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ALERT

New Executive Orders Call for Rewriting Federal Procurement Rules, Maximizing Commercial Acquisitions

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WHAT: President Trump issued two new Executive Orders (EOs) on April 15 and April 16, 2025, focused on federal procurement streamlining. The April 15 EO, entitled "Restoring Common Sense to Federal Procurement," is intended to "create the most agile, effective, and efficient procurement system possible" by revising the Federal Acquisition Regulation (FAR) to ensure that it contains "only provisions required by statute or essential to sound procurement." The April 16 EO, entitled "Ensuring Commercial, Cost Effective Solutions in Federal Contracts," is aimed at ensuring that agencies procure commercial products and services to the maximum extent possible and calls for a wholesale review of pending or planned acquisitions.

WHEN: The April 15 EO on the FAR rewrite requires each federal agency to designate a senior procurement official to work with the Office of Federal Procurement Policy (OFPP) on the reform effort within 15 days of the EO (by April 30, 2025). Within 20 days of the EO (May 5, 2025), the Office of Management and Budget (OMB) in consultation with OFPP, must issue a memorandum to agencies providing guidance on implementation of the EO. Within 180 days of the EO (October 12, 2025), OFPP and the FAR Council must "take appropriate actions to amend the FAR to ensure that it contains only provisions that are required by statute," identify all FAR provisions not required by statute that will remain in the FAR, and consider amending the FAR to create a four-year sunset for any provisions not

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required by law.

The April 16 EO on commercial products and services requires all agency contracting officers (COs) within 60 days of the EO (by June 15, 2025) to review all open agency procurements, broadly described, for non-commercial products and services, and compile those procurement actions for which commercial products or services are not available to meet agency needs into a proposed application for approval submitted to the agency's head approval authority. That authority will have 30 days to assess the application, including returning it to the CO for further market research or making recommendations to advance the solicitation through purchase of commercial products or services. Within 120 days of the EO (August 14, 2025) and annually thereafter, agencies must report to OMB on their compliance with the Federal Acquisition Streamlining Act (FASA), which requires agencies to procure commercial products and services to the maximum extent practicable, and their progress towards meeting the EO's goals.

WHAT IT MEANS FOR INDUSTRY: The EOs continue a recent spate of Executive action focused on eliminating regulatory burdens and streamlining federal procurement. They provide a unique opportunity for industry to weigh in on the regulatory process.

"Restoring Common Sense to Federal Procurement"

The April 15 EO calls for "a comprehensive reform of the FAR" to remove "self-inflicted" issues that have made the FAR a "barrier to, rather than a prudent vehicle for, doing business with the Federal Government." The EO directs the OFPP, in consultation with the FAR Council and federal agencies, to take the following actions:

- First, the EO calls for OFPP to amend the FAR to ensure that it contains only provisions that are either (1) required by statute or (2) "otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests."
- Second, the EO requires OFPP to work with agencies to "align" any agency-specific FAR supplements (e.g., DFARS, GSAR, HHSAR, FEHBAR) with the FAR reform efforts called for in the EO. To that end, OMB is required to provide agencies with guidance for issuing new agency supplemental regulations and internal guidance "that promote expedited and streamlined acquisitions." The EO also requires agencies to comply with the "ten-for-one" requirement in EO 14192, which requires agencies to identify at least 10 existing regulations to be repealed for every new regulation proposed.
- Finally, for any FAR provisions retained or later adopted that are not statutorily required, the EO directs OFPP and the FAR Council to consider amending the FAR so that those provisions expire four years after the effective date of the final rule amending the FAR.

Although potentially broad in scope, the actual impact of the EO may be somewhat limited by the fact that many existing provisions in the FAR, DFARS, and other agency supplements are rooted in statute – including the yearly National Defense Authorization Acts (NDAA) which regularly impose new obligations on contractors that are ultimately codified in the FAR, DFARS, and agency supplements.

Nevertheless, there are no doubt provisions that have been added to the FAR over the past 40 years of its existence that are not based on statutes. For example, the Advisory Committee on Streamlining and Codifying Acquisition Regulations (Section 809 Panel) identified 109 clauses (54 FAR and 55 DFARS) applicable to commercial item (now commercial products and commercial services) contracts that had no statutory basis for being included in those contracts. There may also be other FAR provisions that are required by statute, but not for the breadth of contract types or subject areas to which they are currently applicable. And some FAR provisions may simply be outdated. One example is FAR 15.208, governing late proposals, which refers to proposals submitted via "an electronic commerce method" and bases the exception on computer "batch processing," which is nonexistent today.

Although the EO directs OFPP and the FAR Council to take "appropriate actions" to amend the FAR, it is not clear whether the updates to the FAR will follow normal notice and comment rulemaking, given the EO's aggressive six-month deadline as well as the EO's direction for OFPP and the FAR Council to issue deviations and interim guidance "as appropriate" until final rules reforming the FAR are published.

Contractors should therefore closely monitor developments in this area and take advantage of any opportunities to comment – particularly to the extent there are provisions in the FAR and DFARS that have acted as "barriers" to doing business with the Government or that could be removed or modified to improve the "simplicity," "usability," and "efficacy" of the procurement system.

"Ensuring Commercial, Cost-Effective Solutions in Federal Contracts"

The April 16 EO explains that the Trump Administration intends to "enforce existing laws directing the Federal Government to utilize, to the maximum extent practicable, the competitive marketplace and innovations of private enterprise to provide better, more cost-effective services to taxpayers."

The EO says that it is the Administration's policy that agencies "shall procure commercially available products and services, including those that can be modified to fill agencies' needs, to the maximum extent practicable," as mandated by FASA. Within 60 days, agencies must direct COs to review "open agency solicitations, pre-solicitation notices, solicitation notices, award notices, and sole source notices for non-commercial products" and create a consolidated "application requesting approval for the purchase of the non-commercial products or services." This consolidated application must then be submitted to, and approved by, the agency's approval authority before the agency can proceed with the acquisition. Each agency's approval authority will have 30 days to review the applications and assess whether they comply with FASA. If not, the approval authorities are directed to take appropriate action "including returning the application or any portion of the application to the contracting officer for additional research or action with respect to potential commercial products or services."

The EO also creates an ongoing obligation for agencies to report to OMB on their compliance with FASA and their progress towards implementing the EO. Moving forward, COs will need to seek approval before proceeding with a non-commercial procurement by submitting a description of the proposed procurement, including "the specific reasons a non-commercial product or service is required," and "all market research

and price analysis in support of the proposed solicitation." The approval authority must then review and approve or deny the proposed procurement in writing.

Here again, although the changes sound far-reaching, the practical results may be relatively modest. As the EO notes, the Government has been required to acquire commercial products and services to the maximum extent practicable since the passage of FASA in 1994. But the Government's compliance with this requirement is often lacking.

Notwithstanding the EO's emphasis on streamlining procurements, the review and approval process called for in the EO could initially slow ongoing procurements as COs review requirements, seek to determine whether commercial products or services are able to meet their needs, and submit updated justifications to agency approval authorities. The ongoing requirement for approval authorities to "review and approve or deny [non-commercial procurement] proposals in writing" might also provide fertile ground for contractors seeking to challenge a solicitation on the basis that a commercial product or service can meet an agency's needs.

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Wiley's Government Contracts Practice will continue to monitor these developments and update contractors as OFPP and the FAR Council move forward with FAR revisions.

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