

ARTICLE

USDA Withdraws Proposed Rule and Certification Regarding Compliance With Labor Laws

February 6, 2012

On February 6, 2012, the U.S. Department of Agriculture (USDA) withdrew its Direct Final Rule and Proposed Rule (both issued on December 1, 2011), which would have added a new clause to the Agriculture Acquisition Regulation (AGAR) entitled "Labor Law Violations." See 77 Fed. Reg. 5714 (withdrawing Direct Final Rule); 77 Fed. Reg. 5750 (withdrawing Proposed Rule).

As drafted, the clause would have required USDA contractors to certify that they are "in compliance with all applicable labor laws" and that, to the best of their knowledge, all of their subcontractors (at any tier) and suppliers are also in compliance with all applicable labor laws. See 76 Fed. Reg. 74722; 76 Fed. Reg. 74755. If no adverse comments were received by the USDA before January 30, 2012, this clause would have taken effect immediately on February 29, 2012. Effective today, however, USDA has announced that it would withdraw both the Direct Final Rule and Proposed Rule in their entirety.

As noted in our December 5, 2011 Client Alert, USDA originally issued the rule as a "Direct Final Rule," based on the Agency's apparent belief that the rule represented a "non-controversial action" as well as its expectation that the rule would generate no adverse comments. Notwithstanding these expectations, USDA received a number of adverse comments from a wide array of interested parties, including farming groups, contractors, human resources professionals, universities and a number of different trade associations such as the Council of Defense and Space Industry Associations (CODSIA), an association of six trade associations that are actively involved in

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matters relating to federal procurement policy - the Professional Services Counsel, TechAmerica, the National Defense Industrial Association, the American Council of Engineering Companies, the U.S. Chamber of Commerce and the Aerospace Industries Association.

These adverse comments urged USDA to either withdraw the rule or to follow standard notice-and-comment rulemaking to address a number of concerns, including for example:

- The lack of any clear justification or need for the USDA rule, in light of the existing enforcement powers entrusted to other federal agencies, as well as the existing web of enforcement mechanisms available to those agencies under U.S. labor laws;
- The potential burdens imposed on USDA contractors, who would be required to adopt processes to enable them to certify compliance by themselves as well as their subcontractors with myriad different labor laws;
- The potential burden on USDA contracting officials, who would be required to review reports of noncompliance and determine whether corrective action is warranted, without having the resources, training or expertise necessary to interpret and enforce the myriad labor laws covered by the rule; and
- The potential ambiguities in the rule, which as originally drafted did not define which specific labor laws were potentially "applicable," what constitutes a "formal allegation or formal finding" of noncompliance (or who is responsible for "determining" whether a noncompliance exists), or the scope of "suppliers" covered by the rule.

As a result of these and other adverse comments, USDA announced that it has decided to withdraw the Direct Final Rule. In addition, USDA also withdrew the Proposed Rule, without explanation. In withdrawing these rules, USDA did not give any indication whether it plans to re-issue the rule at a later time. However, Wiley Rein will continue to be on the lookout for any future developments in this area, as part of its ongoing monitoring of issues of interest to the procurement community.