

Statement of  
The Associated General Contractors of America  
to the  
**Committee on Oversight and Government Reform**  
**Committee on Small Business**  
U.S. House of Representatives

For a hearing on

**“Politicizing Procurement: Will President Obama’s Proposal Curb Free  
Speech and Hurt Small Business?”**

May 12, 2011

**AGC of America**  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  

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The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 33,000 firms, including 7,000 of America's leading general contractors, and over 12,000 specialty-contracting firms. Over 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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**Statement of the Associated General Contractors of America  
Committee on Oversight and Government Reform  
Committee on Small Business  
United States House of Representatives  
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On behalf of the Associated General Contractors of America (AGC), we strongly support full and open competition for the many contracts necessary to construct improvements to real property. This includes competition among general contractors, specialty contractors, suppliers and service providers. Over the years, it has been established that such competition energizes and improves the construction industry to the benefit of the industry and the nation as a whole. AGC thanks the Committees for working together on addressing the numerous concerns raised by the draft Executive Order (EO).

AGC has long opposed efforts to paint all contractors, politicians or government contracting officials with a broad brush as suspect, and we have proactively supported procurement reform to improve delivery of federal construction services. We wish to make clear that many of the claims inferred by the EO fail to address the realities of federal contracting. Some of these assumptions are based on statements that ignore current federal contracting law, as well as the rigorous legal obligations and financial risk that federal contractors must endure. The EO generalizes all federal contractors, all politicians and all government procurement officials and demonizes an entire market that is dedicated to serving the public interest. We offer our comments on how we believe the draft EO is unnecessary, how implementation of the EO would be extremely difficult, and how it would inject politics into the federal procurement process, rather than removing politics and ensuring the integrity of federal construction contracting.

**There Is No Need for the Executive Order**

The EO presumes that political contributions of any kind are somehow influencing the award of Federal contracts. It also appears to ignore the multitude of rules governing the federal procurement process. There is no reported record documenting an epidemic of political favoritism that would require the issuance of this EO as proposed. The vast majority of political spending is already well-documented in a government database that is publicly accessible. While the draft EO is allegedly designed to "...ensure that [the Federal government's] contracting decisions are merit based and in order to deliver the best value for taxpayer," requiring disclosure in a procurement database of currently disclosed and undisclosed donors would inject information about political contributions into the federal procurement process. It would introduce the potential for a political litmus test on government contractors that would not exist without the EO. Furthermore, the draft EO fails to recognize that per FAR 31.205-22, costs incurred to induce or tend to induce, either directly or indirectly, executive branch employees to give consideration or to act regarding a government contract on any basis other than the merits of the matter "are unallowable."

The primary function of the complexities of the federal procurement system is to protect the government's proprietary interests and it has been remarkably successful. The Federal Acquisition Regulation (FAR) contains thoughtfully laid out procedures for determining contractor responsibility and potential contractor wrongdoing. It ensures due process and a thorough evaluation of any charges and claims against a company. Accordingly, contractors should not be barred from competing for work until the full legal due process has been completed. Political contributions for or against the Administration should not be a consideration in awarding contracts to responsive and responsible contractors. The only benefit of the EO could be for the Administration to apply a political litmus test that would systematically blacklist contractors from federal work based on political considerations. We believe this will have a serious chilling effect on current or potential new market entrants.

The current system has long held numerous rules designed to ensure federal contractors are held to the highest professional and ethical standards. The vast majority of procurements undertaken by the federal agencies already factor in a contractor's legal and ethical compliance record and reputation for quality work with the government. Many procurements under these agencies also go through a prequalification process, where bidders are screened based on a variety of factors – including compliance with standards and regulations. They are also checked against the government's past performance evaluation system, the non-responsible contractor list, and the suspension/debarment lists. Recently, additional rules increasing oversight on issues concerning ethics and compliance standards have been reinforced and updated. AGC believes this process is strict and fair. It includes real contractor performance data, it ensures compliance with legal standards, and it ensures that political contributions are not considered in contract award by specifically prohibiting it and by not creating a mechanism for reporting political contributions to government officials.

### **Complexities of Implementation and Enforcing the EO**

Under current law, there are prohibitions against government contractors "making contributions or promises of contributions" in exchange for government contracts, and the Federal Election Commission already has available online a complete "Disclosure Database" of legal contributions made by all individuals and Political Action Committees and their recipients.

The proposed EO would create an overly complex paradigm in the federal procurement system and would be cumbersome to implement. It would require coordination, cataloguing, and constant upkeep of legal personal contributions made by individuals working for government contractors and their affiliates. It also would require the disclosure of additional information about contributions made to third party entities "...with the reasonable expectation those contributions would be used to make independent expenditures or electioneering communications." This would require not only the tracking of expenditures of the company but also the tracking of third party groups and the policing of not only the contributions, but also the intent of the contractor and a third party group when contributions are made, both of which would be difficult.

Also the proposed disclosure requirements would apply only to companies that make bids on government contracts. It does not apply to other areas of federal decision making where there could be similar concerns that decisions about federal funds “are merit-based in order to deliver the best value for the taxpayer.” Contradictory to the Administration’s pledge to ensure transparency at every level of the federal government, the draft Executive Order does not apply the same standards to federal employee unions that negotiate contracts for their members worth many times the value of most government contracts. Also, the recipients of hundreds of millions of dollars of federal grants are not covered by the draft Executive Order. This incomplete application makes us question the intent of the draft EO.

## **Ensuring Integrity in Federal Construction Contracting**

Federal construction contractors hold themselves, and are held, to the highest ethical standards. In fact, the federal government has long sought to protect itself from fraud or other abuse in the performance of federal contracts. Congress passed the first version of the federal False Claims Act in 1863, in response to widespread perceptions that federal contractors were defrauding the government during the Civil War. The current federal laws and regulations on false claims and other abuses are the product of more than 150 subsequent years of federal legislation and rulemaking. Indeed, many of the concerns inferred by the draft EO have already been addressed in federal laws and regulations. Embedded in the existing rules is the expectation that a firm performing a federal contract will make an affirmative effort to ensure ethical conduct and compliance with the law and disclose misconduct to the federal government. In addition, federal rules include significant penalties for those who fail to meet ethics and compliance standards and provide tough penalties for contractors who fail to comply with the existing mandatory disclosure obligations on federal contractors and subcontractors for "significant overpayments," violations of federal criminal laws involving fraud, conflict of interest, bribery or gratuity violations, and violations of the civil False Claims Act.

The existing government-wide debarment and suspension program provides a regulatory basis for immediately excluding a contractor that is not "presently responsible" from doing business with the federal government. In fact, the current system is designed to ensure that the federal government conducts business only with "responsible contractors," defined as those who have "...a satisfactory record of integrity and business ethics." 41 U.S.C. § 403(7)(D)." The FAR, which governs federal agency procurements, provides all federal agencies with broad discretion to debar or suspend contractors and subcontractors for a wide range of improper conduct, including commission of a criminal offense or a civil judgment for conduct involving fraud.

Recent years have seen enactment of several critically important changes to federal procurement law. The expectation of responsible self-governance and full compliance has greatly increased over the past four decades as Congress and the Executive Branch adopt a more comprehensive approach to reduce the risk of fraud or other abuse. In recent years, both Congress and the Executive Branch also initiated a variety of other efforts to address any perceived abuse by federal contractors:

- In late 2006, the Justice Department established a Procurement Fraud Task Force;
- Members of Congress renewed their efforts to amend the False Claims Act to make it easier for private citizens to bring civil actions against federal contractors;
- The FAR Councils have amended the FAR to require federal contractors and subcontractors to implement proactive ethics and compliance programs, including hotlines; and
- The FAR Councils have substituted rigid mandates for the self-disclosure of wrongdoing (on pain of suspension and/or debarment) replacing the traditional system of incentives to self-report any problems that a federal contractor or subcontractor may uncover.

In addition to the False Claims Act, Ethics and Compliance Rules, and the aforementioned FAR provisions, the Congress recently enacted, and the FAR Council is currently implementing, a new Federal Awardee Performance and Integrity Information System (FAPIIS) database. FAPIIS was created in order to provide assistance to contracting officials in making better award determinations by providing timely information on the honesty and reliability of contractors. The legislation specifically called for the government "to establish and maintain a data system containing specific information on the integrity and performance of covered federal agency contractors and grantees." The provision also "requires awarding officials to review the data system and consider other past performance information when making any past performance evaluation or responsibility determination." The new database will further be populated with disclosures of civil, criminal, and administrative proceedings with federal and state governments that did or could have resulted in penalties.

While the goal of providing the most accurate and complete information available to contracting officers is admirable, already the EO fails to consider the massive amount of information that is being reviewed to ensure the government is working with contractors who deal fairly and equitably with their employees, their subcontractors, suppliers and with their client, the federal government. Today's contracting officers face a complex myriad of regulatory and statutory requirements. The many types of legitimate capability and responsibility criteria that must be considered by the contracting officer are extremely broad, and it must be recognized that contracting officers already go to great lengths to gather and assess massive amounts of legitimate performance and compliance data in order to make an informed and sound decision.

### **The Will of the Congress**

We are also greatly concerned that this is an attempt by the Administration to enact, via regulatory fiat, key provisions of the failed DISCLOSE Act, which was soundly rejected by the 111th Congress. It is clear the oversight function of the two Committees have a role in examining the draft EO, as it appears that the Administration's consideration of issuing the draft EO would be an attempt to override the will of the Congress.

## **First Amendment Rights**

AGC is greatly concerned that the Administration would consider an EO that would impede with the rights of contractors granted under the First Amendment by effectively placing significant and complicated restrictions on free speech in the form of political advocacy. By effectively introducing political contributions into the proposal evaluation process, the Administration deliberately circumvents the Supreme Court's ruling in *Citizen's United* that protects political advocacy of corporations as free speech. Perhaps even more egregious, the draft EO would treat corporations and trade associations differently than labor unions, even though both are the same type of entity under the law, are active in political advocacy. It unfairly gags companies that receive even small government contracts but does not similarly gag unions who represent government employees. AGC opposes the EO because of its restriction on free speech and increased confusion of federal procurement rules and campaign finance laws.

## **Concluding Remarks**

Thank you for the opportunity to provide our views on this critical issue. We agree that the consideration of political contributions should not be considered when awarding government contracts. The role of the federal procurement system is to procure goods and services based on the best value for the American taxpayer. Issues such as detailing political contributions and other related protected political speech have no place in this critical function of the federal government. AGC believes the draft EO will inject politics into the Federal procurement process. It will do more harm than good and we urge the Congress to do all it can to ensure the Administration does not blur the line between politics and procurement. AGC looks forward to continue working with the Committees on these and other critically important issues.