

Looking ahead: Federal procurement under the Biden administration

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When the Biden Administration begins, the government contracting community may be wondering whether the change in administration and party in the White House will lead to significant changes to federal procurement. Although the crystal ball is still swirling, our prediction is that while there will be some changes, they will likely be around the margins and not sea changes.

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First, many of the national security issues facing the country today are agnostic to which party holds the White House. There is widespread consensus that the United States needs to secure its supply chain, increase cybersecurity, counter actions from China, Russia, and North Korea that threaten national security, and advance the technology of our defense systems, including, among other things, increasing use of artificial intelligence.

Further, President-Elect Biden has previously stated¹ that he does not foresee a significant decrease in Defense spending. A forecast by the Professional Services Council² also predicts Defense budgets will largely remain the same and could see a slight increase in the critical areas of information technology, artificial intelligence and machine learning, and cybersecurity.

Beyond just Defense spending, President-Elect Biden also campaigned³ on a promise to invest \$400 billion in “Buy American” procurements followed by \$300 billion more in research and development investments over the next four years to spur the U.S. economy.

Second, much of the regulatory policy and spending priorities are set in the yearly National Defense Authorization Act (NDAA) and associated appropriations bills. That process is largely controlled by Congress, not the White House. If there is a change in control of the Senate, Defense spending reductions are more likely to be on the table, but that’s one prediction too far for our crystal ball.

Where changes are most likely are in areas that candidate Joe Biden identified as priorities – using federal procurement dollars to ease the economic burdens caused by the coronavirus (COVID-19) pandemic and shoring up the supply chain for critical medical supplies, focusing on federal workforce pay, promoting clean-energy focused procurement,⁴ and advancing small businesses, particularly those owned by racial and ethnic minorities and women.

Some of these policy objectives will likely come in the form of Executive Orders, but that is not new, either. The Federal Property and Administrative Services Act (FPASA) gives the President broad authority to prescribe “policies and directives” that the President considers necessary to carry out FPASA’s purpose.

Federal courts have generally recognized this authority, upholding Executive Orders issued pursuant to FPASA so long as the Order is tied to advancing the “economy and efficiency” of federal procurement.⁵

The Trump Administration, like the Obama Administration, relied on FPASA and made liberal use of Executive Orders to promote certain policy objectives. The Biden Administration is likely to follow suit.

Biden also proposes to “close the loophole” to prohibit officers and directors of federal contractors to contribute to candidates for federal office, on the theory that such contributions may influence the award of federal contracts.

Based on priorities announced by the Biden team and industry press, we peer into our swirling crystal ball and provide our predictions below.

- **Continuation and expansion of “Buy American” policies.** The Trump Administration put forward a “Buy American” policy in a string of Executive Orders, detailed here,⁶ here,⁷ and here.⁸ As we’ve previously reported, Congress has also been active on Buy American and other domestic sourcing

requirements in recent years, including the House version of the Fiscal Year 2021 NDAA.⁹ The Biden Administration will also emphasize “buying American,” and it could even expand that emphasis as part of an effort to address the current economic downturn. For example, one pillar of the President-Elect’s “Buy American” initiative¹⁰ is to “use the government’s purchasing power to Buy American,” with a focus on areas that are consistent with other Biden priorities, such as clean energy, critical medical supplies, and advanced technologies. President-Elect Biden also proposes tightening domestic content rules and making it harder for a contractor to receive a waiver of Buy American requirements (or at least making the waivers more transparent). In fact, in a November 16, 2020 speech, the President-Elect doubled down on his commitment to Buy American, saying that “no government contract will be given to companies that don’t make their products here in America.”

- **Focus on the supply chain.** Dovetailing with its “Buy American” policy, the Biden Administration will also focus on rebuilding the U.S. supply chain¹¹ for critical products, particularly those necessary to combat the COVID-19 pandemic. For example, the Biden Administration proposes using the Biomedical Advanced Research and Development Authority (BARDA) to ensure adequate production of vaccines and other medical products used to combat COVID-19 and leverage its health care purchasing power to encourage manufacture of critical drugs and medical devices in the United States. But according to the Biden team’s policy announcements, this effort is not limited to critical medical supplies: “America needs a stronger, more resilient domestic supply chain in a number of areas, including energy and grid resilience technologies, semiconductors, key electronics and related technologies, telecommunications infrastructure, and key raw materials.” This initiative includes a quadrennial Critical Supply Chain Review, expanded use of the Defense Production Act to procure supplies to address the COVID-19 pandemic, “direct[ing] the federal government’s purchasing power to support manufacturing capacity for products designated as critical to U.S. national security,” and pursuing public-private partnerships to improve manufacturing capacity.
- **Increased infrastructure spending.** Both President Trump and President-Elect Biden have emphasized the need to spend on U.S. infrastructure, although with different strategies for doing so. Infrastructure legislation, to spur jobs and the economy, may even have, at some spending level, bipartisan support, according to Speaker Pelosi.¹² A difference between the Trump and Biden Administrations is the intersection of climate change with infrastructure spending, with the Biden plan¹³ having clean energy as a major component. For example, President-Elect Biden proposes leveraging the power of federal procurement to purchase “clean vehicles” for federal, state, tribal, postal, and local fleets, using procurement and research and development funding on battery technology for the vehicles and the power grid, creating a new cross-agency Advance Research Projects Agency on Climate (ARPA-C) to develop clean-energy technology, and establishing a competitive grant program¹⁴ for new business startups that are not in large cities.
- **Buying from minority-owned small businesses.** Increasing spending with small businesses has been a year-over-year goal for previous administrations, and it will be again in the Biden Administration. The Biden team is particularly focused on promoting minority-owned small businesses and enhancing the Small Business Administration’s 8(a) business development program. For example, Federal News Network¹⁵ reports that President-Elect Biden has proposed tripling government spending on goods and services from small businesses owned by racial minorities and establishing a Federal Procurement Center to help minority-owned firms apply for and win government contracts. The Biden team’s “Made In America” platform¹⁶ also includes ensuring that the Government’s investments in research and development and infrastructure reach across urban and rural communities by focusing investments in communities of color and small businesses.
- **Focus on the workers.** Not unlike the Obama Administration, the Biden Administration is likely to push for increased wages and benefits for workers performing federal contracts. Indeed, as part of his platform, Joe Biden proposes¹⁷ requiring companies that receive federal procurement contracts to commit to “pay at least \$15 per hour, provide paid leave, maintain fair overtime and scheduling practices, and guarantee a choice to join a union and bargain collectively.” On another workplace front, we expect that President-Elect Biden will rescind Executive Order 13950,¹⁸ entitled Combating Race and Sex Stereotyping, about which Wiley has previously written,¹⁹ and which is unpopular with many in the government contracting community.
- **More emphasis on oversight and ethics.** A Biden Administration is likely to exercise more oversight over federal procurement and agency conduct overall. Furthermore, it is likely that as investigations into spending under the Paycheck Protection Program or Coronavirus Aid, Relief, and Economic Security Act (CARES Act) conclude, there will be an uptick in False Claims Act actions, similar to the uptick in enforcement actions following Obama-era economic relief programs. The Biden platform²⁰ includes measures such as strengthening Inspectors General (IG) laws to provide IGs with full subpoena power. President-Elect Biden also

proposes to “close the loophole” to prohibit officers and directors of federal contractors to contribute to candidates for federal office, on the theory that such contributions may influence the award of federal contracts. And, likely in reaction to the long-running saga of the U.S. Department of Defense’s Joint Enterprise Defense Infrastructure (JEDI) procurement, in which Amazon Web Services alleged interference in the procurement by President Trump, President-Elect Biden also proposes to issue an Executive Order that prohibits White House personnel from interfering with federal agencies on procurement matters, and he will require the White House to disclose publicly if any entity or individual attempts to solicit White House assistance in a procurement.

- **CFIUS updates.** The Biden Administration may also take a different approach to the review of corporate transactions by the Committee on Foreign Investment in the United States (CFIUS), which is an interagency committee that reviews certain transactions to determine the effect on the national security. The Trump Administration has made several high-profile public statements about certain CFIUS probes, most recently the TikTok transaction. Under the Biden Administration, we expect that CFIUS will continue to take seriously its mandate of policing mergers and acquisitions to ensure national security is not at risk. But CFIUS will likely resume its stance of working quietly and maintaining silence about transactions under review, even when a transaction raises a red flag. In such instances, CFIUS will likely take appropriate action by either blocking controversial deals or taking steps to mitigate any national security concerns. Wiley will discuss these issues in greater detail in our upcoming webinar on Post-Election National Security Developments.²¹

The Biden/Harris plan is ambitious, and it is likely that not all of it will be achievable. But, as with other administrations, aspects of the President-Elect’s platform are likely to see implementation, either through legislation or Executive Orders.

Although there are no infallible oracles, it seems reasonable to predict that the federal procurement system will continue to fuel the economy at levels similar to those in the recent past.

Notes

- ¹ <https://bit.ly/33xCrX1>
- ² <https://bit.ly/3lwSPgs>
- ³ <https://bit.ly/3mAkZZj>
- ⁴ <https://bit.ly/36tefa6>
- ⁵ See, e.g., *City of Albuquerque v. Dep’t of Interior*, 379 F.3d 901 (10th Cir. 2004).
- ⁶ <https://bit.ly/3IAUx0i>
- ⁷ <https://bit.ly/39xNSli>
- ⁸ <https://bit.ly/2Vq7GyG>
- ⁹ <https://bit.ly/3oktsjE>
- ¹⁰ <https://bit.ly/33EVkre>
- ¹¹ <https://bit.ly/37rRD9k>
- ¹² <https://on.mktw.net/2VumUmo>
- ¹³ <https://bit.ly/3qnFtGT>
- ¹⁴ <https://bit.ly/33EQQ3w>
- ¹⁵ <https://bit.ly/2JlmLPT>
- ¹⁶ <https://bit.ly/33EVkre>
- ¹⁷ <https://bit.ly/33EVkre>
- ¹⁸ <https://bit.ly/36x5EmH>
- ¹⁹ <https://bit.ly/3g4hyl6>
- ²⁰ <https://bit.ly/33zLdUw>
- ²¹ <https://bit.ly/3IG1fT3>

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