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ALERT

FAR Council Publishes Proposed Rule Setting New Requirements for Pay Equity and Transparency

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WHAT: The Federal Acquisition Regulatory (FAR) Council has published a proposed rule that would bar contractors and subcontractors from considering covered job applicants' prior compensation and require disclosure of compensation for positions involving work on or in connection with covered federal contracts. Agencies would also set up central collection points to receive allegations of non-compliance submitted by job applicants. The proposed rule would apply to all FAR-based contracts and subcontracts performed in the United States and its outlying territories.

WHEN: The FAR Council published its proposed rule on January 30, 2024. Comments are due by April 1, 2024.

WHAT DOES IT MEAN FOR INDUSTRY: The proposed rule's impact may vary geographically. Some contractors may see little impact on their current hiring practices because several states, such as California, Colorado, Maryland, Nevada, New York, and Washington, have already imposed similar bars on considering compensation history or requirements for disclosing compensation information for job postings. But for other contractors, the proposed rule may require more wholesale review and revision of policies and practices related to hiring and recruitment. Contractors should review the proposed rule and their current pay equity and transparency practices to determine what changes may need to be made if the proposed rule becomes final.

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The proposed rule's two key changes would apply through a new FAR subpart 22.XX and corresponding FAR clause entitled "Prohibition On Compensation History Inquiries and Requirement For Compensation Disclosures By Contracts During Recruitment and Hiring." The clause would apply to all contracts in which the principal place of performance will be the United States and its outlying territories—including contracts for commercial products and services, along with contracts under the simplified acquisition threshold. Flowdown to subcontracts would be equally broad.

Both prohibitions would cover jobs "on or in connection with" contracts and subcontracts subject to the clause. The clause has a brief definition of "on or in connection with," but implementation of recent Executive Orders, such as the contractor minimum wage and contractor sick leave, signals that the term could be expected to encompass indirect-charge type work supporting contract performance, such as contract managers, subcontract managers, human-resources personnel whose work relates to workers on the contract, and similar roles.

The clause would prohibit contractors from directly or indirectly seeking compensation history as a condition for candidacy and from retaliating against an applicant for failing to respond to an inquiry about compensation history. The clause would also prohibit relying on any compensation history voluntarily provided by an applicant.

Regarding job openings, the proposed clause would require contractors to disclose the compensation that the contractor in good faith believes the position will be paid. The clause contemplates disclosure of salary or wages, either a specific figure or a range. If at least half of the expected compensation would be from commissions, bonuses, and/or overtime, the contractor must specify a dollar amount or range for each form of compensation. The disclosure must also provide a general description of benefits and other forms of compensation the position will receive. The FAR Council proposed to require the clause be included in all solicitations and contracts, including flowed down to all subcontractors, where the place of performance is the United States or its outlying territories.

The clause requires contractors to notify job applicants of these rights and prohibitions, with lengthy prescribed language in the clause itself. The text includes a space for listing the central point of contact at the federal agency that awarded the contract receiving complaints alleging a contractor's noncompliance with the clause.

This last provision on reporting complaints highlights one uncertainty caused by the clause's breadth of application. For many jobs, contractors may face difficulty identifying *the* agency whose contracts will be supported. The clause says that for applicants supporting multiple agencies, "complaints should copy the central collection point of all known agencies to be supported by the applicant's position." This language suggests that contractors' job listings must identify every agency supported by a position. It's not hard to imagine contractors' erring on the side of caution by listing every agency that might be supported, which is unduly burdensome for contractors and not particularly informative for workers, either.

The proposed rule makes no exceptions for classified and other contracts that do not permit the contractor to publicly identify the work. There is likewise no exception for subcontracts that bar the subcontractor from public statements about the work absent prior approval.

Finally, the clause's breadth of application to workers adds another layer of uncertainty. Unlike clauses implementing the Executive Orders noted above, this clause does not limit application to jobs that work "in connection with" covered contracts for at least 20% of the workweek or some other threshold. With no de minimis standard built into the rule, contractors may find it difficult to define the scope of jobs subject to the rule with confidence. Contractors might be able to manage risk by erring on the side of treating jobs as subject to the rule when it's a close call, but the ability to apply the proposed rule cautiously should not be mistaken for the proposed rule's being clear and well defined.

Wiley attorneys will continue to monitor the proposed rule's development.