



# PRESIDENT BIDEN'S NEW DIRECTIONS FOR GOVERNMENT CONTRACTING

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# Introduction

- Changes are routine with a new president, especially of a different party
- These changes are occurring more quickly because of a record executive order pace and the shadow of the Pandemic
- Two major categories of changes:
  - More Money and Projects
    - Government will not retreat from its \$500+ billion a year contracting
    - Continued and increased spending vitally important to revive the economy
  - Changes in Policies and Regulations
    - Will likely affect Grants and flow down clauses
    - Change is most likely in the social economic areas - FAR parts 19 - 25

# Infrastructure

- President Biden is expected to submit an infrastructure proposal shortly to include trillions of dollars in new spending
- Widely defined – not just roads and bridges anymore - surface transportation, aviation, waterfront, Army Corps of Engineers, civil Works, flood control mitigation projects, clean drinking water, renewable energy, school construction or broadband.
- Infrastructure will not include the wall. Border wall is stopped “to the extent permitted by law”
- Clean energy will be emphasized

# Biden Infrastructure Initiatives Continued

- On February 5th Senate and House advanced Biden's first legislative priority, the "American Rescue Plan." Plan targets COVID-19 issues, it includes \$130 billion for K-12 schools and \$350 billion in emergency assistance to state and local governments
- "Build Back Better" plan to be detailed at the State of Union address (February 23, 2021)
- Many proposed laws are especially aimed at reviving small businesses devastated by the Pandemic
- Amounts are earmarked for small businesses

# Government Contracts R&D

- Biden proposes \$300B investment in R&D, “Innovate in America”, including "advanced industries like cutting-edge telecommunications and artificial intelligence" and clean vehicles "**on a scale well beyond the Apollo program**"
- Biden team R&D plan and government contractors rights in technical data and computer software; Government seeks broader intellectual property rights in solicitations, especially DOD
- When it comes to IP in government contracting, the rules are quite different than in the commercial space, and there are different rules for civilian agencies and the DoD
- Other Transactions Agreements and Small Business Innovation Research/STTR program growth

# Budgetary Issues – Problems on the Horizon

- Congress must take the lead - thin Democratic majorities
- Biden proposes large spending increases
- Tax revenues will be down and expenditures have risen
- Fiscally conservative members of Congress (not just Republicans) are raising concerns
- Biden budget priorities will drive changes in Government contracts direction

# General Categories of Contracting Changes

- Continuation of Trump policies, perhaps with new emphases
- U-turn from Trump policies
- Aggressive Use of EO, over 30 in first 19 Days
  - E.g. Made in all of America and EO on a Sustainable Public Health Supply Chain
- Re-emphasized and Brand-new initiatives
  - Labor/Fair Pay Issues, Domestic Preferences (Buy American), Cybersecurity and Supply Chain Protection, Infrastructure Projects, Clean Energy Initiatives, COVID-19 Vaccine Distribution, DPA, and A-76

# Trump Policies Likely to Stay

- The Trump replacement for NAFTA - the United States, Mexico and Canada agreement - is unlikely to be rolled back because of its bipartisan support.
- The Opportunity Zones which were created by the 2017 Tax Cuts and Jobs Act. Both Democrats and Republicans have applauded that act which has encouraged investment, with very favorable capital gains retreat treatments, in low income areas.
- The Defense Production Act will certainly be used in support of COVID-19 vaccine response. President Trump used it at least 18 times especially to develop the coronavirus vaccine. President Biden has already invoked it to speed up the production and distribution of the vaccine and the production of protective equipment.

# Likely Return of Obama Executive Orders

- President Trump had kept some of President Obama's Executive Orders, for example Minimum Wage and Sick Leave
- Revoked but likely to return in some fashion
  - Right of First Refusal for Service Employees - EO 13495 "Non-Displacement of Qualified Workers under Service Contract" implemented in FAR 22.12.
  - Fair Pay and Safe Workplaces, EO 13673
    - Transparency on Pay
    - Accountability - the so called "Blacklisting Rule"
    - Ban on Sexual Harassment arbitration clauses

## Part 19 – Small Business

- Biden \$400 billion Small Business spending plan
- Administration intent to triple the federal government's contracting goal for small, disadvantaged businesses (currently at 5%) by 2025
- Supposedly more audits to verify but personnel restraints
- More restraints on bundled contracts. See FAR 7.107-3

## Part 22 – Labor Standards

- President Trump's EO 13950 "Combating Race and Sex Stereotyping" had prohibited federal agencies, contractors, and grant recipients from using workplace diversity and inclusion trainings to “promote race or sex stereotyping or scapegoating.”
- President Biden revoked this within hours of taking office and issued "preventing and combating discrimination on the basis of gender identity or sexual orientation" which directed agencies to review all regulations to remove systemic barriers to government contracting.
- OFCCP – more active and with greater power to assure contractors adhere to employment standards and do not violate equal opportunity rules - greater audits likely – especially on pay equity
- \$15 Minimum Wage EO promised within 100 days
- Project Labor Agreements likely to increase

## Part 22 – Labor Standards Continued

- Democrats are pro union. Republicans markedly less so. PRO (Protect the Right to Organize) Act probably the most pro union of all the possibilities.
- Biden administration will likely make it easier for workers who are not US citizens to be legally employed. This should help construction's perennial manpower shortage. As the spokesperson for the Associated General Contractors of America said “there are over 100,000 workers in the construction industry that are either in the DACA (deferred action for childhood arrivals) or TPS (temporary protected status) programs.”

# Part 23 – Environment, Energy and Safety

- More environmentally sensitive and aggressive
  - Federal gas driven vehicles promised to be phased out
  - Keystone pipeline stopped
- Additional Evaluation factors - the size of your carbon footprint –to determine whether to award
- EO on “Protecting the Federal Workforce and Requiring Mask-wearing” applies to contractors on site in federal buildings and on federal lands and directs agency heads to require compliance with CDC guidelines e.g. to wear masks and keep socially distant.

## Part 25 – Buy America

- President Trump had been extremely active, with 3 EOs. His last on this subject “Maximizing Use of American-Made Goods, Products, and Materials”, will be effective soon in the FAR, via a Final Rule  
<https://www.federalregister.gov/documents/2021/01/19/2021-00710/federal-acquisition-regulation-maximizing-use-of-american-made-goods-products-and-materials>.
- Biden will continue the changes, Jan 25<sup>th</sup> EO 14005, Ensuring the Future Is Made in All of America by All of America’s Workers  
<https://www.govinfo.gov/content/pkg/FR-2021-01-28/pdf/2021-02038.pdf>.
  - Harder to get waivers - higher-level, website
  - Increased content for domestic determination - 95% for iron and steel under Final Rule, 55% (non-COTS) for other items but this may increase

# Biden “Made in All of America” EO 14005 cont.

- Changes in how domestic content is measured
- Likely increase in the percentage added to a foreign bid to determine whether a domestic bid is reasonable, 20% to 30% now under new Final Rule
- Practical problems to overcome: cost and lack of adequate domestic supply chain
- Made in America Office in Office of Management and Budget
- Agency reporting requirements
- Likely increase in fraud risk and enforcement
- Biden affirms **Jones Act** US flag vessel preference, offshore wind vessels built in USA in support of clean energy

# Cybersecurity and Supply Chain Security

- Rollout of Department of Defense's CMMC program
- SolarWinds impact
- Legislative changes impacting Cybersecurity for Government contractors, enforcement and sanctions
- Supply Chain security: Section 889 restrictions on “covered technology” won't be stopped; focus on Final rule implementation
- Federal Acquisition Security Council

# Questions

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## THE PROCUREMENT PLAYBOOK

LEGAL INSIGHT FOR GOVERNMENT CONTRACTORS

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