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ALERT

Contractor Certifications Regarding Labor Law Compliance Revived by USDA

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WHAT: The U.S. Department of Agriculture issued a proposed rule that would update the Agriculture Acquisition Regulation (AGAR) with significant new compliance obligations for the agency's contractors and subcontractors. The proposed rule would add an AGAR clause requiring contractors to certify that, as of contract award, they and their subcontractors and suppliers are complying with "all applicable labor laws." A second proposed AGAR provision would require offerors for covered contracts to disclose "specific violations" of labor laws, certify compliance with all "previously required corrective actions" for these laws, and provide regular updates on those actions during contract performance.

Readers who find that these terms sound familiar may recall USDA's similar rulemaking a decade ago, which the agency quickly withdrew, and prior administrations' pursuit of broader "blacklisting" requirements, such as the Fair Pay and Safe Workplaces implementation that was ultimately enjoined, withdrawn, and disapproved by Congress.

WHEN: USDA published these provisions in the Federal Register on February 17, 2022; the provisions appear towards the end of a larger, administrative-type proposed rule that USDA described as "align[ing] the AGAR" with changes in law and internal policy. (USDA actually first introduced the provisions last summer in an "unofficial" version of the AGAR posted to its website.) Comments on the proposed rule are due by March 21.

WHAT DOES IT MEAN FOR INDUSTRY: The entire contractor community should consider what this rulemaking might signal about a future revival of government-wide blacklisting—a possibility we noted

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last year. Meanwhile, USDA contractors and subcontractors face new compliance obligations and risks that are tangible, potentially imminent, and ill-defined. These terms raise, as explained below, both False Claims Act and de facto debarment concerns. The terms also apply broadly to prime contracts and solicitations over the simplified acquisition threshold, while flowdown-type obligations do not have a dollar threshold. This scope means that even contractors with relatively modest business in the USDA supply chain may be affected.

Thus, contractors with USDA business at any tier should consider whether to submit comments or perhaps request an extension by March 21. They should also start to consider how they might approach compliance with the proposed rule's requirements if finalized by USDA—in particular determining which company functions have information relevant to applicable labor-law obligations, and how that information can be efficiently compiled and assessed for the certifications and potential disclosures required by these new AGAR provisions. Although it is far from clear whether or when USDA will proceed with this revival of a rulemaking it withdrew a decade ago, experience from Fair Pay and similar activities suggests that contractors may wish to start soon on considering how they would move forward these efforts if the agency does finalize the rulemaking.

AGAR 452.222-70, Labor Law Violations, would be incorporated in USDA solicitations and contracts over the simplified acquisition threshold. This clause is a close copy of USDA's prior attempted rulemaking. Key terms are as follows:

- **Certification Requirement:** Contractors would be required to certify that, as of contract award, they are "in compliance with all applicable labor laws." The clause provides a list of laws (and similar obligations) ranging from generally applicable (e.g., Title VII; Occupational Safety and Health Act) to federal contractor-specific (e.g., Service Contract Act; Executive Order 11246) to "[e]quivalent State laws" that will be "defined by the Secretary of Labor in guidance." The list is non-exhaustive, though, and the proposed rule offers no standard for identifying any other "labor laws" that might be "include [d]" in the scope of this certification. The proposed rule also does not indicate when and how the Department of Labor will provide "guidance" on "equivalent" state laws.
- **Reporting Requirement:** Contractors would be required to report "if and when adjudicated evidence of noncompliance occurs." This phrasing is a change from the prior attempted rulemaking, but there is no definition of when or how a contractor should determine that "adjudicated evidence" has "occurred."
- **USDA "Corrective Action":** The clause states that USDA intends to "vigorously pursue corrective action" upon receiving notice of a labor-law violation. The proposed rule does not indicate how, when, and to what extent USDA will do so, or how its personnel will ensure consistency with the exercise of authority under the relevant labor laws by the federal and state agencies tasked with enforcing them.
- **Subcontract-Related Obligations:** The certification noted above would encompass certifying, to the best of the prime's knowledge, as to compliance by subcontractors "of any tier" and suppliers. Further, the clause requires that subcontracts include a term requiring "information" about covered labor-law violations to "be provided to the contractor," presumably for disclosure to the USDA contracting officer, although the clause is unclear on that point. (The proposed rule implicitly assumes that subcontractors will agree to send their prime/higher-tier contractors information on labor and employment issues that

in many cases may be highly sensitive and confidential.) As noted above, the clause does not limit this flowdown-type obligation by subcontract type, subcontract tier, or dollar value, leaving the prospect of expansive coverage.

- **False Claims Act Considerations:** The clause states that USDA will consider the certification to be a "certification for purposes of the False Claims Act." Among many observations, contractors may perceive risk from USDA's attempt to invoke the FCA for a certification that is both open-ended and in need of definition.

These concerns with AGAR 452.222-70 are striking given the history of this clause. When USDA attempted to promulgate basically the same clause as both a "direct final rule" and a proposed rule in 2011, it withdrew the rulemaking after receiving a negative reaction from commenters (which Wiley analyzed here). Yet despite the concerns raised a decade ago, the proposed rule features essentially the same language.

The other provision being proposed, **AGAR 452.222-71, Past Performance Labor Law Violations**, was not part of the prior USDA rulemaking, though it presents concerns as well. The provision would appear in solicitations over the simplified acquisition threshold, with "[a]ssertions pertaining to" this provision "binding and incorporated by reference into the contract." Key provisions include the following:

- **Certification Regarding Prior Violations:** Offerors would be required to certify that they, and any subcontractor, "are in compliance with all previously required corrective actions for adjudicated . . . violations" of the labor laws identified in the -70 clause, which as noted provides a list of laws that is not exhaustive.
- **De Facto Debarment Concerns:** The provision calls for the contracting officer to coordinate with "Mission Area contracting officials" to "consider any information provided and determine whether a contractor is a responsible source that has a satisfactory record of integrity and business ethics." This phrasing copies directly from the criteria in FAR 9.104-1 for a contracting officer's required determination of contractor responsibility before contract award. (The Fair Pay and Safe Workplaces executive order adapted the phrasing as well.) Such a direct linkage in this clause raises concerns that even a single labor-law violation may tend to prompt exclusion from USDA procurements on a contract-by-contract basis, without providing any (or at least meaningful) process to the contractor.
- **Ongoing Disclosure Obligations:** Contracting officers would be required to "ensure that contractors update the information provided every 6 months" and that contractors require their subcontractors to update them on the same information. This language suggests that USDA contracting officers may be tasked with the equivalent of post-violation compliance monitoring, which at a minimum seems likely to duplicate the work of federal and state agencies authorized to enforce those laws.

Taken together, these proposed obligations loudly echo the Fair Pay and Safe Workplaces executive order and regulatory implementation, which was enjoined (in relevant part) by a federal court, rescinded by a subsequent Executive Order and rulemaking, and disapproved under the Congressional Review Act, 5 U.S.C. § 801 *et seq*. (analysis of that rulemaking is available here, and implications of the rule's nullification here). Given the similarities between the USDA's proposed rule and the earlier Fair Pay implementation, it is fair to

consider whether USDA's proposed rule falls within the prohibition under the Congressional Review Act on future regulations that are "substantially the same" as the disapproved Fair Pay rule.