August 25, 2015

General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Hada Flowers
1800 F Street, N.W., 2nd Floor
Washington, D.C. 20405

Subject: FAR Case 2014-025 Fair Pay and Safe Workplaces

Dear Ms. Flowers:

Thank you for the opportunity to provide comments on the proposed rule amending the Federal Acquisition Regulation ("FAR") to implement Executive Order ("EO") 13673, Fair Pay and Safe Workplaces.

The Coalition for Government Procurement ("the Coalition") is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for a significant percentage of the sales generated through General Services Administration ("GSA") contracts including the Multiple Award Schedules program. Coalition members are also responsible for many of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium, and large business concerns. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

I. Reporting Burden for Contractors

Implementation of the Fair Pay and Safe Workplaces EO, as described in the FAR Council proposed rule and the Department of Labor ("DOL") Guidance, would impose a significant increase in compliance and reporting burdens for Government and industry—burdens that far exceed identified labor compliance issues with Federal contractors as a whole. As noted in the White House Fact Sheet on EO 13673, "[t]he vast majority of federal contractors have clean records" and "the vast majority of companies play by the rules." The data reporting regime currently proposed is an extreme response to the identified problem of a limited number of Federal contractors that regularly fail to comply with labor laws. As the EO directs, the FAR Council should "minimize to the extent practicable, the burden of complying with this order for

Federal contractors and subcontractors and in particular small entities, including small businesses." The Coalition's comments are intended to provide the FAR Council with recommendations to meet this goal maximizing the use of already existing controls within the Federal procurement system.

The Coalition is concerned that, as proposed, the labor reporting requirements are overly broad in scope, redundant with already existing requirements, discourage businesses of all sizes from participating in the Federal market, reduce competition, and increase costs for taxpayers. The broad scope of the reporting risks a substantial overload of information for both the Government and contractors that could slow contract awards and the delivery of mission-critical services and products to Federal agencies. Further, these massive labor reporting requirements would be duplicative of existing disclosures that contractors already perform today. The additional compliance burden will impact both small and large businesses. It will likely discourage small businesses from entering into potential agreements whereby they may become a subcontractor. Large companies that provide mission-critical services and products to Federal agencies may flee the Federal market, negatively impacting rates of competition for government contracts. Lastly, the broad scope and complexity of the reporting will increase costs for contractors—costs that will inevitably be covered by taxpayers in the form of higher prices for products and services purchased by the Government.

Scope of the Burden

The proposed rule would add a new subpart to the FAR, *22.20 Fair Pay and Safe Workplaces*, that would proscribe disclosure requirements and responsibilities for contractors and the Government in accordance with EO 13673. For contractors, disclosures would be required in response to solicitations valued at over $500,000 if within the preceding three-year period, any administrative merits determinations, arbitral awards or decisions, or civil judgments (as defined by the DOL Guidance) had been rendered against them under the following:

- Fair Labor Standards Act
- Occupational Safety and Health Act
- National Labor Relations Act
- Americans with Disabilities Act
- Family and Medical Leave Act
- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act
- Davis-Bacon Act
- Service Contract Act
- Section 503 of the Rehabilitation Act
- Vietnam Era Veterans' Readjustment Assistance Act
- Migrant and Seasonal Agricultural Worker Protection Act

- Executive Order 11246 (Equal Employment Opportunity)
- Executive Order 13658 (Contractor Minimum Wage)

Disclosures would also be required for a list of "equivalent state laws" that for now include OSHA-approved state plans. According to the proposed rule and DOL Guidance, the list of state laws will likely be extended even further in a subsequent proposed rule. The reporting requirements related to all of these statutes and executive orders must be updated every six months throughout the life of any awarded contract. In addition to the biannual update, contractors must do the same disclosures every time they respond to a solicitation valued at more than $500,000. For the government's most active service and product contractors, this could be a continuous reporting exercise throughout the year.

Given the broad scope of the covered Federal statutes/executive orders and equivalent state laws, contractors will have to make significant investments to deal with the complexity of complying with the disclosure requirements. In addition to understanding the various statutes and executive orders, contractors will need to master the definitions and terminology outlined in both the FAR and the DOL Guidance. In support of the new requirements, a new bureaucracy will likely be created which includes advisors, at an unspecified cost, to counsel contracting offices, contractors, and subcontractors on the intricacies of the new rules.

Materiality

As discussed, the proposed rule encompasses any civil judgment, administrative merits determination, or arbitral award or decision, as defined in the DOL Guidance. The broad definition of those terms may prove problematic in practice, both for Government and industry, in terms of the burdens imposed by the rule. According to the Guidance, an administrative merits determination would include notices and findings that are not yet final and determinations that are not the result of an adversarial or adjudicative proceeding. *See* DOL Guidance at 21-22. A complaint by an enforcement agency would constitute a reportable violation. *See id*. at 22. Contractors thus will be required to provide a breadth of preliminary information that contracting officers will need to consider, even when some portion of that information may never result in any conclusive finding that the contractor, in fact, has violated any labor law. These expansive disclosure obligations, coupled with the prospect of significant liability for a failure to disclose (such as the potential treble damages under applicable civil fraud laws, discussed on pg. 9), pose a risk of a substantial overload of information that will be disclosed and thus need to be reviewed.

An alternative this expansive approach would be to limit required disclosures to final determinations involving material violations of labor law. Absent such a materiality limitation, contracting officers (and prime contractors for subcontractors, under the proposed rule) may be required to expend considerable effort reviewing alleged violations that ultimately may not be

considered sufficient to pose a responsibility concern. Limiting required disclosures to final determinations that are material would make the review process for contracting officers much more efficient and effective.

Managing the Data

It is not clear from either the proposed rule or the DOL Guidance how the massive amount of disclosed data that the government will receive will be managed when the rule is implemented as expected in late 2015/early 2016. While the proposed rule estimates that only 25,000 contractors will be reporting disclosures in accordance with EO 13673, this number is grossly underestimated. The total number of current contractors for the Federal Supply Schedule alone is 18,368 which accounts for only 10 percent of total Federal procurement spending. The number of contractors reporting labor disclosures, and thus the amount of information to be reported to the Government, will be much greater than contemplated in the proposed rule. Further, the electronic system to be provided by GSA to collect the labor compliance information is not yet available, nor is it clear whether Agency Labor Compliance Advisors (ALCAs) across the Government will be trained and ready to assess the incoming data with contracting officers at the time of the rule's implementation.

There is an associated cost to management of the data for both the Government and contractors. In order for contractors to report the data to the Government, investments must be made in business systems to accommodate the data or in personnel to capture the data manually. These costs inevitably are covered by taxpayers in the form of higher prices for products and services offered to the Government.

The Coalition recommends that the scope of the disclosures be limited to reduce costs and manage most effectively and efficiently the disclosure data that will be reported by contractors. Again, reducing the scope of the disclosures to final determinations of material labor law violations would reduce the amount of data being reported and target the disclosure on information that actually can be used to make responsibility determinations.

Duplication of Effort and Resources

The proposed rule duplicates existing disclosure requirements for Federal contractors under the FAR and other statutes, regulations, and executive orders. In compliance with FAR 52.209-7, when responding to solicitations valued at more than $500,000, contractors with Federal contracts valued at more than $10 million must report in the Federal Awardee Performance and Integrity Information System ("FAPIIS") whether they have had been the subject of any proceedings in the previous 5 years at the Federal or state level that resulted in certain criminal, civil, or administrative dispositions. These disclosure requirements are consistent with the standards set forth in FAR 9.104. DOL also has numerous compliance requirements for

contractors under the Federal statutes and executive orders covered by the proposed rule. Contractors are required to establish extensive programs in compliance with these statutes and executive orders which are implemented through DOL's Office of Federal Contract Compliance Programs ("OFCCP"). Just a few examples include corporate programs tailored to DOL's requirements for hiring veterans per the Vietnam Era Veterans' Readjustment Assistance Act; hiring people with disabilities per Section 503 of the Rehabilitation Act; and ensuring equal employment opportunities in accordance with EO 13672.

The effects of this proposed rule's redundancy are analogous to the effects of other aspects of duplication across government contracting. Consider, for instance, the Coalition's November 16, 2012, letter to OFPP, DoD, and GSA reporting the results of its contract duplication survey of member companies. That survey examined the prevalence and cost impacts associated with the government-wide trend toward such duplication. The Coalition asked MAS Schedule contractors in the survey about their investment in contracts that offer the same or similar products as their GSA Schedule, and 88.5 percent of the survey respondents reported that participating in contracts duplicating what they provide on other contracts added to their administrative costs.

In the market, to the extent that they are not offset in process improvements or other efficiencies, increased costs are manifested in increased prices. It is no different here. The duplicative reporting requirements in the proposed rule would add unnecessary costs to the acquisition system and cause an upward pressure on prices that the Government will pay. In addition, because funding will have to increase and resources will have to be dedicated to overhead reporting and compliance functions, rather than to direct contract performance, there will be a rise in ancillary cost to the Government, as well. Equally as problematic, these additional burdens, although costly for all, could weigh more heavily on the small business community. Ultimately, this duplicative regime risks lower efficiency and increased costs for Government and industry in meeting agency missions on behalf of the American people.

II. Inconsistency with Current Federal Initiatives to Reduce Barriers to the Federal Market for Commercial Item Acquisitions

The proposed onerous reporting requirements run counter to recent Office of Management and Budget and Chief Acquisition Officers ("CAO") Council initiatives to reduce barriers to the Federal market to attract more innovative companies, especially small businesses. A central tenet of the December 4, 2014 memorandum by Office of Federal Procurement Policy ("OFPP") Administrator Rung, *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance*, is "removing regulatory barriers to innovation." In the memo, the OFPP committed to taking steps to "reduce burden in commercial item acquisitions, especially for small businesses." The CAO Council, the Department of Health and Human Services, and GSA are also conducting a National Dialogue to collect ideas from the public to reduce the costs associated

with reporting compliance under Federal awards and improve the efficiency of the procurement process.

Implementation of the proposed rule, however, would have the opposite effect. Rather than removing regulatory requirements for companies that offer commercial items, it would add another unnecessary layer to the regulatory burdens and risk that serve as disincentives to companies considering entry into the Federal market. To the extent that the increased costs of these duplicative regulatory burdens and risks represent a barrier to participating in government contracting, their impact on government cost could be logarithmic, and the Government's access to innovation could suffer. Competition provides the mechanism whereby vendors distinguish themselves based on the value they provide to the customer based on price, quality, and other factors. With reduced competition for government business, the incentive for remaining vendors to differentiate themselves through product improvement and aggressive pricing is weakened.

Implementation of EO 13673 should be established in the context of OFPP's and the CAO Council's broader initiatives to reduce regulatory burdens for commercial item acquisitions and to increase access to innovation. Rather than creating a new subpart to the FAR, *22.20 Fair Pay and Safe Workplaces*, with its own unique requirements, the FAR Council should look to existing provisions such as FAR 52.209-7 to determine whether the disclosures that are already required of contractors cover the requirements set forth in EO 13673. Further, the Coalition recommends that the disclosure requirements be limited to contracts over $500,000 for other than commercial items, thereby excluding commercial item contracts and commercial off-the-shelf (COTS) contracts from the new rule. This limitation would minimize the reporting burden on Federal contractors, as directed by the EO, and lessen the impact on innovative commercial companies that the Government is seeking to attract.

The more that the Government can streamline reporting processes required of contractors, the less burden will exist for innovative commercial companies considering entrance into the Federal market. At a time when the nation faces increasing existential threats, and DoD has stated expressly a critical need to access cutting-edge firms to "achieve dominant capabilities through technical excellence and innovation," reducing the obstacles to the Federal market faced by those firms should be a critical concern guiding the implementation of the proposed rule.

III. Subcontractor Reporting

The proposed rule also requires prime contractors to collect labor law compliance information from subcontractors for subcontracts that exceed $500,000, with the exception of commercial-off-the-shelf contracts. Prime contractors are to assess the disclosed information to determine whether the subcontractor is a responsible source.

The Coalition recommends that the scope of subcontractors subject to labor disclosure and reporting requirements should be consistent with the definition of a first-tier subcontractor in FAR 52.204-10, *Reporting Executive Compensation and First-Tier Subcontract Awards*. Under that clause, a "first-tier subcontract" means "a subcontract awarded directly by the Contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs." Limiting the scope of subcontractors to only those related to a Federal contract on which the prime and subcontractor have partnered would provide numerous benefits. *First*, it would satisfy a primary objective of EO 13673, *i.e.*, to minimize the burden of compliance for Federal contractors and subcontractors, particularly small businesses. *Second*, it would provide consistency for prime contractors that would have to elicit subcontractor reporting for both executive compensation and labor law violation purposes. *Third*, it would make the amount of incoming data for ACLAs and contracting officers to review for responsibility determinations prior to contract award more manageable than under the proposed rule.

The Coalition has significant concerns about the appropriateness of imposing responsibility on prime contractors for subcontractor compliance and the risk to subcontractors arising from the exercise of that responsibility. We recommend the FAR Council's proposal allowing subcontractors to report information about violations directly to DOL. Direct reporting could alleviate a number of concerns, including the following:

1. Prime contractors simply do not have the resources in place to review subcontractor disclosures on labor law violations, determine in which situations the subcontractor has violated Federal and/or state labor laws, and render a responsibility determination.

2. Serious confidentiality concerns are raised by the prospect of requiring subcontractors to disclose labor violations directly to prime contractors. Business relationships between contractors are based on the requirements of a specific contract. A prime contractor and a subcontractor under one Federal contract also could be competitors against each other for other contract opportunities. Therefore, the disclosure of compliance violations could provide an unfair competitive advantage or even fuel protests under future procurements.

We also have questions whether it is appropriate to allow prime contractors to make their own determinations of responsibility should the DOL fail to provide guidance within 3 business days. The FAR Council should consider and address the following:

1. If the prime contractor is acting for the Government and affecting a subcontractor's rights, should a mechanism be provided for subcontractor recourse in the case of a perceived erroneous decision?

2. Subsequent to the prime contractor's determination, should the DOL issue a determination inconsistent with the prime contractor's determination, how would the DOL's determination be implemented *vis-à-vis* the existing acquisition?

Thus, although the Coalition supports having subcontractors manage their reporting of any labor violations directly to DOL, we believe that the above questions should be answered before allowing for the automatic reversion of DOL's authority to prime contractors when guidance is not provided within 3 business days.

IV. Agency Labor Compliance Advisors

Proposed FAR 22.2004-2 and 22.2004-3 address the role of ACLAs in advising contracting officers of a contractor's integrity and responsibility with respect to Federal and state labor laws. Federal agencies are to designate a senior level agency official to serve as an ACLA in support of that agency's contracting officers. ACLAs are to make recommendations within 3 business days in response to each contracting officer as to a contractor's record of integrity and business ethics.

The Coalition is concerned that the envisioned role of ACLAs to make labor responsibility determinations prior to contract award will undermine the efficiency, balance, and discretion of the contracting officer who, under the law, is vested with the sole discretion to make responsibility determinations. We also are concerned that inserting ACLAs into this process could result in inconsistent responsibility determinations across agencies and ultimately slow the Federal acquisition process overall.

Under FAR 1.602-2, the contracting officer has the responsibility to "ensure performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships." ACLAs have different objectives, specifically, to determine whether labor violations constitute a lack of business integrity or business ethics and to help agency officials determine the appropriate response to address violations. The ACLAs have no responsibility to ensure that companies awarded Federal contracts meet any other compliance requirements, or that the right contractors are in place to deliver best value services and products in response to specific agency needs. Because labor compliance is being called out for specific review and this compliance is the narrow focus of the ACLAs, notwithstanding their sole authority to assess the totality of a vendor's capabilities and determine its responsibility in the context of fulfilling the government's requirements efficiently, contracting officers inevitably will face significant pressure to allow ACLA recommendations to drive what should be a holistic contracting decision.

Inconsistent recommendations among ACLAs are an additional concern. It is possible that in reviewing the same information regarding a contractor's labor violations, ACLAs at different agencies will make conflicting recommendations as to whether any of the reported violations are serious, repeated, willful, or pervasive, and whether suspension or debarment is warranted.

Lastly, from a practical perspective, there are real concerns with the requirement that the contracting officer consult with and receive a recommendation from the ACLA before a responsibility determination can be made. Although the proposed rule states that the ACLA must respond to a contracting officer's request within a 3-day period, this deadline may not be realistic due to the sheer amount of information the ACLA may have to review, especially considering that disclosures are to cover the 14 Federal statutes/executive orders, as well as equivalent laws for the 50 states. A 3-day response period also may be unrealistic for any agencies that have only one ACLA to support all contracting officer requests, especially if the ACLA assignment is in addition to other duties. Slow responses from ACLAs could cause significant delays in contract awards for mission-critical services and products for agencies. The Coalition does not believe that such a significant impact on the Federal acquisition process is warranted, especially given that the Government itself has acknowledged that the vast majority of contractors have clean records related to labor laws[1], and that the proposed rule duplicates existing disclosure requirements.

V. False Claims

Particularly due to its breadth, implementation of the proposed rule could subject contractors to a substantial risk of violation of the civil False Claims Act, 31 U.S.C. §§ 3729-3733. Violation of the Act brings with it the prospect of treble damages and penalties, as well as collateral risks, such as suspension and debarment. Actions often are filed by individuals, such as current or former employees, referred to as "*qui tam* relators" on behalf of the Government. These individuals may share in a portion of the recovery.

Because the proposed rule would implement disclosure requirements, and such disclosures are to be considered in the award of government contracts, contractors are at risk for a claim that they obtained one or more contracts as a result of a failure to disclose in accordance with law, which might subject the contractor to substantial damages claims under the statute.

There is precedent that a prime contractor reasonably may rely on certain disclosures made by a subcontractor in the context of avoiding False Claims Act liability. *See United States ex*

[1] It is worth recognizing that the Government's statement that the vast majority of contractors have clean records related to labor laws is testament to the fact that implementation of the proposed rule will duplicate already existing disclosure requirements for Federal contractors under the Federal Acquisition Regulation (FAR) and other statues and executive orders through the Department of Labor. How else could the Government make such a statement if it already did not possess the labor compliance data for contractors?

rel. Folliard v. Gov't Acquisitions, Inc., 764 F.3d 19 (D.C. Cir. 2014). Notwithstanding that precedent, the proposed rule's imposition of a role for the prime contractor in obtaining labor law violation information from subcontractors poses a risk for liability for the actions of a third party.

Again, one alternative to the currently proposed reporting chain would be to require subcontractors to report directly to the Government and then to call for the subcontractor to make a representation to the prime contractor regarding any DOL response to its disclosure (*see id.*). This approach would have the benefit of making the information available to the Government while reducing the potential liability under the civil False Claims Act to prime contractors for third party information.

VI. Recommendations

Based on the foregoing, the Coalition recommends that the FAR Council:

1. Look to existing FAR provisions to determine whether disclosures already required of contractors cover the requirements set forth in EO 13673, rather than creating a new subpart to the FAR.
2. Limit required disclosures to:
    a. Final determinations that a labor law has been violated that are of a defined material scope or significance, so that considerable effort is not spent reviewing violations that ultimately would not be sufficient to pose a responsibility concern.
    b. Contracts valued at over $500,000 for other than commercial items, thereby excluding commercial item contracts and COTS contracts from the new rule.
3. Proceed with the proposed alternative that would allow subcontractors to report information about violations directly to DOL.
4. Define subcontractors covered by the rule as "first-tier subcontractors" consistent with FAR 52.204-10.
5. Allow contracting officers the discretion to consult with ACLAs in making responsibility determinations rather than imposing on them a mandatory requirement.

Thank you for considering the Coalition's comments in response to the Fair Pay and Safe Workplaces proposed rule. If there are any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

Roger Waldron
President