

# Akerman Practice Update

CONSTRUCTION

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## Legal Landscape Changes On Federal Construction Projects

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A combination of Executive Orders and changes in the Federal Acquisition Regulations (FAR) have significantly shifted the legal obligations of contractors performing work on Federal construction projects. These changes are accentuated by the anticipated burst of Federal construction projects associated with the Federal stimulus efforts.

Although some of the changes are rather benign, others such as the Business Ethics and Conduct regulations, present significant changes to the status quo. Collectively, these changes highlight the unique environment of Federal procurement, particularly in light of the consequences of non-compliance – including termination, suspension, debarment, and liability under the False Claims Act.

### Use of Project Labor Agreements on Federal Projects

President Obama signed Executive Order 13502 on February 6, 2009, permitting Federal Agencies to require the use of Project Labor Agreements (“PLAs”) on Federal construction projects. The Executive Order reverses a prohibition against PLAs adopted by the Bush Administration through prior Executive Orders. The Order is permissive and not mandatory. It only applies to projects where the total cost to the Federal Government is \$25 million or more.

However, where the agencies choose to employ a PLA, the Executive Order requires that the PLA: bind all contractors and subcontractors through appropriate bid specifications; contain guarantees against strikes, lockouts, or job disruptions; incorporate prompt and binding procedures for resolution of labor disputes; and permit

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contractors and subcontractors to compete for contracts, irrespective of whether they are parties to a collective bargaining agreement.

The National Labor Relations Act prohibits employers from entering into collective bargaining agreements with a labor union unless the union represents a majority of its employees. The “construction industry” proviso permits PLA or “prehire agreements” for construction projects. Under this proviso, PLAs control the terms of employment, such as hiring, firing, wages, benefits, and hours of work. By their terms, the PLAs apply to all contractors and subcontractors on the project irrespective of whether the particular contractor or subcontractor is a signatory to a collective bargaining agreement.

Predictably, the Executive Order has provoked substantial reaction from labor and management groups. Labor organizations have supported the Executive Order, praising its goal of stability and efficiency in the execution of Federal construction projects. Representatives of non-union groups such as ABC have criticized the Order as imposing a labor union monopoly on Federal projects. The debate reflects the broad impact of the stimulus legislation which will pour billions of dollars into infrastructure and related construction projects.

The Federal Acquisition Regulatory Council (FAR Council) is charged with developing appropriate regulations to implement the Order. In addition, the terms of the Order require the Office of Management and Budget to recommend whether the Order should be expanded to include construction projects receiving Federal financial assistance. The practical impact of the Order may in large part depend upon these regulations and recommendations. Nevertheless, the Order has the potential to substantially circumscribe the ability of non-union contractors to compete on Federal construction contracts and independently control the terms and conditions of employment for their employees.

### **Notification of Employee Rights Under Federal Labor Laws**

Executive Order 13496, issued January 30, 2009, requires all Government contracting departments and agencies (unless exempted) to incorporate mandatory provisions in their contracts requiring the contractor to post a notice regarding the rights of employees under the National Labor Relations Act. The Secretary of Labor is charged with the responsibility to prescribe the size and content of the notice.

Two features of the Order are significant. First, the Order requires that government contractors incorporate these provisions in subcontracts, thus requiring the subcontractor to comply with the Order’s requirements. Second, a government

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contract subject to the Order may be suspended, cancelled, or terminated for non-compliance with the requirements. Likewise, a non-compliant contractor may be deemed ineligible for further government contracts.

The Secretary of Labor is given principal responsibility for implementation of the Executive order, including not only the size and content of the notices, but also the investigation of complaints regarding the violation of the Order's provisions.

### **Disallowance of Employer's Costs Incurred to Counter Union Organizing**

Executive Order 13494, issued as “Economy in Government Contracting,” prohibits reimbursement of costs incurred by government contractors to counter union organizing efforts or collective bargaining activities. Such costs are deemed “unallowable” whether incurred with respect to the employees of the contractor or “any other entity.” Examples of such costs include: costs for preparation and distribution of materials; legal or consulting costs; and costs of meetings held for such purposes.

The Executive Order seeks to preserve the allowability of costs for “maintaining” labor-management relations, provided such activities are not undertaken or directed to persuading employees against union organizing or collective bargaining efforts. This Order necessarily implicates the regime of cost accounting standards and sanctions associated with cost reimbursement under Federal contracts.

### **Business Ethics and Fraud Provisions**

New FAR provisions add requirements for a written Code of Business Ethics and Conduct, an internal control system and prompt disclosure of crimes, civil false claims and overpayments by the contractor, subcontractor or their principals. Effective December 12, 2008, the new contract requirements apply to Federal prime contracts and subcontracts that require performance over 120 days or more and are in an amount over \$5 million.

The new FAR provisions implement “The Close the Contractor Fraud Loophole Act,” Public Law 110–252, Title VI, Chapter 1, enacted in 2008. That law applies to “any contract in an amount greater than \$5,000,000 and more than 120 days in duration.” The law also provides that the contractor's Internal Control System shall be established within 90 days after contract award, unless the Contracting Officer establishes a longer time period. The internal control system is not required for small businesses or commercial item contracts. But it otherwise applies to construction contracts and subcontracts.

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The new FAR provisions add new requirements to FAR clause 52.203-13, Contractor Code of Business Ethics and Conduct, which implements the new law. These new FAR provisions, in FAR clause 52.203-13, are to be included in all Federal contracts over \$5 million with durations over 120 days.

The new FAR provisions provide for the suspension or debarment of a contractor for up to three years for a knowing failure by a principal to timely disclose, in writing, to the agency Office of the Inspector General, with a copy to the Contracting Officer, certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. A principal is defined to include an owner, director or manager.

The new FAR provisions require that ALL contractors and subcontractors over \$5 million and 120 day-durations must have a written Code of Business Ethics and Conduct issued within 30 days of contract award and made available to all employees performing the contract. They also require the Contractor to promptly disclose to the Government when “the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed” a crime involving fraud, conflict of interest or bribery or a violation of the civil False Claims Act (which prohibits the knowing submission of a false claim for payment.)

For all but small business contractors and “commercial item contracts,” the new FAR provision requires that prime and subcontractors have, within 90 days of contract award, an ongoing business awareness and compliance program with an internal control system. This must include training of the contractor’s principals and employees about the company’s ethics program. The internal control system must promote discovery of improper conduct regarding Government contracts, call for periodic reviews of company business practices for improvement, have a mechanism for reporting improper conduct, and provide for timely disclosure of improper conduct to the Government.

While a Federal prime contractor may already have a business ethics program in place, a subcontractor may not have one. The prime contractor is responsible for flowing down these requirements to its subcontractors in subcontracts exceeding \$5 million and a 120-day duration. Prime contractors may need to work with subcontractors to help them become compliant with these new requirements.

### **Interim “Buy American” Regulations**

Buy American regulations have been issued on an interim basis pursuant to the American Recovery and Reinvestment Act provisions. These regulations apply to projects funded by the Recovery and Reinvestment Act. The regulations mirror and complement the regulations under the Buy American Act. Nevertheless, the interim regulations contain some noteworthy differences.

First and foremost, the Recovery Act regulations dispense with the “components” test or analysis for construction materials which contain foreign components but are assembled or manufactured in the United States. Thus, provided that the construction material is “manufactured” in the United States, the material satisfies the Buy American requirements of the Recovery Act regulations, even if the component parts are largely of foreign origin.

Second, the Recovery Act regulations express an explicit preference for formal and pre-award determinations regarding the inapplicability of the regulations for construction materials. Thus, under the Recovery Act regulations, an agency must publish in the Federal Register a detailed justification for making exceptions to the applicability of the Buy American regulations. Likewise, the regulations provide that decisions and determinations of inapplicability should be made pre-award – including those based upon the unreasonable cost of domestic construction material.

Finally, in cases making a pre-award determination of unavailability based upon unreasonable cost, the contracting officer is required to apply a price adjustment of 25% in the case of a bid incorporating foreign manufactured construction material. This adjustment is applied to the entire bid amount – not simply the portion of the bid representing the cost of foreign manufactured construction material.

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