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Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building
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To: Members, Subcommittee on Contracting and Workforce
Members, Subcommittee on Investigations, Oversight and Regulations
From: Committee Staff
Date: September 28, 2015
Re: Hearing: "The Blacklist: Are Small Businesses Guilty Until Proven Innocent?"

On Tuesday, September 29, 2015 at 10:00 am in Room 2360 of the Rayburn House Office Building, the Committee on Small Business Subcommittees on Contracting and Workforce and Investigations, Oversight and Regulations will meet for the purpose of receiving testimony on the ramifications of the United States Department of Labor (DOL) and Federal Acquisition Regulatory (FAR) Council's implementation of Executive Order (E.O.) 13,673, which President Obama issued in 2014, for small businesses that sell goods and services to the federal government. The DOL and FAR Council recently issued proposed guidance and a proposed rule to implement the Executive Order's provisions. The Subcommittees will examine how the proposals, if finalized, would affect the ability of small businesses to compete for and win federal contracts.

I. E.O. 13,673[1]

On August 5, 2014, President Obama issued E.O. 13,673 "to promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws."[2] E.O. 13,673 seeks to accomplish this goal by imposing new pre-award and post-award requirements and introducing new processes into the federal procurement process. Pursuant to the E.O., DOL and the FAR Council have primary responsibility for its government-wide implementation.

A. Pre-Award Disclosure Requirements

Under E.O. 13,673, prospective contractors must disclose whether any administrative merits determinations, arbitral awards or decisions, or civil judgments have been rendered against them within the preceding three-year period for violations of 14 labor laws or executive orders (collectively, "labor laws") before contracting officers may award them with contracts worth more

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[1] This section focuses on the E.O.'s labor law compliance requirements for contractors and subcontractors and the implementation requirements for the DOL and FAR Council. E.O. 13,673 has additional requirements on paycheck, complaint, and dispute transparency that are not discussed in the interest of brevity.
[2] Executive Order 13,673 of July 31, 2014, 79 Fed. Reg. 45,309.

than $500,000.[3] Businesses also must disclose violations of "equivalent [s]tate laws," as defined by DOL in guidance required by E.O. 13,673. A contracting officer must permit a prospective contractor to provide information regarding steps it has taken to correct a violation or improve its labor law compliance.[4]

The E.O. also requires each agency to designate an agency labor compliance advisor (ALCA) to advise and assist the contracting officers in reviewing the disclosed information. The contracting officer, in consultation with the ALCA, must use the information provided by a prospective contractor, in conjunction with DOL guidance and any final rules issued by the FAR Council, to determine whether the business is a "responsible source that has a satisfactory record of integrity and business ethics."[5] Furthermore, the ALCA is required to advise the contracting officer on whether any agreements regarding any labor law violations "are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters."[6]

E.O. 13,673 also applies to subcontracts for supplies or services worth over $500,000 that are not for commercially available off-the-shelf items. Contractors must require each subcontractor to disclose any administrative merits determination, arbitral award or decision, or civil judgment rendered against it in the preceding three-year period for violations of the labor laws listed in § 2 of the Executive Order. The contractor must consider the information disclosed by the subcontractor to determine whether it is "a responsible source that has a satisfactory record of integrity and business ethics."[7] Moreover, contractors must incorporate into subcontracts a subsection that details these disclosure requirements.[8] A contractor may consult with the contracting officer, ALCA, and DOL, or other relevant enforcement agency, when evaluating the information disclosed by a subcontractor.[9] Finally, contracting officers, in consultation with ALCAs, may refer matters related to the disclosures of contractors and subcontractors to agency suspension and debarment officials.[10]

B. Post-Award Disclosure Requirements

After a contract is awarded, contractors and subcontractors must provide updated information on labor law violations every six months during the performance of the contract.[11] Should information regarding a contractor's labor law violations come to the attention of a

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[3] The 14 labor laws include: the Fair Labor Standards Act; the Occupational Safety and Health (OSH) Act of 1970; the Migrant and Seasonal Agricultural Worker Protection Act (MSPA); the National Labor Relations Act; the Davis-Bacon Act; the Service Contract Act; Executive Order 11,246 of September 24, 1965 (Equal Employment Opportunity); § 503 of the Rehabilitation Act of 1973; the Vietnam Era Veterans' Readjustment Assistance Act of 1974; the Family and Medical Leave Act; Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act of 1990; the Age Discrimination in Employment Act of 1967; and Executive Order 13,658 of February 12, 2014 (Establishing a Minimum Wage for Contractors). *Id.* at § 2(a)(i), 79 Fed. Reg. at 45,309.
[4] *Id.* at § 2(a)(i)-(ii), 79 Fed. Reg. at 45,310.
[5] *Id.* at § 2(a)(iii), 79 Fed. Reg. at 45,310.
[6] *Id.* at § 2(a)(ii), 79 Fed. Reg. at 45,310.
[7] *Id.* at § 2(iv), 79 Fed. Reg. at 45,310.
[8] *Id.* at § 2(v), 79 Fed. Reg. at 45,310.
[9] *Id.* at § 2(vi), 79 Fed. Reg. at 45,310.
[10] *Id.* at § 2(vii), 79 Fed. Reg. at 45,310.
[11] *Id.* at § 2(b)(i), 79 Fed. Reg. at 45,310.

contracting officer through other sources, the contracting office and ALCA will consult as to whether any actions, such as an agreement requiring remedial measures, is warranted.[12] Similarly, if a contractor obtains information about a subcontractor's labor law violations through other sources, the contractor must determine if any action is necessary and may consult with the contracting officer and ALCA regarding this decision.[13] Contracting officers, in consultation with ALCAs, may share information gleaned from the post-award disclosures to agency suspension and debarment officials, and DOL is required to inform contracting agencies about its investigations of contractors and subcontractors that are currently performing a contract so that an agency can take any steps necessary to help a contractor attend to labor law issues.[14]

C. Implementation

E.O. 13,673 directs the DOL and the FAR Council to issue, respectively, guidance and a rule to assist agencies in implementing its requirements[15] and requires the DOL and FAR Council, in developing the guidance and rule, to "minimize, to the extent practicable, the burden of complying with [E.O. 13,673] for Federal contractors and subcontractors and in particular small entities, including small businesses . . . , and small nonprofit organizations."[16] It instructs the DOL to develop guidance to assist agencies in determining whether the labor law violations are for "serious," "repeated," "willful," or "pervasive" violations of the E.O.'s requirements. E.O. 13,673 states that existing statutory standards for assessing whether a violation if serious, repeated, or willful should be incorporated into the guidance. In addition, it provides factors that DOL's guidance must take into consideration in assessing serious, repeated, willful, and pervasive violations if statutory standards do not exist.[17] E.O. 13,673 also directs DOL to develop processes by which: (1) ALCAs consult with the DOL and contracting officers; (2) ALCAs give proper consideration to determinations and agreements made by enforcement agencies; and (3) contractors can enter into agreements before they are considered for contracts.[18]

The FAR Council is directed to issue a proposed rule to amend the Federal Acquisition Regulation (FAR)[19] to "identify considerations for determining whether serious, repeated, willful,

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[12] *Id.* at § 2(b)(ii), 79 Fed. Reg. at 45,311.
[13] *Id.* at § 2(b)(iii), 79 Fed. Reg. at 45,311.
[14] *Id.* at § 2(b)(iv)-(v), 79 Fed. Reg. at 45,311.
[15] *Id.* at § 4, 79 Fed. Reg. at 45,312.
[16] *Id.* at § 4(e), 79 Fed. Reg. at 45,313.
[17] *Id.* at § 4(b)(i)(A)-(B), 79 Fed. Reg. at 45.312. When deciding if a violation is serious, DOL's guidance shall take into account "the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with regard to the violation." *Id.* at § 4(b)(i)(B)(1), 79 Fed. Reg. at 45.312-13. In determining if a violation is repeated, the guidance shall take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." *Id.* at § 4(b)(i)(B)(2), 79 Fed. Reg. at 45.313. The guidance must take into account "whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the labor laws" in determining whether a violation is willful. *Id.* at §4(b)(i)(B)(3), 79 Fed. Reg. at 45,313. For the purposes of determining if a violation is pervasive, the guidance shall take into account "the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity." *Id.* at §4(b)(i)(B)(4), 79 Fed. Reg. at 45,313.
[18] *Id.* at § 4(b)(ii), 79 Fed. Reg. at 45,313.
[19] The FAR are the government-wide regulations issued jointly by the Department of Defense, General Services Administration, and National Aeronautics and Space Administration, which executive agencies must adhere to when purchasing goods and services. http://www.gsa.gov/portal/content/101126.

or pervasive violations of the labor laws listed [in the E.O.] demonstrate a lack of integrity or business ethics."[20] These considerations are to be taken into account by both contracting officers and contractors. Furthermore, E.O. 13,673 states explicitly that generally single violations should not lead to a determination of lack of responsibility, remedial measures or mitigating factors should be considered appropriately, and contracting officers and ALCAs should send information to agency suspension and debarment officials, as appropriate.[21] On May 28, 2015, the DOL and FAR Council simultaneously published their proposals to implement E.O. 13,673.[22]

II. DOL Proposed Guidance

As drafted, the Proposed Guidance defines key terms and provides guidance to assist agencies in implementing E.O. 13,673 and businesses in understanding their reporting obligations.[23] However, the Proposed Guidance is incomplete. It does not provide a list of state laws that are equivalent to the 14 federal labor laws as directed by the E.O.[24] According to the Proposed Guidance, DOL will issue another guidance document to address equivalent state laws at some future date.[25]

The guidance defines the terms "administrative merits determination," "civil judgment," and "arbitral award or decision."[26] The definition of "administrative merits determinations" includes a list of documents, notices, and findings issued by enforcement agencies, such as an citation from OSHA or letter from DOL's Wage and Hour Division (WHD) indicating a Fair Labor Standards Act violation, that may be final or subject to further review.[27] Thus, a non-final citation that an employer is challenging, which may later be found to have no merit, must be reported.

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[20] *Id.* at § 4(a), 79 Fed. Reg. at 45,312.
[21] *Id.*
[22] DOL, Guidance of Executive Order 13,673, "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30,573 [hereinafter "Proposed Guidance"]; Department of Defense, General Services Administration, National Aeronautics and Space Administration, Federal Acquisition Regulations; Fair Pay and Safe Workplaces; Proposed Rule, 80 Fed. Reg. 30,548 [hereinafter "Proposed Rule"].
[23] For the purposes of reporting obligations, the Proposed Guidance states that the relevant three-year period for which the contractor or subcontractor must disclose labor law violations rendered is the three-year period preceding the date of the offer. *Id.* at 30,578.
[24] Proposed Guidance, 80 Fed. Reg. at 30,574-75.
[25] *Id.* at 30,575. The Proposed Guidance does note that equivalent state laws do include state plans that DOL's Occupational Safety and Health Administration (OSHA) have approved. *Id.*
[26] *Id.* at 30,579-80. The Proposed Guidance also defines other terms used in the document. For example, a "labor compliance agreement" is an agreement between a contractor or subcontractor and an enforcement agency to address steps to increase labor law compliance, appropriate remedial measures, compliance assistance, or other related matters. *Id.* at 30,577.
[27] *Id.* at 30,579. The definition lists seven categories of documents that are administrative determinations, including: 1) notices or findings from the DOL Wage and Hour Division; 2) notices or findings from the DOL OSHA or any state agency that is designated to administer an OSHA-approved state plan; 3) notices or findings from the DOL Office of Federal Contract Compliance Programs (OFCCP); 4) notices or findings from the Equal Employment Opportunity Commission (EEOC); 5) notices or findings from the National Labor Relations Board (NLRB); 6) a complaint alleging labor law violations by a contractor or subcontractor filed by or on behalf of an enforcement agency with a federal or state court, an administrative judge, or an administrative law judge; and 7) any order or finding that a contractor or subcontractor violated any provision of the labor laws that is issued by an administrative judge, administrative law judge, the DOL Administrative Review Board, the Occupational Safety and Health Review Commission or state equivalent, or the NLRB. *Id.*

"Civil judgment" is defined as "any judgment or order entered by any federal or State court in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws."[28] As with administrative merits determinations, civil judgments include judgments or orders that are not final or subject to appeals.[29] "Arbitral award or decision" is defined as "any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws."[30] Like the other categories of aforementioned violations, non-final arbitral awards and decisions or those that are subject to being vacated, modified, or confirmed by a court must be reported.[31] Furthermore, the guidance states that arbitral award or decision includes those that are the result of private or confidential proceedings.[32]

Finally, the Proposed Guidance also, as directed by the E.O., defines the terms "serious," "repeated," "willful," and "pervasive," describes how agencies should weigh labor law violations, and provides examples of violations that would fall in the aforementioned categories.[33] While one violation is unlikely to give rise to a determination of a lack of responsibility, the Proposed Guidance states that "pervasive violations and violations of particular gravity, among others, will in most cases result in the need for a labor compliance agreement [(LCA)]."[34]

III. The Proposed FAR Rule

As a companion to the Proposed Guidance, the FAR Council concurrently issued a Proposed Rule to implement E.O. 13,673, primarily by amending FAR Part 22 and by adding implementing contract clauses in Part 52.[35] Part 22 currently provides 81 pages of regulations addressing the application of labor laws to federal acquisitions, and the Proposed Rule will significantly expand it though the addition of a proposed FAR 22.20.[36] The new subpart begins by restating that it is the policy of the federal government "to promote economy and efficiency in procurement by awarding contracts to contractors who promote safe, healthy, fair, and effective workplaces through compliance with labor laws."[37] To that end, it concludes that, "[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services."[38] However, to assess whether the Proposed Rule successfully achieves those policy goals, it is first necessary to understand to understand the current regulatory environment

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[28] *Id.* at 30,580.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 30,582-91; 30,593-604.
[34] *Id.* at 30,582.
[35] Proposed Rule at 30,551.
[36] The Proposed Rule also addresses paycheck transparency and arbitration clauses, but given the vast scope of this rulemaking, this memorandum focuses on compliance with labor laws.
[37] Proposed Rule at 30,566.
[38] *Id.*

for contractors. Once this is accomplished, this memorandum will explain changes to the pre-award and post-award requirements for contractors and subcontractors.

A. Current Requirements.

The current regulatory scheme already provides two processes to protect against bad actors receiving federal contracts. First, the FAR currently requires that federal purchases shall "be made from, and contracts shall be awarded to, responsible prospective contractors only" and that contracting officers make "an affirmative determination of responsibility" prior to award.[39] Further, the FAR provides for the suspension and debarment of contractors.

1. Responsibility Determinations.

Made prior to the award of any contract, a determination of contractor responsibility is itself a substantial undertaking. It requires that the contracting officer make an affirmative finding that a contractor has: (1) the financial capability to perform the contract; (2) the ability to meet the proposed schedule for performance; (3) an acceptable past performance record; (4) "a satisfactory record of integrity and business ethics;" (5) the skills and organization necessary to perform; (6) the required equipment and facilities; and (7) met all other requirements to be considered qualified and eligible under applicable laws and regulations.[40] Therefore, a "prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors."[41] The Federal Awardee Performance and Integrity Information System (FAPIIS) collects information on the integrity and performance of contractors to aid in this determination,[42] but the contracting officer has the ability to ask for any information necessary to make this determination.[43]

If the contracting officer does not have "information clearly indicating that the prospective contractor is responsible," the contracting officer must make "a determination of nonresponsibility."[44] Further, a "prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action."[45] Therefore, if a contractor's performance has previously been adversely affected by violations of labor laws, it is already required to be found nonresponsible.[46]

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[39] FAR 9.103(a)-(b).
[40] *Id.* at 9.104-1. Prime contractors are responsible for determining and documenting the responsibility of subcontractors, and may be required to provide this evidence to the contracting officer. FAR 9.104-4.
[41] *Id.* at 9.103(c).
[42] FAPIIS was mandated by the Duncan Hunter National Defense Authorization Act of 2009, Pub. Law No. 110-417, § 872 (2008).
[43] FAR 9.104-5.
[44] *Id.* at 9.103(b).
[45] *Id.* at 9.104-3(b).
[46] Once the contracting officer makes this required determination of nonresponsibility, it must be entered into FAPIIS as such to help with the evaluation of future contracts. *Id.* at 9.105-2(b)(2).

2. Suspension and Debarment.

The federal government may, in order to "protect the [federal g]overnment's interest and only for the causes and in accordance with the procedures set forth in [the FAR]" sanction contractors through suspension or debarment.[47] Suspension occurs when the government has an immediate need to protect itself and the public by temporarily barring a contractor from competing for new work while the government completes an investigation into allegations against a contractor.[48] Suspension is permissible, but not mandatory, if there is adequate evidence to suspect that the contractor committed: (1) fraud or a criminal offense in conjunction with a federal contract; (2) one of many other enumerated violations; (3) "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility" of the contractor or subcontractor; or any other offense "so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."[49] During the suspension, a contractor may not receive new contracts, unless the agency head documents "compelling reasons justifying continued business dealings between that agency and the contractor."[50]

While suspension exists to protect the public during an investigation, debarment protects the public once the investigation or prosecution is concluded. In addition to the reasons provided for suspension, debarment is permitted when there is a "[v]iolation of the terms of a Government contract or subcontract so serious as to justify debarment, such as . . . [w]illful failure to perform in accordance with the terms of one or more contracts; or [a] history of failure to perform, or of unsatisfactory performance of, one or more contracts."[51] Suspensions generally last three years.[52]

Suspension and debarment proceedings are conducted by an agency suspension and debarment official (SDO).[53] Contracting officers, the Offices of the Inspectors General, program offices, the Department of Justice, other federal and state agencies, whistleblowers, and the general public may all refer cases to the SDO for investigation. Given that suspensions are intended to address an immediate threat, no advance notice of a suspension is required; however, the FAR requires that after the suspension is imposed the contractor be allowed to provide, "in person, in writing, or through a representative, information and argument in opposition to the suspension."[54] The suspension notice itself must contain the reason for the suspension and what additional steps will be taken to investigate the allegations.[55] If the reason for the suspension is not an indictment, the contractor is also able to "appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and … obtain a transcribed record of the proceedings."[56] While the process for debarment is similar to

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[47] *Id.* at 9.402(b).
[48] *Id.* at 9.407.
[49] *Id.* at 9.407-2, 9.407-3. The FAR provides a full list of suspension worthy offenses, along with examples.
[50] *Id.* at 9.407-1(d).
[51] *Id.* at 9.406-2(b). The full list of permissible reasons to debar contractors may be found at FAR 9.406-2.
[52] *Id.* at 9.406-4(a).
[53] *Id.* at 9.403.
[54] *Id.* at 9.407-3(b)(1).
[55] *Id.* at 9.407-3(c).
[56] *Id.* at 9.407-3(b)(2).

suspension, prior to debarring a contractor, the SDO must issue a notice of intent, which then begins the debarment process and triggers the contractors rights.[57] In each case, a written decision of the SDO is required, and the contractor may challenge either the suspension or debarment in court.[58]

Violations of the labor laws enumerated in E.O. 13,673 are already grounds for suspension or debarment, either as indictments, convictions, offenses indicating a lack of business integrity that affect present responsibility, as a serious or compelling offense affecting present responsibility, willful failures to perform in accordance with the terms of the contracts, or as a history of failure to perform, or of unsatisfactory performance of, one or more contracts.[59] Thus, having explained the current protections in place to protect against bad actors receiving federal contracts, this memorandum turns to the Proposed Rule.

B. ***Changes Implemented by the Proposed Rule.***

1. Definitions.

Proposed FAR subpart 22.2002 provides the relevant definitions necessary to understand the requirements. This is common in the FAR – while general definitions are provided in Part 2, specific definitions are provided in the relevant sections and subsections of the regulations. However, what is noteworthy about these definitions is that they are not self-contained. For example, the definition of administrative merits determination contains the qualification that "[t]o determine whether a particular notice or finding is covered by this definition, it is necessary to read section II. B. in the DOL [G]uidance."[60] Similar cross references are provided for the definitions of ALCA, arbitral award or decision, pervasive violation, repeated violation serious violation, and willful violation.[61] Thus, unlike any other provision in the FAR, the meaning of the defined terms could be changed by amending the Proposed Guidance rather than undertaking notice and comment rulemaking. Additionally, it means that anyone commenting on the Proposed Rule must assume that the Proposed Guidance will be adopted in order to understand the scope of the rulemaking. If DOL changes one of these definitions, it could render moot the comments and impact analysis conducted by the commenters and the FAR Council.

2. Pre-Award Requirements.

To implement the E.O., the Proposed Rule requires an offeror on a solicitation exceeding $500,000, to certify whether, in the prior three years, any administrative merits determinations, arbitral awards or decisions, or civil judgments were rendered against it.[62] Subcontractors at any tier that are expected to perform more than $500,000 of work on the contract, except

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[57] *Id.* at 9.406-3(b).
[58] *See, e.g.*, OSG Prod. Tankers, LLC v. United States, 82 Fed. Cl. 570 (2005).
[59] FAR 9.407-2, 9.407-3, 9.406-2(b).
[60] Proposed Rule at 30,565.
[61] *Id.* at 30,565-566.
[62] *Id.* at 30,566.

subcontracts for commercially available off-the-shelf items, must make equivalent certifications.[63]

For prime contractor disclosures, any affirmative statement is to be considered in addition to the responsibility determination the contracting officer would normally make.[64] In the System for Award Management (SAM), the prime contractor must enter: the "labor law violated," the case number, inspection number, charge number, docket number, or other unique identifier, the date the decision was rendered, and the name of the rendering entity.[65] Then, the contractor must give the contracting officer any information it deems necessary to demonstrate responsibility, which the contracting officer will provide to the ALCA.[66]

Within three business days, the ALCA must provide its "written advice and recommendations" to the contracting officer.[67] During those three days, the ALCA must obtain copies of all determinations and judgments, which together with the information provided by the contractor, shall lead the ALCA to provide one of three recommendations: (1) the "prospective contractor could be found to have a satisfactory record of integrity and business ethics;" (2) the "prospective contractor could be found to have a satisfactory record of integrity and business ethics *if the process to enter into or enhance [an LCA] is initiated*" (emphasis added); or (3) the prospective contractor failed to demonstrate a satisfactory record of integrity and business ethics, and the SDO should be notified.[68] This recommendation must include whether: (1) any violations should be considered "serious, willful, or pervasive;" (2) the number of violations; (3) the contractor has initiated remedial measures; (4) the contractor has or needs an LCA, or if the LCA and other remedial measures are being adhered to; (5) the contractor is "still negotiating in good faith [an LCA] that was recommended as necessary;" and (6) additional information the ALCA believes necessary.[69] Using the ALCA report, the contracting officer is then to make a responsibility determination.[70] If the contracting officer determines that the company is not responsible, and the company is a small business, the determination must be referred to SBA for review.[71]

When prime contractors are attempting to assess whether their subcontractors meet the requirements of the E.O., the Proposed Rule provides two alternatives. The first requires that any subcontractor with violations is subject to a responsibility determination conducted by the prime contractor.[72] In this case, the prime contractor should obtain copies of all decisions and a DOL notice that the subcontractor does not have a LCA or is not complying with its LCA.[73] The subcontractor should be provided with the opportunity to provide its prime contractor with mitigating information, but the prime is then expected to apply the DOL Guidance to the

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[63] *Id.*
[64] *Id.* at 30,566.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 30,567.
[71] *Id.*
[72] *Id.* at 30,570.
[73] *Id.* at 30,571.

subcontractor just as the ALCA would apply it to a prime contractor.[74] If the prime contractor determines that the subcontractor is responsible despite not having entered into an LCA, then the prime contractor must report this information to the contracting officer, who will consider the information as part of the prime contractor's ongoing responsibility determination.[75]

In the alternative, the FAR Council is considering having subcontractor violations reported to DOL rather than to the prime contractor.[76] In this approach, the subcontractor would make all representations to DOL, and then would provide some sort of documentation to the prime contractor demonstrating that it is a responsible contractor for purposes of the E.O.[77] Recognizing that this would strain procurement lead time, the FAR Council would allow the prime to make a responsibility determination if DOL did not respond within three days, and DOL had not previously stated that the subcontractor need to enter into a LCA. While this approach seems more reasonable, the challenge would occur if DOL later found that the subcontractor needed an LCA but the subcontractor disagreed or was unwilling to implement the requested LCA.[78] It is worth noting that in either scenario, it will be DOL, not the ACLAs, who are advising the prime contractor.

3. Post-Award Requirements.

Every six months post award, successful contractors must update their certification regarding whether any administrative merits determinations, arbitral awards or decisions, or civil judgments were rendered against them.[79] This means the contractor must update the information in SAM and provide the previously detailed information to the contracting officer.[80] Concurrently the ALCA is required to monitor the SAM disclosures, and may make document requests of the contractor via the contracting officer at any time.[81] The ALCA is to monitor any LCAs, and if anything the ALCA learns though any of these methods "indications that further consideration or action may be warranted," the ALCA is to notify the contracting officer.[82] If the contractor had already notified the contracting officer on the matter the ALCA is investigating, then the contractor shall be given an opportunity to provide additional information.[83] Presumably, if the contractor did not notify the contracting officer, then the contractor may not provide additional information.

Once the ALCA has completed the investigation, he or she will provide recommendations to the contracting officer.[84] The contracting officer is then required to make a determination as to

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[74] *Id.*
[75] *Id.*
[76] *Id.* at 30,556.
[77] *Id.* at 30,557.
[78] *Id.*
[79] *Id.* at 30,566.
[80] *Id.* at 30,567.
[81] *Id.* at 30,567.
[82] *Id.* at 30,567.
[83] *Id.* at 30,567.
[84] *Id.* at 30,567.

whether to continue the contract, refer the matter to DOL for action, opt to not exercise an option, or terminate the contract.[85]

For subcontractors, again the Proposed Rule offers two alternatives. If the prime contractor is conducting the responsibility determinations itself, it must then receive a semiannual recertification from the subcontractor.[86] Any new violations or failures to adopt or comply with an LCA must be adjudicated by the prime contractor, and if the prime contractor continues the subcontract, the prime contractor must report this to the contracting officer.[87] Alternatively, if DOL is reviewing subcontractor disclosures, then the subcontractor must disclose any changes in status from DOL to the prime contractor. Again, if DOL determines that the subcontractor has not entered into a need LCA or is not meeting the terms of an existing agreement, the prime contractor must inform the contracting officer of any decision to continue contracting with the subcontractor.[88]

IV. Issues Before the Subcommittee

Small businesses have expressed significant concerns with the implementation of the E.O. by the Proposed Guidance and Proposed Rule. The following is not an exhaustive list, but some of the most common issues raised, either by small businesses for by the Proposed Rule itself.

A. Issues Highlighted for Public Comment.

The Proposed Rule identified six areas where it believed public comment would be informative. Each will now be discussed.

1. State Equivalent Laws.

Both the Proposed Guidance and the Proposed Rule state that equivalent state rules will be identified at a later date, but this makes it impossible difficult to analyze the effects of either document on small contractors– a point raised by the Subcommittee Chairmen in a letter with the Committee on Oversight and Government Reform and the Committee on Education and the Workforce to the Secretary of Labor and the Administrator of the Office of Federal Procurement Policy.[89] Indeed, even the OSHA approved state plans cited as an example of equivalent state laws is not helpful, as neither the ALCAs nor the DOL are experts in interpreting state laws, but the Proposed Rule and Proposed Guidance will have them arbitrating contractor compliance with these plans. Given that the Council on Defense and Industry Associations (CODSIA) estimates that there could ultimately be hundreds of different equivalent labor laws identified, small businesses will be forced to either master a myriad of laws that may not ever apply to them

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[85] *Id.* at 30,567.
[86] *Id.* at 30,571.
[87] *Id.*
[88] *Id.*
[89] Letter to the Hon. Thomas Perez and the Hon. Anne Rung, Re: Fair Pay and Safe Workplaces (Jul. 15, 2015).

directly in order to monitor subcontractor compliance.[90] The time and expertise required to do so could prove fatal to a small contractor.

2. Burden Reduction for Small Businesses.

The E.O. directs that DOL and the FAR Council minimize compliance burdens on small businesses.[91] The Proposed Rule states that to meet this objective, the FAR Council limited disclosure to prime contracts and subcontracts above $500,000, which it claims will exclude the vast majority of transactions performed by small businesses.[92] This is technically true: in fiscal year 2014 (FY14), there were 1,405,426 contract actions where the contractor was a small business, and all but 574,114 were for commercial items, so roughly sixty percent of small business prime contract transactions are exempt.[93] However, the remaining forty percent accounted for 58.7 percent of the dollars awarded to small businesses – thus, nearly $58 billion in small business prime contracts are subject to this requirement.[94] When the base contract and unexercised options are included, the numbers become significantly higher – 99.9 percent of these dollars, or $417 billion, are covered by these proposals. Given that no small businesses were identified in any of the reports that inspired this E.O. and the resulting guidance, it raises the question of whether small businesses should be exempted completely.

The Proposed Rule also states that it reduced the burden on small businesses by limiting initial disclosure from offerors to a simple statement of whether the offeror has any covered labor violations and generally requiring more detailed disclosures only from the apparent awardee.[95] Unfortunately, this does not recognize the amount of work required to make that simple statement. While the Proposed Rule estimates that only about 62,000 small businesses will be affected, that number does not account for subcontractors.[96] The Proposed Rule relied upon the Federal Subcontracting Reporting System (FSRS) to identify the number of subcontractors covered, and came up with only 398 small businesses.[97] Given that the Subcommittees have regularly criticized the quality of data in FSRS, relying on this data seems suspect. FSRS currently states that there are 200,343 unique prime contractors, but only 16,056 subcontracts reported into FSRS. In contrast, there are 27,804 subcontracts reported in the electronic Subcontract Reporting System (eSRS). Thus, assuming that all the subcontracts captured by FSRS are with small businesses, the system is missing at least 11,000 subcontracts.[98] Given that first tier small business subcontractors routinely account for $78 to $90 billion a year in subcontracts, even assuming that there are 27,804 unique subcontractors would mean each received on average $2.8 to $3.2 million in subcontracts annually – well above the reporting threshold. Further, construction contractors have told the Subcommittees that it isn't unusual to have seven or more tiers of subcontractors on a project, and

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[90] CODSIA Comments on the Proposed Guidance and Proposed Rule at 5 (2015).
[91] E.O. *at* § 4(e), 79 Fed. Reg. at 45,313.
[92] Proposed Rule at 30,554.
[93] Federal Procurement Data System (FPDS). Report generated September 27, 2015 (on file with the Committee).
[94] *Id.*
[95] Proposed Rule at 30,554.
[96] *Id.* at 30,560.
[97] *Id.*
[98] FSRS FFATA Report generated September 27, 2015.
[98] Proposed Rule at 30,560.

the top ten industries as identified as having violations are all in the construction industry.[99] Given that the federal government cannot actually track subcontractors, despite the fact that it has been required to do so since 2006, its seems overly optimistic to believe that it can track enforcement at the subcontracting level.[100]

The third item the FAR Council says it took to reduce burdens on small business was only requiring post award updates semi-annually rather than in real time.[101] While this is certainly preferable to continuous reporting, it overlooks the fact that much of this reporting is unnecessary. A visit to the DOL Enforcement Data website provide maps with pins, statistic on how many violations are willful, serious, repeat or other, a breakdown by industry, and much more information.[102] If the DOL already has this data, why is it necessary to require contractors to provide it a separately?

Fourth, the FAR Council states that it is, "creating certainty for contractors by having ALCAs coordinate through DOL to promote consistent responses across Government agencies regarding disclosures of violations."[103] However, there is no way to ensure that ALCAs at different agencies will not treat similar violations differently. Indeed, there is no transparency at all into the DOL determination process. Rather than furthering the goal of having a transparent and straight forward procurement system, these proposals further cloud the basis of award.

The fifth way the FAR Council states it is reducing the burden on small businesses is by "considering phasing in requirements for flowdown and disclosure of state labor law violations so that contractors and subcontractors have an opportunity to become acclimated to new processes."[104] While a phase-in for subcontractors has merit, a phase-in of the state law requirements means that companies that are building systems to collect and report will have to redo these systems in the future.

Finally, the FAR Council says that the sixth approach to reducing small business burdens is to set up "systems that centralize and avoid redundant reporting of violations."[105] This recommendation is sound, but holding this out as future hope for contractors will not allow small businesses to avoid creating reporting mechanisms now.

3. Public Disclosure of Violation Information and Systems.

For ease of discussion, this subsection addresses two areas identified by the Proposed Rule, since in the case of systems the Proposed Rule stated that comments would not be considered public comments for purposes of the rulemaking. The Proposed Rule recognized that it will required contractors to publicly disclose whether they "have violations of covered laws within the last three years and, for prospective contractors being evaluated for responsibility, certain basic information about the violation (e.g., the law violated, the docket number, the name of the

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[99] Department of Labor Enforcement Data, *available at* http://ogesdw.dol.gov/homePage.php.
[100] *See, e.g.,* Federal Funding and Accountability and Transparency Act of 2006, Pub. Law No. 109–282 (2006).
[101] Proposed Rule at 30,554.
[102] Department of Labor Enforcement Data, *available at* http://ogesdw.dol.gov/homePage.php.
[103] Proposed Rule at 30,554.
[104] *Id.*
[105] *Id.* at 30,555.

body that made the decision)."[106] The Proposed Rule seeks comments on whether administrative merits determinations, arbitral awards or decisions, civil judgments or LCAs should be made public.

In asking this question, and in crafting the Proposed Rule, the FAR Council continues to insist that the required disclosure if of the "labor law violated."[107] As discussed in Section II of this memorandum, the definition of administrative merits determinations includes documents, notices, and findings issued by enforcement agencies that are not final. Thus, to require small businesses to publicly declare themselves guilty renders moot the very enforcement systems OSHA, NLRB, and DOL administer. Thus, a non-final citation that an employer is challenging, which may later be found to have no merit, must be reported as the equivalent of a final decision by a court.

Requiring small businesses to then publicly disclose the particulars of what may prove to be an unfounded allegation could prove fatal to the small business. If a competitor is able to leverage this information, and point to a federal database such as SAM where the company states it violated a labor law, the small business could find itself out of business altogether. Indeed, given recent breaches of government systems, small businesses and the FAR Council should also be concerned with the potential abuse of non-public information the Proposed Rule seeks to collect. While the Proposed Rule states that "interested parties may provide feedback" the single web site GSA is developing to implement the E.O., they are advised that "such comments will not be considered public comments for the purposes of this proposed rulemaking."[108]

4. Subcontractor Requirements.

As discussed in Section III, the FAR Council proposed two alternatives for subcontractor compliance. Unfortunately, neither sufficiently addresses the fear that:

> Small business subcontractors may be negatively affected by this proposed rule. A prime contractor or higher tier subcontractor may have difficulty evaluating labor violations, and may find it problematic to find time to learn. This may lead to behaviors such as choosing not to subcontract with a small business which has labor violations, especially if the small business has not initiated the process to negotiate a labor compliance agreement.[109]

In a scenario where the prime contractor must itself conduct the evaluation, a prime is unlikely to want enter into teaming agreement or subcontract with a company it perceives as posing a higher risk with the contracting officer. Thus, even if the small business can successfully convince the prime contractor that there is no merit to an administrative merits determination, the prime contractor must assume the risk of convincing its contracting officer that this is correct. If it is later proven wrong, it risks having to change subcontractors mid-performance, placing its own

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 30,561.

performance at risk, even if the subcontractor is performing perfectly. In such a case, the subcontractor has shared commercially sensitive information with a company that may be its competitor on other contracts, and may still be deemed ineligible for award.

In the alternative where prime contractors can outsource the analysis of labor violations to the DOL, prime contractors or higher tier subcontractors still assume the risk that DOL will announce post award that there is an issue with the subcontractor, and the prime contractor will need to change subcontractors or risk its own contract. In either scenario, the safest course of action for a prime contractor is to only work with companies with disclosures indicating no violations. However, there is no way the prime contractor will know if its subcontractors are telling the truth. Thus, an honest subcontractor falsely accused a violation is unlikely to obtain any work.

5. Recordkeeping.

Finally, the Proposed Rule asks for comments on the recordkeeping burden for contractors.[110] It notes that it does not "currently include hours for prospective contractors or prospective subcontractors to retain records of their own labor law violations," but notes that "contractors and subcontractors may choose to set up internal databases to track violations subject to disclosure in a more readily retrievable manner—particularly firms that are larger and more geographically or organizationally dispersed—and may incur associated one-time setup costs."[111] The witnesses before the Subcommittees are expected to testify that the recordkeeping requirements far exceed those estimated by the Proposed Rule – sentiments echoed by the comments of the Office of the Chief Counsel for Advocacy (Advocacy) in the Small Business Administration (SBA).[112]

B. Other Issues Before the Subcommittees.

1. Reduction of Risk.

Throughout the Proposed Rule, Proposed Guidance, and in the E.O. are the notion that when contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and to deliver goods and services to the Federal Government in a timely, predictable, and satisfactory fashion. As noted in the Proposed Regulation, "[i]n recent years, the Administration and Congress have taken a number of steps to strengthen the quality of responsibility determinations generally as well as the overall integrity of the Federal procurement system" the deployment of [FAPIIS] to provide contracting officers with data on the business integrity of companies; a requirement that offerors disclose criminal, civil, or administrative violations within the past 5 years; and "[d]irection to agencies to take steps to strengthen their

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[110] *Id.* at 30,555.
[111] *Id.*
[112] SBA Advocacy, Re: Proposed Regulation to Implement E.O. 13,673 "Fair Pay and Safe Workplaces(Aug. 26, 2015) *available at* https://www.sba.gov/advocacy/82615-gsa-proposed-regulation-implement-executive-order-13673-fair-pay-and-safe-workplaces.

capability to take suspension and debarment actions when necessary to protect the Government from harm."[113]

Unfortunately, the three studies used to support this contention are not as clear cut as the proposals suggest. Instead, they lack empirical evidence as the basis for imposing this new and burdensome reporting requirement on over 360,000 federal contractors.[114] The report issued by the Democratic staff of the Senate Committee on Health, Education, Labor, and Pensions, included a number of cases that were tied to the government's failure to appropriately exercise its responsibilities.[115] The report does not acknowledge that: (1) many of those contractors should have been excluded by the agency in the first instance but the contracting officer failed to check the excluded patties list; and (2) the agency often failed to include the appropriate contract clauses notifying the contractor that prevailing wage rules applied. The second report, published by the Center for American Progress, draws its conclusions from data on just 28 companies – less than 0.01 percent of the contractors that would be subject to the proposed rules.[116] The third report on which the proposed rule and guidance are based is a Government Accountability Office (GAO) report that examined DOL WHD and OSHA penalties assessed during fiscal years 2005 through 2009.[117] The latter report does not acknowledge the inherent problems of overly complex regulations tied to such complicated labor laws that have been tripping up many employers, including DOL itself, for years.[118] Further, the GAO report is offered to support a proposition it expressly repudiates: "GAO did not evaluate whether federal agencies considered or should have considered these violations in awarding of federal contracts, *thus no conclusions on that topic can be drawn from this analysis.*"[119]

A better indicator of whether labor violations may affect contractor performance is whether contactors are referred for suspension and debarment based on their labor violations. As discussed in Section III, a violation of a contract term or law, or the failure to perform based upon such violations, may trigger suspension or debarment. However, a review of Interagency Suspension and Debarment Committee Reports for FY 2011-2014 indicate that the DOL did not propose debarment or debar a single contractor in the past four years.[120] During this same period, DOL only suspended two contractors in FY 2011. Indeed, DOL issued no show cause letters during this period. Thus, not a single labor violation found by DOL was grounds for even the most preliminary investigation. In comparison, suspension and debarment actions govenmentwide are at record high levels.[121] Thus, if DOL is using the statutory mechanisms provided to prevent bad

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[113] Proposed Rule at 30,548.
[114] Proposed Rule at 30,549; Proposed Guidance at 30,575.
[115] STAFF OF S. COMM. ON HEALTH, EDUCATION, LABOR, AND PENSIONS, I I 3TH CONG., ACTING RESPONSIBLY? FEDERAL CONTRACTORS FREQUENTLY PUT WORKERS' LIVES AND LIVELIHOODS AT RISK (2013), *available at* www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf.
[116] Karla Walter and David Madland, Center for American Progress, AT OUR EXPENSE: FEDERAL CONTRACTORS THAT HARM WORKERS ALSO SHORTCHANGE TAXPAYERS (2013), *available at* www.americanprogressaction.org/issues/laborlreport/20 I 3/ I 2/1 I /80799/at-our-expense/.
[117] The 2013 Center for American Progress report cited in footnote 116 is based on this 2010 GAO Report.
[118] GAO, FEDERAL CONTRACTING : ASSESSMENTS AND CITATIONS OF LABOR LAW VIOLATIONS BY SELECTED FEDERAL CONTRACTORS (Sept. 17, 2010) (GAO-l0-1033), *available at* www.gao.gov/assets/310/309785.pdf.
[119] *Id.* at Highlights (emphasis added).
[120] http://isdc.sites.usa.gov/isdc-reports/.
[121] *Id.*

actors from receiving contracts, the Subcommittees wish to learn what problem the additional authority is trying to address.

2. Procurement Time.

The Subcommittees are concerned that the Proposals will delay the ability of agencies to obtain the goods and services they need in a timely manner. For example, there are approximately 24,000 contracting officers in the Department of Defense (DoD). Each of these contracting officers will have to consult with the ALCA regarding the labor law reporting information. The sheer number of ALCAs required to support DoD is staggering, but the idea that ALCAs will be able to conduct a thorough investigation into purported labor violations, negotiate a LCA, and report back to the contracting officer within three business days is simply ludicrous. Thus, either contracting officers will avoid selecting contractors requiring ALCA review, or the procurement process will be further delayed.

3. Reduction of Small Business Participation.

Echoing many small business trade associations, SBA Advocacy found that the "cost of compliance will serve to deter small businesses from participating as prime and subcontractors in the federal acquisition process."[122] During three roundtables on the Proposed Rule and Proposed Guidance, small businesses stated that the increased cost of doing business would reduction of the number of small businesses that participate in the federal marketplace.[123] For example, the Associated Builders and Contractors report that 57 percent of their members will stop participating in federal contracting as either a prime contractor or a subcontractor if final rule is implemented because the compliance costs are too high.[124] Given that over a quarter of small prime contractors have exited the federal market in the last two years, an additional reduction could threaten the underpinnings of the industrial base.

4. Blacklisting and Coercion.

The last issue before the Subcommittees is the threat of blacklisting and coercion. As previously discussed, there is a fear that small contractors accused of labor violations will be blacklisted or coerced into admitting guilt. Given that the Proposed Rule states that the ALCA, contracting officer and prime contractor should uses as a factor whether a contractor is "still negotiating in good faith [an LCA] that was recommended as necessary,"[125] it makes it clear that a small business protesting its innocence will not be treated favorably. Thus, to preserve any chance at award the small business must agree to whatever conditions the ALCA and DOL proposed for and LCA.

Even if the small business adopts and fully implements the LCA, it risks being blacklisted. As previously discussed, contracting officers with heavy workloads and prime contractors seeking awards may be better served by simply selecting companies with nothing to

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[122] SBA Advocacy, Re: Proposed Regulation to Implement E.O. 13,673.
[123] *Id.*
[124] Conversations of Associations Builders and Contractors with Committee staff on September 10, 2015.
[125] Proposed Rule at 30,566.

disclose. This path of least resistance may be wisest in terms of expediency, but it creates a dangerous precedent. Highly qualified firms with a Service Contract Act (SCA) violation may be excluded from competition, even though the violation is wholly attributable to the contracting officers failure to insert the SCA clause in the contract. Thus, innovative and competitive solutions will not be available to government customers. If this small business can no longer receive federal work, its commercial customers may also become distrustful. An entire business could be destroyed through no fault of the company.

Likewise, there is nothing to prevent a disgruntled employee or an unscrupulous competitor from filing a complaint that could result in an administrative merits determination in order to sabotage a small firm. Ironically, companies will also be less likely to settle nuisance lawsuits lest they need to report these civil determination, so the courts, DOL, NLRB and others will be forced to spend time adjudicating these cases rather than pursuing true bad actors.

V. Conclusion

The joint hearing of the Subcommittees will provide an opportunity for Members to hear from affected small businesses and experts. It will also allow questions to be posed to DOL and OFPP. The transcript of the hearing will be submitted for the administrative record.