Labor and Employment Alert

June 12, 2015

Proposed Rule on Fair Pay and Safe Workplaces Executive Order Provides Significant Discretion to Deny Contract Awards

On May 28, 2015, the Federal Acquisition Regulatory Council ("FAR Council") issued a proposed rule ("Proposed Rule") and the Department of Labor (DOL) issued proposed guidance ("Guidance") to implement President Obama's Executive Order 13673 Fair Pay and Safe Workplaces (the "Order"). The Order requires federal contractors and subcontractors to disclose various violations of labor and employment laws to be considered by the government in determining contract awards.

Since the Order was issued in July 2014, the contractor community has been alarmed by a number of unresolved issues, particularly the precise scope of the violations that would be covered by the Order and how contracting officers would weigh those violations in contracting decisions. The Proposed Rule and Guidance reveal that the government intends to require contractors to disclose a wide range of labor law violations, and it grants contracting officers significant discretion to deny contract awards based on those violations or even terminate ongoing contracts.

If finalized in their present form, the Proposed Rule and Guidance will impose a host of new obligations on contractors and greatly increase the potential consequences of violations of labor and employment laws for contractors seeking government business. Contractors must carefully assess how they prepare for and address these new requirements to avoid denial of contract awards or termination of existing contracts.

Covered Contracts

The Order applies to all federal contractors submitting bids on solicitations for goods and services contracts, including construction contracts, where the estimated value of the solicitation exceeds $500,000. Prime federal contractors covered by the Order will also be required to flow down the requirements to all subcontracts where the estimated value of the subcontract exceeds $500,000, except for subcontracts for commercially available off-the-shelf items.

Requirements

As part of the solicitation process, contractors submitting bids for covered contracts are required to disclose, to the "best of their knowledge and belief," whether, in the three years prior to bidding on the solicitation, there have been any court, arbitration or investigative agency findings that they have violated certain federal or state discrimination, wage and hour, leave and safety laws. The proposed Guidance contemplates a two-step process for such disclosures. Under the first phase, contractors will be asked a series of yes-or-no questions about whether they have experienced any covered labor law violations. If the contractor confirms that such violations exist and reaches the stage in the bidding process where the contracting officer must make a "responsibility determination," the contractor will be required to provide

details on its labor violations, including: (1) the specific law violated; (2) the case number, inspection number, charge number or other unique identifier; (3) the date of the violation; (4) the name of the court, arbitrator(s), agency or board that found the violation; and (5) any remedial efforts taken by the contractor to mitigate the violation.

After contract award, the Proposed Rule and Guidance envision contractors being required to update this information every six months, disclosing whether there have been any additional labor law violations against them or their covered subcontractors, since the initial disclosure. Any new violations must be reported, even if they arise from covered violations already disclosed to the government.

Violations Disclosed

The Order requires contractors to report violations of 14 different federal laws along with their "state equivalents" that resulted in an "administrative merits determination," "arbitral award or decision" or "civil judgment." The specific labor laws covered include, among others, the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), the National Labor Relations Act (NLRA), the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and laws administered by the Office of Federal Contract Compliance Programs (OFCCP).

By broadly defining the following terms, the Proposed Rule and Guidance reveal that the government intends contractors to disclose a wide range of violations:

- "Administrative merits determinations" include notices or findings issued by an enforcement agency following an investigation, including but not limited to (1) issuance of a Form WH-56 or a letter from the DOL's Wage and Hour Division that an investigation revealed violations of Sections 6 or 7 of FLSA or a violation of the FMLA; (2) a show cause notice from OFCCP; (3) a citation from OSHA or notice of imminent danger; (4) a complaint filed by the regional director of the NLRB; and (5) a reasonable cause determination issued by or a civil action filed on behalf of the Equal Employment Opportunity Commission (EEOC).
- "Civil judgments" include any judgment or order entered by a federal or state court (but not administrative tribunals) finding a violation of a covered labor law, including but not limited to preliminary injunctions, partial summary judgment rulings, and consent or default judgments. Private settlement agreements are expressly excluded from "civil judgments."
- "Arbitral awards or decisions" include any determination by an arbitrator or arbitration panel that the contractor violated a provision of a covered labor law or was enjoined from violating a covered labor law.

Significantly, the Proposed Rule and Guidance would require contractors to submit information on covered violations, even if the actions related to those violations are not yet final or are under appeal. For example, a number of the "administrative merits determinations" are more in the nature of administrative allegations. OSHA citations, NLRB complaints and EEOC cause determinations, while made after investigation, all are subject to formal adjudication before they become an enforceable final agency

decision. Also noteworthy is that neither the Proposed Rule nor Guidance identifies the "state law equivalents" to the covered federal labor laws, except for indicating that "OSHA-approved State Plans" are "equivalent" laws. The DOL plans to issue additional proposed guidance addressing state law equivalents at some future date.

Review of Violations

A major unresolved issue from the Order was how contracting officers would assess violations reported by contractors. The Proposed Rule and Guidance state that contracting officers, in consultation with the newly created Labor Compliance Advisor position at the particular agency, will review all facts and circumstances of reported violations, as well as any mitigating factors, to determine if those violations are "serious," "repeated," "willful" or "pervasive." The DOL's proposed Guidance provides lengthy definitions of each of these terms:

- "Serious" violations include but are not limited to violations that affect 25 percent or more of the workforce, fines of at least $5,000 or back wages of $10,000 or more, findings of a pattern or practice of discrimination or systemic discrimination, or breach of a settlement agreement with an enforcement agency or interference with an agency investigation.
- "Willful" violations include but are not limited to FLSA merits determinations that sought or assessed back wages for two years or civil monetary penalties for willful violations, liquidated damages that were assessed for ADEA violations, punitive damages that were awarded under Title VII or the ADA, or findings that the contractor knew its conduct was illegal or showed a reckless disregard for the law.
- "Repeated" violations include violations that are the same or substantially similar to one or more separate violations of labor laws by the contractor in the past three years.
- "Pervasive" violations are violations that demonstrate a pattern of serious or willful, continuing or numerous violations, which will be balanced in relation to the overall size of the contractor.

Contracting officers can exercise substantial discretion to determine what they consider serious, willful, repeated or pervasive violations. The DOL Guidance instructs contracting officers to pay particular attention to the following types of violations: (1) pervasive violations; (2) violations that are reflected in the final orders; (3) violations of a particular gravity (e.g., violations that result in death of an employee or termination of an employee for exercising a right under a labor law); and (4) violations that meet at least two of the following: serious, repeated or willful. In addition to violations contractors self-report, contracting officers can consider "similar information" from "other sources," which essentially permits plaintiffs' attorneys, labor unions, competitors or others to submit information to the contracting officer concerning the contractor's compliance and violations of covered labor laws.

Contracting officers must also examine circumstances that could mitigate reported violations. The Guidance instructs that the most important mitigation factor is the extent to which the contractor has remediated the violation and taken steps to prevent reoccurrence. Other mitigating factors that might be considered include, but are not limited to, whether (1) there is only a single violation; (2) the number of

violations is relatively low to the size of the contractor; and (3) the contractor has implemented a compliance program to address the issue.

Contractors are required to perform this same assessment before awarding contracts to their covered subcontractors. Contractors must also continue to monitor violations throughout the term of the subcontract by requiring subcontractors to update their disclosures semi-annually. The Proposed Rule permits contractors to choose to evaluate all of their subcontractors, or they can delegate the evaluation of lower tier subcontractors to higher tier subcontractors.

Contract Awards, Terminations, Suspension and Debarment

Based on their assessment, contracting officers have discretion to deny a contract award or not exercise an option on an existing contract. Even more unsettling is that the Proposed Rule entitles contracting officers to terminate a contract or refer the contractor for suspension or debarment, if the violations are significant.

Wage and Status Notifications

Contractors will be required to provide all individuals performing work on a covered contract a notification each pay period "concerning the individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." Although the Proposed Rule clarifies that contractors will not be required to provide employees exempt from FLSA with a wage statement reflecting their hours worked, contractors will be required to provide written notices to exempt employees notifying them that they are exempt from the overtime provisions of FLSA.

Contractors must also provide independent contractors with a written notice informing them of their status as independent contractors. The notice must be given at the time when the independent contractor is engaged, and it must be in a standalone document separate from any independent contractor agreement. The document will not be used to determine whether an independent contractor is properly classified.

If a "significant portion" of the contractor's workforce is not fluent in English, the wage statements and status notices must be in a language with which the workforce is more familiar. The Proposed Rule and Guidance are silent as to when non-English speakers will constitute a "significant portion" of a contractor's workforce.:

Arbitration Provisions

The Order prohibits contractors and subcontractors with a covered contract of $1 million or more from requiring employees to enter pre-dispute agreements to arbitrate claims arising under Title VII or any tort related to sexual assault or harassment. This prohibition does not apply to employees covered by a collective bargaining agreement or those employees who entered into a valid arbitration agreement prior to the contractor bidding on a covered contract where the contractor cannot be changed.

Website

The Proposed Rule indicates that the Government Service Agency is developing a website for contractors to report labor law violations. Much of this information will be made publicly available in the Federal

Awardee Performance and Integrity Information System, although the government is considering the precise scope of the information it will release to the public.

Comments

Interested parties will have until July 27 to comment on the Proposed Rule and Guidance.

Significant Implications

Assuming the Proposed Rule and Guidance are implemented without major alteration, contractors will face new and significant obligations and risks in doing business with the federal government. Contractors should start reviewing their employment compliance now to minimize the occurrence of future violations. In addition, some of the violations reported will be made publicly available, which may be used to support private employment lawsuits and union organizing. As a result, contractors should consider conducting privileged audits of their employment practices to determine their current level of compliance with federal and state labor laws covered by the Order and implement practices and procedures to avoid violations going forward. Having a robust compliance program is also a factor contractors can offer to mitigate violations they must report.

Contractors also will need to consider how they will track and report covered violations. It is common for larger contractors to have multiple departments with responsibility for handling compliance with the various covered labor laws. Coordinating all of those departments so that there is a consistent method of tracking and reporting those violations will be a significant undertaking that will take time to develop and input from many stakeholders.

It is equally important to consider the scope and format of any information the contractor will provide to explain violations it must report. The Proposed Rule and Guidance do not provide a formal mechanism for a contractor to appeal the decision to deny a contract award for labor law violation. Because of the subjective nature of these determinations, the contracting officer's assessment will be very difficult to protest. Without a "second bite at the apple," contractors will need to sufficiently explain reportable violations and mitigating factors in their initial disclosures to the government. It is critical to start planning an effective method of gathering this data and devising a strategy for disclosing violations.

Contractors will also need to anticipate that plaintiffs' attorneys, labor unions or competitors may submit information to leverage their positions or gain unfair advantages. For example, plaintiffs' attorneys and government investigators may use adverse determinations to pressure contractors to settle claims to avoid having to report them. Contractors with unionized workforces may also be unfairly pressured during bargaining to agree to contract terms to avoid the filing of unfair labor practice charges.

Contractors should explore how they will assess their subcontractors. It may be difficult for prime contractors, particularly smaller contractors without sufficient staffing or legal expertise, to assess subcontractor labor violations. Training or additional staffing might be necessary to conduct proper assessments. Tracking the reporting of the labor law violations and conducting these assessments will also be very time consuming, especially for large contractors with potentially hundreds of subcontractors.

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