



Government Contracts and New Mandates: Executive Orders and Cost Recovery Strategies Explained

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Jackie leads PilieroMazza's Government Contracts Group, serving as Chair of the Firm's largest practice group. She also co-chairs the firm's False Claims Act Group, where she represents clients in investigations related to government contracts, including FCA investigations and suspension and debarment proceedings. Jackie provides thoughtful and thorough guidance on a wide variety of government contracting issues, such as compliance with Buy American Act and Trade Agreements Act requirements; drafting, reviewing, and negotiating teaming agreements, subcontracts, and joint venture agreements; as well as small business subcontracting plans and OCI mitigation plans. Jackie also advises on cure notice responses, adverse CPARs ratings, REAs, and claims. She regularly counsels contractors in navigating the complexities of the Federal Acquisition Regulation and Small Business Administration's (SBA) small business program requirements. Jackie is also well-versed in representing clients in procurement-related disputes, including filing and defending against bid protests at the Government Accountability Office and the Court of Federal Claims. She also handles size and status protests before the SBA and its Office of Hearings and Appeals.

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Lauren represents commercial businesses in a variety of government contracting and litigation matters. As Chair of PilieroMazza's REAs, Claims, and Appeals Group, she leads a team of attorneys who assist clients in every phase of the contract dispute process. A highly skilled practitioner, government contractors benefit from Lauren's substantial experience managing complex claims and appeals for contractors under the Contract Disputes Act (CDA) and other applicable jurisdictional statutes. This experience is particularly valuable for contractors seeking monetary relief and time extensions from procuring agencies, as she adeptly handles cases at the U.S. Court of Federal Claims and various boards of contract appeals. Lauren's work in this area extends to advocating for the rights of contractors facing constructive changes, unjustified terminations, cure and show cause notices, and defective or vague specifications.

About PilieroMazza

PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Construction
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital

Agenda

- Overview of Key Executive Orders
- Managing Impacts to Government Contractors
 - Stop Work Orders
 - Requests for Equitable Adjustment
 - Claims
 - Terminations and Termination Settlement Proposals
 - Challenging Stop Work Orders and Terminations
 - Other Impacts to Consider

Initial Rescissions of Harmful Executive Orders and Actions

- Revokes 78 EOs determined not to align with President Trump’s policy objectives
 - Includes EOs which furthered policies on COVID-19, climate, diversity, equity, and inclusion (DEI), and immigration
- Rescinds EO 14055, “Nondisplacement of Qualified Workers Under Service Contracts”
 - Required certain federal contractors to provide a right of first refusal to employees of the predecessor contractor

America First Trade Policy Directive

- Highlights the President’s intent to establish “a robust and reinvigorated trade policy that promotes investment and productivity, enhances our Nation’s industrial and technological advantages, defends our economic and national security, and—above all—benefits American workers, manufacturers, farmers, ranchers, entrepreneurs, and businesses”
- Contains three topics requiring reports and recommendations under each:
 - Unfair and Unbalanced Trade
 - Economic and Trade Relations with the People’s Republic of China (PRC)
 - Additional Economic Security Matters

Multiple EOs Imposing Tariffs

- Three EOs impose tariffs on Canada, Mexico, and China
 - 25% on Mexican products - **Paused until March 4th**
 - 25% on Canadian products, except 10% on “energy or energy resources” - **Paused until March 4th**
 - 10% on Chinese products – went into effect on February 4
- On February 10, Trump signed proclamations imposing 25% tariffs on steel and aluminum imports
- On February 13, Trump announced reciprocal tariffs

Establishing and Implementing the Department of Government Efficiency

- Renames the U.S. Digital Service as the U.S. DOGE Service
- Establishes DOGE teams of at least 4 people within each agency
- Directs DOGE to commence a software modernization initiative to improve the quality and efficiency of government-wide software, network infrastructure, and IT systems
- Directs agency heads to ensure DOGE has full access to all unclassified agency records, software systems, and IT systems

Unleashing American Energy

- States a federal energy policy agenda that seeks to establish American energy dominance and ensure no federal funding is employed in a manner contrary to the EO's goals
- Rescinds Biden Administration clean energy and climate-related EOs, abolishes any offices and programs established thereunder, and directs that contracts in furtherance of the entities or programs abolished be terminated
- Terminates the “Green New Deal”
 - Directs agencies to pause disbursement of funds appropriated through the Inflation Reduction Act and Infrastructure Investments and Jobs Act
 - Requires agencies to review their practices on financial disbursements of IIJA and IRA funds for consistency with the EO's energy priorities and to submit a report within 90 days detailing their findings and recommendations
- OMB Memorandum M-25-11 clarified that the pause only applies to funds supporting clean energy and climate-related initiatives

Executive Orders Targeted at Affirmative Action Programs

- Declares race- and sex-based preferences illegal and largely eliminates all DEI and affirmative action-based programming for both the federal government and its contractors
- Revokes EOs that established contractors' affirmative action obligations
- Orders OFCCP to immediately cease enforcement of contractor affirmative action responsibilities
- Requires contractors to cease affirmative action practices by April 21
- Requires agencies to grant contract awards based on a contractor's (1) agreement that its compliance with all federal anti-discrimination laws is material to the government's payments and (2) certification that it does not operate any programs promoting "illegal DEI"
- Requires termination of all "equity-related" grants or contracts and all DEI performance requirements for contractors or grantees by March 21st

Reevaluating and Realigning United States Foreign Aid

- Implements a 90-day pause on all foreign development assistance
- Requires a review of each foreign assistance program with determinations within 90 days as to whether to continue, modify, or cease the program
- Seeks to ensure that foreign assistance is fully aligned with President Trump's foreign policy
- Permits waivers for specific programs

Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs: OMB Memorandum M-25-13

- OMB Memo M-25-13 instructed agencies to pause all federal financial assistance on programs implicated by any of the EOs
- Applied to new awards or obligations of federal funds, disbursement of funds under existing awards, and activities such as merit review panels for open NOFOs
- Directed agencies to identify programs and activities impacted by EOs and submit detailed information about paused programs by February 10

Legal Challenges to EOs & OMB's Memo

- Two lawsuits challenging the funding freeze implemented by OMB's memo, both resulting in TROs blocking the freeze
 - Memo rescinded on January 29th by OMB Memorandum M-25-14, but freeze continued to be implemented
- Noncompliance with the TRO led to Court granting motion to enforce TRO, ordering the Government to:
 - Immediately restore frozen funding during pendency of the TRO
 - Immediately end any federal funding pause during pendency of the TRO
 - Comply with the plain text of the TRO not to pause any funds based on pronouncements pausing funding incorporated into the OMB Directive
 - Immediately restore withheld funds, including those federal funds appropriated in the Inflation Reduction Act and the Infrastructure Improvement and Jobs Act
 - Resume the funding of institutes and other agencies (e.g., the National Institutes for Health) included in the scope of the Court's TRO
- Government appealed the orders; First Circuit Court of Appeals rejected DOJ's request for an administrative stay

Current Impacts of the Executive Orders: What We Are Seeing On The Ground

Impacts to Federal Contractors

- Stop Work Orders
 - Best Practices
 - REA vs. Claim
 - Warnings
- Terminations for Convenience
 - Notice Requirements
 - Types of Proposals
 - Cost Recovery
 - Challenges to Stop Work/T4C Directives
- Appeal Rights

What is a Stop Work Order?

See FAR 52.242-15

- Stop-work orders may be issued at any time by written order of the CO
 - Not to exceed 90 days
- Contractors must mitigate
- The CO can also terminate the contract for convenience or default anytime during the stop-work period
- In either case (resumption of work or termination), the contracting officer “shall make an equitable adjustment in the delivery schedule or contract price, or both” if:
 - (1) the order results in an increase of time required for, or the contractor’s costs properly allocated to, the performance of the contract; and
 - (2) the contractor asserts its right to an adjustment within 30 days after the end of the order.

Stop Work Order Requests for Equitable Adjustment Under 52.242-15

- REAs under the Stop Work Order Clause are commonly due within 30 days of the lift of stoppage
- No required format
- Key points:
 - May include attorneys' fees, administrative costs, and internal costs
 - No required deadline for the government to respond

Best Practices on Stop Work Orders

- Provide immediate notice to your CO of your intention to file an REA under FAR 52.242-15
- Begin working to mitigate costs and record proof of mitigation
- Begin documenting efforts in implementing stop work
- Consider filing a claim in lieu of an REA to ensure timely processing of your cost request, better to be first in line than last
- Reserve rights to challenge directive based off recent Court Orders

Consider Elevating your REA to a Claim under the Contract Disputes Act

- An **REA** may be the right first step when:
 - There is plenty of time left on the contract
 - The issues are not contentious, and the customer may have signaled openness to the REA
 - You want to include your preparation (including legal) expenses; not yet a dispute
- A **claim** may be the right first step when:
 - Little time left on the contract (or certainly if the contract has ended)
 - The issues are controversial or the relationship with the customer is adversarial
 - You cannot wait indefinitely for the government to respond/funding
 - Note: Cannot recover on legal or admin time associated with claim prep

Warnings Re: Recent Stop Work Orders

- Commercial Items Contracts Being Amended to Include Stop Work Clause 52.242-15 (Require Bilateral Agreement)
- Stop Work Orders being issued under Suspension of Work Clause, 52.242-14
- Stop Work Orders not being issued by COs
- Certifications that DEI-related programs have ceased in exchange for lifting of a stop work order – reach out to a L&E attorney to ensure compliance before certifying

Additional Warning: Waivers and Reservations of Rights

- Watch out for waiver language before you sign a mod or amendment
 - The government often includes waiver language in contract mods releasing the government from any liability for any action or inaction prior to the modification
 - Waivers and releases of rights may be absolute bar to recovery
- Reserve your rights if you believe you have a claim associated with a stop work order
 - Try to get the government to remove the waiver/release
 - Or add your own language to the release to make clear you take exception

Terminations for Convenience

- Termination for Convenience (T4C)
 - The unilateral right, in favor of the Government, to terminate a prime contract for its convenience
 - T4C can be initiated for generally any reason
 - The nature of the settlement proposal and your entitlement to recover may vary depending on the type of contract
 - You may need to convert the settlement proposal to a claim if you reach an impasse with the Government in resolving your settlement proposal

You've Received a Termination Notice – Now What?

- Per FAR 49.104, the duties of a prime contractor upon receiving notice of termination include, but are not limited to:
 - Stop work immediately on the terminated portion of the contract and stop placing subcontracts thereunder
 - Terminate all subcontracts relating to the terminated portion of the prime contract – adhere to notification requirements (e.g., email, certified mail, etc.)
 - Immediately advise the TCO of any special circumstances precluding the stoppage of work
 - Take necessary or directed action to protect, and preserve property in the contractor's possession in which the Government has or may acquire an interest and as directed by the TCO, deliver the property to the Government
 - Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO
 - Promptly submit the contractor's own settlement proposal, supported by appropriate schedules
 - Dispose of termination inventory, as directed or authorized by the TCO

Types of T4C Settlement Proposals

- FAR 52.249-2, Termination under FFP Contracts
- FAR 52.249-6, Cost Reimbursement
- FAR 52.249-4, Services, Short Form
- FAR 52.212-4, Commercial Items Terminations

Contractor Recourse – Recover Your Costs

- The following types of unpaid costs are generally allowable and recoverable under termination settlement proposal guidelines. List is not exhaustive.
 - Direct costs (labor and material)
 - Settlement expenses (i.e., accounting, legal, clerical, termination of subcontractors)
 - Subcontractor claims
 - Indirect costs
- Claimed costs should be generally allowable, allocable, and reasonable
- But do need to mitigate damages
- No duplicate recovery

Can You Challenge These Stop Works/T4Cs?

- Government has broad discretion in electing to stop work/terminate a contract for the convenience of the government
- Final decision, absent bad faith or clear abuse of discretion
- Allegations of abuse of discretion are evaluated based on the existence of the following:
 - evidence of subjective bad faith on the part of the government official;
 - whether there is a reasonable, contract-related basis for the official’s decision;
 - the amount of discretion given to the official; and
 - whether the official violated and applicable statute or regulation.
- Providing bad faith requires clear, and convincing evidence, often termed “well-nigh irrefragable” proof of malice or a specific intent to injure

Best Practices to Challenge

- Reserve rights in writing to challenge the high-level determination while stopping work/processing termination
- Keep an eye on Federal Court decisions and impact of any injunction, i.e. Rhode Island enjoinderment of OMB memo and associated freezing of funding, some agencies interpreting decision differently
- Contact your Congressperson!
- Convert stop work order REA/termination proposal to a claim asap.

Appeal Rights

- If your stop work order/T4C **claim** is denied, you can appeal to the BCA or COFC
 - Some agencies have their own BCA, like the Postal Service and FAA
 - BCA appeal deadline is 90 days; COFC is 12 months
 - There are pros and cons to both forums; we tend to prefer BCA but not always
 - Both BCA and COFC decisions may be further appealed to the U.S. Court of Appeals for the Federal Circuit
- Negotiations and Alternative Dispute Resolution
 - Available at BCAs, COFC, and some agencies
 - Voluntary = both sides must agree to participate
- Judgment Fund available for court judgments

Other Impacts

- Tariffs resulting in unforeseen increase in costs
 - 52.229-3, Federal State and Local Taxes
 - 52.229-6, Foreign Taxes for contracts outside US
 - EPA Clauses
- Subcontractor quotes
- Unpaid invoices
- Unforeseen delays due to supply chain disruptions
- Employment handbook and policy changes

Questions?



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