**COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS**
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Augusts 26, 2015

General Services Administration
Regulatory Secretariat (MVCB)
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U.S Department of Labor
Attn: Ms. Tiffany Jones
Room S-2312
200 Constitution Ave., NW
Washington DC 20210

RE: FAR Case 2014-035, Fair Pay and Safe Workplaces and ZRIN 1290-ZA02, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces"

Dear Ms. Flowers and Ms. Jones:

On behalf of the Council of Defense and Space Industry Associations (CODSIA)[1], we appreciate the opportunity to submit comments on the FAR proposed rule entitled, "Fair Pay and Safe Workplaces" published at 80 FR 30548 in the *Federal* Register on May 28, 2015 and the Department of Labor proposed guidance published at 80 FR 30574 titled Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces." The rule and guidance seek to implement Executive Order (E.O.) 13673 (as amended by E.O. 13683) by establishing new labor reporting and compliance requirements for determining that a contractor is a responsible source to receive contract awards from the federal government. As both the rule and the guidance are intended to operate in concert, our comments address both simultaneously and are submitted in response to each publication.

Industry supports balanced policy efforts to ensure that only responsible contractors are permitted to receive federal contracts. The E.O.'s recognition, however, that the "vast majority of federal contractors play by the rules,"[2] raises serious questions about the necessity of creating the sweeping and significant new compliance regime established by this rule.

The government has not assessed adequately the harmful impacts, including the potential for unintended consequences of this rule on the government's mission and the federal marketplace. In this regard, the government has underestimated significantly the costs and the burdens associated with implementing this regulatory scheme.

Industry opposes the proposed rule and proposed guidance. We strongly recommend that this FAR rulemaking be withdrawn for further deliberation by the government in concert with the Department of

[1]The Council of Defense and Space Industry Associations (CODSIA) was formed in 1964 by industry associations
[2] Fact Sheet: Fair Pay and Safe Workplaces Executive Order, available at http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order.

Labor (DoL) or, in the alternative, move forward only after (1) communicating and consulting further and more deliberately with industry representatives, (2) revising the rules based on industry recommendations herein, and (3) republishing revised proposed rules for further review and comment.

**PROPOSED RULE SUMMARY AND RESPONSE FRAMEWORK**

Summarily, the rule is overly broad and arbitrary in its scope, not implementable or scalable under the current regulatory scheme, disrupts the existing labor-management legal and remedial framework, and upsets longstanding and effective acquisition processes, including the responsibility determination and suspension-debarment oversight systems, all without statutory authority or firm expression of need.

The FAR rule requires offerors (prospective prime contractors) seeking federal contracts over $500,000 to certify to their compliance, and the compliance of any of their subcontractors or suppliers (except for subcontractors providing Commercial-Off-the-Shelf (COTS) items) with 14 named labor laws (and unnamed equivalent state laws) and to self-disclose any violations within the preceding three (3) year period, as defined by the guidance, to the contracting officer (CO). The three-year look-back period begins from the date the offeror submits an offer to the contracting agency.

Further, the rule includes lengthy pre- and post-award obligations and ongoing disclosures by offerors and proposed subcontractors that will impact the supply chain significantly, along with a projected remedial scheme that has yet to be determined and/or tested to the scale required by the rule. The rule also requires the stand-up of a new governmental infrastructure at each agency by designating one or more agency employees as Agency Labor Compliance Advisors (ALCA). The requirement to identify and appoint an ALCA was prescribed for agencies in a memorandum issued by the Office of Management and Budget (OMB) and the Department of Labor (DoL) on March 6, 2015 titled, "Implementation of the President's Executive Order on Fair Pay and Safe Workplaces," well in advance of the release of the guidance or the proposed rules or consultation with industry.

Among their proposed duties, the ALCAs will be required to advise the CO and liaise with the DoL to assess any reported contractor violations, and to advise the CO in writing within three days of notice for every transaction whether the offeror is responsible. In this process, they will serve as the agency labor law authority in the analysis, investigation and remediation process between a CO and the offeror, where an offeror or a proposed subcontractor discloses a relevant "violation" on any solicitation submitted to an agency.

Although the ALCAs are responsible for validating prime contractor compliance, they are not involved in the subcontractor compliance review. Under the proposed rule, prime contractors will be permitted, but not required, to seek guidance about a subcontractor's present responsibility from DoL. Unfortunately, the proposed rule also limits the COs or ALCAs assistance to identifying the appropriate DoL representative assigned to assess subcontractor responsibility, but prohibits further engagement in any substantive way to advise or assist with the subcontractor responsibility determination. They may not advise or assist with the subcontractor responsibility determination process.

The E.O. thus shifts a significant proportion of the government responsibility to monitor and enforce labor, workplace safety, and anti-discrimination legal compliance across multiple government jurisdictions from relevant government agencies to federal contractors and subcontractors without relinquishing any of the oversight burdens independently applied to federal contractors under federal labor statutes and E.O.s. This oversight burden shift will increase costs and process times dramatically, reduce competition and the incentive for non-traditional and small suppliers to participate in the federal market.

This proposed scheme suffers from multiple fatal errors: (A) the government has failed to perform the required evaluation of the necessity and advisability of this framework before promulgating the rule; (B) this hastily created framework ignores basic issues of functionality, which will ultimately lead to unnecessary costs to both contractors and the federal government; and (C) this framework upends longstanding procurement practices and is silent on a number of critical elements. In light of these flaws, CODSIA proposes a number of revisions and adjustments to the proposed scheme.

Among other things, the CODSIA comments focus on the following issues and make recommendations pursuant to those areas below and throughout this letter:

1. There is no demonstration of need for this new labor compliance regime and no explanation of how it is not duplicative of existing labor law enforcement authorities and functions already resident in the government.
2. The government woefully underestimates the costs associated with compliance.
3. The proposal will have a detrimental effect on government access to goods and services.
4. Analysis of the statutory and regulatory construct: Definitions Proposed in the Guidance and Employed in the rule Are Extra-Legal and Not Found in Statute.
5. The rule creates a "blacklisting" effect for federal contractors and suppliers.
6. The government's stated preference for Labor Compliance Agreements (LCAs) can be used to unfairly ply unreasonable and unfavorable concessions from contractors and subcontractors in exchange for affirmative responsibility determinations.
7. The proposal is disruptive to the acquisition process.
8. The rule unnecessarily impinges on the discretion of the contracting officer.
9. Key questions about the subcontractor mitigation process must be answered.
10. The complexity of supply chains makes flow-down of these requirements impractical.
11. The rule requires disclosure of sensitive corporate information and does not adequately establish protocols to protect the required information to be collected.
12. The monetary threshold for application of the rule is too low and should be raised.
13. Recommendations from industry to mitigate the impact of the rule and guidance.
14. Other subjects addressed by the rulemaking raise some concerns.

## *A. The government failed to perform the required evaluation of the necessity, feasibility, and advisability of this new framework prior to promulgation*

## 1. There has been no demonstration of need for the imposition of a new labor compliance regime for contractors and no explanation how this regime is not duplicative of existing labor law enforcement authorities

Both the FAR proposed rule and the DoL guidance lack any demonstration of need for this new, extra-legal process. At the same time, they disrupt a well-understood process that addresses and the responsibility determination, including determinations involving labor compliance. The existing mechanisms to address labor law violations have existed for decades and provide the government with a broad array of remedial actions. Moreover, this new onerous compliance regime fails to incorporate existing labor law enforcement databases, unnecessarily increasing the burden on both contractors and the government.

### *a. The Federal Acquisition Regulations (FAR) Part 9.1 establishes adequate authority to address any concerns with labor law compliance in the current responsibility determination process.*

FAR 9.104-1 provides the general standards for finding of present responsibility to contract with the federal government. These standards provide guidance to COs to evaluate the responsibility of contractors holistically, considering, amongst other factors: whether they have adequate financial resources; the ability to meet the required delivery or performance schedule; a satisfactory performance record; a satisfactory record of integrity and business ethics; necessary organization, experience, accounting and operational controls; technical skills; the necessary production, construction, and technical equipment and facilities; and, to be otherwise qualified and eligible to receive an award under applicable laws and regulations. FAR Part 9 provides a process for COs to review relevant information in FAPIIS and other government systems, as well as information provided by contractors in response to contractually required representations and certifications. Through this multi-layered process, the CO is able to incorporate multiple sources of information regarding a contractor's responsibility.

The emphasis is on establishing the contractor's present responsibility through a series of information gathering and validation steps now replete with contracting prohibitions based on various types of alleged individual and company behavior. Over the course of 36 months, a contractor may have had a violation and executed a remediation. Moreover, if a contractor is found to be in persistent violation of labor laws, independent authority exists for them to be suspended or debarred until such time as the contractor remedies its violation, sufficient to be found presently responsible. Neither the Executive Order nor the guidance and proposed rule address why these mechanisms are not working or are ineffective in their operation.

### *b. The new framework proposed by the rule fails to capitalize on existing government databases tracking labor law violations.*

In addition to ignoring the existing suspension and debarment framework, the proposed rule will lead contractors, even commercial/COTS item providers, to report into federal databases violations already tracked by DoL and the other relevant agencies. OSHA, for instance, maintains databases for

approximately 100,000 OSHA inspections conducted annually and displays enforcement data on their website. The dataset includes the reason for an inspection, citation details, penalty assessments, and accident information associated with OSHA standards violations. Data aggregations such as this map and applications demonstrate that DoL has the ability to and in fact already has aggregated existing compliance data. Likewise, GSA maintains the SAM database which already contains much of the information the proposal seeks to collect from contractors and their subcontractors regarding their past performance on government contracts.

The OSH Act itself, at Section 8(d), requires that "any information obtained by the Secretary…be obtained with a minimum burden upon employers…unnecessary duplication of efforts in obtaining information shall be reduced…" (29 U.S.C. § 657(d)). In light of this requirement, and the fact that DoL has provided no explanation why it cannot aggregate and utilize the information it possesses, we believe that the DOL should aggregate the data it already receives into a single database and abandon the proposed duplicative information collection and reporting scheme, or in the alternative, fund its own data collection efforts and allow industry to input data into that portal.

Despite the existence of these databases, containing a wealth of data regarding reported labor law violations, the rule proposes to create a new database from scratch based entirely on contractor self-reporting. Disregarding the E.O.'s mandate to increase efficiency and cost savings in federal contracting, the DoL has failed to explain why consolidating and aggregating labor compliance information is less feasible and less burdensome and costly than creating from scratch the information collection and data reporting construct this rule imposes. To reduce the reporting burden on contractors and subcontractors all data currently available in existing government data bases should be utilized by the contracting officer and Agency Labor Compliance Advisors, and should not be required to be provided under this Regulation.

### *c. The government woefully underestimates the costs associated with compliance.*

As outlined below, the E.O. shifts a significant proportion of the burden of monitoring and enforcing labor, workplace safety, and anti-discrimination legal compliance in multiple government jurisdictions from appropriate agencies to federal contractors and subcontractors without relinquishing any of the existing oversight burdens applied to federal contractors under the respective federal labor statutes and E.O.s.

There is a great deal of concern about the cost and burden associated with this proposed rule and the fact that the government has woefully underestimated these costs and burdens. The costs of shifting this labor compliance burden will be astronomical. Some federal contractors have large supply chains with a commensurate number of subcontracting agreements numbering in the tens of thousands. A six month review cycle as contemplated in the E.O., of thousands of subcontractors, even with the minimal due process requirements it includes, is not scalable to the process currently envisioned and thus not executable on a timely basis, even if only a small number of subcontractors report violations of the E.O.'s covered labor laws.

Hypothetically, if one-third of a large company's supply chain (say 5,000 suppliers or subcontractors) has any reportable "violation" that could be cause for the prime contractor to review thousands of cases and potentially trigger similar reviews and engagement with the yet-to-be-created ALCAs or DoL. Not only do companies not have the compliance and manpower resources to conduct these type of enforcement reviews, or the legal expertise at all levels of the subcontract transactional process to distinguish an alleged violation from a civil judgment or an administrative merits determination, especially where such legal decisions are not final, the DoL would also be overwhelmed by responsibility reviews of even minor cases that would ultimately need clearance.

The President's FY 2016 budget request included funding for an Office of Labor Compliance within DoL that would be staffed by 15 federal employees at a cost of $2.6 million. If this office is intended to be the resource for prime contractors to consult with regarding subcontractor responsibility determinations, then CODSIA would express strong concerns that the full time employee count of 15 falls far short of the number of personnel that will be needed to support prime contractors. It is worth noting that the FY 2016 Labor/HHS appropriations bill, as passed by the House appropriations committee, would prohibit the use of fiscal year 2016 funds to establish an Office of Labor Compliance. If this provision is enacted into law, there is little question that the supporting DoL/LCA infrastructure will not be in place or actively engaged in their advisory role as the implementation proposes and be resource starved at the outset.

The table below sets forth the various labor laws and the responsible federal administrative agency for purposes of directing attention to the scale and scope of the process being implemented. If nothing else, the table reflects how many discrete agencies and structures within the DoL and elsewhere in government that an ALCA, a CO, and all prospective federal contractors and subcontractors may have to engage with before a single responsibility determination can be made and a contract can be awarded or any single subcontract can be approved.

**List of Laws and Administrative Responsibility**

| Law | Administrative Enforcement Agency |
|---|---|
| Fair Labor Standards Act | Department of Labor (DoL) – Wage & Hour Division |
| Occupational Safety and Health Act | Department of Labor (DoL) – Occupational Safety and Health Administration |
| Migrant and Seasonal Agricultural Worker Protection Act | Department of Labor (DoL) – Wage and Hour Division |
| National Labor Relations Act | National Labor Relations Board (NLRB) |
| Wage Rate Requirements | Department of Labor (DoL) – Wage and Hour Division |
| Service Contract Labor Standards (Service Contract Act) | Department of Labor (DoL) – Wage and Hour Division |
| Executive Order 11246 – Equal Opportunity | Office of Federal Contract Compliance Programs (OFCCP), DoL |
| Section 503, Rehabilitation Act of 1973 | Office of Federal Contract Compliance Programs (OFCCP), DoL |
| Vietnam Era Veterans Readjustment Assistance Act | Office of Federal Contract Compliance Programs (OFCCP), DoL |

| | |
|---|---|
| Family and Medical Leave Act | Department of Labor (DoL) – Wage and Hour Division |
| Title 7 – Civil Rights Act of 1964 | Equal Employment Opportunity Commission (EEOC) |
| Americans with Disabilities Act | Equal Employment Opportunity Commission (EEOC) |
| Age Discrimination in Employment Act of 1967 | Equal Employment Opportunity Commission (EEOC) |
| Executive Order 13658 – Minimum Wage | Department of Labor (DoL) – Wage and Hour Division |

**Equivalent State Laws (Undefined except OSHA approved state plans)*

i. Assessing the burden of this proposal is incomplete pending several clarifying actions DoL or the FAR Council must provide.

Additional considerations are necessary to fully define the burden associated with this rule:

*A. The cost of complying with unspecified "equivalent" state laws cannot be determined.*

To date, the state laws "equivalent" to the fourteen specified federal laws implicated by this framework have not been defined by the government. Accordingly, industry has been unable to quantify the precise cost of identifying, reviewing, and reporting "violations" under the rule. However, based on the reality that each state has its own, idiosyncratic set of labor statutes and regulations, it is reasonable to conclude this will be a substantial undertaking. Simply identifying, understanding and staying current on the applicable laws in each state in order to understand which "violations" would be covered by the rule could be a momentous legal undertaking and maintenance effort. Many large contractors operate in all fifty states but, even contractors which do not operate in all fifty states would still be required to have knowledge of the statutes and regulations in states other than which they operate, to the extent a violation is reported by a subcontractor under that states' regime. Creating the mechanism and devoting the resources necessary to capture and report state level "violations" in up to fifty different jurisdictions will certainly require significant financial resources. None of the options discussed in this proposal for how to collect information from the supply chain would help alleviate a prime or subcontractor of this cost and burden. Industry has estimated that there would be hundreds of equivalent state laws captured by this proposal. It is unclear how the DoL will undertake and sustain a capability to catalogue and maintain currency on these state statutes, because no such capability or resources devoted to such a capability are in place today. The fact that the DoL guidance and this rule have postponed this element of the rulemaking is ample evidence of the complexity of this undertaking.

*B. Agencies can anticipate significant delays acquiring the goods and services they need for mission requirements.*

To the extent that all federal contracts are issued to meet essential missions for a public purpose, including the defense of the United States from military attack and terrorism, the management and preservation of our natural environment, protection against cyber terrorism and cyber-attacks, control of the nuclear stockpile, control of the energy grid, regulation of the nation's airspace, conduct of international trade and diplomatic relations, piloting spacecraft to outer space, to name but a few, it is

difficult to underestimate the damage to the nation's interests from the lengthier and more complex, litigious and exclusionary award process that is likely to result from this rulemaking.

The rule contemplates a perfectly harmonious labor-management environment that is inconsistent with a modern industrial world and the modern regulatory and governance model. In that light, contracting outcomes will become less predictable, since it is likely that a negative labor law responsibility determination for either prime or subcontractor will become a regulatory bottleneck at the last moment before an award. This bottleneck will conceivably lead to the overthrow of many projected awards and oust many otherwise eligible prospective awardees from consideration and/or cause the renegotiation of new or different subcontract or supplier agreements to account for the need to change vendors, all of which will create added risk of bid protest. While the rules contain a notional date of 3 days for the ALCA to respond to the CO request for assistance, that estimate is contingent on the actions of other parties and submission of a significant amount of data. This three-day response requirement does not appear to be binding on the ALCA and is likely to be ignored in the pace of events. Industry also notes that there has also been no specific timeframe identified for resolution of the process where a prospective contractor consults with the DoL on subcontractor labor law related non-responsibility determinations. Such an oversight must be addressed to establish and maintain some regularity to the process.

The procurement and labor law due diligence process will thus take much longer to complete and the cost to engage in the federal marketplace, already unduly high, will grow disproportionately higher for prospective contractors trying to retain performance teams in place while dealing with the labor law due diligence process, including the likelihood that companies will have to stand up large and expert compliance functions solely for this purpose. Under the normal process of crafting a profitable proposal and considering continued cost pressure downward by government buyers on companies engaging in the federal market, it is likely that already low company investment returns will be negatively impacted, leading to less competition. Even with competition, the FAR Council should expect that awards for contracts over $500,000 will have lead-times of many more weeks, if not months (not including bid protest impacts), simply to clear the responsibility determination hurdle. As stated above, such action was once considered the last step before an award is announced and previously done within a day or two prior to, or contemporaneous with, an award.

It is likely that the responsibility determination process, already expanded by many other new pre-award compliance checks aimed at catching bad actors in the federal government space (such as tax delinquents, human traffickers, counterfeit part and payroll fraudsters and offshore contractors), will become its own distinct, segregable procurement process, aimed at enforcing laws not necessarily related to contract performance, rather than a last due diligence step on present responsibility as prescribed in FAR Part 9.

Such administrative delays in procurements were one of the primary reasons that the seminal acquisition reform statutes were passed two decades ago. Eviscerating the efficiency measures put in place by those status, this rule will bring back extraordinarily long lead-times for even non-complex commercial items, and where highly competitive and/or complex, technology based supplies or services are necessary to meet the agency missions, the procurement lead-times could easily double or triple in

length, meaning a procurement scheduled now to take 9 months could take 2-3 years to execute while any or all violations are disposed of or closed out. Agencies should anticipate that missions will be enormously and negatively impacted by the insertion of these rules into the procurement process.

CODSIA reiterates that the government has poorly addressed or anticipated these impacts in the development of this rule and urge again that it be withdrawn until such time as the ramifications of this action can be effectively catalogued and mitigated or eliminated.

### *C. Delays resulting from the inability to address the volume of transactions are inevitable.*

The proposed rule requires that the ALCAs will respond within three days in writing to any request from a CO for advice on a responsibility determination regarding the award of a contract. The federal government contracts each year for billions of dollars of goods and services across hundreds of thousands of contracting actions. While the proposal limits application of this framework to contracts over $500,000, or subcontracts over $500,000 for non-COTS items, this does not sufficiently narrow the scope of application to make the resulting process manageable given the currently level of dedication of resources. The Department of Defense (DoD) alone has over 24,000 COs – far too many for a departmental ALCA to effectively address. Since the related actions by this administration do not provide additional resources to create legions of ALCAs to match the legions of COs, delays are inevitable.

Furthermore, just because a contractor avoids reporting on one contract because it is below the $500,000 threshold does not negate their compliance requirement if they plan to ever grow or be more successful in their business. For primes, there are no efficiencies to be found in flowing these requirements through the supply chain in a piecemeal or spotty fashion. Should a prime contractor omit this requirement in an initial subcontract because the dollar value did not meet the $500,000 threshold, it could find itself in the position of having to renegotiate that subcontract and perform an evaluation of the subcontractor's labor law compliance mid-stream should it later require additional orders from that supplier under the prime contract which raised the total value over the threshold amount. Government and industry should anticipate instead that, both out of an abundance of caution and risk management, and in the interest of efficiency these compliance requirements will mostly flow to all companies in the supply chain. Given that the federal government has incomplete data regarding the number of companies actually serving the federal industrial base as subcontractors and suppliers below the first few tiers, we must rely upon the accurate tallies offered by large primes. It is therefore reasonable to conclude that hundreds of thousands of subcontractors and suppliers exist across the federal enterprise. If the rules are to be applied across a corporate enterprise for purposes of compliance, record collection and reporting, then that number could easily exceed a million vendors across the global market. Capturing data on a million vendors every six months and ensuring that it is reported to the DoL and effectively catalogued for use by the ALCAs is a task the government is ill equipped or resourced to manage. Such a volume would also dramatically increase the compliance costs for prime contractors, which will be passed along to the taxpayer in the form of higher prices.

Industry believes that the monumental regulatory compliance apparatus necessary to capture and manage the volume of data that would be collected would be unwieldy, at best, and it is difficult to imagine that it could be efficient enough to support the ALCA advising the CO in the time prescribed under the proposed rules. Such delays would be significantly compounded given the scant number of ALCAs available to review the volume of contracting actions.

This means that the government and industry must anticipate delays in government contracting if this proposal is implemented and some of those delays could be extreme. Delays can be unavoidable because of bureaucratic processes, but delays associated with the limited resourcing in anticipation of this rule are unacceptable. In government contracting, delays are frequently impermissible because of mission urgency, like national or cyber security, or when lives could be at stake, like provisioning the warfighter or responding to natural disasters. In order to address this situation, the government should establish contingency protocols providing COs with the ability to proceed with contract award when delays are impermissible. Such options should be established before this rulemaking becomes final. Additionally, the government should realistically assess the volume of regulatory activity this rule creates and effectively resource to mitigate the inevitable delays this rule will bring.

### *D. Industry anticipates the volume of bid protests will increase.*

In addition to the delays that this framework will introduce into the normal procurement process, the other inevitable outcome of implementing these new requirements would be to provide a new and easy protest ground for unsuccessful offerors. Wherever an awardee has at least one reportable "violation" under the rule, an unsuccessful offeror could raise as a challenge to the procurement decision the agency's failure to properly consider the responsibility of that awardee in light of this "violation". Although the record of the ALCA and CO's consideration of the matter would, in many instances, lead to the denial of this protest ground, this resolution could not be accomplished without completion of the full protest adjudication process—100 days at GAO and potentially longer if brought at the Court of Federal Claims. Troublingly, in a procurement where a protestor might not have any other valid basis for protest, a single "violation" could provide a basis to force full protest adjudication, delaying the procurement and adding substantial cost to the government.

The inevitability of this new protest ground derives from the fact that, as currently envisioned, information regarding any reported "violation" will be made available in FAPIIS. *80 Fed. Reg. 30,549*. Thus, even if a competitor would otherwise have no basis to challenge an award, publicly available information will provide them with a road map to protest.

Even if the information made publicly available in FAPIIS is limited to address this concern, the rule fails to account for the reality that, considering the requirement to review subcontractor information, companies will still be put in the position of revealing detailed information regarding their labor law compliance to other parties, including potential competitors. Parties will be required to negotiate complex Non-Disclosure Agreements (NDAs) to simply exchange information related to any labor law violation as contemplated under the clause at 52.222-BB(c). Nonetheless, it is reasonable to conclude that revealing such sensitive information to a competitor or other third party, even those operating

under an NDA, could create added fodder for future bid protests and additional litigation between the parties.

Industry further anticipates that the current staffing at GAO is insufficient to manage the expected increase in the number of protests as a result of adverse or delayed responsibility determinations under this rule. Such an increase would become unmanageable and companies entering into a protest would experience additional delays, on top of those already contemplated above, in the contracting process. Since a bid protest at the GAO automatically stays performance of a contract, these actions (even without considering resource shortcomings) would create further delays in federal contracting.

### *E. The reporting requirements are overly burdensome.*

The reporting requirements in the operative clause require semi-annual reporting by primes and subcontractors of disclosed violations over the life of the contract – essentially creating a kind of continuing responsibility determination process - the purpose of which is unclear since it applies to the ongoing DoL duty to monitor labor law violations. The cost estimates for these ongoing reporting requirements are enormous and disruptive to industry business objectives. Considering the number of contracts that may be subject to the rules, and that each contract will have a different award date, contractors may be reporting multiple times on each contract on the same violations over the term. Reporting should be consolidated as annual or semi-annual based on a date the contractor selects and that could align to the maximum extent with other report submissions to the federal government for other purposes, such as when DoD CAS-covered contractors have to submit their incurred cost submissions at the same time each year. This could help industry build predictability in the supply chain and prevent industry from flooding the government with redundant reports on the same violations.

### *F. The government has grossly underestimated the cost to industry of implementing new compliance tools.*

In the proposed rulemaking, the government fails to accurately recognize the substantial costs that federal contractors and subcontractors will incur to implement the brand new compliance processes and systems to identify, analyze, and track reportable "violations." Currently, there is no comparable requirement to track "violations" of federal and state labor laws in the manner required under this proposed framework. Accordingly, the vast majority of industry will be required to design and implement—from scratch—processes and systems to both collect this information and to then review it to determine whether it is a reportable "violation" under the rule. The cost associated with implementation and maintenance of these new systems, including the administrative and legal personnel required to process and review the data generated, will be substantial and will be ultimately passed on to the taxpayer through higher overhead rates and/or higher prices for goods and services.

Additional costs will include the need for new tools at companies in order to establish and maintain compliance and reporting requirements. Some companies use cross-functional databases accessed by various departments including Security, Ethics, Legal, and Human Resources/Equal Opportunity (Program EOP) to track internal usage and control access. Functionality can be limited or privileged and no such functionality as contemplated by this proposal is currently part of any database that can be

identified in industry. Costs to develop a tool to collect data in one place within a company, and analyze and track all "violations" would likely be required because current tools were not designed to track and report on matters as currently defined in the Executive Order, the guidance and the proposed rule. For some tools, the annual operating cost in one business unit facing the federal government is $500,000. Companies have not yet been able to confirm the design and development costs for upgrades as described above, however, it likely exceeds the annual operating costs and will be a multi-year project. Anecdotally, standing up industry compliance with the E-Verify system across one large federal contractor simply to verify an employee's identity cost between $1,000,000-2,000,000, not including any recurring expense to operate and maintain.

Reportable matters from a wage hour perspective will require establishment of a process to track and report. For most companies, DoL wage and hour investigations are today handled and resolved at the business area level and are not tracked centrally. For some companies, Service Contract Act and Davis-Bacon Act matters are tracked centrally but are handled and resolved in the business area.

Lastly, many companies believe that, as the items included in the proposed regulation's reporting requirements extend across functional areas, a cross functional tool may need to be built to support each area separately, capturing relevant information in a tool while ensuring that the data is only available to those deemed necessary to the reporting aspect.

Therefore, companies looked at current tools utilized by various departments within their organizations including Ethics, Legal, EOP, Security, etc., to track relevant information related to investigations, to get an estimate regarding building a compliance tool. Using similar existing tools, industry is able to evaluate additional burdens associated with managing risks associated with this rule and the resultant compliance and reporting regimes required by this rule and the DoL guidance. A representation of that burden estimate is presented below.

| Activity/Event | Description | Time Estimate |
|---|---|---|
| Confirm if contractor has any reportable offenses for each Contract of $500,000 and above to be bid | Company would determine best method to confirm with Business Area & then collect data | 8 hours per reportable offense |
| Business Area confirm status | Business Area confirms if they have reportable offense within prior 3 years and report back to Corporate Equal Opportunity | 8 hours per Business Area per reportable offense |

| | | |
|---|---|---|
| | Program | |
| Enter reportable offense into DOL System for Award Management (SAM) database | | ½ hour per offense circumstances |
| Type of Violations as determined by Agency Labor Contract Advisor (ALCA) | N/A | N/A |
| Determine the likely level(s) of violation assigned to each reported offense | | 40 hours per reportable offense |
| Corporate confirm monthly status of any reportable offense | Ongoing maintenance of database | 4 hours per month |
| Business Area confirms monthly status of any reportable offense | Business Area confirms any new or changes if they have reportable offense and report back to Corporate | 4 hours per Business Area per month |
| Determine which reportable offense which has already or is being reported belong to which contract<br><br>It is assumed that once a contract is awarded there is not a retroacted review of previous rewarded contracts. | Corporate Equal Opportunity Program would need to review reportable offenses and identify to which Business Area they belong.<br><br>Contractors would need to notify or get verification from Corporate Equal Opportunity Programs and other POCs if the Business Area(s) in the new or | 2 hours per reported offense |

| | | |
|---|---|---|
| | revised contract has any reported offenses listed in SAM or are likely to be listed prior to the award of the contract. | |
| Remediation/Clarification Discussion with ALCA in Agency | If Agency ALCA requests more information about a violation, discussion will be needed to offer mitigation defense, or clarify on questions | 40 hours per offense cited |
| Review Subcontractor reports on Equal Employment Opportunity/Affirmative Action offenses | Internal or external; prime reports to SAM or option to have Subcontractors report directly to DoL/SAM and provide prime with case numbers | 20 hours per contract |
| Database Use/Maintenance | | $500K Annual |
| | Corporate total hours per "Reportable Offense" | 90.5 hours |
| | Business Area total hours per "Reportable Offense" | 8 hours |
| | Corporate total hours per month "Maintenance" | 4 hours |
| | Business Area total hours per "Maintenance" | 4 hours |

| | |
|---|---|
| Combined Corporate & Business Area "Verification of Subcontractor compliance per contract" | 20 hours |

Such costs spread across the entire industrial base and the entire supply chain for the federal government are not adequately reflected in the cost estimates the government has provided as part of the proposal documentation. The following economic impact assessment developed by industry outlines what we believe will be a realistic cost and burden to industry and government.

Considering the scale and cost to address the practical problems that will be encountered in the data collection, fact finding and reporting functions, and absent the withdrawal of the proposed rules, industry recommends that the government create a government-wide labor data collection and reporting repository to be stood up over time to be updated annually or biannually that contractors can use to submit ongoing compliance data, violation records and any other relevant information that government COs can then use to make their labor law responsibility determinations. Any system for the collection and storage of such data must have the requisite protections needed to prevent leakage of proprietary data or privacy protected data to the public or to potential competitors.

## 2. The proposal will have a detrimental effect on government access to goods and services.

### *a. The rule will have a detrimental impact on non-traditional contractors and small businesses.*

This year, Under Secretary of Defense for Acquisition, Technology, and Logistics, Mr. Frank Kendall, the Chairman of the House Armed Services Committee, Rep. Mac Thornberry, and the Chairman of the Senate Armed Services Committee, Sen. John McCain, have all announced initiatives to increase the technological competitiveness of U.S. military equipment. All three have seen and expressed concerns about the advances that other nation-states have made relative to U.S. technology, and the impact that those gains will have in emboldening nations to misbehave globally. Already the United States has seen irresponsible behavior by Russia in Crimea and Ukraine, and efforts by China to build land barriers in the South China Sea in order to exert new, disruptive territorial claims well outside of its traditional borders. These behaviors will only become more aggressive as foreign states approach technological parity with the U.S. military.

One of the solutions to this challenge is for the U.S. defense industry to gain increased access to the global, commercial, and financially complex technology innovators outside of the industry that traditionally does business with the government. These "non-traditional" suppliers often avoid doing business with the government due to the increased cost, and regulatory and compliance requirements that companies face when dealing with government customers. That outcome means a loss of needed technology in some cases, and more expensive technology in other cases.

One response by industry to the increase in regulatory pressure by the federal government in the form of unique requirements is to create distinct and separate corporate business units to sell to the

government designed solely for the purpose of meeting those unique compliance requirements. Such changes in business models carry with them all the added costs associated with the unique regulatory requirements, such as those proposed here, but are also mostly disruptive to commercial suppliers, increase costs to the government, and defeat the government's declared intention to capitalize on current technology innovators within the commercial market. Another means by which new technologies have entered the federal marketplace is through acquisition by a prime contractor from a supplier or subcontractor. The procurement of such technology, however, through these commercial vendors will be hampered if they are required to accept, as a contractual flow-down, the requirements to report and be subject to assessment by a prime of labor law compliance under this onerous framework. These primarily commercial suppliers will not have the compliance processes to track and report the required information, and may be unable or unwilling to make the certification required by the FAR flow-down.

Combining the labor law compliance and enforcement processes with the contracting process provides an example *par excellence* of the phenomenon that will drive away non-traditional, innovative suppliers. If the U.S. commercial marketplace has one set of labor compliance rules which are less burdensome than the rules that apply to the government marketplace, commercial suppliers will choose to remain exactly that—they will decline the exposure and heightened risk involved in selling to the government or to prime federal contractors. The probability of this decision will increase because the rule and guidance will require enormous compliance investment and has the potential to create more labor disruption in a commercial supplier than it purports to cure, while offering only the incentive of receiving a single, time-bounded government contract as the reward for compliant behavior.

Particularly at a time when sequestration is reducing the available spend on federal contracting, increasing competition cost and lowering the likelihood of success, the government should seek to make itself a more attractive buyer, not a less attractive one. The proposed "Fair Pay, Safe Workplaces" rule does the opposite. Faced with this substantial compliance hurdle as an entrance fee to seeking government work, not to mention the multitude of other regulatory compliance requirements facing the government vendor, companies not currently participating in the federal marketplace will have no incentive to pursue such work.

Furthermore, this Administration has made a concerted effort over the last few years to attract non-traditional companies, particularly for information technology needs in the federal market. They have dispatched representatives to Silicon Valley to specifically recruit new talents to public service, created the "18F" incubation program and the U.S. Digital Services to bring that talent to bear in the federal agency structure. They have also offered capabilities using non-traditional contracting exercises, like the Buyers Club and the recent GSA solicitation for assistance to 18F, as a means to attract small, non-traditional technology vendors to the market. Such efforts are detrimentally impacted by this proposal. The flow-down provisions also prevent more traditional federal market prime contractors from securing innovative goods and services from these non-traditional actors, who are not adequately resourced to effectively comply with these requirements and/or do not wish to reveal or publicize their alleged or actual labor law violations. Accordingly, the risk associated with an adverse decision by the DoL regarding their compliance as a supplier or subcontractor could lead to an existential crisis for small companies that cannot be mitigated through any process. This rule directly undermines and negates

these efforts and establishes a requirement that makes their success significantly more challenging. The Administration needs to reassess these impacts upon these other priorities they have established and consider establishing options to mitigate these detrimental effects.

*b. The government should consider the impact of this rule to small businesses.*

The challenges presented by this rule when applied to "non-traditional" suppliers only increase when applied to small businesses. While the government by law prefers small business suppliers, these suppliers are the least able to efficiently metabolize significant new compliance burdens. In theory, large companies can spread new compliance costs across a significant number of contracts executed across the enterprise. Small companies instead see their overhead rates increase dramatically, on an exponential scale, with each additional new compliance burden. The more compliance burdens levied on small businesses, the more difficult it is for them to compete in the federal marketplace, regardless of the other advantages we may provide to them. Considering these businesses are already required to comply with the underlying federal and state statutes, the imposition of this additional compliance burden will have the effect of hampering their ability to operate as lean, low-overhead, and agile operations.

CODSIA also notes that there is some confusion over the application of the rule to small businesses. Under current procurement rules, the simplified acquisition threshold, under which all acquisitions are reserved for small businesses, is $150,000. Over $58 billion of the total $101 billion small business set-asides are greater than the simplified acquisition threshold in FY 2014. That is over 57 percent of the small business set-asides that are potentially greater than the current $500,000 limit. With services NAICS codes starting at $1 million annual gross profit, and construction-related services like architecture ($7.5 million), engineering ($15 million) and construction at ($36.5 million) there are many opportunities for small businesses to be negatively affected by this rule, as either a prime or a subcontractor. The rule will affect small, medium, and large businesses, which is antithetical to the current Administration's policy for including new small businesses in the government. Although the brunt of the rule will not fall on small businesses, but on mid-tier and large contractors, small business will still be subject to the rule if they enter into a prime or subcontract over $500,000. While it is presumed that setting the threshold at that level was designed to exempt many small businesses performing only at lower thresholds from being impacted by the rules, it may not accomplish that objective, given the rule's application to subcontractors. There is also some concern that if the rules are tailored to mostly exempt small businesses, higher tiered contractors will have to absorb all risk related to labor law violations by small business suppliers.

## 3. The economic analysis supporting the order is severely deficient.

Executive Order 12866 directs agencies "to assess all costs and benefits of available regulatory alternatives" and to "select those approaches that maximize net benefits." It also directs each agency to base "decisions on the best reasonably obtainable scientific, technical, economic and other information," and to "tailor its regulations to impose the least burden." Executive Order 13563, further directs agencies "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." In the truncated time provided to develop and publish the

proposed rule and guidance, the FAR Council and the DoL have not complied with these requirements. Instead of presenting a reasoned analysis based on verifiable empirical evidence of the benefits and costs of the selected regulatory approach and of the alternatives considered, the FAR Council and the DoL have presented an incomplete analysis based largely on assertions and assumptions not supported by empirical evidence. For example, the cost-benefit analysis:

- Incorrectly assumes that firms already track and maintain consolidated records of alleged labor law violations covered by the E.O. In fact, the proposed rule will compel current contractors and subcontractors, *and prospective contractors*, to create information systems that do not currently exist to collect and track the ongoing status of all enforcement and legal actions companies may have related to the covered federal labor and employment laws and executive orders and the as yet undefined equivalent state laws. Importantly, these costs are inherent when a company indicates they have no violations to report.
- Fails to estimate the costs associated with the labor compliance agreement process. These costs would include the legal costs of entering into such agreements with a wide variety of enforcement agencies. Moreover, it is possible that some contractors and subcontractors will be required to enter into three separate labor compliance agreements with the DoL, the EEOC, and the NLRB that have separate jurisdictions over the federal laws they enforce.
- Because of these significant additional costs and the failure by the government to include them in the published economic analysis, especially those costs associated with the labor compliance agreement process, is hard to assign to mere oversight. In any event, such oversight is clearly a violation of the Administrative Procedures Act and the Office of Federal Procurement Policy Act, and as such, the FAR Council and DoL should re-propose the rule and guidance to include a discussion of this critical component of the E.O.

## *B. This hastily created framework ignores basic issues of functionality, which will ultimately lead to unnecessary costs to both contractors and the federal government*

### 1. Analysis of statutory and regulatory framework: The definitions and policies proposed in the DoL Guidance and in the FAR rule are problematic, extra-legal, violate fundamental due process requirements and remedial frameworks in existence and should be withdrawn or radically revised before implementation.

The definitions proposed in the guidance and used in this rule are overly broad and vague, and thus unfairly limit the rights employers have under law. The definitions alone significantly expand the scope of application of this proposal and create challenges for any company wishing to engage in the public sector market as a prime or sub-contractor.

The DoL guidance creates significant confusion by introducing alternate and duplicate, parallel remedies that appear to conflate mere complaints, letters, and allegations regarding labor law infractions with fully adjudicated legal decisions. The proposed FAR rules reliance upon the DoL guidance to define new enforcement application of those definitions essentially eviscerates statutory due process for labor law compliance for contractors, subcontractors and suppliers.

The potential for adverse action in federal contracting against a contractor, subcontractor or supplier attributable to a non-responsibility determination or an ongoing set of adverse determinations for such a wide range of alleged or putative violations is self-evident to industry and far more draconian than those currently imposed by the governing labor statutes or E.O.s. As indicated below, resolution of many labor litigation cases often takes years before final resolution and a broad expansion of the responsibility determination process to subsume such litigation into its ambit will unduly and unnecessarily lengthen the procurement cycle. Such a lengthening of the process is beyond the exercise of any efficient contracting process and will result in unconscionable delays in source selections to fulfill agency missions.

Additionally, as will be seen in the detailed discussion of significant cases below, and repeated at other junctures herein, the responsibility determination process, prior to this rulemaking, has been designed as a final brief check on a contractor's business capabilities and integrity prior to award. It is specifically not intended as an *adjudication* of a prospective contractor's alleged bad acts, inclusive of labor law violations, in the many areas identified in FAR 9.1. Thus, implementation of this framework using the terms set forth in the guidance is not only flawed on its face and unfair to all parties given the existing contract and labor law frameworks, but will lead to excessive and unwarranted delays in the procurement process.

### *a. Agency preliminary assessments are not and cannot be labeled violations of law.*

The expansive proposed definition of "administrative merits determination" ("AMD") circumvents statutory mandates and fails to accomplish the increased efficiency or costs savings that the executive order demands. At its core, the proposed guidance and implementing rule transform agency preliminary assessments and ongoing disputes with employers into "violations," never contemplated by the statutes or implementing regulations. Any AMD short of a final and enforceable order of the agency would impose a punishment on contractors that Congress has not included in the underlying statutory language, and therefore cannot stand. Further, the guidance seeks to create a distinction between complaints filed by individuals and initial findings by agencies. In practice, this is a distinction without difference, as the underlying statutes afford no such latitude in their adjudicative mechanisms. The guidance and the corresponding rule will use initial findings and assessments as if they were "violations," foreclosing due process as established in the governing statutes for the accused party.

#### i. The referenced laws have specific statutory and regulatory adjudicatory mechanisms that cannot be short-circuited by executive order or agency guidance.

Each of the fourteen statutes listed in the E.O., and the unspecified equivalent state laws, already have in existence their own enforcement and adjudicatory mechanisms. The use of initial assessments as violations and the subsequent incorporation of an unrelated review of these purported violations of these statutes through the evaluation of a contractor's responsibility, where there is not necessarily an accompanying finding of violation through the dedicated channels for enforcing the underlying requirement, inappropriately shortcuts the underlying statutory framework. The three statutes discussed in detail illustrate the inappropriate distortion of existing processes effectuated by the rule's

definition of AMD. The examples below provide three types of statutes as examples, but each of the listed statutes in the executive order has its own adjudicatory mechanism, which cannot and should not be distorted or cut short through executive order. Unfortunately, the proposed AMD definition would do just that. The definition must be recast to fit within the requirements of the underlying statutes and employ only violations as fully adjudicated under each statutory framework.

In the context of the Occupational Safety and Health Act (OSH Act), the DOL, through the Occupational Safety and Health Administration (OSHA), has the authority to inspect workplaces to identify if it believes employers have violated any standards promulgated under the OSH Act or violated a general duty to provide a place of employment which is free from recognized hazards. *29 U.S.C. § 657(a)*. OSHA may issue citations to the employer for violations of these standards or the general duty clause. *29 U.S.C. § 658(a)*. The employer and the applicable OSHA area office may reach an "informal settlement agreement" within 15 working days of issuance of the citation. *29 C.F.R. § 1903.20*. The employer has 15 working days to file a "notice of protest" over issuance of the citations. *29 U.S.C. § 659(a)*. After the employer has filed a notice of contest, the Area Director may enter into a Formal Settlement Agreement with the employer. *OSHA Field Inspection Reference Manual, § IV.D.4.d*. OSHA, through the Solicitor of Labor, must file a complaint with the Occupational Safety and Health Review Commission (OSHRC) no later than 20 days after receipt of the notice of contest. *29 C.F.R. § 2200.35*. The complaint is first heard by an Administrative Law Judge (ALJ) who makes findings and issues an order on the complaint. *29 C.F.R. § 2200.90*. The employer may appeal the finding/order of the ALJ to the full OSHRC. *29 C.F.R. § 2200.91(b)*. The parties may enter into a settlement at any stage of these proceedings. *29 C.F.R. § 2200.100(a)*. The employer can appeal an adverse decision and order from the OSHRC in the appropriate United States Court of Appeals. *29 U.S.C. § 660(a)*.

The proposed rule and guidance, which would require reporting of OSHA "violations" at the initial citation stage, regardless of any notice of protest or ongoing settlement. Accordingly, the ALCA and CO would evaluate, and potentially base a finding of non-responsibility, on a preliminary complaint, regardless of any notice or protest. This undermines the very framework established by the OSH Act, which specifically provides for a process to challenge findings of violations, and punishes the employer in the absence of any actual finding of liability. In other words, the proposed rule and guidance labels a preliminary assessment or ongoing dispute as employer liability for a violation – which it is not. If a citation is withdrawn or settled informally (or settled at all in the absence of a specific admission of liability), it is not and should not fall within the AMD definition and should not be deemed a "violation". If the employer pursues its rights to contest a violation, then during the pendency of that proceeding, the citation should not fall within the AMD definition and should not be deemed a "violation".

A similar result occurs in the context of the National Labor Relations Act (NLRA). Under the NLRA, a union or employee files a charge with the National Labor Relations Board (NLRB) alleging that an employer committed an unfair labor practice. *29 C.F.R. § 101.2*. After an investigation, the NLRB decides whether to dismiss the charge or to file a complaint. *29 C.F.R. § 101.6*. The NLRB, through the Office of the General Counsel, has the authority to issue a complaint against any person based on an assessment that the employer committed an unfair labor practice. The General Counsel will file the complaint to be heard by an NLRB administrative law judge or can file a complaint seeking injunctive relief in federal district court. *29 U.S.C. § 160(b),(e)*. An employer may enter into a settlement agreement with the NLRB

at any stage of the process and most commonly through a non-board settlement, informal settlement, formal settlement agreement, or formal settlement stipulation. *29 C.F.R. § 101.7, 101.9; NLRB Case Handling Manual, § 10124 et seq*. If an employer does not settle, the complaint will be heard by an NLRB administrative law judge. *29 C.F.R. § 101.10, .11*. An employer may appeal the findings and decision of an ALJ to the full NLRB. *29 C.F.R. § 101.11*. An employer may appeal the findings and decision of the full NLRB to the appropriate United States Court of Appeals. *29 U.S.C. § 160(f); 29 C.F.R. § 101.14*. Again, as in the OSHA context, automatically labeling an initial agency complaint as a violation and then allowing the evaluation and use by the ALCA and the contracting officer – despite the ongoing proceeding before the ALJ and/or the Board – punishes the employer in the absence of any actual finding of liability. To reiterate, the proposed rule and guidance labels an ongoing dispute as employer liability for a violation – which it is not. If the complaint is withdrawn or the employer appeals a decision by an ALJ or the NLRB against it, it is not fully adjudicated and cannot be a reportable AMD and thereby labeled a "violation". The AMD definition should be clear that it is only where liability is final and not appealable that that the agency's action can be an AMD and thereby deemed a violation.

This type of short-circuit of the adjudicatory process is even more striking in the context of the various statutes before the Equal Employment Opportunity Commission, including Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Title VII, the ADA, and the ADEA all require that an aggrieved person file a charge of discrimination or retaliation with the Equal Employment Opportunity Commission (EEOC). *42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117(a); 29 U.S.C. § 626(c)*. Prior to determining if there is reasonable cause of a violation, the EEOC may encourage the parties to settle the charge. The EEOC typically signs any settlement agreement between the parties. *29 C.F.R. § 1601.20*. If, after an investigation, the EEOC determines there is "no reasonable cause" that a violation occurred, the EEOC shall dismiss the charge. *42 U.S.C. §2000e-5(b)*. After the EEOC notifies the charging party of the dismissal, the EEOC's jurisdiction over the charge is terminated and the charging party has 90 days to file a civil action against the employer. *42 U.S.C. § 2000e-5(f); 29 C.F.R. § 1601.28(a)(3),(4)*. If, after an investigation, the EEOC determines there is "reasonable cause" that a violation occurred, the EEOC "shall" attempt to resolve the charge through "conciliation" with the employer. *42 U.S.C. § 2000e-5(b)*. If conciliation fails, the EEOC may file a civil action against the employer. Alternatively, if it chooses not file a civil action, the EEOC shall notify the charging party who then has 90 days to file a civil action against the employer. *42 U.S.C. § 2000e-5(f); 29 C.F.R. § 1601.28(b)*. Once a civil action has been filed, the parties have the normal rights of appeal and settlement as in other civil matters.

The numbers of cases where employers would be prematurely be deemed in violation grows even further with the definition of AMDs including pre-complaint preliminary reviews like the EEOC reasonable cause determinations. Out of the 2,745 EEOC reasonable cause findings in FY2014, only a fraction actually resulted in any court complaint. *See* http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm. For example in FY2014, there were only 133 instances where charges were pursued in litigation by the agency. *See* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm. So, again, even with a reasonable cause finding, the vast majority of those cases result in no actual proof or finding of a violation. Requiring the reporting and consideration of a reasonable cause determination or pre-complaint preliminary reviews is tantamount to sentencing the accused for the crime upon arrest, despite any

protest from the accused of her innocence and in the absence of a trial. This is contrary to the statutory construct and cannot stand. The AMD definition should be clear that it is only where there is a conciliation agreement that admits employer liability that an EEOC action can be an AMD and thereby deemed a violation.

ii. The proposed AMD definition illegally circumvents the due process requirements of the underlying statutes that require proof of the violation before punishment.

Rather than awaiting an actual judicial decision on liability to announce a violation has occurred, the proposed guidance inappropriately attempts to impose liability at the agency complaint stage. This flips the burden of proof under the applicable laws on its head, forcing the contractor to now prove its innocence to avoid a premature judgment in the responsibility determination process. For example, in a Title VII matter, an EEOC reasonable cause determination does not equate to a finding of employer liability. Instead, the employer can disagree with the reasonable cause finding, and then either the EEOC must pursue litigation in federal court, the charging party can pursue litigation in federal court, or the matter is simply dropped. In the end, it is only if a federal court finds by a preponderance of the evidence that an employer has engaged in discrimination under Title VII, that there is an actual violation. Another example of circumvention can be found in the guidance proposal to elevate to "violation" any "Letter" from the agency indicating that an investigation disclosed a violation of sections six or seven of FLSA or violation of Family Medical Leave Act (FMLA), Service Contract Act (SCA), Defense Base Act (DBA) or E.O. 13658. This assessment at the investigation stage is not a final agency action and is not a finding of legal liability. It is simply a preliminary step, where the employer retains the right to contest that finding and defend itself against the investigatory finding. The immediate elevation of this preliminary assessment to a "violation" again removes the due process afforded to the employer under the applicable statute and regulations. The generic reference to "letters" from the agency should not be included in the AMD definition, as they are not violations.

The proposed rule and guidance attempts to create a reportable "violation" only based on the agency preliminary assessment, without establishing actual proof of such violation. Reporting at this stage illegally thrusts the burden of proof on the employer before the ALCA and contracting officer. Moreover, Title VII does not impose any punishment or damages on an employer until a federal court determines that the employer is liable and imposes such damages. The proposed rule and guidance attempt to illegally add an additional damage provision – a finding of non-responsibility – beyond the damages afforded under the statute, as well as prior to the liability stage dictated in the statute. The fact that the agency could dictate a "violation" where the case is never pursued or where a federal court years later finds in favor of the employer flies in the face of the statute. In sum, there can be no administrative merits determination under the statutes enforced by the EEOC.

iii. The proposed AMD definition guarantees that responsibility determinations would be based on an erroneous record.

Not only does the elevation of the proposed administrative merits determination violate an employer's statutorily afforded due process under the statutes, the clear statistical evidence reveals the potential for mistake by labeling violations so early in the process.

Based on NLRB and EEOC statistics, only a fraction of complaints or reasonable cause findings issued by those agencies result in a court order of a statutory violation. For example, in 2014, approximately 88,778 charges were filed with the EEOC; 2745 probable cause findings were issued in 2014; and the EEOC filed 167 lawsuits in 2014 (which doesn't indicate if the lawsuits were successful or not). Of the 3836 total OFCCP audits in 2014, 567 closed with violations and 81 closed with "serious" violations.

In 2014, a total of 20,415 Unfair Labor Practice (ULP) charges were filed with the NLRB with only 1,216 complaints issued. Of these complaints, the NLRB had 7251 ULP charges withdrawn, 7209 were closed through settlement prior to the issuance of a complaint, 5055 were formally dismissed for lack of merit, and only 421 charges resulted in a formal NLRB determination. *See* https://www.nlrb.gov/news-outreach/graphs-data. Reflecting on these numbers, almost two thirds of those employers against whom a complaint is issued are not found to have violated the Act. But, under the proposed guidance, any contractor within that two-thirds bucket would be unjustly saddled with the label of "NLRA violator." Any criteria for establishing an AMD that creates a sixty-six percent chance of error is a grossly distorted measure for determining whether a contractor is a responsible party. And using that 66% assumes that all 421 Board Orders found a violation, when in fact that is not the case. Finally, the length of time between a complaint being issued by the Regional Director and the Board issuing an Order can be lengthy. Because award decisions cannot generally be delayed for such a length of time, it is unlikely that the unjustly labeled "violator" will receive the award and the business will be lost to the potential prime contractor or subcontractor.

The proposed guideline's AMD definition takes this ill-advised approach of including as a "violation" any and all agency complaints filed with a court or ALJ. This simply expands the instances of premature and inappropriate consideration of complaints before they have resulted in any final determination of an actual violation. Contractors would have to defend against those complaints not just in court or before the administrative judge, but also defend against those complaints before the ALCAs in each contract award decision.

iv. The proposed AMD definition would potentially saddle contractors with "violations" for years in cases where a federal court rules that the agency complaint overreached and there was no violation.

The guidance inappropriately saddles contractors with a "violation" at the complaint stage of the adversarial process, where the vast majority of claims end in the employers favor without any finding of liability. This subjects contractors to reporting "violations" even where the agency is overreaching in its purported application of the law. Two recent examples are the EEOC's failed attempt to push its restrictive view of the use of credit and criminal background checks and the Department of Labor's bad faith pursuit of Fair Labor Standards Act claims.

If the overly broad AMD definition were in place, under the EEOC's recent litigation posture, EEOC complaints inappropriately challenging legitimate background investigations would be deemed violations, where in reality there were no violations found. The EEOC filed two high-profile credit and criminal background check cases in 2010. In affirming the EEOC's defeat at summary judgment, the U.S.

Court of Appeals for the Sixth Circuit questioned the EEOC's statistical analysis and criticized the EEOC for attacking the same type of background check that the EEOC itself uses. *EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749 (6th Cir. 2014)*. The Fourth Circuit reached a similar conclusion. *EEOC v. Freeman, No. 13-2365, 2015 U.S. App. LEXIS 2592 (4th Cir. 2015)*.

Applying the example of the Kaplan case to the proposed AMD definition highlights the lengthy injustice and erroneous nature of the information that would be considered. In the *Kaplan* case, the EEOC filed the federal court complaint in December 2010, and the district court dismissed the lawsuit in January 2013. So, this complaint would be reported as a violation for almost the entire reporting period contemplated under the proposed rule when, in fact, there was no violation at all. Moreover, as explained in more detail below, the proposed DOL guidance would not only call the complaint a "violation," but would slap the contractor with a "serious" "violation", forcing the contractor to either (A) continuing its defense against the EEOC's complaint and risk the ALCA advising that the contractor is not responsible and the CO concurring with that in a responsibility determination, or (B) try to negotiate a LCA with the EEOC in a situation where the adjudicative process would find that there was no actual violation at all.

Another example highlighting how the inequity in the proposed AMD definition is the recent federal appellate court decision against the Department of Labor in *Gate Guard Services, LP v. Perez, No. 14-40585, 2015 BL 212957 (5th Cir. July 2, 2015)*. In *Gate Guard*, not only did the federal district court reject the DoL's pursuit of the case, the court held that the government's conduct was oppressive and its case legally frivolous, and the Fifth Circuit agreed that the district court should evaluate the level of attorneys' fees that DOL must pay to Gate Guard. Again, if the proposed AMD definition were applied to this case, the contractors would have to report a violation for well over two years (from the 2010 filing of the complaint until the 2013 dismissal of the case), and again, it would be characterized a serious violation involving an allegation related to 400 guards – all in a case where the Circuit Judge criticized the government's actions:

> At nearly every turn, this Department of Labor ("DOL") investigation and prosecution violated the department's internal procedures and ethical litigation practices. Even after the DOL discovered that its lead investigator conducted an investigation for which he was not trained, concluded Gate Guard was violating the Fair Labor Standards Act ("FLSA") based on just three interviews, destroyed evidence, ambushed a low-level employee for an interview without counsel, and demanded a grossly inflated multi-million dollar penalty, the government pressed on. In litigation, the government opposed routine case administration motions, refused to produce relevant information, and stonewalled the deposition of its lead investigator…*Id.* at 1 ("We hold that attorneys' fees are appropriate under the EAJA's bad faith provision….").

These examples highlight why the proposed AMD definition of requiring reporting complaints as tantamount to a proven violation cannot stand. The measured procedures and burdens of proof established in the underlying statutes avoid the proposed definition's rush to judgment in a responsibility determination where there may simply be no violation of law. Moreover, these examples

highlight the proposed definition's path to wasting agency and contractor resources on negotiating and implementing a LCA in order to receive a favorable responsibility determination where there is no underlying "violation" and the inefficiency and increased costs that will be incurred where the agency and contractor are concurrently spending money litigating.

v. The governments stated preference for use of LCAs is without assurance of fairness in the contemplated process.

Under the construct created by the rule and the guidance, contractors would be faced with the impossible choice of forgoing their rights and entering into a LCA or risking a negative responsibility determination for not conceding to the agency's preliminary assessment of the charge. The most recent Supreme Court decision in *Mach Mining* clarified there is also necessary judicial review to ensure that the EEOC follows the statutory requirement to conciliate with employers following a reasonable cause determination. *See Mach Mining, LLC v. EEOC*, U.S. 135 S. Ct. 1645 (2015). Unlike the statutory construct under Title VII, however, the proposed rule and guidance does not appear to include any recourse for a contractor to challenge the fairness of the LCA negotiation process contemplated by proposed guidance. The proposed rule and guidance inappropriately place a determination of the good faith effort of the employer and the EEOC in conciliation in the hands of an ALCA or CO, rather than a federal court where the Supreme Court dictates that it belongs.

vi. The proposed guidelines' transformation of initial agency action into a deemed "violation" is counterproductive to the goals of legal compliance and government efficiency.

The proposal would be counterproductive to the goals of legal compliance for the government and for contractors, as well as establish an inefficient mechanism that would divert or waste resources. For example, under the proposed rule, all OSHA Citations would need to be disclosed. A majority of these citations, however, are ultimately withdrawn or resolved without a finding of violation indicated in the initial citation, through the statutory and regulatory settlement or adjudication process. An ALCA and CO would be faced with a requirement to consider these reported deemed "violations", only to have the citations resolved in the adjudicative process in the best interests of the agency, the employer, and the employees and no longer qualify as a reportable "violation." For these reasons, and the others articulated herein, OSHA citations should not be included in the AMD definition unless the citation has become a final determination that is not subject to appeal or challenge.

In this same vein, the guidance turns historical efforts to amicably settle wage and hour claims into the threat of the finding of a "violation." For years, the WH-56 Form has been a mechanism to settle real differences between the specific wage and hour investigator and the employer who is being investigated. The Form is a statement that indicates that the employer has agreed to pay certain "unpaid wages" to the listed employees pursuant to a specific statute (e.g., the Fair Labor Standards Act). The WH-56 has been used as a practical and effective means of resolving complaints short of the litigation process. There are instances, however, where the WH-56 is employed through no fault of the employer. For example, when the government agency fails to include appropriate contractual clauses

regarding the applicability of the Service Contract Act (SCA), the resultant dispute frequently is resolved through issuance of a WH-56.

By turning this pre-litigation settlement vehicle into an automatic "violation", the proposed rule and guidance will push employers to continue through an adversarial process, wasting government resources and prolonging resolution for employees. Turning agency preliminary assessments into violations will not serve the goal of the Executive Order or advance the compliance efforts of the employers who are investigated, but simply force contractors to litigate to clear their name. Actions using Form WH-56 should not be included in the AMD definition and should not be reportable.

vii. By reaching back to preliminary findings (rather than, for example, agency final, unappealable orders), the proposed guidance runs the serious risk of inconsistent and changing results related to the same contractor conduct.

Using a broad definition of AMDs, as the guidance and proposed rule do, results in violations being reportable, even if subsequently adjudicated in the contractors favor or settled with no admission of liability. Further, sweeping reporting of pre-litigation "violations" will result in many items being first reported and evaluated as "serious," exposing the contractor to potential suspension and debarment, only to be then viewed by the same agency (and potentially evaluated again by the same ALCA) as allowing a determination that the same contractor is a responsible party. This condition further highlights that these preliminary assessments should not be part of the AMD definition, as they are too early in the statutory and regulatory process to constitute actual "violations". In sum, the proposed definitions used to assess reported "violations" are so overly broad and vague that they will result in unnecessary over-reporting, while at the same time stripping contractors of their statutory rights.

*b. Proposed evaluation definitions are overbroad and inconsistent with the law.*

We agree with the Department of Labor that "all violations of federal labor laws are serious", but identify a number of flaws and unintended consequences in its evaluative definitions of "serious," "willful," "repeated," and "pervasive." Contrary to the Executive Order's directive of efficiency and cost savings, the proposed evaluative definitions will result in virtually all labor and employment agency findings at whatever stage to be viewed as serious, willful, repeated, and/or pervasive. This mass of reported violations that fall within these broad definitions will clog the system with labor compliance advisor evaluations, cause confusion among contracting officers, and lead to inconsistent evaluations, as it becomes clear that the definitions do not differentiate between bad actors and the vast majority of the rest of the contractor community. In other words, contracting officers and labor compliance advisors will be in the unenviable position of determining which contractor has more serious, willful or repeated violations or acted in a manner that was more pervasive than another contractor, leading to inconsistent, arbitrary and capricious results. And the goal of efficiency and cost savings cannot be served by every contractor being forced to negotiate a labor compliance agreement with multiple labor and employment agencies across the government. The resource pull on both the government agencies and contractor community would be unmanageable. The impracticality and difficulty of the evaluative definitions are compounded significantly in conjunction with the discussion above regarding a "violation" as defined in the guidance and implemented in the rule.

i. The vast definition of "serious" does not focus on the "violations" that are most concerning.

*A. Including all "serious" OSHA citations will flood the system with deemed "violations" that are not violations at all.*

The proposed definition of "serious" includes OSHA citations labeled by the agency as "serious" under the OSH Act. The combination, however, of the vast definition of AMD and the statute's definition of serious would require 80% of all OSHA citations to be reported as a serious violation, mixing up the worst actors with everyone else. The majority of OSHA citations are then resolved by either being withdrawn or entering into an informal agreement with the agency, but not with any finding of an actual violation. In fact, informal agreements with OSHA regarding citations routinely and clearly indicate that the employer does not admit any liability. In other words, these "serious" citations, on which the contractor is unjustly judged, are nothing of the sort.

*B. The "serious" 25% threshold is too low, lacks any reasonable minimum for smaller sites, and requires more robust definitions like the WARN Act.*

The 25% workforce threshold triggering "serious" will lead to disproportionate results in the absence of a clearer minimum threshold. For example, many contractors provide specific services across multiple sites where small numbers of employees have as their place of employment a government site. At a small site of four employees working on IT services, for example, even a single violation for one employee could inappropriately trip the "serious" threshold. Any percentage-based threshold should, at the least, have a minimum threshold, such as the Worker Adjustment and Retraining Notification Act (WARN Act) 50-person threshold. Further, the description of single site could also borrow from the clear and developed statutory and regulatory provisions of the WARN Act. *See* 29 U.S.C. §§ 2101-2109; 20 C.F.R. §§ 639.1-639.10.

That being said, even a 25% marker with a number threshold would likely result in a "serious" designation where the "violation" should not be deemed serious. For example, the NLRB has struck down provisions of handbooks in non-union workplaces, taking the position that the handbook provision chilled the employees' exercise of their Section 7 rights to engage in concerted activities. The handbook, of course, would apply to the entire workforce, and thus would trigger the 25% threshold. Even in cases where the Board or court determined, however, that there was no specific violation of the NLRA with respect to the complaining employee (e.g., the Company appropriately discharged the employee), the handbook provision (which is corrected as part of the remedy in the case) would be a serious violation.

*C. Labeling any injunctive relief a "serious" violation is over-inclusive, capturing, for example, and inappropriately labeling all NLRB ALJ and Board decisions against an employer as serious.*

The proposed "serious" definition is overbroad in including any and all injunctive relief. For example, every single ALJ decision and NLRB decision that finds against an employer includes injunctive relief, no matter how minor the infraction (or until such decision is overturned by the federal courts of appeal. Under the guidance and proposed rule, all of these actions would be considered "serious." Specifically, an NLRB finding against an employer in an unfair labor practice charge proceeding will include injunctive relief requiring the employer to post a notice. The E.O. could not possibly have intended to expand the definition of serious to all NLRB findings against any contractor, no matter the type of violation or circumstance. Such an overly broad application of terminology cannot accomplish the goal of the guidance to identify violations that are most concerning.

Let's take the recent case of *Cooper Tire & Rubber Company*, 08-CA-087155 (ALJ Dec. June 5, 2015) (appeal pending) as an example. In this case, an arbitrator found that the employee was discharged for just cause when he made racial slurs at workers crossing a picket line, in violation of the Company's harassment policy. *Id.* at 6-7. In response to an unfair labor practice charge, however, the Regional Director determined that the NLRB should not defer to the arbitrator and should pursue a complaint against the employer. The ALJ found that the employer violated the NLRA and, as with all such remedies, ordered the employer to reinstate the employee and post a notice in the workplace (among other things). Although the employer is appealing this decision to the Board, the preliminary stage order of injunctive relief would be deemed a "serious" violation. It cannot stand that somehow the conduct of the employee making the racial slurs is not serious, but the employer that stands up for its rights to discharge someone for violating its harassment policy is a "serious" NLRA "violator" (for the years until they are able to obtain relief on appeal to the Board or Court of Appeals). Forcing the ALCAs and COs to sift through all complaints, ALJ decisions, and Board decisions because the rule deems them "serious" violations in order to determine which ones are actually serious is simply counter to the goals of contracting efficiency demanded by the E.O. Injunctive relief in and of itself should not be deemed "serious," unless combined with additional criteria that warrant a serious label and identify the most concerning violations.

### ii. Including an overbroad "interference" category of serious violations strip contractors of their legal right to defend themselves from agency overreach.

Another area of concern is the inclusion of a catch-all "interference" category of "serious" where the proposed guidance includes in the definition a category of "violations" where the contractor allegedly interfered with the agency's investigation. Examples provided include denial of access to conduct an on-site investigation, evaluation or review; refusal to submit required documents or comply with information request; threats to workers who speak to enforcement agency investigators; and lying or making misrepresentations to investigators. This type of broad, uncontrolled category will inevitably pull into the category "serious" mere disagreements with contractor employers regarding the scope and conduct of investigations, without any mechanism to challenge or defend against a label of interference.

For example, under the current statutory and regulatory structure, if an employer takes the position that the EEOC investigation is overbroad and inappropriate, it may refuse to provide certain information and documents, and then the EEOC can decide whether or not to subpoena those records. Under the proposed guidance, such a position would likely be viewed as "interference," and therefore, would

expose the contractor employer to being deemed a serious violator if the EEOC's investigation resulted in a reasonable cause determination. Accordingly, the "serious" label based on "interference" could be affixed, even if the EEOC did not pursue its alleged right to obtain the information and documents through a subpoena. There should absolutely be no interference label where the agency fails to use its established enforcement mechanisms to obtain the information it feels it needs to pursue an investigation.

Moreover, the proposed "interference" category could inappropriately include situations where the employer challenges an EEOC's subpoena. Win or lose, it is the employer's right to challenge the EEOC subpoena power in cases where it feels that the EEOC is exceeding its investigatory authority under the statute and regulations. The proposed rule and guidance should not strip employers of their rights to defend themselves. And, in a number of cases, courts have agreed that the EEOC has overreached and quashed EEOC subpoenas. *See*, *e.g., EEOC v. Burlington N. Santa Fe Ry. Co*., 669 F.3d 1154 (10th Cir. 2012) (affirming district court's quashing of EEOC "fishing expedition" subpoena); *see also EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002); *EEOC v. Southern Farm Bureau Casualty Ins. Co.*, 271 F.3d 209 (5th Cir. 2001); *EEOC v. Randstad et al*, 765 F. Supp. 2d 734 (D. Md. 2011).

This is just one of many examples of where agencies could claim "interference", when employers are simply defending their rights. What if an employer exercises its rights in an OSHA inspection situation to demand an inspection warrant? Will the agency then view the employer's action as a "serious" violation, even if a resulting citation is not "serious" under the regulatory construct? Will disagreeing with an agency's legal position be deemed "interference"? Will losing a court effort to limit an investigation then be deemed to be "interference"? The proposed "interference" category under the "serious" definition is overly broad and inconsistent with the legal framework established in the governing statutes and regulations that are designed to check and balance agency action.

Expanding the definition of "serious" in the manner proposed mandates a level of deemed "cooperation" that is unachievable in defending the contractors' rights under the applicable statutory and regulatory processes. In a recent hearing before the House Education and Workforce Committee's Subcommittee on Workforce Protections, a witness representing the U.S. Chamber of Commerce testified as to questionable tactics by the Department of Labor Wage and Hour Division in conducting investigations and pressuring settlement. *See* Testimony of Leonard Court, "Reviewing the rules and Regulations Implementing Federal Wage and Hour Standards", U.S. House of Representatives Committee on Education and Workforce Subcommittee on Workforce Protections (June 10, 2015). This begs the question as to whether contractors will be forced to succumb to these types of tactics or jeopardize being deemed a responsible party by an agency determining they were not cooperative enough in its investigation. In sum, the definition of serious is vague and overbroad and subject to inconsistent application and abuse, particularly when combined with the overbroad AMD definition.

iii. The proposed definition of "willful" must require a specific finding that is not subject to appeal.

For the same reason that the AMD definition should not and cannot include preliminary assessments by an agency, the definition of willful should be limited to a specific finding that is not subject to appeal.

For purposes of the statutes that define willful and place a specific remedy on such willful finding, it requires proof in the adjudicatory process, and only upon that final finding not subject to appeal, can the remedy be applied. Anything less would expand the application of the statute beyond what Congress intended. The proposed guidance should be revised so as not to contravene this statutory dictate.

With respect to statutes that do not define willful, the proposed definition would rely on an undefined assessment that the employer "knew that its conduct was prohibited" or "showed reckless disregard or plain indifference". Without revision, this would allow an agency investigation conclusion that an employer's alleged action is willful in the context of a statutory framework that did not define the term and which leaves the employer without any recourse to challenge the investigation or the label. Further, even in the absence of an agency investigation applying a willful label, the proposed guidance would inappropriately leave the determination to the discretion of the ALCA, which will inevitably result in inconsistent application and potential abuse of discretion, all without an avenue for review of the willful label by the contractor employer. The untested and unproven "willful" label leaves out any statutory adversarial process or burden of proof. Instead, any inclusion of willful outside of the statutory definition and process should require the same type of proof in the adjudicatory process that is required under those statutes.

iv. The proposed guidance expands "repeated" to dissimilar violations within broad statutory constructs and even violations of different statutes.

Outside of the statutes with definitions of repeated, the proposed guidance unnecessarily expands the definition of "repeated" to encompass separate and unrelated violations. For example, the explanation of what would be covered under "repeated" could arguably include violation of the FLSA overtime regulations based on a complaint by a non-exempt employee, combined with a challenge to an employee's exempt status in a different organization of the same site or different site altogether. With both claiming failure to pay overtime, albeit for completely different reasons, they would be labeled "repeated." The guidance should be amended to narrow the repeated definition to more specific statutory violations. "Repeated," as proposed, would also include completely separate and distinct retaliation violations under different statutes, in different locations, and by different actors. This distorts "repeated" into a label that simply means multiple. This expanded reach will cause an over-labeling of contractors as "repeated" violators, which will only flood the pool and make it more difficult to distinguish between the true, repeated violators and companies who simply have a dispersed and/or decentralized organization. "Repeated" should be limited to the same provision of the same statute in the same location. This will focus on the true repeat violators.

*c. Conclusion: The defective functionality of the guidance and the rule must be addressed before implementation.*

We have serious concerns that the redefining of terms in the DoL guidance and their application in this proposed rule will require contractors to report violations based on an AMD, and not a finding of fault in law, and could equate an agency preliminary assessment or employee complaint with a violation of a law. Such an interpretation or the terms and their application in the context of this proposal would strip

federal contractors of due process currently afforded in labor law compliance regimes. AMDs should exclude those that are not final or are subject to further review. A determination of contractor responsibility should be based upon only final decisions and not those subject to additional review as it may bias the decision by relying on findings that could later be reversed.

The expansive definition of administrative merits determination and the overbroad and malleable violation assessment definitions will not serve the Executive Order's stated goal. Vast numbers of reportable "violations" will overwhelm the system (once one is created) and require an expanded and unnecessary bureaucracy (duplicative of the already established labor and employment agency processes). ALCAs will be overloaded and unable to respond to contracting officers within the requisite three days. Either the delayed ALCA review will slow down the contacting process while the contracting officer waits for ALCAs to get through the backlog, or contracting officers will proceed in the absence of an ALCA recommendation, resulting in inconsistent (and likely arbitrary and capricious) outcomes among contracting officers, agencies, and suspension and debarment authorities. And even ALCAs will be faced with constantly changing reportable violations as each preliminary and appealable step is considered and evaluated, also leading to inconsistent (and likely arbitrary and capricious) outcomes for the same contractor on different contracts and at different points in time, albeit based on the same underlying conduct. Moreover, the definitions do an end-run around the established statutory and regulatory enforcement and adjudication requirements, drive employers to succumb to whatever investigation tactic they encounter, and force a level of negotiation of LCA that strip contractors of their due process rights. All of this will simply add to the cost and inefficiency of the contracting process and will certainly not differentiate between the worst actors and the vast majority of contractors who have established internal compliance programs and strive to do the right thing in running their business and ensuring they are good stewards of taxpayer dollars.

Because of these deficiencies in the guidance and the application of these terms and definitions in the proposed rule, industry once again reiterates that the guidance and proposed rule should be withdrawn until such time as their shortcomings can be addressed.

## 2. The Rule Effectively Allows DoL to Blacklist Contractors and Subcontractors Based on Purported Violations of Labor Law.

The rule is the latest attempt to inappropriately utilize the acquisition system to impose overbroad labor law requirements on federal contractors.[3] Unlike prior attempts, this FAR proposed rule implicates many more complex labor and anti-discrimination laws and reaches much deeper into the federal supply chain than previous failed rulemaking. By using the "stick" of a DoL recommended finding of non-responsibility, this rule would create a "blacklist" of contractors who, based primarily on the findings of DOL, will be deemed ineligible for federal contracting or subcontracting.

[3] An earlier iteration of this "Blacklisting" approach was promulgated during the Clinton administration, and led to a lengthy struggle between government and the industrial base over implementation ultimately leading to rescission of that rule. Contractor Responsibility, 65 Fed. Reg. 40830, 40833 (June 30, 2000). Similarly, in 2012, the Department of Agriculture (DOA) also attempted to insert a broad labor law disclosure framework into their responsibility determination regulatory process. Ultimately, the number of adverse public comments submitted in response to this proposed change persuaded the agency to retract the rulemaking.

*a. The proposal creates undue pressure on the role and discretion of the contracting officer.*

As a process matter, the proposed rule requires a pre-award assessment of labor compliance, facilitated via a solicitation representation, by the CO for every prospective contract and subcontract award over $500,000 contemplated by the federal government. For companies that bid on multiple opportunities, the CO assessment will create a disproportionate and costly process burden on offerors engaged in the procurement process. Given the scale of the rules, and the nature of the laws being enforced, there is a high risk that the assessments will lead to many unexpected outcomes for the offeror and their supply chain. Based on a lengthy history of risk-averse CO behavior, it is reasonable to conclude that different COs and ALCAs will make assessments about a contractor's labor disclosures and come to different conclusions after reviewing identical information about a contractor's compliance with labor laws over the prior three year period. Similarly, prime contractors and yet-to-be-established functions within DoL will make determinations about subcontractors without any involvement of CO's or ALCAs.

Because the transactional environment is so fast moving, and the tendency to make judgments in that environment about complex data without the necessary predicate subject matter knowledge, a contractor could be determined to be "presently responsible" by one CO, but be found "not presently responsible" by another CO based on identical information. This potential for inconsistent application caused by the lack of subject matter expertise at the CO and ALCA levels alike, and the added pressure of conforming to conclusions stored in federal databases, creates enormous risk and uncertainty for both the government and contractors. Alternatively, once one CO makes a determination that a contractor is not a responsible source, based on such an idiosyncratic analysis, it is reasonable to conclude that other COs will avoid the risk of oversight scrutiny and come to the same conclusion to exclude a source as not responsible, especially where repositories such as Federal Awardee Performance and Integrity Information System (FAPIIS), System for Award Management (SAM), Contract Business Analysis Repository (CBAR), and Contractor Performance Assessment Reporting System (CPARS) exist to store and disseminate that data to all manner of agency operatives at different points in the acquisition process and for substantially different purposes.

COs will be under enormous pressure to conform to the "advice" of the ALCAs even if it is not in the best interest of the taxpayer and they will be expected by their superiors to avoid inconsistency or the heightened risk of increased scrutiny from an ALCA, their subject matter superiors at DoL or the extant oversight community. Such pressure would also be bestowed upon prime contractors that receive guidance from DoL to avoid using certain subcontractors, even though the affected subcontractor may ultimately be cleared of any wrongdoing. When a supplier is found not responsible, the prime will not only cease to consider using that "tainted" supplier for the award under consideration, but it is almost certain, for risk mitigation purposes, that the supplier will be considered ineligible for other federal contracts or transactions across the entire supply chain with that prime contractor, or the prime could risk allegations that they are not adhering to business ethics standards in FAR Part 9. Such exclusion would quickly become public knowledge across the industrial base and the ripple effect from exclusion would likely spread across the entire market.

It is thus very likely from the process implicated in the rules that differing conclusions by COs or ALCAs based on identical facts, and/or successive non-responsibility determinations based on the same operative set of facts stemming from a labor law "violation" could amount to double jeopardy for an offeror and create a "blacklist", which dominoes into a "de facto" debarment that acts to informally, and without the due process offered in FAR Part 9, limit or exclude otherwise responsible offerors from competing for federal contracts. Courts have found in such cases, that where a CO makes such repeated non-responsible findings based on the same facts, the offeror is entitled to the initiation of formal debarment proceedings and corrective action.[4]

In an unprecedented alteration of the existing acquisition authority, which concentrates authority on the CO, this proposed regime invents a new ALCA, designed to "advise" the CO on the import of information provided to the CO regarding a contractor's labor law compliance. Undermining the CO's historical role as the authority for making determinations of responsibility, instead the CO must now incorporate and, likely, defer to the determination of an ALCA, provided without any greater context regarding the subject procurement, the agency's needs, or the particular history with that contractor. Although the CO will ostensibly remain the authority for making the responsibility determination, it can reasonably be expected that the CO, not wishing to attract unwanted scrutiny for disregarding the advice of the ALCA - even if in the best interest of the taxpayer - would most likely seek to avoid controversy and choose an alternative awardee for the contract.

It can reasonably be expected that once one ALCA directs a CO to find a contractor non-responsible, this finding will be propagated across the federal contractor and acquisition workforces, if not unofficially as a means of avoiding risk, then officially as part of the advice ALCAs and DoL will offer to other COs and to primes who seek information about potential subcontractors and suppliers they may use. Thus, any contractor found by an ALCA as non-responsible will be effectively "blacklisted" across the entire government market.

### *b. The guidance and proposed rule will detrimentally impact the viability of business and create prohibitive barriers to sustainment and entry in the federal market.*

To avoid these devastating consequences, it stands to reason that contractors will take any measure possible to avoid running afoul of the ALCA. Thus, the ALCA will have unprecedented power over the contracting community to impose on individual contractor's novel compliance obligations—above and beyond what is required under existing labor law—through labor compliance agreements. Contractors determined by an ALCA to have an unacceptable history of purported labor law non-compliances can mitigate this finding by agreeing to the requirements of a "Labor Compliance Agreement." Through this new contractor agreement, the ALCA can mandate that the contractor adopt any number of new compliance requirements—outside of the normal regulatory process and without due process for the contractor—or face addition to the "blacklist" of non-responsible contractors. Notably, even if a contractor chooses not to continue pursuing government contracts following such a finding of non-responsibility, this black mark will likely have a negative impact on commercial business, as many companies rely on government findings of non-responsibility as a basis not to contract with commercial

[4] Shermco Indus. V. Secretary of the Air Force, 584 F. Supp. 76, 94 (N.D. Tex. 1984)

entities. Through these LCAs, the ALCA will essentially have the power to ply and leverage contractors into changing their practices to meet the requirements imposed by the individual ALCA, without reference to the cost or utility of these changes. By using this mechanism, DoL can essentially impose on some of the country's largest companies novel requirements without going through the normal process of regulatory promulgation or legislative adoption.

The risk to many companies, particularly companies who are primarily commercial businesses and who may be a supplier on a government contract, would be prohibitive. Facing the potential consequence of being forced into accepting a LCA, many companies will likely opt not to pursue government contracts. Significant effects of this proposal will be to force companies out of the federal market and to erect insurmountable barriers to entry for others, particularly non-traditional contractors, the attraction of which are the specific focus of this administration.

Damage to the viability of the company would also likely occur from enforcement of clauses that exist in many commercial contracts and contracts with other countries that require cancellation should the company become unable to contract with the U.S. government. The ramifications on the U.S. economy from lost business and the global corporate standing of U.S. based companies that were not able to continue to work in other sectors or in other countries would be dramatic. The risk to many companies, particularly companies who are primarily commercial businesses and who may be a supplier to a prime on a government contract, would be prohibitive.

### *c. The government's stated preference for LCAs can be used to unfairly ply unreasonable concessions from contractors and subcontractors in exchange for affirmative responsibility determinations*

The rule limits and subsumes the authority and discretion of the CO in the context of the Labor Compliance Agreements (LCAs). A repeated requirement in the proposed rule involves compelling contractors to enter into LCAs as the sole way to remedy and/or mitigate any alleged labor law violation during the pre-award evaluation process in order to forestall a determination of non-responsibility.

The proposed FAR rules contemplate LCAs as the only sufficient remedy at the exclusion of any other available administrative or legal remedy and the rules require the ALCA to so advise COs of that exclusive option throughout FAR Part 22.2004. The language used at FAR 22.2004-2(b)(3)(i) cites that ALCA's may provide a recommendation to a CO that a prospective contractor is only either (a) responsible, (b) could be responsible if they have entered into, or are in the process of entering into, a LCA with the DoL or (c) not responsible. At a basic level, such direction forecloses contractors from either defending their actions in any given labor allegation disclosed under the required representations and certifications, and thus compels contractors that want to receive federal contracts over $500,000 to enter into LCAs or be "de facto" debarred from any contracts by a non-responsibility determination.

Factually, many contractors in the federal sector have thousands of employees in multiple work sites in the US that could be the subject of allegations or actual litigation in any of the named labor statutes at any given time. It is entirely plausible that a contractor undergoing the responsibility determination process will have "violations" (as defined in the rule) that are not fully adjudicated, and the ALCA will be

charged with advising on that determination under the "serious, willful, repeated or pervasive" standard. Industry is concerned that internal pressure to obtain contracts will force them to trade their legal rights to fully litigate labor violations in exchange for LCA compliance.

There is also concern that unnamed parties to a labor violation could force a contractor into an LCA by simply creating multiple unfounded claims or complaints that could undermine the responsibility determination process. Such actions could be used to force unfavorable labor concessions or terms upon a contractor or subcontractor who would not otherwise have agreed to accept such conditions, but for the need to achieve the ALCA's or DoL's favorable advisory opinion. Despite skepticism over such scenarios actually occurring, wherever third-party actors can unduly influence the process and their actions adversely impact the provision of a favorable responsibility determination, there is no limit to the concessions or actions a prospective contractor or subcontractor might be passively or actively coerced into accepting.

The rule's reliance on a punitive LCA compliance construct thus violates basic labor management law because it prevents contractors from exercising choice of resolution and denies the fundamental right to negotiate mutually beneficial settlements between the parties. Such a "Hobson's choice" creates undue leverage for the DoL in their enforcement of labor law violations unrelated to the scope of the responsibility determination process and is unnecessary if the aspiration of the DoL is to enhance the efficiency of the federal procurement process, while achieving greater contractor labor law compliance. Such a facially deficient model militates for withdrawal of the proposed guidance and rule and calls for considerable engagement with industry for revision of any rule.

### *C. This framework upends longstanding procurement practices and processes and is silent on a number of critical elements.*

It is possible that, in any given procurement situation, all of the prospective offerors could have spotless labor law records. There is, however, a strong likelihood that a percentage of federal contractors and subcontractors will have to make one or more required disclosure of a "violation" of labor law. In that context, it is probable that most, if not all, solicitations for government contracts will become embroiled in the non-transparent administrative and remedial process between the ALCA and the CO, who will seek to craft a legally sufficient responsibility determination prior to making an award. This process will be complicated by a lack of subject matter expertise in both the CO and ALCA functions, conducted by yet to be trained ALCAs, performed by risk averse COs and hampered by language and process barriers at each agency empowered to enforce the relevant labor laws prior to this rulemaking. The inevitable result of such a flawed process will be a terminally inert responsibility determination process with a corresponding slow-down, and potential for a stoppage, of the entire procurement process.

#### 1. Options for subcontract reporting as proposed for consideration by the FAR Council.

The proposed model whereby prime contractors consult with the DoL to determine subcontractor or supplier responsibility creates an enormous risk for prime contractors and a cost-prohibitive process for all parties, including many small and non-traditional companies wishing to act as either prime or subcontractor. Because the risks of an adverse responsibility determination are borne by the prime,

they will be forced to pursue and compile information and update that information on a regular basis in order to effectively manage risk associated with ongoing labor compliance reporting throughout their supply chain.

Finally, the alternative DoL subcontractor verification model posited in the rule makes no assessment of the burdens and costs they create within the proposed rule for either the contractors or the government. Such costs and burden determinations must be made in order to effectively assess whether one option becomes preferable over another in that context.

## 2. Other elements are not effectively addressed and would create additional disruptions to the acquisition process.

### *a. Mergers &Acquisitions (M&A) activity could be adversely impacted.*

M&A contributes to economic growth by: shifting poor performers from the marketplace; allowing consolidation to eliminate excess capacity in the marketplace; disposition of less profitable companies in favor of emerging industries; allowing new entrants to the marketplace; increasing competition; and, freeing up new resources to innovate.

There is an entire discipline associated with the conduct of due diligence in the M&A world designed to ferret out risk in acquiring an entity and compare profit and loss as a predictor of future economic performance. While the due diligence process typically discloses risks associated with litigation involving the labor force in a company, it is conducted in an closed environment with parties cognizant of the risks in the marketplace and willing to balance those risks with other factors of profitability. It is unclear from the rules, where M&A is concerned, that the labor law "violations" of a legacy company acquired by a new or existing entity or spun off as a matter of economic sense, will require disclosure by the new entity or remain with the old entity. This could become a matter vital to any given contract competition and could act to undermine M&A currently occurring in the federal marketplace and could influence the tendency to use such disclosures as a sustainable grounds for a bid protest.

There is also a sense in the federal marketplace that companies may seek to disavow prior labor law violation liability that could impact their present responsibility per this rule by spinning off companies whose sole purpose is to own the violations. There are all sorts of process gamesmanship and mischief that could develop as a work-around to a negative labor law record by all the parties to a federal competition in any given situation. The rule could thus stifle or constrain a robust M&A environment because of the fear of being held responsible for legacy company violations and being disadvantaged by such disclosures. The FAR Council should clarify the owner of the violations for responsibility determination purposes during the rulemaking.

### *b. It is unclear how the Small Business Administration Certificate of Competency process will operate under this proposal.*

It is also germane that where a small business is determined to be non-responsible for a prime or subcontract over $500,000, the CO is required to submit the determination and the file record to the

Small Business Administration (SBA) pursuant to Certificate of Competency (CoC) procedures under FAR 9.103 and 19.601. It is unclear whether the CoC procedures will be subject to the same standards for labor law compliance and responsibility as businesses that are not small or whether the SBA can override any CO labor law based non-responsibility determination unilaterally for small business primes and subcontractors subject to the rules, as they are now able to do under FAR 19.601 for non-labor law non-responsibility determinations. It is equally unclear how and whether a CoC process for a small business subcontractor found to be non-responsible by a CO will be managed and what role either the prime contractor or the ALCA will have in this area. Moreover, is it unclear whether the SBA ALCA or the buying agency ALCA will have jurisdiction over the small business CoC labor law non-responsibility determination.

*c. It is unclear whether and how the proposal affects the breadth of supplier relationships in the global economy.*

Given the global nature of the economy, when it solicits goods and services from the market, the federal government encounters different prime contractor and subcontractor teams comprised of domestic and foreign firms. Whether based on jurisdiction or agreement, generally, it is clear that the impact of this proposal is consistent for all of these firms. What is not clear, however, is the impact of this proposal on indirect supplier relationships unassociated with the performance of a contract for the government. Thus, in order to avoid confusion and the over inclusion of information, the rule and guidance should be modified to assure that those global supplier relationships incidental to or outside the context of the performance of a contract with the government are not intended to be covered by the proposed rule.

*d. The rule does not adequately address current DoD practices regarding business ethics.*

With respect to DoD contracts, this framework fails to acknowledge that the contractor purchasing system requirements already have clear requirements for the procurement of subcontract and supplier resources by DoD contractors. The rules emphasize that DoL will be the oversight agent of such transactional compliance, but the DoL has not heretofore had an ingrained presence in business system oversight conducted by the Defense Contract Management Agency (DCMA) or appear to be institutionally oriented to defer to DCMA for such decisions about business integrity. We recommend that if not withdrawn, the rules phase in any subcontractor certifications over a five-year period as set forth in the conclusion to this letter.

*e. Clarification is required on which corporate "Entity" must report "violations".*

In many of the proposed FAR clauses, it is not clear whether reportable "violations" are those occurring within the contracting entity, or the national or global corporate entity, including parent and affiliate entities. If the reporting requirements and subcontractor and supplier data collection and reporting requirements will be applicable to all entities within a company—including commercial subsidiaries and affiliates with no contracting with the federal government—the associated compliance costs will dramatically increase. This is because business units of prime contractors offering goods and services to

the federal government are often prepared and, in the case of the larger transaction values, already deploying government unique compliance requirements across those business units. A good example is the business systems in use at DoD or cost accounting standards in use in federal government contracting. While some companies have regimes in place to address government unique compliance requirements, none of those regimes was established contemplating this proposal and therefore would require in most cases starting from scratch.

Additionally, if the requirements for compliance and reporting apply across a corporate enterprise, then other commercial business units would have difficulty establishing and implementing what would amount to alien requirements not found at all in the commercial market. For mid- and small-sized businesses, the ability and resources to address government-unique compliance requirements vary, but it can be anticipated that almost none would have the business capabilities or resources to be compliant with this proposal and to achieve compliance would be a costly and burdensome process. If these requirements apply across the entire corporate enterprise, for a mid- or small-sized business these would create prohibitive barriers to sustainment or entry into the market.

Industry would recommend that the government follow current regulatory practice applying this to only those entities contracting with the federal government. The government should anticipate further aggravation to the challenges discussed above with attracting and retaining small- and mid-sized companies and other non-traditional contractors should the guidance and rule be clarified as applying across the entire corporate entity. In either case, the rule is currently not clear on that point.

*f. Clarification is needed on how Joint Ventures (JV), Partnering/Teaming arrangements are to be reported.*

In a JV or partnering/teaming arrangement, multiple companies jointly submit a bid and, upon award, perform work under a contract. The current rule does not provide clarification as to what entity is required to capture and report covered "violations" – the JV entity, the JV members, or all of the above. Moreover, the open question remains as to which entity will carry forward any finding of non-responsibility based on a reported "violation." Would it be simply the JV entity, or would a participating member company be included on the "blacklist" based on its participation? If the ALCA sought to put in place a LCA, which entity would be required to comply?

*g. The rule should provide an exemption for all commercial items.*

The proposed rule and guidance exempts suppliers providing commercial off-the-shelf (COTS) subcontracts from the requirements. There is an increasing tendency in recently published FAR rulemaking to provide for exemptions of COTS items, but not commercial items as defined in FAR 2.1. COTS items are commercial items that are sold to the government in the same form (i.e. without modification) that are sold to the general public. It was explicitly recognized in the FAR clauses developed as a result of the seminal acquisition reform statutes that the government frequently made minor modifications to commercially available goods and services, but these items still retained their commercial item identity for other relevant regulatory purposes. Such items were expected to be exempted, to the maximum extent possible, from government-unique requirements that inordinately

increased the costs to acquire these items or would preclude them from being offered in the government market.

A major reason the commercial item exemptions exist for many federal acquisition requirement is that commercial firms do not have the resources, systems, processes and personnel to comply with unique federal acquisition requirements. Many of the companies that deliver commercial items to the government are the same companies that deliver COTS. They thus have the same challenges with respect to compliance with unique federal requirements. Considering the emphasis on reinvigorating commercial item acquisition principles currently manifest in proposed acquisition reform statutes, and the benefit to be derived from utilizing private sector R&D and development activities, it would be consistent to exempt all commercial items from the rules.

At the time of the seminal reform statutes emphasizing a preference for commercial and COTS items, the government was only in the first stage of transitioning from a government specification world to the use of commercial items as both (1) end items and (2) to integrate underlying commercially developed capabilities into government requirements, including where such items had to be modified to meet those requirements. Congress and acquisition policymakers now recognize the continued criticality of integrating commercial and COTS items into emergent product designs and have advocated vigorously for broader adoption of commercial products and business models into their strategic plans for the future.

Thus, adding new unique and complex federal compliance obligations to the acquisition process where no business or policy case exists such as this rule is a step back from a consensus approach to commercial item usage in the law and reinforced through recent statutes calling for more and broader policy exemptions for commercial items. Commercial items should thus be exempted from this rule in order to conform to the intent of the original statutes (see 41 USC 3306 and 10 USC 2377), and to comply with Congressional and agency strategies to reduce costs and performance risk.

### 3. The rule unnecessarily impinges on the discretion of the Contracting Officer and establishes a tenuous reliance upon Agency Labor Compliance Advisors.

As noted above, the most important implication to the acquisition process from the creation of the ALCA position and their imposition upon agency contracting responsibilities will be the immense pressure COs will face to concede to the ALCA recommendation. Should the CO ignore or dispute the ALCA's recommendation, the CO is effectively putting a target on their back for an oversight investigation to determine why they did not follow the ALCAs recommendation. Such pressure means that, because of the already risk-averse nature of the CO community, they can be expected to cede some of their authority to exercise discretion in pursuit of best value for the taxpayer. Effectively, an ALCA can compromise the CO's ability to make their own responsibility determination, and yet, not share the responsibility and penalty that a CO assumes if they make a poor determination.

In general, making long term investment decisions on stricter and tighter budgets already hinders the CO's ability to make a business deal that provides for a good return on investments, and unfortunately, this proposed rule further undermines the authorities and responsibilities granted to the CO. As

envisioned, the ALCA role is an extremely complicated function that has few, if any, comparable models elsewhere in government or the private sector and will essentially be an agency employee working to impose DoL legal requirements on the agency CO. COs are given immense responsibility and authority to spend taxpayer dollars in their roles, and to introduce an outside opinion on contracting matters challenges that authority.

In order for the DoL guidance and the corresponding FAR rules to be implemented efficiently, federal agencies will also have to hire a significant number of new staff to serve as (and support) the role of the ALCAs. Within DoD alone, the ALCA would be required to support the activities of approximately 24,000 COs and hundreds of contracting offices, dealing with tens of thousands of primes and subcontractors of all shapes and sizes, and millions of potential transactions yearly that will be subject to the operative clauses contained in the rulemaking. As stated earlier, the DoD ALCA role is not scaled to meet the demands of this proposed rule. If DoD is not adequately scaled for this implementation, industry is extremely skeptical that much of the rest of government is scaled for implementation either.

Even if the federal government could somehow ramp up its capacity to provide ALCAs and related resources to the federal agencies and prime contractors, a significant amount of time and funding would be needed to train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. These training and funding requirements would also be necessary for the creation of a new office within DoL to assist prime contractors with making assessments about subcontractors. Ironically, CODSIA notes that the recent OMB/DoL implementation memo describing the ALCA selection process within the executive agencies dated March 5, 2015, inexplicably cites that **acquisition knowledge or experience is not required** (emphasis added), which will undoubtedly create increased risks for all parties.

## 4. Key questions about the subcontractor review process are not addressed in the proposed rule or guidance.

There are key aspects and critical elements of the construct regarding subcontractor mitigation that must be addressed and resolved before this rule can be finalized. If a prime contractor makes an affirmation of present responsibility using information provided by DoL about one of its subcontractors, but an ALCA later reviews the case and makes an alternative determination, what will be the process for dealing with the disagreement? If a potential prime contractor is determined not responsible by a CO, but another prime contractor who uses the same company as a subcontractor on a separate contract determines, based on information provided by DoL, that the subcontractor is presently responsible, how will the discrepancy be handled? Key questions about the overall adjudication role of the ALCA and the ancillary role of the DoL in the subcontract review process must be explored and thoroughly answered before this rulemaking moves forward. In the absence of adequate guidance about the ALCA function, or the enhanced DoL advisory role, some agency personnel have contemporaneously described the role of the ALCA as being part of other duties as assigned or subsumed within the functions of other currently staffed full-time functional positions, which is not tenable given the scale and scope of the rulemaking.

Further, such a compartmentalized process does not give industry confidence that any such guidance will be quickly obtained, allow contractors to rely on the advice given, or that the DoL will be accountable in any way to cooperate with this prime contractor request for advice. In our analysis of DoL capability to staff this new subcontractor advisory and assistance function, no such office currently exists to provide this service, nor has there been any analysis of the potential workload that would flow through such an office and whether it could meet the demands of prime contractors, some of whom manage subcontractors and suppliers that number in the tens of thousands. The current lack of clarity regarding protocols and precedents established under this rule establishes untenable risk for prime contractors, and subcontractors who wish to remain in the federal market, and must be addressed prior to making this rule final.

## 5. The guidance does not provide assurances of stability for contractors and unnecessarily raises risks for the federal market.

DoL should establish clear stability in the guidance they have issued underpinning this FAR proposal. We are concerned that the overreach outlined above could increase because guidance, like that issued by DOL, is not subject to rulemaking process. In fact, the DOL has already incorporated compliance under the recently released *Prohibition in Trafficking in Human Persons* regulation into the compliance scheme for this E.O. through a joint DoL/OMB Memorandum to executive agencies, despite the absence of reference to this regulation in the original E.O. Through interpretive memoranda such as this, DOL can change the guidance at any time, substantially increasing the already onerous compliance burden on contractors. This means prime contracts and subcontracts can in effect be changed unilaterally by the government without notice and comment, through the revision of the DoL guidance informing interpretation of the FAR clauses.

## 6. The complexity of supply chains makes flow-down of these requirements impractical.

Federal contractor supply chains on many major federal acquisition programs can be extremely complex and involve multiple tiers of subcontractors and suppliers. Even with a dollar threshold of $500,000, a supply chain on a large prime contract may be several tiers deep. Imposing burdensome requirements such as this rule on every tier of subcontracts significantly adds administrative costs and potential for delay and disruption to the contracting process. In other rules, such as reporting of subcontracts under the Federal Funding and Taxpayer Accountability Act (FFATA) (See FAR 52.204-10), the government has recognized these problems and confined the reporting to first tier subcontracts only. We strongly recommend that the FAR Council and the DoL modify the rule and guidance to limit reporting of labor violations to first-tier subcontracts. In addition to lessening the administrative burden and attendant delay and disruption, confining the rule to first-tier subcontracts would lessen the burden on small businesses that are more likely to serve as prime contractors or first-tier subcontractors.

The FAR requirement that prime contractors mandate subcontractor reporting of labor law violations will be very costly, exceptionally onerous - if not impossible - for prime contractors to administer, and creates a number of unintended consequences related to prime and subcontractor relationships. Subcontractor reporting adds a significant level of complexity to the information collection and related review processes outlined in the rules. Prime contractors cannot, and should not, be tasked with

ensuring the labor compliance of their subcontractors and their entire supply chain on a continual or ongoing basis, especially when non-compliance may be entirely unrelated to the federal contract under which the prime and subcontractor are partnered, or not applicable to the vast majority of the supplier's non-federal business.

This framework shifts the burden of labor law enforcement onto federal prime contractors by requiring them to perform a set of activities aimed at revealing subcontractor non-compliance and the procedural posture of their labor law violations, activity that is presently within the exclusive purview of the DoL. Prime contractors will be compelled to require ongoing information disclosures from their subcontractors, and then to engage in review and, potentially require corrective actions, with these subcontractors to remediate any "violations" under the framework. These activities will take a significant amount of time and may otherwise be outside the scope of any contractual agreement between a prime and supplier, even where the subject clause is required to be flowed down.

The fundamental nature of the buyer and seller relationship in the supply chain is defined by contract privity and has never envisioned a buyer being involved in resolving problems in the legal relationship between a seller/subcontractor and their employees and government enforcers. Unfortunately, that is what this rulemaking necessarily contemplates through its process for reviewing violations and/or negotiating resolutions or creating and monitoring binding LCAs to address issues flagged by the overbroad framework. Inserting a prime contractor into review and evaluation of internal labor matters of its subcontractors will almost certainly run afoul of privilege or, potentially, collective bargaining arrangements, between those subcontractors and their employees.

As discussed above, the advisory and assistance function provided by ALCA's for prime contractor labor law compliance remediation does not apply to subcontractor labor law non-compliance and the DoL then steps into the ALCA and CO's shoes to be the sole regulatory guide for how to manage the subcontractor responsibility process, should the prime contractor request it. The rationale for this bifurcation of the duty to provide advice to the prime about subcontractor remediation as limited to the DoL and not including the CO or ALCA (agency employees) is not explained in the rule. Industry is unclear why this construct was chosen, as it further complicates the process for the prime contractor, subcontractors and suppliers and the government.

These outstanding elements of subcontractor and supplier compliance must be addressed in advance of any effort to finalize this rule.

7. **The rule requires disclosure of sensitive corporate information and does not adequately establish protocols to protect the required information to be collected.**

Considering the sensitive and privileged nature of the information used in the investigation and enforcement processes of the labor laws involved in this rulemaking, it is reasonable to conclude that the process of higher tiered contractors being involved in any way in the disclosure of a labor law violations of contractors at other tiers in the supply chain or that require receipt and storage of subcontractor case files or legally protected documents will create enormous legal and third party liability and breach of contract risks for all parties. This will be true regardless of whether the ALCA and

CO establishes robust prophylactic ways to shield information, properly manages the information flow and/or puts in place contractor firewalls to protect such information.

The rule requires the collection by prime contractors of labor law compliance data for 14 enumerated federal labor statutes and other regulatory requirements. To adequately address this concern, the rule should outline the steps to be taken by the contractor that is supplying the information to redact or remove identifying language from it, so as to mitigate additional opportunity for risk of exposure or breach.

Furthermore, for prime contractor information collection and reporting requirements, the agencies that receive such data should be required to ensure personally identifiable and business proprietary information is protected from disclosure when making violation information available either on a database visible to the federal contracting community or on a public website. The agencies should also seek comment from the provider of the documents regarding the scope of the documents that should be publicly disclosed. For example, issuance of OSH law violations may be the result of employee injuries. As such, personally identifiable information, such as the impacted employee's name and his or her health information, may be contained on documents disclosed to the agencies by the contractor or subcontractor. The proposed rule and guidance are silent on the protection of personal information and should be revised to instruct agencies in how to protect this information from inadvertent disclosure and establish protocols and penalties for inappropriate or unauthorized disclosure of protected data.

The rule also proposes to have the prime contractor collect information from its suppliers regarding labor law compliance. Such information, particularly if it includes information about a purported or actual violation, is sensitive corporate information, yet the rule makes no mention of marking the data or establishing protocols for appropriately protecting and safeguarding the information. Such protections around personal and corporate information should be clearly established in the rule and provide a means for the provider of the information to redact certain types of information or require the agency receiving the information to establish protocols to ensure protection.

Preferably, as noted above, the DoL will realize that it is easier and far more efficient and cost-effective to aggregate their own data regarding corporate labor law compliance, thereby mitigating any risk from exposure. Such action to build a complete government capability to collect and store relevant data submitted by federal contractors is more viable than pursuing the construct in the rule whereby a duplicative process for collecting compliance data is established within the federal vendor community.

## 8. The monetary threshold for application of the rule is too low and should be raised.

The rule establishes a $500,000 threshold for the requirement for subcontractors to report labor violations. This threshold is far too low. One of the stated purposes of the rule is to avoid burdens on small businesses, but small businesses routinely receive contracts and subcontracts of $500,000. It is worth noting that dollar thresholds subject to five-year inflation adjustments that were once at $500,000 are now set at higher amounts and are scheduled to be increased later this year. If the objective is truly to minimize the impact on small businesses and mitigate the burden this rule will have on subcontractors, industry recommends that after an appropriate phase-in period, the threshold

should be $1,000,000 as the lowest threshold, but also recommend scaling significantly higher as set forth in the industry recommendations below.

## 9. Recommendations from industry to mitigate the impact of the rule and guidance.

As stated above, there are numerous issues that the government must consider prior to issuing a final rule and guidance. In industry's opinion, many of these issues are not resolvable within the current proposed framework and thus the government should consider reworking its proposed approach to work within existing procurement processes in order to avoid imposing on contractors an inappropriate and costly compliance obligation which provides no added value. Should the government wish to proceed within this framework however, below are recommendations that industry believes will accomplish the requirements of the E.O. in a more efficient and functional manner.

### *a. Establish a single reporting portal for all contractors through SAM.*

Many subcontractors sell products to many prime or higher tier contractors. Many subcontractors also sell directly to the government. Moreover, because reports must be updated every six months, presumably from the date of award of a covered contract or subcontract, if subcontractors do not have a single place to file reports, they will be in a constant state of filing new and updated reports with both the government and multiple prime contractors. Because the reporting burden of this regulation is so significant, the government should at a minimum provide a common place for reports to be filed. As stated above, industry believes that any reporting requirements under this rule are redundant to compliance information already in the possession of the DoL. If, however, a reporting requirement remains as part of this proposal, industry would recommend that this reporting should be made through the SAM system, which is already accessed and utilized in the contracting process. Such a requirement would aggregate the data into the existing tool familiar to the contracting community and would avoid the added expense of creating new databases and interfaces.

### *b. Contractors should be afforded the opportunity to establish compliance on a bi-annual basis.*

Though the E.O. contemplates contractor labor violation reports every six months following contract award, for many larger contract holders with thousands of federal contracts, this could cause nearly continuous daily reporting. We would recommend that the burden for some contractors and the government could be alleviated by disconnecting the reporting requirements from each transaction and creating the ability to establish labor law compliance, for purposes of responsibility determinations for contract awards, on a bi-annual basis. The process could be done pre-award, in anticipation of competitions and the need to demonstrate compliance for a responsibility determination. The DOL and the FAR Council could select dates based on the calendar for reporting, (e.g., April 30 and October 30 to align with other contractor bi-annual reporting periods already established in statute and regulation) or require filing in conjunction with other required DOL reporting. Such a step would significantly reduce the reporting burden for both prime contractors and the government, as it would dramatically reduce the volume and frequency of initial and subsequent reporting. Such an option should also significantly

alleviate the burden on the ALCAs and the COs, freeing them to rely upon a prior determinations instead of re-reviewing information for each individual procurement.

*c. Limit the reporting requirements to labor law violations in connection with the performance by the offeror of a federal contract.*

Such a limitation would be consistent with existing responsibility reporting requirements under the FAR (see FAR 52.209-5 and 52.209-7) and would also significantly reduce the volume of the reporting burden. It would also permit those entities that are conducting business in the federal market and best prepared to address government-unique requirements like those proposed in this rule and guidance.

*d. Shorten the period of coverage of the reporting requirements.*

Industry would suggest that the period of coverage should be reduced to 6 to 12 months in order to provide more manageability in the process and avoid a punitive action in contracting, as expressly proscribed in FAR Part 9.

*e. Provide exemptions for all commercial items at the prime and subcontract levels.*

As noted above, the government should sustain the intent of the legislative branch and exempt all commercial items, including those in subcontracting and supply contracts, from coverage under this rule. It was never the intent of the statutes to impose government-unique requirements on these items, which are essentially the same or very similar to those offered in the commercial market.

*f. Provide exemptions or create mechanisms for contingency, urgency or expedient needs or where the agency directs the prime contractor to a specific source and/or permit agency heads to waive the requirements of this rule to permit rapid acquisition as needed.*

Do not limit or abolish the current ability of CO's ability to contract with a non-responsible party under the compelling needs exception in FAR 9.4

The rule as drafted includes no exemptions for urgent and compelling situations and the government simply has too many urgent national security, homeland security or natural disaster emergencies to allow those mission needs to become mired in the bureaucratic process this proposal imposes on responsibility determinations. Such an inability to act quickly would place these missions at risk.

*g. Establish a means to "fast-track" low risk violations without activating the remedial process.*

Establish risk for labor law "violations" and permit CO discretion to move forward with a responsibility determination for matters that properly fit into the low risk categories. This means of mitigation of

impact could be done in conjunction with the ALCA, but without the remedial process *having to be activated.*

*h. Prohibit retroactive application of any final policies through modification of existing contracts, including multiple year IDIQ contracts with less than 3 years remaining in the contract term, and do not make option invocation contingent on agreement to incorporation of the new policies or clauses.*

*i. Industry recommends consideration of a phased approach to implementation to make the burdens and costs more manageable for government and industry.*

Industry would propose consideration of a phased implementation and enforcement approach over at least 5 years that included the following elements:

- Year 1-2: Stand up the ALCA functions within each agency: Hire and/or appoint and train employees at every relevant agency and within the DoL to implement the rule and manage the oversight compliance process. This time frame also permits contractors to effectively assess the applicability of the new rules to their specific business model and offerings and begin to establish compliance and reporting protocols and mechanisms, and train their employees.
- Year 3: Implement contractually in new solicitations and contracts valued over $20,000,000 and apply the requirement to prime contractors only;
- Year 4: Implement contractually in new solicitations and contracts valued over $10,000,000 and apply the requirements to prime contractors only;
- Year 5: Implement contractually in solicitations and contracts valued over $5,000,000 and apply the requirements to prime contractors only;
- Year 6: Implement the flow-down requirements to subcontractors;
- At the end of the phase-in period, align the actionable threshold value with the contractual value.

*j. Address "blacklisting" concerns by establishing safe harbor frameworks for subcontractors and primes.*

The government should establish some form of safe harbor framework to provide subcontractors, found not to be responsible by prime contractors based on DoL or CO advice with the ability to remain competitive in the federal market after demonstrating appropriate remediation of concerns.

Another safe harbor should be established in the policy that includes protection for the prime contractor from contract or other civil liability that might otherwise be actionable by a subcontractor from a finding of non-responsibility.

After phasing in such a framework for subcontractors, the government should extend that safe harbor for prime contractors to rely on subcontractor labor law violation representations made in good faith.

## Conclusion

CODSIA members overwhelmingly agree with E.O. 13673 that the vast majority of federal contractors comply with labor law, but note that this proposed rule does not reflect that position. The DoL guidance and the FAR proposed rule would subject contractors and the government to significant risks, including increased costs and liability associated with managing this regulatory burden and delays in the contracting process. Rather than risking such liability and complying with burdensome and costly requirements of the rules, some companies – particularly non-traditional DoD suppliers and commercial-item vendors - will choose to exit the federal marketplace. The rules will also discourage new entrants from coming into the federal marketplace because of the significant business risks and extraordinary process and legally risky requirements not required in the commercial sector. The delays contemplated with this proposal will only serve to damage the government mission, particularly when there is a sense of urgency associated with the acquisition.

As set forth above, CODSIA strongly urges that the government withdraw both the guidance and proposed rule in order to communicate and coordinate with industry to establish a new paradigm for assessing labor law compliance in relation to government contracting.

Respectfully,

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