PILIERO MAZZA PLLC
ATTORNEYS AT LAW

888 17TH STREET, NW, 11TH FLOOR
WASHINGTON D.C. 20006
PHONE 202 857-1000
FAX 202 857-0200
WWW.PILIEROMAZZA.COM

PilieroMazza Client Alert

July 2, 2015

Analysis of the Federal Acquisition Regulatory Council's Proposed Rule to Implement Executive Order 13673 "Fair Pay and Safe Workplaces"

On May 27, 2015, the Defense Department, General Services Administration and National Aeronautics and Space Administration announced the Federal Acquisition Regulatory Council's proposed rule to implement Executive Order 13673 "Fair Pay and Safe Workplaces" (EO), dated July 31, 2014. Together with the proposed Federal Acquisition Regulation (FAR), the Department of Labor (DOL) published proposed guidance (collectively, "Proposed Rules"), defining many terms set forth in the EO and beginning to establish a framework of expectations. PilieroMazza addressed the requirements of the EO and identified prospective concerns in its Legal Advisor article "The Impact of the Fair Pay and Safe Workplaces Executive Order on Contract Procurement." While some of questions about the EO and its implementation have been answered in the Proposed FAR and DOL regulations, many of the concerns still remain.

The premise of the EO is to improve contractor compliance with labor laws and to increase efficiency and cost savings in Federal contracting by requiring contractors to disclose violations of 14 labor laws and associated state laws in the three-year period prior to submitting a bid or proposal and to update these disclosures semi-annually in SAM.

Contracting officers, in consultation with agency labor compliance advisors (LCAs), consider the disclosures as part of their decision to award a contract or exercise an option. These requirements apply to contracts over $500,000. Although the fundamental underpinnings of the EO continue to be questioned, there are also significant concerns about the impact and burden the Proposed Rules will have on contractors. Below are some of the highlights of the Proposed Rules and why they might matter to your business.

As an initial matter, when submitting an initial bid or proposal, only the violation history—without any detail or mitigating circumstances—is reported. This raises questions about whether contracting officers will be inclined to give less consideration to those contractors who have one or more labor violations simply to avoid the administrative process that would follow in the full responsibility determination phase should the contractor become an apparent awardee. It is only during the responsibility determination phase of the apparent awardee that the contracting officer consults with the agency LCA and asks the contractor to provide information regarding the specific circumstances of the disclosed violation history. The LCA must render a recommendation that the contractor: (i) has a satisfactory record; (ii) could be found to have a satisfactory record with additional assistance; or (iii) does not have a satisfactory record and the agency suspending and debarring official should be notified.

Second, the Proposed Rules set forth broad definitions of what types of violations must be disclosed and the severity of the violation, possibly subjecting a contractor to the loss of a contract before a labor issue is fully adjudicated. The EO requires contractors to report whether there has been an

administrative merits determination, civil judgment, arbitral award or other decision rendered against the contractor in the last three years.

The Proposed Rules define an administrative merits determination as any determination made by an enforcement agency such as the DOL, OSHA, EEOC, NLRB, or state agencies. Examples include a WH-56, "Summary of Unpaid Wages" from the DOL, a letter indicating violations of Section 6 and/or 7 of the FLSA, a letter or notice assessing civil monetary penalties, an order from an ALJ, an OSHA citation, an imminent danger notice, a notice of abatement, a show cause notice from OFCCP, a letter of determination of reasonable cause or civil action filed by the EEOC, or a complaint from the Regional Director of the NLRB, to name a few examples. Contractors must report these "violations" even if the contractor is challenging the determination, can still challenge the determination or the determination is otherwise subject to further review.

The Proposed Rules presume that if an agency provides the contractor the opportunity to state mitigating circumstances at some point during the process, there should be little issue with the fact that a contractor is required to characterize a labor issue as a violation prior to fair adjudication. However, the concern is that the initial disclosure will influence contracting officers to refrain from awarding a contract to contractors before it has the opportunity to set forth any mitigating circumstances. The Proposed Rules are also silent as to how the DOL will interpret the frequent instances where the agency failed to include the appropriate contract clauses or wage determinations in the contract, resulting in a violation. DOL typically asks contractors to sign a WH-56 in those instances, even though back wages were owed at no fault of the contractor.

Once information is submitted regarding a violation, the LCA must consider (i) whether any violation is considered "serious, repeated, willful or pervasive"; (ii) the number of violations; (iii) remedial measures taken by the contractor; (iv) whether the contractor is adhering to labor compliance agreements or remedial measures; (v) whether the contractor is negotiating in good faith a labor compliance agreement; and/or (vi) other factors as the LCA sees fit.

The Proposed Rules provide some degree of clarity about what it means to have a serious, willful, repeated or pervasive violation. However, some of these standards again fail to employ sound due process and rely on agency discretion. For example, a serious violation can be a fine of $5,000, back wages of $10,000 or injunctive relief, but it is not clear whether a DOL withholding request on a contract would be considered injunctive relief, something that happens often when investigations coincide with the end of a contract term.

A serious violation might also include seemingly neutral policies like a height and weight requirements that has a discriminatory impact—a determination that would be left to agency discretion. A violation might be considered willful if a DOL investigator decides to expand an investigation period for longer than 2 years, a manager fails to investigate a complaint of harassment or there are repeated violations. There is no specific number of violations that might initiate a finding that violations are pervasive.

However, DOL states that violations are pervasive if a contractor's actions reflect basic disregard by the contractor for labor laws as demonstrated by pattern of serious, willful, continuing or numerous violations. For smaller companies, a smaller number of violations may be sufficient for finding of pervasiveness while for large companies pervasive violations will typically require a greater number of violations or violations affecting a significant percentage of a company's workforce. DOL is seeking guidance regarding how to better define these terms.

PILIERO MAZZA PLLC
ATTORNEYS AT LAW

Contractors must also be aware that the EO requires prime contractors to require subcontractors, at any tier, to report violations in a similar manner to the prime contractor before awarding a subcontract, or in some cases, within 30 days after the award. The Proposed Rules seek comments as to how best to manage this process and indicate that DOL is considering methods to work with subcontractors directly upon request. Prime contractors should carefully evaluate the impact that such a requirement would have on their operational responsibilities and costs.

Prior to this EO, federal labor law did not require that pay be kept in any particular manner, although employers were required to keep adequate pay records. However, the Proposed Rules require contractors with contracts over $500,000 to provide a wage statement each pay period in every paycheck to all individuals performing work on the contract subject to applicable wage statutes, not just employees. The statement must list the hours worked, overtime hours, pay and additions to or deductions from pay. Overtime hours contained in the statement must be broken down by the period in which the overtime was earned (most likely weekly as required by the FLSA), which may be different from the way your company currently displays overtime on a pay stub. If employees are exempt, a contractor must notify the individual of the exempt status and independent contractors must be provided a document, separate and apart from an independent contractor agreement, that notifies the individual of his or her independent contractor status prior to the start of work performance. This notice must be provided each time the IC is engaged to perform work under a contract and does not indicate that the person is classified correctly under DOL or IRS guidelines. All notices must be provided in languages other than English if a significant portion of the work force is not fluent in English.

The Proposed Rules state that the intent is to minimize the burden on small business by limiting the disclosure requirements to contracts over $500,000 and by limiting the amount of information that must be disclosed semi-annually.

The goal is to create some consistency with agency LCAs and to develop a process for DOL to work cooperatively with companies to prevent violations. While these aspirations are certainly a step in the right direction, it will also be important to understand the Proposed Rules and how they impact your business, whether large or small.

If you have specific concerns about how the Proposed Rules will impact your business, you may want to consider submitting comments. Regardless, the three year look-back period makes it imperative that you and your counsel understand the EO and the proposed rules so that you are better prepared when the final rules are issued and the EO is fully implemented.

Please don't hesitate to contact Pamela Mazza or Nichole Atallah at (202) 857-1000 if you have any questions about this analysis.

Very truly yours,

Pamela Mazza
Nichole Atallah

PilieroMazza PLLC