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WHAT'S NEW IN GOVCON: Legal Updates 2023



HOUSEKEEPING NOTES AND TIPS

- ✓ Take Note of Emergency Exits
- ✓ Silence Your Mobile Devices
- ✓ THANK YOU to our Sponsors
- ✓ Questions will be addressed during allotted time.

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Today's presentation is not intended to be legal advice; please don't take it as such.

Discussion summary

Constantly-changing regulatory morass

- Some changes took effect in 2022
 - Legislative changes
 - Regulatory changes
 - New SDVOSB Program
 - Size standard changes
 - Judicially-imposed changes
- Some changes might take effect in 2023
 - 8(a) Program updates
 - Greenhouse gasses

Legal updates for government contractors



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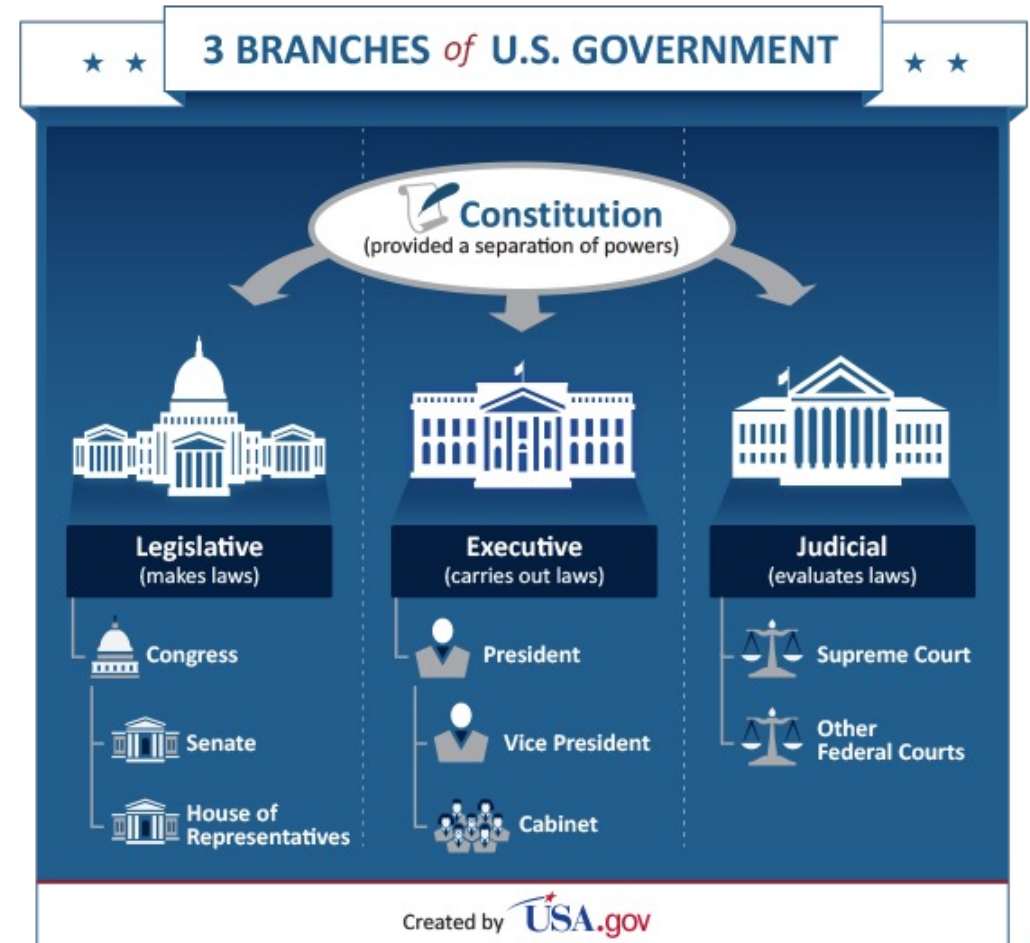


2022 Changes

Legislative

Regulatory

Judicial



2022 Legislative Updates

Congress enacted at least 10 procurement-related statutes in 2022

- **SBA Cyber Awareness Act**
 - Annual reporting relating to SBA's strategy to increase its cybersecurity infrastructure
- **Preventing Organizational Conflicts of Interest in Federal Acquisition Act**
 - Requires FAR updates to better define OCIs
 - Prevent issues where contractor is also working under a related private-sector contract
- **One Stop Shop for Small Business Compliance Act**
 - SBA must create website compiling all small business compliance guides
- **2023 National Defense Authorization Act**
 - **Priorities, not money**

2023 NDAA

Section 818: Pricing Process Pilot Program Extension

- Extends 2019 NDAA program for simplifying price reasonableness evaluations
 - Relies on historical cost and pricing data for similar acquisitions
 - Pilot program: 10 contracts
 - Now extended through January 2, 2024

Section 822: Modification of DOD Contracts to Provide Extraordinary Relief Due to Inflation Impacts

- Amends 50 USC 1431, to allow advanced payments up to \$500k
 - President must determine K facilitates national defense
 - Modification available only when the cost of performance exceeds price of K
 - Must request costs by December 31, 2023

2023 NDAA

Section 873: Contract bundling/consolidation

- Agencies must discuss with SBA the impact of bundled/consolidated contracts

Section 874: Small Business Working Group

- SECDEF must create a working group to ensure integration of small businesses

Section 875: Commercial Due Diligence Programs

- Use commercial due diligence tools to identify malicious foreign actors trying to gain influence/control at small businesses
 - Monitor and assess attempts; provide information back to small business



2023 NDAA

Section 856: Codifying DoD Mentor-Protégé Program

- DoD's mentor-protégé program now permanent
 - Mentor threshold lowered: now must only have \$25m in DoD K
 - Now a 3-year term
 - Possible protégé reimbursements in certain industries

Section 871: Codifying Small Business Scorecard

- Expands reporting requirements for SDVOSB, WOSB, HUBZone, and 8(a)

Section 872: SBIR and STTR Extension

- Programs reauthorized to 2024
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2022 Regulatory Updates

SDVOSB Program Consolidation

- 2 separate SDVOSB Programs (VA and SBA) → SBA
 - Governmentwide certification from SBA, effective January 1, 2023
 - Self-certified firms have until January 1, 2024 to get certified

Size Calculation Updates

- Employee-based calculations = avg. number of employees for each pay period over preceding **24 months**
 - Employee = full-time, part-time, or other basis
- Inflationary adjustments for receipts-based size standards

2022 Regulatory Updates

Federal Contractor Minimum Wage

- Executive Order 14026 (Nov. 22, 2021)
 - Minimum wage under covered contracts is \$15.00; increases each year
 - 2023: \$16.20
 - If SCA/Davis Bacon apply, pay highest required minimum wage

Nondisplacement of Qualified Workers under Service Contracts

- Executive Order 14055 (Nov. 18, 2021)
 - Contractor and subcontractors must offer qualified employees the right of first refusal under successor contracts

FAR Council: Implementation of EO 14005 (Buy American Act)

- Increases domestic content threshold from 55% to 60%
 - 65% in 2024; 75% in 2029

2022 Regulatory Updates

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FAR Council: Construction Contract Administration

- Construction Contracts awarded to small businesses, agency must provide notice regarding practices, policies, and compliance with requirements for REAs

FAR Council: Small Business Regs Apply OCONUS

- Support SBA's policy of including overseas contractors in small business contracting goals
- Allows set-asides for contracts for overseas procurements

FAR Council: Effective Communication

- Communication with industry encouraged (if no unfair competitive advantage)

2022 Judicial Happenings

COVID-19 Vaccine Mandate . . . Enjoined

- Federal Contractors
 - FAR 52.233-99 and Safer Federal Workforce Task Force guidance
 - Nationwide injunction issued after states sued
 - President exceeded his authority under the Federal Property and Administrative Services Act of 1949
 - Will it be enforced if voluntarily agreed to?
- Federal Employees



Changes in 2023 (and beyond)

HUBZone Appeals

- Currently, HUBZone status protest appeals are heard by SBA's AA/GCBD
- Regulatory update: HUBZone appeals will be heard by OHA
 - Parity with other socioeconomic programs

8(a) Program Changes

- Bona fide office requirement suspending until September 2023 (at least)
- Changes to ownership requirements
 - Mentor's ownership in protégé is not subject to former participant caps
 - **Certain** ownership changes not subject to SBA approval
- Non-8(a) BAT must be met for each set-aside order under MATOC
- Prohibits "super" set-asides (requiring more than one socioeconomic status)
- Business Plan review prioritized if contracts waiting

2023(ish) Changes

Proposed Greenhouse Gas Emissions

- **Reporting greenhouse gas emissions as an element of responsibility**
 - Significant contractor: received at least \$7.5m in federal obligations in year prior
 - Major contractor: received at least \$50m in federal obligations in prior year
- **Reporting requirements**
 - Scope 1: emissions from sources owned/controlled by the entity
 - Scope 2: emissions occurring from power/heating purchases
 - Scope 3: emissions occurring at other sources as a consequence of entity's operations
 - Scope 3 only required for major contractors

2023(ish) Changes

Davis Bacon Act changes

- 2022 proposed rule imposing significant changes to Davis Bacon Act
 - “Prevailing wage” redefined to old requirements (match actual wages in community)
 - Updating prevailing wage rates regularly
 - Expands “site of work” and “covered work” definitions
 - Covers truck drivers dropping off materials
 - Make DBA apply by operation of law, rather than by specific contract terms
 - Strengthen anti-retaliation and debarment provisions
- Look for litigation



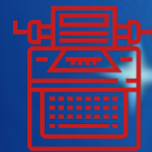
Thank you!

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