

Compliance with Labor Law Stuff

Written by Nick Sanders

Monday, 10 January 2022 00:00

I'm always surprised when government contractor personnel don't want to cooperate with auditors' requests for information. What did they expect was going to happen when they accepted that government contract?

To be clear, though, there are boundaries that should be enforced. Government auditors aren't entitled to *everything*. They are, however, entitled to request and review *most* things. Knowing those boundaries is a key part of what every compliance practitioner needs to know. The other aspect of knowing those boundaries is explaining them to employees—often executives—who don't know and probably don't care, and *most certainly* do not want to provide to the auditors what they have requested.

They signed the contract but they didn't read the fine print, the part in Section I where those pesky "clauses incorporated by reference" are listed. Too bad because, if they'd known what they were signing up for, they might not have signed. Or—more likely—they would have signed anyway, because *revenue*. But at least they would have had a clue.

Now, either during performance or perhaps after performance is complete, a government audit is happening. Auditors are requesting information, and they (quite reasonably) expect the company to provide the information requested. But somebody doesn't want to provide the information. Why? Maybe they're too busy right now, overwhelmed with all the other stuff they need to be doing. Or maybe they see the audit request as being unreasonable, over-the-line, beyond the pale. Government overreach. They're just objecting based on principle.

Or maybe they have something to hide.

There's very often no way to tell what's really going on. Nobody can read minds. (Or, if you *can* read minds, then you are definitely in the wrong line of work.) But what's often forgotten in the internal debate over what can and should be provided to the auditors is the point that the auditors can't read minds either. They don't know *why* the company won't provide what they've requested—and they often default to the worst position: the company won't provide the information because there is something to hide.

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We were reminded of the rules about what can and should be provided versus what should not be provided by this [news brief](#) issued by the Department of Labor. As you can see (if you follow the link), the Department of Labor Administrative Law Judges have ordered a government contractor to provide information and documents related to a review of the contractor's affirmative action program.

As we reviewed the case, it seems that this issue has been in play since 2013. Yes, that's right. For eight years, a government contractor has disputed the Department of Labor's right to review its affirmative action plans.

Anyway, after eight years of dispute (and eight years of paying attorney fees), the government contractor was told in no uncertain terms to comply "upon penalty of debarment and contract termination." That would be quite a hit to the company's revenue, we believe. Not a great hill to die on, in our view.

The DoL Judge found that the contractor "violated 41 C.F.R. § 60-1.12(c)(2) by failing to provide its written affirmative action programs and supporting data upon request, and that Defendant did not have good cause to excuse the violation." This was after the contractor had argued that the audit requests were "unconstitutional under the Fourth Amendment because OFCCP has failed to articulate a basis for having selected any of [the contractor's] facilities for compliance review according to a neutral administrative plan. [The contractor] further argues that the number of document requests is unreasonably burdensome...."

Yeah, no.

Defendant [the contractor], through its officers, directors, partners, representatives and agents, jointly and individually, shall provide all information Plaintiff [the Department of Labor] requested in the scheduling letters that were identified in the administrative complaints filed in these consolidated cases. Defendant shall provide the information to Plaintiff's representatives no later than 4:00 PM on the business day next following the thirtieth calendar day after this Order becomes final under the law.

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Should Defendant fail to comply with the Order set forth above, Plaintiff is directed to take all administrative steps necessary to terminate all existing Government contracts held by Defendant, jointly and individually, and to debar Defendant from receiving and participating in any future Government contracts for a period of at least three years or until Defendant complies with the provisions of EO 11246, the VEVRAA, the Rehabilitation Act, and 41 C.F.R. Chapter 60, whichever period is longer.

The next time some executive in your company wants to dispute the government's right to request, receive, and review documents for which it clearly has the authority to request, receive, and review, we suggest you mention this little lesson.