NASCO
National Association of Security Companies

July 7, 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, the National Association of Security Companies (NASCO) 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.

The NPRM/NPG, which seek to implement Executive Order 13673 ("Fair Pay and Safe Workplaces"), would impose burdensome new requirements on federal contractors and interject unprecedented and unnecessary risk, cost and delay into an already strained procurement process. NASCO previously filed comments opposing all of the proposed amendments as unlawful, unworkable and extremely burdensome, increasing the costs for federal agencies to acquire services and delaying and decreasing the ability for agencies to procure quality services. As detailed in the comments filed by NASCO, the impact on private security services contracts will be particularly profound as they will negatively affect the cost, availability, quality, and delivery of these vital services, thereby increasing the risk of danger to over 1 million employees and visitors who enter federal facilities each day.

NASCO is submitting these supplemental comments to the comments that NASCO has already stated for the record[1] to focus on legal developments since those comments were filed. These comments provide additional grounds for stopping the Proposed Rule, or anything like it, from being issued as a Final Rule.

In particular, NASCO wants 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." NASCO also calls your attention below to a recently issued injunction against a similar instance of regulatory overreach by the executive branch.

About NASCO

NASCO is the nation's largest contract security trade association, whose member companies employ more than 400,000 of the nation's most highly trained security officers servicing every business sector. Founded in 1972, NASCO strives to increase awareness and understanding among policy-makers, consumers, the media and the general public of the important role of private security in safeguarding persons and property. At the same time, NASCO is the leading advocate for raising standards for the licensing of private security firms and the registration, screening, and training of security officers, and has collaborated with legislators and officials at every level of government to implement higher standards for companies and officers.

NASCO members provide security officers and other security related services to numerous federal agencies for the protection of a wide range of federal facilities and assets and the employees and visitors in those facilities. Among the agencies that utilize services from private security companies are the Federal Protective Service (FPS), in which approximately 13,500 private security personnel protect GSA-owned and managed facilities; the United States Marshal Service, in which approximately 5,000 private security personnel protect court facilities; and the Department of Energy, in which approximately 5,000 private security personnel protect national labs, nuclear facilities, and other DOE assets. Other federal agencies that use contact security include: DoD, CSP, ICE, INS, IRS, NASA, FAA, USDA, DOT, DOC, HHS, SSA, NARA, DOL, FDIC, US Coast Guard, State, DIA, NRC, Holocaust Museum, and Smithsonian. Private screening personnel are also utilized at 20 airports around the United States under the TSA Screening Partnership Program. Not including contracts for security services used overseas (e.g. DoD, State, USAID) there are several hundred contracts for domestic agency security services that would be subject to the Proposed Rule and Guidance.

NASCO's Supplemental Comments

Recent First Amendment Case Law Invalidates The Proposed Rule's Compulsion Of Speech

[1] NASCO 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.

Under recent case law, decided after the initial comment period in this rulemaking, the Proposed Rule's compulsion of speech by government contractors violates the First Amendment. 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. Under the Department of Labor's interpretation, this will require contractors/subcontractors to include among their reported 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. "Administrative merits determinations" are simply not final, and in many cases occur before a hearing has been held. Arbitration decisions and civil determinations, including preliminary injunctions, are similarly not final and are subject to appeal. The Proposed Rule's unprecedented requirement conflicts with many of the federal labor laws themselves in a manner invoking principles of preemption, as was addressed in NASCO's previous comments. However, 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 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. In the case of compelled disclosure of conflict minerals, the court found the information to be disclosed was inherently "controversial" in nature, as is the disclosure being forced upon government contractors under the present Proposed Rule. For this reason, 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 "Fair Pay and Safe Workplaces" Rule now under review by the Office of Information and Regulatory Affairs shares the same constitutional defect as the conflict minerals rule in *NAM v. SEC*. As with the conflicts minerals rule, 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.

The Proposed Rule defines "administrative merits determinations" to include many *claimed* violations. However such *claimed* "violations" may turn out not to be violations at all. Nonetheless, the Proposed Rule 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.").

It must also be noted that government contractors are entitled to the same First Amendment protections as other citizens, and the government's procurement role does not entitle it to compel speech as the price of maintaining eligibility to perform government contracts. *See O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996) (First Amendment applied to government contractor's right to placement on list of contractors eligible for awards); *see also Board of County Commissioners v Umbehr, 518 U.S. 668, 685 (1996).*[2]

Though the Supreme Court did not reach the question whether the First Amendment applied to bidders for new government contracts, it must be observed that the Proposed Rule requires reports of violations to be filed by existing government contractors and those who have "commercial relationships" with the government, in addition to new bidders. 80 Fed. Reg. at 30553. In any event, many courts have applied the Supreme Court's holdings to bidders and applicants for new government contracts as well. *See, e.g., Oscar Renda Contracting, Inc., v. City of Lubbock, Tex.*, 463 F.3d 378 (5th Cir. 2006); and *Lucas v. Monroe Cty.*, 203 F.3d 964, 972-75 (6th Cir. 2000) (declining to follow the earlier contrary holding of *McClintock v. Eichelberger*, 169 F.3d 812, 817 (3d Cir. 1999).

Finally, 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). To avoid the government spending resources in litigation, OIRA should direct that the compelled disclosure requirements of the Proposed Rule be withdrawn.

Recent Case Law Enjoining Labor Department Rulemaking Contrary To Congressional Intent

In the recently decided case of *National Federation of Independent Business v. Perez,* Case No. 5:16-cv-00066-C (N.D. Tex. June 27, 2016), a federal judge issued a preliminary injunction against the Department of Labor's "persuader" rule, which purported to implement Section 403 of the Labor Management Reporting and Disclosure Act (LMRDA). In a carefully reasoned 90-page opinion, the court found the rule to be "defective to its core" for a litany reasons that apply equally to the proposed rule here. Specifically, the court found that the Department's new rule was inconsistent with the plain language of the statute and Congressional intent; that it violated the First Amendment rights of employers; that it departed from longstanding policies without taking cognizance of reliance interests of industries that had operated under the previous rule for decades; that the new rule contained "unexplained inconsistencies" rendering it arbitrary and capricious; and that the Department failed to provide an adequate factual basis for its cost

[2] *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.").

estimates and artificially excluded important costs by deferring important aspects of the rule to subsequent rulemaking.

The NFIB decision relied on part on two other recent decisions that must be considered applicable to the Proposed Rule here, one from the Supreme Court and another from the Fifth Circuit. The Supreme Court decision of note is *Encino Motorcars v. Navarro*, __ S.Ct.__ (June 20, 2016). There the Court held that federal agencies are not entitled to Chevron deference where they fail to justify reversals of longstanding policies. In particular, no deference is due to agencies that change course without taking cognizance of "reliance interests" of the regulated community; and where the policy reversal results in "unexplained inconsistencies."

Also bearing significantly on the present rulemaking is the Fifth Circuit's holding in *Texas v. U.S.*, 787 F.3d 733 (5th Cir. 2015), *aff'd, United States v. Texas*, 2016 U.S. LEXIS 4057 (U.S. June 23, 2016), in which the appeals court enjoined a Presidential Executive Order that was inconsistent with Congressional intent as expressed in the immigration laws. The Fifth Circuit expressly refused to presume a delegation of authority to the executive branch based upon the claim that Congress has failed to specifically prohibit executive action. The same holding bars the Executive Order and rulemaking in the present case.

Conclusion

NASCO urges OIRA to direct that the Rule be withdrawn for each of the reasons set forth above as well as in its original comments. The FAR Council and DOL should withdraw their unlawful, unworkable, unnecessary and costly proposals. Thank you for meeting with NASCO representatives and allowing us to submit these additional comments on this matter.

Respectfully submitted,

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