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THE PRESIDENT'S MEMORANDUM -- DOES IT REALLY CHANGE GOVERNMENT CONTRACTING?

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On March 4, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies with the subject "Government Contracting." The headlines of newspapers and electronic news services screamed things such as:

- President pledges 'accountable' government that cuts down on wasteful spending
- President Obama Ordered Reforms on Government Contracts
- Obama seeks to limit 'no-bid' contracts in Iraq, elsewhere
- Obama Calls for Review of How Government Contracts Are Awarded

In fact, a Presidential Memorandum has no authority to contravene federal law or regulation. It can, however, influence how the existing laws and regulations are implemented.

The main topics addressed by the Memorandum are:

- Increased number of sole-source contract awards
- Increase in award of cost reimbursement contracts
- Lack of acquisition workforce to oversee acquisition
- Contractors performing inherently governmental functions
- Contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs

The Memorandum directs the Director of the Office of Management and Budget to issue "Government-wide guidance" by September 30, 2009 regarding the above issues.

The kinds of guidance we can expect will include:

- Higher levels of approvals for sole source and cost reimbursement contract awards
- Additional documentation requirements for justification of these awards is also likely
- Reports to agency procurement executive regarding service contracts that were outsourced under the A-76 process on the cost savings and efficiency of those contracts
- Reports on whether all agency service contracts are possibly performing inherently governmental functions
- Requirements for all agency procurement executives to conduct reviews of all awarded contracts to eliminate wasteful or inefficient contracts

This Presidential Memorandum is really a shot across the bow -- a warning to agency procurement executives that actual reform will be coming in proposed legislation and regulation that may actually result in changes such as:

- Limits on, elimination, or revision of the statutory bases for exceptions to full and open competition
- Limited defined conditions under which cost reimbursement contracts can be awarded
- Specified services that may not be performed by contractors because they are deemed inherently governmental

In the last year or two, Congress has focused on funding additional positions for auditors and investigators who are reviewing the work of the small acquisition workforce. The government contractor community is most anxious to see if

the administration will fund additional positions for contracting officers, program managers, and others who carry out acquisitions and fund additional training. The Memorandum implies this is an administration goal, but additional spending could be politically risky.

We will look for the OMB's guidance, but will pay particular attention to the authorization bills in Congress to see what changes make it through the political process and provide further reports.

Should you have any questions about any of the issues described above or any aspect of government contracts, we would welcome your call.

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