Government Contracts Update

February 2024

Proposed Rule on Pay Equity and Transparency May Significantly Impact Government Contractors and Federal Supply Chain Companies

Key Notes:

- The proposed rule would prohibit contractors and subcontractors from seeking and considering a job applicant's compensation history as part of hiring for work on or in connection with a federal contract.
- Contractors and subcontractors also would be required to disclose compensation information for job openings for work on or in connection with a federal contract under the proposed rule.
- The proposed rule may significantly impact how contractors (including those in the federal supply chain) hire and retain employees who support federal contract requirements, based upon the rule's broad requirements on salary history and compensation information.

The Federal Acquisition Regulatory Council has issued a proposed rule regarding pay equity and transparency that could significantly impact federal contractors and companies down the federal supply chain. Under the proposed rule contractors and subcontractors would be prohibited from seeking and considering information regarding a job applicant's compensation history when making hiring decisions for work on or in connection with a federal contract. The proposed rule also requires contractors and subcontractors to disclose the compensation offered for any position that involves performing work on or in connection with a contract in all job opening advertisements for federal contracts. As discussed in this alert, the proposed rule would broadly apply to contractors, directly and indirectly, supporting federal government customers across the United States, and it leaves unanswered questions regarding potential exemptions from the rule.

The proposed rule flows from Executive Order 14069, "Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency," issued by the Biden Administration in March 2022. The executive order directed the FAR Council and other agency heads to consider issuing proposed rules to advance economy, efficiency and effectiveness in federal procurement by promoting pay equity and transparency for job applicants and employees of federal contractors and subcontractors. The FAR Council's proposed rule, which would create new Federal Acquisition Regulation (FAR) provisions, adopts the policy developed by the Office of Federal Procurement Policy on pay equity and transparency in federal procurement.

Summary of Proposed Rule

The proposed rule has two main components.

First, the proposed rule prohibits contractors and subcontractors from seeking a job applicant's compensation history as part of the hiring process for work on or in connection with a federal contract. Commonly known as "salary history" bans, similar prohibitions already apply to employers in at least 17 states and several counties and cities across the United States. Much like those state and local laws, the proposed FAR rule precludes a federal contractor or subcontractor from (i) seeking an applicant's compensation history, either orally or in writing, directly from any person (including from the applicant or the applicant's current employer), (ii) requiring the disclosure of compensation history as a condition of an applicant's candidacy, (iii) retaliating against or refusing to interview or otherwise consider, hiring or employing any applicant for failing to respond to an inquiry regarding their compensation history or (iv) relying on an applicant's compensation history either as a criterion in screening or considering the applicant for employment or in determining the compensation for such individual at any stage in the selection process. The proposed rule also precludes contractors from relying on an applicant's compensation history even if an applicant volunteers their compensation history without prompting at any stage of the employment process.

Second, the proposed rule requires contractors and subcontractors to disclose, in all advertisements for job openings involving work on or in connection with a federal contract placed by or on behalf of the contractor or subcontractor, the compensation to be offered to the hired applicant, for any position to perform work on or in connection with the contract. Once again, this imposes a requirement similar to other wage disclosure laws that currently apply to private employers in at least nine states. The proposed FAR rule requires contractors and subcontractors to disclose on job advertisements the salary or wages, or applicable range, that the contractor believes in good faith will be paid for the position. Contractors are also required to include a general description of the benefits and any other forms of compensation applicable to the position. Where at least half of the expected compensation will be derived from commissions, bonuses and/or overtime pay, a contractor is further required to specify the percentage of overall compensation or dollar amount, or applicable ranges, for each form of compensation that the contractor believes in good faith will be paid for the position.

While not required, a contractor may also disclose (if applicable): (i) the contractor's pay scale for the position, (ii) the range of compensation for those currently working in similar jobs or (iii) the amount budgeted for the position.

Using specific language outlined in the proposed rule, contractors will be required to provide job applicants with notice of the above prohibitions and disclosure requirements as part of any job announcement or application process for positions that will work on or in connection with the contract or subcontract. The proposed rule also describes a specific procedure for applicants to submit complaints regarding a contractor's noncompliance with the compensation history prohibitions and wage disclosure requirements. Complaints may be submitted to a central collection point of the agency that issued the solicitation or awarded the applicable contract or order within 180 days of the date the violation occurred. Under the proposed rule, the contracting agency will review the complaint, consult with the complainant as necessary to confirm that the complainant is a covered applicant and take appropriate action.

Implications for Federal Contractors

As written, the proposed rule would have broad application, covering both prime contractors and subcontractors performing a government contract or subcontract within the United States (including its outlying areas). This essentially imposes a nationwide "salary history" ban for contractors and subcontractors, as well as compensation disclosure requirements that apply regardless of where the position or applicant is located. The proposed rule also specifically applies to prime contracts and subcontracts at or below the simplified acquisition threshold (currently $250,000 for commercial products and services). As a result, companies who find themselves down the supply chain supporting a federal contract could be subject to the proposed rule's nationwide "salary history" prohibition and compensation disclosure requirements.

If covered by the proposed rule, contractors and subcontractors should prepare to amend their recruiting and hiring procedures (and prepare related personnel) to comply with these new requirements. Job advertisements (including those distributed by third parties) and application processes should be reviewed and updated to satisfy the proposed rule's requirements. Recruiters, hiring managers and other personnel involved in the hiring process should educate themselves about the contractor's legal obligations relating to pay equity and transparency and the organization's stance or philosophy on compensation. All such personnel will likely need to be prepared to respond to questions from both applicants and employees regarding the contractor's compensation ranges, policies and practices. Additionally, contractors and subcontractors may face conflicting compliance issues if they operate in states or localities that impose similar or additional requirements to those described in the proposed FAR rule.

While the proposed rule will likely create significant new compliance headaches for contractors and subcontractors, it also leaves several issues unresolved. For example, the rule's prohibitions and disclosure requirements apply to positions that perform work on or "in connection with the contract." However, the rule provides no definition of this language or the scope of its reach, potentially expanding its application to companies further removed from a prime contract.

Likewise, although the proposed rule provides that any complaint arising under the rule must be reported to the agency that issued the solicitation or awarded the contract, the rule also states that any complaint alleging discrimination based on characteristics such as race, religion or gender should be filed with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The proposed rule lacks clarity on the process by which an agency would investigate and address a complaint, the due process rights of the contractor or how an agency will determine whether to defer to the OFCCP on complaints alleging discrimination. Additionally, the proposed rule does not specify whether the OFCCP will have the authority to investigate compliance with the rule's requirements as a part of the agency's overall compliance evaluation and audit process.

Conclusion

Contractors, subcontractors and companies supporting government requirements in the supply chain should review the proposed rule and weigh its impacts on the company's business operations, including its hiring, compensation and retention procedures. The implications for companies without a direct government contract also are significant. The proposed rule specifies that the clause must be flowed down to subcontracts at any tier, including those for commercial products or services. This requirement implicates companies down the supply chain supporting a government requirement, who often are unaware that they are supporting a government customer. The current lack of limiting factors in the proposed rule, such as dollar value or percentage of time supporting government contracts, could greatly impact several companies in the supply chain.

Comments on the proposed rule must be submitted on or before April 1, 2024. If you have any questions regarding the proposed rule, please contact Chip Purcell at Chip.Purcell@ThompsonHine.com, Matt Kissling at Matthew.Kissling@ThompsonHine.com or any member of the Thompson Hine Government Contracts or Labor & Employment practice groups.

FOR MORE INFORMATION

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