

The background of the slide is a photograph of wide, grey stone steps leading up a hill. The steps are made of large, rectangular stone blocks. The lighting is soft, and the overall tone is somewhat muted, with some greenery visible at the top of the steps.

Vinson & Elkins

Navigating

U.S. Government Contracts
Developments—The First Year
of the Biden Administration

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Meet the Speakers



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Jamie has a full-service government contracts practice, in which he represents contractors in bid protests, contract disputes, and other litigation. For over 15 years, he has litigated bid protests at the Government Accountability Office (GAO) and Court of Federal Claims (COFC) and filed claims and prosecuted appeals at the Boards of Contract Appeals and COFC.



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John is a litigation and regulatory attorney focused in government contracts and national security. His work helps individuals and entities that do business with the government or are otherwise under the watch of government regulators operate successfully under complex statutory, regulatory, and contractual regimes.

I. Introduction

Our Focus

A year ago, we gave a presentation focusing on U.S. government contracts developments during the first 100 days of the Biden administration. Today, a year later, we continue the theme, and will focus on providing an overview of key developments in government contracting over the first year of the Biden administration.

This presentation will include a discussion of the following key developments:

- The Federal Contractor COVID-19 Vaccine Mandate
- Regulatory and Statutory Update
- Enforcement Initiatives
- Case Law Developments



Which policy area impacting federal procurement should the Biden Administration focus on the most?

- a) The COVID-19 pandemic
- b) Job creation/domestic manufacturing
- c) Wage and labor issues
- d) Climate change and environmental justice
- e) Something else

II. The Federal Contractor COVID-19 Vaccine Mandate

Federal Contractor Covid-19 Vaccine Mandate - Background

- On September 9, 2021, President Biden issued Executive Order (“E.O.”) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors
- On September 24, 2021, the Safer Federal Workforce Task Force issued its COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
 - Three areas of requirements:
 - All “covered contractor employees” (i.e., those employees working at a location controlled by the contractor at which a covered contract was performed, even if those employees themselves did not work on a covered contract) required to be fully vaccinated by December 8, 2021, or the first day of the period of performance of a newly awarded contract
 - Contractors required to implement masking and physical distancing requirements in their workplaces in accordance with published CDC guidance
 - Contractors required to designate a person or group of people to coordinate implementation of, and compliance with, the published guidance
- Federal Government required to add the associated clause in most prime contracts, and prime contractors required to flow down the clause and the requirements to their subcontractors
- Executive agencies then promulgated the applicable contract clauses and began incorporating the clause in contracts

Federal Contractor COVID-19 Vaccine Mandate - Litigation

- Numerous States filed lawsuits challenging the legality of the contractor vaccination mandate
 - There currently are seven primary cases filed throughout the country covering 26 states
- From November 2021 through January 2022, each district court entered preliminary injunctive relief enjoining enforcement of the mandate while the cases proceeded
 - The one legal theory consistently adopted by the district courts was that the plaintiffs were likely to prevail on their claim that the President had exceeded his authority under the Federal Property and Administrative Services Act in issuing the E.O. mandating implementation of the vaccination requirement
- Some of the preliminary injunctions were limited to the boundaries of the plaintiff States; however, at least two of the district courts (Georgia and Texas) granted nationwide injunctions
- As a result of the preliminary injunctions, the Federal Government paused implementation of the vaccination mandate; the Safer Federal Workforce Task Force published the following:
 - *The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, “Excluded State or Outlying Area”)*

Federal Contractor COVID-19 Vaccine Mandate - Litigation

- The Federal Government has appealed all seven of the preliminary injunctions -- there currently are appeals pending in the 5th, 6th, 8th, 9th, 10th, and 11th Circuits
- As of now, there has not been much movement in the cases
 - In the first appeal, relating to the decision in Kentucky, the Government requested the 6th Circuit stay the injunction pending the appeal.
 - In January 2022, the 6th Circuit denied the stay request, and the appeal is proceeding
 - On April 8, 2022, the 11th Circuit was the first to hold oral argument -- that appeal relates to the decision in Georgia that resulted in one of the nationwide injunctions
 - The Government challenged both the merits of the injunction and the nationwide scope of the injunction
- Briefing is continuing in these cases, but as of now, there are no other oral arguments scheduled yet

Federal Contractor COVID-19 Vaccine Mandate – Current Status

- As a result of the appeals, the Government has continued to defer enforcing the vaccination mandate nationwide, pending the decisions of the Courts of Appeals
- Realistically, though, this issue will eventually proceed to the Supreme Court for review of the question of whether the imposition of the vaccine mandate exceeds the President's authority under the Federal Property and Administrative Services Act
 - *National Federation of Independent Business v. Department of Labor*, 142 S.Ct. 661 (2022)
 - Supreme Court found that the Occupational Safety and Health Administration (OSHA) vaccine-or-test mandate for all employers with 100 or more employees exceeded OSHA's authority to establish safety standards for the workplace
 - *Biden v. Missouri*, 142 S.Ct. 647 (2022)
 - Supreme Court found that Centers for Medicare & Medicaid Services' (CMS) vaccination mandate for all health care workers at facilities that participate in Medicare and Medicaid was within the scope of CMS's authority over regulated healthcare providers
- Not clear now which way the Court will rule on the scope of the Federal Property and Administrative Services Act; however, it is currently thought that this statute grants the President broad authority on what terms can be included in federal contracts
 - As a result, a Supreme Court decision limiting the scope of the President's authority could be significant for reasons beyond the vaccination mandate and the Executive Branch's ability to implement policy decisions through contract provisions

III. Regulatory and Statutory Update

Regulatory and Statutory Update – Build America, Buy America

- Part of the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58
 - Became law on November 15, 2021; authorizes appropriations for highways, rail, energy grids, water, broadband
- Key provision – for federal financial assistance programs for infrastructure, all iron, steel, manufactured products, and construction materials used in a project must be produced in the United States
 - Waivers are available for public interest, nonavailability, and unreasonable cost
 - Applies to all federally funded infrastructure projects, regardless of whether funded through IIJA or not
- “Produced in the United States”
 - For iron and steel products and construction materials, all manufacturing processes must occur in the United States
 - For manufactured products, the product must be manufactured in the U.S., and the cost of U.S. components must exceed 55% of the cost of all components
- The Office of Management and Budget (OMB) Guidance issued on April 18, 2022
 - Provides standards for review of waiver requests, and initial guidance for identifying “construction materials”
- IIJA statute also amends the Buy American Act to create special rules for iron and steel products
 - All manufacturing processes, from initial melting stage through application of coatings, must occur in the U.S.

Regulatory and Statutory Update – Buy American Act Regulations

- On March 7, 2022, the FAR Council published a final rule implementing Section 8 of E.O. 14005, Ensuring the Future Is Made in All of America by All of America's Workers
 - Goal is to “strengthen the impact of Federal procurement preferences in the Buy American statute for products and construction materials that are domestically manufactured from substantially all domestic content”
 - Follows a previous final rule published January 19, 2021, that implemented a 2019 Trump E.O. that was also intended to strengthen the Buy American Act
- Most significant change is an increase to the domestic content requirements for “domestic end products” and “domestic construction materials” in the “cost of component” test
 - Increases from 55% to 60% effective October 25, 2022
 - Increases from 60% to 65% effective January 1, 2024
 - Increases from 65% to 75% effective January 1, 2029
- Introduces concepts of “critical component” and “critical item”
 - Deemed critical to the U.S. supply chain and will enjoy an additional preference factor
- Final rule does not replace the “cost of component” test with a “value-added” test, which was the most interesting idea in the E.O.

Regulatory and Statutory Update – Wages and Labor

- On November 22, 2021, the Department of Labor (“DOL”) published a final rule implementing an increase in the minimum wage for Federal Government contractors and subcontractors from \$10.95 per hour to \$15.00 per hour, in accordance with President Biden’s April 27, 2021 E.O. 14026
 - Applies to four specific types of covered Federal contracts that are performed in the United States
 - (1) Procurement contracts for construction covered by the Davis-Bacon Act; (2) contracts for services covered by the Service Contract Act; (3) “concessions” contracts; and (4) contracts related Federal property and the offering of services to Federal employees, their dependents, or the general public
 - United States defined to include 50 states, District of Columbia, Puerto Rico, and various other U.S. territories
 - Effective January 30, 2022, and applies to “new” contracts and solicitations after that date
 - Includes extensions or renewals of existing contracts and exercises of options on existing contracts
 - Applies to non-exempt workers under the Fair Labor Standards Act working “on” or “in connection” with a covered contract
 - Exception for certain workers performing less than 20% work under covered contracts; different rules for tipped employees
 - Wage may be increased annually by DOL each year beginning on January 1, 2023
- FAR 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026
 - Applicable clause that will be in contracts; must be flowed down in applicable subcontracts

Regulatory and Statutory Update – Wages and Labor

- On March 18, 2022, DOL published a notice of proposed rulemaking calling for sweeping revisions to the Davis-Bacon Act (“DBA”) implementing regulations
 - The DBA requires Federal Government construction contractors for covered public works projects to pay the “prevailing wage”—a rate determined by DOL for each local area throughout the country—to laborers and mechanics performing covered work
 - DOL estimated that the DBA affects 1.2 million construction workers and \$217 billion in Federal construction spending annually
 - Major highlights from DOL’s proposed changes include:
 - Altering the methodology to determine the prevailing wage, including use of a “30 percent rule” instead of the current majority rule to determine a prevailing wage; as in, if at least 30% of wage survey respondents report the same rate, then DOL would use that reported rate as the prevailing wage (if the 30% threshold is not met, then a weighted average will be used)
 - Using additional mechanisms to provide for more frequent updates of the prevailing wage, including allowing the adoption of state and local authority wage determinations
 - Having DBA contract clauses become effective by operation of law, meaning that contractors will be bound by the clauses and wage determination requirements even if not explicitly in their contract
 - Adding anti-retaliation provisions to the DBA contract clauses that will allow DOL to direct contractors to provide relief to employees who are retaliated against for reporting DBA violations
 - DOL received more than 37,000 comments by the May 17, 2022 deadline to submit comments

Regulatory and Statutory Update – Climate Change

- On May 20, 2021, President Biden issued E.O. 14030, Climate-Related Financial Risk
 - Expresses Administration policy to “advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk . . . , act to mitigate that risk and its drivers . . . , and achieve our target of a net-zero emissions economy by no later than 2050.”
 - Section 5(b) directed the FAR Council to consider amending the FAR to:
 - (i) require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets; and
 - (ii) ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions
- FAR Council has two open rulemaking proceedings – one for each sub-section of Section 5(b)
 - Advanced Notice of Proposed Rulemaking with request for comments issued October 15, 2021, for Section 5(b)(ii)
- Currently, FAR Subpart 23.8 only requires certain contractors to:
 - (1) represent whether they publicly disclose greenhouse gas emissions; (2) represent whether they publicly disclose a quantitative greenhouse gas emissions reduction goal; and (3) provide the website for any such disclosures

Regulatory and Statutory Update – Climate Change (continued)

- On December 8, 2021, President Biden issued E.O. 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability
 - Establishes Administration policy for the “Federal Government to lead by example to achieve a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by no later than 2050”
 - Section 208 – Sustainable Acquisition and Procurement – prioritize purchases of environmentally friendly products
 - Section 301 – Federal Supply Chain Sustainability – pursue procurement strategies to reduce emissions
 - Section 302 – Supplier Emissions Tracking – requires GSA to track contractor disclosures under E.O. 14030
 - Section 303 – Buy Clean – consider embodied emissions and pollutants of construction materials in procurement
- FAR Council currently preparing proposed rule to implement E.O. 14057 and OMB memorandum
 - Will also reorganize FAR Part 23: Environment, Energy and Water Efficiency; Renewable Energy Technologies
- On February 15, 2022, the Buy Clean Task Force was formed to develop recommendations on:
 - Identifying materials, such as steel and concrete, as well as pollutants to prioritize for consideration in procurement
 - Increasing transparency of embodied emissions through supplier reporting, incentives and technical assistance
 - Launching pilot programs to boost federal procurement of clean construction materials

Which recent regulatory focus of the Biden Administration will have the most impact on federal contracting?

- a) Updates to Buy American/domestic preferences
- b) Changes to minimum and prevailing wages
- c) New climate change initiatives

Regulatory and Statutory Update – DoD Enhanced Debriefings

- On March 18, 2022, the Department of Defense (“DoD”) issued final rule implementing Section 818 of the National Defense Authorization Act (“NDAA”) for Fiscal Year 2018
- DoD had partially implemented Section 818 previously through a “Class Deviation”
 - In a post-award debriefing, provided offerors an opportunity to submit additional questions within two business days after receiving the debriefing, and required the agency to respond in writing within five business days
 - Debriefing is held open until agency provides written answers to the questions, thereby extending the deadline for a GAO protest and for an automatic suspension of contract performance
- Incorporates holding of *Nika Technologies Inc. v. United States*, 987 F.3d 1025 (Fed. Cir. 2021)
 - The five-day period to trigger an automatic stay begins on the date the post-award debriefing is offered, unless additional questions are received within two business days after the debriefing date
- Implements for first time the requirement of Section 818 to provide a redacted version of the source selection decision document (“SSDD”) as part of the debriefing
 - For contract awards between \$10 million and \$100 million to a small business or nontraditional defense contractor, if the small business or nontraditional defense contractor requests the SSDD
 - For contract awards in excess of \$100 million to any type of contractor
- Clarifies that post-award debriefings required for DoD contracts/orders if valued at \$10 million or more

Regulatory and Statutory Update – DoD Guidance on Inflation

- On May 25, 2022, the DoD Defense Pricing and Contracting office (“DPC”) issued a memorandum providing guidance to contracting officers on inflation-related cost increases
- For existing contracts, DPC noted that responses to cost increases will depend on the type of contracts
 - For cost reimbursement type contracts, Government bears the risk of increased cost, including those due to inflation
 - Contractors have responsibility to notify contracting officers when costs incurred are approaching limits specified in the contract under FAR 52.232-20, Limitation of Cost, or FAR 52.232-22, Limitation of Funds
 - With notice, Government may increase contract funding to allow for continued performance, with contractor not being obligated to continue performance beyond what can be accomplished within the funded amount
 - For firm-fixed-price contracts, contractors bears the risk of increased cost, including those due to inflation
 - There is no authority providing contractual relief for unanticipated inflation under a firm-fixed price contract—and DPC states that a contracting officer should not agree to a request for equitable adjustment based on inflation—unless the contract contains an economic price adjustment clause
- For contracts being negotiated at a time of high inflation, DPC states that an economic price adjustment clause may be appropriate for inclusion in a contract “to equitably balance the risk of inflation between the Government and contractor”

Regulatory and Statutory Update – NDAA 2022

- On December 15, 2021, Congress passed the NDAA for Fiscal Year 2022, which authorized \$768.2 billion in defense spending
- NDAA for 2022 contains key provisions relevant to government contractors, such as:
 - Requiring DoD to undertake additional cybersecurity initiatives and practices, including the creation of a national cyber incident response plan, the continuance of a cyber-risk monitoring pilot program for critical infrastructure, a reevaluation of DoD's controlled unclassified information ("CUI") program, and a report on plans for the Cybersecurity Maturity Model Certification ("CMMC") program
 - Encouraging DoD investment in artificial intelligence, machine learning, and other innovative technology initiatives
 - Promoting DoD use of nontraditional procurement methods for certain acquisitions, including by permanently authorizing DoD use of Commercial Solutions Openings and requiring DoD to review its use of other transaction authority
 - Repealing the fixed-price contract preference, and no longer requiring contracting officers to receive special approval for cost reimbursement type contracts
 - Requiring DoD to submit annual reports on violations of domestic preference laws to include the names of contractors

Regulatory and Statutory Update – FY2023 Budget

- On March 28, 2022, the Biden Administration released its Fiscal Year 2023 budget proposal, and proposed discretionary funding echoes many of the Biden Administration policy goals, such as:
 - Supporting United States leadership abroad, including to counter Russian aggression
 - Funding to enhance the capabilities of the European Deterrence Initiative, the North Atlantic Treaty Organization (NATO), other European partner states, and the stabilization of Ukraine
 - Improving U.S. infrastructure in roads, bridges, ports, and waterways
 - Strengthening U.S. supply chains and manufacturing capabilities
 - Preparing to counter future pandemics and other biological threats through comprehensive public health initiatives
 - Promoting clean energy transition and technology to fight climate change and promote environmental justice
 - Supporting equitable law enforcement, crime prevention, and community violence intervention
 - Promoting rigorous enforcement of antitrust law, with increases in funding the Department of Justice Antitrust Division and the Federal Trade Commission

IV. Enforcement Initiatives

Procurement Collusion Strike Force (“PCSF”)

- Established in 2019 to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government—federal, state, and local
 - Led by Department of Justice (“DOJ”) Antitrust Division, membership has grown to 22 U.S. Attorneys’ Offices, the FBI, and the Offices of Inspector General for multiple federal agencies
- Two main objectives:
 - Educate: training thousands of contracting officers and other government personnel to spot “red flags” of collusion in procurement activities and encouraging reporting suspicious behavior / patterns to DOJ
 - Detect & Prosecute: prosecute collusive conduct in procurement to protect taxpayer money. PCSF estimates that as much as 20% of discretionary Government spending may be impacted by collusion
 - Very focused on small business set-aside fraud; infrastructure/COVID/disaster spending; international spending
 - Increasing use of data analytics to analyze bidding information to look for suspicious patterns
- Teaming Agreements
 - PCSF leadership has stated that they are taking hard looks at teaming agreements that appear to reduce competition. Using terms like “taking them off the street,” etc. increases the risk that your agreement will be scrutinized

“No Poach” Enforcement

- In 2016, DOJ / FTC jointly announced so-called “no poach” agreements would be prosecuted criminally going forward
- No poach agreements cover agreements between employers that compete for employees not to solicit, recruit, cold call, and/or hire one another’s employees
 - Wage-fixing agreements are also illegal (i.e., agreements relating to compensation, benefits, wages)
- DOJ has obtained indictments in six investigations in just over a year, including one in the aerospace engineering industry
- This has also resulted in civil actions by employees, including a prominent class action against three prominent government contractors
 - Allegation is that the three government contractors entered into an illegal agreement not to recruit or hire one another’s employees working on certain contracts to provide intelligence services to the U.S. Government at a former Royal Air Force base in Molesworth, England
 - One of the defendants already has settled with the plaintiffs

COVID-19 Fraud Enforcement Task Force

- Attorney General Merrick Garland announced the creation of the Task Force on May 17, 2021
 - *“The Department of Justice will use every available federal tool—including criminal, civil, and administrative actions—to combat and prevent COVID-19 related fraud.”*
- The Task Force includes partners at agencies across the Federal Government and is aggressively pursuing criminal cases involving fraud
 - As of March 2022, DOJ has charged over 1,000 individuals with criminal offenses involving losses exceeding \$1.1 billion; seized over \$1 billion in Economic Injury Disaster Loan (“EIDL”) proceeds; and conducted over 240 civil investigations into more than 1,800 individuals and entities for alleged misconduct in connection with pandemic relief loans totaling more than \$6 billion
- Key areas of focus of the Task Force are the Payment Protection Program (“PPP”) / Main Street Lending Program / EIDL program
- However, the increased oversight and breadth of the Task Force’s mission will include additional scrutiny of federal contracts related to pandemic response measures
 - This likely will involve increased False Claims Act activity for pandemic related procurements and grants

**In which enforcement initiative area do you think
the Government will most aggressively pursue
federal contractors?**

a) Procurement collusion

b) “No poach” agreements

c) COVID-19 fraud

IV. Case Law Developments

Notable Claims & Disputes Decisions

- *Aptim Federal Services, LLC*, ASBCA No. 62982, 2022 WL 1601951 (Apr. 28, 2022)
 - Key takeaway: The Government may assert the sovereign acts doctrine to avoid liability for increased contract costs resulting from Government directives—including those related to the COVID-19 pandemic—that are “public and general” and render contract performance by the Government impossible
- *ORSA Technologies, LLC v. Department of Veterans Affairs*, CBCA No. 7141, 22-1 BCA ¶ 38,025 (Jan. 18, 2022)
 - Key takeaway: Performance complications from the COVID-19 pandemic are not an unforeseen excusable delay to avoid a termination for default when the COVID-19 pandemic was ongoing at the time of entering into the contract
- *MLB Transportation, Inc. v. Department of Veterans Affairs*, CBCA No. 7019, 21-1 BCA ¶ 37,919 (Sept. 3, 2021)
 - Key takeaway: A contractor must be able to point to a valid and enforceable contractual provision to recover COVID-19-related costs
- *Pernix Serka Joint Venture v. Secretary of State*, 849 F. App’x 928 (Fed. Cir. 2021) (mem) (per curiam), *aff’g* CBCA No. 5683, 20-1 BCA ¶ 37,589
 - Key takeaway: Under excusable delays clauses in firm fixed-price contracts, contractors will likely only receive additional time, but not costs, for delays related to “epidemics” and “quarantine restrictions” that did not result from contracting officer directives

Notable Bid Protest Decisions

- *Harmonia Holdings Group, LLC v. United States*, 20 F.4th 759 (Fed. Cir. 2022)
 - Key takeaway: Filing a timely agency-level protest may avoid a *Blue & Gold* waiver issue in a later protest at the Court of Federal Claims, but without diligent pursuit of a pre-award protest issue, the remedy available in a later protest may be limited
- *Battelle Memorial Institute*, B-420403.3, Mar. 10, 2022, 2022 CPD ¶ 64
 - Key takeaway: Be wary of the timeliness trap when protesting at the GAO if you defer a debriefing until after the award of a contract, when a pre-award debriefing is made available
- *Golden IT, LLC v. United States*, 157 Fed. Cl. 680 (2022)
 - Key takeaway: The Court's decision to reject GAO's rule requiring notice to the agency of the unavailability of proposed key personnel even after proposal submission as unfair and ungrounded in law or regulation opens up the possibility of a reevaluation of a strict (and punitive) rule
- *IAP Worldwide Services, Inc. v. United States*, 2022 WL 1021781 (Fed. Cl. 2022)
 - Key takeaway: For procurements of more than \$100 million, DFARS 215.306 creates a regulatory presumption that the agency will conduct discussions, thereby requiring agencies to document reasonable justifications for not doing so

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