



Turn Around America

AFL-CIO Recommendations for the Obama Administration

Procurement and Regulatory Policy

Departments/Agencies Covered

Office of Management and Budget

Office of Federal Procurement

Office of Information and Regulatory Affairs



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Procurement and Regulatory Policy

I. Procurement

Each year, the federal government buys more than \$300 billion worth of goods and services from federal contractors.¹ The government is required to purchase these goods and services only from companies that are deemed “responsible sources” – companies with the track record, business ethics and integrity, and operational capacity to deliver a quality product to the government on a timely manner.² Yet too often these contractors cheat the system, pay sub-standard wages, use components from overseas when they are supposed to produce goods domestically, overbill the government, and fail to turn in a quality product in a timely manner.³ Enforcement of prevailing wage laws for workers on federal construction and service contracts is weak. And the Bush Administration has skewed the government contracting system against workers and unions through a series of anti-worker, anti-union executive orders on important issues like project labor agreements and job retention on service contracts, and through aggressively pursuing the contracting out of federal work.

A new administration has the opportunity to reform the government contracting system by: immediately rescinding the Bush Administration’s hostile executive orders on project labor agreements and service contracts, among others; taking action to ensure that inherently governmental work is performed by federal employees; and instituting measure to ensure that taxpayer dollars are used to buy goods and services from responsible companies that respect workers rights.

A. The Scope of Work That is Being Contracted

The Bush Administration has aggressively undermined the concept of “inherently governmental” work, and has opened the door to contracting out of federal work and privatization of inherently governmental functions.

¹ U.S. Government Accountability Office, “Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process,” (July 2005), at 1.

² 41 U.S.C. 253b(c); 41 U.S.C. 403(7); 48 C.F.R. 9.103(a).

³ See, e.g., “Waste, Fraud, and Abuse Identified by Oversight Committee Investigations”, House Committee on Oversight and Government Reform, available at <http://oversight.house.gov/documents/20081003181709.pdf>; U.S. Government Accountability Office, “Worker Protection: Federal Contractors and Violations of Labor Law” (Oct. 24, 1995); U.S. Government Accountability Office, “Occupational Safety and Health: Violations of Safety and Health Regulations by Federal Contractors,” (Aug. 23, 1996).



A new administration should adopt a three-year moratorium on the contracting out of federal work until a complete audit and review of the outsourcing of all federal jobs, including a review and revisions to OMB Circular A-76 and related guidelines, can be completed. It should immediately restore language to E.O. 13180 that was deleted by the Bush Administration in E.O. 13264, so that air traffic services will be designated as an “inherently governmental function.” The administration should determine what additional actions are needed to preserve and protect inherently governmental work (e.g., administration of public benefit programs such as Medicaid and Food Stamps, federal corrections), including the insourcing of inherently governmental work that should not have been contracted out, so that the federal workforce is preserved and this work is not wrongly contracted out to private interests.

B. The Rules/Standards for Obtaining a Federal Contract

Under current law, the government can only contract with companies that are deemed to be “responsible contractors.” The meaning of this term is not clearly defined, and the requirement is not rigorously reviewed or enforced.

At the urging of the AFL-CIO, the Clinton Administration issued regulations making clear that contracting officers could disqualify a company from receiving a particular contract on grounds of not meeting the “responsible contractor” test if the company had a record of serious and pervasive non-compliance with the law. An earlier version of the proposed rules also required contracting officers to review a prospective contractor’s “capability” to perform the contract in question, which included a review of worker retention and other workforce factors.⁴ The rules also required disclosure of information by the prospective contractor about its record of compliance with the law. The rules were quickly repealed by the Bush Administration.⁵

A new administration should **strengthen the existing responsible contractor requirements** to ensure that government contracts go to high-road, law-abiding employers that provide good jobs and respect workers’ rights. The rules should cover subcontractors to the maximum extent possible.

The administration should create a **government-wide database**, searchable by employer through a common identifier, of violations of federal law in actions brought against employers by administrative agencies (e.g., OSHA, EPA, wage and hour, other). This will provide contracting officers with important data when evaluating a prospective contractor’s record.

In addition, the new administration should explore mechanisms for ensuring that as much **federally-funded work is performed in the United States** as possible. There needs to be stepped up enforcement of existing Buy American and Barry Amendment provisions and an upward revision of their coverage. Over the last seven years the Department of Defense has granted a record amount of waivers to these requirements. The broad use of

⁴ 64 Fed. Reg. 37360 (July 9, 1999).

⁵ 66 Fed. Reg. 66986 (Dec. 27, 2001).



offsets and the ability of so many countries to be counted as allies (and thus as U.S. producers for the purpose of meeting these procurement requirements) defeats the purpose of these procurement provisions.

C. The Rules of the Road for Companies with Federal Contracts

Action is needed to undo damage to workers' rights in the federal contracting system inflicted by the Bush Administration:

- **Project Labor Agreements.** The new administration should immediately repeal Executive Order 13202 as amended by E.O. 13208. The Executive Orders, signed on February 17 and April 8, 2001, respectively, revoked Executive Order 12836 of February 1, 1993, as well as the Presidential memorandum of June 5, 1997 entitled "Use of Project Labor Agreements for Federal Construction Projects." These executive orders should be immediately revoked, and at a later date a new executive order should be issued promoting appropriate use of project labor agreements on federal and federally-funded construction projects.
- **Job Retention for Service Workers.** The new administration should immediately repeal E.O. 13204 (Feb. 17, 2001), which repealed E.O. 12933, Non-Displacement of Qualified Workers Under Certain Contracts, issued under the Clinton Administration. E.O. 12933 directed federal agencies to include in building service contracts a provision requiring follow-on contractors to offer workers employed by the prior contractor the right of first refusal. The executive order applied to most federal building service contracts, including contracts for janitorial services, window washing, food service, laundry, protective services, lawn and grounds care, and inspection, maintenance, and repair of fixed equipment such as elevators, air conditioning, and heating systems. However, E.O. 12933 excluded service contracts for certain public buildings such as military installations, Postal Service facilities, veterans' hospitals, NASA installations, housing projects, and a few other types of federal facilities. The new administration should reinstate Executive Order 12933 and expand it by removing these exclusions.
- **Posting of Information about Workers' Rights under the National Labor Relations Act.** The new administration should repeal E.O. 12301, which requires federal contractors to post notices in their workplaces informing workers of their right not to join a union. E.O. 12301 should be replaced with an executive order that provides workers with information about the full scope of their rights under the National Labor Relations Act, including the right to form or join a union without retaliation.
- **Prevailing Wage Determinations.** The new administration should issue an executive order making it clear that the Department of Labor's coverage determinations under the Davis-Bacon Act and the Service Contract Act are binding on all federal agencies. The executive order should also give the



Department of Labor the authority to order compliance with its determinations, so that the Department is not required to litigate against other federal agencies when they are not in compliance.

- **Ban on Using Federal Money to Fight or Promote Unions.** The new administration should reinstate the regulations adopted by the Clinton Administration that barred the use of federal contract dollars to fight (or promote) unions, and that barred the reimbursement of legal fees incurred by the contractor in unsuccessfully defending against National Labor Relations Board and other legal proceedings brought against the contractor by the federal government.⁶
- **Respect contractor employees' pensions and health benefits.** The new administration should issue a clear directive to the Department of Energy that they should in no way interfere with DOE policy to fully reimburse federal contractors for expenses resulting from pension and medical benefits provided to contractor employees. DOE Notice 351.1, which revised that policy, expired on April 27, 2007 and has not been reissued.

II. Regulatory Policy

The Bush Administration has been vehemently anti-regulatory, except when it comes to imposing greater regulatory requirements on labor organizations. The Bush Administration has greatly enhanced OMB's role and its ability to impede agency rulemaking. It has extended OMB's reach to include informal guidance documents adopted by agencies, creating new layers of review and adding delay to even non-binding agency documents. OMB's political appointees have overruled the judgments of agency experts on numerous rules. The system has lacked transparency.

A new Administration needs to immediately signal that it will take a different approach to regulation. It needs to demonstrate that it will respect the judgments of the expert agencies and not allow OMB to impede the regulatory process. Early actions by a new administration should include the following:

- **Appoint an OIRA Administrator** who understands and respects the importance of regulation to protecting public health and the public interest, and who respects the preeminent role of agency experts.
- **OMB Review of Guidance Documents.** The new administration should repeal E.O. 13422 (Jan. 18, 2007), which amended E.O. 12866 to expand regulatory review by OMB to include guidance documents issued by agencies.
- **Freeze and Review Pending Regulations.** The new administration should immediately issue an executive order or other presidential directive freezing for 60 days all regulations under development by Executive Branch agencies and

⁶ 64 Fed. Reg. 37360 (July 9, 1999) (proposed rules); 65 Fed. Reg. 80256 (Dec. 20, 2000) (final rules).



regulations that have been issued in final form but have not yet gone into effect. The Clinton and Bush Administrations took a similar approach when they came into office. This short “time out” will allow for a systematic review of all pending new regulations not yet finalized or not yet in effect, to ensure that new regulations reflect the policy views of the new administration. The administration can then work with agencies and with Congress to continue, modify, or repeal particular regulations through the administrative process, through appropriations riders, or through the Congressional Review Act. This approach will allow the new administration to address last-minute Department of Labor regulations like:

- New union financial reporting rules (revised T-1, revised LM-2, LM-3 revocation procedures)
- DOL “secret rule” on risk assessment
- New MSHA rules on drug testing
- DOL rules interpreting the Fair Labor Standards Act

The new administration should review E.O. 12866 (Regulatory Planning and Review) and determine what reforms are needed to ensure timely, responsible review of agency regulations in a manner that does not delay the regulatory process or undermine the work of agency experts. Longer term, the new administration should undertake a review to determine what revisions are needed to the various statutes governing the regulatory process (e.g., the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Paperwork Reduction Act, the Unfunded Mandates Reform Act, 2 U.S.C. 1501, et seq., etc. These requirements, separately and collectively, have imposed tremendous burdens on agencies seeking to adopt protective regulations, with questionable benefits to the overall regulatory process or to public health and safety.

**Key Federal Agency Positions – Procurement and Regulatory Policy**

<u>Department</u>	<u>Agency</u>	<u>Position</u>	<u>Nature of Position</u>
White House	Office of Management and Budget	Director	PAS
White House	Office of Management and Budget	Deputy Director for Management (DDM)	PAS
White House	Office of Information and Regulatory Affairs	Administrator	PAS
White House	Office of Federal Procurement Policy	Administrator	PAS
Defense	Office of the Secretary	Under Secretary of Defense (Acquisition and Technology)	PAS
General Services Administration	Office of the Administrator	Administrator	PAS