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ALERT

U.S. Department of Agriculture to Require all Contractors to Certify That They (and Their Subcontractors and Suppliers) are in Compliance with Labor Laws or Risk Being Subject to the False Claims Act

December 5, 2011

On December 1, 2011, the U.S. Department of Agriculture (USDA) issued a proposed rule which would add a new clause to the Agriculture Acquisition Regulation (AGAR) entitled "Labor Law Violations." *See* 76 Fed. Reg. 74722; 76 Fed. Reg. 74755. This new clause would require every USDA contractor 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.

In addition to this broad certification requirement, contractors would also be responsible for notifying their contracting officer "when formal allegations or formal findings of non-compliance of labor laws are determined." Unlike the certification requirement, which clearly extends to subcontractors or suppliers, it is not entirely clear whether this reporting obligation likewise applies to violations by subcontractors or suppliers. It is also not clear who "determines" that a non-compliance has occurred-for example, whether the reporting obligation only applies to final administrative actions or formal complaints by an agency, or to other types of complaints.

Finally, in addition to imposing these new obligations on contractors, the proposed rule states that "[t]he Department of Agriculture will vigorously pursue corrective action against the contractor and/or any tier subcontractor (or supplier) in the event of a violation of labor law

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made in the provision of supplies and/or services under this or any other government contract." Moreover, the rule explicitly states that the USDA "considers certification under this clause to be a certification for purposes of the False Claims Act."

As currently drafted, this mandatory clause would be required in all USDA contracts exceeding the simplified acquisition threshold, including all contract options, as well as contracts for commercial items or COTS (for which there are no exceptions). It should be noted that in addition to issuing this new clause as a proposed rule, the USDA also published the clause as a "direct final rule," which would allow the rule to take effect immediately on February 29, 2012, if no adverse comments are received by USDA before January 30, 2012. In the event that USDA receives adverse comments (*i.e.,* comment that suggests the rule be changed or withdrawn), the direct final rule will be withdrawn and the proposed rule will then be subject to the standard notice and comment procedures. All comments received will then be addressed in a subsequent final rule.

Although USDA has stated that it "views this as a non-controversial action and expects no adverse comments," this rule may pose significant challenges for prime and higher-tiered contractors that may not have insight into the labor practices of their subcontractors and suppliers. While no immediate action is required for USDA contractors (except for those who desire to submit comments), contractors should nevertheless be prepared to comply in the event that the direct final rule takes effect on February 29, 2012. At a minimum, USDA contractors should be prepared to "flow-down" the requirements of the clause to their subcontractors and suppliers, and to develop processes for identifying and reporting instances of non-compliance.