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Novel Labor Clause Ruling May Beg Scrutiny In Court

By **Daniel Wilson**

Law360 (September 25, 2024, 9:47 PM EDT) -- A controversial demand from the Centers for Medicare and Medicaid Services for prospective contractors to recognize union organizing may stretch the limits of the government's required neutrality in contactors' labor disputes, and a ruling supporting it is likely to attract close scrutiny from courts.

The U.S. Government Accountability Office ruled in a decision released Tuesday that a labor harmony agreement, or LHA, requirement in a CMS solicitation for call center services did not violate a Federal Acquisition Regulation requirement for federal agencies to "remain impartial" in disputes between contractors and their employees. The decision rejected in part a protest from contractor Maximus Federal Services Inc.

An LHA is a deal between a contractor and a labor organization that either represents "or demonstrates intent to represent" service employees, stating that employees will not strike or picket during the course of a contract, implicitly in exchange for concessions from the contractor.

The relevant FAR clause, Federal Acquisition Regulation 22.101-1, only relates to active labor disputes and doesn't prohibit contractual terms "designed to prevent future disputes," and the disputed LHA doesn't mandate any particular outcome "but rather simply seeks to protect the agency's interests," the GAO said.

But the ruling "doesn't pass the straight face test," said Daniel Abrahams of Abrahams Wolf-Rodda LLC, whose practice involves both government contracts and wage and hour law.

"I think the decision on the conflict of the LHA clause and FAR 22.101-1 is just wrong on its face. It is a plain conflict," said Rodda, who has represented Maximus in the past but not in the GAO dispute. "I also think the LHA requires a FAR deviation and approval of the FAR council, and I don't think [CMS] followed those procurement rules and process."

Husch Blackwell LLP partner Michael Schrier said the GAO decision appeared to discount the underlying factual circumstances of the case and the implications of mandating a deal between the company and its workers.

Maximus call center workers held several strikes across 2022 and 2023 seeking better pay and working conditions, the GAO said. There is also an ongoing effort by the Communications Workers of America to organize those employees, and CMS effectively cut short an existing multibillion-dollar contract with

Maximus, scheduled to run for up to nine years, a little more than a year in to re-solicit the deal with an LHA requirement included, according to contract documents.

"I think that you have a situation where the government is putting its thumb on the scale," Schrier said.

The GAO decision also likely conflicts with the Service Contract Act, which sets out prevailing wages and benefits for the employees of federal services contractors, Abrahams said. The SCA allows for collective bargaining agreements as a basis for setting prevailing wage rates, but also embodied in the law is a choice for workers of whether to unionize, and CMS mandating an LHA short-circuits that process, he said.

"I think unions are a force for good and can help workers on these service contracts achieve even better working conditions," Abrahams said. "But CMS is going to force the workers to unionize whether they want to or not. That is a first."

Krista Sweet, vice president for civilian agency issues at the Professional Services Council, a group that represents federal services contractors, contrasted CMS' LHA requirement with the Biden administration's requirement to use project labor agreements, a similar type of upfront labor-contractor deal, for federally funded construction contracts worth $35 million or more.

That PLA requirement was underpinned by both an executive order and a formal rulemaking process, and the PLA rule has clearer expectations for contractors, such as a minimum dollar threshold and applicability to subcontractors, Sweet said.

"I'm not sure how you can justify [needing] a rulemaking process for one and not the other, when their intent is the same in terms of dealing with labor relations problems," she said. "To just say, 'Oh, [an LHA is] allowed because it's not specifically excluded' is a little disingenuous when you think about how broad an authority you would be giving to agencies without having that requirement more defined, and giving notice to industry as to when to expect it."

Maximus, whose protest was partially sustained based on an argument that the specific disputed LHA was too vague, said in a statement to Law360 on Wednesday that it believes that "all our legal arguments are meritorious and deserve due consideration" and "remains committed to fighting for what we believe is right."

"We will continue to explore all options to challenge this decision including taking our case to the U.S. Court of Federal Claims to ensure that the interests of our workforce and the beneficiaries we serve are protected," the company said.

Court of Federal Claims judges take notice of GAO decisions on novel or unusual issues but are not bound by them, and the court has increasingly diverged from the GAO on a range of both procedural and substantive issues in recent years.

Maximus also may be able to take its alternative arguments that mandating an LHA violates the Labor Management Relations Act and is preempted by the National Labor Relations Act — arguments that the GAO said were outside its purview — to a district court, where CMS no longer has the benefit of heightened Chevron deference to its interpretation of those statutes after the U.S. Supreme Court's Loper Bright decision in June, Schrier said.

But if the GAO's decision stands, and CMS is able to award a call center contract with an LHA requirement, it is likely that similar agreements will be used for other federal contracts, with "broad and potentially troubling" implications, said Professional Services Council president and CEO David Berteau.

"It could reduce or eliminate competition," he said. "It likely would dramatically increase costs, and might actually lengthen the amount of time between contract idea and contract execution."

Representatives for the CWA and workers' rights and union advocacy groups declined to comment or did not immediately respond to requests for comment on the decision.

--Editing by Brian Baresch.
