

“Fair Pay and Safe Workplaces”: New Rules Create Burdens and Risks When Conducting Business with the US Government

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Overview of Presentation

Introduction to the new Rule and Guidance, and brief examples of why they constitute significant developments

Background, including Executive Order 13673

New FAR responsibility criteria, including relevant aspects of the Guidance

Paycheck transparency requirements

Arbitration requirement

Best practices to consider

Introduction to the Rule and Guidance

- On August 25, 2016, the Government issued the new FAR Rule and Guidance.
- The new Rule and Guidance constitute significant developments, and present a powerful mix of Government contracts law and Labor law.
- The primary focus of the new Rule and Guidance is on responsibility, but the Rule also covers several other matters, including past performance.
- The new Rule will likely cause an increase in different types of litigation.

Introduction to the Rule and Guidance (cont.)

- Legislation has been introduced to diminish the impact of the new system, or eliminate it.
- A recent lawsuit challenges the legality of the Executive Order, the new FAR Rule, and the Department of Labor Guidance.

Background – Fair Pay and Safe Workplaces Executive Order 13673

- E.O. 13673 requires contracting agencies to take into account 14 labor and employment laws (and state equivalents) when determining if a federal contractor “is a responsible source that has a satisfactory record of integrity and business ethics.”
- Contractors are also required to report violations of these labor laws during the bidding process and periodically post-award.

- The 14 federal labor laws and executive orders are:
 1. The Fair Labor Standards Act
 2. The Occupational Safety and Health Act of 1970
 3. The Migrant and Seasonal Agricultural Worker Protection Act
 4. The National Labor Relations Act
 5. The Americans with Disabilities Act of 1990
 6. The Family and Medical Leave Act
 7. Title VII of the Civil Rights Act of 1964
 8. The Age Discrimination in Employment Act of 1967
 9. The Davis-Bacon Act
 10. The McNamara-O'Hara Service Contract Act
 11. Section 503 of the Rehabilitation Act of 1973
 12. Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Veterans' Readjustment Assistance Act of 1974
 13. Executive Order 11246 (Equal Employment Opportunity)
 14. Executive Order 13658 (Establishing a Minimum Wage For Contractors)

Labor Laws (cont.)

- To date, the only identified “equivalent state laws” are OSHA-approved State Plans.
- The Guidance states that the DOL will issue further guidance identifying other “equivalent state laws”.
- One should assume that the to-be-identified state laws will include equal opportunity, wage payment, wage and hour, and similar laws enacted in many states.

Introduction to the New FAR Rule and Guidance

- Portions of the new Rule and Guidance are complex.
- The Guidance is not a regulation, but parts of it are incorporated into the new FAR Rule.

The New FAR Rule and Guidance – Responsibility

- The primary focus of the executive order is on contractor and subcontractor responsibility based on certain labor laws.
- The new Rule adds provisions to FAR 9.1, which deals with “Responsible Prospective Contractors”.
- New language added to FAR 9.1 refers to an entirely new section of the FAR created by the rule, FAR Subpart 22.20.
- As we will discuss, many of the complications arising from the new Rule are created by the lengthy new provisions at FAR Subpart 22.20.

FAR Subpart 22.20: What Relevant Violations do Contractors Need to Disclose?

- Administrative Merits Determinations
- Civil Judgments
- Arbitral Awards or Decisions

FAR Subpart 22.20: What Relevant Violations do Contractors Need to Disclose? (cont.)

- “Administrative Merits Determinations (AMDs)”
 - Includes notices or findings – whether final or subject to appeal or further review – issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the labor laws.

FAR Subpart 22.20: What Relevant Violations do Contractors Need to Disclose? (cont.)

- Three takeaways as to what is included in AMDs:
 1. Notices or findings “***subject to appeal or further review***”
 - Nonfinal and appealable decisions
 - A/k/a “guilty until proven innocent” determinations
 2. The list of AMDs is exhaustive
 - Wage and Hour forms and letters
 - OSHA citations and notices
 - OFCCP show cause notices
 - EEOC letters and actions
 - NLRB complaints
 - Complaints filed by or on behalf of enforcement agencies
 - Orders or findings from ALJs or enforcement agencies
 3. Settlements

FAR Subpart 22.20: What Relevant Violations do Contractors Need to Disclose? (cont.)

- “Civil Judgments”
 - Any judgment or order by any Federal or State court in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the labor laws.
 - Includes a judgment or order that is not final or is subject to appeal.
 - Does not include a private settlement where the lawsuit is dismissed by the court without any judgment being entered.

FAR Subpart 22.20: What Relevant Violations do Contractors Need to Disclose? (cont.)

- “Arbitral Award or Decision”
 - Any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor or subcontractor violated any provision of the labor laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the labor laws.
 - Includes awards and decisions even if the arbitral proceedings were private or confidential.
 - Includes awards or orders that are not final or are subject to being confirmed, modified, or vacated by a court.
 - Does not include an arbitrator’s decision finding only a CBA violation.

Labor Law Disclosures

- The new prime contractor disclosure obligations generally apply to offerors on solicitations estimated to exceed \$500,000.
- Those offerors must represent whether, in the past three years, any labor law violations have been rendered against them.
- Covered subcontractors for purposes of labor law disclosures are subcontractors where the estimated value of the subcontract is over \$500,000, that is not for commercially available off-the-shelf (“COTS”) items.

Labor Law Disclosures – Phase In of Requirements

- The disclosure requirements will be phased in.
 1. From October 25, 2016 through April 24, 2017, the prime contractor disclosure requirements will apply to solicitations with an estimated value of \$50 million or more, and resultant contracts; after April 24, 2017, the requirements will apply to solicitations estimated to exceed \$500,000, and resultant contracts.
 2. The requirements apply to subcontractors starting October 25, 2017.
 3. The disclosure period covers labor law decisions rendered against the offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the offer, whichever period is shorter.

Labor Law Disclosures – What Has to be Disclosed

- If an offeror has indicated that it has had a labor law violation within the relevant period, and is the apparent contract awardee, then the offeror has to disclose within a government database (“SAM”) the following information:
 1. The labor law violated.
 2. The case number, or other unique identification number.
 3. The date rendered.
 4. The name of the court, arbitrator, agency, board, or commission that rendered the decision.

Labor Law Disclosures – What Has to be Disclosed (cont.)

- This information will be publicly available in another government database – FAPIIS.
- An offeror also can provide such additional information it deems necessary to demonstrate responsibility, including mitigating factors and remedial measures.
- This information will not be made public unless the contractor wants it made public.

Should Contractors Disclose Anything Else?: Mitigation, Mitigation, Mitigation (or Context and Advocacy)

- Did the contractor take steps to correct the violation (remediation)?**
- Did the contractor take steps to improve compliance? **
- At what stage is the violation? Is it nonfinal and appealable?
- Was the violation committed during performance of a federal contract or not?
- Was this a first violation? Has there been only one violation?
- Did the violation involve one employee out of an employee pool of hundreds? Thousands?
- Does the contractor have safety and health or compliance programs?
- Have there been recent legal or regulatory changes related to the violation at issue?
- Did the contractor act in good faith and have reasonable grounds for believing it was not violating the law?
- Has there been a significant period of compliance before the violation?

What Happens after All the Disclosures?

- Agency Labor Compliance Advisor's (ALCA's) preaward assessment of a contractor's labor law violations.
- Contracting Officer's (CO's) responsibility determination.

ALCA Preadward Assessment

- ALCA assesses the nature of the violations and provides analysis and advice to the CO.
- Three-step process:
 1. ALCA reviews all the contractor's violations to determine if they are serious, repeated, willful, and/or pervasive.
 2. ALCA weighs any violations in light of the totality of circumstances, including the severity of the violation(s), size of the contractor, and any mitigating factors.
 3. ALCA provides a written analysis and advice to the CO regarding the contractor's compliance.

ALCA Preaward Assessment (cont.)

- Classifying Violations

- **Serious:** (a) if an OSHA citation was designated as serious; (b) for all other Labor Laws, if the violation involved one of the following (i)-(ix), e.g., (i) affected at least 10 workers, or affected employees composed 25% or more of the workforce at the worksite; (ii) fines and penalties of at least \$5,500 were assessed, back wages of at least \$10,000 were due; (vi) the contractor engaged in retaliation.
- **Repeated:** (a) if an OSHA citation was designated as repeated; (b) for all other labor law violations, if the violation is the same as, or substantially similar to, one or more other violations of the labor laws.
- **Willful:** (a) under the OSH Act, if there was an OSHA citation was designated as willful; (b) under the FLSA, if there was an assessment of back wages for greater than two years or an assessment of monetary penalties for a willful violation; (c) under the ADEA, if there was an award of liquidated damages; (d) under the ADA or Title VII, if there was award of punitive damages; (e) for all other labor laws, if it is ascertainable from the findings that the contractor knew its conduct was prohibited or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by the labor laws.
- **Pervasive:** a pattern of serious and/or willful violations, continuing violations, or numerous violations.

CO Responsibility Determinations

- Current rule and practice:
 - Contracting officer discretion.
- Effect of new rule:
 - CO must consider labor law violations.
 - Classifications, mitigation, and remedial measures.
 - Mere fact of violation(s) is not dispositive on responsibility question.
 - Advice from ALCAs.
 - CO reliance on advisors.

CO Responsibility Determinations (cont.)

- ALCA advice – 1 of 5 recommendations:
 1. Satisfactory record of business ethics & integrity.
 2. Satisfactory record, but contractor needs to commit, after award, to negotiate a “labor compliance agreement” (LCA).
 3. Could be satisfactory record only if commit prior to award to negotiate LCA.
 4. Could be satisfactory record only if enter LCA preaward.
 5. Does not support finding of satisfactory record and agency suspension and debarment official should be notified.

CO Responsibility Determinations (cont.)

- Based on ALCA guidance, CO to:
 - Consider advice (if provided in a timely manner) when making responsibility determination.
 - Place ALCA report in file.
 - Document how report was considered in the responsibility determination.
 - If ALCA advice not timely, make decision based on “available information and business judgment”.
- Notify contractor if and when an LCA is required and with what agency.

Labor Compliance Agreement

- Entered into between a contractor or subcontractor and an enforcement agency (an agency granted authority to enforce federal labor laws) to address:
 - Appropriate remedial measures.
 - Compliance assistance.
 - Steps to resolve issues to increase compliance with the labor laws.
 - Other related matters.
- The procurement agency is not a party to the LCA.
- The existence of an LCA will be noted in FAPIIS.

Post-Award Updates and Assessments

- Responsibility as a post-award issue.
 - Comparison to present rule and practice.
- Requirement to update.
 - ALCAs to review and advise.
 - Contractor input and publication.
 - CO consideration.
 - Possible actions.

Prime Contractor Assessments of Prospective Subcontractors

- Current rule and practice.
- What the new Rule brings:
 - Data.
 - Review.
 - Responsibility.
 - Timing and remedies.

Paycheck Transparency

- To comply with the E.O.'s requirements for paycheck transparency, the Guidance states that each pay period, federal contractors and subcontractors must provide all persons performing work under the contract a wage statement containing:
 - The employee's hours worked, overtime hours, rate of pay, and any additions to or deductions from their pay.
 - Written notice that a person is classified as exempt from the overtime provisions of the FLSA.

Paycheck Transparency (cont.)

- In addition, written notice that a person is classified as an independent contractor must be provided before the person performs work under the contract.
- Review whether the paycheck transparency information is already provided on employees' pay stubs and work with the payroll provider to provide any missing information.
- This requirement will become effective on January 1, 2017.

Prohibition on Contractors' Use of Arbitration Agreements

- Contractors who have contracts for goods and services **worth more than \$1M** are prohibited from agreeing with employees **in advance** to arbitrate claims arising under **Title VII, as well as all tort claims related to sexual assault or harassment.**
- Three exceptions:
 1. If employees are covered by a CBA that the contractor negotiated with a labor organization.
 2. If arbitration agreements were signed before the contractor or subcontractor became covered by the proposed rule.
 3. Contractors who are providing commercial items or commercially available off-the-shelf items.
- Contractors are able to arbitrate covered claims if the employee filing the claim voluntarily agreed to arbitration after the dispute arose.

Best Practices – Department of Labor Pre-Assessment Process

- Contractors and subcontractors can engage with the DOL to obtain compliance assistance if they identify labor law violations that may be serious, repeated, willful, and/or pervasive.
- The Government indicates that this will allow the entity to focus its attention on developing the best possible offer.
- This process is not in the FAR Rule, but section VI of the Guidance includes information about the process.

Best Practices – Department of Labor Pre-Assessment Process (cont.)

- Significantly, the Guidance states that if a contractor that has been assessed by the DOL subsequently submits a bid, and the contracting officer initiates a responsibility determination, the contracting officer and the ALCA may rely on the DOL's assessment that the contractor has a satisfactory record of labor law compliance unless additional labor law decisions have been disclosed.

Best Practices – Department of Labor Pre-Assessment Process (cont.)

- Also, ALCAs encourage prospective contractors to work with enforcement agencies to address labor law violations as soon as possible.
- The new FAR Rule defines “enforcement agency” as any agency granted authority to enforce the federal labor laws, and includes the enforcement components of the DOL, the EEOC, the Occupational Safety and Health Review Commission (OSHRC), and the NLRB.

Best Practices – Tracking Systems/Compliance Programs

- Tracking:
 - What
 - When
 - Who
- Compliance:
 - IT systems
 - Purchasing systems
 - Training

Litigation – Bid Protests

- Responsibility challenges.
 - Current standard.
 - How the new Rule may affect protest practice.
- Past performance.
 - Current standard.
 - How the new Rule may affect protest practice.

Other Possible Types of Litigation

- In addition to bid protests, contractors and subcontractors should be aware that the new Rule creates the possibility of other types of litigation, including:
 1. Contract Disputes Act litigation.
 2. Prime-subcontractor litigation.
 3. Civil False Claims Act litigation.

Conclusion

- Questions?
- Please submit questions by using the chat feature on the right panel of the WebEx portal.

Thank You

- Please email prucker@mayerbrown.com with any additional questions, or reach out to us directly:

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