Proactive Federal Contractors Will Be Most Prepared for Burdensome Fair Pay and Safe Workplaces ("Blacklisting") Final Rule

On August 25, 2016, the Federal Acquisition Regulatory ("FAR") Council and the United States Department of Labor ("DOL") issued their Final Rule and Final Guidance, respectively, on the Fair Pay and Safe Workplaces Executive Order ("EO"). Taft explained the potential ramifications of the EO when it was signed in 2014. We now have more details to share with federal contractors concerned about how the EO will affect their competitiveness when bidding.

Many in the industry refer to the EO as the "blacklisting" rule because of a provision requiring all federal contractors—both primes and subs—to make pre-award disclosures about past labor law violations involving an administrative agency determination, an award resulting from an arbitration, or a civil judgment, even when one of those procedures is not final or is subject to further review. What we don't yet know is how difficult it will be for a firm with recent labor law violations to obtain a satisfactory responsibility determination—only time and practice will tell.

While the new labor law violation disclosure regime is the most eye-catching element of the EO, federal contractors must also keep in mind several other provisions including the paycheck transparency clause and the new prohibition against mandatory arbitration of certain civil rights claims. We have compiled the most impactful details of the EO below.

The Most Important Differences between the Proposed Rule and Final Rule

- Subcontractor Reporting: Prime contractors were originally responsible for reporting their subcontractors' labor law violations along with their own. A newly defined process allows subcontractors to submit their own labor law violations directly to the DOL and prime contractors will receive a report for use in evaluating prospective subcontractors' integrity and business ethics—otherwise referred to as "responsibility"—in advance of a bid.
- Staggered Implementation: The labor law violation reporting disclosure period is initially limited to one year and will gradually increase to three years by October 25, 2018.
- DOL Preassessment Process: Firms may now obtain a non-binding DOL responsibility determination prior to a formal request from a contracting officer.

Dates to Remember

- Week of September 12, 2016: Preassessment begins, through which current or prospective contractors may come to DOL for a voluntary assessment of their labor compliance history in anticipation of bids on future contracts but independent of any specific acquisition.
- October 25, 2016: The final rule takes effect. Mandatory disclosure and assessment of labor law compliance begins for all prime contractors under

consideration for contracts with a total value ***greater than or equal to $50 million***. The reporting disclosure period is initially limited to one year and will gradually increase to three years by October 25, 2018.

- January 1, 2017: The paycheck transparency clause takes effect, requiring contractors to provide wage statements and notice of any independent contractor relationship to their covered workers.
- April 25, 2017: The total contract value threshold for prime contracts requiring disclosure and assessment of labor law compliance is ***reduced to $500,000***.
- October 25, 2017: Mandatory assessment begins for all subcontractors under consideration for subcontracts with a total value ***greater than or equal to $500,000***.

Contracting Firms Covered by the EO's Labor Law Violations Disclosure Requirements

The majority of federal prime and subcontractors are covered by the EO, but the following exclusions exist:

- Contracts valued below $500,000.
- All subcontracts for the procurement of COTS items and services.
- Affiliated entities, including subsidiaries and parents of federal contractors, are exempted so long as their name and address do not appear on the bid/offer.

Role of the Agency Labor Compliance Advisors ("ALCAs")

The DOL's Final Guidance clarifies that the ALCA's role is advisory to the contracting officer who makes the final responsibility determination prior to an award. The three-step process envisioned requires the ALCA to:

(1) Review the contractor's submitted violations to determine if any rise to the level of "serious, repeated, willful, and/or pervasive";
(2) Weigh any violations meeting the standard in step one in light of the totality of the circumstances giving consideration to factors such as the severity of the violation(s), the contracting firm's size, and any relevant mitigating factors such as subsequent remediation, prevention, or when there is only one violation; and
(3) Provide analysis and opinion as to the contractor's responsibility to the contracting officer.

Depending on the results of the ALCA's inquiry, a contracting agency may require a bidder with a poor record to sign a "labor compliance agreement" as a condition of acceptance of an award. What we don't yet know is exactly where agencies will draw the line and decide that a firm's labor violations are sufficiently negative to warrant denying them an award—the so-called "blacklisting" effect.

Law Violations Subject to Mandatory Disclosure

14 Federal Laws

- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Title VII of the Civil Rights Act
- Davis-Bacon Act
- Executive Order 11246 (equal employment opportunity)
- Executive Order 13658 (federal minimum wage for contractors)
- Fair Labor Standards Act
- Family and Medical Leave Act
- Migrant and Seasonal Agricultural Worker Protection Act
- National Labor Relations Act
- Occupational Safety and Health Act
- Section 503 of the Rehabilitation Act (of 1973)
- Service Contract Act
- Vietnam Era Veterans' Readjustment Assistance Act

State Law

- Violations of Occupational Safety and Health Administration ("OSHA") State Plans must be reported.
- The DOL will release a list of state law equivalents of the 14 federal laws listed above. At an undetermined future date, contractors will be required to disclose these violations.

Labor Law Violation Data to Be Disclosed

Covered contractors must submit the following four data points for any "administrative merits determinations, civil judgments, or arbitral awards or decisions":

- The labor law violated.
- The case number, inspection number, charge number, docket number, or other unique identification number.
- The date rendered.
- The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision.

These four data points will be publicly disseminated through the Federal Awardee Performance and Integrity Information System (FAPIIS). Contractors may submit additional information such as evidence of remediation or mitigating factors. Contractors will have a semiannual duty to update.

Paycheck Transparency

Beginning on January 1, 2017, federal contractors must fully comply with the paycheck transparency clause, which requires mandatory provision to workers of:

(1) Clear wage statements explaining all elements of pay (hours worked, overtime hours, pay, and any additions to or deductions made from their pay);
(2) Written notice of employment classification (employee vs. independent contractor); and
(3) Written notice of whether employees are exempt from receiving overtime compensation.

Prohibition against Mandatory Arbitration of Certain Civil Rights Claims

Any federal contractor maintaining contracts worth more than $1 million is prohibited from entering into mandatory pre-dispute arbitration clauses with employees for Title VII or tort-based sexual harassment/assault claims beginning on October 25, 2016. Exceptions to this rule include when employees are covered by a collective bargaining agreement, when the contractor entered into the arbitration agreements prior to bidding on a federal contract containing the clause prohibiting arbitration, and subcontracts for the acquisition of commercial items.

Contracting Firms Should Take Action Now to Mitigate and Prevent Violations

- Contractors should task a sufficiently senior management-level employee with collecting from all business units reports of labor law violations within the covered period as well as all steps taken or procedures implemented to prevent similar future violations. Providing this information at the last minute will be a challenge, but companies have the opportunity now to create a system for cataloging violations.
- Contractors should begin formulating arguments for why particular violations do not rise to the level of "serious, repeated, willful, and/or pervasive", the standard by which ALCAs will assess whether contractors maintain a satisfactory level of integrity and business ethics.
- Prime contractors should consider counseling preferred subcontractors on how to deal with the Final Rule to prevent future delays.
- Contractors weary of investing the time and resources necessary to submit a bid before knowing the possible effect of past labor law violations may avail themselves of a voluntary preassessment with the DOL beginning on September 12, 2016. However, it is important that contractors understand that these preassessments are not binding and therefore provide no guarantee of a favorable determination during a formal responsibility determination. The Final Rule merely gives contracting officers and ALCAs the discretion to adopt the preassessment so long as no new violations have occurred since completion of the preassessment. Contractors should also keep in mind that we still do not

know what prejudicial effect these preassessments might have on any pending administrative determinations or other labor law decisions requiring disclosure.

- Prime contractors who are unfamiliar with their subcontractors' labor law violation record and/or who find it inconvenient or uncomfortable to perform due diligence prior to submitting a bid should consider requiring a prospective subcontractor to obtain a preassessment to share with the prime.
- All labor and employment compliance policies should be reviewed for consistency with the Final Rule and Final Guidance.
- All contractors desiring pre-dispute mandatory arbitration agreements with their workers for Title VII or sexual harassment/assault claims must obtain signatures before October 25, 2016, unless one of the exceptions detailed above applies

Recommended Additional Resource

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