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BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS
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CHAIRMAN HANNA, CHAIRMAN HARDY, CONGRESSMAN TAKAI, CONGRESSWOMAN ADAMS, AND MEMBERS OF BOTH SUBCOMMITTEES, I appreciate the opportunity to appear before you today to discuss the impact of the proposed Federal Acquisition Rule ("FAR") Rule and Department of Labor ("DOL") Guidance implementing the Fair Pay and Safe Workplaces Executive Order ("EO 13673").[1]

As Chair of the Crowell & Moring Government Contracts Group, and as former Administrator for Federal Procurement Policy at the Office of Management and Budget, I have worked closely with small business contractors throughout my professional career. Based upon over two decades of experience in federal procurement, I am deeply concerned that the EO will undermine the government's long-standing policy of maximizing contracting opportunities for small businesses. Certainly, no one opposes the principles of "fair pay" and "safe workplaces" for employees of government contractors, and the Administration itself has acknowledged that "the vast majority of federal contractors play by the rules."[2] But if the EO is aimed at only a small number of bad actors, then surely there is a more efficient way to accomplish this goal than imposing requirements that will lead to procurement delays, the blacklisting of ethical

[1] Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015); Guidance for Executive Order 13673, Fair Pay and Safe Workplaces, 80 Fed. Reg. 30,574 (May 28, 2015); EO 13673, Fair Pay and Safe Workplaces 79 Fed. Reg. 45,309 (Aug. 5, 2014).

[2] Fact Sheet: Fair Pay and Safe Workplaces Executive Order Jul 31, 2014, http://www.dol.gov/asp/fairpay/FPSWFactSheet.pdf (last visited July 2, 2015).

companies, and reduced competition in the federal marketplace. My testimony today highlights five principal concerns about the substance of the EO as it relates to small businesses:

- Potentially severe unintended consequences for small businesses.
- High compliance costs that will deter small businesses from participating in the federal marketplace.
- The diversion of federal employees from assisting and growing our small businesses to collecting data, monitoring compliance, and enforcement of federal and state labor laws with a high risk of *de facto* debarment.
- A flawed Initial Regulatory Flexibility Act analysis.
- Failure to give even the most basic rationale for the necessity of this rule.

For a more in-depth analysis of other portions of the Proposed Rule and the potential effect on the entire procurement system, I refer you to the official comments to the Proposed Rule submitted by the National Association of Manufacturers ("NAM"), a client of Crowell & Moring, and attached to this testimony. Over the course of several months, we have been fortunate to assist NAM with an analysis of the Proposed Rule and preparation of comments for official submission. While I am testifying on my own behalf today, I have worked extensively with industry in understanding and assessing the potential impact of this rule.

The EO Creates Potentially Severe Unintended Consequences for Small Businesses

On May 28th, the Administration released a 131-page Proposed FAR Rule and a 106-page Proposed DOL Guidance to implement EO 13673. Under the EO, a small business bidding on a federal prime contract or subcontract valued at more than $500,000 will be required to disclose "violations" of the fourteen enumerated labor laws and be required to provide mitigating documentation to the federal government and/or prime contractors. The collection and provision of documentation on a wide array of labor compliance issues will cause significant disruption to small businesses, and forces the delivery of competitively sensitive information to prime

contractors, the Department of Labor, or both. The notion of providing this information to prime contractors is especially problematic in the government contracts marketplace where it is not uncommon for contractors to team on one project only to be competitors on a separate procurement. Under the arrangement proposed by the EO, prime contractors will learn significant information about a small business subcontractor's labor compliance history that could then be used as ammunition in bid protests against the company in subsequent competitions. In other words, the EO could radically alter the prime/subcontractor relationship that the government depends on for the delivery of innovative products and solutions.

There is also the risk—acknowledged in the Proposed Rule—that prime contractors will shy away from doing business with subcontractors with any kind of labor violation, no matter how minor, because it could slow down the award of the potential contract or jeopardize the award of the contract altogether. This raises the chilling specter of small businesses with minor labor issues being "frozen out" of the marketplace.

And let us not forget that over twenty percent of federal procurement dollars are awarded to small businesses as *prime* contractors on federal projects. Under the EO, these small business prime contractors will face a daunting task. In addition to satisfying the rule's onerous compliance and reporting requirements with respect to their own corporate history, they will be charged with collecting, analyzing, and updating information with respect to their subcontractors. If any of those subcontractors are large federal contractors – which is often the case – it is not hard to imagine a small business being subsumed in paperwork when its large business subcontractor forks over boxes and boxes of paperwork on its historical labor compliance, mitigating circumstances, and other information required under the EO. Instead of delivering

critical services to federal agencies that rely on their support, small business prime contractors will be forced to re-allocate precious resources to generate paperwork for paperwork's sake.

Pricey Compliance Costs will Diminish Small Businesses Participation in the Federal Marketplace

One fact is crystal clear: compliance with the new requirements will be incredibly expensive and burdensome. These costs hit small contractors especially hard, as they have limited resources to build new compliance infrastructure, track legal allegations, or even challenge frivolous claims. All of this comes at a time when the Government is attempting to encourage more innovative small businesses and commercial item contractors to enter the government marketplace.

Section 4 of EO 13673 requires the FAR Council to minimize the burden of complying with the regulation on small entities.[3] While the Proposed Rule contains several steps to minimize the burden such as the possible phasing-in of flow-down requirements and the exemption of subcontracts for Commercial Off the Shelf ("COTS") purchases, the Proposed Rule introduces a host of new labor law compliance reporting requirements and creates substantial administrative burdens for small businesses that want to sell goods and services to the federal government.

For even the largest, most sophisticated government contractors, the collection of subcontractor labor compliance data will create an unprecedented data collection and reporting burden. If compliance will be difficult for large contractors with in-house personnel and expertise, satisfying the requirements will be near impossible for small businesses when they are awarded prime contracts and are therefore required to make responsibility determinations for

[3] E.O. § 4

their own subcontractors. Many small businesses lack the staffing or compliance infrastructure to collect and evaluate information about labor law violations from subcontractors with hundreds or even thousands of employees. In all likelihood, small businesses will be overwhelmed with the task of trying to collect and evaluate the labor violations of their subcontractors, and this heavy burden is compounded by the fact that the process will have to be repeated every six months after award.

Small business contractors are already expending substantial resources to comply with federal labor laws and regulations, oftentimes without the benefit of large administrative staffs, and sophisticated legal counsel. The additional costs, risks, and compliance requirements associated with the EO may force some small businesses to exit the federal marketplace altogether. In the same vein, potential new entrants to the government contracts market may be deterred by the up-front investment that will be required to comply with the EO. I think we can all agree that reducing the number of companies competing for federal contracts is bad for everyone: bad for our job-creating small businesses, which will lose critical contracting opportunities; bad for the government, which will have greater difficulty meeting statutorily-mandated socioeconomic contracting goals; and bad for the taxpayers, because reduced competition will lead to higher prices.

Concerns about the collateral effects of the EO on small entities is shared by the Small Business Administration ("SBA") Office of Advocacy, the federal government's own small business watchdog. According to public comments submitted by that Office, the Proposed Rule is "very burdensome," "raises the cost of doing business with the federal government," and could lead to the "reduction of the number of small businesses that participate in the federal

marketplace."[4] Notably, the SBA's Office of Advocacy recommends that the new requirements not apply to small businesses at least until the subsequent rulemaking when DOL identifies the state equivalents of the fourteen federal labor laws.

Diversion of Federal Employee Resources to Data Collection and Enforcement with a Specter of *De Facto* Debarment

The Proposed Rule and Guidance do not address how the federal acquisition workforce is expected to divert resources from guiding and growing small businesses to the collection, analysis, and enforcement of labor laws in a fair and even-handed way. As a threshold matter, each of the fourteen federal laws identified in EO 13673 is extremely complex, and the caselaw is constantly evolving. There is not a lawyer in Washington who could claim to be an expert on each of the fourteen identified federal labor and employment laws, much less the yet-to-be-identified "equivalent state laws."[5]. So it is wholly unreasonable to assume that a contracting officer ("CO") or agency labor compliance advisor ("ALCA") will have a sufficient understanding of the universe of relevant labor laws to be able to make the required responsibility determinations, and to make them consistently.

The tasks delegated to COs and ALCAs under EO 13673 and the Proposed Rule are made more difficult because of the short window of time in which responsibility determinations must be made. In order to meet the requirements of the Proposed Rule, a CO will be required to take the following steps for every contract award over $500,000 in which an offeror reports a labor violation:

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[4] SBA Office of Advocacy, Regulatory Comment Letter re: Proposed Regulation to Implement Executive Order 13673 "Fair Pay and Safe Workplaces," 80 Federal Register 30,547, May 28, 2015, FAR Case 2014-025, available at https://www.sba.gov/sites/default/files/2015_08_26_15_20_33_2.pdf

[5] The DOL announced in its Guidance that it will define "equivalent state laws" as part of a future rulemaking.

- First, the CO must check to see if the contractor has disclosed any violations in the System for Award Management ("SAM") as part of the initial certification;

- Second, the CO must request all relevant information about the administrative merits determination, civil judgment, or arbitral award;

- Third, the CO must furnish the ALCAs with all of this information and request that the ALCA provide written advice and recommendations within three business days of the request;

- Fourth, the CO must review the DOL Guidance and the ALCA's recommendation;

- Fifth, the CO must consider the mitigating circumstances such as the extent to which the contractor has remediated the violation or taken steps to prevent its recurrence; [6]

- Sixth, the CO must make a responsibility determination as to whether the contractor is a responsible source with a satisfactory record of integrity and business ethics;

- Lastly, the CO will need to take the time to document the various stages of this process in order to develop a more favorable administrative record in preparation for bid protests regarding the responsibility determination.

Of course, the burden on small business contractors, subcontractors, and the acquisition workforce does not end there. After contract award, the contractor has to provide updated information for itself and its subcontractors every six months.

Given the number of contract actions that will be subject to this process, these requirements will no doubt result in a less efficient and more cumbersome procurement process. Due to the enormous demands on a CO's time, and the complexity of making responsibility determinations, the requirements of the Proposed Rule will likely result in conflicting and redundant decisions by COs.

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[6] Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015) ("The Executive Order (EO) requires that prospective and existing contractors disclose certain labor violations and that contracting officers, in consultation with labor compliance advisors, consider the disclosures, including any mitigating circumstances, as part of their decision to award or extend a contract.")

The most troubling unresolved question is whether these responsibility decisions could result in *de facto* debarment without the due process or the procedural protections embedded in Subpart 9.4 of the FAR. For instance, one CO may find a small business to be non-responsible after determining that a handful of OSHA violations constitute evidence of a "pervasive" problem. Another CO, in an effort to reduce her crushing workload, could understandably decide to follow his or her colleague's responsibility determination—about the same underlying facts—without conducting the required independent analysis. Indeed, such failure would seem much more likely when a small business is involved, a small business without the resources to fight back against an arbitrary decision made without independent analysis. If this were to occur, the government would have improperly effectuated a *de facto* debarment. While small businesses' understand that contracting with the federal government is a privilege and not a right, contractors (and particularly small businesses) have a due process liberty interest in avoiding the damage to their reputation and business caused by the stigma of broad preclusion from government contracting.[7] In sum, the requirements of the EO create a slippery slope to the "blacklisting" of companies – effectively preventing them from competing for federal contracts – based upon the opinion of one contracting officer.[8]

The EO is grounded in the proposition that a greater understanding of—and compliance with—labor laws will lead to increased economy and efficiency in the procurement process. But rather than ensuring the timely and predicable delivery of goods and services, the EO and the implementing regulations divert precious federal resources and inject uncertainty into the

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[7] *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993).

[8] *Phillips, et. Al, v. Mabus et. al,* Civ. Action No. 11-2021, 2012 WL 476539 (D.D.C.) ("*De facto* debarment occurs when a contractor has, for all practical purposes, been suspended or blacklisted from working with a government agency without due process, namely, adequate notice and a meaningful hearing.") citing *Trifax Corp. v. Dist. Of Columbia,* 314 F.3d 641, 643-44 (D.C. Cir. 2003).

procurement process that will delay critical federal purchases and side-step the procedural due process rights of contractors.

The FAR Council's Initial Regulatory Flexibility Analysis is Flawed

In addition to the substantive flaws, the FAR Council's regulatory analysis[9] falls short of the obligations imposed by EO 12866,[10] the Paperwork Reduction Act,[11] and the Regulatory Flexibility Act ("RFA").[12] Due to the fact that the Proposed Rule is likely to have a significant impact on a substantial number of small businesses, the RFA requires that the FAR Council prepare an Initial Regulatory Flexibility Analysis ("IRFA") describing the impacts of the rule on small entities. Under the RFA, the IRFA must address a number of required elements including "a description of the projected reporting, recordkeeping and other compliance requirements of the Proposed Rule," and a description of any "significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." Here, the FAR Council's IRFA does not adequately consider these elements and fails to calculate the true impact that the new requirements will have on small businesses across the country.

Absent from the FAR Council's IRFA is any substantive analysis of the recordkeeping or ongoing compliance requirements that will be imposed on small businesses. For most contractors, just the initial step of determining whether their company has any violations to disclose will be a significant undertaking. At present, most companies do not have systems in

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[9] Accompanying the Proposed Rule is a Regulatory Impact Analysis ("RIA") that is required under EO 12866 (and, by adoption, EO 13563). *See* Federal Acquisition Regulation (FAR) Case 2014-025, Fair Pay and Safe Workplaces Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563.

[10] EO 12866 directs federal agencies to assess the economic effects of their proposed significant regulatory actions, including consideration of reasonable alternatives.

[11] 44 U.S.C. §§ 3501–3521.

[12] 5 U.S.C. § 605(b).

place to implement the new information collection and reporting requirements of the EO. In order to comply, contractors will be required to create new databases and collection mechanisms to account for information subject to disclosure. Moreover, contractors would be required to develop new internal policies and procedures and hire and train new personnel to ensure compliance with the proposed requirements.

Moreover, the IRFA fails to consider alternatives to the Proposed Rule that could accomplish the same objectives. Had the FAR Council considered less costly alternatives, the Council would have concluded that federal dollars would have been better spent improving existing processes rather than requiring data collection and self-reporting which will only increase costs for small businesses.

Under the present system, DOL already reviews federal contractors' compliance with federal labor laws through the Wage and Hour Division, the Occupational Safety and Health Administration, and the Office of Federal Contract Compliance Programs. DOL collects data from these enforcement agencies and makes much of it publicly available through its Online Enforcement Database ("OED"). Rather than requiring contractors to collect and report data that the government already has in its possession, the government could improve its own information-sharing channels so that COs can have the information they need at their fingertips when making responsibility determinations.

The EO is Unnecessary and Redundant

Finally, a significant and wholly unanswered question: why is the federal government creating this burdensome process in the first place? Each and every labor law identified in the EO has its own separate penalties for companies who violate the respective laws. And, unlike the EO, those labor laws and the associated penalties were created by Congress rather than

mandated by the Executive Branch. The federal procurement system also already includes adequate remedies to prevent companies with unsatisfactory labor records from being awarded federal contracts. Specifically, the suspension and debarment official ("SDO") within each federal agency has broad discretion to exclude companies from federal contracting based upon evidence of any "cause so serious or compelling a nature that it affects the present responsibility of a Government contractor." To the extent that a contractor's labor compliance record impacts its present responsibility, FAR Subpart 9.4 sets forth the proper channels for suspension and debarment proceedings.

With an established and effective system in place, it makes no sense to create a new bureaucracy to review these issues on a contract-by-contract basis with the possibility of astoundingly inconsistent decisions by different agencies and different COs.

Conclusion

Given its scope and complexity, this EO will be impractical—if not impossible to implement. The substantial costs of compliance imposed on federal contractors will likely lead to higher procurement costs and will likely drive many small businesses out of the federal marketplace altogether. Moreover, these costs will be borne disproportionately by companies who can least afford them – our small businesses. This is an entirely unacceptable outcome considering that the goals of the EO—targeting contractors with the most "egregious violations"—could be accomplished through the enforcement of existing labor laws and our existing suspension and debarment system. As such, the FAR Council and DOL should rescind the Proposed Rule and Guidance. This concludes my prepared remarks. I am happy to answer any questions you may have.