August 26, 2015

VIA ELECTRONIC SUBMISSION
Tiffany Jones
U.S. Department of Labor
Room S-2312
200 Constitution Avenue
Washington, DC 20210

Re: Proposed Guidance to Implement Executive Order 13673 "Fair Pay and Safe Workplaces," 80 Federal Register, 30547, May 28, 2015, ZRIN 1290-ZA02

Dear Ms. Jones:

The Office of Advocacy (Advocacy) offers the following comments to the Department of Labor (DOL) in response to the above-referenced guidance document issued on May 28, 2015. The Executive Order directs DOL to develop guidance to assist federal agencies in implementing the Order's requirements. In accordance with this direction, the proposed guidance defines administrative merits determinations, civil judgment and arbitral award or decisions and provides guidance on what information related to these determinations must be reported by contractors and subcontractors. The document provides guidance to the Contracting Officers (CO) and to Labor Compliance Advisors (LCA) as to how to assess reported labor law violations. In addition the guidance document ensures that DOL will work with LCAs agencies to minimize the information that contractors have to provide.

Advocacy held three roundtables in Washington, DC, Des Moines, Iowa and Albuquerque, N.M. At these roundtables, small business owners and small business representatives expressed concern with the cost of compliance with the proposed rulemaking and the uncertainty in the guidance document based on input from small business stakeholders, Advocacy has three chief concerns:

- That the cost of compliance will serve to deter small businesses from participating as prime and subcontractors in the Federal Acquisition process.
- The guidance document is much more regulatory in compliance than providing guidance and thus it should follow the rule-making process.
- The method of calculating the number of impacted small businesses is flawed.

To address these concerns, Advocacy recommends DOL revise its guidance document to reflect its regulatory nature and publish such as a proposed regulation. Advocacy would recommend that allow federal and state labor laws that will be covered by this Executive Order be published as a single source and not as proposed as two separate processes.

Advocacy would that DOL recalculate the number of small entities that will be impacted by this Executive Order action.

Advocacy thanks the staff of the Office of Federal Procurement Policy and the Department of Labor for participating in the roundtable in Washington, D.C., with small business stakeholders to discuss this rulemaking.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

In July 2014, President Obama issued Executive Order 13673, "Fair Pay and Safe Workplaces." The E.O. requires agencies to consider a contractor's history of compliance with fourteen labor laws or any equivalent state laws in determining a contractor's or subcontractor's responsibility.

On May 28, 2015, the Federal Acquisition Regulatory Council (Council) published its proposed rule implementing Executive Order 13673. The proposed rule would require an offeror, for any solicitation estimated to exceed $500,000 (including solicitations for commercial items), to represent whether it has any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against it within the preceding three years for violations of the specified labor laws. If an offeror represents that it has a violation before the award and the Contracting Officer (CO) has initiated a responsibility determination, then the CO will require the offeror to submit additional information on the violations. The CO would then confer with an Agency Labor Compliance Advisor (ALCA), a new position created by the Executive Order, and consider the ALCA's advice in evaluating any disclosed violations. The proposed regulation also requires the prime contractor to flow down these requirements to subcontractors for subcontracts expected to exceed $500,000, other than those for commercial off-the shelf items. After

the award of the contract, contractors and subcontractors continue to be required to disclose semi-annually whether there have been any new labor law violations.

The proposed rule contemplates a phase two rulemaking. The time for this phase two rule-making has not been determined. Phase two will focus on section 2 of the Executive Order that DOL determines to be equivalent to the 14 Federal labor laws. Thus other than the Occupational Safety and Health Administration (OSHA) approved state plans, the equivalent state law requirement is not a part of this rulemaking.

On May 28, 2015, the Department of Labor (DOL) published for public comment a proposed guidance document that is required by the E.O. The DOL guidance provides more specific information related to implementing the rule: definitions for key terms from the Executive Order; definitions of labor violations and how to determine whether a labor violation must be reported; what information must be disclosed; how to analyze the violation; the use of labor compliance agreements; and the role of the ALCAs, DOL, and other enforcement agencies in addressing violations.

The public comment period for the proposed rule and the DOL guidance was originally scheduled to end on July 27, 2015. Advocacy, small entities and small business representative's trade groups requested an extension, and the Administration extended the comment period to August 26, 2015.

I. The cost of compliance will serve to deter small businesses from participating as prime and subcontractors in the federal acquisition process.

The rule raises the cost of doing business with the federal government.

Section 4 of the Executive Order requires the Council to minimize, to the extent practicable, the burden of complying with the regulation on small entities. The proposed regulation contains several such steps including, (1) limiting disclosure requirements to contracts and subcontracts exceeding $500,000; (2) excluding commercial off-the-shelf items; (3) limiting the initial disclosure from offerors to a simple statement of whether the offeror has any covered labor law violations; and (4) considering phasing in requirements for flow-down and disclosure of state labor law violations.

Notwithstanding the Council's good faith effort to comply with the Executive Order by providing elements that may reduce the burden on small businesses, the general concern expressed by small businesses from Advocacy's three Fair Pay roundtables across the United States is that this proposed rule is still very burdensome, and it has the potential unintended consequence of negatively impacting the economic foundation of this nation, which is the small business community.

Small businesses represent 99.7 percent of the U.S. employer firms, and they generate 63 percent of net new private-sector jobs and 46 percent of private-sector payroll. One unintended consequence of the proposed rule is the reduction of the number of small businesses that participate in the federal marketplace. In fiscal year 2014, the federal

government awarded more than 23 percent of its federal acquisition dollars to small businesses, $91.7 billion as prime contractors. The FAR Council analyst believes that this rule may require some contractors to utilize a general manager equivalent to a mid-range GS-14 to monitor the company's compliance at an anticipated total cost to contractors of $12,990,600. This cost for the most part cannot be passed onto the government. Some small contractors are of the belief that they are already expending large sums of money to comply with Federal labor laws and regulations and additional compliance requirements may reduce their profit margins to a level that will force them away from this marketplace.

The IRFA states that this proposed regulation will have adverse impacts particularly on small subcontractors; many prime contractors will simply avoid contracting with a company that has a violation, rather than wait for the outcome of a responsibility determination. The summary of "quantifiable cost" in the proposed regulation provides a cost to the public of $91,507,322. This amount does not reflect additional time and cost to review phase two of the DOL Guidance and the revised FAR rule, nor does this summary include any costs for review of current state labor laws. As such the cost to the public is underestimated.

<u>The rule and guidance as proposed create much uncertainty for small businesses doing business with the federal government.</u>

Small businesses question whether the ALCAs can complete meaningful analysis and recommendations in three business days; whether the rule allows for due process (the implication of the rule is that a disclosure of a violation before final adjudication may result in the denial of a contract); whether small subcontractors can receive a certificate of competency, similar to the system in place for small business prime contractors; how this rule impacts mergers, acquisitions and teaming agreements; and how prime contractors will handle subcontractors' proprietary information. Companies are worried that they would be subject to a False Claims Act violation if they failed to disclose a non-final agency action or violation. Additionally, small businesses have observed a general shortcoming of the rule, namely, if it is intended to provide the public with information on labor law violators, it lacks a system to track subcontractors who may report violations. Small businesses will be reluctant to participate in such an uncertain environment.

II. The agencies are miscounting the number of impacted small businesses.

Advocacy believes the FAR Council and DOL are underestimating the number of entities affected by this rule. In determining the number of contractors affected by this proposed rule, the FAR Council and DOL relies on enforcement agency estimates of the number of entities who have violations that may require a disclosure under this proposal. As DOL notes, these different agencies all have different units of analysis and define regulated entities differently. For example, OSHA looks at establishments and Office of Federal Contract Compliance Programs (OFCCP) looks at active federal contractors. Consequently, the resulting proportion of contracting entities with violations requiring a

disclosure (as seen in Table 1 of the (RIA) is manageable. As a result, it is difficult to interpret what that proportion represents. Advocacy recommends that to clarify and improve the accuracy of its estimates, DOL should consider converting each regulatory agency estimate into common units. Given DOL's inherent assumption in its analysis that violations are all independent events, Advocacy presents two potential ways to achieve these improvements:

A. Convert all units into "firms" by taking the proportion of non-firm units to firms. As an illustrative example, if there are on average two establishments for every firm in the country, then dividing OSHA estimates by two would provide OSHA estimates in terms of firms. DOL could then do this conversion so that all agency estimates are in terms of firms.

B. Convert all estimates into a dollar figure using the costing methodology provided in the RIA so that all estimates have a common and standard unit of measurement.

III. Guidance document should be published as a proposed rule.

A guidance document should not be designed to provide detailed implementation requirements. The DOL guidance document has specific requirements that contractors and subcontractors must follow. For example, under the heading "what information must be disclosed," DOL clearly states that the following sections provide guidance on what information must be reported at different stages of the contracting process. The details of this process are mandatory and thus are more than guidance to the contractor.

Recommendations

1. To address the problem that the cost of compliance will serve to deter small businesses from participating as prime and subcontractors in the Federal Acquisition process, and to reduce the unintended reduction of the utilization of small subcontractors by prime contractors, Advocacy recommends that the Council and DOL reconsider the implementation strategy for this proposed rule and provide a phase-in period for small prime contractors. This phase-in period should be long enough that small businesses who are doing business with the government or who wish to enter that market can better absorb the costs of the rule. This new system needs time for proper implementation before these businesses expend large sums of money to comply. The new system should provide due process to small subcontractors in their relationship with the prime contractor. Small subcontractors should also have the benefit of the SBA Certificate of Competency program or a similarly designed program.

2. Advocacy recommends that the Council and DOL provide more clarity as to the actual cost of compliance for small entities as prime and subcontractors. The Council and DOL should provide small entities with a clearer statement of the cost of compliance. The IRFA should be amended to reflect the costs that are cited in the Regulatory Impact Analysis. To further support the importance of this cost data, once such data are made more readily available, the Council should extend the public comment period for 30 days.

The FAR Council and DOL should also consider alternative calculations to better appreciate the uncertainty in its determination of the number of contractors affected by this rule.

3. Advocacy recommends that small businesses not be required to comply with this regulation until phase two of the rule-making has been implemented.

4. DOL should publish the guidance document as a formal rulemaking.

Conclusion

Advocacy reiterates it's thanks to the Council for participating in its Washington, D.C. small business roundtable and encourages the Council to adopt these recommendations. If you have any questions or require additional information please contact me or Assistant Chief Counsel Major L. Clark at (202) 205-7150 or by email at major.clark@sba.gov.

Sincerely,

Claudia R. Rodgers
Acting Chief Counsel for Advocacy

Major L. Clark, III
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget