Business Roundtable Member Company Comments on Contracting Rule

From a large industrial manufacturing company:

We would be forced to hire at least one additional staff to track and monitor our suppliers' compliance, as well as an internal committee to review and certify contracts. Alone, one resource would cost a minimum of $150,000 annually.

In order to comply with the current proposed language, we would need to establish one centralized system to track 'violations', develop internal processes to determine what would constitute as a violation for system entry, provide training to each establishment HR (over 150 estabs within our company alone) to ensure state 'violations' are captured and designate a group or individual to oversee these entries.

If we simply expanded a current system we have in place, we would be required to spend $500,000 to purchase and configure the software, in addition to another $50,000 annually to maintain the system.

From a large aerospace company:

It does not make policy or practical sense to overlay a complicated reporting scheme on the acquisition process that, in effect, requires contractors to enforce the statutory duties of the federal agencies responsible for implementing and enforcing labor laws. This reporting scheme will add significant compliance costs and will likely lead to delays in the acquisition process of major weapons systems.

At our company, on average, we receive approximately 25 unfair labor practice charges filed per year, with an average of 1-2 complaints issued. During the last three years, any meritorious findings have been resolved through informal settlements prior to the issuance of a complaint.

Reporting violations that are not final merits determinations is a fundamental violation of due process. The proposed rule require contractors to report on alleged violations that have not been afforded full investigation and defense under established legal and regulatory processes and imposes the severe potential consequence, including exclusion from consideration for contracts based on matters in which no finding of wrongdoing based on established evidentiary standards has been determined.

Our company does not currently have a single system that tracks compliance with federal and state labor laws. Compliance is split up between corporate functions and our contracts division, which manages our multiple federal government contracts, is currently not involved in this process, though complying with the Proposal and Guidance will require their involvement.

The severity of the violation is not currently collected in the IRT system and therefore would need to be added as a new requirement for entry. We estimate this additional work may take between fifteen and thirty minutes per violation to generate the information required to be disclosed by the Regulation. Additional work would be required to track violations by program—the IRT system itself would have to be modified to allow for the program to be identified such that it could be a search criteria.

However, what is more concerning is the obligation to report on matters that are not final determinations. This requires reporting at merely the complaint stage and then updating our reports at each stage of a proceeding, whether agency, arbitral or civil litigation. While we track pending litigation in a matter management system, it contains attorney client privileged information. Consequently, to track and report on violations as currently defined, which are not limited to final determinations, we would have to establish a tool to input non-privileged information related to employment and labor matters.

In addition to concerns about reporting on our own corporation, our company maintains relationships with over 16,000 first tier suppliers, both large and small, performing on contracts of $500,000 or more. Managing bi-annual labor violation reports for each of these suppliers would require the hiring of dozens, if not more, full-time employees to manage the reporting, particularly if reporting is to be completed on a contract basis rather than a calendar basis. If prime contractors are responsible for collecting, analyzing and monitoring the reporting obligation of its subcontractors, there are a number of considerations.

- There would be no consistency in process across the contracting community. DOL Guidance specifically requires contractors to make the "same assessments" of subcontractors that agencies will make of contractors. It is unclear as to what "same assessment" means.
- This would impose significant costs on contractors to track the subcontractor data as well as dedicate personnel to the process of gathering the underlying information from the subcontractors, and training personnel to understand and identify violations.
- The contractor's determination regarding a subcontractor could be overturned by the LCA, which is an inefficient approach to evaluate subcontractor compliance.
- A subcontractor who works with multiple prime contractors will have to file information with each prime and the finding of a violation would likely vary across the prime contracting community. Finally, direct reporting would raise conflicts of interest due to lack of potential impartiality based on established relationships between primes and subs. Competitive issues and grounds for contract protests could arise.

The Regulations require that the contracting officer is to make a judgment of contractor responsibility. The above provision would require that the contractor act in place of the Agency Labor Compliance Advisor (ALCA) and contracting officer, which is inappropriate and would result in the contractor incurring additional labor costs to make the determination.

From a large telecommunications company:

The effect of the EO coupled with subsequent decisions of the DOL and NLRB put contractors in a regulatory Catch 22. Compliance with the EO necessarily requires contractors to exert heightened control over our sub-contractors. But the DOL's Wage & Hour Division and the National Labor Relations Board have issued decisions and administrative guidance that have substantially elevated the risks associated with "joint employer" determinations to employers who would necessarily be required under this EO to impose tighter control over its subcontractors.

At least one full-time headcount will be required to obtain, collate, and update existing systems. In addition, there certainly will be a substantial, recurring cost associated with the development, implementation, and oversight requirements to properly track and report items identified by the proposed EO.

The EO would strongly incent unions to aggressively file and/or threaten to file claims (and this is not limited to the National Labor Relations Act area of the EO). This presents an increased risk of economic harm for a company like ours that has a substantial unionized workforce.

This provision inappropriately would increase civil litigants' and unions demands to settle and would encourage even more "gray area" litigation to be filed to exact extortionate settlements. Thus, arbitral awards, Unfair Labor Practices, OHSA violations, and civil judgments should be carved out of any rules, or at a minimum be given substantially less weight.

Our company's historical experience is that most federal agencies recognize that a complaint or charge many times is the first notice an employer receives from an employee that there was "an issue" that needed to be investigated or addressed. By law, employees can utilize these agencies *in the very first instance* to raise.

Thus, absent reform, we are on a collision course in government policy objectives as the Executive Order suggests the agencies want to assist employers with compliance and resolving complaints, but the agencies themselves are tracked and rewarded based on the "violations" they find (hence the difficulty resolving matters short of a fully adjudicated "violation" finding).

From a large aerospace company:

The proposed rule is unworkable with one Agency Labor Compliance Advisor to provide a written recommendation within 3 days, for virtually every agency contract (and potentially thousands of subcontractors) multiple times. It will inevitably take considerable agency and contracting officer time and resources and delay the contracting process.

The proposed rule deprives government contractors of important due process rights by tagging them as violators without the statutory and regulatory means of challenging the agency's preliminary investigation or determination through the appeals and/or adversarial process.

Beyond the very significant legal and policy deficiencies of the proposed rule, the implementation and administration burdens on the supply chain are immense, in terms of volume, systems, evaluation, and reporting. For example, a large prime contractor, in a given calendar year, would likely have well over a thousand subcontracts over the $500,000 threshold, and that is not even taking into consideration the enormous reach of the rule to *every tier* of subcontractor.

With this type of volume, prime contractors would constantly be receiving semi-annual reporting from these subcontractors (and all the tiers of subcontractors), which would require increased staff just to process the reports. And these reporting obligations apply regardless of whether the subcontractor provides commercial items (other than commercial-off-the-shelf items) or is a small business.

Even beyond just receiving the reports, evaluating subcontractor submissions would also require increased personnel and significant training of those personnel to ensure consistent and thorough evaluations, and a computer system to track the incoming reports and evaluations that could withstand government audit and subcontractor or competitor challenge. Such a system would require at least twelve months to create, once final rules are actually set (including the yet-to-be proposed state law equivalents guidance) and the government dictates the information it will require for its TBD web-based reporting. There is simply no off-the-shelf solution.

From a large manufacturing company:

Establishing a process for requesting, gathering and compiling information from our subcontractors, and following up with any non-responsive suppliers, would impose meaningful costs on our company. Additionally, if subcontractors fail to provide the requested information, we might be forced to make sourcing changes, which could be costly and have an impact on the availability, price and/or quality of the products we can make available to our customers.