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“They’re heeeere” – Poltergeists Lurk Within Game-Changing Final Rule on Fair Pay & Safe Workplaces

By Hope Eastman

After some two years of process – involving proposed rules, amendments, delays, and public comments – the final regulations implementing the President’s Executive Order on Fair Pay and Safe Workplaces were published on August 25, 2016. On that date, the Federal Acquisition Regulatory Council published a final rule and the U.S. Department of Labor (DOL) published final guidance, but the two publications must be read in tandem. The regulations are many hundreds of pages long and represent a *sea change* in the way that labor laws are enforced and reported. Federal contractors should be prepared to invest a lot of time and energy learning about these new requirements, because poltergeist pitfalls are lurking everywhere.

REQUIRED REPORTING OF LABOR VIOLATIONS

Most notably, the regulations require that in order to be eligible for any procurement over $500,000, bidders must now submit comprehensive disclosures of any and all violations of 14 different federal labor laws, including FLSA, OSHA, NLRA, FMLA, ADA, ADEA, Title VII, the Davis-Bacon Act, the Service Contract Act, and Executive Orders relating to affirmative action and minimum wage. The regulations also require disclosure of violations of any “equivalent” State labor laws, though DOL has yet to propose supplemental regulations identifying which State laws are equivalent. However, any State-administered OSHA Plans are considered state “equivalents” and any violations of those State Plans must be reported. Contractors and subcontractors at *all* tiers must report all such violations going back *three years* from the date that a bidder submits its proposal on a federal procurement opportunity.

The final regulations provide for a phased-in approach to help contractors adjust. The new requirements for reporting take effect on October 25, 2016, and while there will ultimately be a three-year look-back period for reporting, contractors will not be required to report any labor violations that were determined prior to October 25, 2015. Additionally, for the first six months, the reporting requirement will only be applied to procurements worth at least $50 million. On April 25, 2017, the threshold will reset to $500,000.

Subcontractors at all tiers are also required to make these disclosures for applicable prime contracts. While the prime contractor remains responsible for ensuring that it uses subcontractors who are in compliance with the new rules, the final regulations establish a process by which subcontractors can report their labor violation data directly to the government, rather than forcing the prime contractor to act as the middleman. It remains unclear how such a process will work in practice.

One of the most controversial aspects of the regulations is the scope of what is considered a “violation” that must be reported. The rule defines violations to include civil judgments, arbitral awards or decisions, and “administrative merits determinations.” As we have previously reported on this blog, this last category has been interpreted so broadly as to include any process by which an enforcement agency has made a mere preliminary finding that there is probable cause to believe a labor violation may have occurred. In other words, if NLRB or EEOC staff performs a preliminary investigation and issues a letter indicating there is cause to believe a labor violation may have occurred, or if the agency files a complaint in court, this alone suffices to require a contractor to report the matter as an “administrative merits determination,” notwithstanding that the preliminary determination may never mature into an adverse adjudication by a court or quasi-judicial administrative body. The mere issuance of a WH-56 “Summary of Unpaid Wages” form by DOL’s Wage and Hour Division (WHD) is likewise considered an “administrative merits determination” that must be reported. Some agencies have already indicated they will use this as leverage to force quick settlements.

These disclosure requirements apply to all types of procurement contracts for goods or services, including

construction and commercial items. The only exception is commercial off-the-shelf (COTS) items from subcontractors. However, they do not apply to other types of government contracts that are not "procurements," such as certain leases or grants.

Contractors are also required to update and supplement their disclosures as circumstances change, *e.g.*, by providing information about any additional labor violations determined after a proposal has been submitted but before an award has been issued. Updates will also include changes in the status of a previously disclosed violation, *e.g.*, if it has subsequently been dismissed or reversed. Finally, during performance of a covered contract, contractors must make updated post-award disclosures every six months.

HOW THE DATA WILL BE USED

Contractors will be required to input their labor violation data into the existing System for Award Management (SAM) database platform, including the following data points for each violation: the particular labor law that was violated; the case number or other unique identification number; the date that the judgment, decision, or determination was rendered; and the name of the court, arbitrator, or agency rendering the decision. Other detailed information such as the name of the complainant is not required. But the aforementioned data will be *publicly available* on the internet via the Federal Awardee Performance and Integrity Information System (FAPIIS).

Each agency will appoint an Agency Labor Compliance Advisor (ALCA) to review the data and assist the contracting officer in evaluating the labor law compliance history of bidders. The ALCA will issue a *written* report to the contracting officer with the ALCA's findings and recommendations as to whether a potential awardee is "responsible." But the final call remains with the contracting officer (CO). According to the final regulations, only violations "that are serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice." The rules dedicate several pages to defining and explaining each of these four terms, with several examples. Note that the language is disjunctive, *i.e.*, that a CO need only find that a contractor's violations meet just *one* of these standards -- serious, repeated, willful, *or* pervasive – in order to conclude that a contractor is not responsible and *therefore* ineligible for award. Given the potential for a perception that the ALCA is more well-versed in labor law than the CO, there is a good chance that COs will regularly defer to their ALCAs for the responsibility determination.

Contractors are permitted to submit additional information before a final responsibility determination is made, to help explain the data and mitigate the chances of a finding that their violations are serious, repeated, willful, or pervasive. This additional information will also be submitted through SAM, and contractors may opt to keep this additional information private or make it publicly available. But there is nothing in the final regulations that limits the consideration of this information to a single procurement, so it may end up being shared across agencies and considered repeatedly in conjunction with multiple procurements. It may also be subject to FOIA requests, as these final regulations do not carve out any new exemptions to FOIA. Any such material that contractors provide should be properly marked pursuant to Federal Acquisition Regulations governing protection of confidential and proprietary information or information submitted solely for the purpose of evaluating a bid.

Contractors will be required to certify the accuracy of the data they report, which means that false or fraudulent certifications of labor violation data could expose contractors not only to losing a contract, but also to liability under the False Claims Act and similar regulations governing certifications. Federal Acquisition Regulations (FAR) provide for suspension or debarment of a contractor and/or its principals for knowingly failing to disclose evidence of false or fraudulent certifications. In some cases, there may even be criminal penalties.

ALCAs are also empowered to consider additional information from *any* third party source. This means that competitors, disgruntled employees, plaintiffs' attorneys, or anyone trolling a contractor may contact ALCAs and report information related to labor violations, which the ALCA and CO can then vet and consider as they see fit. The unbounded nature of this provision raises serious concerns about potential abuses of the process and the data, especially when considering that the data will be publicly available. For example, an alleged whistleblower or former employee might try to use the data as an admission by the contractor of a pattern of behavior or as the basis for a *qui tam* lawsuit.

OPTIONS: PREASSESSMENT AND LABOR COMPLIANCE AGREEMENTS

To address contractors' concerns about the breadth of the disclosure requirements and the availability of the data, the final regulations provide for a so-called "preassessment" process, in which contractors can voluntarily consult with DOL *prior* to bidding, in order to get a preliminary opinion as to whether their record of labor violations is serious, repeated, willful, or pervasive. If DOL's preassessment advises the contractor that it is unlikely to be considered "responsible," the contractor can then decide not to proceed with bidding on that contract. If a contractor subsequently decides to go forward with a proposal, ALCAs and COs may rely on DOL's preassessment – but they are not required to rely on it. Moreover, the regulations do not provide for any safe harbor or confidentiality as to the information disclosed by a contractor during a preassessment, raising the risk that such information could be used against the contractor in other ways even if it does not end up bidding on the contract at issue.

Another mechanism in the final regulations allows a contractor about whom an ALCA has concerns to remain eligible for an award if the contractor agrees to a Labor Compliance Agreement (LCA). The ALCA can recommend that an LCA be required if the "contractor has serious, repeated, willful, and/or pervasive Labor Law violations that are not outweighed by mitigating factors—but the ALCA identifies a pattern of conduct or policies that could be addressed through preventative actions." But an LCA can also be recommended even when a contractor's labor law compliance record is satisfactory, as long as there are "risk factors" present. COs and ALCAs have significant discretion to require an LCA as a mitigating factor to justify an award. If they direct a contractor that an LCA is required, the contractor must then negotiate the LCA directly with the labor law enforcement agency or agencies involved.

Commenters have expressed concern that this process could subject contractors to unfair pressure to execute an LCA "and forgo a challenge to a nonfinal administrative merits determination in order to receive a pending contract," or that it could "unfairly penalize contractors by subjecting them to multiple rounds of remedial requirements in response to the same underlying conduct," *e.g.*, where an enforcement agency has already resolved a complaint but the contractor must then come back to the same agency and negotiate an LCA containing additional obligations. The final regulations, however, rejected these concerns, noting that "in appropriate circumstances contractors may enter into labor compliance agreements while at the same time continuing to contest an underlying Labor Law violation. And, if a contractor … refuses to negotiate an agreement, the existing procurement process provides ample opportunity to contest any resulting nonresponsibility determination. The contractor can bring a bid protest and receive a hearing and judicial review of the agency action." The final DOL guidance also rejected the notion that LCAs might penalize contractors unfairly, concluding that "[t]he purpose of a labor compliance agreement is not to penalize a contractor for past violations; it is to protect the Federal Government's interest in economy and efficiency in the prospective contract at issue.… Federal agencies have a duty to contract only with responsible sources, and a track record of Labor Law violations raises serious questions about whether a contractor can be trusted to comply with Labor Laws—or with other non-labor laws—during the course of contract performance." LCAs are, according to the final regulations, therefore "properly understood as an opportunity for contractors, not a penalty."

OTHER EMPLOYEE PROTECTIONS

While the labor violation reporting system and the attendant process for agencies to weigh contractor responsibility represent the most noteworthy aspects of the new final regulations, there are additional requirements for employers who engage in federal contracting. First, new paycheck transparency rules require covered contractors and subcontractors to provide detailed wage statements to all employees starting on January 1, 2017. Statements must include information about hours worked, overtime hours, pay, and any deductions. Furthermore, prior to the start of any work under an awarded contract, contractors and subcontractors must notify each individual who is being treated as an independent contractor in writing that this is the case. The notice cannot "indicate or suggest" that the independent contractor classification for that worker is objectively correct, and such notice must be provided anew each time an individual commences work on a different contract.

Additionally, effective October 25, 2016, contractors with federal contracts totaling at least $1 million may no longer impose binding arbitration on employees for sexual harassment or Title VII claims. This anti-arbitration rule builds off of the Franken Amendment to the Department of Defense Appropriations Act of 2010, which legislated a similar prohibition but was limited to defense contractors. The new restriction also applies to subcontractors with subcontracts totaling at least $1 million, except for subcontracts for commercial items (including COTS). However, the prohibition on arbitration of such claims does not apply to employees subject to a collective bargaining agreement. Nor does it apply to employees and independent contractors who executed an arbitration agreement before the contractor submitted a bid for the covered contract, unless the contractor has the authority to change the terms of the covered contract. But it does apply as soon as a contract is replaced or renegotiated.

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As is evident from the volume of these final regulations and the many complex bureaucratic burdens, unclear definitions, and unanswered practical concerns inherent in the text of the rule and the guidance, they are rife with poltergeists that have yet to be ferreted out. In time, perhaps some of the many questions raised by these regulations will be clarified by further rulemaking, litigation, or legislation. But until then, contractors and subcontractors need to proceed with great caution in developing a robust understanding of these game-changing rules and implementing thoughtful compliance procedures in time for the impending effective dates.

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