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August 26, 2015

VIA INTERNET SUBMISSION

Ms. Tiffany Jones
U.S. Department of Labor
200 Constitution Avenue NW
Washington D.C. 20210

Re: **ZRIN 1290-ZA02** - Jackson Lewis P.C. Comments
Concerning Guidance for Executive Order 13673, "Fair Pay
and Safe Workplaces" - 80 FR 30574 (May 28, 2015)

I. Introduction

Founded in 1958, Jackson Lewis P.C. (Jackson Lewis) is a nationwide law firm of 800 labor and employment lawyers dedicated to assisting and representing management in all areas of workplace law. The firm's wide-ranging and specialized practice areas address every aspect of the employer/employee relationship for a broad array of employers in diverse industries. In particular, Jackson Lewis works closely with many federal contractor employers and, as a result, is uniquely positioned to comment on the labor and employment challenges facing contractors.

Jackson Lewis commends and supports the efforts of President Barak Obama, the Department of Labor (DOL) and the Federal Acquisition Regulatory Council (FAR Council) to promote safe, healthy, fair and effective workplaces while striving to achieve economy and efficiency in federal procurement contracting. Jackson Lewis appreciates the opportunity to submit comments and recommendations regarding DOL's Guidance. We offer comments, observations and suggestions to support those efforts while balancing the contractor community's legitimate interests in ensuring the Guidance considers viable alternatives, is based upon valid assumptions and minimizes administrative burdens.

Jackson Lewis is also submitting letter comments in response to Federal Acquisition Regulation (FAR) Case 2014-025 - Federal Acquisition Regulation; Fair Pay and Safe Workplaces; Proposed Rule – 80 FR 30548 (May 28, 2015) (Proposed Rule), a copy of which is included with this letter. Jackson Lewis respectfully requests that the FAR Council and DOL consider concurrently these two comments.

II. Summary of Comments

Jackson Lewis' comments and recommendations regarding the DOL Guidance fall into the following categories:

- **The DOL Guidance Creates Unnecessary Burden and Expense:** In addition to the burdens of the overall reporting system, the Guidance proposes an overly-complex and broad set of definitions and requirements which are not necessary to the objectives of the Executive Order.
- **The Definitions of “Labor Violation” are Prejudicially Broad:** The DOL Guidance contravenes basic principles of fundamental fairness and procedural due process with the inclusion of *alleged* labor law violations in responsibility determinations.
- **The Terms “Serious,” “Willful,” “Repeated,” and “Pervasive” are in Some Cases Ill-Defined and Overly-Broad:** The thresholds set for these terms are so low and so broad as to provide little or no substantive guidance for distinguishing non-responsible contractors.
- **The DOL Guidance Lacks Specific Direction for Distinguishing Non-Responsible Contractors:** While certain “labor violations” raise “particular concerns,” the Guidance does not provide sufficient direction for applying these factors in the responsibility determination.
- **The DOL Guidance Prejudicially Favors DOL and Agency Compliance Agreements:** The Guidance framework for assessing labor violations places excessive importance on a contractor’s willingness to enter into, or modify, “Labor Compliance Agreements” as a factor in assessing a lack of integrity or business ethics.

III. The DOL Guidance Creates Unnecessary Burden and Expense

While Jackson Lewis appreciates the attempt to specifically define “labor violation” and other relevant terms, the attempt goes much too far and creates a complex set of definitions which, ultimately, are unworkable. As discussed in greater detail in Section IV below, this complexity is a direct result of the inclusion of *alleged* labor violations. If only final determinations¹ are included, the applicable terms need little definition. There is no apparent justification for including alleged violations in a responsibility determination because the violations have yet to be reviewed by an ALJ, Review Board or other impartial decision maker.

Significantly, nowhere in the Order, the Proposed Rule or the Guidance is there an explanation for why it is necessary or desirable to include alleged violations. The DOL Guidance discloses nothing about any benefit or efficiency gained or what insight into contractor responsibility might be achieved. Instead, the Guidance merely states that contractors “may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged).” 80 FR 30580. It cannot be that alleged violations conclusively determine liability. Perhaps there is a presumption within DOL that agency contracting officers can make better and/or quicker labor law violation determinations than can labor law enforcement agencies. However, that presumption is patently misguided. If the reason for including alleged

¹ In stark contrast to other enforcement agency situations, DOL has not identified a “backlog” of contested proceedings or litigation that is delaying the prompt enforcement of OFCCP, ADA, EEOC, FLSA, FMLA, NLRB or OSHA claims. *See e.g.* DOL FY2014 Annual Performance Report; EEOC FY2014 Performance & Accountability Report; NLRB FY2013 Performance & Accountability Report; Testimony of Asst. Sec’y David Michaels Before Senate Subcommittee on Employment and Workplace Safety, Committee on Health, Education, Labor and Pensions, April 29, 2014 (stating the OSHA whistleblower complaint backlog is eliminated).

violations is to enable contracting agencies (or enforcement agencies) to proactively provide compliance assistance or remediation, encourage settlement, or avoid protracted litigation, that is also duplicative of enforcement agency efforts. Agency contracting officers simply cannot achieve anything in this regard beyond what enforcement agencies can already achieve. Indeed, when the enforcement agencies confirm² that high percentages of cases with merit are settled without litigation, there is no rational basis for including an alleged violation in a responsibility determination.

Moreover, a contractor's ability to provide additional information regarding an alleged violation is misleading and duplicative given that a contractor would, under the Proposed Rule, be obligated to make its defense not only with the enforcement agency, but also with the contracting agency. The inclusion of alleged violations creates extra work, which is unnecessary and unreasonable, and at least in the OSHA enforcement realm, will likely result in higher citation contest rates and administrative litigation.³

The decision to include alleged violations also leads directly to yet another burden: the otherwise unnecessary instruction for the reporting of "successive" determinations. Nothing in the already dense DOL Guidance is more complex than sorting what successive determinations must be reported and what need not be reported. For instance, this lengthy explanation includes the following excerpt:

If a subsequent decision concerning the same underlying violation upholds or does not completely reverse or vacate the finding of violation, the contractor or subcontractor should report only the [determination] that is the most recent at the time of reporting... If, however, the contractor or subcontractor appeals or challenges only part of a[] [determination], it must continue to report the original [determination] even if a successive [determination] has been issued.... If the contractor or subcontractor reported a[] [determination] before being awarded a covered contract, and a successive [determination] arising from the same underlying violation is rendered during the performance of the contract and affirms that the contractor or subcontractor committed the violation, the successive [determination] is a[] [determination] within the meaning of this guidance and the Order.

80 FR 30580.

Accordingly, the DOL Guidance does not promote or achieve economy or efficiency. Rather, it creates unnecessary complexity by requiring the reporting of alleged violations for no apparent compelling reason, resulting in duplication and inefficiency. For these and the reasons set forth in Section IV below, Jackson Lewis respectfully recommends that "labor violation" be defined to include only final determinations.

² See e.g. NLRB FY2014 Performance and Accountability Report p. 64 (stating that over 90% of cases with merit are settled without formal litigation).

³ Many government contractors are publicly traded, for-profit businesses. Officers and directors of these companies have a responsibility to maximize shareholder value. Historically, when deciding whether to challenge the merits of questionable citations, company leaders weighed the known costs of litigation against the economic benefits gained by prevailing in litigation. The DOL Guidance and Proposed Rule turn this calculus on its head. The decision to accept a questionable citation is no longer a fixed cost. Now a questionable citation has the potential to reduce the company's future revenues by contributing to a non-responsibility finding. In addition, OSHA enforcement actions are a matter of public record, and the Proposed Rule requires that portions of each contractor's disclosures in FAPIIS be made available to the public. 80 FR 20549. Therefore, even if the disclosure of an unadjudicated violation does not result in adverse responsibility determinations and the contractors earn a contract award, unsuccessful offerors will have opportunity and motive to protest these affirmative responsibility determinations. The award winners will be encouraged to intervene in the resulting bid protests to protect their interests. By requiring Contracting Officers and LCA's to include unadjudicated violations in their analyses, the Proposed Rule opens the floodgates for future litigation.

IV. The Definitions of “Labor Violation” are Vague and Prejudicially Broad

As used in the Guidance, the term “violation” is a misnomer because it includes not only allegations which are not final determinations that a violation has occurred; the term includes allegations where there has been little or no investigation by the enforcement agency, and where a contractor has had little or no substantive opportunity to be heard in response to the allegation. All that is needed in many instances is the allegation. Thus, in the responsibility evaluation process, two unproven allegations of labor law violations can suffice to find a contractor non-responsible. A “process” which considers such allegations is little more than a presumption that a labor enforcement agency’s allegations must be true. As such, the use of alleged violations in a responsibility determination would be a perversion of fair process principles.

Specifically, “administrative merits determinations” include the following:

- Wage and Hour Division

The proposed regulations include as an administrative merits determination the issuance of WH-56 “Summary of Unpaid Wages” forms or a letter indicating that an investigation revealed a violation of, among other laws, the Fair Labor Standards Act, the Service Contract Act or the Davis-Bacon Act. However, the DOL regularly issues such forms and letters to employers at the conclusion of their investigations, but before the employer has been provided a full opportunity to refute the basis of alleged violations and/or back pay calculated by the DOL in connection with the alleged violations.

Jackson Lewis is well aware from our own experience working with employers that the issuance of such forms and letters rarely denotes the end of the investigative and pre-litigation enforcement process.

In addition, some DOL investigators will provide employers with a WH-56 at or before a closing conference so that the employer can review, analyze and respond to the alleged violations and individual damages calculations. In contrast, other investigators will refuse to provide the form unless and until the employer first agrees to the findings of violations and the total sum of associated back pay, with no breakdown per alleged violation and per employee.

These findings of violations and demands for a total sum of back pay typically are provided orally to employers, who often are given little time to respond before the issuance of letters of violations. In these instances, employers are told to “agree or else,” without even having been provided a detailed basis for the violations and a breakdown of the amounts allegedly due each employee in connection with the alleged violations. In other cases, the issued WH-56 form marks the start of negotiations with DOL over violations and back pay and months may pass before there is a final agreement and a reissued WH-56 form which is signed by the employer. Because of the speculative and inconsistent use of the form, the inclusion of WH-56 forms and letters (and other such notices) within the definition of an Administrative Merits Determination, we request that all such alleged findings of violations be excluded from the definition.

- OSHA

The proposed regulations would accept an OSHA citation, notice of failure to abate, imminent danger notice, or any state law OSHA-equivalent to be a violation. OSHA has acknowledged there is a wide disparity between enforcement levels across state OSHA plans. This disparity requires that contracting officers and Labor Compliance Advisors (LCA) apply significant scrutiny to all state law OSHA enforcement actions to ensure that

prospective contractors are reviewed on a level playing field, and that certain contractors do not benefit from lax enforcement at a state level.

In addition, the OSHA enforcement actions described in the DOL Guidance are not the result of an adversarial proceeding, or an investigative finding that followed an employer's opportunity to rebut the allegations in the enforcement actions. The OSHA enforcement actions enumerated in the DOL Guidance do not allow the contractor to present its "side of the story." As a result, relying on these as a measure of contractor responsibility is unfair and untenable.

- OFCCP

According to the Federal Contract Compliance Manual (FCCM), OFCCP may issue a show cause notice for failure to timely submit an affirmative action plan (AAP), data or information, or for a failure to submit an acceptable AAP or data – instances that have no indication of employee discrimination or harm. As a result, the reliance on this notice in the responsibility determination does not advance the principles or spirit of the Executive Order.

- EEOC

The plain language of the ADA and Title VII demonstrate that EEOC "reasonable cause" determinations serve a procedural purpose only; a private plaintiff or the EEOC may only establish liability against an employer through a *de novo* court proceeding. For almost 20 years, the EEOC has abandoned any pretense that its investigations are thorough or complete. Prior to the EEOC adopting its National Enforcement Plan ("NEP") on February 8, 1996, the EEOC had a policy of "full investigation and enforcement." The NEP abandoned the full investigation model in favor of a "cause-lite" model, whereby the EEOC now enters cause findings where it determines "it is more likely than not" that discrimination has occurred. The EEOC's NEP has led to astounding admissions by the EEOC as to how its investigations are superficial and one-sided. For example, in oral argument before the Eighth Circuit involving a massive EEOC hostile work environment lawsuit, the employer's counsel criticized the EEOC for never interviewing any of the alleged harassers during the EEOC's investigation. Instead of dodging the criticism, the EEOC attorney proudly told the Eighth Circuit: "We did not question alleged harassers and that would not be our role." The Eighth Circuit ruled the EEOC's investigation and determination were insufficient. *EEOC v. CRST Van Expedited*, 679, F.3d 657 (8th Cir. 2012). Yet, citing to its lack of resources, the EEOC goes ahead undeterred, arguing that the Eighth Circuit was wrong to hold the EEOC to any investigatory standards because its efforts are "***of no legal consequence.***" See EEOC Brief in *EEOC v. The Geo Group* (9th Cir. 2014), page 28 (emphasis added). For these reasons, a reasonable cause determination is an improper measure of "responsibility."

- NLRB

Under the National Labor Relations Act (NLRA), "any person" may file an unfair labor practice (ULP) charge alleging an employer has violated the NLRA. Such violations may be as slight as an errant word from a supervisor that is deemed to be "coercive" to an employee regarding the employee's exercise of protected concerted activity. Often, culpability turns on a credibility determination – where there are inconsistent versions of the facts proffered by the employer and by the charging party. Regional Directors, acting as agents of the NLRB General Counsel, may conduct investigations, but do not make credibility determinations. The Board's Casehandling Manual for Unfair Labor Practice cases states that regions reviewing an unfair labor practice charge "are expected to resolve factual conflicts only on the basis of compelling documentary evidence and/or an objective analysis of the

inherent probabilities in light of the totality of the relevant evidence.” (§10064). The Manual advises Board personnel to obtain evidence, to the extent possible, which avoids the need for credibility determinations.

Of course, this is often not possible. Where the operative facts provided during an investigation are in dispute, which is often the case, a Regional Director will necessarily issue a complaint to allow an administrative law judge to take evidence, make credibility determinations, and render a decision on the law. Thus, a “complaint” issued by a Regional Director is not in any way a finding or determination of a violation or necessarily based on any “investigation.”

Moreover, the General Counsel frequently expands on the law, urging the Board to find violations on facts which had heretofore not been considered evidence of a violation. For instance, the past several years has seen a constant evolution of General Counsel Advocacy, and of Board law regarding workplace policies. Conventional, commonplace policies regarding arbitration, confidentiality, media access, workplace conduct, and many more have been found by the Board for the first time to be unlawful. An employer acting in good faith upon traditional best practices in the workplace is now finding compliance with the law to be a moving target. To use such interim findings as the issuance of a ULP complaint as a basis to deny a public contract to an employer is grossly unfair.

* * *

Nothing in the Executive Order suggests the term “labor violation” was intended to include anything but adjudicated, final determinations. Nowhere are alleged violations or any other sort of interim finding mentioned in the Order, let alone any alleged violation where the contractor has not had the opportunity to be heard by a neutral decision-maker. The Order refers to “administrative merits determinations,” a phrase which has no meaning outside the Order. However, the definitions⁴ of the recognized terms “administrative determination” and “merits” determination directly contradict the examples in the DOL Guidance. The definitions of these component terms refer to adversarial proceedings where both parties have presented their arguments and a neutral decision-maker has made a final determination on the merits.

As if it solves the underlying problem, the Guidance states that contractors “may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged).” 80 FR 30580-81. However, the necessity of submitting “additional information” to rebut allegations only creates additional problems. For those “administrative merits determinations” which the DOL Guidance acknowledges are not final, or the contractor can still challenge, the DOL Guidance potentially forces a contractor to disclose information *to the adverse party* – the government – in the enforcement actions. This requirement to share information with a litigation adversary or, at best, a third-party-affiliate of the enforcement agency, places contractors in a difficult position. The contractor will need legal counsel to be involved in the submission of mitigating circumstances to bolster its record as a responsible contractor, lest such submissions later be argued by the enforcement agency to constitute an admission, a waiver of attorney-client privilege or a waiver of the attorney work product doctrine during litigation.

The use of alleged violations as a basis for determining contractor responsibility is simply contrary to basic principles of reasonableness, fairness and adequate due process. The Proposed Rule not only contravenes this basic principle, it does so, as discussed above, with no apparent justification. As addressed in Section V, this

⁴ By way of example, Black’s Law Dictionary: (1) equates “administrative determination” with administrative adjudication, to mean the administrative process of issuing an order and the resolution of a dispute; (2) defines determination to mean the decision of a court or administrative agency implying ending or finality of a controversy; (3) equates “merits” with judgment on the merits, to mean a decision rendered after argument and investigation, rendered on the basis of evidence and facts introduced.

problem is greatly compounded when considering “repeat” violations. Thus, Jackson Lewis respectfully recommends that the term “labor violation” be limited to adjudicated, final violations.

V. The Terms “Serious,” “Willful,” “Repeated,” and “Pervasive” are in Some Cases Ill-Defined and Overly-Broad

The effort to define terms such as “serious,” “repeated” and “pervasive” is laudable, but, in some instances, goes too far. Because some of these terms set very low thresholds, they are over-inclusive and do not serve their intended purpose of distinguishing a responsible contractor from one which truly is not. In that case, the terms are not only unhelpful, they are counterproductive in lumping everyone together.

This problem is, again, compounded by the inclusion of alleged violations. It is also compounded by the DOL Guidance concerning “repeat” violations and by the concept that violations falling into one or more of these categories merit “particular concern.” Two relatively minor, alleged violations which, due to low thresholds, are deemed “serious” could raise “particular concern” because they are “repeated” and fall into two different categories. For instance, an OFCCP Show Cause Notice issued to a contractor who in good faith objects to jurisdiction and then contests a Show Cause Notice alleging back wages for a single employee of \$11,000 would be of “particular concern.” A repeat offender who fails to pay overtime in the amount of \$500,000 or more to a significant portion of its workforce would, according to the terms, fall into the same category. That is not helpful or efficient.

- **“Serious”**

A term loses its meaning when its thresholds are set so low as to encompass a wide range of misconduct. That is the case here with DOL’s expansive definition of “serious.”

As noted in the DOL Guidance, the Occupational Safety and Health Act defines a violation as serious “if there is a substantial probability that [the hazard created by the violation could result in] death or serious physical harm . . . unless the employer did not, and could not with the exercise of reasonable diligence know” of the existence of the violation. OSH Act, 29 U.S.C. § 666(k); 80 FR 30583. The DOL Guidance elaborates, stating a “violation may be determined to be serious where, although the accident itself is merely possible * * *, there is a substantial probability of serious injury if it does occur.” 80 FR 30583.

The language in the statute and DOL Guidance confirm that OSHA’s definition of “serious” deals with the likelihood of a serious injury, not the employer’s state of mind or the employer’s degree of negligence. Indeed, OSHA is authorized, if not obligated, to issue a “serious” citation to an ethical employer who personifies business integrity if the observed condition has a substantial probability to cause harm. Simply put, a serious violation of the OSH Act can occur irrespective of a contractor’s desire to comply with the regulatory standard, integrity or ethics.

A serious violation of the OSH Act is inconsistent with the government’s historical analysis of business integrity and ethics for responsibility determinations under FAR 9.104-1. *See e.g. FN Manufacturing, Inc.*, Comp. Gen. ¶ B-297172 (Dec. 1, 2005); *Southwestern Bell Tel. Co.*, Comp. Gen. ¶ B-292476 (Oct. 1, 2003).⁵ On the other hand, when describing a “willful” violation of the OSH Act, the DOL Guidance describes certain activities that show an

⁵ Both cases describe bid protests for a lack of ethics and business integrity, where the contractors were accused of fraud or criminal activity, had filed for bankruptcy protection, had been audited by the Attorney General, as well as other offenses involving misrepresentation and dishonesty.

employer's attempt to evade statutory responsibilities – falsification of records; fraud; intentional misrepresentation; and “off the books” transactions. 80 FR 30586.

Thus equating a “serious” OSHA citation with the Federal Acquisition Regulation's analysis of integrity and business ethics during a responsibility determination is a poor, “apples-to-oranges” comparison.

The NLRA provides no guideline for determining which violations may be considered “serious.” The lone Guidance example of a “serious” NLRA violation is the following:

The General Counsel of the National Labor Relations Board (NLRB) issued a complaint alleging that the contractor fired the employee who was the lead union adherent during the union's organizational campaign.

80 FR 30596.

This singular example is distressing: it is not unlawful to discharge an employee during an organizing drive. It is unlawful to do so if the discharge was *in retaliation for* the employee's protected activity. Concerns about this NLRA example as a standard-bearer for a “serious” violation are underscored by the fact that a mere complaint is not proof of any violation whatsoever (*see* Section IV NLRB discussion *supra*). The DOL Guidance conflates a case being sent to trial with a post-trial finding of fact and ultimate conclusion that the employer has indeed committed a “serious” violation – a mere allegation in this example is enough to deny a contract to a low bidder. Other examples where alleged “serious” violations are overly-broad and expansive include:

- An allegation that back wages of \$10,000 are owed, while not to be minimized on a personal level, is a very low threshold for a damages award and could include an inadvertent action involving a single employee;
- The Guidance appears to include any form of injunctive relief regardless of the substance of the relief granted;
- “Adverse employment action” encompasses many alleged violations. For instance, all OFCCP allegations of adverse impact include adverse employment action;
- Virtually all OFCCP discrimination allegations are pattern/practice or systemic allegations;
- A good faith refusal to provide data/information to OFCCP based on jurisdictional objections could be deemed “interference.” Thus, minor and alleged infractions could be deemed “serious.”

The DOL Guidance proposes that interference with investigations, including denial of access and refusal to submit documents or comply with requests for information, constitutes a serious violation. However, the Guidance does not address the situation where a contractor is engaged in a valid jurisdictional or discovery dispute with an enforcement agency, regarding an alleged violation that has not yet been “adjudicated” as the DOL Guidance defines that term. *See* 80 FR 30587. Presumably, good faith disputes over Constitutional rights to demand a warrant or quash a subpoena or to litigate a good faith dispute over the scope of discovery would not be construed as interfering with an investigation, even if the contractor did not prevail with its claim. Interestingly, the DOL Guidance appears to provide no safe harbor for employers who utilize procedural mechanisms put in place by the EEOC itself; specifically, the right of a respondent to insist on a subpoena and the ability to petition to revoke any Title VII or ADA subpoena whereby each EEOC Commissioner reviews and evaluates a respondent's petition. 29 C.F.R. § 1601.16(b)(1). Accordingly, Jackson Lewis respectfully suggests that DOL revisit this definition and republish it for further comment.

- **“Willful”**

In its application of the term “willful,” the DOL Guidance follows existing statutory and regulatory definitions in many instances, but adds catch-all categories which are overly-inclusive and do not delineate between responsible contractors and those that are not. According to the DOL Guidance, where no statutory standards exist, the standard for “willful” should take into account “whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the [labor laws].” 80 FR 30585.

The DOL Guidance provides that conduct with “knowledge” that it is prohibited by law is “willful” and that such knowledge can be “inferred” from mere allegations of violations. 80 FR 30586. Likewise, violation of a contractor’s own written legal policy prohibiting certain conduct can be “willful.” *Id.* These two definitions are so broad as to render the term meaningless.

Moreover, of course, “blissful ignorance of the law is not a defense to a willful violation.” A contractor who fails to make “sufficient effort to learn or understand whether it was complying with the law” may have engaged in willful conduct. A “lack of attention to its legal requirements” can also be willful conduct. 80 FR 30586-87. These vague, catch-all definitions stretch the bounds of common sense and usefulness.

For instance, contractors have “knowledge” of the OFCCP-enforced obligation to track applicants, so a failure to adequately track all applicants is conceivably willful.

As with the term “serious,” the National Labor Relations Act provides no guidance for which of its unfair labor practices would be considered “willful.” The term has no legal significance in itself to the NLRB. Violations of sections 8(a) and (b) do not turn on whether the respondent acted in a willful manner. Again, the term is purely a subjective adjective. The example provided by the DOL guidance of an NLRB case and how the term “willful” under the EO should be applied is limited to the following:

The NLRB issued a decision finding that a unionized roofing contractor set up a non-union alter ego corporation to avoid paying its employees the wages and benefits provided in its contract with the union.

80 FR 30598.

The DOL explains that creation of an alter-ego company must be “willful” because it was not an “inadvertent” act by the employer. *Id.* Thus, any violation that was not the result of an accident or mistake by an employer qualifies as grounds to consider denial of a contract award. This is far too broad a standard and, as a result, should be withdrawn.

- **“Repeated”**

This is another term from the Guidance which is, to a large degree, helpful, but which in other respects is both overly-complex and counterproductive. The first problem stems again from the inclusion of *alleged* labor violations. In an acknowledgement that alleged violations are not truly meaningful, the Guidance states that for a prior administrative merits determination to be a predicate for a second, “repeat” offense, it must have been adjudicated on the merits or uncontested. Such a determination is adjudicated if it “follows a proceeding in which the contractor or subcontractor had an opportunity to present evidence or arguments on its behalf, such as at a hearing or through written submissions, before the appropriate decision-making authority.”

The Guidance continues:

This framework is intended to ensure that repeated violations will only be assessed when the contractor or subcontractor has had the opportunity to present facts or arguments in its defense concerning the predicate violation.

80 FR 30587.

However, that is not to say the determination must be final; it need not be and may still be little more than an allegation to which the contractor has responded.

In contrast, the Guidance makes clear that the second violation need not be adjudicated. In other words, according to the Guidance, it is fair game to presume that a first allegation of a violation is, indeed, a violation without any response from the contractor. However, in order to make a presumption that two, similar allegations are, indeed, violations, nothing more is needed than the opportunity to respond to the first alleged violation. As for the second alleged violation, it can be presumed to be a violation regardless of whether the contractor has been heard in response to the allegation. This standard is confusing, and ill-founded, at best.

A contractor should at least have the opportunity to be heard before *any* alleged violation is considered to be a violation, let alone a repeat violation. However, the reporting of only final determinations removes the problem altogether and, therefore, is the better course.

The DOL Guidance provides one example of a “repeated” violation under the NLRA. However, in the example, the first case was adjudicated before an ALJ. ALJ decisions are not final agency orders, but a recommendation to the NLRB. The second, putatively “repeated” violation was a General Counsel complaint, tangentially factually similar in some respects, but remote in time and location. Here, neither of the cases are final agency orders. Further, agencies relying on this guidance will necessarily assume that any two cases with facts generally in the same category will provide a basis for denial of a contract award.

“Repeated” violations may also be considered on a company-wide basis, although there is no explanation of what company-wide means. Presumably, it does not include separate legal entities. Jackson Lewis thus respectfully requests clarification of these issues.

- **“Pervasive”**

This term needs clarification and delineation, as DOL acknowledges.⁶ This is especially true as “pervasive” violations are given greater weight and “raise particular concerns” in the responsibility determination. 80 FR 30590. Jackson Lewis suggests that DOL consider proposing definitive numeric thresholds as to what is and is not “pervasive” using violation data in its possession.

Such thresholds should account for a number of different factors, including:

- The number of violations;

⁶ The definition also confuses pervasiveness with willfulness in a number of examples. 80 FR 30589. “Pervasive” means existing in or spreading through every part of something; there is no knowledge component to its meaning. While “knowledge” may impact whether a violation is “willful,” a contractor’s “knowledge” thus cannot logically convert a number of isolated violations into “pervasive” violations.

- The number of inspections and investigations of the contractor;
- The time period over which the violations occur;
- The gravity of the violations;
- Whether violations occur across or within establishments/locations or divisions/organizational units;
- The number or percentage of employees affected across an organization;
- The number of violations relative to industry competitors;
- The number of violations relative to other entities regulated by that same enforcement agency (e.g., applicable state enforcement agencies); and
- The number of violations relative to agency investigations, audits, and employee complaints.

Only by comparing a contractor's compliance record against objective, empirical data that is comprised of similar compliance records within the applicable industry or applicable jurisdiction can a contracting officer or LCA accurately assess the pervasive criteria.

Solely for the purposes of discussion, and by no means does Jackson Lewis suggest this as a recommended methodology, federal contractors could be categorized based on:

- The number of locations (*e.g.*, 1-5, 6-20, 21-100, 101-300 and 301+) with a certain and graduated number of serious and/or willful violations over a set period of time deemed "pervasive" for each category.
 - Contractors with 1-5 locations and 3 serious/willful final violations over a two-year period could be deemed to have "pervasive" violations, while a contractor with 6-20 locations would need 6 violations to fall within the "pervasive" definition.
- Similarly, contractors could be categorized by number of employees (*e.g.*, 15-20, 21-50, 51-100, etc.).
 - Each category would have a certain number or percentage of employees being affected by a serious/willful final labor violation(s) deemed "pervasive" for each category over a set period of time (15-20=20%, 21-50=25%, 51-100=30%, etc.).
- Using the same example, while a single, serious violation in a two-year period would not be pervasive for a contractor with 1-5 locations, if that same contractor had 51-100 employees, a single serious violation affecting 25% of the workforce might be deemed pervasive.

DOL must ensure that such categories and criteria are not arbitrary and are not applied in an anecdotal manner but, rather, rely on data in DOL's possession regarding the actual violations issued to the small minority of contractors at which the DOL Guidance is aimed.

The gravity of a final violation is an important consideration in addition to numeric factors. A number of minor violations affecting few employees which are deemed "pervasive" are not reasonably comparable to the same number of violations that affect the same percentage of employees but pose a far greater risk to the employees. Thus, while gravity/willfulness does not dictate pervasiveness, to be pervasive a certain number of violations must also be willful, repeated, etc.

Thus, Jackson Lewis respectfully suggests that DOL use data in its possession to numerically delineate the term "pervasive" for further contractor comment.

VI. The DOL Guidance Lacks Specific Direction for Distinguishing Non-Responsible Employers

The DOL Guidance sets forth a number of criteria to be considered by contracting officers and LCA's in determining responsibility. The Order at Section 4 requires the FAR Council, DOL, OMB, relevant enforcement agencies and contracting agencies to amend the FAR to identify the criteria that will determine whether certain violations will be considered to demonstrate a lack of integrity or business ethics. Similarly, Section 4(b) of the Order directs the Guidance to "assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments were issued for serious, repeated, willful or pervasive violations" of certain labor laws. Yet the DOL Guidance does not provide adequate empirical direction as to: how those factors should be weighed; how those factors should be viewed in comparison to the contractor's industry sector (*e.g.*, NAICS or SIC code based) as a whole; how one state's enforcement program compares to another state's program; or how the interplay of the factors affects the responsibility determination.⁷

As a result, contracting officers (as well as LCA's) have considerable unchecked latitude as to how to interpret and apply the Guidance. The danger is, of course, that such discretion will be used and applied inconsistently and arbitrarily from one contract to another contract, contracting officer to contracting officer, and from agency to agency. This problem is exacerbated if, as addressed in Jackson Lewis' comments to the Proposed Rule, procedural checks and balances are not incorporated into the process to provide contractors and others a means for gauging whether the Guidance is interpreted and applied in a uniform and consistent manner.

The Order at Section 4 directs that the agencies will, "where available, incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful." The DOL Guidance provides no empirical, objective or quantitative data to explain how, and to what extent, that weight is allocated. Thus, in this regard, the Proposed Rule exceeds the authority and bounds of the Order.

Adding to the confusion, although the DOL Guidance provides that final determinations "should be given greater weight" than non-final determinations, 80 FR 30590, the DOL Guidance cites no existing statutory, FAR or other standard which includes an assessment of *alleged* violations in the responsibility determination, "serious" or otherwise. How do *allegations* that a contractor committed multiple "serious" violations stack up against a *final determination* that a contractor committed a single egregious violation? No guidance on this is provided. And, again, absent the inclusion of alleged violations, no such conundrum of comparison exists.

Importantly, the removal of alleged violations from the reporting scheme would not undermine the Order. The minority of contractors with serious, willful, repeated or pervasive labor violations can be excluded accordingly. No significant or repeat offender will slip through the cracks merely because alleged violations are omitted. Reporting of only final determinations will not upset the balance or objective DOL seeks to strike because the reporting of final determinations is still something that contractors want to avoid for many reasons. Moreover, no opportunity to offer early compliance assistance or a compliance agreement to such an offender will be lost. Undeniably, enforcement agencies already have those tools at their disposal.

Accordingly, Jackson Lewis respectfully requests that additional direction be provided as to how these factors are to be applied in order that contractors can provide informed comment.

⁷ In at least one instance, these factors of "particular concern" also set a low bar: the \$100,000 threshold for back pay, penalties and other damages is very low and does not further the goal of distinguishing non-responsible from responsible contractors.

VII. The DOL Guidance Prejudicially Favors Compliance Agreements

In addition to exacerbating factors, the Guidance also lists mitigation and remediation factors which should influence the responsibility determination. Again, however, there is a lack of direction as to how these factors should be applied. That is, except for Labor Compliance Agreements.

The Guidance states that its primary objective is labor law education and compliance, not disqualification of prospective contractors. 80 FR 30574. Thus, it suggests that in all but the most serious cases, contractors with violations who have taken adequate remedial measures will not necessarily be disqualified. 80 FR 30590. On its face that sounds reasonable. However, a careful reading and understanding of the Proposed Rule and the Guidance makes clear that the required reporting of alleged violations serves primarily to prejudicially increase the pressure on contractors to forego their defenses to alleged violations in favor of compliance agreements, in order to avoid an adverse impact on federal contract opportunities.

Of seven mitigating factors, the first listed is remediation, including compliance agreements. Notably, compliance agreements need not be reported but the mere allegation of a labor violation based on little or no investigation must in many instances be reported. The impact of such an alleged violation can be, in all but the most serious cases, alleviated by entering into a compliance agreement.

Provisions of the Proposed Rule also make this added leverage clear. The Rule provides that LCA's must make one of three recommendations, including: "The prospective contractor could be found to have a satisfactory record of integrity and business ethics *if the process to enter into or enhance a labor compliance agreement is initiated.*" The LCA's recommendation must also include a determination regarding: "The *need for*, existence of ... labor compliance agreements or other appropriate remedial measures" and "whether the prospective contractor is *negotiating in good faith a labor compliance agreement.*" 80 FR 30566. This information will, of course, come from the enforcement agencies which, naturally, strongly favor compliance agreements in most instances. Similarly, a contractor determining the responsibility of a proposed subcontractor must consider "any notice the subcontractor received *from DOL* advising that it has not entered into a labor compliance agreement *within a reasonable period* or is not meeting the terms of an existing agreement." 80 FR 30570.

A compliance agreement entered into after a final determination is one thing, but the prospect of entering into a compliance agreement based on mere allegations is quite another. In many situations a bidder or (sub)contractor facing an alleged violation but believing it has meritorious defenses may be more inclined to forego its defenses in favor of a compliance agreement due to the added negative weight of reporting an alleged violation to contracting officers with no compliance agreement.⁸ Currently, no such added factor exists. Thus, the required reporting of alleged violations for no apparent reason other than to tip the balance in favor of compliance agreements is a perversion of the process which, ultimately, does not benefit anyone. In contrast, the required reporting of *only final violations* preserves the current balance inherent in the invaluable process of fleshing out legal parameters through the litigation process where necessary. Because the inclusion of alleged violations also creates tremendous burdens and inefficiencies, there is no apparent justification for this perversion of process.



VIII. Conclusion

For the reasons set forth above, as well as those set forth in its comments regarding the Proposed Rule, Jackson Lewis respectfully recommends that the FAR Council and DOL withdraw the Proposed Rule and Guidance in

⁸ While enforcement agencies always have the offer of a compliance agreement as a persuasive tool to avoid protracted litigation, the addition of this tool increases the possibility that the tool could be used inappropriately.

favor of alternative means for more economically and efficiently achieving the stated objectives. Alternatively, the firm respectfully suggests the Proposed Rule and DOL Guidance be withdrawn for reassessment and revision in light of the firm's comments and recommendations so that the federal contractor community may comment on a more robust and complete Proposed Rule.

Jackson Lewis appreciates DOL's consideration of these comments and recommendations.

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