

Leaked Draft of Presidential Executive Order Would Require Contractors to Report Political Spending

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In April, a draft Presidential Executive Order (the E.O.) was leaked and generated immediate controversy. The E.O. would require federal government contractors and their executives to publicly disclose their political spending. Although the E.O. does not explain how contracting agencies will use the information about contractors' political spending, it states that the president is seeking to "increase transparency and accountability." The E.O. would require any company bidding on a federal contract to disclose contributions or expenditures-by the company, its affiliates and subsidiaries, or its officers and directors-within the previous two years to federal candidates or parties, as well as contributions to third-party entities "with the intention or reasonable expectation" that those third parties would use the contributions for independent political expenditures or "electioneering communications." The government will then post all contractor disclosures to a publicly available website. The E.O. also would require the Federal Acquisition Regulation (FAR) Council to promulgate regulations implementing the E.O., including procedures for contractors to certify their disclosures.

The FAR Council's regulations would determine the scope and procedures for the disclosure and certification requirements, and final regulations could not be issued until the FAR Council provided public notice of the proposed regulations and an opportunity for public comments. However, the FAR Council could issue interim regulations that would take effect immediately and govern the disclosure and certification requirements during the rulemaking process. The FAR Council followed that model in 2010 when it issued an interim rule to

Authors

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

Scott M. McCaleb
Partner
202.719.3193
smccaleb@wiley.law

Tracye Winfrey Howard
Partner
202.719.7452
twhoward@wiley.law

implement statutory requirements for contractors to disclose information on executive compensation and first-tier subcontractors. See 75 Fed. Reg. 39414 (July 8, 2010).

The E.O. raises many issues under campaign finance, procurement and other law, as well as a number of important policy considerations. For example:

- Is the E.O. an appropriate exercise of the president's authority after Congress failed to pass the Democracy Is Strengthened by Casting Light On Spending in Elections Act, the so-called "DISCLOSE Act," that would have required similar disclosures?
- What is the justification for mandating these disclosures when similar information is already publicly available from the Federal Election Commission's website?
- Will these disclosures inject political considerations into the procurement process, which is designed to be free of any such influence?
- Do these disclosures justify the increased administrative burden they will place on an already strained federal acquisition workforce?
- Will bid protests increase based on claims of alleged political bias?
- By failing to exempt commercial item contracts, small business contracts or contracts below the "simplified acquisition threshold," will small business and commercial providers be discouraged from participating in government contracting?
- Is the burden placed on contractors to establish systems to collect and verify political spending information from their affiliates, subsidiaries, officers and directors-at the risk of facing civil and criminal penalties under the False Statements and False Claims Acts, as well as suspension or debarment from federal government contracting if their political spending disclosures are not current, accurate and complete-justifiable?

Wiley Rein will continue to monitor issues related to this Executive Order and any implementing regulations. Wiley Rein is uniquely situated to advise clients on the impact of this draft or any final Executive Order, both with respect to Election Law matters and from a Government Contracts compliance perspective.