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ALERT

New Proposed Regulation and Guidance Implementing Executive Order 13673 Fair Pay and Safe Workplaces

May 28, 2015

On May 28, 2015, the Federal Acquisition Regulatory Council (Council) published its proposed rule and the Department of Labor (DOL) issued proposed guidance implementing Executive Order 13673 Fair Pay and Safe Workplaces. Both the proposed regulations and the proposed guidance are followed by a public comment period ending July 27, 2015. The Executive Order and proposed FAR rule and DOL Guidance collectively impose significant reporting and recordkeeping obligations on contractors and subcontractors that will require careful planning in anticipation of the final rule.

Proposed FAR Rule

The Executive Order, which was issued in July 2014 (previously discussed here), among other things requires that agencies consider a contractor's history of compliance with fourteen listed labor laws (which includes the Service Contract Act, the Davis Bacon Act, the Fair Labor Standards Act (FLSA), and the Family and Medical Leave Act) or any State equivalent laws in determining contractor or subcontractor responsibility. In addition, the Executive Order requires that, if the contract has already been awarded, contracting officers consider a contractor's history of labor compliance in determining whether action needs to be taken during performance of the contract.

The proposed rule issued today would implement these requirements by adding a new FAR Subpart 22.20, Fair Pay and Safe Workplaces, as well as a number of new contract clauses, which would impose new disclosure requirements for contractors and subcontractors; rules for and the assessment of those disclosures; new paycheck

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transparency requirements; and complaint and dispute transparency requirements. The rule also includes changes to FAR 9.105, regarding responsibility determinations; and FAR Part 17, regarding option exercises. The following is a summary of how these new requirements would play out under the proposed rule:

- Consistent with the Executive Order, the proposed rule would require an offeror, for any solicitation estimated to exceed $500,000 (including solicitations for commercial items), to represent whether it has any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against it, within the preceding three years for violations of the specified labor laws.
- If an offeror represents it has a violation before award, and if the CO has initiated a responsibility determination, then the CO will require the offeror to submit additional information on the violations and afford the offeror an opportunity to provide information on mitigating circumstances and remedial measures taken in response.
- The CO would then confer with an agency labor compliance advisor (ALCA), a new position created by the Executive Order, and consider the ALCA's advice in evaluating any disclosed violations as part of the CO's responsibility determination.
- Similarly, a contractor has obligations to ensure a subcontractor's responsibility before award of a subcontract. For subcontracts estimated to exceed $500,000, other than those for commercial-off-the-shelf items, the contractor must require its prospective subcontractors to make similar disclosures to those that the contractor must make, although as described below, the procedures that ultimately will be in place for prime contractors to solicit such information from subcontractors is still largely undefined.

After award of the contract, contractors and subcontractors continue to have reporting obligations. The contractor and its subcontractors would be required to disclose, semi-annually, whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against them for violations of the identified labor laws. According to the background, this requirement to update on a semi-annual basis is included to allow COs to consider a contractor's labor compliance history when deciding whether to exercise an option. As with the pre-award procedures, COs, in consultation with the ALCA, are responsible for considering information submitted by contractors after contract award. If new violations are reported, the CO can choose to take no action and continue the contract; refer the matter to DOL for action, which may include a new or enhanced labor compliance agreement; decline to exercise an option; terminate the contract; or notify the agency Suspending and Debarring Official if there are such serious, repeated, willful, or pervasive labor violations such that the violations demonstrate a lack of integrity or business ethics.

The proposed rule also outlines the duties of the ALCA. ALCAs are responsible for reviewing information regarding violations reported by contractors; assessing whether reported violations are serious, repeated, willful, or pervasive; reviewing the contractor's remediation of the violation and any other mitigating factors; and determining if the violations identified warrant remedial measures, such as a labor compliance agreement. The proposed rule contemplates that the ALCA will generally provide such written advice and recommendation "within three business days" of a request by the CO. Although the proposed rule requires the CO to confer with the ALCA, it is ultimately up to the CO to make the responsibility determination of

prospective contractors.

The Council invites public comment on six issues in particular:

- First, it is interested in feedback on how to define and identify "equivalent state laws." As the DOL guidance also mentions, the only "equivalent state laws" identified at this point are Occupational Safety and Health Administration-approved state plans. Otherwise, the state law requirement is not implemented in the proposed rule.
- Second, the Council invites comments on how to reduce the rule's burden on small businesses. Certain steps have already been taken to minimize the burden, such as limiting the disclosure requirements to contracts over $500,000 and excluding commercial-off-the-shelf items, but the Council remains interested in identifying additional ways to reduce the burden.
- Third, the public is invited to provide input on the scope of documents that should be publicly disclosed and how to otherwise strike the right balance between transparency and candid communication with enforcement agencies on compliance agreements and other remediation measures. The rule as proposed would require prospective prime contractors to publicly disclose only whether they have violations of covered laws within the last three years and, for prospective contractors being evaluated for responsibility, certain basic information about the violation, *e.g.*, the law violated, the docket number, and the name of the body that made the decision. The rule would not compel public disclosure of additional documents the prospective contractor deems necessary to demonstrate its responsibility, such as mitigating circumstances, remedial measures, or other steps taken to achieve compliance with the labor laws. The rule is silent on the public disclosure of the administrative merits determinations, arbitral awards or decisions, or civil judgments (some of which are public records regardless) and on the public disclosure of labor compliance agreements.
- Fourth, the Council is interested in comments on how technology can be used to maximize the efficiency of compliance and reduce the reporting burden. The Executive Order requires the General Services Administration to develop a single website for contractors to use to report the violation information.
- Fifth, the Council solicits comments on how to handle the flow down of reporting obligations to subcontractors and to whom subcontractors should report their information. The proposed rule provides that prime contractors may seek assistance from DOL in evaluating subcontractor labor violations and making determinations of responsibility or, for existing subcontracts, evaluating the need for other actions. However, the Council has proposed three alternative subcontractor reporting options to achieve this, including subcontractors reporting directly to DOL instead of to the prime contractor, and seeks input on the best approach.
- Lastly, the Council seeks comment on the burden on contractors for tracking labor law violations. Specifically, the Council is interested in comments on the need for and cost of setting up a tracking database, how such costs would depend on a contractors' size and organizational structure, and the extent to which setting up such systems would reduce recurring disclosure costs in the following years. The Council recognizes that prudent businesses likely already retain determinations or decision documents of labor violations as normal practice, so the recordkeeping burden in this regard might be

low.

DOL Guidance

On the same day as the Council published the proposed rule, DOL simultaneously issued proposed guidance. In many respects, the proposed rule and guidance are mutually reinforcing, with the proposed rule oftentimes referring to the DOL guidance for further explanation. The DOL guidance focuses on defining labor violations and how to determine whether a labor violation is reportable, what information about labor violations must be disclosed, how to analyze the severity of labor violations, the use of labor compliance agreements, and the role of ALCAs, DOL, and other enforcement agencies in addressing violations. The DOL guidance also offers insight into the type of wage statement information that contractors will be required to provide to employees and notifications that must be made to independent contractors. In many of these areas, the DOL guidance specifically requests public comments.

The DOL guidance provides definitions for key terms from Executive Order 13673 including "administrative merits determination," "civil judgment," and "arbitral award or decision." Notably, the proposed definition of "administrative merits determination" includes seven rather broad categories of notices or findings including findings that entail issuance of "a WH-56 'Summary of Unpaid Wages' form" or a "letter, notice, or other document assessing civil monetary penalties." The DOL guidance also makes it clear that a contractor must report a covered administrative merits determination that the contractor is still challenging or one that is otherwise subject to review (although the contractor also may provide additional information describing the status of the challenge or ongoing review/appeal of a findings or can provide other mitigating information). The DOL guidance also describes the types of information a contractor or subcontractor must disclose in connection with a covered violation consistent with the information required to be disclosed under the proposed rule, as discussed above. Questions remain, however, concerning the process that will be adopted for reporting of subcontractor violations to higher-tiered contractors, as noted in the FAR proposed rule.

The DOL guidance also defines when violations are "serious," "repeated," "willful," or "pervasive" and offers appendices with tables of examples to help inform contractors as to what types of activity could rise to the these levels. Contractors should take note that the threshold for a violation to be considered "serious" is relatively low. For example, any covered violation that affects 25% or more of the workforce at the worksite or a violation that involves fines and penalties of at least $5,000 or back wages of at least $10,000 will be considered a "serious" violation. (Note, DOL has sought comments specifically as to the appropriateness of these thresholds.)

In addition, the DOL guidance outlines considerations an agency or prime contractor may take into account when assessing the severity of violations as well as mitigating factors. Factors to consider when assessing the severity of a violation include whether the violations are pervasive such that they demonstrate a basic disregard for the labor laws; whether the violations meet two or more of the "serious," "repeated," "or "willful" categories; whether the violations are reflected in final orders; and whether the violations are of particular gravity as described in the guidance. Mitigating factors include, among others, remediation of a violation, including labor compliance agreements; commission of only one violation as opposed to repeated acts;

implementation of safety and health programs or grievance procedures; good faith efforts to ascertain legal obligations and follow the law; and a significant period of compliance following violations. The DOL guidance notes that it will publish additional guidance in the future to resolve remaining issues, such as the "equivalent state laws" definition. As mentioned previously, only state plans approved by DOL's Occupational Safety and Health Administration are considered equivalent state laws at this point.

Finally, the DOL guidance provides further details concerning the paycheck transparency requirements from the Executive Order. The DOL guidance identifies the type of wage information a contractor must provide to its employees in the form of a wage statement including information concerning the individual's hours worked, overtime hours, pay and any additions made to or deductions from pay. These requirements also must be incorporated into any covered subcontracts. For any workers that are exempt under the FLSA such that a wage statement need not include a record of hours worked, contractors or subcontractors now must provide written notice to the worker stating that the worker is exempt from the FLSA's overtime compensation requirements (oral notice is not sufficient). Contractors and subcontractors also will be required to provide a written document to any independent contractors informing those workers that the contractor considers them to be independent contractors. Once again, oral notice is not sufficient and any notice must be provided separately from any contract entered into between the contractor or subcontractor and the independent contractor.

Contractors should consider whether it would be beneficial to submit comments by the July 27, 2015 due date in order to help shape the final rule. Wiley Rein is available to assist in such an effort. In any event, in light of the new proposed rule and guidance, contractors must remain vigilant as to their evolving obligations and be aware that additional guidance will be published in the future. Contractors should consult with counsel early to navigate the changes and develop a strategy to comply with their obligations in advance of the final rule.