

**Comments of**  
**THE COUNCIL ON LABOR LAW EQUALITY**

**On**

**FAR CASE 2014-025**  
**DOL CASE ZIN 1290-ZA02**

**PROPOSED REGULATIONS on FAIR PAY AND SAFE WORKPLACES**

**PROPOSED GUIDANCE on FAIR PAY AND SAFE WORKPLACES**

**Issued by:**

**The Civilian Agency Acquisition Council**

**The Defense Acquisition Regulations Council, and**

**The U.S. Department of Labor**

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**Federal Acquisition Regulatory Council Proposed Acquisition Regulation:  
Fair Pay and Safe Workplaces & ZRIN 1290-ZA02, Department of Labor Proposed  
Guidance: Fair Pay and Safe Workplaces.**

**I. Statement of Interest**

I. Established nearly thirty-five years ago, COLLE is the oldest national trade association devoted exclusively to monitoring and commenting on all major legal developments related to the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151, *et seq.* COLLE regularly files *amicus curiae* briefs in significant National Labor Relations Board (NLRB, Board, or Agency) and court cases involving the NLRA; and, files comments with the NLRB and other federal agencies with respect to proposed regulations that touch upon the NLRA. In light of COLLE's institutional charter, its comments herein will be confined, in substantial respect, to the impact of the Proposed Regulations and DOL Guidance on the NLRA.

Among its nationwide corporate members, COLLE represents several large federal contractors, and subcontractors, that are covered under the NLRA; and that would be affected by the Proposed Regulations and DOL Guidance

COLLE unquestionably supports the goal of fair pay and safe workplaces for all employees, including those employed by federal contractors. COLLE similarly supports efforts to insure honesty and integrity, as well as economy and efficiency, in all government contracting. However, COLLE believes that as applied to the NLRA in particular, the Proposed Regulations are not designed to, and will not achieve such worthwhile goals. Moreover, for the reasons noted herein, COLLE believes that the Proposed Regulations impermissibly encroach upon and conflict with the NLRA and, therefore, cannot withstand legal scrutiny. For these, and the other reasons noted herein, COLLE urges the FAR Council and DOL to withdraw the Proposed Regulations and DOL Guidance.

**II. The Proposed Rules Lack the Requisite Close Nexus to Advancing Economical and Efficient Procurement.**

FAR Council procedures already authorize government contracting officers to consider a contractor's performance and capabilities, including legal compliance with specific laws, in making eligibility determinations in awarding federal contracts. *See* 48 C.F.R. § 9.104-1 (standards for “responsible prospective contractor”); *id.* § 9.104-6 (Federal Awardee Performance and Integrity Information System).<sup>1</sup> These same FAR policies and procedures also provide the means by which non-performing/irresponsible contractors may be suspended or debarred from future federal contracting. *See* 48 C.F.R. ch. 1, subchap. B, pt. 9 (Debarment, Suspension and Ineligibility). Current FAR regulations provide for a multi-factored examination of a bidder or contractor’s fitness to provide goods and services. This includes an examination of their “relevant performance history”, whether they have a “satisfactory record of integrity and business ethics”, and current capabilities *to the extent such matters are legitimate predictors of a bidder or contractor’s efficient and economical performance of future contracts*. 48 C.F.R. § 9.104-1(a-g). *See generally*, 48 C.F.R. subpart 9.1 (“Responsible Prospective Contractor”). It is, however, well-settled that there must be a legitimate and manifestly close nexus between the factors which are considered in a contract award or renewal, or in a contractor suspension or debarment, and the efficient, predictable and economic performance of the federal contract. *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 171 (4<sup>th</sup> Cir. 1981); Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 101, *et seq.* (Procurement Act) (formerly cited as 40 U.S.C. §§ 471, *et seq.*). The purpose of federal procurement law, as developed under

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<sup>1</sup> Even if the existence of actual and alleged NLRA violations constituted a permissible basis for denying bids or renewals, or suspending and debarring contractors, the oppressive and burdensome reporting system envisioned by the Proposed Regulations could hardly be justified. Thus, under the Proposed Regulations, a prime contractor would be required to monitor all the NLRA unfair labor practice activity of its subcontractors and report and update this material every six months. Prime contractors often have multiple tiers of subcontractors. It is self-evident that this periodic requirement is a very significant administrative and financial burden. The full dimensions of that administrative and financial burden, while of considerable importance, are beyond the limited scope of this Comment. Suffice it to note, however, that it would appear impossible to justify imposing significant administrative and financial burdens on a prime contractor to gather and report information that it does not have in its possession, in order to provide that same information to the federal government which already has it in its possession. For a procurement system that should be promoting efficiency and seeking to lower the costs incurred by the federal government in the performance of federal contracts, it is hard to envision a less efficient or more needlessly expensive cost than that which would result from imposing these requirements in order for the federal government to obtain information that the federal government already has.

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Section 101 of the Procurement Act, is to insure these ends. 40 U.S.C. § 101 (promoting “economical and efficient system” is the statutory goal). Thus, Executive Branch regulation which furthers this congressional end is legitimate since it draws its essence from the core purpose of federal procurement law. *See, e.g.*, 48 C.F.R. § 9.406(2)(a) (nexus between debarment and “convictions” and “civil judgments” for unlawful conspiracy in submission of offers, bribery, fraud and “offense[s] indicating a lack of business integrity . . . that seriously or directly affects . . . present [contractor] responsibility.”). On the other hand, regulation which seeks to use procurement decisions to enforce or punish current or potential contractors for the past violation of wholly separate federal labor and employment laws, is both beyond the purpose of the Procurement Act and in conflict with the remedial provisions of the implicated federal labor and employment statutes. *See, e.g.*, 66 Fed. Reg. 17753 (Apr. 3, 2001).

The FAR Council itself affirmed these observations in 2001 when it stayed its own final 2000 FAR rules that had added language providing that a “satisfactory record of integrity and business ethics” included “satisfactory compliance” with federal “labor and employment” laws. As it noted in its own public notice: “It is not clear to the FAR Council that there is a justification for including the added categories of covered laws.” *Id.* at 17755. The same observation is equally applicable now. *See generally*, Ken M. Kanzawa, *Legal and Practical Issues in Implementing Executive Order 13673: Fair Pay and Safe Workplaces*, 44 Pub. Cont. L.J. 417, 432-37. It is particularly true where, as here, there is no legitimate articulated nexus or demonstrable relationship between the proposed added category of laws --federal (and state) labor and employment laws-- and the performance of the contract.

The Proposed Regulations clearly recognize the legal necessity of a nexus between the regulation and the stated statutory purpose of federal procurement law. Thus, the Proposed Regulations baldly assert that bidders and contractors that do not have past labor and employment law violations are more productive, and more likely to provide the timely, predictable and satisfactory delivery of goods and services than those that do not. Proposed Regulations, 80 Fed. Reg. at 30599. Indeed, this is the only statutorily-anchored rationale articulated for the promulgation of the Proposed Regulations. However, the Proposed Regulations contain not a shred of evidence in support of this claim. Simply saying it does not make it so. In truth, there is absolutely no evidence that a government contractor that may have past violations of the NLRA is less productive or less likely to perform future contracts

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efficiently and economically than one that does not. Nor is there a shred of evidence to support the notion that such bidders or contractors are “dishonest”, lack “integrity” or are “irresponsible”. There is certainly no evidence that a contractor that is *alleged* to have violated the NLRA will be less efficient or economical than an employer free of such allegations. Nor is there any evidence that a contracting entity that itself has no NLRA violations, but happens to be part of a corporation, or contracts with another entity, that does have past allegations or violations, will be less efficient or economical than a contracting entity that does not have such relationships. There simply is no demonstrated rational nexus between past violations of the NLRA and the efficient and economical performance of future federal contracts.<sup>2</sup> Absent such a nexus, it is clear that the Proposed Regulations are not designed or intended to further the legitimate ends of contracting and procurement regulation. Rather, as discussed below, they constitute an impermissible attempt to regulate labor/management relations in conflict with the exclusive jurisdiction of the NLRA.

None of this is to suggest the condonation of any violation of the NLRA by any employer, whether a federal contractor or not. However, the determination and remediation of such violations is a matter which Congress has entrusted exclusively to the NLRB, not to the federal procurement process. Congress has entrusted only the timely, economical and efficient completion of federal contracts to the contract procurement and oversight process. There is simply no nexus between these two discrete regulatory purviews that is persuasively articulated in the Proposed Regulations. Indeed, there is no nexus that would permit the procurement process to trench upon the exclusive regulatory and remedial jurisdiction of the NLRB. On the contrary, there is much which demonstrates that such encroachment is not permissible.

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<sup>2</sup> Indeed, if the existence of NLRA violations or alleged violations had any genuine nexus to contract performance then the regulations would most certainly address similar violations and alleged violations by labor organizations that serve as the exclusive representative of employees performing federal contracts. In a typical year, over one-quarter of the unfair labor practice charges filed with the NLRB are filed against labor unions, not employers. (See, e.g., NLRB, Annual Report for FY 2010, at Table 5) Given the number of labor organizations covered by the NLRA, and the number of employers covered by the NLRA, the conclusion that individual unions have far more claimed violations than any individual employer is inescapable. Moreover, union violations, e.g. violations of NLRA Sec. 8(b) (4), are far more likely to have a direct impact on the timely and efficient performance of a government contract than any employer violation. It is impossible to accept as credible the notion that NLRA claims predict contracting success and therefore may be regulated by the procurement process when the Proposed Regulations completely ignore over a quarter of the NLRB’s annual unfair labor practice intake, including the only violations that demonstrably interfere with production.

**III. The Executive Order and Proposed Regulations Impermissibly Interfere With the Exclusive Jurisdiction of the NLRA.**

Congress enacted the NLRA, and established the NLRB, for the express purposes of regulating private sector labor/management relations and creating the means to do so. Section 8 of the NLRA delineates those practices deemed by Congress to constitute “unfair labor practices,” 29 U.S.C. § 158. The NLRA further provides the NLRB with the power to investigate, determine violations of the Act, and to provide for the proposed remediation of all such violations. 29 U.S.C. §§ 160-161. Congress intended the jurisdiction of the NLRA with respect to these matters to be exclusive. Thus, the preemptive sweep of the NLRA is both broad and well settled. *San Diego Building Trades Council Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959); *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 282, 292 (1976). Attempts by various states and municipalities to “supplement” or supplant the NLRA have been uniformly struck down by the federal courts as being federally preempted. *Garmon*, 359 U.S. at 289; *Wis. Dep’t of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986). Similarly, attempts by other agencies and instrumentalities of the federal government itself that interfere or trench upon the jurisdiction of the NLRA have been uniformly struck down for precisely the same reasons of exclusivity. *See, e.g., Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (D.C. Cir.), *reh’g denied*, 83 F.3d 439 (D.C. Cir. 1996).

The Proposed Regulations, however, contemplate a scheme under which federal contractors or bidders that violate<sup>3</sup> the NLRA would be subject to the draconian, supplemental economic sanctions of bid denial, suspension or debarment. *See, e.g., Proposed Regulations 22.2004-3(b)(4)(ii)*, 80 Fed. Reg. 30567, regarding post-award evaluations, and, *22.2004-2(b)(3)(i)(C)*, 80 Fed. Reg. 30566, regarding pre-award evaluations. The Proposed Regulations do not tread upon fresh ground in this respect. Indeed, as noted below, this same impermissible path has been travelled before.

The FAR Council is plainly authorized by Congress to promulgate regulations for the purpose of implementing various procurement statutes. Congress, however, has not granted the

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<sup>3</sup> As noted, the Proposed Regulations go well beyond requiring the reporting of court-enforced “violations” of the NLRA. Remarkably, they would also predicate adverse economic consequences for federal contractors on mere unsubstantiated allegations and unreviewed and unenforced Agency findings and orders. *Infra* at 15-16.

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FAR Council the authority to implement or enforce the NLRA. Instead, Congress has assigned that responsibility exclusively to the NLRB. *Garmon*, 359 U.S. at 289; *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986) (preemption doctrine is intended to preclude interference with the NLRB's enforcement of the 'integrated scheme of regulation' established by the NLRA).

The Proposed Regulations would inject federal contracting officers into the regulation of private sector labor/management relations – a regulatory arena delegated by Congress to the exclusive purview of the NLRB. This type of regulatory encroachment has been repeatedly found improper by reviewing courts, including the Supreme Court.<sup>4</sup>

The Executive Branch's creation of the Agency Labor Compliance Advisor (ALCA) position, *see* Proposed Regulations 48 C.F.R. 22.2002, 80 Fed. Reg. 30565; 22.2004-2(a)(2), 80 Fed. Reg. 30566-30567, does nothing to cure these infirmities that are inherent in the scheme contemplated by the Proposed Regulations. Congress has neither authorized nor created the position of ALCA, much less delegated to such position the authority to act as a proxy for any federal enforcement agency, including the NLRB. In the absence of such a congressional grant of authority to the ALCA<sup>5</sup> the existence of the position is simply irrelevant to the legal analysis of regulatory encroachment.

The Proposed Regulations here are unquestionably invalid under the preemption doctrine as articulated by a unanimous Supreme Court in *Gould*. In *Gould*, the Court held that a Wisconsin statute which directed state agencies and state procurement agents to debar contractors for their repeat, *court enforced* violations of the NLRA was invalid because "it conflict[ed] with the [NLRA's] comprehensive regulation of industrial relations" and "assume[d] for the State of Wisconsin a role Congress reserved exclusively for the [NLRB]." *Gould*, 475 U.S. at 291.

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<sup>4</sup> *See Herman B. Taylor Const. Co. v. Barram*, 203 F.3d 808 (Fed. Cir. 2000); *see also Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 190 (3d Cir. 1983); *Community Television of S. Cal v. Gottfried*, 459 U.S. 498, 510 (1983) (FCC cannot enforce Section 504 of the Rehabilitation Act which is not entrusted to its enforcement); *True Oil Co. v. Commissioner*, 170 F.3d 1294, 1304 (10<sup>th</sup> Cir. 1999) ("FERC has no Congressional authority to interpret any provision of the Internal Revenue Code"); *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997) (holding that efforts by FERC to enforce the Clean Water Act were invalid because FERC does not possess a "roving mandate" to enforce the Act). *See also Gould*, 475 U.S. at 291.

<sup>5</sup> Similarly, Congress did not grant such authority to DOL, and it certainly did not grant such authority to prime contractors that would be required to make such determinations regarding prospective subcontractors.

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The exclusivity analysis in *Gould* has been applied by reviewing federal courts in the instance of similar attempts to trench upon the exclusive jurisdiction of the NLRB not only by states and municipalities, but by other instrumentalities of the federal government itself. Thus, in *Reich, supra*, the D.C. Circuit Court of Appeals observed: “Nor . . . is there any doubt that . . . ‘pre-emption’ applies to federal as well as state action.” *Reich*, 74 F.3d at 1334, *reh’g. den.*, 83 F.3d 439, 441 (D.C. Cir. 1996) In *Reich*, the D.C. Circuit found that a DOL regulation barring employers that hired permanent replacements for striking workers from receiving federal contracts was invalid because it encroached upon and conflicted with the NLRA.<sup>6</sup>

Neither the debarment statute in *Gould*, nor the DOL regulation and Executive Order invalidated in *Reich*, could survive the pre-emptive sweep of the NLRA. The Proposed Regulations cannot either. Neither the state statute in *Gould*, nor the DOL regulation in *Reich*, could justify the regulatory encroachment by reference to any statutory purpose underpinning relevant procurement law. The Proposed Regulations cannot either. Both the statute in *Gould* and the regulation in *Reich* were invalid because they impermissibly interfered and conflicted with the exclusive jurisdiction of the NLRA. So, too, do the Proposed Regulations.

**IV. The Reporting and Debarment Scheme Envisioned by the Proposed Regulations is Punitive and Thus Contravenes the Intent of Congress in Enacting the NLRA.**

The Proposed Regulations do not merely encroach upon a regulatory area reserved by Congress to the exclusive purview of the NLRB. The Proposed Regulations directly conflict with such regulatory authority as granted by Congress. As noted above, the Proposed Regulations envision a scheme under which a bidder or contractor may be denied a contract or renewal, or be suspended or debarred from contracting with the federal government based on violations and/or alleged violations of the NLRA. *See supra* at 6. It is well established that the denial of a contract or renewal, or the suspension or debarment from contracting, plainly results in economic harm to

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<sup>6</sup> The Executive Order and implementing DOL regulation in *Reich* was struck down even though there was at least a colorable nexus between the Executive Branch policy and contract performance. *See* E.O. 13954 (Ensuring the Economical and Efficient Administration and Conflict of Federal Government Contractors: Final Rule 60 Fed. Reg. 27855 (May 25, 1995)). Thus, the articulated rationale was that replacement workers would be less trained and less familiar with the work to be done under the federal contract, and thus less efficient. This claimed nexus, even if true, was insufficient to save the DOL regulation because, like here, it fundamentally interfered and conflicted with the NLRA. *A fortiori*, the Proposed Regulations must fail since not only do they interfere and conflict with the NLRA, they are devoid of any legitimate contract performance nexus.

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the bidder or contractor. Writing for the D.C. Circuit, then Chief Circuit Judge Burger recognized what was at stake in the event of an administrative termination of the right to bid or contract, “colloquially called ‘blacklisting’”:

The impact of debarment on a contractor may be a sudden contraction of bank credit, adverse impact on market price of listed stock, if any, and critical uneasiness of creditors generally, to say nothing of ‘loss of face’ in the business community. These consequences are in addition to the loss of specific profits from the business as a result of debarment. [W]e strain no concept of judicial notice to acknowledge these basic facts of economic life.

*Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964). As the federal government itself conceded long ago, “the penalty of blacklisting is so severe that its imposition may destroy a growing business.” Report of Attorney General’s Committee on Administrative Procedure in Government Agencies, S. Doc. No. 10, 77<sup>th</sup> Cong. 1<sup>st</sup> Sess., pt. 1, at 2-3 (1941). *See also* Paul H. Gantt & R.M. Panzer, *The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts*, 25 Geo. Wash. L. Rev. 175 (1957); and Senate Subcomm. on Administrative Practice and Procedure, Selected Reports of the Administrative Conference of the United States, S. Rep. 88-24 (1963) (noting “debarment should be predicated upon a reasonable expectation, evidenced by something more than an accusation, an unrelated offense, or an offense remote in time, that an impairment of responsibility exists which will interfere with current satisfactory performance of a Government contract.”).

It is beyond cavil that denying a contract award or renewal; or, suspending or debarring an employer from the contracting process is a punitive economic sanction. DOL has long recognized as much in the rules it has issued to implement the statutory debarment scheme for federal contractors under the Service Contract Act. 29 C.F.R. § 4.187 (“Restoration . . . [of wages and benefits] is not itself a penalty. The penalty for violation is the suspension from the right to bid on Government contracts.”).

In enacting the NLRA, however, Congress established a regulatory scheme that was expressly and intentionally, **not** punitive, but solely remedial. *See infra* at 14. This is unlike some other federal workplace statutes. For example, the Occupational Safety and Health Act of 1974, 29 U.S.C. §§ 651, *et seq.*, specifically provides for punitive monetary penalties, and provides for the statutory classification of violations as “serious”, “willful”, or “repeated”. *See, e.g.*, 29 U.S.C. § 666(a)-(c) (providing a maximum penalty of \$70,000 for each “willful” violation). The

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NLRA does not classify violations, and, it most certainly does not provide for any monetary or other punitive sanctions.

In a similar vein, Congress specifically provided for the denial of federal contracts as a punitive sanction under certain federal statutes regulating “drug-free workplace[s]”, “unfair trade practice[s]”, and “Made in America” labeling. 48 C.F.R. § 9.406-2(b)(B). Congress has done likewise under a series of labor standards statutes that are enforced by DOL and that govern federal contracting –i.e., the Walsh-Healey Act, 41 U.S.C. §§ 35, *et seq.*, the Contract Work Hours Safety Standards Act, 40 U.S.C. §§ 327, *et seq.*, the Davis-Bacon Act, 40 U.S.C. §§ 3141, *et seq.*, and the Service Contract Act, 41 U.S.C. §§ 351, *et seq.* In stark contrast, and as more fully explicated below, Congress has expressly and specifically withheld suspension and debarment as remedies for violations of the NLRA.

**A. The Imposition of Federal Contracting Sanctions for NLRA Violations Has Been Explicitly Rejected by Congress.**

The NLRB has developed a broad range of remedies for NLRA violations. However, denial, suspension or debarment from federal contracting has never been a remedy proposed by the NLRB or authorized by Congress. Indeed, Congress has expressly rejected all attempts to engraft such punitive sanctions onto the NLRA’s remedial scheme.

In 1977, for example, Congress considered, but declined to adopt, a proposed debarment remedy for NLRA violations. Representative Thompson’s House bill, entitled “The Labor Reform Act of 1977”, called for amending the NLRA to prohibit the award of a federal contract to any entity found to have committed a “willful” violation of the NLRA, provided the Secretary of Labor certified the NLRB’s findings to GAO. *See* H.R. Rep. No. 95-367 at 51 (1978). The legislation and debarment provision was rejected by Congress.<sup>7</sup>

Similarly, in 1997, Congress, again, explicitly rejected efforts to impose a debarment remedy for NLRA violations. The proposed legislation, Senate Bill 780, would have amended the NLRA to allow contracting agencies to debar firms that exhibited a “clear pattern and practice” of unfair labor practice violations. According to the sponsor’s floor remarks, Senate

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<sup>7</sup> The Proposed Regulations would afford dramatically less due process and procedural safeguards than the legislation that was rejected. Thus, while the legislation provided that contract denial decisions could only be made by the Secretary of Labor, the Proposed Regulations would allow such decisions to be made by administratively designated ALCAs, and effectively made by prime contractors with respect to putative subcontractors. The Proposed Regulations thus advance a procedural scheme decidedly more offensive than that expressly rejected by Congress.

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Bill 780 proposed to amend the NLRA “to require Federal contract debarment for persons who violate labor relations provisions . . .” and it was accompanied by legislation seeking to amend the Act to “permit additional remedies in certain unfair labor practice cases.” 141 Cong. Rec. S6353 (May 9, 1997). Senate Bill 780 was not enacted.

The effort in 1997 was, however, significant in demonstrating the complete lack of empirical evidence in support of the need for such legislation. Thus, the House Committee on Government Reform and Oversight observed that, based on the results of a GAO report commissioned by the bill’s sponsor, there was little need for, or purpose to, the proposed remedial revisions. H.R. Rep. No. 104-874 (1997). Essentially, the proposed legislation amounted to a solution in search of a problem. Thus, GAO found that out of approximately 57,000 federal contractors around eighty (80) were identified to have violated Section 8 of the NLRA under a final Agency decision. *See* U.S. General Accounting Office, *Worker Protection: Federal Contractors & Violations of Labor Law*, GAOIHEHS-96-8 at 1 (Oct. 24, 1995).

This [GAO] report documents, with summary reports of violations in all 88 cases reviewed, that labor law violations are not widespread among Federal contractors, and that serious violators have only a miniscule portion of Federal contracts. The NLRB already has extensive enforcement authority in these areas. The lack of [GAO] recommendation indicates that the remedy [of NLRA debarment] would have limited utility in enforcing Federal labor laws against Federal contractors.

H. Rep. No. 104-847, at 73 (1997).

It is significant that the study made in conjunction with the 1997 legislation specifically sought to determine the number of federal contractors that had been adjudged in violation of the NLRA. That number turned out to be “miniscule”. Beyond this finding, there has been no other study of any probative value<sup>8</sup> that has linked the existence of past NLRA violations with a contractor’s present ability to perform a federal contract efficiently. There simply is no empirical evidence in the administrative record remotely demonstrating such a correlation.

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<sup>8</sup> The only new “development” is the so-called Harkin Report which does nothing more than list some federal contractors by their respective violations of certain federal labor laws. The “report” makes no effort to distinguish minor, technical, or record keeping violations. It lumps all violations together. Most importantly, it contains no evidence that links the existence of violations with any performance short-comings by contractors. Indeed, the “report” demonstrates precisely the opposite. Thus, the list is replete with iconic corporations that have unquestioned success in the performance of government contracts.

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The legislative actions in 1977 and 1997 are by no means isolated. Thus, since 1997 Congress has had numerous additional opportunities to re-visit this issue and to consider changes and amendments that would have authorized both the NLRB and other entities to impose the punitive federal contracting sanctions for violations of the NLRA. It has consistently refused to do so. *See, e.g.*, Federal Procurement and Assistance Integrity Act, H.R. 1227 (1999) and Federal Procurement and Assistance Integrity Act, S.1339 (1999) (twin bills seeking to deny federal contracts to firms found to have violated the NLRA); H.R. 4081 (Mar. 20, 2002) (Rep. Wynn’s contractor blacklisting bill proposing to amend the Procurement Act to establish for civilian and defense procurement that a satisfactory record of integrity and business ethics includes “a record of satisfactory compliance with the law, including . . . labor and employment . . . laws.”); 154 Cong. Rec. S.8285 (Sept. 10, 2008) (Sen. Clinton’s proposed contractor blacklisting amendment to the 2009 military appropriations bill seeking to amend the Procurement Act to establish for defense procurement that a satisfactory record of integrity and business ethics includes satisfactory compliance with “labor and employment” laws). Together these failed legislative efforts dating back at least to the 95<sup>th</sup> Congress, clearly demonstrate that the legislature has repeatedly rejected any and all efforts to deny government contracts to firms that have been found to have violated the NLRA. The NLRA, by congressional design, contains no provision for punitive sanctions of any kind, including federal contracting sanctions. Congress has repeatedly considered and repeatedly and unequivocally rejected efforts to add such sanctions to the NLRA. The present effort to circumvent Congress and provide such punitive remedies by Executive Branch fiat cannot withstand legal scrutiny. Such overreach is not constitutionally sustainable as it impermissibly encroaches on powers vested exclusively in a coordinate branch of the federal Government.

**B. The Attempt to Impose Punitive Sanctions for NLRA Violations Contravenes Both National Labor Policy and the Remedial Nature of the NLRA as Mandated by Congress.**

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The NLRA, as enacted by Congress, is intended to be a strictly remedial statute, not a punitive one. The “cease and desist”, “make whole,” “reinstatement,” and “rescission and restoration of the status quo ante” orders which the NLRB typically issues in the face of an unfair labor practice finding are consistent with that congressional intent. The imposition of

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adverse economic sanctions in the face of an unfair labor practice finding, which the Proposed Regulations envision, is punitive, and thus it contravenes clear congressional intent.

Congress specifically empowered the NLRB to “prevent any person from engaging in an unfair labor practice.” 29 U.S.C. § 160(a). The NLRA underscores that, with respect to unfair labor practice cases, the power to grant remedial relief rests exclusively with the NLRB. 29 U.S.C. § 160(a). Although Congress has conferred broad remedial power on the NLRB to fashion affirmative relief, it has long been established that the NLRB, itself, “lacks authority to punish; its remedy must not be punitive in nature.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). *See also Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 219 (1938). It is abundantly clear that the NLRB, the entity empowered by Congress to enforce the NLRA, cannot impose punitive sanctions for its violation. *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983). Certainly then a wholly different governmental entity, that lacks any congressional authority to enforce the NLRA, cannot do so through punitive sanctions, even under the guise of fulfilling its own legitimate congressional mandate.

The Supreme Court specifically addressed this precise issue in *Gould* where it invalidated a punitive State debarment statute. There the Court specifically noted:

The conflict between the challenged debarment statute and the NLRA is made all the more obvious by the essentially punitive, rather than corrective, nature of Wisconsin’s supplemental remedy. The regulatory scheme established for labor relations by Congress [in the NLRA] is ‘essentially remedial,’ and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. Wisconsin’s debarment sanction, in contrast, functions as punishment and serves no corrective purpose. *Punitive sanctions are inconsistent . . . with the remedial philosophy of the NLRA.*....

*Gould*, 475 U.S. at 288, n. 5 (internal quotation omitted and emphasis supplied). *See also Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940).

The Proposed Regulations at issue here, with respect to the NLRA, suffer essentially the same fatal flaw as the debarment statute invalidated in *Gould*. Denial, suspension and debarment because of the commission of unfair labor practices are punitive sanctions that conflict with the intent of Congress in enacting the NLRA, and, as such, are invalid. *See Campbell v. Apfel*, 177 F.3d 890, 898, n.6 (9<sup>th</sup> Cir. 1999) (“[W]e ‘may invalidate an agency regulation’....if the legislative history reveals a clear expression of congressional intent that runs contrary to the

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regulation.”) (quoting *Figueroa v. Sunn*, 884 F.2d 1290, 1293 (9<sup>th</sup> Cir. 1989)); *National Labor Relations Board Union v. Federal Labor Relations Authority*, 834 F. 2d 191, 198 (D.C. Cir. 1987) (“If Congress’ intent is clearly at odds with the regulations, then [the regulations] must be struck down ....”).

The Proposed Regulations plainly provide for punitive sanctions in the instance of violations, and even alleged, unproven violations, of the NLRA. The imposition of such punitive sanctions is contrary to the statute, contrary to the intent of Congress, and has been repeatedly rejected both by Congress and the courts. It must be rejected here as well.

**V. The NLRA’s Unique Statutory and Procedural Features Renders it Particularly Unsited for the Purposes of Determining Prospective Contractor Suitability.**

Beyond the fatal infirmities already noted, violations and alleged violations of the NLRA do not constitute a rational or permissible basis for the denial of federal contracting opportunities in light of the unique statutory and administrative features of the NLRA. Even a cursory examination of those features reveals the manifold flaws of predicating the imposition of punitive sanctions on violations and alleged violations of the NLRA.

**A. A Reporting and Penalty Program Based on Unreviewed Complaints and Board Decisions Offends Due Process and Flies in NLRB the Face of the NLRA and the FAR Council’s Prior Representations.**

From a procedural perspective it should be noted initially that the Proposed Regulations provide that the mere issuance of a “complaint” by the NLRB constitutes a reportable “labor violation” upon which punitive sanctions can be predicated. DOL Guidance at 22; Proposed Regulations 22-2002 (“administrative merits determination” definition). However, an NLRB complaint is nothing more than *a mere allegation* by the General Counsel of the Agency that there is probable cause to believe that there *may* be a violation of the NLRA. It is only well after the issuance of a complaint that an employer has any right to the minimal due process of a hearing, the right to examine evidence, and the right to cross examine adverse witnesses. *See* 29 U.S.C. § 160(b). At the time a complaint is issued an employer has had no right to such procedural safeguards. Even following a subsequent hearing before an Agency Administrative

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Law Judge (ALJ), the relevant statutory procedure specifically provides that the determination made by an NLRB ALJ is appealable, *as of right*, to the NLRB itself, and that any order issued by an ALJ is simply *recommended*. 29 U.S.C. § 160(c). Moreover, Congress has specifically provided that any subsequent NLRB decision and order is expressly *not* self-executing. *See* 29 U.S.C. § 160(e). Thus, by congressional design, an employer adjudged *by the Agency* to have committed an unfair labor practice is *not* automatically subject to even the Agency’s own remedial order, let alone the imposition of a punitive remedy by a wholly separate governmental entity based upon a bare, unsubstantiated allegation. Rather, pursuant to the procedural structure expressly provided for by Congress, NLRB orders are subject to federal court review and enforcement. *Id.*

The Proposed Regulations would stand these processes on their head. In complete contravention of the procedural safeguards and remedial limitations mandated by Congress under the NLRA, the Proposed Regulations would allow the imposition of punitive sanctions at the administrative complaint stage, long before the Agency adjudicative process is complete – indeed, before it has even begun. This “hang ‘em now, trial to follow” scheme not only contravenes express congressional intent, it violates the most fundamental notion of even minimal due process.

By way of comparison, even the rejected debarment scheme in *Gould* made a point of limiting debarment to firms with repeat violations of the NLRA “found by judicially enforced orders of the [NLRB].” *Gould* 475 U.S. at 284 (noting Wis. Stat. § 101.245(1) predicated debarment upon “final decisions of a federal court.”). *See also* 48 C.F.R. § 406-2(a) (predicating FAR administrative debarment upon a “civil judgment” or “conviction”); *id.* § 9.406-2(b)(i)(v)(A)(1) (debarment based on an assessed federal tax deficiency over \$3,000 must await contractor’s “pending administrative challenge” and exhaustion of “all judicial appeal rights.”).

Beyond its obvious constitutional infirmities, the proposed approach is arbitrary and capricious as evidenced by the FAR Council’s own previous actions with respect to this precise issue. Thus, as noted above, in 2000, in conjunction with an earlier proposed contractor rule, the FAR Council reconsidered and ultimately rescinded its proposed reliance on administrative complaints as an appropriate reportable measure of contractor integrity and business ethics. *See* 65 Fed. Reg. 80265 (Dec. 20, 2000). In its public comments, the FAR Council explained that the final (and subsequently rescinded) 2000 contractor blacklisting rule would not require

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certification of administrative complaints, but would limit certification to “[a]dverse decision[s] by a Federal administrative law judge, board, or commission indicating violations of law.” 48 C.F.R. § 9.104-3(c)(ii)(B-C). Notably, the FAR Council confirmed that it was pulling back on its initial approach in response to an avalanche of adverse public comments, while at the same time fostering due process and relieving contractors from “undue reporting burdens” *See* 65 Fed. Reg. 80265.

The due process and Administrative Procedure Act flaws inherent in the Proposed Regulations hardly end with the untenable *procedural* notion of imposing a penalty at the NLRB complaint stage. Predicating a penalty on anything short of a judicially enforced order suffers from at least six additional substantive and practical problems.

**1. The Proposed Regulations Provide for the Immediate Reporting and Predicate Status of Matters Which May Not be NLRA Violations At All**

First, whether at the Agency complaint or decisional stage, the NLRB is not infallible with respect to its unfair labor practice findings. Indeed, it is often wrong. A recent decision by the DC Circuit plainly illustrates the point. Thus, in *Southern New England Telephone*, 356 NLRB No. 118 (2011), the NLRB’s General Counsel issued a complaint alleging that the employer had unlawfully threatened dozens of employees and illegally suspended more than twenty workers in direct violation of their statutory rights protected by the NLRA. The Agency ALJ who heard the case sustained the complaint and the NLRB affirmed the ALJ’s decision and order. On review, however, the D.C. Circuit found that the NLRB’s decision lacked even fundamental “common sense” and refused to enforce its restorative order. *Southern New England Telephone Co. v. NLRB*, C.A. No. 11-1099, 2015 WL 4153873 (D.C. Cir. Jul 10, 2015). Significantly, whether at the NLRB complaint stage *or* the decisional stage, the Proposed Regulations most certainly envision that threatening and suspending dozens of employees in direct violation of the NLRA would be precisely the type of unfair labor practice that should serve as a predicate for the penalty of adverse federal contracting sanctions. *See, e.g.*, DOL Guidance, 80 Fed. Reg. 80584 (“violation involving adverse employment action or unlawful harassment against one of more workers for exercising any right protected by the Labor Laws is a serious violation.”) (citing NLRA adverse employment example as a reportable labor law

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violation). Under the Proposed Regulations, such a contracting sanction would have been imposed long before the reviewing circuit court vacated and refused to enforce the NLRB's unfair labor practice decision and restorative order. Notably, under the Proposed Regulation, a federal contractor in Southern New England Telephone Company's shoes would have been subject to a continuing labor violation-certification obligation and potential sanctions when the *complaint* was issued; and certainly again when the NLRB issued its erroneous *decision* of affirmance. *See* Proposed Guidance, 80 Fed. Reg. 30580 (report only the most recent ruling if it upholds the underlying administrative merits determination). The complaint in *Southern New England Telephone Southern New England Telephone* was, in fact, issued in 2009 and the Board's erroneous decision was initially issued in 2011. The Circuit Court did not overturn the decision until 2015. Thus, for more than five years, the employer would have had to report an extremely serious "violation", have that "violation" remain as the predicate for irreversible contracting sanctions for the same period of time, only to find that the "violation" was utterly without merit. The imposition of a regulatory framework that could yield such a result is simply untenable. Significantly, the sanctions called for under the Proposed Regulations are immediate and irreversible. *See supra* at 8. There is simply no way to "unring the bell" when the legal predicate for the penalty proves non-existent. The Proposed Regulation provides no way for a contractor that has suffered adverse economic consequence to recoup its losses when the predicate for the government's action proves false; nor do the Proposed Regulations provide any means for restoring improperly based reputational damage. This, despite the fact that the Proposed Guidance readily acknowledges that there will be instances where complaints and decisions will be subsequently overturned. In such instances, the Proposed Guidance graciously notes that reversed or vacated findings do not need to be reported. *Compare* Proposed Guidance, 80 Fed. Reg. 30580 ("administrative merits determination that must be reported . . . include [ones] that the contractor . . . is challenging . . . or is otherwise subject to further review") *with* (contractor "need not report the violation if, *at the time of reporting*, the determination that there was a violation . . . has been reversed or vacated in its entirety.") (emphasis added). Not having to report a non-violation is hardly a remedy for the prior imposition of completely unjustified economic or reputational sanctions.

**2. An NLRB “Test Case” Would Result in a Reportable Predicate “Violation” Despite the Fact that the Complaint was Contrary to Extant Law**

Second, the NLRB General Counsel often issues complaints that are not supported by, or, indeed, are directly contrary to extant law. For example, in *Purple Communications*, 361 NLRB No. 43 (2014), the NLRB General Counsel issued a complaint alleging that the employer had violated the rights of all of its employees by limiting their usage of the company’s e-mail system. The complaint, when issued in 2013, was totally contrary to existing Board law, *inter alia*, *Register Guard*, 351 NLRB 1110 (2007). The NLRB General Counsel, however, is independent from the five-member Board, and has the unreviewable authority to issue complaints. In *Purple Communications*, as in many other instances, issuance of the complaint was motivated by the NLRB General Counsel’s desire to change existing Board decisional law. Whatever the motive and whatever its legitimacy, the fact remains that at the time the complaint was issued it was contrary to extant law.<sup>9</sup> Yet, under the Proposed Regulations, an Agency complaint, even one unsupported by, or contrary to, extant law, would serve as the predicate for economic contracting and reputational sanctions. *See, e.g.*, DOL Guidance, 80 Fed. Reg. 30580 (“complaints’ issued by enforcement agencies are included in the definition of administrative merits determination.”) Thus, contract sanctions could be imposed on a federal contractor or bidder based on nothing more than the untested theories of the NLRB General Counsel. A mere complaint based on such untested theories, which may or may not be sustained by the NLRB or reviewing courts, cannot and should not form the basis for irreversible economic or reputational sanctions. The NLRB itself recognizes, with respect to its own *decisions*, let alone mere complaints, that it may be wholly improper to impose even a “restorative” remedy on the basis of a change in law. *See, e.g.*, *WKYC-TV*, 359 NLRB No. 30 (2012); *SNE Enterprises*, 344 NLRB 673, 673 (2005).<sup>10</sup> However, the Proposed Regulations make no such distinction with respect to the imposition of irreversible

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<sup>9</sup> While in the case of *Purple Communications*, *supra*, the NLRB adopted the view of the NLRB General Counsel, that is by no means always the case. In fact, the NLRB frequently rejects new theories advanced by the NLRB General Counsel that run counter to extant law. So, too, do reviewing courts.

<sup>10</sup> Thus, when the NLRB issues a decision based on a change of law it determines whether or not the change in law would work a “manifest injustice” if applied to pending cases, including the case in which such change is found. The remedial authority delegated to the NLRB by Congress provides it with the legal authority to make such judgments. Congress has not delegated the authority to make these and similar judgments under the NLRA to any other person or entity.

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punitive sanctions at the complaint stage, nor do they contain any legitimate process for making such judgments.<sup>11</sup>

**3. The NLRB's Non-Acquiescence Policy Manufactures Reportable Predicate "Violations" Based on Legal Theories Rejected by the Federal Circuit Courts**

Third, not only are the complaints issued by the NLRB General Counsel often based upon theories that are contrary to extant law, the Board itself, oftentimes issues decisions that directly contravene the law as found by reviewing federal circuit courts. Thus, if the NLRB disagrees with reviewing circuit court rulings, the Agency will simply engage in what it refers to as "non-acquiescence" and will issue subsequent NLRB decisions in contravention of the law as found by those circuits until such time as the Supreme Court, following the grant of a discretionary petition for certiorari, precludes the Agency from doing so by affirming the contrary view of the circuit court(s).

Non-acquiescence is most certainly alive and well at the NLRB. For example, in January 2012 the NLRB issued its decision in *D.R. Horton*, in which it found that the employer had violated the NLRA and the statutorily-protected rights of all of its employees by maintaining a pre-employment dispute resolution mechanism that contained a class action waiver. *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5<sup>th</sup> Cir. 2013). The U.S. Court of Appeals for the Fifth Circuit subsequently found that the NLRB's decision was, in relevant part, unequivocally incorrect and refused to enforce the NLRB's order. The NLRB, however, has chosen not to accept the view of the Fifth Circuit and simply continued to follow its own "rogue" interpretation of the law. Thus, in late 2014, the NLRB, in direct contravention of the Fifth Circuit's decision, issued a new decision resuscitating and reaffirming its rejected rationale from the *D.R. Horton* litigation. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). It continues to persist in its view. *See, e.g., Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015).

In continuing to insist that the inclusion of a class action waiver constitutes a company-wide unfair labor practice, the NLRB is not only at odds with the Fifth Circuit. Its view of the

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<sup>11</sup> The Proposed Regulations in this regard, as in many others, contain no congressionally-authorized process as to what complaints, or even decisions, should serve as predicate for the imposition of punitive sanctions. It is no answer to say that this is a matter which the ALCAs can decide. As already noted herein, the ALCA has no statutory or congressionally-delegated authority to make this, or any other substantive decision under the NLRA. *Infra* at 31.

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governing law runs contrary to the view of federal courts in nearly forty other cases. *Murphy Oil*, 361 NLRB No. 72.at 36 & n.5 (Member Johnson, dissenting) (collecting cases). *See, e.g. Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owens v. Bristol Care, Inc.*, 702 F.3d 1050 (8<sup>th</sup> Cir. 2013); *Richards v. Ernst & Young LLP*, 744 F.3d 1072. 1075, n. 3 (9<sup>th</sup> Cir. 2013); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4<sup>th</sup> 348 (Cal. Sup Ct, 2013).

Such Agency intransigence is no minor matter. At the time *Murphy Oil* issued there were some thirty-seven cases pending before the NLRB involving violations of the NLRA identical to those in *D.R. Horton* and *Murphy Oil*; and, an even greater, untold number of NLRA complaints pending at various stages of the administrative process below the NLRB level. *See Murphy Oil*, 361 NLRB No. 72, at 38-39 & n. 12 (Member Johnson, dissenting). All of these complaints and ALJ decisions that find violations of the NLRA, however, are based on a view of the law that has received “near universal condemnation from the federal and state courts”. *Id.* at 36. Nonetheless, under the Proposed Regulations, each NLRB General Counsel complaint, ALJ “recommended order”, or Board decision constitutes a reportable “labor violation” and a legitimate predicate for imposing the contracting sanctions of denial, suspension or debarment and imposing reputational harm. Such a scheme is simply untenable and violates any conceivable sense of due process or fundamental fairness.

Lastly, it should be noted that while the *D.R. Horton*/class action waiver issue is the one which has received the most publicity of late, it is by no means the only instance in which the NLRB persists in its own view of the law despite the diametrically opposite disposition by federal courts. In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), for example, the NLRB, *on the basis of identical operative facts*, expressly rejected the view of the D.C. Circuit and made legal findings diametrically opposed to those reached by the circuit court in *FedEx Home Delivery v NLRB*, 563 F. 3d 492 (D.C. Cir. 2009). The notion that punitive sanctions could be properly predicated on judicially rejected theories is simply untenable.

**4. The Reporting of “Violations” and the Imposition of Punitive Sanctions Runs Counter to the Procedural Structure of the NLRA as Designed by Congress**

Fourth, the notion that denial of, or suspension and/or debarment from federal contracting opportunities could be properly based on the issuance of an unfair labor practice complaint, or

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even on an NLRB finding of an unfair labor practice, totally ignores the procedural construct of the NLRA as enacted by Congress. Thus, Section 8 of the NLRA, 29 U.S.C. § 158, contains its unfair labor practice provisions, Section 9, 29 U.S.C. § 159, contains the NLRA's representation case provisions, and Section 10, its judicial review and enforcement provisions, 29 U.S.C. § 160. The determinations under Section 9 involve such critical legal issues as whether the NLRB has correctly determined the contours of a proposed bargaining unit, whether individuals or entire classifications of workers are included within such bargaining units, or, even enjoy the protections of the NLRA, and whether or not an NLRB -conducted secret ballot election has been conducted properly and therefore fairly reflects the choice of a majority of employees in an appropriate bargaining unit. These so-called representation or "R case" issues are at the heart of national labor policy and their proper disposition is the right of all parties to the representation case process.

Under the NLRA, as devised by Congress, there are provisions for the direct court review of matters decided by the NLRB involving Section 8. *See* 29 U.S.C. §150(e)(5). There is, however, *no* direct review by the federal courts of "R Case" matters decided by the NLRB under Section 9 of the NLRA. In order to obtain federal court review of matters decided under Section 9 an employer must engage in a refusal to bargain under Section 8 in order to obtain that review. *See* 29 U.S.C. § 159(d). Thus, to obtain court review of critically important matters arising under Section 9, the NLRA procedurally requires an employer to commit "technical" unfair labor practice under Section 8. The employer does this by engaging in a refusal to bargain, thus violating Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), and eventually leading to the NLRB's issuance of a summary judgment determination finding such a violation. The NLRB routinely finds these violations of the statute and employers, unions and the NLRB recognize that this is process that an employer must utilize to obtain judicial review in R Case matters.

Despite the routine and necessary nature of technical Section 8(a)(5) violations, the Proposed Regulations would make them the predicate for irreversible economic and reputational sanctions. Thus, an employer/contractor confronted with what it believes is an erroneous determination under Section 9; and, seeking its NLRA-preserved, legitimate right to obtain court review of same, would face an untenable Hobson's choice – pursue Court review and risk the imposition of irreversible economic sanctions, or forego its right to obtain judicial review and enter a "Labor Compliance Agreement" based on the untested R-case "violation". Punitive

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sanctions cannot be the “price” an employer must pay for the exercise of its right to judicial review, particularly where Congress has created a statutory process that requires the commission of a violation in order to obtain that court review. 29 U.S.C. § 158(a)(5). Indeed, the Supreme Court has specifically analyzed the technical violation issue as follows:

Punitive sanctions are inconsistent . . . with the Act's procedural logic. For example, the [NLRB's] certification of a bargaining representative is not subject to direct judicial appeal. An employer who believes that the [NLRB] erred in approving an [union representation] election or defining a bargaining unit thus may obtain administrative and judicial review only by refusing to bargain [with the newly certified union] and awaiting an enforcement action by the [NLRB] for violation of the Act. An unsuccessful challenge of this sort, if pursued in good faith, will generally present an especially inappropriate occasion for punitive sanctions.

*Gould*, 475 U.S. at 288, n.5 (citations omitted). *See also Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971); *AFL v. NLRB*, 308 U.S. 401 (1940). Punishing an employer/contractor because it seeks judicial review through the very means prescribed by Congress is neither logical nor tenable, yet, precisely what the Proposed Regulations would allow.

**5. The Proposed Regulations Would Improperly Render Unintentional Acts Reportable and Accord Them Punitive Predicate Status**

Fifth, underpinning the entire notion of the Proposed Regulations is the notion that an employer that engages in or is alleged to have engaged in behavior that transgresses the governing labor/management statute must, perforce, be a “bad actor”. This tacit supposition is both fallacious and hypocritical. Thus, the vast majority of labor/management violations do not require proof of intent. Indeed, most do not involve “bad” intent at all, nor is such “bad” intent routinely found.<sup>12</sup> For example, in recent years one of the most prevalent unfair labor practice

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<sup>12</sup> Related to the NLRA, the Proposed Regulations also require bidders and existing government contractors and subcontractors to certify their adverse “arbitral awards or decisions” (apparently on the hyper-technical ground that an action taken in reliance on a mistaken view of a collective bargaining agreement nonetheless, and wholly unintentionally, violates the “refusal to bargain” requirements of the NLRA); and, permits any adverse arbitration awards to form the basis for punitive contracting sanctions. In the labor/management context, arbitration is principally utilized to finally resolve differences between the parties to a collective bargaining agreement with respect to the meaning or application of contractual language. The vast majority of arbitration cases involve what words in a contract mean or how they are meant to be applied. These are garden variety contract language disputes that have nothing to do with either party engaging in wrong-doing or acting with “bad intent”. They are no different than any commercial contract dispute. It defies credulity that such a simple dispute with respect to contract language could be used as the predicate for economic sanctions imposed by the federal government against one, and only one, of the parties to the collective bargaining agreement that contains the language in question. Even in those

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findings has stemmed from the wording of employer handbook policies. The NLRB has issued dozens of decisions involving the wording of employer handbooks and policies. As of last year it had been estimated that well over a third of the cases in the NLRB's decisional inventory involved the wording of employer policies, and the issue was so prevalent that the NLRB General Counsel found it necessary to take the unusual step of issuing a lengthy guidance memorandum on the topic. *See* GC Mem. 15-04 (Mar. 2015). At issue in these cases is whether or not the wording of an employer's plant or handbook rule could be construed as potentially "chilling" an employee from engaging in some form of protected behavior. Most of these cases involve a technical reading and parsing of the syntax of the rule, coupled with the speculation of how a reasonable employee might read the rule. Virtually none of these cases involve an issue or a finding to the effect that the employer drafted the rule for the purpose of "chilling" any rights at all. Most of these cases do not even involve the enforcement of the rule, and many do not involve any adverse employment action. Thus, in what is perhaps *the most active* area of recent unfair labor practice complaints and NLRB findings, the violation is a wholly unintentional one. At best these unfair labor practice complaints illustrate that the involved employers are "bad grammarians", not "bad actors". Most unfair labor findings are, like the handbook cases, violations that lack any intent. The vast majority of the remainder of cases do not require, nor do they specifically find, such intent.<sup>13</sup>

With only rare exception, violations of the governing labor/management statute are quite simply not a reasonable indicator of an employer's "honesty", "integrity", or "responsibility". Indeed if the frequency of alleged or determined violations of a governing labor/management statute were an accurate indicator of "honesty", "integrity", "responsibility" or the other employer "character" traits to which the Proposed Regulations repeatedly refer, it would raise for proponents of those regulations some ironic and problematic facts.

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handful of arbitrations that might involve a claim or element of "bad intention", the NLRB has recently made clear that such cases fall within its purview, not that of an arbitrator, to decide. *See Babcock and Wilcox*, 361 NLRB No. 132 (2014). Treating arbitration awards as reportable predicates for adverse contracting sanctions or as candidates for remediation through a Labor Compliance Agreement is simply untenable, and will chill an employer's ability to secure a neutral's determination of the meaning of unclear language in a collective bargaining agreement.

<sup>13</sup> Making matters worse, the NLRB refuses to provide any specific guidance or advisory opinions as to whether or not an employer's policy or handbook is in compliance with the law. It has offered no approved or "safe harbor" language. Rather the Board engages in *ad hoc* decision-making, and utilizes such a vague and imprecise "standard" to determine the lawfulness of handbook provisions that it is, in reality, no standard at all. It is a wholly subjective, and, thus, ever-changing and unpredictable mode of "analysis".

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The federal government is, itself, an “employer”, and it too, is subject to labor/management statutes that contain unfair labor practice provisions. Thus, the federal government, as an employer, is subject to the Federal Labor Relations Act; and, the United States Postal Service (USPS), a part of the Executive Branch of the federal government, is, as an employer, subject to the NLRA. *See* 5 U.S.C. §§7101, *et seq.*; *see also*, 39 U.S.C. §§ 1201, *et seq.* (Postal Reorganization Act of 1970). Even a cursory examination of available<sup>14</sup> unfair labor practice data yields some startling results. For example, Federal Labor Relations Authority (FLRA) data for fiscal year 2012 shows that it closed the year with nearly 1500 unfair labor practice cases pending, and that during the course of the year it had issued over 230 unfair labor practice complaints predominantly against the “employer”, i.e., the federal government. *See FLRA Annual Report, FY 2012*. By way of comparison, the NLRB issued some 1300 unfair labor practice complaints over the same period. *See NLRB Summary of Operations, 2012*. However, there are some 2.6 million individuals in the federal workforce as contrasted with more than 120 million individuals employed in the private sector. *See* Office of Personnel Management, Federal Workforce Tables, 2014, U.S. Census Bureau, Workforce Data 2014, Federal Reserve Private Sector Employment data, 2013. Two conclusions appear quite clear. First, on a per capita basis there are an exponentially larger number of “merit” unfair labor practices each year against the federal government than there are against all private sector U.S. employers *combined*. And, by orders of magnitude, the federal government, itself, as an employer, is the most frequent violator and alleged violator of governing labor/management statutes.

The irony runs deeper still when one considers the data involving the USPS. The USPS is an arm of the Executive Branch, however, under the Postal Reorganization Act of 1978 (PRA) it, unlike all other federal employers, is subject to the NLRA. *See* PRA, Ch. 12, 5 U.S.C. §§ 7101, *et seq.* Thus, in the case of the USPS there is a direct comparison of the federal government’s record of NLRA violations as compared to violations by private sector employers. When such a comparison is made, the federal government does not fare well. Indeed, over the past several decades there has probably been no more frequent and chronic violator of the NLRA than the USPS. Indeed, the NLRB frequently notes the fact that the USPS has an “extensive history” of

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<sup>14</sup> In some instances, Agency data collection is not detailed or fully current. For example, as noted above, *supra* at n.2, the NLRB has discontinued publication of detailed data in its Annual Report, and the Federal Labor Relations Authority does not make granular distinctions in the overall unfair labor practice data it reports. The overall conclusions, however, are clear.

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violating the NLRA, has engaged in “decades of widespread and repeated violations”, and has a “proclivity to demonstrate opposition to workers’ [NLRA] Section 7 rights”. *See, e.g., United States Postal Service*, 341 NLRB 684, n. 4 (2004); *United States Postal Service*, 339 NLRB 1162 (2003); *United States Postal Service*, 345 NLRB 426 (2005), *enforcing order*, *NLRB v. United States Postal Service*, 486 F.3d 683 (10<sup>th</sup> Cir. 2007); *United States Postal Service*, 338 NLRB 1052 (2003); *see also*, NLRB Complaint in Case Nos. 5-CA-140690 and 5-CA-143686.

The NLRB’s own numbers certainly support the NLRB’s claims. Thus in fiscal year 2010<sup>15</sup> there were some 2,164 unfair labor practice charges filed against the USPS. That was more than twice as many charges as were filed during the same period against **all** construction employers in the country (1,098 charges); four times as many charges as were filed against **all** retail employers in the country (597 charges); and significantly more than **all** U.S. manufacturing employers (1,514 charges), **all** U.S. transportation employers (1,336 charges) and **all** U.S. hospital employers (1,353 charges).

There seems little room for debate. Year after year, the most frequent and chronic violator of the NLRA is not some private corporation or employer. It is the federal government itself. Applying the baseless logic which underpins the Proposed Regulations and the Executive Order, the result is inescapable – as an employer, there is no entity less “honest”, more “irresponsible”, or less lacking in “integrity” than the federal government itself. Of course no serious person suggests or believes this to be true in the case of the federal government. It is obviously not – and its labor/management record does not prove otherwise. However, neither does that of any private sector contractor.

**6. No NLRB Actions Should Form the Basis for Punitive Sanctions  
Given the Systemic Fragility of the Agency’s Authority**

In recent years the legal inadequacy of NLRB decisions as a predicate for irreversible punitive action has been demonstrated not only in individual cases, but as a systemic matter as well. Thus, not once, but twice in the last five years literally hundreds of NLRB decisions and findings of unfair labor practice liability have been summarily invalidated by the Supreme Court because the NLRB at the time lacked the statutory authority to make the determinations in

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<sup>15</sup> This is the last year for which the NLRB has provided detailed public case analysis in an Annual Report. Following the issuance in 2010 it unfortunately discontinued the decades-long reporting format.

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question. *See New Process Steel v. NLRB*, 660 U.S. 674 (2010); *NLRB v. Noel Canning, Inc.*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 2550 (2014).

If *New Process Steel* and *Noel Canning* alone were not a sufficient caution against relying on the legal adequacy of the NLRB's actions, the D.C. Circuit has provided fresh evidence of this reality less than a month ago. Thus, in *SW General, Inc. v. NLRB*, No. 14-1107, 14-1121, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015) a unanimous panel found that Lafe Solomon, the former Acting General Counsel of the NLRB, was serving in that capacity in violation of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, *et seq.* from January 5, 2011 until November 4, 2013. In other words, and bearing in mind that only the NLRB's General Counsel has the authority to issue complaints, such complaints were being issued for *nearly three years by an individual that lacked the statutory authority to do so*. Yet, these are the very type of complaints that under the Proposed Regulations would form the predicate for irreversible punitive sanctions.

The decision-making of an entity with such fragile legitimacy as the NLRB has demonstrated over the last five years should hardly be used as the predicate for punitive sanctions. It would fly in the face of due process for the government to impose economic sanctions on an employer/contractor on the basis of the actions of an Agency that has no legal authority to act. Yet, three times in the last five years, and in hundreds of actions and decisions, that is precisely what would have happened had the Proposed Regulations been in effect. *See generally*, Proposed Regulations 52.222-AA (requiring reporting of any “administrative merits determination, arbitral award or decision, or civil judgment, rendered against the offeror within the three year period preceding the date of the offer for violations of labor laws.”)

**B. The Proposed Regulations' Delegation of Authority to Federal Regulators and Prime Contractors to Weigh the Severity of NLRA Violations is *Ultra Vires* and Usurps the NLRB's Plenary Remedial Duties.**

Unquestionably, there are those who will argue that now that the Proposed Regulations have created the post of Agency Labor Compliance Advisor (ALCA), a number of the concerns raised herein are more illusory than real since the ALCA is familiar with the statute in question and can therefore advise on these issues. With the ALCA in place, supposedly only serious, willful, or pervasive violations of the NLRA will cause an employer/contractor to suffer adverse

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economic consequence. Proposed Regulations 22.2004-2(b)(3)(ii)(A) (ALCA shall evaluate “[w]hether any violation should be considered serious, repeated, willful, or pervasive,”); *id.* 22.2004-3(b)(3)(i) (same) (post-award evaluation).

This claim is utterly without merit. Quite simply, Congress has not delegated to any ALCA the authority to make these or any other related judgments. In the case of the NLRA there is no statutory framework for the NLRB, let alone some individual lacking any congressional authority, to determine what is “serious” or not serious, or what is “pervasive” or not pervasive. An ALCA would merely be making it up as he or she goes along, without congressional authority, statutory guidance or meaningful review. Ironically, however, under the Proposed Regulations, an administratively-selected ALCA would, effectively, have the sole and largely unreviewable ability to impose punitive sanctions against an employer for violations of the NLRA. This is a power far beyond that of the NLRB itself, the Members and General Counsel of which are Presidential appointees that must be confirmed by the Senate; and, who are statutorily empowered to interpret and enforce the NLRA. Yet, even the NLRB and its General Counsel have no authority to impose punitive sanctions, see *supra* at 13-14, and their actions in unfair labor practice matters are directly reviewable by the federal courts. Creating the post of ALCA does not resolve any of the serious legal and practical issues with the Proposed Regulations. It simply makes their manifold infirmities more obvious.

Beyond the fatal legal shortcomings of the ALCA scheme are the additional practical issues. There is simply no basis for assuming that mere familiarity with the statute and the operations of the NLRB would give an ALCA any ability to resolve the issues noted herein. Should a decision by the Board not be afforded predicate status because it is likely to be overturned by a court of appeals as was the case in *Southern New England Telephone Co.*? Will the NLRB or courts ultimately sustain a General Counsel “test case” like *Purple Communications* such that a complaint issuance can be used as predicate for an economic sanction? Will a “rogue” NLRB theory like that in *D.R. Horton* be sustained by the Supreme Court thus making its use as a predicate permissible? Is an employer acting with “malice”, are its violations “serious” or “pervasive”? Is the NLRB operating in a constitutional manner; or, are its Members or General Counsel serving without statutory authority yet issuing Agency decisions that may serve as a predicate for punitive sanctions? In truth, and well beyond the fact that Congress has not authorized anyone to make these determinations, mere familiarity with the

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statute or the Agency does not equip any one to make these determinations with any more accuracy that an individual lacking such familiarity. The ALCA proposal is a band aid which the Proposed Regulation attempts to apply to a gaping practical and legal wound. Just like the band aid, it is wholly inadequate for the task.

**VI. The Proposed Regulations Invite Third-Party Abuse and Compromise the Obligation of the Federal Government to Maintain Neutrality in the Organizing Context.**

Finally, the Proposed Regulations would establish a “certification program” under which prime contractors and subcontractors would be required to make semi-annual submissions detailing their respective labor “violations”. The reportable “violations” would include bare, unsubstantiated complaints, preliminary determinations that, as noted above, *see supra* at 15-23, are inherently unreliable. The Proposed Regulations would require reporting under thirteen federal labor, employment and workplace safety laws, in addition to the NLRA, and twenty-two separate state health and safety laws. All “violations” of these thirty-six laws, over a rolling three-year period would have to be reported. Thus, as previously noted, contractors will have to go to great expense and assume oppressive administrative burdens to provide the federal government with information that the federal government already has in its possession. *See supra* at n.1. The requirements of the certification program are the very antithesis of fostering efficiency and economy in federal procurement, as the FAR Council itself recognized in its public representations in 2001. *See infra* at 3.

However, the current proposed reporting burdens are merely the beginning. The FAR Council has indicated that the certification program will be expanded “imminently” to include an entirely new set of “equivalent” state labor and employment laws nationwide. Thus, once fully implemented, the parameters of the reporting regime will expand well beyond the thirty-six federal and state laws already implicated. These certification requirements are broader and more onerous than those that were included the 2000 contractor blacklisting rule. *See supra* at 16-17 (seven categories of “administrative merits determinations”). The FAR Council itself previously characterized even those less demanding reporting requirements as “burdensome” and without “justification” in 2001, when it stayed, and ultimately rescinded its final 2000 rule.

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Consequently, there is little room for debate that the current requirements of the FAR Council's resuscitated certification program are unduly burdensome and unnecessary.

While the certification program and accompanying records disclosure obligations imposed under the Proposed Regulations will do little to insure that federal contracts are awarded to employers that provide goods and services efficiently and economically, *see supra* at 4-5, 26, the Proposed Regulations will by their very design invite third party abuse and award organized labor an unwarranted opportunity to influence bidder and contractor FAR "responsibility" determinations.

As noted, contracting officers would have as one option notifying an Agency Suspension or Debarment official of a contractor's "nonresponsibility", and, as another, urging a bidder or existing contractor to take the opportunity to achieve "responsible" source status by entering into or "enhancing" an existing Labor Compliance Agreement to remediate the putative "violation(s)".

It is no secret that during the course of a typical union organizing campaign, corporate campaign, or, in the case of a unionized employer during periodic contract renegotiations, unions often file and use administrative charges for tactical purposes. Thus, unions utilize administrative charges to sully the reputation of employers with their own employees, with business relations, and with the general public in an effort to apply pressure and advance their organizational and bargaining goals. Unions increasingly use such tactics to advance their organizing and memberships' objectives.<sup>16</sup> Indeed, one prominent union that had its internal corporate campaign manual disclosed in a court proceeding devoted a section to the topic of "bringing pressure by raising regulatory or legal issues." *See Service Employees International Unions, AFL-CIO, Contract Campaign Manual, Pt. 3 "Pressuring the Employer"* (Ex. 1-8 in *Sodexo, Inc. v. Service Employees International Union*, No. 11-cv-00276 (E.D. Va. filed Mar. 17, 2011)). The manual instructs readers under the "Legal/Regulatory Pressure" section as follows: "Management officials may find that, because union members have started looking for employer abuses, the employer is now facing . . . extra expenses to meet regulatory requirements

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<sup>16</sup> *See, generally*, Jarol B. Manheim, *The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation* (2001); Herb R. Norhrup & Charles H. Steen, *Union "Corporate Campaigns" as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. L.J. Pub. Pol'y. 771 (1999). *See also Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation Before the Subcomm. on Health, Employment, Labor and Pensions of the Comm. on Education and the Workforce*, 112 Cong. 1 (May 2011),

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or qualify for necessary permits or business licenses. . . .” *Id.* at 3-21. Under the Proposed Regulations, of course, the stakes are considerably higher than a temporary permit block.

The Proposed Regulations are tailor-made to advance union corporate campaign pressures, although the unions themselves are exempt from the FAR Council’s business ethics and integrity reporting regime. *See supra* at n.2.

The Executive Order, for example, imposes a non-discretionary and sweeping duty on contracting officers (and presumably on prime contractors charged with determining the responsibility of their prospective and existing subcontractor) to consider “all other sources of information.” Executive Order (iv)(B)(ii). That is “all other sources of information”, *in addition to* information disclosed by a prospective bidder or existing federal contractor, through the certification program, and after contracting officers invite these potential or existing contracting parties to defend their assertion that they are a “responsible” source notwithstanding their certified “violations.”

By making it imperative for procurement officials to consider outside information, the Proposed Regulations invite outside parties to inundate agency officials with partisan and unsubstantiated claims of wrongdoing in order to exert coercive economic pressure on employer/contractors. This gross abuse is virtually guaranteed.<sup>17</sup>

To put this in perspective, consider the efforts of the union in the Bay Area Rapid Transit procurement case. In that instance, the union’s corporate campaign derailed the orderly procurement process on a federally-funded local project through the use of repeated meetings with and peppering of sympathetic procurement officials with unsubstantiated “other source” information alleging that the targeted steel supplier, a long-time supplier to BART, was not a “responsible” source. In this instance, as would be the case potentially under the Proposed Regulations, the union’s tactics and objectives were utterly at cross-purposes with advancing economical and efficient procurement. The United Steelworkers’ (USW) objective included advancing the interests of a competing, USW-organized steel supplier over those of BART’s existing supplier, which despite a ten-year track record of timely supplying its products to BART’s specification, had separately refused to rehire all of the unions’ employees after they

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<sup>17</sup> The Proposed Regulations will prompt organized labor to update their corporate campaign manuals. *See, e.g.*, SIEU Contract Campaign Manual at 3-22 (“Find out which federal, state, or local agencies enforce standards the employer must meet . . . Make a request for copies of that agency’s files for any cases involving this employer. If the workers at the regulatory agency are unionized, meet with their union leadership . . .”).

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struck one of its operations. All this notwithstanding, by virtue of its full court press and abuse of the procurement process, the USW succeeded in influencing BART to pass a debarment resolution targeting BART's own, long-term steel supplier. Notably included in the resolution was the following recital: "WHEREAS, the District has been advised that the [NLRB] has alleged that Rocky Mountain Steel Mills has committed violations of Federal labor laws" *CF&I Steel; L.P. v. Bay Area Transit Dist.*, No. 00-00529, 2000 WL 1375277, at \*3 (N.D. Cal. Sept. 19, 2000).<sup>18</sup>

As the BART case aptly illustrates, with respect to the NLRA, the Proposed Regulations' "all other sources" mandate threatens to upset the carefully-structured balance of labor/management relations. It would tilt the balance, struck by Congress, by providing a new and unwarranted economic weapon to organized labor. It would provide unions with improper leverage in organizing and collective bargaining and force one of the other parties –federal contractors or bidders-- to make concessions even though the other party did not have the power to gain that concession on its own. This is misuse of the procurement process and runs counter to national labor policy.

**VII. Conclusion**

For the reasons noted herein, there should be no FAR certification requirement with respect to any NLRB matter, and such matters should not serve as the predicate for punitive federal contract sanctions. COLLE urges that the FAR Council abandon the proposed rulemaking and rescind the accompanying proposed FAR amendments pertaining to contractor blacklisting for "labor violations."

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<sup>18</sup> The SEIU Contract Campaign Manual goes on to tout as a corporate campaign highlight a tactical maneuver in which the union "hit Mellon Bank with a series of legal charges" which included charges of "violating laws on antitrust, age discrimination, and worker rights under the NLRB." SIEU Contract Campaign Manual at 3-23. *See also* U.S. Gov't Accountability Office, GAO/HEH5-00-144, Worker Protections at Establishments Experiencing Labor Unrest (Aug. 2000) (corporate campaign tactics triggering increased OSHA workplace inspections).