

## Trump's Contracting By Twitter Likely To Backfire

By **Daniel Wilson**

*Law360, Nashville (January 23, 2017, 4:47 PM EST)* -- President Donald Trump's efforts to involve himself in the federal contracting process through Twitter are unprecedented, and could inadvertently drive up costs or touch off lawsuits if he doesn't soon take a more hands-off approach, attorneys said.

Presidents using their "bully pulpit" — a term coined by President Theodore Roosevelt — to promote their agendas is nothing new, attorneys noted. But Trump's use of Twitter to cajole, criticize and otherwise attempt to influence companies takes the practice to a different level, they said.

While rhetoric from both presidential candidates and presidents regarding cutting allegedly wasteful government spending is par for the course, no other president-elect has attempted to directly intervene in specific contracts before entering office in the way Trump has. Sitting presidents and Cabinet secretaries only rarely seek to directly involve themselves in individual deals, instead entrusting contract decisions to dedicated acquisition staff members, attorneys said.

"I'm not aware of a president doing quite what President Trump has done," Covington & Burling LLP partner Alan Pemberton said. "President [Jimmy] Carter certainly criticized wasteful spending [and] there have been criticisms of runaway spending in the Defense Department during the Clinton administration, but not the sort of focus on individual contracts that we've seen recently."

In the new president's range of Twitter broadsides, one common target is purported federal overspending, with the president making claims that he will slash costs on "out of control" procurement programs.

His ire toward allegedly wasteful federal spending has been directed in particular toward two high-profile deals: the U.S. Air Force's planned replacement for the Air Force One presidential jet, and the U.S. Department of Defense's massive F-35 fighter jet acquisition program.

On the Air Force One replacement, Trump has suggested the purported \$4 billion expected to be paid to The Boeing Co. — a figure not yet actually finalized, although close to current estimates — is too high, saying in no uncertain terms that he believes the deal should be nixed.

Attorneys said that though perhaps well intentioned, Trump's criticism has missed the target, as contract costs and cost growth are typically driven by the need to meet government requirements.

And his rhetoric may prove to be counterproductive to his aims of slashing government spending and increasing jobs in the U.S. It's likely to have a depressive effect on the industry, McCarter & English LLP government contracts practice group leader Franklin Turner claimed.

"I don't think he fully comprehends the chilling effect that [his tweets] actually have on the supplier base," Franklin said. "If you're a company ... are you going to want to enter into negotiations to supply things to the government, knowing that you have a head of state that is somewhat prone to volatility through his mobile phone?"

The F-35 program alone relies on around 1,250 U.S.-based suppliers and employs about 146,000 workers in the U.S. down the supply chain, Turner noted. And acquisition programs of the size and complexity of the F-35 program — a program estimated to cost around \$380 billion — are years if not decades in the planning, attorneys said.

As such, the potential for a long-planned deal to be turned upside down through an errant tweet may drive some companies away from doing business with the government, unable to risk the uncertainty, a particular problem for the new president given his plans to radically expand the military that will require extensive amounts of contracted work.

"I think sooner or later the president will realize that ... contractors are not there to hurt the public, they're there to help the public. They're literally the lifeblood of how the United States functions — they perform the services, they provide the goods, they are the morning, noon and night of our machinery," Franklin said.

The CEOs of both Boeing and F-35 prime contractor Lockheed Martin Corp. have met with Trump and promised to cut costs on the criticized programs, and more companies may follow suit if the president rails against them, afraid of adverse publicity or being unofficially frozen out.

But not all government contractors rely on federal contracts as much as Lockheed and Boeing, the No. 1 and No. 2 federal contractors by dollar amount in fiscal 2016.

As such, Trump may run into obstacles if he attempts to intervene in deals involving companies who aren't willing to voluntarily come to the table and renegotiate, attorneys claimed.

While presidents do have the power to direct broad long-term federal procurement policy and the influence to warn off agencies on pending deals that are yet to be signed, their ability to alter existing deals is a lot more circumscribed, attorneys said.

For example, although the president may be able to lean on an agency to get them to invoke a termination clause, a termination for default — alleging a contractor has not lived up to its end of the bargain — invites a legal challenge if the contractor disagrees.

A termination for the government's convenience can also be challenged in court, and even if accepted by the contractor, that company must then be paid out for all work done up to that point, plus a reasonable profit, which can be an expensive proposition, attorneys said.

Either way, the government can be left without the benefit of whatever capability it was looking for from that contract, and may have to spend additional time and money putting together a replacement deal, according to attorneys.

And with regard to putting together replacement contracts — and despite Trump's threat to replace the F-35 with an updated F/A-18 — the president cannot simply direct that a sole-source deal be entered into without risking a bid protest from aggrieved companies shut out from the process, attorneys noted.

Laws such as the Competition in Contracting Act, for example, require contracting officers to use competitive sourcing wherever possible, with only rare exceptions, and they are also legally required to exercise their own independent judgment to pick the bid that best fits requirements.

A particularly relevant cautionary example regarding negotiating through the correct channels already exists, attorneys said, pointing to the long-running saga stemming from the cancellation of the U.S. Navy's A-12 Avenger II attack aircraft program, originally canceled for default in 1991 following reports of delays and projected cost overruns.

It touched off long-running litigation including claims that the cancellation had not been an independent decision of the relevant contracting officer, but had instead been driven by then-Defense Secretary Dick Cheney, unsatisfied with the response of the Navy and program contractors to a "please explain" letter. The case was only resolved in 2014, through a settlement, after making a trip to the U.S. Supreme Court along the way.

"It's important to remember that the president certainly has considerable power in the bully pulpit, but contractual actions do have to be translated into writing and things have to happen in accordance with the complex and slow-moving ... federal contracting process and accordance with all the laws that apply to the contracting process," Pemberton said. "Ultimately, the i's have to be dotted and the t's have to be crossed by a contracting officer."

--Editing by Katherine Rautenberg and Emily Kokoll.