



Acquisition Reform Working Group

April 20, 2015

The Honorable John McCain
Chairman

The Honorable Mac Thornberry
Chairman

The Honorable Jack Reed
Ranking Member

The Honorable Adam Smith
Ranking Member

Armed Services Committee
228 Russell Senate Office Building
Washington, DC 20510

Armed Services Committee
2126 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairmen McCain and Thornberry and Ranking Members Reed and Smith:

On behalf of the undersigned members of the Acquisition Reform Working Group (ARWG), we write to bring to your attention and express our opposition to the Fair Pay and Safe Workplaces Executive Order (Executive Order 13673) issued by the President on July 31, 2014¹, and to request that your committees undertake a thorough review of the Executive Order.

Industry supports the laudable goal of Executive Order 13673 (E.O.) to ensure that only those contractors who abide by applicable labor-related laws and regulations are permitted to receive federal contracts. Such a goal not only serves to ensure fair and equitable treatment of employees, but also maintains and preserves equality among offerors in the competitive federal public sector market. The E.O.'s own recognition, however, that the "vast majority of federal contractors play by the rules,"² raises serious questions about the necessity of such a sweeping and significant new compliance regime. While we recognize that the implementation of the E.O. will have government-wide effect, its impact on DoD's acquisition process and outcomes is significant.

A major goal of the House and Senate Armed Services Committees and the Department of Defense has been to identify and remove non-value added regulatory burdens and barriers to entry into the federal marketplace and execute needed reforms to streamline the acquisition process. We strongly believe that Executive Order 13673 will severely undermine those efforts by adding several layers of new,

¹ Executive Order, Fair Pay and Safe Workplaces, available at <https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>.

² Fact Sheet: Fair Pay and Safe Workplaces Executive Order, available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>.

costly, and unnecessary burdens on businesses currently providing, or seeking to provide, goods and services to the Department of Defense (DoD).

The E.O. requires that federal procurements over \$500,000 include a provision in the solicitation that every prospective contractor (offeror) must represent whether there have been any determinations or judgments rendered against the offeror within the preceding three-year period for violations of 14 enumerated federal labor laws, regulations and their equivalent state statutes. Based on the information received from offerors, government contracting officers must make a determination about each offeror's present responsibility, thus determining whether the offeror is suitable for a contract award. Furthermore, prime contractors must require their subcontractors and suppliers at all levels of the supply chain to disclose any of their labor-related findings to the prime contractor and the prime contractor must evaluate any disclosures and make a determination regarding whether their subcontractors are "presently responsible sources."

The E.O. directs the Department of Labor (DoL) to provide certain definitions of key provisions and additional guidance regarding the implementation of the E.O. It also requires federal agencies to identify agency personnel to serve as "Labor Compliance Advisors" (LCA) to assist contracting officers with responsibility determinations. The E.O. also directs the FAR Council to develop a proposed rule to implement the E.O. after or contemporaneous with any DoL regulations or guidance. It is our understanding that the issuance of the DoL guidance and the FAR Council proposed rule are imminent. Because of the urgency with which this E.O. is being treated, this letter does not include detailed comments on all elements of the E.O. or the proposed DoL guidance or the FAR proposed rule that will implement all of its provisions. We plan to comment further and in a more detailed fashion once those proposals or others addressing this E.O. are offered for comment. We wish to call to your attention the concerns industry has with the construct of this E.O., the potential ramifications we believe that the government will experience and the significant undermining effect this will have on your efforts to reduce non-value added compliance burdens and bureaucracy in the acquisition process and to sustain the government's access to the latest innovations and technologies.

First, DoL has long-standing authority over labor compliance generally, and such authority requires them to routinely conduct investigations of contractors' compliance with federal labor laws. Hence, much of the relevant information the E.O. seeks to collect from contractors using a new data collection regime is, in fact, already in the government's possession and thus adds another unnecessary process layer to federal contracting. In addition, the E.O. ignores existing statutory and regulatory remedies available to the government to address noncompliant contractors. With respect to federal contractors, such remedies include criminal prosecutions, civil actions, substantial fines, liquidated damages, contract terminations, and suspension or debarment. These authorities include the ability of DoL to independently initiate a suspension or debarment review against vendors found to be in serious violation of statutes and regulations governing labor and employment. The E.O. fails to acknowledge the existing role of the DoL in the administration of labor law or that the existing remedies even exist, or that they have been shown to be ineffective. Based on the President's own assertion that the vast majority of federal contractors play by the rules, it is reasonable to conclude that the existing deterrents and the current system for reviewing and adjudicating potential violations of labor laws are working effectively, and as designed.

Second, the E.O. may inadvertently create a "blacklist" that acts to informally, and without due process, limit or exclude otherwise responsible and ethical offerors from competing for federal contracts. As a process matter, the E.O. requires a pre-award assessment of labor compliance, conducted via a

solicitation representation, on a proposal-by-proposal basis by a CO for every contract contemplated for award by the federal government. For companies that bid on multiple opportunities, these assessments are a large part of the responsibility determination process, and there is a high risk that different COs will make assessments about a contractor's labor record over the prior three-year period and come to different conclusions after reviewing identical information. Although the E.O. attempts to address the issue of consistency with the creation of the Labor Compliance Advisors and the DoL guidance, the transactional environment is so dynamic and fast-moving, and the tendency is to make judgments in that environment about complex data without the necessary predicate subject matter knowledge, a contractor could be determined to be "presently responsible" by one CO, but, based on identical information, be found "not presently responsible" by another CO. This potential inconsistency creates enormous risk and uncertainty for both the government and contractors. Alternatively, once one CO makes a determination that a contractor is not a responsible source, based on such an idiosyncratic and subjective analysis, it is reasonable to conclude that other COs will come to the same conclusion to exclude a source as "not a responsible offeror."

Contracting officers will also be under enormous pressure to conform to the "advice" of the LCA's even if it is not in the best interest of the taxpayer and they will be expected to avoid inconsistency or the heightened risk of increased scrutiny from a LCA, their superiors or the oversight community. The consequences of being inadvertently excluded or found to be not responsible for the suppliers and small businesses in the prime contractor supply chain could be severe because there is no carve-out or exception for small businesses or commercial items generally, or in the alternative, limited to the first tier. Thus, like their partner prime contractors, subcontractors will also be scrutinized for responsibility as part of the determination for the prime award. When such a company is "blacklisted," the prime will not only cease to consider using that vendor for the award under consideration, but it is almost certain that those "tarred" companies will be made ineligible for all other current prime contracting activity or transactions within the supply chain. Such an exclusion would quickly become public information across the industrial base and the ripple effect from exclusion would likely spread across the entire federal market. Hence, a contractor or supplier would face a "de facto" debarment without being afforded the due process that is required under existing suspension and debarment regulations in FAR Part 9.

Third, the E.O. requirement that prime contractors mandate subcontractor reporting of labor law violations will be very costly and exceptionally onerous, if not impossible, for prime contractors to administer, and creates a number of unintended consequences related to prime and subcontractor relationships. Subcontractor reporting adds a significant level of complexity to the information collection and related mitigation processes outlined in the E.O. Prime contractors cannot, and should not, be tasked with ensuring the labor compliance reporting of their subcontractors and their entire supply chain on a continual or ongoing basis, especially when non-compliance may be entirely unrelated to the federal contract under which the prime and subcontractor are partnered. Once again, the E.O. shifts the burden of labor law enforcement onto federal prime contractors by requiring them to perform a set of activities, including compelling an information disclosure and engaging in the corrective actions of subcontractors and suppliers designed to remediate their alleged non-compliance. Labor law enforcement is not a function the federal government should transfer to its prime contractors via the acquisition process.

The costs of this labor reporting and compliance burden will be astronomical. Most federal contractors have large supply chains with a commensurate number of subcontracting agreements numbering in the tens of thousands. A six month reporting and review cycle as contemplated in the E.O. of thousands of subcontractors, even with the minimal due process requirements it includes, is not scalable to the

process currently envisioned and thus not executable on a timely basis, even where only a small number of subcontractors report violations of the E.O.'s covered labor laws. Hypothetically, if one-third of a large company's supply chain (say 5,000 suppliers or subcontractors) has even a minor violation of a covered federal or state labor law, or believes out of an abundance of caution that it is required to report the status of every allegation, that could be cause for the prime contractor to review thousands of cases and potentially trigger similar reviews by both the CO and the LCA. Not only do prime contractors not have the compliance and manpower resources to conduct these type of enforcement reviews, or the legal expertise at all levels of the subcontract transactional process to distinguish an alleged violation from a civil judgment or an administrative merits determination, DoD would also be overwhelmed by responsibility reviews of even minor cases that would ultimately need clearance *prior to award* for the CO to conclude that a subcontractor and contractor are responsible parties.

Fourth, in order for the E.O. to be implemented in a workable manner, federal agencies would have to hire a significant number of new staff to serve as (and support) the LCAs. Within DoD alone, the LCA would be required to support the activities of approximately 24,000 COs and hundreds of contracting offices. Additionally, the LCA would need significant additional resources to support prime contractors seeking guidance about whether potential subcontractors' violations warrant a decision by the prime contractor not to award a subcontract to the entity. Even if the federal government could somehow ramp up its capacity to provide LCAs and related resources to the federal agencies and prime contractors, a significant amount of time would be needed to effectively train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. The cost of hiring and training new personnel will be substantial, not to mention the delays and interruptions in performance that could reasonably be expected to occur pending responsibility determinations. Ironically, ARWG notes that the recent OMB implementation memo describing the LCA selection process within the executive agencies dated March 5, 2015, inexplicably cites that acquisition knowledge or experience is not required, which will undoubtedly create increased risks for all parties, as set forth above, if such a hiring approach is implemented.

Lastly, the E.O. will subject contractors to significant risks, including increased liability associated with potentially unfounded allegations of false claims or false statements because of inaccurate reporting or representation of compliance under the E.O. Rather than risking such liability and complying with burdensome and costly requirements of the E.O., some companies—particularly non-traditional DoD suppliers and commercial-item vendors—will simply choose to exit the government marketplace. The E.O. will also discourage new entrants from coming into the federal marketplace because of the significant business risks and extraordinary process and legally risky requirements not present in the commercial sector. Ultimately, this only hurts DoD and undermines the Committees' focus to create and sustain access to companies that may be able to offer innovative technology and valuable solutions for the taxpayer and DoD.

In closing, we strongly believe that these and other cascading negative ramifications of the E.O. would inject needless risk and cost into the federal acquisition process, particularly when the "vast majority of federal contractors play by the rules." We request that your committees undertake a review of the E.O. to determine if it is a necessary complement to existing labor laws, if its approach is the most efficient manner of reasonably maximizing compliance, the extent to which it duplicates reporting of existing government data, the impact it would have on the DoD procurement process, and the associated risks and costs that would be borne by DoD and the defense industrial base. We also request that your Committees consider options for delaying implementation of the E.O. until such impacts are fully understood and alternative solutions are explored.

Sincerely,

Aerospace Industries Association
American Council of Engineering Companies
Associated Builders and Contractors, Inc.
The Associated General Contractors of America
The Coalition for Government Procurement

Financial Executives International
IT Alliance for Public Sector
National Defense Industrial Association
Professional Services Council
U.S. Chamber of Commerce

cc:

The Honorable Thad Cochran
Chairman, Defense Appropriations
Subcommittee
U.S. Senate

The Honorable Rodney Frelinghuysen
Chairman, Defense Appropriations
Subcommittee
U.S. House of Representatives

The Honorable Richard Durbin
Ranking Member, Defense
Appropriations Subcommittee
U.S. Senate

The Honorable Peter Visclosky
Ranking Member, Defense
Appropriations Subcommittee
U.S. House of Representatives

Members of the Senate Armed Services Committee
Members of the House Armed Services Committee