

**Statement of
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before the
Subcommittee on Investigations, Oversight and Regulations &
Subcommittee on Contracting and Workforce
Committee on Small Business
U.S. House of Representatives
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Good morning Chairmen Hardy and Hanna and Ranking Members Adams and Takai. Thank you for the invitation to appear before your Subcommittees to speak about the Department of Labor (DOL or the Department) proposed guidance to implement Executive Order 13673, the Fair Pay and Safe Workplaces Executive Order (EO or the Order).

Although most Federal contractors comply with applicable laws and provide high-quality goods and services to the government and taxpayers, a small number of Federal contractors have committed a significant number of labor law violations in the last decade. In 2010, the Government Accountability Office issued a report that found that almost two-thirds of the 50 largest wage-and-hour violations and almost 40 percent of the 50 largest workplace health-and-safety penalties issued between Fiscal Year (FY) 2005 and FY 2009 occurred at companies that later received government contracts.

Beyond their human cost, these violations create risks to the timely, predictable, and satisfactory delivery of goods and services to the Federal Government, and Federal agencies risk poor performance by awarding contracts to companies with histories of labor law violations. Poor workplace conditions lead to lower productivity and creativity, increased workplace disruptions, and increased workforce turnover. For contracting agencies, this means receipt of lower quality products and services, and increased risk of project delays and cost overruns. Contracting agencies can reduce execution delays and avoid other complications by contracting with contractors with track records of labor law compliance—and by helping to bring contractors with past violations into compliance. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and deliver goods and services to the Federal Government in a timely, predictable, and satisfactory fashion.

Moreover, by ensuring that its contractors are in compliance, the Federal Government can level the playing field for contractors who comply with the law. Those contractors who invest in their workers' safety and maintain a fair and equitable workplace should not have to compete with contractors who offer slightly lower bids—based on savings from skirting labor laws—and then ultimately deliver poor performance to taxpayers. By helping contractors improve, the Federal Government can ensure that taxpayers' money supports jobs in which workers have safe

workplaces, receive the family leave they are entitled to, get paid the wages they have earned, and do not face unlawful workplace discrimination.

To address this issue, President Obama signed this EO last year, requiring prospective Federal contractors on covered contracts to disclose certain labor law violations and giving agencies more guidance on how to consider those labor violations when awarding Federal contracts. With this Order, the President pledged to hold accountable Federal contractors that put workers' safety, hard-earned wages, and basic workplace rights at risk.

The EO builds on the existing procurement system, and changes required by the Order fit into established contracting practices that are familiar to both procurement officials and the contracting community. In addition, the Department will provide support directly to contractors and subcontractors so that they understand their obligations under the Order and can come into compliance with Federal labor laws without holding up their proposals in response to specific Federal contracting opportunities. Finally, the Department will work with Labor Compliance Advisors across agencies to minimize the amount of information that contractors have to provide and to help ensure efficient, accurate, and consistent decisions across the government.

Nothing in the Order displaces the existing authority of the Small Business Administration to make a definitive determination of a small business's responsibility to perform a particular contract. If a contracting officer makes a determination on non-responsibility involving a small business apparent successful offeror, the contractor must be given the opportunity to apply to the Small Business Administration for a "certificate of competency." If SBA grants the certificate of competency, SBA's determination overrides the responsibility decision made by the contracting officer—even a decision made pursuant to this Order.

The objective of the Order is to help contractors come into compliance with Federal labor laws, not to deny them contracts, and it encourages compliance, not suspension and debarment. The processes and tools envisioned by the Order are designed to identify and help contractors address labor violations and come into compliance before consideration of suspension and debarment. The Order does not in any way alter the suspension or debarment process; however, the expectation is that the processes and tools envisioned by the Order will drive down the need for an agency to consider suspension and debarment and help contractors avoid the consequences of that process. As a result, this Order, once implemented, will offer contractors an opportunity to come into compliance and maintain the privilege of being a Federal contractor, unlike the suspension and debarment process, which could exclude them from receiving awards.

The Order also ensures that contractors' employees are given necessary information to make sure their paychecks are accurate. It also ensures that more workers who may have had their civil rights violated or been sexually assaulted can have their day in court.

On May 28, 2015, the Department published proposed guidance to assist contracting agencies and the contracting community in applying the Order's requirements. On that same day, the

Federal Acquisition Regulatory Council (FAR Council) also issued proposed regulations integrating the Order's requirements and the provisions of the Labor Department's guidance into the existing procurement rules.

The Department's proposed guidance would do several things. First, it would define "administrative merits determination," "civil judgment," and "arbitral award or decision," and provide guidance on what information related to these determinations must be reported by covered contractors and subcontractors. Second, it would define "serious," "repeated," "willful," and "pervasive" violations and provide guidance to contracting officers (or contractors with respect to their subcontractors) and Labor Compliance Advisors (LCAs) for assessing reported violations, including mitigating factors to consider. Third, it would provide guidance on the Order's paycheck transparency provisions, including identifying those States whose wage statement laws are substantially similar to the Order's wage statement requirement, such that providing a worker with a wage statement that complies with any of those State laws satisfies the Order's requirement. It would also provide a roadmap to contracting officers, Labor Compliance Advisors, and the contracting community for assessing contractors' history of labor law compliance and considering mitigating factors, most notably efforts to remediate any reported labor law violations.

The Department and representatives of the FAR Council have been very active in seeking out stakeholder feedback with the goal of ensuring that the drafters of the guidance and related FAR rule receive a wide range of views and information so that the EO is implemented in a manner that is clear, fair, and effective. For example, on July 22, 2015, representatives from DOL and the FAR Council attended a public roundtable sponsored by the Small Business Administration's Office of Advocacy to hear feedback from small businesses and gain a better understanding of the types of concerns they can expect to be raised in comments from this community.

During those sessions, the regulated community stressed the importance of effective implementation of the order and the need to streamline the disclosure process and minimize the burden on contractors. In response to what we learned from the regulated community in these sessions and in an effort to ensure that this rule creates a fair, reasonable, and implementable process, the proposed guidance and Notice of Proposed Rulemaking (NPRM) would:

- 1.) Leverage existing Federal acquisition processes and systems with which contractors are familiar. Federal contracting officers already must assess a contractor's record of integrity; however, the information about a prospective or current contractor's workplace violations is not readily available to contracting officials. The regulations and guidance would propose that contracting officers have access to additional information to make more informed decisions, and provide greater transparency for contractors as to the information that will be considered in making that determination.
- 2.) Phase in parts of the rule over time. Contractors would not be required to disclose violations related to equivalent State laws immediately (other than violations of OSHA

state plans), which is expected to significantly reduce the number of violations they will need to report. Separate guidance and an additional rulemaking will be pursued at a future date to identify equivalent State laws, and such requirements will be subject to notice and comment before they take effect. In the proposed FAR rule, the regulated community is also asked to comment on the phased-in subcontractor reporting requirements.

- 3.) Provide an alternative proposal, under which subcontractors would directly report violations to DOL, rather than to their contractor. If this alternative is adopted in the final rule, the contractor could then rely on DOL's review of the subcontractor's violations in determining whether the subcontractor is responsible. Moreover, the proposed FAR rule has invited public comment on additional or alternative approaches to subcontractor disclosure and reviews of the disclosures.

We are working through the comments to produce a quality guidance document that will better inform Federal procurement decisions; provide contracting officers with the necessary information to ensure accurate, efficient, and consistent compliance with labor laws; help contractors meet their legal responsibilities; and remove truly bad actors from Federal contract consideration – creating a more level playing field for law-abiding contractors. Most importantly, it will also ensure that hardworking Americans get the fair pay and safe workplaces they deserve.

I appreciate the invitation to testify and will be happy to take any questions you may have.