

## 4 Gov't Contracting Policy Developments To Watch In 2020

By **Daniel Wilson**

*Law360 (January 1, 2020, 12:04 PM EST)* -- The new year will see several policy changes that are sure to affect government contractors, including a Pentagon program imposing new cybersecurity requirements for defense contractors and overhauls of major U.S. General Services Administration programs.

Here are four of the biggest government contracting policy changes on the horizon for 2020:

### **Cybersecurity Maturity Model Certification**

There has been an increased emphasis on cybersecurity from the government in recent years, led by the U.S. Department of Defense, which has issued a number of related rules and initiatives going back to 2013, seeking to protect defense systems, sensitive information and critical infrastructure.

One of those initiatives likely to have significant impact on contractors is the pending Cybersecurity Maturity Model Certification program, which has gone through several drafts and is expected to be finalized in January.

Under the program, contractors will be assessed by a third-party auditor — the DOD is still in the midst of setting up that program — and given a rating from 1 to 5 for their cybersecurity programs.

From June onward, those requirements will start to be included in DOD contracts, and contractors who don't meet the minimum won't be able to bid, according to the DOD.

Contractors are concerned about the potential burden the program will impose, as well as a lack of clarity on issues such as how program requirements will compare to current cybersecurity standards, with more than 3,000 public comments submitted across the two draft versions of the plan, released in September and November 2019.

On the upside for contractors, however, given the increased scrutiny on cybersecurity issues — especially as a new avenue for False Claims Act liability — having a third-party auditor confirm a company's cyber standards could be a boon, according to Holland & Knight LLP partner Eric Crusius.

"The positive thing about CMMC is I think it will blunt a lot of False Claims Act cases based on cybersecurity compliance in the future," he said. "It'll be hard to argue a contractor has unjustly certified their compliance implicitly or explicitly if they have that audit that they've passed."

Given the logistical challenges of recruiting those third-party auditors and then certifying what it has estimated as 300,000 applicable contractors and suppliers, though, it wouldn't be a surprise to see the CMMC implementation date slip back, Crusius said.

"I don't know whether the Department of Defense is going to be able to make CMMC in the time frame they want — I think it's a workable solution within a time frame," he said. "Whether that time frame is the next nine months, I tend to have my doubts, but I'd be happy to be proven wrong about that."

### **Changes to the DOD's Acquisition Framework**

The DOD is expected this month to modify the overarching policies that direct the defense acquisition system to make them shorter and more flexible.

"I cannot emphasize how important this is, and I continue to describe it as the most transformational change to acquisition policy in decades," Undersecretary of Defense for Acquisition and Sustainment Ellen Lord said in December.

The anticipated new versions of Directive 5000.1 and Instruction 5000.2, which are currently hundreds of pages long and heavily prescriptive, will form the basis of a more "adaptive" acquisition framework, Lord said.

That new framework will give DOD acquisition staff a choice of six "pathways" based on the characteristics of what they're trying to buy, such as "urgent operational needs" that have to be delivered within two years, major weapons systems that need heavy ongoing oversight, or back-office information and business systems.

It will provide examples of when each pathway — and particular contracting model, such as fixed-price or cost-type — is appropriate, and will include a feedback mechanism that helps those pathways adapt over time, Lord said.

### **2021 National Defense Authorization Act**

The annual defense and policy bill, one of the few "must-pass" bills Congress considers every year, often becomes a catch-all for acquisition changes by Congress.

The fiscal year 2020 version of the bill, for example, included a number of procurement policy initiatives, such as directives for the DOD to take more heed of outside experts and standards for its acquisition processes and training, and a clause to establish a software-specific defense acquisition process.

While it's unclear exactly what will be in the 2021 bill, a likely source of proposals is the Section 809 panel, a group of acquisition experts mandated by the 2016 NDAA.

Across three volumes and more than 2,400 pages, in its report, the last volume of which came in January 2019, the panel made 98 recommendations intended to simplify and streamline defense acquisition. Its overarching idea is that the DOD should move from its often-rigid acquisition system to a "dynamic marketplace" model that includes more communication between the department and industry.

Of the panel's 98 recommendations, 26 have been adopted in recent NDAs, leaving many still

outstanding, most prominently what the panel has called its "most revolutionary" recommendation, heavily streamlining the way the DOD purchases commercial and other "readily available" items.

The Future of Defense Task Force, a bipartisan congressional task force led by Reps. Seth Moulton, D-Mass., and Jim Banks, R-Ind., may also have a hand in any acquisition changes in the 2021 NDAA. Formed in October, the task force has been given six months to come up with "big picture" ways to improve innovation at the DOD over the long term, stepping back from the year-to-year approach that is often used.

"There's things like the task force and, at a more granular level, the Futures Command for the Army that talk about ... technology and how, as a country, this is important," Duane Morris LLP partner Michael Barnicle, a former contracting attorney in the U.S. Army's Judge Advocate General's Corps, said. "That's both good for national security, but also good for just general innovation."

The upcoming NDAA could also include more provisions that would expand the government's right to obtain pricing information on commercial items, given recent congressional attention to alleged "price-gouging," even as that definition has been applied somewhat arbitrarily, said Covington & Burling LLP government contracts practice co-chair Fred Levy.

"I think we're going to see an increase in the ability to obtain that type of information and the ability to exclude companies from competition," he said.

### **Major GSA Initiatives**

The U.S. General Services Administration will also have a busy year in 2020, continuing with the rollout of at least three major policy initiatives, including the ongoing consolidation of 10 legacy systems into what it has called a "centralized, authoritative source of federal award data" under the federal System for Award Management database.

From there, contractors will be able to, for example, track contract solicitations, check to see if a prospective subcontractor is on the government's list of excluded parties and obtain any necessary certifications.

The GSA is also set to roll out its "Amazon-like" e-marketplace as part of a pilot program mandated by the 2018 NDAA. That marketplace is intended to allow federal agencies to easily purchase commercial off-the-shelf, or COTS, items, below the federal micro-purchase limit — currently \$10,000, which the agency has asked to be raised to \$25,000 for the pilot.

And it will also continue with its efforts to consolidate the Federal Supply Schedules — also known as the Multiple Award Schedules — a set of overarching contracts that give federal agencies a streamlined way to buy commonly used products and services.

The Schedules are the most-used contracting vehicle across the entire government, responsible for about \$31 billion in spending each year, according to the GSA. Previously run as 24 separate contracts, covering broad areas such as information technology hardware and software or office supplies, the GSA merged them into a single overarching contract at the start of October 2019.

While that consolidation went smoothly, there are still two phases left in the plan that may be more difficult for the GSA to implement, said Morris Manning & Martin LLP partner-elect Kelly Kroll.

In Phase 2, which will take several months, the GSA has to issue a mass modification to thousands of existing contracts to reflect the consolidation. That effort has already been pushed back a few weeks from the agency's initial early January start date, suggesting that "maybe things are not going as smoothly as thought," Kroll said.

Likely to exacerbate the issue is the widely used nature of the Schedules, which means that contracting officers from outside the GSA, used to doing things a certain way for a long time, may struggle to adapt at first.

"I think there's going to be confusion and growing pains, if you will," she said.

Then, in Phase 3, the GSA will work with companies that currently hold contracts across multiple schedules to consolidate their contracts into one, working out which provisions to keep and which to jettison.

That is likely to be the most difficult phase of all, as multiple Schedule contract holders hold a wide variety of different combinations of contracts, and there are also issues such as which contract takes precedence for price-escalation clauses if items were priced differently under different Schedules, Kroll noted.

"Everybody's problem is different; there's no one-size-fits-all [solution] for these contractors," she said. "I think there's going to be a lot of issues to work through there."

--Editing by Philip Shea and Alanna Weissman.