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Proposed Regulations Under Executive Order 13673 Will Create New Heavy Compliance and Reporting Burdens on Federal Contractors

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On May 28, 2015, the Federal Acquisition Regulatory Council (FARC) and the U.S. Department of Labor (DOL) published proposed regulations and guidance regarding the upcoming implementation of Executive Order 13673, "Fair Pay and Safe Workplaces." Federal contractors should carefully review the order and the proposed regulations/guidance because they create new onerous compliance obligations for contractors who enter into procurement contracts for goods, services and construction in excess of $500,000 annually.

President Obama issued the order last fall to require federal contracting agencies to award federal contracts to contractors who have a history of responsibility and compliance with federal and state labor laws. The order is intended to improve the federal contracting process by reducing the number of contractors who jeopardize the "timely, predictable and satisfactory delivery of goods and services to the Federal Government" through improper and illegal employment practices. To accomplish this goal, the order prescribed three new obligations on "covered" federal contractors.

First, the order provides that prospective contractors who enter into procurement contracts in excess of $500,000 must disclose and report to the contracting agency all "administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against it within the preceding three years" for violations of 14 federal labor laws[1] and analogous state laws.

The proposed regulations provide that the contractor must report this information to a "labor compliance officer" (LCA), a new federal position within each agency. The LCA is charged with working with prospective contractors to ensure compliance with the order. All reported information will be cataloged online, on a bi-annual basis, in the System for Award Management (SAM) reporting module. Upon reviewing a contractor's labor law compliance history, the LCA will be responsible for determining whether the contractor is a "responsible source" pursuant to 10 U.S.C. 2405(b); 41 U.S.C. 3703. In making this determination, the LCA will also consider: (1) whether the history of reported violations are serious, repeated, willful or pervasive, (2) the number of violations over the three-year reporting period, (3) any mitigating circumstances, and (4) any remedial measures taken to address labor violations, including the existence of and compliance with any labor compliance agreements. Federal contractors will have to submit this information on a semi-annual basis to

the LCA and will also have to collect and report this information for its subcontractors that have subcontracts in excess of $500,000.

Second, the order, and its proposed regulations, require contractors and their subcontractors with contracts valued at more than $500,000 to provide their employees with "paycheck transparency." Accordingly, covered contractors will be required to provide to each employee who performs work under the contract, each pay period, a written document that contains information about their hours worked, overtime hours, pay, additions or deductions from pay and whether or not they are considered an independent contractor. Contractors do not have to provide notice of hours worked to exempt employees or independent contractors so long as such individuals are advised in writing of their status in advance.

Third, the order prohibits contractors with annual contracts valued at more than $1 million from requiring their employees to enter into mandatory arbitration agreements to resolve disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (except when valid contracts already exist) prior to a dispute arising under the order. However, contractors can still enter into voluntary agreements with their employees post-dispute unless they are represented by a union and other limited circumstances apply. This restriction applies to subcontractors as well.

The foregoing requirements raise a host of concerns for the federal contracting community because:

1. Large federal contractors with multiple locations and divisions will have to track and report on numerous labor and employment law violations within their organizations as the reporting requirements are companywide.
2. The LCAs will have enormous discretion in determining whether a contractor is a "responsible source," and their determinations will in many instances be difficult to overturn through the protest process, which could result in a de facto debarment.
3. The regulation's definition of "administrative merits determination" is extremely broad and includes non-final agency determinations that include, but are not limited to: (a) show cause orders from the OFCCP, (b) OSHA citations, (c) reasonable cause letters from the EEOC, (d) complaints issued by the NLRB, and (e) letters from the DOL indicating a finding that the contractor violated the FLSA, FMLA, SCA, DBA or Executive Order 13658. Accordingly, contractors will now have to report on violations that have not been deemed final by a reviewing court.
4. Violations reported to the SAM system may be accessible to the public, which will be a boon for the plaintiffs' bar to develop class action litigation and to labor unions during their organizing efforts.
5. The definition of a "serious" violation includes instances involving payment of back wages of at least $10,000 or instances involving adverse employment actions (discharge, refusal to hire, suspension, demotion or threat), which is an extremely low threshold.

As such, the order and proposed regulations/guidance will significantly increase the regulatory burden on federal contractors. Accordingly, contractors may wish to take advantage of the DOL's invitation to submit public comments by July 27, 2015, to address these issues. Additionally, federal contractors may also want to support the pending House of Representatives Appropriations Subcommittee's Fiscal Year 2016 Labor, Health and Human Services, Education and related agencies funding bill, which currently prohibits the DOL from using allocated monies to implement the order, thereby rendering it toothless.

Where a federal contractor is unsure of its obligations under the order and related proposed regulations/guidance, it should seek guidance from legal counsel. Failing to do so could result in the loss of its "responsible source" designation, thereby endangering its federal contracts and potential debarment proceedings.

For more information about this alert or any other affirmative action issues, please contact Kenneth A. Rosenberg at krosenberg@foxrothschild.com or 973.994.7510 or Courtney D. Roach at croach@foxrothschild.com or 973.994.7516 or any other member of Fox Rothschild's Labor and Employment Department.

[1] The 14 covered federal labor laws are the Fair Labor Standards Act, the Occupational Safety and Health Act of 1970, the Migrant and Seasonal Agricultural 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 1972 and 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 and Executive Order 13658.

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