SheppardMullin

Jonathan Aronie
jaronie@sheppardmullin.com
202.747.1902

Ryan Roberts
reroberts@sheppardmullin.com
202.747.2187

Nikole Snyder
nsnyder@sheppardmullin.com
202.747.3218

October 19, 2021

All-

It was a busy time in the 14042 world last week. Below are the highlights. As always, if these updates become an annoyance, just let Alex know to take your name off the list. Alternatively, if you have colleagues you'd like added to the distribution list, Alex can take care of that as well.

Legal Challenges

We have been watching the docket for legal challenges to the EO. While it didn't get much press, one rather poorly-written challenge was filed in DC District Court. The challenge focused primarily on the federal employee mandate, but also referenced EO 14042. It's possible the complaint gets kicked back to the filer since it had procedural flaws, but those could be corrected rather easily. If you want to give it a read, you can find it HERE.

OMB/GSA Provide (Some) Additional GuidanceMany of you attended the OMB and GSA webinars last week. While they didn't answer any of the more complicated questions we all have, both agencies made some statements that provide additional insight in a few areas. For those of you who did not make the events, here are our takeaways:

- ***Contract Modifications***. OMB confirmed that purchase orders placed under a master agreement are "new contracts" for purposes of the EO, and therefore, require acceptance of the new clause prior to award. This is not surprising.
- ***In Connection With***. GSA and OMB added some additional color to what it means to perform "in connection with" a covered contract. GSA suggested that anyone in a contractor's overhead pool should be considered working "in connection with." This formulation, however, will not be of much help to commercial items contractors that don't track overhead costs. OMB, in turn, advised contractors to ask whether a contract "cannot be performed without" the employee. We don't find this "guidance" particularly helpful either. We think the examples provided in the Task Force Guidance – Legal, HR, Payroll – are better guides than the "cannot be performed without" formulation. In any event, OMB and GSA encouraged contractors to interpret "in connection with" broadly, which we already knew.
- ***Cost/Schedule Impacts***. OMB did spend some time talking about a contractor's ability to recover cost increases and/or not be penalized for schedule delays. According to OMB, whether a contractor will be entitled to schedule or cost/price concession will be circumstance-specific and determined by the Contracting Officer on a case by case basis. The Agency explained that Contracting Officers will be directed (and trained?) to review EPA/Change/Delay requests from contractors tied to the EO. We are hopeful OMB and/or GSA issues formal guidance soon because we expect to see significant increase in cost claims, Economic Price Adjustment submissions, change requests, and delay excuses.
- ***Subcontractors/Vendors***. One of the most frequent questions we have received over the past three weeks is "is vendor X or Y a subcontractor within the meaning of the rule?" OMB and GSA apparently have heard similar questions. According to GSA, contractors should flow down the 14042 clause just as they would any other mandatory clause. This guidance, however, is not particularly helpful since contractors struggle all the time over flow down questions; so looking at prior decisions may not be the best guide for future actions. According to OMB,

to help make these determinations, contractors should view the term "subcontractor" broadly to include not only direct subcontractors, but subcontractors that perform "in connection with" a Federal award. This would mean, we think, a vendor that performs outsourced HR functions, for example, would be a subcontractor within the scope of the EO. This broad reading is consistent with the Guidance, in which the Task Force gives the following examples of vendors not covered by the EO – food services, onsite security, grounds keeping, janitorial. The narrowness of these examples speaks volumes of the Government's view of the breadth of the clause.

While not stated in the rule, we think the best way to evaluate whether a vendor is a subcontractor is to ask two questions:

(1) Is the vendor performing a function that is necessary in order to perform the contract?
(2) Is the vendor performing a function that, if it were performed by the contractor, would be covered by the EO?

If either answer is yes, there is a good argument the vendor would be deemed a subcontractor under the EO by the Government.

- ***Resellers***. Someone on the GSA call asked a question about whether authorized resellers would be deemed subcontractors for purposes of the -99 flow down requirement. This is a good question with which contractors have struggled for quite some time. GSA responded that the Agency is "working on a FAQ" to share with industry in the near future. Until then, we all are left guessing. In our view, until we have further guidance from the Government it's probably best to follow GSA's earlier advice and include the -99 clause in reseller agreements if you include other mandatory flow-down clauses in those agreements. A different way to approach the issue is to ask whether you include reseller spend in your Small Business Subcontracting Plan reports. If you do, then it may be safer to treat resellers as subcontractors for purposes of the -99 flow down as well. In any event, we are hopeful GSA acts on its promise and provides additional guidance in this area soon.
- ***Accommodations***. You will not be surprised to learn that the vaccine mandate has brought out the religion in people – or at least the claimed religion in people. According to NPR, the DC Government received requests for more than 400 religious exemptions following the mayor's vaccine mandate. OMB spent some time talking about religious and medical accommodations on its webinar, but continued to punt to the contractors to figure out what's appropriate. OMB suggested contractors follow their own current process for dealing with accommodation requests, and confirmed that, depending on the circumstances, acceptable accommodations may include masking, physical distancing, regular testing, and/or telework. OMB also suggested looking to how the Government handles accommodations for further guidance.

In determining whether a claimed religious belief is "sincerely held," the EEO notes that the following factors may be relevant to the inquiry: "[i] Whether the employee has behaved in a manner markedly inconsistent with the professed belief; [ii] whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; [iii] whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and [iv] whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons."

You can find a copy of the federal template accommodation evaluation form HERE. You can find a copy of how one agency, the Department Of Commerce, has used that template HERE.

- ***Compliance.*** Many of you understandably have been concerned about the impact of having to terminate multiple employees on December 8. The issue came up on the OMB call and the GSA call. OMB seems to recognize that the Federal employee discipline process in this area is more lenient than the standards being imposed upon contractors.

Notwithstanding the lack of a grace period in the rule itself, OMB anticipates contractors will work through their "usual process" for employee discipline. *This comment may signal some level of understanding that termination may not be a contractor's first and only option for dealing with non-compliant employees.* According to OMB, if a Contracting Officer learns of non-compliance, he/she will work with the contractor to address it. GSA made similar comments during its call. (It's almost as though they compared notes in advance . . . .) GSA leadership stressed that the Agency does not plan to terminate contractors for default (including those that experience performance issues in connection with the mandate, such as delays attributable to identifying replacement subcontractors) if they are making a good faith effort toward compliance OMB's and GSA's statements serve as a good reminder that contractors may want to engage with their COs early in the compliance process. This level of transparency may not always prevent a breach claim, but it should avoid a False Claims Act claim. And, of course, whatever corrective action the contractor proposed to the CO should be meaningful. OMB cautioned that since vaccinations are critical, contractors not taking reasonable steps to comply can expect consequences.

- ***December 8 Deadline***. OMB made clear the Government is not considering delaying the December 8th implementation date. However, the Agency did remind its audience of the 60-day extension option for urgent, mission critical contractors. No guidance was given as to what sort of contract might be considered urgent or mission critical, but we think, depending on the circumstances, it could be just about everyone on this email.
- ***Immunity*.** As this group knows, we've advocated for the Government to provide contractors immunity from lawsuits in connection with compliance with the EO (specifically in granting or denying exemption requests). As we suspected, OMB stated it has no intent to provide contractors this protection. We know this goes without saying, but developing and implementing a clear and reasonable process for evaluating exemption requests and accommodation decisions should be a core part of every 14042 compliance plan.

Deep In The Heart Of TexasAs you probably saw, the Governor of Texas issued an executive order last week taking aim at EO 14042. We will be updating the Survival Guide with a new FAQ on this topic this week. In the meantime, here's a sneak peek at our *new Texas* Q&A. As you will see, it tracks GSA's not-surprising statement on its industry call earlier this week that federal law trumps state law.

Q. I've seen a few state governors and legislators taking steps to outlaw vaccine mandates and/or review of vaccination cards. These conflict with our obligations under the President's EO. How are contractors handling the conflict?

A. On October 11, 2021, the Governor of Texas issued an executive order prohibiting companies operating in Texas from compelling receipt of a COVID-19 vaccine by anyone who objects on the basis of "personal conscience" (as well as the standard religious and medical bases). Pew's *Stateline* project last week published a useful article highlighting other governors and states taking or considering similar efforts. Unquestionably, these state efforts will cause great heartburn, and expense, for federal contractors operating in Texas and a few other states.

When evaluating these various state rules, keep in mind this critical principle: Lawful federal orders prevail over conflicting state orders. If we pop open our pocket Constitutions, we all will be reminded that Article VI provides that "*This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .*" Over the years, courts have made clear that federal Executive Orders fall within the scope of this "Supremacy Clause." (For those of you who like to read case law, you can check out *Old Dominion Branch No. 496 v. Austin*, from 1974 (418 U.S. 264) to form your own opinion on this point.) As a general rule, Executive Orders are not typically struck down by the courts, but several have been over the years, from a particularly famous Supreme Court rejection of a Truman EO in 1952, to less notable judicial rejections of Clinton, Obama, Bush, and Trump EOs in more recent years.

Of course, if a federal court *were* to find EO 14042 illegal or unconstitutional, then a conflicting state order or law would take precedence – because it no longer would be in conflict. While one can take issue with elements of EO 14042 (just as one could challenge the legality of a "dynamic" FAR clause tied to an ever-changing Task Force website), there is not much about the rule that jumps out to us as blatantly illegal or unconstitutional. This certainly is not the first Executive Order to take advantage of the procurement process to implement social policy priorities. EO 11246, for example, imposed extensive equal opportunity and affirmative action requirements on federal contractors and subcontractors. Presidential powers are very high in the areas of national security, public health, and the executive procurement process, all of which the President invoked when he issued EO 14042. Moreover, the religious and medical carveouts further protect EO 14042 from a successful challenge.

Additionally, while not controlling on a court, it's worth at least noting the Government anticipated such challenges, and provided its own view of the outcome of a state/federal showdown over the EO 14042. Here is what the Task Force had to say on the topic:

Q19: Does this clause apply in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in this Guidance?

A: Yes. These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance. Additionally, nothing in this Guidance shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective workplace safety protocols than those established under this Guidance.

On Thursday, in response to a specific question about Federal contractors currently operating in Texas, the Department of Defense released a statement reiterating the position from the Guidance, and confirming that DOD expects Federal contractors operating in Texas to comply with the vaccine mandate.

So with all this being said, how are companies handling the currently conflicting state/federal mandates? As you'd expect, they are treating the federal EO as supreme. As widely reported in the press, two major airlines and several other sizeable businesses recently publicly stated their view that they would adhere to EO 14042 since federal Executive Orders supersede conflicting state laws/orders. *Time* published an article providing additional examples of corporations taking a similar stance.

We agree that, in the event of a direct showdown, federal law will win out over state law here. But the conflict still puts companies in an awkward position to say the least, and may create nuanced, challenging compliance scenarios.

Benchmarking

We have received a lot of requests for help benchmarking a company's 14042 approach against other companies in the same industry. In short, everyone understandably wants to know what everyone else is doing. To help on this front, we're working on two initiatives.

First, we're working with the Coalition for Government Procurement to prepare an ***anonymous 14042 benchmarking survey***, which we plan to circulate via email later this week. We will analyze the responses by industry and share the *aggregated results* with all participants. We will forward the survey link once it is ready to go later this week. Participation, obviously, is optional – but your participation will provide some insight into how a wide swath of companies are implementing their compliance plans.

Second, we know that many of you already are finalizing your compliance plans and will be releasing communications to affected employees in the very near future (if you haven't already). Given that the Coalition survey process will take some time (we anticipate making results available one to two weeks after the survey responses come in), we'd like

to gauge interest for an event one of our clients requested: a *live 30-60 minute Benchmarking Zoom* this week (likely Wednesday afternoon). Here's how it would work: participation would be anonymous, we'd ask live polling questions (either developed by us or submitted by you in advance), each participating company would respond to the live question anonymously, and you'd receive the results in real-time. The event would not include as broad a participant pool as the forthcoming Sheppard Mullin/Coalition Benchmarking Survey, but we think it will be nonetheless useful. If your company is interested in sending a participant, please email Alex (copied here – aduncan@sheppardmullin.com) to let us know by 12pm ET on Tuesday, 10/19. If more than 10 companies are interested in participating, we'll send a Zoom link to those who responded.

****

That's all for now. Have a great week.

-The Sheppard Mullin GovCon Team