

Federal Contracting Policy By Executive Order: What Does it Mean for Contractors?

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Angela B. Styles
Partner



Kris D. Meade
Partner



Stephen J. McBrady
Counsel



Jason C. Lynch
Associate

Introduction

- History
 - Executive Orders on Procurement since WWII
 - Cited authority since 1970s - Federal Property & Administrative Services Act (“FPASA”), 40 U.S.C. § 101
- FPASA Rationale:
 - Supporting goal of creating economical and efficient system for procuring and supplying property and non-personal services
 - President may prescribe policies and directives necessary to carry out the FPASA goals of efficiency and economy.

Executive Orders Applicable to Federal Contractors

- The Obama Administration
 - 12 Executive Orders under FPASA
 - Broadband spectrum to texting-while-driving
 - Strict mandates to mere suggestions
 - Always prospective
- Strategies
 - Procurement (negotiation) process
 - Contract clauses
 - Representations or certifications
 - Cost allowability
 - Delegation & regulation

Executive Orders Applicable to Federal Contractors (continued)

- Procurement (negotiation) process
 - EO 13502: project labor agreements
 - Mem. (June 20, 2013): spectrum efficiency
- Contract clauses
 - EO 13495: incumbent workers' rights
 - EO 13496: workplace signs
 - EO 13658: hourly minimum wage

Executive Orders Applicable to Federal Contractors (continued)

- Representations or certifications
 - EO 13673: labor law violations
- Cost allowability
 - EO 13494: persuading/dissuading collective bargaining
- Delegation & regulation
 - EO 13672: discrimination based on sexual orientation or gender identity
 - EO 13665: non-retaliation for disclosure of compensation data

Recent Executive Orders on Labor Policy

- Recent Executive Orders on Labor Policy
- Executive Order vs. Legislation
 - Frustrated by lack of Congressional action
 - Effort to show progress on Administration priorities
- New Vehicle, But Not a New Phenomenon
 - Clinton era so-called “blacklisting regulations”

“Fair Pay and Safe Workplaces” Executive Order

- “Fair Pay and Safe Workplaces” Executive Order
 - Key Provisions
 - Timeline for Implementation
- Discussion of What the Order May Mean for Federal Contractors

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors

What will the E.O. mean for Federal contractors?

- Sets the stage for the FAR Council and agencies to prepare and issue guidance and regulations to implement substantive provisions.
- Potentially creating several new obligations for contractors and subcontractors doing business with the Federal government.
- Including ...

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Prior to Award.

- Contractors bidding on procurement contracts in excess of \$500,000 required to “represent, to the best of the [their] knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment” rendered against the contractor within the preceding 3-year period for violations of a slew of labor laws (including the FLSA, Service Contract Act, Davis-Bacon, ADA, ADEA, FMLA, NLRA, OSHA, Title VII of the Civil Rights Act and others, as well as equivalent State laws).
- This information factored into the CO’s responsibility determination (i.e., “whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics”).
- Contractors required to disclose similar information for *subcontractors* on subcontracts (other than COTS items) valued over \$500,000.
- Contractors required to include provisions in their subcontracts requiring *subcontractors* to disclose and update such information.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Post Award.

- During contract performance, contractors performing work on covered contracts and subcontracts required to provide updated information every 6 months.
- Information brought to the attention of the CO or the Labor Compliance Advisor may result in Government action
 - “includ[ing] agreements requiring appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, as well as remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official.”

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Labor Compliance Advisors.

- Federal agencies required to designate a senior agency official to be a “Labor Compliance Advisor”
- LCA tasked with facilitating contractor compliance with labor laws, which includes
 - “helping agency officials determine the appropriate response to address violations of the requirements of the labor laws” and
 - “coordinat[ing] assistance for agency contractors seeking help in addressing and preventing labor violations”
 - but also includes “as appropriate” sending information to agency suspending and debarring officials.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Paycheck Transparency.

- Contractors performing work on covered contracts and subcontracts required 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.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Dispute Resolution.

- Contractors performing work on contracts valued over \$1 million required 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.”
- This requirement, like the requirements noted above, would also apply to subcontracts where the estimated value of the subcontract meets the dollar threshold.
- This element is essentially an expansion of the “Franken Amendment” to contractors other than DoD contractors and subcontractors that meet the dollar threshold.

What the “Fair Pay and Safe Workplaces” E.O. Means for Contractors, cont.

Effective Dates.

- Effective dates of new requirements will be driven by regulations and guidance issued by the FAR Council and several other agencies (primarily the DOL).
- White House “Fact Sheet” indicates that implementation will occur “on new contracts in stages, on a prioritized basis, during 2016.”

What to do now about the “Fair Pay and Safe Workplaces” E.O.?

- The sky is not falling – yet.
 - Timeline for implementation is 2016.
 - Unlike some E.O.s, no “within 90 days...” language here.
 - However, FAR Council may act sooner.
- Depending upon circumstances, conduct internal review regarding labor law compliance and/or current arbitration agreements to assess potential impact of the order.
- Monitor and participate in public comment period on proposed regulations.
- Monitor potential legal challenges.

Additional EOs Targeting Labor Law Compliance

- Discrimination based on sexual orientation or gender identity (EO 13672)
 - Amends EO 11246
 - Reaction to stalled legislative action (ENDA)
 - Effect
 - Reflects prevailing trends in large private sector companies
 - Already prohibited in 18 states and D.C.
 - Cancellation/debarment penalties
 - DoL regulations to follow (Oct. 19, 2014)
 - Considerations
 - Amending written policies
 - HR policies and training

Additional EOs Targeting Labor Law Compliance

- Minimum Wage (EO 13658)
 - Covered Contacts
 - Construction
 - Service contracts (>\$2,500)
 - Concession contracts
 - Federal property/land
 - Offerings to federal employees, dependents
 - Scope
 - Prime and subcontractors
 - DOL: work “in connection with” a covered contract

Additional EOs Targeting Labor Law Compliance

- Minimum Wage (cont'd)
 - Effect
 - \$10.10/hr (or higher legal minimum)
 - Starting Jan. 1, 2015
 - CPI-W adjusted wage set annually by DOL
 - Condition to payment (FCA)

Potential Inversion EO

- Significant legislative and regulatory efforts to stop the movement of U.S. corporations overseas to avoid taxes
- Proposed Legislation
 - “No Federal Contracts for Corporate Deserters Act of 2014” (H.R. 5278 & S. 2704)
 - “Corporate Inverters Earnings Stripping Reform Act”
- Demand for Executive Action
 - Letter from Sens. Durbin, Levin, Reed and Reps. DeLauro, Doggett and Levin (8/13/2014)

Potential Inversion EO

- Retroactive to prior inversions
- Prospective to new contracts
- Definition of inverted domestic corporation (“IDC”)
 - Likely to match proposed legislation
 - More restrictive than 6 USC 395
- Representation or Certification
 - Do not meet new definition of IDC
 - Potential flow down to subcontracts
 - Periodic re-certification
- Consideration in evaluation
 - Disfavoring IDCs in source-selection evaluation

Potential Challenges to Executive Orders

- Significant deference
- Rebuttable presumption of legality
- FPASA EOs
 - Sufficient nexus to purpose
 - Reasonable and rational explanation for how EO promotes economy and efficiency in procurement system
 - Only attenuated nexus required

Potential Challenges to Executive Orders

- Upheld under FPASA:
 - An order directing agencies to include in their contracts clauses requiring compliance with otherwise voluntary wage and price standards.
 - An order providing that the federal government would “neither require nor prohibit the use of” project labor agreements on federally funded projects.
 - An order directing that all contracts over \$100,000 include a provision obligating employers to post notices informing employees of right not to join unions.
 - An order requiring federal contractors to use E-Verify to verify employment eligibility for certain employees.

Potential Challenges to Executive Orders

- Two Victories vs. FPASA Authority
 - *Chrysler v. Brown* (U.S. 1979)
 - Authority under FPASA trumped by Trade Secrets Act
 - *Liberty Mutual v. Friedman* (4th Cir. 1981)
 - EO affected the *insurers* of federal contractors, where the insurers themselves held no contracts

Potential Challenges to Executive Orders

- Conflict with Statute Challenges
 - *Chamber of Commerce v. Reich* (D.C. Cir. 1996)
 - EO invalidated that prohibited federal contractors from replacing striking workers with permanent employees – conflict with NLRA
 - Does “Fair Pay” conflict with FAA or existing labor law remedies?
- Competition in Contracting Act Challenge
 - “all responsible sources” may compete

Questions?

Angela Styles
astyles@crowell.com
202.624.2901

Stephen McBrady
smcbrady@crowell.com
202.624.2547

Kris Meade
kmeade@crowell.com
202.624.2854

Jason Lynch
jlynch@crowell.com
202.624.2678