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FEDERAL CONTRACTING

Guest Opinion: New laws burden Triangle federal contractors

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On July 31, 2014, President Barack Obama signed Executive Order 13673, entitled Fair Pay and Safe Workplaces, which places significant new burdens on federal contractors concerning workplace employment practices.

The executive order states that the government will promote economy and efficiency in federal procurement of goods and services by contracting with “responsible” sources that comply with federal labor laws.

The Executive Order then lists three new requirements for employers seeking to do work with the federal government:

- Employers must disclose any history of violations of 14 separate federal labor laws, which history will be considered by contracting officers in making a “responsibility finding” prior to the award of any contract;

- Employers must provide wage statements that show hours worked, overtime hours worked, any additions to or deduction from pay, and whether a worker is classified as an independent contractor; and

- Employers must agree to limit the use of pre-dispute arbitration clauses.

While these three requirements seem completely unrelated in terms of their effect on federal contracting, the one unifying factor is that they all represent a huge burden on any employer wanting to do business with the federal government.

As part of the executive order, the President directed the Federal Acquisition Regulation Council (FAR Council) and the U.S. Department of Labor to issue rules and guidance for the imple-



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mentation of the new requirements.

The new rules, which are over 800 pages long, are phased in beginning Oct. 25, with some requirements not taking effect until April, 2017.

The first, and by far most burdensome and controversial, part of the executive order is the requirement for contractors and subcontractors to disclose any history of “labor law violations” over the three year period prior to bidding on a contract.

The Executive Order lists 14 federal labor laws – the Fair Labor Standards Act, the Occupational Safety and Health Act, National Labor Relations Act, Title VII, Americans with Disabilities Act, Age Discrimination in Employment Act, Davis Bacon Act, Service Contract Act, Family Medical Leave Act, and a few lesser-known federal laws and executive orders – for which any “violations”

must be listed as part of a bid.

A federal contracting officer will then evaluate the contractor’s history to determine if it qualifies as a “responsible” bidder. The officer can rule that a bidder is responsible and eligible to bid, that it has a history of violations but could be deemed responsible if it takes certain remedial action, or that it is not responsible, in which case it could be debarred from bidding.

This process is full of uncertainty, subjectivity and room for dispute. The issue of what is a violation is a contentious threshold issue and promises to give rise to lots of litigation. For example, is a case that is settled a violation? What about an initial determination that is not final? In addition to these issues, the whole standard for what makes a contractor “responsible” is open to debate.

The order and the guidance require the contracting officer to determine if a contractor’s violations are “serious, willful, repeated and pervasive.” While the guidance tries to establish definitions for these phrases, it is still unclear how this process will work.

This Executive Order and the related rules and guidance are a massive new pile of bureaucracy and red tape aimed at government contractors. The idea that this is supposed to promote efficiency and economy in federal contracting is truly laughable. Contractors will be struggling with how to comply with these requirements for years to come as many of the unanswered questions in the rules get settled through litigation. The one thing that is certain is that these rules will make bidding on federal contracts more complicated and burdensome and will provide much work for contracting officers and attorneys.