Federal Regulatory Update

LORI ANN LANGE

Recently, the Federal Government issued a number of final and proposed regulations that will have a significant impact on government contractors. Below is a summary of some of the key regulations.

I. Affirmative Action Goals for Veterans and Disabled Workers Final Regulations

Most federal government contractors and subcontractors are familiar with the requirement to take affirmative action to recruit, hire, and promote qualified protected veterans[1] under the Vietnam Era Veterans' Readjustment Assistance Act[2] ("VEVRAA") and disabled workers under Section 503 of the Rehabilitation Act[3]. Recently the Federal Government issued new regulations expanding federal government contractors' and subcontractors' obligations with regard to recruiting, hiring, and promoting protected veterans and disabled workers.

A. VEVRAA

VEVRAA applies to contractors and subcontractors with federal contracts or subcontracts in excess of $100,000. It prohibits discrimination against covered veterans in employment and requires contractors and subcontractors to take affirmative action to employ qualified covered veterans. The new regulations, which take effect on March 24, 2014, among other things, require federal government contractors and subcontractors to:

- Set annual hiring benchmarks for protected veterans.[4] While the new regulations specifically state that quotas are expressly forbidden, contractors must create a quantifiable method (*i.e.*, benchmark) by which they can measure their progress toward achieving equal employment opportunities for protected veterans. Contractors may either: (1) use a benchmark equaling the national percentage of veterans in the civilian labor force as published by the Office of Federal Contract Compliance Programs (OFCCP) (currently 8%); or (2) set their own benchmark based on data from the Bureau of Labor Statistics and Veterans' Employment and Training Service/ Employment and Training Administration.[5] Contractors must document the hiring benchmark and the factors considered in establishing the benchmark, and retain these records for three years.[6]

Please Contact

Lori Ann Lange
llange@pecklaw.com
202.293.8815

[1] The classes of protected veterans are disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces service medal veterans. 41 C.F.R. § 60-300.1(a).
[2] 38 U.S.C. § 4212.
[3] 29 U.S.C. § 793.
[4] 41 C.F.R. § 60-300.45.
[5] 41 C.F.R. § 60-300.45(b).
[6] 41 C.F.R. § 60-300.45(c).

- Invite all applicants – not just applicants who will receive a job offer – to inform the contractor whether the applicant believes that he/she is a protected veteran who may be covered by VEVRAA.[7] The invitation must be made both prior to and after any job offer.
- Collect and document data on the number of veteran and non-veteran applicants and the number of veteran and non-veteran hires.[8] Specifically, contractors must document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three years: (1) the number of applicants who self-identified as protected veterans or who are otherwise known as protected veterans; (2) the total number of job openings and total number of jobs filled; (3) the total number of applicants for all jobs; (4) the number of protected veteran applicants hired; and (5) the total number of applicants hired.
- Include the Equal Opportunity for VEVRAA Protected Veterans clause in subcontracts using the following flow down language:

  > This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.[9]

  The new regulations require each contracting agency and each federal government contractor to include the Equal Opportunity for VEVRAA Protected Veterans clause in each of their covered government contracts and subcontracts as well as any modifications, renewals, or extensions to contracts if the clause was not included in the original contract. Thus, it can be expected that, after March 24, 2014, federal government contractors may find their contracts being modified to include the Equal Opportunity for VEVRAA Protected Veterans clause.

B. Section 503

Section 503 applies to contractors and subcontractors with federal contracts or subcontracts in excess of $10,000. It prohibits discrimination against persons with mental and/or physical disabilities in employment and requires covered contractors and subcontractors to take affirmative action to hire, retain, and promote qualified individuals with disabilities. The new regulations, which take effect on March 24, 2014, among other things, require federal government contractors and subcontractors to:

- Endeavor to meet the nationwide 7% utilization goal for employment of qualified individuals with disabilities.[10] While the new regulations specifically state that quotas are expressly forbidden, contractors must take affirmative action to try to meet or exceed the goal. The goal is applicable

[7] 41 C.F.R. § 60-300.42.
[8] 41 C.F.R. § 60-300.44(k).
[9] 41 C.F.R. § 60-300.5(d).
[10] 41 C.F.R. § 60-741.45.

to each of the contractor's job groups unless the contractor has 100 or fewer employees, in which case the goal will be applied to the contractor's entire workforce. Contractors must conduct annual utilization analyses to assess their efforts to meet the goal. Contractors who do not meet the goal for any job group must take steps to determine whether and where impediments to equal employment opportunities exist and develop programs designed to correct the identified problem areas.

- Invite all applicants – not just applicants who will receive a job offer – to inform the contractor whether the applicant believes that he/she is an individual with a disability.[11] The invitation must be made both prior to and after any job offer. At least every five years, contractors must invite current employees to self-identify whether they are an individual with a disability. In addition, at least once during the intervening years between the invitations, contractors must remind their employees that the employees may voluntarily update their disability status. Contractors, however, cannot compel or coerce an individual to self-identify whether he/she is an individual with a disability.
- Collect and document data on the number of disabled and non-disabled applicants and the number of disabled and non-disabled hires.[12] Specifically, contractors must document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three years: (1) the number of applicants who self-identified as individuals with disabilities or who are otherwise known as individuals with disabilities; (2) the total number of job openings and total number of jobs filled; (3) the total number of applicants for all jobs; (4) the number of applicants with disabilities hired; and (5) the total number of applicants hired.
- Include the Equal Opportunity for Workers with Disabilities clause in subcontracts using the following flow down language:

  > This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.[13]

The new regulations require each contracting agency and each federal government contractor to include the Equal Opportunity for Workers with Disabilities clause in each of their covered government contracts or subcontracts as well as any modifications, renewals, or extensions to contracts if the clause was not included in the original contract. Thus, it can be expected that, after March 24, 2014, federal government contractors may find their contracts being modified to include the Equal Opportunity for Workers with Disabilities clause.

[11] 41 C.F.R. § 60-741.42.
[12] 41 C.F.R. § 60-741.44(k).
[13] 41 C.F.R. § 60-741.5(d).

II. New Prime Contractor Responsibilities For Subcontractor Utilization

On September 27, 2010, the Small Business Jobs and Credit Act was enacted. Recently, the Federal Government issued final regulations implementing various provisions of the Act. In an effort to halt "bait and switch" practices by federal prime contractors, recent Small Business Administration ("SBA") regulations impose new obligations on prime contractors to either contract with the specific subcontractors used by the prime contractor in its proposal or provide a written explanation of why those subcontractors were not used to the contracting officer. Prime contractors similarly will be required to provide written explanations to the contracting officer if they make reduced or delayed payments to subcontractors on federal projects. Repeated failure to promptly pay subcontractors in full and on time can result in a negative past performance evaluation, which may impact the prime contractor's evaluation on future procurements.

A. Small Business Subcontracting Plans

Prime contractors with government contracts over a specified dollar value ($650,000 for supply and service contracts and $1.5 million for construction contracts) that offer significant subcontracting opportunities are required to submit a small business subcontracting plan.[14] The purpose of the plan is to specify how the contractor intends to meet the small business subcontracting goals set forth in the contract. Section 1322 of the Small Business Jobs and Credit Act added the requirement that contractors make a representation that they will make a good faith effort to acquire the articles, equipment, supplies, services, or materials, or obtain the performance of construction work from small businesses in the same amount and quality used in preparing the subcontracting plan.

Final regulations implementing Section 1332 became effective on August 15, 2013.[15] The regulations apply to "covered contracts," which are defined as contracts for which a small business subcontracting plan is required. The regulations require the contractor to represent to the contracting officer that it will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small businesses that it used in preparing the bid or proposal, in the same scope, amount, and quality used in preparing and submitting the bid or proposal.[16]

In determining whether the contractor used a small business in preparing its bid or proposal, the contractor will be considered to have used the small business if: (1) the contractor referenced the small business as a subcontractor in the bid or proposal or associated small business subcontracting plan; (2) the contractor had a subcontract or agreement in principle to subcontract with the small business to perform a portion of the specific contract; or (3) the small business drafted any portion of the bid or proposal or the offeror used the small business' pricing or cost information or technical

[14] *See*, the Small Business Subcontracting Plan clause, FAR 52.219-9
[15] 78 Fed. Reg. 42390.
[16] 13 C.F.R. § 125.3(c)(3).

expertise in preparing the bid or proposal and there is written evidence (including email) of an intent or understanding that the small business will be awarded a subcontract if the contractor is awarded the prime contract.[17] Merely responding to a request for quotes is not sufficient to establish that the small business was used.

If the contractor fails to acquire the articles, equipment, supplies, services, or materials or obtain the performance of construction work from a small business used to prepare the bid or proposal, the contractor must provide the contracting officer with a written explanation.[18] The contractor must submit the written explanation prior to the submission of the invoice for final payment and contract closeout. The contracting officer will consider the contractor's explanation in evaluating the contractor's conduct for past performance evaluation purposes, which can impact the contractor's ability to obtain future government contracts.[19]

The regulations also added a requirement that, at the conclusion of the contract, the contractor must submit a written explanation to the contracting officer if the contractor did not meet all of the small business subcontracting goals.[20] The contractor has to provide a specific explanation of why it did not meet the goals. The contracting officer will use this explanation to evaluate whether the contractor acted in good faith. A contractor who fails to take good faith efforts to meet the contract's subcontracting goals may be subject to liquidated damages.[21]

In addition, the contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over $150,000 when a small business received a preference in the subcontract award (*e.g.*, where the contractor selected the successful subcontractor at least in part because the successful subcontractor was a small business).[22] The written notification must include the name and location of the successful subcontractor, and whether the successful subcontractor is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business.

B. Payment to Subcontractors

Section 1334 of the Small Business Jobs and Credit Act strengthened subcontractor payment protections by requiring contractors with a subcontracting plan to notify the contracting officer whenever the contractor paid a reduced price to a subcontractor for goods and services or delayed paying the subcontractor for more than 90 days. Final regulations implementing Section 1334 became effective on August 15, 2013.[23]

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[17] *Id.*
[18] 13 C.F.R. § 125.3(c)(4).
[19] 13 C.F.R. § 125.3(d)(4).
[20] 13 C.F.R. § 125.3(c)(6).
[21] *See,* the Liquidated Damages – Subcontracting Plan clause, FAR 52.219-16.
[22] 13 C.F.R. § 125.3(c)(1)(viii).
[23] 78 Fed. Reg. 42390.

The regulations require the contractor to notify the contracting officer in writing if, upon completion of the small business subcontractor's responsibilities under the subcontract, the contractor: (1) paid a reduced price to a small business subcontractor for goods and services provided; or (2) paid the small business subcontractor more than 90 days past the due date under the subcontract for goods and services for which the Federal Government paid the contractor.[24] The contractor must include the reason for the reduction in payment to or failure to pay a small business subcontractor in the written notice.

The contracting officer will evaluate whether the contractor has a history of unjustified untimely or reduced payments to subcontractors.[25] The contractor will be deemed to have a history of unjustified untimely or reduced payments if it reported three instances of reduced or late payments in a twelve-month period.[26] If the contracting officer determines that the contractor has such a history, he/she will note this in the Federal Awardee Performance and Integrity Information System ("FAPIIS"). In other words, a contractor who fails to fully pay or delays in paying its small business subcontractors may receive a negative past performance evaluation, which can impact the contractor's ability to obtain future government contracts.

C. Misrepresentation of Size Status

Section 1341 of the Small Business Jobs and Credit Act created a deemed certification of small business size status. Under the Act, by taking one of the following actions, a contractor affirmatively, willfully, and intentionally certified that it was a small business:

- Submitting a bid or proposal for a federal contract or subcontract that was set-aside or otherwise classified as intended for award to a small business;
- Submitting a bid or proposal for a federal contract or subcontract that in any way encouraged a federal agency to classify the bid or proposal, if awarded, as an award to a small business; and
- Registering in any federal electronic database (such as the System for Award Management ("SAM")) for the purpose of being considered for the award of a federal contract or subcontract as a small business.

Section 1341 created a presumption of loss to the United States when a large business willfully sought and received the award of a contract or subcontract that was set-aside or otherwise classified as intended for award to a small business. The amount of the loss to the Government is the total amount expended on the contract or subcontract.

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[24] 13 CFR § 125.3(c)(5).
[25] 13 CFR § 125.3(d)(6).
[26] 13 CFR § 125.3(a)(3).

Final regulations implementing the Small Business Jobs and Credit Act's certification provisions became effective on August 27, 2013.[27] The final regulations reiterate the language of Section 1341 that a contractor affirmatively, willfully, and intentionally certifies that it is a small business by submitting a bid or proposal on a set-aside procurement, submitting a bid or proposal that encourages the agency to believe award would be made to a small business, or registering as a small business in SAM or another federal electronic database.[28] The regulations also require small business contractors to recertify their size status yearly.[29]

A contractor may not be held liable in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful, or actionable under the False Claims Act.[30] In addition, prime contractors acting in good faith will not be held liable for subcontractor misrepresentations regarding a subcontractor's size.[31]

With regard to the deemed certification provisions, the final regulations retain the presumption that the loss to the Government for any wrongfully awarded contract is the entire value of the contract or subcontract.[32] However, that presumption has been eased from an "irrefutable" presumption to a rebuttable presumption. In other words, the contractor may have some ability to argue that the Government's loss was not the value of the contract or subcontract.

In addition to forfeiting all contract funds, the regulations provide for severe penalties for misrepresentation of size status. A contractor that misrepresents its size status as small may be: (1) suspended or debarred from government contracting; (2) subject to civil penalties under the False Claim Act and the Program Fraud Civil Remedies Act; and any other applicable laws; and (3) subject to criminal penalties under the False Claims Act, the False Statements Act, and the Small Business Act.[33]

Section 1341 and its implementing regulations will make it easier for the Federal Government to prove that a contractor intentionally and falsely certified its size status and the amount of damages resulting from that false certification. Given SBA's complex regulations concerning size status and affiliation between companies, contractors who are unfamiliar with SBA's regulations could find themselves violating Section 1341 merely by misinterpreting SBA's regulations.

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[27] 78 Fed. Reg. 38811.
[28] 13 C.F.R. §§ 121.108(b), 121.411(e), 124.521(b), 124.1015(b), 125.29(b), 126.900(b), 127.700(b).
[29] 13 C.F.R. §§ 121.109(b), 124.1016(b), 125.30(b), 127.701(b).
[30] 13 C.F.R. §§ 121.108(d), 121.411(g), 124.521(d), 124.1015(d), 125.29(d), 126.900(d), 127.700(d).
[31] *Id.*
[32] 13 C.F.R. §§ 121.108(a), 121.411(d), 124.521(a), 124.1015(a), 125.29(a), 126.900(a), 127.700(a).
[33] 13 C.F.R. §§ 121.108(e), § 121.411(h), 124.1015(e), 125.29(e), 126.900(e), 127.700(e).

III. Whistleblower Protections Interim Rules

A. DFARA Interim Rule

Section 827 of the 2013 National Defense Authorization Act ("NDAA") expanded the whistleblower protections afforded to employees of government contractors, subcontractors, and grant recipients. Among other things, Section 827 expanded the recognized parties to whom protected disclosures can be made. Previously, a whistleblower needed to bring his/her concerns to federal or state officials before being afforded protected status. Under Section 827, a whistleblower can bring his/her concerns to a contractor's employee who has the responsibility to investigate, discover, or address misconduct.

On September 30, 2013, the Department of Defense ("DoD") issued an interim rule amending the Defense Federal Acquisition Regulation Supplement ("DFARS") to implement Section 827's amendments to whistleblower protections for contractor and subcontractor employees.[34] Among other things, the interim rule:

- Provides that contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing to any of the specified entities[35] information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, an abuse of authority relating to a DoD contract, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract (including the competition for or negotiation of a contract).
- Provides that a protected disclosure can be made to a court or grand jury or a management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.
- Provides that any whistleblower reprisal complaint must be brought no later than three years after the date on which the alleged reprisal took place.
- Requires that any whistleblower reprisal complaint be signed and contain the name of the contractor, the contract number or a description reasonably sufficient to identify the contract(s) involved, the violation of law, rule, or regulation giving rise to the disclosure, the nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed, and the specific nature and date of the reprisal.

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[34] 78 Fed. Reg. 59851.

[35] The specified entities are: a Member of Congress or a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a federal employee responsible for contract or grant oversight or management at the relevant agency, an authorized official of the Department of Justice or other law enforcement agency, a court or grand jury, and a management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

- Clarifies the procedures for the DoD Inspector General to investigate whistleblower reprisal complaints.
- Provides that DoD may: (1) order the contractor to take affirmative action to abate the reprisal; (2) order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken; (3) order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal. If the contractor fails to comply, DoD will request that the Department of Justice file an action for enforcement of the order in federal court.
- Clarifies that Section 827 does not provide any rights to disclose classified information not otherwise provided by law.
- Revises the Requirement to Inform Employees of Whistleblower Rights clause, DFARS 252.203-7002, to require contractors to inform their employees in writing, in the predominant native language of the workforce, of employee whistleblower rights and protections under 10 U.S.C. § 2409 and to flow the clause down in all subcontracts.

B. FAR Interim Rule

Section 828 of the NDAA created a pilot program enhancing whistleblower protections for contractor employees that is effective from July 1, 2013 through January 1, 2017. The pilot program mirrors the DoD expanded whistleblower protections in Section 827. The pilot program provides that an employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a specified entity[36] information that the employee reasonably believes is evidence of gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract) or grant.[37] Section 828 also contains provisions on the handling of whistleblower reprisal complaints.

On September 30, 2013, the Federal Acquisition Regulation ("FAR") Council issued an interim rule amending the FAR to implement the pilot program.[38] The interim rule creates a new FAR Subpart 3.908. While the interim rule leaves intact the existing regulations in FAR 3.901 through 3.906, which

[36] The specified entities are: a Member of Congress or a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a federal employee responsible for contract or grant oversight or management at the relevant agency, an authorized official of the Department of Justice or other law enforcement agency, a court or grand jury, and a management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.
[37] The pilot program is not applicable to DoD, NASA, and the Coast Guard.
[38] 78 Fed. Reg. 60169.

implement the existing whistleblower protections, these provisions are suspended while the pilot program is in effect.

Among other things, the interim rule:

- Adds Section 828's prohibition on reprisals against employees who provide information to one of the specified entities when the employee reasonably believes the information is evidence of gross mismanagement of a federal contract, a gross waste of federal funds, an abuse of authority relating to a federal contract, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract).
- Adds a procedure whereby a contractor or subcontractor employee who believes that he/she has been discharged, demoted, or otherwise discriminated against may submit a complaint to the Inspector General of the agency concerned. The complaint must be filed no later than three years after the date on which the alleged reprisal took place.
- Adds procedures for the Inspector General to investigate complaints.
- Adds a provision that the agency may: (1) order the contractor to take affirmative action to abate the reprisal; (2) order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken; (3) order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal. If the contractor fails to comply, an enforcement action may be brought against the contractor in federal court.
- Clarifies that Section 828 does not provide any right to disclose classified information not otherwise provided by law.
- Requires the contracting officer to insert the Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights clause, FAR 52.203-17, in all solicitations and contracts that exceed the simplified acquisition threshold.

About Peckar & Abramson, P.C.

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