

**IMPACT OF OBAMA
ADMINISTRATION'S LABOR
AND EMPLOYMENT POLICIES
ON GOVERNMENT
CONTRACTORS**

June 18, 2009

GIBSON, DUNN & CRUTCHER LLP

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Today's Presenters

- **William J. Kilberg**
- **Karen L. Manos**
- **Jason C. Schwartz**

Today's Topics

- New labor requirements under the Stimulus Bill
- Mandatory disclosure rule for contractors
- New Executive Orders that affect labor and employment
- Immigration issues

The Stimulus Bill

- The American Recovery & Reinvestment Act of 2009 (“ARRA”)
- \$787.2 Billion in government spending and tax cuts, delivered through a variety of mechanisms
- Two significant labor issues:
 - Expansion of Davis-Bacon Act prevailing wages
 - New whistleblower protections

Stimulus—Davis-Bacon (cont.)

- Current Davis-Bacon Act FAR Clause (22.403-1):
“The Davis-Bacon Act provides that *contracts* in excess of \$2,000 *to which the United States or the District of Columbia is a party* for construction, alteration, or repair (including painting and decorating) of *public buildings or public works* within the United States, shall contain a clause that no laborer or mechanic *employed directly upon the site of the work* shall receive less than the prevailing wage rates as determined by the Secretary of Labor.”

Stimulus—Davis-Bacon Wages

- Section 1606 of the Stimulus Bill:
“All laborers and mechanics employed by contractors and subcontractors on *projects funded directly by or assisted in whole or in part* by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor....”

Stimulus—Davis-Bacon (cont.)

- Additional application of prevailing wages:
 - Under § 1705: Projects financed under renewable energy and power transmission grants
 - Under § 1601: Projects financed with proceeds of:
 - Clean renewable energy bonds and energy conservation bonds
 - Qualified school construction bonds
 - Qualified zone academy bonds
 - Any recovery zone economic development bond

Stimulus—Whistleblower Protection

- Section 1553 of the Stimulus Bill:
 - Applies to any non-federal employee of an employer receiving “**covered funds**,” which are those delivered through a contract, grant, or other vehicle where the stimulus bill provides “some of the funds”
 - Covered employees include:
 - Employees of contractors, subcontractors, grantees, or recipients of stimulus funds;
 - Employees of state and local governments with respect to “covered funds”; and
 - Employees of contractors and subcontractors of state and local governments with respect to “covered funds”

Stimulus—Whistleblower Protection

Protected disclosures—Section 1553(a):

- Gross mismanagement of an agency contract or grant relating to covered funds
- Gross waste of covered funds
- Substantial and specific dangers to public health or safety related to covered funds
- An abuse of authority related to the implementation or use of covered funds
- A violation of law, rule, or regulation related to an agency contract or grant relating to covered funds

Stimulus—Whistleblower Protection

- Internal disclosures
- Administrative process for evaluating whistleblower claims
- Other Procedural Provisions:
 - Burden of Proof
 - Judicial Review
 - Statute of Limitations
 - Waiver of Rights

Mandatory Disclosure Rule

- Took effect 12/12/2008
- Revised Federal Acquisition Regulation clause 52.203-13, Contractor Code of Business Ethics and Conduct
- Requires
 - More extensive Code of Business Ethics & Conduct and Business Ethics Awareness & Compliance Program and Internal Control System
 - Disclosure of criminal offenses, false claims and significant overpayments
 - Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions

Contractual Requirement to Disclose

“The Contractor shall **timely disclose**, in writing, to the agency **Office of the Inspector General (OIG)**, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of **this** contract or any subcontract thereunder, the Contractor has **credible evidence** that a principal, employee, agent or subcontractor has committed –”

Contractual Requirement to Disclose (Cont'd)

- A violation of 18 U.S.C. involving fraud, conflict of interest, bribery, or gratuity violations; or
- A violation of the civil False Claims Act
- Limited to contracts containing FAR 31.205-13
 - *i.e.*, were awarded on or after 12/12/2008, are worth over \$5M and have period of performance longer than 120 days
- No exemption for commercial item contracts or contracts performed outside the U.S.

Contractual Requirement for an Internal Control System

- Contractor must establish and maintain an internal control system that includes **timely disclosure** to the **IG** and CO, “whenever in connection with the award, performance, or closeout of **any** Government contract performed by the Contractor or a subcontractor thereunder, the Contractor has **credible evidence** that a principal, employee, agent or subcontractor of the Contractor has committed”
 - A violation of 18 U.S.C. involving fraud, conflict of interest, bribery, or gratuity violations; or
 - A violation of the civil False Claims Act

Contractual Requirement for an Internal Control System (Cont'd)

- Limited to contracts containing FAR 52.203-13
 - But, business ethics awareness and compliance program not applicable to small businesses or commercial item contracts
- Disclosure obligation applies until 3 years after **final payment**

Suspension or Debarment

“**Knowing failure** by a **principal**, until 3 years after final payment on **any** Government contract awarded to the contractor, to timely disclose to the **Government**, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, **credible evidence** of —”

- A violation of 18 U.S.C. involving fraud, conflict of interest, bribery, or gratuity violations;
- A violation of the civil False Claims Act; or
- A **significant overpayment**, other than overpayments resulting from contract financing payments

Suspension or Debarment (Cont'd)

- Applies regardless of FAR 52.203-13
- No duty to notify IG of overpayment under FAR 52.203-13; must notify “Government” to avoid potential suspension or debarment under FAR 9.4
- The drafters note that there already exists a contractual obligation to disclose overpayments under various Prompt Payment clauses
- Failure to disclose significant overpayment is new cause for suspension/debarment
- DOJ letter suggests disclosure of significant overpayment avoids need to determine if there is credible evidence of criminal offense

Defining Key Terms

- “Timely”
 - Allows reasonable time to complete a “preliminary investigation”
 - Clock starts upon:
 - Award of contract with FAR 52.203-13 for contractual requirement to disclose;
 - Award of contract with FAR 52.203-13 and implementation of internal control system; or
 - December 12, 2008 for suspension or debarment

Defining Key Terms (Cont'd)

- “Credible evidence”
 - Higher standard than “reasonable grounds to believe” that was used in proposed rule, “implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government”
 - Consider probativeness, facts & circumstances, and potential defenses
 - Top management decision with legal advice
 - Document the basis for decision not to disclose

Defining Key Terms (Cont'd)

- “Knowing”
 - Not defined, but appears to require actual knowledge
 - Preamble: “The FAR Councils rejected the suggestion for adding ‘or should have known.’”
 - “... principals are only required to disclose what they know”
 - “With regard to the term ‘knowing failure to disclose’ the ‘knowing’ refers to the **failure to disclose...**”

Defining Key Terms (Cont'd)

- “Principal”
 - FAR 2.101(b)(2): “*Principal* means an officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division or business segment; and similar positions)”
 - Preamble: “[T]his definition should be interpreted broadly, and could include compliance officers or directors of internal audit, as well as other positions of responsibility”

Defining Key Terms (Cont'd)

- “Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code”
 - 100+ references to “fraud” in Title 18
 - Almost any procurement-related offense can be charged as a mail or wire fraud violation (18 U.S.C. §§ 1341 and 1343)
 - 21 conflict of interest/bribery/gratuity provisions (§§ 201 – 206)
 - 18 U.S.C. § 208, “Acts affecting personal financial interest”
 - 18 U.S.C. § 207, Post-employment restrictions
 - Conspiracy involving fraud, conflict of interest, bribery or gratuity
 - Qualified by “in connection with the award, performance, or closeout of the contract or subcontract”

Defining Key Terms (Cont'd)

- Civil False Claims Act, 31 U.S.C. §§ 3729-33
 - Substantial uncertainty in law and conflicts among federal circuits
 - Fraud Enforcement and Recovery Act of 2009
 - Preamble: “Genuine disputes over the proper interpretation of the civil FCA may be considered in evaluating whether the contractor knowingly failed to disclose a violation of the civil FCA”
 - “... the mere filing of a qui tam action ... is not sufficient to establish a violation of the statute, nor does it represent, standing alone, credible evidence of a violation”

Defining Key Terms (Cont'd)

- “Final payment”
 - FAR 52.216-7, “Allowable Cost & Payment”
 - ¶ (h) *Final payment*. “Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (d)(5) of this clause, and upon the Contractor’s compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs....”
 - FAR 4.804, “Closeout of contract files”
 - FAR 4.804-5(b)(8) requires CO to prepare “Contract Completion Statement” including number of final payment voucher

Defining Key Terms (Cont'd)

- “Full cooperation”
 - Defined as “disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors’ and investigators’ request for documents and access to employees with information.”

Summary of New Executive Orders

- President Obama has signed four important new Executive Orders:
 - E.O. 13494—Economy in Government Contracting
 - E.O. 13496—Notification of Employee Rights
 - E.O. 13495—Nondisplacement of Qualified Service Contract Workers
 - E.O. 13502—Project Labor Agreements (“PLAs”) for Federal Construction Projects

E.O. 13494—Economy in Government Contracting

- Unallowable Costs—The cost of efforts to persuade employees “to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively”
- Implementing rules and regulations must be adopted within 150 days (by June 29, 2009). The Order is effective immediately, but only applies to “contracts resulting from solicitations issued *on or after the effective date of the action taken by the FAR Council*”

E.O. 13496—Notification of Employee Rights

- Will require contractors to post conspicuous notice of employees' rights under the federal labor laws
- Secretary of Labor to issue regulations within 120 days of the order regarding the information to be included, as well as the form and size of the posting

E.O. 13495—Worker Nondisplacement

- *Application:* Follow-on, service contracts for the performance of “*same or similar*” services at the “*same location*”
- Right of first refusal for positions for which employees are “qualified”
 - Does *not* apply to managerial and supervisory employees
 - Does *not* apply to predecessor’s poor performers
 - Does *not* force the new contractor to terminate existing employees with at least 3 months of service

E.O. 13502—Project Labor Agreements

- Agencies may require the use of PLAs—pre-hire collective bargaining agreements covering terms and conditions of employment—in connection with large construction projects (total cost is \$25M or more)
- Would bind all contractors and subcontractors
- Within 180 days, Director of the Office of Management & Budget is to make a recommendation regarding broader use of PLAs

Immigration Issues

- Implementation of the E-Verify Program—now set to be implemented by September 8, 2009
- Immigration Enforcement Priorities

Questions & Thank You

- Questions
- Thank you for joining us!

Today's Presenters

Please don't hesitate to contact our presenters if you have additional questions:

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