

Contracting by Executive Order: Courts and Congress Push Back on Contractors' Behalf

October 2022

Federal contractors are all too familiar with having new requirements imposed through executive orders, which often direct the creation of new Federal Acquisition Regulation (FAR) clauses to be inserted into government contracts. Recent examples include President Biden's Executive Order (EO 14042), President Trump's Executive Order on combating race and sex stereotyping (EO 13950), and President Obama's Executive Order on fair play and safe workplaces (EO 13673).

The executive orders and FAR clauses frequently impose significant new compliance burdens on government contractors, though the clauses rarely provide a mechanism under the contract for recovery of the associated additional compliance costs. Some clauses are imposed through unilateral modifications without any adjustment to the contract price. Even for new clauses added to contracts through modifications that are ostensibly "bilateral," contracting officers are often reluctant to agree to an equitable adjustment to compensate the contractor for implementing the new requirements.

Recent developments suggest the tide may be shifting in contractors' favor, however, as both federal courts and Congress have taken steps to push back on Presidents' expansive use of executive orders to impose new requirements on federal contractors.

Courts Strike Down Executive Orders Aimed at Federal Contractors

Last year, several federal district courts blocked the Biden Administration from enforcing the federal contractor COVID-19 vaccinate mandate. In August 2022, the U.S. Court of Appeals for the

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Eleventh Circuit issued a decision upholding an injunction of the vaccine mandate in seven states. In doing so, the court found that the President likely exceeded his authority under the Federal Property and Administrative Services Act to prescribe policies and directives necessary to promote an economical and efficient federal procurement system. This followed a nationwide injunction of the Fair Pay and Safe Workplaces Executive Order and FAR clause, issued by a federal district court in October 2016 on the ground that they conflicted with labor laws enacted by Congress.

As a result of these decisions, there is a growing sense that federal courts will more closely scrutinize Presidents' use of executive orders to impose new requirements on federal contractors. They likely will also embolden contractors and trade associations to challenge new requirements imposed as a result of new executive orders in the future.

Senate NDAA Provision Would Make New Executive Orders a Contract 'Change'

Congress is also getting in on the act. In the Senate version of the National Defense Authorization Act (NDAA) for FY2023, there is an under-the-radar provision that has the potential to dramatically change the practice of contracting by executive order, at least for U.S Department of Defense (DOD) contractors.

Section 821 of S.4543 would mandate that the insertion of any clause implementing the requirements of an executive order into a DOD contract "shall be treated as a change directed by the contracting officer pursuant to, and subject to, the Changes clause of the underlying contractual instrument."

If included in the final NDAA, this provision could be a game changer for DOD contractors. By making new executive order requirements a "change," contractors would have increased leverage to demand additional time and other relief as a result of new FAR clauses inserted into their contracts. More importantly, contractors would automatically be entitled to recover the costs of implementing the new requirements through an equitable adjustment under the Changes clause.

Executive orders aren't going away. Presidents will continue to use them to advance their policies through the federal acquisition process, especially given the challenges they face trying to push their agendas through a divided Congress. But these recent developments may finally give contractors some realistic options for pushing back, or at least a contractual mechanism to recover the costs of implementing Presidential policies.