VIA ELECTRONIC SUBMISSION

August 26, 2015

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405

Tiffany Jones
U.S. Department of Labor
Room S—2312
200 Constitution Avenue NW
Washington, DC 20210

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

Dear Ms. Flowers and Ms. Jones:

Associated Builders and Contractors, Inc. (ABC) submits the following 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 Federal Acquisition Regulatory (FAR) Council, and to the Department of Labor's Notice of Proposed Guidance (NPG or proposed guidance) published the same day. [1]

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. The proposed amendments require federal contractors and subcontractors for the first time to disclose any "violations" of 14 federal labor laws occurring in the three years prior to any procurement for federal government contracts/subcontracts exceeding $500,000, in addition to requiring updated

[1] 80 Fed. Reg., at 30548. Though published separately, the FAR Council's NPRM is heavily dependent on and substantially interrelated with the Labor Department's NPG. ABC believes it is therefore appropriate and more efficient to consolidate its comments on both documents and submit the same consolidated comments to each of the agencies. The proposed rule and proposed guidance will hereafter be referred to collectively as the "NPRM/NPG" or the "proposals."

disclosures of labor law violations every six months while performing covered government contracts. The proposals also require contractors/subcontractors to include among their disclosed violations an unprecedented list of court actions, arbitrations and "administrative merits determinations" set forth in the Department of Labor's NPG, including many forms of agency actions that merely allege violations without having been fully adjudicated. The proposals further require each contracting agency's contracting officers (COs) for the first time to attempt to determine whether companies' reported violations of the above-referenced labor laws render such offerors "non-responsible" based on "lack of integrity and business ethics." The proposals also require each contracting agency to designate an agency labor compliance advisor (ALCA) to assist COs in determining whether a company's actions rise to the level of a lack of integrity or business ethics. The proposals also require each contractor/subcontractor that is forced to report violations of labor laws to demonstrate "mitigating" efforts and/or enter into remedial agreements or else be subject to a finding of non-responsibility for contract award, suspension, debarment, contract termination or nonrenewal, all in a manner inconsistent with due process under the 14 federal labor laws referenced in the NPRM.

In addition, the NPRM/NPG requires covered contractors/subcontractors for the first time to report to their employees detailed information, including hours worked, overtime hours, pay, and any additions to or subtractions from pay, as well as notifying such individuals whether they are independent contractors. Finally the NPRM/NPG proposes to prohibit covered contractors/subcontractors from requiring their employees to agree to submit to arbitration any Title VII claims in addition to sexual assault and sexual harassment claims, in direct violation of the Federal Arbitration Act.

As further explained below, ABC opposes all of the above-referenced proposals by the NPRM/NPG, and other related changes. Both the NPRM and NPG are unlawful, impracticable, and extremely burdensome to taxpayers and to government contractors, particularly small businesses in the construction industry. Both the executive order and the proposals to implement it should be rescinded in their entirety.

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 member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. 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 government contracts exceeding the threshold for coverage by the proposed NPRM/NPG. Indeed, a recent survey of federal government construction contracts listed at USASpending.gov indicated that ABC members performed

more than 56 percent of all federal government construction contracts exceeding $25 million during the last five years.[2]

The proposal will have a significant and broad impact on the entire construction industry. For example, in 2014, there was $962.057 billion worth of construction put in place.[3] Of that amount, $275.698 billion was public construction, and $22.735 billion of that was federal construction.[4] We estimate the vast majority of the federal construction put in place is subject to the new proposals, as few federal construction contracts are below the $500,000 proposal threshold. In addition, the proposals improperly impose reporting requirements on employers based upon their performance of work *unrelated* to the performance of their government contracts, by apparently requiring reports of alleged violations arising on *non*-government projects regardless of size and regardless of the private or public nature of the work being performed.

1. Background

Congress presently authorizes federal agencies to make responsibility determinations in federal procurements based on, among other criteria, each offeror's "satisfactory record of integrity and business ethics."[5] However, until now, contracting officers generally have restricted their exercise of this power to those circumstances where contractors or subcontractors have been found to have committed serious crimes or acts of fraud or similarly serious civil matters.[6] There are sound practical and legal reasons for this longstanding practice. Federal agencies have rightly focused on contractor transgressions that are directly correlated to contract performance, and courts have required contracting officers to afford due process rights to contractors accused of ethics violations.[7] Rather than attempting to determine contractor integrity based on mere complaints or ongoing litigation in areas of law where contracting officers themselves lack judgmental expertise, such determinations are generally made only upon reports of final adjudications proving violations that call into question the ethical ability of contractors to perform government contracts.

During the course of many decades, neither Congress, nor the FAR Council, nor the Department of Labor has deemed it necessary, practicable or appropriate for contracting officers to make responsibility determinations based on alleged violations of labor and

[2] http://www.thetruthaboutplas.com. As reported on June 24, 2015, ABC members performed 569 government construction contracts exceeding $25 million from FY 2009-FY2014, with a total contract value exceeding $35 billion.
[3] See U.S Census Bureau, accessed 8/21/15 http://www.census.gov/construction/c30/xls/total.xls
[4] See U.S Census Bureau, accessed 8/21/15 http://www.census.gov/construction/c30/xls/federal.xls
[5] 41 U.S.C. § 113.
[6] *See, e.g.*, CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation*, at 6 (Jan. 4, 2013); *citing Traffic Moving Sys*., Comp. Gen. B-248572 (Sept. 3, 1992) (officers' criminal convictions); *Standard Tank Cleaning Corp*., Comp. Gen. B-245364 (Jan. 2, 1992) (repeated violations of state law); *Drexel Indus., Inc*., Comp. Gen. B-189344 (Dec. 6, 1977) (integrity offenses that are grounds for suspension under the FAR); *Greenwood's Transfer & Storage Co., Inc*., Comp. Gen. B-186438 (Aug. 17, 1976) (pending debarment).
[7] *See Old Dominion Dairy Prods., Inc. v. Sec'y of Def*., 631 F.2d 953 (D.C. Cir. 1980).

employment laws. Instead, where Congress has chosen to authorize suspension or debarment of government contractors, it has done so expressly in a narrow category of labor laws directly applicable to government contracts, and even then only after final adjudications of alleged violations by the Department of Labor, with full protection of contractors' due process rights.[8] At the same time, in passing federal labor and employment laws that apply to private employers outside the field of government contracts, Congress has created a variety of different remedial requirements to compel compliance by employers, which were the product of careful balancing of competing interests by Congress.[9] Congress did not authorize the executive branch to impose the "supplemental sanction" of debarment on employers that violate these laws.[10] Congress certainly did not authorize federal contracting officers to disqualify employers from being awarded government contracts based solely upon alleged violations of these laws, in the absence of final adjudications and the protections of due process of law.

As further explained in ABC's comments below, it is plain that the new proposals will improperly disrupt the balanced labor law schemes established by Congress, to the detriment of taxpayers, contractors and the procurement process. The sanctions imposed by the NPRM/NPG are unprecedented in their scope and exceed the president's authority. If finalized in anything like their present form, the proposals will impose draconian new obligations on government contractors and will greatly increase the risks contractors will confront in performing services for the government. Finally, the proposals will encumber the government contracting process with impracticable and unworkable restrictions that will injure competition and degrade the services received by the federal government. All of these outcomes will be particularly harmful to government contractors in the construction industry, which will be the particular focus of ABC's comments below.

2. The Proposals Impermissibly Engraft an Unauthorized New Sanction Mechanism Onto 14 Labor Law Enforcement Programs Established by Congress

The NPRM/NPG gives little attention to the careful balance of remedies and sanctions already established by Congress in existing labor and employment laws (described above). Instead, the proposals undermine the Constitution's separation of powers by substituting the president for Congress in the exercise of legislative authority.

---

[8] CRS Report RL34753, *Debarment and Suspension of Government Contractors* (2013), describing the procedures for suspension and debarment authorized under such labor laws as the Davis-Bacon Act, 40 U.S.C. 3144; the Service Contract Act, 41 U.S.C. 6705; Executive Order 11246; Section 503 of the Rehabilitation Act, 29 U.S.C. 793; the Vietnam Veterans Readjustment Act, 38 U.S.C. 3696; and Executive Order 13658, all of which apply exclusively to government contracts and/or government-assisted contracts.

[9] Such laws include the National Labor Relations Act, 29 U.S.C. 151, Title VII of the Civil Rights Act, 42 U.S.C. 2000e, the Fair Labor Standards Act, 29 U.S.C. 201, the Family and Medical Leave Act, 29 U.S.C. 2601, the Americans With Disabilities Act, 29 U.S.C. 706, the Age Discrimination in Employment Act, 29 U.S.C. 621, and the Occupational Safety and Health Act, 29 U.S.C. 553..

[10] *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1344 (applying NLRA preemption to federal executive order "encroaching on NLRA's regulatory territory.").

As noted above, the 14 federal labor/employment laws referenced in the proposals fall into two categories with regard to disqualification of employers from performing government contracts. Six of the laws are limited in their coverage to government contractors, and within those limits these laws expressly authorize suspension and/or debarment of government contractors that violate their provisions under limited circumstances that include full protection of due process rights and final adjudications.[11] The remaining eight laws apply broadly to private employers, regardless of whether they perform government contracts, and these laws contain no provisions authorizing disqualification of government contractors that violate their provisions.[12] ABC contends that the new proposals violate both types of laws.

Turning first to the "government contractor laws," ABC members performing government contracts are most commonly impacted by the Davis-Bacon Act (DBA), which applies exclusively to construction contracts.[13] Under that law, violators may have payments on their contracts withheld, or be debarred for a period of three years, but only after a hearing has been held in which the DOL proves they committed a "willful" or "aggravated" violation.[14] The post-hearing findings of the administrative law judge and the agency must be thorough, as opposed to "general and conclusory."[15] Debarred contractors also are entitled to judicial review of the department's suspension and debarment decisions.[16]

Moreover, six months after a contractor or subcontractor is debarred under the DBA, it can request that the administrator of the Wage and Hour Division permit it to contract with the government. The administrator considers, among other factors, the contractor or subcontractor's "severity of the violations, the contractor or subcontractor's attitude towards compliance, and the past compliance history of the firm." If the administrator denies the contractor's request, the contractor can petition for review by the Administrative Review Board.[17]

The new proposals at issue here dispense with all of the foregoing hearing and adjudicatory requirements of the DBA, as well as the reinstatement process. The proposals plainly violate the DBA, as well as conflict with the DOL's longstanding regulations and deny contractors their constitutional rights of due process.

The new proposals similarly conflict with longstanding suspension and debarment procedures under the Service Contract Act. Again, under that law applicable to service contractors, including many ABC members that perform non-construction maintenance work for the government, a hearing is required before a contractor can be debarred.[18] However, similar to the DBA, the

---

[11] See note 6 above, listing the laws aimed at federal contractors.
[12] See note 7 above, listing the labor and employment laws that are not limited in their coverage to government contractors.
[13] 40 U.S.C. 3141.
[14] 40 U.S.C § 3144; 29 C.F.R. § 5.12; *e.g.*, *Facchiano Construction Co v. Dep't of Labor*, 987 F.2d 206, 214 (3d Cir. 1993) (requiring knowledge on the part of the corporate officer).
[15] *Griffin v. Reich*, 956 F.Supp. 98, 110 (D.R.I. 1997). *See also Pythagoras General Contracting Corp., Stanley Petsagourakis*, 2011 WL 1247207, at *13 (Mar. 1, 2011).
[16] *Facchiano Construction, supra n.12.*
[17] 29 C.F.R. § 5.12(c).
[18] 41 U.S.C. 6706(b); *Dantran, Inc. v. Dep't of Labor*, 246 F.3d 36, 45-46 (1st Cir. 2001).

contractor has an opportunity to show that it should not be debarred based on "unusual circumstances," including the (lack of) history of violations and aggravated circumstances.[19] Contrary to the SCA, the proposed rule and guidance afford neither a hearing before a contractor can be disbarred, nor an opportunity for the contractor to reverse a debarment order if there are unusual circumstances.

Finally, ABC is deeply concerned with how the new proposals appear to conflict with longstanding DOL regulations implementing affirmative action compliance obligations under Section 503 of the Rehabilitation Act, the Vietnam Era Veteran's Readjustment Assistance Act, and Executive Orders 11246 and 13658.[20] Again, contractors that violate these statutory and regulatory provisions may be debarred under aggravated circumstances from receiving future contracts or terminated from ongoing government work. However, a contractor is entitled to a formal hearing before any of these sanctions can be imposed.[21] Again, the NPRM/NPG directly contradicts these statutory and regulatory schemes, in violation of applicable laws.

Equally as egregious, if not more so, is the manner in which the new proposals ignore congressional intent in enacting the second category of laws referenced above, which apply to private employers generally and which authorize no disqualification of employers from performing government contracts.

Most prominent among this category of laws whose violations are included within the proposals is the National Labor Relations Act (NLRA). It is well settled that the National Labor Relations Board (NLRB) is the sole and exclusive authority designated by Congress to address and remedy any claimed violations of the NLRA.[22] Moreover, the NLRB itself is restricted by Section 10(c) to issuing "make whole," non-punitive remedial orders tailored to the unfair labor practices being redressed.[23] Directly contrary to the new proposals, the Supreme Court has expressly held that governments are not permitted to impose "supplemental sanctions," including disqualification from government contracts, as remedies for violations of the NLRA.[24] Significantly, in *Gould*, the Supreme Court declared unlawful a state's attempt to disqualify even those contractors that had been found by judicially enforced orders to have violated the NLRB on multiple occasions during a five-year period. The current proposals are significantly worse because they threaten

[19] 29 C.F.R. § 4.188; *Bither v. Martin*, 995 F.2d 230 (9th Cir. 1993).
[20] See note 6 above for citations.
[21] *See* 41 C.F.R. § 60-741.66(a-d) ("Sanctions and penalties;" Section 503); 41 C.F.R. § 60-300.66(a-d) ("Sanctions and penalties;" VEVRAA). Similarly, a contractor may be debarred for violating Executive Order 11246, but only after the contractor has been afforded the opportunity for a hearing. 41 C.F.R. § 60-1.27(a-b) ("Sanctions"); Executive Order 11246 §§ 208(b), 303(c). *See, e.g., OFFCP v. O'Melveny & Myers LLP*, ARB Case No. 12-014, 2013 WL 4715032 (2013) (remanding to ALJ allegations that respondent violated Section 503, VEVRAA, and Executive Order 11246); *OFFCP v. Bridgeport Hospital*, ARB Case No. 00-034, 2003 WL 244810 (2003) (upholding order of ALJ dismissing citation of noncompliance with Section 503, VEVRAA, and Executive Order 11246).
[22] *Garmon v. NLRB*, 359 U.S. 236 (1959).
[23] *See, e.g., Sure-Tan*, Inc. v. NLRB, 467 U.S. 883, 900 (1984); *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938).
[24] *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

contractors with disqualification merely upon issuance of an unadjudicated administrative complaint.

The foregoing preemption doctrine applied in *Gould* has by no means been limited to state government actions inconsistent with the NLRA. The same legal principles have been applied to the federal executive branch. Thus, in *Chamber of Commerce v. Reich*, the court found that regulations issued under an executive order issued by President Clinton dealing with striker replacements "promise[d] a direct conflict with the NLRA, thus running afoul" of preemption doctrine. [25] It is also significant that in both *Gould* and *Reich*, the courts rejected the government's claims to being exempt from preemption under the "market participant" doctrine and/or the Federal Procurement Act. In both cases, the courts stressed that the government's actions were "regulatory" in nature because they "disqualified companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government."[26]

For similar reasons, the new proposals violate such generally applicable employment laws as the Fair Labor Standards Act, the Occupational Safety and Health Act, Title VII of the Civil Rights Act, and similar discrimination laws cited in the proposals as potentially disqualifying to government contractors that violate them. In each of these laws, Congress established "unusually elaborate remedies,"[27] including by way of example under the FLSA, civil and criminal prosecution and fines, liquidated damages and enhanced penalties for "willful" violations. Notably missing from any of these statutes is authorization for any government agency to disqualify employers from performing federal government contracts. Certainly absent is any Congressional authorization for such disqualifications to occur in the absence of final adjudication of liability against such contractors in a court of law. Again, the NPRM/NPG violates the plain language of each of the statutes cited as grounds for potential disqualification of contractors.[28]

Equally problematic is the claimed authority of agency COs and ALCAs to determine on their own whether reported violations of the 14 cited labor laws are "serious," "willful," "repeated" or "pervasive." Some of these terms already have been defined by Congress in the labor laws covered by the NPRM, but some terms such as "pervasive" do not appear in any of the statutes and others are defined by the NPRM and DOL guidance in ways that are inconsistent with legislative intent.

The definitions contained in the DOL guidance are overly expansive and vaguely defined, leaving agency officials far too much discretion to assess violations based on inherently subjective factors.[29] According to the proposals, each contractor's disclosed violations will be

[25] 74 F.3d 1322 (D.C. Cir. 1996), expressly rejecting the government's claim that the executive order at issue was somehow authorized by Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101.
[26] *See Building & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2003).
[27] *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999).
[28] *See also Anderson v. Sara Lee Cop*., 508 F.3d 181, 191 (4th Cir. 2007).
[29] *See, e.g.*, 80 Fed. Reg., at 30586 (to determine whether a violation is "willful," the "focus is on whether the enforcement agency, court, arbitrator or arbitral panel's findings support a conclusion that, based on all of the facts

"assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractors, and any mitigating factors. The extent to which a contractor has remediated violations . . . including agreements entered into by contractors with enforcement agencies, will be given particular weight in this regard."[30]

The proposals do not explain how the new assessments will be made in a manner that is consistent with congressional intent underlying each of the 14 federal laws whose violations must be assessed. Whereas the time-honored agency and judicial review procedures embedded in each of these labor statutes promote fairness and consistency, the NPRM/NPG can only lead to increased uncertainty and arbitrary agency action. It will be unclear to entities subject to the regulation (if finalized) which and how many labor law "violations" cause them to lose a contract.

Like contractors, federal agencies are required to obey the laws as they are written. Both the FAR Council and the Labor Department have a Constitutional duty to implement the president's executive orders in a manner that is consistent with congressional intent, and to refuse to implement an executive order to the extent that it violates the laws written by Congress.[31] The NPRM/NPG fails to meet this Constitutional standard and must be rescinded or drastically rewritten.

3. The Proposed Rule Violates Due Process by Punishing Contractors Based on Non-Final Decisions and Without the Opportunity for a Hearing

Even if the 14 federal labor laws cited above permitted contractors to be disqualified from federal government contracts based on final court adjudications, which they do not, the current proposals would have to be rescinded because they threaten to deprive contractors of their rights to due process under the U.S. Constitution. The proposals specifically threaten disqualification of contractors based on mere allegations of misconduct without a hearing or trial or judicial review. The proposed rule requires contractors to report many types of adverse administrative actions that are not final—where no hearing has been held and no ultimate agency determination has been issued or reviewed by the courts.[32]

In a recent survey of its membership, ABC found that more than 12 percent of the respondents have been falsely accused of violating one of the 14 labor laws. This is consistent with statistics derived from published data of the NLRB, Equal Employment Opportunity Commission and DOL, whose initiating complaints, cause determinations, and charging letters are now being put forward by the new proposals as potential grounds for disqualification. It is not at all uncommon

---

and circumstances discussed in the findings, the contractor or subcontractor acted with knowledge or reckless disregard of its legal requirements"); *id.* at 30587 (whether a violation is "repeated" "turns on the nature of the violation and underlying obligation").

[30] 80 Fed. Reg., at 30582.

[31] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[32] In this regard, the proposals also violate the President's Executive Order, which sets forth the goal of disclosing only "determinations", "awards," "decisions," or "judgments." Nowhere does the EO authorize disqualification of contractors based solely on mere *allegations* of labor law violations.

for agency complaints against employers to be withdrawn or settled without any ultimate finding of wrongdoing by the employer. Such charging documents cannot form the basis for disqualifying any contractor from performing government work.

Thus, contrary to the NPRM/NPG, a complaint issued by a NLRB regional director does not constitute final agency action and is not a "finding" of any violation of the NLRA, which only the board itself can determine at the agency level.[33] Even the NLRB's own determinations are not self-enforcing under the NLRA, as Section 10 makes clear, because only a court of appeals can enforce orders of the board—not the board itself and certainly not any other federal agency.[34]

Similarly, OSHA citations are not in any sense "final" and should not constitute any basis for a CO to find a violation of that act to have occurred. In the experience of ABC member contractors, most OSHA citations are routinely changed after investigation and negotiation between the employer and the investigating agency, resulting in a lesser fine or type of citation. These and other non-final allegations by a single agency official do not constitute binding agency "determinations" of violations under any reasonable definition and should not be considered in contracting decisions. To contest decisions by full agency boards, an employer must generally exhaust the administrative process through the agency before challenging the agency action in federal court.[35] It is cold comfort that the DOL proposes that COs and ALCAs give "lesser weight" to violations that have not resulted in a final judgment, determination or order.[36] The potential remains under the new proposals that contractors will be disqualified from performing government work because of unadjudicated agency or judicial allegations that should be entitled to no weight at all.

Based on "similar information obtained through other sources," the DOL's guidance permits COs to take remedial measures up to and including contract termination and referral to the agency's suspending and debarring official.[37] The contractor may be disqualified as a result of an unknown source's mere allegation of a labor law violation. The source may be a labor union seeking to organize the contractor, and the union may have an incentive to file baseless labor law allegations. Construction trades unions regularly target ABC member contractors, which are predominately nonunion employers, for so-called "corporate" or "comprehensive" campaigns. These campaigns consist in large part of union efforts to destroy a targeted company's reputation

[33] *See Independent Stave Co.*, 287 NLRB 741 (1987), explaining that the NLRB is alone vested with lawful discretion to determine the merits of a complaint and whether any violation of the NLRA has occurred.
[34] 29 U.S.C. 160. Published NLRB statistics indicate that federal appeals courts have reversed more than 30 percent of board decision during the past 40 years. http://www.nlrb.gov (Appellate court decisions 1974-2013).
[35] *E.g., NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-26 (1987) (decision of NLRB General Counsel to file a complaint does not constitute final agency action); *Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37, 40 (1st Cir. 1995) (finding that federal courts lack jurisdiction to review pre-enforcement challenge to OSHA citation).
[36] 80 Fed. Reg., at 30590.
[37] 80 Fed. Reg., at 30577.

by filing numerous unsubstantiated charges of labor law violations.[38] The new proposals play directly into the hands of malicious third parties that 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.

The new proposals impose other significant barriers to a fair process. For example, a CO might conclude that a contractor should not be awarded a contract based on its failure to comply with labor laws. When that contractor applies for a different contract, a second CO may use the first CO's no-contract determination in order to reduce his/her new workload or avoid inconsistency, thereby causing a *de facto* contract bar without affording the contractor due process.

In addition, because the CO's analysis of the severity of the violation will be inherently based on subjective considerations ("serious," "willful," etc.), there will be bid protests alleging favoritism (i.e., a contractor may question why it was passed over for a bid in place of an entity the contractor believes has a similar record of labor law "violations").

The reporting requirement itself is unfair to contractors that have been falsely accused of labor law violations. Information that contractors must provide under the new proposals will be subject to misuse by the public. Competitors and labor organizations can be expected to seize on non-final "violations" that a contractor must report, even though the contractor may be fully vindicated by a court, agency, or settlement months or years down the road. For example, in the experience of ABC members, it can take upwards of six months for an OSHA citation to reach final agency adjudication. Even worse, it is not uncommon for a contested NLRB complaint to take *years* to reach a final adjudication by an appeals court. As noted above, the process of agency adjudication and judicial appeal often results in the initial administrative decision being overturned—yet the NPRM/NPG unfairly sweeps these decisions within its reach, risking loss of contracts before the employer is ultimately vindicated.

4. The Proposed Rule Imposes Onerous Burdens on Contractors, Contracting Officers and Agency Labor Compliance Advisors, Which the Proposals Unfairly Minimize

Without any supporting evidence, the NPRM/NPG claims that the new proposals will improve the "economy and efficiency in procurement" in government contracting."[39] To the contrary, the new proposals in their present form can only impose new burdens on contractors, COs and ALCAs, as well as the entire 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 proposed rules for a period of three years before a contract is offered. This long look-back period should be rescinded in its entirety, as it is not only overbroad, but also gives retroactive effect to non-final "violations." In addition, the requirement of updates every six months imposes heavy and unnecessary burdens on both

[38] There is a substantial body of documentation of union corporate campaigns and their pernicious effects on employers, particularly in the construction industry. See, e.g., Jarol Manheim, *Trends in Union Corporate Campaigns* (U.S. Chamber of Commerce 2005), available at www.uschamber.org.
[39] 80 Fed. Reg., at 30548.

contractors and procurement officials. The update period should be modified to at least annually. The proposals also should clarify that the updates need only be provided on a calendar year basis. If they are required six months after each contract award, then contractors performing on multiple contracts could find themselves required to file updates on a constant basis throughout each year. The $500,000 contract coverage threshold also sweeps far too broadly. Finally, a contractor should not have to report on all of its subsidiaries if only one subsidiary has a federal contract, or if it acquires or merges with an entity that has a contract.

Given the proposed rule's scope, agencies will not realistically be able to fund this endeavor with current resources. It is far more likely that procurement agencies will be required to hire hundreds if not thousands of staff to serve as or assist the newly created ALCAs, and then will have to spend time and resources to the new staff members on the nuances of 14 federal labor laws, to say nothing of the as-yet-unidentified state laws. Neither the FAR Council nor DOL can assure the public that ALCAs will be experts in the 14 labor laws and "state law equivalents." It also will be extremely difficult, if not impossible, for prime contractors to certify the labor compliance of their supply chains of subcontractors because few, if any, contractors have the necessary expertise in all 14 labor laws now being placed at issue, not to mention the exponentially greater potential number of state laws yet to be defined.

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 FAR Council acknowledges that it has access to most of this information, yet asserts that its overbroad reporting proposal is a more efficient approach.[40] The federal government already has a robust system in place for determining whether to award contracts to entities, including the discretion not to award a contract if the entity has an unsatisfactory labor record and reference to the Federal Awardee Performance and Integrity Information System.[41] The FAR Council cannot demonstrate that it has examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.[42]

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 COs or contractors will be able to navigate the labyrinth of requirements in a timely manner without unduly delaying the procurement process.

For sizeable contractors, the infrastructure required to adequately report the contractor's "violations" will be immense under the NPRM/NPG. ABC member companies do not routinely track whether there have been any administrative merits determinations, arbitration decisions or civil actions against them—largely because many such actions are non-final and reversible. If the rule is finalized, companies will have to expend large sums on human resources, outside legal counsel, compliance and information systems to ensure this data is accurately gathered,

[40] 80 Fed. Reg., at 30562.
[41] *See* 48 CFR part 9; 80 Fed. Reg., at 30548.
[42] *See Motor Vehicles Mfr.'s Ass'n v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29, 43 (1983).

maintained and sorted. Regulated entities will have to hire officials versed in both procurement policy and labor and employment law. The proposed requirements are not merely "check the box" exercises. Even contractors without violations must engage in an arduous process to reach that conclusion.

Because no guidance on "equivalent state laws" was issued, monitoring and training systems must be updated if and when a rule is finalized on this subject. Given the proposed rule's substantial tracking burden, if a contractor in good faith reports that it has no violations but later realize it does, it should not be penalized. The contractor should similarly be immune from penalty if the contractor later realizes through a genuine mistake that a covered subcontractor has reportable violations.

The process by which contractors communicate with COs and ALCAs about their "violations" is bound to be cumbersome, given potentially detailed communications by email and/or other modes of communication between contractors and the government concerning the violations and any mitigating circumstances. The cost of compliance will be high, and may skew particularly against small contractors, which have limited resources not only to keep track of legal allegations but to challenge frivolous ones.

The impact would be compounded by the proposed reporting requirement imposed on prime contractors regarding their subcontractors (if this requirement stands). The time requirements alone are burdensome and unrealistic. If the prime contractor awards the subcontract (or the subcontract becomes effective) within five days of the prime contract execution, then it must conduct the same analysis the contracting agency performed of the contractor within 30 days of awarding the subcontract. For all other subcontracts, review of possible reportable subcontractor violations must occur prior to the subcontract award.

For large contractors in particular, the burden to review a multitude of possible violations from hundreds of subcontractors will be tremendous. Many prime subcontractors may not have the staffing, IT or legal expertise necessary to identify and confirm the subcontractor violations that fall under the reporting requirement from those that do not. Smaller subcontractors may seek advice from the contractor's legal counsel on such issues, creating potential ethical quandaries for counsel, whose legal responsibility does not extend to the subcontractor.

If the subcontractor cannot adequately determine its own reporting responsibilities, the contractor will be loath to retain the subcontractor—not on the basis of an actual labor law violation, but because the contractor does not want to risk an accusation that it incorrectly reported the subcontractor's violations. ABC members also are concerned that the proposed rule will drive out small minority-owned and women-owned businesses because they do not have the resources to compile and/or assess reports of labor law violations in so many areas of labor and employment law, and will be unwilling to take the unavoidable risk of making a false statement to the government. Alternatively, to avoid the reporting requirements altogether, subcontractors may structure their bids under the $500,000 threshold, forcing the contractor to staff a project with several low-cost subcontractors instead of one that could most efficiently perform the work.

Under the new proposals, contractors will be in the untenable situation of policing their subcontractors, and subcontractors will be in the untenable position of sharing sensitive or proprietary information with prime contractors with whom they compete on other projects. According to ABC's survey of its membership, 47 percent of respondents have performed work as both prime contractors and subcontractors on federal contracts. It is also unclear how long each contractor would have to retain the information, and whether they would be required to disclose it under federal and state public information statutes. Furthermore, already many subcontractors agree to report to the prime contractor offenses such as OSHA citations, but much of the time the subcontractors fail to actually report. The proposed self-reporting scheme is unworkable.

These considerations make the NPRM's DOL reporting alternative more palatable (between two bad choices).[43] However, that alternative still comes with significant practical problems. For example, under the NPRM, a prime contractor must consider whether the subcontractor is a responsible source during the term of the subcontract. If, based on the DOL's advice, the contractor concludes that the subcontractor should not be retained, it would have to quickly find a "clean" subcontractor replacement midstream during the project at a new bid price, which is no small feat. Delays would be significant, and the costs involved should not be imputed to the innocent contractor.

Adding to contracting costs, the proposed rule requires regulated entities to litigate defenses to alleged labor law violations in multiple forums. The NPRM states that when contractors and subcontractors report administrative merits determinations, they also may 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. Additionally, contractors and subcontractors may provide information regarding any mitigating factors. The net result of these provisions will be to require contractors to litigate their defense of any claimed violations in two separate forums: at the original agency level and at the procurement level.

The threat of cancellation, suspension and debarment of contracts also may significantly impact contractors' approaches to charges, demands and matters pending before enforcement agencies, encouraging them to settle matters rather than seeking vindication of their position and thereby risking a reportable "violation" that could affect their contract rights. This is especially unfortunate because many allegations are prompted by plaintiff attorneys and unions engaged in corporate campaigns. These and other groups will no doubt file questionable labor law allegations simply to meet their financial and public relations goals, knowing the NPRM gives contractors an incentive to settle. A related concern is that unions will threaten contractors with NLRB bad faith bargaining charges or grievances that could lead to arbitration, to gain leverage during negotiation sessions. Already in the weeks since the proposed rule was issued, labor organizations have threatened contractors to yield to their bargaining demands or else be in jeopardy of losing their government contract.

[43] *See* 80 Fed. Reg., at 30555.

ABC's survey of its members reveals that more than 57 percent of respondents believe that the proposals, if finalized, will compel them to abandon the pursuit of federal contracts. Ninety-four 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. The Proposed Rule Impermissibly Bifurcates This Proceeding by Failing to Present Proposals on "Equivalent State Laws"

The FAR Council deferred for a later proposed rule the executive order's "equivalent state law" disclosure requirements.[44] A new proposed rule on this subject may potentially cover hundreds of state and local laws. It is impossible to accurately gauge the massive costs to the procurement system that will result from the proposed rule without knowing its full scope. It is unclear whether contractors need to report new laws that states may enact in the future, or whether there would be a new rulemaking each time there is a change. This would create even more internal tracking contractors would have to undertake. There is no justification for such a bifurcated rulemaking process, and the first stage of the proposals should not be made final until the full magnitude of the final rule is known.

6. The New Paycheck Requirements Are Unlawful and Arbitrary

The paycheck "transparency" requirements again encroach on Congress's domain. The NPRM requires contractors for the first time to provide a document informing individuals of their independent contractor status, in addition to a wage statement. However, the DOL's proposed guidance acknowledges that the determination of independent contractor status under a particular law is governed by that law's definition of employee, leaving employers uncertain as to what definition should be used.[45] The DOL's second proposed option for the disclosure of wage statements, which requires that it contain employees' rate of pay, total hours, gross pay, and any additions or deductions, is more in line with employers' practices and is less burdensome than the first option, which also would require overtime hours or overtime earnings. Under the first option, employees can calculate whether the paycheck includes payment for overtime hours.[46] Provision of the paycheck requirements by electronic means is appropriate given the widespread use of electronic dissemination of information.[47]

7. The Proposed Ban on Arbitration Agreements Violates Federal Law

The proposed rule broadly prohibits arbitration agreements covering claims arising under Title VII, as well as all tort claims related to sexual assault or harassment, with limited exceptions. These restrictions conflict with the U.S. Supreme Court's decision in *CompuCredit v.*

[44] 86 Fed. Reg., at 30554.
[45] 80 Fed. Reg., at 30593.
[46] 80 Fed. Reg., at 30592.
[47] 80 Fed. Reg., at 30592-93.

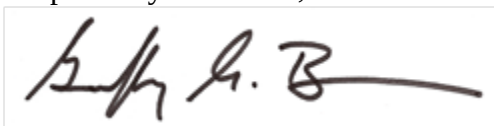
Greenwood, 132 S.Ct. 665 (2012), and other similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act. An agency cannot by the stroke of a pen eliminate pre-dispute arbitration, yet the FAR Council proposes just that.

Conclusion

For each of the reasons set forth above, ABC urges the FAR Council and DOL to withdraw their unlawful and unwise proposals.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



Geoffrey Burr
Vice President, Government Affairs

Of Counsel: Maurice Baskin, Esq.
Littler Mendelson, P.C.
1150 17th Street, NW, Suite 900
Washington, D.C. 20036

Robert A. Burton, Esq.
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004