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Via Federal eRulemaking Portal (http://www.regulations.gov)

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F. Street, NW, 2nd Floor
Washington, DC 20405-0001

Ms. Tiffany Jones
U.S. Department of Labor
Room S-2312
200 Constitution Ave., N.W.
Washington, DC 20210

Re: Comments on the Proposed Federal Acquisition Regulation: Fair Pay and Safe Workplaces (FAR Case 2014-025) (Docket No. 2014-0025; Sequence No. 1)
and
Comments on the Department of Labor's Proposed Guidance (ZRIN 1290-ZA02)

Dear Ms. Flowers and Ms. Jones:

The law firms of Fortney & Scott, LLC and Conn Maciel Carey PLLC are pleased to submit these comments on behalf of a coalition of federal government contractors and subcontractors ("federal contractors"). Our comments address both the proposed Federal Acquisition Regulation ("FAR")[1] rulemaking and the proposed U.S. Department of Labor ("DOL") guidance[2] (collectively, "the Proposals"), both of which were published on May 28, 2015 to implement Executive Order 13673, titled "Fair Pay and Safe Workplaces" ("Executive Order").

As described in detail below, we have serious concerns about the legality of the Proposals, which, if adopted, would violate fundamental concepts of due process; conflict with statutory and regulatory requirements; and unduly and unnecessarily burden the procurement process, without accomplishing the goals articulated by the Executive Order.

[1] Federal Acquisition Regulation: Fair Pay and Safe Workplaces, 80 Fed. Reg. 30548 (proposed May 28, 2015) (to be codified at 48 C.F.R. pts. 1, 4, 9, 17, 22, and 52).
[2] Guidance for Exec. Order 13673, "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30574 (proposed May 28, 2015).

I. THE COALITION SUBMITTING THESE COMMENTS

These comments represent the views of federal government contractors and subcontractors across a wide range of industries, including aerospace, global security, health care and pharmaceuticals, food manufacturing and distribution, fuel and petrochemical manufacturing, and electrical energy production, and include companies from the Fortune 100. The members of the coalition are parties to hundreds of millions of dollars in federal contracts. Members of the coalition have employees or perform operations throughout the United States, as well as many locations outside the United States. Collectively, the coalition members employ approximately two million employees. The coalition members' employees include units of employees who are represented by various labor organizations and work subject to collective bargaining agreements and employees who are not represented by unions.

Each contractor and subcontractor that is a part of the coalition, formed for purposes of providing comments on the proposed regulation and guidance, is committed to complying with federal and state labor laws and has robust policies and practices in place for doing so. As the White House stated when President Obama signed the Executive Order on July 31, 2014, "[w]hile the vast majority of federal contractors play by the rules, every year tens of thousands of American workers are denied overtime wages, not hired or paid fairly because of their gender or age, or have their health and safety put at risk by corporations contracting with the federal government that cut corners."[3] The members of this coalition are part of the "vast majority" of federal contractors and subcontractors that play by the rules.

The coalition agrees with the underlying objective of the proposed regulations and guidance – that federal contractors should comply with applicable labor and employment laws. Respectfully, the coalition members submit that the Proposals would improperly impose significant new burdens and obligations across the entire federal government contractor and subcontractor community to address alleged shortcomings by a small minority – a fundamentally flawed approach. Moreover, as discussed more fully below, the government already has tools at its disposal to assure responsibility of contractors, but it has not yet given them a chance to work appropriately. Piling requirement on top of requirement, without assuring that each attempt is appropriate or successful, will create disastrous results for the contracting process and the government's ability to attract high-quality providers and to obtain goods and services in an affordable, timely, and efficient manner.

Additionally, as demonstrated below, the Proposals overstep the bounds of due process, violate federal statutory requirements, create procedures that would harm the procurement process, and impose requirements on contractors and subcontractors that are impossible to meet.

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[3] *FACTSHEET: Fair Pay and Safe Workplaces Exec. Order*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (July 31, 2014), https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order.

Our coalition recognizes that the FAR Council and DOL are constrained in drafting regulations and guidance that comport with the framework set forth in Executive Order No. 13673. Therefore, although we strongly disagree with the underlying approach included in the Fair Pay and Safe Workplaces Executive Order, where appropriate to do so, we have suggested alternatives to the Proposals that, in our view, would better promote the goals of the Executive Order and do so in ways that comport with the requirements of law and that are feasible from an economic and practical point of view.

II. THE PROPOSALS RAISE DUE PROCESS CONCERNS

A. Substantive Due Process Is Undermined

Substantive due process "limits what the government may do in both its legislative . . . and its executive capacities . . ."[4] As the U.S. Supreme Court has stated, "[w]e have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government, . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . ."[5] In their current state, there is no "reasonable justification" for the Proposals. Stated differently, there is no rational relationship between the stated purpose of the Executive Order and the proposed regulations and guidance.

As noted above, the President has recognized that the "vast majority" of federal contractors play by the rules. Yet, the Proposals would have *all* contractors and subcontractors create new systems for capturing and reporting even the most minor allegations of state and federal labor laws, regardless of the lack of intent to violate any law, the relationship of the alleged "violation" to the performance of the government contract or whether those allegations are ultimately determined to constitute actual violations.

The Proposals would require contracting agency responsibility determinations to take into account unproven allegations or, worse, agency determinations that may later be withdrawn by the agency or rejected by a court or administrative law judge or review board. Plainly, this process would not be in the service of the goal of ensuring that agencies will work only with those contractors with track records of compliance. In fact, quite the opposite would occur. Compliant bidders and contractors would be unjustly denied opportunities, and the government would be irrationally and unreasonably deprived of the services of outstanding companies.

Some examples from the Proposals illustrate this point. The proposed DOL guidance requires the reporting of "administrative merits determinations," which means any of the notices or findings, "whether final or subject to appeal or further review," that

[4] *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citations omitted).
[5] *Id*. at 845-846 (citations omitted).

are listed in the guidance.[6] One example of a reportable administrative merits determination is a letter of determination issued by the Equal Employment Opportunity Commission ("EEOC") "that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring."[7] Such a reasonable cause determination merely means that the EEOC has determined that "it is more likely than not" that the charging party or other persons were subject to discrimination on the bases prohibited by an EEOC-enforced statute.[8] This is a preliminary conclusion based typically on a cursory investigation. Although the EEOC is unable to conciliate a large number of cases in which it finds reasonable cause, the agency only litigates a small percentage of these cases. Therefore, a large number of cases where preliminary reasonable cause has been found are essentially dropped by the EEOC. Under the Proposals, these rejected reasonable cause determinations will be reportable, despite the fact that EEOC may have determined that there is insufficient cause to proceed to litigation and despite the fact that the contractor never had an opportunity to challenge the EEOC's preliminary determination.[9]

The proposed DOL guidance also states that a WH-56 "Summary of Unpaid Wages," issued by the Wage and Hour Division of DOL, is also an "administrative merits determination."[10] Yet, the Wage and Hour Division will issue a WH-56 even where the back wages to be paid by the contractor are owed under the Service Contract Act ("SCA"), for example, because of the contracting agency's failure to include the applicable clause or wage determination in the contract. In these situations, the Wage and Hour Division recognizes that the contractor has not violated the SCA, but the covered employees are due SCA prevailing wages, and the contractor may obtain an equitable adjustment from the contracting agency to cover the cost of those back wages. And, as discussed more fully below, if the back-wage assessment is at least $10,000, such "violation" would be deemed "serious," even though the contractor did not, in fact, violate the SCA.

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[6] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30579.
[7] *Id*.
[8] EEOC Compliance Manual § 40.2.
[9] For example, in FY2012, there were 4,207 reasonable cause findings by the EEOC. EEOC ENFORCEMENT & LITIGATION STATISTICS: ALL STATUTES, FY 1997-FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Aug. 20, 2015). In this same year, there were 2,616 unsuccessful conciliations. *Id*. However, the EEOC only filed 155 suits. EEOC ENFORCEMENT & LITIGATION STATISTICS: LITIGATION STATISTICS, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Aug. 20, 2015). In FY2013, the EEOC found reasonable cause in 3,515 cases. EEOC ENFORCEMENT & LITIGATION STATISTICS: ALL STATUTES, FY 1997-FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Aug. 20, 2015). In this same year, there were 2,078 unsuccessful conciliations. *Id*. However, the EEOC only filed 148 suits. EEOC ENFORCEMENT & LITIGATION STATISTICS: LITIGATION STATISTICS, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Aug. 20, 2015). In FY2014, the EEOC found reasonable cause in 2,745 cases. EEOC ENFORCEMENT & LITIGATION STATISTICS: ALL STATUTES, FY 1997-FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Aug. 20, 2015). In this same year, there were 1,714 unsuccessful conciliations. *Id*. However, the EEOC only filed 167 suits. EEOC ENFORCEMENT & LITIGATION STATISTICS: LITIGATION STATISTICS, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Aug. 20, 2015).
[10] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30579.

The proposed guidance also provides that a complaint issued by a Regional Director of the National Labor Relations Board ("NLRB") is an "administrative merits determination" that must be disclosed.[11] Yet, such complaint does not even represent a finding by the agency. Instead, although the issuance of a complaint may indicate that the Regional Director has reasonable cause to believe that a violation has occurred, it just as easily may merely indicate that there is a conflict in the evidence. In either event, the complaint does no more than initiate the adjudication process before an administrative law judge,[12] yet, as proposed, a bidding contractor could be prejudiced based on this "violation."

As these examples illustrate, the Proposals do not provide a rational relationship between the definition of a disclosable administrative merits determination and the aim of the Executive Order to ferret out contractors and subcontractors that do not comply with federal and state labor laws. Contrast the Proposals with FAR 52.209-7(a), which defines an "administrative proceeding" as

> a non-judicial process that is *adjudicatory in nature* in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and State level *but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.*[13]

The Proposals also require Agency Labor Compliance Advisors ("ALCAs") to weigh the violations disclosed by contractors and subcontractors and determine whether they are "serious," "willful," "repeated," or "pervasive."[14] The DOL guidance purports to have "purposely excluded . . . violations that could be characterized as inadvertent or minimally impactful" when crafting the definitions of "serious," "willful," "repeated," and "pervasive" violations, stating an intent to include only those violations that fall within a "subset of . . . violations that are most concerning and bear on an assessment of a contractor's . . . integrity and business ethics."[15]

The current definition of "serious," however, creates no such "limited subset" of violations that are "most concerning" or that in any meaningful way bear on an assessment of a contractor's integrity and business ethics. Quite the contrary is true, as is evident in the context of OSHA violations. OSHA data for 2009-2013, for example,

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[11] *Id.*
[12] NLRB Rules and Regulations § 102.15.
[13] FAR 52.209-7(a) (emphasis added).
[14] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30582-30590, Apps. A-D.
[15] *Id*. at 30582.

show that the vast majority of all OSHA citations issued – approximately 75 percent – are classified as "serious" violations by the agency.[16] Even if one assumes that every one of the issued citations does, in fact, reflect a regulatory violation of the cited standard (which is demonstrably not the case), these "serious" citations do not provide any meaningful indication that an employer is among the small minority of federal government contractors lacking integrity and business ethics.

"Serious" citations that would be considered evidence of a contractor's lack of integrity and business ethics would include, for example:

- inclusion of a riser height or tread depth on a stairway system on a construction site with a variation more than ¼ inch (.6 cm);[17]

- failing to cover a 2" x 2" opening in a work platform and somehow presenting a hole into which an employee could accidentally walk;[18] or

- failing to ensure that a supervisor completing a permit-required confined space form include the date he/she has completed the form next to his/her name.[19]

In the case of a supervisor's failure to provide the date of his/her signature, such failure bears no relation to whether a contractor is responsible, and classifying such administrative merits determination as "serious" is arbitrary. While citations issued for certain of these technical violations of the cited OSHA standards might well be "serious" in the context OSHA intends that term, *i.e.*, an employee could possibly be seriously injured if the regulation is violated, such citations do not provide evidence that the contractor lacks business ethics and integrity. An "apples and oranges" problem is created by hinging contractor responsibility determinations on the existing statutory definition of "serious."

Moreover, it is not uncommon for a "serious" classification accorded the initial citation to be reclassified to "other than serious" or withdrawn by OSHA in the context of a challenge to the citation based on the evidence that no employees were exposed to the hazard. While the Proposals allow for a process to provide information about the reclassification to the contracting agency, the reclassification may come well after the agency has conducted its responsibility determination and made its choice of contractors.

Under the proposed guidance, a violation will also be deemed "serious if it resulted in $5,000 or more in fines and penalties, or $10,000 or more in back wages."[20] The proposed guidance cites "recent enforcement data" to assert that only a small

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[16] OSHA ENFORCEMENT DATA: 2013 ENFORCEMENT SUMMARY, https://www.osha.gov/dep/2013_enforcement_summary.html (last visited Aug. 25, 2015).
[17] 29 C.F.R. § 1926.1052(a)(3).
[18] 29 C.F.R. § 1910.23(a)(8).
[19] 29 C.F.R. § 1910.146(c).
[20] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30583.

minority of cases result in fines and/or back-wage awards in excess of the $5,000/$10,000 threshold.[21] Although the Proposals do not provide a citation to the enforcement data for verification and review, we assume that the data are limited to collected fines and back-wage awards, not the amounts initially assessed by the agency, which typically are higher. As the Proposals make clear, "the threshold amounts for fines and penalties are measured by the amount '*assessed*,'" as follows:

> If an administrative merits determination, for example, assesses $6,000 in civil monetary penalties against a contractor or subcontractor but later that amount is reduced to $4,000 in settlement negotiations or only $4,000 is collected, the underlying violation is serious based on the assessed amount. The Department believes that the amount assessed is a better indication of seriousness because civil monetary penalties may be reduced for reasons unrelated to the seriousness of the violation. If the amount assessed was later reduced, the contractor or subcontractor should provide that information as a possible mitigating factor.[22]

Monetary penalties or back-wage assessments may be reduced for a variety of reasons. In the coalition's experience, assessments are frequently reduced because the employer is able to demonstrate that it did not commit all or any of the alleged violations, or that the agency's calculations were erroneous. Thus, the original assessment is a profoundly flawed indication of the seriousness of the violation and cannot reasonably be proposed as the yardstick against which the gravity of the violation or the contractor's integrity and business ethics is measured. Additionally, characterizing the reduced amount that the agency agrees to and accepts as a *mitigating* factor is simply not factually or legally sound; the final, reduced amount paid should be the *only amount reported* and considered because the initially assessed amount is wholly immaterial and has been voluntarily reduced by the enforcement agency, based on the additional information provided by the employer.

The Proposals provide that a violation will be deemed a "repeat" violation if the violations are of the same "type of violation."[23] The concept of a repeat violation is established, for example under the Fair Labor Standards Act,[24] and means that the same kinds of violations have occurred. In contrast, "repeat violation" is differently and more broadly defined in the proposed DOL guidance. In addressing how repeat violations are to be defined in DOL's proposed guidance, the very limited information provided does not explain how to determine whether violations are of the same type. In place of a useful definition, the Proposals provide a broad assertion that the claims do not have to be "exactly the same" and that it is sufficient to share "essential elements in common."[25]

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[21] *Id*.
[22] *Id*. at 30584 (emphasis added).
[23] *Id*. at 30587.
[24] Fair Labor Standards Act, 29 U.S.C. § 216(e). *See* 29 C.F.R. § 578.3(b).
[25] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30587 (internal quotations and citations omitted).

This proposed definition is facially deficient. For example, would a Title VII claim for sexual harassment be considered a repeat violation if the contractor previously had an OFCCP show cause notice on a sex-based hiring discrimination claim? Or would a violation of Title VII for sex discrimination involving a woman and a probable cause finding in a separate charge filed by a man alleging race discrimination constitute a repeat violation? Or, finally, would separate probable cause findings in separate charges involving different discrimination statutes enforced by the EEOC (*e.g.*, Employee A's charge under Title VII and Employee B's charge under the Age Discrimination in Employment Act) constitute a repeat violation? Would the same type of charge, but with different facts, raised in different states and at different contractor facilities by different people and involving different personnel, be a repeat violation? There are countless examples that could be provided that illustrate why the broad and undefined criteria, such as those proposed in DOL's guidance, fail to provide the contracting community and the ALCAs with meaningful guidance or a legally enforceable standard for assessing federal contractors' eligibility.

If the "touchstone" of due process is to prevent the "exercise of power without any reasonable justification in the service of a legitimate governmental objective,"[26] then substantive portions of the Proposals must be re-examined and re-cast. As the Proposals are currently stated, there appears to be no way that contractors can avoid being deprived of fundamental rights.

B. Procedural Due Process Is Undermined

As written, the Proposals contain barriers to the procedural due process rights of federal contractors as established in the Constitution. The Fifth Amendment of the Constitution prevents the government from depriving individuals of life, liberty, or property without the due process of law.[27] When "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[28]

Federal contractors have a liberty interest in contracting with the government.[29] This liberty interest requires that the government entitle a contractor to "challenge the processes and the evidence" before a declaration of ineligibility.[30] In regard to debarment, a contractor is permitted "to challenge the processes and the evidence before he is officially declared ineligible for government contracts" because a charge of a lack of integrity will harm its reputation.[31] The risk that a contractor could be banned from

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[26] *Lewis*, 523 U.S. at 845-846 (citations omitted).
[27] U.S. CONST. Amend. V.
[28] *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972) (internal quotations and citations omitted).
[29] *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 962 (D.C. Cir. 1980) (relying on *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964)).
[30] *Gonzalez*, 334 F.2d at 575. *See Old Dominion Dairy Prods.*, 631 F.2d at 962 (quoting *Gonzalez*, 334 at 574).
[31] *Old Dominion Dairy Prods.*, 631 F.2d at 962-63 (quoting *Gonzalez*, 334 F.2d at 574).

receiving a source of revenue requires minimum safeguards.[32] Before a contracting officer makes a determination that a contractor lacks the responsibility required for a government contract, the contractor must be afforded notice to have the ability to respond to a charge of a lack of responsibility and ethics.[33]

1. Compelled disclosures deprive contractors of a meaningful opportunity to repair their reputations

The Proposals deny federal contractors these required due process protections. Under the proposed regulation and guidance, federal contractors will be required to submit information on labor law violations "whether final or subject to appeal or further review."[34] The "administrative merits determinations that must be reported under the Order include an administrative merits determination that the contractor or subcontractor is challenging, can still challenge, or is otherwise subject to further review."[35]

Under Section 22.2004-1 of the proposed FAR regulation, an offeror on a covered solicitation must represent whether, in the past three years, it was found to have violated federal or state labor laws. Then, "if the contracting officer has initiated a responsibility determination, the contracting officer will require the offeror to submit information on the violation(s) and afford the offeror an opportunity to provide information on mitigating circumstances."[36] The proposed DOL guidance elaborates on this process, noting that at the initial representation, a potential contractor will submit a representation "to the best of its knowledge and belief whether it has or has not had such violations, *without providing further information*."[37] At the next stage of pre-award reporting, a contractor, for whom the contracting officer has initiated a responsibility determination, is required to report information regarding each of the alleged or actual violations to the contracting officer.[38] Though the contractor at some point may offer the contracting officer "additional information as the contractor deems necessary to demonstrate its responsibility,"[39] the proposed FAR 22.2004-2 does not provide that both kinds of information will be available for other government officials and the public. Rather, the only information to be made available is the information about each of the actual or alleged violations, which is to be entered into the governmentally and publicly accessible database.[40] Furthermore,

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[32] *Id*. at 955-56 (holding "that when the government effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity, due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken.").
[33] *Id*. at 966-68.
[34] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30579.
[35] *Id*. at 30580. As noted in *supra* note 9 and accompanying text, in most cases in which EEOC issues a reasonable cause determination, the agency ultimately chooses not to litigate the matter, thus leaving contractors and subcontractors with no opportunity to appeal an erroneous probable cause finding in court.
[36] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30566.
[37] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30581 (emphasis added).
[38] *Id*. The proposed FAR rule requires that this information be posted on a publicly accessible government database that both government officials and the public can access to learn the specific information about each violation. FAR, Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30549.
[39] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30581.
[40] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30566. *See* the SAM User Guide, which provides in pertinent part at section 1.4 Public User Capability that "SAM includes information of various sensitivity

serious violations are determined by weighing the fines or penalties "assessed," instead of the final determinations of such penalties.[41]

The Proposals essentially have split the responsibility determinations into two phases: an initial reporting phase where only "violations," including mere allegations, are reported, without affording the contractor any opportunity to explain; and a second phase resembling the traditional responsibility determination, but also requiring that the contractor publicly report on its actual or alleged violations. Although the initial stage is not labeled as a responsibility determination, nothing in the Proposals suggest an alternate conclusion. It is not clear that a contracting officer will consider anything other than these non-final administrative merits determinations in determining whether to initiate a responsibility determination. Therefore, the initial process outlined in the Proposals becomes a *de facto* responsibility determination made without the required due process.

Furthermore, under the "assessed" fines requirement, contractors will not have the opportunity to challenge the non-final notice or finding. As a result, contractors may be eliminated from consideration on a contract before they have any opportunity to present their defense or mitigating factors, which can include a final judgment in their favor or a reduction in the fine, penalty or back-wage assessment. A contractor could thus, essentially, be deemed "guilty even when proven innocent." Under the Proposals, contractors can be adjudged as non-responsible without the procedural safeguards afforded by a challenge or final adjudication, as guaranteed by law.

The second phase also constitutes a *de facto* responsibility determination that deprives the contractor of a fair opportunity to clear its good name before it is harmed. Even before any formal notice of non-responsibility that would trigger the contractor's right to appeal, the Proposals mandate that the contractor publicly enter information regarding the actual or alleged violations. The second phase – which may occur at the initial threshold for consideration of a contractor's offer in a procurement or at a later time when the contracting officer is determining whether to include the offeror in the competitive range of a competed procurement or at an even later time when the contracting officer is actually considering the offeror for a specific award – triggers a disclosure to the public that also raises a *de facto* responsibility concern.[42]

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levels. Public data is available to search and view without having to login or register for a SAM account. Information that was previously publicly available in the legacy systems has been moved to SAM—and will remain publicly available in SAM. Public users that want to save their searches or government users needing access to higher levels of sensitive data must register for a SAM user account." *SAM User Guide*, GENERAL SERVICES ADMINISTRATION, https://www.sam.gov/sam/SAM_Guide/SAM_User_Guide.htm#_Toc330768940 (last visited Aug. 20, 2015).

[41] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30582.

[42] *Compare* proposed 22.2004–2(b)(1)(i) (requiring violation information be entered into SAM) *with* proposed 22.2004-2(b)(1)(iii) (providing that contractor may provide contracting officer "such additional information as the prospective contractor deems necessary to demonstrate its responsibility, *e.g.*, mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws."), FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30566. As

If the reported labor law violations relate to past performance of a government contract, these matters may be properly addressed under the contract and/or under applicable past performance evaluation and reporting procedures set out in FAR Part 42.15,[43] and there is no need to impose additional and redundant reporting obligations.[44] If the reported labor law violations do *not* relate to past performance under a government contract, then such information would not necessarily be relevant to a contractor's or subcontractor's ability to successfully perform a specific government contract. Consideration of whether a contractor is responsible for other than a particular procurement must be determined in accordance with the established procedures set out in FAR Part 9.4.[45]

Additionally, the Proposals require that contractors submit basic information about labor law violations to a public website, which has yet to be created.[46] Although the Proposals provide that a contractor is not required to report where the agency dismisses the charge or finds in favor of the contractor on the violation matter, this too raises concerns. There is no indication in the Proposals that the website will be updated to reflect subsequent decisions in the contractor's favor, in regard to non-final administrative merits determinations such as a reduction in penalty, the withdrawal of a show cause notice, or an ALJ's dismissal of an agency's allegations. As a result, under the procedures as proposed, a company seeking to bid on and to perform federal contracts lacks a meaningful opportunity to repair its reputation before the compelled publication of incomplete and inaccurate information, or even after that point. Furthermore, absent a mechanism to remove the information, will the erroneous information remain in the

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noted, there is no provision for the inclusion of a contractor's exculpatory information along with the reported violations that are to be made accessible to the public and other agencies through SAM.

[43] *See, e.g.,* FAR 42.1502 ("(a) General. Past performance evaluations shall be prepared at least annually and at the time the work under a contract or order is completed. Past performance evaluations are required for contracts and orders as specified in paragraphs (b) through (f) of this section, including contracts and orders performed outside the United States. These evaluations are generally for the entity, division, or unit that performed the contract or order. Past performance information shall be entered into CPARS, the Government wide evaluation reporting tool for all past performance reports on contracts and orders. Instructions for submitting evaluations into CPARS are available at http://www.cpars.gov/.").

[44] *See* FAR 42.1503(d) ("These evaluations may be used to support future award decisions, and should therefore be marked 'Source Selection Information'…. The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart. A copy of the annual or final past performance evaluation shall be provided to the contractor as soon as it is finalized."). *See also* FAR 9.104-6 ("(a) Before awarding a contract in excess of the simplified acquisition threshold, the contracting officer shall review the Federal Awardee Performance and Integrity Information System (FAPIIS), (available at www.ppirs.gov, then select FAPIIS).").

[45] FAR Part 9.4 covers the established process of debarment, suspension, and ineligibility of a contractor for contract awards and option exercise where there are convictions or civil judgments, or where the established process under this Part has resulted in a determination that there is adequate evidence, pending the completion of investigation or legal proceedings, that immediate action is necessary to protect the Government's interest. *See, e.g.*, FAR 9.406, 9.407.

[46] FAR: Fair Pay and Safe Workplaces, Section 22.2004-2, 80 Fed. Reg. at 30566. *See also id.* at 30555.

system in a manner that harms the contractor's potential to be awarded a different contract, in the future?

In addition, the Proposals are silent on what will be done with this incomplete or inaccurate information once a contractor is vindicated. There is no mechanism for posting this vindication on SAM, or otherwise removing the offending information. Indeed, in the world of cyberspace, once a government official or member of the public has downloaded information, it may still be able to access the information even though it is no longer listed on the government website.[47] The contractor is harmed forever by the required reporting of incomplete, non-final information, without an effective remedy.

These procedures, which inevitably will violate the right to due process and result in significant and irreparable harm to contractors, stand in stark contrast to the protections established in the regulations adopted during the Administration of President Clinton, which more fully acknowledged the need for due process protections. Those regulations required the reporting of convictions and civil judgments; indictments for the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract; and adverse decisions by federal administrative law judges, boards or commissions.[48] We urge that the FAR Council and DOL, if they deem reporting of labor law violations, not occurring in the performance of a government contract, to be essential to the procurement process, require disclosure only of final adjudications.

III. AS PROPOSED, THE FAR RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT ("APA")

Under the APA, an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or which is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," will be held unlawful and set aside.[49] The Proposals do not meet these APA standards for at least four independent reasons.

First, the Proposals must be reasonably related to the purpose of the enabling legislation under which they were promulgated.[50] By requiring the disclosure of unproven allegations and even of allegations and findings that are later overturned, and by considering mere allegations and insubstantial findings in responsibility determinations for awarding federal contracts, the Proposals do not rationally serve the goal of reserving federal contracts or subcontracts to those that "comply" with federal and state labor laws.

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[47] The harm is further compounded since the reporting database, SAM, provides that the public and government users can save their searches, and apparently their search results, for later use. *See supra* note 40.

[48] Federal Acquisition Regulation, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80256, 80265 (Dec. 20, 2000).

[49] 5 U.S.C. § 706(2)(A), (C).

[50] *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973).

Second, the Proposals would impermissibly amend a number of federal statutes by adding a remedy – denial of a government contract or subcontract – not authorized by these statutes. Neither the Fair Labor Standards Act nor Title VII, for example, list debarment or the potential loss of a contracting opportunity as a penalty or remedy for violating their respective provisions.[51] These statutes do not permit the FAR Council to include the additional penalty of a loss of a contract opportunity with the federal government for prior violations. Indeed, Title VII explicitly prohibits the denial, withholding, termination, or suspension of government contracts when the employer has an affirmative action plan and unless certain conditions are met.[52] Only Congress can enact the penalties imposed by the Proposals.

Third, the Proposals create an opportunity for federal enforcement agencies to impose requirements on contractors and subcontractors through the newly established "labor compliance agreements" that are not required – or even authorized – for violations of a federal or state statute or regulation. The proposed FAR regulation 22.2004-2(b)(3)(i) provides that the ALCA must make one of the following recommendations:

> (A) The prospective contractor could be found to have a satisfactory record of integrity and business ethics;
>
> (B) The prospective contractor could be found to have a satisfactory record of integrity and business ethics if the process to enter into or enhance a labor compliance agreement is initiated; or
>
> (C) The prospective contractor could be found to not have a satisfactory record of integrity and business ethics, and the agency Suspending and Debarring Official should be notified in accordance with agency procedures.[53]

The "labor compliance agreement" is defined in DOL's guidance as "an agreement entered into between an enforcement agency . . . and a contractor or subcontractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other related matters."[54]

Importantly, there is no delineation in the Proposals as to what might be deemed an "appropriate remedial measure," and it appears that an enforcement agency would have complete discretion to dictate the terms of a labor compliance agreement. A contractor or subcontractor would have no choice but to accept those terms if it hoped to win the contract or subcontract award. Might OSHA require that a bidder adopt and implement an Injury and Illness Prevention Program (I2P2), a heat stress program, or an ergonomics program, for instance, in order to be deemed a responsible bidder, despite the

[51] Fair Labor Standards Act, 29 U.S.C. § 216; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5.
[52] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (providing that U.S. agency or officer cannot do so without "first according such employer full hearing and adjudication under the provisions of section 554 of Title 5.").
[53] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30566.
[54] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30577.

fact that OSHA has not had the political support to mandate these programs through regulation (with the exception of the ergonomics program, which was swiftly rescinded by Congress)?[55] Could OSHA also require abatement of a hazard for which the contractor has been issued a citation, despite the fact that employers are not required to abate the alleged hazard pending resolution of the contest of the OSHA citation?[56] Could OFCCP require that workers not determined to be performing a contract be paid $10.10/hour?[57] Absent clearly articulated standards, the government is left with untrammeled discretion and the contractor bereft of any defense. This is a prime example of illicit arbitrary authority.

Fourth, the proposed rule requires that violations of not just Federal, but comparable state labor laws, be reported.[58] Thus, the proposed rule would require state law enforcement agencies to dictate whether remediation is properly taking place.[59] This placement of power in the hands of a state for a Federal procurement is at odds with federalism principles and improperly places responsibility – a federal determination –in the hands of a state agency, whose workplace laws may have standards and provisions that are different from, and may even conflict with, their federal counterparts.

The imposition of additional remedies and sanctions through the labor compliance agreement process is fundamentally flawed. Accordingly, we recommend that the labor compliance agreement provision be deleted, lest it be used to allow the agencies and states to engage in unlawful "back-door" legislation and create an environment in which contractors may feel pressured to agree to provisions that go beyond the requirements of law or regulation in order to be awarded a federal contract.

IV. THE PROPOSALS VIOLATE THE NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS OF FEDERAL LAW

The proposed FAR Subpart 22.20 sets forth the definitions to be used in the subpart. As proposed, however, many of the essential definitions are to be found in the DOL guidance, and it is those definitions that will provide the substantive requirements to be included in the clauses prescribed by the final FAR rule. As stated explicitly in the proposed FAR rule, in order to determine the substantive disclosure requirements

[55] Ergonomics Rule Disapproval, Pub. L. No. 107-5 (Mar. 20, 2001) (disapproving of Final Ergonomics Standard, 65 Fed. Reg. 68262-01 (Nov. 14, 2000)); 66 Fed. Reg. 20403-01 (Apr. 23, 2001).
[56] *See OSHA Field Operations Manual, CPL 02-00-150*, Ch. 7, Sec. IV(b) (Apr. 22, 2011). In situations where an employer contests either (1) the period set for abatement or (2) the citation itself, the abatement period generally shall be considered not to have begun until there has been an affirmation of the citation and abatement period. In accordance with the Act, the abatement period begins when a final order of the Review Commission is issued.
[57] *See* Exec. Order 13658.
[58] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30549.
[59] *Id*. at 30565 (defining "enforcement agency" as including "a State agency designated to administer an OSHA-approved State Plan").

required by the rule, a contracting agency – and, hence, a contractor – must refer to the DOL guidance, which will be incorporated by reference in the final FAR rule.[60]

Thus, for example, as stated in proposed section 22.2002, "[t]o determine whether a particular notice or finding is covered by this definition [of an administrative merits determination], it is necessary to read section II. B. in the DOL guidance."[61] Similarly, to determine whether a particular arbitral award or decision or civil judgment is covered by the definitions, and, therefore, is subject to the Proposals' disclosure requirements, "it is necessary to read section II. B. in the DOL guidance."[62] The Proposals do not contemplate that these definitions, once final, will be set forth in full in the required FAR clauses; they will, instead, be incorporated by reference to the final DOL guidance.

Similarly, in order to determine the gravity of disclosed violations, the contracting agency and the contracting community would be relegated to a review of the DOL guidance. As stated in the proposed definitions, in order to determine whether a particular violation is "serious," "repeated," "willful," or "pervasive," "it is necessary to read" sections III. A through III. D in the DOL guidance.[63]

The Publication Statute requires that the FAR regulation that will give effect to Executive Order 13673 must be promulgated through notice-and-comment rulemaking:

> (a) Covered policies, regulations, procedures, and forms.—
>
> (1) Required comment period.--Except as provided in subsection (d), a procurement policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register pursuant to subsection (b) if it—
>
> (A) relates to the expenditure of appropriated funds; and
>
> (B)(i) has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or
>
> (ii) has a significant cost or administrative impact on contractors or offerors.[64]

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[60] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30565. The proposal states, "*DOL guidance* means the Department of Labor (DOL) guidance entitled: 'Guidance for Executive Order 13673, Fair Pay and Safe Workplaces,' which can be obtained from *www.* _____." *Id.*

[61] *Id*.

[62] *Id*.

[63] *Id*. at 30565-66.

[64] 41 U.S.C. § 1707(a), formerly 41 U.S.C. §418b (which amended the Office of Federal Procurement Policy Act), and Pub. L. No. 98-577, § 302 (adding § 22 to the Office of Federal Procurement Policy Act). *See* Vernon J. Edwards, *POSTSCRIPT: Agency Policy Memos*, 27 No. 11 Nash & Cibinic Rep. (Nov. 2013). The statute provides for a waiver of the requirements of subsections (a) and (b) "by the officer

The proposed DOL guidance is essentially a procurement rule that, under the Publication Statute, may only be issued through notice-and-comment rulemaking. As currently constituted, the DOL guidance contains essential terms of the proposed FAR procurement rule, as it is expressly referred to in the FAR procurement rule and incorporated by such reference. However, DOL has stated that, "*in its discretion*," the Agency is soliciting public comment on the proposed guidance, thereby suggesting that the guidance is not subject to rulemaking and is changeable at the will of DOL without notice and comment.[65] We disagree that DOL may issue its guidance and future amendments to the guidance without notice and comment. Although the Supreme Court held in *Perez v. Mortgage Bankers Assoc.*,[66] that DOL could revise its guidance under the FLSA without the benefit of notice and comment, the Court's decision in *Mortgage Bankers* was based on the requirements of the APA, which governed that case. *Mortgage Bankers* does not authorize unilateral changes to DOL's proposed guidance on procurement rules, which are, instead, governed by the notice-and-comment requirements of the Publication Act.

As a result, to avoid violating statutory rulemaking requirements for procurement rules, the final FAR provision should be revised to remove reference to the DOL guidance and instead contain all required terms for its interpretation and execution, so that any and all future changes to the regulations will be properly undertaken only through notice-and-comment rulemaking.

Indeed, the DOL guidance cannot be made applicable to any and all federal procurements; only FAR rules are applicable to procurements by the various federal agencies.[67] Thus, the DOL guidance should be withdrawn. Even if the DOL guidance were retained, future changes to the Guidance would not automatically trigger changes to the FAR rule.[68] If and when DOL revises its guidance in the future, in order for those changes to become applicable to other agencies' federal contracting eligibility determinations, the FAR Council then would be required to amend the FAR regulation in accordance with statutory notice-and-comment rulemaking requirements. These recommended changes are essential because DOL lacks the authority to promulgate federal procurement rules that apply across the Executive branch agencies; only the FAR Council may issue such regulations.[69]

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authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with the requirements impracticable." 41 U.S.C. § 1707(d).

[65] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30576 (emphasis added).

[66] *Perez v. Mortgage Bankers Assoc.*, ___ U.S. ___, 135 S.Ct. 1199, 1203 (2015).

[67] 41 U.S.C. § 1303(a)(1) (providing for "a single Government-wide procurement regulation"). *See infra* note 69.

[68] We note in this regard a further concern that any DOL guidance on procurement matters must be consonant with the procurement rules. Inconsistent thresholds, definitions, etc. raise the possibility of real dissonances between applications of the same law under procurement rules in FAR and in the DOL guidance. Contractors should not be required to guess as to the obligations that apply to them.

[69] Under the Office of Federal Procurement Policy Act, as revised and re-codified, the FAR Council is established and responsible for promulgating a set of uniform rules to be applied across the executive branch agencies for the fair and efficient procurement of needed goods and services by the Executive branch. 41 U.S.C. § 1302(a) ("There is a Federal Acquisition Regulatory Council to assist in the direction

V. SUBCONTRACT COVERAGE

We are concerned that any application of the Proposals to subcontractors will have a deterrent or chilling effect on subcontracting; *i.e.*, its onerous provisions may discourage potential subcontractors from entering or remaining in the federal contracting supply chain. Additionally, it may put prime contractors in a difficult situation. For example, what course is open to a prime contractor whose subcontractor has, during the life of the subcontract, been found to have a labor law violation? Termination of that subcontract is often not a feasible choice, particularly where the subcontractor is the only entity that can provide the goods or services required by the prime contract. Indeed, particularly in procurements where there is an established bill of materials (BOM), the subcontractor is a qualified supplier and/or supplies required qualified products, switching mid-stream can have serious and unintended consequences on contract schedule, cost and quality of performance, imposing significant, additional risks and costs on both the contractor and the government. Thus, the Proposals should not apply to subcontractors.

However, if the government chooses to apply the Proposals to subcontractors, the definition of "subcontract" and "subcontractor" should be modified. As drafted, the proposed DOL Guidance defines a "covered subcontract" as "any contract awarded to a subcontractor that would be a covered procurement contract except for contracts for commercially available off-the-shelf items."[70] This definition is inconsistent with the FAR Part 44 provisions on subcontracting, which more narrowly define a "subcontract" and "subcontractor" as follows:

> "Subcontract" means any contract as defined in [FAR] subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

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and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government."). An agency, such as DOL, is limited to only issuing agency-specific supplemental regulations for their agency procurements, which regulations must be consistent with FAR Council-promulgated procurement rules. *See, e.g.*, 41 U.S.C. §1303(a)(1) ("Subject to sections 1121, 1122 (a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 of this title, the Administrator of General Services, the Secretary of Defense, and the Administrator of National Aeronautics and Space, pursuant to their respective authorities under division C of this subtitle, chapters 4 and 137 of title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451 et seq.), [1] shall jointly issue and maintain in accordance with subsection (d) a single Government-wide procurement regulation, to be known as the Federal Acquisition Regulation"); 41 U.S.C. § 1302(b)(2). Any other procurement regulations by another agency must be consistent with the FAR. 41 U.S.C. § 1303(a)(3). Other agencies' regulations that are inconsistent with the FAR should be removed or revised to be rendered consistent with FAR. *Id*. Further, the FAR Council is charged with ensuring that any proposed rules go through the notice-and-comment process before becoming final. Permission for deviation from this rulemaking requirement will only be given where it is determined by the FAR Council members that urgent and compelling circumstances exist justifying the grant of an interim approval, without review, for not more than 60 days for a procurement regulation. 41 U.S.C. § 1303(b)(1)(A). Thus, even where a procurement rule is issued without notice and comment, it is only temporary. The final rule must still go through this rulemaking process.

[70] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30578 (footnote omitted).

> "Subcontractor" means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.[71]

The final regulations and guidance should limit the definition of "subcontract" to only those contractual arrangements with a federal contractor, under which the subcontractor agrees to furnish supplies or services to a prime contractor or other subcontractor, entered into to meet the obligations under any one or more Federal contracts funded with appropriated funds.[72]

In addition, if the government does apply the Proposals to subcontractors, we also propose that application be limited to first-tier subcontractors, applying the proposed modified definition of "subcontract" and "subcontractor." Additionally, the application to subcontractors should be phased in so that the reporting obligations apply initially only to prime contractors and then, after a phase-in period, to first-tier subcontractors.

VI. THE PROPOSALS ARE INCONSISTENT WITH STATUTES AND REGULATIONS THAT GOVERN THE PROCUREMENT PROCESS

In the interest of adding a new element to a determination of responsibility, the Proposals would undermine the procurement process and create procedures that are inconsistent with the laws and regulations that govern the process.

A. The Requirement for Representations by Contractors and Subcontractors is Contrary to Law

The Proposals would impose representation requirements on contractor reporting of labor violations in procurements and contracts, including those for commercial items. Indeed, although the proposed rule identifies this reporting as a "representation" requirement, the rule makes clear that the representation is to be a "certification" as to the accuracy and completeness of the reports.

Whether called representations or certifications, these kinds of reports potentially expose the reporter to the risk of criminal or civil liability under the False Claims Act.[73] This risk is exacerbated by the sheer breadth and lack of clarity as to what must be reported. Contrary to the FAR Council's and DOL's apparent assumptions, the coalition

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[71] FAR 44.101.

[72] FAR 2.101 defines "[c]ontract" as "a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of *appropriated funds* and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq." (emphasis added).

[73] False Claims Act, 31 U.S.C. § 3729.

members can state that they do not have systems in place to capture this information and therefore, they must build them. This is particularly the case with regard to "violations" that occurred in the preceding three years—a period during which no contractor or subcontractor was required to track or maintain records of all of the types of agency actions that will now be considered reportable "violations."

It is for this reason that the procurement rulemaking laws prohibit the imposition of certification requirements unless authorized by statute, or where there is an express written justification for the certification requirement.[74] There is no statutory requirement for certification of reports of violations of all of the identified labor laws as required under the proposed rule and DOL guidance, and, as noted in the section below, neither the FAR Council nor DOL has provided justification for imposing such an onerous requirement on not only the contractor, but also its subcontract supply chain, during procurements or in contract performance.

Although the preamble to the proposed FAR rule tries to portray this new requirement for certification of "violations" as akin to the existing requirement for representation and disclosure of violations set out in FAR 52.209-7, Information Regarding Responsibility Matters, the allegations and non-final determinations covered by the proposed rule differ significantly from the violations covered by the FAR 52.209-7 rule. In the proposed rule, the FAR Council would require disclosure of a broad range of labor matters that have not gone through a full administrative or litigation process because "agencies would benefit from additional information about labor violations in order to better determine if a potential contractor is a responsible source."[75] The proposed rule also would require the contractor to report violations that arose outside of the award or performance of a government contract. Thus, the additional required reporting of these matters under the proposed FAR rule bears no nexus between the requirement to report these kinds of labor violations and traditional notions of responsibility that relate to whether a contractor is responsible for the particular procurement and performance of a government contract. Moreover, as noted previously, the proposed rule would require reporting of violations that may be no more than unproven allegations.

B. The Proposal Contravenes Laws Preventing the Disclosure of Information on Classified Procurements

Additionally, the Proposals are flawed in that they do not provide for the protection from disclosure of information relating to classified contracts or subcontracts.

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[74] 41 U.S.C. § 1304(b) ("When Certification Required.— (1) By law.— A provision of law may not be construed as requiring a certification by a contractor or offeror in a procurement made or to be made by the Federal Government unless that provision of law specifically provides that such a certification shall be required. (2) In federal acquisition regulation.— A requirement for a certification by a contractor or offeror may not be included in the Federal Acquisition Regulation unless— (A) the certification requirement is specifically imposed by statute; or (B) written justification for the certification requirement is provided to the Administrator by the Council and the Administrator approves in writing the inclusion of the certification requirement.").

[75] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30548.

The proposed regulation impermissibly requires contractors and subcontractors to disclose information protected against disclosure as a matter of law. Specifically, the Proposals provide for the mandatory reporting of contractor violations without any "carve out" or exception for matters that could identify information protected under classified contracts or subcontracts or proposals for classified procurements. The sharing of information that would identify, alone or through a compilation, these classified contracts or procurements, or any protectable proposal or contract information about the companies that bid or perform on such contracts, is subject to strict controls as a matter of law.[76] Any new reporting requirements must be tailored to comply with the existing legal restrictions on handling and disclosure of classified procurement information.

C. The Proposals Will Require the Public Disclosure of Information that is Protected under the Freedom of Information Act

The Freedom of Information Act ("FOIA") specifically exempts from unauthorized use, release or disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[77] Information on which procurement a contractor is bidding, what entities it is using or would use to perform a contract, or bits of information that could be compiled to provide insight into such information, are the kinds of information that the law requires be protected from disclosure. Indeed, not only FOIA, but Federal procurement integrity laws and regulations, expressly provide that where the contractor discloses information on its trade secrets or privileged, confidential, commercial or financial information in a bid or proposal, the contractor has the right to protect such information from use, release or disclosure by the government to any one inside or outside the government for other than the purpose of evaluating the bid or proposal.[78] Yet, under the Proposals, the contractor would be forced to disclose such information on a public website as a condition of bidding, or obtaining continuing performance under the exercise of contract options, whether or not it obtains a contract or option exercise.

D. The Proposals are Inconsistent with FAR Limitations on Discussions Prior to Establishment of Competitive Range

The Proposals require activities by the ALCA, DOL and the contracting officer that could go beyond mere responsibility evaluations, and that could constitute government direction to the offeror regarding changes to the offeror's proposed method

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[76] *See, e.g.*, Classified Information Procedures Act, 18 U.S.C. App. 3; Atomic Energy Act of 1954, 42 U.S.C. § 2014(y); FAR 4.402 (citing Executive Order 12829, Jan. 6, 1993 (58 Fed. Reg. 3479, Jan. 8, 1993), entitled "National Industrial Security Program" (NISP), which "establishes a program to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government. Executive Order 12829 amends Executive Order 10865, February 20, 1960 (25 FR 1583, February 25, 1960), entitled 'Safeguarding Classified Information Within Industry,' as amended by Executive Order 10909, January 17, 1961 (26 FR 508, January 20, 1961)."); *National Industrial Security Program Operating Manual*, DoD 5220.22-M (NISPOM) (incorporates the requirements of these Executive Orders and Industrial Security Regulation, DoD 5220.22-R). S*ee also* FAR pt. 4.4.

[77] Freedom of Information Act, 5 U.S.C. § 552(b)(4).

[78] *See, e.g.*, 41 U.S.C. § 2102; FAR 3.104-3; FAR 9.105-2; FAR 9.105-3.

or manner of performance in a procurement. As explained below, the Proposals exceed the limits of permissible discussions and changes prior to the establishment of a competitive range in a federal procurement.

The Proposals would require the ALCA, and possibly DOL and the contracting officer, to review the disclosed violation information and to determine whether the contractor or its subcontractors need to enter into a labor compliance agreement or revise an existing agreement.[79] Further, the Proposals would require the contracting officer to consider these evaluations and activities in determining whether to award a contract to an offeror.[80] We note that, under current FAR provisions, the entity that will be performing the contract or that currently holds the contract is the appropriate reporting unit.[81]

The active solicitation and receipt of information and the follow-up discussions regarding the remediation of violations and the terms upon which a contractor will be deemed presently responsible pose significant risks of exceeding the prescribed review of a contractor's record to determine present responsibility for a particular procurement and may also exceed the limited clarification of offers permitted prior to establishment of a competitive range.[82] Only once a competitive range is established can the government engage in discussions with offerors.[83]

The Proposals are also flawed because negotiation or direction to enter into a labor compliance agreement could violate the federal procurement framework, its laws, and regulations.[84] Under the federal procurement framework, the contracting officer is prohibited from engaging in discussions with any offeror until a competitive range is established. Moreover, if discussions with contractors are held, they must be held with all offerors in the competitive range, and the contracting officer cannot provide any offeror

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[79] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30566-67 (proposed FAR 22.2004-2).
[80] *Id*. at 30550.
[81] *See* FAR 9.104-3(c) ("Affiliated concerns […] are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility."). *See also* FAR 42.1502 (stating past performance evaluations "are generally for the entity, division, or unit that performed the contract or order."). We recommend that reporting be at the Commercial and Government Entity ("CAGE") Code level.
[82] FAR 15.306 limits contracting agencies' exchanges with offerors after receipt of proposals and before a competitive range is established to information gathering and mere clarification. The contracting officer (or his or her designee) is not permitted to provide information on how the contractor can improve or revise its proposal or way of doing business in order to gain an award. *See* FAR 15.306(b). And, for responsibility determinations, any communication is one-sided. The government cannot tell the contractor what it needs to do to become responsible in a particular procurement; it can only request and accept information from the contractor and search for information elsewhere to determine whether the contractor is presently responsible for purposes of award under the particular procurement. *See id*. *See also* FAR 9.105-1. To do anything else, as noted further in this comment, requires referral to the Suspension Debarment Official and due processes pursuant to FAR Part 9.4.
[83] FAR 15.306(d).
[84] FAR 6.101 ("(a) 10 U.S.C. 2304 and 41 U.S.C. 3301 require, with certain limited exceptions (*See* subpart 6.2 and 6.3), that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts."). *See supra* note 82.

with solutions to its contracting deficiencies. Therefore, for example, discussions regarding elements of labor compliance agreements as a means to establish responsibility could constitute improper interaction with offerors.

E. The Proposals Provide a Perverse Incentive for Contractors to Procure Goods and Services outside the United States

The Proposals contradict the policy goal reflected in Buy American requirements.[85] By requiring onerous and costly disclosures of subcontractors' violations of federal and state labor laws, the Proposals will have the unintended consequence of encouraging prime contractors to enter into subcontracts with foreign companies, *i.e.*, those which do not have employees within the United States and which are not subject, therefore, to federal and state labor laws. The efforts to block non-compliant U.S. companies from participating in the federal contractor process should not be allowed to provide an incentive for the use of non-U.S. workers, thus violating the goals of the Buy American requirements. We strongly urge that the final regulations and guidance be revised to address this significant shortcoming.

F. The Proposals will have a Chilling Effect on Subcontractors

The Proposals will have a chilling effect on subcontractors and their desire to submit bids to a government prime contractor or other subcontractor. Many potential subcontractors may not want to be burdened by the extra data gathering, reporting, and scrutiny that would be required or result from the Proposals. Successful businesses that have other commercial business, with lower burdens on obtaining an award, may opt not to enter or remain in the federal marketplace in light of these significant increased burdens. The chilling effect also is likely to harm the ability to attract small business subcontractors (and even prime contractors). These entities have limited resources to expend on the kind of effort that will be needed to gather, report, and continue to report. The chilling effect may be especially pronounced where these costs and burdens must be incurred before those small businesses have even received a government contract or subcontract, since there is no guarantee that the prime contractor will be selected or that the selection will result in a subcontractor award. This will result in a chilling effect on the pool of potential subcontractors, with the further unintended consequence of driving prices up as a result of the less competitive nature of the bidding for subcontract awards.

VII. THE PROPOSALS PLACE UNREASONABLE AND UNNECESSARY BURDENS ON CONTRACTORS AND THE PROCUREMENT PROCESS

A. Federal Agencies Already Possess the Required Information

The Proposals state that the term "administrative merits determination" means any of the notices or findings listed in the proposal "issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any

[85] FAR pt. 25. *See, e.g.*, FAR 25.001.

provision of the Labor Laws."[86] The Proposals define "enforcement agency" as "any agency that administers the federal Labor Laws, such as the Department [of Labor] and its agencies, the Occupational Safety and Health Review Commission, the Equal Employment Opportunity Commission, and the National Labor Relations Board."[87]

The enforcement agencies already should have all of the information that the Proposals would require contractors and subcontractors to provide with regard to administrative merits determinations. Yet, instead of requiring the enforcement agencies to produce that information from their existing databases, the Proposals would impose significant burdens on contractors and subcontractors to provide information about administrative merits determinations they currently are *not even required* to maintain. The Proposals provide no justification for imposing on federal contractors and subcontractors the duplicative task of providing the information that already is in the records of the enforcement agencies. The enforcement agencies, themselves, are in the best position to provide the information because the agencies already maintain and compile such data, which is routinely used for enforcement targeting, budget requests and other purposes.

Nonetheless, if the government relies on the information it already has compiled in its own databases, the contractor still must be afforded an opportunity to review and correct errors in those database before such data are used to make contractor responsibility determinations.

If the FAR Council and DOL elect to reject this better alternative of having the federal agencies report based on their own records, we then respectfully request that a phased-in approach be undertaken so that the contractor/offeror only is responsible for reporting on violations occurring on or after the effective date of the regulation, and starting in the third year, is responsible for reporting on violations occurring within the past three years. Thus, the *earliest* point at which contractors and subcontractors would be required to disclose administrative merits determinations that occurred during the preceding three-year period would be three years after the date on which the final regulations and guidance take effect. If, however, this phase-in period is not adopted, Contractors will still require some lead time to build databases and collect the required data. Contractors should be afforded an additional period of time—at least 12 months—to develop the data collection processes to be able to respond to the new data reporting obligations.

B. The Semi-Annual Reporting Requirement is Unreasonably Burdensome and Overbroad

The Proposals require that, where a contractor is awarded a government contract, it must update the disclosure of labor violations provided with its offer and report on new violations every six months throughout the life of that government contract.[88] This is,

[86] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30579.
[87] *Id*.
[88] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30570.

presumably, designed to provide the contracting officer with updated information regarding a contractor's labor law violations for the purposes of termination of a contract or other remedial measures. However, this semi-annual reporting requirement over the life of each contract is unduly burdensome and over-broad for a number of reasons: (1) it requires reporting on any violation even where it does not arise in connection with a federal contract, subcontract, or grant; and (2) it is not tied to the specific procurement lifecycle.

Although the proposed regulation's reporting on procurements of more than $500,000 and timeline of representation at time of offer and semi-annually is somewhat analogous to the FAR 52.209-7 reporting regime of the Federal Awardee Performance and Integrity System ("FAPIIS"), the Proposals impose requirements that are significantly different from and more onerous than those imposed by the FAPIIS regime. For example, the FAPIIS reporting regime was established by statute and requires reporting only on adjudicated matters occurring within the last five years that specifically relate to the award or performance of federal contracts and grants, federal contract terminations due to default, a Federal suspension or debarment, or a Federal administrative agreement entered into by the person and the Federal Government in that period to resolve a suspension or debarment proceeding.[89]

Moreover, the reporting done through FAPIIS provides the contractor with a mechanism to object to the public posting of information that is subject to Freedom of Information Act protections from disclosure. FAPIIS reporting also permits the contractor to provide its comments along with the reported violation, so that the reported matter is viewed in context.[90]

The typical federal procurement process requires that an offeror be evaluated to determine whether it is currently responsible for the purpose of being awarded a government contract.[91] The offeror will typically provide a certification to the contracting officer asserting that it is currently responsible and eligible for award, *e.g.*,

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[89] *See, e.g.*, The Duncan Hunter National Defense Authorization Act of 2009, P. L. 110-417, § 872 (Oct. 14, 2008) (requiring the development and maintenance of information system that contains specific information on integrity and performance of covered Federal agency contractors and grantees); FAR 52.209-7 (requiring reporting by contractors that hold at least $10,000,000 in federal contracts and grants and defining in 52.209-7 "reportable matters" to be "(1) Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions: (i) In a criminal proceeding, a conviction. (ii) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more. (iii) In an administrative proceeding, a finding of fault and liability that results in-(A) The payment of a monetary fine or penalty of $5,000 or more; or (B) The payment of a reimbursement, restitution, or damages in excess of $100,000. (iv) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision."); FAR 52.209-9 (requiring semiannual updates on FAPIIS for life of contract).

[90] FAR 52.209-9.

[91] FAR 9.103.

the offeror has not been (1) "debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency"; (2) within a three-year period preceding the offer, it has not a) "been notified of any delinquent Federal taxes in an amount that exceeds $3,000 for which the liability remains unsatisfied" or b) "been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property"; and (3) is not currently "indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of" these enumerated offenses.[92]

This certification is contemporaneous with the offeror's submission of a proposal, so as to allow the contracting officer to review all information and make a determination as to whether the offeror should or should not be awarded a contract.[93] The contracting officer, however, will once again evaluate the present responsibility of a contractor at the point where it considers exercising an option under an existing contract.[94] If the contractor is suspended or debarred, it cannot receive an option exercise except where the contracting officer finds that there is a compelling reason to do so and prepares a written determination to that effect.[95]

In contrast, the Proposals require contractors who have been awarded a contract to submit information on the covered violations every six months during the life of the contract in order to determine whether to permit the contractor to continue performing under an already awarded contract.[96] Current FAR requirements do not provide that the government will automatically terminate an existing contract merely on the ground that there has been a violation, even where the violation has led to a debarment or suspension of the contractor.[97] Indeed, government contracts enable the government to carry out its business. A process that disrupts a contract that is being properly and timely performed would hinder the government's ability to carry out its mission. The approach embodied in the Proposals would mark a significant shift in how the government procurement process operates, and such a fundamental shift is neither required nor justified to implement the Executive Order provisions.

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[92] FAR 52.209-5.
[93] *See, e.g.*, FAR 9.104-7(a), 52.209-5.
[94] FAR 9.405-1(b) ("For contractors debarred, suspended, or proposed for debarment, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities shall not-(1) Place orders exceeding the guaranteed minimum under indefinite quantity contracts; (2) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or (3) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.").
[95] *Id*.
[96] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30570.
[97] FAR 9.405-1(b).

If the purpose of the proposed regulation is to provide the contracting officer with timely information to determine whether to exercise an option, then collection of information tied to the time for consideration of option exercise would make better sense. Collection of information not tied to a procurement consideration point is significantly burdensome and serves no useful purpose in light of the stated goals of the Executive Order.

Further, the Proposals suffer from lack of clarity. The Proposals do not state when this six-month reporting requirement begins. For example, the Proposals do not suggest whether the six-month reporting begins from the original certification submitted with the contractor's bid, at the time of contract award, or at the beginning of contract performance. Further, the Proposals do not clarify whether companies must submit this information to FAPIIS pursuant to each contract or whether a company may update the information once every six months to cover the reporting requirements for all of their contracts.

This lack of clarity is problematic, particularly when a contractor has multiple contracts. The open FAR case on the proposed rule estimates that there are approximately 22,153 contractors and 3,622 subcontractors, a total of 25,775 entities that the government has identified as likely to be impacted by this rule.[98] Presumably, many, if not most, of these contractors and subcontractors have multiple contracts that meet the reporting threshold. The sheer volume and frequency of reporting would create an onerous reporting burden that quickly would become untenable for almost all contractors, and likely the government itself.

C. The Proposals Will Create Significant Delays in Making Procurement Awards

The Proposals will create a burdensome, multi-tiered regulatory scheme with perpetual reporting and oversight that raises significant risks of delaying procurement awards and interfering with contract performance at all levels.

Because the Proposals would require that contractors report on all tiers of their supply chain, the requirement to submit representations of violations with each bid or proposal will require the prime contractor to start very early to accumulate the information needed to make such a representation, or risk that the contractor will be unable to prepare and submit a bid or proposal because it has been unable to obtain information needed for its representation in a timely manner. Further, if and when a contracting officer initiates a responsibility determination and requests mitigating information, the contractor (and its subcontractors) will need time to respond.

The contracting agencies will have to factor in time for a contractor to obtain information for its own, as well as its subcontractors', certified reports. In addition, the agencies must allow for the time it will take the ALCA to sort through and evaluate the reports being provided by all competitors in a particular procurement. Such additional

[98] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30557.

time is required to determine whether to seek mitigating information, to assess that information, and to work with the contractor (or subcontractor), DOL or other enforcement agency, and the contracting officer to enter into labor compliance agreements and make recommendations. Further, since each contracting agency will have only one ALCA to evaluate all of the disclosures and since, as is suggested by the Proposals, DOL will establish a group within DOL to advise the agency ALCAs, it seems likely that DOL, rather than the contracting agencies, will decide the terms and conditions under which contractors are to be deemed responsible enough to receive awards. The three days proposed in the rule are unlikely to be sufficient to conduct the appropriate evaluation. Moreover, although the Proposals state that the contracting officer may proceed even if the ALCA does not timely provide his or her recommendation, given the numerous laws covered by the Proposals, as well as the multitude of state laws still to be identified, it is likely that the contracting officer would delay the award, pending input from the ALCA. By law, only the contracting officer has the authority to award contracts; the proposed rule would effectively nullify this authority.[99]

D. The Proposals Will Open the Floodgates of Bid Protests and Litigation and Result in Long Delays in the Procurement Process

The proposed rules will increase the litigation relating to federal procurements, including but not limited to protests relating to responsibility determinations, claims relating to the non-exercise of options based on responsibility determinations, suspension, debarment, and FOIA and reverse FOIA litigation.

1. Protests and SBA Responsibility Appeals

The determinations required by the Proposals will lead to challenges to (1) the contracting officer's responsibility determinations, (2) the elimination of an offeror from the competitive range, (3) the decision not to award to the offeror, and (4) the decision to award to another offeror. These challenges will take the form of bid protests at the agency,[100] the Government Accountability Office,[101] or the U.S. Court of Federal Claims.[102] Additionally, for small business responsibility matters, the small business can appeal non-responsibility determinations through the SBA Area office and up that chain.[103]

This predictable increase in the number of protests and appeals will result in extensive delays in the procurements to which they relate. For example, certain protests to the GAO when timely filed will result in imposition of an automatic stay of the procurement, its award and contract performance, pending the 100-day period allotted for

[99] FAR 2.101 (defining "contracting officer" as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings."); FAR 4.101 ("Only contracting officers shall sign contracts on behalf of the United States.").
[100] FAR 33.103.
[101] FAR 33.104.
[102] FAR 33.105. *See generally* FAR 15.507 (protests against award).
[103] FAR 19.602-1.

GAO's consideration of the protest. The stay will remain in place absent the agency's establishment of urgent and compelling circumstances to justify overriding the automatic stay. Further, in the event a protest is filed at the Court of Federal Claims, directly or as an appeal seeking *de novo* review of a protest filed at the agency or GAO, the Court can issue a preliminary injunction to enjoin the procurement, award and performance, pending disposition of that protest. Notably, there is no time limit on when the Court is required to issue a decision on a protest. Moreover, there is the additional opportunity to appeal such protests to the U.S. Court of Appeals for the Federal Circuit.

In addition, in the case where responsibility questions arise, the contracting officer can only refer one matter at a time for a single acquisition to the SBA. [104] Thus, if multiple small businesses are being considered for an award and such questions are raised, the SBA would be required to consider each of these matters in turn. In the interim, no award could issue for a period of at least 15 business days following receipt of a referral.[105]

2. Contract Disputes Act Appeals

In addition, reporting of violations could trigger adverse performance evaluations or lead to decisions not to exercise options based on responsibility determinations. The FAR provides specific processes for responding to and appealing performance evaluations.[106] In addition, where a contracting officer determines that a contractor is not responsible, such that the contract should be terminated for default or options not exercised, there may be grounds to bring claims under the contract, based on claims that the contracting officer acted arbitrarily and capriciously; there is also a right to appeal any final contracting officer decision on these grounds under the Contract Disputes Act.[107]

3. FOIA and Reverse FOIA Appeals

Public access to reports filed under the Proposals and the attendant risk that information reported could be compiled in a manner that might expose contractor proprietary or competition-sensitive information, will likely result in numerous FOIA requests. Moreover, contractors will undoubtedly seek to enforce FOIA's exemptions from disclosure for trade secrets and/or proprietary, commercial or financial information. Denials or grants of FOIA requests require considerable government administrative time and personnel to retrieve relevant information, review and issue decisions, and litigate appeals at the agency level or in the federal district and appellate courts.

Such legal proceedings, in whatever form they take, are assured to delay the procurement process and significantly adversely impact the efficiency of government contracting.

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[104] FAR 19.602-1(d).
[105] FAR 19.602-1(e).
[106] *See generally* FAR pt. 42.15.
[107] *See, e.g., id.*; FAR pt. 33.2.

VIII. CLARIFICATION IS NEEDED REGARDING THE PAYCHECK TRANSPARENCY REQUIREMENTS

The Proposals require contractors and subcontractors to provide workers whom they treat as independent contractors with a document informing the individual of the independent contractor status.[108] Although we note that this requirement is included in the Executive Order, there is no sound policy justification for such a requirement with respect to improving the efficiency and effectiveness of the federal procurement process.

While we understand that the notice must be provided to workers whom the contractor or subcontractor treats as a 1099 worker, the Proposals are unclear as to whether the notice must also be given to workers who are W-2 employees of another employer (*e.g.*, a temporary staffing agency), but not of the contractor or subcontractor. The final regulation and guidance should make it clear that contractors would *not* be required to provide such notice to workers who are W-2 employees of a staffing agency or other similar entity and that such notice be given only to those workers to whom the contractor or subcontractor provides an IRS Form 1099.

IX. THE PROHIBITION ON ARBITRATION AGREEMENTS IS UNRELATED TO THE PURPOSES OF THE EXECUTIVE ORDER

Section 22-2006 of the proposed FAR regulation prohibits certain contractors from requiring mandatory arbitration on a pre-dispute basis of any claims arising "under Title VII or under any tort related to or arising out of sexual assault or harassment."[109] There are a number of exceptions to this general rule. The first is for arbitration agreements reached by "voluntary consent of employees or independent contractors after such disputes arise."[110] The other exceptions are:

- Contracts and subcontracts of $1,000,000 or less.
- Contracts and subcontracts for the acquisition of commercial items…
- Where employees are covered by a collective bargaining agreement negotiated between the contractor and a labor organization representing the contractor's employees.
- Certain pre-existing arbitration agreements described at 52.222-YY(b)(2).[111]

In most respects, the proposed FAR regulation is an expansion of the "Franken Amendment"[112] and its implementing regulations,[113] which imposed a similar limitation on defense contractors. However, unlike that measure, which was a response to a

[108] Guidance for Exec. Order 13673, 80 Fed. Reg. at 30592-93.
[109] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30567.
[110] *Id.* at 30554.
[111] *Id.*
[112] Defense Appropriations Act of 2010, § 8116, Pub. L. No. 111-118 (Dec. 19, 2009).
[113] 48 C.F.R. pts. 212 and 222.

particular case of abuse, the proposed FAR regulation has no rationale or justification. The proposed FAR regulation offers no explanation for how an expanded limitation on arbitration relates to the stated purposes of the proposed FAR regulation, either with respect to identifying "responsible" contractors or in increasing the efficiency of contractors. Stated differently, this provision of the proposed FAR regulation is entirely extrinsic to the purposes of the Executive Order. It simply burdens large contractors, or at least, those without collective bargaining agreements.

Furthermore, the Franken Amendment makes no exception for arbitrations under labor agreements, nor are such arbitrations mentioned in the Executive Order 13673. The proposed FAR regulation offers no explanation of how the reach of the statute can be altered or amended in this regulation. As written, defense contractors would be faced with contradictory regulatory rules, one prohibiting all pre-dispute arbitrations of Title VII claims, etc., and one excepting pre-dispute arbitrations of those claims under collective bargaining agreements. There is no articulated basis for a limitation on arbitrations beyond that already approved by Congress, and this extension should be excised.

In addition, the numerous exceptions set forth in the proposed FAR regulation subsume the rule and therefore raise questions about the usefulness of the limitation. If pre-dispute arbitration agreements for Title VII and related tort claims are appropriate for most contractors,[114] what possible benefit is derived by limiting such pre-dispute arbitration agreements in the remaining situations?

Indeed, it is difficult to find either courts or human resource advisors who share the distrust of arbitration that is so clearly evidenced in the proposed FAR regulation. In fact, the prohibition on arbitrations in the proposed FAR regulation is a rare governmental statement proposing litigation as a *preferred* mode of dispute resolution. The costs and delays of formal judicial adjudications – all of which will be passed on to the government – have justly been the subject of repeated criticisms from every branch of government. Most significantly, the Supreme Court has recently and repeatedly stated its support for the expansive use of arbitration as contemplated under the Federal Arbitration Act.[115] Yet, even in the face of such precedents, the proposed FAR regulation offers no explanation or rationale for including this provision in a regulation ostensibly concerned with increased efficiency in government contracting.

We believe the Franken Amendment offers more than sufficient protections against the abuses that generated it. We can find no basis in the proposed FAR regulation or elsewhere for applying limitations on pre-dispute arbitration to *every* government contractor meeting the threshold criteria. Additionally, the exception for arbitrations pursuant to collective bargaining agreements evidences that the proposed FAR regulation improperly penalizes those contractors who do not have collective bargaining

[114] *See, e.g.*, FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30550 (disclosure threshold "excludes vast majority of transactions").
[115] *See CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U. S. 213 (1985).

agreements, which is an additional, independent basis for challenging the proposal as presented. We urge that this provision of the proposed FAR regulation be deleted.

However, if a limitation on pre-dispute arbitration agreements is retained in the final FAR regulation, we recommend that the government adopt the Department of Defense's interpretation of the Franken Amendment: "The term 'contractor' is narrowly applied only to the entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected."[116] Additionally, under the Franken Amendment, there are no exceptions for collective bargaining agreements. The proposed FAR regulation should be amended to mirror that statute. Such an amendment would bring some measure of uniformity in the interpretation and application of statutory and regulatory limitations on arbitrations in Title VII and related tort claims.

X. THE PROPOSALS' COST/BENEFIT ANALYSIS AND ESTIMATE OF BURDEN HOURS ARE FLAWED

The Proposals significantly underestimate the cost of complying with the regulations and guidance and fail to take a number of costs and burden hours into account. For example, there is no estimate of the cost of establishing databases for the collection of information regarding violations of federal and state labor laws or of purchasing database services from outside vendors. Nor do the Proposals recognize that if a contractor or DOL determines that a subcontractor must enter into a labor compliance agreement, at some point during an ongoing contract, the additional costs incurred would now be borne by the contractor; those costs are not included in the estimates.

The estimates are wildly off target in every respect. For example, the Proposals state:

> In order to successfully comply with the requirements of the rule, contractors and subcontractors will initially need to review and become familiar with the FAR rule and the DOL guidance. We estimate that for this initial requirements review the average contractor will utilize a general manager equivalent to a mid-range GS-14 ($63 hourly rate) and spend approximately eight hours.[117]

As large employers, with multiple divisions and business units, coalition members would devote substantially more than eight hours in reviewing and understanding their new obligations; to spend only eight hours would be an indication that a contractor or subcontractor did not take its new obligations seriously. It would be foolhardy for any of the coalition members to determine that a single mid-range manager would be the only employee who must review and understand the new obligations. Given the enormity of

[116] Defense Federal Acquisition Regulation Supplement, Restrictions on the Use of Mandatory Arbitration Agreements, 75 Fed. Reg. 27946 (interim rule May 19, 2010) (to be codified at 48 C.F.R. pts.212, 222, and 252).
[117] FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30563.

the data collection and reporting requirements proposed, multiple mid- and upper- level managers and executives in each business unit must fully understand the new requirements.

In addition, it will be incumbent on each federal contractor and subcontractor to educate and train key field and headquarters managers, as well as the employees who will input letters, notifications, emails, and other documents received from federal and state enforcement agencies concerning charges, violations, notices, and determinations. Record keepers will need to have knowledge of the federal and state laws, work closely with the legal department in reviewing documents, and be responsible for the submission of all required documentation.

We note that it has required far more than eight hours per contractor to review the Proposals and discuss internally the requirements and potential impacts. Additional time would also be required to implement the Proposals, including educating many more people throughout the company about the requirements, establishing internal reporting and review guidelines and mechanisms, and extending the requirements to subcontractors.

Finally, it is impossible for the FAR Council or DOL to estimate the cost and burden of the Proposals, and for the coalition members to provide meaningful comment, because the Proposals are incomplete. By failing to identify equivalent state laws, the Proposals fail to take into account the costs and burdens of tracking and disclosing violations of hundreds of additional laws and the potential costs and burdens of entering into labor compliance agreements with respect to those additional laws.

XI. COMMENTS ON ALTERNATIVES TO THE FAR REGULATION

The FAR Council has asked for comments on alternatives presented in the Proposals. Our coalition is responding to that request:

A. Phase-In of Subcontractor Disclosure Requirements

We support the proposal that requirements associated with subcontracting would be phased-in for new contracts, so that contractors and subcontractors have time to understand the impact of the new reporting requirements and acclimate themselves to their new responsibilities. We recommend that the requirements associated with subcontracting take effect no sooner than three years after the time allotted for the contractors to develop and implement the compliance data collection following the effective date of the final regulations and guidance, so that contractors and subcontractors may capture data not currently required to be reported.

B. Subcontractor Disclosures and Contractor Assessments

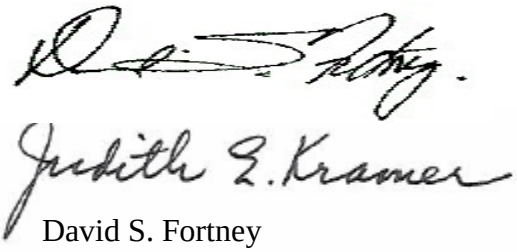
We support the alternative set forth in the proposed FAR regulation, whereby the contractor would direct the subcontractor to consult with DOL on its violations and

remedial actions, instead of requiring subcontractors to disclose details regarding their violations to the prime contractor. This alternative recognizes that the prime contractor is not in a position to determine whether a subcontractor's violations would render the subcontractor non-responsible.

CONCLUSION

In light of the significant constitutional, legal and practical issues posed by the Proposals, their enormous cost to the public and the harm they would do to the well-established procurement system, we respectfully request that the FAR Council and DOL withdraw the Proposals. If, however, the FAR Council and DOL decide to go forward with this rulemaking, we respectfully suggest that the final FAR Rule and DOL Guidance be modified as suggested herein, to best ameliorate the problems created by the Proposals.

Respectfully Submitted,



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