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Executive Orders Impacting Federal Contractors

On January 30, 2009, President Barack Obama issued three Executive Orders that significantly impact federal contractors: Notification of Rights Under Federal Labor Laws, Nondisplacement of Qualified Workers Under Service Contracts, and Economy in Government Contracting. The following are highlights of those Orders.

Notification of Rights Under Federal Labor Laws

The Notification of Employee Rights Under Federal Labor Laws Order revokes Executive Order 13201 issued by former President George W. Bush on February 17, 2001, and imposes new requirements notifying employees of their rights under the National Labor Relations Act ("NLRA").¹

Qualifying government contractors must post a notice, yet to be drafted by the Secretary of Labor, during the term of a federal contract. The notice must be posted in conspicuous places in and about plants and offices where employees covered by the NLRLA engage in activities relating to the performance of a federal contract, including all places where notices to employees are ordinarily posted both physically and electronically. Within 120 days of the issuance of the Order, the Secretary of Labor will commence a rulemaking process to establish the proposed

¹ Executive Order 13201 required in part that qualifying federal contractors post a notice advising non-union employees of certain rights, including the right not to join a union and the right to decertify a union.

language of the notice. It must describe the rights of employees under federal labor laws consistent with President Obama's stated policy mission of not having government contracts interrupted by labor unrest.

The Order also specifies four new contract clauses that must be included in all qualifying government contracts and resulting subcontracts.² The clauses include, in part, an agreement to post and comply with the notice and an affirmation that the contractor will take action with respect to any subcontract as directed by the Secretary of Labor in order to enforce the contractual provisions.³

Contractors who fail to comply with the obligations set forth in the Executive Order and any accompanying rules and regulations may be penalized, in part, by having their contracts cancelled or being deemed ineligible for additional future government contracts. The Order was effective on January 30, 2009 and applies to contracts resulting from solicitations issued on or after the effective date of the rule promulgated by the Secretary of Labor's rulemaking.

² Collective bargaining agreements, purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, and contracts specifically exempted by the Secretary of Labor are exempt from the requirements.

³ Should the contractor become embroiled in a litigation with the subcontractor because of any action it was directed to take by the Secretary of Labor, the contractor may request the United States government to enter into such litigation to protect the interests of the United States.

Nondisplacement of Qualified Workers Under Service Contracts

In order to avoid the disruption of services and loss of efficiency often associated with the transfer of a government service contract, President Obama issued the Nondisplacement of Qualified Workers Under Service Contracts Order. It requires employers assuming a government service contract to offer non-management and non-supervisory employees of the predecessor employer the right of first refusal for positions for which they are qualified. Successor employers cannot make the positions available to a wider audience until a minimum 10-day right of first refusal period has been provided. The Order also includes specific language that must be included in service contracts and solicitations for such contracts.

Notably, successor contractors are able to determine the number of employees necessary for efficient performance of the contract and may elect to employ fewer employees than the predecessor contractors employed. Additionally, they are not required to offer a right of first refusal to an employee it reasonable believes, based on the particular employee's past performance, has failed to perform suitably on the job. A contractor may be ineligible for government contract awards for a period of up to three years for failure to comply with this Order. This Executive Order revokes another of President Bush's Orders issued on February 17, 2001 (Executive Order 13204). Regulations implementing this Order will be forthcoming.

Economy in Government Contracting

Many government contracts are awarded on a cost-reimbursement basis. There are a series of costs that are deemed "not allowable" or, stated otherwise, that the government will not reimburse. President Obama has created a new category of unallowable costs in the Economy in Government Contracting Order – those associated with activities undertaken to persuade employees to exercise or not to exercise the right to join a union or activities concerning the manner of exercising such a right. Examples of such costs include: preparing and distributing union campaign materials, hiring or consulting with legal counsel and consultants, holding meetings, and planning or conducting persuasive activities. Interestingly, however, costs incurred in maintaining satisfactory relations between a contractor and its employees are allowable (e.g., labor-management committees and employee publications provided they are not undertaken to persuade employees either way about unionization). Regulations implementing this Order will be forthcoming.

Please contact Farah Mollo or any other attorney at the Firm at (212) 758-7600 for additional information or if you have any questions about the content of this advisory.

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