



## Government Contracts Ramifications of the Trump Election

The presidential Administration of Donald J. Trump is likely to usher in many changes for government contractors. Through campaign statements, including his “Contract with the American Voter,” President-elect Trump has identified multiple planned actions that would affect the way the federal government does business. This *Commentary* explores those potential changes.

### Repeal of Numerous Executive Orders Affecting Government Contractors

President Obama has issued several Executive Orders (“EO”) and Presidential Memoranda pertaining to government contracting. These Executive Orders impose numerous additional requirements or restrictions on government contractors. Many government contractors, in turn, have objected to the use of Executive Orders to impose these additional, sometimes costly, requirements. In 2015, four associations—the National Defense Industrial Association, the Aerospace Industries Association, the Professional Services Council, and the IT Alliance for Public Sector—sent a [letter to the White House](#) “respectfully request[ing] that no further presidential directives primarily focused on government contractors be issued for the foreseeable future.” The letter noted that these additional requirements have required substantial

investments of time and systems, even though their actual impact is “exceedingly minimal,” which creates problems for current contractors and barriers to entry for potential government contractors.

In his “[Contract with the American Voter](#),” President-elect Trump stated that he will “cancel every unconstitutional executive action, memorandum and order issued by President Obama.” Similarly, President-elect Trump’s [campaign website](#) vowed to “[c]ancel immediately all illegal and overreaching executive orders.” Although President-elect Trump has not yet supplied details on which Executive Orders he views as unconstitutional, illegal, or overreaching, his planned actions could potentially result in lifting numerous restrictions placed on government contractors. The following Executive Orders affect government contractors:

- [Economy in Government Contracting](#),<sup>1</sup> which requires that federal agencies treat as “unallowable” the costs of any activities by federal contractors “undertaken to persuade employees ... to exercise or not to exercise ... the right to organize and bargain collectively.”
- [Nondisplacement of Qualified Workers Under Service Contracts](#),<sup>2</sup> which requires that when a

new contractor replaces a firm doing work under a contract for services, certain service employees must be granted a right of first refusal of employment in positions for which they are qualified.

- [Notification of Employee Rights Under Federal Labor Laws](#),<sup>3</sup> which requires that federal contractors (and subcontractors) covered by the National Labor Relations Act must conspicuously post a notice to employees regarding their rights under federal labor laws, including the National Labor Relations Act.
- [Use of Project Labor Agreements for Federal Construction Projects](#),<sup>4</sup> which encourages executive agencies to consider requiring the use of project labor agreements in connection with construction projects with a total cost to the government of \$25 million or more. This Executive Order also sets forth several requirements for project labor agreements.
- Presidential Memorandum, [Memorandum for the Heads of Executive Departments and Agencies on Contractor Tax Delinquency](#),<sup>5</sup> which directs the Commissioner of the Internal Revenue Service to conduct a review of certifications of nondelinquency in taxes submitted by federal contractors and to report on the accuracy of those certifications. It also directs agency heads to submit recommendations on process improvements to ensure that tax-delinquent contractors are not awarded new contracts.
- [Strengthening Protections Against Trafficking in Persons in Federal Contracts](#),<sup>6</sup> which imposes requirements, including additional requirements for compliance plans, certification, and reporting, on federal contractors to strengthen compliance with anti-trafficking laws.
- [Establishing a Minimum Wage for Contractors](#),<sup>7</sup> which raised the minimum wage for workers on government contracts to \$10.10 per hour beginning January 1, 2015, and requires that the minimum wage for such employees be determined annually by the Secretary of Labor.
- [Non-Retaliation for Disclosure of Compensation Information](#),<sup>8</sup> which prohibits federal contractors from

discriminating or retaliating against employees who discuss their compensation with fellow workers.

- Presidential Memorandum, [Advancing Pay Equality Through Compensation Data Collection](#),<sup>9</sup> which directed the Secretary of Labor to propose a rule within 120 days that would require federal contractors and subcontractors to submit to the Department of Labor summary data on the compensation paid to their employees, including data by sex and race.
- [Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity \("Further Amendments EO"\)](#),<sup>10</sup> which extended equal employment opportunity protections to prohibit discrimination on the basis of sexual orientation and gender identity, in addition to the grounds previously prohibited.
- [Fair Pay and Safe Workplaces](#),<sup>11</sup> which requires federal contractors to report on their compliance with 14 labor laws, including the Davis-Bacon Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, and the Occupational Safety and Health Act.<sup>12</sup> This executive order also establishes a paycheck transparency requirement, under which contractors are required to provide covered employees with information concerning their hours worked, overtime hours, pay, and any additions made to or deductions made from pay.
- [Planning for Federal Sustainability in the Next Decade](#),<sup>13</sup> which requires agencies to include environmental performance and sustainability factors, to the maximum extent practicable, in the planning, award, and execution phases of applicable acquisitions.
- [Establishing Paid Sick Leave for Federal Contractors](#),<sup>14</sup> which requires the inclusion of a clause in contracts and subcontracts with the federal government providing that all employees performing under the contract shall earn not less than one hour of paid sick leave for every 30 hours worked, and providing other requirements and limitations with regard to paid sick leave for employees.

The majority of these Executive Orders relate to either labor rights or environmental policies—areas in which President-elect Trump's views deviate from those of President Obama.<sup>15</sup> Therefore, it is possible that the Trump Administration will seek to repeal in full each of these Executive Orders. However, repealing President Obama's Executive Orders may not be as easy as issuing a new Executive Order repealing all of the previous ones. Nearly all of President Obama's Executive Orders have been implemented through the formal rulemaking process.<sup>16</sup> For those Executive Orders that are the subject of final rules, the process of repealing them could be much slower. President-elect Trump could order agencies to begin replacing the rules of the previous Administration, but such a process would take significantly more time and may not be accomplished on "day one," or even within the first 100 days.

Moreover, the impact of repealing these Executive Order will likely vary depending on whether the Executive Order has been in place long enough to change contractor practices. For example, the final rules implementing Executive Orders 13665, Non-Retaliation for Disclosure of Compensation Information, and Executive Order 13672, "Further Amendments EO," became effective in January 2016. The final rule implementing Executive Order 13673, Fair Pay and Safe Workplaces, became effective in October 2016, but implementation was halted by a temporary restraining order issued the day before the final rule was to take effect. The final rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, was not effective until November 29, 2016.

Since the final rules implementing these Executive Orders have not been in place for long, it is less likely that contractors have already implemented significant changes in response to them. As a result, contractors may notice less of an impact if the Order is repealed. In contrast, the final rules implementing Executive Orders 13494, Economy in Government Contracting; 13496, Notification of Employee Rights Under Federal Labor Laws; and 13502, Use of Project Labor Agreements for Federal Construction Projects, have been in place since 2010 and 2011. Since contractors have had more time to adjust their practices in response to these Orders, their repeal could have more of an impact.

## Rejection of Some Obama Administration Procurement Policies

The Obama Administration's overt and categorical "preference for fixed-price type contracts" enunciated in President Obama's March 4, 2009, [Memorandum for the Heads of Executive Departments and Agencies](#), is likely to be replaced by direction for public contracting professionals to effectively implement the guidance and requirements set forth in Federal Acquisition Regulation ("FAR") Part 16 regarding the selection of the appropriate contract type. Similar to President Obama's Memorandum, the Trump Administration will likely expect that cost-reimbursement contracts are to be used only when circumstances prevent a federal agency from defining its requirements sufficiently to allow for a fixed-price type contract, or when the risks and uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. However, under President-elect Trump, an emphasis on accountability and incentivizing efficient, cost-effective performance when cost-type contracts are selected will likely replace the Obama Administration's active discouragement of the use of cost-type contracts.

Similarly, the current embrace of Lowest Price, Technically Acceptable ("LPTA") contracts in FAR Part 15 negotiated procurements can be expected to wane, and in its place, contractors may see a renaissance for traditional Best Value negotiated contracts based on reasonable and vigorous technical/cost trade-offs. Under President-elect Trump, public procurements will likely again seek to secure the best combinations of quality, delivery, price, and capabilities in negotiated procurements for products and services, eschewing the too often ill-fitting or underperforming solutions driven by a price-only acquisition strategy. Together with a resurgence in best value procurements, the Trump Administration will likely favor creative approaches to the acquisition of products and services. For example, share-in-savings contract approaches and techniques are likely to be reinvigorated under the new Administration. Current efforts to better engage innovators in places like Silicon Valley may be reinforced with practical, private-sector savvy policies with regard to profit margins when the innovations deliver what the government needs.

Finally, outsourcing, which generally was disfavored by the Obama Administration, may regain popularity under the new Trump Administration. While inherently governmental functions can be expected to continue to be reserved to federal executive agencies, President-elect Trump is likely to favor a narrower definition of functions that are inherently governmental in nature to promote increased outsourcing of services.<sup>17</sup>

## Emphasis on Commercial Item Contracting

Under President-elect Trump, the statutory preference for Commercial Items can be expected to enjoy a renewed emphasis and resurgence. Contractors can expect significant changes to current federal guidance aimed at constricting the products and services deemed to fall within the ambit of “Commercial Items.” The “of a type” aspect of the Commercial Item definition will likely be emphasized and advanced to provide federal agencies and offerors alike with great latitude in characterizing specific products and services as Commercial Items. The renewed emphasis on Commercial Item contracting will likely include a revisiting of the allocation of rights in intellectual property (“IP”) to ensure that IP does not become an obstacle to the government’s ability to access and acquire new and innovative technologies as well as products and services based on established (or “proven”) technologies. The new Administration likely will promptly seek to revise the current default posture taken by many federal agencies under which federal offerors’ and contractors’ assertions of commercial item status are met with skepticism and extensive requests for information other than cost or pricing data. The new emphasis likely will be a public procurement climate openly receptive to, if not aggressively seeking, Commercial Items, with challenges only in circumstances where Agencies have credible information to rebut the Commercial Item presumption enjoyed by offerors and contractors, or where offerors and contractors are unable to produce the rudimentary information supporting a determination that the price of a Commercial Item is fair and reasonable.

## Increased Spending for Defense, Cybersecurity, Infrastructure, and Immigration-Related Activities

President-elect Trump has signaled a willingness to increase federal spending in several areas. The first area is defense spending. For example, the [President-elect has stated](#) that

he will increase the Navy’s ships and submarines from 276 to 350 and the number of Air Force fighter aircraft from 1,113 to 1,200. He has also stated that as soon as he takes office, he will seek to repeal the federal sequester caps for Department of Defense spending. A related area where contractors can expect to see increased spending is cybersecurity. In a [press release](#) issued last September, President-elect Trump stated that he will “make it a priority to develop defensive and offensive cyber capabilities,” which could mean increased federal spending on cybersecurity contracts.<sup>18</sup>

Another area that could see increased spending under the Trump Administration is infrastructure. In his election [victory speech](#), President-elect Trump stated that he intends to put “millions of our people to work” to rebuild highways, bridges, tunnels, airports, schools, and hospitals.<sup>19</sup> Finally, there is a potential for increased government contract dollars to be devoted to immigration-support and prison-related functions.

## Decreased Spending

While there is the potential for increased spending in several areas, President-elect Trump has also said that he wants to eliminate wasteful and duplicative spending, and to implement major budget cuts for certain agencies. In a [debate](#), Mr. Trump specified that cuts would be aimed at the Department of Education, Environmental Protection Agency, and Internal Revenue Service, but would also extend beyond these three agencies: “If you look at every single agency, we can cut it down, and I mean really cut it down and save.” Although President-elect Trump has not provided details on these cuts, there is potential for them to significantly affect federal government contracts.

## Continued Emphasis on Compliance, but with a Different Focus

The Trump Administration will likely continue to emphasize contractor compliance. However, companies may see a shift in the emphasis and focus of contractor compliance. Accountability, contractor responsibility, and ethical conduct will continue to be a fundamental expectation in public procurement, but President-elect Trump will likely renew the contracting community’s focus on rooting out fraud, waste, and abuse. This renewed focus will likely be reflected in more actions responding to suspected bribery, improper gifts and gratuities, and

violations of procurement laws that are intended to protect the United States' industrial and technological bases, such as the Buy American Act and Trade Agreements Act.

## Possible Disruptions to Supply Chain Partners

President-elect Trump has been vocal about his disapproval of America's current trade relationships. In his "[Contract with the American Voter](#)," President-elect Trump pledged to renegotiate or withdraw from the North American Free Trade Agreement, withdraw from the Trans-Pacific Partnership, and to direct the Secretary of Commerce and U.S. Trade Representative to "identify all foreign trading abuses that unfairly impact American workers and direct them to use every tool under American and international law to end those abuses immediately." While this would obviously affect foreign companies doing business with the federal government, it also has the potential to affect American companies whose supply chains include foreign companies.

## Decreases in Agency Contracting Workforce

In his "[Contract with the American Voter](#)," President-elect Trump said he will freeze federal hiring, seeking to reduce the federal workforce through attrition. Depending on how it is implemented, this could exacerbate the already understaffed and undertrained workforce of federal acquisition professionals, leading to more contracting delays and mistakes. To counterbalance this decreased workforce, the Trump Administration may seek to increase emphasis on, and funding for, training of the procurement workforce.

## Appointments that Will Affect Government Contracting

Several of President-elect Trump's political appointments will be instrumental in shaping the future of government contracting. President-elect Trump will appoint the next Office of Federal Procurement Policy ("OFPP") Administrator, who heads the agency responsible for providing overall direction for government-wide procurement policies, regulations, and procedures.<sup>20</sup> The OFPP Administrator serves as the chair of the FAR Council, oversees the development of the executive branch's position on all procurement-related legislation, leads the Chief Acquisition Officers Council,<sup>21</sup> manages the

government-wide procurement data system, develops small business contracting policies (in consultation with the Small Business Administration), and chairs the Cost Accounting Standards Board.<sup>22</sup> OFPP is an office within the Office of Management and Budget ("OMB"); President-elect Trump will appoint the next Director of OMB, who will also have the ability to help shape the future of government contracting.

In addition, all of the members of the FAR Council, which is chaired by the OFPP Administrator and includes the Secretary of Defense, the Administrator of National Aeronautics and Space Administration, and the Administrator of General Services Administration, are appointed positions. Of these positions, President-elect Trump has so far filled only one—on December 1, 2016, he named retired Marine General James Mattis as his pick for the Secretary of Defense.<sup>23</sup> The individuals selected to fill these positions will also have a significant impact on federal procurement policy in the Trump Administration.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

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## Endnotes

- 1 Exec. Order No. 13494, 74 Fed. Reg. 6,101 (Jan. 30, 2009).
- 2 Exec. Order No. 13495, 74 Fed. Reg. 6,103 (Jan. 30, 2009).
- 3 Exec. Order No. 13496, 74 Fed. Reg. 6,107 (Jan. 30, 2009).
- 4 Exec. Order No. 13502, 74 Fed. Reg. 6,985 (Feb. 6, 2009).
- 5 Presidential Memorandum: Memorandum for the Heads of Executive Departments and Agencies on Contractor Tax Delinquency (Jan. 20, 2010).
- 6 Exec. Order No. 13627, 77 Fed. Reg. 60,029 (Sept. 25, 2012).
- 7 Exec. Order No. 13658, 79 Fed. Reg. 9,851 (Feb. 12, 2014).
- 8 Exec. Order No. 13665, 79 Fed. Reg. 20,749 (Apr. 8, 2014).
- 9 Presidential Memorandum: Advancing Pay Equality Through Compensation Data Collection (Apr. 8, 2014).
- 10 Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 21, 2014).
- 11 Exec. Order No. 13673, 79 Fed. Reg. 45,309 (July 31, 2014).
- 12 A federal district court in Texas has temporarily halted the implementation of most of the Fair Pay Executive Order. *Associated Builders & Contractors of Se. Tex. v Rung*, No 1:16-CV-425 (E.D. Tex. Oct. 24, 2016)(order granting preliminary injunction).
- 13 Exec. Order No. 13693, 80 Fed. Reg. 15,871 (Mar. 19, 2015).
- 14 Exec. Order No. 13706, 80 Fed. Reg. 54,697 (Sept. 7, 2015).
- 15 See, e.g., DonaldJTrump.com, “[Regulations](#)” (stating that President-elect Trump would eliminate “intrusive regulations,” including those relating to environmental protection).
- 16 See, e.g., 29 C.F.R. pt. 9 (Department of Labor’s final rule implementing Exec. Order No. 13495, Nondisplacement of Qualified Workers Under Service Contracts); 29 C.F.R. pt. 471 (Department of Labor final rule implementing Exec. Order No. 13496, Notification of Employee Rights Under Federal Labor Laws, 41 C.F.R. pt. 60 (Office of Federal Contract Compliance Programs final rule implementing Executive Order 13672, Further Amendments EO); 29 C.F.R. pt. 13 (Department of Labor final rule implementing Exec. Order No. 13706, Establishing Paid Sick Leave for Federal Contractors).
- 17 See generally FAR Subpart 7.5. The new Administration is likely to seek a lifting, or reversal, of the [statutory moratorium and restrictions](#) on public-private competitions pursuant to Office of Management and Budget (“OMB”) Circular A-76 and section 2461 of Title 10, United States Code. Currently, the U.S. Department of Defense continues to be prohibited by statute from converting any work currently performed, or designated for performance, by any number of civilian personnel to private sector (contract) performance. Expect the new Administration to seek the efficiencies and cost benefits of contracting out more work currently performed by federal civilian personnel. In addition, the Administration is likely to advocate a broad interpretation of the examples of functions generally not considered to be inherently governmental as listed in FAR § 7.503(d). The new Administration will be less inclined to categorize “Closely Associated Functions” as inherently governmental functions that can be performed only by federal employees. The OMB, the Office of Federal Procurement Policy, and the FAR Counsel are expected to be the key players.
- 18 [Donald J. Trump Military Readiness Remarks](#), Sept. 7, 2016.
- 19 Transcript: [Donald Trump’s Victory Speech](#), *The New York Times*, Nov. 9, 2016.
- 20 “[Office of Federal Procurement Policy](#),” The White House.
- 21 The Chief Acquisition Officers Council “promotes the President’s Management Agenda (PMA) and the President’s specific acquisition-related initiatives and policies” and “is the principal inter-agency forum for monitoring and improving the Federal acquisition system.” “[Office of Federal Procurement Policy](#),” The White House.
- 22 “[Office of Federal Procurement Policy](#),” *supra*.
- 23 “[Trump Picks Retired Marine Gen. James Mattis for Secretary of Defense](#),” *The Washington Post*, Dec. 1, 2016.