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Government Contracting Changes Proposed By The Obama Administration

By Susan Kohn Ross

In a March 4, 2009 Memorandum to Heads of Executive Departments and Agencies, President Obama laid out a philosophy he wants to follow regarding government procurement and contracting. In it, he sets forth the policy of his administration to not engage in noncompetitive contracts except where they can be fully justified and where appropriate safeguards are in place to protect taxpayers. The preference now will be for fixed-price contracts. Cost reimbursement contracts may be used only when "circumstances do not allow the agency to define its requirements" with sufficient detail to allow a fixed-price contract to work.

The Memo goes on to say the government must manage the risk associated with the goods and services being purchased and have sufficient capacity to manage and oversee the contracting process.

To that end, the Office of Management and Budget (OMB) is directed to collaborate with the heads of Defense, NASA, GSA, Office of Personnel Management, and other agencies as OMB determines, with the participation of appropriate management councils and program management officials, so that by July 1, 2009, it will develop and issue government-wide guidance to assist agencies "in reviewing and creating processes for ongoing review of...existing contracts in order to identify contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs, and to formulate appropriate corrective action in a timely manner." Corrective action includes modification or cancellation of existing contracts.

The same group is tasked to include public input and develop and issue by September 30, 2009 government-wide guidance to:

1. govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes;
2. govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417;
3. assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately; and
4. clarify when government outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 USC 501 note).

Public Law 110-417 is last year's budget bill. A summary of it can be found at [Budget Bill Summary](#).

Citing a 2008 GAO study, the President's memo mentions 95 major defense acquisitions projects which were examined only to find that 26% had cost overruns totaling \$295 billion. As such, the memo goes on to say, improved contract oversight is sought to reduce that sum.

As part his overall reform effort, President Obama also called a Fiscal Responsibility Summit, which was held at the White House on February 23, 2009. The Summit appears to have been intended as a first step to finding answers to the serious challenges facing the U.S. in the areas of budget reform, tax reform, health care, Social Security and government procurement and contracting.

The budget reform group discussed health care, Medicare, Social Security and federal retirement programs. The Tax Reform session dealt with tax code simplification and health care costs. Expansion of coverage and containment of cost was the focus of the Health Care session while the Social Security attendees dealt with changes to that program.

The final breakout session dealt with government procurement. Consensus formed around several general principles - expanding competition, enforcing stricter standards, minimizing contractors, expanding temporary federal workers, flying before you buy - does it work?, independent cost directors, cancellation in the face of significant cost overruns, and favoring fixed-price contracts. Of course, one other area of general consensus was the need for more transparency to the entire procurement system.

The report from the Summit was released March 20, 2009 and can be found at [Fiscal Responsibility Summit Report](#). However, the highlights regarding the procurement and contracting reform session included discussion about such topics as the lack of an adequate procurement workforce, the failure to exercise effective oversight of federal contracts, drastically reduced competition, increased reliance on cost-plus contracts, prevalence of long-term no-bid contracts, contractors' providing inherently governmental services, overreliance on contract employees, large contracts being unbundled to allow smaller contractors a greater chance to compete, performing cost/benefit analyses, ever-increasing contract cost overruns, streamlining of security clearance procedures, security clearance portability, altering the situation of it being disadvantageous for someone to remain in the federal workforce (due to how retirement benefits are granted), and, finally, a presumption of cancellation if there is a Nunn-McCurdy notification (which occurs when the cost growth of a defense contract increases by 15% or more; at 25%, termination is called for; there are also exceptions which might apply).

Reinforcing this new attitude is the recently announced budget proposal at the Department of Defense, which mirrors the testimony of Secretary of Defense Robert Gates before the Senate Armed Services Committee on January 27, 2009. Therein, he indicated that changes were needed in the area of government procurement. Secretary Gates spoke about the potential need to invest more in a "future-oriented" program of one service and less in that of another, but also to write contracts that incentivize proper behavior, seek increased competition, advocate use of prototypes, and ensure technology maturity.

In the face of the last eight years of government contracts totaling about half a trillion dollars, given the tremendous budget deficit which existed when the new Administration took office, and the significant expenditures arising from the various bailout efforts being attempted, while the exact form of the government procurement changes is yet to be fully determined, it seems likely that substantial change is coming. MS&K's attorneys have been successful in assisting clients to capitalize on procurement opportunities in the past, and we expect that to continue regardless of the changes which might result from the proposed long-needed review. Have you considered how your company will be impacted? Look for future updates as we continue to monitor these issues.

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