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View From Brown Rudnick: Follow the 'Year of Action' with a Year of Preparation

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Contractors routinely begin to prepare for large procurements more than a year before the agency issues the request for proposals. Contractors should be taking a similarly far-sighted approach toward regulations that could dramatically affect their chances of winning new awards beginning in 2016.

The regulations in question will implement Executive Order 13673 signed by President Obama on July 31, 2014. Under that order, solicitations will require offerors to represent, to the best of their knowledge and belief, whether there have been findings within the preceding three-year period that they violated any of 14 Federal statutes and executive orders, and equivalent state laws, addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections. Contracting officers will be required to consider those disclosures in determining whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics.

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E.O. 13673 won't become effective until the Federal Acquisition Regulation ("FAR") has been amended to reflect the new requirements and the U.S. Department of Labor ("DOL") has issued guidance to be used by contracting officers in implementing the order and the forthcoming FAR clause. DOL has said that that will happen sometime in 2016. However, Labor Secretary Tom Perez left no doubt about the tough posture that DOL's guidance will take toward contractors when he blogged on July 31, 2014, "Cheaters shouldn't win. This action ensures they won't." (http://social.dol.gov/blog/cheaters-shouldnt-win/)

So what can contractors do now, before draft regulations have even been issued? There are a few things.

The Executive Order says that agencies should require contractors to disclose any "administrative merits determination, arbitral award or decision, or civil judgment . . . within the preceding 3-year period for violations" of the listed labor laws. Those laws are:

- the Fair Labor Standards Act ("FLSA");
- the Occupational Safety and Health Act;
- the Migrant and Seasonal Agricultural Worker Protection Act;
- the National Labor Relations Act;
- the Davis-Bacon Act;
- the Service Contract Act ("SCA");

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■ Executive Order 11246 (Equal Employment Opportunity);

■ Section 503 of the Rehabilitation Act of 1973;

■ the Vietnam Era Veterans' Readjustment Assistance Act of 1974;

■ the Family and Medical Leave Act (''FMLA'');

■ title VII of the Civil Rights Act of 1964 (''Title VII'');

■ the Americans with Disabilities Act of 1990 (''ADA'');

■ the Age Discrimination in Employment Act of 1967 (''ADEA'');

■ Executive Order 13658 (Establishing a Minimum Wage for Contractors); and

■ equivalent State laws, as defined in guidance issued by the Department of Labor.

The order further says that contracting officers should, prior to making responsibility determination, give offerors an opportunity to disclose any steps taken to correct their labor law violations and to improve their compliance with above labor laws.

Thus, the first step that contractors should be taking is to identify any administrative merits determinations, arbitral awards or decisions, or civil judgments against them involving the above laws in 2013 or later and to review what steps they have taken to correct the violations of, and improve compliance with, the above labor laws. Paying the damages awarded in a lawsuit is not enough. Contractors should be taking steps to discover any systemic problems that led to a violation and correcting them.

One of the most effective ways for a contractor to improve its compliance with labor laws is to commission a labor law compliance audit. Such an audit, which is best performed by outside consultants such as lawyers or human resources professionals, reviews the employer's labor policies and practices to identify past violations or vulnerabilities that could lead to future violations. Such an audit would consider, for example:

■ whether personnel who are being treated as independent contractors meet the legal tests for that classification;

■ whether workers being treated as exempt from the FLSA, SCA and Davis-Bacon Act are correctly classified;

■ whether working time and overtime are being calculated and compensated properly;

■ whether FMLA leave is being properly administered; and

■ whether documentation of terminations and other employment actions is sufficient to survive scrutiny under laws such as Title VII, the ADA and the ADEA, among others.

A knowledgeable and experienced compliance auditor also can help the contractor correct past wrongs with a minimum of unwanted attention.

A second important step that contractors with past labor law violations should be taking is training. It's not enough to have an employee handbook that prohibits off-the-clock work, for example. It also is not adequate to make sure that employees read the handbook. *Managers* need to be trained to honor the rules and employees' rights. In fact, having rules and disregarding them may be worse than having no rules, since the former could be interpreted as evidence of disregard for the law. Contractors who doubt the importance of training managers and staying on top of them should review the countless news stories over a period of years about employers who have paid multi-million dollar judgments as a result of off-the-clock work.

Third, contractors should be examining any pending labor litigation and administrative investigations or proceedings and considering which cases to settle. Of course, there are many considerations that impact whether a company settles a lawsuit of any kind. The Executive Order introduces a new consideration, however, since it requires disclosure of every ''administrative merits determination, arbitral award or decision, or civil judgment.'' It does not appear to require disclosure of settlements. Note, though, that the term ''administrative merits determination'' remains to be defined by DOL in the future guidance. Going forward, contractors should consider demanding language in any DOL settlements acknowledging that the settlement is *not* an ''administrative merits determination.'' At a minimum, contractors should insist on language in any settlement that they do not admit liability. Indeed, that was always a good practice.

President Obama has referred to 2014 has his ''Year of Action '' and much of that action has been directed against government contractors through a series of Executive Orders. In response, contractors should be increasingly vigilant and proactive about complying with all applicable laws and taking steps to defend and improve their compliance record.

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