It is too early to tell the effect of this directive on contractors as the implementation and outcome of this executive order is unknown. Also, some of the more relevant provisions are vague or not defined at all, e.g., what regulations actually are or will be included in the military, national security, or foreign service exemption. Regulations typically produce favorable or unfavorable consequences and administrative requirements on contractors. As such, the ultimate effect of the two-for-one order may be good or bad depending on the effect of the related rule and its applicability to certain types of contractors.

2 Two-for-one

Synopsis

The President issued January 30, 2017 an executive order directing the elimination of two existing regulations for every new regulation proposed or issued. Further, agencies were directed to ensure there would be zero incremental cost.

Key provisions of this executive order include:

- Applicability only to executive branch agencies – 15 total, including DoD, DOE, HHS, DOT, and DHS
- Provision for exemptions pertaining to regulations required by law and relating to military, national security, or foreign service
- Guidance is to be issued by the director of the Office of Management and Budget to address the administration and practical mechanics of implementation, including calculation and measurement of the intended savings

3 Fair Pay and Safe Workplaces

Synopsis

The FAR Council issued a final rule December 16, 2016, effective immediately, which implements a Texas court issued preliminary injunction banning most of the original requirements mandated in the executive order. Further, the House of Representatives and Senate voted in February 2017 and March 2017, respectively, in favor of repealing the initial executive order. As Congress has voted to repeal the prior executive order, all that remains to complete its elimination is signature by the president.

Key provisions of this final rule include:

- Reference to Federal Acquisition Regulatory Council October 25, 2016 memorandum issued to the Chief Acquisition Officers, Senior Procurement Executives, Defense Acquisition Regulations Council, and Civilian Agency Acquisition Council directing development of processes to ensure new solicitations do not contain representations or clauses that would have enforced the enjoined rule, including FAR 52.222-57, FAR 52.222-58, FAR 52.222.59, FAR 52.222-61, and FAR 52.212-3(s)
- The requirement to remove from and amend prior solicitations released containing the above FAR references
- A directive restricting the government from taking any action on information that may have been previously submitted by offerors

Takeaway

Contractors should review recent and future solicitations to ensure such representations or clauses are not included. If such representations or clauses are included in solicitations, request the contracting officer to have them removed.

4 Privacy Training

Synopsis

The FAR Council issued a final rule December 20, 2016, effective January 19, 2017, requiring contractor employees who have access to personally identifiable information (PII) to receive specific training, both an initial and an annual refresher, to protect the PII under applicable privacy laws. This rule applies to solicitations under the simplified acquisition threshold (currently \$150,000) as well as commercial items, including commercially available off-the-shelf (COTS).

Key provisions of this final rule include:

- Two new FAR references – Subpart 24.3; 52.224-3
- The requirement for specific elements of training, including – Privacy Act provisions and corresponding penalties, appropriate handling and safeguarding of PII, system or equipment restrictions, and procedures to be followed in the event of a breach

- The option to choose sources that provide the training, unless government provided training is required
- The requirement to flow down to applicable subcontractors
- The requirement to document that applicable employees have received the required training

Takeaway

Contractors should assess current training programs and develop plans or curriculums to address these requirements as well as establish adequate documentation to demonstrate who received what type of training and when. Further, contractors will need to monitor applicability of this final rule across supply chains.



5 Confidentiality Agreements

Synopsis

The FAR Council issued a final rule January 13, 2017, effective January 19, 2017, prohibiting federal dollars from going to companies that require employees or subcontractors to sign internal confidentiality agreements that restrict employees from reporting suspected waste, fraud, and abuse to the government. This rule applies to solicitations under the simplified acquisition threshold (currently \$150,000) as well as commercial items, including COTS. Starting January 19, 2017, this final rule will apply to all solicitations and contracts using fiscal year 2015 funds and subsequent fiscal year funds. Further, contracts existing prior to January 19, 2017 will require modification if these contracts are funded using fiscal year 2015 and beyond funding.

Key provisions of this final rule include:

- Two new FAR references - 52.203-18(d) and 52.203-19(b)
- The requirement that offerors on federal contracts certify that they do not utilize such agreements (prospective representation)
- The requirement to flow down to applicable subcontractors

Takeaway

Contractors should carefully review existing agreements subject to employee, subcontractor, or independent contractor signature to ensure these restrictions do not exist as the real life effect could be loss of future awards. Further, contractors will need to monitor applicability of this final rule across supply chains.

6 Congressional Investigations

Synopsis

The FAR Council issued a final rule January 13, 2017, effective immediately, amending the cost principles to now include as unallowable costs, the costs associated with contractors' dealings relating to congressional investigations, or inquiries.

Key provisions of this final rule include:

- New FAR reference – 31.205-47(f)(9)
- A clarification that GAO investigations or inquiries are outside this specific provision, i.e., 31.205-47(f)(9)
- A clarification that the investigation or inquiry must be a known event – versus an event that may occur

Takeaway

Contractors should now identify and segregate costs associated with applicable congressional investigations or inquiries. These costs will need to be excluded from applicable billings, cost representations or pricing proposals to the government pending the outcome of the matter.

7 Late or Reduced Payments to Small Business Subcontractors

Synopsis

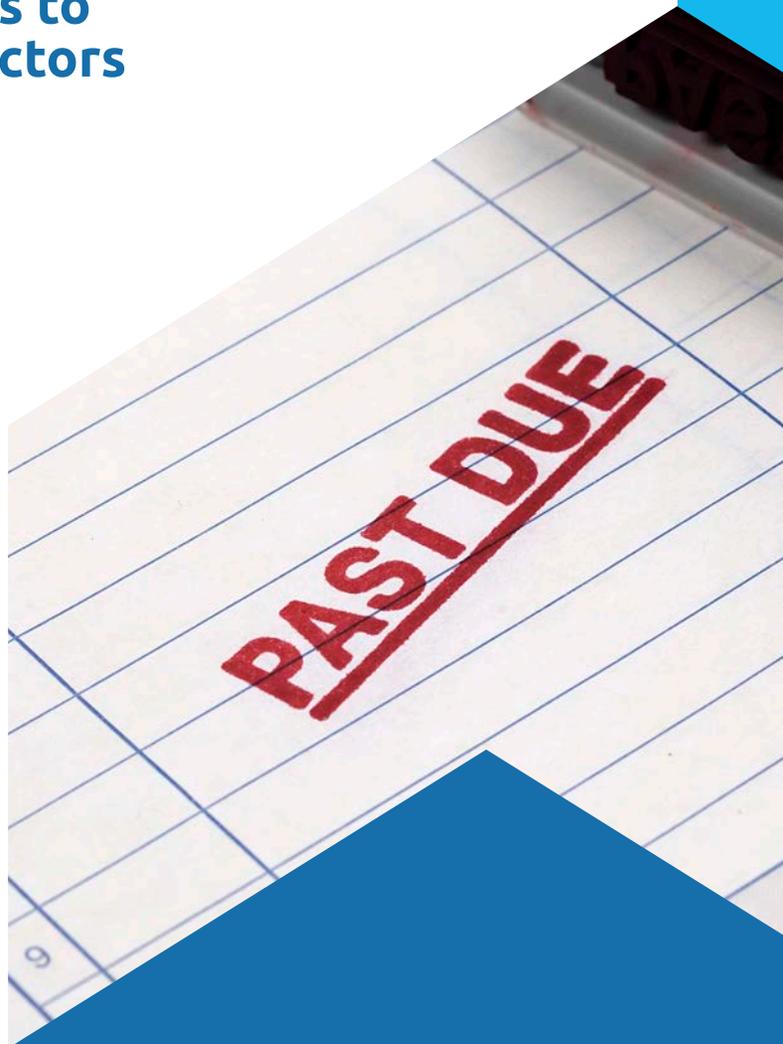
The FAR Council issued a final rule December 20, 2016, effective January 19, 2017, requiring prime contractors to report any “untimely” or “reduced” payments made to their small-business subcontractors. Additionally, this final rule requires contracting officers to document for past performance evaluation purposes contractors with a history – defined as a minimum of three reported instances over a 12-month period under a single contract – of late or reduced payments to subcontractors. This rule applies to all prime contracts that require a small business subcontracting plan (currently greater than \$700,000 or \$1,500,000 for public facility construction).

Key provisions of this final rule include:

- Several revised FAR references - 52.242-5, 52.212-5, 52.219-9, 42.1502(g), and 19.704
- The requirement for contractors to report to the ACO within 14 days (FAR 52.242-5)
- “Untimely” is defined to mean greater than 90 days past due under the terms of payment
- “Reduced” is defined to mean less than the amount agreed upon
- The requirement for small business subcontracting plans to contain language regarding assurances to pay the subcontractor as well as notify the government (FAR 52.219-9)

Takeaway

Contractors should assess current supply chain administration and management processes to avoid payment related issues with small business subcontractors. Repeated offenses may negatively affect past performance evaluations and risk future award opportunities.





Takeaway

The government has a recent and increased focus on inclusion of small businesses of all forms in the federal procurement process. Prime contractors may now have greater ability to meet small business subcontracting goals by receiving credit for small business awards throughout the supply chain and should ensure this data is captured accurately for purposes of documenting if overall goals were met.

8

Lower Tier Subcontracts

Synopsis

The SBA issued a final rule December 23, 2016, effective January 23, 2017, allowing other than small prime contractors (large businesses) to receive small business subcontracting credit for awards made to small businesses at any tier. Small business subcontracting plans are currently required on contracts greater than \$700,000 or \$1,500,000 for public facility construction.

Key provisions of this final rule include:

- Applicability to other than small business prime contractors that maintain individual subcontracting plans under prime executive agency contracts
- The requirement for the prime contractor's large business subcontractors to include in their small business subcontracting plans the small business subcontracts awarded at a lower tier level
- The requirement for the applicable size standard to appear in the solicitation for the subcontract
- The requirement for prime contractors to monitor their subcontractors' compliance and reporting related to their subcontractor small business subcontracting plans

9 Paid Sick Leave

Synopsis

The FAR Council issued an interim rule December 16, 2016, effective January 1, 2017, requiring contractors to provide paid sick leave to eligible employees under covered contracts. This rule applies to solicitations or contracts subject to Construction Wage Rate Requirements or Service Contract Labor Standards statutes, where work is to be performed, in whole or in part, in the United States.

Key provisions of this interim rule include:

- Two new FAR references – Subpart 22.21; 52.222-62
- The requirement for contractors to provide a minimum of 56 hours of paid sick leave per year
- The choice to accrue sick leave hours as earned throughout the fiscal year or provide on a lump sum basis at the beginning of the fiscal year
- A provision for potential consequences to nonconforming contractors, including suspension, debarment, or termination for default

Takeaway

Adverse cost impacts may arise under applicable contracts covered under the cost accounting standards (CAS) as a change in cost accounting practice may be required to account for these costs. Increased costs associated with applicable CAS-covered contracts may be recoverable through the request for equitable adjustment process as the potential change in cost accounting practice should be deemed by the government as a mandatory change or considered to be costs incurred for the first time, as both allow for the government to pay increased costs under applicable CAS-covered contracts affected by the change in cost accounting practice. Contractors should assess if a change in cost accounting practice is required and notify the contracting officer.



10 Bid Evaluation for Independent Research and Development (IR&D)

Synopsis

The DoD issued a proposed rule November 4, 2016 seeking to include contractors' IR&D expenses as an element of the overall evaluated price under competitive procurements. The proposed rule would apply to major defense acquisition programs and major automated information system programs, defined at 10 U.S.C. 2430 and 10 U.S.C. 2445(a), respectively. The subject IR&D expenses would represent "substantial" (undefined in the proposed rule) expenses to be incurred in future years. The objective of this proposed rule stems from the government's Better Buying Power 3.0 initiative and seeks to ensure that substantial future IR&D expenses are evaluated in a uniform way during competitive source selection process. Contracts for the purchase of commercial items, including COTS, are exempt from this rule.

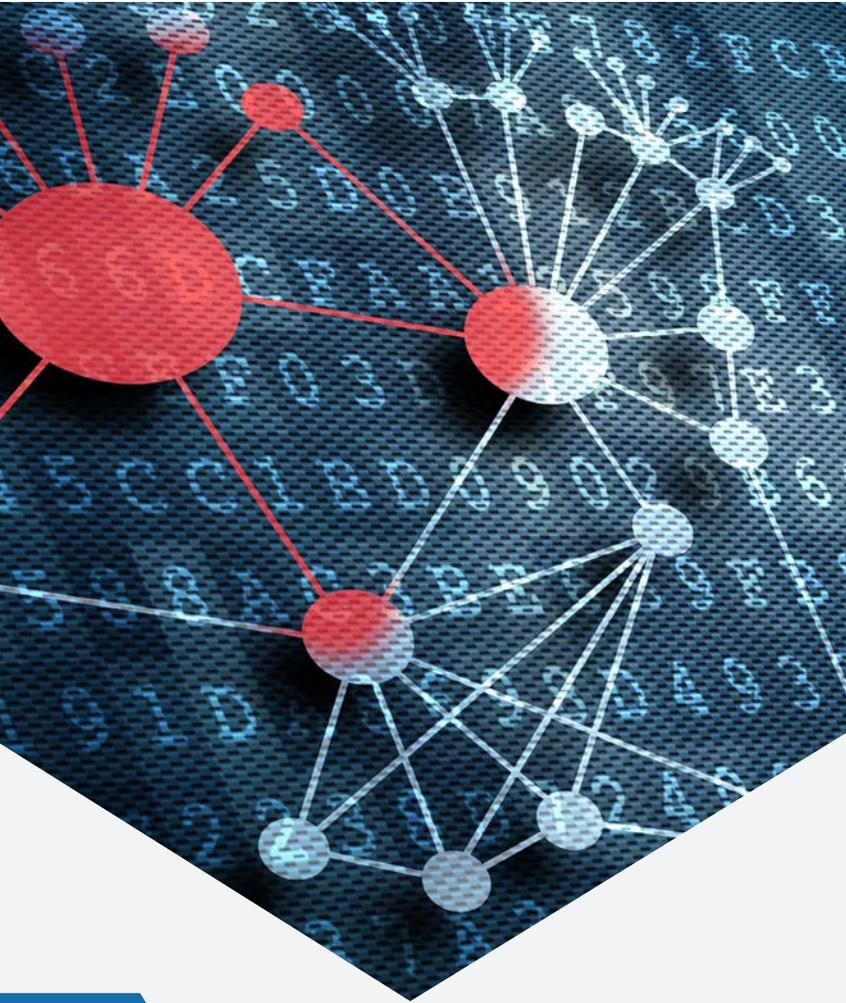
Key provisions of this proposed rule include:

- New DFARS reference – 252.215-70XX, Notification of Inclusion of Evaluation Criteria for Reliance Upon Future Government-Reimbursed Independent Research and Development Investments
- A mandate that contracting officer upward adjustments to contractors' proposed prices are for evaluation purposes only
- The requirement that offerors include with their proposals an amount representing future IR&D investments



Takeaway

It is unclear how proposed rules will proceed considering the current freeze on regulations by the new administration. A fair amount of controversy among industry has developed as future IR&D activity (a good thing for both the government and industry) is now potentially an opposing factor to competitive position and the probability of award for selected procurements. Contractors should review future IR&D activities and initiatives to assess potential effects to their pricing schemes and competitive positions.



Takeaway

It is unclear how proposed rules will proceed considering the current freeze on regulations by the new administration. Implementation of these proposed rules is expected to require potentially significant contractor investment and resources to design or revise systems to address these new requirements (especially CII). Hence, a significant amount of public comments are expected. The opportunity to leverage from existing recent FAR Council rules regarding privacy may exist.

11 Cyber Requirements

Synopsis

The DHS issued three proposed rules January 16, 2017 expanding cyber and privacy requirements under DHS contracts. The proposed rules address; i) expanded safeguarding and handling of controlled unclassified information (CUI); ii) training associated with protection of personally identifiable information (PII), and iii) standardization of IT awareness training.

Key provisions of these proposed rules include:

- CII – expanded contractor requirements related to information handling, incident response and other reporting requirements
- PII – similar to the recently issued final rule by the FAR Council, this DHS rule requires contractors to receive privacy training and maintain related documentation
- IT awareness – requires completion of IT awareness training and signing of a Rules of Behavior agreement
- The requirement to flow down to applicable subcontractors

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