In the **previous article** , we discussed the nature of a Presidential Executive Order (EO). We learned that it is, essentially, a directive from the Chief of the Executive Branch to the various Executive agencies and departments. It may have the force of law, depending on circumstances and the relationship between the content of the EO and Congressional intent on that same subject.

But we still didn't answer the question—to what extent must government contractors comply with Executive Orders?

An EO is published in the Federal Register and it may have the force of law, but it still must be codified in an agency regulation before it can be implemented. For example, the Government Contracts Law Blog (published by the law firm Sheppard Mullin Richter and Hampton) recently posted an article written by David Gallacher and Ariel Debin that discussed implementation of Trump EO #13881, entitled "Maximizing Use of American-Made Goods, Products, and Materials." In that article, the authors noted that the EO was signed July 15, 2019, but that it was not until September 14, 2020 that the FAR Council published a proposed rule that would implement it. As with most proposed rules, there is a comment period. The comment period ended 11/13/20 with more than 30 public comments received. Now the rulemakers must review the comments and disposition them before issuing a final rule. Once issued, that final rule will need to be incorporated into government contracts.

Then—and only then—will a government contractor need to comply with it.

Until that point in time, it's just something to be aware of. A future condition that may change compliance requirements associated with Buy American rules, to some extent that is currently unknown. Certainly, if you think your product or service may be impacted by that rule, when implemented, you would want to get out in front of it now. As the attorneys wrote—

Contractors should consider now taking stock of those items manufactured using steel or iron and determining whether those products are made 'predominately' (or more than 50 percent by cost) from iron or steel. Contractors also should begin assessing and documenting their compliance with the BAAs new requirements, generally, including the heightened domestic content requirements. This includes a review of products acquired throughout the supply chain, as the impact of these changes also will flow throughout the entire supply chain.

But there is no impact (outside of competitive position) for failing to do so. Indeed, remembering that often the first act of an incoming Presidential Administration is to revoke or significantly modify the EOs of the prior Administration, it is certainly possible that something will change between now and the final rule's effective date, such that contractors would not want to invest too much time and effort (and money) into compliance measures.

The seeming dichotomy between a statute (or EO) and the regulations that implement it is nothing new to the readers of this blog. We had a similar discussion here throughout much of 2018 with respect to the changes to certified cost and pricing data thresholds mandated by 2018 National Defense Authorization Act. The Act increased the threshold from $750,000 to $2 million (which also increased the CAS coverage threshold from $750,000 to $2 million) but the FAR Council and the DAR Council were (in our view) very slow to act to implement those threshold changes, leaving a disconnect between what the statute said and what the regulations said. (We also noted that the CAS threshold was tied to the statute and not to the regulations, so that threshold changed automatically, even though implementing agency guidance lagged significantly.) There was a spate of Class Deviations and, eventually, the regulations were changed. [1] However, that didn't change the thresholds found in the contracts that had been issued either (a) before the public law was signed or (b) between the time the public law was signed and the time the regulations were revised. That separate disconnect needed to be fixed via "no-consideration" contract mods—if the parties thought to do so.

Thus, in our view an Executive Order applies to Federal agencies and departments, not to contractors. To the extent those agencies and departments then engage in the regulatory rule-making process to revise regulations—and those regulations then prescribe solicitation provisions and contract clauses that make their way into RFPs and contracts—that then establishes the rules for regulatory compliance.

Until then, not so much.

[1] Interestingly, it was not until July 2, 2020 that the regulations were (finally) revised in the FAR, nearly three years after the statute was revised. See **this** Federal Register notice, implementing FAR Case 2018-005. To our knowledge, that regulatory change has not yet been aggregated into a Federal Acquisition Circular (FAC) for formal publication in the FAR System.