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Labor Law

On Oct. 15, Bloomberg BNA published a BNA Insights by Eric Conn of Conn Maciel Carey PLLC that was critical of the recently proposed regulations and guidance to implement President Obama's Executive Order 13,673, ''Fair Pay and Safe Workplaces.'' The following presents another side of the debate over the Executive Order.

Executive Order 13,673 — Fair Pay and Safe Workplaces: Proposed Rule Will Protect Responsible Government Contractors, Taxpayers and Workers

BY DEBORAH BERKOWITZ

Eric Conn's Oct. 15 BNA Insights article, titled ''An OSHA Rule in FAR Clothing: Proposed Government Contractor 'Blacklisting' Rule,'' contains several misrepresentations about President Barack Obama's Executive Order 13,673, ''Fair Pay and Safe Workplaces,'' and the proposed implementing Federal Acquisition Regulatory (FAR) Council regulations and Department of Labor guidance (45 OSHR 1051, 10/15/15).

The erroneous premise of the article is that their ''likely effect'' will be to ''intensify the scrutiny to which [presumably responsible] contractors will be subjected'' and increase their costs, without accomplishing the objectives of ''ferreting out irresponsible contractors.''

None of these fears is realistic. Far from ''blacklisting'' government contractors, the proposed regulations and guidance will reward responsible contractors and level the procurement playing field, while also protecting taxpayers and employees. The point of the Executive Order is not to bar companies from federal contracts—it is to make sure every company with a federal contract respects the legal rights of its employees.

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This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.

The Executive Order, issued in 2014, requires prospective federal contractors to disclose labor law violations, because taxpayer dollars should not reward corporations that repeatedly break our nation's labor and employment laws. With this Executive Order, the president is helping ensure that all hardworking Americans get the fair pay and safe workplaces they deserve.

Though the business lobbies try to portray this Executive Order as one that ''blacklists'' corporations from competing for government contracts, the opposite is actually the truth. One of the goals of this order is to give companies that have violated the law a chance to let the government know how they abated hazards or mitigated the violations. Companies with labor law violations will be offered the opportunity to receive early guidance on whether those violations would be potentially problematic so that they can remedy any legal problems that exist. The clear objective of the Executive Order, therefore, is not to bar companies from federal contracts—it is to make sure every company with a federal contract treats its workers fairly. It is to protect workers, taxpayers and law-abiding businesses.

The Current Contractor Responsibility Review System Is Broken

The federal government is currently required by law to contract only with ''responsible'' companies that have a satisfactory record of performance, integrity and business ethics. But the present contracting system does not effectively review the responsibility records of companies before awarding contracts, nor does it adequately impose conditions on violators that encourage them to reform their practices.

There is a long and unfortunate history of federal agencies granting contracts to unscrupulous employers who flout federal labor law. This history has been well-documented in the reports by both the Government Accountability Office and the Senate HELP Committee referenced in the DOL guidance and FAR proposals. Even companies with the most egregious violations of workplace laws continue to receive federal contracts, as

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the government awarded $81 billion in federal contracts to these companies in fiscal year 2012 alone.

Moreover, there is a well-established correlation between labor law violations and poor contract performance. According to an analysis by the Center for American Progress, of the companies that committed the worst workplace violations over a five-year period and later received federal contracts, one in four had significant performance problems. These problems included fraudulent billing, cost overruns, performance problems and schedule delays costing taxpayers billions of dollars.

Contractors that violate wage and occupational safety and health laws have little incentive to improve their practices. On the other hand, honest and responsible contractors who invest the time, attention, capital and reputation to comply with federal labor laws are placed at a competitive disadvantage compared to their unscrupulous brethren.

The Executive Order will help encourage law-abiding companies that respect their workers to bid for federal contracts by ensuring that they are not put at a competitive disadvantage in comparison to bad actors that reduce their overall contract costs by unscrupulous practices such as paying wages lower than required by law or cutting corners on workplace safety.

The proposed FAR regulation and DOL guidance will create a fair and consistent process by which the federal government can ensure all government contractors are subject to uniform standards for the evaluation of their labor law compliance records. The goal of the proposed regulations and guidance is increasing the government's ability to contract with companies that comply with labor laws, not blacklisting.

Few Employers Will Be Affected by the Disclosure Obligations

Not all government contractors will be affected by the Executive Order. Only companies bidding on executive branch contracts with an estimated value exceeding $500,000 are covered. The Executive Order will affect about 25,775 contractors, which is only about 5 percent of the 500,000 firms registered in the federal government's database of contract and grant recipients (SAM).

The new system will simply require law-abiding companies to check a box to certify compliance with applicable labor laws, a requirement no different from how these firms currently report on a number of responsibility matters, including tax delinquency and contract fraud.

If the prospective bidder reaches the point in the procurement process where the government contracting officer must determine whether the company is sufficiently ''responsible'' to be awarded the contract, the company must then disclose whether there have been any administrative merits determinations, civil judgments or arbitration awards rendered against it within the preceding three-year period for labor law violations.

After a contract has been awarded, contractors must semi-annually update the information provided about their own labor law violations and obtain the same information for covered subcontracts.

No one has a ''constitutional right'' to bid on or perform a government contract. It is not ''unfair'' for the government to impose responsibility standards on its contractors. Indeed, it is entirely fair for the government to do what it must to ensure that our tax dollars do not subsidize sub-standard jobs and employers without adequate respect for the rule of law.

The FAR regulation recognizes that the objective of the Executive Order is ''to increase the Government's ability to contract with companies that are compliant with labor laws, thereby increasing the likelihood of timely, predictable, and satisfactory delivery of goods and services.''

The Executive Order and proposed implementing regulations stand for and are intended to further the simple goal of ensuring that in its role as steward of taxpayer funds, the government is not underwriting lawbreaking. Holding contractors that seek federal contracts to the modest and straightforward standard that they obey the law and correct legal violations is not only *not* a burden—it is the least taxpayers have a right to expect. The certification requirements in the EO and regulations are designed to give contracting officers the information they need to determine that bidders aren't breaking the law.

Bids Will Not Be Rejected Nor Contracts Rescinded on the Basis of Mere Allegations

Conn repeats the claim, often made by opponents of the proposed regulations, that they will unfairly result in adverse actions based on the reporting of ''mere allegations of violations,'' including Occupational Safety and Health Administration citations that have not yet been upheld in the administrative review process.

First, administrative merits determinations are more than mere ''alleged violations.'' Government enforcement agencies—and OSHA in particular—reach these determinations only after conducting a full and thorough investigation and concluding that there has been a violation.

OSHA inspectors provide employers with many opportunities to learn about the nature of the violations during the inspection and citation process—for example, during the ''walk around'' evidence collection and the pre-decision ''closing conference'' before OSHA makes final decisions about penalties or deadlines for abatement.

By the time a citation is issued, a violation is no longer a ''mere allegation.''

Further, *bids will not be rejected ''based on mere allegations.''* The Executive Order makes clear that bidders and contractors can present mitigating evidence in response to allegations—and contract awards will not be based on an administrative merits determination alone.

The Executive Order unequivocally states that ''. . .in most cases a single violation of law may not necessarily give rise to a determination of lack of responsibility. . . .'' The proposed DOL guidance likewise recognizes that labor law violations that ''could be characterized as inadvertent or minimally impactful'' are purposely excluded from consideration. The proposed regulations further require that ''most disclosures, *such as minor violations of workplace safety and wage-and–hour requirements*, should not trigger specific actions beyond those that would otherwise be directed by DOL or the contracting agency to correct the violation.''

Moreover, affected bidders will be able to submit evidence of mitigating circumstances to procurement officials, including whether they are contesting the citation, appealing the determination or whether they have already corrected the issue.

Even after administrative merits determinations or OSHA citations have been reported, no contractors will be disqualified merely as a result of such disclosures. Instead, after full consideration of mitigating circumstances, and if the violations are serious enough to warrant corrective action, contractors will be given the opportunity to remedy them by entering into a labor compliance agreement with the appropriate enforcement agency.

OSHA Citations Will Not Inevitably Lead to Findings of Non-Responsibility

Conn repeats opponents' often-stated contention that contractors with OSHA violations will be particularly harshly affected by the labor law violation disclosure requirements since "upward of 85 percent of OSHA citations are initially characterized as serious, repeat or willful." They contend this means that "virtually all OSHA citations fall within the category of labor law violations that the FAR/DOL proposals identify as the types of violations that most seriously threaten the outcome of a responsibility determination."

These fears are misplaced and the statistics grossly exaggerated. First, only a small percentage of employers have serious OSHA violations. Most employers who are eventually cited by OSHA for violations willingly comply when violations are found. These processes would not be affected by the Executive Order.

More significantly, only a small percentage of disputed OSHA violations end up as cases that actually go to a full administrative hearing. Because OSHA's long-standing procedures provide for multiple layers of discussion and review with employers, very few employers actually appeal OSHA violation determinations—typically fewer than one out of 10 cited employers.

For example, for the two most recent comparable fiscal years (fiscal year 2013-14), according to the Federal Occupational Safety and Health Review Commission, an average of only *59 cases* went to a full hearing before an administrative law judge—less than 0.2 percent of all inspections in which Federal OSHA inspectors issue violations.

Labor Compliance Agreements Will Not Lead to OSHA Circumventing or Exceeding Its Existing Powers

The Executive Order and proposed regulations emphasize the importance of labor compliance agreements as critical steps in achieving remediation and corrective action—enabling bidders and contractors with reported labor law violations to be deemed responsible.

Opponents of the proposed regulations falsely contend that the emphasis on corrective action will lead to unfairly burdening contractors who have reported "serious, repeat or willful violations." They claim OSHA will allegedly be able to require employers to prematurely enter into immediate labor compliance agreements, thereby circumventing their right to wait for the outcome of a legal challenge or force them to enter into agreements with onerous terms not available under OSHA regulations.

OSHA has long-standing procedures encouraging cited employers to enter into settlement agreements at every step in the inspection, citation and abatement process. Indeed, the vast majority of employers already either accept the violations and correct them promptly, or agree to enter into such settlement agreements, and there is no evidence that the Executive Order will change this behavior. Procurement officials will not need to hold any employers "hostage" to do what they were already predisposed to do, in order to obtain federal contracts.

Nor will the Executive Order deprive contractors of the opportunity to contest citations or file appeals before entering into labor compliance agreements. Bidders and contractors will have the chance to present mitigating circumstances, such as contests or appeals, to procurement officials, and labor compliance agreements will only come into play if the reported violations warrant corrective action in light of all the evidence.

Costly New Administrative Systems Will Not Be Required to Identify and Track Disclosures

Opponents of the Executive Order and proposed implementing regulations mistakenly argue that the new system will create an undue burden on private companies that will increase compliance costs. But the simple fact is that only the small subset of contractors that have outstanding violations of applicable labor laws will be subject to a heightened responsibility review process.

Reporting of workplace compliance under the proposed regulations will function in largely the same way as is currently required for other legal violations, such as tax delinquency and contract fraud. Companies will simply self-report by checking a box to certify whether they are in compliance.

Conclusion

Opponents' fears concerning reporting and disclosure and the responsibility determination processes under the Executive Order are overstated, to say the least. The federal government has long been required to do business only with responsible contractors, and the Executive Order and its proposed regulations and guidance will play the important role of helping more contractors come into compliance with workplace protections, rather than denying contracts to contractors or blacklisting them. Cynical attempts to mischaracterize the Executive Order should get the scant attention that they deserve.

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