LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION
U.S. CHAMBER OF COMMERCE

Summary of Issues in E. O. 13673, "Fair Pay and Safe Workplaces" And Proposed Guidance and Regulations

Summary

On May 27, 2015, the administration released proposed guidance from the Department of Labor (DOL) and proposed regulations from the Federal Acquisition Regulatory Council (FAR Council) as the first steps in implementing President Obama's Executive Order 13673, "Fair Pay and Safe Workplaces." (E.O. or "the Order") The E.O. was issued July 31, 2014 and seeks to restrict the ability of companies with violations under a wide variety of labor and employment laws (including state versions) to obtain federal contracts or subcontracts worth $500,000 or more.

The DOL guidance provides definitions on such terms as "administrative merits determinations, arbitral awards or decisions, and civil judgments" and how to determine whether they reflect "serious, repeated, willful, or pervasive violations" of labor and employment laws by the contractor in question. This guidance is intended to assist the newly installed "Labor Compliance Advisor" in each agency on how to apply these terms in their role of advising contracting officers.

As explained below, the emphasis on these levels of violations provides virtually no relief as many federal contractors will find themselves in jeopardy, despite conscientious efforts to fully comply with the wide array of laws at issue, because the term "violations" is given extraordinarily broad meaning and allows for no opportunity to contest a citation before being required to disclose it. Also, the terms "serious, repeated, willful, or pervasive violations," are included in some employment laws and not in others, and we are not aware of any federal employment law that even uses the term "pervasive."

Labor and Employment Laws Covered

Among the laws for which contractors and subcontractors will have to report violations are: Fair Labor Standards Act, Family and Medical Leave Act, Occupational Safety and Health Act, Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, National Labor Relations Act, Davis-Bacon Act, Service Contract Act, and the recent Obama Executive Order on raising the minimum wage for federal

contractors.[1] In addition, contractors and subcontractors will also have to report violations of "state equivalent" laws. This term has created significant confusion and was expected to be clarified in the guidance that was just issued. However, the DOL has indicated it will issue a second set of guidance detailing which state laws will be deemed "equivalent" but the Occupational Safety and Health Administration (OSHA) approved state plans are already considered "equivalent."[2]

Disclosure of violations

Under the proposed FAR Council regulation, companies bidding on federal contracts would have to indicate at the initial submission *whether* they have any violations of the listed laws and executive orders within the last three years (see below discussion of expansive definitions for administrative merits determinations). The administration describes this as the simple "checking the box" exercise where contractors with no violations would simply check a box indicating that. Even the process for determining whether a company has any violations will be daunting. Large, multi-unit companies do not currently have in place the reporting systems to capture every possible issuance of a citation, complaint, or letter of interest from a federal agency so that they can with the necessary degree of certainty merely "check the box."

Once a bidder is selected as a finalist, and if they had earlier indicated any violations, then they would have to disclose those specific violations. These disclosures would be made via a publicly available website. Once disclosed, the contracting officer, with assistance from the Labor Compliance Advisor, would determine whether these violations qualified as serious, repeated[3], willful, or pervasive, and if so how much weight they should carry in making the determination of responsibility and whether the company satisfies the requirement for having a satisfactory record of integrity and business ethics. As part of this disclosure, the contractor is also permitted to provide any mitigating information that demonstrates they are now in compliance such as any Labor Compliance Agreements, or settlements into which they may have entered. The same disclosure process will recur every six months for the life of the contract.

While the contracting officer is instructed to give compliance with these labor laws close scrutiny, the Order and the proposed regulations stop short of directing them to a specific outcome, i.e. the Order does not specify automatic debarment for a contractor with a specific level of violations. In addition to finding the contractor is responsible, other possible actions include referral to the suspension and debarment official of the agency enforcing the law(s) in question, directing the contractor to enter into a labor compliance agreement, or denial of the award.

Impact on Federal Procurement

Because of the low contract thresholds specified for compliance (broadly, any solicitation estimated to exceed $500,000), the implementation of Executive Order 13673 would significantly disrupt the procurement system across every federal agency *without* improving the existing suspension and debarment process which has ensured due process and effective enforcement of federal procurement standards of conduct. Moreover, the Executive Order is counter to any notion of acquisition reform or streamlining—implementation of these regulations will weigh down an already cumbersome procurement process.

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[1] This E.O. uses an expansive definition of a federal contractor that goes beyond companies providing goods and services to the government to include any company with lease arrangements on federal property serving the general public.

[2] While OSHA approved state plans track federal requirements, they are not identical and in some areas include requirements not found at the federal level such as ergonomics regulations and safety and health plan requirements.

[3] OSHA uses a five year lookback window to determine repeated violations, thus putting the OSHA term "repeated" in conflict with three year lookback period used by the Executive Order.

Acquisition officials have ample existing authority and information to hold contractors accountable for labor and employment law violations, especially through use of the Federal Awardee Performance Information and Integrity System (FAPIIS). While federal agencies have adequate discretion to initiate suspension or debarment actions against a contractor, this due process system would be set aside under the terms of the Executive Order by potentially making companies ineligible for a contract while a complaint is being reviewed.

In addition, the regulations to implement the Executive Order would impose an unnecessary and costly compliance regime for all contractors irrespective of their employment and contract performance history. The Executive Order not only requires that contractors and subcontractors report labor law violations during the bidding process, but mandates a reporting regimen every six months for the duration of the contract. Moreover, the prime contractor is required under the Executive Order to make regular determinations regarding the responsibility of their subcontractors, effectively forcing one company to divulge potentially sensitive information to another company. (See expanded discussion on Subcontractor Reporting below.)

Overall, the proposed regulations will slow down the bid and proposal process, potentially jeopardize existing supply chains, and stifle innovation and possibly require prime contractors to certify alternate critical subsystem and component vendors. Just as significantly, implementation of the E.O. through these regulations may force many small and mid-tier subcontractors out of business, or at least out of federal contracting, as prime contractors use the presence of even minor violations to disqualify these firms, or contracting officers force prime contractors to choose different subcontractors because of reported violations.

Other troubling provisions

There are other troubling provisions in the Order as well that are carried forward in the proposed FAR Council implementing regulations. For instance, the E.O. would bar employers seeking contracts of $1 million or more from requiring their employees to enter into mandatory arbitration agreements to resolve disputes "arising out of Title VII of the Civil Rights Act or any tort related to or arising out of sexual assault or harassment." This expands a provision that has only been applied to Defense Department contractors through congressionally enacted legislation and directly conflicts with statutory law and every court decision that has considered the question.

The Order also mandates that federal contractors provide their employees information concerning their hours worked, overtime hours, pay, and any additions to, or deductions made, from their pay, as well as requiring employers to notify any worker in writing whether they are being treated as an independent contractor rather than an employee. While these actions may appear simple and many employers may already be doing these, these requirements are expected to provide plaintiffs' attorneys with increased opportunities for litigation challenging such determinations.

Additionally, the Order directs the DOL to inform contracting agencies when a contractor is under investigation with the intention of the contracting agency helping the contractor determine how to address the issues including providing compliance assistance. One possible consequence of this provision will be the DOL using the threat of disclosing these investigations to the contracting agency to pressure companies into settling investigations or accepting citations.

Successor to Clinton "blacklisting" regulation

In many ways, this is the successor to the effort made by the Clinton administration to issue regulations that would have blacklisted federal contractors with violations under a similar list of laws (and others such as environmental laws). In particular, the Order specifies that information about a contractor's violations will be publicly available on the Internet. As such, we expect that this process will be used by unions and others who wish to bring pressure against companies such as in organizing or corporate campaigns. The Chamber led the employer community opposition to the Clinton blacklisting rulemaking.

Process going forward

The proposed guidance and FAR Council regulation both have 60 day comment periods that go to July 27, 2015. If these deadlines hold, actual implementation of the Order could be targeted for new contracts in 2016. Their new proposals raise many questions and set up many issues for commenting. We are working with members of our Labor Relations Committee, and the Chamber's Procurement Council and have retained the law firm of McKenna, Long (soon to merge with Denton's) to develop our comments. This firm (and the new merged firm) has a highly regarded government contracting practice as well as similarly strong labor and employment practices. We will also be exploring all options to keep this from being implemented, including legislative and legal ones at the appropriate times.

Issues in the Proposed DOL Guidance and FAR Council Regulations

- **No data or support for entire reporting regime**—The proposed rule/guidance blithely cites promoting economy and efficiency in federal contracting, as the justification under the Procurement Act, for creating the new reporting requirements and associated other provisions, but in fact these would create just the opposite effect. Among the data cited by the administration to support this assertion are reports from the Center for American Progress, a union affiliated think tank, and one from former Senator Harkin. Neither of these establishes a problem requiring such an extensive new system that imposes such burdens on federal contractors. Indeed, contracting officers already have the authority to review labor law violations, many of these laws already have suspension and debarment procedures available, and the data regarding company violations already exists within the federal government systems. The only explanation that survives scrutiny for the E.O. and the implementing instruments is the request made by the AFL-CIO to the Obama transition team.

- **Expansive Definitions of Administrative Merits Determinations, etc.**—Contractors and subcontractors are required to report any violations defined as administrative merits determination, civil judgment and arbitral award or decision. DOL's guidance defines administrative merits determinations down to the lowest level of procedure, on the logic that these actions are the products of extensive investigation. The guidance even acknowledges that these may not be final, or still under review. Examples of these are:

    - National Labor Relations Board (NLRB) Complaints: NLRB complaints are commonplace and are simply a preliminary step in the Board's administrative adjudication process. They are not issued by the NLRB itself, but by the 32 Regional Directors across the country when there is reasonable cause to believe that the NLRA has been violated. Additionally, complaints are issued simply when there is a dispute with regard to the evidence presented, which then requires a credibility determination by an Administrative Law Judge. Complaints may be settled, withdrawn or serve as the basis to proceed to a hearing, the results of which

can be appealed first to the NLRB itself and ultimately to a federal court of appeals. The bottom line is that an NLRB complaint is a very early part of a lengthy adjudicatory process which can end in a variety of ways, many of which result in no finding of wrong-doing by the employer. That such complaints should be reportable and serve as a basis for determining whether a contractor has a "satisfactory record of integrity and business ethics" is inappropriate.

- Equal Employment Opportunity Commission (EEOC) Reasonable Cause Letters: Like NLRB complaints, EEOC reasonable cause letters are issued after an investigation reveals that there is–as the name indicates—reasonable cause to believe a violation occurred. These letters then serve as the basis for conciliation discussions between EEOC and the employer, which are required by statute. Like NLRB complaints, EEOC reasonable cause letters are therefore a preliminary step in the process, can be withdrawn or settled, and provide no final determination of a violation. Moreover, if the EEOC's reasonable cause determination demands $10,000 it will be deemed "serious" under the Guidance, even if the employer settles the case for a lesser amount or the EEOC's case is eventually dismissed in court.

- OSHA Citations: This is the first step in an OSHA enforcement action after the inspection. Employers have 15 days after the issuance of a citation to file their notice of contesting the citation. Under the DOL guidance, once a citation is issued, that contractor would have to report it if it was a serious, repeated, willful, or pervasive level citation. OSHA often looks for reasons to describe violations as willful as an opening position, understanding that this may be negotiated downward. Furthermore, OSHA has adopted the policy of holding one location of a company accountable for the violations of another location of the same company so that the agency can assess repeated violations. This is the approach taken by the DOL in its guidance.

- Wage and Hour WH-56 "Summary of Unpaid Wages" letters: This is the initial step in a Wage and Hour Division assessment that an employer has not properly paid minimum wages or overtime wages.

"Civil judgment" means "any judgment or order entered by any federal or state court in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws." Similarly, "arbitral award or decision" means any award or order in which an arbitrator or panel determines that the contractor or subcontractor violated any provision of the Labor Laws. The proposed regulations expressly require reporting of such arbitral awards or decisions, regardless of whether the arbitral proceedings were private or confidential.

- **Pressure to sign Labor Compliance Agreement**—The FAR Council proposed regulation makes clear that one of the key mitigating items a contractor can provide to show they are now in compliance is a signed Labor Compliance Agreement (defined as an agreement with an agency where the employer agrees to the charges, and commits to correcting the problem). This will provide extraordinary leverage for an agency to force employers to accept settlement agreements on the agency's terms. Coupled with the requirement that they have to disclose before they have any opportunity to challenge the initial enforcement action, this will completely stack the deck in favor of the agency leaving virtually no value for a contractor to exercise their normal due process rights and challenge the citation/complaint, etc.

- **Expansive Definitions of serious, repeated, willful, pervasive**—At the direction of the Executive Order, the proposed guidance and regulations also create new categories of violations for each of the fourteen enumerated federal labor laws and the unidentified "equivalent" state laws. These "serious," "repeated," "willful," and "pervasive" violations—as invented by the administration—may be considered evidence that a contractor or subcontractor demonstrates "a lack of integrity or business ethics" sufficient to disqualify them from consideration for a contract. The determination of whether any disclosed violations qualify under these levels of severity will be made by the contracting officer with assistance from the Labor Compliance Advisors.

  The term "serious violation" exists only in one of the labor statutes covered by the Order (i.e., OSHA). Accordingly, the proposed regulations and guidance define the term with an expansive list by which a broad variety of fairly typical, trivial or "technical" violations may be considered "serious" during responsibility assessments. Among other hallmarks, the proposed guidance suggests a violation will be "serious" if: it affects more than 25% of the workers at a worksite; it involves more than $5,000 in fines or $10,000 in backpay; it involves harassment or retaliation for protected activity; or, it involves "interference" with an agency investigation—such as failure to provide requested information, or to provide access to property for investigation.

  Similarly, the administration invents expansive definitions for "repeated," "willful" and "pervasive" for the majority of the laws involved. For example, following the OSHA definition, a violation is "repeated" if it is "substantially similar to one or more other violations of the Labor Laws by the contractor….". "Pervasive"—a term that is found in none of enumerated laws—violations will be ascertained by considering "the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity," but will also consider the extent to which the violations also qualify under other definitions.

- **Subcontractor reporting**—Under the proposed regulations, contractors also must require prospective covered subcontractors to "represent to the best of the subcontractor's knowledge and belief" whether they have any labor law violations (both federal and "equivalent" state laws) within the preceding three years. Subcontractors with violations would be required to provide contractors with documents related to the violations and would also have an opportunity to present evidence demonstrating their responsibility. The contractors then would have the additional responsibility of considering these labor law violations in determining whether the subcontractors are sufficiently responsible to engage. Subcontractors also would be required to update their disclosures semi-annually. This reporting would extend to subcontractors all the way through the supply chain (as long as those subcontractors have a contract for at least $500K, excluding commercially available off-the shelf items). For large federal contracts there can be many layers of subcontracting that would be covered.

  Aside from the administrative headache that will result, from a competitiveness standpoint, there are many reasons why companies would not want to report perceived labor violations to companies with whom they compete for other contracts. The FAR Council's alternative proposed solution – having subcontractors report directly to DOL – is equally problematic, as DOL would then essentially determine which subcontractors are sufficiently "responsible" to do business with the prime.

How prime contractors are to solicit and gather such information from their subcontractors is still largely unsettled in both the proposed DOL Guidance and FAR Council regulation. What is clear, however, is that these reporting obligations for both primes and subcontractors must continue to be made semi-annually throughout the contract term. This reporting during the life of the contract is a new requirement, as under the current process contractor "responsibility" is determined at the time of the contract award.

Finally, there is at least a question of how broadly the definition of "subcontract" sweeps. The only limitations placed on the definition of "subcontract" are that it must be for at least $500K and that contracts for commercially available off-the shelf items are not included. There is nothing to indicate that reporting on subcontractors is limited to those that have a direct involvement in satisfying the prime contract. In other words, it is possible to read the Guidance and NPRM as requiring subcontractors who provide goods or services to a prime that have nothing to do with the prime contract to report.

- **Lack of guidance on equivalent state laws—**The Department of Labor was unable to provide a list of what will constitute "equivalent" state laws, but did say that OSHA approved state plans would be an example. The DOL has said it will publish a second guidance document that will deal with this question and the FAR Council will similarly issue a second proposed regulation describing how these state laws will be incorporated into the contracts.

  In various meetings, representatives of the DOL have said they would examine the state laws in the different areas and isolate only those provisions they believe relate to the federal counterpart. However, while they have promoted OSHA approved state plans as the signature example, there has been no recognition that many state safety programs include requirements not found at the federal level, or have different thresholds for hazards.

- **Bad economic analysis:** The FAR Council NPRM estimates that each of 25,775 prime contractors affected by the proposed "Fair Pay and Safe Workplaces" regulation would be able to respond to each of an approximately 10 responsibility reports required on initial bid offers or for post-award semi-annual updates rule in only 6.26 hours PER YEAR per response.
  This optimistic estimate:
  1. Ignores the fact that the typical contractor has multiple establishments whose violations must be canvassed for each report;
  2. Ignores the fact that 25,775 only represents the number of prime contract awardees (holding one or more contracts of $500,000 or more value) during a year and that offer report burdens are also imposed on unsuccessful bidders who hold no current contract;
  3. Ignores the fact that the prime contractor is required to collect and report information for each covered subcontractor and that a similar response burden is imposed as an indirect reporting burden by the proposed rule that is not recognized in the 6.26 hours per response estimate;

     The 10 (precisely 9.9 in the calculations) annual "responses per respondent" included in the calculation is presumed to reflect the requirement that an awardee make semi-annual updates of responsibility reports to each agency with which a contract is awarded and that contractors may bid on or hold multiple contracts with multiple agencies, each of which entails a separate report. The exact basis of the 9.9 multiplier is not evident in the NPRM, but it may be shown in the Information Collection Request supporting document submitted to the Office of Information and Regulatory Affairs (OIRA), which is not yet available for public inspection

Even with this highly optimistic burden estimate of 6.24 hours per response, the government calculates an annual reporting burden on the contractor community of $87,389,423. Substitution of a more realistic hours estimate could push the annual cost of just the reporting element into the billions range. We are in the process of surveying affected companies to develop a realistic estimate of this reporting burden. Other costs, such as developing necessary information systems to track information needed for the reporting requirement and costs to respond to additional questions and compliance "nudges" from the new Agency Labor Compliance Offices would entail additional burdens.

Litigation possibilities

We are working with the Chamber Litigation Center to identify opportunities for a lawsuit to challenge the Order and its implementing regulations at the appropriate time. Although some legal claims could be brought against the Order before the regulations are finalized, the Litigation Center's preliminary view is that those claims would be weak; and there are some claims that must wait for the regulations to become final. Because it might take more than a year for the Administration to finalize the regulations, a lawsuit therefore might not be ripe until late 2015 or even 2016.

Nevertheless, the Litigation Center is reviewing the Order and considering legal arguments with an eye towards both supporting the Chamber's policy experts during the regulatory process and advancing a potential court challenge to the Order and its regulations if circumstances warrant and our members support a lawsuit. The Litigation Center is also coordinating with numerous other trade associations that have expressed some interest in litigation against various aspects of the Order, and is engaged with other groups on both the substance and timing of any litigation.

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