

Congress of the United States
Washington, DC 20515

July 15, 2015

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

The Honorable Anne Rung
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
1650 Pennsylvania Avenue, NW, Room 264
Washington, D.C. 20502

Dear Secretary Perez and Administrator Rung:

On May 28, 2015, the United States Department of Labor (DOL) and the Federal Acquisition Regulatory (FAR) Council (collectively, the “agencies”) began implementing Executive Order 13673 (“EO”).¹ DOL issued proposed guidance to assist federal agencies in the implementation of the EO, which requires contractors and subcontractors to disclose potential violations of 14 federal labor laws and equivalent state laws.² The FAR Council also issued a proposed rule implementing the EO and DOL’s proposed guidance.³ The proposed guidance and rule institute new burdensome and unnecessary requirements that will delay an already cumbersome federal procurement process and will impose additional costs on employers, federal agencies, and American taxpayers. We request the proposed implementing guidance and rule be withdrawn.

The EO requires that prior to bidding on a contract, employers must report whether there have been any administrative merits determinations, arbitral awards, or civil judgments rendered against them in the preceding three-year period for 14 federal labor laws and “equivalent State laws.” These developments must be reported whether final or subject to review. If the employer selected by the contracting officer has responded in the affirmative, the contracting officer must consult with newly created agency Labor Compliance Advisors (LCA) and consider this information when determining if the employer is eligible to participate in federal contracting. Once an award is received, the employer must update this information every six months and ensure any subcontractors are compliant with this reporting requirement. Such reports could trigger a range of remedial actions including contract termination.

¹ Exec. Order 13673 of July 31, 2014, Fair Pay and Safe Workplaces, 79 Fed.Reg. 45,309 (Aug. 5, 2014).

² Guidance for Exec. Order 13673, “Fair Pay and Safe Workplaces,” 80 Fed. Reg. 30,573 (May 28, 2015) [hereinafter Proposed Guidance].

³ Federal Acquisition Regulations; Fair Pay and Safe Workplaces; Proposed Rule, 80 Fed. Reg. 30,547 (May 28, 2015) [hereinafter Proposed Rule].

The proposed rule and DOL guidance primarily rely upon three reports lacking empirical evidence as the basis for imposing this new and burdensome reporting requirement on over 360,000 federal contractors.⁴ 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.⁵ 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 parties 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 left-leaning 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.⁶ The third report on which the proposed rule and guidance are based is a Government Accountability Office (GAO) report that examined DOL Wage and Hour Division and Occupational Safety and Health Administration penalties assessed during fiscal years 2005 through 2009.⁷ 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.⁸ 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.*”⁹

Agencies must have strong foundations on which to propose new guidance or a new regulation and must afford interested parties the opportunity to thoroughly assess the changes and provide substantive and informed comments on those proposals. To ensure compliance with the spirit of the *Administrative Procedure Act* (APA),¹⁰ the comment period should allow for a deliberative process to ensure that interested parties have a complete understanding of how current and future proposals work together so that they can provide meaningful input to the agencies. This is especially true when proposals threaten due process, impose onerous reporting burdens, and limit competition by favoring certain competitors while blacklisting others, resulting in significant job losses.

Furthermore, there is a significant portion of the EO's requirements relating to equivalent state laws that have yet to be identified. DOL's guidance does not include equivalent state laws as directed by the EO and instead reflects DOL's plans to publish additional guidance at a later

⁴ Proposed Rule, 80 Fed. Reg. at 30,549; Proposed Guidance, 80 Fed. Reg. at 30,575.

⁵ STAFF OF S. COMM. ON HEALTH, EDUCATION, LABOR, AND PENSIONS, 113TH CONG., ACTING RESPONSIBLY? FEDERAL CONTRACTORS FREQUENTLY PUT WORKERS' LIVES AND LIVELIHOODS AT RISK (2013), *available at* <http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf>.

⁶ KARLA WALTER AND DAVID MADLAND, CENTER FOR AMERICAN PROGRESS, AT OUR EXPENSE: FEDERAL CONTRACTORS THAT HARM WORKERS ALSO SHORTCHANGE TAXPAYERS (2013), *available at* <https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/>.

⁷ The 2013 Center for American Progress report cited in footnote 6 is based on this 2010 GAO Report.

⁸ GAO, FEDERAL CONTRACTING: ASSESSMENTS AND CITATIONS OF FEDERAL LABOR LAW VIOLATIONS BY SELECTED FEDERAL CONTRACTORS (Sept. 17, 2010) (GAO-10-1033), *available at* <http://www.gao.gov/assets/310/309785.pdf>.

⁹ *Id.* at Highlights (emphasis added).

¹⁰ 5 U.S.C. §§ 500-596.

undetermined date to address those laws and requirements.¹¹ This will necessitate a second proposed rule from the FAR Council,¹² rendering it impossible to accurately assess the substantial changes to the federal procurement system that will result from implementation of either DOL's guidance or the FAR Council's proposed rule at this time. As such, all comments submitted prior to the publication of those proposals will lack complete information on which to provide comment. In the meantime, agencies will be implementing the EO, guidance, and rule with unbridled discretion to determine what constitutes equivalent state laws, thus engendering the possibility that similarly situated entities will be treated differently – a clear violation of the APA. For these reasons, the proposed guidance and rule should be withdrawn until such time as the equivalent state laws have been identified.

The proposals will significantly delay federal contracting and the efficient delivery of goods to the U.S. government at a reasonable cost to taxpayers. For example, there are approximately 24,000 contracting officers in the Department of Defense. Each of these contracting officers will have to consult with the newly created LCA regarding the labor law reporting information. Additionally, the Administration erroneously assumes that employers already track the information required to be reported under the proposed guidance and rule. Some of the largest federal contractors have indicated that they will have to develop and maintain costly systems to comply with these new burdens – raising the price of contracts – even if they have no violations to report. Smaller businesses that struggle to win contracts will simply drop out of the competition instead of implementing these new systems, decreasing competition and further increasing costs. Eventually these employers will be forced to modify these new recording systems to incorporate equivalent state laws, which will further slow the procurement process at the expense of the taxpayer.

As the Chairmen and Members of the Committees of jurisdiction, we believe the agencies should withdraw the proposed guidance and the proposed rule. In the fact sheet accompanying the EO, the White House stated that “the vast majority of federal contractors play by the rules.”¹³ We agree with the Administration that most contractors are in compliance with the law and agree that bad actors denying workers basic protections should not be rewarded with government contracts funded by taxpayer dollars. DOL's existing statutory authorities for enforcement of federal labor laws are sufficient to hold bad actors accountable. Further, our current suspension and debarment system already gives agencies the authority to deny federal contracts to problematic employers.¹⁴ We do not see the need to implement measures through executive fiat

¹¹ See Proposed Guidance, 80 Fed. Reg. at 30,574 n.2. The 14 federal labor laws include: *Fair Labor Standards Act* (29 U.S.C. §§201-219), *Occupational Safety and Health Act of 1970* (29 U.S.C. §§ 651-678), *Migrant and Seasonal Agricultural Worker Protection Act* (29 U.S.C. §§1801-1872), *National Labor Relations Act* (29 U.S.C. §§ 151-169), *Davis-Bacon Act* (40 U.S.C. §§ 3141-3148), *Service Contract Act* (41 U.S.C.A. §§6701-6707), Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), Section 503 of the *Rehabilitation Act of 1973* (29 U.S.C. §793), *Vietnam Era Veterans' Readjustment Assistance Act of 1974* (38 U.S.C. §§ 3696, 3698-3699, 4214, 4301-4306), *Family and Medical Leave Act* (29 U.S.C. §§ 2601-2654), Title VII of the *Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e-2000e-17), *Americans with Disabilities Act of 1990* (42 U.S.C. §§ 12101-12213), *Age Discrimination in Employment Act of 1967* (29 U.S.C. §§ 621-634), and Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors). *Id.* at 30,576.

¹² 80 Fed. Reg. at 30,554.

¹³ The White House, 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>.

¹⁴ According to the Annual Interagency Suspension and Debarment Committee (ISDC) reports to Congress for fiscal years 2012 through 2014, DOL did not use their suspension and debarment authority, which raises the question of why DOL is not using existing authorities with the contractors. <http://isdc.sites.usa.gov/isdc-reports/>.

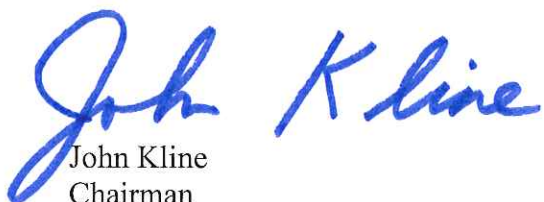
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to fix a problem that simply does not exist. Rather than implement another layer of bureaucracy, the Administration should work with Congress and stakeholders to use the existing system to crack down on bad actors and ensure the rights of America's workers are protected.

If the proposed guidance and rule are not withdrawn, we alternatively request the public comment periods for the proposals issued on May 28, 2015, be extended by 90 additional days to ensure that interested parties have adequate time to review, assess, and provide meaningful input. We believe a more robust comment period is vital to guaranteeing that affected parties have sufficient time to carefully examine the current proposals and provide DOL and the FAR Council with the necessary input to ensure that implementation of the EO does not negatively affect the federal procurement process. While we appreciate the recent two-week extension, the present public comment period remains insufficient to evaluate even those portions of these complex proposals that are currently available. It does not afford small or large businesses enough time to effectively evaluate the full ramifications of the proposals and develop thorough comments to assist the agencies in their implementation of the EO. Finally, additional time would allow DOL and the FAR Council to further determine the adverse impact on small business contractors, as well as the acquisition of goods and services to our men and women in uniform.

Please provide us with your decision concerning our requests **by no later than July 29, 2015**. If you have additional questions or comments, please contact Emily Murphy or Viktoria Ziebarth (202-225-5821) with the Committee on Small Business, Julie Dunne or Christina Aizcorbe (202-225-5074) with the Committee on Oversight and Government Reform, or Christie Herman or Joe Wheeler (202-225-7101) with the Committee on Education and the Workforce.

Sincerely,



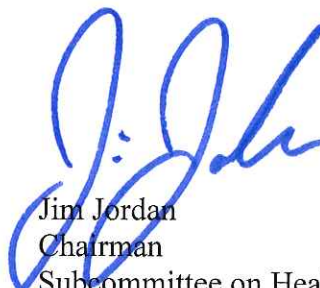
John Kline
Chairman
Education and the Workforce Committee



Steve Chabot
Chairman
Committee on Small Business



Jason Chaffetz
Chairman
Committee on Oversight and Government Reform



Jim Jordan
Chairman
Subcommittee on Health Care,
Benefits and Administrative Rules
Committee on Oversight and Government Reform

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Richard Hanna
Chairman
Subcommittee on Contracting and Workforce
Committee on Small Business



Crescent Hardy
Chairman
Subcommittee on Investigations, Oversight and
Regulations
Committee on Small Business



Phil Roe, M.D.
Chairman
Subcommittee on Health, Employment, Labor,
and Pensions
Education and the Workforce Committee



Tim Walberg
Chairman
Subcommittee on Workforce Protections
Education and the Workforce Committee

cc: The Honorable Shaun Donovan, Director of the Office of Management and Budget