

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

April 21, 2011

The Honorable Barack H. Obama
President of the United States
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

A draft Executive Order titled “Disclosure of Political Spending By Government Contractors” has come to my attention. As Chairman of the Small Business Committee, which works to see that Small Businesses have every opportunity to compete for federal contracts, I am deeply disturbed by this Executive Order. The Order, if enacted, would politicize public contracting and infringe on the free speech rights of American citizens. It would intimidate contractors and reward cronyism, all the while ignoring the prerogatives of Congress and the express findings of the Judiciary. This Executive Order must never be issued.

1. Forcing small businesses seeking contracts to disclose political contributions will wrongly politicize the federal procurement process.

Government contracts are supposed to be awarded to the contractor who provides the best value for the government. When contracting officers evaluate offers, they look at the price, technical approach, ability of the contractor to perform, and other specifically enumerated factors. All of this serves to increase competition, including small business participation and incentivize innovation, ensuring that the government acts as a worthy custodian of the taxpayer dollar.

A potential contractor’s political views should in no way affect any of these factors, so I am hard pressed to see why such information is germane to the contracting process. In order to insure that there isn’t even an appearance of impropriety, current law already prohibits federal contractors from making certain contributions during the course of negotiation and performance of a contract – a fact acknowledged by your own Order. In cases where the contributions are to third party entities, the companies have gone even further to ensure that their political speech is not taken into consideration at the time of contracting. Every effort has been made to make sure that contracting is not politicized.

The proposed Order will tear down the wall between contracting and politics. Right now, contracting officers do not have ready access to the history of a company’s political activities.

The Order states that contracting departments and agencies will “require all entities submitting offers for federal contracts to disclose certain political contributions and expenditures that they have made within the two years prior to the submission of their offer.” This takes political contributions and puts them directly in front of the contracting activity. Is it naïve as to assume that no one will ever use this information when evaluating contactors or writing requirements documents? Considering that the most senior contracting official in each agency is a political appointee, this seems disingenuous. The potential for misuse of this information becomes even more troubling in the context of suspension and debarment – political speech would now be available to the official deciding whether a company should be allowed to pursue federal contracts.

2. Forcing small businesses to disclose political records will allow this Administration to intimidate the business community and reward political allies.

This Order will either intimidate contractors not to get involved in politics, or make them believe that they need to contribute to the party in power if they want to compete for contracts. As Americans, our society functions best when all our citizens are actively engaged in the national political discourse. In particular, small businesses are acutely aware of the issues facing their communities. Every day, they confront the challenges posed by health care, impediments to job growth, issues with access to capital, high taxes, and the other important issues which the Federal government seeks to address. Silencing these small businesses robs our nation of an important voice in our political discourse.

The alternative is even more nefarious. Once political contributions are thrust in front of contracting agencies, contractors may feel pressure to curry favor with the President’s party by being able to produce a history of donations to the President’s party. Consequently, an Order that claims to prevent “pay-to-play” contracting may actually create a pay to play culture in federal contracting. As this law applies not just to companies, but to their senior employees as well, this could force individuals into political activity to curry favor.

It is important to note that nowhere in the draft Order is there a single mention of ensuring that this information be used appropriately. Small businesses received over \$100 billion in federal contracts in FY 2010 – approximately 20% of all prime contracts. Yet they are already afraid to complain about abuses in the procurement process for fear of retribution by agencies, even before politics enter into the equation. Limitations on the ability to speak and coerced speech are equally repugnant to a country where the First Amendment enshrines our belief in the absolute necessity of free speech.

My skepticism over the intentions of this Order is even further piqued by certain glaring omissions. If disclosing campaign contributions is truly necessary to ensure transparency into the way the Federal government spends taxpayer dollars, why would this Order apply only to federal contractors? Would not the taxpayers be equally well served if it applied to unions who

negotiate labor agreements with the Federal government or entities who win grants? Why are only for-profit entities candidates for transparency? These omissions speak volumes.

3. **This Executive Order circumvents both Congress and the Judiciary.**

In the United States, the Presidency is not imperial – it leads a branch equal to the Judiciary and the Legislature. However, the issuance of this Order is calculated to circumvent the will of Congress and the decisions of the Supreme Court.

The 111th Congress contemplated legislation that would have codified some of the provisions now found in the draft Order. At that time, the Democratically-controlled Congress did not act. Instead, the DISCLOSE Act barely passed the House, led by then-Speaker Nancy Pelosi, with the slimmest of margins – thirteen votes. The Senate, under the leadership of Senator Harry Reid, never took up the Act. To attempt to accomplish through executive dictate that which is within the purview of Congress is simply an abuse of the executive power.

The limitations of free speech in the proposed Order are also contrary to the Supreme Court's rulings on First Amendment rights. In *Citizens United v. Federal Election Commission*, the Court affirmed the rights of private citizens and companies to exercise their right to free speech through political donations. Seeking to deprive potential federal contractors of these rights shows a complete disregard for the Judiciary and for the Constitution.

I strongly urge you to not issue this proposed Executive Order, and to instead use your powers to ensure that contracting is a meritocracy, not a political plum.

Sincerely,



Sam Graves
Chairman
Committee on Small Business

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