

Gov't Contracts Policies To Watch In 2021

By **Daniel Wilson**

Law360 (January 3, 2021, 12:02 PM EST) -- The upcoming transition in the White House will likely bring about a significant shift in federal procurement policy in 2021, and a task force fighting collusion among contractors is expected to launch its first enforcement actions this year.

Here are four policy areas and government enforcement priorities that federal contractors should keep an eye out for in 2021.

The Policies That Will Change Under the Biden Administration

The switch from one administration to another always comes with policy changes, and federal contractors are often among the first to feel those changes, as much of the policy affecting this area can be changed by executive order or regulation without Congress' involvement.

When a new administration looks to rebuke the policies of its most immediate predecessor, the process can often be last-in, first-out, with the most recent orders and regulations relatively easy to withdraw or rescind. Under President-elect Joe Biden, the contentious September executive order on "Combating Race and Sex Stereotyping" is likely the first to go.

That September order is aimed at stopping what President Donald Trump called "anti-American" types of sensitivity and diversity training — for example, training that ascribes inherent "privileges" to some individuals because of their race or sex.

The order has been heavily criticized by civil rights and business groups alike and is "antithetical to 30, 40 years of the way that corporate America has evolved," said Franklin Turner, co-chair of the government contracts practice group at McCarter & English LLP.

"That's going to go away, like, on day one," Turner said. "Any type of policy that was purely political in nature has a reasonable shot of getting a very hard look in the new administration."

Contractors may also see the return of some Obama-era policies that were rescinded by Trump, such as the Nondisplacement of Qualified Workers rule, which required new contractors on certain federal contracts to give first right of refusal to employees of the incumbent contractor for similar positions.

Small businesses owned by the socially and economically disadvantaged should particularly benefit from

a Biden presidency, with his campaign platform having included a push to increase the share of contracting dollars that go to these companies from the current goal of 5% up to 15%, alongside new technical assistance and preference programs.

In line with that, the president-elect has flagged a governmentwide review of contract "bundling," where what had previously been separate contracts are consolidated into large contracting vehicles, calling it a racial justice issue.

"Contract bundling ... often prevents smaller firms owned by Black and Brown people from effectively bidding on procurement contracts," his platform stated.

More broadly, it is likely that the Biden administration will put a renewed focus on procurement oversight and ethics, which "will permeate all facets of federal procurement," said Aron Beezley, co-leader of the government contracts practice group at Bradley Arant Boult Cummings LLP.

In some areas of federal contracting policy, however, there could be strong continuity between the Trump and Biden administrations.

Biden has, for example, said he would bring "critical supply chains" back to the U.S. in response to COVID-19 and could seek to use — and perhaps modernize — the authorities in the Defense Production Act, the Korean War-era law invoked by Trump to secure emergency supplies to respond to the pandemic to help with that process, said Marcia Madsen, chair of Mayer Brown LLP's government contracts practice.

"We're not doing all the things we could with it ... there's a lot of interesting authorities in there," she said. "It has lots of tools that go beyond, 'I've got to do something today, because we're having an emergency.' And they're not being used."

The FAR Council's Proposed Amendment to Buy American Rules

Another area where the Biden administration will likely stay on a similar course to the Trump administration is in continuing to push Buy American requirements for federal acquisitions.

On the campaign trail, the president-elect argued those rules operate "like a suggestion, not a requirement," with waivers too easy to come by. Under the Biden administration, waiver requests will be published on a public list, and there will be ways for domestic companies to "raise their hand and have a shot at stepping up" to fulfill those needs, he said.

Biden also noted he would "invest \$400 billion in additional federal purchases of products made by American workers" during his first term, likely as part of his plans for building infrastructure.

Among the tweaks made to Buy American requirements during the Trump administration are a proposed Federal Acquisition Regulatory Council rule published in September, which would increase domestic content requirements for most products supplied under federal contracts to 55%, up from 51%. Steel or iron products would get their own specific category, with a much steeper increase, from 51% to 95%.

"I think these changes are only going to impact a narrow set of procurements," said K&L Gates LLP associate Amy Hoang. "But the impact to those procurements is significant."

While the Biden administration might keep the rule, it might look different in its final form, especially given his promises to re-engage with allies that Trump has pulled away from.

Current Buy American rules allow foreign products to be purchased if domestic products are considered to be priced unreasonably, but those nondomestic products are subject to a price penalty, which would increase under the proposed rule from 6% to 20% if the domestic supplier is a large business and from 12% to 30% if it's a small business. The 50% price penalty for U.S. Department of Defense procurements would stay the same.

That increase could draw a reaction from other countries if their companies find it more difficult to participate in U.S. deals, said Sandy Hoe, senior of counsel at Covington & Burling LLP.

There could be "some equally domestic-favoring practices in those countries, some retribution, which could have a negative impact on some of our contractors," he said.

The DOJ's Procurement Collusion Strike Force

The U.S. Department of Justice launched the Procurement Collusion Strike Force in late 2019, and although it largely spent 2020 engaged in behind-the-scenes action, 2021 may be when the group begins to bring enforcement actions in earnest.

A cooperative effort among the department's Antitrust Division, U.S. attorneys' offices, the FBI and several inspectors general, the DOJ said the strike force is intended to cut down on collusion between ostensible competitors for federal contracts and grants. When it announced the strike force, the DOJ said about a third of the department's more than 100 ongoing antitrust investigations involved government procurement issues.

In a November 2020 speech, Assistant U.S. Attorney General Makan Delrahim said the strike force had spent its first year "hard at work," training hundreds of federal, state and local government agencies — and more than 8,000 individual agents — on how to spot collusion risks in public procurement, and analyzing data using models "that proactively identify red flags of antitrust crimes and related fraud schemes in bid and award data."

Recognizing that crises and the related increases in government spending mean "bad actors far too often respond with new schemes to secure a bigger piece of the pie for themselves," Delrahim said the strike force had also created a dedicated portal for reporting collusion and price-gouging related to COVID-19.

The strike force also appointed its first permanent director, Daniel Glad, in 2020, and in November added nine more U.S. attorneys' offices, the Department of Homeland Security's Office of Inspector General and the Air Force Office of Special Investigations, Delrahim said. The group had more than two dozen grand jury investigations underway at the time of the speech, he said.

While antitrust agencies have always had an interest in investigating bid-rigging in government contracts, the strike force has brought a "laser focus" to the issue, showing it's a "very real, important priority" to the government, said Crowell & Moring LLP counsel Alexis DeBernardis.

"I've spent a lot of time this year coaching clients on it and bringing everyone up to speed about this

very, very real risk," she said. "Companies and individuals face the possibility of huge fines and damages, and prison time for executives, as well as all the parallel enforcement proceedings. This is a serious risk with serious stakes."

As with Buy American rules, this type of antitrust enforcement is another area where the Biden administration is unlikely to deviate too much from the approach taken by the Trump administration, DeBernardis said.

"Atmospherically, this idea of protecting taxpayers is very much a bipartisan interest," she said.

The GSA's Move Toward Unpriced Schedule Contracts

In August, the General Services Administration released an advance notice of proposed rulemaking saying it intends to implement an unpriced Federal Supply Schedule, shifting its focus from pricing at the contract level to competition at the point when task orders are issued.

The schedule, a set of overarching contracts recently consolidated from 24 separate schedules into one, offers federal agencies a streamlined way to buy commonly used products and services. It's the most-used contracting vehicle across the entire government, accounting for about \$31 billion in purchases each year, according to the GSA.

The current process for services contractors to get a schedule contract requires them to negotiate "fair and reasonable" hourly rates with contracting officers, in the absence of any specific statement of work, a process that is often antithetical to how those companies sell their products in the commercial market, Crowell & Moring partner Adelia Cliffe said.

"There are companies that don't even try to get on the GSA schedule because they don't want to go through the process of having to do the commercial sales disclosures; they think it'll be challenging to do the price justification for hourly rates, because that's not how they sell," she said. "And then you have providers that are actually leaving the schedule, because it's so hard."

Those hourly rates often aren't even used at the task order level, as — in line with the general preference in the Federal Acquisition Regulation — many schedule orders are done as firm-fixed-price deals where hourly rates are irrelevant, Cliffe said.

Under the GSA's proposal, price won't be considered in contract negotiations. Instead, it will only be considered at the time an order is issued, which will likely benefit both contractors and agencies, she said.

"This would be a massive change to the professional services industry and GSA, and I actually think would make GSA schedules more attractive, more user-friendly, both for industry and for the customer agencies," Cliffe said.

--Editing by Aaron Pelc and Philip Shea.