

Trio of Executive Orders Renews Focus on Efficiency and Commercial Solutions in Federal Procurement

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Three executive orders issued by President Donald Trump in mid-April combat what those orders describe as an unacceptably slow, expensive and bureaucratic process for federal government acquisition in the US, and direct changes that seem at once radical and familiar. The executive orders call, for example, for a complete rewrite of the Federal Acquisition Regulation (FAR), which signals potentially major changes in the rules that have governed the relationships between contractors and their federal agency customers for more than 40 years.

But the goals expressed in the executive orders – including increasing efficiency and speed, decreasing costs, deploying more commercial products and services across government, and encouraging innovation in the government market – have been much discussed for decades. While changes to the procurement system are certainly coming, as described below, those changes might not be as disruptive as they initially appeared. It may be that the executive orders work to reduce historic barriers for commercial companies looking to do business with the US government and ease related compliance burdens.

‘Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial Base’

The first of the three executive orders, “Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial Base,” landed April 9 with the stated intent of initiating a “comprehensive overhaul” of the US defense acquisition system. The administration expressed a desire to “ensur[e] that the United States military possesses the most lethal warfighting capabilities in the world,” along with its view that prioritizing speed and flexibility in defense procurement is critical to achieving this goal. To do so, the executive order calls for a review of the acquisition process and workforce at the Department of Defense (DoD), requiring the Secretary of Defense to undertake the following initiatives:

- Within 60 days, recommend a strategy to help expedite defense acquisition, remove unnecessary and duplicative aspects, centralize decision-making, and better manage risk across defense acquisition programs.
- Within 90 days, review all major defense acquisition programs (MDAPs), defined in 10 USC section 4201, to determine whether any are inconsistent with the administration’s stated policy objectives, propose for potential cancellation any that are more than 15% behind schedule or 15% over cost, failing key performance parameters, or out of alignment with mission priorities, and provide a list of all MDAP contracts comparing actual performance with the originally approved government cost estimates. After the MDAP review process, the Secretary of Defense must turn to a review of all remaining major systems, defined in 10 USC section 3041.
- Within 120 days, provide a plan “to reform, right-size, and train the acquisition workforce,” including changes to performance evaluations, reevaluating staffing levels, creating field training teams, incentivizing the use of “innovative acquisition authorities” and taking “measured and calculated risks.”
- Within 180 days, review the Joint Capabilities Integration and Development System with an eye toward streamlining and accelerating acquisition.

- Oversee a review of the DoD's internal regulatory framework, including acquisition regulations, instructions, manuals and guidance, and propose revisions that remove anything deemed unnecessary in an effort to expedite and streamline the acquisition process.

Woven throughout the April 9 executive order are mandates to prioritize, in each of these initiatives, the consideration of and preference for utilizing commercial solutions – a preference built into federal procurement law for the last 30 years – and other existing options for faster acquisition of defense capabilities, such as Other Transactions Authority, Rapid Capabilities Office policies and the Adaptive Acquisition Framework.

DoD is instructed to use these authorities wherever possible and, importantly, consistent with applicable law, immediately in all contracting actions that are currently pending or pursued while the administration considers the plans proposed pursuant to the executive order. In a fact sheet issued simultaneously with the April 9 executive order, the administration makes clear its overarching concern is that the current defense acquisition processes and procedures have hindered the US's ability to innovate and respond quickly to emerging threats.

‘Restoring Common Sense to Federal Procurement’

The second and third executive orders, issued back to back on April 15 and 16, address procurement across the federal government, not just within DoD. Though broader, the two orders are consistent with the first in their emphasis on commercial products and services and procurement efficiency.

The April 15 executive order, much like the April 9 executive order, describes the current federal acquisition process as “prohibitively inefficient and costly,” grounded in the “excessive and overcomplicated regulatory framework” of the Federal Acquisition Regulation (FAR). It calls for revisions to the FAR geared toward improving efficiency and flexibility. Specifically, the administrator of the Office of Federal Public Procurement Policy (OFPP), working with the FAR Council, acquisition officials and agency heads, has 180 days to strip out provisions of the FAR that are not mandated by statute or otherwise required “to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests.” Any FAR provisions that are not required by statute but will remain in the regulation must be identified and considered for a “regulatory sunset” such that they expire in four years unless specifically renewed. The OFPP administrator and FAR Council must likewise consider a four-year regulatory sunset for any new FAR provisions promulgated after the revised FAR takes effect.

While this FAR review process kicks off, each agency that exercises procurement authority under the FAR has 15 days to identify an official who will be responsible for working with the administrator and the FAR Council to align agency-specific FAR supplements to the forthcoming FAR revisions. Additionally, within 20 days of the order, the director of the Office of Management and Budget (OMB) must issue implementation guidance to agencies to ensure consistency and propose new agency regulations that prioritize efficient procurement. The corresponding fact sheet expresses the administration's hopes that reforming the FAR in this manner will reduce bureaucracy in the acquisition process while increasing competition in contracting and maximizing value.

‘Ensuring Commercial, Cost-Effective Solutions in Federal Contracts’

Rounding out the trio of related orders, the April 16 executive order focuses explicitly on enforcing the existing, decades-old statutory preferences for government acquisition of commercial solutions to help with the administration's goals of making the procurement process faster and cheaper. It notes that the Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), for example, has long required that agencies procure commercial products and services to the extent available, rather than custom solutions. Many agencies, particularly DoD, have been historically reluctant to fully embrace this strategy, despite its statutory and regulatory underpinnings.

Consistent with this revitalization of the preferences for commercial acquisition, the April 16 executive order requires that the senior procurement executive of each agency must, within 60 days, have their contracting officers review and provide justification for all open-agency procurement actions for noncommercial products or services, including market research and pricing analyses of potential commercial alternatives. The senior agency procurement executive then has 30 days to assess each identified procurement for compliance with FASA's mandates. The executive may direct contracting officers to conduct additional research to address any identified deficiencies and must recommend that they pursue commercial products or services if those appear to be sufficient to meet the government's needs. Additionally, any contracting officer who proposes to solicit a noncommercial solution in the future must first submit an application for approval to the senior agency procurement executive, explaining the rationale for that approach and providing the related market research. Agencies will be required to demonstrate their FASA compliance efforts to OMB each year, with the first report due within 120 days of the April 16 executive order.

Conclusion

These three executive orders will spark some significant changes in the familiar regulations that control government business. Some of those changes may require contractors to make operational adjustments, modify their policies and procedures, and/or change the way they prioritize and pursue government business opportunities. In those ways, these executive orders may cause some disruption that not all contractors will view positively.

However, the goals that the executive orders aim to advance and (especially) the government's renewed emphasis on commercial solutions and technological innovation may help usher in a new wave of opportunities for commercially oriented companies, while reducing burdens that slow the procurement process and complicate the relationship between agencies and industry. If that happens, then these executive orders will have meaningfully advanced the procurement reforms that first gained momentum nearly three decades ago and opened new avenues for doing business with the world's largest customer.

In anticipation of such new avenues, current and prospective contractors should consider evaluating whether their products and services qualify as "commercial," using as guides the current definitions in the FAR of "commercial products" and "commercial services." Additionally, contractors should be prepared, during the bidding process, to identify and challenge noncommercial solicitations that violate the commercial preference rules in existing statutes and regulations, and in future changes that result from these executive orders.

Cooley's government contracts team will continue to monitor related developments and would be pleased to answer questions and/or help you consider potential consequences for your business.

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