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FEATURE COMMENT: Preparing For Day-One Compliance With Fair Pay And Safe Workplaces

On August 25, the Obama Administration published the long-awaited Federal Acquisition Regulation final rule (81 Fed. Reg. 58562) and Department of Labor final guidance (81 Fed. Reg. 58653) implementing the "Fair Pay and Safe Workplaces" executive order. The underlying executive order was issued on July 31, 2014, with the stated goal of ensuring that parties who contract with the Government understand and comply with labor laws. The proposed rule and guidance were issued on May 28, 2015, and received more than 10,000 comments as part of the rulemaking process.

In response to the feedback from industry and other interested parties, the FAR Council and DOL incorporated several notable changes into the final rule and guidance. Nevertheless, many of the more burdensome aspects remain unchanged, and the concern is that the rule will create costly new burdens and potentially pave the way for "blacklisting" companies from procuring Government contracts. This FEATURE COMMENT provides an overview of the key provisions of the final rule and guidance, and discusses what contractors should be doing now to start preparing for day-one compliance.

New Reporting Requirements—The final rule imposes new obligations on Government contractors and subcontractors, including pay transparency obligations and restrictions on arbitration provisions. But perhaps the most controversial provision is the new requirement to report labor "violations" (defined in the guidance to include some *non*-final adjudications) that will be considered by contracting officers when they make responsibility determinations in connection with new contract awards. Specifically, after October 25, when submitting a bid for a covered contract in the System for Award Management (SAM), prospective contractors will be required to indicate whether they anticipate submitting an offer with an estimated contract value over $50 million (between October 25 and April 24, 2017), or an estimated contract value over $500,000 (after April 24, 2017).

If the offer is expected to exceed the threshold over the life of the contract, the offeror must explain whether there have been any administrative merits determinations, arbitral awards or civil judgments for any of the following 14 statutes and executive orders: Fair Labor Standards Act (FLSA); Occupational Safety and Health Act (OSHA); National Labor Relations Act; Americans with Disabilities Act; Family and Medical Leave Act; Title VII of the Civil Rights Act; Age Discrimination in Employment Act; Davis-Bacon Act (DBA); Service Contract Act (SCA); Section 503 of the Rehabilitation Act; Vietnam Era Veterans' Readjustment Assistance Act; Migrant and Seasonal Agricultural Worker Protection Act; and EOs 11246 (equal employment opportunity) and 13658 (contractor minimum wage). Also covered by the rule are OSHA-approved state plans.

The Obama Administration intends to identify additional "equivalent state laws" in a future rulemaking. When the proposed rule was issued, there was some confusion as to whether contractors would have to report violations for subsidiaries, parents and affiliates. The final rule clarifies that the reporting requirements apply to the legal entity whose name and address is on the bid or offer, and that will be legally responsible for contract performance.

If an offeror has reportable violations and the CO initiates a responsibility determination, the offeror will be asked to enter the following information into SAM: the labor law violated; the case number, inspection number, charge number, docket number or other unique identification number; the date

rendered; and the name of the court, arbitrator(s), agency, board or commission that rendered the determination or decision. In addition to the mandatory information above, offerors have the option of submitting information about mitigating circumstances, remedial measures and other steps taken to achieve compliance with workplace protections. The information entered into SAM will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS). Contractors have the option of making public the information about mitigating circumstances and remedial measures.

Responsibility Determination—FAR 22.2004-2 requires COs to weigh labor law compliance when determining contractor responsibility. COs must consider a contractor's actions, mitigating factors and remediation when making a responsibility determination. Special attention will be given to the existence of a so-called "labor compliance agreement"—an agreement between a contractor and an enforcement agency to resolve outstanding labor issues. If previous attempts to secure adequate remediation by the contractor have been unsuccessful, and it is necessary to protect the Government's interests, the CO may consider a nonresponsibility determination or exclusion action. If a contractor is found nonresponsible because of labor compliance issues, the responsibility determination can be protested at the Government Accountability Office or the U.S. Court of Federal Claims.

The magnitude of the reporting requirement is compounded by the fact that the final rule requires COs to repeat the responsibility analysis every six months during contract performance. In fact, contractors must report new decisions and determinations even if they arise from a violation of labor law that was already reported. FAR 22.2004-3 lists the options available to a CO upon learning of a violation during performance—i.e., a CO can decide not to exercise an option, terminate the contract, or make a referral to the agency suspending and debarring official. Contractors have flexibility in establishing the date for the semiannual update, which will help ease some of the administrative burden for large contractors that hold many covered contracts.

The final rule also addresses the newly established role of the agency labor compliance advisor (ALCA). Federal agencies must designate a senior agency official to serve as an ALCA to advise COs when assessing labor law violations, mitigating factors and remedial measures. According to the rule, the ALCA provides COs with analysis and advice, but the final rule notes that this does not disturb the CO's independent authority in determining contractor responsibility.

Past Performance—Not only does the new rule impact responsibility determinations, it also affects past performance evaluations. Under FAR 22.2004-2, COs must consider a prospective contractor's compliance with labor laws when past performance is an evaluation factor. The final rule requires COs to consider a contractor's compliance with labor laws as part of the Contractor Performance Assessment Report (CPAR). One of the duties of the newly created ALCA position is to provide input to be included as part of the CPAR. For example, if an ALCA raises concerns that a contractor has not met the terms of an existing labor compliance agreement, this could find its way into a CPAR and, in a future source selection, a CO would be required to consider the ALCA's concerns as part of the past performance evaluation.

FAR 22.2004-2 is likely to have an immediate impact on bid protests. Much of the labor compliance information reported by contractors under the rule will be publicly available in FAPIIS. A disappointed bidder could therefore access use FAPIIS information to protest an award on both responsibility and past performance grounds, using the information that the contractor supplied to satisfy the rule. It remains to be seen whether such protests would succeed on the merits, but it will be "low-hanging fruit" now that (1) corporate labor compliance is a point of emphasis for COs during source selection, and (2) data regarding "violations" will be easily accessible.

Subcontractor Reporting—Perhaps the most significant change from the proposed rule is the reporting regime for subcontractors set forth in the final rule. Under the proposed rule, subcontractors were to report alleged labor law violations to prime contractors. This would have required subcontractors to share such alleged violations with potential competitors for future procurements, and would have increased the administrative burdens placed on prime contractors, who would have had to process and report subcontractor labor compliance data as well as their own. The final rule addresses this concern by requiring primes to obtain a representation regarding the sub's compliance with labor laws. In most circumstances, the prime will not review violation-specific information. Instead, if a subcontractor has a reportable violation, this information will be submitted directly to DOL via a web portal,

and the sub will make representations to the prime regarding DOL's assessment.

Under the final rule, a prime can award to a sub if the sub represents that DOL has determined that its violations are not serious, repeated, willful or pervasive. Even if the violations meet one of these definitions, the prime can still award to a sub if DOL has advised that a labor compliance agreement is not warranted, or if the sub has already agreed to enter into a labor compliance agreement.

If a prospective subcontractor disagrees with DOL's assessment, the sub can provide the prime with detailed information about the violations, mitigating factors and remedial actions, and explain why it disagrees with DOL's assessment. The final rule then permits the prime to find the prospective sub responsible and award the subcontract, if the prime determines that the sub has a satisfactory record of integrity and business ethics, or if the prime has a compelling reason to award the subcontract. In these circumstances, the prime must notify the CO in writing and provide the basis for its decision.

Key Definitions—The FAR Council and DOL published the rule and guidance as separate documents, but the two documents have to be read together. Namely, the guidance defines key terms such as "serious," "repeated," "willful" and "pervasive," and attempts to provide guidelines for COs who are weighing and considering alleged labor law violations. For example, violations of particular gravity (such as terminating employees in retaliation for exercising their rights under the covered labor laws, or violations related to an employee's death) are given the most weight.

The guidance also addresses mitigating factors that COs must consider when weighing violations, including good faith efforts to remedy past violations, internal processes for expeditiously and fairly addressing reports of violations, or plans to proactively prevent future violations. The appendix to the guidance includes an extensive chart of illustrative examples that will be helpful to contractors in evaluating how violations might be weighed.

Pre-Assessment—In a new development, DOL has created a voluntary "pre-assessment" process through which contractors can proactively have their labor compliance history reviewed. If there are concerns, this process permits the contractor to attempt to negotiate a labor compliance agreement and start taking steps to mitigate issues before there is a specific acquisition. According to the information presently available (the "pre-assessment" process is unprecedented and was not contemplated in the proposed rule), participating in pre-assessment "will be considered in future acquisitions as a mitigating factor." This change amplifies the importance of "labor compliance agreements"—heretofore undefined—and likely heightens contractor concerns about the apparent authority of ALCAs.

To participate in the pre-assessment, any current or prospective Government contractor may fill out the pre-assessment request intake form on DOL's website. This includes the company's name and contact information, and an individual for a DOL representative to contact with an additional form for the company to complete with the company's labor law history. Participation in this pre-assessment does not require SAM registration, and a contractor may participate at any time after the rule takes effect on October 25.

Implementation—Under the final rule, reporting requirements will be implemented in phases. Starting October 25, the rule will apply only to contracts of at least $50 million. Beginning April 25, 2017, the rule will apply to contracts of at least $500,000. Subcontractors will not start reporting violations until Oct. 25, 2017. In addition, the disclosure reporting period will be limited to one year, but will gradually increase over the next three years, with a full three-year reporting period required beginning on Oct. 25, 2018.

Paycheck Transparency and Dispute Resolution—FAR 22.2005 requires contractors performing work on covered contracts and subcontracts to provide employees covered by the FLSA, DBA and SCA with information concerning their pay, hours worked, overtime hours if applicable, and any additions to or deductions from their pay. The rule also requires that any independent contractors working on the contract be provided with a document informing them of their status as independent contractors. The paycheck transparency requirements will become effective on Jan. 1, 2017. These provisions of the proposed rule and guidance remain largely unchanged in the final rule.

For contracts worth over $1 million, FAR 22.2006 requires contractors to agree that the decision to arbitrate claims, arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, may only be made with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. This flows down to subcontracts exceeding

$1 million, other than for the acquisition of commercial items. This provision of the proposed rule and guidance likewise remains largely unchanged, and is a significant concern for employers who have adopted robust arbitration and claims resolution procedures.

Potential Legal Challenges and Congressional Action—Considering its scope and impact on the contracting community, the final rule—along with the executive order—could be subject to a legal challenge by a combination of affected companies and industry trade groups. Moreover, Congress could impede the rule's application. For instance, the House and Senate passed fiscal year 2017 National Defense Authorization Act (NDAA) bills that would exempt defense contractors from the executive order. That provision of the NDAA is subject to removal, and the White House has issued statements opposing it.

Next Steps for Contractors—Industry should keep a close eye on the legislative activity and litigation that could affect the implementation of these new requirements, but contractors do not have time to wait and see how the activities will play out. Significantly, contractors without a compliance plan in place will be at risk of competitive disadvantage in the procurement process, and worse, potential suspension or debarment action if the Government determines that their labor compliance history—and failure to "mitigate" or explain that history in context—warrants exclusion from the contracting process. Contractors that want to prepare for day-one compliance should consider a four-part approach:

First, the requirements of the new rule are unique insofar as there is substantial "crossover" between Government contracting, compliance, and labor and employment functions required to comply. As we work with clients to meet these requirements, we find that identifying not only "what" the rule entails, but "who" at the company is going to take the lead, and "how" to ensure communication among the various stakeholders—at both large and small companies—are common threshold issues that must be addressed to ensure that the company accounts for every facet of the rule.

Second, contractors should start the look-back process now to identify "administrative merits determinations," "civil judgments" and "arbitral awards" that have been issued since Oct. 25, 2015. This is easier said than done because most large companies have not been collecting information about these 14 labor laws in a single database. And again, it will require diligence to make certain that the cognizant personnel understand how these terms are defined in the DOL guidance.

Third, contractors need to establish procedures to collect information about violations going forward so that the information is available when they bid on covered contracts. Contractors purchasing items that do not qualify as commercially available off-the-shelf items will need to collect representations from their suppliers, and ensure appropriate measures are taken if a proposed subcontractor indicates that it has labor violations.

Fourth, using the DOL guidance, contractors should determine whether they have violations that are likely to be treated as "willful," "serious," "pervasive" or "repeated." It is critical that contractors make this determination proactively so that, if necessary, they can compile information about mitigating factors and remedial measures. When providing information about violations in SAM, offerors can provide explanatory text and upload relevant documents. Depending on the severity of the violations, contractors may want to consult with counsel to craft robust mitigation and remediation statements to put their "best foot forward" when bidding on new work.

Conclusion—At a budget hearing in March 2015, the secretary of labor downplayed the reporting requirements as a simple "check the box" exercise for the majority of contractors. But in light of the required SAM representations and certifications, and the potential risk of False Claims Act exposure for making a false certification, prudent contractors will need to do more than simply check a box. Contractors will need systems in place to make sure they capture the required information about violations, and make sure that information about mitigation and remediation is appropriately packaged. In addition, they will need to consider their own labor compliance history (and possibly that of competitors) in the context of potential bid protest proceedings. Given the rapid phase-in of the new rule over the next several months, contractors who are not already preparing for day-one compliance should take steps to do so now.

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