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New OMB Guidance Further Signals the Sea Change in Government Contracting

On July 29, 2009, the Office of Management and Budget ("OMB") released three memoranda providing guidance in response to President Obama's Memorandum on Government Contracting issued on March 4, 2009. OMB's memoranda have far-reaching goals with significant consequences for federal contractors. In particular, these memoranda aim to reduce the government's growing reliance on contractors, identify and save billions in procurement spending, reduce the use of certain contracting vehicles and improve the collection and dissemination of contractor performance information.

Background: On March 4, 2009, President Obama issued a memorandum ("March 4th Memo") recognizing the considerable growth of government contracting since 2001 – reaching over \$500 billion annually. Moreover, President Obama expressed concern over the drawbacks of such growth, in particular that the federal government had become excessively reliant on government contractors, in turn eroding the government's internal capacity to function effectively, and too often awarded contracts under circumstances that limited competition and in a manner that was "wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the Federal Government or the interests of the American taxpayer."

In response to these concerns, President Obama charged the Director of OMB with the task of providing guidance to assist federal agencies in reviewing and improving the federal contracting process. Specifically, President Obama required that such guidance should limit the use of contracting methods that restrict competition; enhance contracting oversight; assess the capability and capacity of the federal workforce to develop, manage and oversee the procurement process; and clarify when outsourcing is appropriate.

Pursuant to President Obama's directive, on July 29, 2009, OMB issued three memoranda:

- Managing the Multi-Sector Workforce;
- Improving Government Acquisition; and
- Improving the Use of Contractor Performance Information.

Managing the Multi-Sector Workforce: This memorandum addresses an overarching issue posed by President Obama in his March 4th Memo – when the federal government should use the services of contractors. In response, OMB laid out three steps for federal agencies to begin implementing with supporting attachments providing further detail. These steps require agencies to:

1. Adopt a framework for planning and managing the multi-sector workforce that is built on strong strategic human capital planning;
2. Conduct a pilot human capital analysis of at least one program, project, or activity where the agency has concerns about the extent of reliance on contractors; and
3. When considering in-sourcing, use guidelines that facilitate consistent and sound application of statutory requirements.

OMB added that additional steps to improve the government's management of a multi-sector workforce were underway, as well as reviews of those functions deemed "critical" to the government's operation. The OMB guidance urges that "critical functions be performed by government employees."

Improving Government Acquisition: OMB's second memorandum and supporting attachments attempts to assist federal agencies in improving the effectiveness of their acquisition practices and their contractual results. Specifically, OMB intends to accomplish this through two steps, the first of which is through guidance for agencies to use in reviewing current contracts and acquisition practices. OMB plans to unveil the second step in the Fall.

With regard to this first step, OMB is requiring agencies to:

- (1) review their existing contracts and acquisition practices and develop a plan to save 7 percent of baseline contract spending by the end of FY 2011; and (2) reduce by 10 percent the share of dollars obligated in FY 2010 under new contract actions that are awarded with high-risk contracting authorities.

It is estimated that 7% less spending will result in a total savings of \$40 billion and that a 10% reduction in high-risk contracting authorities will reduce risks and costs associated with cost-reimbursement, time-and-material, and labor-hour contracts.

Improving the Use of Contractor Performance Information: The third OMB memorandum aims to improve contractor accountability for past performance. OMB believes this can be achieved through "[g]

reater and more effective use of contractor performance evaluations.”

In particular, OMB points out that recent changes to the Federal Acquisition Regulation (“FAR”) strengthen the use of contractor performance information. Moreover, to reinforce the new FAR requirements, OMB outlines new responsibilities for Chief Acquisition Officers and Senior Procurement Executives, such as identifying the use and role of the Past Performance Information Retrieval System, creating a process for periodic compliance assessments and developing a process for determining the quality and timeliness of contractor performance evaluations. The OMB memorandum also tasks the Office of Federal Procurement Policy with various responsibilities, including overseeing the timely submission of performance information.

Practitioner’s Tips: Similar to various other initiatives taken by the Obama Administration (see, e.g., Four Employment-Related Executive Orders – <http://www.venable.com/increased-oversight-of-government-contracts-02-24-2009>, President Obama’s March 4th Memo and OMB’s implementing guidance further underscore the sea-change taking place in government contracting. Government contractors should be mindful of:

- Greater involvement of government personnel in the management, administration and oversight of government contracts;
- Increased examination into the use of contract dollars;
- Renewed pressure from agencies for contractors to cut prices/rates;
- The use of firm-fixed price contracts for projects not entirely suitable for such contract types; and
- Increased reliance on past performance information in the award of contracts.

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