

ALERT

FAR Council Published Interim Rule for Contractor Minimum Wage

December 16, 2014

On Monday, the Federal Acquisition Regulatory Council (FAR Council) issued an interim rule implementing the minimum wage for contractor personnel performing on, or in connection with, certain federal contracts. 79 Fed. Reg. 74,544 (Dec. 15, 2014). The FAR interim rule, and the minimum wage itself, had been ordered by Executive Order (EO) 13658 in February 2014; the Department of Labor (DOL) then published a rule as required by the EO. The FAR interim rule will serve as a companion to the DOL final rule.

Wiley Rein has analyzed EO 13658, DOL's proposed rule, and DOL's final rule this year. This alert identifies the important new provisions in the FAR interim rule and the gaps that the interim rule fills when compared to the provisions in the EO 13658 and the DOL rule. Comments on this interim rule are due February 13, 2015, which is the same date that, by their terms, the FAR interim rule and the DOL rule take effect, though the FAR interim rule notes that many federal contracts may be subject to the minimum wage before that date because agencies will have created clauses via class deviations and inserted those clauses into contracts.

First, a brief primer on the new federal minimum wage. EO 13658, the DOL rule, and the FAR interim rule (collectively, the "minimum-wage rules") require that specified minimum wages be paid to covered workers under contracts subject to the Service Contract Act (SCA), Davis-Bacon Act (DBA) and other covered contracts. The new minimum wage also must be paid to workers covered by the Fair Labor Standards Act (FLSA) who work in support of SCA- and DBA-covered contracts for at least 20% of their time. The minimum-wage rules set the wage at \$10.10 per hour for contracts awarded after January 1, 2015, with annual adjustments to be announced by DOL

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for calendar year 2016 and beyond. The minimum-wage rules cover workers performing directly on covered contracts and those performing “in connection with” such contracts—that is, personnel who support the performance of covered contracts but are not directly charged under those contracts. The minimum-wage rules exempt certain personnel from this coverage, most notably bona fide administrative, executive, and professional employees exempted by the FLSA regulations.

Now for the key points of the FAR interim rule:

- **New FAR Provisions and Clause.** The interim rule creates a new FAR subpart 22.19, Establishing a Minimum Wage for Contractors, and FAR clause, 52.222-55, Minimum Wages Under Executive Order 13658.
- **Coverage Generally.** The FAR interim rule expressly applies only to procurements (prime contracts and subcontracts) subject to the FAR. For other agreements such as concession contracts, the interim rule defers coverage to the DOL rule.
- **Definition of New Contract.** The FAR interim rule does not adopt the DOL final rule’s definition of “new contract” for determining when an existing contract should be subject to the minimum-wage rule. The FAR Council determined that the DOL final rule’s definition was inconsistent with or repetitive of existing FAR principles, such as requirements that agencies offer full-and-open competition for out-of-scope modifications to existing contracts (which would lead to an entirely new contract award). The FAR Council accordingly required that FAR 52.222-55 be included in bilateral modifications extending a contract longer than six months, and encouraged that the clause be included in indefinite-delivery/indefinite-quantity contracts with at least six months or a significant number of orders remaining, but did not otherwise require that the clause be inserted into contracts that will have been in existence when the FAR interim rule takes effect.
- **Price Adjustments.** The FAR interim rule addresses price adjustments in detail, with example calculations provided in the new FAR subpart 22.19. The interim rule requires calculating adjustments based on the actual increase in costs attributable to the minimum wage beginning with the first annual adjustment to be made effective January 1, 2016. For each year’s new minimum-wage rate, contractors should take the new rate and subtract, for each labor category, the highest of (a) the actual wage being paid to the labor category, (b) the wage required for the labor category by any applicable SCA or DBA wage determination, or (c) any applicable existing minimum wage (including those set by state or local law). Contractors will be entitled to adjustments only when this subtraction results in a difference greater than zero. Contractors may request such adjustments after the new/increased minimum wage has taken effect (i.e., after January 1 of the relevant year). This process is similar to the process for calculating price adjustments under the SCA and DBA themselves. And as with the SCA and DBA, contractors must warrant that their proposals and contracts do not include contingencies to account for potential annual increases in the minimum wage.
- **Collective Bargaining Agreements (CBAs).** Some federal contractors may have contracts that (a) will be subject to the minimum-wage rules, and (b) incorporate CBAs requiring wages below \$10.10 per hour after January 1, 2015, for some labor categories. The FAR interim rule’s terms expressly require

contractors to pay at least the minimum wage to all covered employees regardless of any CBA provisions requiring lower wages. The FAR interim rule offers no guidance on how to address these circumstances with the relevant collective-bargaining representatives, such as by negotiating revisions or addenda.

- **Workers Performing “In Connection With” a Covered Contract.** As under the DOL final rule, the FAR interim rule provides that FLSA-covered workers who spend more than 20% of their hours in a given week working “in connection with,” but not directly on, contracts covered by the SCA and DBA (and not otherwise exempt from the minimum-wage rules) are entitled to the contractor minimum wage. Contractors should note that the DOL final rule and FAR interim rule calculate the 20% figure on a workweek-by-workweek basis, rather than by using an average calculated on a monthly, yearly, or other basis.
- **Fringe Benefits.** Like the DOL final rule, the FAR interim rule forbids contractors from satisfying the minimum wage in whole or in part by furnishing fringe benefits or cash equivalents to covered employees.
- **Flowdown Requirement.** The FAR interim rule requires covered contractors to flow down FAR 52.222-55 to all subcontracts, at any tier, covered by the SCA or DBA. The interim rule makes contractors responsible for the compliance of their immediate subcontractors. The DOL final rule, in contrast, had made contractors and upper-tier subcontractors responsible for all lower-tiered subcontractors, but the FAR Council imposed more limited responsibility “due to a lack of privity” with lower-tiered subcontractors.
- **Suspension and Debarment.** The FAR interim rule provides for debarment by DOL when a contractor is found to have “disregarded” its obligations under the minimum-wage rules. Left unclear by the FAR rule is that DOL’s rule makes debarment *mandatory* in these circumstances. Separately, the FAR interim rule requires contracting agencies to consider referring contractors to agency suspension and debarment officials following “significant violations” of the FAR minimum-wage provisions and contract clause.
- **Disputes.** Under the interim rule, FAR 52.233-1, Disputes, will not apply to any disputes between the contractor, the contracting agency, DOL, or individual employees relating to the minimum-wage clause. Instead, the parties must follow the administrative procedures provided in DOL’s final rule at 29 C.F.R. § 10.51 to resolve such disputes.
- **Notice to Employees.** Like the DOL final rule, the FAR interim rule allows contractors to notify SCA-covered and DBA-covered employees of the minimum wage by posting the relevant SCA and/or DBA wage determinations. (The wage determinations will be revised to include a notice about the minimum wage.) For other employees, namely those performing in connection with covered contracts, the FAR interim rule requires contractors to post the notice published in an appendix to DOL’s final rule.

Contractors should monitor all contracts for the addition of FAR 52.222-55, understand its requirements, and ensure that their recordkeeping, employee tracking systems, and compliance procedures are adequately updated to account for these new requirements. All contractors subject to the minimum wage should consider whether they need to make at least some adjustments, because many wages in SCA and DBA wage

determinations are below the new minimum wage of \$10.10 taking effect on January 1, 2015, and these wages will not be revised specifically to equal or exceed the minimum wage.

Wiley Rein has extensive experience counseling clients on SCA and DBA compliance and is ready to assist contractors with ensuring compliance with the minimum-wage rule as well.