

November 6, 2014

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Ms. Cecilia Muñoz
Assistant to the President and
Director of the Domestic Policy Council
Executive Office of the President
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Re: Concerns with the Fair Pay and Safe Workplaces Executive Order (E.O. 13673)

Dear Secretary Perez and Ms. Muñoz,

The undersigned organizations represent a broad cross-section of the federal contractor community. We are writing to follow up on the views expressed at the October 10, 2014 White House listening session regarding the President's "Fair Pay and Safe Workplaces" Executive Order (E.O.) 13673. Our organizations appreciate your outreach to the contractor community and are encouraged by your commitment to pursuing a transparent and full rulemaking process. However, our members have strong concerns with this E.O. and believe it suffers from a number of fundamental flaws.

First and foremost, the President does not have the legal authority to make the regulatory changes that will follow from this E.O. By directing the Department of Labor (DOL) to develop guidance that will establish degrees of violations not included in the underlying statutes, the E.O. significantly amends the enforcement mechanisms Congress established for these laws. Simply put, the President is not authorized to change enforcement mechanisms in a statute without specific Congressional approval.

In addition to exceeding statutory authority, the E.O. disregards existing enforcement powers the administration already has through the Federal Acquisition Regulation (FAR) and various labor laws. The DOL and the federal agencies have sufficient authority under the FAR to consider contractor compliance with federal labor laws and share relevant information with federal contracting officers or agency suspension and debarment officials. In the most egregious cases, these authorities include the ability to initiate suspension and debarment proceedings against federal contractors, based upon violations of established business ethics standards, including violations of the laws covered by the E.O. The E.O. will only complicate the current system by imposing new data collection, review, inter-agency consultation and enforcement procedures on top of the already balanced remedial provisions under the 14 labor laws and related state laws the E.O. cites.

Another area where the E.O. contradicts federal law is in the impact it would have on the ability of employers to use arbitration to resolve specific types of employee disputes. For contracts over one million dollars, the E.O. prohibits contractors from relying on pre-dispute arbitration agreements to resolve certain civil rights and tort claims. While the Executive Order tracks language that has been included in Department of Defense appropriations legislation since FY 2010, no act of Congress has applied these limitations to any other set of federal contractors. In addition, federal law and Supreme Court decisions have made it clear that these arbitration agreements are acceptable, except as limited by the DOD appropriations language.

We are also deeply concerned that implementation of the E.O. will create widespread disruptions in the federal procurement process and significantly increase costs for both government and industry. Given its highly subjective enforcement requirements, the E.O. will inevitably lead to delays in award evaluations, limitations on competition, and a greater number of contract award protests. Coupled with the other E.O.s issued this year specifically targeting federal contractors, the recordkeeping and reporting requirements in this E.O. significantly increase the cost and administrative burden of contracting with the federal government. Ultimately, this will result in fewer companies and organizations, especially smaller ones, that are willing or able to compete for federal contracts. These results directly conflict with the administration's stated goals of increasing competition, driving efficiencies and savings, reducing barriers to entry for small and innovative employers, and improving the federal acquisition ecosystem in general.

The E.O. also raises many questions that must be addressed, including the definitions of key terms, as well as the impact the rule will have on the federal contracting process itself. For example, what is meant by "administrative merit determination," "arbitral award," "arbitral decision," "equivalent state laws," and "serious, repeated, willful or pervasive"? Will active or non-final determinations and labor complaints be considered? Is it necessary for there to have been a finding of fault for a violation to count against an employer? If contractors will be disadvantaged before they have exhausted their due process rights, how will the rule treat violations that are ultimately overturned? Is self-reporting limited to cases involving an employer's performance of federal contracts?

Upon issuing the E.O., the President stated that "the vast majority" of federal contractors play by the rules and would likely not be impacted by it. However, in addition to overlooking the significant reporting burden imposed by the E.O., this view fails to recognize that certain federal labor laws such as the Fair Labor Standards Act are extremely complex and can be challenging for employers to implement correctly. The Department of Labor itself and other federal agencies have been found to have violated these laws. Furthermore, the requirements under these laws frequently change, as seen in DOL's current effort to modify the rules governing overtime pay. Our members are concerned that a noticeably risk-averse federal contracting officer community will simply avoid doing business with federal contractors with even minor violations, effectively blacklisting them. Though the E.O. ostensibly targets a small number of companies, the requirements and processes it establishes will likely have a much broader impact.

We appreciate your careful consideration of these concerns. Given these problems, it is clear that the executive order cannot be fixed through rulemaking or agency interpretation and should be withdrawn by the President. However, if the Administration is determined to move forward despite these problems, we urge the Administration to conduct a thorough and comprehensive analysis of the full impact these actions will have on federal procurement, employers, and American workers.

Sincerely,

Aerospace Industries Association
American Coatings Association
American Foundry Society
American Hotel & Lodging Association
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
College and University Professional Association
for Human Resources
Forging Industry Association
HR Policy Association

Industrial Fasteners Institute
International Franchise Association
IT Alliance for Public Sector
National Association of Manufacturers
Professional Services Council
Society for Human Resource Management
TechAmerica
The Coalition for Government Procurement
U.S. Chamber of Commerce
WorldatWork

Cc: The Honorable Beth Cobert, Deputy Director for Management, Office of Management and Budget
The Honorable Anne Rung, Administrator, Office of Federal Procurement Policy, Office of
Management and Budget
The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs,
Office of Management and Budget
The Honorable Frank Kendall, Under Secretary of Defense for Acquisition, Technology and Logistics,
Department of Defense
The Honorable Lafe Solomon, Senior Labor Compliance Advisor, Department of Labor