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What Contractors Can Expect after 2020 Election

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Overview

- Biden Administration Executive Orders (EOs) Affecting Federal Contractors
 - Day 1 EOs
 - Next Policy Steps
 - Climate Change
 - Buy American
- Areas of Continuing Focus
 - Cybersecurity
 - Supply Chain Security
 - Emerging Technology and Non-Traditional Contracting
- What is Happening on the Hill?
- Enforcement Trends



Day 1: Rescinding Trump Administration Executive Orders

- [EO 13985](#): Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
 - Rescinds EO13950 Combating Race and Sex Stereotyping
 - Sec. 7: Promoting government contracting and procurement opportunities on equal basis to all eligible providers of goods and services
 - Sec. 10: Policy of comprehensive approach to advancing equity across Government agencies and programs



Day 1: Rescinding Trump Administration Executive Orders

- [EO 13992](#): Revocation of Certain Executive Orders Concerning Federal Regulation
 - Revokes:
 - EO 13771 Reducing Regulation and Controlling Regulatory Costs
 - The “two-for-one” EO that required repeal of two regulations for every one issued
 - EO 13891 Promoting the Rule of Law Through Improve Agency Guidance Documents
 - EO that controlled the use of agency guidance documents in lieu of promulgated regulations
 - EO 13892 Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication
 - EO that restricted reliance on agency guidance documents in enforcement actions



Day 1: Modernizing Regulatory Review AND Regulatory Freeze Memorandum

- Presidential Memorandum
 - Tasks OMB with developing process to modernize regulatory review to promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity and benefit future generations
 - Improve review process to reflect new developments in science/economic understanding
 - Ensure regulations do not inappropriately burden disadvantaged or marginalized communities
 - Have OIRA be more proactive with agencies
 - Identify ways to make interagency review more efficient, transparent, and inclusive
- Assist. to President and Chief of Staff Memorandum
 - Asks Exec. Branch agencies to pause regs that have not been published or taken effect as of Jan. 20, 2021 to allow for review by Biden Administration designees



Day 1: Termination of Border Wall Construction

- [Proclamation 10142](#): Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction
 - Policy that “no more American taxpayer dollars be diverted to construct a border wall”
 - Directs Sec’y of Defense and Homeland Security to pause work on southern border wall; assess legality of contracts and funding; gather information on the construction project and related funding; and develop plan for redirecting wall funds
 - Aims to pause, and ultimately stop construction of southern border wall



Day 1: Protecting the Federal and Contractor Workforce

- [EO 13991](#): Protecting the Federal Workforce and Requiring Mask-Wearing
 - Urges federal contractor employees on site in federal buildings to wear masks and social distance
 - Instructs agency heads to require compliance with Centers for Disease Control and Prevention (CDC) guidelines
- [EO 14003](#): Protecting the Federal Workforce
 - Revokes four EOs, including October 2020 EO establishing “Schedule F” for employees who served in policy positions and allowed for easier and more expeditious termination of these employees
 - Expresses policy of encouraging federal employee union organizing and collective bargaining
- President announced that he has directed preparations for an EO that will increase the contractor minimum wage to \$15 per hour



Day 1: Ethics Pledge for Executive Branch Employees

- [EO 13989](#): Ethics Commitments by Executive Branch Personnel
 - Ethics Pledge for all Biden appointees
 - Prohibits gifts from registered lobbyists (without mention of OGE gift exceptions)
 - “Revolving Door Ban” for all appointees
 - Upon entering: prohibits appointees from participating in matters “directly and substantially related” to former employer/clients for 2 years
 - Upon leaving: prohibits communicating with/appearing before agency with intent to influence for 2 years and includes communications with Sr. White House staff
 - “Revolving Door Ban” for very senior appointees
 - Upon leaving: Prohibited from “materially assist[ing] others in making communications [to] or appearances [before]” employees in appointee’s former agency



Next Policy Steps: Address Climate Change

- EO 14008: Tackling the Climate Crisis at Home and Abroad
 - Putting climate crisis at center of foreign policy and national security
 - DoD, Council on Env't'l Quality (CEQ), EPA, DNI, Dir. of Office of Science and Tech., and NASA to develop analysis of security implications of climate change
 - DoD and Joint Chiefs of Staff to incorporate analysis in developing Nat'l Defense Strategy, Defense Planning Guidance, Chairman's Risk Assessment and other relevant strategies
 - DHS to consider homeland security implications of climate change in Arctic, at borders, and to national critical functions
 - Using Government's buying power and real property and asset management
 - Federal Clean Electricity and Vehicle Procurement Strategy to facilitate procurement of clean and zero-emission vehicles for federal, state and local government fleets, including USPS
 - Directs the CEQ to work with the FAR Council to develop procurement regulations "to promote increased contractor attention on reduced carbon emissions and Federal sustainability."



Next Policy Steps: Address Climate Change (cont.)

- Focusing on sustainable infrastructure
 - Instructs OMB and CEQ to ensure that federal infrastructure investment reduces climate pollution
 - Should lead to greater attention to sustainability and pollution control in federal procurement and grant opportunities
- Establishing National Climate Task Force
 - Comprised of DoD, DHS, DOT, DOE, and GSA
 - Charged with planning and implementing federal actions to combat climate change
 - Prioritizing actions on climate change in contracting and procurement as well as in policymaking and budget processes



Next Policy Steps: Even More Buy American

- [EO 14005](#): Ensuring the Future is Made in All of America by All of America's Workers
 - Charges FAR Council to consider several significant changes to current Buy American Act (BAA) rules:
 - Replace “cost of component test” with test for determining country of origin based on “the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity”
 - Increase: (1) percentage of domestic content required to qualify as a domestic end product and (2) price preference provided to domestic end products in procurement covered by BAA
 - Develop recommendations for lifting the BAA's exception for “commercial item IT”
 - Update FAR's current list of “nonavailable articles” that are exempt from BAA



Next Policy Steps: Even More Buy American (cont.)

- Expresses policy to maximize goods, products, and materials produced in, and even “services” offered in US in connection with federal contracts and grants
- Requires agencies to consider “suspending, revising, or rescinding” existing agency actions or undertaking additional agency actions to carry out policy
- Creates centralized process for review and approval of agency waivers of Made in America Laws
- Directs OMB to create a “Made in America Office” headed by a “Made in America Director”
 - See later slide re EO 14005 questions
- Directs GSA to develop public website that includes information on proposed waivers and whether waivers granted to increases transparency



Next Policy Steps: Even More Buy American (cont.)

- Requires agencies to consider source of any cost advantage of any foreign-sourced product before granting a public interest waiver
 - Does it result from “dumped” steel, iron or manufactured good or use “injuriously subsidized” steel, iron or manufactured good?
- Directs the head of each agency to submit a report on agency’s implementation of, and compliance with, Made in America Laws, to include agency use of waivers, including TAA waivers



Questions Regarding EO 14005

- EO takes waiver authority out of agency's hands and gives this discretion to the "Made in America Director" at OMB
 - Impacts to acquisition schedule?
 - OMB ability to process anticipated waiver volume?
 - Exceptions for emergencies?
 - What if OMB takes longer than 15 days to respond to a waiver request?
- "Waiver," as used in the EO, covers both exceptions to and waivers from the BAA and other Made in America Laws, without clearly distinguishing between the two
 - Are restrictions on "waivers" intended to apply to blanket waivers/exceptions?
 - OMB approval required for BAA waivers pursuant to the TAA?
- Impact on U.S. international relationships and treaties?
- Speculative and fluctuating nature of "value" vice "component test"



Area of Continuing Focus: Cybersecurity

- President's Feb. 4 State Dep't Speech
 - "Elevated the status of cyber issues within our Government"
 - Appointed first Nat'l Security Advisor for Cyber and Emerging Technology, Anne Neuberger (prior NSA director of cybersecurity)
- Addressing SolarWinds breach
 - Neuberger Feb. 17 Press Briefing
 - Need to overcome legal barriers for private sector to share information with Government
 - "[F]ederal networks' cybersecurity need investment and more of an integrated approach to detect and block threats"
 - Preparing Executive action to address gaps identified in review of incident
- Interim rule on cybersecurity for DoD contractors effective Nov 30, 2020
 - Includes plan for implementing self-assessments for compliance with current requirements and plan for implementing the Cybersecurity Maturity Model Certification (CMMC) over next five years to require third-party assessments
 - Final rule in 2021 expected to include revisions but not elimination of requirements
- Title XVII of FY21 NDAA (Sec. 1701-52)
 - Recommendations from Cyberspace Solarium Commission report
 - Creation of White House Office of the National Cyber Director



Area of Continuing Focus: Cybersecurity (cont.)

- DoD Vulnerability Disclosure Program (VDP) pilot program for the Defense Industrial Base
 - 12-month voluntary pilot established by DoD Cyber Crime Center (DC3) DoD Defense Industrial Base Collaborative Information Sharing Environment (DCISE), DoD VDP, the Defense Counterintelligence & Security Agency (DCSA)
 - Desire to bring lessons learned of VDP to DIB companies
 - Launches April 5, 2021, run 12 months, and end with result analysis



Area of Continuing Focus: Supply Chain Security

- [EO on America's Supply Chains](#)
 - Calls for a comprehensive review of domestic production, research and development capabilities, and the formulation of strategies to strengthen critical sectors with intent to protect U.S. industries from “[p]andemics and other biological threats, cyber-attacks, climate shocks and extreme weather events, terrorist attacks, geopolitical and economic competition, and other conditions [that] can reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services.”
 - Charges Asst. to President for Nat’l Security Affairs (APNSA) and Asst. to President for Economic Policy (APEP) to coordinate agency actions
 - Institutes a two-track parallel examination of supply chain vulnerabilities: (1) targeted, 100-day review of four key industries (pharmaceutical ingredients; critical minerals and rare earth elements; semiconductors; and large batteries (including those for electric vehicles), and (2) one-year review of broader range of industries



Area of Continuing Focus: Supply Chain Security (cont.)

- One-year review includes defense industrial base and requires update of report required by EO 13806 (2017)
 - HHS to report on supply chain for public health and biological preparedness; DoC/DHS to report on supply chains for critical sectors of information and communications technology industrial base; DoE to report on energy supply chain; DoT to report on transportation supply chain; DoA to report on agricultural commodities and food product supply chain
- EO directs Government to consult widely with outside stakeholders, including industry



Area of Continuing Focus: Supply Chain Security (cont.)

- FY19 Section 889 prohibition on contractor use of telecommunications or video surveillance equipment or services from certain Chinese companies (“Huawei ban”) is a statutory requirement with bipartisan support
 - Potential revisions re waivers?
 - Impact of Open FAR Case re application to affiliates and subsidiaries
- Source prohibitions for specific industries in FY21 NDAA
 - Sec. 841: printed circuit boards
 - Sec. 848: order of precedence for DoD acquisition of strategic/critical materials



Area of Continuing Focus: Emerging Technologies and Non Traditional Contracting

- Continuing need to attract “non-traditional” contractors
- Use of Other Transaction Agreements (OTs)
 - Tension between “FAR-ification” and “Wild West”
 - Perception (by some) that FAR provides flexibility
- FY2021 NDAA
 - Sec. 833: Requires DoD to publish list of OT authority consortia used to manage OT contracting opportunities
 - Sec. 1752: New National Cyber Director given authority to enter into contracts and OTs for Office of the National Cyber Director responsibilities



What is Happening on the Hill?

- CARES Act, § 3610 extension to Sept 30, 2021
- Defense spending
 - SASC Chair Jack Reed: budget likely to be similar to 2021, and not with same percentage increase as in years past
 - Unlikely to be major upheavals in defense spending given slim Dem majority in House and 50-50 Senate split
- Acquisition Streamlining
 - Risk aversion vs. speed
 - Defense Production Act-style tools
 - Reorganization of Title 10 Acquisition Statutes
- FY22 NDAA?



Enforcement Trends

- Feb 24: [DoJ Fraud Section Year in Review](#)
 - DoJ Fraud Section Market Integrity and Major Fraud Unit Procurement Fraud and Bribery program
 - Combats corruption and contracting fraud in Government programs.
 - Works with a range of law enforcement agencies and in parallel with civil and regulatory agencies.
 - Notable 2020 prosecution of SK Engineering & Construction Co.
 - SK obtained large Army construction project in South Korea. Paid millions of dollars to fake Korean construction company which then paid the money to Army contracting official. To cover payments, submitted false documents to Army
 - \$60 million fines; \$2.6 million restitution; 3 years probation; 3 years exclusion
 - “The Procurement Fraud and Bribery program also focuses on criminal accounting fraud schemes involving major defense contractors.”



Enforcement Trends

- Procurement Collusion Strike Force
 - Nov 12: Announce expansion of PCSF
 - Nov 2020 added 9 US Attorney Offices; Air Force Office of Special Investigations; and DHS Office of Inspector General
 - 450 partners currently
 - Over two dozen grand jury investigations ongoing
 - Data analytics project
 - New Director Daniel Glad (Oct. 2020)
- False Claims Act
 - Sen. Grassley working on FCA bill to address “materiality” and DoJ dismissals of FCA suits
 - DoJ priorities
 - Fraud related to COVID-19 pandemic and cybersecurity, among others less relevant to contractors
 - More sophisticated data analytics tools will mean DoJ brings more cases itself (vice through relators)

