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AUTHORS

Paul Debolt  
padebolt@Venable.com  
202.344.8384

Robert A. Burton  
rburton@Venable.com  
202.344.4776

Terry L. Elling  
tlelling@Venable.com  
202.344.8251

## President Obama Issues Memorandum to the Heads of Executive Departments and Agencies Concerning Government Contracting

On March 4, 2009, President Obama issued a policy Memorandum for the Heads of Executive Departments and Agencies regarding Government Contracting. The memorandum contains a number of broad policy pronouncements and sets forth timetables by which the Government must complete a review of federal contracting procedures as well as for issuing “tough new guidelines” on how the Government does business. In his remarks accompanying the signing of the memorandum, the President described the procurement system as “broken” and stated that the Federal government had failed to keep the public trust. In particular, some of the concerns and failures highlighted by the President were: fraud; massive cost overruns; contractors overseeing other contractors; and, a lack of oversight and accountability.

### Background to President’s Obama’s Policy Memorandum

Between 2001 and 2008, federal spending on Government contracts almost doubled to \$500 billion. In addition, during this same period, the Government significantly increased the number of dollars awarded to contractors without full and open competition as well as the number of dollars obligated through cost-reimbursement contracts. More significantly, reviews by various Inspectors General and the Government Accountability Office (“GAO”) have shown that “noncompetitive and cost-reimbursement contracts have been misused, resulting in wasted taxpayer resources, poor contractor performance, and inadequate accountability for results.” Similarly, a GAO study in 2008 found cost overruns of 26 percent on 95 major defense acquisitions.

In these difficult times, the President stated that these problems cannot continue. Rather, as American families continue to face difficult financial challenges every day, the American people must be assured that the Federal procurement system functions efficiently and effectively such that it provides value for the taxpayers. No longer should the Government buy things that it does not need or pay more for items than it needs to pay.

### HIGHLIGHTS

- Preference for firm-fixed price contracts
- Prohibition against non-competitive contracts absent justification and adequate oversight
- Limited use of cost-reimbursement contracts
- Ensure inherently governmental functions performed by Government

## **President Obama's Procurement Policy and Associated Agency Requirements**

To achieve these objectives, the President issued the following broad policy objectives for Federal procurements:

- a preference for firm-fixed-price contracts;
- a prohibition against noncompetitive contracts *except* where their use can be *fully justified* and their performance monitored to protect the taxpayer;
- a limit on the use of cost-reimbursement contracts, except in the circumstances where an agency cannot sufficiently allow for a fixed-price contract;
- sufficient Government capacity to manage the contracting process from start to finish; and,
- ensure that functions that are inherently governmental in nature are performed by Government employees rather than outsourced.

In addition, the President directed the Director of the Office of Management and Budget ("OMB"), in collaboration with the heads of other executive agencies, to develop and issue by July 1, 2009 guidance for the identification and review of contracts that "are wasteful, inefficient, or not otherwise likely to meet the agency's needs" as well as the appropriate corrective action. Further, the President directed these individuals to issue guidance by September 30, 2009 to (1) maximize the use of competition and establish the appropriate use and oversight of non-competitive procurements; (2) govern the use and oversight of all contract types; (3) "assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately"; and (4) clarify the situations where the government may outsource for services. It is unclear whether the "guidance" will be in the form of changes to the Federal Acquisition Regulation.

### **Implications for Government Contractors**

Some would argue that the President's policy simply reinforces the policies and regulations that already exist. The Federal Acquisition Regulation sets forth regulations regarding the use of sole-source procurements and cost-reimbursement contracts. Likewise, there are procedures in place to determine when outsourcing is permitted. Thus, the problem is not with a lack of rules or policies, but rather the lack of sufficient personnel to perform the functions needed for the Federal procurement system to function effectively and efficiently.

Indeed, for years commentators have bemoaned the fact that the size and quality of the Federal acquisition workforce has not kept pace with the level of Government spending. Consequently, the current problems have arisen, in many cases, simply from a lack of adequate and experienced personnel. These policies arguably do little to change this short-fall and, in some instances, could exacerbate the problem by focusing the Government's resources on monitoring, reporting and enforcement, rather than on recruiting and retaining a high-quality workforce to award and administer contracts.

Those that take this view, however, do not appreciate the impact that the new administration will have on Federal procurements. Already, the President has

## **PRACTITIONER TIPS**

- Establish effective compliance programs
- Review and strengthen program controls, including the establishment of internal reporting procedures
- Implement frequent training regarding rules and regulations issued by Government

issued four Executive Orders containing policies relating to labor and unions and has established an oversight board to monitor the stimulus money awarded through contracts and granting. This increase in oversight will invariably lead to more allegations of fraud and increased investigations of companies, whether or not such allegations are well-founded and without regard to the ongoing systematic causes of any noncompliances. Likewise, these changes may inhibit government contracting personnel from implementing creative solutions to problems for fear of being second-guessed, or force more cases to be resolved through claims simply because a government official does not want to be viewed as being supportive of a contractor.

To protect themselves in this new environment, contractors must have an established and effective compliance program. In fact, most contractors are now required by the FAR to have compliance programs and internal control systems in place. The FAR even outlines certain features that the programs must include. Likewise, contractors will have to ensure that their workforce receives frequent training to ensure that they maintain awareness of the evolving regulatory framework in which they work. Finally, contractors must ensure that they have adequate reporting procedures in place, so they can identify problems as quickly as possible and bring possible violations to the attention of their Government counterparts. Failure to have adequate compliance programs and controls in place can be a recipe for disaster in this new oversight and accountability environment.

## Venable office locations

### **BALTIMORE, MD**

750 E. PRATT STREET  
NINTH FLOOR  
BALTIMORE, MD 21202  
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f 410.244.7742

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SUITE 2100  
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t 703.760.1600  
f 703.821.8949

### **WASHINGTON, DC**

575 SEVENTH STREET NW  
WASHINGTON, DC 20004  
t 202.344.4000  
f 202.344.8300

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