PSC PROFESSIONAL SERVICES COUNCIL

The Voice of the Government Services Industry

STATEMENT OF

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PROFESSIONAL SERVICES COUNCIL

BEFORE THE JOINT HEARING OF THE

COMMITTEE ON SMALL BUSINESS AND COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

"*POLITICIZING PROCUREMENT: WOULD PRESIDENT OBAMA'S PROPOSAL CURB FREE SPEECH AND HURT SMALL BUSINESS*"

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Chairmen Issa and Graves, members of the two committees, thank you for your invitation and the opportunity to testify at this joint hearing to address a draft Executive Order requiring the disclosure of political spending by government contractors. We are opposed to the draft Executive Order in its current form and hope that it will not be issued.

I am Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council (PSC). PSC is the leading national trade association representing more than 340 companies providing professional and technical services to the federal government**.** PSC's member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Approximately 20 percent of our members are small businesses and another approximately 30 percent would be considered small mid-tier firms. Together, the association's members employ hundreds of thousands of Americans in all 50 states. Our membership list is public and is posted on our website.

PSC is a non-profit concern organized under Section 501(c)(6) of the Internal Revenue Code. In addition, we have an affiliated, Federal Election Commission-registered, political action committee, the PSC PAC. I am also the PAC Treasurer. Neither PSC, nor the PSC PAC, have ever made any independent expenditure ourselves nor made any contribution to others for the purpose of making independent expenditures.

Draft Executive Order

On April 20, we became aware of the April 13 draft Executive Order titled "Disclosure of Political Spending by Government Contractors."

Contrary to the laudable goal of keeping political contributions out of the federal procurement process, the draft Executive Order is based on a number of misconceptions, including: 1) that political contributions are currently impacting federal contract awards 2) that contracting officers would find useful the information required by the draft executive order and, 3) that much of the information required is currently hidden from public view.

The truth is that political contributions currently are not, and should not, be disclosed as part of the bidding and source selection process for federal contract awards. Despite the repeated efforts by some to show a link between campaign contributions and contract awards, I am pleased that there is no evidence that campaign contributions—for either president or Congress—have had any impact on any agency's procurement evaluation or award decisions. Yet the draft executive order takes the ill-conceived approach of injecting that very information into the contracting process, forcing all bidders for federal contracts to collect and disclose that information as part of their bid.

Furthermore, only those competing for federal contracts are covered by this draft Order. We are not aware of any action that is being taken elsewhere to cover other "entities," such as entities that win federal work without having to competitively "bid" for it (such as federally funded research and development centers) or federal employees who are source selection decision-makers for those federal procurements, or grantees, or those receiving other types of federal assistance. Singling out federal contractors adds its own political tinge to the draft Order.

In addition, the draft Order imposes a significant administrative and compliance burden on companies seeking to provide their goods or services to the federal government and would force contractors to unnecessarily track the political giving of their directors, officers or any affiliate or subsidiary within the bidding entity's control. Since the largest number of federal contractors are small businesses, we would expect that this Order and any subsequent acquisition regulations would have a disproportionate impact on that sector of the federal marketplace.

Of course we were well aware of the Supreme Court's January 2010 *Citizens United* decision. In an article I wrote in February 2010 for a newsletter "Government Services Insider,"[1] I noted that, for most government contractors, the existing panoply of regulations governing campaign contributions were unaffected by the decision and have remained effective, thus outweighing any immediate advantage of the Court's decision.

But beyond carefully watching the legislative response to the Supreme Court's decision, primarily through the consideration of the DISCLOSE Act,[2] and being vigilant about any particular effort to focus on the government contractor community, PSC did not then and has not now taken a position on the Supreme Court's decision or on the appropriateness of a legislative response that would require all entities making covered contributions to report that information publicly.

So we were surprised when a draft Executive Order focused only on government contractors was circulated. We had no prior discussions with officials in the Executive Branch about this draft Order or any other Executive Branch initiative relating to the disclosure of campaign contributions. On April 20, we issued a public statement strongly objecting to the approach in the draft Order[3] and over the next several days responded to numerous questions from Congress, the Executive Branch and the media.

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[1] See Government Services Insider, "Contractor Political Campaign Activism Unleashed?," Feb. 20, 2010, available at: http://gsinsider.com/wordpress/archives/47

[2] See the Democracy Is Strengthened by Casting Light On Spending in Elections (Disclose) Act, 111th Congress, introduced in the House (H.R. 5175) and the Senate (S. 3295).

[3] See "PSC: Draft Executive Order Counterintuitive, Counterproductive" issued April 20, 2011, and available at:http://www.pscouncil.org/AM/Template.cfm?Section=Home1&CONTENTID=7164&TEMPLATE=/CM/ContentDisplay.cfm

Draft Order Preamble

The authority statement for the draft Order cites the president's authority under the Federal Property and Administrative Services Act (40 U.S.C. 101, et.seq.) as well as the president's authority to ensure the integrity of the federal contracting system in order to produce the most economical and efficient results for the American people. While others may be better suited to explain in detail the scope of the president's authority, we know that it is not unlimited or unconstrained.

Draft Order Section 1

The first paragraph of Section 1 of the draft Order spells out the policy foundation for the Order. It starts with the affirmative statement that the "Federal Government's policy (is) that its contracting decisions are merit-based in order to deliver the best value for the taxpayer." It then adds that "every stage of the contracting process… be free from the undue influence of factors extraneous to the underlying merits of contract decision-making, such as political activity or political favoritism. It is important that the contracting process not only adhere to these principles, but also that the public have the utmost confidence that the principles are followed." We fully endorse these statements and those that follow in the paragraph. They spell out a necessary and appropriate requirement that is, and in our view must be, at the very heart of the federal contracting process. If that were all there was to the Administration's statement, I am confident we would all support it and I doubt this hearing would be necessary except maybe to explore the question of why the president thought it necessary to restate it.

However, the second paragraph of Section 1 of the draft Order then raises interesting but at times unrelated matters. For example, the first sentence asserts that the "Federal Government prohibits federal contractors from making certain contributions during the course of negotiation and performance of a contract." The federal election laws do generally prohibit federal contractors from making contributions and the Federal Acquisition Regulation already specifically provides that certain "lobbying" and political advocacy costs are unallowable for charging against government contracts.

However, no information about campaign contributions or other political activity is ever asked to be presented to a contracting officer or other source selection official. I doubt that any procurement official has done her own market research of publicly available campaign contributions to aid them in their source selection determination. But if there is that concern, rather than insulating contracting officials from this "tainted" information, this draft Order requires every bidder for a federal contract to affirmatively disclose that information to them and further provides that making the required disclosure of the covered information specified in the draft Executive Order is a condition of the award of the federal contract.

But the order then asserts that "additional measures are appropriate and effective (sic) in addressing the perception that political campaign spending provides enhanced access to or

favoritism in the contracting process." Contrary to limited, unproven and vigorously denied allegations of political favoritism, we are not aware of any evidence that campaign contributions or other related actions have created enhanced access to or favoritism in federal contracts. Nor are we aware of any bid protest filed at the Government Accountability Office, or any case filed in the federal courts, where this type of favoritism has been alleged, let alone proven.[4] Much of the credit for this can be attributed to the fact that contracting officers are far removed from the political process and have no reason to look into a contractor's political inclinations. Those trying to demonstrate favoritism in the contracting process in exchange for political contributions have historically pointed to the congressional earmark process as the most vulnerable to favoritism, even though only a limited number of cases have been proven and the current system of detecting potential cases seems to be working. Furthermore, even the potential for future instances have been further minimized by the recent reforms that Congress has adopted regarding earmarks. Lastly, I can assure you that the competitors in the federal market are attuned to any government action or inaction that would bias the source selection process and would not hesitate to challenge an agency's decision if there was information that an award decision was based on it.

Draft Order Section 2

The first paragraph of Section 2 of the draft Order requires a "certification" that disclosure of this information has been made and the FAR Council is given authority to establish the manner in which that certification is made. It is not clear whether the draft Order also gives the FAR Council the flexibility to determine the nature of the certification required to be made. Certifications have special importance in the federal procurement system. Typically (and ideally) where they are required, they should be made subject to the certifier's "best knowledge and belief" where the contractor is dependent on obtaining information from others in order to make the necessary certification. Second, there should be some method for the bidder to be able to identify areas outside the contractor's control where the certification cannot be made, such as when a contributor refuses to provide the relevant information to the bidding entity. Finally, if there is to be any disclosure requirement on federal contractors, we strongly recommend that bids for commercial items be exempt from the certification and reporting requirement.

Section 2 also requires the disclosure of two types of contributions. The first type is of contributions to or on behalf of federal candidates, parties or party committees, information that is already generally required to be publicly disclosed by recipients based on long-standing federal election laws and Federal Election Commission requirements. However, reporting entities are required by the election law only to make a good faith effort to collect personal

[4] The Federal Acquisition Regulation recognizes that an incumbent contractor may have an advantage in the follow- on competition for the same work because it may have access to information that competitors do not. This "incumbent advantage" is often challenged in bid protests and GAO has spelled out the standards to differentiate between the advantage of incumbency and the conflict of interest that might arise because of "unequal access to information." See FAR 9.5.

information from contributors where the contribution exceeds $200. This draft Order does not acknowledge that threshold applicable to individuals, even if, in the aggregate, total contributions exceed the $5,000 threshold specified in the draft Order. We also have concerns about the threshold that has been established because the "bidder" still has to collect the information in order to know whether the aggregate exceeds the $5,000 threshold. While significantly raising the threshold would have some benefit on the certification and disclosure side, the entity would still have to collect the information from the covered individuals to know whether the threshold has been met.

The second type is of contributions to third party entities "with the intent or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications." None of these contributions are now subject to reporting by anyone. The draft Order uses an undefined standard of "reasonable expectation" whose interpretation may vary by individual, by third party entity and by bidding entities, thus undercutting the value of the information and potentially creating conflicting reporting between bidding entities based on the extent of their due diligence and the timing of collecting this information from covered individuals. Further, by adding a requirement that the bidder ascertain from the contributor whether she was aware of the intent of the third party or had a reasonable expectation of the likely use of the contributor, the bidding entity would have to further pry into the contributor's knowledge of the actions of the third party recipient.

In addition, the draft Order puts the responsibility on the bidding entity to collect information about these contributions from officers and directors who are not now obligated to disclose to the company whether or to whom any such contributions have been made and the entity has no means to require that this personal information be disclosed to it merely to meet a government-imposed reporting requirement. As with the first type of contributions, and notwithstanding the $5,000 threshold for disclosure included in the last paragraph of this section, bidding entities would have to collect all of the information required so as to know whether the contributions exceed the minimum threshold and thus trigger the disclosure requirement.

Where the reporting requirements are not duplicative of existing reporting requirements, they would impose a heavy information collection and compliance burden on contractors, despite the Order's language stating that rules or regulations stemming from the Order "shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors or their officers or employees to engage in political activities to the extent otherwise permitted by law."

Draft Order Section 7

In one of the few positive elements of the draft Executive Order, Section 7 makes the Order effective upon enactment but applicable only to contracts that result from solicitations first issued on or after the effective date of the FAR regulations. This formulation at least allows the governing rules to be put into effect and then gives both the government and the contractor community an opportunity to understand how to comply. It is at that point that companies will be in the best position to determine whether they want to compete for new federal contracting opportunities knowing that they will have to make the required disclosures or not compete for new business.

Conclusion

PSC is opposed to this draft Order and recommends that it not be issued. PSC is deeply concerned about the potential impact this draft Order, if finalized in its current form, would have on federal procurement awards. This type of political information has been intentionally kept out of source selection to ensure a merit-based evaluation and award process, but the Order would make its disclosure a condition of award! While the putative purpose of the Order is to prevent "pay-to-play" contracting seen in some state procurement environments, the result will be to create the very "pay-to-play" environment on the federal level where none currently exits.

Thank you for the opportunity to present these comments. I look forward to any questions you may have.