

FAR and DFARS Update

Joseph G. Martinez
Meagan R. Fackler

May 18, 2023

Agenda

- FAR Updates
 - Small business changes
 - Updates to the SBIR Program
 - Removal of helium acquisition requirements
- DFARS Updates
 - Discretion assessing Supplier Performance Risk Systems
 - Settling direct costs
 - Restrictions on procured materials
- Executive Actions
- Miscellaneous Updates
 - Increases to Build America, Buy America requirements
 - Changes resulting from COVID national emergency ending
 - Ongoing negotiations around increasing the debt ceiling

FAR Updates

Accelerated Payments Applicable to Contracts With Certain Small Business Concerns

Final Rule

- FAR Council issued a final rule on February 14, 2023
- Implements a policy providing for accelerated payments to small business contractors and small business subcontractors by accelerating payments to their prime contractors
- Requires agencies to establish an accelerated payment date for prime contractors that subcontract with small businesses and small business prime contractors, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract
 - DoD contracts do not include the condition: “if a specific payment date is not established by contract”

Updates to SBIR/STTR Program

Proposed Rule

- FAR Council issued a proposed rule on April 7, 2023
- Implements changes related to data rights that are necessary to comply with the SBA's SBIR and STTR Policy Directive
 - Updates terminology, definitions, and data rights allocations to ensure consistency
 - Reflects the extension of the data rights protection period from a minimum of 4 years to 20 years
 - Data rights protection extension necessarily leads to extending the record retention period from 6 to 20
- Implements competition requirements unique to Phase II and III awards under the programs
 - Includes guidance on when Phase II sole-source actions may be awarded without justification
 - Clarifies that COs may issue sole source under Phase III without justification

Acquisition of Helium

Final Rule

- FAR Council issued a final rule on April 26, 2023
- Removes all of the procedures and reporting requirements associated with helium procurements currently in the FAR, FAR Subpart 8.5
- All federal agencies will now be able to procure helium on the open market by using the methods deemed most appropriate in the FAR
- The directives to acquire Helium are no longer needed because the Government's operation of the Federal Helium System ended as of September 30, 2021

DFARS Updates

Supplier Performance Risk Systems (SPRS) Assessments

DoD Final Rule

- DoD issued a final rule March 22, 2023, proposed rule was issued on Aug. 31, 2020
- Updates the policy and procedures for use of the Supplier Performance Risk System (“SPRS”)
 - SPRS retrieves item, price, quality, delivery, and contractor information from contracts in Government reporting systems in order to develop risk assessments of contractors
 - SPRS is available at <https://piee.eb.mil/>, Procurement Integrated Enterprise Environment
- Added new DFARS clauses to require COs to *consider* available SPRS risk assessments when evaluating bids and making pre-award determinations for contractor responsibility
 - DFARS 204.7603: gives COs discretion in considering SPRS risk assessments, with a look at item risk, price rise, and supplier risk – not mandatory
 - DFARS 252.204-7024: new solicitation provision, will be applicable to all solicitations for supplies and services, including FAR Part 12 and Part 13 procedures

Contract Administration Office Functions Relating to Direct Costs

DoD Final Rule

- DoD issued final rule on March 22, 2023
- Adds an additional contract administrative function delegable from a procuring contracting office to a contract administration office
- DFARS 242.302(b) specifies functions performed by the contract administration office “only when and to the extent specifically authorized” by the procuring contracting office
 - See FAR § 42.302, any admin functions not otherwise delegated remain the responsibility of the PCO
- This updated rule explicitly allows delegation of authority from the PCO to the Government CAO to negotiate and settle direct costs questioned in incurred cost audits
 - CAO then provides the PCO the results of the settlement

Restrictions on Certain Metals

DoD Proposed Rule

- DoD issued a proposed rule on April 27, 2023
- Revises the restriction on the acquisition of covered materials melted or produced in North Korea, China, Russia, or Iran at DFARS 225.7018–2(a), with changes to go into effect on Jan. 1, 2026
 - “covered materials” means samarium-cobalt magnets, neodymium-iron-boron magnets, tantalum metals and alloys, tungsten metal powder, and tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy
- Revisions include:
 - Removes from the metals’ restriction “material melted” and replaces it with “material mined, refined, separated, melted”
 - Increases the restriction on samarium-cobalt magnets and neodymium-iron-boron magnets to include their entire supply chains from mining through production of finished magnets
 - Revises the COTS items exception to the restriction of 50 percent or more by weight to include all covered material and removes the individual exception for tungsten

Defense Cybersecurity Activities

DoD Proposed Rule

- DoD issued a proposed rule on May 3, 2023
- Proposes revisions to the eligibility criteria for the voluntary Defense Industrial Base (DIB) Cybersecurity (CS) Program
 - Allows a broader community of defense contractors to benefit from bilateral information sharing
 - All defense contractors who are subject to mandatory cyber incident reporting will be able to participate
- DIB includes Department of Defense, Government, and private sector worldwide
 - DIB Cybersecurity Program is a voluntary program to enhance and supplement participants' capabilities to safeguard DoD information that resides on, or transits, DIB unclassified information systems
 - It encourages greater threat information sharing to complement mandatory aspects of DoD's DIB cybersecurity activities (contractual clause DFARS 252.204–7012)

Executive Actions

Prohibition on Spyware

EO on Prohibition on Use by the United States Government of Commercial Spyware that Poses Risks to National Security (March 27, 2023)

- Born from US national security and foreign policy interests in protecting universal human rights, the rule of law; and appropriate legal authorization, safeguards, and oversight, while mitigating the risk emerging technologies may pose to USG institutions, personnel, information, and information systems
- Restricts the use of commercial spyware deployed by federal agencies
 - Only apply when there is significant counterintelligence or security risks to the US
- Agencies may only procure, for reasons other than criminal investigations, by:
 - Reviewing an intelligence assessment being issued by DNI (forthcoming);
 - Requesting from DNI any information regarding commercial spyware that is relevant to counterintelligence and security risks;
 - Considering certain factors related to whether foreign entities have used the spyware to collect information on US citizens; and
 - Considering whether any entity furnishing the commercial spyware has implemented reasonable due diligence procedures and standards

Miscellaneous Updates

Implementing the Build America, Buy America Act (“BABA”)

OMB Proposed Rules

- OMB issued a proposed rule on February 9, 2023
- Would implement the BABA provisions of the Infrastructure Investment and Jobs Act
- Enacted in line with Biden Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States”
- This proposed rule would add a new part, part 184 in 2 CFR chapter I to support implementation of BABA, and revisions to 2 CFR 200.322, Domestic preferences for procurements
 - Applies consistent implementation of Buy America requirements for infrastructure projects across the government
 - Part 184: aims to use terms already defined in the FAR and provide consistent guidance to any award that involves infrastructure to ensure that “all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States”

SBA: Employee-Based Size Standards

SBA Final Rule

- SBA issued a final rule on February 15, 2023
- Increased the size standards for certain NAICS sectors including:
 - Mining, Quarrying, and Oil and Gas Extraction (Sector 21);
 - Utilities (Sector 22);
 - Manufacturing (Sector 31-33);
 - Transportation and Warehousing (Sector 48-49);
 - Information (Sector 51);
 - Finance and Insurance (Sector 52);
 - Professional, Scientific and Technical Services (Sector 54); and
 - Administrative and Support, Waste Management and Remediation Services (Sector 56)
- In total, this increases 144 and retains 268 employee-based size standards in those sectors
- Clarifies also that SBA is retaining the current 500-employee size standard for supplies under the nonmanufacturer rule

SBA: Employee-Based Size Standards

SBA Final Rule

- SBA issued a final rule on April 10, 2023
- Provides procedures for SBA's OHA to hear appeals from protest determinations regarding the status of a HUBZone small business concern
 - Currently, appeals are decided by the Associate Administrator of Government Contracting and Business Development
- The rule
 - Further clarifies that HUBZone appeals are processed by OHA in accordance with the procedures in 13 CFR Part 134;
 - Amends Subparts A and B to include appeals from HUBZone status protest determinations; and
 - Creates a new subpart M with the rules of practice for appeals from HUBZone status protest determinations

The End of COVID

Bill Signed Ending National Emergency

APRIL 10, 2023

Bill Signed: H.J.Res. 7



BRIEFING ROOM



LEGISLATION

On Monday, April 10, 2023, the President signed into law:

H.J.Res. 7, which terminates the national emergency related to the COVID-19 pandemic.

###

The End of COVID

Progress Payment Rate Reversion

- On March 20, 2020, DoD temporarily increased customary progress payment rates in an effort to curb the economic impact of COVID-19 in response to the Presidential declaration of a National Emergency due to COVID-19
 - Increased the progress payment rate for large business concerns from 80% to 90% and the small business progress payment rate from 90% to 95%
- On May 8, 2023, DoD decided to:
 - maintain, for now, the temporary 95% rate for small businesses; and
 - revert the progress payment rate for large business concerns to 80%, the pre-COVID rate
- The reversion to 80% becomes effective on July 7, 2023, applying to new solicitations and contracts
 - Existing contracts, task orders, and delivery orders will retain the higher 90% rate for the life of the contract

Looming Debt Ceiling Deadline

Congressional Negotiations to Increase the Debt Ceiling

- As the government negotiates a raise to the debt ceiling, failure to come to an agreement by June 1 would result in default
- Default would severely impact financial markets, affecting individuals and businesses, especially in government contracting
 - Decreases in:
 - Federal spending
 - Job growth
 - The value of the US dollar
 - Increases in:
 - Interest rates
 - Unemployment

Thank you

DENTONS



Dentons US LLP
1400 Wewatta Street
Suite 700
Denver, CO 80202-5548
United States

Dentons is a global law firm driven to provide a competitive edge in an increasingly complex and interconnected world. A top 20 firm on the Acritas 2014 Global Elite Brand Index, Dentons is committed to challenging the status quo in delivering consistent and uncompromising quality in new and inventive ways. Dentons' clients now benefit from 3,000 lawyers and professionals in more than 80 locations spanning 50-plus countries. With a legacy of legal experience that dates back to 1742 and builds on the strengths of our foundational firms—Salans, Fraser Milner Casgrain (FMC), SNR Denton and McKenna Long & Aldridge—the Firm serves the local, regional and global needs of private and public clients. www.dentons.com.