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Obama Win Means More Of The Same For Gov't Contractors

Government Contracts Law360

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After a long election cycle with record campaign spending and razor-thin margins in the polls leading up to Election Day, the 2012 election cycle is (finally) over. President Barack Obama has won a second term and the Republican majority in the House of Representatives and Democratic majority in the Senate remain in place. The question now is: What do the election results mean for government contractors?

Presidential Election: What Do Four More Years Mean?

The Obama administration, rightly or wrongly, has been generally viewed as more regulatory and less "contractor-friendly." The perception that President Obama would take a heightened interest in regulating the industry started shortly into his first term when on March 4, 2009, he issued a memorandum on government contracting to the heads of all executive departments and agencies, signaling an intent to focus on reform of government contracting.

Through executive orders and agency rulemaking, the Obama administration has been active in the oversight and regulation of contractors. President Obama has also proposed reducing, or at least slowing growth of, defense spending in the coming years as the war in Afghanistan winds down and U.S. combat troops return home. He also has made clear his desire to shrink the size of our military and focus spending priorities on areas like intelligence, cybersecurity and special operations, rather than new major weapons systems that are simply unaffordable in the current fiscal environment.

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GOP presidential nominee Mitt Romney, again rightly or wrongly, was perceived as more "contractor-friendly." He pledged to roll back regulations on businesses and announced plans to increase defense spending to at least 4 percent of gross domestic product, representing an increase of up to $2 trillion over current budget projections.

Romney also proposed to increase the annual production of naval warships from nine to 15, and criticized the Obama administration's plan to reduce overall Army troop levels from a wartime peak of 570,000 to 490,000 by 2017, pledging to keep the force at roughly current levels for the foreseeable future. Thus, although it was uncertain whether Romney could follow through with these proposals, he at least positioned himself as a more "contractor-friendly" candidate.

Congress: Steady As She Goes

The reality is, however, that the re-election of President Obama is unlikely to have a significant short-term effect on government contractors. Most of the regulation and oversight initiatives over the past four years have come from Congress, not President Obama, and most of this oversight regulation has come through National Defense Authorization Acts.

For example, the fiscal year 2008 NDAA, Pub. L. No. 110-181, expanded protections for contractor employees who provide certain government officials information the employee reasonably believes may be evidence of wrongful conduct, imposed requirements regarding certain officials leaving government service for private employment with government contractors, required reports by certain contractors on their ethics and compliance programs, and required the U.S. Department of Defense to develop comprehensive regulations for private security contractors operating in combat areas.

The FY 2009 NDAA, Pub. L. No. 110-417, introduced the requirement for policies addressing contractor personal conflicts of interest in the performance of certain government work and reporting requirements regarding alleged crimes by or against contractor personnel in Iraq and Afghanistan. The FY 2010 NDAA, Pub. L. No. 111-84, addressed restrictions on contracting with suspended or debarred subcontractors; the FY 2011 NDAA, Pub. L. No. 111-383, introduced the requirement for the DOD to review contractor business systems (and authorized payment withholdings); and the FY 2012 NDAA, Pub. L. No. 112-8, included requirements for regulations to avoid the introduction of counterfeit electronic parts into the DOD supply chain. Thus, while executive agencies have been active in issuing new regulations over the past four years, it was often at the direction of Congress, not President Obama.

With control of the Republican House and Democratic Senate unchanged, contractors can likely expect this trend to continue. Democrats appear to have expanded their majority in the Senate by, at press time, a possible two seats (assuming newly elected Angus King, I-Maine, caucuses with Democrats), but this increase is still slim. With Republican term limits coming into play, the ranking member slot on the Senate Armed Services Committee (SASC) likely shifts from Sen. John McCain, R-Ariz., to Sen. Jim Inhofe, R-Ohio.

There are also changes coming in the make-up of the SASC with Sen. Scott Brown, D-Mass., losing and Sen. Jim Webb, D-Va., retiring. Webb's seat will likely be filled either by Sen. Mark Warner, D-Va., or the newly elected Tim Kaine, D-Va. In addition, Sens. Joe Lieberman, D-Conn., Ben Nelson, D-Neb., and Daniel Akaka, D-Hawaii, all retired, which means the Democrats have, at this point, four total seats to fill. The re-election of Sen. Claire McCaskill, D-Mo., likely means that she will remain chairwoman of the Senate Armed Services Readiness and Management Support Subcommittee and stay on the Senate Homeland Security Committee. Sen. McCaskill also chairs the Contracting Oversight Subcommittee.

The Senate Homeland Security and Governmental Affairs Committee will also be impacted as Chairman Lieberman's retirement paves the way for Sen. Tom Carper, D-Del., to become the new chairman. On the Republican side, ranking member Susan Collins, R-Maine, is term limited and the next Republican in line with seniority is Sen. Tom Coburn, R-Okla. Membership-wise, Sen. Brown's loss and Sen. Akaka's retirement open up a possible vacancy on each side.

Although the leadership of the House Armed Services Committee will not change, there will be rank and file movement on the committee. As many as six members appear to have lost their re-election bids, but the lost committee seats were evenly split between Democrats and Republicans. For the Republicans, Richard Hudson won the House race in North Carolina's 8th Congressional District, defeating Rep. Larry Kissell, D-N.C., Republican Keith Rothfus won his House election for Pennsylvania's 12th Congressional District, unseating Rep. Mark Critz, D-Pa., and Rep. Betty Sutton, D-Ohio, lost her race to Republican Jim Renacci.

For the Democrats, Cheri Bustos won the House race in Illinois's 17th Congressional District, defeating Rep. Bobby Schilling, R-Ill., Democrat John Delaney won the House race for Maryland's 6th Congressional District, unseating Rep. Roscoe Bartlett, R-Md., chairman of the House Armed Services Tactical Air and Land Forces Subcommittee, and Rep. Allen West, R-Fla., is trailing his opponent, Democrat Patrick Murphy by roughly 2,500 votes at press time.

As for policy-making impact, all of these changes are at the margins. The Senate remains in Democratic control, and the House remains in Republican control. Given this relative status quo, contractors can likely count on Congress continuing to levy new requirements on contractors through the annual authorization and appropriations process. Indeed, the process is already underway with the FY 2013 NDAA, pending now in the House and Senate, and it is unlikely that the election results will dramatically impact some of the measures included in the pending legislation, as discussed below.

Sequestration: Fiscal Cliff-Diving

The 800-pound gorilla looming over everything, of course, is sequestration. Now that the election is over, President Obama's first priority will be to try to reach an agreement with the House and Senate to avoid the "fiscal cliff" coming in January of next year. Numerous articles have been written about sequestration and the likely impact on government contractors.

In a nutshell, sequestration, which has its origins in the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 (commonly referred to as the Graham-Rudman Act), is set to go into effect on Jan. 2, 2012, because the bipartisan "Super Committee" created by the Budget Control Act of 2011, Pub. L. No. 112-25, failed to reach agreement on long-term deficit reduction. Unless a "grand bargain" or a short-term stop gap measure is put into place in less than two months, automatic, across-the-board spending reductions of $1.2 trillion over nine years will be triggered, resulting in massive, indiscriminate cuts to both defense and nondefense budgets.

Although many in industry have predicted what might occur — contract terminations, funds not added to contracts, options not exercised — what is clear now is that federal agencies are not currently planning on what to do if sequestration occurs. To keep pressure on Congress to reach a resolution, the White House instructed all agencies not to prepare for sequestration. The DOD, for its part, has repeatedly told industry that it currently has no plans for dealing with fallout from the hundreds of billions of cuts to its budget. If sequestration does in fact go into effect, federal agencies will be left scrambling to decide which programs and contracts to cut, and which to maintain. Today, at least, it is impossible to predict how this might play out.

With the election over, the job of dealing with sequestration can begin again in earnest. President Obama has said that it would be his first priority in a second term, and some kind of deal, if not a "grand bargain," remains possible in the short-term. Unlike Romney, who would have been acting as a president-elect with a lame duck Congress, President Obama has the benefit of staff in place that is ready to work with Congress immediately.

Indeed, according to reports, even prior to the election, the White House and both houses of Congress began preparing to engage in post-election negotiations to avoid sequestration. Both parties remain deeply entrenched in their positions, however, with the White House and the Democratic Senate demanding additional revenues (i.e., tax increases) as part of any deal, and the Republican House refusing to agree to any.

With President Obama's reelection and the Republican House and Democratic Senate remaining unchanged, the election failed to provide a mandate to either party on the tax issue (although both parties have claimed one). As a result, neither party is likely to budge anytime soon.

Thus, while the elusive "grand bargain" remains possible, the most likely outcome in the short term is that sequestration will be delayed, or at least limited, for a period of time to allow negotiations to continue into next year over broader issues, including reducing deficits, tax reform, and raising the debt ceiling. Indeed, House Speaker John Boehner of Ohio set low expectations for Congress's year-end session on Monday when he said a "bridge" over the so-called fiscal cliff "is the best you can hope for." And, he told CNN, "Even that is going to be very difficult to do."

Impact on Contractors: Fewer Dollars, Continued Oversight

For contractors, the short term is likely to bring more of the same. Regardless of whether we dive off the "fiscal cliff" or reach a compromise, the outlook necessarily includes reduced spending by government and, certainly if the Obama administration's policies are implemented, reduced defense spending.

Contractors will have to continue to deal with restrained spending by agencies, which have for some time now been holding back from making new investments because of both short-term and long-term budget uncertainty. They will also likely continue to see delays in the award of new contracts or task/delivery orders, at least until the current budget situation is more settled. Just a few of the other oft-discussed future impacts are:

- continued restrictions on cost-type contracts and increased use of fixed-price contracts;
- more bid protests because of a smaller government "pie";
- focus on proven, mature technologies in lieu of new, development programs;
- more indefinite quantity/indefinite delivery contracts, which provide more flexibility to agencies; and
- longer program schedules to match stretched out spending dollars.

Moreover, perhaps the only thing Congress and the White House are generally able to agree upon is increased oversight measures for government contractors. Thus, the House and Senate versions of the FY 2013 NDAA, passed by the House as H.R. 4310 and pending in the Senate (S. 3254), include additional contractor regulatory obligations. A handful of the new obligations under consideration include:

- anti-human trafficking measures in connection with federal contracts, including contractor disclosure requirements (H.R. 4310);
- additional measures on counterfeit parts (H.R. 4310);
- a plethora of small business-related measures (H.R. 4310);
- extension of personal conflict of interest regulations to cover more contractor employees (S. 3254);
- requirements to establish a suspension and debarment official (SDO) in each military department and the Defense Logistics Agency, mandatory referral requirements, and restrictions on DoD SDOs reporting up through Acquisition or Inspector General organizations (S. 3254);
- further restrictions on use of cost-type contracts (S.3254);
- Defense Contract Audit Agency access to contractor internal audit reports (S.3254); and
- flat "caps" on reimbursement of contractor employee or "executive" compensation in lieu of the current formula approach (S.3254).

Given that neither chamber has changed control, many of these measures will likely have bipartisan support (e.g., anti-human trafficking), and some of the measures build upon prior legislative initiatives, it is likely that many of these measures will end up in the final legislation.

So, has anything changed for government contractors? Not really. Control of the White House, Senate and House remains the same, sequestration persists as a looming and daunting task, and spending cuts, either as a result of a budget deal or sequestration, are likely in the short term and inevitable in the long run. For contractors, it means that wartime spending is likely over and enhanced oversight will continue as fiscal realities force the government to "do more with less."