COVINGTON

COVINGTON & BURLING LLP

E-ALERT | Election and Political Law
Government Contracts

May 18, 2011

PROPOSED EXECUTIVE ORDER WOULD REQUIRE GOVERNMENT CONTRACTORS TO REPORT POLITICAL SPENDING

A draft Executive Order circulating around Washington would require government contractors to publicly disclose their political contributions. In recent days, Members of Congress and industry representatives have voiced sharp concerns with this proposal, including that the disclosure requirements would be burdensome for contractors, chill political speech, and create the appearance of partisanship in government contracting. Indeed, draft legislation (H.R. 1906) has been introduced in the House of Representatives that would bar federal agencies from imposing such disclosure requirements on contractors.

If implemented, the draft Executive Order would require disclosure of contributions by an entity submitting a bid for a federal contract, by the entity's "directors or officers," or by the entity's "affiliates or subsidiaries." Contractors would be required to disclose direct contributions to political candidates and parties and, more significantly, contributions made to third parties with the intention or expectation that the parties would use them to make independent expenditures or electioneering communications.

ADDING NEW DISCLOSURE OBLIGATIONS FOR GOVERNMENT CONTRACTORS

The new disclosure obligations in the draft Executive Order are similar to those found in state "pay-to-play" laws that require disclosure of contributions by state government contractors and by their officers and affiliates. State laws frequently also limit the amount of such contributions, but the draft Executive Order would not impose a similar limitation. The draft Executive Order reasons that while contractors already are prohibited from making certain contributions during the negotiation and performance of a contract, these new measures are necessary to address the perception that political campaign spending leads to favoritism in the contracting process.

While the proposed disclosure requirements are intended to "increase transparency and accountability to ensure an efficient and economical procurement process," some industry groups and lawmakers believe that the requirements would in practice create new problems in government contracting. During a congressional hearing last week, some Members of Congress and industry representatives expressed concerns that the proposed requirements would chill political speech and politicize the procurement process because agency officials involved in government contracting would have access to information regarding the political donations of bidding entities.

DISCLOSURE OF RECENT CONTRIBUTIONS OR EXPENDITURES

The draft Executive Order, as currently formulated, would impose the following requirements:

- All entities submitting bids for federal contracts (no minimum stated) would be required to disclose certain contributions and expenditures made within the previous two years; certification that proper disclosure had been made would be a condition of award.
- *Whose contributions would need to be disclosed?* Contributions by the bidding entity, its directors or officers, or any "affiliates or subsidiaries within its control." As discussed below, the terms "affiliates" and "subsidiaries" would presumably be defined in implementing regulations.
- *What types of contributions would need to be disclosed?* Contributions or expenditures to or on behalf of federal candidates, parties or party committees. Also covered would be contributions made to "third party entities with the intention or reasonable expectation" that such parties would use the contributions to make independent expenditures or electioneering communications.[1] These reporting requirements for third-party contributions go beyond what is required by existing federal disclosure rules.
- Disclosure would be required when the aggregate amount of contributions and expenditures by the donors listed above exceeds $5,000 to a given recipient in a year.
- The data would be made publicly available at http://www.data.gov.
- The draft Executive Order would be effective immediately when signed by the President, and would cover contracts resulting from solicitations issued on or after the effective date of action taken by the Federal Acquisition Regulatory Council ("FAR Council") to adopt appropriate rules.

FAR COUNCIL WOULD CARRY OUT THE EXECUTIVE ORDER AND ADDRESS UNRESOLVED ISSUES

The draft Executive Order provides that the FAR Council would have authority over this program and would adopt necessary rules, regulations, and orders to carry out the Executive Order. If the draft Executive Order is signed, the FAR Council presumably would issue proposed amendments to the Federal Acquisition Regulation ("FAR") to implement the Executive Order. In doing so, the FAR Council would need to address several issues that are left unresolved by the draft order. Among those many issues are:

- *Definitions.* The draft Executive Order leaves several key terms undefined. For example, the order requires a bidding contractor to disclose political spending by "any affiliates or subsidiaries within its control." But how will the FAR Council define "affiliates" and "subsidiaries"? Will these terms include a contractor's majority owners or investors? What does it mean for an affiliate or subsidiary to be "within" an entity's "control"? How these key terms are defined would have a major impact on the scope of these new disclosure requirements.
- *Method of and timing for reporting.* While the draft Executive Order mandates that contractors report their political spending, it does not indicate *how* or *when* contractors would report this information. The FAR Council would be charged with adopting a workable disclosure process.
- *Easing the administrative burden.* The draft Executive Order instructs the FAR Council to issue rules, regulations, and orders that "minimize the costs of compliance for contractors" and do "not interfere with the ability of contractors or their officers or employees to engage in political activities" permitted by law. How the FAR Council responds to this instruction could be vital for

[1] "Electioneering communications" include communications, such as television or radio advertisements, that air shortly before an election, refer to an identified candidate for federal office, and are targeted to the relevant electorate.

contractors, because the expansive scope of the disclosure requirements suggests that contractors could face significant administrative burdens and costs in tracking contributions from the various covered donors.

- *Sanctions for non-compliance.* The draft Executive Order provides that the FAR Council would adopt rules enforcing the disclosure requirements. These rules could impose sanctions on contractors for non-compliance and for making false certifications.

PRACTICAL CONCERNS

If the President signs this Executive Order, it will present some familiar problems for clients that are currently covered by state pay-to-play laws. In some respects, the federal rules will be easier to comply with than many state laws. In part this is because fewer individuals are covered by the draft Executive Order than is true under the more onerous state laws. For example, while the draft Executive Order requires reporting political contributions by "directors or officers," it does not cover contributions by senior executives, much less executives involved in or compensated based on state contracting, or the spouses or children of executives, as is true in some states.

In addition, these rules should be easier to comply with because some of the data that must be reported is already available on-line and easily searchable in the Federal Election Commission's ("FEC") records. Those contributions which must be disclosed and which are not currently on the FEC system, primarily contributions where the donor "intends" or "expects" the funds to be used for certain kinds of political ads, may largely disappear as organizations soliciting such contributions re-tailor their fundraising pitches to avoid triggering these disclosure rules.

While the compliance burden will be less onerous than in some current state laws, there could be a fair amount of *Sturm und Drang* surrounding the issuance of the Executive Order. As noted above, there is already a bill pending in Congress to block it, and that bill, or something similar, is likely to pass the Republican-led House. It also seems likely a constitutional challenge will be filed in court, if the Executive Order were to issue. As a result, we expect the validity of any new disclosure rules to come under almost immediate challenge from a number of fronts.

Attorneys at Covington & Burling LLP are experts in advising companies on matters relating to government contracts and political spending. We are closely monitoring this matter, and we would be pleased to discuss the draft Executive Order and its potential impact on your industry, company, and customers. If you have any questions concerning the material discussed in this client alert, please contact the attorneys listed below:

Robert Kelner	202.662.5503	rkelner@cov.com
Bob Lenhard	202.662.5940	rlenhard@cov.com
Alan Pemberton	202.662.5642	apemberton@cov.com
Jennifer Plitsch	202.662.5611	jplitsch@cov.com
Scott Freling	202.662.5244	sfreling@cov.com