

DENTONS



FAR and DFARS Update

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Agenda

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Regulatory Updates

Country of Origin Restrictions on Auxiliary Ship Components

Final Rule

- DoD issued a final rule July 20, 2023
- Amends DFARS to implement a section of the 2020 NDAA
- Requires certain components of auxiliary ships, specifically large medium-speed diesel engines, to be procured from a manufacturer within the national technology and industrial base, which includes the United States, Australia, Canada, New Zealand, and the United Kingdom
- Does not apply to icebreakers or special mission ships, and there are exceptions for contracts and subcontracts valued at or below the SAT for commercial products and services
- Requires flowing down the rule to all relevant subcontracts exceeding the SAT

Inflation Adjustments of SBA Size Standards and Disadvantage Thresholds

Final Rule

- SBA issued a final rule on July 19, 2023
- Increases industry-based monetary small business size standards by 13.65 %, accounting for inflation
- Also increases thresholds for: leases of government property, stockpile purchases, and the alternative size standard which is reliant on tangible net worth and net income for the Small Business Investment Company (“SBIC”) program.

Management and Oversight Changes for UCAs

Final Rule

- DoD issued final rule on May 25, 2023
- Aims to incentivize contractors to submit qualifying proposals according to the contract definitization schedule to avoid the withholding up to 5 % of all subsequent financing requests
- Requires COs to consider applying separate and differing contract risk factors to costs incurred and estimated costs to complete, when completing the DD Form 1547, Record of Weighted Guidelines
- Requires COs to justify its decision for either withholding or not withholding a portion of financing payment, when the qualifying proposal was not submitted according to the contract definitization schedule

Tik Tok Ban on Devices Used to Perform Government Contracts

DoD Interim Rule

- FAR Council issued an interim rule on June 2, 2023
- FAR 52.204-27 prohibits “the presence or use of” Tik Tok on devices used in the performance of government work, regardless of ownership
 - Meaning this applies to both company-issued devices as well as personally-owned employee
- However, it only applies to devices used “in the performance of a government contract or work”
 - Doesn’t apply to “technology incidental to the performance of such work”

Sole Source Follow-On Production Contracts Without RFP Notification

DoD Final Rule

- DoD issued a proposed rule on May 25, 2023
- Amends DFARS to implement Section 842 of FY 2023 NDAA
- Allows DoD to award follow-on production contracts without competitive procedures, even if explicit notification was not included in the prototype project's RFP
- This change was intended to supersede GAO's bid protest decisions that required DoD to state expressly in its Prototype OT RFPs when it contemplated awarding sole-source follow-on production work
- Although this rule now removes that RFP notification requirement, the DoD's newly updated OT Guide still states that doing so is best practice

New Buy American Act Requirements

DoD Proposed Rule

- On June 9, 2023, the DoD published a proposed rule amending DFARS to supplement the FAR implementation of Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers. 86 Fed. Reg. 7475 (Jan. 28, 2021)
- Proposed rule would set out scheduled increases in domestic content thresholds ranging from 55 percent in 2023 to 75 percent in 2029
- The rule also sets out extensions and exceptions to the requirement, including allowing a contractor to apply the domestic content threshold in effect at the time of the award to the duration of the contract if requiring compliance with increasing thresholds over the life of the contract is not feasible

Executive Order Updates

Revocation of Federal Contractor Vaccine Mandate

Executive Order

- On May 9, 2023, President Biden issued Executive Order 14099, ending COVID–19 emergency declarations and vaccination requirements
- Any agency policies adopted to implement the mandate are no longer enforceable and shall be rescinded
- The order went into effect at 12:01 a.m. eastern daylight time on May 12, 2023
- Uncertainties surrounding the scope of the President’s authority under the Federal Property and Administrative Services Act still remain
 - Circuit split: Fifth, Sixth, and Eleventh Circuits all preliminary injunction of Executive Order 14042 whereas the Ninth Circuit instead found that President does have authority to impose health-related requirements on government contractors under the Procurement Act
 - Revocation likely means the Supreme Court will not resolve the circuit split since it will be moot

Legislative Updates

FY 2024 NDAA: Preview

Preview & Expectations: Key Differences

- Senate Version Would Remove Place of Business Rule for DoD 8(a) Construction Contracts
 - Currently, SBA requires contractors to have a bona fide place of business in the same or adjacent geographic area as the area where the SBA construction contract is located
 - Senate version of the NDAA eliminates this bona fide place of business requirement for DoD construction contracts
 - House version does not include this provision
- House Version Would Limit Mandatory Consideration of Affiliate Past Performance
 - Currently, some agencies do not consider—or restrict the consideration of—affiliates' past performance in acquisition decisions
 - Both versions would require the DoD to consider affiliates' past performance, but the House version would limit this consideration to affiliates' past performance within the last 9 years

FY 2024 NDAA: Cont'd

Preview & Expectations: Key Differences Cont'd

- House version would limit servicemembers' access to reproductive health care and gender-affirming health care, and would rescind several DoD Diversity, Equity and Inclusion programs
 - Not expected to become part of the final version
- Senate version would significantly increase DoD sole source threshold for several socioeconomic set-aside programs to adjust for inflation
 - Note, no increase for non-DoD contracts

FY 2024 NDAA: Cont'd

Preview & Expectations: Key Differences Cont'd

- House version would extend temporary authority under Public Law 85-804 to modify contracts to address the effects of inflation
- Provides authority for Contract Adjustment Boards and authorized agencies to modify contracts to allow for economic price adjustments for DoD fixed price contracts or subcontracts
- Must show that the cost of performing the contract or subcontract is greater than the price of the eligible contract or subcontract “due solely to economic inflation”

Debt Ceiling Increase

Fiscal Responsibility Act of 2023

- On June 3, 2023, President Biden signed the Fiscal Responsibility Act of 2023 (H.R.3746), avoiding U.S. default
- The bill increased the federal debt limit, established new discretionary spending limits, rescinded unobligated funds, and expanded work requirements for federal programs
- The bill suspended the federal debt limit through January 1, 2025, and will increase the limit on January 2, 2025, to accommodate the obligations issued during the suspension period
- If the ceiling had not been limited, there would have been severe economic consequences including significant impacts on government contractors
 - Spending would've been limited to incoming revenues and the government could have been forced to violate its contracts, delay or reduce government programs' payments to beneficiaries, and/or delay or reduce payments to federal employees

Automatic Spending Cuts

Fiscal Responsibility Act of 2023

- House Republicans inserted automatic spending cuts into the debt ceiling package that would cut defense and infrastructure funding if triggered
 - This automatic cut would cut spending overall by 1% if Congress failed to approve its annual spending bills
 - This measure is designed to pressure both parties to reach an agreement before the end of the fiscal year by threatening a reduction in spending that are critical to both parties
- The caps would in effect amount to a significant cut to defense programs
 - Unobligated funds from prior-year appropriations and emergency military spending are NOT subject to the new caps, but still counts towards the sequesterable base for required cuts

Sentinel Nuclear Deterrence Act

Introduced Legislation

- On June 15, 2023, Senators Mitt Romney (R-UT) and Deb Fischer (R-NE) introduced the Sentinel Nuclear Deterrence Act of 2023 (S. 2017)
 - Co-sponsored by Senators Mike Lee (R-UT), Cynthia Lummis (R-WY), John Barrasso (R-WY) and Steve Daines (R-MT)
- There's ongoing development of the Sentinel intercontinental ballistic missile system at Hill AFB and other locations
- This legislation aims to solidify this program
 - Seeks to bring efficiency and fiscal responsibility to the ground-based leg of the nuclear triad by providing multi-year procurement authority for LGM-35A Sentinel intercontinental ballistic missiles. It also seeks to stabilize critical supply chains and enhance program efficiency
- The law would give USAF authority to acquire 659 missiles through a multi-year contract

Military Industrial National Defense Supply (“MINDS”) Act

Introduced Legislation

- On May 17, 2023, Rep. Donald Norcross (D-NJ) introduced the MINDS Act (H.R. 3438)
- The bill would require the Secretary of Defense report on the domestic content requirements applicable to major defense acquisition programs
- It would also establish enhanced domestic content requirements for major manufactured articles, materials, or supplies procured in connection with a major defense acquisition program
- This proposed legislation has strong support from the International Association of Machinists and Aerospace Workers, which is the largest defense and aerospace union in the U.S.

Thank you

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