Fair Pay and Safe Workplaces Executive Order
Summary of Concerns Presented on March 26, 2015

The following reiterates and expands on points made during the meeting on March 26, 2015 between employer community representatives and Administration representatives to discuss concerns with the Fair Pay and Safe Workplaces Executive Order in conjunction with the proposed regulations from the FAR Council and the proposed guidance from the Department of Labor being under review at OIRA.

Overview

The Fair Pay and Safe Workplaces Executive Order (EO 13673) raises a number of concerns ranging from its cost effectiveness and utility, to its duplication of current federal capabilities and violation of the separation of powers doctrine. Our groups represent a broad cross-section of federal contractors and there is widespread agreement among our members that the EO is unworkable in its current form, will seriously disrupt the procurement system, result in unnecessary complexity, delivery delays and escalating costs to the tax payer, and directly undermines the separation of powers doctrine that makes Congress the only branch of government that can create new law.

Compliance with the EO is Not a “Check-the-Box” Exercise

The Secretary of Labor and other proponents of the EO have repeatedly described its reporting requirements as a simple “check-the-box” exercise for federal contractors. However, this fails to grasp the challenges contractors face in making representations about their compliance with a myriad of labor laws and in vetting the labor law compliance of their subcontractors or suppliers. Even in an ideal situation where an employer has had no labor violations over the past three years, checking the box would require that they: 1) have a central, complete, electronic record of their own federal and state violations company-wide over the past three years, including compliance records of their subsidiaries or related commercial sector business units; 2) include this provision in all agreements with subcontractors and collect and store their data; 3) determine, in consultation with the Department of Labor (DOL), contracting officers and labor compliance officers, whether their sub-contractors are a “responsible source,” and then take remedial action where necessary; 4) put systems and staff in place to report this information every six months.

The compliance burden the EO imposes is daunting and the costs to the taxpayer will be significant. In 2013 there were over 24,000 (according to the White House’s fact sheet on the EO) federal contractors with prime contracts over $500,000. The largest federal contractors are spread out across the country and rely extensively on networks of subcontractor vendors; in some cases as many as 20,000. Given that there is currently no federal requirement for prime contractors to collect and aggregate federal or state-level labor violations, most of our members do not have the systems in place to do so and they certainly do not collect this data from their subcontractors. That means most prime contractors would need to create major new data collection systems, internal policies and procedures, and hire and train new employees to comply with the EO. The costs associated with putting such systems and procedures in place will likely be in excess of $100,000 per company and for large primes such compliance systems and regimes will easily cost in the millions of dollars.
Even a cursory estimate of economic impact on contractors and their suppliers and subcontractors shows that the annual cost for implementing the EO would far exceed the $100,000,000 threshold under EO 12866 for this to be considered an economically significant regulatory action. (See attached preliminary economic analysis.) Determining whether subcontractors are a “responsible source” and then reporting that data bi-annually would present an additional range of challenges. Because of this, we strongly disagree with the determinations as presented on the OIRA website listing of proposals under review for both the DOL guidance and the Federal Acquisition Regulation (FAR) Case that they are not economically significant and ask OIRA to change that designation.

The EO Demands Data the Government Already Has

In addition to placing a significant data collection and reporting burden on federal contractors, in many instances the EO requests data the Administration already has or should be able to obtain through searches of its own databases. Under the present system, the DOL collects data from its various enforcement agencies and makes much of it publicly available through its Online Enforcement Database (OED). Though this repository does not contain data on every violation enumerated under the EO, it does cover a good portion of them. Before asking contractors to undertake this data collection burden, it is incumbent upon the Administration to demonstrate that this data is not available through its own channels or resources.

The EO Conflicts with Current Enforcement Powers

Before creating a vast new enforcement bureaucracy, the government’s present capabilities should be examined closely. Under existing authorities, the contracting officer has broad discretion—including for violations of Federal labor statutes and regulations—to refer any contractor for a responsibility determination review and possible suspension or debarment actions. Furthermore, the DOL also has independent suspension and debarment authorities that can be used against any government contractor found to be a violator of federal labor statues or regulations.

In 2014, following a multi-year review of federal agencies’ enforcement capabilities, the Government Accountability Office found that suspension and debarment programs at federal agencies have been significantly strengthened in recent years. According to GAO, the number of suspensions and debarments government-wide more than doubled from FY 2009-2013. In its latest report to Congress in March of this year, the Interagency Suspension and Debarment Committee (ISDC) emphasized how it has worked with agencies to strengthen their programs by promoting best practices and leveraging the experience of agencies with well-established programs. ISDC concludes that “these efforts have demonstrated results.” Clearly robust enforcement is possible under the current system when used effectively.

Rather than building on this success by working within the current suspension and debarment system, the EO creates an additional enforcement structure that will cause significant problems. As former Administrator of Federal Procurement Policy Angela Styles testified recently in the House

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of Representatives, the system proposed under the EO will likely result in “overlapping and inconsistent decisions to exclude companies.” Whereas suspension and debarment officials make decisions for the entire federal government using a well-established system with clear due process protections, the EO proposes a “painstaking contract-by-contract analysis of each prime contractor and subcontractor’s labor practices by a contracting officer with a repeat every single six months...” If contracting officers, or yet to be created Labor Compliance Advisors (LCAs), seek to reduce this workload by sharing their determinations about specific employers across different contracts, they would violate the employer’s confidentiality rights by failing to notify them. This could also lead to the effective blacklisting of companies without giving them any legal recourse.

**Legal Uncertainty and Non-Final Determinations**

Requiring employers to report unadjudicated agency actions before they even have an opportunity to challenge the agency’s judgment on the issue would be fundamentally unfair and highly inappropriate. Our legal system provides those alleged to have violated laws the opportunity to defend themselves to the extent they wish. Until a party has no other recourse, or has agreed to a settlement, it should not have its eligibility for a federal contract undermined; this is an improper second penalty imposed based solely on an agency’s claims. Stated otherwise, if active and non-final labor determinations and complaints are considered by the contracting officer as part of the responsibility determination, an employer may lose a contract as a result of mere allegations.

Another consequence of allowing non-final charges to be held against contractors is that doing so could be used as leverage to force settlement of matters that a company would otherwise contest. Contractors facing allegations or citations, knowing that contesting them to the point of exoneration will not benefit them, will likely cut their losses and accept an unfavorable settlement. With millions of dollars in contracting in the balance, the priority will be on preserving their contracting status rather than fighting a citation or other allegation, regardless of how meritless these allegations may be.

Relying on mere allegations would not only be unfair to employers; it would also overwhelm the contracting officer and Labor Compliance Advisor with information about active and non-final agency determinations — proceedings that, due to their preliminary nature, have little probative value in assessing a contractor’s “record of integrity and business ethics.” The EEOC, for example, receives nearly 100,000 charges a year, but not even 0.5% of those charges mature into lawsuits. Once again, it makes no sense to require contractors and subcontractors to report mere allegations as “merits determinations.” Allegations simply are not anything of the sort.

It is important to understand in this context that agency allegations often turn out to be meritless. Thus, even final agency decisions concluding that an employer violated labor laws are often subsequently overturned by a court. Indeed, between 1974 and 2013, courts of appeals reversed or remanded NLRB decisions approximately 30% of the time.

**Disruption to the Federal Procurement System**

In FY 2014 the federal government executed almost 100,000 contract actions over the $500,000 threshold covered by the EO. Those contracts are fulfilled by an ever-changing network of contractors and subcontractors, governed by statutes and regulations which aim to encourage real competition and true arms-length negotiation. As a result, contractors that have a prime/subcontractor relationship on one contract may be direct competitors for other contracts. The
subcontractor “flow-down” requirements in the EO and the associated responsibility of prime contractors to gather information about their subcontractors’ labor law compliance and use the information to make “responsibility determinations” will create significant challenges for both industry and government. For example, if company A is a sub-contractor for company B on one project, but the two will likely compete for future work, will company A be willing to share data on labor violations with its prime contractor knowing that the prime contractor could use the information to wage a bid protest against it when the two are later in competition?

More broadly, the EO will likely cause prime contractors to steer clear of subcontractors with any kind of labor violation, however minor, that could slow down the evaluation of, or jeopardize, the award of a contract. There is little doubt these effects will be felt most severely by small businesses. Also, the delays that the workload will impose on the system cannot be overstated. Contracting officers and labor compliance advisors will have significant challenges to ensure that the government can acquire the goods and services it needs in a timely fashion. Finally, we must note that the possible protest scenario described above can also only be seen as another delay on an already overburdened process.

**The EO Will Result in New Law Being Made**

Finally, EO 13673 is impermissible as it will substantively change a wide array of labor laws in ways that only Congress, or the state legislatures are allowed to do. The EO directs the Secretary of Labor to issue guidance on how to apply the 14 laws enumerated in the EO and their state equivalents. Under the EO contractors are to report violations if they are “serious, repeated, willful, or pervasive.” Many of the laws listed under the EO, along with their state counterparts, do not include these terms, and none include the term “pervasive.” Therefore, through the DOL’s guidance, new law will be made adding these terms to these laws. This is clearly a violation of the separation of powers doctrine that gives Congress, or the state legislatures, the sole authority to create and define levels of violations under these laws.

**Conclusion**

For these reasons, we respectfully submit that the Office of Information and Regulatory Affairs should carefully consider whether the EO’s proposed data collection and reporting scheme meets the stated goal of “increas[ing] efficiency and cost savings in the work performed by parties who contract with the Federal Government” and whether the EO can be implemented consistent with limitations on the Executive’s authority to not create new law.

The attendees at the meeting believe that: 1) implementing this EO will create an economic impact sufficient for the regulatory actions to be considered “significant” as defined by EO. 12866; 2) the EO will have a detrimental impact on agencies’ ability to achieve their mission requirements through acquisition processes that are as efficient and effective as possible; 3) the EO will have a negative impact on the government’s ability to achieve robust competition; 4) the EO will serve as a significant and prohibitive barrier for companies to enter or sustain a presence in the federal marketplace, particularly small business that comprise the vast majority of vendors found in the federal market.

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3 In reality, one of the “laws” is the recently issued E.O. 13658 increasing the minimum wage for federal contractors. In addition, Section 5 creates a new “Paycheck Transparency” requirement not found anywhere else. Furthermore, a memo from Beth Cobert and Christopher Lu instructing heads of executive agencies on how to hire Labor Compliance Advisors, includes implementing E.O. 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, as one of the responsibilities for LCAs.
supply chain; and 5) the guidance called for under the EO will be contrary to the separation of powers doctrine that prohibits the Executive from creating new law. Accordingly, we request that the proposed regulation be returned to the FAR Council and the guidance returned to the Department of Labor in order for them to complete the statutorily required assessments for a rule deemed to be economically significant.