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Last Week's Government Contracting Reforms Continue Federal Push for Increased Regulation, Penalties

By: Adam C. Briggs and Daniel J. Finerty

President Barack Obama has promised sweeping reforms to the federal government's procurement process for later this year, but several recent reforms, including some enacted just last week, have already changed the regulatory landscape for businesses contracting with the federal government. Through a combination of new legislation, administrative rulemakings related to the American Recovery and Reinvestment Act of 2009 ("ARRA"), and several new Executive Orders, the federal government continues to impose new compliance burdens onto contractors.

Fraud Enforcement and Recovery Act of 2009

Last week, President Obama signed the Fraud Enforcement and Recovery Act ("FERA") into law. FERA increases the federal government's authority to bring fraud prosecutions and civil actions relating to federal contracts and the use of federal funds, including those arising from ARRA and the Troubled Asset Relief Program ("TARP").

Another key feature of this new law is the expansion of the federal False Claims Act ("FCA"), an already far-reaching law carrying stiff penalties for contractors that overcharge the federal government for goods or services. FERA extends FCA whistleblower protections for employees to include individuals who are agents of a business accused of making a false claim, and also expands the federal government's authority to investigate suspected FCA violations, even before any false claims lawsuit is commenced.

FERA also expands the FCA by nullifying the requirement that a false claim must be "presented" to the federal government. Previously, under the U.S. Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), a subcontractor would not necessarily incur FCA liability for a false statement made to a general contractor but not the federal government itself. Under FERA, even false claims that are never directly transmitted to the government can give rise to contractor liability.

Weapon Systems Acquisition Reform Act of 2009

Last week, President Obama also signed the Weapon Systems Acquisition Reform Act of 2009 ("WSARA"). This law is designed to improve the federal government's defense procurement process to reduce the number of defense contracts experiencing cost overruns or unsatisfactory results. The intended effect of the bill is to hold defense contractors to higher standards of quality and cost control.

Several provisions of WSARA are likely to be of immediate concern to defense contractors. One portion of the new law, for example, would establish a "Director of Independent Cost Assessment" to review cost estimates for major defense acquisition programs, adding pressure on defense contractors and their subcontractors to carefully document their cost estimates. Another provision aimed at promoting innovation among defense contractors will require the increased use of competitive prototyping, dual-sourcing, and mechanisms

The following is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

to promote ongoing competition among contractors throughout the life cycle of a defense project. Defense programs experiencing considerable cost growth will also now face increased risk of outright termination under this new law.

New ARRA Regulations

Last week's reforms were only the latest in a continued federal push for greater oversight over the use of federal funds. As many government contractors and grantees are already aware, the federal government unveiled a series of new interim rules designed to ensure proper use of stimulus funds appropriated under ARRA in March of this year. Among the most notable of these proposed interim rules are reporting provisions requiring contractors to meticulously account for—and report—their use of stimulus funds, provisions requiring funding recipients to agree to extensive federal authority to audit company records and interview employees, and even new “Buy American” provisions focused on the construction industry.

Many businesses expecting to be affected by these rules have already submitted public comments regarding these provisions. Others are expected to do so before the June 1, 2009 comment deadline. Promulgation of the final rules is expected in the months to follow.

Employment-Related Executive Orders

Also earlier this year, President Obama signed four Executive Orders that place additional employment-related requirements on government contractors. In some cases, the penalties for non-compliance with these new rules may be termination of existing contracts and/or debarment from consideration for future contracts.

Executive Order 13494 provides that “certain costs that are not directly related to the contractors’ provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures.” Costs made “unallowable” by this Order are those that relate to the contractor’s efforts to persuade employees “to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively.” These costs can be *incurred* but cannot be *reimbursed* through a federal contract. Under this order, supervisor training relating to unionization monitoring, and union-related workforce education, materials, legal advice, and consulting would be “unallowable.”

Under Executive Order, 13495, new contractors taking over a service contract from another contractor may be required to offer employment to the predecessor contractor’s

service employees in many circumstances. Contractors and subcontractors may be subject to this new requirement if (1) they are subject to the Service Contract Act of 1965, 41 U.S.C. §351 *et seq.*; (2) they employ “service employees” that are covered by the Order; and (3) other conditions making the new contractor’s work similar to the predecessor’s work apply.

President Obama also revoked President Bush’s Executive Order 13201, which required notice to employees of their rights *not* to join a union and *not* to pay agency fees for nonrepresentational union expenditures. This change, enacted through Executive Order 13496, lessens the ability of a contractor to inform employees working on a contract of these rights. Sanctions for failure to comply with this Order include contract termination, cancellation, suspension or debarment from future contract work in whole or in part.

Department of Labor Plans to Increase Investigation and Enforcement Funding

By: Margaret R. Kurlinski

On May 7, 2009, the Department of Labor released its proposed budget for fiscal year 2010. The proposed budget calls for a significant increase in funding and staffing for the Office of Federal Contract Compliance Programs (“OFCCP”), the office charged with enforcing federal laws and executive orders requiring contractors to take affirmative action in employment, including Executive Order 11246, Section 503 of the amended Rehabilitation Act of 1973, and the amended Vietnam Era Veterans Readjustment Assistance Act of 1974.

The proposed budget increase of \$23.6 million will be directed toward strengthening the OFCCP’s overall enforcement efforts, including an increase in compliance audits. OFCCP intends to use these new resources to augment its investigative efforts to identify and respond to compensation discrimination. Accordingly, government contractors should ensure that they monitor all employment processes, specifically compensation, for statistical indicators of discrimination problems.

The Department of Labor has also proposed an increase in the federal Wage and Hour Division’s budget to account for, among other things, the increased demands on the Division to investigate, enforce, and educate covered government contractors regarding prevailing wage requirements associated with certain ARRA funds.

Finally, President Obama signed Executive Order 13502, which encourages agencies to use Project Labor Agreements (“PLAs”) in federal construction projects of \$25 million or more. This order promotes pre-hire collective bargaining agreements with one or more labor organizations to establish the terms and conditions of employment for a specific construction project. However, the government cannot compel a contractor to enter into an agreement with any particular labor organization, and the Order does not explicitly exclude non-union contractors from competition.

Conclusion

Government contracting has always carried compliance costs, and these reforms will not be the last major changes in government contracting policy this year. Still, adherence to these new policies does not require existing government contractors to abandon the practices that have made them successful federal contractors in the past. These changes, as well as those anticipated for the second half of the year, will require businesses to turn anew to their ongoing compliance efforts to ensure that all employees and agents are equal partners in continued contracting success. Businesses new to government contracting should devote special attention to internal training, particularly for those employees dealing directly with government officials or managing employee relations.

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