VIA ELECTRONIC SUBMISSION

August 26, 2015

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405

Tiffany Jones
U.S. Department of Labor
Room S—2312
200 Constitution Avenue NW
Washington, DC 20210

Re: FAR Case 2014-025, Comments on the Proposed Federal Acquisition Regulation; Federal Pay and Safe Workplaces (RIN 9000-AM81); Comments on the Proposed Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" (ZRIN 1290-ZA02)

Dear Ms. Flowers and Ms. Jones:

Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM or Proposed Rule), published in the Federal Register on May 28, 2015, by the Federal Acquisition Regulato
e first time to disclose any "violations" of
ior to any procurement for federal
000, in addition to requiring updated

[1] 80 Fed. Reg., at 30548. Though published separately, the FAR Council's NPRM is heavily dependent on and substantially interrelated with the Labor Department's NPG. ABC believes it is therefore appropriate and more efficient to consolidate its comments on both documents and submit the same consolidated comments to each of the agencies. The proposed rule and proposed guidance will hereafter be referred to collectively as the "NPRM/NPG" or the "proposals."

disclosures of labor law violations every six months while performing covered government contracts. The proposals also require contractors/subcontractors to include among their disclosed violations an unprecedented list of court actions, arbitrations and "administrative merits determinations" set forth in the Department of Labor's NPG, including many forms of agency actions that merely allege violations without having been fully adjudicated. The proposals further require each contracting agency's contracting officers (COs) for the first time to attempt to determine whether companies' reported violations of the above-referenced labor laws render such offerors "non-responsible" based on "lack of integrity and business ethics." The proposals also require each contracting agency to designate an agency labor compliance advisor (ALCA) to assist COs in determining whether a company's actions rise to the level of a lack of integrity or business ethics. The proposals also require each contractor/subcontractor that is forced to report violations of labor laws to demonstrate "mitigating" efforts and/or enter into remedial agreements or else be subject to a finding of non-responsibility for contract award, suspension, debarment, contract termination or nonrenewal, all in a manner inconsistent with due process under the 14 federal labor laws referenced in the NPRM.

In addition, the NPRM/NPG e N els/N0(r)3nere(f)3r2v(r)-7(e(f)3r)3neat 7 coNPs-6(Nl)-2()-4(rn)-4(t)-6(r)-1(a)-1

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more than 56 percent of all federal government construction contracts exceeding $25 million durin

employment laws. Instead, where Congress has chosen to authorize suspension or debarment of government contractors, it has done so expressly in a narrow category of labor laws directly applicable to government contracts, and even then only after final adjudications of alleged violations by the Department of Labor, with full protection of contractors' due process rights.[8] At the same time, in passing federal labor and employment laws that apply to private employers outside the field of government contracts, Congress has created a variety of different remedial requirements to compel compliance by employers, which were the product of careful balancing of competing interests by Congress.[9] Congress did not authorize the executive branch to impose the "supplemental sanction" of debarment on employers that violate these laws.[10] Congress certainly did not authorize federal contracting officers to disqualify employers from being awarded government contracts based solely upon alleged violations of these laws, in the absence of final adjudications and the protections of due process of law.

As further explained in ABC's comments below, it is plain that the new proposals will improperly disrupt the balanced labor law schemes established by Congress, to the detriment of taxpayers, contractors and the procurement process. The sanctions imposed by the NPRM/NPG are unprecedented in their scope and exceed the president's authority. If finalized in anything like their present form, the proposals will impose draconian new obligations on government contractors and will greatly increase the risks contractors will confront in performing services for the government. Finally, the proposals will encumber the government contracting process with impracticable and unworkable restrictions that will injure competition and degrade the services received by the federal government. All of these outcomes will be par-6(ont3nyl(a)6(r)5lt)-20(y)22 thar

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As noted above, the 14 federal labor/employment laws referenced in the proposals fall into two categories with regard to disqualification of employers from performing government contracts. Six of the laws are limited in their coverage to government contractors, and within those limits these laws expressly authorize suspension and/or debarment of government contractors that

contractor has an opportunity to show that it should not be debarred based on "unusual circumstances," including the (lack of) history of violations and aggravated circumstances.[19] Contrary to the SCA, the proposed rule and guidance afford neither a hearing before a contractor can be disbarred, nor an opportunity for the contractor to reverse a debarment order if there are unusual circumstances.

Finally, ABC is deeply concerned with how the new proposals appear to conflict with longstanding DOL regulations implementing affirmative action compliance obligations under Section 503 of the Rehabilitation Act, the Vietnam Era Veteran's Readjustment Assistance Act, and Executive Orders 11246 and 13658.[20] Again, contractors that violate these statutory and regulatory provisions may be debarred under aggravated circumstances from receiving future contracts or terminated from ongoing government work. However, a contractor is entitled to a formal hearing before any of these sanctions can be imposed.[21] Again, the NPRM/NPG directly contradicts [(c)4(a(i)-2((/N)4(P)-P)-P)-Pa dis10(a)4(nd) o]TJ -26.2 -1.15 Td [(r)3(e)s(d)]T6.22(r)3-2(n)-10(

contractors with disqualification merely upon issuance of an unadjudicated administrative complaint.

The foregoing preemption doctrine applied in *Gould* has by no means been limited to state government actions inconsistent with the NLRA. The same legal principles have been applied to the federal executive branch. Thus, in *Chamber of Commerce v. Reich*, the court found that regulations issued under an executive order issued by President Clinton dealing with striker replacements "promise[d] a direct conflict with the NLRA, thus running afoul" of preemption doctrine. [25] It is also significant that in both *Gould* and *Reich*, the courts rejected the government's claims to being exempt from preemption under the "market participant" doctrine and/or the Federal Procurement Act. In both cases, the courts stressed that the government's actions were "regulatory" in nature because they "disqualified companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government."[26]

For similar reasons, the new proposals violate such generally applicable employment laws as the Fair Labor Standards Act, the Occupational Safety and Health Act, Title VII of the Civil Rights Act, and similar discrimination laws cited in the proposals as potentially disqualifying to government contractors that violate them. In each of these laws, Congress established "unusually elaborate remedies,"[27] including by way of example under the FLSA, civil and criminal prosecution and fines, liquidated damages and enhanced penalties for "willful" violations. Notably missing from any of these statutes is authorization for any government agency to disqualify employers from performing federal government contracts. Certainly absent is any Congressional authorization for such disqualifications to occur in the absence of final adjudication of liability against such contractors in a court of law. Again, the NPRM/NPG violates the plain language of each of the statutes cited as grounds for potential disqualification of contractors.[28]

Equally problematic is the claimed authority of agency COs and ALCAs to determine on their own whether reported violations of the 14 cited labor laws are "serious," "willful," "repeated" or "pervasive." Some of these terms already have been defined by Congress in the labor laws covered by the NPRM, but some terms such as "pervasive" do not appear in any of the statutes and others are defined by the NPRM and DOL guidance in ways that are inconsistent with legislative intent.

The definitions contained in the DOL guidance are overly expansive and vaguely defined, leaving agency officials far too much discretion to assess violations based on inherently subjective factors.[29] According to the proposals, each contractor's disclosed violations will be

[25] 74 F.3d 1322 (D.C. Cir. 1996), expressly rejecting the government's claim that the executive order at issue was somehow authorized by Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101.
[26] *See Building & Const. Trades Dep't, AFL-CIO v. Allbaugh*

"assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractors, and any mitigating factors. The extent to which a contractor has remediated violations . . . including agreements entered into by contractors with enforcement agencies, will be given particular weight in this regard."[30]

The proposals do not explain how the new assessments will be made in a manner that is

for agency complaints against employers to be withdrawn or settled without any ultimate finding of wrongdoing by the employer. Such charging documents cannot form the basis for disqualifying any contractor from performing government work.

maintained and sorted. Regulated entities will have to hire officials versed in both procurement policy and labor and employment law. The proposed requirements are not merely "check the box" exercises. Even contractors without violations must engage in an arduous process to reach that conclusion.

Because no guidance on "equivalent state laws" was issued, monitoring and training systems must be updated if and when a rule is finalized on this subject. Given the proposed rule's substantial tracking burden, if a contractor in good faith reports that it has no violations but later realize it does, it should not be penalized. The contractor should similarly be immune from penalty if the contractor later realizes through a genuine mistake that a covered subcontractor has reportable violations.

The process by which contractors communicate with COs and ALCAs about their "violations" is bound to be cumbersome, given potentially detailed communications by email and/or other modes of communication between contractors and the government concerning the violations and any mitigating circumstances. The cost of compliance will be high, and may skew particularly against small contractors, which have limited resources not only to keep track of legal allegations but to challenge frivolous ones.

The impact would be compounded by the proposed reporting requirement imposed on prime contractors regarding their subcontractors (if this requirement stands). The time requirements alone are burdensome and unrealistic. If the prime contractor awards the subcontract (or the subcontract becomes effective) within five days of the prime contract execution, then it must conduct the same analysis the contracting agency performed of the contractor within 30 days of awarding the subcontract. For all other subcontracts, review of possible reportable subcontractor violations must occur prior to the subcontract award.

For large contractors in particular, the burden to review a multitude of possible violations from hundreds of subcontractors will be tremendous. Many prime subcontractors may not have the staffing, IT or legal expertise necessary to identify and confirm the subcontractor violations that fall under the reporting requirement from those that do not. Smaller subcontractors may seek advice from the contractor's legal counsel on such issues, creating potential ethical quandaries for counsel, whose legal responsibility does not extend to the subcontractor.

If the subcontractor cannot adequately determine its own reporting responsibilities, the contractor will be loath to retain the subcontractor—not on the basis of an actual labor law violation, but because the contractor does not want to risk an accusation that it incorrectly reported the subcontractor's violations. ABC members also are concerned that the proposed rule will drive out small minority-owned and women-owned businesses because they do not have the resources to compile and/or assess reports of labor law violations in so many areas of labor and

Under the new proposals, contractors will be in the untenable situation of policing their subcontractors, and subcontractors will be in the untenable position of sharing sensitive or proprietary information with prime contractors with whom they compete on other projects. According to ABC's survey of its membership, 47 percent of respondents have performed work as both prime contractors and subcontractors on federal contracts. It is also unclear how long each contractor would have to retain the information, and whether they would be required to disclose it under federal and state public information statutes. Furthermore, already many subcontractors agree to report to the prime contractor offenses such as OSHA citations, but much of the time the subcontractors fail to actually report. The proposed self-reporting scheme is unworkable.

These considerations make the NPRM's DOL reporting alternative more palatable (between two bad choices).[43] However, that alternative still comes with significant practical problems. For example, under the NPRM, a prime contractor must consider whether the subcontractor is a responsible source during the term of the subcontract. If, based on the DOL's advice, the contractor concludes that the subcontractor should not be retained, it would have to quickly find a "clean" subcontractor replacement midstream during the project at a new bid price, which is no small feat. Delays would be significant, and the costs involved should not be imputed to the innocent contractor.

Adding to contracting costs, the proposed rule requires regulated entities to litigate defenses to alleged labor law violations in multiple forums. The NPRM states that when contractors and subcontractors report administrative merits determinations, they also may submit any additional information that they believe may be helpful in assessing the violations at issue, including the fact that the determination has been challenged. Additionally, contractors and subcontractors may provide information regarding any mitigating factors. The net result of these provisions will be to require contractors to litigate their defense of any claimed violations in two separate forums: at the original agency level and at the procurement level.

The threat of cancellation, suspension and debarment of contracts also may significantly impact contractors' approaches to charges, demands and matters pending before enforcement agencies, encouraging them to settle matters rather than seeking vindication of their position and thereby risking a reportable "violation" that could affect their contract rights. This is especially unfortunate because many allegations are prompted by plaintiff attorneys and unions engaged in corporate campaigns. These and other groups will no doubt file questionable labor law allegations simply to meet their financial and public relations goals, k0 Tc 0 T0 Tw [(t)-2(e)5(c)6(en)-ei2(a)4ei

ABC's survey of its members reveals that more than 57 percent of respondents believe that the proposals, if finalized, will compel them to abandon the pursuit of federal contracts.

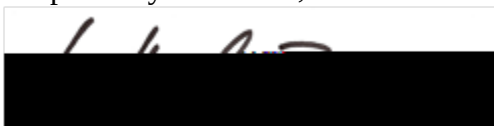
Greenwood, 132 S.Ct. 665 (2012), and other similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act. An agency cannot by the stroke of a pen eliminate pre-dispute arbitration, yet the FAR Council proposes just that.

Conclusion

For each of the reasons set forth above, ABC urges the FAR Council and DOL to withdraw their unlawful and unwise proposals.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



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