August 26, 2015

Ms. Tiffany Jones
Office of the Secretary
U.S. Department of Labor
Room S-2312
200 Constitution Avenue, NW
Washington, DC 20210

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

Filed electronically at http://www.regulations.gov

RE: Proposed Guidance and Regulations to Implement Executive Order 13673 on Fair Pay and Safe Workplaces:

- ZRIN 1290–ZA02 (Docket DOL–2015–0002, Guidance for Executive Order 13673, Fair Pay and Safe Workplaces)
- RIN 9000–AM81 (FAR Case 2014–025; Docket No. 2014–0025; Sequence No. 1, Federal Acquisition Regulations; Fair Pay and Safe Workplaces; Proposed Rule)

Dear Ms. Jones and Ms. Flowers,

On behalf of our coalition of 4.7 million women business owners and 78 organizations, Women Impacting Public Policy (WIPP) is pleased to submit comments on the proposed regulations implementing Executive Order 13763 on Fair Pay and Safe Workplaces ("the Order"). As a leading advocate for women entrepreneurs engaged in or considering entering the federal marketplace, we are concerned about the effects of these proposals on women-owned businesses. These comments address both the Department of Labor (DOL) Proposed Guidance and Federal Acquisition Regulation (FAR) Proposed Rule, and are being cross-filed with both parties.

WIPP supports efforts by the federal government to rid the contracting environment of businesses with a history of abusive and neglectful violations. In doing so, the government levels the playing field for the millions of businesses playing by the rules. The Executive Order and proposed implementation, however, do not ensure that such fairness will be the result of a burdensome and under-resourced system that negatively impacts businesses. Moreover, the system appears to work outside already existing efforts to eliminate bad actors through suspension and debarment procedures.

Background

In response to reports of companies with labor violations continuing to win government contracts, the President issued Executive Order 13673, entitled *Fair Pay and Safe Workplaces* on July 31, 2014.[1] In it, the President required DOL and the FAR Council to develop regulations requiring federal contractors and subcontractors to disclose violations of 14 federal labor laws and equivalent state laws from the past three years. These violations include: administrative merits determinations, civil judgments, arbitral awards or decisions rendered against them. The Order created the position of Labor Compliance Advisor (LCA) at each agency to assist contracting officers and agency personnel with interpreting the requirements of the Order and gauging the severity of violations.

The Order also required contractors to issue employees documents ("wage statements") that include details of pay information (e.g. hours worked, overtime, pay, deductions, etc.). Contractors must also notify overtime-exempt employees and independent contractors of their status in writing. Finally, the Order prevents contractors from compelling employees to arbitrate claims arising out of Civil Rights violations, and sexual assault or harassment incidents unless the employee voluntarily consents to arbitrate claims after the dispute arises.

Each of these requirements applies to subcontractors through "flow-down" provisions, though the Order included exemptions for smaller contracts and subcontracts. Labor violation reporting and wage statement and employment status requirements would apply to companies with contracts or subcontracts valued over $500,000, while pre-dispute arbitration prohibition would only apply to companies with contracts or subcontracts valued over $1,000,000.

On May 28, 2015, DOL and the FAR Council ("the agencies") issued separate, but related regulations to advise agencies and contracting officers respectively on the implementation of this order. Both DOL and the FAR Council acknowledge additional proposed regulations will be necessary to implement this order, but identify the possibility that the regulations discussed in this comment may be enforced prior to the release of additional proposed regulations.[2]

Overview of the Proposed Regulations

In the proposed regulations, the agencies detail how the procurement process would continue in light of the Order. Additionally, the regulations further define the types of labor violations to be reported and provide context to determine the severity of those violations. Finally, the regulations close with implementation requirements for the wage statement provision and pre-dispute arbitration prohibition.

[1] Exec. Order No 13673, 79 Fed. Reg. 45309 (Aug. 5, 2014)

[2] Department of Labor, 80 Fed. Reg. 30579 (proposed May 28, 2015).

Prospective federal contractors would need to declare labor violations from the past three years in the System for Award Management (SAM). Like all certifications and representations, SAM-listed violations must be current prior to submitting bids or proposals as well as required to be updated semi-annually throughout the life of a contract. As a part of any new contract proposal, contractors would respond if they did or did not have violations that qualified in the past three years.

During an initial evaluation, contracting officers would be notified of a prospective contractor's labor violation, without any additional detail or explanation. Only if the contractor were likely to win an award would the contracting officer complete a responsibility determination, which would include details like remediation, mitigating factors, or even that the violation has not been adjudicated.

It is in this phase a contracting officer would utilize the newly created Labor Compliance Advisor (LCA), to measure the egregiousness of violations, with particular focus on "serious", "willful", "repeated", and/or "pervasive" violations. In consultation with the LCA, contracting officers are to determine if a contractor is responsible despite their violations on a case-by-case basis.[3] Should it be warranted, Suspension and Debarment officials would be notified.[4]

Post award, a contractor must report updates every six months, including updates on the labor violations of any subcontractors with contracts greater than $500,000. This includes reporting affirming judgments of already reported violations, or new decisions against them stemming from previously reported violations. [5]

The regulations further define administrative merits determinations, civil judgments, arbitral awards or decisions rendered against them, and provide examples of interpreting each as "serious", "willful", "repeated", and/or "pervasive" violations.

Concerns with Regulations as Proposed

In review of these regulations WIPP has the following concerns:

Incomplete Regulations Could Cost Businesses

As noted in the regulations, the agencies' proposals do not include significant portions of the implementation of the Executive Order.[6] Notably, they do not include details on state equivalent laws, also omitting the eighth category of administrative merit determinations. Of greater concern is an apparent decision to finalize and implement these proposed regulations possibly prior to the identification of state equivalent laws. Specifically, the DOL preamble on OSHA-approved State Plan violations notes that reporting requirements

[3] *Id* at 30582.

[4] Federal Acquisition Regulation, 80 Fed. Reg. 30550 (proposed May 28, 2015).

[5] Department of Labor, 80 Fed.Reg. 30581 (proposed May 28, 2015).

[6] *Id* at 30574(noting that additional guidance on the state equivalent of certain federal labor laws will not be published until a later date).

of those violations "become effective, even if the Secretary has not published final guidance identifying other State law." [7]

While phasing in requirements is often a regulatory strategy used to lessen the burden on companies, this language suggests multiple implementations requiring business owners to review their histories, likely with legal assistance, multiple times. For women entrepreneurs, doubling efforts to compare company history to the list of violations is an inefficient use of resources. In WIPP's view, should these proposals become final, we recommend only one implementation, which should include all state laws covered by the Executive Order.

Merit Determination is Pre-Adjudication

In its current construction, the rule also may punish contractors and subcontractors for violations that have not yet been proven or finally adjudicated. As noted in the DOL proposed rule, "Administrative merits determinations that must be reported…include and administrative merits determination that the contractor or subcontractor is challenging, can still challenge, or is otherwise subject to further review."[8] In these cases specifically, judicial review is imperative because appeals courts have reversed National Labor Relations Board decisions approximately 30% of the time between 1974 and 2013.[9]

A similar example is a common practice of DOL issuing WH-56 determinations for back pay when contract clauses and wage determinations are left out of agency contracts. Typically contractors agree to those findings despite unpaid wages occurring through no fault of the contractor. Nonetheless, a labor violation would be listed for that contractor.

DOL responds to these issues, noting that contractors have the opportunity to describe ongoing adjudication or mitigating circumstances. That is, however, only in the responsibility determination phase of the contract. WIPP is concerned (see next) the initial disclosure will influence contracting officers to refrain from awarding a contract before the contractor has the opportunity to set forth any mitigating circumstances. Thus, including merit determinations that are not entirely settled – and can eventually be set aside – can negatively impact companies with clean records.

Negative Influence of Initial Disclosure

WIPP is concerned that simply having violations on record – some which may not be fully adjudicated (see above) – will "blacklist" companies without the later opportunity to offer mitigating circumstances or remediation. With dwindling procurement resources, contracting officers may elect to avoid companies with any disclosed violations, despite the intent of the order to only bar violations of a certain severity. The proposed system

[7] *Id* at 30579.

[8] *Id* at 30580.

[9] NLRB Appellate Court Decisions, 1974-2014, available online at https://www.nlrb.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2013

undermines the ability to compete for a contract even if it is eventually apparent that the contractor was not in violation of the labor law.

The FAR Council proposed rule states that contracting officers must consider initial disclosures of violations.[10] Both agencies expect the inclusion of "minimally impactful or inadvertent violations" in initial disclosures, but do not expect them to be considered in responsibility determinations. In practice, however, this may not be the case.

Subcontractor Reporting Issues and LCA Burdens

The proposed rule requires subcontractors with contracts over $500,000 to report violations in a similar manner. The onus, however, is now on the prime contractor to determine responsibility of prospective subcontractors. This will be particularly difficult for smaller businesses, including the majority of women-owned federal contracting companies, which will have to collect information regarding their subcontractors' compliance with not only federal labor laws, but also state labor laws in all of the states the subcontractor operates. Many businesses do not have the administrative capacity to collect this information, which will ultimately limit access to the federal marketplace for small businesses.

To aid in this, DOL is considering allowing subcontractors to consult with DOL in addition to setting up a department to address questions from prime contractors on responsibility determination of subcontractors. WIPP is concerned about a lack of resources for timely responses. The agencies note that determinations not made within three days, allow the contractor to consider the subcontractor responsible, despite violations.[11] In our view, this undoes the efforts of the Order. Given the volume of subcontractors engaged in the federal marketplace, WIPP is unsure DOL will be regularly responding in the given timeline. The three-day timeline is identical to the time proposed for LCAs who WIPP is also concerned will be overburdened.

WIPP is concerned the infrastructure does not currently exist to support the implementation of the LCA position. LCAs will need extensive training on all 50 states' labor laws, and training on effective mitigation techniques implemented by contractors. The LCA must consider (i) whether any violation is considered "serious, repeated, willful, or pervasive"; (ii) the number of violations; (iii) remedial measures taken by the contractor; (iv) whether the contractor is adhering to labor compliance agreements or remedial measures; (v) whether the contractor is negotiating in good faith a labor compliance agreement; and/or (vi) other factors as the LCA sees fit. The contracting officer will consider the LCA's determination when making their decision to award or not award a contract. It is reasonable to expect that all contracting officers will agree with the first LCA to avoid inconsistency or having to justify a different conclusion. Therefore, the first LCA will ultimately make a decision about whether or not a contractor can do business with the government.

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[10] Federal Acquisition Regulation, 80 Fed. Reg. 30549 (proposed May 28, 2015).

[11] *Id* at 30556.

Ongoing Regulation of Federal Contractors

This proposed rule furthers an emerging and disconcerting trend of new rules and regulations that specifically target federal contractors. Earlier this year, the Department published a final rule to implement the provisions of Executive Order 13658, which raised the minimum wage solely for workers on federal contracts. This proposed rule will further that trend. The burden on federal contractors will continue to grow and eventually encompass new regulations regarding sick leave.[12] This will make contracting with the federal government more onerous, particularly for small businesses.

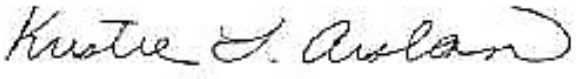
Conclusion

Others in the contracting community point to additional concerns with the construction of these regulations. In some cases, the contracting officer and LCA could utilize this authority to leverage extra-judicial remediation for violations. The comments are unclear about applying these requirements entity-wide for business that engage in both federal and commercial business.

In our view, much of this could be accomplished through strengthening the suspension and debarment procedures are already in existence. Currently, government contractors can face suspension and debarment for a wide variety of transgressions. Incorporating safe workplaces into that well-established system is an alternative to creating an enormous reporting burden that may not ultimately drive bad actors from the contracting marketplace.

Finally, as has been noted, this exacerbates pressure on federal contractors beyond the norms of the commercial sector. Doing so, will continue to push small and innovative firms away from the government marketplace. Women entrepreneurs represent one of the fastest growing segments of the American economy. At an opportunity to bring their skills, products and services to government agencies, the procurement process is creating barriers. Thank you for considering these comments.

Sincerely,



Kristie Arslan

Executive Director
Women Impacting Public Policy

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[12] Jonathan Weisman, *Obama Drafts Order on Paid Sick Leave for Federal Contractors*, The New York Times, Aug. 5, 2015 *available* at http://www.nytimes.com/2015/08/06/us/white-house-drafts-executive-order-on-paid-sick-leave-for-federal-contractors.html.