

Post-Election Webinar Series

Government Contracts | November 20, 2020

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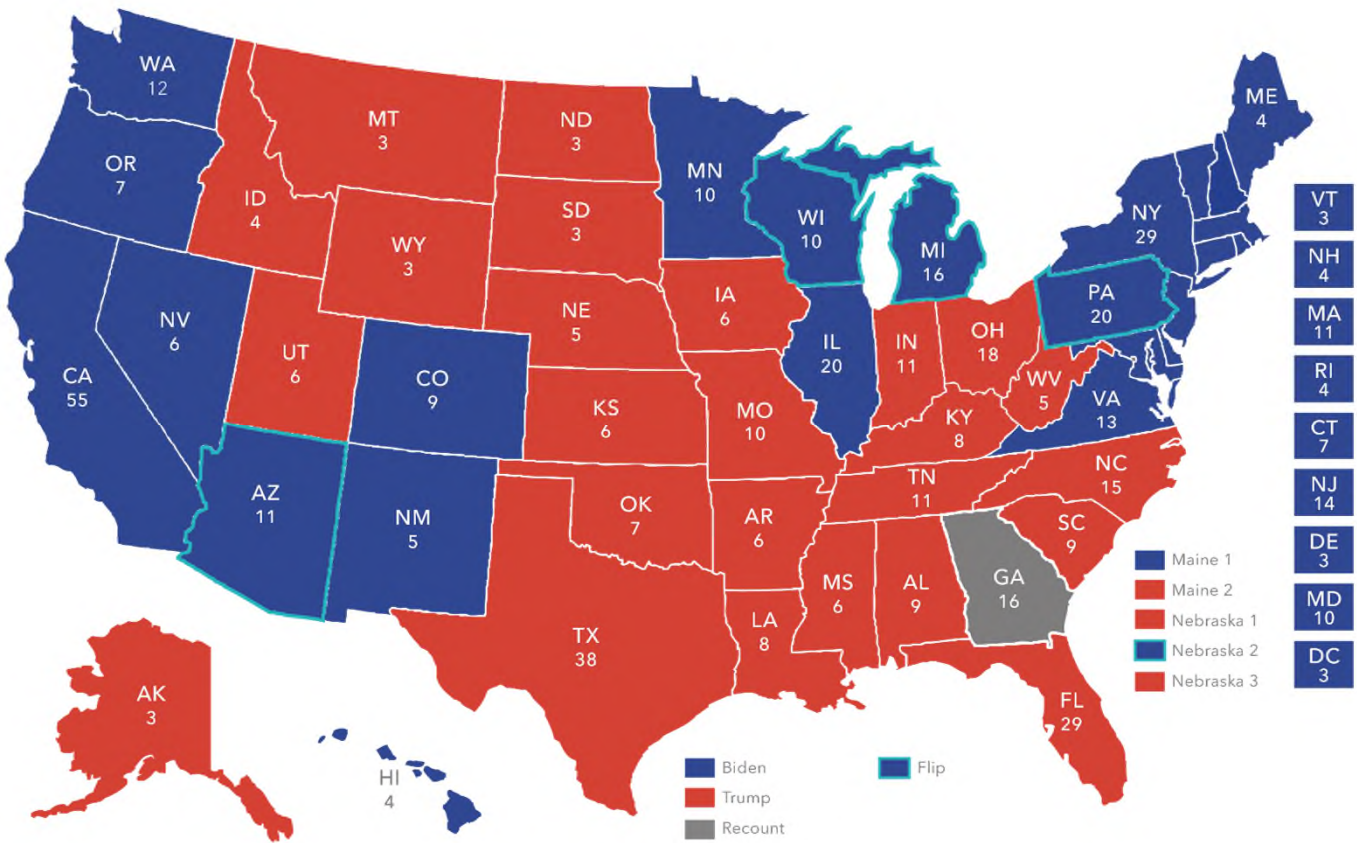
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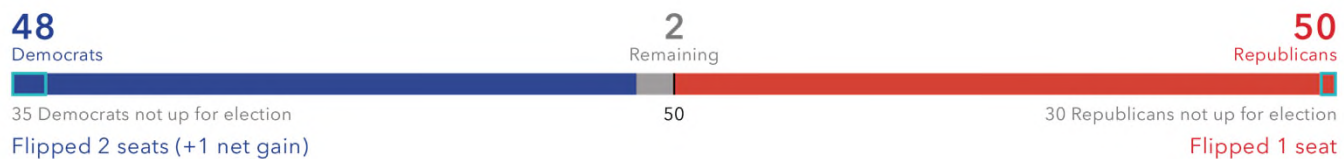
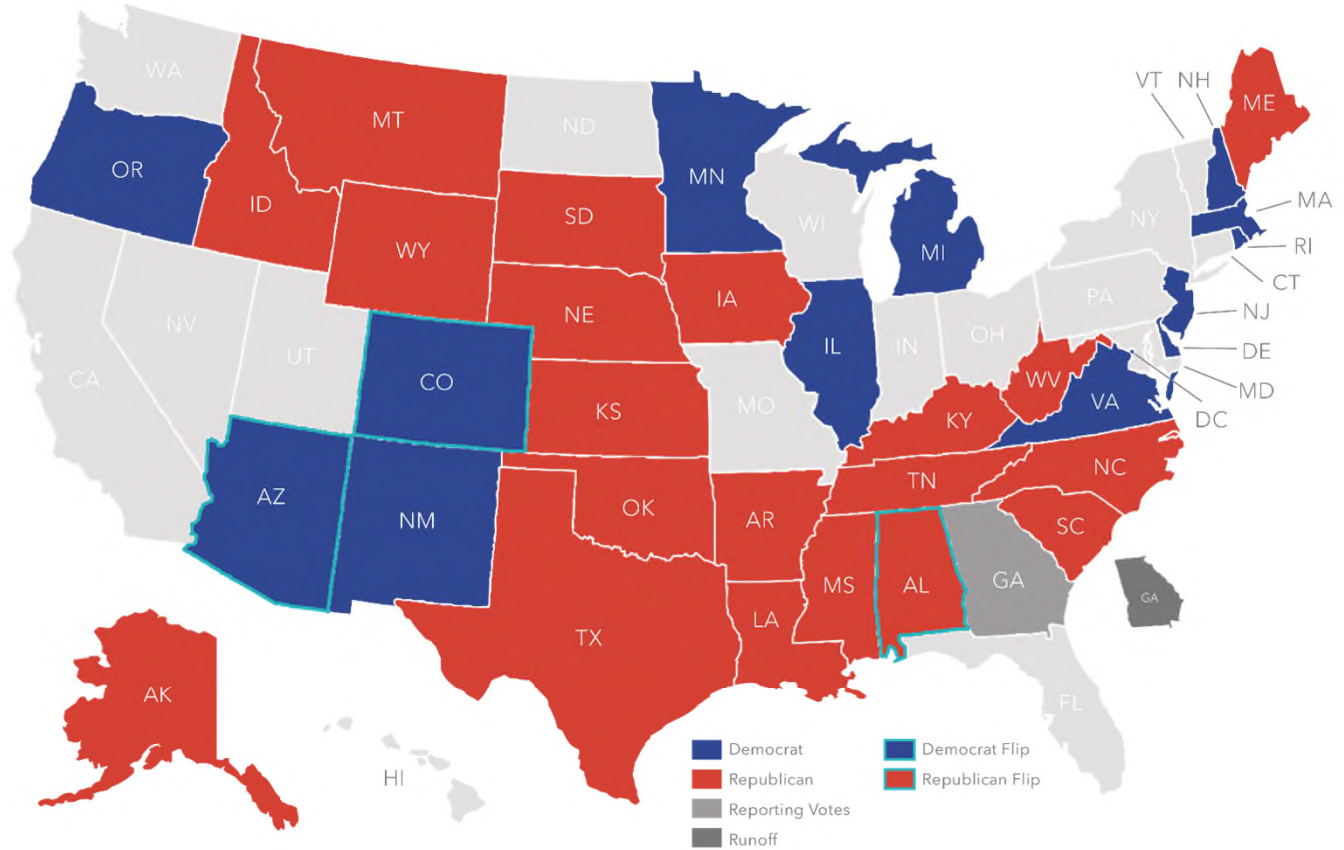
The 2020 Election – President-Elect Biden at 290

- President-Elect Joe Biden is the projected winner with 290 votes. President Trump has 232 votes but has yet to concede.
- Georgia is going to a recount. Pennsylvania is being litigated, and President Trump wants to prohibit PA from certifying the election.



The 2020 Election – The U.S. Senate: Undecided

- Control of the United States Senate has not been determined yet.
- Republicans were able to flip Alabama and hold Montana and Iowa.
- Democrats flipped Arizona and Colorado.
- There will be two runoffs in Georgia that will determine the majority in the U.S. Senate.



The 2020 Election – The Next 60 Days

The Election Fight, Continuing Resolution, and COVID-19 Stimulus Bill

- How long could it take to finalize the results of the presidential election?
- Georgia January runoff elections
- The government runs out of funding on December 11
- Will Democrats and Republicans work to finish a COVID-19 bill and combine with a CR or wait until 2021?
- Will Trump sign any bill coming to him?



The 117th Congress

House of Representatives



Rep. Nancy Pelosi (D-CA)

House Committee Chairs



Unknown
House Appropriations



Rep. Richard Neal (D-MA)
House Ways and Means



Rep. Frank Pallone (D-NJ)
House Energy and Commerce



Rep. Maxine Waters (D-CA)
House Financial Services

U.S. Senate



Sen. Mitch McConnell (R-KY)

Senate Committee Chairs



Sen. Richard Shelby (R-AL)
Senate Appropriations



Sen. Mike Crapo (R-ID)
Senate Finance



Sen. Roger Wicker (R-MS)
Senate Commerce, Science, and Transportation



Sen. Patrick Toomey (R-PA)
Senate Banking

Changes in Spending Generally

- While Democrats will have control of the presidency and House of Representatives, if Republicans maintain control of the Senate, there is an increased likelihood of a government shutdown at some point, which could impact government contractors
 - Already talk from a Republican-controlled Senate to curtail spending
- Regardless, a Biden administration, with support from a Democrat-controlled House will likely see a shift in spending from defense to civilian agencies, with waterfall effects for contract spending
 - Biden has said that he doesn't foresee major reductions in the U.S. defense budget as the military refocuses its attention to potential threats from "near-peer" powers such as China and Russia. However, he has advocated for including priorities in the budget, stating that the Pentagon must invest in emerging technologies
<https://www.defensenews.com/congress/2020/09/11/biden-not-planning-defense-cuts-but-they-may-come-anyway/>
 - Potential decrease in spending for immigration-related activities
 - Potential increase in spending on environmental efforts and labor enforcement
 - Potential increases to DHS budgets to improve minority relations with police departments

Changes in Spending Generally (cont.)

- New spending from COVID-19 package with waterfall effects for contract spending
- Potential impact on bid protests at both the Government Accountability Office (GAO) and Court of Federal Claims (COFC) if number of contracts increases or decreases
- The Trump administration has funded the border wall with billions of dollars originally allocated for other items (including “buying equipment for National Guard and Reserve units, such as trucks, generators and spare parts, as well as fighter jets and ships”). Presumably, a Biden administration would move this money back to its original purpose (or something closer to it than a border wall)

Executive Orders Affecting Government Contractors

- Under a Biden administration, we can expect a repeal of numerous executive orders impacting government contractors. Examples include:
 - EO 13950, Executive Order on Combating Race and Sex Stereotyping, which institutes a federal ban on the “use of workplace training that inculcates in its employees” or promotes the concepts of “any form of race or sex stereotyping or any form of race or sex scapegoating.” (The requirements enumerated in this EO apply to federal government contractors, their subcontractors, and federal grant recipients, among others. Venable has been covering the recently issued EO and potential challenges to its legality.)
 - EO 13940, Aligning Federal Contracting and Hiring Practices With the Interests of American Workers (ending attacks on H1-B visas)
 - EO 13945, Executive Order on Improving Federal Contractor Operations by Revoking Executive Order 13495, which required new contractors working on a follow-on contract to give employees of the incumbent contractor who worked on the predecessor contract the right of first refusal of employment under the new contract
 - The Trump administration has stopped the collection of worker’s pay data sorted by race, sex, ethnicity, and job category from businesses, but if Biden wins he could reinstate such requirements (this data collection was a 2016 Obama rule)

Executive Orders Affecting Government Contractors (cont.)

- Examples (cont.):
 - Biden has said the border wall construction contracts will be terminated for convenience, and, presumably, any procurement planning for future or related work would be shut down (affecting the construction firms already building). Subcontractors, vendors, and others might have interests as well
 - The rescindment of the current Mexico City Policy (which relates to foreign NGOs' ability to perform abortion-related activities with non-federal funds). This has gone back and forth between Republican and Democratic administrations since Reagan

Rollback of Trump Procurement Policies and Reinstatement of Some Obama Administration Policies

- Under the future Biden administration, some expect to see a reduced spotlight on Buy America requirements (domestic preference). However, Biden’s campaign website references plans to “retool and revitalize American manufactures” and to “bring back critical supply chains to America”
- Potential resurrection of the Fair Pay and Safe Workplaces rule (sometimes called the “blacklist rule” by opponents) from the Obama era
 - Rule (signed by Obama in 2014) required companies to report any labor law violation or alleged violation they've had in the last three years when bidding on federal contracts over \$500,000
- Likely pullback of the recent changes at DOL’s Office of Federal Contract Compliance Programs. Biden could seek to return to the Obama-era Active Case Enforcement guidelines, potentially decreasing the number of audits conducted but making them more in-depth
- May increase certain labor-related requirements on government contracts, such as minority hiring (including small business and minority subcontracting requirements), and potential changes to prevailing wage requirements
- Unlikely to see any major changes regarding Section 889 or CMMC compliance

Emphasis on Compliance, Uptick in Audits and Investigations

- Potential increase in audits and investigations and enforcement
 - Environmental
 - Labor – EEOC, OSHA, etc.
 - Especially with respect to COVID-related grants and contracts
- There may be addition of contract clauses (FAR and agency supplements) focused on policy priorities (enhanced nondiscrimination provisions, additional incentives for green products/services, etc.)
- Potential rollbacks on DOJ False Claims Act related memos that attempted to make DOJ friendlier to companies for fraud allegations, investigations, etc.
- Potential legislation to better insulate OIGs and DOJ from executive influence

Appointments That Will Affect Government Contracting

- The 3 most important roles for government contracting are OMB, OFPP, and GSA Administrator.
 - A lot of initiatives are just starting at these organizations, and changing leadership will set them back, some of which will be intended, others not so
 - Unified debarment rule
 - Given recent transition issues, unclear whether Emily Murphy will remain
- At the Court of Federal Claims, there are a few appointees who are still waiting (almost a year later) for the final vote. Additionally, a handful of judges hit senior status this year (Judge Sweeney, for example, qualified for senior status just this month), and one of them (Judge Wheeler) officially retired. Per COFC's website, there are only 9 non-senior judges, and the Court can have 16 "active" (aka non-senior) judges. <https://www.uscfc.uscourts.gov/judicial-officers>
- Court of Appeals for the Federal Circuit also has senior judges. Although they serve lifetime appointments, it is possible there will be openings at CAFC in the next four years
- Potential changes to the Supreme Court could affect the world of CDA claims if a challenge on that front is brought
 - This summer, SCOTUS issued a ruling that essentially affirmed Judge Wheeler's (and not Judge Lettow's) interpretation of the statute for appropriation payments in the ACA risk corridor cases. *Maine Community Health Options v. United States*, 590 U.S. ____ (2020)

Questions?



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