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Federal District Court Issues Preliminary Injunction Against Implementation of the Fair Pay and Safe Workplaces Final Rule

On July 31, 2014, President Barack Obama issued Executive Order 13673. As subsequently amended, the Executive Order purports to “increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws.” On August 25, 2016 the Federal Acquisition Regulation (“FAR”) Council published the final FAR Rule and the United States Department of Labor (“DOL”) published its Guidance further implementing the Executive Order. The FAR final rule was scheduled to go into effect in stages, starting with solicitations with an estimated value of \$50 million or more on October 25, 2016. The potential effect of these new regulations on government contractors has been the subject of prior alerts from this office and much ongoing discussion.

One day before their effective date, the United States District Court for the Eastern District of Texas issued a preliminary injunction enjoining the implementation of significant portions of Executive Order 13673, the FAR regulations and the DOL guidance. The court enjoined the portions of the Executive Order that required government contractors and subcontractors to disclose their violations of fourteen federal labor laws and that prohibited pre-dispute arbitration agreements regarding matters arising under Title VII of the Civil Rights Act and torts based on sexual assault or harassment. The court declined to enjoin the paycheck transparency portion of the Executive Order, which requires covered contractors and subcontractors to provide their employees with wage statements concerning hours worked, overtime hours, rate of pay, gross pay, and deductions from gross pay. The Court issued the preliminary injunction in response to a lawsuit filed by the Associated Builders and Contractors of Southeast Texas, the Associated Builders and Contractors, Inc., and the National Association of Security Companies. The Court found that there was a substantial likelihood that the plaintiffs would prevail on their lawsuit, in part because the requirements were not authorized by applicable legislation, violated contractors’ First Amendment and Due Process rights, and had been adopted in an arbitrary and capricious fashion.

The Court issued a nationwide injunction, which did not limit its applicability to the Eastern District of Texas. There has been some legal controversy on whether district courts have the authority to issue nationwide injunctions; although a recent four-four split decision by the U.S. Supreme Court allowed a ruling that a district court had the authority to issue a nationwide injunction related to immigration regulations to stand.

It remains to be seen whether the Federal Government will seek to challenge this preliminary injunction on the merits and/or on the authority of the district court to issue a nationwide injunction. For now, government contractors should continue to review solicitations issued on or after October 25, 2016 to determine if they contain the labor law disclosure requirements and arbitration restrictions, and consult with counsel as to whether and how to comply with these requirements.