

ALERT

DOL Seeks Comments on Minimum Wage for Contractors Proposed Rule

June 19, 2014

On June 17, 2014, the U.S. Department of Labor's (DOL) notice of proposed rulemaking (NPRM) "Establishing a Minimum Wage for Contractors" was published in the Federal Register seeking to implement the increased minimum wage requirements for federal contractors from Executive Order (EO) 13658, which we previously discussed here. DOL's proposed rule establishes standards and procedures for implementing and enforcing the minimum wage protections of the EO and heavily borrows definitions, standards, procedures, and enforcement mechanisms from the Davis-Bacon Act (DBA), Service Contract Act (SCA), and the Fair Labor Standards Act (FLSA). Comments on the proposed rule are due on July 17, 2014.

Key Features of the Proposed Rule:

- **Applicability of Executive Order 13658.** The proposed rule reiterates that the four types of contracts covered by the EO minimum wage requirement include: (1) contracts for construction under the DBA; (2) service contracts under the SCA; (3) concession contracts; and (4) contracts in connection with federal property or lands and contracts related to offering services for federal employees, their dependents, or the general public. As it relates to service contracts under the SCA, the EO minimum wage requirement applies to both procurement and non-procurement prime contracts that exceed \$2,500.

The relevant definitions in the proposed rule are consistent with those used in the FLSA, SCA, DBA, and Federal Acquisition Regulation (FAR). For instance, the proposed rule adopts the FLSA definition of "tipped employee" and incorporates FAR

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definitions of “contract,” “contractor,” and “option.” The proposed rule defines “contract and contract-like instrument” collectively, which is interpreted broadly. Not only is a “contract” a bilateral instrument, but it encompasses awards, notices of awards, purchase orders, and contract modifications. Moreover, the term “contractor” refers to a prime contractor and all of its first or lower-tier subcontractors working on the covered contract.

Pursuant to the proposed rule, the EO minimum wage will not apply to certain contracts either because of timing or contract type. For instance, contracts awarded under solicitations issued prior to January 1, 2015 are not subject to the minimum wage requirement. For this reason, the EO minimum wage applies only to new contracts and replacements for expiring contracts when such contract results “from a solicitation issued on or after January 1, 2015 or a contract that is awarded outside the solicitation process on or after January 1, 2015.” Likewise, the EO minimum wage will not apply to subcontracts unless the prime contract results from a solicitation that was issued on or after January 1, 2015. Thus, the requirements of the EO would not apply to contracts entered into pursuant to solicitations issued prior to January 1, 2015, the automatic renewal of such contracts, or the exercise of options under such contracts. In addition, the proposed rule notes that only truly automatic renewals of contracts or exercises of options lacking bilateral negotiations fall outside the scope of the EO.

Furthermore, the EO and proposed rule exclude certain types of contracts and other awards from the EO minimum wage coverage. For instance, the EO minimum wage requirement does not apply to grants, employment contracts where an individual is providing direct services to a federal agency, or contracts that entail manufacturing or furnishing of supplies to the Government under the Walsh-Healey Public Contracts Act.

- **Contractor Obligations.** Contractors must pay their workers no less than the applicable minimum wage on covered contracts—\$10.10 beginning January 1, 2015. Beginning January 1, 2016, and annually thereafter, the Secretary of Labor will determine the applicable minimum wage increase based on the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). However, if a federal or state wage law requires a higher minimum wage than the EO, the employee must be paid the higher wage. For instance, if the applicable SCA or DBA wage determination is higher than the EO minimum wage requirement, the contractor is not excused from paying the employee the higher rate. The proposed rule provides that prime contractors and subcontractors are required to insert the minimum wage contract clause in all lower-tier subcontracts. In addition, the proposed rule provides the frequency of payment, and requires contractors to pay their workers “no later than one pay period following the end of the regular pay period in which such wages were earned or accrued.” There remains some question, however, as to whether and how contractors will be able to seek changes in wages from the Government when the Secretary of Labor raises the minimum wage.

Of particular note, DOL has taken an aggressive position that contractor personnel are entitled to EO minimum wages when performing work on or “in connection with” a covered contract. Consequently,

contractors must pay their workers the applicable EO minimum wage not just when the employees are directly chargeable to a covered contract, but also when they perform “other duties necessary to the performance of the contract.” For a SCA-covered contract, this broad interpretation will likely result in the minimum wage requirements applying to certain “back office” or indirect personnel – personnel that in many cases are not covered by the wage and fringe benefit requirements of the SCA. As a result, it is essential that contractors have adequate documentation showing: (1) work performed that is subject to the EO; and (2) work that has been performed that is not covered by the EO or that is not “necessary” to contract performance.

The proposed rule also requires contractors and subcontractors to create and maintain records for three years, which must be available for inspection by the DOL. These records must contain the following: (1) background information of each worker, such as the worker’s name, address, and security number; (2) the rate(s) of wages paid; (3) the number of hours worked by each worker; and (4) deductions made, if applicable.

- **Remedies and Enforcement.** Contractors may be exposed to significant sanctions for failing to pay workers the applicable EO minimum wage. These sanctions include, but are not limited to, civil action by the DOL or debarment. Workers, contractors, labor organizations, and contracting agencies may file an oral or written complaint with the DOL alleging a violation of the EO or its implementing regulation. Not surprisingly, the proposed rule also prohibits contractors from discharging or discriminating against a worker for filing a complaint or instituting a proceeding related to the EO.

As noted above, the deadline to submit comments is July 17, 2014 and DOL intends to issue a final rule by October 1, 2014. Notably, the DOL NPRM seeks to amend title 29 of the Code of Federal Regulations on Labor, not the FAR. The EO requires the FAR Council within 60 days of the Secretary of Labor issuing the EO minimum wage regulations to issue regulations in the FAR to provide for inclusion of the contract clause in federal procurement solicitations and contracts subject to the EO. Thus, contractors should also be prepared to carefully review and provide comments on the imminent FAR Council regulations.