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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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The Fair Pay & Safe Workplaces (Blacklisting) Executive Order: What Federal Construction Contractors Need to Know

On August 25, 2016, the Federal Acquisition Regulation (FAR) Council and U.S. Department of Labor (DOL) released a final rule and guidance, respectively, to implement the "Fair Pay and Safe Workplaces" Executive Order 13673, commonly called the Blacklisting Executive Order (EO). AGC has fought against and informed members about this unfounded, unnecessary, unworkable and unlawful EO since the president signed it in 2014. The association has been and will continue to pursue all options—legislative and legal—to block this EO and its regulations.

The Blacklisting Rules in a Nutshell

Under the rule and guidance, both prime and subcontractors must report violations of 14 federal labor laws before contract award and again every six months after contract award on federal contracts (not federally-assisted contracts) exceeding $500,000. Prime contractors would also be responsible for evaluating the labor law violations of subcontractors at all tiers. The rule also includes changes to employee arbitration agreements and paycheck notices. The requirements of the final rule will be phased in over the next several months and years.

AGC's Efforts Fighting for Construction Contractors against the Blacklisting Executive Order

AGC has fervently represented the interests of the construction contracting industry before Congress, federal agencies, and the White House on the harmful impacts of this EO. To do so, AGC:

- Lobbied dozens of members of Congress, their staff and key congressional committees, organizing AGC members to contact Capitol Hill, participating in roundtable discussions, taking meetings, and testifying itself;
- Engaged leaders of federal contracting agencies—U.S. Army Corps of Engineers, Naval Facilities Engineering Command, General Services Administration and Department of Veterans Affairs—at their offices and AGC conferences;
- Met with the White House Office of Management and Budget;
- Submitted 35-pages of extensive comments to the FAR Council and DOL opposing the EO and representing contractor concerns;
- Raised contractor concerns at the U.S. Small Business Administration roundtable on the EO, which SBA included in its comments;
- Surveyed its members to help gauge the impact of the rule on contractors
- Held webinars, workshops and conferences that highlighted AGC concerns to inform the industry.
- Successfully included provisions in the 2017 Defense Bill to prohibit application of the EO, which is pending further congressional action;
- Worked with a coalition of industry associations to coordinate legislative advocacy efforts;
- Taken efforts to advance timely and well-reasoned legal action.

AGC's Continued Efforts to Inform Construction Contractors: Complimentary WebED Sept 7 and More!

AGC will hold a webinar—complimentary for AGC members, $49 for non-members—on September 7 from 2:00 to 3:00 p.m. ET. Register today. AGC created this document to help contractors prepare for compliance, as AGC continues to advocate against its further implementation. AGC will update this document as it continues its comprehensive review of the regulation, which will be available at http://www.agc.org/blacklisting.

The Phase-In Timeline:
Effective Date Deadlines for Compliance

The FAR Council's final rule sets forth a host of dates at which contractors will be subject to various mandates. The chart below sets forth several key effective dates for several of those mandates.

Effective Dates	Rule Segment	Brief Explanation
October 25, 2015	Reporting period for labor law decisions	The Rule phases in the reporting period for disclosing various labor law violations from one to three years. On October 25, 2016, contractors will have to disclose their labor law violations rendered since October 25, 2015. Beginning on October 25, 2018, contractors will be responsible for disclosing their applicable labor violations rendered during the previous three years.
September 12, 2016	DOL "preassessment" of contractor labor records	The Rule and Guidance invite contractors—prime and subcontractors—to contact DOL for a "preassessment" of a contractor's labor law violations beginning September 12, 2016. Before voluntarily submitting records to DOL, contractors should be fully aware of the reporting requirements and are cautioned to seek legal review prior to submission.
October 25, 2016 to April 24, 2017	Prime contractors bidding contract solicitations above $50 million must disclose labor records	Prime contractors are required to follow the requirements of labor law violation disclosure portion of the Rule for federal solicitations for contracts expected to exceed $50 million issued on or after October 25, 2016.
October 25, 2016	Arbitration agreement restrictions take effect	Contractors with federal contracts of $1 million or more are prohibited from requiring their employees to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act, or any torts related to sexual assault or harassment.
January 1, 2017	Paycheck transparency portion of the rule takes effect	All contractors—on covered contracts and subcontracts that exceed $500,000—must provide employees with pay stubs and notice if they are independent contractors.
April 25, 2017	Prime contractors bidding contract solicitations above $500,000 must disclose labor records	Starting April 25, 2017, prime contractors are required to follow the requirements of the labor law decisions disclosure portion of the Rule for solicitations issued on or after October 25, 2016 for prime contracts expected to exceed $500,000, and resulting contracts.
October 25, 2017	Labor record disclosure Rule applies to Subcontractors; Prime contractors to flow down requirements	Subcontractors are required to follow the labor law violation disclosure requirements of the Rule for subcontracts exceeding $500,000. Prime contractors will flow down the applicable FAR clause and impose the relevant requirements. It is at this juncture that prime contractors will ultimately have to preform responsibility determinations of their potential and existing subcontractors.

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Disclosure of Applicable Labor Law Violations to Federal Agencies

Under the FAR Council Final Rule, contractors and subcontractors will have to report applicable labor law violations to federal agencies during the solicitation process and after contract award twice a year. These requirements are phased-in over time for prime contractors and subcontractors based on the estimated contact value of the solicitation. If a contractor is not deemed "responsible" based on its labor law record, it could: (1) sign a labor compliance agreement with a labor enforcement agency; or (2) be recommended for suspension or debarment proceedings.

PRIME CONTRACTORS: Prime contractors will have to begin reporting their applicable labor law violations through the System for Awards Management (SAM) on solicitations for contracts estimated to exceed:

- $50 million issued on or after October 25, 2016;
- $500,000 issued on or after April 25, 2017.

For all solicitations issued between October 25, 2016, and October 24, 2017, prime contractors will NOT be responsible for reviewing their prospective or actual subcontractors' labor law violations.

Prime contractors will be responsible for reviewing their prospective or actual subcontractors' labor law violations—at all tiers—on:

- Solicitations for prime contracts estimated to exceed $500,000 on or after October 25, 2017; AND
- Where potential and actual subcontracts exceed $500,000*
    - *Except for subcontracts for commercial-off-the-shelf (COTS) products (furniture, fixtures, equipment, electronics, etc.).

Review the Phase-In Timeline on page 2 for another way of understanding these timelines.

Prime contractors—especially those that bid federal contracts above $50 million—should immediately begin the process of establishing programs within their companies to collect the applicable records and to transmit them in a carefully reviewed manner to federal agencies.

Prime contractors are also required to direct their prospective subcontractors to submit labor law decision information to DOL. Primes must consider DOL analysis and advice of subcontractors as primes make responsibility determinations on their prospective subcontractors. The rule notes that "[s]ubcontractors must update the information semiannually." However, the rule does not explain to whom subcontractors will report semiannually—prime contractors or DOL.

SUBCONTRACTORS: Subcontractors at all tiers will have to begin reporting their applicable labor law violations on subcontracts:

- Estimated to exceed $500,000, except for subcontracts for COTs; AND
- Stemming from solicitations for prime contracts issued on or after October 25, 2017.

These reports will occur once during the solicitation process and twice annually after subcontract award. The subcontractors will report the information to DOL. If DOL has not completed its review of subcontractor labor compliance records within three business days, subcontractors would seemingly submit the records to prime contractors.[1] Subcontractors should begin the process of establishing programs within their companies to collect the applicable records and to transmit them in a carefully reviewed manner to DOL or prime contractors.

Applicable Labor Law Violations

Before they can receive a contract, prospective contractors must disclose violations from the reporting period (the previous three years, once the rule is fully phased in) of 14 workplace protections, including those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections. Specifically, the following federal laws and executive orders are covered:

- the Fair Labor Standards Act;
- the Occupational Safety and Health Act;
- the Migrant and Seasonal Agricultural Workers Protection Act;
- the National Labor Relations Act;
- the Davis-Bacon Act;
- the Service Contract Act;
- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act of 1973;
- the Vietnam Era Veterans' Readjustment Assistance Act;
- the Family and Medical Leave Act;
- Title VII of the Civil Rights Act of 1964;
- the Americans with Disabilities Act of 1990;
- the Age Discrimination in Employment Act of 1967; and
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

While the EO also covers equivalent state laws, only violations of occupational safety and health "State Plans" that have been formally approved by OSHA must be reported initially.

[1] See footnote 3 for more information.

Information about Labor Law Violations Reported

If a contracting officer initiates a responsibility determination and the contractor has indicated it has labor violations that resulted in administrative merits determinations, civil judgments, or arbitral awards during the reporting period, the contractor will be asked for the following information:

- The labor law violated;
- The case number, inspection number, charge number, docket number, or other unique identification number;
- The date rendered; AND
- The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision.

The information above will be publically reported and available in SAM. Contractors are also allowed to submit evidence of mitigating circumstances, remedial measures and subsequent compliance with labor laws to contracting officers. That mitigating/remedial information will not be made public, unless the contractor specifically requests it to be so.

The Applicable Reporting Period for Labor Law Violation Disclosure

Prime contractors and subcontractors must disclose decisions regarding labor violations that were rendered against them within the 3-year period preceding the date of the disclosure. This 3-year disclosure period will be phased in during the first years of implementing the final rule, so that no contractor or subcontractor need disclose any decisions regarding labor violations that were rendered against them before October 25, 2015.

Applicable Entity that Must Report Labor Law Violations

The requirement to represent and disclose labor law violations applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates. A corporate division is part of the corporation. If the offeror is not itself a separate legal entity, each concern participating in the joint venture must separately comply with the representation and disclosure requirements.

Post-Award Labor Law Violation Reporting

After contract award, prime and subcontractor must report any new labor law violations at least twice a year. The prime contractor may use the six month anniversary date of contract award, or may choose a date before that six-month anniversary.

The Determination of Whether a Contractor is “Responsible”

Under the FAR, the federal government may only consider and award contracts to “responsible” contractors. As such, the FAR requires federal procurement agency contracting officers (COs) to

determine whether interested contractors are responsible—considering a variety of factors, including the contractor's record of integrity and business ethics in context of labor violations—during the solicitation process. This is something that routinely happens in the federal contracting arena, generally with little fanfare. Nevertheless, under the under this EO, this process and the potential for fanfare may change.

DOL/PROCUREMENT AGENCY REVIEW OF PRIME CONTRACTORS' LABOR LAW VIOLATIONS

The FAR Council final rule requires agency labor compliance advisors (ALCAs)—senior agency officials at each contracting agency who will have primary responsibility for implementation of the EO—to provide COs with analysis and advice, including a recommendation, to COs on the responsibility of a potential prime contractor based on its labor law violation record. An ALCA's advice must include one of the following recommendations about the prospective prime contractor's record of labor law compliance:

- The record supports a finding, by the CO, of a satisfactory record of integrity and business ethics, i.e., the contractor is responsible;
- The record supports a finding, by the CO, of a satisfactory record of integrity and business ethics, but the prospective contractor needs to commit, after award, to negotiating a labor compliance agreement or another acceptable remedial action;
- The record could support a finding, by the CO, of a satisfactory record of integrity and business ethics, only if the prospective contractor commits, prior to award, to negotiating a labor compliance agreement or another acceptable remedial action;
- The record could support a finding, by the CO, of a satisfactory record of integrity and business ethics, only if the prospective contractor enters, prior to award, into a labor compliance agreement; or
- The record support a finding, by the CO, of a satisfactory record of integrity and business ethics, and the agency suspending and debarring official should be notified in accordance with agency procedures.

The ALCA provides this recommendation in order to inform the CO's assessment of the prospective contractor's integrity and business ethics, as the CO ultimately makes the determination as to whether a prime contractor is "responsible," not the ALCA.[2] And, similarly, the CO ultimately selects which of these five options best reflects the course of action necessary for the potential prime contractor to be considered for contract award.

SMALL BUSINESS PRIME CONTRACTORS

In the event a CO finds a prospective small business prime contractor to be "nonresponsible" in the context of this regulation, the CO must refer that small business to the U.S. Small Business Administration for a Certificate of Competency. There is no mention of such special treatment for small business subcontractors when DOL recommends or prime contractors determine a small business subcontractor to be nonresponsible.

[2] The final rule instructs COs to request that ALCAs provide their assessments within three business days of the request, or another time period determined by the CO.

DOL/PRIME CONTRACTOR REVIEW OF SUBCONTRACTORS' LABOR LAW VIOLATIONS

Subcontractors must report their labor law violations directly to DOL before and after contract award, just as prime contractors. The Department will provide subcontractors with an "assessment" of its labor record and provides a recommendation for prime contractors. The subcontractor must represent to the prime contractor that it has disclosed all labor violations to DOL. However, the DOL assessment of the prospective subcontractor is not directly transmitted to the prime contractor, but rather returned to the subcontractor. The subcontractor, in turn reports to the prime contractor on the DOL assessment.

In the event the subcontractor either (1) disagrees with the DOL assessment/recommendation; or (2) DOL has not provided its assessment within three business days, then the subcontractor may have to submit the information to the prime contractor.[3] In either, case, the prime contractor is ultimately charged with making the determination as to whether a subcontractor is "responsible."

Assuming DOL transmits a timely assessment to the subcontractor, the subcontractor will notify the prime contractor of DOL's assessment. If the subcontractor disagrees with that assessment—which could include the recommendation for signing or altering labor compliance agreements—then the subcontractor must provide the prime contractor with information about all disclosed labor law violations that have been determined to be serious, repeated, willful and/or pervasive by DOL and any other information the subcontractor deems necessary to show it is responsible.

With the realistic possibility that DOL will not be able to provide timely assessments or recommendations of subcontractors, then prime contractors should have the capabilities to internally preform similar reviews as ALCAs and COs when applicable subcontractors begin making their disclosures in October 2017. That stated, a prime contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or labor compliance agreements.

The final rule sets forth a timeline for prime contractor responsibility determinations. That timeline instructs that prime contractors must compete their assessment:

- For subcontracts awarded within 5 days of the prime contract award or that become effective within five days of prime contract award, no later than 30 days after subcontract award;[4] OR
- For all other subcontracts, prior to subcontract award.

[3] The rule states, that "[i]f DOL does not provide advice to the subcontractor within three business days of the subcontractor's disclosure of labor law decision information . . . and DOL did not previously advise the subcontractor that it needed to enter into a labor compliance agreement . . . the [prime] Contractor may proceed with making a responsibility determination using available information and business judgment." The rule requires prime contractors to have their subcontractors submit relevant labor law violation information to DOL. However, it does not appear to affirmatory state that subcontractors must or may submit such relevant information to prime contractors, even in the event of DOL failing to meet its deadlines. Prime contractors, seemingly, would have to use information publically available through the Federal Awardee Performance and Integrity Information System if the subcontractor refused to provide further information.

[4] This language appears to allow prime contractors to conduct their assessments not only after prime contractor award but also after subcontract award.

Most prime construction contractors will likely fall under the first category when it comes time to review potential subcontractors, as subcontract awards typically come after the prime contract is awarded in construction. Again, prime contractors are ultimately responsible for the assessment of all subcontractors—at all tiers—with subcontracts exceeding $500,000, except those for COTS items. The rule allows for subcontractor flowdown of these responsibility determinations.

PRIME CONTRACTOR AND SUBCONTRACTOR PRE-ASSESSMENT

There also is now a process by which contractors can voluntarily go to DOL for pre-assessment of their violations before bidding on contracts. The FAR rule states that contractors should encourage prospective subcontractors to seek such a pre-assessment from DOL. However, before voluntarily submitting records to DOL, all contractors should be fully aware of the reporting requirements and are cautioned to seek legal review prior to submission.

Labor Law Compliance Agreements

As noted above, an ALCA can recommend and a CO can request that a prime contractor enter into "labor compliance agreements" to enable that contractor to be considered for contract award. A contractor may enter into such an agreement with one or more enforcement agencies to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or "other related matters." AGC is very concerned that such nebulous agreements place contractors in a difficult place when negotiating with enforcement agencies—completely disinterested in the procurement or delivery of a federal construction contracts—in order to be considered for contract award. There appears to be no limitation on:

- The duration of such agreements;
- The frequency of such agreements;
- The depth of training, mitigation or remedial action required;
- The frequency or depth of any recordkeeping or reporting they might require;
- The circumstances under which enforcement agencies might require a firm to go so far as to engage a third-party monitor; or
- The "related matters" enforcement agencies might require a firm to address.

NOTIFICATION OF & CHALLENGING THE NEED FOR A LABOR COMPLIANCE AGREEMENT

If an ALCA recommends that a prospective prime contractor needs to enter a labor compliance agreement, whether before or after contract award, the CO must provide notice of that recommendation to the prospective prime contractor. A prospective prime contractor must respond as indicated as to whether it will or will not negotiate. The failure of such a contractor to enter into a labor compliance agreement or take other remedial action within six months of contract award "may result in the application of a contract remedy," seemingly termination, but that remains undefined. There rule does not include a path to challenge or object to negotiating or signing a labor compliance agreement.

Potential for Whistleblower Participation

Members of the public will be able to contact ALCAs with information they feel should have been disclosed about contractors' labor violations. Contact information for all ALCAs will be made available on the DOL's website. As such, contractors must be certain that they are accurately reporting their labor compliance records, or subject themselves to potential whistleblower actions. That stated, only information regarding labor law violations that resulted in administrative merits determinations, civil judgments, or arbitral awards will be considered, defined in the DOL guidance. Mere allegations of violations will not be considered.

Paycheck Transparency

The final rule requires covered contractors and subcontractors to provide wage statements that contain: 1) hours worked, 2) overtime hours, 3) rate of pay, 4) gross pay, and 5) an itemization of each addition to and deduction from gross pay. If a significant portion of the contractor's workforce is not fluent in English, the wage statement must also be provided in the language(s) other than English in which that portion or those portions of the workforce are fluent. The wage statement provided to workers who are exempt from overtime pay under the Fair Labor Standards Act need not include a record of hours worked if the contractor informs the individuals of their exempt status. The wage statement must be provided every pay period.

The rule also requires contractors to provide workers who are independent contractors a notice informing them that they are being treated as independent contractors. The notice must be separate from any independent contractor agreement with the individual. It must be provided at the time that the independent contractor relationship is established, before the worker performs any work under the contract, and again each time the worker begins work on a new contract.

Pre-Dispute Arbitration Agreements

The final rule requires contractors with contracts exceeding $1 million to agree that the decision to arbitrate claims arising under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, be made only with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. This requirement also applies to subcontractors with subcontracts exceeding $1 million, except for subcontracts for the acquisition of commercial items. Exceptions are provided for employees covered by collective bargaining agreements and for independent contractors under certain circumstances.

More to Come & Your Questions

There are more facets of this rule with which contractors will need to become familiar, including the balancing test federal agencies and prime contractors will have to consider when making responsibility determinations, what type or number of violations are considered serious, repeated, pervasive, or willful, the details of what types of violations are considered reportable under the definitions of administrative merits determinations, civil judgments and arbitral awards. AGC will continue to provide more information as it continues to review this regulation and hear member concerns. Please send your

questions to AGC's Regulatory Counsel Jimmy Christianson at christiansonj@agc.org, as we will prepare a Frequently Asked Questions document based on feedback received.

Government Resources

DOL has also compiled a list of resources on the EO. Contractors can find those through the links below:

- Prime Contractor Disclosures
- Subcontractor Disclosures
- Paycheck Transparency
- Mandatory Arbitration
- Preassessment
- ALCA Directory
- FAQs
- Additional Resources