



VIA ELECTRONIC SUBMISSION

January 30, 2012

Ms. Lisa M. Wilusz, Director  
Office of Procurement and Property Management  
Procurement Policy Division  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
Washington, D.C. 20250-9303

**RE: “48 CFR 422 Direct Final Rule”; Agriculture Acquisition Regulation, Labor Law Violations; RIN 0599-AA19**

Dear Director Wilusz:

Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced direct final rule (DFR) and notice of proposed rulemaking (NPRM) published in the *Federal Register* by the U.S. Department of Agriculture (USDA, or Department) Dec. 1, 2011, at 76 Fed. Reg. 74722 and 74755, respectively.

**About Associated Builders and Contractors, Inc.**

ABC is a national construction industry trade association representing more than 23,000 contractors, subcontractors, materials suppliers and construction-related firms within a network of 75 chapters throughout the United States. ABC member contractors employ nearly 2 million workers, whose training and experience span all of the more than 20 skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. ABC’s membership is bound by a shared commitment to the *merit shop philosophy*. This 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 of ABC’s member contractors and subcontractors perform work on federal construction projects, including contracts awarded under the Agriculture Acquisition Regulation (AGAR). Therefore, the USDA’s rulemaking will significantly impact a substantial number of ABC members.

## **Background**

On Dec. 1, 2011, the USDA issued a joint DFR-NPRM to add a new clause to the AGAR titled, “Labor Law Violations,”<sup>1</sup> which reads:

*In accepting this contract award, the contractor certifies that it is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors of any tier, and suppliers, are also in compliance with all applicable labor laws. The Department of Agriculture will vigorously pursue corrective action against the contractor and/or any tier subcontractor (or supplier) in the event of a violation of labor law made in the provision of supplies and/or services under this or any other government contract. The contractor is responsible for promptly reporting to the contracting officer when formal allegations or formal findings of non-compliance of labor laws are determined. The Department of Agriculture considers certification under this clause to be a certification for purposes of the False Claims Act. The Department will cooperate as appropriate regarding labor laws applicable to the contract which are enforced by other agencies.*

The USDA claims to be issuing this rulemaking because it “highly respects and follows the policies and laws regarding worker labor protections, particularly as they pertain to the acquisition process.”<sup>2</sup>

## **ABC’s Comments in Response to the USDA’s Rulemaking**

ABC strongly opposes contracting provisions that facilitate inequality or favoritism in the federal contracting process, and works diligently to ensure such policies are ultimately implemented fairly. Current law requires contracts be awarded to the lowest responsible bidder. Nothing in the longstanding “contractor responsibility” regulations of the AGAR have ever previously required contractors to self-certify their compliance with “labor laws.”<sup>3</sup> The unspecified labor laws referenced in the proposed text each contain their own procedures for determining whether violations of their provisions have occurred, including exclusive remedies for such violations. Due to the complexity of the applicable laws, it is difficult, if not impossible, for any employer to “certify” they are in compliance with any or all labor laws. It is certainly impossible for any contractor to certify independent subcontractors are in compliance with such laws. The

---

<sup>1</sup> 76 Fed. Reg. 74756.

<sup>2</sup> 76 Fed. Reg. 74755-74756.

<sup>3</sup> A previous Federal Acquisition Regulation (FAR) rule purporting to impose more specific reporting requirements on contractors under Part 9 of the FAR’s contractor responsibility regulations was withdrawn in the face of a storm of well justified criticism and litigation in 2001. *See* FAR Amendment, 65 Fed. Reg. 80255 (Dec. 20, 2000), repealed, 66 Fed. Reg. 66986 (Dec. 21, 2001); *see also* Mark Cutler, *Chamber, Business Groups File Lawsuit Challenging Contractor Compliance Rule*, Daily Labor Report (BNA) at A-2 (Dec. 28, 2000).

rulemaking also fails to properly analyze the significant regulatory burdens imposed by the rule. Accordingly, ABC has both substantive and procedural concerns.

While the stated intent of the USDA's rulemaking is to support the labor protections in the procurement process, ABC nevertheless believes that the Department has failed to recognize the significant and detrimental impact this rulemaking could have on federal contractors. Both the DFR and the NPRM should be withdrawn immediately.

### **The USDA Lacks Authority to Impose a Certification Requirement on Contractors that is Beyond the Scope of the Existing Federal Acquisition Regulation's (FAR) Responsibility Provisions and the Applicable Labor Laws Themselves**

Courts have repeatedly held that it is unlawful for the executive branch to impose additional penalties on government contractors beyond those specified by Congress. Specifically, the U.S. Supreme Court struck down previous attempts to link violations of the National Labor Relations Act (NLRA) to government contracts.<sup>4</sup> Moreover, the sole grounds for suspension and debarment of government contractors are those set forth in Part 9 of the FAR, and the USDA is not authorized to unilaterally exceed its authority by taking "corrective action" against contractors for alleged violations of laws that are not addressed in a manner consistent with the existing statutory and regulatory mandates.

While the proposed text does not specify what "corrective action" will be taken upon receipt of notice of an alleged labor law violation, there is no reason to impose the burden of a certification requirement upon contractors unless it is the USDA's intent to threaten reporting contractors with suspension or debarment in the event of an alleged labor law violation.<sup>5</sup> However, mere alleged violations of labor laws do not constitute grounds for suspension or debarment under the AGAR or the FAR. Labor laws carry their own specific penalties, as well as rights of due process to determine violations after a full administrative hearing, as established by Congress.

As is further explained below, the proposed text is so vague and confusing as to render its provisions arbitrary and capricious. But the entire proposal is rendered invalid at the outset due to the USDA's lack of statutory or regulatory authority to impose the new certification and/or reporting requirements, or to take any "corrective action" depending on the substance of such reports. For each of these reasons, both the DFR and the NPRM must be withdrawn immediately.

---

<sup>4</sup> See *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282 (1986). In addition, the Civil Rights Act contains a similar prohibition at 42 U.S.C., Section 2000e-17.

<sup>5</sup> On the other hand, if it is not the Department's intention to use the newly collected information about contractors' labor law violations to challenge contractors' responsibility to perform contracts for the Department, then the rulemaking is a meaningless paperwork exercise that should be withdrawn on that ground.

## **Even if the USDA were Authorized to Issue this Rulemaking, it is Nevertheless Arbitrary and Capricious and Should be Withdrawn**

Apart from the serious question raised above as to the Department's authority to impose any new rule increasing the certification/reporting requirements of contractors, the actual text of the new rule is arbitrary and capricious and must be immediately withdrawn on this additional basis. The arbitrariness of the rule begins with its first sentence, which requires the USDA contractors for the first time in the history of the Department to "certify" they are "in compliance with all applicable labor laws." The rulemaking fails to define the terms "compliance" or "applicable labor laws."<sup>6</sup> An ever changing number of labor laws exist that apply to contractors depending on size, industry and location. Labor laws have become so complex, particularly in the construction industry, that it is difficult, if not impossible, for any contractor (many of whom are small businesses without ready access to legal counsel) to determine whether they are in actual compliance with every law that might conceivably apply to them. It is incumbent on the Department to identify exactly which labor laws are being referred to in the rulemaking and what constitutes compliance with such laws.<sup>7</sup>

Even if contractors could somehow certify within the meaning of the False Claims Act that they are in full compliance with every conceivable labor law that might be applicable to them, it would be impossible for such contractors to certify all of their *subcontractors* are in compliance with whatever labor laws (which may be different laws) apply to *them*. Subcontractors are independent businesses whose workplace practices are subject to only limited review by prime contractors, particularly about any activities taking place on projects other than the project on which there happens to be a contractor-subcontractor relationship. At a minimum, the cost for a construction contractor to audit every subcontractor's workplace practices to determine compliance with every conceivably applicable labor law would be prohibitively expensive and futile.

As noted above, the first sentence of the proposed text does not indicate what the purpose would be of the certifications that are being demanded for the first time by the USDA. Although "corrective actions" are referred to later in the proposed text, such corrective actions appear to be limited to "the event of a violation of labor law made in the provision of supplies and/or services under a specified Department contract." Therefore, the burdensome certification requirement imposed by the first sentence appears to be a needless and wasteful exercise imposed on contractors for no apparent purpose. The first sentence is therefore arbitrary and capricious and should be deleted.

The second sentence of the proposed text is equally arbitrary and should likewise be withdrawn. This sentence states that the Department "will vigorously pursue corrective action against the

---

<sup>6</sup> Part 422 of the AGAR currently identifies six different labor laws as applying to government acquisitions: Contract Work Hours and Safety Standards Act, Davis-Bacon Act, Walsh-Healey Public Contracts Act, Executive Order 11246, laws pertaining to Special Disabled and Vietnam Veterans, and Section 503 of the Rehabilitation Act. The rulemaking is unclear whether its provisions are limited to these particular labor laws.

<sup>7</sup> The fourth sentence of the proposed AGAR text exacerbates this problem by declaring that the Department will "consider certification under this clause to be a certification for purposes of the False Claims Act," thereby improperly invoking the draconian penalties of that law.

contractor and/or any tier subcontractor or supplier in the event of a violation of labor law made in the provision of supplies and/or services under this or any other government contract.” The proposed text does not explain exactly what “corrective action” the USDA will take. Again, as noted above, the Department is not authorized to unilaterally suspend or debar a contractor or subcontractor for alleged violations of labor law in the absence of adherence to the provisions for fact finding, hearings, and administrative and judicial review that are imposed under each applicable labor law. Each labor law imposes its own set of penalties that may or may not include debarment, and each law designates the proper agency or department charged with administering the applicable law. The USDA has no such authority, and certainly has no authority to act in the vaguely described manner set forth in the proposed text.

How a “violation” of an as yet unspecified labor law will be determined is not addressed by the second sentence of the proposed text. The third sentence further confuses this issue by requiring contractors to promptly report whenever any “formal allegations or formal findings of non-compliance of labor laws are determined.” A mere allegation of a labor law violation is not the same as an actual violation which, as noted above, can only be determined after due process rights are satisfied through fact finding, hearings, and administrative and judicial review. It would be unlawful and improper for the USDA to take any “corrective action” based upon mere allegations of labor law violations. Such allegations are often frivolous or motivated by malice against the contractor by outside parties. Moreover, even agency investigatory findings of non-compliance with labor laws, no matter how “formal,” do not constitute a lawful basis for the USDA action. The rulemaking exceeds the agency’s lawful authority by inviting competitors or advocacy groups such as unions to make allegations against law-abiding contractors, knowing the allegations will be counted against the contractors while they are still being investigated by the appropriate labor agencies. The debarment regulations of Part 9 of the FAR and the remedies specified under the various labor laws themselves constitute the sole basis for any “corrective action” by any government agency. Therefore, the rule must be withdrawn for this reason as well.

The USDA’s rulemaking could destroy existing safeguards for fair competition, and eliminate protections against subjectivity and corruption in federal contracting by leaving the door open for contracting officers to make judgment decisions based on inconclusive information, including mere allegations of wrongdoing. It would encourage the filing of labor-related charges at multiple agencies (including the National Labor Relations Board, the Occupational Safety and Health Administration, the Wage and Hour Division and the Office of Federal Contract Compliance Programs), regardless of whether they have merit. The existence of baseless and unsubstantiated items on a contractor’s record could unfairly be used against the contractor, and could very well prevent it from having a chance to compete for a contract.

This rulemaking would create a highly coercive tool that could be used to victimize responsible contractors that are unfairly targeted by competitors, labor unions, disgruntled former employees or anyone else who would benefit from seeing a company barred from federal work. In addition, the significant costs imposed on contractors in the form of time, money and resources could easily prevent them from hiring additional employees, investing in equipment, and securing more work to grow their companies and create additional jobs.

## **The USDA’s Declaration of a “Direct Final Rule” Violates the Administrative Procedure Act and Must be Withdrawn Immediately**

Regardless of the rulemaking’s merits, as a matter of providing the basis for the USDA to receive public comment, there is NO lawful basis for the agency to have issued this proposal as a “direct final rule” (DFR). The sole explanation for the Department’s action is its assertion that “the agency is publishing this action as a DFR without prior proposal because [the Office of Procurement and Property Management] views this as a non-controversial action and expects no adverse comments.”<sup>8</sup> However, the notice goes on to note that “if the agency receives adverse comments, a timely document will be published withdrawing the DFR and all public comments received will be addressed in a subsequent final rule based on this action.” It should be clear to the agency after reviewing the docket that this rule, which was originally thought to be “non-controversial,” is anything but. The DFR should therefore be withdrawn immediately.

## **The USDA’s Rulemaking Relies on an Erroneous Analysis of Associated Regulatory Burdens**

In addition to the substantive deficiencies in the rulemaking described above, the proposal contains a myopic and clearly erroneous analysis of the heavy burdens the rulemaking threatens to impose on contractors. In particular, the Department’s analysis is woefully deficient under the Regulatory Flexibility Act (RFA), the Paperwork Reduction Act (PRA), and several other statutes and executive orders that the Department deemed to have no application to the rulemaking based upon erroneous assumptions.

The RFA requires agencies to carefully consider the impact its rulemakings are likely to have on small businesses. If a significant impact is identified on a proposal, a more in-depth analysis is required. The PRA requires agencies to analyze and attempt to reduce the federal government’s paperwork burden on stakeholders.

However, contrary to the Department’s flawed analysis, the rulemaking would actually require *thousands* of man hours per contractor (and subcontractor) for each to audit its workplace practices. An audit would have to be done before a contractor could even attempt to certify it is in compliance with every conceivable labor law. For such contractors to be able to certify their subcontractors’ compliance with such laws would increase the paperwork and cost burdens *exponentially*. The USDA failed to adequately address these potential costs and burdens, and gave no factual basis for the assertion that its rulemaking would not have such impacts.

Notwithstanding the Department’s failure to adequately consider costs and burdens associated with its rulemaking, the fact remains that there is absolutely no benefit to the government from receiving such certifications. Nor are the required reports of labor law “alleged violations” and agency findings of violations justified by any benefit to the USDA, such as to justify the regulatory burden associated with the newly proposed reporting requirements.

---

<sup>8</sup> 76 Fed. Reg. 74755.

If the Department chooses to issue a revised proposal after a withdrawal of the DFR and NPRM, ABC requests it be accompanied by a thorough written review of the proposal through the lens of these statutory requirements.

### **Conclusion**

ABC is extremely concerned with the USDA's rulemaking and the manner in which it was issued. Clearly, such a drastic policy change requires a great deal of additional review. The proposal threatens to destabilize labor relations in the construction industry (and in other industries) at a time when contractors already face significant economic hardship. The new rules have the potential to harm existing businesses and impair their ability to grow and create new jobs. For the reasons outlined above and in the more extensive comments filed by the U.S. Chamber of Commerce—which we support and incorporate by reference—ABC requests that the USDA withdraw its rulemaking without delay.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. Burr", followed by a long horizontal line extending to the right.

Geoffrey Burr  
Vice President, Federal Affairs

Of Counsel: Maurice Baskin, Esq.  
Venable LLP  
575 7<sup>th</sup> St., NW  
Washington, D.C. 20004

Cc: Hon. Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, OMB  
Hon. Pearlie S. Reed, Assistant Secretary for Administration, Departmental Management,  
USDA