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NEWSLETTER

Navigating a New Judicial Landscape: Executive Actions Under FPASA Face Scrutiny

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A long-time bipartisan practice may be getting a fresh look from federal courts. Historically, presidential administrations have leveraged government contracts to implement various policy aims – sometimes those unrelated to the work actually performed under a given contract. (Think FAR 52.226-8, Encouraging Contractor Policies To Ban Text Messaging While Driving.) As it has become more difficult to legislate desired policies through Congress, federal contracts and the large federal contracting workforce are an attractive target for an administration to quickly amass policy points. But the long-accepted conventional wisdom that administrations have *carte blanche* authority to impose policy preferences via government contracts may be facing judicial headwinds.

In recent years, there has been a surge in judicial scrutiny of Executive actions taken under the Federal Property and Administrative Services Act (FPASA). This trend is particularly evident in cases with a political valence, such as the contentious COVID-19 vaccine mandate, but the courts' rationales for judicial review are broader than politics. Understanding and monitoring this trend is crucial for contractors and practitioners who need to navigate the complex regulatory environment and ensure compliance with federal policies while identifying potential opportunities to challenge some requirements in certain instances.

Presidential Authority Under FPASA

FPASA grants the President considerable authority to issue policies and directives aimed at promoting efficiency, economy, and effectiveness in federal property management and procurement. As relevant here, the statute identifies as its "purpose" to "provide the

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Federal Government with an economical and efficient system" for activities including "[p]rocuring and supplying property and nonpersonal services, and performing related functions." *See* 40 U.S.C. § 101. And it further authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," but provides that those "policies must be consistent with this subtitle." *Id.* § 121(a).

Historically, this authority has been used to implement a wide range of policies, including labor standards, environmental regulations, and public health measures. Some examples include: President Lyndon Johnson requiring government contractors to take affirmative action to ensure that employment practices are free of racial bias; Presidents Bill Clinton and George W. Bush imposing various environmental protection measures; President Barack Obama increasing the minimum wage for federal contractor employees; President Donald Trump restricting broad categories of diversity training; and President Joe Biden again increasing the minimum wage for federal contractor employees.

It is far from clear that any of those policies could have possibly been achieved through the ordinary means of setting national policy: legislation passed by Congress and signed into law by the President. In that regard, the last three examples are especially notable because they occurred in a time of polarization and congressional gridlock. If those administrations had the mandate and political support to pass legislation to implement those goals on a national scale, it's hard to imagine why any would bother with Executive Orders that implicated only government contractors. Put simply, an Executive Order under the authority of FPASA was likely the only means through which those administrations could achieve their policy goals on any meaningful level. And as far as opponents and proponents of those policies were concerned, until recently, few doubted those administrations' authority to implement those policies through federal contracts.

In the last few years, however, courts have demonstrated an increasing willingness to entertain challenges to the President's authority under FPASA, particularly concerning policies with significant economic and social implications (also known as political "hot potatoes") that arguably veer from the Act's goal of ensuring an "economical and efficient system" for procurement.

The most prominent example concerns the COVID-19 vaccine mandate. On September 9, 2021, President Biden issued Executive Order 14042, requiring federal contractors to ensure that their employees were vaccinated against COVID-19. Litigation ensued almost immediately, and three U.S. Circuit Courts of Appeals held that the mandate was unlawful because it exceeded the President's authority under FPASA, which those courts emphasized was limited to ensuring an "economical and efficient system" for procurement. A longtime test that many courts had employed previously was whether there was a "sufficiently close nexus" between the policy and "economy and efficiency." While not every Circuit Court here endorsed that test, most found that the mandate did not satisfy it. A common theme in each decision was that the mandate ran afoul of the "Major Questions Doctrine" that requires Congress to speak clearly when authorizing the Executive branch to take actions of, for lack of a better word, major significance.

Another recent, and perhaps more broadly sweeping, example of judicial skepticism arose from a challenge to President Biden's increase of the minimum wage for federal contract employees. Although the Tenth Circuit found that the increase was within the President's authority under FPASA, that panel did so over a notable

dissent. Judge Allison Eid would have found the Procurement Act itself violated the Nondelegation Doctrine because it "grants the President nearly unfettered power to create any policy ... under the guise of economy and efficiency." The Nondelegation Doctrine arises from broader separation of powers principles where each of the three branches of government holds its area of authority, and as relevant here, it would be unconstitutional for Congress to "delegate" its legislative authority to the President without appropriate limitations. While Judge Eid's position did not carry the day, it is noteworthy because (i) it is a view held by at least one Circuit Judge that (ii) is also a view that was not widely discussed or debated (much less held) within the procurement community even just a year ago. The law can move fast, and this is a development worth keeping tabs on.

Implications for Government Contractors

The increased judicial scrutiny of FPASA-implemented policies has significant implications for government contractors, highlighting the need for proactive risk management and compliance strategies, as well as identifying opportunities to challenge unreasonable policies.

Managing Risks

Legal Uncertainty and Compliance Challenges: The trend of courts striking down or questioning Executive actions under FPASA creates obvious uncertainty for contractors. This uncertainty can complicate contract negotiations and compliance efforts, as contractors may face changing regulatory requirements and ongoing legal disputes during bidding and negotiations. The vaccine mandate is a perfect example. While that specific circumstance will not (one hopes) arise again anytime soon, it's undeniable that contractors were in a difficult spot. Whatever their views of the merits of the mandate, they were forced to make decisions in a tense environment about how to comply with a politically charged policy under legal challenge and risked losing talent no matter how they came down. That political dynamic is not likely to change soon, so contractors may find themselves facing obligations under Executive Orders that are hotly contested and subject to litigation.

This new era requires contractors to remain vigilant and adaptable. That includes staying informed about legal developments and potential changes in regulatory environments. Turning again to the vaccine mandate, the state of play there was changing by the day, with the mandate operative in some regions but unenforceable in others. In these situations, there is no substitute for legal counsel, in-house or otherwise, who monitor these developments and can provide real-time advice.

Contract Terms and Negotiations: Contracts may include clauses that require compliance with Executive Orders and other regulatory mandates. To the extent possible, contractors may consider incorporating terms into their proposals that account for potential regulatory changes and ensure that they are protected against unforeseen compliance costs.

Identifying Opportunities

While the recent judicial skepticism related to FPASA presents challenges contractors must face, it also presents opportunities. Contractors were long thought to be bound by any policy preference that a given administration wished to impose via contract. That view is probably no longer a sound one. If an administration attempts to implement its policies by imposing contractual requirements that are unworkable or unconscionable, contractors may have judicial recourse, at least if their concern fairly fits in one of the following avenues for legal challenges.

- **Nexus to Statutory Objectives**: Though not a universally adopted test, most courts have looked to whether Executive actions under FPASA directly promote the statutory objectives of economy and efficiency in federal procurement. Contractors can challenge policies if there is no clear or direct connection between the policy and these statutory goals. These challenges should assess whether the policy has a clear and demonstrable connection to promoting economy and efficiency in federal procurement. If the connection is weak or indirect, this could be a strong basis for a challenge.
- **Major Questions Doctrine**: This doctrine holds that significant policy decisions with broad economic and social implications require clear, specific, and explicit congressional authorization. Policies that involve those concerns may be vulnerable to an argument that such policies overstep Executive authority without explicit congressional backing. Here, contractors should determine if the policy involves significant economic or social implications that would require clear congressional authorization. Policies with broad impacts are more susceptible to challenges under the major questions doctrine.
- **Nondelegation Doctrine**: This also requires clear and specific guidelines from Congress, this time as to how it delegates authority to the Executive branch. A policy without a clear and specific authorization for the policy in question may violate the nondelegation doctrine. To the extent that an Executive Order has a sufficient nexus to FPASA and does not contravene the Major Questions Doctrine, that order may still be promulgated under an unconstitutional delegation of Congress' legislative power. Here, again, contractors should analyze whether FPASA provides specific and clear authorization for the policy. If the delegation of authority is too broad or vague, it may violate the nondelegation doctrine.

Conclusion

The judicial trend of heightened skepticism towards Executive actions under FPASA presents significant challenges for government contractors who merely wish to do their job and comply with ever-changing requirements. But that same scrutiny also provides an opportunity to challenge problematic policies forced on them just because they do business with the government. In either case, staying informed about legal developments and engaging legal counsel to navigate these challenges is crucial for contractors aiming to protect their interests in an evolving regulatory landscape.