June 15, 2016

VIA HAND DELIVERY

Hon. Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
1650 Pennsylvania Ave., N.W.
Washington, D.C. 20503

Re: FAR Case 2014-025, Supplemental Comments on the Proposed Federal Acquisition Regulation; Federal Pay and Safe Workplaces (RIN 9000-AM81); Supplemental Comments on the Proposed Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" (ZRIN 1290-ZA02)

Dear Mr. Shelanski:

In connection with our meeting in your office on this date attended by representatives of the Federal Acquisition Regulatory (FAR) Council and the Department of Labor, Associated Builders and Contractors, Inc. (ABC) submits the following supplemental comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM or Proposed Rule), published in the Federal Register on May 28, 2015 by the FAR Council, and to the Department of Labor's Notice of Proposed Guidance (NPG or Proposed Guidance) published the same day.

As you know, the NPRM/NPG seeks to implement Executive Order 13673 ("Fair Pay and Safe Workplaces"), by amending 48 CFR parts 1, 4, 9, 17, 22, and 52. ABC previously filed comments opposing all of the proposed amendments as unlawful, impracticable and extremely burdensome to taxpayers and to government contractors, particularly small businesses in the construction industry.

The purpose of these supplemental comments is not to repeat what ABC and other interested parties have already stated for the record[1], but to focus on legal developments since those comments were filed. The comments provide additional grounds for stopping the Proposed Rule, or anything like it, from being issued as a Final Rule.

In particular, we wish to bring to your attention recent case law raising serious First Amendment concerns about the Proposed Rule's attempt to compel employers to publicly declare themselves to be labor law "violators." Finally, we present new information concerning

[1] ABC incorporates comments filed to the docket on August 26, 2015, into this letter by reference. Comments located at Docket ID FAR-2014-0025-0749 and Docket ID DOL-2015-0002-0085.

the burdensome impact of the Propose Rule on small businesses and the procurement process itself.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. -ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Many ABC members currently perform federal government contracts exceeding the threshold for coverage by the NPRM/NPG. Indeed, a recent review of federal government construction contracts listed at USASpending.gov indicated that ABC members performed almost 56 percent of all federal government prime construction contracts exceeding $25 million from FY2009-FY2015.[2]

ABC's Supplemental Comments

1. Under Recent Case Law, The Proposed Rule's Compulsion Of Speech By Government Contractors Violates The First Amendment.

As previously noted, the Executive Order and the Proposed Rule impose an immediate reporting requirement that obligates federal contractors and their subcontractors for the first time to disclose any "violations" of 14 federal labor laws and an unspecified number of additional state laws occurring in the three years prior to any covered procurement for government contracts/subcontracts. As interpreted by the Department of Labor, this will require contractors/subcontractors to include among their disclosed violations an unprecedented list of court actions, arbitrations, and "administrative merits determinations," even where there has been no final adjudication of any violation at all. Not only does this new requirement conflict with many of the federal labor laws themselves in a manner invoking principles of preemption, but the Proposed Rule also infringes on contractors' rights under the First Amendment, because the Rule would coerce speech on the part of the contractors.

In *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), rehearing *en*

[2] http://www.thetruthaboutplas.com. As reported on January 28, 2016, ABC members performed 626 federal construction contracts exceeding $25 million from FY2009-FY2015, with a total value of almost $40 billion.

banc denied, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015), the D.C. Circuit held that an SEC rule requiring private businesses to disclose their use of "conflict minerals" (minerals obtained from war zones) violated the First Amendment. The appeals court distinguished its previous holding in *American Meat Institute v. U.S. Department of Agriculture ("AMI")*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), which had applied a more relaxed standard of review to governmentally compelled disclosures that are "purely factual and uncontroversial information about a service being offered." 800 F.3d at 527. With regard to compelled disclosure of "controversial" information, the D.C. Circuit in the *NAM v. SEC* case held that the government bears a heavy burden to prove that such disclosures are narrowly tailored to support a compelling government interest. As the appeals court stated: "Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so." *Id.* at 530.

The Rule now being considered by Office of Information and Regulatory Affairs (OIRA) shares the same constitutional defect as the conflict minerals rule in *NAM v. SEC*. Here too, the Proposed Rule compels government contractors to "publicly condemn" themselves by stating that they have violated one or more labor or employment laws. Such a disclosure cannot be characterized as "factual and noncontroversial," particularly where the disclosures are not limited to matters that have received final adjudications in the courts. As previously noted in ABC's comments, the Proposed Rule defines "administrative merits determinations" as including many *claimed* violations that may turn out not to be violations at all.[3] The Proposed Rule nevertheless requires government contractors to declare themselves to have violated the laws in question even while they are contesting whether any violations have in fact occurred. Such compelled disclosures, under the holding of *NAM v. SEC*, plainly violate the First Amendment. *See also Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (all cases cited in *NAM v. SEC* for the principle that "freedom of speech prohibits the government from telling people what they must say.").

First Amendment violations of the sort imposed by the Proposed Rule have been found to constitute irreparable harm justifying preliminary injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).[4] In order to avoid the government spending resources in litigation, OIRA

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[3] As noted in its original comments, a survey of ABC's membership found that more than 12 percent of the respondents had been falsely accused of violating one of the 14 labor laws. This is consistent with statistics derived from published data of the NLRB, EEOC and the Department of Labor whose initiating complaints, cause determinations, and charging letters are now being put forward by the NPRM/NPG as potential grounds for disqualification from government contracts. See Docket ID FAR-2014-0025-0749, page 8.

[4] The chilling effect of the Proposed Rule's compelled disclosures was discussed in ABC's previous comments, which noted that ABC member contractors are predominately nonunion employers who are regularly targeted by construction trades unions for so-called "corporate" or "comprehensive" campaigns. These campaigns consist in large part of union efforts to destroy a targeted company's reputation by filing

should direct that the compelled disclosure requirements of the Proposed Rule be withdrawn.

2. Recent Surveys Indicate The Proposed Rule Will Harm Small Businesses And Reduce The Government's Procurement Choices

ABC has surveyed its membership in order to assess the impact of the Proposed Rule on federal contractors. More than 57 percent of the survey respondents believe that the proposals, if finalized as proposed, will compel them to abandon the pursuit of federal contracts. 94 percent of respondents believe the NPRM/NPG would make them less likely to pursue federal contracts. Finally, 99 percent of the respondents believe the new proposals will make the federal contracting process less efficient and 98 percent believe the proposals will make federal contracting more expensive."[5]

To put this into perspective, from FY2009-FY2015, ABC member prime contractors won 56 percent of large-scale federal contracts. In other words, 626 prime contracts valued at roughly $40 billion (63.65 percent of total value) were won by ABC members. With the loss of these qualified and experienced prime contractors expected to result from the proposal, the federal government would experience increased costs, reduced competition and lower quality construction projects.

These findings directly contradict the NPRM/NPG claim that the Rule will promote "economy and efficiency in procurement." To the contrary, the new proposals can only impose new burdens on contractors, Contracting Officers, Agency Labor Compliance Advisors, the federal acquisition workforce and entire federal procurement process. Compliance with these proposals will require time-consuming and highly subjective analyses of complex and specialized legal concepts that appear in each of the 14 federal laws subject to the NPRM/NPG for a period of three years before a contract is offered and every six months during a new contract.

Private and public resources should not be spent to require contractors to file public reports in this manner when the federal government already has sufficient data on whether offerors have violated federal labor laws. The pre-award review as proposed will result in uncertainty for both contractors and the government, and will delay the procurement process. The NPRM does not explain how Contracting Officers or contractors will be able to navigate the labyrinth of requirements in a timely manner without unduly delaying the procurement process.

Conclusion

For each of the reasons set forth above, and in its attached original comments, ABC urges OIRA to direct that the Rule be withdrawn or at least held in abeyance. The FAR Council and DOL should withdraw or substantially revise their unlawful and unwise proposals. Thank you for

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numerous unsubstantiated charges of labor law violations. The proposals play directly into the hands of malicious third parties who seek to put unfair pressure on employers, because mere allegations of labor law violations could result in disqualification of targeted government contractors under the NPRM/NPG.

[5] Source: Findings of July 2015 Survey of ABC membership on proposed Blacklisting rule.

meeting with ABC's representatives and allowing us to submit these additional comments on this matter.

Respectfully submitted,

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