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Management Alert

FAR and DOL Issue Final Rule and Guidance on "Blacklisting" Executive Order

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Seyfarth Synopsis: *The Final Rules and Guidance on Executive Order 13673, "Fair Pay and Safe Workplaces" (aka "Blacklisting" Order) have been released. Despite robust comments from the contractor community, the Final Rule and Guidance changed little from their proposed versions, but do include a phase-in period, as well as a few other noteworthy provisions. Contractors will now need to implement record-keeping processes in order to ensure compliance with the disclosure rules.*

After an arduous process which began with President Obama's July 31, 2014, issuance of Executive Order 13673, titled "Fair Pay and Safe Workplaces," and popularly referred to as the "Blacklisting" Order, the Federal Acquisition Regulation (FAR) Council issued its final implementing rule, and the U.S. Department of Labor has promulgated guidance interpreting the rule. The Final Rule and Guidance, both issued on August 23, 2016, change little from the Proposed Rule and Guidance, which were the subject of spirited commentary from contractors and their representatives, as well as unions and workplace advocacy groups and other stakeholders.

The Final Rule and Guidance are robust and extensive. As we continue to review the changes, we will continue to update the contracting community on key issues to consider. In addition, we invite you to join us for a complimentary webinar on September 8, 2016 as we provide a fulsome overview of the changes.

The Executive Order

Executive Order 13673 requires prospective federal contractors to disclose "any administrative merits decision, arbitral award or decision, or civil judgment" to the contracting agency under fourteen federal statutes, Executive Orders and all equivalent state labor laws addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections.[1] In addition, the Executive Order directed (i) the Federal Acquisition Regulatory (FAR) Council to amend the Federal Acquisition Regulation to "identify considerations for determining whether serious, repeated, willful, or pervasive violations of labor laws… demonstrate a lack of integrity or business ethics" and (ii) the Secretary of Labor to develop guidance to assist agencies in determining whether labor law violations were issued for "serious, repeated, willful, or pervasive" violations. Finally, the Executive Order extended the Franken Amendment, which applies to Defense Department contractors, prohibiting companies with federal contracts over $1 million from maintaining mandatory arbitration agreements involving sex harassment or related tort actions, despite the manifest legality of such agreements as determined by the Supreme Court.

1 Other than occupational safety and health "State Plans" that have been formally approved by OSHA, the equivalent state laws are not covered by the current rules and guidance. There will be a second rulemaking to implement those changes.

The Final Rule and Guidance identify the following 14 federal laws and executive orders covered by the Executive Order:

- The Fair Labor Standards Act
- The Occupational Safety and Health Act of 1970 (including OSHA-approved State Plans equivalent to State Laws)
- The Migrant and Seasonal Agricultural Worker Protection Act
- The National Labor Relations Act
- 40 U.S.C. chapter 31, subchapter IV, also known as the Davis-Bacon Act
- 41 U.S.C. chapter 67, also known as the Service Contract Act
- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity)
- Section 503 of the Rehabilitation Act of 1973
- The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974
- The Family and Medical Leave Act
- Title VII of the Civil Rights Act of 1964
- The Americans with Disabilities Act of 1990
- The Age Discrimination in Employment Act of 1967
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors)

Changes From the Proposed Rule to the Final Rule and Guidance

Although the changes to the Final Rule and to the Guidance were minimal even after numerous public comments, there were a few substantive and noteworthy alterations. Most important, for contractors and prospective contractors, is the FAR's addition of a phase-in period. Where the Proposed Rule specified no phase-in period, the Final Rule clarifies the effective dates and indicates that implementation will be staggered as follows:

- September 12, 2016: The DOL's *voluntary* preassessment process begins.
- October 25, 2016: The Final Rule becomes effective.
- October 25, 2016: New pre-dispute arbitration requirements for Title VII violations or torts related to sexual assault or harassment are prohibited for contractors with more than $1,000,000 in federal contracts.
- October 25, 2016 - April 24, 2017: Prospective prime contractors bidding on contracts valued at $50 million or more are required to make disclosures as specified in the Executive Order and implementing regulations.
- January 1, 2017: The paycheck transparency clause becomes effective requiring wage statements and independent contractor notices.
- April 25, 2017: Prospective prime contractors bidding on contracts valued at $500,000 or more are required to make disclosures as specified in the Executive Order and implementing regulations.
- October 25, 2017: Subcontractors with a contract valued at $500,000 or more must begin to make disclosures.
- October 25, 2018: The reporting period, initially one year, will be gradually increased to three years.
- Unspecified future date: The FAR will issue rulemaking, and the DOL will issue corresponding guidance, concerning state law equivalents to the federal statutes named in the Executive Order, violations of which contractors and prospective contractors will at some point be required to disclose as well.

Generally speaking, contractors will be required to make disclosures involving qualifying reportable decisions for the three

year look back period from the date of the disclosure. However, the three-year look back period will also take a phased in approach so that the earliest reportable decision will have taken place no earlier than October 25, 2015.

The phased-in approach is welcome news for the federal contracting community, but will provide cold comfort for many, in light of the substantial other burdens the Executive Order and its implementing regulations and guidance impose.

Other Noteworthy Changes In the Final Rule and Guidance:

- **Subcontractors**. The Proposed Rule required subcontractors to make the disclosures specified in the Executive Order to their prime contractors. The Final Rule changes this requirement, mandating instead that subcontractors report their disclosures directly to the DOL. The DOL will conduct a review and assessment, and the subcontractor will subsequently make representations to the prime contractor concerning the results of the DOL review, which the prime contractor will consider in its evaluation of the subcontractor. The DOL has announced that it can commence pre-assessment reviews by September 12. The Guidance states that the Department of Labor will respond within three days.
- **Public Disclosures**. While the Proposed Rule did not mandate public disclosures of so-called "labor law violations" by contractors and prospective contractors, the Final Rule - unnervingly - does. The Final Rule requires contractors to publicly disclose information concerning "labor law decisions" including arbitral awards or decisions, defined in the DOL Guidance as "any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor violated any provision of the Labor Laws, or enjoined or restrained the contractor from violating any provision of the Labor Laws." The disclosures pertain to both final decisions and decisions that are not final or are still subject to review. Specifically, contractors must disclose the labor law that was allegedly violated, the case number, the date of the decision or award, and name of the court, arbitrator, agency, board or commission rendering the decision. Contractors making public disclosures may, at their option, also include "other relevant" information, including information about mitigating factors and remedial steps taken, and the DOL guidance also notes that a contractor may note as part of its disclosure that the decision in question is being appealed.
- **Remedies.** While the Proposed Rule lacked specific information about contract remedies, the Final Rule included additional language on the subject. The Final Rule encourages the use of lower-level remedies for contractors or prospective contractors with labor law violations - even those that contracting agency labor compliance advisors (ALCAs) deem serious, repeated, willful or pervasive, prior to imposing harsh actions such as debarment or termination of a contract. The Final Rule also encourages consideration of a contractor's compliance record, implementation of remedial actions, addressing of violations by its subcontractors, and ALCAs' determination of the need for labor compliance agreements.

Voluntary Pre-Assessment

Beginning the week of September 12, 2016, the DOL will conduct pre-assessments in which contractors and prospective contractors may obtain, on a voluntary basis, an assessment of their labor compliance history in anticipation of a bid on a future contract or acquisition. The DOL will conduct the voluntary pre-assessment using its own guidance to determine whether the requesting entity's violations are "serious, repeated, willful, or pervasive" and to advise on whether a labor compliance agreement is warranted. If the DOL concludes that the requesting entity has a record of labor law compliance, the entity may use that determination when submitting a bid on a future acquisition, unless the contractor or prospective contractor discloses subsequent labor law violations. The pre-assessment may also be a mitigating factor in the event of a disclosure of labor law violations. The DOL's pre-assessment procedure is scheduled to commence on September 12.

Pre-Dispute Arbitration

The Executive Order and the implementing Final Rule also prohibit entities with contracts valued in excess of $1 million from pre-dispute requirements that employees arbitrate Title VII of the Civil Rights Act of 1964 disputes or torts arising out of

or related to sexual harassment or sexual assault. Arbitration for such disputes may be conducted only with the voluntary consent, and such consent must be obtained after the alleged incident occurs. The requirement also extends to subcontracts, other than subcontracts for acquisition of commercial available off-the-shelf (COTS) items, which are valued in excess of $1 million. The mandatory pre-dispute prohibition does not apply to negotiated collective bargaining agreements or to existing agreements that were entered into before the contractor bids on a new contract covered by the Order, unless the arbitration agreement is subsequently renegotiated.

Paycheck Transparency Requirements

The Executive Order also contained language requiring paycheck transparency, which the implementing regulations and the DOL guidance address. Under the paycheck transparency provision, contractors with procurement contracts where the estimated value of the goods or services to be provided exceeds $500,000 are required to provide their employees with "a document with information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." For exempt employees, the document may omit information concerning overtime hours worked so long as the individual has been informed of his or her exempt status. The Proposed Rule and its Final version contain language implementing this requirement, and contractors are also required to incorporate the paycheck transparency requirement into qualifying subcontracts valued in excess of $500,000.

Implications for Government Contractors

The Executive Order and its implementing regulations and guidance carry many implications - quite a few of them unwelcome - for contractors, prospective contractors, and other industry stakeholders. While previous Presidential actions on government procurement established new or modified substantive requirements, such as the increase in contractor minimum wage or the LGBT coverage, this Executive Order incorporates the regulatory and enforcement schemes of the underlying statutes which include well-developed remedial requirements and adds additional potential penalties after the underlying matter was resolved. Likewise this Executive Order adds additional penalties to the procurement penalties that are already part of several of the underlying statutes such as the Service Contract Act, the Rehabilitation Act, and Executive Order 11246. And this Executive Order establishes Labor Compliance Advisors for each procurement agency who will have the authority to review and perhaps amend resolutions of labor and employment violations already resolved by the agencies with authority and expertise.

In addition to the burdensome reporting requirements, the Executive Order raises serious practical issues for government contractors. For example, if a contractor fails to provide the necessary information related to labor law violations, or provides incomplete information, that contractor may be subject to litigation under the False Claims Act, including qui tam litigation on behalf of the United States. Moreover, contractors with losing bids may be in a prime position to challenge a responsibility determination for a winning bidder or to challenge the bid as non-responsive if it believes that the winning bidder did not disclose every matter it was involved with over the three years prior to the bid. Nor is it clear how this will impact reporting requirements when the winning bidder had entered into an acquisition within the three-year period and the acquired entity itself may have had a "serious, repeated, willful or pervasive" matter resolved.

What Now?

The publication of the Final Rule and Guidance does not mean the end of the journey for Executive Order 13673. The Order and its implementing regulations and guidance face a battle on multiple fronts from stakeholders who oppose the additional burdens that these actions place on current and prospective government contractors. In Congress, efforts are underway to exempt defense contractors from coverage under the Order. Both the Senate and the House of Representatives have included such an exemption in the National Defense Authorization Act bills for 2017 -- but the provision is still subject to debate, and President Obama has yet to sign the legislation.

Regardless of Congressional action, the Executive Order also faces likely challenges in the courts. Industry stakeholders

have raised questions about the President's authority to impose additional penalties beyond those already delineated in the fourteen labor and employment laws named in the Order, as well as their as yet unspecified, but certainly numerous, state law equivalents. The success of this argument, and other challenges to the Order, remains to be seen -- but we can say with virtual certainty that the battle over blacklisting of government contractors will shift to the courts in the near future.

Notwithstanding challenges in the halls of Congress and in federal courtrooms, industry stakeholders can also expect further word from the FAR Council and the Department of Labor, as the DOL in particular promised additional guidance on the state law equivalent statutes to which the Order's coverage will extend. Such additional guidance will be subject to the same public commentary that the recently finalized guidance and regulation underwent, but in light of the dearth of changes to this point, contractors' and prospective contractors' doubts that their perspectives will be considered -- in any meaningful way -- may not be misplaced.

In the meantime, contractors should determine whether and how the new reporting requirements may apply to them. In addition, contractors should begin to evaluate their internal processes and implement measures to track reportable "Labor Law Violations" and ensure that the required disclosures are available to those involved in the bidding process with federal agencies.

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