Steptoe
STEPTOE & JOHNSON LLP

Government Contracts Advisory

Proposed Fair Pay and Safe Workplaces Rules and Guidance Raise Compliance and "Blacklisting" Concerns

June 4, 2015

On May 28, 2015, two events occurred that are important to federal contractors. On that day, the Federal Acquisition Regulation (FAR) Council published proposed regulations and the US Department of Labor issued proposed guidance to implement President Obama's Executive Order of July 31, 2014, titled "Fair Pay and Safe Workplaces."

This Executive Order "seeks to increase efficiency and cost saving in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws." It requires that contracts for goods and services, including construction, where the estimated value exceeds $500,000, include the requirement for a representation, "to the best of the offeror's knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor, rendered against the offeror within the preceding 3-year period for violations of [14 labor laws and their equivalent State laws]." The Order requires contractors to represent that they will require each of their subcontractors performing a covered subcontract to report the same information at or before execution of the covered contract.

The Order further requires contracting officers and labor compliance advisors to "assess these types of reported violations (considering whether the violations are serious, repeated, willful, or pervasive) as part of the determination of whether a contractor has a satisfactory record of integrity and business ethics." In addition, the Order provides for ongoing semi-annual disclosure requirements from the contractor for the duration of the contract, and an obligation for the contractor to obtain similarly updated information from its subcontractors.

Labor law reporting requirements have been debated in the past, and the regulations to implement such reporting are often referred to as "blacklisting regulations" because the penalty for violations may result in the denial of an award or extension of a federal contract.

Currently, both the rules and the guidance are proposed, not final, and the public has the opportunity to comment on or before July 27, 2015. If issued as final rules, contractors will need to implement a compliance process that would include data collection and assessment and the reporting of violations to the contracting officer. Subcontractor data collection and reporting would also be included, creating an important additional compliance burden on prime contractors. In addition, the Executive Order contains two paycheck transparency requirements. First, contractors and subcontractors will be required to provide workers on federal contracts with information each pay period on how their pay is calculated. Second, contractors and subcontractors will be required to provide notice to those workers whom they deem to be independent contractors.

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Proposed Rules

The proposed rules implement the Executive Order's requirement that contractors disclose violations of 14 federal labor laws, to the contracting officer, including the Fair Labor Standards Act, the Occupational Safety and Health Act, the National Labor Relations Act, the Davis-Bacon Act, the Service Contract Act,

and Title VII of the Civil Rights Act of 1964. The definition of "violations" includes administrative merits determinations, arbitral awards or decisions, and civil judgments. For the purposes of the Order, the term "administrative merits determination" is defined to include: a WH-56 "Summary of Unpaid Wages" form from the Department of Labor's Wage and Hour Division, a citation from the Occupational Safety and Health Administration (OSHA), a show cause notice from the Office of Federal Contract Compliance Programs (OFCCP), a determination of reasonable cause letter from the Equal Employment Opportunity Commission (EEOC), or a complaint issued by the National Labor Relations Board (NLRB). Also, as the Department of Labor notes in the first footnote to its May 28, 2015, proposed guidance, it will identify at a future date the "equivalent State laws," which the Executive Order requires to be covered.

The proposed rules require that at the beginning of the pursuit of a covered contract, offerors provide the contracting agency with a representation as to whether they have been subject to any covered violations. If so, and if the contracting officer must make a determination of the offeror's responsibility (before it can be awarded the contract), the offeror would be required to provide the following information: (1) the labor law that was violated; (2) the case, charge, docket, or other identification number; (3) the date of the determination, judgment, award, or decision; and (4) the court, arbitrator, agency, board, or commission that rendered it. The contractor would have the opportunity to describe mitigating circumstances, remedial measures, and other steps taken to achieve compliance. Finally, as discussed above, during the post-award period, contractors and subcontractors would update this information semi-annually during performance of the covered contract. The proposed rule provides that "a violation is serious if it resulted in $5,000 or more in fines and penalties, or $10,000 or more in back wages."

Contractors Reporting Obligations for Their Subcontractors

An important part of this compliance requirement is the obligation placed upon the prime contractor to collect, review, and report the compliance information from its subcontractors. Government prime contractors have experienced an increase in obligations to effectively police their global supply chains in many areas, such as counterfeit parts and trafficking in persons, and this is another example of a supply chain significant compliance and policing obligation.

To address the new requirements seen in the proposed rules, prime contractors would need to examine and, as necessary, revise their standard subcontracting and purchasing terms to ensure that they are able to obtain data on any administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against the subcontractor within the preceding three-year period. Prime contractors would also need to have a process to evaluate this material in order to determine whether the subcontractor has met its responsibility requirements. It should be noted that an examination of a subcontractor's present responsibility is not a new requirement. This is already a requirement for prime contractors, described in FAR 9.104-4, Subcontractor Responsibility, which currently states:

> (a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.
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> (b) When it is in the Government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility.

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The proposed rule would alter FAR 9.104-4 and add a new paragraph pertaining to labor violations, and the proposed rule expands the duties of contractors before awarding a subcontract. For contracts other than commercially available off-the-shelf (COTS) estimated to exceed $500,000, prospective subcontractors would be required to make disclosures similar to those required of the contractor, and the contractor, before awarding the subcontract, would be required to consider the information to effectively determine whether the subcontractor is a responsible source of supplies or services.

The proposed rule grants the contractor some discretion – it can choose to evaluate all its prospective subcontractors at all tiers, or it can choose to delegate the evaluation of lower tiers to those subcontractors in privity of contract with the lower tier subcontractors. However, the prime contractor remains responsible for establishing an approach that works. The proposed rule calls for the contractor to afford a subcontractor an opportunity to provide additional information to demonstrate its responsibility, such as mitigating circumstances and remedial measures. The proposed rule also points out that a prime contractor may seek assistance from the Department of Labor in the evaluation of subcontractor labor violations and in making determinations of responsibility.

The proposed rule and the proposed guidance appear to take into account the complexity and material change being imposed by this subcontractor reporting requirement by presenting these alternatives, as well as a phase-in of subcontract disclosure requirements to allow time for contractors and their subcontractors to become acclimated to the new responsibilities. Another alternative discussed in the proposed rule is to have the contractor direct the subcontractor to consult directly with the Department of Labor on the subcontractor's violations and remedial actions, and then report back to the prime contractor on the Department of Labor's response.

Recall the 2001 Blacklisting Rules

The proposed rules are similar to the blacklisting regulations that the Bush administration rescinded in late 2001. Those rules were issued late in the Clinton administration and sought to keep businesses that violate certain categories of federal law from getting government contracts. Keeping violators of law from being awarded contracts is an important part of the present responsibility framework in the Federal Acquisition Regulation. These rules were controversial; the industry's concerns focused on the vagueness of the rules and the resultant potential for inconsistent treatment, the redundancy with existing processes used to determine contractor responsibility, and the subjectivity provided to contracting officers in determining whether to award a contract to a contractor with a violation. The proposed rule and guidance appear to take note of these issues and discuss the assessment process, including the role of Labor Compliance Advisors who are to assist in the review of violations.

Some Practical Considerations

The proposed guidance and regulations may be revised as a result of comments; prudent federal contractors may want to begin to prepare for the implementation of the Executive Order through new FAR rules now, including consideration of how to collect data on any "administrative merits determinations," "arbitral award or decision," or "civil judgment" that would be reportable under the rule; evaluating their compliance with federal and state laws and internal practices for addressing employee concerns and complaints; and considerations of procedures to implement pay transparency requirements.

Collecting subcontractor information could impose a substantial burden. Information must be collected from subcontractors before issuance of a subcontract, making it a part of the pre-subcontract or teaming process. The proposed rule's discussion of a possible phase-in and acclimation period may allow the industry to become familiar with these needs. Terms in standard subcontracts and purchase agreements

may need to be altered to address this rule and the continuing requirement for contractors and subcontractors to report covered violations on a semi-annual basis.

Teaming agreements will play an important role in compliance. Key subcontractors – the ones more likely to be subject to this rule – often enter into such agreements with prime contractors early in the pursuit of a contract, and well before the agency's contract award decision could give rise to a subcontract and acceptance of standard terms and conditions. Contractors should consider revising their teaming agreement terms to provide for the timely collection of required information. Contractors should also consider including an express statement that a determination of subcontractor lack of responsibility as a result of labor law violations would be a basis for termination of the teaming agreement.

In addition, given the proposed relatively low fine, penalty or backpay amount considered to be a "serious" violation under the Order, contractors may want to audit their compliance with federal and state laws, and re-evaluate their internal practices for responding to internal concerns, as well as administrative charges or complaints. A review of a company's overall compliance with federal labor and employment laws and state equivalents may be of value to exhibit prudent behavior and avoid potential future concerns. Contractors also may want to reconsider how they handle responses to internal and external complaints or charges, with consideration of the impact on future federal contract opportunities.

The use of labor violations as a basis for suspension or debarment is also a concern. The FAR at 9.402 states the policy that agencies shall solicit offers from, award contracts to, and consent to subcontracts only with responsible contractors. The FAR also notes that debarment and suspension actions are appropriate means to effectuate this policy. The proposed rule adds labor law violations as a potential basis for referrals for suspension or debarment actions, and notes that, in recent years, the Obama administration and Congress have taken steps to strengthen the quality of responsibility determinations, including the direction to agencies to strengthen suspension and debarment actions.

Finally, federal contractors would also need to address the new pay transparency requirements. This obligation could include review of their systems to ensure compliance with the requirement to provide employees with the necessary information with their pay. Also, contractors would need to consider examining their processes with regard to independent contractors to determine whether independent contractors receive the required notice with each engagement.

The proposed rules and guidance address the requirements of this Executive Order, whose objective as stated in the proposed Department of Labor guidance is "to help contractors come into compliance with federal labor laws, not to deny them contracts." There is a concern, however, that the implementation of and adjustment to the proposed rules will be a complex, difficult process with the all-important issue of responsibility – a prerequisite for the award of a covered contract – at stake.

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