

Compliance – Highlights from January – June 2022

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Agenda

- An Update on Section 889
- Implementation of the New Federal Contractor Minimum Wage
- Changes to Domestic Preference Requirements
- Revisions to Small Size Calculations
- Don't Forget about Qualified Labor
- Cybersecurity – CMMC
- What's Ahead?

Section 889

Compliance with Prohibitions on Certain Telecom Equipment from China

Background on 889

- U.S. govt. response to 2017 National Intelligence Law (國家情報法) of the People's Republic of China
- 2019 NDAA (passed August 13, 2018)
 - **Part A:** Telecom equipment-specific procurement restrictions
 - **Part B:** Agencies cannot contract with any company that uses tech produced by those companies, including non-telecom goods and services.
 - **Waivers**
 - Part A waivers initially set to end in August 2021.
 - Part B waivers initially set to end August 13, 2022.

Compliance with 889, Part B

- Representing compliance
- Continually review existing and new vendors. Incorporate compliance into agreements.
- Educate procurement team.
- Remove or replace non-compliant items.
- For companies that requested waivers, update phase-out plan.

The Minimum Wage E.O.

New Federal Contractor Wage Requirements

The Minimum Wage E.O. – Background

- President Biden issued EO 14026 on April 27, 2021 seeking to increase the minimum wage for federal contractors to \$15 per hour.
- DOL issued a final rule on November 22, 2021.
- Applies to “covered contracts” effective January 30, 2022.
 - Generally applies to service contracts.
 - Includes cooperative agreements, but not grants,
- The final rule provides that the new requirement will apply to new contracts and be included in new solicitations as of January 30, 2022.
 - However, agencies have been “strongly encouraged” to include this requirement in existing contracts and solicitations (prior to January 30, 2022).

The Minimum Wage E.O. - Compliance

- There have been legal challenges to the E.O., but limited injunctive relief has meant little impact to typical government contractors.
- The type of contract and the provisions therein may dictate whether you'll be able to seek an REA to account for the increased costs of labor.



Changes to Domestic Preferences Requirements

Heightened Requirements for American Products

Domestic Preference Changes – Background

- On January 25, 2021, President Biden signed an executive order on Ensuring the Future Is Made in All of America by All of America's Workers.
 - Among other policy goals, the EO increases domestic participation in federal contracting by adding layers of oversight.
- On July 30, 2021, proposed regulations closed loopholes in the current regulation, applying enhanced price preferences to select critical products, and increasing transparency and accountability in Buy American rules.
- On January 19, 2022, the White House created a “Made in America” Council to better synchronize domestic preference laws.
 - There is a recognition that these laws have become confusing and disparate.
 - The hope is that this council will bring coordination and harmony to the varying rules and requirements.
 - Nevertheless, since most of the rules are underpinned by statute, they may require a statutory overhaul.

Domestic Preference Changes

- March 7, 2022, the BAA's final rule issued
 - Largely mirrored the proposed rule
 - Currently, the BAA requires 55% domestic content to qualify as domestic
 - Increases the domestic content requirement:
 - To 60% effective October 25, 2022
 - To 65% in 2024
 - To 75% in 2029
 - “Fallback threshold” that allows products with 55% domestic content to qualify as domestic until 2030 (1 year after the increase to the 75% percent threshold)
 - For use in limited circumstances, such as the unavailability of or the unreasonable cost of certain products
 - “[C]onstruction material that does not consist wholly or predominantly of iron and steel or a combination of both and that are not commercially available off-the-shelf (COTS) items” and
 - “[E]nd products that do not consist wholly or predominantly of iron or steel or a combination of both and that are not COTS items”
 - As noted in the proposed rule, a new category for enhanced price preferences will be created for “critical items”. Identification of “critical items” and details on the enhanced price preference deferred to a later rulemaking

Build America, Buy America (BABA) Act

- On November 15, 2021, President Biden signed the \$1.2 trillion Infrastructure Investment and Jobs Act (IIJA).
 - IIJA included the Build America, Buy America (BABA) Act, which expands domestic preference requirements for grants and contracts and adds more stringent domestic content and Buy America rules to all federally funded infrastructure and public works projects.
 - Requires covered agencies to issue rules to ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the **iron, steel, manufactured products, and construction materials** used in the project are produced in the United States.”
 - The BABA Act allows for waiver of Buy America preference where
 - Domestic content preference is inconsistent with the public interest (“public interest waiver”);
 - Types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”); or
 - Inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25% (an “unreasonable cost waiver”).
- On April 18, 2022, OMB issued further guidance on BABA

Revisions to Small Size Calculations

Increased Time Frame for Qualified Employees

Revisions to Small Size Calculations

- In 2019, the SBA announced that revenue-based size calculations could be averaged over a 5-year period.
- On June 6, 2022, The SBA announced that it was “adopting a 24-month average to calculate a business concern's number of employees for eligibility purposes in all of SBA's programs.”
 - Previously, employee-based size standards required a 12-month average.
 - This change will allow larger small businesses, that base their size status on employee headcount, to retain their small business size status for longer, and some mid-sized businesses to regain their small business status.
 - Effective July 6, 2022.

Qualified Labor

An Oldie but Goodie – Compliance Here Should Never Be Forgotten

Qualified Labor

- Is my labor qualified?
 - Does your contract have labor categories?
 - What are the qualifications to fit within a labor category?
 - Does your workforce meet these qualifications?
 - Is it documented that your workforce meets these qualifications?
- Compliance
 - Project management is often called upon to determine qualifications, but do they compare to the strict contractual requirements?
 - Ensure your review process includes someone outside project management.
 - Use standardized a résumé format to ensure all necessary data is captured.
 - Ensure you have your workforce update résumés annually.
- Enforcement
 - Still a hot button audit issue for T&M work.
 - Has become a routine audit area for GSA in its CAVs and under GSA OIG audits.

Cybersecurity

Cyber Maturity Model Certification

Background

- CMMC 1.0
 - Tiered Model of Five Levels
 - Assessments
 - Implementation through Contracts
- CMMC 2.0 (Dec. 2021)
 - Three Levels
 - 1. Foundational
 - 2. Advanced
 - 3. Expert

CMMC Compliance

- Still not fully implemented.
- Civil Cyber Fraud Initiative launched in October 2021.
- False Claims Act settlements
 - Comprehensive Health Services, \$930,000 – March 8, 2022
 - Aerojet Rocketdyne, \$9 million – July 8, 2022
- Takeaway
 - No more excuses – Move toward compliance or face possible FCA suit.



What's Ahead?

What's Ahead?

- CMMC
- Significant changes to the Davis-Bacon requirements
- Reimplementation of the nondisplacement of service workers
- Migration of the VA's CVE program to the SBA



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