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President Issues Executive Order on Preference for Hiring American Workers for Government Contracts

On August 3, 2020, President Trump issued Executive Order No. 13940 ("EO"), which builds on several prior EOs which have discussed preferences for American workers performing work on U.S. government contracts. This preference has seen a highlighted position due to (a) the current administration's positions on immigration and foreign workers; (b) the current economic situation; and (c) the impacts of the Novel Coronavirus COVID-19 Pandemic and its impacts. The President's action in issuing the EO was spurred by reports that the Tennessee Valley Authority was planning to lay off around 100 U.S. IT workers and outsource those positions to overseas companies.

Finding that the use of temporary workers takes work away from American workers and impacts national security, the President has ordered that each executive agency head which enters into contracts is required to review the respective agency's contracts for fiscal years 2018 and 2019 (the Federal fiscal year runs from October 1st to September 30th of the following year) to determine their performance, inclusive of subcontracts, so that they can determine: "..., to the extent practicable, performance of contracts (including subcontracts) awarded by the agency in fiscal years 2018 and 2019 to assess...":

1. Whether those contractors (and subcontractors) utilized temporary foreign workers on contracts performed in the United States, and, if so,
    1. the nature of the work;
    2. whether this impacted opportunities for U.S. workers; and
    3. what, if any, impacts there may be to national security.
2. Whether contractors (inclusive of subcontractors) "outsourced" or performed government contracts services (not provided goods or other types of work, at least as the EO is written) in foreign locations that had previously been performed in the United States, and, if so,
    1. whether this impacted or otherwise reduced U.S. citizen job opportunities; or
    2. affected United States workers eligible for assistance under the Trade Adjustment Assistance program which arose out of the Trade Act of 1974; and
    3. What, if any, impacts there may have been on national security as a result of such "offshoring."

Where an agency head concludes that any such contracts had a negative impact to the U.S. economy or workers due to such foreign labor hiring or offshoring, or otherwise impacts national security, the agency head is obligated to make suggestions on how to reduce these impacts and/or improve the U.S. economy and efficiencies associated with federal procurements and helping national security.

While not likely achievable (particularly in this world of COVID), the agencies are supposed to submit within a mere 120 days of the EO's August 3rd date a report to the OMB summarizing the findings and

results of these reviews and recommending any corrective actions to institute such recommendations and associated timelines to so effectuate them.

Perhaps more critical to most government contractors is the 45 day deadline imposed by the EO in which the Secretaries of Homeland Security and Labor have to

...take action, as appropriate and consistent with applicable law, to protect United States workers from any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites (including third-party job sites), including measures to ensure that all employers of H-1B visa holders, including secondary employers, adhere to the requirements of section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)).

What precisely this vague and broad language will result in remains a mystery. At the very least, one can foresee implications ranging from a further effort to reign in the H-1B visa program to an attempt to fully preclude the use of foreign visa holders from working in any way on domestic (or overseas) government contracts for services, as being two possible outcomes. As critically, given the present administration's significant efforts to tamp down immigration and the employment of foreign workers, the potential for regulations being promulgated which not only have these affects but also offer much wider ranging impacts is very possible. It bears further noting that the likelihood that DHS and DOL successfully develop and promulgate any formal response or regulations under this EO in 45 days is, at best, unlikely, if not dubious. The possibility for an interim rulemaking, while possible, would likely result in prompt judicial action to enjoin the applicability thereof, but only time will tell.

Conclusion

With its issuance, the President's latest EO appears to create more questions than it answers. While its articulated reason is clear, the protection of American workers and national security, the practical aspects of these concerns lacks much in the way of real fact. There are few widely reported cases of impacts caused by the employment of legal (visaed) workers in the United States and even lesser known cases where the real national security was impacted. That being said, it will depend upon the actions of the President and his administration (the Agency heads) over the coming months, that will ultimately result in any definitive action.

For now, government contractors (and subcontractors) – particularly those in the IT and other commonly off-shoring service industries – would do well to read this EO and remain diligent and cognizant of further rulemakings and regulatory efforts in the coming months. Depending upon the outcome of the impending presidential election, there may or may not be cause for concern or further diligence. Again, only time will tell.