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Management Alert

Coming in 2016 -- More Burden For Federal Contractors Courtesy of The President's July 31, 2014 Executive Order

By Paul Kehoe and Larry Lorber

For employers wondering how the President would respond to the House of Representatives authorizing a lawsuit against him for abuse of power, we have our answer one day later -- more executive orders. On July 31, 2014, President Obama signed an Executive Order entitled "Fair Pay and Safe Workplaces" requiring 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 directs (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 extends the Franken Amendment prohibiting companies with federal contracts over $1 million from maintaining mandatory arbitration agreements, despite the manifest legality of such agreements as determined by the Supreme Court.

This Executive Order is the latest in a series of Orders and regulatory actions which are placing significant additional labor, employment and social requirements on the federal procurement system. However, as we point out, this Executive Order is unique in several ways.

What Additional Reporting Requirements Will There Be?

For procurement contracts for goods and services over $500,000, each agency will require potential contractors to disclose any labor law violations described above within the preceding three-year period. The information must be updated every 6 months over the life of the contract, thereby raising the issue as to whether a contract may be terminated or suspended

[1] The laws include the Fair Labor Standards Act, the Occupations Safety and Health Act, the Migrant and Seasonal Worker Protection Act, the National Labor Relations Act, the Davis-Bacon Act, the Service Contract Act, Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, 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 Act of 1967, Executive Order 13658, and equivalent State laws.

during the course of its performance. A Fact Sheet accompanying the E.O. suggests that these requirements will start in 2016. As defined in the Order, any federal contractor would have to disclose a reasonable cause finding from the Equal Employment Opportunity Commission, an administrative law judge's determination from the Wage & Hour Division or the National Labor Relations Board, or any OSHA inspections leading to citations among other things. Not only that, prospective contractors would have to disclose state law violations as well, meaning for example, that any violations of California laws may prevent a contractor from obtaining a federal contract. With many of the laws cited, federal law does not preempt state law from establishing additional or different requirements, which could lead to the effective debarment of a federal contractor for state law violations. As an example, state family and medical leave requirements often significantly differ from federal requirements, thereby creating different (and often more onerous) standards that may impact a contractor's responsibility determination depending upon where it may do business.

Subcontractors will not escape these requirements either. For any subcontract worth over $500,000 for goods and services that are not commercially available off-the-shelf-items, the prime contractor must disclose the subcontractor's labor law violations within the previous three years. This may require the prime contractor to police its subcontractor's compliance with a myriad of federal and state employment laws which differ from the requirements under the OFCCP programs.

The Executive Order further provides that the GSA establish a single reporting resource so that all potential contractors and subcontractors will be required to report three years of compliance activity. This portal will apparently not be exempt from disclosure under the Freedom of Information Act, meaning that administrative resolutions of investigations or charges, including those alleging class claims, which are often required to be confidential under the statute at issue will now be disclosed by the GSA.

The Regulatory Process

While the White House has instructed the Department of Labor, Office of Management and Budget and senior White House officials to participate in listening sessions with stakeholders, the value of those sessions, and the effectiveness of the comment period afforded during the rulemaking process, is questionable given the breadth of the Executive Order. For example, stakeholders should be interested in how the terms "serious, repeated, willful, or pervasive" are defined and applied to the different laws cited. Indeed, under the definition set forth in the E.O., almost any class action finding would be considered "serious." Nonetheless, the Executive Order essentially defines those terms, curtailing much if not all of the discretion available to those promulgating any rules pursuant to the Order. That is because under the nation's system of laws, a regulation cannot substantively alter an Executive Order, indicating at least to some extent, that the President once again used his pen to reach a result without Congressional approval and with uncertain authority to do so.

Real World Implications

As noted, this Executive Order differs in a material manner from the other procurement regulatory actions announced by the Administration in the past several years. While the previous actions all 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 procurement 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 E.O. 11246. And in the alternative, 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.

Over the past several months, federal contractors have been impacted by the President's go it alone approach. While this Executive Order will not impact contractors immediately given the realities of the rulemaking process, this is one more burdensome reporting and compliance requirement from the White House impacting the procurement process which is already criticized as hidebound and non-responsive and of which stakeholders need to be cognizant.

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