

Management Alert



Federal Contractors and Subcontractors be on the Alert: Federal Government Takes a Step Towards Creating the Elusive List of Federal Subcontractors

There is big news for federal contractors and subcontractors buried in the Department of Treasury's proposed revision to the Department of the Treasury Acquisition Regulation ("DTAR"). On its face, the proposed rule appears to be a simple amendment to the DTAR required by the Dodd-Frank Wall Street Reform and Consumer Protection Act. If implemented in its current form, however, the regulation would require that Treasury contractors provide a list of their subcontractors to the federal government. This may provide the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") the opportunity to take its first step into developing a list of federal subcontractors. As a result, even contractors who do not have contracts with the Department of the Treasury should take note.

The Dodd-Frank Act Establishes Civil Right Agencies within Financial Regulatory Agencies; The Proposed Regulation Sets Standards for the Department of the Treasury

In July 2010, President Obama signed the Dodd-Frank Act into law. In addition to implementing new measures aimed at regulating the financial entities, the Act contains a provision that creates an Office of Minority and Women Inclusion ("OMWI") at numerous U.S. government financial regulatory agencies. The agencies covered by the Dodd-Frank Act include the Department of the Treasury, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, each of the Federal Reserve Banks, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, the Office of the Comptroller of Currency, the Securities and Exchange Commission, and the Bureau of Consumer Financial Protection. The OMWIs at these federal regulatory agencies are charged with monitoring the diversity efforts of the covered agencies, private employers regulated by those agencies, and agency contractors. Each regulated agency was charged with creating regulations to implement this provision.

This week, on August 21, 2012, the Department of the Treasury issued a notice of proposed rulemaking to implement this Dodd-Frank provision. As proposed, the regulations would require Treasury contractors with contracts over \$150,000 to make good faith efforts to include minorities and women in their workforces. The Treasury Department interprets "good faith efforts" to mean efforts consistent with the Equal Protection Clause of the Constitution and Title VII of the Civil Rights Act of 1964, such as the identification and elimination of employment barriers, the widespread publication of employment opportunities, and other forms of outreach to minorities and women. Treasury contractors will also be required to include in all covered subcontracts whose dollar value exceeds \$150,000 specific language related to these obligations.

All Federal Contractors and Subcontractors Should be Alert: Proposed Rule Will Require Contractors To Provide a List of Subcontractors and Provide Information to the Government Under Very Tight Timelines

On its face, and according to the Treasury Department, it would not be burdensome for contractors to comply with these proposed regulations, as many already have compliant affirmative action programs established under the more onerous affirmative action regulations promulgated by the Department of Labor's OFCCP. However, the proposed regulation is big news for three reasons.

Most importantly, the proposed rule would require that audited Treasury contractors provide the government with detailed information about their subcontractors. Contractors would need to provide a list naming each subcontractor, dollar amount of the subcontract, date of award, and the race, ethnicity, and gender of each subcontractor's owner. Given that OFCCP Director Patricia Shiu has publically stated that the DOL Deputy Secretary sent a letter to his counterparts at all of federal financial agencies covered by the Dodd-Frank Act inviting them to partner with the OFCCP, it is not a stretch to believe that the driving force behind the proposed rule, and its largest intended impact, is to bring the OFCCP one step closer to creating a comprehensive list of federal government subcontractors, an objective that has long eluded the OFCCP.

The proposed regulation would also require contractors to submit considerable documentation to the federal government with a very tight turn-around, i.e., within ten business days of a written request from the contracting officer, or such longer time as the contracting officer determines. To show the contractor has engaged in "good faith" efforts, the proposed regulation suggests that contractors would be required to provide:

- The total number of Contractor's employees, and the number of minority and women employees, by race, ethnicity, and gender (e.g., an EEO-1);
- The subcontractor information outlined above (e.g., name of each subcontractor, dollar amount of the subcontract, date of award, and the race, ethnicity, and gender of each subcontractor's owner);
- Information similar to that required in item 1, above, with respect to each subcontractor; and/or
- The Contractor's plan to ensure that minorities and women have appropriate opportunities to enter and advance within its own workforce, as well as its plan to ensure that its subcontractors provide appropriate opportunities for women and minorities, including outreach efforts.

Lastly, the regulations as proposed could be very burdensome to small contractors. These regulations would apply to any Treasury contractor with a contract of more than \$150,000, regardless of the number of employees employed by the contractors. Federal contractors with fewer than 50 employees, who are therefore not subject to the OFCCP's jurisdiction, may not have readily available information related to outreach efforts or their workforce demographics. Failure to show that the contractor engaged in good faith efforts can result in termination of the Contract for default, referral to the OFCCP, or other appropriate action.

What This Means for Contractors and Subcontractors

These regulations could potentially have a big impact on federal subcontractors, many of whom have avoided audit by the OFCCP to date. As a result, we strongly encourage federal contractors and subcontractors to consider submitting comments on the proposed rule, which are due by October 22, 2012. Comments may be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. We are here, if you would like help crafting comments to these regulations. Contractors with the Department of the Treasury should also consider the impact on their businesses of these new regulations and bid accordingly. Finally, Treasury contractors with fewer than 50 employees should start developing methods to track demographic information and outreach efforts.

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