

2014: A 'Year of Executive Orders' Affecting Federal Contracting

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As we look back over 2014, most people, regardless of political affiliations, can agree that President Obama, in some fashion, adhered to his 2014 State of the Union Address where he promised that 2014 would be a "year of action." For federal contractors, however, that "year of action" presented itself as a "year of Executive Orders," several of which further complicated the procurement process and magnified the legal obligations of federal contractors and subcontractors in 2015 and beyond.

In case the "year of action" passed you by too quickly, here is a brief recap of the Executive Orders and Presidential Memoranda impacting the federal contracting arena:

- **Minimum Wage—\$10.10:** On February 12, 2014, the President signed Executive Order 13658—"Establishing a Minimum Wage for Contractors." Beginning January 1, 2015, the hourly minimum wage will increase from \$7.25 to \$10.10 for workers employed under federal construction and service contracts. On October 7, 2014, the United States Department of Labor ("DOL") issued the Final Rule implementing Executive Order 13658. The Final Rule clarified that the new minimum wage will apply only to covered federal contracts for which the solicitation is issued on or after January 1, 2015.
- **Pay Secrecy Policies:** On April 8, 2014, President Obama signed Executive Order 13665—"Non-Retaliation for Disclosure of Compensation Information." Executive Order 13665 amended Executive Order 11246 by adding language prohibiting federal contractors from discharging or discriminating against employees or applicants because the employees or applicants disclose, inquire about, or discuss compensation with others. Additionally, on September 17, 2014, the DOL published a proposed rule that would prohibit federal contractors and subcontractors from firing or otherwise discriminating against employees for discussing, disclosing, or inquiring about compensation with other employees. The comment period closed on December 16, 2014. A Final Rule is expected sometime in early to mid-2015.
- **Equal Pay Report:** Also on April 8, 2014, the President issued a Presidential Memorandum, "Advancing Pay Equality Through Compensation Data Collection" which directed the DOL to propose a rule requiring federal contractors and subcontractors to disclose compensation information, broken down by sex and race, to the DOL. In August 2014, the DOL's Office of Federal Contract Compliance Programs ("OFCCP") issued a Notice of Proposed Rulemaking which, as presently drafted, would require federal contractors and subcontractors who employ more than 100 employees to submit an Equal Pay Report each year in addition to the required EEO-1 Report. The comment period was extended through January 5, 2015. No Final Rule exists at this time.
- **Sexual Orientation / Gender Identity:** On July 21, 2014, President Obama signed Executive Order

13672, amending prior Executive Orders 11478 and 11246 concerning Equal Employment Opportunity protection and extending non-discrimination protection to employees on the basis of sexual orientation and gender identity. The OFCCP published the Final Rule on December 9, 2014. Effective April 8, 2015, federal contractors must update their Equal Employment Opportunity statement to include protection against discrimination on the basis of sexual orientation and gender identity.

- **Fair Pay and Safe Workplaces:** On July 31, 2014, the President signed Executive Order 13673—"Fair Pay and Safe Workplaces." Perhaps the most controversial and burdensome Executive Order affecting federal contractors, Executive Order 13673 requires federal contractors, at the time of bid solicitation for contracts worth \$500,000 or more, to disclose certain federal and state labor law violations committed during the previous three-year period. The contracting officer will not award a contract to a company unless the contracting officer determines the company is "a responsible source that has a satisfactory record of integrity and business ethics." Furthermore, a newly created position, the "Labor Compliance Advisor," will have the power to determine whether a company should be disbarred from further contracts for committing serious, repeated, willful, or pervasive labor law violations.

In addition to reporting its own labor law violations, the federal contractor must require its subcontractors to disclose their labor law violations from the past three years where the subcontract to the federal contract exceeds \$500,000. Before awarding a subcontract, the federal contractor must evaluate the information provided and determine whether the subcontractor is "a responsible source that has a satisfactory record of integrity and business ethics." Unfortunately, the federal contractors' obligations are not complete once they receive a contract—rather, federal contractors must update their disclosures and seek the same information from their subcontractors every six months.

Other sweeping changes imposed by Executive Order 13673 include: (i) a "Complaint and Dispute Transparency" provision, which prohibits federal contractors with contracts exceeding \$1 million from entering into pre-dispute arbitration agreements with employees for Title VII-related claims, and (ii) a "Paycheck Transparency" provision, which requires contractors to provide employees with pay-related disclosures at each pay period, including information on the number of hours worked, overtime hours, pay rate, and additions to or deductions from pay.

Final Rules have not been proposed at this time and are not expected until late 2015. The construction industry has many allies who have voiced their opposition to Executive Order 13673 and who will participate in the rulemaking process and advocate for the construction industry. In the meantime, it may be worthwhile for federal contractors to start tracking their labor law violations now, even though not legally obligated to do so. Once Final Rules are issued, the burdens on contractors will be extensive, confusing, and tedious. To get a leg-up on the process, it may be worth the effort to get a general understanding now of what your obligations may be in 2015 and beyond.

Conclusion

Last year certainly was a "year of action" for President Obama. Unfortunately for federal contractors, it resulted in numerous Presidential actions and orders that further muddle the procurement process and place even greater burdens on companies seeking federal work. Heed this advice: before bidding on the next federal project, consult with legal counsel who is well informed of how these changes impact your contract so that you understand your legal obligations. If 2014 was the "year of action," 2015 is certain to be the "year of enforcement."

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