



The 2009 Federal List

5 proposed rules that could rock the acquisition community

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The acquisition landscape has been changing in the past several years, and now lawmakers and regulators are working on writing stricter rules and setting new precedents along the way.

The Defense Acquisition Regulation Council's [Open FAR Cases document](#) lists regulatory proposals now being considered. Here are five such cases that could shake up the acquisition community.

1. Restrict the use of cost-reimbursement contracts

A proposed rule would revise the Federal Acquisition Regulation (FAR) to deal with the use of cost-reimbursement contracts, as Congress mandated in the [fiscal 2009 National Defense Authorization Act](#). The revisions would include guidance on when an agency should use a cost-reimbursement contract, the findings necessary to support such a decision, and the resources needed by acquisition employees adequately manage such contracts.

Cost-reimbursement contracts include an award or incentive that the contractor earns based on performance. They're riskier than fixed-price contracts, and they require a level of monitoring and enforcement that is often lacking.

Agencies have nearly doubled the amount of money they spend through these contracts during the past eight years, even though those contracts' share of overall federal spending has declined, according to the Office of Management and Budget.

Status: Defense and civilian regulators agreed on a draft interim FAR rule in July.

2. Revamp certain small-business set-aside programs

In November 2008, a federal appeals court struck down one of the Defense Department's small-business set-aside contract programs in [Rothe Development Corp. v. Department of Defense](#).

The court ruled that a legal requirement to set aside contracts for minority-owned businesses is unconstitutional because the government had insufficient evidence of racial discrimination in defense contracting when the program was reauthorized in 2006.

The program set a goal for DOD to spend 5 percent of its contracting dollars with small businesses and allowed the department to apply a 10 percent price-evaluation adjustment to the bids of small businesses owned by socially and economically disadvantaged persons.

Status: DOD regulators are drafting an initial FAR rule.

3. Clamp down on overuse of interagency contracts

Congress wants more control over interagency acquisitions. The fiscal 2009 Defense Authorization legislation calls for new regulations that require agencies to write business case analyses that detail how they would administer such contracts. Agencies would need to show direct and indirect costs to the government and whether the proposed contracts would affect the government's purchasing power as a whole.

Interagency contracts allow various agencies to order supplies or services — often for a fee paid to the agency that manages the contract. Although governmentwide acquisition contracts require approval from the Office of Federal Procurement Policy, other multiagency contracts don't require such approval, and their use has spread through the government in recent years.

Status: Regulators have been debating the issues in reports on the regulations since May.

4. Require agencies to justify and get approval for noncompetitive contracts

Agencies might need to explain their reasons for arbitrarily choosing a contractor without soliciting other bids. The [fiscal 2008 National Defense Authorization Act](#) required that agencies make publicly available the justification and approval documents for awarding such a contract, except for certain exempt information. Agencies would have to post the required documents on their Web sites and a governmentwide site in two weeks of a contract's award.

The Obama administration continues to push for transparency and tough contract oversight. As a U.S. senator, Barack Obama helped introduce legislation that created USAspending.gov, and he also proposed legislation to post more contracting information online. As president, he wrote in a March 4 memo that agencies have misused noncompetitive contracts, which has resulted in inadequate supervision and poor contractor performance.

"It is essential that the federal government have the capacity to carry out robust and thorough management and oversight of its contracts," Obama wrote in the memo.

Status: Civilian regulators are reviewing defense regulators' proposals.

5. Create clearly defined barriers between federal and contractor employees

The fiscal 2009 Defense Authorization bill mandates a standard policy to prevent conflicts of interest by contractors working on inherently governmental functions.

The law required contractor employees to tell agencies about any conflicts and recuse themselves from the duties in question. Those functions could include developing and awarding contracts or managing contracts after they have been awarded.

Congress and the Obama administration have pushed for well-defined boundaries between private-sector and government employees. In response, agencies have sought to increase the size and skills of their acquisition workers, thereby reducing their reliance on contractors.

Status: OFPP identified problems with a draft FAR rule and is working with defense regulators to resolve the issues.

And one to grow on: The recovery act's legacy

There's one more batch of rules to watch. The [American Recovery and Reinvestment Act](#), the economic stimulus law, gave agencies \$787 billion to spend in the next several years to stimulate the economy. However, a number of new regulations will likely accompany the funds.

Regulators are working on rules that would protect contractor whistle-blowers and allow access to the stimulus dollars by the Government Accountability Office and inspectors general. The law also mandates publicizing contract data and requiring contractors to report their data on Recovery.gov.

Many government officials and experts say the rules are setting a new precedent for contract oversight and transparency that could extend well beyond the recovery act.

Status: Civilian and defense regulators are reviewing the various proposals.

About the Author

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