



**Evolution or Revolution? Recent
Changes in Government Contracts
Labor Requirements**

Tom Gies
Gunjan Talati
Richard Arnholt

June 17, 2010

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The 2009-2010 Changes

- » Restrictions on use of mandatory arbitration agreements
- » Executive orders on:
 - Economy in government contracting
 - Nondisplacement of qualified workers
 - Notification of employee rights
 - Project labor agreements
- » OFCCP enforcement actions
- » High Road Contracting

The Franken Amendment – Restrictions on Use of Mandatory Arbitration

- » Legal authority
- » Requirements
- » Compliance
 - Prime contractors
 - Subcontractors

Franken Amendment

- » Part of FY10 DoD Appropriations Act
- » Prohibitions
 - Executing/enforcing mandatory arbitration clauses in agreements with employees or independent contractors
 - Claims under Title VII of the Civil Rights Act of 1964
 - Torts related to sexual assault or harassment

Franken Amendment

- » Coverage
 - Those receiving federal contracts or subcontracts greater than \$1M in 2010 DoD Approps funds
- » Class Deviation (Feb. 17 '10) then Interim Rule (May 19 '10)
 - DFARS 252.222-7006
 - Flow down to subcontractors
 - Excludes commercial item/COTS items

Franken Amendment

- » Does not apply to collective bargaining agreements
- » Primes (after Feb. 17 '10)
 - Over \$1 million in FY10 DoD Approps funds
 - contract, task order, bi-lateral mod for new work
 - Not commercial
- » Subs – all tiers (after June 17 '10)
 - Required in the prime contract
 - Not commercial
 - Only applies to division receiving the FY10 funds.

E.O. 13494 - Economy

- » Economy in Government Contracting - Jan. 30, 2009
- » To “reduc[e] Government expenditures,” makes unallowable costs include activities undertaken to persuade employees to exercise or not exercise the right to organize or bargain collectively through reps of the employee’s own choosing.

E.O. 13494 – Economy (cont)

- » Proposed FAR rule issued April 14, 2010 revises FAR 31.205-21, which makes allowable costs incurred in maintaining satisfactory relations between employer and its employee.
 - New para (b) states cost are unallowable for:
 - any activities undertaken to persuade employee of any entity
 - to exercise or not exercise, or concerning the manner of exercising,
 - the right to organize and bargain collectively through representatives of the employees own choosing.

E.O. 13495 - Nondisplacement

- » Nondisplacement of qualified workers under service contracts - Jan 30, 2009
- » On SCA-covered contracts, successor contractors must offer employment to incumbent workers who will otherwise be terminated as a result of the contract award.

E.O. 13495 – Nondisplacement (cont)

- » DOL reg proposed on March 19, 2010 (75 Fed. Reg. 13382).
 - Right of first refusal
 - No requirement on number of employees
 - Not applicable to managerial and supervisory employees
 - Penalties range from back pay to debarment

E.O. 13496 - Notice

- » Notification of Employee Rights Under Federal Labor Laws - Jan. 30, 2009
- » Revoked E.O. 13201, which required posting of notices that employees cannot be required to join a union or maintain membership in a union in order to retain their jobs.
- » Mandates posting of employee rights under the NLRA – “It is the policy of the United States to encourage collective bargaining ...”

E.O. 13496 – Notice (cont)

- » Proposed rule issued Aug. '09, final rule issued May 20, 2010, and FAR provisions in the works.
 - Will apply to primes over the SAT, and must be **flowed down** to subs at all tiers over \$10,000
- » New notice requirements meant to be incorporated in solicitations starting **June 21**
- » Notice cannot deviate for notice in 29 C.F.R. part 471
 - You have to include the NLRB telephone number

E.O. 13502 – Project Labor Agreements

- » Use of project labor agreements for federal construction projects – Feb. 6, 2009
- » Encourages, but does not mandate, that agencies require these pre-award collective bargaining agreements for construction projects of \$25 mil +.

E.O. 13502 – PLAs (cont)

- » FAR rule issued on 4/13/10 (75 Fed. Reg. 19168). Agencies may require PLA submission with offer, pre-award, or post-award.
- » Sen. Collins said this **shifts federal procurement policy from neutral on union issues to pro-labor.**

OFCCP Enforcement

- » *OFCCP v. UPMC Braddock* - Extension of the *Christian Doctrine* to subcontractors
- » Focus on ARRA contractors
 - Separate scheduling procedures
 - Full on-site audit required
 - No limit on number of establishments audited
- » Increase in funding and staff
 - \$25 million increase in FY 10 for 213 more FTE
 - \$8 million more than FY 10 requested for FY 11

OFCCP Enforcement

- » Focus on veterans/disabled individuals
 - Increased enforcement
 - Rulemaking to revise VEVRAA and Sec 503 regulations
- » Focus on construction industry
 - ARRA audits
 - Rulemaking to require increased compliance efforts expected by January 2011

What is High Road Contracting?

- » Would weigh labor standards in source selection process.
- » Opposition from Chamber of Commerce, PSC, and a number of other organizations.
- » Stalled?
- » Union/White House split?
- » Passage by Executive Order could likely be challenged under the APA.

Questions?

» Contacts



Tom Gies—tgies@crowell.com



Gunjan Talati—gtalati@crowell.com



Richard Arnholt—rarnholt@crowell.com

Reminder—The slides and a link to a recording of the webinar will be sent to attendees.