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"Regulatory Reform" to Change Government Contracting?

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On Friday, February 24, 2017, President Trump issued an Executive Order aimed at reducing burdensome regulations. Pursuant to the E.O., agencies will be required to create teams that will "research all regulations that are unnecessary, burdensome and harmful to the economy" and make recommendations as to which ones should be repealed or simplified.

Now anyone in business can tell you that there are plenty of regulations covering just about every topic. (There even used to be regulations about extraterrestrial contact but those have since been taken off the books.) Government contracting is no exception. In fact, government contracts are almost entirely run by the Federal Acquisition Regulation ("FAR") at 48 C.F.R. While President Trump's comments were not limited solely to government contractors, it's almost a given that the reforms President Trump seeks will impact the FAR. The questions are how and to what extent?

Looking into our crystal ball, we see a few areas that could be targeted by agencies:

- E.O. 13673 – Fair Pay and Safe Workplaces. This Obama administration executive order requires certain prime contractors and subcontractors to: (a) disclose previous labor law violations in the Government's System for Award Management ("SAM"); (b) provide enhanced wage statements to employees to achieve paycheck transparency; and (c) eliminate pre-dispute agreements requiring employees to arbitrate civil rights, sexual assault and harassment claims. On October 24, 2016, the United States District Court for the Eastern District of Texas preliminarily enjoined the Government from implementing most of the order and its 800 pages of implementing regulations and guidance. The current legal controversy, along with the perception by many that the order is burdensome, makes this one a prime candidate for repeal.
- E.O. 13706 – Establishing Paid Sick Leave for Federal Contractors. This executive order requires prime contractors and subcontractors to provide minimum paid sick leave to employees to be used for a variety of DOL-approved reasons. Even contractors who already provide the minimum required leave may face hurdles adapting their payroll systems to track accrual and other DOL-required procedures, not to mention reporting requirements. The fact that DOL's final rule is less than six months old may make this order more vulnerable to elimination than more entrenched regulations.
- Acquisition Planning – Prior to issuing a solicitation, existing regulations require that agencies

conduct market research and consider many variables, such as (a) the sources available (including small and disadvantaged business sources), (b) the appropriate contract vehicle; (c) the extent to which the requirements can be met using commercial or commercially available off the shelf ("COTS") items; and (d) the extent to which the acquired items promote social priorities such as energy conservation. These types of considerations together pull in thousands of pages of regulations. This is an area where we expect to see significant streamlining.

- Acquisitions Under Trade Agreements: Given the President's "America First" campaign slogan and promise to re-negotiate trade deals with other nations, we would not be surprised to see changes limiting and narrowing the scope of Buy American Act and Trade Agreements Act waivers. The theory goes that restricting such waivers would compel more contractors to source products in the United States, promoting American industries and jobs.

We will follow the Trump administration's regulatory review closely and update our readers as events unfold.