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New Executive Order Will Require Contractors to Disclose Labor Violations

As part of his Year of Action, on July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order. The Executive Order will require contractors who are bidding on federal government contracts in excess of \$500,000 to disclose their federal and state labor law violations, as well as the labor law violations of their subcontractors, for the previous three years. While the Executive Order took effect immediately, it only will apply to solicitations issued after new FAR regulations are issued by the FAR Council. The White House has indicated that it expects the Executive Order to be implemented on new contracts in stages, on a prioritized basis, during 2016.

The Executive Order requires federal agencies to include a provision in solicitations requiring bidders to represent, to the best of the bidder's knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment rendered against the bidder within the preceding 3-year period for violations of:

- The Fair Labor Standards Act;
- The Occupational Safety and Health Act of 1970;
- The Migrant and Seasonal Agricultural Worker Protection Act;
- The National Labor Relations Act;
- The Davis-Bacon Act;
- The Service Contract Act;
- Executive Order 11246;
- Section 503 of the Rehabilitation Act of 1973;
- The Vietnam Era Veterans Readjustment Assistance Act of 1974;
- The Family and Medical Leave Act;
- Title VII of the Civil Rights Act of 1964;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967;
- Executive Order 13658 (Establishing a Minimum Wage for Contractors); and
- Equivalent State laws.

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If awarded the contract, the bidder will need to update this information every 6 months.

Prior to making a contract award, contracting officers must consider whether these violations render the offeror non-responsible and thus ineligible for award of the contract. Before it makes any responsibility determination, the contracting officer must give the bidder an opportunity to disclose any steps the bidder has taken to correct the violations and/or improve its compliance with the labor laws.

At contract execution, the contractor must represent to the contracting officer for any subcontract with an estimated value of \$500,000 (except commercially available off-the-shelf items) that the contractor:

- Will require each subcontractor to disclose any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding 3-year period for labor law violations, and update the information every 6 months; and
- Before awarding a subcontract, will consider the information submitted by the subcontractor in determining whether a subcontractor is a responsible contractor with a satisfactory record of integrity and business ethics.

The Executive Order also requires each federal agency to designate a senior agency official to be the agency's Labor Compliance Advisor. Among other things, the Labor Compliance Advisor will assist contracting officers in reviewing bidders' disclosures and providing guidance on whether the bidders' violations are so egregious to rise to the level of a lack of integrity or business ethics.

Additionally, the Executive Order requires contractors to give their employees accurate information regarding hours worked, overtime hours, pay, and any additions to or deductions made from their pay, so employees can verify that they are being paid the correct amount. It also prohibits contractors with federal contracts of \$1 million or more from requiring workers to sign arbitration agreements for disputes related to alleged violations of Title VII of the Civil Rights Act or from sexual assault or harassment violations.

While the White House has stated that the aim of the Executive Order is to assist contractors with being more compliant with labor laws – and not to deny them contracts – it can be expected that contractors with persistent and repeated labor law violations may find themselves being found non-responsible and thus ineligible to receive future contract awards.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.