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TESTIMONY OF ANNE E. RUNG
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BEFORE THE SUBCOMMITTEE ON CONTRACTING AND WORKFORCE AND
INVESTIGATIONS, OVERSIGHT, AND REGULATIONS
COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

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Chairman Hanna, Ranking Member Takai, Chairman Hardy, Ranking Member Adams and Members of the Subcommittees, thank you for the opportunity to appear before you today and discuss the Administration's implementation of Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces. My comments today will primarily focus on actions being taken by the Federal Acquisition Regulatory Council (FAR Council), which I chair as Administrator of the Office of Federal Procurement Policy (OFPP).

It is important to emphasize at the outset that OFPP and the FAR Council have been working in close partnership with the Department of Labor (DOL) on rules and guidance to implement E.O. 13673. Our respective organizations are fully committed to implementing the E.O. in a manner that is clear, fair, and effective, and have been actively seeking feedback from stakeholders since issuance of the E.O. more than a year ago. We did this to ensure that we had sufficient information and insight from stakeholders, including small businesses, to achieve these goals. As part of this outreach, my office took part in a roundtable held this summer by the Small Business Administration's (SBA) Office of Advocacy to hear the small business's views on DOL's proposed guidance and the proposed changes to the Federal Acquisition Regulation (FAR) published in the Federal Register on May 28, 2015.

E.O. 13673 is designed to improve contractor compliance with labor laws in order to increase economy and efficiency in Federal contracting. As section 1 of the E.O. explains, 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. While the vast majority of Federal contractors abide by labor laws, studies conducted by the Government Accountability Office, the Senate Health, Education, Labor and Pensions Committee, and the Center for American Progress (CAP) suggest that a significant percentage of the most egregious labor violations identified in recent years have been regarding companies that received Federal contracts. In addition, CAP and studies performed by others have found a nexus between companies with labor violations and significant performance problems on Government contracts.

In recent years, important steps have been taken by this Administration to better protect taxpayers from the waste and abuse that comes from doing business with contractors that are not responsible sources. These steps include the deployment of the Federal Awardee Performance and Integrity Information System (FAPIIS) that supports agencies as they evaluate whether a company has the requisite integrity to do business with the Government. We have also sought to strengthen agency suspension and debarment programs to protect the Government from harm. Despite these steps, many labor violations that are serious, willful, repeated, or pervasive are not considered in awarding a contract, in large part because contracting officers are not aware of them. In addition, even if information regarding labor violations is made available to the agency, contracting officers generally lack the expertise and tools to evaluate the severity of the labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of business ethics and integrity.

The E.O. requires that prospective and existing contractors on covered contracts disclose violations of certain labor laws and that contracting officers, in consultation with labor compliance advisors (LCAs), consider the disclosure, including any mitigating circumstances, as part of their decision to award or extend a contract. DOL and the FAR Council have been working closely together to create a comprehensive process that is manageable and avoids the uncertainty that drives up the cost of contractors doing business with the government. Once finalized, the FAR rule will provide direction to contracting officers on how they are to obtain disclosures from contractors on their labor violations, how to make responsibility determinations that take into account disclosed labor violations, and how they will work with LCAs, who will advise contracting officers in evaluating violations. DOL's guidance will work hand-in-hand with the FAR rule by addressing how LCAs should identify from among disclosed violations those serious, willful, repeated, or pervasive violations that may warrant heightened attention because of the nature of the non-compliance. The guidance will also explain how contractors can obtain compliance assistance from DOL.

In addition to the new requirements to improve labor compliance, the FAR rule will address requirements in the E.O. to ensure workers on covered contracts are given the necessary information each pay period to verify the accuracy of what they are paid. It will also require that contractors and subcontractors who enter into contracts for non-commercial items over \$1 million agree not to enter into any mandatory pre-dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

As explained in the preamble to the proposed FAR rule, we have taken a number of steps in the proposed rule, consistent with direction in the E.O., to minimize the implementation burden for contractors and subcontractors, including small businesses:

- The proposed FAR rule builds on existing processes and principles, including the long-standing requirement that a prospective contractor be a responsible source that has a "satisfactory record of integrity and business ethics."

- Many of the contracts performed by small businesses, including contracts valued at \$500,000 or less and subcontracts for commercial-off-the-shelf items, are exempt from the proposed FAR rule's disclosure requirements.
- The proposed FAR rule preserves and emphasizes the requirement in the FAR that if a contracting officer finds a prospective small business contractor to be nonresponsible, the matter shall be referred to SBA. If SBA concludes that the small business is responsible, SBA will issue a Certificate of Competency.
- The focus of the proposed FAR rule is on the most problematic labor violations that are most likely to have the greatest bearing on an assessment of a contractor or subcontractor's record of integrity and business ethics.
- LCAs will provide labor expertise to support contracting officers in evaluating labor violations.
- DOL will work with LCAs to coordinate evaluations to promote consistency and certainty.
- Efforts are underway to develop a single website to centralize reporting of labor violations by contractors.

Further, during listening sessions held by DOL, OMB, and relevant policy councils, stakeholders raised concerns regarding the potential complexity and burden associated with two aspects of the E.O. in particular: (1) provisions addressing disclosure of violations of equivalent State laws, and (2) provisions addressing disclosure and evaluation of subcontractor violations. In response to what we learned from these sessions, requirements in the E.O. addressing the disclosure of violations of equivalent State laws, with the exception of OSHA State Plans, will be phased in at a later date. In addition, the FAR Council has developed alternative proposals that seek to address concerns it heard regarding the challenges contractors might face in evaluating violations disclosed by their subcontractors. This includes a possible phase-in of subcontractor disclosure requirements. The proposed FAR rule has invited public comment on additional or alternative approaches to this issue.

Stakeholder feedback has been a key component in the development of the proposed FAR rule. Currently, the FAR Council is carefully reviewing the many and diverse public comments received in response to the proposed rule published at the end of May to determine where additional revisions are needed. In considering comments, the FAR Council seeks to ensure that the final rule is both manageable and impactful in achieving the E.O.'s objective of bringing contractors with significant labor violations into compliance with the law in a timely manner.

Without question, implementation of the E.O. requires the Government's policy, operational, and technology officials to address a number of difficult issues head on. It is hard

work, but work that is critical to the integrity of our procurement system, ensuring economy and efficiency in contracting, and securing the well-being of American workers.

Thank you and I am happy to answer any questions you may have.