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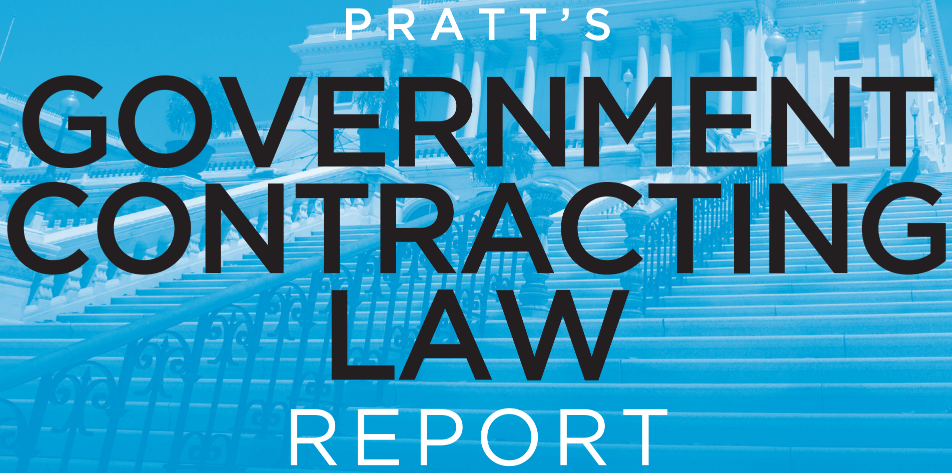

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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Final Rule Requires Contractors to Disclose Labor Law Violations for the Past Three Years

By Cynthia O. Akatugba*

The Federal Acquisition Regulatory Council has issued a final rule implementing Executive Order 13673, Fair Pay and Safe Workplaces. The author of this article explains the new rule.

Contractors and practitioners took notice last month when the Federal Acquisition Regulatory ("FAR") Council issued a final rule[1] implementing Executive Order 13673,[2] Fair Pay and Safe Workplaces. To help contractors and agencies navigate this new regime, the Department of Labor ("DOL") simultaneously issued guidance[3] on the new rule. The Executive Order, issued two years ago with subsequent amendments, requires contracting officers to consider a prospective contractor's violations of 14 labor laws in making responsibility determinations. The reaction to the Order, as well as the proposed rules and guidance that followed, was immediate, with multiple parties weighing in on the impact it would have on government contracting. Last year, after the proposed rule and guidance were issued, the FAR Council received more than 900 comments.

THE FINAL RULE AND GUIDANCE

To be determined responsible, contractors must demonstrate, among other things, a satisfactory performance record and satisfactory record of integrity and business ethics. Although contracting officers previously could take into account a contractor's violation of labor laws in making responsibility determinations, several government reports showed they lacked adequate information, and, even when information was available, they were reluctant to act due to the absence of guidance. The new rule and guidance focus on ensuring that

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[1] https://www.federalregister.gov/documents/2016/08/25/2016-19676/federal-acquisition-regulation-fair-pay-and-safe-workplaces.

[2] https://www.federalregister.gov/documents/2014/08/05/2014-18561/fair-pay-and-safe-workplaces.

[3] https://www.federalregister.gov/documents/2016/08/25/2016-19678/guidance-for-executive-order-13673-fair-pay-and-safe-workplaces.

contracting officers have accurate information by requiring contractors to furnish that information and by providing a framework for considering the information.

Specifically, the final rule requires contractors to represent in responding to a solicitation whether an "administrative merits determination, arbitral award or decision, or civil judgment" has been rendered against it for violation of any of 14 enumerated labor laws, including the Occupational Safety and Health Act, the Family Medical Leave Act, and the National Labor Relations Act. If the answer is "yes" (and where the contracting officer will be required to make a responsibility determination), the contractor must disclose publicly in the System for Award Management ("SAM") the labor law at issue, the case number, date of decision, and the name of the body rendering the administrative determination, the arbitration decision, or the civil judgment against it. This representation must be updated to ensure the ongoing accuracy of representations made at the time of award. Although a violation will not automatically result in a determination of nonresponsibility, the contractor must disclose information about all civil violations, even if the matter is not final and will be appealable. The contractor may present any mitigating information either publicly or privately on SAM, including any measures taken to remediate the violation.

NEW PLAYERS

The Executive Order also created a new cadre of federal employees titled Agency Labor Compliance Advisors ("ALCAs") to help contracting officers evaluate contractors' labor violations. An ALCA is a designated senior agency official responsible for evaluating the information submitted by the contractor; determining which violations are serious, repeated, willful, or pervasive, taking into account the mitigating information; and making a recommendation to the contracting officer regarding the contractor's record of labor law compliance. Among the recommendations an ALCA may make is that even if the contractor's record supports a contracting officer's finding of satisfactory integrity and business ethics, the prospective contractor must nonetheless enter into a labor compliance agreement or another acceptable remedial action with the enforcing agency after award. The ALCA also may recommend that the contracting officer notify the agency's suspension and debarment official.

SUBJECTIVITY AND PAST PERFORMANCE

Contractors have expressed concern that the determination of whether a violation is repeated, willful, or pervasive can be subjective, and therefore can result in unfair or uneven responsibility determinations. Moreover, although the

guidance provides objective standards to determine which labor violations are per se serious, all violations involving retaliation against employees under the 14 labor laws are deemed serious. In this context, it is small comfort that the rule states that a contractor's disclosure of labor law decisions does not automatically render the contractor nonresponsible. Concern for fair assessments is heightened by the relatively widespread, though quietly-stated, perception that DOL enforcement personnel tend to be less than objective when deciding whether something is or may be a violation of the labor laws. That said, ALCA's are neither DOL nor enforcement employees.

There is also a past performance twist to the rule: in addition to having to consider a contractor's labor violations for purposes of a responsibility determination, the rule also provides that Contracting Officers now must consider labor law violations and additional related information in evaluating a contractor's past performance.

FLOW DOWN

The requirements of the new rule flow down to subcontracts valued at more than $500,000 and subcontractors at all tiers. Subcontractors must represent whether they have had any labor law violations within the last three years. Although the contractor is not responsible for making this representation on behalf of its subcontractors, the new rule requires the contractor to consider prior labor violations in making responsibility determinations. In a departure from the proposed rule, rather than disclosing labor violations to prime contractors, prime contractors may direct subcontractors to disclose labor law violations and any mitigating factors to the DOL. The rule lists the conditions in which a prime contractor may conclude that a prospective subcontractor is responsible. Prime contractors will also be able to consult with the DOL in making responsibility determinations.

STATEMENTS AND NOTICE

In addition to disclosing labor law violations, the rule also implements other provisions of the Executive Order requiring contractors to provide wage statements to (1) employees subject to Fair Labor Standards Act, (2) all laborers and mechanics subject to the Davis Beacon Act, and (3) all service employees covered by the Service Contract Labor Standards. These statements are due every pay period and should include the total number of hours worked in a pay period, the number of those house that were overtime hours, the rate of pay, gross pay, and any additions or deductions from gross pay. In addition, contractors must provide written notice to independent contractors explaining that they are being treated as an independent contractor and not an employee.

EFFECTIVITY

Although the final rule became effective on October 25, 2016, the rule will be phased in over one year: for the first six months, it will apply only to solicitations expected to exceed $50 million; starting on April 24, 2017, the rule will apply to all solicitations expected to result in contract of more than $500,000. Subcontractors have one year from the effective date of the rule before they will be required to make the representations and disclosures described above. The three-year disclosure period is also being phased in—contractors do not have to disclose decisions rendered against them before October 25, 2015.

Contractors should develop and implement systems to track the information required by the rule, ensure that SAM representations are updated and accurate, and timely provide information to the contracting officer to ensure that responsibility determinations are based on accurate and up-to-date records. In addition, contractors can now request a preassessment[4] of their record of labor law compliance from the DOL; if the preassessment is current at the time the contracting officer makes a responsibility determination, the contracting officer and the ALCA may rely on the DOL's preassessment.

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[4] https://www.dol.gov/asp/fairpayandsafeworkplaces/PreAssessment.htmhttps:/www.dol.gov/asp/fairpayandsafeworkplaces/PreAssessment.htm.