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New Executive Order Requires Federal Contractors to Route Congressional Requests Through the White House

November 24, 2026

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Receive a congressional inquiry? For federal contractors and subcontractors, a new and unprecedented Executive Order purports to require your organization to first coordinate your response with the White House. Given recent political shifts and the increased likelihood of investigations over the next two years, the Executive Order may significantly change, and delay, the way that organizations have responded to congressional inquiries in the past.

On November 20, 2026, President Trump signed Executive Order 14438, "Protecting the Executive's Privileges and Enhancing Efficiencies in Federal Contracting." It requires every federal contractor, and every subcontractor working on a federal contract, to "immediately" notify the White House and the contracting agency of any pending or future congressional request about the contractor's "communications or work with the executive branch." Contractors must also follow White House and agency instructions to withhold communications the government determines are protected by executive privilege.

The order takes effect without a new contract clause or FAR rule, and the listed consequences for noncompliance include termination and suspension or debarment. Contractors that receive congressional letters, document requests or interview requests should carefully review their response procedures now.

The new Congress convenes in January 2027, and oversight of contracting practices, including sole-source and no-bid awards, Other Transaction agreements and other non-FAR vehicles, is likely to increase. Contractors may soon receive congressional requests and executive-branch instructions that pull in opposite directions.

What the Order Requires

The order rests on the common law and the Federal Property and Administrative Services Act and asserts that executive privilege reaches "information shared between Federal employees and Federal contractors." Its operative terms are short:

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- **Notice.** Contractors must notify "the White House and the contracting agencies of any pending or future congressional request respecting the contractors' communications or work with the executive branch" (Sec. 2(a)). The notice duty covers requests already pending.
- **Withholding instructions.** Contractors must "abide by any instructions received from the White House and contracting agency related to the withholding of communications that the White House or the agency has determined are protected by executive privilege" (Sec. 2(a)).
- **Coordination.** Agencies will coordinate with the White House and contractors on responses, "including the application or assertion of any relevant privileges" (Sec. 2(b)).
- **Subcontractors.** The obligations apply to subcontractors "working for a Federal contractor on a Federal contract," and agencies must make primes "responsible for ensuring" subcontractor compliance (Sec. 2(c)).
- **Implementation.** Each agency must "promptly inform all contractors and subcontractors" of their obligations, and OMB will issue compliance guidance (Sec. 3). No deadline is set for either.
- **Enforcement.** Agencies "shall consider" all appropriate actions for noncompliant contractors and subcontractors, "including the potential termination or cancellation of contracts and the potential debarment or suspension of contractors" (Sec. 4).

The accompanying fact sheet says "certain congressional leaders" have sought confidential executive-branch information and have been "harassing private companies that contract with the federal government." It does not identify any particular inquiry.

What the Order Leaves Open

The order leaves unaddressed several important details:

- **No contract clause or certification yet.** It names no FAR or agency clause and requires no certification. Agencies may notify contractors by letter, modification or new solicitation language, and OMB guidance may add detail. If a clause or certification follows, noncompliance could also carry False Claims Act risk under an implied-certification theory, as with other recent certification-based executive orders.
- **No definition of covered requests.** "Congressional request" is undefined. The order does not say whether it reaches informal staff inquiries, letters from individual members, committee document requests or subpoenas, or requests unrelated to a contractor's specific contract.
- **No contact or timing for notice.** The order says "immediately" but gives no notice mechanism, recipient office or deadline relative to the contractor's response date.
- **No mention of whistleblowers, employees' own disclosures, or Inspectors General.** The order speaks to contractors' responses to congressional requests. It does not purport to restrict what individual employees may report to Congress on their own.
- **Untested legal footing.** Whether executive privilege extends to information in a private contractor's hands, and how a contractor should proceed when a committee subpoena conflicts with a White House instruction, are unresolved. The order cannot override a valid subpoena, and Section 6(b) requires implementation "consistent with applicable law." A contractor caught between the two branches may need to seek a negotiated accommodation or a judicial resolution.
- **No safe harbor.** The order does not promise contractors indemnity or legal representation if they withhold information at the government's direction.

- **Unclear coverage.** The order applies to "Federal contractors" and subcontractors "on a Federal contract." It does not say whether it reaches grantees, cooperative-agreement recipients, holders of Other Transaction agreements, or vendors holding only GSA Schedule or commercial-item orders.

Whose Privilege Is It?

Executive privilege belongs to the executive branch, not to the contractor. Generally speaking, a contractor cannot assert it on its own behalf. Under the order, the contractor's role is to give notice and follow instructions, and the White House or agency decides whether to assert privilege.

That leaves the contractor in the middle. If the government directs it to withhold, the committee may still look to the contractor for compliance. Disputes over congressional access to executive-branch information have traditionally been resolved through negotiated accommodation between the branches. When Congress seeks presidential information held by private parties, courts apply the balancing test of *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020). Contractors may be expected to be asked to participate in that accommodation process.

Contractors may need to consider their own privileges and other applicable protections from disclosure. Sharing internal analyses or counsel's assessments with the White House or agency to coordinate a response could risk waiving attorney-client privilege or work-product protection.

Whistleblower and Retaliation Risks

There is a practical risk of overcompliance. The order governs how a company responds to congressional requests, but federal statutes protect what individual employees tell Congress, and the order does not and could not change those statutes.

- 41 U.S.C. § 4712 (and 10 U.S.C. § 4701 for defense contracts) bars contractors and subcontractors from retaliating against employees who disclose to a member of Congress or a congressional committee information they reasonably believe shows gross mismanagement or waste of federal funds, abuse of authority, or a violation of law related to a federal contract. Contractors must inform employees of those rights in writing (FAR 52.203-17).
- 31 U.S.C. § 3730(h) protects employees and contractors from retaliation for efforts to stop FCA violations, including reports to the government.
- Confidentiality agreements and internal policies that restrict lawful reports to Congress or Inspectors General can themselves be a problem, including under appropriations riders that bar funding for contractors using such agreements.

A policy that tells all employees to route any contact with Congress through legal, or that disciplines an employee for speaking with congressional staff, might implicate these whistleblower and retaliation protections. Requests directed to individual employees, such as invitations to testify, transcribed interviews or subpoenas naming a person, will likely entail separate handling. Company counsel represents the company, not the

employee.

Potential Legal Challenges

The order is vulnerable on several fronts, but challenges face timing and forum hurdles. Contractors and subcontractors may have arguments in four areas:

- **Statutory authority.** The order relies on the Federal Property and Administrative Services Act. Courts uphold FPASA orders that have a sufficiently close nexus to economy and efficiency in procurement (*AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979)). Several circuits rejected the 2021 contractor vaccine mandate as beyond that authority (e.g., *Georgia v. President of the United States*, 46 F.4th 1283, 1301 (11th Cir. 2022); *Kentucky v. Biden*, 57 F.4th 545, 555 (6th Cir. 2023)). A contractor could argue that controlling responses to Congress has little to do with economical procurement, despite the order's efficiency framing.
- **Conflict with statutes.** An executive order cannot override a statute (*Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322,1334 (D.C. Cir. 1996). Instructions under the order could collide with the contractor whistleblower statute (41 U.S.C. § 4712), with obligations to comply with congressional subpoenas (2 U.S.C. § 192), and with the obstruction statute covering congressional inquiries (18 U.S.C. § 1505). The order's own "consistent with applicable law" clause (Sec. 6(b)) gives contractors a textual basis to argue that it yields in those conflicts.
- **First Amendment.** Requiring contractors to clear communications with Congress through the White House, on pain of termination or debarment, raises Petition Clause and free-speech questions. The Supreme Court has held that the government may not terminate contractors in retaliation for protected speech (*Bd. Of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996)), and that funding conditions may not regulate speech outside the program itself (*Agency for Int'l Dev. V. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013)). Courts have also enjoined recent executive orders targeting private firms on First Amendment grounds.
- **Separation of powers and vagueness.** Congress's investigative power is broad, and when Congress seeks presidential information held by private third parties, courts apply the balancing test of *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020), rather than a blanket privilege. Whether executive privilege attaches to communications in a private contractor's files at all is unsettled. The undefined terms "congressional request" and "communications or work with the executive branch" could also support a due process vagueness argument if an agency imposes sanctions.

The Debarment Threat: An Uneasy Fit With the FAR

The order says agencies should consider debarment or suspension for noncompliance, but it does not, and cannot by itself, add a new cause for debarment. The causes are set by regulation in FAR 9.406-2 (debarment) and FAR 9.407-2 (suspension). Changing them should require FAR rulemaking, not an executive order. That leaves agencies trying to fit a failure to notify into the existing causes, and the fit is awkward:

- **Willful failure to perform contract terms.** FAR 9.406-2(b)(1)(i)(A) permits debarment for "willful failure to perform in accordance with the terms of one or more contracts." The order's notice requirement is not, today, a term of anyone's contract. It names no clause, and agency notices may or may not be incorporated by modification. Until a clause is in the contract, this ground is a poor fit. The same reasoning applies to termination for default, which requires a breach of the contract's

terms. Suspension does not list this ground at all.

- **The catch-all.** The likelier hook is FAR 9.406-2(c) (and 9.407-2(c) for suspension): "any other cause of so serious or compelling a nature that it affects the present responsibility" of the contractor. That standard is about whether the contractor can be trusted to perform honestly and capably going forward. A contractor that answered a congressional committee without first alerting the White House would have a strong argument that this says nothing about its present responsibility.
- **Not punishment.** FAR 9.402(b) says debarment and suspension are imposed "only in the public interest for the Government's protection and not for purposes of punishment." Excluding a contractor to enforce compliance with a policy about congressional requests looks punitive, which would support a challenge under the APA as arbitrary and capricious.
- **Process and mitigation.** The contractor would still get notice and an opportunity to respond, and the debarring official must weigh the mitigating factors in FAR 9.406-1(a), including remedial measures and the contractor's compliance program.

The practical upshot: the exclusion threat is real but legally shaky until a contract clause exists. Once one does, the willful-failure ground becomes available. Contractors should review carefully any modification or new solicitation clause that adds the order's requirements, because that is the step that turns a policy directive into a potentially enforceable contract term.

Who Pays: Allowability and Equitable Adjustment

Notice, coordination, privilege review and negotiation with committee staff cost money, and the order does not say who bears it.

- **Allowability.** Whether these costs can be charged to government contracts depends on the cost principles. FAR 31.205-22 makes most lobbying costs unallowable but excepts a "technical and factual presentation of information on a topic directly related to the performance of a contract" to Congress "in response to a documented request." FAR 31.205-47(f)(9) makes costs of a congressional investigation unallowable when the underlying issue leads to an adverse disposition, such as a fraud judgment, a penalty or a debarment. Ordinary legal and administrative costs of responding to oversight fall between those rules and should be assessed for reasonableness and allocability. Contractors should track these costs separately from the start.
- **Equitable adjustment.** If an agency adds the order's requirements by modification, the new duties may be a compensable change. Contractors should evaluate the cost impact before signing a bilateral modification, and should reserve rights or submit a request for equitable adjustment where appropriate.

What Federal Contractors Should Consider Now

1. **Inventory pending requests.** Identify any open congressional letters, document requests, briefing or interview requests, or subpoenas that touch your federal work. The notice duty covers requests already pending.
2. **Set an intake and notice protocol.** Route congressional requests to the company to a single point in legal or government affairs. Document when and how you notify the contracting officer and the White House, until agencies or OMB name a channel.
3. **Watch for agency notices and OMB guidance.** Track contracting officer letters, modifications and solicitation language. Any new clause or certification should be reviewed before signature.

4. **Flow the obligation down carefully.** Primes are responsible for subcontractor compliance. Update subcontract templates and notify key subcontractors, but avoid flow-down language that sweeps in employees' individual communications.
5. **Protect employees' rights.** Review policies, codes of conduct and confidentiality agreements so they expressly preserve disclosures to Congress, Inspectors General and other bodies under 41 U.S.C. § 4712 and the FCA. Train managers that the order does not authorize discipline for protected reports.
6. **Plan for conflicts.** If a White House or agency instruction to withhold conflicts with a congressional subpoena or other legal obligation, get counsel involved early and document the instruction you received.
7. **Issue holds immediately.** Treat any congressional request as a preservation trigger, whatever the status of White House or agency instructions.
8. **Confirm whether you are covered.** Decide which of your awards, including grants, Other Transaction agreements and Schedule orders, fall within the order, and document the reasoning.
9. **Map existing disclosure clauses.** Check each contract for DFARS 252.204-7000, CUI and security requirements, and reconcile them with the new notice duty.
10. **Protect your own privileges.** Put a common-interest arrangement in place before sharing privileged analyses with the government.
11. **Handle employee requests separately.** Give *Upjohn* warnings, consider separate counsel, and do not discourage or shape employee testimony.
12. **Track costs.** Segregate the costs of compliance and congressional responses, and evaluate an equitable adjustment if a modification adds the order's requirements.