POLSINELLI®

Government Contracts

Expecting the Unexpected: Federal Procurement Under Trump

by Greg Jacobs and Walter Wilson

In this Issue:

Federal contractors (and their lawyers) have spent much of the past two months trying to anticipate how federal procurement law and policy may change under the incoming Trump Administration. The first factor to note, which most acknowledge, is that Trump the candidate has been unpredictable in his policy positions. The second factor is that Trump's businesses have not (as far as we can tell) been a contractor to the federal government. So, federal government procurement – with its arcane rules and regulatory processes – may be a completely new and alien segment of the economy to him. Third, President Trump has suggested that he may well assume the position of Deal-Maker-In-Chief for the federal government, creating uncertainty as to when and how he will intervene in the acquisition process.

There is at least some reason for optimism that a Trump presidency will be an economic boon for federal contractors, at least on a macro level. He has called for the end of the much-reviled sequester cuts to defense spending and a rebuilding of the country's fleet of ships and planes, to go along with increases in troop levels. Trump has also promised to pursue advances in military technology, including a "state of the art" missile defense system and other modernized capabilities.

Many also speculate that a Trump Administration will seek to reduce the administrative and compliance burden on contractors. The Obama Administration issued at least eight major Executive Orders that applied specifically to federal contractors.[1] It is reasonable to assume that some or most of those EOs, which are in various stages of implementation, will be in jeopardy under Trump. It is harder to predict which ones. For example, reversing E.O. 13, 672, which prohibits federal

1 E.O. 13,496 - Notice of Employee Rights Under Federal Labor Laws; E.O. 13,494 - Economy in Government Contracting; E.O. 13,495 - Non-Displacement of Qualified Workers Under Service Contracts; E.O. 13,659 - Establishing a Minimum Wage for Contractors; E.O. 13,665 - Non-Retaliation for Disclosure of Compensation Information; E.O. 13,672 - Non Discrimination for Sexual Orientation; E.O. 13,627 - Strengthening Protections Against Trafficking in Persons in Federal Contracts; and E.O. 13,673 - Fair Pay and Safe Workplaces.

contractors from discriminating based on sexual orientation, could set off a culture-war firestorm that Trump may wish to avoid. Likewise, eliminating the minimum wage for federal contractor employees could anger Trump's working class supporters who were so important to his election.

Among the causes for concern for contractors is Trump's perceived willingness – perhaps eagerness – to become personally involved in procurement actions. He has demonstrated this in high-profile ways: with tweets about Boeing on the new Air Force One development and Lockheed Martin on the F-35 program. Will Trump actually direct changes to these programs now that he is the top executive? Contractors will remain hopeful that Trump will be distracted from the minutiae of government acquisition by more pressing matters. Further, most contractors will feel secure that Trump's tweets will only be directed at the largest targets. However, Trump will retain tremendous power to personally disrupt the system. For example, if Trump decided that major changes were needed to the Federal Supply Schedule program to obtain better deals for the government, such changes could impact nearly every contractor.

Finally, Trump will face significant procurement policy issues that will likely have impacts far beyond his term as President. Trump has criticized the "revolving door" between government and industry, promising "to impose a lifetime ban on people that give these massive contracts out or even small contracts." But will he really derail that well-established system and the entrenched interests supporting it? The Trump Administration will also face tricky ethical issues as it considers whether and how to deploy artificial intelligence in the modern battlefield.

The answers to all of these questions will arrive in the coming months and years. In the meantime, federal contractors can only do their best to prepare for the unknowable.

OFPP Makes the Case for Better Debriefings

Contacts: Greg Jacobs and Daniel Donohue

In a January 5, 2017 memorandum titled "'Myth-busting 3' Further Improving Industry Communication with Effective Debriefing," the Office of Federal Procurement Policy lays out the case that effective post-award debriefings improve the entire procurement process. As most contractors know, agencies are required to debrief unsuccessful offerors following "negotiated procurements" that take place under Federal Acquisition Regulation (FAR) Part 15.

Agencies conducting debriefings under Part 15 are required to inform an unsuccessful offeror of: (1) any evaluated "significant weaknesses or deficiencies" in its proposal; (2) the evaluated cost of the debriefed offeror and the successful offeror; (3) the respective technical ratings of the debriefed offeror and the successful offeror; (4) the past performance evaluation of the debriefed offeror; (5) any ranking of offerors; and (6) a summary of the agency's rationale for award. Agencies are also required to give "reasonable responses" to the debriefed offeror's questions regarding source selection processes. Agencies conducting simplified acquisitions under FAR Parts 8 or 13 need not give a full Part 15 debriefing, but are still required to provide brief explanations of award decisions.

Ten years ago, it was common for agencies to hold debriefings in-person (where geographically possible), with all participants sitting at a conference table, discussing why the agency reached the result that it did. In more recent years, it seems rare that agencies even schedule a conference call with an unsuccessful offeror, often preferring instead to give a written debriefing in the form of a slide presentation or memorandum, along with the opportunity to submit written questions. Contractors often tell of feeling stone-walled during the debriefing process, with agency officials refusing to answer legitimate questions and providing only the bare minimum information (and sometimes less).

In the memo, OFPP seeks to directly address agencies that provide ineffective debriefings in hopes of warding off contractor bid protests. Relying on industry feedback from its Acquisition 360 survey, OFPP asserts what we have seen anecdotally: contractors often believe that agencies deliberately stone-wall them during the debriefing process. This, OFPP asserts, often creates more bid protests than it prevents, with contractors engaging the protest process where they believe it is the only way to obtain additional information regarding procurement losses that they do not understand. We, too, have repeatedly assisted frustrated clients that decided to protest, in part, because the agency failed to adequately explain its acquisition decisions. Further, when agency officials act circumspect during a debriefing it also contributes to a contractor's perception that something is amiss in the outcome.

In addition to addressing common agency perceptions of the debriefing process, OFPP also cites to best practices employed by various agencies for preparing for and administering effective debriefings. OFPP notes that both written and in-person debriefings are permitted, but discusses the benefits of in-person debriefings for better communications between the contractor and agency. Both the policy statements and the practical guidance provided by OFPP on this important subject should be applauded.

From the industry perspective, contractors should take more of a proactive role in their debriefings by preparing (and submitting, where possible) questions in advance and engaging in a productive exchange with contracting officials, even when they disagree with the result.

Authors:

Daniel J. Donohue
Senior Partner
202.626.8395
ddonohue@polsinelli.com

Gregory S. Jacobs
Practice Vice Chair
202.626.8368
gjacobs@polsinelli.com

Walter A. I. Wilson
Practice Chair
202.626.8394
wwilson@polsinelli.com

For More Information

For questions regarding this alert or to learn more about how it may impact your business, please contact one of the authors, a member of our Government Contracts practice or your Polsinelli attorney.

To learn more about our Government Contracts practice, or to contact a member of our Government Contracts team, click here or visit our website at polsinelli.com.

About this Publication

Polsinelli provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

Polsinelli is very proud of the results we obtain for our clients, but you should know that past results do not guarantee future results; that every case is different and must be judged on its own merits; and that the choice of a lawyer is an important decision and should not be based solely upon advertisements.

Polsinelli PC. Polsinelli LLP in California.