Westlaw Journal

GOVERNMENT CONTRACT

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 30, ISSUE 13 / OCTOBER 24, 2016

EXPERT ANALYSIS

The Fair Pay and Safe Workplaces Executive Order: The Final Rules, Implementation and Compliance

By David Goldstein, Esq., Linda Jackson, Esq., and Meredith Schramm-Strosser, Esq.
Littler Mendelson PC

President Barack Obama, on July 31, 2014, issued a controversial executive order that an accompanying White House fact sheet said was intended to "crack … down on federal contractors who put workers' safety and hard-earned pay at risk."

Among other things, Executive Order 13673, titled Fair Pay and Safe Workplaces, changes the procurement process for contracts worth more than $500,000 by requiring federal contractors to disclose during the bid process any labor law violations committed within the past three years.

Agency contracting officers must then determine whether, based on the information disclosed, the would-be contractor is a responsible source with a satisfactory record of integrity and business ethics. Depending on the number and nature of the violations, contractors could be prohibited from receiving the contract.

The EO also imposes disclosure obligations on contractors relating to employee paychecks, and it limits the use of pre-dispute arbitration agreements.

The proposed rule to implement the EO was published in May 2015, producing a storm of protests from contractors. The final rule, published Aug. 25, addresses some of the issues that were raised. But it fails to address contractors' most serious concerns and leaves many questions unanswered.

LABOR LAW VIOLATION DISCLOSURE REQUIREMENTS

Under the EO, an entity submitting a bid on a covered federal contract must disclose to the contracting agency whether it has had "reportable violations" of any of the following 14 federal[1] labor laws:

- 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 on 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 establishing a minimum wage for contractors

Disclosure of labor law violations is required from "the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates."

If the bidder/award recipient is a joint venture that is not itself a separate entity, then each concern in the joint venture must separately comply with the disclosure requirements. Successful bidders must update their disclosures every six months during the pendency of the contract. The final rule provides that this update can be done universally rather than on a contract-by-contract basis.

When an original source is not available, contractors are now required essentially to "vouch" for their suppliers, assuming all the risks if a vendor delivers a counterfeit or defective part.

The three-year look-back period for reporting violations is also being phased in. Covered contractors are required to report violations going back three years or to Oct. 25, 2015, whichever period is shorter.

COVERED CONTRACTS

Disclosures are required under the EO when a contractor submits a bid that, if accepted, is expected to result in a contract with a value that exceeds $500,000.

Subcontracts are similarly covered, except that subcontracts for commercial over-the-shelf items are not subject to the disclosure requirements. There is no COTS exception, however, for prime contractors.

Neither the EO nor the final rule clearly defines the term "subcontract." However, the term is defined in the Federal Acquisition Regulations as any contract entered into by a subcontractor to furnish supplies or services "for performance of" a prime contract or a subcontract.

Also, "contract" is defined as a commitment for which the government is obligated to an expenditure of appropriated funds.[2]

While there is likely to be some confusion as to whether particular arrangements with higher-tier federal contractors are covered by the EO, it is important to note that the applicability of the EO is determined by the nature of the subcontract and not the definition of a subcontractor.

The requirements arise only in connection with procurement contracts. The receipt of federal financial assistance or grants does not trigger any obligations under the EO.

IMPLEMENTING THE NEW DISCLOSURE REQUIREMENTS

The new requirements will be phased in beginning with solicitations the government issues on or after Oct. 25.

For the first year, only prime contractors are required to comply. In addition, for the first few months the requirements will apply only to prime contractors submitting bids that would result in a contract with an estimated value of $50 million or more. Beginning in April 2017, the requirements will apply to all bids with an estimated value in excess of $500,000.

Subcontractors will become subject to the EO when being considered for subcontracts arising under solicitations issued on or after Oct. 26, 2017.

© 2016 Thomson Reuters

WHAT CONSTITUTES A REPORTABLE VIOLATION?

The final rule defines "violation" as administrative merits determinations, awards or decisions from an arbitration, or civil judgments. The final rule and Department of Labor final guidance broadly interpret the definition of "violation." The categories are very broad. They include numerous nonfinal decisions, such as an Equal Employment Opportunity Commission reasonable cause determination; Occupational Safety and Health Administration-issued citations, imminent danger notices, notice of failure to abate or any state equivalent thereof; and appealable civil judgments.

These are just a few of many events that constitute labor law violations, and any contractor seeking to bid on a solicitation that requires compliance with the EO should closely and carefully review these definitions.

Because the definition of "violation" is broad, many nonfinal determinations constitute reportable events. Contractors and subcontractors are relieved from the reporting requirements only if the determination that there was a violation of labor law is reversed or vacated.

REPORTING REQUIREMENTS

Under the final rule and final guidance, when a contractor submits a bid on a covered contract, it will first report whether any violations have been rendered against it, without more detail.

Subcontracts for commercial over-the-shelf items are not subject to the disclosure requirements.

Only if the bidder reaches the responsibility determination stage of the procurement process will it be required to provide additional information as to each of the disclosed violations.

This additional information includes "the labor law that was violated; the case number, inspection number, charge number, docket number, or other unique identification number; the date that the determination, judgment, award, or decision was rendered; and the name of the court, arbitrator(s), agency, board, or commission that rendered it."

At that point, if it has not been previously voluntarily disclosed, the contractor can provide information regarding mitigating circumstances and remedial efforts.

The federal agency will then determine whether the bidder "is a responsible source that has a satisfactory record of integrity and business ethics." This determination will be made by the agency's contracting officer in concert with the agency labor compliance adviser, or ALCA, and it will be driven by whether the reported violations were "serious," "repeated," "willful" or "pervasive."

COs must report information received through this process to their agency's suspending and debarring official, as required by their agency's procedures.

The process for subcontractors is a bit different. Subcontractors must disclose any reportable labor law violations directly to the DOL. The department will then issue an assessment regarding the reported violations, which the subcontractor must share with the contractor when seeking covered work.

If the subcontractor disagrees with the DOL's assessment, it may inform the contractor and provide a rationale for its disagreement. The contractor is permitted to enter into or continue subcontracts with a subcontractor that the DOL has negatively assessed, but it must inform the government contracting officer of its action and its basis.

A contractor that acts in good faith will not be liable for misrepresentations made by its subcontractors regarding labor law decisions or labor compliance agreements.

THE PARAMETERS OF VIOLATIONS, ASSESSMENT AND MITIGATION

The final rule and the DOL final guidance attempt to define whether violations are "serious," "willful," "repeated" or "pervasive," as required by the EO. Congress has already defined some of these terms in the labor laws covered by the new rules. But others, such as "pervasive," do not appear in any of the statutes.

© 2016 Thomson Reuters

Each contractor's disclosed violations will be "assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractors, and any mitigating factors."

In an effort to mitigate contractor concerns regarding the effects of this evaluation process, the DOL explained "that to serve as the basis for a determination that a violation is serious, repeated, willful, and/or pervasive, the relevant criteria must be readily ascertainable from the labor law decision itself. This means the ALCA should not second-guess or re-litigate actions or the decisions of reviewing officials, courts, and arbitrators." It is yet to be determined what the effects of this disclosure and evaluation process will be.

Of particular concern to contracting officers are pervasive violations, violations that meet two or more of the categories above, violations reflected in final orders, and violations of "particular gravity."

A difference between the DOL's proposed guidance and the final guidance is in how the two treat an award of injunctive or equitable relief against a contractor or subcontractor.

In the proposed guidance, such an award was treated, in and of itself, as a "serious violation." In the final guidance, the DOL recognized that the grant of injunctive relief as a remedy is rare and said "the ALCA should take this into account as a factor that increases the significance of that violation to the contractor's overall record of labor law compliance."

Subcontractors must disclose any reportable labor law violations directly to the DOL.

In determining whether a bidder has a satisfactory record of integrity and business ethics, the CO must also consider any remedial steps the company has taken to correct the violations, including steps to prevent their recurrence (e.g., those taken pursuant to agreements entered into with the relevant enforcement agency), as well as information communicated by the respective enforcement agency regarding necessary remedies, compliance assistance or future corrective actions.

Other mitigating factors include recent legal or regulatory changes, good faith and a significant period of compliance following violations. The guidance explains that a "labor compliance agreement" may be warranted where the ALCA has concluded that a contractor has an unsatisfactory record of labor law compliance.

PAYCHECK TRANSPARENCY PROVISIONS

In addition to the new disclosure requirements, the final rule also requires contractors holding federal contracts for goods and services (including construction), and qualifying subcontracts worth more than $500,000 to provide specified information to employees with each paycheck.

Specifically, for employees working on contracts covered by the EO, contractors must include with each of their employees' paychecks the following information:

- The number of hours worked during the period for which overtime is calculated and paid (in other words, reporting must be by workweek).
- The number of overtime hours worked during this same period.
- Rate of pay.
- Gross pay.
- Any additions to or subtractions from pay (like bonuses, awards and shift differentials).

Where a significant portion of the workforce is not fluent in English, the contractor must provide the statement in English and the language(s) in which the significant portion(s) of the workforce is fluent. Information regarding hours worked and overtime does not have to be provided to exempt employees as long as such employees have been informed in writing that they have been classified as exempt.

© 2016 Thomson Reuters

Contractors that are required to maintain wage records under the Fair Labor Standards Act, the Davis-Bacon Act, the Service Contract Act or any equivalent state law must provide a written notice to any independent contractor informing the individual of his independent contractor status. This document must be provided before the individual performs any work under the contract, and it must be separate from any contract entered into between the contractor/subcontractor and the independent contractor.

The first notice must be provided as of the effective date of the notice requirement, and thereafter each time the independent contractor is engaged to perform work under each covered contract.

LIMITATIONS ON THE USE OF PRE-DISPUTE ARBITRATION AGREEMENTS

Finally, on contracts and subcontracts with a value exceeding $1 million the final rule prohibits contractors from agreeing with employees and independent contractors in advance to arbitrate Title VII claims, as well as tort claims related to sexual assault or harassment. Contractors will be able to arbitrate such claims only if the employee filing the claim voluntarily agrees to arbitration after the dispute arises.

This prohibition of pre-claim arbitration agreements does not apply when:

- A contractor's employees are covered by a collective bargaining agreement that the contractor negotiated with a labor organization.
- Employees or independent contractors entered into a valid contract to arbitrate before the contractor or subcontractor bid on a covered contract, unless the contractor or subcontractor has the ability to change the terms of the contract (in which case the exception expires when the contract is renegotiated or replaced).
- Contractors are providing commercial items or commercially available off-the-shelf items.

Until now, only defense contractors were prevented from requiring such arbitration agreements. This broader restriction on government contractors' use of the arbitration process appears to conflict with the U.S. Supreme Court's decision in *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), and similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act.

CONCLUSION

The EO, the final rule, and the DOL final guidance represent a significant change in federal contracting practices. While the effects of these new requirements will undoubtedly unfold over time, and legal challenges are likely, the EO is likely to increase contracting costs and may delay necessary federal procurement decisions.

The "blacklisting" provision would enable federal agencies to reject a bid or cancel an existing contract — as well as initiate suspension and debarment proceedings — based on violations that a contractor may have already resolved or that have not been fully adjudicated. This pre-award review may result in uncertainty for both contractors and the government.

The threat of cancellation, suspension and debarment of contracts may also significantly impact contractors' approaches to charges, demands and matters pending before enforcement agencies. These threats may force companies to settle matters rather than seek an adjudication of their position and risk a reportable "violation" that could affect their contract rights.

The cost of compliance will be high and may skew particularly against small contractors, which have more limited resources. The cost of compliance may also deter new contractors from choosing to compete for government contracts.

Furthermore, the final rule explains that while inadvertent mistakes in the disclosure process will likely not result in False Claims Act exposure, any intentional or knowing failure to disclose could result in FCA liability.

© 2016 Thomson Reuters

Litigation will be filed challenging various components of the EO. Meanwhile, government contractors should prepare for compliance by taking the following steps:

- Identify a point person responsible for maintaining required information and compliance.
- Identify all of the company's labor law decisions going back to Oct. 25, 2015.
- Conduct self-audits on areas of risk, and begin mitigation efforts.
- Review the corporation's overall ethics and compliance programs.
- Consider the impact when defending and resolving disputes.

Let us know if you are interested in participating in or supporting the litigation effort, or otherwise would like our assistance with your self-audits or compliance efforts.

NOTES

[1] In addition to the federal labor laws, the EO also mandates that contractors must disclose violations of "equivalent state laws, as defined in guidance issued by the [DOL]." With the exception of OSHA-approved state plans included in the final rule and the DOL guidance, the DOL has yet to identify or define "equivalent state laws." These disclosure requirements will be phased in following an additional notice-and-comment period. Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014).

[2] *See* FAR Sections 2.101 and 44.101.

David Goldstein (L) is a shareholder of **Littler Mendelson** and co-chair of its government contractors industry group in Minneapolis. He can be reached at dgoldstein@littler.com. **Linda Jackson** (C) is a shareholder and co-chair of the firm's government contractors industry group in Washington. She can be reached at ljackson@littler.com. **Meredith Schramm-Strosser** (R) s an associate in the firm's Washington office. She can be reached at mschramm-strosser@littler.com.

©2016 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit www.West.Thomson.com.