Construction Industry Round Table

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Regulatory News

8/26/2016 – Administration Issues Final "Blacklisting" Rule on Workplace Compliance

On Thursday, August 25, the Administration issued a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13673, "Fair Pay and Safe Workplaces", along with the Department of Labor (DOL) simultaneously releasing final "Guidance" to federal agencies on its application [Site as: FAC 2005-90, FAR Case 2014-025]. The highly controversial rule has already been challenged in court, for its overreaching broad approach which may violate fundamental Constitutional rights such as due process. CIRT, ABC, AGC and other design/construction community organizations have joined business groups in opposing the dubbed "blacklisting rule" as it worked its way through the process.

In July 2014, President Obama signed E.O. 13673 to require prospective federal contractors to disclose labor law violations and give agencies guidance on how to consider labor violations when awarding federal contracts. Critics quickly referred to this action as "Blacklisting" for its witch-hunt nature holding contractors at risk (barred from future federal contracts) for even unresolved or pending claims, while expecting the prime contractors to collect all potential violations from their subcontractors to be in compliance. Under the '*guilty until proven innocent*' rule, prospective contractors will be required to disclose any violation (even minor ones) of the 14 basic workplace protections, including wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections. Contractors that win contracts will also be required to give their employees the necessary information each pay period to verify the accuracy of their paycheck. The final version removes the requirement that prime contractors would have to report on their subcontractor's violations over a three period, instead making the subs directly responsible to report that to the federal agencies.

Notwithstanding some of the changes made in the final version, the rule is still extremely burdensome and potentially unconstitutional. If, for example, a claim is made to the NLRB and the preliminary finding is adverse to the firm, while the case is on appeal. . . the rule would require it to be reported as a labor violation, obliterating the firm's opportunity to fully use its legal remedies. Whether, given this serious flaw, the court reviewing the rule will "stay" implementation of the new regulation, or the House and Senate passed National Defense Authorization Act bills for fiscal year 2017 that would exempt defense contractors from this rule/order is passed and signed, remain to be seen. If neither occurs, the rule will begin a step-by-step phased-in process starting on October 25, 2016 for prime contractors, and then expanding to include subcontractors and longer reporting periods.