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VIA REGULATORY PORTAL

General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Hada Flowers
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Ms. Tiffany Jones
U.S. Department of Labor
Room S-2312
200 Constitution Ave. NW
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Re: **Comments on Proposed FAR Regulation, FAR Case 2014-025, Fair Pay and Safe Workplaces, 80 Fed. Reg. 30548 (May 28, 2015), and Comments on Proposed DoL Guidance, DOL 2015-0002, 80 Fed. Reg. 30574 (May 28, 2015)**

Dear Mses. Flowers and Jones:

On behalf of the Section of Public Contract Law ("PCL Section") of the American Bar Association ("ABA"), I am submitting comments on the proposed rule and proposed guidance, cited above. The ABA consists of attorneys and associated professionals in private practice, industry, and government service. The ABA and its Sections' governing Councils and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the PCL Section seeks to improve the process of public contracting for needed supplies, services, and public works.[1] The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.[2]

[1] Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Anthony N. Palladino and Heather K. Weiner, members of the Section's Council, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

[2] This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic "Acquisition Reform & Emerging Issues."

I. INTRODUCTION

The President signed Executive Order 13673, Fair Pay and Safe Workplaces, on July 31, 2014 (the "Executive Order" or "EO"). The stated policy of the Executive Order is to increase efficiency and cost savings in government contracting by ensuring that contractors understand and comply with labor laws and promote safe, healthy, and fair workplaces. According to a White House press statement, a "vast majority of federal contractors play by the rules," and the EO is aimed at corporations that do not treat workers fairly or endanger their health and safety.[3] For those corporations trying to play by the rules, the objective as stated in the proposed Department of Labor ("DoL") guidance is "to help contractors come into compliance with federal labor laws, not to deny them contracts."[4]

On May 28, 2015, the FAR Council released proposed rules (the "Proposed Rule") that seek to implement the EO. Along with the Proposed Rule, DoL released proposed guidance (the "Proposed Guidance") that contains many definitions and policies that were not included in the Proposed Rule. The Proposed Rule and Proposed Guidance require contractors to disclose violations of a wide array of labor, employment, and workplace safety laws. Such disclosures are to be made before award of a covered contract and during the performance of the contract, and are to be considered in responsibility determinations made by the agency Contracting Officer ("CO") during the procurement and during the life of any resultant contract or subcontract. The EO and Proposed Rule also include paycheck transparency and dispute resolution provisions. According to the Proposed Rule and Proposed Guidance, the EO is designed to "improve contractor compliance with labor laws and increase efficiency and cost savings in Federal contracting,"[5] and generally to "improve the federal contracting process."[6]

The Section appreciates the opportunity to provide comments on the Proposed Rule and the Proposed Guidance, which we believe will have significant impacts on the procurement process and on industry. The Section agrees that that contractors and subcontractors must comply with U.S. labor laws. Nonetheless, we believe that the Proposed Rule and Proposed Guidance as currently drafted would be difficult to implement, would significantly disrupt procurements, and would impose significant costs and burdens on offerors, contractors, and subcontractors throughout the supply chain, as well as the Government, that the FAR Council has not yet fully evaluated. As discussed below, the Section proposes that the FAR Council and DoL withdraw the Proposed Regulations and Proposed Guidance; issue revised rules that reflect the comments they

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[3] The White House, Office of the Press Secretary, *Fact Sheet: Fair Pay and Safe Workplaces Executive Order* (July 31, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order (the "Fair Pay Fact Sheet").

[4] DOL 2015-0002, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30574, 30574 (May 28, 2015) (the "Proposed Guidance").

[5] FAR Case 2014-025, Federal Acquisition Regulation, Fair Pay and Safe Workplaces, 80 Fed. Reg. 30548, 30548 (May 28, 2015) (the "Proposed Rule").

[6] Proposed Guidance at 30574.

receive; and solicit public comment on, and engage the whole procurement community in a dialogue regarding; the proposed revisions and consideration of the significant impacts of this procurement rulemaking.

II. COMMENTS

A. The Section Recommends That the FAR Council and DoL Revise and Re-Issue the Proposed Rule and Proposed Guidance for Public Comment Before Implementation.

We recommend that the FAR Council and DoL address implementation of the Executive Order in a deliberate fashion that is neither rushed nor incomplete. The Proposed Rule and Proposed Guidance effect a major modification to the current acquisition process. This major modification creates a complex compliance regime that is new both to the Government and to contractors. Implementation of systems both within the Government and at the contractor and subcontractor levels throughout the supply chain will take time and require a significant expenditure of money and resources. Moreover, the labor-law compliance review includes a new agency participant, the Agency Labor Compliance Advisor ("ALCA"); new reporting requirements; and new responsibility reviews that will have to operate within the already-existing procurement environment governed by a complicated and layered system of statutes and regulations. Given the complexity of the task at hand, we believe that any final rules adopted would benefit substantially from additional engagement with interested stakeholders to ensure that all issues are fully considered and addressed.

Our understanding is that there have not been any public meetings on the Proposed Rule and Proposed Guidance, but only meetings for specific invited groups of attendees, in addition to the current notice and comment period. Given the significant impact of the Proposed Rule and Proposed Guidance on the procurement process, the Section urges the FAR Council and DoL to further engage the public, including all stakeholders, in open meetings so that there can be a robust exchange regarding the Proposed Rule, Proposed Guidance, and their implementation.

The Administration anticipated this type of robust interaction with industry in implementing the Executive Order. For example, the "Fact Sheet" accompanying the Executive Order stated: "The Federal contracting community and other interested parties will be invited to participate in listening sessions with [the Office of Management and Budget], DoL, and senior White House officials to share views on how to ensure implementing policies and practices are both fair and effective."[7] In the past, when faced with implementing new, broadly applicable reporting and compliance obligations, the FAR Council has engaged in extended dialogue with stakeholders and conducted multiple rounds of notice-and-comment rulemaking. For example, when the FAR Council implemented the business ethics, internal controls, and mandatory reporting rules in FAR 52.203-13, it engaged in three related rounds of proposed rulemaking and public

[7] *See* Fair Pay Fact Sheet.

comment that benefited the final rule and its implementation.[8] Likewise, when the Department of Defense ("DoD") issued rules requiring systems for the detection and avoidance of counterfeit electronic parts, DoD held public meetings with industry and other interested parties, accepted comments in connection with the meeting, and solicited written comments on its proposed rules.[9] Comparable exchanges are warranted here.

Indeed, although we recognize the Government's concern about contracting with serious labor-law violators, there are no urgent and compelling circumstances that warrant rushing implementation of this complex regulatory scheme and risking unforeseen impacts that, in the end, could do harm to the very individuals the Proposed Rules and Proposed Guidance were intending to protect and impose significant incremental costs on the procurement process. As the Administration and DoL have noted, the vast majority of federal contractors comply with their labor-law obligations.

And when needed, a well-developed regulatory scheme protects the Government and contractor employees. For example, COs can make responsibility determinations and find that an offeror with significant labor-law violations is not responsible because it does not have a satisfactory record of integrity and business ethics.[10] At least with respect to *federal* labor-law violations, information about a contractor's compliance history can be gathered by interested contracting agencies by visiting DoL's website and the federal courts' public access docketing viewer (commonly referred to as "PACER"). In addition, contractors are required to report into the Federal Awardee Performance and Integrity Information System ("FAPIIS") certain final determinations, which would include, for example, a civil judgment on a labor-law violation. Moreover, agency suspension and debarment officials ("SDOs") have discretion to take action if faced with a contractor that has engaged in acts indicating a lack of business integrity or business honesty that seriously affects the contractor's present responsibility or reflects a cause so serious and compelling in nature as to implicate the contractor's present responsibility—acts that can include labor-law violations.[11] Thus, numerous mechanisms exist today to protect the Government's interests from the most serious violators, allowing the FAR Council and DoL the time to proceed deliberately to implement the Executive Order.

We also believe that further notice and comment rulemaking is necessary because of the significant number of open issues relating to the Proposed Rule and Proposed Guidance. The FAR Council and DoL have specifically requested comment on the

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[8] *See, e.g.*, FAR Case 2006-007, Contractor Code of Ethics and Business Conduct, 72 Fed. Reg. 7588 (Feb. 16, 2007); FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64019 (Nov. 14, 2007); FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting (Second Proposed Rule), 73 Fed. Reg. 28407 (May 16, 2008).

[9] *See, e.g.*, DFARS Case 2012-D055, Detection and Avoidance of Counterfeit Electronic Parts, 78 Fed. Reg. 28780 (May 16, 2013); Public Meeting, Detection and Avoidance of Counterfeit Electronic Parts-Further Implementation, 79 Fed. Reg. 26725 (May 9, 2014).

[10] FAR 9.103

[11] *Id.* 9.406-2; 9.407-2.

following topics, all of which are critical to the formulating final rules and all of which should be addressed through an appropriate notice-and-comment process:

- On "additional regulatory or other related steps that might specifically reduce the burden for small businesses and other small entities."[12]

- On the scope of documents that should be disclosed publicly and the changes, if any, that should be made regarding public disclosure of reported information "to ensure the right balance has been reached between transparency and the creation of a reasonable environment for contractors to work with enforcement agencies on compliance agreements and other appropriate remediation measures."[13]

- On "the need for and cost of setting up [an internal recordkeeping/reporting database], how such costs [would] depend on contractors' size and organizational structure, and the extent to which setting up such systems would reduce recurring disclosure costs in the following years."[14] The Government also is developing a single website to use for contractor reporting; however, it has not yet developed that system or solicited public comment on its features or the ramifications of making such information (which may be incomplete) public.[15] This is a vitally important implementation issue for contractors because it is difficult to develop internal reporting mechanisms and information-technology solutions until contractors know what they will have to report to the government website and in what format.

- On proposed phase-in approaches for labor-law compliance reviews of subcontractors.[16] We foresee that the FAR Council and DoL will receive many recommendations in this regard and believe that the phase-in approach that the implementing bodies ultimately proposed should be subject to public comment.

- On an alternative approach whereby subcontractors report their labor-law compliance information directly to DoL, and DoL would make the compliance assessment for a prospective subcontractor.[17] The FAR Council also welcomes additional suggestions for alternative approaches. Again, it is foreseeable that many industry participants will weigh in differently on potential options, and any final rules would benefit from sharing those suggestions and soliciting public comment on them.

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[12] Proposed Rule at 30555.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 30556.

- On two components of the definition of "serious" violations: the "25% of workforce at worksite" and $5,000/$10,000 thresholds.[18]

- On how a CO or contractor should evaluate whether alleged violations are "pervasive" based on the contractor's size and on "how best to assess the number of a contractor's or subcontractor's violations in light of its size."[19]

- On DoL's proposed definition of "substantially similar" violations to be used for determining if a violation is "repeated."[20]

In addition to these open issues, DoL has to date identified only one set of "equivalent state law" for implementation, Occupational Health and Safety Administration ("OSHA")-approved state plans, and it has deferred to a future proceeding further defining "equivalent state laws."[21] This is a key open issue that will significantly affect the development of internal processes for gathering and reporting labor-compliance information at the prime level and all subcontractor tiers. The Section is particularly concerned that any systems implemented before the final definition of equivalent state laws will be rendered immediately obsolete thus needlessly increasing contractors' costs and potentially generating confusion within organizations about the applicable requirements.

Further, we believe that the FAR Council and DoL have not yet considered or sought comment on several additional critical issues:

- The Proposed Rule requires the "offeror" or the "prospective contractor" to complete FAR 52.222-AA, Representation Regarding Compliance with Labor Laws, and to make subsequent disclosures to the CO.[22] The Proposed Rule and Proposed Guidance are unclear regarding what constitutes the reporting entity: does the reporting obligation apply to the entire contractor enterprise, to a business unit, by CAGE Code or DUNS number, or by location?

- The Proposed Rule and Proposed Guidance do not address how the reporting process would be handled for classified procurements and contracts.

- The Proposed Rule does not address what to do when a matter is settled or resolved in a manner that results in the elimination of the violation (other than through full reversal on appeal). There is no stated mechanism for updates to the reporting system to ensure that the Government reviews only the most current information.

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[18] Proposed Guidance at 30583-84.

[19] *Id.* at 30589.

[20] *Id.* at 30588.

[21] Proposed Rule at 30554, 60; Proposed Guidance at 30579.

[22] Proposed Rule at 30552.

- The Proposed Rule and Proposed Guidance do not address contractor cost allowability and allocability for implementing the Executive Order's requirements. We believe such costs should be allowable and, when appropriate, directly allocable to affected contracts. At a minimum, we believe that future disputes would be avoided by addressing cost allowability and allocability before implementing any final rules.

- The Proposed Rule and Proposed Guidance are unclear as to how competitive range determinations will be affected by the labor-law compliance reviews.

We further address several of these issues in our comments, below.

Accordingly, we urge the FAR Council and DoL to evaluate these comments and others that they receive in response to the current Proposed Rule and Proposed Guidance, issue revised proposed rules and guidance, and solicit public comment on the revisions. We also believe that any final proposed rules would benefit from "real time" exchanges among the FAR Council, DoL, and interested stakeholders, and we encourage the FAR Council and DoL to do so in the form of open meetings. We believe that any final requirements will benefit substantially from ensuring that all points of view and alternatives are heard and considered.

B. The Section Recommends That the FAR Council and DoL Consider Potential Additional Implementation Costs and Impacts Before Finalizing any Rules.

The Section is concerned that the FAR Council and DoL have not fully considered the costs of implementing the Executive Order and have omitted some foreseeable costs and impacts from their cost-benefit analysis. As an initial matter, we are concerned that the FAR Council and DoL appear to have underestimated how much covered contractors must spend on system development and on training employees in order to comply with the Executive Order's implementing rules. The Government estimates that 25,775 contractors and subcontractors will be covered and that each will have only one person spend eight hours learning about the new rule during the first year, without any time spent in ensuing years.[23] Basing an estimate on the use of a single contractor employee to understand all the complex requirements is neither reasonable nor realistic, especially for contractors with multiple segments and facilities in different locations. We believe that compliance with the reporting obligations will be a multi-disciplinary effort that involves such functions as human resources, legal, ethics and compliance, information technology, program management, business development, contract management, and subcontract or supply-chain management.[24] Further, we

[23] *See* Regulatory Impact Analysis Estimate ("Analysis"), *available at* http://www.regulations.gov/#!documentDetail;D=FAR-2014-0025-0002 at 3.

[24] Indeed, as noted elsewhere in these Comments, the Proposed Rule and Proposed Guidance do not address the need to protect against unauthorized use, release, or disclosure of information relating to classified contracts. Requiring a single contractor employee to be familiar with and handle reporting of all contractor company violations, where some divisions or business units would have classified contracts and security

anticipate that prudent contractors would plan (and DoL would expect) for a broader knowledge base to ensure that they have adequate processes in place in the event of employee turnover or absence.

We note the following additional gaps in the Regulatory Impact Analysis (the "Analysis")[25]:

- The Analysis noted that "contractors and subcontractors may choose to set up internal databases to track violations subject to disclosure in a more readily retrievable manner."[26] We expect that covered contractors will indeed need to design and implement centralized systems to track and report findings and allegations and allow proposal teams throughout the organization to access and use that information. We further believe these costs would be substantial for contractors, especially those with multiple locations, a diverse workforce, or substantial commercial businesses.

- The Analysis estimates for total annual hours required for reporting by and evaluation of subcontractors each year, and cumulative estimates to implement subcontractor-compliance review, do not align with experiences of many mid- to larger-sized contractors that may issue dozens, hundreds, or even thousands of covered subcontracts each year. The Analysis estimates an average of just less than 50 labor hours per covered contractor per year, essentially a single person for one week annually, to work on these matters.[27] We do not believe this estimate is realistic in light of the Proposed Rule's requirement for semi-annual reporting on every government contract.

- The Analysis estimates zero hours per contractor for future year compliance efforts, such as refresher training, "lessons learned" training, or ongoing maintenance and upkeep of systems specific to compliance with the Executive Order.[28] It is our opinion and experience that responsible contractors will continue with their compliance-education efforts after the initial year of implementation, especially if there is phase-in of equivalent state laws, and, therefore, those costs should be considered as well.

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plans, could result in the unauthorized disclosure of information which would be inconsistent with classified security law, regulation and established security plans. This is particularly a concern where a company has foreign ownership and controlling interests and has multiple contractor entities under it that could be engaged in activities that are classified or controlled but would need to utilize unclassified staff to implement the Executive Order internally.

[25] *See supra* note 23 for citation.

[26] Analysis at 36.

[27] For several discrete tasks, the Analysis estimates annual hours that together total over 1.25 million per year. *See id.* at 12-19. When those hours are divided by the estimated 25,775 covered contractors and subcontractors, the result is 48.8 hours per covered contractor/subcontractor per year.

[28] *See generally* Analysis at 3 (estimating time to learn about requirements only for first year).

- The Analysis does not, but should, estimate the costs of obtaining legal advice regarding the 14 identified federal labor laws and all equivalent state laws. We believe that it is reasonable to assume that non-lawyer supply-chain and contract-management employees will require at least occasional legal advice regarding the meaning of the covered labor laws and the relevance of reported labor-law information.

- The Analysis does not consider the additional costs of documentation for contractors subject to DoD's contractor purchasing system requirements and audits of their purchasing systems. Based on the complexity of the required monitoring and reporting, these costs and impacts also would be significant.

- The Analysis does not consider systemic costs of likely delays in procurements. The Proposed Rule establishes a three-day window for an ALCA to make a responsibility recommendation to a CO.[29] We do not believe this timeframe is likely to be met in many cases. Although the Proposed Rule anticipates that the CO could make the responsibility determination without an ALCA recommendation, COs, not well-versed in the 14 different federal labor laws and their state law counterparts, may delay procurements to await ALCA determinations.[30] (Indeed, there are few available personnel that could be qualified as ALCAs under the Joint Office of Management and Budget and Department of Labor sample position description.[31]) Or their determinations may take longer to make without the benefit of a recommendation.

- The Analysis does not consider the costs to Government and disruption caused by what we believe will be the foreseeable increase in the number of bid protests and contract disputes arising from the new compliance regime and associated responsibility determinations.

As discussed further below, the Section is also concerned about the impact that the Proposed Rule and Proposed Guidance will have on small-business and commercial-item contractors, and the adverse impact that losing participants from these segments of the procurement supply chain may have on the ability of the Government to perform its essential missions. The complexity of the requirements, including the establishment of systems, will likely impact small businesses, with limited support staffs, more sharply. Faced with hiring additional staff or outsourcing compliance, many of these small businesses may choose to exit the federal market instead. Similarly, we are concerned that commercial businesses, which the Government is trying to attract to the federal marketplace, will find that the compliance and disclosure obligations will make the Government marketplace unattractive. This is particularly so for innovative small businesses and commercial-item contractors that have a vibrant commercial and

[29] *See, e.g.*, Proposed Rule at 30566 (Proposed FAR 22.2004-2(b)(2)(i)).

[30] *See id.* at 30567 (Proposed FAR 22.2004-2(b)(4)(ii)).

[31] Office of Management and Budget and Department of Labor Joint Memorandum No. M-15-08, "Implementation of the President's Executive Order on Fair Pay and Safe Workplaces (March 6, 2015).

international market in which to sell their goods and services and may well choose to forgo government business due to the heavy financial and resource barriers to entry and contract performance.

Accordingly, because we believe the FAR Council and DoL should fully consider all of the impacts on the procurement system from the Proposed Rule and Proposed Guidance, the Section recommends that the FAR Council and DoL prepare a revised Regulatory Impact Analysis, and solicit public comment on it before proceeding with final rules.

C. The Section Urges the FAR Council and DoL To Follow Processes That Are Consistent with Federal Procurement Rulemaking Laws.

Federal procurement rulemaking is governed by 41 U.S.C. § 1707(a).[32] This provision mandates that any procurement policy, regulation, procedure, or form that relates to the expenditure of appropriated funds and has a significant effect on an agency's internal operating procedures, or significant cost or administrative impact on contractors or offerors, must go through formal notice and comment before it can be implemented.[33] The law expressly limits any earlier application of such a rule to only when "there are compelling circumstances for the earlier effective date . . . ."[34]

Given the statutory mandate for notice and comment for procurement rules that have a significant effect, cost, or impact, the Section believes that it is particularly important that full notice-and-comment rulemaking be conducted regarding the proposed implementation of the Executive Order in the Proposed Rule and Proposed Guidance. Under the Government's estimate, tens of thousands of contractors and subcontractors will be affected by the Proposed Rule and Proposed Guidance.[35] In addition, every procuring agency will be impacted. Thus, we believe that the FAR Council and DoL should embrace robust notice and comment rulemaking on this complex and far-reaching implementation task.

As currently drafted, however, the Proposed Rule and Proposed Guidance are inconsistent with these requirements. The Proposed Rule does not include key definitions and terms that are essential to its implementation, such as the definitions of covered labor-law violations.[36] Instead, the FAR Council defers these key terms to the Proposed Guidance and states that contractors must become familiar with the definitions

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[32] Formerly referred to as the Office of Federal Procurement Policy Act, 41 U.S.C. § 418b.

[33] 41 U.S.C. § 1707(a).

[34] *Id.* § 1707(a)(2).

[35] Moreover, the need for fair opportunity for notice and comment before significant procurement rules such as the ones proposed are implemented is central to the ABA Principles of Procurements. *See, e.g.*, ABA Principles for Resolving Controversies in Public Procurements, ¶ 5 (adopted February 1999) ("The parties must have available adequate administrative and judicial processes and remedies that provide for the independent, impartial, efficient, and just resolution of controversies.").

[36] *See generally* Proposed Rule at 30565-66.

and terms in the Proposed Guidance because they are essential to implementation of the Proposed Rule.[37] Nonetheless, because DoL does not consider its Proposed Guidance to be subject to any notice-and-comment rulemaking requirements, any revisions to its guidance would be made without the required notice and comment process, even though they are incorporated by reference in FAR provisions and clauses. We believe the reference to the Proposed Guidance to fill essential gaps in the Proposed Rule renders the Proposed Guidance a procurement rule that should be subject to the statutory notice-and-comment requirements for procurement rules.

We recommend that the FAR Council revise the Proposed Rule to ensure that it includes all applicable terms and that these added terms are subject to the required notice-and-comment process, in accordance with procurement rulemaking requirements, since only the FAR Council can issue procurement rules applicable to all agency procurements.[38]

D. The FAR Council Should Consider Issues Raised Regarding Retroactive Reporting.

One central purpose of the new regulations is to foster contractor compliance with labor laws. If the regulations were to go into effect immediately on, for example, January 1, 2016, then contractors would be required to report every labor-law violation from the immediately preceding three years. Because the Executive Order had not been issued and the Proposed Rule and Proposed Guidance were not contemplated three years ago, contractors had no notice of how past labor-law violations might be used in the procurement process. Moreover, they had no reason to track these violations in the form that would enable reporting under the construct of the Proposed Rule and Proposed Guidance. Given that the Proposed Rule requires disclosure in the form of a representation, it is of particular concern that contractors at all tiers would be required to look back for the past three years and "represent" accurately whether they had any of the covered types of labor-law violations.

We propose that the FAR Council amend the Proposed Rule to add a prospective phase-in period for compliance that allows contractors the opportunity to put systems in place and to report on violations that arise after the effective date of the Proposed Rule. Such an approach would have additional benefits:

- COs and ALCAs would initially have a smaller, more current body of labor-law information to review, giving the federal procurement process time to adapt and become accustomed to the Proposed Rule;

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[37] *See, e.g., id.* at 30551 ("FAR Implementation …. DoD, GSA, and NASA has identified and prescribed in the proposed rule specifically when, and in what manner, the Proposed Guidance must be read and utilized to effectively implement the E.O."). The Proposed Rule then refers to the Proposed Guidance repeatedly to define the terms for implementation of the reporting requirements.

[38] 41 U.S.C § 1303.

- There would be a reduced risk of overburdening the new reporting module, which is not yet completed or active;
- Contractors would have every incentive to act responsibly with the Proposed Rule and Proposed Guidance in mind; and
- Contractors would have time to build their own internal information-gathering and reporting systems in a controlled manner.

E. The FAR Council Should Consider the Existing Procedural Protections Provided by FAR Subpart 9.4 in Revising the Proposed Rule.

The Proposed Rule calls for COs to make essentially a subset of the same determinations currently made by agency SDOs,[39] but without offering contractors the same due process currently afforded them under FAR subpart 9.4 and without giving COs and ALCAs adequate time or sufficient information to make such determinations.[40] We recommend that the FAR Council revisit the Proposed Rule against the backdrop of the current suspension and debarment mechanisms in the FAR.

Because the Proposed Rule and Guidance emphasize that COs and ALCAs are to "promote consistent responses across Government agencies regarding disclosures of violations,"[41] contractors found non-responsible by one ALCA or CO are at risk of being found non-responsible by other ALCAs and COs repeatedly across procurements. This design thus potentially fosters de facto debarment, or agency conduct that effectively excludes a contractor from federal contracting without the due-process protections that are provided for contractors under FAR subpart 9.4.[42]

Under the FAR, suspension and debarment are "serious" remedies that should not be imposed for "purposes of punishment," but "only in the public interest for the Government's protection."[43] The FAR's suspension and debarment regulations already allow the Government to exclude contractors that are not presently responsible because of serious violations of labor laws. An SDO may debar a contractor based on a conviction or civil judgment for commission of an offense "indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility" of the contractor.[44] An SDO may also debar a contractor based on "any other cause of so

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[39] *See e.g.*, Proposed Rule at 30552.

[40] *See* FAR 9.402(b); 9.406-3; 9.407-3.

[41] *See, e.g.*, Proposed Rule at 30554.

[42] *See, e.g., Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191 (D.D.C. 1990) (finding de facto debarment when the representatives of the Navy found a low bidder non-responsible on two contracts and made statements evidencing that the Navy did not want to do business with the contractor); *Shermco Indus., Inc. v. Sec'y of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984) (finding de facto suspension when the agency made repeated determinations of non-responsibility on the same basis).

[43] FAR 9.402(b); *see also United States v. Hatfield*, 108 F.3d 67 (4th Cir. 1997) (same point).

[44] FAR 9.406-2(a)(5).

serious and compelling a nature that it affects" the contractor's present responsibility.[45] And of course, one of the considerations of present responsibility is whether a prospective contractor has "a satisfactory record of integrity and business ethics."[46] Thus, for those serious violators that the Proposed Rule and Proposed Guidance are intended to address, the current regulatory regime provides an adequate exclusion remedy and implementation of enforcement and punishment mechanisms.

Furthermore, even when cause exists, suspension and debarment are not automatic responses to findings of illegal conduct or civil violations; instead, the FAR instructs that these remedial measures should be undertaken only if necessary to protect the Government and only after consideration of the mitigating factors in FAR 9.406-1.[47] Under FAR subpart 9.4, SDOs have the ability to engage in dialogue with contractors that protects the Government's interests while ensuring that contractors have an adequate opportunity to respond to responsibility determinations—i.e., due process.

Thus, the current regulatory structure recognizes that exercising suspension or debarment authority is a business decision that considers the totality of a contractor's contributions and performance history and that should be taken only if it is necessary to exclude a contractor from federal contracting to protect the Government's interests. Under the Proposed Rule, however, this complex and nuanced determination, at least with respect to compliance with labor laws, is required to be made within three days. Moreover, the Proposed Rule does not include evidentiary standards by which the reported labor-law information will be evaluated. As a number of courts have recognized, a determination that a contractor lacks a record of business integrity involves a liberty interest recognized by the Fifth Amendment; therefore, agencies must afford contractors sufficient procedural due process before denying contracts based on an unsatisfactory record of integrity or ethics.[48] With these issues in mind, the Section recommends that in revising the Proposed Rule, the FAR Council review the processes and protections afforded to contractors under FAR subpart 9.4 as well as mechanisms to prevent de facto debarments.

F. The FAR Council Should Consider Aligning Its Proposed Rule More Closely with the Contractor Performance Information Process in FAR Subpart 42.15.

The Proposed Rule requires prospective prime contractors to publicly disclose information regarding compliance with the covered laws within the prior three years and, for prospective contractors being evaluated for responsibility, certain basic information about each report (e.g., the law at issue, the docket number, and the name of the body that

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[45] FAR 9.406-2(c); *see also* FAR 9.407-2(a)(9), (c) (similar grounds for suspension).

[46] FAR 9.104-1(d).

[47] *See also* FAR 9.406-2(c), 9.407-2(c).

[48] *See Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953 (D.C. Cir. 1980); *see also ATL, Inc. v. United States*, 3 Cl. Ct. 259, 267 (1983) (*citing Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972)).

made the decision).[49] This publicly-available information tells only a small part of the story, however.

In addressing the question of whether a contractor has "a satisfactory record of integrity and business ethics," FAR 9.104(d) cites FAR subpart 42.15, Contractor Performance Information. That subpart, which addresses the type of information about contractors' performance that agencies may consider, recognizes that any positive or negative government evaluations must be put in context. Thus, FAR 42.1503(d) specifically provides for notice to a contractor, an opportunity for comment, and a review at a level above the CO to address disagreements.

The Proposed Rule is inconsistent with this process from FAR subpart 42.15 in a number of ways. First, the Proposed Rule does not provide notice and an opportunity to respond to a negative ALCA recommendation or CO determination. Second, it does not provide for review at a level above the CO. And third, it provides that only negative information about the contractor (out of context) be made publicly available. We recommend that the FAR Council consider the processes in FAR subpart 42.15 in evaluating revisions to the Proposed Rule.

G. The FAR Council Should Address Reporting Relating To Classified Procurements and Contracts.

The United States has established a National Industrial Security Program to protect against the unauthorized use, release, or disclosure of information that could be contrary to national security interests.[50] Under the National Industrial Security Program Operating Manual ("NISPOM"), even the identity of contracts themselves may be classified, and compilations of data can result in the creation of a classified compilation of information.[51] The Proposed Rule requires reporting during the initial procurement process and then semi-annually during the life of the contract. It further requires the identification of the companies and subcontractors working on the contract, when it requires the reporting of information on violations. For classified contracts, this reporting requirement poses the very real risk that information about classified programs and compilations of information about those contractors and subcontractors performing those programs—their names and locations, and other information—will be made publicly available, which could heighten the risk of the release or disclosure of classified information (and provide a valuable list of targets for foreign adversary hackers). For

[49] *See, e.g.*, Proposed Rule at 30555.

[50] *See, e.g.*, FAR 4.402 (citing executive orders related to the NISPOM and protecting classified information generally); DoD 5220.22-M, National Industrial Security Program Operating Manual ("NISPOM") (February 2006) *available at* http://www.dss.mil/documents/odaa/nispom2006-5220.pdf; DoD 5220.22-R, Industrial Security Regulation (December 1985) *available at* http://www.dtic.mil/whs/directives/corres/pdf/522022r.pdf.

[51] *See, e.g.*, DOD 5220.22-M, NISPOM, § 4-213 ("Marking Compilations. In some instances, certain information that would otherwise be unclassified when standing alone may require classification when combined or associated with other unclassified information.").

this reason, the Section recommends that the FAR Council revise the Proposed Rule to address the protection of information relating to classified contracts.

H. The Section Recommends a Phased Implementation Approach

Upon the Proposed Rule's effective date, each prospective prime contractor, at the beginning of pursuing a covered contract, must inform the contracting agency whether it has had an "administrative merits determination," "arbitral award or decision," or "civil judgment" rendered against it for violation of any one of 14 federal labor laws or regulations (or their state equivalents) within three years of the date the bid or proposal is submitted.[52] At this point, as discussed above, industry does not have the information collection and reporting systems in place necessary to comply with this requirement. Prime contractors will need to design and develop new systems to meet the requirements of the Proposed Rule for their own offers and prime contracts. Moreover, an important part of this Proposed Rule is the requirement that the prime contractor collect, review, and report compliance from its subcontractors expected to be awarded covered subcontracts. Like prime contractors, subcontractors currently lack information collection and reporting systems required by the Proposed Rule.

To be compliant, prime contractors will need to revise their standard subcontracting and purchasing processes to collect this information from prospective subcontractors and train their supply-chain management personnel on the new requirements. Because the information is likely competitively sensitive, primes and subcontractors will need to develop processes to protect the prospective subcontractor's disclosures. Prime contractors will also need processes to evaluate the material received and render responsibility findings. For large contractors, the task of collecting and evaluating this information for potentially hundreds of subcontracts a year will likely prove challenging.

Accordingly, we believe the Proposed Rule's discussion of a possible phase-in of the Proposed Rule is not only prudent but important in order to allow the industry, at all levels, to become familiar with the applicable requirements. It will also be important to the Government and its ability to establish a knowledgeable apparatus to handle and properly evaluate the information it will be receiving.[53]

We suggest a significant period for phase-in because mechanisms for reporting, collecting, and evaluating this information are not in place. Furthermore, a phased implementation, beginning with prime contractors that are not small businesses, will provide for valuable "lessons learned." We suggest limiting initial application to prime

[52] Proposed Rule at 30566 (defining in Proposed FAR 22.2002 the terms "administrative merits determination," "arbitral award or decision," or "civil judgment").

[53] Government and contractor information repositories are increasingly being targeted in cyberattacks and intrusions. Against this backdrop, it is imperative that the proposed vast collection and compilation of supply-chain information be thought through and that the Government and contractors throughout the supply chain be afforded adequate time and resources to set up robust and secure systems for any capture, maintenance and reporting ultimately mandated.

contractors, and specifically contractors that are subject to full Cost Accounting Standards ("CAS") compliance requirements, as these contractors at least will be in a better position to develop systems and train employees on the new rule. Limiting the reporting obligation to prime contractors for a period also may facilitate the implementation process and allow Government and industry time to adjust and understand how to address the Proposed Rule's requirements.

I. The FAR Council Should Further Consider the Impact of the Proposed Rule on Small Businesses and Commercial Item Contracting.

The Proposed Rule acknowledges that section 4(e) of the Executive Order requires the FAR Council and DoL to minimize, to the extent practicable, the burden of complying with the Executive Order for all contractors and subcontractors, but in particular for small entities, including small businesses. We note and appreciate the ways that this Proposed Rule seeks to minimize the burden on small businesses.

Although the burden on small businesses is being considered, a prime contractor is still required to obtain from its subcontractors, including small businesses with which they have contracts of more than $500,000, the same labor-compliance history that the prime contractor must itself disclose. As a result, and as noted in the Proposed Rule, the implementation will impact all small entities that propose as contractors or subcontractors under covered federal contracts. Fiscal Year 2013 Federal Procurement Data System ("FPDS") data shows that, for actions that would be subject to this information collection and reporting requirement (including contracts and purchase orders, but excluding actions that would not be subject to mandatory responsibility determination, e.g., task and delivery orders and calls), there were 12,382 awards greater than $500,000 to small businesses.[54] The Proposed Rule indicates that the total estimate of small business offerors to which this representation will apply is 61,910.[55] This is a large and significant impact on small business.

The Proposed Rule acknowledges that small business subcontractors may be negatively affected because a prime contractor or higher tier subcontractor may have difficulty evaluating labor violations for small contractors.[56] The Proposed Rule notes that this hurdle may lead some prime contractors to decline to subcontract with a small business that has labor violations.[57] In reality, this situation also exists with regard to the evaluation of a large contractor that may be a subcontractor, but the situation is more complex with a small business. That is because any CO determination that a prospective small business contractor lacks certain elements of responsibility will be referred to the Small Business Administration for a Certificate of Competency. There does not appear

[54] Proposed Rule at 30560.

[55] *Id.*

[56] *Id.* at 30561.

[57] *Id*.

to be a similar mechanism to address a prime contractor's non-responsibility determination, however.

As discussed above, we believe a phased approach to implementation is appropriate for all contractors, but in particular small businesses, to afford them sufficient time to develop systems and modify contractual terms to address the rule. In addition, we recommend that the FAR Council consider further whether the Proposed Rule should apply to small businesses at all.

The FAR Council also should consider exempting commercial item contracts. The Federal Acquisition Streamlining Act of 1994 ("FASA") was designed to make federal contracts for commercial items more consistent with their commercial counterparts in order to encourage the commercial entities to enter the federal marketplace and the Government to purchase more commercial items. [58] Section 8002 of FASA mandates that contracts for the acquisition of commercial items include only those clauses "that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items" or "that are determined to be consistent with customary commercial practice" to the maximum extent practicable.[59] The FAR includes similar requirements.[60] The Proposed Rule adds to the government-unique compliance obligations, not required in the commercial marketplace, that have been increasingly applied to commercial item contractors. These compliance burdens increase the cost of doing business with the Government, and the additional requirement to report labor-law compliance information in order to receive, and as a condition of performing, a federal contract could deter commercial item contractors from participating in the government market. All of this comes at a time when the Government is attempting to encourage more innovative commercial item contractors to enter the government marketplace.[61]

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[58] *See* Pub. L. No. 103-355.

[59] *Id*. § 8002.

[60] FAR 12.301(a).

[61] For example, the pending Senate version of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2016 has several provisions intended to remove barriers to commercial item contracting. *See, e.g.*, S. 1376, 114th Cong. §§ 862, 866 (2015) (updating preference for commercial items and allowing items/services provided by nontraditional contractors to be treated as commercial items); *see also* S. Rep. No. 114-49, at 165 (2015) (describing the effort to "increase access to commercial innovation and competition" as a "theme" of the Act). The Executive Branch has also sought to promote more commercial item contracting. For example, the Department of Defense's Better Buying Power 3.0 ("BBP 3.0") initiative expresses the concern that the United States is at risk of losing its technological superiority and recognizes that technological innovation comes "increasingly" from the "commercial sector and from overseas." *See* Memorandum from Frank Kendall, Implementation Directive for Better Buying Power 3.0—Achieving Dominant Capabilities through Technical Excellence and Innovation at Attachment 2 at 1 (Apr. 9, 2015) *available at* http://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf. Moreover, "BBP 3.0 has a primary goal to incentivize greater and more timely innovation in the products DoD uses." *Id*. at 9. BBP 3.0 recognizes that "[a]chieving this objective will require identification and elimination of specific barriers to the use of commercial technology and products." *Id.*; *see also* Acquisition Reform Working Group, 2014 Legislative Working Packet at 2 (Mar. 31, 2014) *available at* https://www.pscouncil.org/PolicyIssues/AcquisitionPolicy/AcquisitionPolicyIssues/ARWG_2014_Legislati

The Executive Order expressly exempts commercial off-the-shelf subcontracts from its coverage. There is no positive indication that the Executive Order intended to reach all commercial item contracts, however. We recommend that the FAR Council consider also exempting commercial item contracts from the scope of the Proposed Rule.

III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
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Chairs and Vice Chairs, Subcontracting, Teaming and Strategic Alliances Committee
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ve_Recommendations.aspx ("Rapid and cost-effective access to commercial items has long been, and remains a paramount objective of Government and industry alike."). Similarly, on December 4, 2014, the Office of Federal Procurement Policy ("OFPP") issued a policy memorandum, "Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings," expressing similar goals. *Available at* https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf The OFPP Memo concluded that "greater attention must be paid to regulations related to procurements of commercial products and services, as the Government is typically not a market driver in these cases and the burden of government-unique practices and reporting requirements can be particularly problematic, especially for small businesses." OFPP Memo at 5-6. The Memo also called for OFPP to join the FAR Council and Chief Acquisition Officer Council in recommending "specific actions that can be taken to reduce burden in commercial-item acquisitions, especially for small businesses, and increase the use of effective commercial solutions and practices by the Government." *Id.*