Legal Corner

Significant Reporting and Compliance Requirements on the Horizon with Implementation of "Fair Pay Safe Workplaces"

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On May 28, 2015, the Obama Administration published the proposed rule and guidance implementing the "Fair Pay and Safe Workplaces" Executive Order, ("EO") which President Obama issued on July 31, 2014. The stated purpose of the EO is to ensure that parties who contract with the federal government understand and comply with labor laws. The underlying goal of the EO may be well-intentioned, but in practice, the proposed rule and guidance will be unworkable and may unfairly exclude responsible companies from doing business with the federal government. These new regulations will not take effect until the final rule and guidance are issued, but the proposals offer insight into the onerous compliance and reporting burdens that contractors could face starting in late 2015 or early 2016.

Applicability of the "Fair Pay Safe Workplaces" Requirements

The proposed rule adds a new subpart to the Federal Acquisition Regulations ("FAR") – subpart 22.20 "Fair Pay and Safe Workplaces" – which incorporates proposed guidance issued by the Department of Labor ("DOL"). Under proposed FAR 22.2004, contractors bidding on contracts valued over $500,000 would be required to disclose whether there has been any "administrative merits determination," "arbitral award or decision," or "civil judgment" – key terms defined by the DOL in its Proposed Guidance –rendered against the contractor within the preceding three-year period for violations of enumerated labor laws. Under the proposed rule, contractors would also be required to report similar information for subcontractors on subcontracts (other than commercially available off-the-shelf items) valued over $500,000. Disclosure of basic information about the labor violations will be made publicly available in the Federal Awardee Performance and Integrity Information System.
Under proposed FAR 22.2002, the definition of applicable "labor laws" includes the following statutes and executive orders: Fair Labor Standards Act; Occupational Safety and Health Act; 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; Service Contract Act; Section 503 of the Rehabilitation Act; Vietnam Era Veterans' Readjustment Assistance Act; Migrant and Seasonal Agricultural Worker Protection Act; Executive Orders 11246 (Equal Employment Opportunity) & 13658 (Contractor Minimum Wage); and "equivalent state Llaws" as defined by DOL. In a notable departure from the EO, and likely in response to contractor concerns, the only "equivalent state laws" identified in this proposed rule are OSHA-approved state plans. According to the proposed rule and guidance, the FAR Council will publish a subsequent proposed rule that further identifies "equivalent state laws." Thus, one of the key questions unanswered by the EO remains unanswered with publication of the proposed rule and guidance.

The magnitude of the reporting requirement is compounded by the fact that the proposed 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. Proposed 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.

Insight into Role of the new "Agency Labor Compliance Advisor"

Proposed FAR sections 22.2004-2 and 22.2004-3 address the newly established role of the Agency Labor Compliance Advisor (ALCA). Federal agencies are required to designate a senior agency official to serve as an ALCA, a position tasked with facilitating contractor compliance with labor laws, and "helping" agency officials determine the appropriate response to address violations. Under proposed FAR 22.2004-2, the ALCA is to provide the CO, within three business days after a request by the CO, a recommendation that (1) the contractor "could be found to have a satisfactory record of integrity and business ethics;" (2) the contractor could be found to have such a record "if the process to enter into a labor compliance agreement" with the DOL is initiated; or (3) the contractor does not have a satisfactory record of integrity and business ethics and "the agency Suspension and Debarring Official should be notified." As a practical matter, it will likely be difficult—if not impossible—for ALCAs to adequately evaluate disclosures about violations of complex labor laws within the three-day window.

Proposed FAR Rule Relies Heavily on DOL Guidance

The FAR Council and DOL published the proposed rule and guidance on the same day under separate notice so that respondents can "consider the documents holistically in addition to offering comment on the specifics of each document." In fact, the two documents have to be read together because the key events that trigger a responsibility determination—"administrative merits determination," "arbitral award or decision," or "civil judgment" are defined in the DOL proposed guidance. Moreover, a sizable portion of the 106-page DOL guidance is devoted to defining the terms "serious," "repeated," "willful," and "pervasive" and explaining how violations of the labor laws should be weighed. Notably, the proposed guidance defines "serious" violations to include those in which an assessment of at least $10,000 in back wages is "imposed by an enforcement agency or a court." The proposed guidance also defines "serious" violations to include those in which the contractor "engaged in adverse employment action" (including discharge, refusal to hire, suspension, demotion or threat) or is responsible for unlawful harassment against one or more workers for exercising rights protected by the enumerated labor laws.

Implementation of the Paycheck Transparency and Dispute Resolution Provisions

Proposed FAR 22.2005 will implement the EO's "paycheck transparency" provision which requires contractors performing work on covered contracts and subcontracts to provide employees covered by the FLSA, the Davis Bacon Act, the Service Contract Act, or "equivalent" state laws, with information concerning the individual's pay, hours worked, overtime hours, if applicable, and any additions made to or deductions made from the individual's pay. The proposed rule also requires contractors to provide to any independent contractors performing work on the contract a document informing them of their status as independent contractors.

Proposed FAR 22.2006 will implement the EO's "dispute resolution" provision on contracts over $1 million and will require 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. The proposed rule lists some narrow exceptions to this requirement including an exception for certain pre-existing arbitration agreements.

What Comes Next?

Based on the impact of "Fair Pay and Safe Workplaces" on the contracting community, contractors will want to consider submitting comments during the 60-day comment period which began running on May 28th. Several respondents have requested an extension of time to file comments, but for now, interested parties should plan on submitting comments by July 27, 2015. After the close of the comment period, the FAR Council and DOL will make final changes and resubmit the rule and guidance to the Office of Information and Regulatory Affairs for another round of regulatory review before issuing the final rule and guidance in the Federal Register. If the Administration has failed to make significant changes, the final rule will likely be subject to a legal challenge by affected companies and industry trade groups.

GSA Contracts Recommended as Sustainable Purchasing Resource

Today, GSA posted an Interact notice about how agencies can meet their sustainable acquisition requirements under the latest green Executive Order using GSA contracts. Executive Order (EO) 13693, "Planning for Federal Sustainability in the Next Decade", instructs agencies to take a number of steps to reduce greenhouse gases government-wide. It also includes certain sustainable acquisition requirements.

In GSA's Interact post, they note that in the White House Council of Environmental Quality's recently released Implementing Instructions, GSA contracts are recommended as a resource for agencies to meet their sustainable acquisition goals. Specifically, GSA referenced a section from page 59 of the instructions, entitled "Use of Government-wide and Shared Acquisition Vehicles." The section states that—

Use of government-wide or other shared acquisition vehicles that already include sustainability requirements—for example, certain Federal Strategic Sourcing Initiative (FSSI) contracts, GWACs, IDIQ contracts, Multiple Award Schedule contracts, and BPAs—can assist agencies in acquiring environmentally preferable products and services and achieving sustainable acquisition goals. Agencies should promote use of these vehicles to increase purchasing of environmentally preferable products and services and support achievement of sustainable acquisition goals.

While not mandating the use of such contracts, GSA said such references are a nice recognition of the work done by the Federal Acquisition Service to green GSA's contract offerings.