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Caught Between the Branches: New Executive Order Requires Federal Contractors to Alert the White House to Congressional Requests

Executive Order 14438 requires federal contractors and subcontractors to notify the White House and their contracting agencies of congressional requests and to follow instructions to withhold communications that the executive branch deems privileged. The Executive Order arrives weeks before new congressional majorities gain subpoena power, and it places contractors between the two branches.

On November 20, 2026, President Trump signed Executive Order 14438, "Protecting the Executive's Privileges and Enhancing Efficiencies in Federal Contracting" (the Executive Order). The Executive Order requires federal contractors and subcontractors to notify the White House and their contracting agencies of any *pending or future* congressional requests about their work or communications with the executive branch. It also requires them to follow instructions to withhold from production communications that the White House or an agency has determined are privileged. Notably, the Executive Order refers to "congressional requests" and not subpoenas, and so appears to cover both compulsory and voluntary requests from congressional committees.

As we explained in our post-election alert, with the Democrats winning control of both chambers of Congress in the midterm elections, new committee chairs will hold subpoena power when the 120th Congress convenes in January 2027; those chairs are expected to focus on companies that do business with the Administration, many of which are federal contractors. The Executive

Order gives the executive branch a way to coordinate responses to those inquiries early and to assert privilege over communications that contractors hold.

The Executive Order exposes contractors to legal risk from both branches. A contractor that withholds documents from Congress on a White House or agency instruction could face criminal contempt charges under 2 U.S.C. § 192, obstruction charges under 18 U.S.C. § 1505, or a civil suit to enforce a subpoena. The five-year statute of limitations for contempt runs past the end of the current Administration, so a future Justice Department could pursue charges for conduct that occurs now. A contractor that refuses a withholding instruction, in turn, risks contract termination, suspension, or debarment. And if agencies write the Executive Order's requirements into existing contracts, it is an open question whether contractors must comply with those changes while they challenge them, particularly where compliance could invite contempt proceedings.

Rationale for the Executive Order

The Executive Order cites three sources of authority: the Constitution, the common law, and the Federal Property and Administrative Services Act (FPASA), 40 U.S.C. § 101 et seq., the last of which exists to create efficiency and economy in federal procurement. The Executive Order also asserts a constitutional interest in protecting executive branch information from disclosure by contractors in response to congressional requests. According to the Executive Order, coordination between contractors and the executive branch prevents the executive branch from "interven[ing] or engag[ing] in separate litigation to defend its rights," avoids "duplicative and wasteful efforts," and allows the executive branch to keep "sharing sensitive information with contractors." By invoking the FPASA and characterizing uncoordinated investigation responses as costly, the Executive Order frames the coordination requirement, at least in part, as a procurement efficiency measure.

Contractor Directives

The Executive Order's core requirements, which appear in Section 2, include:

- ***Reporting Obligations***. Contractors must "immediately" notify the White House and contracting agencies of any *pending or future* congressional requests "respecting the contractors' communications or work with the executive branch."
    - One question is, what degree of certainty triggers the EO's obligation for a contractor to notify the White House about a possible future congressional request?
    - Another is, how broadly will the reporting obligation apply to communications and work with the executive branch? For example, will it apply to a congressional investigation that has nothing to do with a contractor's work with the executive branch but seeks the contractor's communications with the executive branch on a different subject?
- ***Coordination Obligations****.* Contractors, agencies, and the White House must coordinate responses to congressional requests concerning contractor communications or work with the executive branch.

- The EO notes that "[f]ederal contractors and the executive branch engaging in separate strategies and litigation regarding the same requests and information is inefficient and wastes taxpayer resources." This may be true in many if not most instances, but one can surmise instances where it is For example, a congressional committee may send document and information requests to the executive branch and a corporation that is a federal contractor, but not about the work the company is doing for the government. In this case, it may well make sense for the contractor and the government to have separate strategies.

- ***Withholding Instructions***. Contractors must follow White House and contracting agency instructions to withhold communications that the White House or the agency "has determined are protected by executive privilege." The Executive Order, as written, allows an agency, as well as the White House, to make the privilege determination.
    - Only the executive branch can assert claims of executive privilege.[1] How frequently it asserts the privilege with respect to contractor communications, under what circumstances, and whether it will assert the deliberative process privilege as well as the presidential communications privilege, will likely be learned in practice.
- ***Subcontractors***. Section 2 also applies to subcontractors that work on a federal contract. And the Executive Order's language contemplates that agencies must take steps to make contractors responsible for subcontractor compliance with the Executive Order.
    - These steps will likely result in the promulgation of contract clauses with flow-down obligations and / or a duty to monitor subcontractors' contacts with Congress.

Penalties and Implementation

The Executive Order directs contracting agencies to consider significant penalties for noncompliance.

- ***Contract Remedies***. The Executive Order directs contracting agencies to consider terminating or canceling contracts, or taking "all appropriate actions," for failure to comply with the Executive Order.
- ***Administrative Remedies***. The Executive Order also directs contracting agencies to consider suspending or debarring contractors for failure to comply with the Executive Order.
- ***Agency Notice and OMB Guidance***. Agencies must "promptly" inform contractors and subcontractors of the Executive Order and require them to comply. The Office of Management and Budget (OMB) must develop guidance about how agencies can ensure that contractors comply with the Executive Order. The Executive Order does not set a deadline for the guidance.

Enforceability

The Executive Order is not self-executing, and any agency's ability to make contractors "immediately" comply is an open question. Agency enforcement will likely raise questions about

unilateral contractual change under the Federal Acquisition Regulation (FAR), the scope of executive authority under the FPASA, the Executive Order's relationship to laws that require cooperation with Congress, contractors' First Amendment rights, and the reach of executive privilege.

- ***FPASA Authority***. The federal courts of appeals are split on whether the FPASA gives the President broad authority to issue orders with a nexus to efficient and economical federal procurement or narrower authority to carry out the FPASA's substantive provisions.[2] The Executive Order is not tethered to a substantive FPASA provision, so it likely exceeds the authority delegated by the FPASA under the narrow, substantive provisions test. But it is an open question whether the Executive Order has a sufficient nexus to efficient and economical federal procurement to satisfy the broader test.

- ***Contract Implementation***. The Executive Order's immediate notification and coordination requirements are likely to be interpreted as a change order, adding obligations to contract performance. But only contracting officers can execute contract modifications for the government,[3] and standard contract change clauses permit unilateral changes in only designated areas that likely exclude the relevant subject matter.[4]

    - If contracting officers unilaterally modify contracts to implement the order, it is an open question whether contractors would need to comply with the modifications pending challenge. Contractors ordinarily must comply with changes pending resolution of their disputes.[5] But this rule excepts contractual changes that "impose obligations . . . far exceeding any contemplated by [a] contract,"[6] or that require a "contractor to perform duties materially different from those originally bargained for."[7] Whether the Executive Order imposes such obligations, and how the general compliance rule applies to changes that could invite contempt proceedings, remain open questions.

    - Alternatively, agencies may follow the approach used to implement other recent executive orders, namely issuing class deviations,[8] that prescribe new contract language for contracting officers to add through bilateral modifications.[9] A contractor is not required to sign a bilateral modification, but refusing may carry practical consequences. The government could decline to exercise an option or add funding, or even terminate the contract.

    - In either case, because the Executive Order broadly directs agencies to require compliance, agencies will likely seek to add new clauses to new awards and to existing contracts upon renewal, option exercise, extension, or other modification.

- ***Mandatory Cooperation***. Failure to comply with a congressional subpoena can lead to criminal contempt charges under 2 U.S.C. § 192, subject to a five-year statute of limitations. 18 U.S.C. § 1505 makes it a crime to obstruct a congressional investigation with an improper purpose. Congress can also seek civil enforcement of a subpoena.[10] These enforcement mechanisms create risks of criminal penalties and civil litigation for contractors if Congress or the courts do not accept a privilege determination made by the White House or a contracting agency. And they implicate open constitutional questions about the outcome of interbranch conflicts between Congress's subpoena power and executive branch claims of privilege that could limit the enforceable scope of the Executive Order. Further, the Executive Order also treats agencies and federal contractors differently. It directs agencies to enforce its terms "consistent with applicable law," but it states contractors' obligations without that

qualifier. Read literally, the Executive Order makes no explicit exception for a contractor's legal duty to comply with a valid subpoena.

- ***First Amendment***. The First Amendment limits the government's power to terminate a contract in retaliation for protected speech.[11] Contractors may argue that the Executive Order places an unconstitutional condition on their right to speak to and petition Congress. The government will respond that it may restrict disclosure of information a contractor obtains through federal work. It is an open question which argument would prevail if litigated.

Contractors will have to carefully navigate these competing legal obligations and interests as they balance coordination with the executive branch and cooperation with congressional oversight. A contractor that receives both a subpoena and an instruction to withhold could become the nominal party in a dispute between the branches. Indeed, the Executive Order states that the executive branch may "intervene or engage in separate litigation" over a contractor's response.

Contractual Tie-Ins

No existing standard contract clause directly regulates the content of contractor responses to congressional requests. But agencies may rely on more general contract provisions, including, as applicable:

- ***FAR 52.212-4, Contract Terms and Conditions—Commercial Products and Commercial Services***. Contractors must comply with all executive orders applicable to performance under the contract.[12] Agencies use this clause for contracts concerning the acquisition of commercial products or commercial services.[13]
- ***Defense Federal Acquisition Regulation Supplement (DFARS) 252.204-7000, Disclosure of Information***. Contractors cannot release nonpublic, unclassified information concerning a contract without prior written approval from the contracting officer, with one narrow exception for fundamental research.[14] Agencies use this clause when contracts involve sensitive unclassified information.[15]
- ***Other Agency-Specific Provisions***. Some agency-specific FAR supplements contain clauses that agencies may invoke to enforce the order, such as NASA Federal Acquisition Regulation Supplement (NFS) 1852.237-72, which requires contractors to safeguard certain forms of sensitive, privileged information.

Recommended Actions

Federal contractors should consider taking the following actions, to the extent they have not already done so:

- ***Pending and Future Requests***. Identify all "pending" congressional requests now, as the government may decide that a request letter held today triggers the notice requirement. For future requests, consider developing a tracking system and assigning responsibility for all congressional requests, as well as escalation procedures, to a single point of contact in the legal department. It is also prudent, ahead of the next Congress, to review prime contracts for subject matter that might invite scrutiny through future requests.

- ***Targeted Document Collection and Review***. Under the direction of counsel, conduct a targeted collection and review of the company's communications with the executive branch that may interest congressional committees and may be subject to a claim of executive privilege. This review will help the company anticipate withholding instructions, prepare for coordination with the White House and contracting agencies, and identify likely conflicts with congressional requests before a subpoena arrives.
- ***Subpoena Conflicts***. Work with outside counsel and the company's legal department to strategize on a course of action if the company receives a subpoena seeking communications that the White House or an agency has told the company to withhold. For example, the company may ask the committee for more time, tell the committee about the instruction, or ask the executive branch to negotiate with the committee directly or to go to court.
- ***Subcontractors***. Determine all subcontractors that work on the company's federal contracts and identify those likely to draw congressional interest. Work with legal counsel to determine whether to add specific flow-down clauses to new subcontracts, and whether it is appropriate to amend existing subcontracts.
- ***Guidance Monitoring***. Monitor OMB and agency guidance for implementation details and sector-specific requirements.

[1] *United States v. Navarro*, 182 F.4th 1005, 1018 (D.C. Cir. 2026) ("We hold that the authority to invoke executive privilege rests with a president or his designee.").

[2] *See Louisiana v. Biden*, 55 F.4th 1017, 1026 & n.25, 1031 (5th Cir. 2022) (noting circuit split and determining FPASA did not support executive order requiring vaccine mandates under major questions doctrine). *Compare Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 786, 792 (D.C. Cir. 1979) (en banc) (concluding that the FPASA delegated authority to require contractors to comply with wage and price standards because such standards have a "sufficiently close nexus" to economy and efficiency in federal procurement), *and Mayes v. Biden*, 67 F.4th 921, 940 (9th Cir.), *vacated as moot,* 89 F.4th 1186 (9th Cir. 2023) (applying the nexus test to conclude that the FPASA supported an executive order requiring vaccine mandates in government contracts), *with Kentucky v. Biden*, 57 F.4th 545, 552–53, 555 (6th Cir. 2023) (rejecting nexus test and concluding that the FPASA likely failed to support an executive order requiring vaccine mandates because no substantive FPASA provision delegated authority for the order), *and Georgia v. President of the U.S.*, 46 F.4th 1283, 1293–94, 1297, 1300–01 (11th Cir. 2022) (Opinion of Grant, J.) (same).

[3] FAR 43.102.

[4] See FAR 52.243-1–5.

[5] FAR 52.233-1(i); *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276 (Fed. Cir. 1999).

[6] *Alliant*, 178 F.3d at 1276.

[7] *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1332 (Fed. Cir. 2003).

[8] FAR 1.404.

[9] *See* FAR 43.103(a).

[10] The Senate has a statutory basis for doing so. *See* 2 U.S.C. § 288d; 28 U.S.C. § 1365. The House has no comparable statute. There remains an open question as to whether the House would have a cause of action to seek civil enforcement of a congressional subpoena absent statutory authorization. *Comm. on the Judiciary v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020) ("Congress has granted an express cause of action to the Senate—but not to the House.").

[11] *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 686 (1996).

[12] FAR 52.212-4(q).

[13] FAR 12.301(b).

[14] DFARS 252.204-7000(a).

[15] DFARS 204.404-70(a).

The following Gibson Dunn lawyers prepared this update: Lindsay Paulin, Michael Bopp, Barry Berke, Stuart Delery, Matthew Owen, Jillian Katterhagen, Kareem Ramadan, Cole Cooper, and Kuang Wang*.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following members of the firm's Congressional Investigations, Government Contracts, Public Policy, or Administrative Law & Regulatory practice groups:

Michael D. Bopp – Chair, Congressional Investigations Practice,
(+1 202.955.8256, mbopp@gibsondunn.com)

Barry H. Berke – Co-Chair, Litigation Practice,
(+1 212.351.3860, bberke@gibsondunn.com)

Stuart F. Delery – Co-Chair, Administrative Law & Regulatory Practice,
(+1 202.955.8515, sdelery@gibsondunn.com)

Matthew S. Owen – Partner, Congressional Investigations Practice,
(+1 202.955.8616, mowen@gibsondunn.com)

Lindsay M. Paulin – Co-Chair, Government Contracts Practice,
Washington, D.C. (+1 202.887.3701, lpaulin@gibsondunn.com)

Jillian N. Katterhagen – Associate, Congressional Investigations Practice,
(+1.202.955.8283, jkatterhagen@gibsondunn.com)

Kareem W. Ramadan – Associate, Congressional Investigations Practice,
(+1.202.887.3542, kramadan@gibsondunn.com)

Kelly M. Yahner – Associate, Congressional Investigations Practice,
(+1.202.777.9581, kyahner@gibsondunn.com)

**An associate in the New York office who is not yet admitted to practice law.*

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