COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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Joshua Brammer
Office of Information and Regulatory Affairs (OIRA)
Executive Office of the President
1800 G St, NW
Washington, DC 20405

Dear Josh:

Thank you for the opportunity to meet with you on Friday, 3 Jun 16, concerning some of Industry's concerns about both the Department of Labor and the Federal Acquisition Regulatory Council's implementation of Executive Order 13673, "Fair Pay and Safe Workplaces." The following is a summary of our presentation to you during the meeting.

On behalf of the Council of Defense and Space Industry Associations (CODSIA), we appreciate the opportunity to present our concerns with the Fair Pay and Safe Workplaces Executive Order and supplement the extensive public comments CODSIA and many of its member associations, and others, have submitted on the May 28, 2015 proposed Federal Acquisition Regulation (FAR) rule and the companion Department of Labor guidance.

At the suggestion of the Department of Defense, CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues. CODSIA consists of six associations – the Aerospace Industries Association, the American Council of Engineering Companies, the Information Technology Alliance for Public Sector, the National Defense Industrial Association, the Professional Services Council, and the U.S. Chamber of Commerce. CODSIA acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. Together these associations represent many thousands of government contractors and subcontractors, both small and other than small businesses.

The rules are overly broad and not implementable.

In our view, the Executive Order, and the proposed regulatory implementation, is overly broad, arbitrary in its scope and not implementable. It may have legal (and potentially constitutional) infirmities.

As we explain more fully, the rule covers more than actual violations of various labor laws and regulations, it allows for punishments based on as yet unsubstantiated allegations – by both by both federal agencies charged with enforcement of the covered federal laws and by anyone else. It is even more attenuated when state laws are covered – and one category of those state laws is already included in the proposed rule.

The rule is overly broad because it requires unnecessary and frequent reporting even from those who have no violations (or even allegations). The rule is not implementable because much of the information has never been collected by federal agencies or contractors, let alone in the scope and form that will be required by the rule. The proposed rule requires a three-year lookback for information that cannot be recaptured in order to meet the mandates of the proposed rule and it requires prime contractors and higher tier subcontractors to collect proprietary information from subcontractors or vendors who may not be able or willing to provide the prime contractors with such information (and in the timeframes required by the rule).

While we understand that the Administration has purportedly made changes to the FAR rule (and likely the Labor Department's guidance), there has been no public information provided about the nature of those changes. It is not likely that the changes purportedly made could make this rule acceptable to industry. Nevertheless, at a minimum OIRA should send the redrafted rule back out for another round of public comment based on the changes we understand have been made and that we have not had the opportunity to comment on.

Contracting Process Burden on Government

Based on our collective experience, many of us having been part of the Federal workforce, the level of experience of the government's contracting officers is low, almost half of whom have less than 10 years of experience. This proposed rule places significant new requirements on government contracting officers to interpret labor law and the violations of those labor laws to make award determinations. These new requirements will, for most contracting officers, significantly stretch their capacity. It will add to an already well documented risk adverse culture of the government's contracting officer community reflecting their relative inexperience along with a spate of negative IG reports, adverse audits and limited resources.

The proposed rule will further entrench a challenged workforce and significantly extend the time it takes them to make awards of government contracts by adding the new requirement for Contracting Officers to affirmatively assess labor violations over the past three years. More difficult still is the requirement to make assessments on purported labor violations that have not yet resulted in a determination – before deciding on any contract award.

While the proposed rule provides for Labor Compliance Advisors to assist contracting officers, the cost and most importantly the throughput necessary to timely support contracting officers (24,000 contracting officers, geographically dispersed literally around the world, in DoD alone) will create a tremendous bottleneck in the contracting process.

In addition, because of the public transparency of the proposed rule in reporting labor law violations as well as purported violations, we anticipate the number of bid protests filed will increase exponentially when a contractor with a known, or purported, labor law violation is awarded a contract. The contractor with the violation, or purported violation, can be anywhere in the supply chain of the award made or under consideration.

The impact on bid protests is a significant matter. Bid protests have increased every year for the last six years - from 2,300 in 2010 to 2,650 in 2015 according to a recent report by the GAO. Many people, in and out of government, believe the increase in bid protests associated with this particular executive order will be staggering by comparison – further slowing the federal procurement process and potentially, with respect to DoD, impacting national security.

The proposed rule will have an adverse negative impact on responsibility determinations, suspension/debarment and subcontract flowdown

The proposed rules will cause substantial delays in making awards and exercising options, create overlapping and confusing authority problems between CO's and Agency Labor Compliance Advisors (ALCA's), and add performance, compliance and management risk by radically changing contract formation and administration processes in:

1. Making responsibility determinations;
2. Suspension/Debarment; and
3. Subcontract flow-down

Responsibility Determinations:

1. The rules shift the focus of responsibility determinations from the ***present responsibility*** framework in FAR Part 9.1 to an investigative or ***punitive look back at bad acts*** related to strict labor law compliance and is also inconsistent with the Suspension/Debarment framework in FAR Part 9.4;
2. Responsibility determinations of prime contractors, and all putative subcontractors, in all initial offers with labor law violations will have to be adjudicated by the CO and ALCA prior to any contract award. This process will lead to serial delays, conflicts between CO's and ALCA over the meaning of facts and information submitted by offering parties, and inconsistent responsibility determinations up and down the supply chain;
3. Responsibility determinations are typically required only on the prospective contract awardee based on information available immediately prior to award. Assuming violations will surface throughout the federal market through the solicitation preparation process, all offers will have to go through the new labor law adjudication process, which will likely be conducted serially after various offending offerors fall out of competition during the adjudication pre-award process;

4. Given the foregoing process obstacles, and pressure to make awards, CO behavior, already risk averse, will largely defer to ALCA judgments about whether violations are "serious, repeated, willful and pervasive," and thus conclude that the offeror is non-responsible. Non-Responsibility Determinations (NRD) will thus become a default where offerors and potential subcontractors self-disclose violations and few CO's will oppose ALCA's NRD's;
5. Bid protests will grow due to non-selection as ALCA driven CO NRD's grow in number;
6. The rules create an ongoing post-award Responsibility Determination process throughout the life of most contracts for primes and subcontractors.

Suspension/Debarment:

1. Because labor law violations are lumped in FAR 9.1 as an element of business integrity that can be used to make an offeror not responsible for the purpose of a single transaction, the same operative facts regarding self-disclosed labor law violations, even where adjudication is not final, will give rise to referrals to S/D officials at agencies to review as bad actors under FAR 9.4 and not dealt with as present responsibility issues;
2. Suspension/debarment systems require due process and notice, but where an offeror self-discloses the same violations on multiple offers as a requirement to be considered responsible for a single award, multiple NRD's will likely occur, and offerors and their subcontractors could easily find themselves being found as NRD contractors without due process on the same facts;
3. Under the proposed rules, since due process is not part of the adjudication process as it is with S/D, de facto debarment or blacklisting will become the norm for otherwise responsible contractors.

Mandatory Flow-Down:

1. The rule requires mandatory flow-down to all subcontracts over $500,000, except COTS suppliers;
2. This means all initial offers by primes with subcontract work share over $500K will require that the same CO/ALCA labor law adjudication process be performed for those putative subcontractors, invoking the same conflation of authority issues between CO's and ALCA's, except that the adjudication process now has to be managed by the offering prime contractor up through the CO/ALCA;
3. The flow-down also requires a continuing representation and self-disclosure process, by all relevant lower-tier subcontractors/suppliers throughout the life of the contract up to the prime. The prime then has an ongoing contract duty to continually adjudicate all labor law issues of their supply chain up through the CO/ALCA, including reporting upstream every 6 months, mitigating any subcontractor violations, and policing and enforcing subcontractor Labor Compliance Agreements (LCA) with the Department of Labor. The primes thus become the federal ALCA's for their entire supply chain throughout the life of a single contract;

4. Management of these functions up and down the supply chain by prime contractors and successive lower tier suppliers will require massive funding to build compliance systems and hire manpower to perform the adjudication functions required by the flow-down clauses currently not performed by prime contractors, including educating the entire workforce on the legal meaning of labor law violations laws and regulations. This scale is unworkable. For example: Overlay the new rules on a prime with 13,600 suppliers/subcontractors in all 50 states (where the State laws to be invoked have yet to be determined) dealing with 14 federal labor laws, involving over 20,000 federal contracts.

Commercial Items

There is no "carve out" in the Executive Order (EO) or proposed rules for Commercial Items, except for COTS subcontracts. This creates yet another barrier to commercial and non-tradional suppliers to overcome in doing business with the Federal government and is inconsistent with the efforts by the Congress and the Administration to access the solutions available from these potential suppliers. There is no evidence that any analysis or "best interests" determination similar to that required under 41 USC 1906/1907 not to apply government unique requirements to commercial item contracts or subcontracts was ever performed. Absent a valid "best interests" analysis, there is simply no justification in the EO, or the proposed rules, to impose these new rules on commercial or COTS items. Commercial items and COTS should be exempted.

The rules and guidance are unnecessary.

In a word, the rule and guidance are unnecessary. The proposed rule requires contractors and their subcontractors and suppliers to provide data the Administration already has or should be able to readily obtain from their own databases. The Department of Labor and their various enforcement agencies are currently able to compile compliance information and make much of it publically available through the Online Enforcement Database. Though this specific repository does not capture compliance and enforcement information for all of the enumerated statutes and Orders, it does cover a good portion of them and offers a strong indicator of how the requirements of the proposal are redundant, duplicative and unnecessary. Put another way, this means that DoL already knows which companies are the "serious, repeated, willful or pervasive" violators targeted in E.O. 13673 by the President and any additional information collection requirements become truly unnecessary. Further, the guidance requires the labor compliance advisors to consult the data collected through the information collection in the rule and does not appear to even attempt to establish a reliance upon data from the existing databases, which could alleviate or possibly eliminate the need for the duplicative reporting requirements. The government has ineffectually described why the data already in its possession is insufficient for the stated purpose of the E.O., failed to demonstrate that it even considered using the data already in its possession, and failed to adequately justify the necessity and tremendous

expense that the duplicative information collection will incur. OIRA has sufficient basis on this point alone to return the rule with instruction to the proponents to refine the proposal to mitigate or eliminate this unnecessary reliance on a new information collection for data already in government databases.

Making the rule even more glaringly unnecessary is the fact that ALL of the contemplated enforcement outcomes envisioned by the rule and the guidance can already be executed by the Department of Labor with existing authorities. The Congress has established a spectrum of enforcement mechanisms and penalties for the enumerated statutes and Orders and none of those contemplated a separate contractor-only enforcement mechanism. What Congress did envision is that the Department of Labor would leverage their existing enforcement authorities when violators turned out to also be government contractors or subcontractors. These authorities include the ability to discern the "serious, repeated, willful or pervasive" violators – and those determined to be not responsible - and take actions, up to and including suspension or debarment from contracting opportunities. We do not find any evidence that the Department has utilized these existing authorities to address the concerns the President outlined. In any case, NONE of the provisions of the proposed rule or the guidance improve upon DoL's existing ability to prevent contractors who do not adhere to the various applicable labor laws and regulations from competing on government contracts. Quite the opposite, they compound the problem, transfer Labor Department enforcement responsibilities to prime contractors, and create the strong potential for significant disruption of the acquisition processes in the government market.

For these reasons, OIRA should return the rule and guidance with instruction to utilize existing authorities to better contracting and ensure an equitable competitive environment, rather than imposing a redundant, unnecessary construct."

Burden of compliance and management on the Federal vendor market with the nuances of each portion on primes, suppliers and subs and small businesses

"Acquisition personnel in the U.S Government will undoubtedly find the Executive Order to be burdensome, making it more difficult than before to timely conclude procurements. Contractors likewise will share similar kinds of burdens. The Executive Order imposes unprecedented economic, operational and liability burdens on contractors. Contractors will have to develop new systems to continually track labor related complaints and notices. They will have to report those complaints and notices, interpret them and continually update the information in these newly created systems. Since no system(s) exists for this purpose today, this will require costs and resources to be expended to comply with certain elements of the Executive Order, such as the continuing three year look-back for reporting, driving more complexity and cost than virtually any other law or regulation.

Contractors must also take on information collection and reporting obligations for their subcontractors. A mid-size contractor may have thousands of subcontractors, large contractors will have much higher numbers of subcontractors. The status of which must be continually updated and assessed after award.

The Executive Order will also have a negative impact on a contractor's supplier base, as some subcontractors will refuse to engage in the Executive Order's disclosure, monitoring and penalty scheme. And the problem will be particularly acute for small business contractors and subcontractors. Technology contractors, as well as contractors in other industries, already find it very challenging to secure a qualified small business base. The Executive Order will make it even more difficult than ever before. The Order will act to the detriment of the small business community, an important constituency in government contracting. Many of these small businesses have made it clear that they lack the resources to comply with the various reporting and tracking requirements and that they will be impacted disproportionately in having to report complaints and notices before they are finally adjudicated.

The rule disrupts the existing labor---management legal and remedial framework

There are four words to describe the blacklisting E.O. They are: impermissible; unworkable; unnecessary; and, unknowable." Unworkable and unnecessary are covered elsewhere in this document.

Impermissible

The Executive Order and the accompanying regulations and guidance are impermissible because:

- Whatever the authority under the Procurement Act phrase to improve the "economy and efficiency" of contracting, it can't possibly mean this. The rule and guidance will do the opposite of improving economy and efficiency. Thus, the EO lacks statutory authority.
- Whatever the authority the President has under the Constitution to implement policies, it can't possibly mean that he has the authority to change the language in laws enacted by Congress. The severity of the terms "repeated, serious, willful and pervasive" appear in very few of the enumerated laws, and "pervasive" appears in NONE of them. Similarly, the EO adds procurement and contracting penalties not found in many of the enumerated laws. So the EO usurps the Congress' power to make legislation.
- Additionally, the President's authority cannot possibly extend to trampling on constitutionally protected due process rights of contractors by requiring contractors to be held accountable before they have had their day in court and the opportunity to challenge their citations and allegations."

Unknowable

The full scope of the Executive Order is unknowable because we have seen nothing describing what constitutes an "equivalent state law" with the exception of OSHA approved state plans that are NOT equivalent. By definition, they are different from the federal requirements, including different penalty schemes, and different safety procedures and requirements.

The Rule Effectively Allows DoL (through the Labor Compliance Advisors) to Blacklist Contractors and Subcontractors Based on Purported Violations of Labor Law.

There are two ways that the federal government has proposed to undertake the prime-subcontractor reporting. Under the current proposed rule, the federal government requires that "at the time of the execution of the contract" contractors must "require subcontractors performing (on) covered subcontracts to disclose any administrative merits determination, civil judgment, or arbitral award or decision rendered against the subcontractor within the preceding three-year period" of any of the specified labor laws. This raises a difficult choice for prime contractors. Before they sign the contract, they must in effect "pre-clear" their subcontractors. This may sound like a simple situation, but many subcontracts are signed hours before the prime submits their contracts. This creates a further tension as the contracting officer must clear all potential subcontractors prior to the contractor awarding the work. The requirement incorporates an additional step in an already lengthy process.

The FAR Council proposes a second option where the subcontractors report their own labor violations to DOL, which would "then assess the violations." Under this scenario, the prime would have to check with the contracting officer or with the DOL to see if the proposed subcontractors in the contract would qualify to work for the government. In either reporting scenario, the unintended consequence would be the creation of a "blacklist" for subcontractors, triggering claims by subcontractors against the prime contractor and/or the Federal Government for improper disqualification for award of a subcontract. The proposed blacklist could further entrench the encumbered process while eliminating new talent from the federal labor market.

This situation is particularly problematic for engineering firms as these entities subcontract up to 50 percent of their contract. This is required due to the level of technical specifications in engineering contracts, from geotechnical to HVAC to mapping, requiring multiple specialty firms to meet these needs. The new requirements proposed under the Guidance would simply multiply existing burdens on the team while failing to recognize the realities of providing design services to the public.

The rule requires disclosure of sensitive corporate information and does not adequately establish protocols to protect the required information to be collected

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There is a lack of assurances in the rule regarding the 'protection' of the information that contractors must share both with the federal government and amongst our contractor/subcontractor company peers. We fear that the information shared can/will be used against us in bid protests, as well as misused and misinterpreted by the government and private sector/shareholder community.

We do not need any 'sticks' when it comes to following the law and existing regulation. We care too much about our brand/reputation and shareholders to deliberately not follow the law. And, the breadth of what will be reportable under the final rule is unlike anything that is made public today.

We are upstanding federal contractors that act with the best of intentions, in fact the Secretary of Labor has made this observation personally. This rule 'assumes the worst' about us as companies and does not provide any guarantees that when we share sensitive corporate information required by the rule that it will be protected from misuse/misinterpretation with impacts that go far beyond the Federal contracting process.

With tens of thousands of covered contractual relationships under this rule, the amount of data flowing as a result of what will be required to be reported without adequate government protections is extremely worrisome. We take the sharing of this information very seriously, and we are concerned the government either cannot or will not be able to provide information assurance.

We need LOTS of lead time before implementation of the rule and guidance become effective. At a very minimum, we should have at least as much time as the government is providing businesses under the FLSA regulations - 6 1/2 months.

Thank you again for the opportunity to emphasize our concerns that the proposed rule and guidance will have on industry, but more importantly the impact it will have on the taxpayers who rely on industry to provide the goods and services that allows government to serve taxpayers everyday.

Sincerely,

David Drabkin
Administrator
Council of Defense and Space Industry Associations