

What Gov't Contracting Might Look Like Under Biden

By **Joseph Berger and Thomas Mason**

After a hard-fought 2020 election year, President-elect Joe Biden and Vice President-elect Kamala Harris are now faced with the challenges of implementing their plans and achieving their policy objectives through governance.

Their plans reflect that government contracts and grants will play a key role in their administration's economic and domestic agendas, pandemic response, and proposals for global economic and technology leadership.

Among the challenges the new administration will face are the ongoing COVID-19 pandemic, the economic recession and recovery, an array of national security threats and other economic, environmental and geopolitical challenges. During his campaign throughout the spring and summer, Biden released a series of plans and proposals to address these challenges and present his rationale for governance.[1]

The Biden-Harris plans rely heavily on federal investments implemented through government contracting and grants to achieve their goals and objectives. These plans offer a roadmap to the future Biden administration's policy priorities and potential actions.

In a July speech in Pennsylvania, Biden announced his broad "Build Back Better" plan, calling for \$400 billion in new government procurement "to modernize our infrastructure, replenish our critical stockpiles and enhance national security," and \$300 billion in new research and development "to sharpen America's competitive edge in new industries." Biden said, "American manufacturing was the 'arsenal of democracy' in World War II, and has to be part of the engine of new prosperity in America now."

Following the election, Biden has reiterated his broad economic plans in remarks during transition and cabinet announcements, and while previewing proposals to be submitted by his administration to the next Congress.

The notable reliance on contracting and grants in Biden's proposals may be in part due to Biden's experience as vice president, tasked by President Barack Obama to oversee implementation of the American Recovery and Reinvestment Act of 2009, which involved significant investments in infrastructure and related national priorities.

Government contracts will also play a key role in the new administration's pandemic response. During the campaign, Biden and Harris proposed plans to coordinate critical materials for all 50 states, to ramp up production of necessary supplies by fully invoking the Defense Production Act, and to establish a pandemic testing board modeled on former President Franklin D. Roosevelt's War Production Board.[2]

They also proposed investing \$25 billion in vaccine manufacturing and distribution.[3] The Biden administration must assume management of contracts under the successful Operation Warp Speed, and of continuing vaccine distribution and administration through 2021 and beyond.



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Based on the Biden-Harris campaign proposals, the government and its contractors can expect increased emphasis on domestic infrastructure, clean energy, new technologies and Buy American requirements. Biden's comments during the campaign also suggest the defense budget will remain relatively stable, with a continuing focus on cyber capabilities and emerging technologies.

Based on experience under the Obama-Biden administration, contractors can also expect increased regulation, enforcement and labor protections, as well as insourcing of governmental functions.

The Biden-Harris plans depend in significant part on legislation in the U.S. Congress, where control of the U.S. Senate currently depends on the outcome of two Georgia Senate races. If the Republican Party retains control of the Senate, many of Biden's legislative proposals will face significant hurdles to enactment.

However, his proposals will still serve as useful guides to his administration's priorities. Also, Biden may find common ground with Republican senators on certain issues, including, significantly, modernizing the nation's infrastructure.

It is therefore useful to consider the plans Biden and Harris proposed during the campaign, and the priorities they set for the next four years, including those relating to government contracting. These include overlapping proposals on procurement, research and development, infrastructure, transportation, clean energy, U.S. supply chains, and Buy American requirements.

Biden proposed a series of major new investment initiatives to promote these U.S. national interests, which he proposed would be "the largest mobilization of public investments in procurement, infrastructure, and R&D since WWII." [4]

A Proposed "Historic Procurement Investment"

As part of Biden's campaign plan to "ensure the future is 'Made in All of America,'" he put forward a \$400 billion proposal to "make a historic procurement investment," that, together with additional federal purchases over four years, would "power new demand for American products, materials, and services." [5]

This plan is intended to support U.S. manufacturing and the domestic industrial base with new procurement, and would amount to mobilization of industry through contracting on an unprecedented peacetime scale, a time "outside the context of war, [when] we have not historically used our federal purchasing power to aggressively promote U.S. national interests." [6]

The Biden plan would use procurement commitments to "provide a strong, stable source of demand for products made by American workers and supply chains composed of American small businesses ... in vital sectors from steel and cars to robotics and biotechnology."

Biden here committed to purchase tens of billions of dollars in clean vehicles and clean energy generation capacity; American steel, cement, concrete, building materials and equipment; critical medical supplies and pharmaceuticals; and future purchases in "advanced industries like cutting-edge telecommunications and artificial intelligence."

The Biden plan also includes a major commitment to support the American auto industry with "bold federal procurement and Buy American provisions" to create demand for U.S.

auto manufacturing.

The Biden procurement plan would require that these government contracts support American jobs with separately proposed worker protections. The plan states the procurement effort would also "be designed to support small businesses and those owned by women and people of color," and proposes to launch a new federal procurement center that would be "a first-of-its-kind program to help minority-owned firms apply for and win federal government contracts."

Even though this expansive procurement plan may not be adopted by Congress on the scale proposed, its fundamental tenets may set the stage for government contracting initiatives under the Biden-Harris administration. Government contracting, when employed in the strategic manner envisioned by these proposals, can support a variety of greater national priorities, including critical support for the U.S. economy, American manufacturing and leadership in emerging technologies.

Research and Development: "Well Beyond the Apollo Program"

The Biden-Harris "Made in All of America" plan also proposes a \$300 billion investment over four years to increase U.S. R&D "on a scale well beyond the Apollo program." [7]

The plan proposes this new R&D to support "breakthrough technologies — from electric vehicle technology to lightweight materials to 5G and artificial intelligence," and to support jobs in U.S. manufacturing and high-value technology industries. [8]

The "Innovate in America" part of the plan proposes a "major investment in federally funded R&D across all 50 states" intended to "secure our global leadership in the most critical and competitive new industries and technologies."

Biden's plan notes that China is on track to surpass the U.S. in R&D and, by some estimates, will overtake the U.S. in R&D spending in 2020, "in an effort to overtake American technological primacy and dominate future industries."

By comparison, in 1964 U.S. public federal R&D support was 2% of gross domestic product, compared to only 0.7% today. This difference amounts to nearly \$250 billion less in annual federal R&D spending.

Biden's R&D innovation plan would support domestic industries it says can lead the world in advanced materials, health and medicine, biotechnology, clean energy, autos, aerospace, artificial intelligence, telecommunications, and emerging technologies. Biden proposes to allocate research funding to various federal research agencies, as well as to colleges and universities.

To provide capital financing for small businesses, Biden's plan proposes "a scaled-up version of the Small Business Innovation Research ... program, 'America's seed fund,' which provides capital to small businesses pursuing R&D commercialization in concert with research institutions." He also proposes state-of-the-art workforce skill development, and increasing pathways for women and minorities in critical technology jobs.

These proposals reflect the reality that while the U.S. has historically led the world in technological achievement, it is currently facing many challenges and increasing threats to its technology leadership, including from near-peer competitors.

Even if Congress does not adopt Biden's plans on the scale proposed, it must continue to address the nation's and the world's technology challenges. The new administration's proposals may give Congress opportunities to consider greater R&D funding for a greater range of new and emerging technologies.

The Biden-Harris plan also reflects an optimistic view of what can be accomplished through federal investments. Taken together, their plans for procurement, grants and R&D investment, as well as for infrastructure, transportation and clean energy, if implemented, could amount to government contracting on a historic scale, with the potential for unprecedented accomplishments in support of domestic manufacturing capabilities.

Transforming the Nation's Crumbling Infrastructure

The Biden campaign released an overlapping infrastructure and transportation plan proposing a \$1.3 trillion investment over 10 years to transform the nation's crumbling infrastructure.[9] Under this plan, the administration would spend \$50 billion over its first year "to kickstart the process of repairing our existing roads, highways, and bridges," and for federal research to launch a new generation of low-carbon trucking, shipping and aviation technologies.

Biden proposed to spark a second great railroad revolution, noting that the first great railroad expansion helped drive the industrial revolution, but that the U.S. has since fallen behind Europe and China in rail safety and speed. Biden proposed to "make sure that America has the cleanest, safest, and fastest rail system in the world."

He also proposed initiatives for municipal transit, aviation and airports, and freight infrastructure, including inland waterways and ports. He proposed to double transportation grant programs and increase funding for the U.S. Army Corps of Engineers.

Biden proposed infrastructure planning to help achieve a clean energy economy, including a major expansion of renewable energy production. He proposed investments in resilient infrastructure to respond to the impact of climate change, and to help cities withstand storms, floods, wildfires and sea level rise. He proposed to double federal investments in drinking water and water infrastructure.

The plan notes that historically, major infrastructure projects, "from the Erie Canal to the Hoover Dam," could reshape entire regions of the country. Biden proposed to build transformational regional projects with a \$40 billion, 10-year "Transformational Projects Fund," which would provide grants for projects too large and complex for existing programs.

Although infrastructure was a major issue in the 2016 presidential campaigns, Congress has taken little action since then. The nation's infrastructure remains in need of major reinvestment, and lawmakers have described infrastructure as an area of potential bipartisan consensus. The Biden-Harris administration and the new Congress, regardless of party leadership, will have new opportunities to work together to address these pressing and long-standing national needs.

Clean Energy: "America To Be the Global Leader"

Biden's campaign released a separate, overlapping \$2 trillion plan for an "equitable clean energy future." [10] While this plan is focused on energy infrastructure and combating climate change with a plan to reach net-zero emissions by 2050, it also includes significant procurement proposals.

Biden's clean energy plan proposed to:

use all the levers of the federal government, from purchasing power, R&D, tax, trade, and investment policies to ... position America to be the global leader in the manufacture of electric vehicles and their input materials and parts [and] ... use the power of federal procurement to increase demand for American-made, American-sourced clean vehicles.[11]

Biden here proposed a broader "historic investment in clean energy innovation," again relying on federal procurement and R&D to position the U.S. as the global clean energy leader.[12]

For example, a specific focus of Biden's R&D and procurement proposals is battery technology, for use in electric vehicles and the electricity grid, and to support renewable energy technologies, including solar and wind.

Biden also proposed a Day 1 executive action addressing carbon emissions by "using the Federal government procurement system — which spends \$500 billion every year — to drive towards 100% clean energy and zero-emissions vehicles." [13]

While congressional actions would make a significant difference, even without Congress, Biden can be expected to take significant executive actions to employ the power of the federal procurement system to promote U.S. industrial capacity in support of clean energy.

Buy American Under Biden

Biden's plan says his administration will "use the government's purchasing power to Buy American, boosting U.S. industries through a historic procurement investment." [14] Buy American proposals are central to his plan to invest in American products, services and supply chains.

Biden's plan for a national commitment to Buy American says he will:

- "Tighten domestic content rules." Biden criticized so-called loopholes in the law and his plan pledges to require more legitimate American content.
- "Crack down on waivers to Buy American requirements." Biden criticized contracting officer waivers and proposed to publish waiver requests on a website for all potential bidders.
- Extend Buy American principles to R&D, which should support American manufacturing and sourcing.
- "Strengthen and enforce Buy America." Different from Buy American requirements, these provisions would require that "steel, iron, and manufactured products used in transportation projects are melted, mined, and manufactured in the U.S."

- "Update the trade rules for Buy American." Biden proposed to "work with allies to modernize international trade rules ... to make sure that the U.S. and [its] allies can use their own taxpayer dollars to spur investment in their own countries."

Under a separate Biden-Harris plan, Biden proposed a series of executive actions in his first week in office to strengthen Buy American principles.[15] These executive actions would:

- "Use authorities under the Defense Production Act and the Federal Property and Administrative Services Act of 1949 to enforce Buy American rules [and] issue an executive order using the full extent of these powers."
- "Expand and tighten Buy America rules for public infrastructure projects."
- "Expand the scope of critical materials that must be made with U.S. origin components — beyond critical medicines."
- "Create a new 'Made in America' Office within the White House Office of Management and Budget [that] will manage American procurement policy to ensure compliance with Buy American rules."

Buy American principles were a notable aspect of Trump's 2016 and 2020 campaigns, and a subject of executive actions by his administration. The Trump administration increased agency attention to the Buy American Act, and this renewed government focus will continue to increase under the Biden administration.

Buy American principles to support domestic manufacturing, given they have been a priority for both Trump and Biden, may be another bipartisan area of potential consensus for Biden and the next Congress.

U.S. Supply Chains and the Defense Production Act

Biden proposed a separate plan "to rebuild U.S. supply chains and ensure the U.S. does not face future shortages of critical equipment." [16]

U.S. supply chain risks encompass many types of national security concerns, including the urgent needs for medical supplies for the pandemic response, but also U.S. capabilities to manufacture critical products across a broader range of industries.

Congress has enacted numerous and extensive legislative measures focused on the security of the U.S. and global supply chains in recent years, including within the annual defense authorization acts, and this is another potential area for bipartisan consensus.

The Biden plan states that the U.S. "needs to close supply chain vulnerabilities across a range of critical products on which the U.S. is dangerously dependent on foreign suppliers." Critical product areas identified include energy and grid resilience technologies, semiconductors, key electronics and related technologies, telecommunications, and key raw materials.

Biden's plan says in his first days in office he will initiate a 100-day review to "identify critical national security risks across America's international supply chains and ask Congress to enact a mandatory quadrennial Critical Supply Chain Review."

Biden put forward numerous proposed actions supporting U.S. supply chains that rely on government contracting, many of which may be pursued through executive actions, that would:

- Use the full power of the federal government to rebuild domestic manufacturing capacity in critical supply chains.
- Use the Defense Production Act to manufacture critical products, including but not limited to those immediately needed to respond to the COVID-19 pandemic. "As President, Biden will use the DPA to its fullest extent to rebuild domestic manufacturing capacity in critical supply chains, using the lessons learned from the COVID-19 pandemic and applying them to our national needs."
- "Use federal purchasing power to bolster domestic manufacturing capacity for designated critical products." In addition to DPA authority, Biden would use purchasing power to support products designated as critical to U.S. national security.
- "Build long-term supply chain resilience for pharmaceuticals .. [and] use the Biomedical Advanced Research and Development Authority ... to spur medical production."
- Use the government's leverage as the "largest purchaser of health care ... to encourage pharmaceutical companies to make key drugs, drug inputs, and medical devices in the United States while ensuring fair and transparent pricing."
- Increase U.S. strategic stockpiles of medical supplies and critical goods "while using federal procurement authorities to ensure that stockpiled products are made in the U.S. to the greatest extent possible, thereby creating an incentive for on-shoring production of those goods."

While the DPA was invoked by the Trump administration in the course of its pandemic response, Biden has proposed using the DPA to its fullest extent, and his campaign and transition team have repeatedly stated he will use this law more expansively.

Thus, while many commercial companies were introduced to the DPA for the first time during the pandemic response, use of the DPA and related authorities can be expected to increase under the Biden-Harris administration, as it simultaneously confronts the pandemic's winter surge, the need for economic recovery and additional U.S. supply chain issues vital to national security.

Continuing Reliance on Contractors

Four years ago, **in an article we published** on Law360, we wrote that reliance on government contracting would continue under a new administration, like all presidential administrations before, including those that won WWI, WWII and the Cold War, built the transcontinental railway, the federal highway system and the earliest versions of the internet, and sent U.S. astronauts into space, and landed them on the moon.

Trump and Biden have both taken inspiration from these national accomplishments achieved with help from American industry and innovation. Biden will even inherit plans for a new moon landing under NASA's Artemis lunar exploration program, which advanced significantly under the outgoing administration and intends to return humanity to the moon within the next four years.

Much as four years ago, the Biden administration, in many respects like the Trump, Obama and Bush administrations, will need to rely on government contractors to improve national security, respond to natural disasters, rebuild American infrastructure and implement other policy objectives in pursuit of the national interest.

In addition to all of this, the new Biden-Harris administration will need to manage the immediate pandemic response and long-term economic recovery, while addressing environmental challenges, the nation's manufacturing, technology and cybersecurity capabilities, and the advancement of American leadership amid great power competition.

Government contracts are essential to the nation's work, just as they were four years ago and under prior presidential administrations. This will continue to hold true under President Biden.

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[1] This article discusses proposals relevant to government contracting reflected in several of the Biden and Biden-Harris plans released during the 2020 presidential campaign, as noted below.

[2] "Joe and Kamala's Plan to Beat COVID-19," available at <https://joebiden.com/covid19/>.

[3] See id.

[4] "The Biden Plan to Ensure the Future is 'Made in All of America' by All of America's Workers," a campaign proposal available at <https://joebiden.com/made-in-america/#>.

[5] Quotations in this section reference the "Made in America" plan, *supra*, note [4].

[6] This plan states, "History has shown that when the government commits to make significant purchases in targeted, tradable sectors, it positions U.S. manufacturers to create good American jobs by supplying our own communities and selling more products to the rest of the world. But outside the context of war, we have not historically used our federal purchasing power to aggressively promote U.S. national interests."

[7] See notes [10]-[12] below.

[8] See the "Made in America" plan, note [4], for quotations in this section concerning proposals for research and development.

[9] Quotations in this section reference "The Biden Plan to Invest in Middle Class Competitiveness," available at <https://joebiden.com/infrastructure-plan/>.

[10] Quotations in this section reference "The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future," available at <https://joebiden.com/clean-energy/#>.

[11] This Clean Energy plan states that as part of the "historic commitment to increasing procurement investments, Biden will make a major federal commitment to purchase clean vehicles for federal, state, tribal, postal, and local fleets." Further, "by providing an immediate, clear, and stable source of demand, this procurement commitment will help to dramatically accelerate American industrial capacity to produce clean vehicles and components," while upgrading three million vehicles in these fleets.

[12] This plan further states, "A major focus of Biden's commitment to increase federal procurement by \$400 billion in his first term will be purchasing the key clean energy inputs like batteries and electric vehicles that will help position the U.S. as the world's clean energy leader. And, as part of Biden's historic commitment to accelerate R&D investment on a scale well beyond the Apollo program, he will focus on strategic research areas like clean energy, clean transportation, clean industrial processes, and clean materials over the next four years."

[13] "The Biden Plan for a Clean Energy Revolution and Environmental Justice," available at <https://joebiden.com/climate-plan/>.

[14] Quotations in this section reference "The Biden Plan to Ensure the Future is 'Made in All of America' by All of America's Workers," available at <https://joebiden.com/made-in-america/#>.

[15] Quotations here reference "The Biden-Harris Plan to Fight for Workers by Delivering on Buy America and Make It in America," available at <https://joebiden.com/the-biden-harris-plan-to-fight-for-workers-by-delivering-on-buy-america-and-make-it-in-america/>.

[16] Quotations in this section reference "The Biden Plan to Rebuild U.S. Supply Chains and Ensure the U.S. Does Not Face Future Shortages of Critical Equipment," available at <https://joebiden.com/supplychains/>.

[17] <https://www.thompsonhine.com/uploads/1137/doc/GovtContractsUnderTheTrumpAdministration0.pdf>.