



VIA ELECTRONIC SUBMISSION

November 1, 2022

Robin Carnahan
Administrator
General Services Administration
1800 F Street NW
Washington, DC 20405

Re: FMR Case 2022–02: GSA’s Final Rule, Federal Management Regulation; Soliciting Union Memberships Among Contractors in GSA-Controlled Buildings (RIN: 3090-AK54)

Dear Ms. Carnahan:

Associated Builders and Contractors submits the following comments to the General Services Administration, in response to the above-referenced final rule published in the Federal Register on Sept. 2, 2022, at 87 Federal Register 54166.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC’s membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.¹

The vast majority of ABC’s contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy’s findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)² and industry workforce employment (more than 82% of the construction industry is

¹ For example, see ABC’s 32nd Excellence in Construction Awards program from 2022: <https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167>.

² U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

employed by small businesses).³ In fact, construction companies that employ fewer than 100 construction professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.⁴ The vast majority of small businesses are not unionized in the construction industry.

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC members won 57% of the \$128.73 billion in direct prime construction contracts exceeding \$25 million awarded by federal agencies during fiscal years 2009-2021. Winning ABC member federal contractors provided subcontracting opportunities to large and small contractors in the specialty trades and delivered taxpayer-funded construction projects safely, on time and on budget for their federal government customers.

ABC's 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. Fair and open competition is critical as more than 87% of the U.S. construction industry workforce do not belong to a union.⁵

Background

GSA's final rule will alter the Federal Management Regulation to exempt labor organizations representing or seeking to represent contractors working in federal government facilities from the general prohibition against soliciting, posting and distributing materials in or on federal property under the jurisdiction, custody or control of the GSA.

In essence, union organizers would be given the ability to target employees of private sector contractors working for the federal government or its agencies in or on GSA-controlled

³ 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

⁴ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁵ See U.S. Bureau of Labor Statistics Table 3, Union affiliation of employed wage and salary workers by occupation and industry, accessed Oct. 4, 2022, available at: <https://www.bls.gov/news.release/union2.t03.htm>.

property to “educate” them on the benefits of organizing, collective bargaining and union membership.

On April 26, 2021, President Joe Biden issued Executive Order 14025, which established the White House Task Force on Worker Organizing and Empowerment.⁶ The work of the task force, which had the stated goal of “[identifying] executive branch policies ... to promote my Administration’s policy of support for worker power, worker organizing, and collective bargaining”⁷ led to a report released on Feb. 7 containing nearly 70 recommendations to promote pro-union policies and practices in the federal government.⁸

The task force’s report includes a recommendation to “ensure union organizer access to private-sector contractors’ employees on federal property.”⁹

In response to the Feb. 7 report, ABC expressed concerns regarding the lack of public involvement with the task force and its recommendation of policies that will restrict fair and open competition and discriminate against nonunion construction workers and businesses.¹⁰

ABC’s Comments in Response to GSA’s Final Rule

The Final Rule Violates the Administrative Procedure Act

In the final rule, GSA argues that it was not required to engage with the regulated community through the notice-and-comment process outlined in the APA, “because this rulemaking relates to agency management or personnel or to public property, loans, grants, benefits, or contracts. This rulemaking relates to both GSA’s agency management and public property, as it involves the internal process of managing conduct on public property by GSA and Federal agencies acting under a delegation of authority from GSA.”¹¹

GSA’s argument ignores the basic intent of this rulemaking. The final rule does not simply alter the agency’s management of its property but fundamentally alters the substantive standards applicable to the employment practices of federal contractors. This is evident in the fact that the policy was specifically recommended by the White

⁶ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/26/executive-order-on-worker-organizing-and-empowerment/>.

⁷ Ibid.

⁸ <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/02/OSEC20220195.pdf>.

⁹ Ibid.

¹⁰ “[White House Union Report Fails to Create Opportunities for All of the Construction Industry](#),” ABC Newsline, Feb. 9, 2022.

¹¹ 87 Federal Register 54168.

House's Task Force on Worker Organizing and Empowerment as a useful tool to help increase unionization across the U.S. workforce. Under similar circumstances, courts have held that Section 553(a)(2) does not exempt agency rulemakings from the requirements of notice and comment before issuance of any final rule.¹²

This rulemaking implements a significant change to the terms of federal contractors' arrangements with the federal government and could potentially dramatically alter the terms and conditions of employment for those contractors' employees. GSA is attempting to gloss over the significance of this rulemaking, but the rule's intent and potential impact is undeniable.

By avoiding the APA's rulemaking process, GSA is choosing not to hear from the regulated community on a significant alteration of the agency's policies. GSA is sidestepping its responsibility under the law and avoiding accountability to stakeholders. As a result of GSA's chosen path to prevent the regulated community from weighing in on this policy change, this rulemaking most likely will be legally challenged.

The federal government should prioritize hearing from the regulated community before issuing significant changes to its policies. The APA was implemented to ensure the government heard from those entities that would be impacted the most by policy changes, but when government agencies choose to ignore that responsibility, bad policy and disastrous results can and will arise.

In addition to the foregoing violations of the APA, the GSA rule violates the APA because it is arbitrary and capricious. The U.S. Supreme Court has repeatedly held that agencies act arbitrarily when they change course without dealing with the important aspects of the problem addressed by the rule they purport to reconsider.¹³ Here, the GSA rule fails to address the injuries to competition, discrimination, increased costs and greater likelihood of delays in construction caused by allowing unions to enter GSA property in order to interfere with contractors' workers by conducting organizing on government premises.

Agency reversals of policy have also been vacated where they rely on factors that they should not have considered, and where they offer explanations for new rules that run counter to the evidence.¹⁴ The GSA rule offers explanations for allowing union organizing on government property that run counter to the evidence. The use of

¹² See *Texas v. United States*, 787 F.3d 733, 766-67 (5th Cir. 2015); *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989).

¹³ See, e.g., *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020); *State Farm*, 463 U.S. at 43 (1983). ("An agency's action is arbitrary and capricious ... where it fails to consider important aspects of the problem.")

¹⁴ *Id.*; see also *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

internally contradictory reasoning also indicates arbitrary action.¹⁵ GSA's rationales for departing from decades of enforcement of the no-union activity on government property contradicts itself.

As the Supreme Court has also held, an agency that purports to be changing longstanding policies, as is certainly occurring here, must also consider costs to regulated parties, as well as the reliance interests of the regulated parties.¹⁶ Government contractors in the construction industry have long relied on the principle of government neutrality in procurement to provide competitive, responsive and responsible bids. The proposed rule upends these longstanding principles without any consideration of the reliance interests of the regulated parties.¹⁷

The Final Rule Will Have a Chilling Effect on Federal Procurement

Based on the evidence outlined above, it is clear that the intent of the final rule is to increase unionization across the U.S. workforce. Because more than 87% of the U.S. construction industry workforce has already made the choice not to join a union, as noted previously in ABC's comments,¹⁸ this rule will create a chilling effect on a significant portion of the industry in deciding whether to partake in the federal procurement process.

The final rule will force nonunionized federal contractors to reconsider participating in government procurements if the risk of interference by union organizers among their workforces outweighs the reward of winning the government contract in question. Further, the rule may expose them to threats of union organizing and disruptive campaigns that may impact the ability of the business to meet their contractual obligations. In response, such businesses may not want to engage in the federal procurement process.

Additionally, GSA claims the final rule will further the goal of EO 14035, Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.¹⁹ GSA bases this claim on an unproven assertion that unions will provide better protection for marginalized groups.²⁰ In reality, this rule directly contradicts the stated goals of the executive order. The harm

¹⁵ See *Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1030 (5th Cir. 2019) (“[T]he agency’s rationales contradict themselves ... and therefore cannot stand.”).

¹⁶ *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (*en banc*).

¹⁷ See also *Tex. Ass’n of Mfrs. v. U.S. Consumer Prod. Safety Comm’n*, 989 F.3d 368, 387 (5th Cir. 2021).

¹⁸ <https://www.bls.gov/news.release/union2.t03.htm>.

¹⁹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/>.

²⁰ See final rule’s preamble: <https://www.federalregister.gov/d/2022-17949/p-17>.

caused by this rule will fall most heavily on federal small business general contractors and subcontractors, many of whom are minority-, women-owned and disadvantaged businesses and employ a diverse workforce. The majority of these firms are not unionized in the construction industry.²¹

As explained, 82% of the construction firms across the nation are small businesses with fewer than 10 employees, while more than 82% of the construction industry is employed by small businesses; the rule will clearly have a harmful effect on a significant segment of the construction industry.

These small businesses will be forced out of the federal procurement process due to their legitimate fear of the consequences of this final rule. Therefore, the adverse economic impacts of this rule on small businesses will directly contravene Congress's repeatedly expressed intent to promote and encourage federal procurement to small businesses.²²

Unfortunately, this rule continues a trend of policies that have reduced construction industry small business participation in federal contracting. Small businesses have suffered a 60% decline in the number of firms awarded federal construction contracts from 2010-2020, according to SBA data.²³

The federal government should promote inclusive policies that welcome all of America's construction industry to compete to rebuild our nation's infrastructure, increase accountability and competition and reduce waste and favoritism in the procurement of public works projects. This means that the government should not implement policies that unreasonably benefit one stakeholder at the expense of another.

Final Rule Includes Significant Ambiguities

The final rule, which went into effect immediately on Sept. 2, does not provide necessary clarification to the regulated community. It leaves many unanswered

²¹ [Union Construction's Racial Equity and Inclusion Charade](#), Stanford Social Innovation Review, Travis Watson, June 14, 2021. See also [Why Are Philly's Construction Unions So White? Six Takeaways From Our Reporting On Racism In The Building Trades](#), The Philadelphia Inquirer, Sept. 1, 2022.

²² See discussion in [An Overview of Small Business Contracting](#), Congressional Research Service, updated July 29, 2022.

²³ Chart available at: <https://thetruthaboutplas.com/wp-content/uploads/2022/09/60-percent-decline-of-small-businesses-awarded-federal-construction-contracts-2010-to-2020.png>. The data were prepared by an SBA economist who said, "The charts represent data on vendors who have received obligations. The definition of 'small' comes from the contracting officer's determination when the contract was awarded. The COs follow the NAICS size standards." Data are from FPDS that can be publicly accessed through sam.gov: <https://sam.gov/reports/awards/standard>.

questions, creating uncertainty and instability among the federal contractor community.

Questions include:

- 1) What does “enable access to property” mean?
- 2) What is the responsibility of the contractor regarding access?
- 3) Does this final rule apply to subcontractors?
- 4) What does it mean that union organizers will be able to “educate” private sector contractors?
- 5) Does it include distributing materials and/or taking time to talk to employees?
- 6) Will this be disruptive to the work schedule?
- 7) Do contractors have to compensate employees for time spent speaking to union organizers?
- 8) Will contractors need to factor it into the bid?
- 9) What if the work product is impacted or contract terms cannot be met as a result of these activities?

These are all questions that should have been asked and answered during the notice-and-comment process. That process would have ensured GSA was able to produce more clear guidance for the regulated community.

This lack of clarity will force contractors or bidding employers to hire lawyers to navigate the uncertainties and ambiguities within the final rule, such as what the employer can and can't do or say if union organizers come to the worksite. The uncertainty created by GSA's misguided, uninformed final rule will make employers question if engaging in the federal procurement process is a worthwhile endeavor.

Conclusion

For the reasons described above, ABC urges GSA to withdraw this final rule and not allow exceptions for labor organizations representing or seeking to represent contractors working in GSA-controlled property to access the property.

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

Respectfully submitted,



Ben Brubeck
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