Published on *The National Law Review* https://natlawreview.com

Proposed “Fair Pay and Safe Workplaces” Regulations Clarify New Responsibilities for Government Contractors

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On May 28, 2015, the ***Federal Acquisition Regulatory*** (FAR) Council published proposed regulations that create additional obstacles for offerors seeking to obtain government contracts. These regulations implement the “***Fair Pay and Safe Workplaces***” ***Executive Order 13673*** that President Obama signed on July 31, 2014. The regulations, which were accompanied by and incorporate proposed implementing guidance published by the *Department of Labor* (DOL), would amend the FAR to require contractors to disclose certain labor law violations when submitting bids for federal work. The purpose of the Executive Order and proposed regulations is to advance the longstanding principle that contractors must be responsible in order to conduct business with the federal government. The government’s goal is to promote and maintain economy, efficiency, and integrity in the procurement process by only awarding contracts to contractors who comply with labor laws.

Most significantly, the proposed regulations require offerors to disclose to the federal government, in connection with bids for contracts over $500,000, any civil judgment, administrative merits determination, or arbitral award or decision (as those terms are defined in the DOL guidance) that has been rendered against them in the past three years for violating any of the enumerated federal labor laws or an equivalent state law. In addition to requiring contractors to disclose labor law violations to the federal government, the proposed regulations require contracting officers to consult with agency Labor Compliance Advisors (LCA), a position added by the Executive Order, and to consider labor law violations—as well as any mitigating evidence—in rendering pre-award responsibility determinations.

The proposed regulations would also require prime contractors to elicit from subcontractors with whom they have contracts valued at more than $500,000, with the exception of contracts for commercially available off-the-shelf items, the subcontractors’ labor law compliance record and to similarly assess the subcontractors’ integrity and responsibility. While the guidance recognizes that the FAR Council is considering whether it makes more sense for subcontractors to report violations directly to the government, the proposed regulations currently require prime contractors to play the role of the government in evaluating subcontractors’ responsibility. In an effort to promote transparency, the proposed regulations also require contractors and subcontractors covered by the Executive Order to provide workers with certain pay information, including how their pay was calculated, and to provide workers with notice if they are treated as independent contractors or

exempt employees under the Fair Labor Standards Act.

The DOL implementing guidance provides detailed information for contracting officers and prime contractors to consult when evaluating reportable violations as well as information for contractors to use in determining what specific information to disclose. For example, while the Executive Order does not define "administrative merits determination," the guidance's definition of that term is particularly broad and likely to have significant implications for contractors. According to the guidance, "administrative merits determination" includes notices and findings that are not yet final as well as determinations that are not the result of "adversarial or adjudicative proceedings." A complaint filed by an enforcement agency will also constitute a reportable labor law violation. Additionally, as the reportable violations also include determinations rendered for violations of equivalent state laws, the DOL will publish a second proposed guidance at a later date identifying the state enforcement agency determinations that must be reported. The guidance also provides insight regarding how contracting officers should evaluate the severity of violations. The guidance, however, defines the terms "serious" and "willful" so expansively that the definitions are likely to apply to relatively minor violations.

The Executive Order is intended to assist contractors in complying with federal labor laws and is not intended to prevent offerors from obtaining contracts. Nevertheless, because the Executive Order will undoubtedly be burdensome for all parties to implement, it remains to be seen whether the Executive Order will result in unnecessary and expensive roadblocks for federal contractors without achieving the government's stated objectives of economy and efficiency.

The proposed regulations and guidance contemplate a phased approach to implementation of the subcontractor disclosure requirements, and the Executive Order is not expected to take full effect until 2016 when all of the implementing regulations have been published.

Comments on the proposed rule are due on or before July 27, 2015.

National Law Review, Volumess V, Number 155