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ACEC

American Council of Engineering Companies

Introduction

Subcommittee Chairmen Hanna and Hardy, Ranking Member Adams, and members of the committee,

The American Council of Engineering Companies (ACEC) appreciates the opportunity to testify before you today about the issues surrounding the federal government's regulatory burden on small businesses. The Council would like to use two Executive Orders; Fair Pay and Safe Workplaces Executive Order, (E.O. 13, 673) and the Establishing Paid Sick Leave for Federal Contractors Executive Order, (E.O. 13, 706) to examine the impact federal regulations on contractors. ACEC appreciates the efforts that the Department of Labor (DOL) and the FAR Council play to ensure compliance with labor laws. The industry is committed to following the rules, but the federal government must understand the burden on the private sector and the cost that is passed onto the government with duplicative requirements. ACEC's small, medium and large firms believe that small businesses can flourish in the federal market, but there must be continued oversight by this and other committees to reduce regulatory barriers to market entry.

The Fair Pay and Safe Workplaces E.O. (Blacklisting) will create burdens for engineering firms and other contractors working for federal agencies. While we understand the rationale behind the order, it should be noted that bad actors are less than .01 percent of the total contracting force.[1] Even President Obama has said that "the vast majority of the companies that contract with our government,…play by the rules. They live up to the right workplace standards."[2] The Chairmen of the House Education and Workforce, Oversight and Government Reform and Small Business Committees have previously stated that the order is "fixing a problem that does not exist."[3]

The Establishing Paid Sick Leave for Federal Contractors (Sick Leave) E.O. also creates unnecessary administrative and financial burdens on contractors. While the Council supports paid sick leave, the amount of reporting and the changes required to implement the rule create more expense for both the contractors and government. Most of the Council's firms offer equivalent paid sick leave, so the requirement is duplicative.

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[1] 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/.

[2] President Barak Obama, Remarks by the President at the Signing of Fair Pay and Safe Workplace Executive Order (Jul. 31, 2014)

[3] Press Release, House Small Business Committee, House Committee Chairmen Call for Withdrawal of Administration's Harmful, Unnecessary Blacklisting Proposal (July 15, 2015) (on file with author).

Consultants is a Small Business with 36 employees. We are committed to providing our clients sound engineering designs for various sized projects. Our practice focuses on the federal market and we have worked on many federal projects in the past 50 years.

My firm is an active member of ACEC – the voice of America's engineering industry. ACEC's over 5,000 member firms employ more than 500,000 engineers, architects, land surveyors, and other professionals, responsible for more than $500 billion of private and public works annually. Almost 85% of these firms are small businesses. Our industry has significant impact on the performance and costs of our nation's infrastructure and facilities.

The engineering industry, which suffered significantly during the recent recession, is finally coming back to fiscal health. Unfortunately, these and other regulatory actions could put that recovery at risk and create disincentives for engineering firms of all sizes to participate in the federal market.

Blacklisting Rule:

I. Process

The process as outlined by the Guidance requires two-steps. First, the prime contractor must disclose labor violations for awards greater than $500,000 for "goods and services including construction,"[4] and any violations or allegations of violations of labor laws within the preceding three years once the Guidance is fully implemented in 2018. This is done through an initial check-the-box representation at the beginning of the process.[5] If there is a labor violation, then the contracting officer, prior to making an award, must allow for the firm to provide mitigating information about the violation. Then, the contracting officer, in consultation with Agency Labor Compliance Advisor (ALCA)[6] shall determine if the prime or any related subcontractors are a "responsible source with a satisfactory record of integrity and business ethics."[7] Finally, even after a contract has been awarded, the Guidance requires semiannual reporting of any new violations.

The Guidance also applies to subcontracts at every tier, so subcontractors, whether they have a direct contract with the prime or not, must submit this information. If the contract has been executed and there is an accusation of a labor violation, the contracting officer has four potential courses of action; require remedial measures; decline to exercise an option; terminate the contract; or refer for suspension and debarment.[8]

The Council has three broad areas of concern with the Guidance. First, the reporting is overly burdensome. It requires both prime and subcontractors to furnish information that the Government already receives. Second, the reporting burdens the business relationship between the contractor and subcontractor by creating a blacklist of allegedly "unqualified" contractors

[4]Department of Labor Guidance 81 FR at 58663.
[5] *Id* at 58663.
[6] The Labor Compliance Advisor is a senior official designated within each agency to provide "guidance on whether (a) contractors' actions rise to the level of a lack of integrity or business ethics." *Id* at 30577.
[7] *Id* at 58718.
[8] *Id* at 30577.

and subcontractors. Third, non-final judgments or complaints and allegations of non-compliance with labor laws are required to be reported to the contracting officer. This mandate could allow for contracts to be terminated on claims that may be proven invalid, raising very serious due process concerns. All of these concerns could have the effect of prompting well-qualified firms to withdraw from the federal market altogether.

II. Reporting

There are three problems with the reporting requirement in the proposed Guidance. First, it is duplicative and burdensome where both small and large subcontractors will have to report to prime contractors. Second, the process envisions a seamless transfer of information between the ALCA and the responsible contracting officer, which is inconsistent with current practice. Third, with the amount of data that DOL requires to be shared between primes and subcontractors, there are unintended market consequences for those participants not addressed by the Guidance.

A. Burdensome

DOL's Guidance identified 14 federal labor laws and executive orders or equivalent State laws that are applicable to the reporting requirement.[9]

The Fair Labor Standards Act (FLSA)	The Occupational Safety and Health Act of 1970 (OSH Act)
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	National Labor Relations Act (NLRA)
Davis-Bacon Act	Service Contract Act
Equal Employment Opportunity Executive Order (EEOC)	Section 503 of the Rehabilitation Act of 1973
Vietnam Era Veterans' readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974	Family and Medical Leave Act (FMLA)
Title VII of the Civil Rights Act of 1964	Americans with Disabilities Act of 1990 (ADA)
Age Discrimination in Employment Act of 1967 (ADEA)	Establishing a Minimum Wage for Contractors Executive Order

However, the Guidance proposes further review of applicable equivalent state laws, which makes the rule still subject to further amendment and growth. This failure to include applicable state laws at the current time precludes for a thorough review of consequences. It creates instability for firms to accurately assess the burdensome scope of the Guidance and FAR regulations, even as the Order is implemented.

The broad scope of this change has massive implications for the engineering community. These laws and executive orders already require reporting and/or judicial hearings. For example, firms are required to report annually on compliance with the EEOC, the Vietnam Era Veterans' Act, OSHA and the Rehabilitation Act. Under Davis-Bacon, weekly submissions are sent to the DOL. In addition, the firm must submit annual reports to the federal System for Award Management

[9] *Id* at 58718.

(SAM) database to maintain their eligibility for government work, which also reports on their subcontractor's compliance with the Service Contractor Act. Between existing weekly and annual reporting, asking business to resubmit this information is duplicative and wasteful. Given that almost 85 percent of ACEC firms qualify as small-businesses, these additional requirements create new hurdles for small firms participating in government work. Not only will the firms have to comply with the data gathering, but many will need to hire additional legal and human resources employees or consultants to review their files for the past three years. This data gathering will entail additional overhead on firms. As the margins on engineering work are quite small, typically 3 percent, new overhead requirements may preclude firms, including many small firms, from participating in this market. As many prime contractors work to meet admirable small business subcontracting requirements, fewer small businesses will be able to afford to participate in this market. The cost of compliance will hurt their margins even more than larger firms which have greater resources. This reporting burden will reduce innovation and competition on government contracts that are integral to best performance while ultimately increasing the cost of the project to the government.

B. Transition Issues Between the ALCA and the Contracting Officer

The envisioned process requires that the ALCA and the contracting officer review all Labor violations within a three day window. The contracting officer will make the determination regarding the prime or subcontractor's status as a responsible source if the window lapses. This paradigm is deeply flawed by the nature of federal contracting. Federal contracting takes time—and the GAO has reported "services acquisitions have been plagued by inadequate acquisition planning"[10] ACEC members report that acquisition planning can take over 18 months, and that is before these new regulations are implemented. This requirement adds an additional and unnecessary layer to an already overburdened system. The flawed assumption that decisions will be made in three days will prove to further slow the system.

C. Data Sharing with Competitors

Within the engineering industry, primes and subcontractors often change roles in different projects. There is a disincentive for subcontractors to share sensitive labor information with the prime when there is the potential that the firm will compete against that prime in another solicitation. Data sharing of confidential business information could eliminate a competitive advantage between two companies. While this problem might be mitigated if the government received information from subcontractors directly, fundamental concerns over how the process will work linger within the Guidance. There are no guarantees that information sharing will be prohibited given that it is currently an optional enforcement mechanism within the FAR comments. Firms face a level of insecurity between small margins and the potential that competitors could force them out of the federal market due to labor violations that include valuable business intelligence. Even though subcontractors submit their violations to DOL, there must be a level of disclosure to the Prime contractor. Otherwise, the Prime cannot make a reasonable risk assessment of the subcontractor. There needs to be a way for the industry to work reasonably with these guidelines, and the current Guidance does not advance that effort.

[10] U.S. Government Accountability Office, GAO-11-672, Acquisition Planning: Opportunities to Build Strong Foundations for Better Services Contracts, Report to Congressional Requesters (2011), available at http://www.gao.gov/new.items/d11672.pdf.

II. Contractor –Subcontractor Relationship

The FAR Council requires that the subcontractors report their own labor violations to DOL, which would then assess the violations and submit a written report to the contracting officer. Under this scenario, the prime would have to check with the contracting officer or with the DOL to see if the proposed subcontractors in the contract would qualify to work for the government. This raises a difficult choice for prime contractors. Before they sign the contract, they must in effect "pre-clear" their subcontractors. This may sound like a simple situation, but many subcontracts are signed hours before the prime submits their contracts. This creates a further tension as the contracting officer must clear all potential subcontractors prior to the contractor awarding the work. The requirement incorporates an additional step in an already lengthy process.

The unintended consequence would be the creation of a "blacklist" for subcontractors, triggering claims by subcontractors against the prime contractor and/or the federal government for improper disqualification for award of a subcontract. The proposed blacklist could further entrench the encumbered process while eliminating new talent from the federal labor market.

This situation is particularly problematic for engineering firms as these entities subcontract up to 50 percent of their contract. This is required due to the level of technical specifications in engineering contracts, from geotechnical to HVAC to mapping, requiring multiple specialty firms to meet these needs. The new requirements proposed under the Guidance would simply multiply existing burdens on the team while failing to recognize the realities of providing design services to the public.

The current relationship between the prime and the subcontractor will be damaged under this proposed regulation. Given that prime contractors seek to select subcontractors on the basis of qualifications, adding a further element to the selection process is extremely burdensome. Design and construction is a highly complicated business. Engineers design buildings to meet myriad requirements including safety, energy efficiency, functionality, and rigorous standards for homeland and national security. Firm employees must be able to meet the federal security clearance requirements in many instances, which serves to limit market participation. If the subcontractors must now also be pre-approved by the government, the contractor is further limited to an ever narrowing pool of subcontractors. The end result of the government's "blacklist" policy will be to limit the participation of both small and large firms in the federal market; and, once again, many firms will just choose not to participate.

III. Due Process Implications

Primes and subcontractors must report violations of Labor laws that include administrative merits determinations; civil judgements, and arbitral awards or decisions that have occurred within the past three years starting in October 25, 2018.[11] The contractors and subcontractors must report even if underlying violation occurred more than three years prior to the reporting

[11] *Id* at 58719.

date.[12] Moreover, these groups must report even if the violation is outside of the scope of any federal procurement.

The scope of this requirement is too broad. Administrative merits determinations encompasses any complaint from the following:

DOL Wage and Hour division	DOL's OSHA or any state agency designated to administer an OSHA-approved State Plan
DOL's Office of Federal Contract Compliance Program	EEOC
NLRB	Federal or state court complaint alleging that the contractor violated any Labor Law provision
Any order or finding by an administrative judge, administrative law judge, or DOL Administrative Review Board, the OSHRC or state equivalent, or NLRB which states that contractor or sub has a violation of Labor laws	To be determined at a later date—violations of equivalent State labor laws. [13]

These determinations are not limited to "notices or findings issued following adversarial or adjudicative proceedings...nor limited to notices and findings that are final and unappealable."[14] Instead, these are notices of complaint without the firm having the benefit of a response to a third party. This provision forces companies to report on complaints that have not been fully investigated nor had any judicial oversight. The Fifth Amendment guarantees that no person shall "be deprived of life, liberty or property, without the due process of law"[15] by the federal government. By allowing federal contracts to be terminated without full judicial proceedings, the Guidance does exactly what the Fifth Amendment prohibits.

While the Department of Labor could counter that the contractors and subcontractors "may submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged),"[16] this argument ignores the fact that the ALCA has three days to return their determination. In this situation, there may not be enough time to fully document or investigate claims by either the company or the accusing agency, or for the ALCA or the contracting officer to make a fair assessment of whether the violation meets the standards to break a contract. Essentially, the contracting officer, if in the likely event the ALCA cannot meet the three day threshold for a determination, must become the judge on this labor matter. The contracting officer is not suited to this position. They are specialists in Federal contracting law, not labor law. There is a concern that it will incentivize the contracting officer to disqualify the contractor or subcontractor rather than take the risk of censure. This reporting requirement has the potential to cause work slow-downs or stoppage as these investigations compound upon one another through protests and review.

[12] *Id* at 58719.
[13] *Id* at 58665.
[14] *Id* at 58721.
[15] U.S. CONST. amend. IV.
[16] Proposed Guidance at 30579.

DOL's Sick Time Rule

The Department of Labor's proposal would require all engineering firms working for a federal agency – as well as subcontractors at all tiers -- to provide their employees with 56 hours of annual sick leave. The proposal would also expand reporting requirements on those firms. While well intentioned, the Council is concerned that the proposal will result in increased costs and administrative burdens on firms working for federal clients, as well as increased costs to the federal government.

Engineering firms typically pay on a monthly or biweekly cycle, and report sick leave and other paid time off with each pay period. The reporting requirement included in DOL's proposal would disrupt this process, mandating that employees receive weekly reports of accrued time off, requiring new systems and potentially adding employees to implement these changes. In circulating the proposed rule to member firms for comment, implementation costs in the first year are estimated to be in excess of $50,000, with additional costs in subsequent years.

As noted earlier, engineering firms working in the federal marketplace already operate under very tight margins, and this latest proposal from DOL – together with other initiatives that have come from the agency over the last year – will put further financial pressures on firms. In addition, the industry is also experiencing increased pressure from federal agencies demanding arbitrary reductions in overhead expenses. Implementation of DOL's sick leave proposal will further add to those overhead expenses, putting firms in the difficult situation of possibly leaving the federal marketplace – which dilutes competition for critical services to the taxpayer – or adding costs to the agency if the expenses are accepted.

Finally, while engineering firms frequently offer benefits that meet or exceed the DOL's proposal on sick leave, we are concerned that this initiative will limit the flexibility of firms to design benefit packages that will attract and retain employees. This is a particularly relevant concern at a time when there is a growing deficit of qualified professional engineers. By setting mandated levels of sick leave, which fails to allow for flexible benefits packages that reflect the locality and employee needs, firms will find it more difficult to retain key employees for their projects.

Conclusions and Recommendations

The engineering services industry is unique in how firms are team, compete and are selected for work in the federal market. Most firms in the industry are small, specialized, and have a business plan to remain that way to assure performance and reputation. Most do not have marketing departments, limited in-house HR functionality, and few if any, have in-house legal counsel. These factors result in the need for special considerations when trying to ensure appropriate small business participation in federal procurements.

We ask that the committee consider the following actions for the DOL and FAR Council Guidance:

- Ask the FAR Council and the Department of Labor to withdraw the proposed Sick Time Guidance and the final Blacklisting Guidance to redraft it to better align with the current contracting process.
- Support the House or Senate 2017 NDAA language to limit the implementation of the FAR Rule and DOL Guidance.

ACEC and I thank the Committee for the privilege and opportunity to address engineering and construction industry issues with current regulatory challenges and I am pleased to answer any questions.