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FEATURE COMMENT: President Obama Issues Memo On Government Contracting To The Heads Of Executive Departments And Agencies

On March 4, President Obama issued a policy memorandum for the heads of executive departments and agencies regarding Government contracting. The memo contains broad policy pronouncements, and sets forth timetables by which the Government must review federal contracting procedures and issue "tough new guidelines" on how it does business. In his remarks accompanying the signing of the memo, the president described the procurement system as "broken" and stated that the Government has lost 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 Policy Memo— Between 2001 and 2008, federal spending on contracts almost doubled to \$500 billion. In addition, during this same period, the Government greatly increased the number of dollars awarded 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 have shown that "noncompetitive and cost-reimbursement contracts have been misused, resulting in wasted taxpayer resources, poor contractor performance, and inadequate accountability for results." Another GAO study in 2008 found cost overruns of 26 percent on 95 major defense acquisitions.

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

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, *unless* their use can be *fully justified* and their performance is monitored to protect the taxpayer;
- a limit on the use of cost-reimbursement contracts, unless an agency cannot sufficiently allow for a fixed-price contract;
- increased Government capacity to manage the contracting process from start to finish; and
- ensuring that inherently governmental functions are performed by Government employees rather than outsourced.

In addition, the president directed the director of the Office of Management and Budget to develop and issue by July 1, in collaboration with the heads of other executive agencies, guidance on identifying and reviewing contracts that "are wasteful, inefficient, or not otherwise likely to meet" agency needs, as well as on appropriate corrective action. Further, the president directed these individuals to issue guidance by September 30 to (1) maximize the use of competition, and establish the appropriate use and oversight of noncompetitive 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 in which 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 policies and regulations that already exist. The FAR regulates the use of sole-source procurements and cost-reimbursement contracts. Likewise, there are procedures for determining when outsourcing is permitted. Thus, the problem is not a lack of rules or policies; it is the lack of sufficient personnel to support the federal procurement system effectively and efficiently.

Indeed, for years commentators have bemoaned the inability of the federal acquisition workforce to keep pace with the level of Government spending. Consequently, the current problems have arisen, in many cases, simply from a dearth of adequate and experienced personnel. The policies arguably do little to change this shortfall 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 who take this view, however, do not appreciate the impact that the new administration will have on federal procurements. Already, the president has 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 grants. This increase in oversight invariably will lead to more allegations

of fraud and investigations of companies, whether or not such allegations are well-founded and without regard for systemic causes of noncompliance. Likewise, these changes may inhibit Government contracting personnel from implementing creative solutions for fear of being second-guessed, or force more cases to be resolved through claims because Government officials do not want to be viewed as supporting a contractor.

To protect themselves in this new environment, contractors must have an effective compliance program. In fact, the FAR now requires most contractors to have compliance programs and internal control systems in place. It even outlines certain features that the programs must include. Likewise, contractors must ensure that their workforces receive frequent training to ensure that personnel 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 quickly and bring possible violations to the attention of the Government. Failure to have adequate compliance programs and controls in place can be a recipe for disaster in this new oversight and accountability environment.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Paul Debolt, Rob Burton and Terry Elling, partners in the Government Contracts Practice at Venable LLP.