Client Alert

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New Executive Order Places Additional Reporting Obligations on Government Contractors and Creates an Additional Weapon in the Government's Labor Law Enforcement Arsenal

By Daniel Westman, Tina Reynolds and Susan Borschel

On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order, which requires both government contracting officers and government contractors to track and coordinate contractor and subcontractor compliance with federal and certain state labor laws starting in 2016. Contractors that have gone through a Department of Labor administrative merits determination or civil adjudication, and may even have fully resolved their compliance problems, will now face further scrutiny and the possibility of additional remedial measures being imposed. This Executive Order follows several other recent employment related Executive Orders applicable to government contractors, all of which have increased costs or compliance obligations for government contractors.

The most significant substantive changes and impact on contractors and subcontractors are discussed below.

SUMMARY OF REQUIREMENTS

Under Section 2 of the Executive Order, all offerors for government contracts worth in excess of $500,000 must disclose as part of their proposal certifications all administrative merits determinations, arbitral awards or decisions, and civil judgments relating to violations of a host of federal and state labor laws received within the previous three years. Contract awardees must update these disclosures every six months during contract performance. Among the labor laws for which disclosures must be made are:

- Fair Labor Standards Act;
- Occupational Safety and Health Act of 1970;
- Migrant and Seasonal Agricultural Worker Protection Act;
- National Labor Relations Act;
- Davis-Bacon Act;
- Service Contract Act;
- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act of 1973;

- Vietnam Era Veterans' Readjustment Assistance Act of 1974;
- Family and Medical Leave Act;
- Title VII of the Civil Rights Act of 1964;
- Americans with Disabilities Act of 1990;
- Age Discrimination in Employment Act of 1967;
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); and
- equivalent state laws, as defined in guidance issued or to be issued by the Department of Labor.

Offerors that disclose past violations must also identify to the contracting officer the steps they have taken to correct the violations and improve compliance with labor laws. The awarding agency's Labor Compliance Advisor (a new position required by Section 3 of the Executive Order) will consult with relevant enforcement agencies and "advise the contracting officer whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters."

Contracting officers who are made aware of violations of labor laws post-award must consult with the agency Labor Compliance Advisor and decide what remedial actions, if any, are required. Remedies available to the contracting officer include deciding not to exercise an option, terminating the contract, or referring the contractor to the agency's suspension and debarment official.

These disclosure requirements are to be flowed down to all subcontracts with an estimated value in excess of $500,000 that are not for commercially available off-the-shelf (COTS) items. It is important to note that the Executive Order does not include a similar COTS exclusion at the prime contract level, so all prime contracts in excess of $500,000, even those for COTS items, will be subject to the new disclosure requirements. Also, whereas the decision whether supplemental agreements or other steps are necessary to improve labor law compliance is made pre-award for prime contractors, the decision at the subcontract level can be made up to 30 days post-subcontract award. Notably, it is the contractor, not the Government that is supposed to make the decision whether its subcontractors remain responsible sources notwithstanding prior labor law violations, although the Executive Order specifies that "[a] contracting officer, Labor Compliance Advisor, and the Department of Labor (or other relevant enforcement agency) shall be available, as appropriate, for consultation with a contractor to assist in evaluating the information on labor compliance submitted by a subcontractor."

In addition to these newly imposed burdens, another section of the Executive Order creates new "Paycheck Transparency" requirements, specifying what information must be included on contractor employee pay stubs. Contractors and subcontractors must give all employees a document showing their hours (for non-exempt status employees), pay, and additions to and deductions from pay.

Section 6 of the Executive Order requires that federal contracts valued over $1 million for other than COTS items or commercial items shall include clauses in both the solicitation and contract specifying that "contractors agree

that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise." There is a limited exception, however, for valid arbitration agreements entered into prior to submission bids, unless such agreements are subject to change or are re-negotiated or replaced. This clause must be flowed down to subcontracts worth in excess of $1 million. A major difference in the implementation of this Section 6 requirement and the others in the Executive Order is that it will not apply to commercial items or COTS procurements at either the prime contract or subcontract levels.

IMPACTS ON GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

This Executive Order places additional compliance responsibility on both contracting officers and government contractors. (This Executive Order applies to contracts, but not to grants or other transaction authority agreements.)

The White House Fact Sheet accompanying the Executive Order claims that it will promote efficient federal contracting. However, even without the benefit of knowing what the implementing regulations will require, it appears certain that the new requirements will cause duplication of efforts, inefficiencies, and increased costs. In addition, there will be confusion as to what agency has authority or responsibility over enforcement of labor law compliance obligations (i.e., DOL or the awarding agencies now charged with negotiating compliance agreements).

It is not clear why the White House determined that DOL's current enforcement mechanisms are insufficient to combat labor law violations, and why additional responsibility had to be foisted upon awarding agencies. The new procedures are likely to lead to different, and possibly inconsistent, agency-level reporting requirements.

Further, contractors already subject to an administrative merits determination, arbitral award or decision, or civil judgment, all of which normally include a compliance plan, may now be subject to new or additional compliance obligations based on the agency contracting officer's determination that the already-imposed remedies are inadequate. In this way, the new rules could raise due process concerns. Also, rather than allowing employees to get their day in court (another benefit identified in the White House Fact Sheet), the new rules could incentivize contractors to settle labor disputes to avoid being subject to an administrative merits determination, arbitral award or decision, or civil judgment.

Finally, contractors will face considerable burdens in evaluating the labor compliance policies of their subcontractors. While the Executive Order states that contractors will have to work closely with contracting officers, agency Labor Compliance Advisor and DOL to review compliance plans and even arrange for subcontractor labor compliance agreements, it is not clear to what extent the contractor will need to be involved in actually negotiating and enforcing these labor agreements. It is fair to say that no contractor currently has such a burden with respect to its subs.

RECOMMENDATIONS FOR BEST PRACTICES

While the Executive Order does not take effect until 2016, there are steps that federal contractors can take now to best position themselves for compliance. Among our recommendations are:

- Keep meticulous records of all labor law charges filed with relevant federal or state agencies, and of how those charges are resolved;
- Conduct more rigorous labor law compliance reviews (contractors that focus on ensuring compliance with labor law requirements will be able to "check the box" indicating that they are free of violations during the previous three years);
- Prepare to conduct additional due diligence on subcontractors; and
- When appropriate, add new FAR provisions implementing the Executive Order to FAR flow-down checklists, particularly for those clauses where flow down will be mandatory.

Morrison & Foerster will carefully monitor the development of implementing regulations and industry comments on draft regulations and be prepared to assist clients in complying with the newly imposed obligations.

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