

AN A.S. PRATT PUBLICATION

JULY 2016

VOL. 2 • NO. 7

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Steven A. Meyerowitz

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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An A.S. Pratt® Publication

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Preparing for Fair Pay & Safe Workplaces—Previewing Violation and Remediation Information with the Government

*By David B. Robbins, Stephen J. McBrady, and Peter J. Eyre**

The Fair Pay and Safe Workplaces Rule poses significant challenges for contractors who must collect and report substantial amounts of historical data with their proposals and during contract performance. The authors of this article explain the rule and caution contractors not to overlook common sense protection measures in order to reduce the risk of adverse government action.

By now, government contractors are largely aware of the information gathering and reporting requirements of the Fair Pay and Safe Workplaces Proposed Rule (“Fair Pay”), but whether and how to package the information proactively for the government has received less attention. Contractors would also be well served to consider their messaging and outreach efforts in proposals and, if necessary, in meetings with Suspending and Debaring Officials (“SDOs”) before the Fair Pay final rule issues or shortly after its effective date.

DISCLOSURE

Assuming the final Fair Pay rule mirrors the proposed rule, it will require disclosure of a variety of adverse findings, including “administrative merits determination,” “arbitral award or decision,” or “civil judgment” decisions rendered against the contractor within the preceding three-year period for violations of 14 enumerated federal labor laws and “equivalent state laws.” Multiple disclosures are necessary before award and every six months during contract performance. Gathering and reporting this information is a Herculean task and has consumed significant legal department time in recent months. But

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legal departments should also consider how the government will use the information, and whether proactive outreach and messaging to government customers is also necessary to protect the company.

After the government receives Fair Pay disclosures, the contracting officer will request analysis from a new category of official—a labor compliance advisor—who will focus on whether the violations are serious, repeated, willful, or pervasive. The contracting officer can then decide whether to award a contract, exercise an option, terminate a contract, or refer the matter to the agency SDO.

There are three federal officials of note who will interact with a contractor's history of labor violations: the contracting officer, the labor compliance advisor, and the SDO. Two of those officials—the contracting officer and the SDO—can materially, directly, and detrimentally impact the contractor. So contractors should be considering how to shape their communications and disclosures to address the needs of both of these officials.

While it is possible that the eventual Fair Pay final rule will contain more information concerning how these officials should review a contractor's history of labor violations, the norms for these evaluations are more likely to develop over time. Over the short- to medium-term, the government is likely to rely on familiar evaluation and enforcement methods that are predictable in their application and afford contractors several avenues for proactive communication to reduce risk.

CONTRACTING OFFICER

In assessing Fair Pay information, contracting officers will likely be conducting an analysis similar to making a FAR 9.1 present responsibility determination. Specifically, the contracting officer must consider whether the prospective contractor has “a satisfactory record of integrity and business ethics”¹ and “the necessary organization . . . and operational controls” to perform the contract.² Accordingly, contractors with more than de minimis histories of labor violations have at least two risks under FAR 9.1. They may be found lacking in business integrity or operational controls and lose a contract, or the contracting officer might fail to reasonably consider the history of labor violations and the award may be lost in a protest. Therefore, it may make sense to consider providing relevant contracting officers with an easy to follow summary of the labor violation information and appropriate remediation in order to address any concerns and mitigate protest risk.

¹ FAR 9.104-1(d).

² FAR 9.104-1(e).

SUSPENDING AND DEBARRING OFFICIAL

The wild card in Fair Pay process is the role of the SDO, who may receive referrals from contracting officers (or perhaps directly from labor compliance advisors) for suspension and debarment consideration. The unknown in the process is how these referrals will be packaged and presented to the SDOs. It is likely that the process will evolve in an agency-specific manner, following the norms for each agency's internal referral system. However, the referral is likely to be accompanied by some government analysis for why suspension and/or proposed debarment is in order. These referrals are commonly less-than-balanced, and contain advocacy for excluding the contractor.

Three different dynamics impacting SDO consideration of Fair Pay information create risk for contractors when reporting violation and mitigation information.

- First, SDOs receiving one-sided records are more likely to engage with the contractor either through Show Cause Letters or suspensions/proposed debarments. Recent history is full of examples of exclusions based on one-sided agency records that are terminated once the contractor provides its “side of the story.”
- Second, SDOs will eventually receive inquiries from oversight agencies such as offices of inspectors general, Congress, or others concerning their level of engagement with Fair Pay information. “No involvement” will not be a comfortable answer for the SDOs. An answer will be needed, even if that answer is limited to a series of Show Cause Letters to obtain clarity concerning contractors' labor compliance operations.
- Third (though intertwined with the prior dynamic), labor compliance violations qualify for proposed debarment and/or suspension under FAR 9.406-2(c) (“[a] contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”). Once one federal agency begins excluding or sending show cause letters based on Fair Pay data, others in the government are likely to follow suit.

While suspensions and proposed debarments are not likely immediately after the effective date of the final Fair Pay rule, show cause letters are more probable. And suspensions and/or proposed debarments will eventually happen. Proactive engagement with cognizant SDOs can help shape the SDO's impression of Fair Pay violations, and reduce the risk of more significant, and formal SDO engagements later.

The Fair Pay and Safe Workplaces Rule poses significant challenges for

contractors who must collect and report substantial amounts of historical data with their proposals and during contract performance. Contractors have spent considerable time preparing to comply. They should not overlook other common sense protection measures such as those identified here in order to reduce the risk of adverse government action.