INSIDE THE MINDS™

GOVERNMENT CONTRACTS COMPLIANCE

LEADING LAWYERS ON NAVIGATING EVOLVING REQUIREMENTS, DEVELOPING COMPLIANCE PROGRAMS, AND COLLABORATING WITH GOVERNMENT AGENCIES

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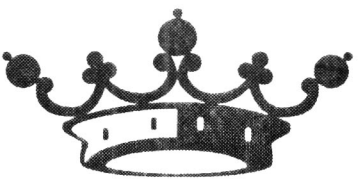
INSIDE THE MINDS

Government Contracts Compliance

Leading Lawyers on Navigating Evolving Requirements, Developing Compliance Programs, and Collaborating with Government Agencies



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Introduction

My practice focuses on labor and employment law. I represent companies on matters related to government contracting, with a specific focus on developing and defending affirmative action plans (AAPs). Employers with federal government contracts or subcontracts worth at least $25,000 have to be mindful of legal requirements to undertake affirmative action efforts to recruit minorities, women, and veterans. The law imposes different requirements on employers depending on the type of business and the number of employees. The most significant difference is between non-construction and construction contractors. Non-construction contractors that provide services or supplies to the government or to government contractors, with at least fifty employees, must prepare written AAP each year. A company that provides janitorial services to an Air Force base is an example of a non-construction contractor. In contrast, construction companies that contract with the federal government or subcontract with a federal contractor do not have to prepare the written plans, but may be audited regarding their affirmative action efforts. I assist employers with drafting the plans and defending the employers' affirmative action efforts during government audits.

As an attorney, I believe the overall scope of my services is more valuable to contractors than what could be provided by non-attorney providers of services relating to AAPs. Significantly, communications with those non-attorney providers are not shielded from disclosure or discovery by the attorney-client privilege rules. In addition, internal communications within the company directed by or requested by me are also privileged and may not be discovered for use against the company. Accordingly, the client can be comfortable discussing negative issues and how to correct the problem going forward.

Overview of the Affirmative Action Laws

Depending on the size of the contract (or subcontract), a contractor or subcontractor may be subject to the non-discrimination and affirmative action obligations imposed by Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 as amended, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 as amended by the Veterans

Employment Opportunities Act of 1998, and the implementing regulations of the Office of Federal Contract Compliance Programs (OFCCP).

Generally, these laws cover contracts with the government (or subcontracts with government contractors) in which the company is paid in consideration for the contractor doing something for the government agency, such as providing janitorial services or paving a road. Those situations are different from grants, such as a Medicare grant, where the government reimburses a health care provider who provides services to patients. Grants are not governed by the same affirmative action rules, meaning that a Medicare grant recipient does not have to create an AAP simply because it is a grant recipient. Of course, Congress can always create exceptions to this rule; for example, Congress recently has attached some affirmative action obligations to certain stimulus package grants.

Agency Enforcement of Government Contract Requirements

The OFCCP has responsibility for ensuring that government contractors meet all affirmative action and anti-discrimination requirements. AAPs are a significant component of those requirements. The plans require the employer to analyze the composition of their workforce at least annually and compare it to the surrounding community from which they recruit. I advise the employer on how to set up its policies and procedures to help it comply with the regulations. The employer provides me with data that enable me to complete an annual analysis and draft the plan document, which will be used as an operational guide and documentation in the event of an audit.

When the company is audited, I maintain contact with the government auditor and provide all the backup information requested. In the large majority of situations, auditors follow a relatively straightforward process. They usually first perform a desk audit, which is a minimal level of scrutiny accomplished by a form letter what outlines what the company must produce. The auditors will ask for the current-year and prior-year AAP documents, and will state that these documents must contain:

- An organizational profile prepared according to 41 CFR §60-2.11 (2010)

- The formation of job groups (covering all jobs) consistent with criteria given in 41 §CFR 60-2.12 (2010)
- For each job group, a statement of the percentage of minority and female incumbents, as described in 41 §CFR 60-2.13 (2010)
- For each job group, a determination of minority and female availability that considers the factors given in 41 CFR §60-2.14(c) (1) and (2) (2010)
- For each job group, the comparison of incumbency to availability, as explained in 41 CFR §60-2.15 (2010)
- Placement goals for each job group in which the percentage of minorities or women employed is less than would be reasonably expected given their availability, consistent with 41 §CFR 60-2.16 (2010)

Here is a list of what is customarily requested in a desk audit in addition to the AAP documents:

- Collective bargaining agreements governing the workforce
- Employment data regarding the company's incumbents as of the beginning of the prior AAP year, a statement of goals set by the company at that time, information relating to "good-faith" recruitment efforts, and data relating to the total number of applicants, hires, and terminations during the prior AAP year, organized by job group, applicant pool, and/or job title applied for
- Compensation summary showing annualized compensation for all incumbents as of a specific date

In sum, the auditor is looking to establish two years of documentation on all employment data related to the company's affirmative action obligations.

The next step after a desk audit is the site visit. Predicting when a site visit may occur can be difficult. I have seen a situation where everything was in order at the desk audit stage in two different audits of the same company, but because I was dealing with different OFCCP auditors, one scheduled a site visit and another did not.

Important Components of Government Contracts

Obligations of Subcontractors

In my opinion, the most important consideration for a subcontractor is to understand the specific, contractual requirements that accompany a contract with a prime contractor. The subcontractor must understand the real-world consequences of not carefully examining its agreement and complying with any law that is incorporated by reference in the subcontract. In these situations, legal counsel can be invaluable to the subcontractor.

Generally, the large regional or national companies with large government contracts directly with government agencies such as the Pentagon know the services they are providing, the wages they are paying, and the affirmative action obligations they must meet to remain compliant. It is the subcontractor who works on part of the master contract that should be particularly aware of what is involved when dealing with the prime contractors.

A less sophisticated subcontractor may not realize that when signing their agreement with the government contractor, there is an embedded obligation to undertake the affirmative action efforts required by law. Many times, the contracts contain a brief, terse statement about a contract requirement, such as a brief reference to Executive Order 11246 or veterans' re-employment rights. The details are not spelled out for the subcontractor, but the requirement for compliance is there regardless.

At times, the government contract may require the subcontractor to pay its employees at the prevailing wage rate for the project. Another potential risk for the subcontractor is issues of indemnity. The subcontractor should have a clear understanding of who is going to be responsible if, during the project, someone makes a mistake and does not comply with these various laws. In many cases, the prime contactor will ensure that there are protections in the contract between it and the subcontractor, such as a retainage provision that holds back 20 percent of the contract price until the contractor can verify that the subcontractor is complying with the law. The subcontractor may be caught off guard and may not be paid the money

they thought was due because the contractor is asserting that the subcontractor did not comply with the contract.

Unionized Federal Contractors and Notices to Employees

Unions representing employees in a workplace cannot require a person to be a union member in order to work. That is known as an illegal "closed shop." But unions are allowed to charge non-members a fee, which is sometimes called an agency fee or a representation fee. Essentially, the union can charge non-members a fee and get it deducted directly from the paycheck for the services the union provides in terms of collective bargaining and handling grievances. A major area of contention for these non-members which lead to litigation involved union use of these fees for other purposes, particularly support of certain political parties or politicians.

In 1988, the U.S. Supreme Court ruled in *Communication Workers v. Beck*, 487 U.S. (1988) that employees in a unionized workforce had rights not to join a labor union and to object to the use of their "agency-fee payments" to the union for purposes unrelated to collective bargaining and handling grievances. In Executive Order 13201, President Bush directed federal contractors and subcontractors to post notices to employees about these "*Beck*" rights under federal law. In one of his first actions as president, Barack Obama on January 30, 2009, revoked Bush's order by signing Executive Order 13496. President Obama's order requires federal contractors to inform their employees of all protected rights under the National Labor Relations Act, not just their *Beck* rights, including employees' rights to join a union and their rights to protection from interference or retaliation for unionization activities.

Implications of the Project Labor Requirements

In federal contracts, especially in the construction context, there is a concept known as project labor agreements. The Obama administration recently announced that federal construction projects that are at least $25 million in value require a project labor agreement, which means everyone must be unionized or use union labor for the project.

Understanding Compliance Requirements in Government Contracts

Compliance with the Service Contract Act and the Davis-Bacon Act

Other significant compliance issues for employers involve the Service Contract Act and the Davis-Bacon Act. Under the Service Contract Act, the government actually sets and requires payments of certain rates for jobs and provision of certain fringe benefits. The Davis-Bacon Act requires the contactor to pay prevailing wage rates that are tied to union-level compensation even if it is not a union employer. For example, if collectively bargained wage rates are higher in the employer's area than what the employer typically pays, the federal contract or subcontract may require payments at the higher rate. It is vitally important for a contractor and subcontractor to be aware of these requirements before finalizing the contract, because it affects the bottom line. It is much more expensive to staff a contract if the contractor has to follow the prevailing wage rules. Both the contractor and the subcontractor must understand the provisions of the prevailing wage rate at the outset of the contract.

Projects covered by the Service Contract Act and the Davis-Bacon get audited or investigated as well. I was involved with a U.S. Department of Labor Service Contract Act investigation of a Federal Emergency Management Agency contract related to the cleanup of New Orleans after Hurricane Katrina. This was a massive audit because thousands of employees and several years of records were involved. One of the thorniest legal issues involved the computer software used for payroll management and how it generated paychecks. We had protracted discussions with the government investigators over recordkeeping issues and whether, in fact, the contractor was providing the required benefits to employees. The issue arose because the paychecks generated by the computer software were not as detailed as I would have wished had we been consulted in the first instance, rather than after the investigation began. Fortunately, we were able to resolve the issue. During the process, I learned a lot about how you go about identifying the required rates for employees, maintaining a uniform list of jobs, provision of benefits based on those jobs, and maintenance of records that will pass muster when there is an audit. Taking these precautions on the front end may obviate the need for negotiating with the government during a costly investigation.

Affirmative Action Requirements and the Need for Recordkeeping

With respect to the affirmative action requirements, they do not affect the bottom line as directly, but they will have impact because the company has to have knowledgeable people who know how to collect the data and maintain the records required to prepare the AAP each year. As outside legal counsel, once the plans are established, I can have a relatively short conversation with the company about what they need to maintain and be done for the year unless they have specific issues. But it will take a cadre of clerical employees and management to gather the data, ensure that applicants and employees complete voluntary disclosure forms, and maintain key information in a spreadsheet that records the race, sex, and veteran status of the people applying to work for the company.

For a large contractor with significant turnover, this type of recordkeeping will be a major undertaking that requires numerous full-time staff to maintain, which adds to the overhead cost of the project above what is paid to employees. Therefore, a company entering into the government contracting business for the first time must be cognizant of all the costs associated with the contract. Legal advice is essential, even if the business has been a mom-and-pop business that never had to confer with an attorney.

Immigration Law Compliance

In some government contracts I have reviewed, prime contractors and subcontractors have to promise that they are not going to use illegal aliens and will take all actions necessary to ensure that all workers are entitled to work legally in the United States. These big crackdowns are in the news frequently; the chilling aspect is that if there is an especially blatant level of non-compliance, there can be individual criminal liability for managers and executives. During every OFCCP site visit I have handled, the OFCCP auditor has always asked to review a sampling of the company's I-9 forms, which can call the company's immigration compliance into question. In one situation in the late 1990s, my client had failed to properly complete more than 500 I-9 forms and was required by the auditor to correct that oversight before closing the audit. Fortunately for that employer, the auditor viewed this as more of a clerical problem rather than a violation of the immigration laws.

Risks of Misunderstanding Compliance Requirements

Failure to comply with the basic laws associated with federal contracts can result in some severe penalties. A company can be banned from contracting with the government forever or for a period of time, and can be subject to forfeiture provisions that cause it to lose a percentage of what it has to pay relative to prevailing wages laws. Failure to pay an employee the prevailing wage can result in assessment of back pay, back pay with interest, or back pay with interest and liquidated damages. There may also be other civil penalties assessed; it can get fairly costly very quickly. For example, even a small difference in payment—suppose the company pays $10 per hour to an employee who should have been paid $11 per hour—can result in a major expense if there are 4,000 employees in the same job classification who were all paid incorrectly over time.

Resources for Government Contract Compliance Support

One of the key sources of information I use is the Department of Labor Web site. It is well organized and contains all the regulations, statutes, and executive orders. If a company has a contract and it states it is governed by provisions of Executive Order 11246, for example, the employer and legal counsel can find the complete text on the Department of Labor site. For the layperson, the site is the best place to start. Attorneys can research the legal aspects of the regulations in other legal research sources. Because this particular area of the law is statute- and regulation-driven, the administrative agencies' Web sites are often good sources of guidance regarding compliance.

Communication with Existing Contractors

Certain laws and regulations govern a contract. Therefore, ignorance of the law is not an excuse for non-compliance. If the regulations change, it is a public process: before the Department of Labor or any of its subdivisions can change a regulation, it has to give public notice and provide an opportunity for comment. With that said, as discussed previously with respect to the *Beck* rights posters, the president can sign an executive order to change requirements for government contracts at any time. The

provisions are promulgated immediately upon signature, and the onus is on the company and its legal counsel to find out the details.

Working with Government Agencies

The most important aspect of working with a government agency is to exercise the golden rule and be discreet. There is no good reason to needlessly antagonize government agency investigators and auditors. It is reasonable to be firm with one's position, provide the information requested, and state the reasons for withholding information if there is a legitimate basis for doing so. For example, information that is confidential or relates to trade secrets may be withheld, as well as certain personnel information. When the government comes calling and the interaction is at the auditing stage, it is advisable to give them everything they ask for but nothing more. If there is a request for something for which there is a legitimate reason to decline, I make it my practice to let the government auditor know the reason and try to work with him or her. Angering the auditor will only increase the size and scope of the investigation, because this may create the perception that there is something to hide.

Common Issues Related to Contract Performance

In my experience, I have found that e-mail with the government auditors can be pretty effective if you stay on top of it. Phone contact in response to an audit request is acceptable, and a written response is always necessary for a main response or final response. Given that desk audits will begin with a formal letter requesting information, if the company responds in an equally formal manner, it tends to expedite matters. A formal cover letter and information that is well organized sends the message that the company is serious about resolving the issues that may arise in the audits. After handling fifteen audits during the last three years, I have found that a set procedure to record the government's requests, provide the information in the order in which it was received, and present the information in a professional manner often limits the scope of the audit. By extension, if a problem arises during the course of the contract, an equally formal notification to the company's government contact is good policy. Written letters are the best communication method, because they provide concrete evidence of communications and can, for example, memorialize events