Thompson Coburn LLP
Government Contracts/Labor and Employment News Alert

New Regulations Will Change Business for Government Contractors

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The Administration has been active in promulgating Executive Orders (E.O.) that affect the stakeholders in the Government contracting process. On July 31, 2014, the President signed Executive Order 13673, "Fair Pay and Safe Workplaces." The E.O. states that it "improve[s] the federal contracting process." But it will create a burden for prime contractors, subcontractors, and their agency customers. It will place increased importance on avoiding any type of adverse ruling involving an employment-related or safety-related claim.

As all Government contractors are aware, a contract may be awarded only after a federal agency determines that the prospective contractor is "responsible" in accordance with Part 9 of the Federal Acquisition Regulation (FAR). Under this E.O., a company's compliance with 14 federal labor statutes, as well as unnamed state labor statutes, will now be a factor that agencies and prime contractors must consider prior to awarding a contract or subcontract over $500,000.

The FAR Council issued a proposed rule (FAR Case 2014-025) on May 28, 2015, amending the FAR to implement E.O. 13673. 80 Fed. Reg. 30548. On that same day, the Department of Labor (DOL) issued extensive "guidance" on the E.O. 80 Fed. Reg. 30573. Comments on the proposed regulations were originally requested by July 27, 2015, but that deadline has been extended twice and is now August 26, 2015. Your company, or an association representing your industry, may have already filed comments on the proposed regulation; regardless, it is very important that your company focus on the requirement and take immediate steps to prepare for its implementation.

Boiled down to its basic requirements, the E.O. requires that prospective and existing federal contractors, for contracts over $500,000, disclose whether there has been an "administrative merits" determination, civil judgment, or arbitral award or decision rendered against them during the preceding three-year period

for violations of any of the 14 specific federal labor laws and E.O.s or equivalent state labor laws, including those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections. This disclosure will take place via a new "representation and certification" that will be added to the already substantial list. This certification will be made on the System for Award Management (SAM) annually and in semi-annual updates under covered contracts. Contracting officers, through consultation with a new agency employee called a "labor compliance advisor," must consider the disclosure, including any mitigating circumstances, as part of their decision to award or extend a contract. Perhaps even more concerning, prime contractors will be expected to conduct a similar responsibility determination with respect to all potential subcontracts over $500,000, except for subcontracts awarded for Commercial Off-the-Shelf (COTS) items.

The federal labor laws and existing E.O.s that are specifically included in this E.O. are:

1. The Fair Labor Standards Act, 29 U.S.C. chapter 8
2. The Occupational Safety and Health Act (OSHA) of 1970
3. The Migrant and Seasonal Agricultural Worker Protection Act
4. The National Labor Relations Act
5. 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act
6. 41 U.S.C. chapter 67, formerly known as the Service Contract Act
7. E.O. 11246, September 24, 1965 (Equal Employment Opportunity)
8. Section 503 of the Rehabilitation Act of 1973
9. The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974
10. The Family and Medical Leave Act
11. Title VII of the Civil Rights Act of 1964
12. The Americans with Disabilities Act of 1990
13. The Age Discrimination in Employment Act of 1967
14. E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors)

In addition, the E.O. mandates the disclosure of violations of "equivalent state laws." At this time, the DOL has not identified those state laws but plans to do so in the future. In the meantime, all OSHA-approved state plans are included.

At an August 7, 2015, American Bar Association program on this topic, a panel of four experts discussed the possible implications of this E.O. One speaker, a private practitioner, predicted that it will give rise to increased activity in the areas of suspension and debarment, bid protests, False Claims Act violations, friction between prime contractors and subcontractors, and possible defamation claims.

Another panelist, a recently-retired DOL official, urged contractors to begin—sooner rather than later—a "self-evaluation" of their labor compliance profile because the government's test will require contractors to demonstrate their commitment to labor compliance both now and in the future. We second that recommendation.

It is uncertain when the proposed regulations will be finalized, but federal contractors would be wise to consult with counsel, who may advise that they: (1) assign a person or team to study the E.O., the proposed regulations, and the DOL guidance; (2) implement a company-wide review program that will enable the contractor to be prepared by January 1, 2016, to certify truthfully to this new requirement; (3) where reportable events are identified, take prompt action to rectify the situation so that the events do not recur; and (4) implement a program going forward to identify any covered violations promptly. In addition, contractors may decide to avoid voluntarily agreeing to any type of consent judgment or order in one of the above types of claims and not treat any such claim lightly, regardless of the monetary exposure.

If you would like to know more about this new requirement and how to prepare for its upcoming implementation, feel free to contact your Thompson Coburn attorney or any of the following attorneys:

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