THE COALITION
FOR GOVERNMENT PROCUREMENT

April 1, 2024s

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FAR Council

General Services Administration
1800 F ST, NW
Washington, DC 20405

Re: FAR Case 2023–021, "Pay Equity and Transparency in Federal Contracting"

The Coalition for Government Procurement (the Coalition) appreciates the opportunity to comment on the Federal Acquisition Regulatory (FAR) Council's proposed rule, "Pay Equity and Transparency in Federal Contracting."

By way of background, the Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Its more than 300 members collectively account for a significant percentage of the sales generated through General Services Administration contracts, including the Multiple Award Schedule program. Members of the Coalition are also responsible for many of the commercial item solutions purchased annually by the Federal Government. These members include small, medium, and large business concerns. The Coalition is proud to have collaborated with Government officials for 40 years in promoting the mutual goal of common-sense acquisition.

As you know, Federal law provides that no provision of law enacted after October 13, 1994, will be applicable to procurement of commercial products or services **unless**, among other things, the FAR Council determines in writing that it would not be in the best interests of the government to exempt contracts for the procurement of commercial products or services from the law. 41 U.S.C. § 1906(b)(2).

The Executive Order that provides the authority for the rule, "Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency," left the FAR Council with broad latitude to choose an approach to pay equity and transparency that is compatible with the Federal market's structure. This provides an opportunity for the Council to recognize the problems that commercial providers will face in complying with the rule and exempt them.

Commercial providers, including small businesses, may decline to participate in the Federal market if the market does not currently represent a large portion of their revenue. Moreover, commercial providers often rely on intricate supply chains, and will face challenges in applying the flow down provisions of the rule. In the commercial market, pay transparency and equity measures are not well-established outside of a small number of jurisdictions. Commercial providers thus face a disproportionate risk of non-compliance from upstream providers who may be unprepared or unwilling to meet the rule's requirements. These concerns could deprive the Federal Government of crucial products and services if commercial providers or their suppliers and subcontractors are unwilling to comply with the rule and withhold their products or services.

For the past thirty years, the Federal Government has declared its intent to conduct itself more like a commercial customer to capture the cost and performance benefits of a broader supplier base. Applying a broad, unclear requirement to all commercial contracts subverts this critical aim of our contemporary acquisition system. Together, we believe that these concerns about regulatory cost, practical challenges, and commerciality argue for narrowing the scope of the rule and exempting commercial item and service providers. Thus, the Coalition recommends that the final rule provide an exception for contracts for commercial items and services, or at a minimum, exempt commercial providers from flowing these requirements down to subcontractors or suppliers.

In addition to our recommendation that commercial contracts be exempted from the rule, we would like to provide the following questions for the Council to consider and answer in its response to public comments:

1. Would this rule apply to all job postings after it is effective, or only those created after the rule's effective date?
2. Can the Council clarify what constitutes a "general description of the benefits and other forms of compensation applicable to the job opportunity," as required by the disclosure described in FAR 22.XX02(c)? Similarly, can the Council clarify what information is required when "specify[ing] the percentage of overall compensation or dollar amount, or ranges thereof, for each form of compensation"?
3. Can the Council clarify the term "application process" in FAR 22.XX02(d)? For instance, does the application process end when an offer is extended or accepted?
4. Since applicants include current employees per FAR 22.XX01, must employers make disclosures for internal moves such as transfers and promotions?
5. FAR 22.XX02(c) references "overtime pay." Should overtime pay be provided in a disclosure as the full amount paid per additional hour worked, or as the rate paid above the base pay rate?
6. Will there be an exception for prospective offerors that have to comply with FAR clause 52.222.46, Evaluation of Compensation for Federal Employees? The FAR encourages successor contractors to retain and fairly compensate incumbent employees and requires the contracting officer to evaluate an offeror's compensation plan. Offerors may need to request incumbent employee compensation details in order to comply with this FAR clause.

7. Will competitors be able to use an offeror's salary range information to more frequently and more successfully bring cost realism and related protests challenging awards?

Thank you for considering this recommendation and our questions. For further discussion, I can be reached at rwaldron@thecgp.org or 202-331-0975.

Sincerely,

Roger Waldron