Fair Pay and Safe Workplaces Executive Order
An Introduction

========== [Introduction] ==========

On July 31, 2014, President Barack Obama signed Executive Order 13673, Fair Pay and Safe Workplaces. The Executive Order is designed to improve federal contractors' compliance with labor laws and ensure they are responsible in providing basic workplace protections. The Executive Order requires prospective and existing federal contractors to disclose labor law violations, and it establishes how Federal agencies should consider labor law violations when awarding contracts of $500,000 or more.

The Department of Labor, the Federal Acquisition Regulatory Council, the Office of Management and Budget and other agencies are coordinating their efforts to implement the Executive Order in phases so the federal acquisition workforce and contractors have time to acclimate themselves to the Executive Order's new requirements. These organizations have also worked with the Federal Acquisition Institute to develop this presentation; introducing you to the Executive Order so that you're familiar with some of its basic features when they begin to take effect.

The goal of this presentation is to provide you with an understanding of:

- The general provisions of the Fair Pay and Safe Workplaces Executive Order
- The responsibilities of the Contracting Officer and other agency officials in meeting the new requirements, and
- The responsibilities of current and prospective contractors and subcontractors

Before we begin, it's important to note that in May 2015, the Department of Labor issued proposed guidance and the Federal Acquisition Regulatory Council published proposed changes to the Federal Acquisition Regulation for implementing the Executive Order. We won't attempt to explain the details of the final guidance or Federal Acquisition Regulation rule in this presentation because they are still under development. They are being carefully reviewed and revised to address the many comments that were offered and to ensure the final guidance and rule are manageable and clear. This presentation will focus on a number of basic features of the Executive Order making it easier to understand the final guidance and rule when they are issued.

========== Part A: General Provisions and Principles ==========

So, let's get started by taking a closer look at the provisions of the Executive Order and the principles sustaining it.

The Fair Pay and Safe Workplaces Executive Order states that it's designed to improve contractor compliance with labor laws thus increasing economy and efficiency in Federal contracting. Supporting that intent it also says contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and, therefore, increase the likelihood of timely, predictable, and satisfactory delivery of products and services to the Federal government.

In recent years, important steps have been taken by the Executive Branch to better protect taxpayers from the waste and abuse that comes from doing business with contractors that are not responsible sources. For example, in 2010, the Federal Awardee Performance and Integrity Information System was deployed to support agencies as they evaluate whether a company has the requisite integrity to do business with the Government.

Unfortunately, many labor law violations that are serious, willful, repeated, or pervasive aren't considered in awarding contracts, in large part, because contracting officers aren't aware of them. And, even if information regarding labor law violations is made available, contracting officers generally lack the expertise and tools to evaluate the severity of the labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of business ethics and integrity.

The Executive Order takes a multi-faceted approach to addressing those weaknesses - many of which don't involve the contracting officer. For example, the Executive Order:

- anticipates that the various agencies with labor enforcement responsibilities will coordinate with one another so that contractors can more easily identify with whom they can work in addressing their violations; and
- requires agencies to appoint "Agency Labor Compliance Advisors" or ALCAs to help contractors understand their responsibilities and encourage early outreach to the Department of Labor or other enforcement agencies to address their violations, as appropriate so they may focus their attention on developing the best possible offer when agencies issue solicitations regarding work for which they wish to compete.

The contracting officer comes into play through provisions that require a process for federal agencies to consider labor law violations when awarding contracts valued at $500,000 or more.

Specifically, the Contracting Officer shall include provisions in solicitations requiring prospective contractors – that is those who are being considered for a contract award and are undergoing a responsibility determination to disclose any administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against it for violating any of 14 identified federal labor laws and executive orders. Violations might include things like employees:

- being denied overtime wages they've earned,
- not being hired or paid fairly because of gender or age, or
- being forced to perform work in conditions where their health and safety are at risk.

This Executive Order also requires compliance with equivalent state laws, but, with the exception of OSHA State plans, these requirements will be phased in at a later date.

In addition to the efforts to improve labor law compliance, the Executive Order requires paycheck transparency to ensure employees are given the necessary information each pay period to verify the accuracy of what they are paid.

Finally, the Executive Order requires that contractors and subcontractors who enter into contracts for non-commercial items over $1 million agree not to enter into any mandatory pre-dispute arbitration agreements with their employees or independent contractors on any matter arising under the Civil Rights Act as well as any torts related to or arising out of sexual assault or harassment. This effectively expands a statutory provision applying to Department of Defense contracting across federal procurement.

The Executive Order has been designed to minimize the implementation burden for contractors and subcontractors, including small businesses. Consistent with the terms of the Fair Pay and Safe Workplaces Executive Order, the Department of Labor and the Federal Acquisition Regulatory Council have adopted the following six principles, many of which are outlined in the White House FACT Sheet that accompanied the release of the Executive Order and in testimony presented last Fall by the Administrator for the Office of Federal Procurement Policy and the Senior Labor Compliance advisor at the Department of Labor.

1. **Build on existing processes**: The Executive Order builds on existing processes and principles, including the long-standing requirement that contractors be responsible sources that have "satisfactory records of integrity and business ethics."

2. **Help contractors improve**: The focus of the Executive Order is on helping contractors come into compliance with labor laws - not to exclude them from competing for contracts. Contractors will be offered assistance from the Department of Labor and other labor enforcement agencies and encouraged to address their violations as early as possible. Determining a company is not a responsible source, and subsequent notification to suspending and debarring officials for consideration of exclusion, will only be considered as a last resort for contractors who demonstrate a basic disregard for labor laws and such considerations will be subject to long-standing principles of fairness and an opportunity to be heard as set forth in the Federal Acquisition Regulation.

3. **Focus on where the real problems exist:** The vast majority of contractors abide by labor laws. They shouldn't have to risk losing business to contractors that seek to undercut their bids by cutting corners with labor laws. In addition to ending this unfair competition, the Executive Order seeks to minimize burden by limiting most contractor obligations to a representation that they do not have labor law violations. Instead, the focus here is on the most problematic labor law violations that are likely to have the greatest bearing on an assessment of a contractor's or subcontractor's record of integrity and business ethics --namely, violations that are serious, willful, repeated, or pervasive.

4. **Create processes that are manageable and promote efficient and effective acquisition**: The Department of Labor and the Federal Acquisition Regulatory Council are working closely to create a process that avoids the uncertainty that drives up the cost of contractors doing

business with the government. When finalized, the Federal Acquisition Regulation rule will provide important clarification on three issues:

a. First, it will give direction to contracting officers on how they obtain disclosures from prospective and current contractors on their labor law violations,
b. Second, it will explain how to make responsibility determinations that take into account disclosed labor law violations, and
c. And third, it will explain how contracting officers will work with Agency Labor Compliance Advisors who advise contracting officers in evaluating labor law violations. Specifically, the Executive Order requires agencies to appoint Labor Compliance Advisors to help not just contracting officers but also assist contractors in understanding their responsibilities and encourage early outreach to the Department of Labor to address labor law violations reported in their proposals. The Department of Labor's guidance will work hand-in-hand with the Federal Acquisition Regulation rule to address how Agency Labor Compliance Advisors should identify those disclosed violations that warrant heightened attention because of the nature of the violation. Both the Department of Labor guidance and the Federal Acquisition Regulation rule will emphasize the importance of taking into consideration mitigating circumstances and remedial steps already taken by the contractor.

5. **Limit requirements imposed on small businesses**: Many of the contracts performed by small businesses including contracts valued at $500,000 or less and subcontracts for commercial-off the-shelf items - are exempt from the proposed Federal Acquisition Regulation rule's disclosure requirements. Equally important, the Executive Order preserves the requirement that a contracting officer must refer a prospective small business contractor found to be non-responsible to the Small Business Administration. If the Small Business Administration concludes that the small business is, in fact, responsible, the Small Business Administration will issue a Certificate of Competency.

6. **Streamline Implementation and Reporting:** The General Services Administration is developing a single website for contractors to meet their reporting requirements for this Executive Order and for other reporting requirements for all of their federal contracts.

Now you have the basics of this Executive Order - what its purpose and principles are - but what are the practical impacts on our roles and responsibilities in the Federal contracting process?

========== [Part B: Role of the Contracting Officer and Other Agency Officials] ==========

You're a Federal contracting officer. And, one of your responsibilities is to determine if prospective contractors are "responsible."

The existence of a labor law violation does not automatically make a contractor "non-responsible." In fact, even the existence of serious, repeated, willful, and pervasive violations will not automatically make a contractor non-responsible. There are no automatic triggers. To the contrary and consistent with long-standing practice, the Executive Order requires that a contractor's labor responsibility be determined on a case-by-case basis, taking into consideration the nature of the labor violations, the

number of violations, mitigating circumstances, and any compliance agreements entered into with the appropriate enforcement agency.

The vast majority of contractors are not expected to have labor violations and of those that do have violations warranting heightened attention because of the nature of the non-compliance, contractors will be encouraged to work with the Department of Labor and other enforcement agencies to enter into labor compliance agreements if necessary, so non-responsibility determinations should be infrequent (although will be rendered if and when necessary).

Let's take a breath right here. Contracting officers may not have the expertise to make judgments regarding labor law matters. So, the Executive Order requires agencies to appoint a senior employee as the Agency Labor Compliance Advisor to provide consistent guidance on how to judge a contractor's violations and remedial actions.

Agency Labor Compliance Advisors will help contracting officers:

- review information about violations reported by prospective contractors
- verify the number of violations
- determine if violations are serious, repeated, willful, or pervasive
- decide if the violations warrant remedial measures such as a labor compliance agreement
- provide prospective contractors an opportunity to disclose any steps they may have already taken to correct any violations or improve compliance with the labor laws including any agreements entered into with an enforcement agency; and
- review the prospective contractor's remediation of the violations and any other mitigating factors
- receive incoming information from third parties about contractor labor violations

The Agency Labor Compliance Advisor will also consult with the Department of Labor as necessary.

The contracting officer shall consider and document the Agency Labor Compliance Advisor's recommendation in his or her responsibility determination and the ultimate source selection decision.

Once a contract is awarded, the work still isn't done. Every six months contractors must provide contracting officers updated information regarding reportable violations. If a contractor is in violation of applicable labor laws during a period of performance, the contracting officer, in consultation with the Agency Labor Compliance Advisor, will decide whether further action is needed, such as:

- the contractor entering into a labor compliance agreement, or
- the Department of Labor providing compliance assistance to the contractor, including working with the contractor to resolve issues in order to avoid further violations.

Significant violations could potentially result in the government:

- not exercising an option on a contract,
- terminating the contract under which the violations have occurred, or
- referring the contractor to the agency suspending and debarring official

So you can see the collaboration between the contracting officer and the Agency Labor Compliance Advisor is extremely important to the entire process.

========== [Part C: Role of Prospective and Existing Contractors] ==========

Now let's take a look at what the Fair Pay and Safe Workplaces Executive Order means to industry and prospective or existing contractors.

As we said before, the vast majority of federal contractors have clean records when it comes to complying with labor laws and they shouldn't have to compete for Federal contracts with companies that don't. The goal of the Executive Order is to help contractors and subcontractors with serious, willful, repeated, and pervasive violations come into compliance with applicable laws. Every effort will be made to offer prospective contractors with labor law violations the opportunity to receive early guidance on whether those violations are potentially problematic and to remedy any problems. And prospective contractors will be encouraged to work with the Department of Labor and other enforcement agencies to enter into labor compliance agreements where necessary.

Let's review the list of provisions in the Executive Order for prospective contractors submitting proposals on contracts valued at $500,000 or more:

- Contractors are required to disclose any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against them within the preceding three-year period for labor law violations. Contractors and their subcontractors will have the opportunity to disclose steps taken to correct violations or improve compliance. The General Services Administration will develop a single website for contractors to meet their reporting requirements for this Executive Order and for other contractor reporting requirements for all of their federal contracts.
- Subcontractors are required to disclose labor law violation information for *subcontracts* valued at $500,000 or more, other than for commercial off-the-shelf items. Contractors shall include provisions in their subcontracts requiring subcontractors to disclose and update such information on the same schedule as the prime contractor.
- Contractors shall ensure paycheck transparency**,** so employees can ensure they are getting paid what they are owed.

Also, the Executive Order requires that contractors and subcontractors who enter into contracts for non-commercial items over $1 million agree not to enter into any mandatory pre-dispute arbitration agreements with their employees or independent contractors on any matter arising under the Civil Rights Act as well as any torts related to or arising out of sexual assault or harassment.

And, of course, compliance reporting isn't over once a contract is awarded. Contractors, and any subcontractors, shall provide updated information every six months regarding reportable labor law violations.

A number of actions are being considered by our policy officials to help contractors and subcontractors acclimate themselves to the rule and address concerns regarding the potential complexity and burden associated with certain aspects of the Executive Order.

First, as mentioned earlier, the requirements of the Order will be phased in stages. As one example, the requirements of the Order addressing the disclosure of violations of equivalent state laws, with the exception of violations under OSHA State Plans, will be subject to a separate rulemaking developed at a later date in the future. Careful consideration is also being given to phase-in of subcontractor disclosure

requirements, and policy officials are evaluating feedback provided regarding the need and cost of implementing systems to track violations.

Second, policy officials are looking at options for simplifying disclosure of violations by subcontractors. Comments on potential alternatives are being carefully reviewed.

========== [Closing] ==========

Thank you for viewing this summary presentation of the Fair Pay and Safe Workplaces Executive Order. The final Federal Acquisition Regulation rule and Department of Labor guidance implementing the Executive Order will be issued later this year, so you need to be prepared to move forward when that final rule is released. The Executive Order, related guidance from the Department of Labor, the Federal Acquisition Regulation proposed rule, along with other related reference material can be found at acquisition.gov.