

Complying with Executive Orders

Written by Nick Sanders

Tuesday, 24 November 2020 00:00

Apologies for the dearth of blog posts in recent weeks. I've been ... distracted ... by other events/issues/concerns associated with national events. It's been a bit of a struggle to muster the energy to write about the mundane topics associated with government contracts.

Finally, I think I found a topic that sort of combines both things—the national drama and government contracts. And I hope I can pull it off without offending anybody!

I want to discuss Executive Orders and compliance therewith.

President Trump has issued a number of Executive Orders (EOs) in recent days. Since September, 2020, 12 EOs have been issued, ranging from “Establishing the One Trillion Trees Executive Council” (EO #13955, published 10/16/2020) to “Addressing the Threat to the Domestic Supply Chain From Reliance on Critical Minerals From Foreign Adversaries and Supporting the Domestic Mining and Processing Industries” (EO #13953, published 10/05/20). All told, as of today President Trump has issued 195 Executive Orders. Some of the EOs get more publicity than others, and some impact government contracting more than others.

To be clear: I'm not picking on President Trump. All Presidents issue Executive Orders, to a greater or lesser extent. The first EO was issued by President George Washington in 1789. Here's [a link](#) to the Federal Register site that compiles EOs. If you follow the link, you'll see that, while President Trump's quantity is higher than other recent Presidents, it's not super incredibly higher either. For example, Bill Clinton issued 254 EOs during the eight years of his Presidency. Similarly, George W. Bush issued 291 EOs during his eight years. Thus, Trump's 195 issued over a bit less than four years is higher than Presidents of the recent past—but it's not 200% higher. I would say it's within historical norms.

The issue to be discussed is whether a government contractor must comply with an Executive Order. If so, when and how? What are the remedies associated with non-compliance, if any?

First, what is an Executive Order? Here's a link to a solid 2014 [article](#) on that topic, published by the Congressional Research Service. According to the authors, an EO is the result of the inherent powers of the Presidency, granted to the Executive Branch by the U.S. Constitution.

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The authors wrote—

While the President's ability to use executive orders as a means of implementing presidential power has been established as a matter of law and practice, it is equally well established that the substance of an executive order, including any requirements or prohibitions, may have the force and effect of law only if the presidential action is based on power vested in the President by the U.S. Constitution or delegated to the President by Congress. The President's authority to issue executive orders does not include a grant of power to implement policy decisions that are not otherwise authorized by law. Indeed, an executive order that implements a policy in direct contradiction to the law will be without legal effect unless the order can be justified as an exercise of the President's exclusive and independent constitutional authority. ... [I]f issued under a legitimate claim of authority and made public, a presidential directive could have the force and effect of law, 'of which all courts are bound to take notice, and to which all courts are bound to give effect.'

The U.S. Supreme Court opined on the limits of Presidential power as exercised via EO in its 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579). According to the authors of the CRS study quoted above, that decision is more notable for the five concurring opinions than for the majority opinion. Among those concurring opinions, "Justice Jackson's has proven to be the most influential." In his concurring opinion, Justice Jackson identified three groupings of EO, based on each one's relationship to Congressional authority. In the first category, the President is executing an express or implied authority granted by Congress. In the second category, Congress has neither granted nor denied authority to the President. In the third category, the President's actions are "incompatible with the express or implied will of Congress."

Regardless of which category an EO falls under, by their very nature Executive Orders are not permanent directives. As the CRS authors noted, "The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor." As Presidential Administrations change, often the very first actions taken are to revoke or modify the prior President's EOs—especially those EOs that have impacted an agency's rulemaking process. Moreover, Congress may overturn an EO by passing a bill to do so, though that is a relatively rare occurrence. Finally, the CRS authors noted that—

Congress may also inhibit the implementation of an executive order by preventing funds from being used to implement the order. For example, Congress has used its appropriations authority to limit the effect of executive orders by denying salaries and expenses for an office established in an executive order, or by directly denying funds to implement a particular section of an order.

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(Footnotes omitted.)

To sum this up, an Executive Order may have the force of law in certain circumstances; however, since EOs tend to be rather ephemeral, that force may not be long-lasting.

But must contractors comply with Executive Orders?

While I am not a scholar of constitutional law (nor even any kind of legal scholar), I am fairly confident that an Executive Order means very little until it is codified in an agency regulation. We'll talk more about that in Part 2, coming soon.