AN ALERT FROM THE BDO GOVERNMENT CONTRACTING PRACTICE

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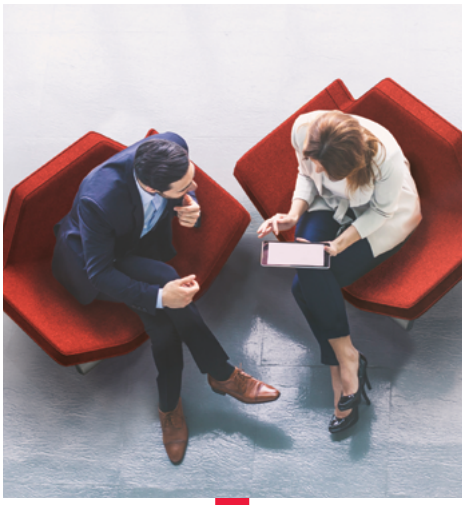

ARE YOU PREPARED FOR THE FAIR PAY AND SAFE WORKPLACES FINAL RULE?

SUMMARY

On August 25, 2016, the Federal Acquisition Regulatory Council (FAR Council) and the U.S. Department of Labor (DOL) published a Final Rule (81 Fed. Reg. 58562) and Final Guidance (81 Fed. Reg. 58654) implementing Executive Order 13673, Fair Pay and Safe Workplaces. Although each contains some changes from prior iterations—described below—both the Final Rule and Guidance were published largely as proposed.

This rule promises to fundamentally alter the way both prime contractors and subcontractors manage labor and employment matters across their workforce and throughout the contract lifecycle. The Final Rule takes effect October 25, 2016, and is broken into three parts: 1) the central requirements related to disclosure of labor law violations; 2) paycheck transparency; and 3) limitations on arbitration agreements. Although the requirements phase in over time, given the complexities, broad ramifications and unchartered territory covered, contractors should—or in some cases, must—start preparing today.

BACKGROUND

Originally issued on July 31, 2014, the stated purpose of Executive Order 13673 is to "promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws." The Order goes on to state that "contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and, therefore, increase the likelihood of timely, predictable, and satisfactory delivery of products and services to the federal government." The objective of the Order is to raise the awareness of labor violations in the procurement process and to restrict "bad actors" from awards that should otherwise go to compliant, responsible bidders.

APPLICABILITY AND TIMING

This rule is far-reaching and affects much of the government contracting community. In addition, the timeline for implementation is very short.

The mainstay disclosure requirements will ultimately cover all prime contracts and subcontracts greater than $500,000, excluding subcontracts for commercially available off-the-shelf (COTS) items. The rule offers no safe harbor for small businesses or other commercial item contracts, and it does not apply to federal grants or cooperative

TIMELINE OF EVENTS

- **July 31, 2014**
  Executive Order 13673 issued
- **May 28, 2016**
  Proposed Rule issued
- **August 25, 2016**
  Final Rule published
- **October 25, 2016**
  Disclosure requirements apply to prime contracts >$50M. Arbitration limitations also begin
- **January 1, 2017**
  Paycheck transparency rules apply
- **April 25, 2017**
  Disclosure requirements extend to prime contracts >$500,000
- **October 25, 2017**
  Disclosure requirements apply to subcontracts >$500,000 (excluding COTS items)

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agreements. However, the rule does phase in over time. The October 25, 2016 effective date applies to prime contracts valued at $50 million or more. Six months later, on April 25, 2017, the threshold decreases to cover prime contracts in excess of $500,000. Coverage for subcontracts in excess of $500,000 begins October 25, 2017.

The paycheck transparency requirements similarly cover prime contracts and subcontracts greater than $500,000, excluding subcontracts for COTS items. However, it only applies to those subject to the Fair Labor Standards Act, the Service Contract Act or the Davis-Bacon Act. This component of the Final Rule becomes effective on January 1, 2017.

The arbitration agreement provisions become effective October 25, 2016, and apply to all contracts and subcontracts valued at more than $1,000,000, excluding COTS items contractors.

COMPLIANCE REQUIREMENTS

Disclosure Requirements

Under the new rule, for any solicitation estimated to exceed $500,000, contractors must disclose, as part of the bidding process, violations rendered over the past three years related to 14 different labor laws and state law equivalents. The successful awardee must then recertify and disclose any new labor law violations every six months thereafter during the performance period.

The Contracting Officer (CO), in conjunction with each agency's newly created Agency Labor Compliance Advisor (ALCA), will review the reported labor law violations to determine whether the bidder is a responsible source eligible for award. For companies with violations, this may result in a variety of outcomes—from requiring contractors to take remedial steps, such as entering into a "labor compliance agreement" as a condition of award, to referring violators to a suspending and debarring official. Similarly, the requirement to report every six months after award may result in the CO, in consultation with the ALCA, determining whether to continue with the contract. At that time, as needed, the CO may also refer the matter to the DOL for remedial action, elect not to exercise any options, terminate the contract or notify the agency suspending and debarring official.

The new contract requirements will be incorporated via FAR clauses 52.222-57, -58 and -59. Per FAR 52.222-59, the relevant labor laws for disclosure are the following federal statutes and Executive Orders:

i. The Fair Labor Standards Act (FLSA);
ii. The Occupational Safety and Health Act of 1970 (OSHA);
iii. The Migrant and Seasonal Agricultural Worker Protection Act;
iv. The National Labor Relations Act;
v. The Davis-Bacon Act (DBA);
vi. The Service Contract Act (SCA);
vii. Executive Order 11246 (Equal Employment Opportunity);
viii. Section 503 of the Rehabilitation Act of 1973;
ix. Vietnam Era Veterans' Readjustment Assistance Act of 1974;
x. The Family and Medical Leave Act;
xi. Title VII of the Civil Rights Act of 1964;
xii. The Americans with Disabilities Act of 1990;
xiii. The Age Discrimination in Employment Act of 1967;
xiv. Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); and
xv. Equivalent state laws[1].

With so much at stake, the definition and scope of reportable labor law violations is extremely important. The Final Guidance defines reportable violations broadly to include administrative merit determinations, civil judgments and arbitral awards or decisions. This includes decisions and judgments that are not final or are subject to appeal, though contractors can provide information on the status of such matters as mitigating factors during the disclosure process. In other words, a minor OSHA citation, an EEOC reasonable cause determination in an employment discrimination case or a SCA violation notice, including the receipt of the Wage and Hour Division's WH-56 "Summary of Unpaid Wages" form, are reportable violations that could subject contractors to the ALCA's and CO's evaluation process.

Where reportable violations exist, contractors must enter into the System for Award Management (SAM): 1) the labor law violated; 2) the case number, inspection number or other unique identifier; 3) the date the decision was rendered; and 4) the name of the court, arbitrator, agency or board making the decision. In addition to this mandatory information, contractors will have the option of providing any information on mitigating circumstances or remedial measures taken in response to the violations. The ALCA will use the reported information to assist the CO in making a responsibility determination. The ALCA will assess whether each violation is "serious," "repeated," "willful" or "pervasive," and make a recommendation to the CO. These terms are defined broadly in the Final Guidance and, in some cases, appear to overlap. As one might expect, the more prevalent and severe the violation, the more likely the contractor will be deemed not responsible.

Paycheck Transparency

The paycheck transparency rules to be enumerated in FAR clause 52.222-60 require covered contractors and subcontractors to furnish each worker with a wage statement accompanying their paycheck. The statement must include that individual's total hours worked, overtime hours, rate of pay, gross pay and any additions to or deductions from pay. All hours worked and overtime hours must be broken down by week, regardless of the employer's paycheck cycle. This rule also applies to independent contractors and includes a separate notice requirement informing individuals of their independent contractor status. The rule does not apply to FLSA exempt employees, provided the employees received written notice of their exempt status no later than the first required issuance of the wage statement under the contract. The above information will likely become a key request during an investigation into any SCA, DBA or FLSA compliance matter.

1 The only equivalent state laws currently recognized are OSHA-approved state plans; however, DOL is expected to add to this list over time.

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Arbitration Limitations

In accordance with the new FAR clause 52.222-61, the Final Rule requires contractors to 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, with few exceptions. Thus, at least in certain types of claims, the decision to arbitrate will rest entirely with the worker.

OTHER KEY CONSIDERATIONS

Though largely consistent, the Final Rule and Guidance do contain a number of changes and further clarifications from the proposed rule. Some of the most notable items are listed below:

Look-Back Period – The three-year look-back period will also be phased in. Starting on the date of implementation, contractors will only have to report labor law violations dating back to October 25, 2015. This date becomes a fixed line in the sand beyond which reportable violations should never extend. As such, disclosures made on the effective date of the new rule need only provide information on reportable violations occurring in the prior year period. However, for each day that passes after the Final Rule's implementation, the look-back period will grow from the one-year minimum until the full three-year look-back applies on October 25, 2018 and thereafter.

Subcontractor Disclosures – The proposed rule raised a number of concerns about subcontractors submitting information directly to prime contractors. To address this, the Final Rule tasks the DOL with evaluating subcontractor disclosures. The DOL will have a special unit to perform assessments, similar to the ALCAs' role for prime contractors. Upon receipt, DOL will have three days to provide a written evaluation response back to the subcontractor to then route to the prime contractor (or higher tier contractor) to make a responsibility determination. If DOL does not perform this function within the three-day period, the prime contractor can make a determination using available information and judgment. If the subcontractor disagrees with the DOL's analysis, the subcontractor can provide underlying information and documentation to the prime contractor for another analysis. If the prime contractor disagrees with DOL's analysis and has reason to proceed with the subcontractor, the prime contractor must provide a written explanation to the CO.

Voluntary Pre-assessments – The DOL is available to provide contractors with an optional "pre-assessment." This process is akin to the review the ALCA will perform during the bidding process, but takes place directly with the DOL outside of any particular solicitation response, and can occur at any time. The primary benefit of the pre-assessment is that it will be considered a mitigating factor in future acquisitions, and it can start the contractor on the path to any necessary remedial actions, such as a labor compliance agreement. The pre-assessment is an open invitation that subsists beyond the effective date of the Final Rule. Contractors interested in participating can initiate the process by completing the intake form on the DOL's website.

Affiliate / Subsidiary Coverage – In response to a number of questions stemming from the proposed rule, the preamble to the Final Rule clarifies that the disclosure obligations pertain only to the legal entity submitting the proposal and entering into the contract. As such, violations of parent companies, subsidiaries and affiliates of the bidder are not reportable violations.

Effects on Past Performance – In accordance with the new rule, labor law violations affect both responsibility determinations and past performance evaluations. Under FAR 22.2004-2, COs must evaluate a prospective contractor's labor law compliance when past performance is an award factor. As a result, a contractor's compliance will become part of the Contractor Performance Assessment Report (CPAR). The ALCAs' duties include responsibilities to provide relevant information to be included as part of the CPAR. This will influence future source selections and will likely have a direct impact on bid protests, as well.

PREPARATION

For prime contractors, the October 25 and April 25 implementation dates leave limited time for planning and preparation. Even for subcontractors, with a rule of this magnitude, the time to begin planning for compliance is now. Below are some practical tips for contractors to consider:

- Identify the key personnel responsible for understanding and ensuring compliance with the Final Rule's requirements across the organization.
- Begin to gather information on reportable violations dating back to October 25, 2015, and establish a system for capturing, tracking and reporting the necessary data and documentation for compliance going forward.
- Review all contracts to determine which awards are subject to the Final Rule (e.g., based on phase-in deadlines, dollar thresholds or contracting parties, etc.) and ensure the new FAR clauses have only been flowed down where applicable.
- Prepare or enhance policies and procedures affected by Fair Pay and Safe Workplaces to achieve compliance. For example, update procedures governing contracts administration and reporting, proposal preparation and procurement.
- Proactively develop responses to labor law violations for use in future disclosures. Highlight any mitigating factors, remedial measures taken or other relevant facts to best position the company for a positive responsibility determination.
- Communicate with subcontractors to ensure they are aware of and understand the impact of the Final Rule and Guidance so as not to impede the procurement process.
- Consider the benefits of the pre-assessment option in light of your company's particular circumstances and business objectives.
- Evaluate the company's approach to handling labor-related matters, keeping in mind the definition of administrative merit determinations, civil judgments

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and arbitral awards or decisions. The risk profile of labor law violations has changed.

- Assess the need for additional internal or external reviews of compliance with each of the 14 covered labor laws to limit future violations.
- Train applicable employees on the new requirements and the impact to each particular job function.

CONCLUSION

For all those affected, this story is far from over. There are numerous procedural nuances, challenges and potential pitfalls inherent in the 203 pages of the Final Rule and Guidance, many of which are beyond the scope of this article. Successful compliance will demand a thorough understanding of these requirements and procedures, along with careful planning and preparation. An adaptable compliance strategy is also paramount as the true impact of the Final Rule continues to unfold after October 25. What is clear now is that the rule has the ability to significantly alter the procurement process, and it elevates the ramifications of labor law violations. Furthermore, the required SAM representations will carry additional False Claims Act exposure for contractors and provide more opportunities for protests.

There also remain a number of outstanding questions that could further impact implementation of the Final Rule. The most recent request for funding to establish the new DOL Office of Labor Compliance, intended to coordinate the Final Rule and Guidance, was rejected. Additionally, the pending House and Senate spending bills, if passed, could exempt Department of Defense and National Nuclear Safety Administration contractors from the disclosure requirements. However, that particular provision of the bill is subject to removal, and the White House has made its opposition known. The final bill may not be passed until after the election, once the rule has already taken effect, which makes it especially important that contractors prepare for compliance now.

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BDO understands the unique needs of Government Contractors and the complex and highly regulated environment in which they operate. For more information, contact:

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