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# New DOD Cyber Rules Create Fertile Bid Protest Grounds

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Since Nov. 30, 2020, all U.S. Department of Defense solicitations, except those for commercial off the shelf items, have included Defense Federal Acquisition Regulation Supplement clause 252.204-7019, to require assessment of contractor compliance with cybersecurity requirements.[1]

Additionally, certain solicitations, other than those for commercial off the shelf items, have included DFARS clause 252.204-7021 to phase in the implementation of Cybersecurity Maturity Model Certification, or CMMC, requirements.[2]

These clauses were published together on Sept. 29, 2020, as part of an interim rule intended to assess contractor implementation of cybersecurity requirements.[3] There are many questions about what the new interim rule means for contractors, but very little attention has been paid to how the new interim rule may create protest issues during the solicitation period for contracts.

As we near the end of the U.S. Government Accountability Office's 100-day statutory deadline to resolve protests that may implicate these provisions,[4] reported decisions may soon appear analyzing challenges under the new clauses. As implementation continues, additional protest issues will certainly arise.

This article is intended to highlight some of the more likely issues expected to arise, and to provide some initial analysis and considerations related to these challenges.

**Preaward Protest Issues**

Preaward protests can be brought at the agency level, or at the GAO or the U.S. Court of Federal Claims, with certain jurisdictional exceptions.[5] It is well established in all forums that challenges to the ground rules of a procurement must be filed prior to the deadline for receipt of proposals or else such challenges are waived.[6] This waiver rule may create significant activity in the preaward protest context.

Initially, protesters could conceivably challenge the applicability of the clauses to a particular procurement. The interim rule requires contracting officers to insert the 7019 clause in all solicitations except those for commercial off the shelf items.[7]

But the 7019 clause applies by its terms only to covered contractor information systems, which are those information system that are "owned, or operated by or for a contractor that processes, stores, or transmits covered defense information."[8] Covered defense information is defined as controlled unclassified information or other information that "requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and governmentwide policies."[9]

Protesters will not likely be able to challenge the inclusion of the clause itself as the rule requires the clause in all solicitations.[10] But, protests may be useful in forcing the agency to clarify the extent to which the clause is expected to apply — e.g., is there any controlled unclassified information in contract performance, and if so, on which systems.

Protesters may also challenge the inclusion of the 7019 and 7021 clauses on the basis that they unduly restrict competition. The viability of such challenges may depend on how the agency incorporates the clause into the solicitation.

For example, the most basic requirement of the 7019 clause is for the contractor to perform a basic self-assessment of its compliance with National Institute of Standards and Technology Special Publication 800-171 within the three-year period prior to the solicitation.[11]

That three-year period can, however, be shortened,[12] and if the agency does so, offerors who cannot complete the assessment in time may be able to proceed on the theory that the shorter duration for the self-assessment unduly restricts competition.

Alternatively, under the 7019 clause, there are also medium and high level assessments, which are more onerous, and more importantly, are conducted by the DOD.[13]

If solicitations preference or even require such higher level assessments — or higher associated scores within either level — this could provide a viable opportunity for a protester to challenge the solicitation on grounds that it is improper to exclude competitors who, through no fault of their own, have not been able to receive such an assessment from the DOD.

Additionally, protesters may challenge the level selected by, for example, arguing that requiring a high assessment is unconnected to the agency's actual requirements. The 7021 clause could be subject to similar challenges as the 7019 clause, particularly as the 7021 clause is being phased in over time, and so only certain contractors will have an opportunity to undergo certification prior to 2025.[14]

The 7019 clause has a summary level score associated with each assessment level, and a perfect score of 110 may not be achieved until a future date.[15] Protesters may also challenge the use of the score on the basis of an ambiguity if the solicitation does not explain how the score will be used or why it is relevant to the work being competed. Such challenges could be coupled with arguments that requirements are unduly restrictive of competition, or not reflective of the agency's actual needs.

The requirements of these clauses also flow down to subcontractors.[16] That could restrict the ability of offerors to team with entities, particularly small businesses, who have not yet had an opportunity to undergo a required assessment.

Such restrictions may make contractors noncompetitive for award, and induce protests to restrict the scope of application of the clauses, particularly if it can be argued that a potential subcontractor will not

handle controlled unclassified information or control a covered contractor information system.

Finally, one variation of the above challenges would be for a protester to allege that the clauses required by the interim rule establish an impermissible qualification requirement without first giving offerors the opportunity to demonstrate their ability to meet the standards.[17]

This may be a particularly attractive option in procurements where the medium or high level assessments under the 7019 clause, or any certification under the 7021 clause, is required but the contractor has not had an opportunity to obtain such assessment or certification because the DOD or the CMMC third-party assessment organization has not been available.

**Post-Award Protest — the GAO or the Court**

In the post-award protest context, offerors will focus on how the clauses were applied to the evaluation. The scope of possible challenges will depend heavily on what the agency said it would do with the assessment information.

For example, if the clauses were incorporated as part of the contracting officer's responsibility determination, offerors would generally be prohibited from challenging a responsibility determination at the GAO.[18]

At the GAO, protesters can only challenge the failure to meet definitive responsibility criteria or evidence raising serious concerns that the contracting officer unreasonably failed to consider available relevant information in making the responsibility determination.[19]

Review in the Court of Federal Claims is more permissive, and the court will review a responsibility determination under the Administrative Procedure Act to determine if there has been a violation of a statute or regulation, or if determination lacked a rational basis.[20]

In either forum, such protests are difficult to win, unless there is a statement in the solicitation establishing an objective standard as to how responsibility will be judged. However, any such statement may for the basis for protests that awardees did not meet the criteria, or that unsuccessful offerors were improperly determined nonresponsible.

Protesters may challenge unfavorable assessments as unstated evaluation criteria where the use of the assessments was not specified in Section M of the solicitation. Agencies that do not expressly incorporate the 7019 and 7021 clauses into Section M may still defend on grounds that compliance with the 7019 and 7021 clauses is required and therefore rationally considered.

Alternatively, agencies that do not incorporate the 7019 and 7021 clauses into Section M may still face challenges that the clauses themselves impose mandatory evaluation requirements that were not properly considered.[21]

Another possibility for protest lies in the way the agency treats the assessment summary scores. If the agency establishes a cut off below which offerors are excluded from further competition, disappointed offerors may protest that the agency treated the 7019 and 7021 clauses as a qualification requirement without announcing this to offerors or providing a reasonable opportunity to qualify.

Note here that this creates a double-edged sword for the agency — it may face a qualification

requirement challenge whether it announces a requirement for a certain score, or whether it subsequently treats a certain score as a cutoff.

To avoid such protests, agencies should carefully consider how they will use the assessment summary scores under the 7019 clause, and which CMMC levels they will apply under the 7021 clause.

Protesters may also challenge the selection of an awardee based on arguments that the agency improperly evaluated the summary scores.

Such protests could take many forms, including: (1) that the awardee misrepresented its scores or compliance; (2) that the agency failed to take into account relevant information bearing on the reliability of the scores — for example, recent cyber incidents affecting the awardee under protest; (3) that the agency gave undue weight to the summary scores on contracts where controlled unclassified information or other covered defense information is not implicated; or (4) that an agency improperly downgraded the protester based on incorrect information or in violation of the solicitation.

Finally, there is the possibility for organizational conflict of interest challenges. Commentators have already noted the potential conflicts created by virtue of the CMMC third-party assessment organizations being private entities who may also compete for contracts themselves. However, the traditional unequal access, biased ground rules, and impaired objectivity type organizational conflicts of interest are also all potentially implicated by the new clauses.

For example, the interim rule requires contracting officers to verify current assessments and CMMC level certifications prior to any exercise of a contract option or extension of the period of performance on existing contracts.[22]

As a result, incumbents may enjoy an advantage in obtaining initial assessments and certifications. Such advantages could lead to allegations of unequal access to competitively useful information — for example, protesters may allege that offerors learned nonpublic competitively useful information about how offerors will be deemed to have satisfied NIST SP 800-171 requirements.

To the extent that incumbents collaborated with the agency to determine the appropriate assessment and CMMC levels, that may create biased ground rules organizational conflicts of interest. And if an offeror holds a separate contract where it helps the agency determine compliance with the assessment and CMMC requirements, it may create impaired objectivity organizational conflicts that could also form the basis of protest.

Given the fertile protest landscape associated with the interim rule, agencies would be well advised to carefully consider how they incorporate the new 7019 and 7021 clauses into their solicitations, how they use the assessment and certification information in the evaluation, and how much information they provide to offerors about the process.

Protesters should also carefully consider the requirements announced in their solicitations, and consider their protest options to clarify the standards that will be used to determine eligibility for award under these new clauses.

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[1] See Defense Federal Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019-D041), 85 Fed. Reg. 61,505 (Sept. 29, 2020).

[2] Id. at 61,506.

[3] Id. at 61,505.

[4] 31 U.S.C. § 3554(a)(1); 2 C.F.R. § 21.9(a).

[5] See FAR 33.102 (agency level protest authority); 4 C.F.R. § 21.1(a) (GAO pre-award protest authority); 28 U.S.C. § 1491(b) (COFC pre-award jurisdiction); see also 41 U.S.C. § 4106(f)(1) and 10 U.S.C. § 2304c(e) (limitation on COFC jurisdiction over task order protests).

[6] See FAR 33.103(e); 4 C.F.R. § 21.2(a)(1); Blue & Gold Fleet, L.P. v. U.S., 492 F.3d 1308 (Fed. Cir. 2007); Comint Sys. Corp. v. U.S., 700 F.3d 1377 (Fed. Cir. 2012).

[7] See DFARS 204.7304(d) (emphasis added); see also 85 Fed. Reg. 61,519.

[8] See DFARS 252.204-7019 (c) (requiring assessment for "covered contractor information systems"), (a) (defining "covered contractor information system" by reference to DFARS 252.204-7012); DFARS 252.204-7012(a).

[9] DFARS 252.204-7012(a).

[10] See 85 Fed. Reg. 61,519; DFARS 204.7304(d).

[11] See DFARS 252.204-7019(b), (c).

[12] Id.

[13] See id. at (d); DFARS 252.204-7020(a).

[14] See DFARS 204-7503.

[15] See DFARS 252.204-7019(d).

[16] See DFARS 252.204-7020(g); DFARS 252.204-7021(c).

[17] See 10 U.S.C. § 2319(b); FAR § 9.202.

[18] 4 C.F.R. § 21.5(c).

[19] Id.

[20] See, e.g. Impresa Construzioni Geom. Domenico Garufi v. U.S., 238 F.3d 1324 (Fed. Cir. 2001).

[21] See, e.g., CR Associates Inc. v. U.S., 95 Fed. Cl. 357 (2010)(finding that agency failed to perform evaluation of professional compensation required when clause 52.222-46 incorporated into contract).

[22] See DFARS 204.7303(b)(2); DFARS 204.7502(a)(2).