

DENTONS



Legislative and Regulatory Updates

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Agenda

- FAR and DFARS Updates
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- Executive Reports
- Legislative Updates

Regulatory Updates

FAR Council Proposed Rule on Combating Trafficking in Persons

Proposed Rule

- On July 18, 2024, the FAR Council published a proposed rule to amend the definition of “sex trafficking” at 22 U.S.C. 7102
 - The definition would clarify the range of conduct considered sex trafficking
- It also would amend 22 U.S.C. § 7104b(c)(1) to require that, upon receipt of an Inspector General's report substantiating an allegation of violations by a contractor or subcontractor, the agency head refers the matter to the agency suspending and debarring official

FAR Council Final Rule and Proposed Rule on Reverse Auctions

Final Rule & Proposed Rule

- On July 30, 2024, the FAR Council published a final rule amending the FAR to provide guidance on electronic reverse auctions
- The final rule provides guidance for the use of reverse auctions, but does not require them
 - Requires reverse auction service providers (and allows agencies) to disclose the lowest price offered during an auction so that other bidders have an opportunity to amend their offers before the auction closes
 - Prohibits reverse auctions for several types of contracts: (1) design-build construction contracts; (2) architect-engineer services under FAR 36.601; (3) sealed-bidding procedures under FAR Pt. 14; and (4) personal protective equipment (PPE)
- In a separate FAR case, on August 29, 2024, the FAR Council published a proposed rule that prohibits reverse auctions for “complex, specialized, or substantial design and construction services” exceeding the simplified acquisition threshold
- Comments for the proposed rule close on October 28, 2024

DoD Proposed Rule Assessing Contractor Implementation of Cybersecurity Requirements

Proposed Rule

- On August 15, 2024, DoD published a proposed rule to amend the DFARS to incorporate contractual requirements related to the proposed Cybersecurity Maturity Model Certification (CMMC) 2.0 program rule published at 88 Fed. Reg. 89,058 (Dec. 26, 2023)
- CMMC 2.0 provides a framework for assessing contractor implementation of cybersecurity requirements and enhancing the protection of unclassified information within the DoD supply chain
- The proposed changes would
 - (1) add references to the CMMC 2.0 program requirements proposed at 32 C.F.R. part 170;
 - (2) add definitions for controlled unclassified information (CUI) and DoD unique identifier (DoD UID) to the subpart;
 - (3) establish a solicitation provision and prescription; and
 - (4) revise the existing clause language and prescription
- Comments closed for this proposed rule on October 15, 2024

DoD Proposed Rule on Limitation on Certain Institutes of Higher Education

Proposed Rule

- On August 15, 2024, DoD published a proposed rule to amend the DFARS to implement sections 1044 and 1045 of the NDAA for FY 2024
- The proposed rule prohibits DoD from appropriating or otherwise making available funds to an institution of higher education that hosts a “Confucius Institute”
 - A “Confucius Institute” is defined as a cultural institute directly or indirectly funded by the Chinese government or any cultural institute funded by the Chinese government
- Comments closed for this proposed rule on October 15, 2024

SBA Proposed Rule on HUBZone Program Updates and Other Small Business Programs

Proposed Rule

- On August 23, 2024, SBA published a proposed rule, which proposes to amend SBA regulations governing the Historically Underutilized Business Zone (HUBZone) Program regulations to make it more efficient and effective
- Proposed Changes to HUBZone Program
 - HUBZone firms would be required to be eligible at the time of offer for any HUBZone contract and only recertify every 3 years
 - HUBZone firms would be subject to heightened residency requirements, and stricter evidence for conducting work at the principal office
 - Only HUBZone businesses would be able to protest a HUBZone set-aside (currently any offeror can bring a protest)
- MP JV Changes: only minor changes despite prior announcement suggesting major impacts
- Streamlined Re-Cert Rules for all size and status programs
- Comments closed for this proposed rule on October 7, 2024

DoD Proposed Rule on Prototype OTA Regulations

Proposed Rule

- On September 4, 2024, DoD released a proposed rule to revise regulations related to Other Transaction Agreements (“OTAs”).
- The rule would make the following changes:
 - Allow for follow-on production OTAs
 - Change the use of OTAs for prototype projects so it does not require a cost share from a performer when at least one nontraditional defense contractor is participating to a significant extent
 - Provide authority for the senior procurement executive of the agency to make an exceptional circumstances justification to use such a prototype OTA transaction
 - Apply procurement ethics requirements to covered OTAs: Post-government employment restrictions
 - Promote competition to the maximum extent practicable
- Comments on this proposed rule close on November 4, 2024

DoD Proposed Rule on Cost or Pricing Requirements

Proposed Rule

- On September 26, 2024, DoD published a proposed rule to amend the DFARS to implement sections of the NDAA for FYs 2018, 2021, and 2022 to update requirements for contractors to submit cost or pricing data
- The proposed rule establishes a uniform \$2M threshold for TINA requirements regarding DoD contractual action. It would add six DFARS clauses to replace the references to the TINA threshold in the FAR clauses with the current threshold for DoD contracts.
- It would also require, upon CO request, an offeror to submit data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract or subcontract
- Comments on this proposed rule close on November 25, 2024

DoD Proposed Rule on Preventing Conflicts of Interest for Certain Consulting Services

Proposed Rule

- On September 26, 2024, DoD published a proposed rule to amend the DFARS to implement Section 812 of the FY 2024 NDAA, which prohibits contracting officers from awarding contracts assigned certain North American Industry Classification System (NAICS) codes (management, scientific, and technical consulting services) to offerors that perform consulting service contract with certain covered foreign entities including Russia, China, and other covered countries.
- Offerors responding to solicitations for consulting services would have to certify whether or not they (or their subsidiaries and affiliates) hold contracts that involve consulting services with one or more covered foreign entities and if so, they must disclose and implement a conflict-of-interest mitigation plan.
 - This change coincides with a GAO report released on September 19, 2024, finding that the current regulations do not address the risks posed by the federal government's consultants who also provide consulting services to China. The report recommended that DoD take steps to ensure this risk is mitigated
- Comments on this proposed rule close on November 25, 2024

Caselaw

***Boeing Co. v. United States*, No. 2023-1018, 2024 WL 4399474 (Fed. Cir. Oct. 4, 2024).**

CAFC Case Expanding CDA Jurisdiction to Challenge Regulations

- On October 4, 2024, the COFC revived Boeing’s challenge to the Government’s implementation of CAS’s offset rules for cost accounting changes under FAR § 30.606
- Holdings
 - While the COFC lacks jurisdiction to decide “pure challenges to the validity of a regulation,” the mere fact that a contract dispute implicates the validity of a regulation does not preclude jurisdiction, so long as the “true nature of the action” is contractual
 - Court focused on the fact that the regulation’s validity was outcome determinative to the contract claim
 - COFC jurisdiction also was proper for illegal exaction claim – rejecting the COFC’s rationale that if a dispute is within the scope of the CDA, it cannot simultaneously be brought under an alternative claim with a separate jurisdictional basis
- *Boeing* opens the door for contractors to challenge the validity of regulations implicated in their contract claims at the COFC under CDA jurisdiction

Executive Orders and Reports

DCAA MRD – Reporting Questioned Direct Costs on Incurred Cost Audit

DCAA Memorandum for Regional Directors

- On September 10, 2024, DCAA issued a Memorandum for Regional Directors (“MRD”) with updated guidance on reporting questioned direct costs on incurred cost audits
- In alignment with a March 22, 2023 final rule, the MRD states that the PCO is responsible for negotiating or settling questioned direct costs in an incurred cost audit, but the PCO may delegate such authority to DCMA or the ACO in certain circumstances
- DCAA updated its Contract Audit Manual (DCAAM) to reflect these changes including DCAAM 6-708.5, Writing the Audit Report, and DCAAM 10-210.1, Audit Report Distribution and Restrictions
- The MRD provides guidance for PCO communication with DCAA and the ACO and emphasizes that DCAA should take steps to ensure that the “PCO is correct before reporting on questioned direct costs”
- Will this guidance continue to blur the lines of the scope of an incurred cost audit (i.e., audit of indirect rates vs. direct costs)

Legislative Updates

S. 4638 – NDAA for FY 2025

Fiscal Year 2025 National Defense Authorization Act

- On July 8, Senator Jack Reed (D-RI) introduced the NDAA for FY 2025 (S. 4638)
- The proposed FY 25 NDAA authorizes a topline of \$919.9 billion for national defense programs and would:
 - Provide a pay raise for military servicemembers
 - Provide significant support for technologies like counter-drone defenses and AI
 - Enhance protections for whistleblowers of DoD contractors by ensuring whistleblowers are fully informed of the final disposition of their reprisal allegation, and what actions, if any have been ordered
 - Create a pilot program to raise the threshold for certified cost or pricing data for small businesses and non-traditional contractors
 - Authorize the development of contractors with a history of poor performance on space procurement contracts or nonprocurement transactions such as grants and cooperative agreements

H.R. 8333 – Biosecure Act

An Act that Would Restrict Contracting with Biotech Companies of Concern

- On September 9, 2024, the House voted on the Biosecure Act, in a vote of 306-81
- The act would prohibit entities that receive federal funds from using biotechnology that is from a company associated with a foreign adversary
 - Of note, a recipient of federal funds (including grantees), may not procure or use any biotechnology equipment or services that are from a biotechnology company of concern and may not contract with entities that do so
 - A biotechnology company of concern is any entity that is: (1) under the control of a foreign adversary; and (2) poses a risk to national security based on its research or multiomic data collection (e.g., collection of genomic information)
- This legislation has been received in the Senate and awaits action by the Committee on Homeland Security and Governmental Affairs

H.R. 8958 – NASA Reauthorization Act of 2024

A Bill Reauthorizing NASA Programs and Restricting Space Cooperation With China

- On September 23, 2024, the NASA Reauthorization Act of 2024 passed out of the House by a vote of 366-21
- This act would reauthorize through FY 2025 NASA programs and activities
- Section 310: restricts use of federal funds for certain space and scientific activities associated with China
- Section 405: instructs NASA to develop a celestial time standard for the moon and other celestial bodies
- Section 810: provides that under NFS1852.242-72, for the period that NASA facilities are not accessible to contractor employees, a CO may adjust the contract performance or delivery schedule, forego the work, reschedule the work, or consider REAs to the contract
- Wolf Amendment: requires NASA to get approval from Congress before entering into space cooperation with China
- This legislation has been received in the Senate and awaits action by the Committee on Commerce, Science, and Transportation

S. 4921 – Department of Defense Appropriations Act, 2025

A Bill Providing FY 2025 Appropriations for Military Activity

- On August 1, 2024, Senator Jon Tester (D-MT) introduced DoD Appropriations Act, 2025
- The Senate-proposed version of this legislation appropriates \$852.2B in total funding
- This legislation provides appropriations for: Military Personnel; Operation and Maintenance; Procurement; Research, Development, Test and Evaluation; and Revolving and Management Funds.
- Section 8083 would prohibit funds appropriated under the Act from being expended for any federal contract in excess of \$1M unless the contractor agrees not to enter into agreements that would require as a condition of employment that an employee agree to resolve through arbitration a claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment
- This legislation currently awaits a vote before the floor of the Senate and the House version of this bill passed on June 13, 2024

Questions and Answers

Thank you

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