

Gov't Contracting Policies To Watch In The 2nd Half Of 2024

By **Daniel Wilson**

Law360 (August 26, 2024, 12:25 PM EDT) -- An overhaul to the U.S. Department of Defense's cybersecurity requirements and a pending rule requiring many contractors to report their greenhouse gas emissions headline a slate of significant policy initiatives for government contractors to watch for during the second half of this year.

Here, Law360 previews four upcoming policy changes with significant potential impacts on government contractors:

Final Cybersecurity Rules Expected for Defense Contracts

Years in the making, the U.S. Department of Defense is scheduled to release a final rule by November detailing minimum cybersecurity requirements for all defense contracts, as part of its implementation of the Cybersecurity Maturity Model Certification program.

Intended as a response to growing numbers of cyberattacks against the defense industrial base, CMMC will require more than 300,000 defense contractors, subcontractors and suppliers to assess and certify their cybersecurity programs.

Initially launched in 2019, and streamlined in 2021 after complaints that the initial version was too prescriptive, the new final rule is expected to have three levels of compliance ranging from the basic Level 1, which will allow self-certification, up to Level 3, with detailed requirements for contractors handling particularly sensitive information.

The DOD released a proposed rule in December 2023, with a companion proposed rule implementing CMMC requirements into contracts published on Aug. 15. Contractors are still waiting for answers to questions such as when the department will adopt the latest revision to the National Institute of Standards and Technology's cybersecurity standards underpinning the program, and how to address issues that arise related to that certification process.

Uncertainty also exists around whether enough third-party assessors will be available to timely assess all contractors that will need CMMC certification, said Blank Rome LLP partner Robyn Burrows.

"What happens if you disagree with an outside assessor saying that you haven't achieved a Level 2 certification?" she said. "There's the possibility of losing out on awards — will that impact whether certain procurements are sufficiently competitive, if potential offerors aren't able to get their

certification in time?"

Greenhouse Gas Emissions Reporting

The Federal Acquisition Regulatory Council is scheduled to finalize a rule this year requiring many contractors to disclose, and in some cases curb, their greenhouse gas emissions, as part of a Biden administration effort to use procurement authority to introduce climate change-related policies.

The proposed version of the rule floated requiring "major" federal contractors with more than \$50 million in annual federal contracts to publicly disclose direct GHG emissions and climate-related financial risks, report some of their indirect emissions from suppliers, and set emissions reduction targets.

Contractors considered "significant," receiving between \$7.5 million and \$50 million in annual federal contracts, would also have to report their GHG emissions, and any companies who don't comply will be treated as "nonresponsible," effectively unable to be chosen for federal contracts, under the proposed rule.

The proposal drew more than 30,000 comments, raising concerns about issues such as contractors being expected to report emissions from third parties they have no control over and the use of a third party, London-based organization for validating emissions figures.

Lawmakers have made several efforts to bar funding for any implementation of the rule or underlying executive orders in recent funding and authorization bills.

The council "just keep bumping [the rule] every month" after missing its original due date of April 2023, said DLA Piper associate Tom Daley, at least partially as a result of that pushback, but the most recent federal semiannual regulatory agenda indicates the rule should be released by December.

Contractors Barred From Using Salary History

Federal contractors may soon be barred from asking job applicants for their salary histories under one of several rules **introduced** throughout the Biden administration at the intersection of labor and contracting policy.

By December, the FAR Council is expected to finalize its January proposal to ban contractors and subcontractors from seeking or using salary history when making employment decisions "on or in connection" with a federal contract. That phrase needs to be defined in the final rule, attorneys previously told Law360.

The proposed rule, part of the Biden administration's pay equity initiative, would also require contractors to post a salary range in job listings. Both that requirement and the salary history ban "have been shown to promote pay equity by closing pay gaps, which leads to increased worker satisfaction, better job performance, and overall increased worker productivity," the FAR Council said.

The rule is one of a series of efforts by the Biden administration to introduce expansive rules for contractors intended "to do some of the things they haven't been able to do more broadly through legislation," said Rebecca Springer, a labor and employment partner at Crowell & Moring LLP.

"I think pay equity has been, and will continue to be, a huge focus of the administration," she said. "The

[Office of Federal Contract Compliance Programs] sees itself as the key watchdog of pay equity, with all that it's doing to focus on pay equity in OFCCP audits."

Supply Chain Semiconductor Security Requirements

Building on previous policies to address concerns about espionage in the federal supply chain, the FAR Council is also set to introduce rules by the end of 2024 banning government purchases of semiconductor products sourced from U.S. adversaries.

The rule would bar agency purchases of semiconductor chips from three specific Chinese companies, including Semiconductor Manufacturing International Corp., as well as any chips made by companies owned or controlled by the Chinese, Russian, North Korean or Iranian governments, the council said in an advance notice of proposed rulemaking.

Contractors will also be expected to scrutinize their supply chains to try to eliminate the barred chips, although the council asked for feedback on issues like what a "reasonable inquiry" into components of items supplied to the government should include, and how deeply contractors can realistically look into their supply chains.

As with previous policies barring certain products from the federal supply chain, the proposed rule highlights an inherent tension between competing federal goals, said Amy Hoang, co-chair of Seyfarth Shaw LLP's government contracts practice group.

"You obviously need to have these supply chain security rules to protect the defense industrial base, but on the flip side, you're trying to expand and innovate the defense industrial base," she said. "And there is a concern that some companies are just going to eschew federal funding if they feel like there's too much red tape involved."

--Editing by Jay Jackson Jr.