June 16, 2015

General Services Administration
Regulatory Secretariat
Attn: Ms. Hada Flowers
1800 F Street NW
Washington DC 20405
REF FAR Case 2014-025

Ms. Tiffany Jones
U.S. Department of Labor
Room S-2312
200 Constitution Avenue NW
Washington, DC 20110

By electronic submission: www.regulations.gov

Dear Ms. Flowers and Ms. Jones:

The United States Chamber of Commerce (Chamber), HR Policy Association, Associated Builders and Contractors (ABC), and The Associated General Contractors of America (AGC) request an extension of the public comment period for the above referenced “Federal Acquisition Regulation: Fair Pay and Safe Workplaces” proposed regulation (RIN9000-AM81; 80 FR 102, p. 30548) and the associated Department of Labor “Guidance for Executive Order 13673: Fair Pay and Safe Workplaces” (ZRIN 1290-AZ02; 80 FR 102, p. 30574) document.

We request that the public comment period be extended for 90 additional days, to October 27, 2015. This request is based on our initial review which has found significant flaws in the regulatory impact analysis of the proposed regulation under Executive Orders 12866 and 13563, Regulatory Flexibility Act cost analysis, Unfunded Mandates Act cost analysis and in the burden analysis submitted to Office of Management and Budget under the Paperwork Reduction Act. These flaws make it
impossible for us to comment meaningfully without the benefit of data, which will require time to compile for submission to the rulemaking docket. Some of these flaws are described in detail below, and they derive generally from the failure of the government’s regulatory analysts to conduct thorough empirical research. Meaningful public comment will require the benefit of additional data collection, analysis and research that cannot be accomplished within the currently provided 60 day comment period. The current limit on the comment period effectively forecloses the opportunity for the government to receive meaningful comments that will help it shape a reasoned regulatory decision. Foreclosing meaningful public comment suggests an arbitrary regulatory decision.

The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. More than 96 percent of the Chamber’s members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented.

Associated Builders and Contractors (ABC) is a national trade association representing more than 21,000 construction and industry-related firms, including general contractors, subcontractors and materials suppliers belonging to 70 local chapters. ABC and its members promote the merit shop construction philosophy, which ensures public works contracts are procured through fair and open competition that encourages a level playing field for all qualified contractors and their skilled employees, regardless of whether they belong to a union. Experience demonstrates the merit shop philosophy helps government agencies like the USACE provide taxpayers with the best possible construction product at the best possible price.

The HR Policy Association represents the most senior human resource executives in more than 360 of the largest companies in the United States. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. These senior corporate officers participate in the Association because of their commitment to improving the direction of human resource policy. Their objective is to use the combined power of the membership to act as a positive influence to better public policy, the HR marketplace, and the human resource profession. Many of the Association’s member companies are government contractors.

The Associated General Contractors of America (AGC) is the leading association for the construction industry. AGC represents more than 26,000 firms, including over 6,500 of America’s leading general contractors, and over 8,800 specialty-contracting firms. More than 10,400 service providers and suppliers are associated with AGC through a nationwide network of chapters. Visit the AGC website at www.agc.org.

This request for extension of the comment period is based on the input of member companies who are interested in maintaining a fair, effective and efficient federal procurement system. Many of the member companies who have expressed
interest in the proposed rule have experience as government contractors, subcontractors and suppliers. They understand the complexities of the procurement process. They wish to share their experience and perspective through the public comment rulemaking process, but the currently limited comment period combined with the need for adequate data and research on which to base their assessments of the rule’s impact creates a significant barrier to meaningful comment. By extending the comment period, the government will benefit from more substantive, fact-based comments that will help it to ensure that final regulations are fair, efficient and effective.

**Flaws in the Government’s Data and Analysis**

Executive Order 12866 directs agencies “to assess all costs and benefits of available regulatory alternatives” and to “select those approaches that maximize net benefits.” It also directs each agency to base “decisions on the best reasonably obtainable scientific, technical, economic and other information,” and to “tailor its regulations to impose the least burden.” Executive Order 13563, further directs agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” In the apparent rush to produce regulations to implement Executive Order 13673 (Fair Pay and Safe Workplaces), the FAR agencies and the Department of Labor have not met the President’s instructions in Executive Orders 12866 and 13563. Instead of presenting a reasoned analysis based on verifiable empirical evidence of the benefits and costs of the selected regulatory approach and of alternatives considered, the agencies have presented an incomplete analysis based largely on assertions and assumptions not supported by empirical evidence. Examples of these regulatory analysis flaws include:

1. The $12.99 million initial year familiarization cost estimate relies on the assumption that the typical affected firm will incur 8 labor hours of time for this process. The agencies have presented no empirical evidence to support this estimate. It was within the capability of the agencies or the Labor Department to conduct experiments or other research to obtain a scientific empirical estimate for this key statistical parameter. Empirical research is needed to correctly estimate this essential cost element.

2. The agencies’ estimate of 25,775 contractors or subcontractors potentially affected by the proposed rule is questionable because it reflects only contractors or subcontractors currently holding awards of $500,000 or more. This is a potentially significant underestimate of the number of firms that may have costly compliance obligations under the rule because it omits firms that submit bids but do not have current awards. It also ignores the turnover in the number of incumbent federal contract awardees. Reliable data regarding the number of primary and sub-contract bidders on federal procurements who may be impacted by the proposed rule, including the numbers of federal contracts or subcontracts held by firms of various sizes and in various industries is needed.

3. The agencies’ estimate of the percentage of contractors who may have violations to report is seriously flawed. Their assumption that these firms have violations “similar to the percentages of all firms with such reportable violations” is questionable because the universe numbers for “all firms” include a preponderance of firms with
fewer than 10 employees each. There is no evidence to support the assertion that the violations probability distribution is uniform across firm sizes. Furthermore, the estimates do not include any allowance for civil judgments or arbitral awards,¹ nor any estimate of state/local labor law violations; this shortcoming is another source of compliance cost under-estimation. Reliable data appropriate to firms of the employment size of firms covered by the proposed rules and covering the full range of covered violations needs to be compiled and analyzed regarding the incidence and resolution of citations, charges, or claims of violations of certain federal and state labor laws by employers in general, and, particularly by those who may bid on or be awarded federal procurement contracts.

4. The agencies’ analysis assumes that firms already track and maintain consolidated records of the subject labor law violations, but this assumption is not supported by evidence. For large multi-establishment firms, especially, this question should be investigated. The effect of the proposed regulation may be to compel companies to create information systems that do not currently exist or to significantly modify ones that do. Whether adequate systems now exist and the extent of costs of developing and maintaining internal company information systems to compile, track and report their labor law violation citations, charges or claims and their adjudication and resolution in conformity with the proposed regulation’s requirements are empirical questions that are central to the feasibility of the proposed regulation. The 60 day comment period is insufficient for commenters to conduct the studies needed on this question. These costs are inherent when a company indicates they have no violations to report.

5. Similarly, the costs of developing and maintaining internal prime contractor company information and analytical systems to compile, classify, analyze and evaluate the incidence and severity of labor law violations and to make “subcontractor responsibility determinations” regarding supply chain companies who may be considered by the primary company for inclusion as subcontractors on federal contract procurements on which the primary company may submit bids or manage awarded contracts is another compliance burden that has been inadequately analyzed by the agencies and for which further research is needed. Again, the comment period provided is inadequate to accomplish this research and serves to limit meaningful comment on this important issue.

6. The proposed rule provides that contractors with violations deemed serious may be required to enter a labor compliance agreement with the Department of Labor. The negotiation of such an agreement is a potentially costly legal process, but the agencies have not included any acknowledgement of these costs in their regulatory impact analysis.

The items listed above are examples of the important areas of the analysis of the cost of the proposed regulation where the agencies have not done the basic empirical data collection and analysis research that should have been done before this regulation was proposed. After nearly a year since Executive Order 13673 was issued, the government has had ample time to collect data, conduct experiments and execute

¹The agencies’ request for information on sources of data regarding civil and arbitral awards is a request that cannot be fulfilled by commenters in the allotted 60 day period.
surveys to provide a reasoned basis for regulations to implement the intent of the Executive Order, but the agencies charged with the task have not done the research needed.

Provided Comment Period Inadequate

The Chamber and other commenters are preparing to do the research work that needs to be done to answer these critical questions, but the limited comment period provided will not allow this. Without better data and analysis, the Chamber, other commenters, and their members affected by the proposed regulation are unable to assess the real impact of the proposed rule on their obligations and operations and are unable to comment cogently on the merits or demerits of the proposal and of alternatives. Without time to conduct independent research to examine fully the costs and benefits of the proposed approach and of alternatives, the public’s right to comment will have been an empty promise and certainly not one that meets the purposes of the Administrative Procedure Act.

We hope that the agencies will agree that it is in the interests of everyone to ensure that the final regulatory decisions are made with the benefit of full examination of the issues and are based on the most accurate and complete analysis possible. The provided comment period is clearly inadequate, and we request a 90 day extension to facilitate more complete and meaningful public comment.

Thank you for your consideration of this urgent matter.

Sincerely,

Associated Builders and Contractors
The Associated General Contractors of America
HR Policy Association
U.S. Chamber of Commerce

Reply to:

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