



General Services Administration
Regulatory Secretariat (MVCB)
Attention: Ms. Flowers
1800 F Street, NW
Washington, DC 20405
FAR Case 2014-025

Ms. Tiffany Jones
U.S. Department of Labor
S-2312
200 Constitution Avenue, NW
Washington, DC 20210
ZIRN 1290-ZA02

August 26, 2015

Subject: Comments on Executive Order 13673, Fair Pay and Safe Workplaces (79 FR 45309, August 5, 2014) to GSA on proposed Federal Acquisition Regulations at 80 FR 30548, May 28, 2015, and Proposed Labor Department Guidance on EO13673 at 80 FR30574, May 28, 2015 (Submitted by mail and by e-mail through www.regulations.gov)

Dear Ms. Flowers and Ms. Jones:

Following are comments on the proposed regulations and guidance on Executive Order 13673 published by your respective agencies on May 28, 2015.

These comments are filed on behalf of a coalition of national construction employer associations, called the Campaign for Quality Construction, which is comprised of: FCAInternational (FCA), the International Council of Employers of Bricklayers and Allied Craft Workers (ICE-BAC); the Mechanical Contractors Association of America (MCAA); the National Electrical Contractors Association (NECA); the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA); and The Association of Union Constructors (TAUC)

The six specialty construction employer associations in our Campaign for Quality Construction (CQC) coalition represent more than 20,000 specialty construction employers, which perform large scope construction projects in public and private construction markets nationwide. CQC firms operate as both prime contractors and subcontractors on commercial, institutional and industrial facility projects of all





types, performing mechanical, electrical, plumbing, sheet metal, steel erection, equipment and tool installation, and painting, architectural metal and glass and interior finishing aspects of all those types of projects. CQC members operate both as prime contractors and subcontractors on direct Federal construction projects for the full range of Federal Defense and Civilian agencies. CQC employers employ the full range of skilled construction civil and building construction craft workers, including painters, plumbers, pipe fitters, hvac technicians, electricians, sheet metal workers, iron workers, boilermakers, bricklayers, cement masons, glaziers, drywall and flooring finishers, as well as carpenters, laborers, and equipment operators. Employment relations with these skilled crafts are governed through use of multiemployer collective bargaining agreements, both national and local, which also include health and welfare, defined benefit pension, and joint apprenticeship and training programs building and maintaining the high skill production craft base in the industry overall.

CQC comments are aimed at helping the FAR Council and DoL to establish a tenable and workable construction prime contractor and subcontractor responsibility screening process that improves competition for Federal construction projects, and increases the likelihood of successful project completions for Federal agency programs and for the direct benefit of the taxpayers. CQC has identified a number of key elements for changes to the proposed regulations that are necessary for EO13673 to achieve its stated goals, as enumerated below.

- 1. The legal compliance assessment of all covered construction prime contractors and subcontractors must be conducted by the government agency – the Labor Department and the agency Labor Compliance Advisor (LCA) in collaboration in some fashion, with the ultimate decision making responsibility and discretion continuing to reside in the Contracting Officer’s warrant to make affirmative responsibility determinations. The legal compliance assessment of the prime contractor and all covered subcontractors also should all be performed at the same time in the pre-award responsibility determination phase of the project – not at the time of subcontract execution.**

CQC submits that the optional approach adopted in the proposed regulations to allow the prime contractor discretion to require covered subcontractors to submit their legal compliance certifications to the Labor Department for review should be made mandatory for construction contracts for all covered subcontractors (first tier and lower tier subs). The prime also should not be allowed to delegate flow-down certification review to subcontractors for them to assess the legal compliance of lower tier





subcontractors. And, the DoL assessment of all covered subcontractors should be performed at the same time as the assessment of the prime contractor – in the pre-award responsibility process to minimize the impact of ineligibility decisions coming later in the project – disrupting successful project completion and increasing chances for project delay, claims, cost overruns and disputes. The subcontractor naming and review process likewise would apply to all contractor selection methods – low-bid, competitive negotiations trade-off methods (best value), low-price/technically acceptable (LPTA), and indefinite delivery/indefinite quantity (IDIQ), and, multiple award task order contracting methods (MATOC).

The reasons for this necessary change are many. We agree with the Congressional comments asserting that the legal compliance assessments of both primes and subs are an inherently governmental function (House of Representatives comments, page 2). We also agree with comment that the legal compliance assessment and mediation between arms-length business partners in an ordinary commercial contracting context is wholly inappropriate (Jenner & Block comments, page 21.). Furthermore, the proposed attenuated, flow-down legal compliance assessments throughout the time schedule of the project is rife with opportunities for inconsistent application of the very complex legal standards in the DoL proposed guidance. If primes were allowed to assess subcontractors throughout the course of the project at the time each successive subcontract is signed, and then also were allowed to delegate that assessment to subs to assess their covered lower tier subcontractors, the opportunities for inconsistent application of the EO standards, and for other mischance, mistakes and misapplication, and consequent project claims, delays, cost increases and other disputes would abound. Similarly, the risks of opportunistic post-award price or other subcontract term and conditions renegotiations in the legal compliance review process also can't be discounted.

Consolidated agency review of all covered firms at the beginning of the process also would bring uniform False Claims Act discipline to the certification process at all contracting tiers. Moreover, because the proposed regulations currently put the legal compliance assessment risk and burden on primes and subcontractors, they may be counterproductive to the aims of EO13673, and have the effect of driving competitors out of the market, fearing claims, disputes, and potential liability for either challenged stringent or lax application of the hyper complex legal judgments called for in the Labor Department Guidance. Some number of otherwise well qualified and responsible firms may abjure competing for Federal projects altogether, as either primes or subs, wanting to stay out of the legal business and focus on their business strengths – building projects.





We should note that construction project supervision and contracting personnel are not trained in law, most often they are former skilled craft workers and project engineers and estimators – builders in one way or another – not lawyers, by choice. One need only skim through the proposed Labor Department guidance to fully apprehend the impossibility of achieving consistent EO13673 standards relying on field supervision assessments. It is immediately apparent that construction project contracting personnel are wholly ill-equipped to assess whether another company’s Title VII adverse impact violations are disqualifying under EO13673 standards, or how to discern culpable Title VII workplace harassment from every day jobsite horseplay or shop talk. The legal case reporters themselves are replete with examples of even judges having difficulty mastering the intricacies of Title VII Uniform Guidelines of Employee Selection Procedures and how to assess the disqualifying potential of a serious or not- so- serious employment screening adverse impact claim or violation. It is patently contrary to the goal of consistent application called for by Section 4 of EO13673 to ask private sector project superintendents/engineers or any other private sector contracting personnel to make the hyper legalistic governmental judgments called for in the DoL proposed Guidance.

The support for revising the proposed regulations to require the Labor Department and LCA to assess both the prime and covered subs in the pre-award responsibility determination process can be grounded in the terms of EO13673, as well as other aspects of the proposed regulations calling for comments on how to reduce the burden of the EO on business and small business. Certainly, having the government accept the burden of applying the Labor Department guidance would be a big relief to both primes and subs, and achieve the aim of consistency called for in the terms of the EO itself in Sections 4 and 7.

Moreover, other provisions of the Federal Acquisition Regulations strongly support this necessary change to the proposal, primarily FAR Part 9.104-4(b) - “When it is in the Government’s interest to do so, the contracting officer may directly determine a prospective subcontractor’s responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, **or substantial subcontracting**). In this case, the same standards used to determine a prime contractor’s responsibility shall be used by the Government to determine subcontractor responsibility.” [Emphasis added]

It should be noted that most construction contract project awards of any significant scope involve a predominate scope of the project let out in subcontract awards – satisfying the parenthetical example in FAR Part 9.104-4(b) entirely.





Also, the proposed FAR rule Regulatory Flexibility analysis on this point is somewhat misleading. On the subcontractor flow-down reporting on page 30563, seemingly dismissing the efficacy of having the Labor Department assess the subcontractors legal compliance, the analysis says: “Another alternative would be to have the subcontractor report the information to DoL and inform the prime. However, the prime has to make a subcontractor responsibility determination and without this information may not be able to complete their analysis for the determination.”

That statement overstates the requirements of the FAR in Part 9.104-4(a), which says only that: “**Generally**, prospective prime contractors are responsible for determining the responsibility of their respective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government’s determination of the prospective prime contractor’s responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor’s responsibility.” [Emphasis added]

Taken on its face, FAR Part 9.104.4 (a) is a rather permissive, “general” statement that a prime has responsibility for qualifying its subcontractors – it is not a hard-and-fast, specific requirement as the regulatory analysis seems to suggest. And, in any case, having the CO/LCA provide the legal compliance screening would not necessarily interfere with any other type of responsibility screening the prime may conduct of subs – if it chooses to do so.

Other provisions in the FAR too may support the consolidated pre-award agency legal compliance screening of primes and subcontractors. For example, FAR Part 1 often is cited for the premise that practices that are not specifically prohibited in the FAR are permissible for agencies. And, there may be other direct examples of prime and subcontractor screening by other agencies, for example, the Office of Federal Contract Compliance Programs (OFCCP) pre-award screening of prime contractor and subcontractor compliance with EO11246 affirmative action requirements.

As to common objections to the type of agency screening called for above, several are typical and unpersuasive in the context of EO13673. The proposed rules, in currently reserving an option for the prime to direct the subcontractor to deliver the certification to DoL and then have the subcontractor report the DoL recommendation back to the prime would seem to be some indirect deference to the time-worn concept of privity of contract. That conceptual restraint is typically now observed in the breach in many ways in advanced public construction contracting methods, with BIM modeling,





integrated project delivery contracting methods combining all firms in a collaborative contracting model, prime and subcontract teams selection and many other examples, including the highly evolved Federal contract subcontract payment clause too serving as examples of “privity” constraints being removed to improve contracting performance. (See, ***Integration at its Finest: Success in High-Performance Building Design and Project Delivery in the Federal Sector***, U.S General Services Administration, Office of High – Performance Green Buildings, Research Report April 14, 2015.) Also, there is a consensus that public agency prequalification of primes and subcontractor does not contravene requirements of full and open competition. (See, ***Fair Pay and Safe Workplaces Executive Order: Questions and Answers***, Congressional Research Service, 7-5700, July 15, 2015, citing Ralph C. Nash, Jr., ***Prequalification: Can it Be Used to Improve the Procurement Process***, 10 Nash & Cibinic Report Sec 16, April 1996 – “[The Competition in Contracting Act] provisions here have generally been seen to limit (although not prohibit) the use of prequalification by federal agencies.”) In summary, prequalification of prime contractors and subcontractors in the private sector and public agencies outside the Federal sector are in fact very common – legal compliance reviews are routinely a part of those prequalification rating systems. See, ***Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps***, American Bar Association, Construction Lawyer, Vol. 27, No. 2. Spring 2007.) For sure, there are significant differences between a prequalification process, and responsibility determination reviews of successful bidders/offerors, but the establishment of the dedicated GSA website for this process is a start in melding the two. The scope of that work for a purchasing system as vast as the U.S Government is challenging, but altogether necessary, and would almost certainly be cost effective in spurring significant improvements in competition for Federal projects and promoting more consistent successful project completions.

2. Support for paycheck transparency provisions.

The CQC supports the paycheck transparency provisions of the EO13673 as they pertain to notices to independent contractors. This is entirely in line with CQC’s long held policy views and initiatives to stem worker misclassification in the construction industry, which has become the bane of fair competition in the industry in public and private sector that must be addressed in a variety of ways, including actions such as EO13673.

3. The proposed regulations should clarify that the prime contractor’s legal compliance certification is required after it wins the contract selection competition, not in its initial offer.

EO13673 by its terms (Section 2) requires agency solicitations to notify offerors that they will be





required to make legal compliance certifications in the pre-award process (which usually means the contractor responsibility determination process), that is, after successful competition for the contract award. However, the proposed regulations (Subsection 22.2004-1) interprets this to mean that offerors must provide the legal compliance certification earlier, that is, with their initial offer, before they win the project. As that may risk the impartiality of the negotiated selection process because of an early indication of legal issues entering into the selection/competitive negotiations decisions, the regulation should be amended so that the certification should be required only after completion of the competition for contract award in the responsibility determination review of the successful offeror or low bidder. While this may not currently be the practice with respect to the other contractor responsibility certifications under FAR Part 9-104-5 and Part 52.209-5, it may still be appropriate for legal compliance certifications to be collected post offer, as provided in FAR Part 9.105-1.

4. The definition of “administrative merits determinations” should be pared back to include only final agency determinations; arbitral award definition should be clarified.

Paring back the “administrative merits determinations” to include only final agency decisions (removing initial NLRB unfair labor practice complaints, and EEOC right to sue letters, for example) would achieve a more equitable assessment of contractor and subcontractor responsibility, on proven records, improving the operation and durability of the EO, and diminishing the attacks on the fairness of the concept, without substantially impairing the goals of the EO, which is culling out truly non-responsible firms based on their established records. Similarly, the EO should clarify that arbitral decisions bearing on collective bargaining issues that don’t amount to statutory violations should be expressly excluded for reporting and LCA/CO consideration. Arbitrator awards pertaining to ordinary collective bargaining agreement terms and conditions disputes are not the types of violations that denote any integrity or business ethics issues – and merely reflect good faith disputes about how to implement complex labor agreement working terms and conditions by workforce supervision at the jobsite.

5. Expand and clarify Contracting Officer possible responses to LCA recommendations.

The provisions of the scope of possible Contracting Officer responses to the Labor Compliance Advisor’s recommendations pertaining to a prime contractors compliance review in proposed pre-award (subsection 22.2004-2 (b)(4), and post-award (subsection 22.2004-3(b)(4) procedures), and parallel provisions relating to prime contractor reviews of subcontractors records (in the event the final regulations continue to reflect the flawed flow-down process argued against in Point 1 above), should be expanded to include an optional response of the CO to an adverse LCA recommendation to permit an award to the firm despite the LCA’s negative assessment. The current list of CO response options says





the response actions may include certain negative actions in response to a negative LCA recommendation, but it is only weakly implied that the Contracting Officer retains business interest proprietary discretion to make a positive responsibility determination over an adverse LCA recommendation. The new provision should give greater weight to the discretion the Contracting Officer currently has to make a judgment in the Government's best interest, based on objective criteria, such as satisfactory past performance in spite of some legal compliance issues, if justified in writing by the Contracting Officer to be in the government's best interest based on verifiable objective criteria. There is no express term in Executive Order 13673 that would override the Contracting Officer's discretion to act contrary to the recommendation of the LCA if it is in the Government's interest to do so.

Respectfully submitted on behalf of the Campaign for Quality Construction, comprised of:

- FCAInternational (FCA)
- International Council of Employers of Bricklayers and Allied Craft Workers (ICE-BAC)
- Mechanical Contractors Association of America (MCAA)
- National Electrical Contractors Association (NECA)
- Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)
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