Government Contracts Blog

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Administration Actively Solicits Higher Costs From Bidders - Is Its "High Road Procurement Policy" Headed Off a Cliff?

The Obama Administration is now planning yet another spending plan, this time in the form of a policy that actively encourages federal contractors either to increase the pay and benefits extended to their workforces, or to face an evaluative disadvantage in competing for federal contracts. This so-called "High Road Procurement Policy" includes an evaluative reward for "potential Federal contractors that pay wages or provide benefits above those required by our laws," including the Service Contract, the Davis-Bacon, the Walsh-Healey, and the Fair Labor Standards Acts.

Internal Administration documents obtained by the Associated Press and other news organizations recognize that the High Road will increase labor costs on federal contracts. (Click here for additional reports relating to the public debate on the new OMB policy). In what can only be described as "a firm grasp of the obvious," the Administration concedes that "[s]ome part of the resulting increase … is likely to be passed on to the government in the form of higher bid prices" and that, "modest staff increases may be necessary to administer the policy." But the Administration reassures those who might be concerned by this unnecessary increase in contract prices not to worry – "the cost increases would be offset by savings on public assistance, productivity gains and increased price competition."

With all due respect, what parallel universe do the folks in the Obama Administration inhabit? Contractors who have been continually lambasted for more than a generation about their lack of cost control are now being encouraged to *spend more money*? And simultaneously penalized for exercising cost controls? And the taxpayers are supposed to believe that these increased costs will essentially pay for themselves? And that only "modest" administrative costs will be incurred? **P-L-E-A-S-E**.

The devil, of course, is always in the details, and there are precious few of those on the table right now, but it appears that the "High Road" has at least four likely lanes.

1. The Office of Management and Budget (OMB) will direct agencies to give "[p]ositive weight in the source selection process … to bidders based on the labor standards of their

entire workforce," not just that portion of their workforce performing federal contracts.

2. The OMB direction will then provide basic criteria against which the bidder's labor standards will be measured, including whether the bidder: (i) pays "a livable wage," and provides (ii) "quality, affordable health insurance," (iii) "an employer-funded retirement plan," and (iv) "paid sick days." However, it does appear that the number and duration of coffee breaks will be negotiable and subject to collective bargaining under the OMB guidelines. (We hope).

3. A Department of Labor compliance office will compile or develop a "score" on contract bidders based on the new emerging criteria for what constitutes a "living wage."

4. Procuring agency contracting officers will then use this score to weigh the "living wage" evaluation factor when making source selection decisions., along with any additional required evaluation factors such as past performance, the contractor's ability to meet specific requirements set out in the solicitation, and (lest we forget it) cost.

There can be little doubt that the Administration's "High Road" leads to unnecessarily higher labor costs to be borne "*ipse dixit*" (to use a phrase from my Latin I class) by the American taxpayer. Five Republicans on the Senate Homeland Security and Governmental Affairs Committee question whether this policy is prudent or even good for America. One proponent of the policy, a federal procurement official quoted by Steven Greenhouse in the New York Times, counters that taking the "High Road" would "encourage procurement officers to favor companies with better compensation packages only if choosing them did not add substantially to contract costs." The procurement official goes on to illustrate his point with the following hypothetical:

> If two companies each bid $100 million for a contract, and one had considerably better wages and pensions than the other, [then] that company would be favored [over the company with the lower wages and pensions].

Ah, the old "tie breaker" gambit. Well… **N-O**. That isn't the way it is going to work and, even if it did, can anyone remember the last time that a competitive process yielded a literal dead heat? Yes, identical bids do happen – the Federal Acquisition Regulation explicitly addresses that possibility – and Republicans also occasionally win Senatorial elections in Massachusetts. But neither event occurs with any regularity. And, even if that happenstance is the thin reed on which the "High Road" is constructed, then we really ought to save all of the time and money that is being spent on this new spending initiative. Indeed, if "tie bids" form any part of the calculus here, then a foundational assumption of federal acquisition policy – *i.e.*, that price competition, in fact, exists as a force in the government marketplace – would be mere wishful thinking.

“Breaking a tie” is not, sir, the *raison d’etre* of this policy. The policy is plainly designed to make worker benefits a separate evaluation factor that can affect an integrated “best value” assessment. But just how does a source selection authority weigh the differences in worker benefits against the higher cost the taxpayers will be asked to bear? Will the test be objective and mathematical? Or will it be a “judgment call”? And the formula used to derive the living wage score – what will its components be and how will they be judged? Against what standards and with what impact for deviations from what norms?

Perhaps these questions are premature. Perhaps they should not be asked until the policy is in place, so that lawyers can profit from the vagaries of a policy that is counterintuitive to the objectives of a competitive acquisition process. But it *will* spur the economy – because it will create *government jobs* and generate *legal fees*. At least one of these results is applauded by lawyers around the world.

Before leaving this subject, a moment or two with respect to the impact of the "High Road" on small businesses, the sector in which most jobs creation (outside of Government) is typically experienced. Available data – including a 2009 study by the U.S. Small Business Administration's (SBA) Office of Advocacy – shows that Senator Snowe (R-ME) and her colleagues are almost certainly right in their contention that High Road contracting will cause many small businesses to conclude that the requirement to "[shoulder] the often unmanageable burden of more costly pay and benefits packages" will preclude their participation in the government market.

- Recent research by Forbes indicates that small business revenues and profits have declined significantly, putting pressure on cash flow and requiring some small businesses to, among other things, undertake "cutbacks to salaries and benefits."

- The 2009 SBA report observed that:"[F]irm size is a major determinant in whether a business offers … [health] benefits," which is not surprising since "it costs more to administer small health plans than it does large ones" which means, among other things, that "the owners of new [small business] firms are increasingly reluctant to offer [health insurance]" This reluctance, together with the 1 to 2 percent of small businesses who have dropped health coverage altogether in the current economic downturn, is the apparent reason for the stagnation or decline in the number of small businesses offering health insurance."

- The SBA report also observed, "Ongoing research shows that employees at smaller firms are less likely to received health insurance or other benefits than those at large firms." In brief, "virtually all" firms with more than 200 employees offered such benefits in 2008 compared to 62 percent for firms with fewer than 200 employees. And for firms with 3 to 9 employees – among whom are the "start-ups" on whom the economy depends for growth, "the offer rate was 49 percent."

When it comes to this "High Road," the Administration ought to peruse the works of Robert

Frost and linger for a moment on the title of one of his most famous poems – “The Road Not Taken.” It seems to make good sense here.

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