

INSIGHTS

Federal Contractors Beware: New Hiring Restrictions Proposed on Companies Doing Business With the Federal Government

February 1, 2024

By: [Robert J. Wagman Jr.](#) and [Amber K. Dodds](#)

Earlier this week, the Federal Acquisition Regulatory Council proposed a [new rule](#) that would amend the Federal Acquisition Regulation (FAR) to impose new restrictions on federal contractors and subcontractors, including: (1) prohibiting, seeking or considering an applicant's compensation history; (2) requiring compensation disclosures in job advertisements; and (3) affirmatively providing written notice to applicants with specific language on their rights under the rule.

What is noteworthy is the potentially broad reach of the proposed rule. The new requirements would apply to contractors with federal contracts and subcontracts for commercial products (including Commercially Available Off-the-Shelf (COTS) Items) or commercial services valued in excess of \$10,000, and to be performed within the United States. The proposed rule would apply "to the recruitment and hiring for any position to perform work on or in connection with the contract" or subcontract. The proposed rule defines work on or in connection with the contract as "work called for by the contract or work activities necessary to the performance of the contract but not specifically called for by the contract."

This vague definition will present challenges to contractors to determine whether an applicant would be covered. For example, if a company sells commercial software to the government, would every coder who writes code be performing "work activities necessary to the performance of the contract but not specifically called for by the contract?" Would every employee working at a refinery that produces jet fuel be covered? Would indirect functions that support contracts — e.g., IT, accounting, HR — be covered? The current proposed rule provides no guidance on these questions.

It bears mention that several states have implemented employment laws imposing similar obligations on all employers. In some cases, the new FAR requirement will have limited impact, if any, on current contractors and subcontractors. Others may find that the state requirements and the FAR requirements differ, requiring revision of practices to meet the requirements of overlapping rules. Finally, some companies will need to establish special practices covering their government business.

Turning to the substantive prohibitions; *first*, the proposed rule would establish a new contract clause providing that "any recruitment and hiring [covered by] this clause the Contractor shall

not —

1. Seek an applicant's compensation history, either orally or in writing, directly from any person, including the applicant or the applicant's current or former employer or through an agent;
2. Require disclosure of compensation history as a condition of an applicant's candidacy;
3. Retaliate against or refuse to interview or otherwise consider, hire, or employ any applicant for failing to respond to an inquiry regarding their compensation history;
4. Rely on an applicant's compensation history-
 1. As a criterion in screening or considering the applicant for employment or
 2. In determining the compensation for such individual at any stage in the selection process; and
5. Violate the prohibitions of (c)(1) through (4) even if an applicant for employment volunteers their compensation history without prompting at any stage in the recruitment and hiring process."

Second, the proposed rule would require contractors to disclose in job advertisements the compensation to be offered for positions working on or in connection with a federal contract. Specifically, the disclosures must include the salary or wages (or range) the contractor in good faith believes that it will pay for the advertised position, as well as a general description of the benefits and other forms of compensation applicable to the job opportunity.

Third, contractors must provide written notice to covered applicants as part of the job announcement or application process, and include specific language contained in the required contract clause provisions, which, as set out in the proposed rule, is a multi-paragraph description of the rule and how to submit a complaint regarding alleged non-compliance. The complaint process in the proposed new FAR clause provides for applicants to submit a complaint to the contracting agency point of contact within 180 days of the date the alleged violation occurred. The proposed rule does not enumerate the specific remedies other than to say the contracting agency may "take action as appropriate."

The proposed FAR clause would also require the terms of the clause to be flowed down to all subcontractors.

Comments in response to the proposed rule must be submitted by April 1, 2024.