

Wiley Rein and Professional Services Council Discuss Concerns about Proposed Fair Pay and Safe Workplaces Rule and Guidance

Summer 2015

On June 23, 2015, Wiley Rein and the Professional Services Council (PSC) co-sponsored a panel discussion on recent regulatory developments concerning Executive Order 13673: Fair Pay and Safe Workplaces. Rand L. Allen, the chair of Wiley Rein's Government Contracts practice, joined PSC representatives in highlighting key concerns about the implementing rule recently proposed by the Federal Acquisition Regulatory (FAR) Council and accompanying guidance proposed by the Department of Labor (DoL).

As proposed, the FAR rule will require contractors and subcontractors to disclose a wide range of labor law violations when competing for and then performing most federal contracts and subcontracts over \$500,000. The contracting officer and prime contractor then must analyze any disclosed violations when making pre-award assessments of the responsibility of prospective contractors and subcontractors, respectively. DoL's proposed guidance attempts to define key terms in the proposed FAR rule and to provide additional insight into how the proposed FAR rule should work, although DoL has deferred defining perhaps the most critical term in the proposed rule: the hundreds of "equivalent state laws" of which contractors and subcontractors will also be required to disclose violations.

The presentation covered many concerns raised by the panelists and the attendees (which represented a cross-section of the services sector), including the following:

- The proposed rule and guidance impose a costly solution across the entire contracting base to address a problem that

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may not exist or be nearly as extensive as asserted.

- The proposed rule potentially adds a remedy (*i.e.*, ineligibility for federal contracts) that goes beyond what was authorized by each of the underlying labor laws.
- The proposed rule requires prime offerors to publicly disclose any determinations of violations regardless of whether the determination was confidential (e.g., confidential arbitration), under appeal or review, preliminary, etc.
- The definitions of the categories of violations described in the proposed rule and guidance are very broad so as to encompass seemingly minor violations.
- It is unclear how newly required agency personnel, called agency labor compliance advisors, will develop the needed familiarity with the relevant labor laws or will complete a meaningful analysis of a contractor's labor violations as required by the proposed rule and guidance.
- The proposed rule/guidance emphasize consideration of "labor compliance agreements" with little guidance on the form or substance of such agreements, when they should be considered or required, or how they might relate to administrative agreements with SDOs.
- The proposed rule and guidance establish processes that largely duplicate the functions of agency suspending and debarring officials (and, to a lesser degree, enforcement agencies) without the independence, coordination, and due process provided through the suspension and debarment mechanisms.

Comments on the proposed rule and guidance are due July 27, 2015. If the rule and guidance are implemented as proposed or in substantially similar form, contractors should expect to shoulder significant compliance burdens as a result. Wiley Rein expects the possibility of litigation over the proposed rule and guidance, especially given the substantial costs and significant overreach that the proposed terms represent.