



Update on Government Contracts Ramifications of the Trump Administration

In December 2016, Jones Day issued “[Government Contracts Ramifications of the Trump Election](#),” a *Commentary* in which we discussed several likely impacts of the Trump Administration in the government contracts arena. Specifically, we discussed that the new Administration would:

- Seek repeal of numerous Executive Orders affecting government contractors.
- Reject some Obama Administration procurement policies, such as: the preference for fixed-price type contracts; the preference for lowest-price technically acceptable (“LPTA”) evaluation schemes; and the preference against outsourcing government jobs to private companies.
- Embrace Commercial Item contracting.
- Increase government spending for defense, cybersecurity, infrastructure, and immigration-related activities.
- Decrease spending by many agencies, including the Department of Education, Environmental Protection Agency, and Internal Revenue Service.
- Focus on compliance issues such as rooting out fraud, waste, and abuse, and ensuring compliance with the Buy American Act and Trade Agreements Act.

- Withdraw from, or renegotiate America’s participation in, certain trade relationships, which could affect companies’ supply chains.
- Decrease the federal workforce, which could result in understaffing and undertraining within the acquisition workforce.
- Appoint the members of the FAR Council, including the Office of Federal Procurement Policy (“OFPP”) Administrator, Secretary of Defense, Administrator of National Aeronautics and Space Administration, and the Administrator of General Services Administration.

Since the issuance of our earlier *Commentary*, President Trump has taken several actions that provide additional insight into the impact his Administration will have on government contractors. President Trump’s actions and statements in the last few months indicate the following potential impacts on government contractors:

Willingness to Participate in Contract Negotiations

On several occasions before his inauguration, then President-elect Trump made public statements criticizing what he saw as overspending on government

programs. For example, he issued public statements criticizing the costs of two high-profile Air Force procurements—the F-35 fighter jet procurement and the Air Force One procurement. In both cases, the President’s willingness to get involved in price negotiations resulted in the contractors agreeing to lower their prices.

President Trump views himself as a dealmaker, and he may seek to involve himself directly in negotiating procurements even now that he has taken office. Therefore, government contractors can expect that, especially with regard to high-profile procurements, the President may take a keen interest in the selection process and seek to negotiate price decreases—perhaps even after the award of the contract has been made.

However, President Trump’s public criticism of acquisitions could have negative effects. First, some believe that such public criticism, which has had an impact on the stock prices of the contractors involved, could dissuade contractors from competing for certain government contracts, resulting in less competition. Second, the President’s involvement could introduce risk to the government. If the President influences the selection of a contractor during the procurement process, companies could protest the award, alleging that the selection did not follow the evaluation criteria laid out in the solicitation. If the President influences the performance of a contract after award, this could potentially result in costly claims against the government for changes to the contract terms.

Repealing Executive Orders and Regulations

In our *Commentary*, we discussed that President Trump would seek to repeal several Executive Orders affecting government contractors. On January 20, 2016, the President’s first day in office, he issued a Presidential Memorandum ordering a freeze on the federal regulatory process. The Memorandum orders agencies not to send any regulations to the Office of the Federal Register until the new Administration reviews and approves the regulation. Regulations that have already been sent to the Office of the Federal Register but have not yet been published are to be withdrawn, and regulations that have been published but have not yet taken effect are to have their effective dates postponed. This

Memorandum does not affect the Executive Orders listed in our prior *Commentary*, as each of those Orders has already been implemented through the regulatory process. However, the President’s Memorandum demonstrates his commitment to undoing many significant regulatory actions of the prior Administration. Contractors can expect that the President will soon begin ordering agencies to start the process of repealing or canceling a number of previously issued regulations that affect government contractors.

Decreasing the Federal Workforce

We discussed in our prior *Commentary* that President Trump could move to decrease the federal workforce. On January 23, 2016, he issued a Presidential Memorandum ordering an “across the board” hiring freeze for the executive branch. The Memorandum stated that no vacant positions existing at noon on January 22, 2017, may be filled and no new positions may be created. In addition, contracting outside the government to circumvent the hiring freeze is not permitted. The Memorandum also orders the director of the Office of Management and Budget, in consultation with the director of the Office of Personnel Management, to develop a long-term plan to reduce the size of the federal government’s workforce through attrition. This Memorandum could have the unintended effect of exacerbating understaffing and undertraining within the federal acquisition workforce, potentially leading to more contracting delays and mistakes.

Move to Privatization

The new Administration has indicated that it believes that many functions currently performed by the government could be more efficiently and effectively procured through the commercial marketplace. The White House and several of President Trump’s political nominees have indicated a preference for privatization in the areas of health care, housing finance, schools, prisons, and air traffic controllers. Therefore, contractors can expect potential opportunities in these areas.

Possibility of Introducing Additional Domestic Preferences

President Trump, through his campaign statements and statements on the White House’s website, has made clear his

belief that keeping jobs in America is key to the country's economic growth. In fact, in December 2016, then-President-elect Trump personally intervened when a company announced plans to move some of its jobs to Mexico. Now that he is in office, President Trump will likely seek to strengthen domestic preferences in government contracting. He may decide to do this through an Executive Order instructing agencies to consider the creation or retention of American jobs as an evaluation factor, or he may seek to introduce additional domestic preferences through legislation.

Increased Defense Technology Spending

President Trump has made several statements that indicate a willingness to increase defense spending. Specifically, the [White House website](#) reports that the Trump Administration “will pursue the highest level of military readiness” by ending the defense sequester and submitting a new budget to Congress with a plan to rebuild the military. In addition, the White House has stated that it will aim to develop a state-of-the-art missile defense system to protect against missile-based attacks from states like Iran and North Korea, and develop defensive and offensive cyber capabilities. In his confirmation hearing, now-Secretary of Defense James Mattis testified that President Trump’s criticism of defense programs on Twitter shows the President’s preference to acquire important defense technology at lower costs but does not indicate any lack of support for the acquisitions themselves.

Preference for LPTA

We discussed in our prior *Commentary* that the Trump Administration could move away from a preference for LPTA procurements in favor of trade-offs of price and technical factors. Since the issuance of our initial *Commentary*, the new Administration has sent mixed signals regarding its preferences. On one hand, Congress passed the National Defense Authorization Act for 2017, which contains a strong preference

for best value, rather than LPTA, evaluation schemes in Department of Defense procurements. On the other hand, the President has taken several actions since the issuance of our *Commentary* that indicate a possible preference for LPTA procurements. President Trump’s focus on the overall cost of defense technology procurements and criticism of programs that he perceives to be too expensive indicate that his top concern may be getting the lowest priced item or service that will accomplish the task, rather than paying more for additional features.

Possible Disruptions to Supply Chain Partners

In our prior *Commentary*, we discussed that President Trump would seek to withdraw from, or renegotiate America’s participation in, certain trade relationships, which could impact companies’ supply chains. President Trump has already carried through on one of his campaign promises by issuing a Presidential Memorandum on January 23, 2017, directing the United States Trade Representative to withdraw the United States as a signatory to the Trans-Pacific Partnership (“TPP”) and to permanently withdraw the United States from TPP negotiations. The Memorandum also directs the Trade Representative to “begin pursuing, wherever possible, bilateral trade negotiations to promote American industry, protect American workers, and raise American wages.”

Freeze on Contracting and Grants for Disfavored Agencies

According to news reports, shortly after he took office, President Trump instructed the Environmental Protection Agency to temporarily suspend the award of all new contracts and grants, including task orders and work assignments. It is unclear how long the freeze will last, or what the long-term impact on contracting with the EPA will be. However, this development raises the possibility that other agencies could experience similar freezes on contracting activity.

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