August 26, 2015

Tiffany Jones
U.S. Department of Labor
200 Constitution Avenue NW, Room S-2312
Washington DC 20210

Submitted via: Regulations.gov

Re: Guidance on Fair Pay and Safe Workplaces; ZRIN 1290-ZA02

Dear Ms. Jones:

We appreciate the opportunity to comment on the Department of Labor's (DOL) draft guidance on Executive Order (E.O.) 13673 "Fair Pay and Safe Workplaces." We represent poultry and meatpacking workers, and are civil rights, labor, and public health advocates.

The federal government awards hundreds of millions of dollars in contracts to many of the nation's largest meat and poultry producers. We believe these firms – and all federal contractors – should be held to a high standard of labor practices, including full compliance with safety and health, wage and hour, and anti-discrimination laws and regulations.

For the record, we think that companies choosing to provide goods and services to the federal government should go above and beyond simple compliance with our nation's labor laws. These laws establish a floor below which companies should not fall. Companies doing business with the federal government should have policies and practices that far exceed minimum requirements.

We support the new requirements for federal contractors and subcontractors to disclose "administrative merits determinations, civil judgments, or arbitral awards or decisions" rendered against them during the past three years for violations of the 14 federal labor laws identified in the E.O. and guidance, and equivalent state laws. However, we propose the following amendments to the guidance that we believe would better serve the E.O.'s objectives of increasing efficiency and cost savings in the performance of federal contracts, assisting contractors with coming into compliance with labor laws, and leveling the playing field for companies that wish to do right by their workforce.

***Require Contractors to be Responsible for Disclosure during Bid Process and Semi-Annually***

We agree that contractors should be responsible for disclosing during the bid process whether they have had any "administrative merits determinations, civil judgements, or arbitral awards or decisions" against them in the last three years for violations of various labor laws, including the OSH Act and wage and hour laws. We also support the requirement for firms with existing government contracts to report semi-annually the status of their compliance with labor laws.

We agree that firms should be required to request this information of subcontractors who may be providing goods or services under the proposed contract. We disagree with business, interest groups, and others who suggest that assembling such information from subcontractors is too

onerous. Firms interested in the large federal contracts defined in the E.O. (i.e., $500,000.00 or greater) should vet their potential subcontractors for compliance with labor laws. If firms think such vetting is too burdensome, they are not obliged to compete for a government contract.

***Require Disclosure of "Meritorious" Whistleblower Complaints***

We recommend that DOL revise the guidance to include among the list of "administrative merit determinations" (provided in the proposal at Federal Register 30579) disclosure of whistleblower complaints that were determined to have "merit" by the federal Occupational Safety and Health Administration (OSHA) or a state-plan counterpart.

***Consult with DOL when Firms Show Pattern of Challenging Citations***

We recognize that firms disclosing violation(s) will want to notify a contracting officer that the violation(s) is being contested or challenged. As the guidance document notes, a company "may raise good-faith disputes" about labor law violations. We recommend revising the guidance document to instruct agency contracting officers to consult with the Labor Department when firms demonstrate a practice of contesting the majority of violations, findings, or other administrative merit determinations. Some firms make it a business practice to contest all but de minimus violations as a way to negotiate lower penalties and avoid correcting hazards. Contracting officers and the Labor Department should be on the look-out for firms "gaming the system."

***Verify Accuracy of Initial Representation and Request Updated Representation Prior to Award***

In accordance with the E.O., contracting agencies must include in solicitations for procurement contracts of $500,000 or more a requirement for the contractor to "*represent, to the best of its knowledge and belief*, whether there has been any administrative merits determination, civil judgment, or arbitral award or decision rendered against it within the preceding three-year period . . . ." The proposed guidance states, "If a contractor reaches the stage in the process at which a responsibility determination is made, *and that contractor responded affirmatively at the initial representation stage*, the contracting officer will require additional information about the contractor's Labor Law violation(s)."

We support the requirement that a contractor make this initial representation, but the guidance does not instruct contracting officials to verify the accuracy of a contractor's initial representation, whether affirmative or negative, or of any additional information provided by a contractor. Moreover, at the pre-award reporting stage, the guidance only instructs contracting officers to require additional information about a contractor's labor law violations when the contractor responded affirmatively at the initial representation stage. There should be a requirement at this pre-award stage for a contractor who responded negatively at the initial representation stage to provide contracting officers with an update about any new violations against it or its subcontractors. As written, contracting officials may not learn of violations until the semi-annual disclosure period, long after the agency has already awarded the contract. We propose the following amendments to the guidance to best ensure the federal government is contracting with responsible entities [see underline]:

"If a contractor reaches the stage in the process at which a responsibility determination is made, and that contractor responded affirmatively at the initial representation stage, the contracting officer will require additional information about the contractor's Labor Law violation(s). If the contractor responded negatively at the initial representation stage, it will be required to provide written certification to that effect again at the pre-award stage, and if violations have become known since the initial representation, the contractor must provide the additional information as if he had responded affirmatively at the initial representation stage. The contracting official will consult with the designated Labor Compliance Advisor and the U.S. Department of Labor to verify the accuracy of the contractor's representation and additional information, if any, disclosed by the contractor."

***Refer Entities with Violations Involving Serious Injury or Death of Worker(s) for Suspension and Debarment***

We believe that a contractor or subcontractor with pending or concluded violations involving the serious injury (e.g., amputation, permanent disability) or fatality of one or more workers does not demonstrate a satisfactory record of integrity and business ethics and thus is not a responsible contractor. For prospective contractors, the contracting official, in consultation with the Labor Compliance Advisor (or a contractor with respect to a subcontractor), should find the entity lacks responsibility and exclude the entity from federal contracting. When a contractor is performing on a contract at the time such a violation occurs or is discovered, the contract should be terminated in accordance with FAR regulations or referred to the agency's suspending or debarring official.

Where such violations exist against a contractor or subcontractor, post-hoc measures to correct the hazardous conditions, including agreements entered into with enforcement agencies, should not suffice to overcome an exclusion from federal contracting. In no instance should the federal contractor be permitted to perform on an existing contract or be awarded a new contract while the underlying conduct that constituted the violation remains unabated.

These changes promote the goals of the Executive Order, which are to incentivize contractors and subcontractors to come into compliance with labor laws and to ensure contracts are awarded to responsible entities. To allow a contractor or subcontractor to continue performing on a contract or to be awarded a new contract when hazardous conditions that caused workers to be injured or killed remain unabated offers no incentive for the contractor or subcontractor to correct the conditions before continuing with work. By terminating the existing contract or barring new contract awards, it incentivizes the contractor or subcontractor to take proactive steps to protect workers' health and safety and levels the playing field for responsible contractors who do not cut corners in the first place.

***Remove "A Single Violation" and "Long Period of Compliance" From Mitigating Factors***

For the assessment of a contractor's or subcontractor's labor law violations, neither the fact that the entity has a "single violation" or a "long period of compliance" should be considered as mitigating factors.

The guidance instructs contracting officials (or contractors with respect to subcontractors) that, "in most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility." We do not believe this would promote responsible contracting because it draws a presumption in favor of the contractor without any review of the severity or context of the underlying violation.

As the guidance explains, "The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful." Thus, all violations assessed by the contracting official are advertent and potentially impactful violations. Choosing to ignore these violations simply because there is only a single violation in the preceding three years would be to ignore evidence of irresponsible conduct, which would serve only the interests of the contracting entity without providing any benefit whatsoever to the public or contracting agencies.

Furthermore, allowing consideration of "a single violation" or "a long period of compliance" as mitigating factors wrongly assumes that an entity with few violations, or with a long period of compliance (the duration of which is not clearly defined in the guidance), is acting responsibly. Given that agencies like federal OSHA have so few resources that it would take 99 years to inspect every establishment within its jurisdiction, and agency resources are on the decline, these factors simply may be evidence that the agency has not inspected more than once over the past three years. Thus, to consider these as mitigating factors could result in erroneously awarding federal contracts to contractors based on the fact they have gone uninspected, rather than based on an accurate assessment of their "responsibility."

***Consider Violations of Environmental Law When Assessing a Firm's Labor Violations***

Contracting officials in consultation with the Labor Compliance Advisor (or contractors with respect to subcontractors) should be permitted to take into account in assessing a contractor's responsibility any evidence of environmental violations under statutes such as the Clean Water Act and Clean Air Act. A history of environmental violations can serve as an indicator that a contractor or subcontractor lacks a satisfactory record of integrity and business ethics. If there is evidence that an entity is violating environmental laws and failing to cooperate to address those violations, there is a likelihood that the company will also ignore labor laws.

***Elaborate on Public's Role in Monitoring Federal Contractors' Compliance with Labor Laws***

The guidance document should indicate the method(s) by which the public can alert the contracting agency and/or the Labor Department to complaints or violations against a contractor or subcontractor. Citizen involvement in monitoring contractors' and subcontractors' compliance with labor laws will complement the efforts of the affected federal agencies.

***Explicitly State the Sanction for False Reporting***

The guidance document fails to indicate the sanction to be imposed on a firm that falsifies the disclosure and/or documents requirements. The guidance document should explicitly state that if a contractor makes false statements they shall be deemed non-responsible for purposes of federal contracting and could be charged under 18 U.S.C. §1001.

***Enhance Guidance on Paycheck Transparency***

We agree that firms receiving federal contracts should be required to provide "a document with information concerning the individual's hours worked, overtime, pay, and any additions made to or deductions made from pay." We recommend the language be amended to read [see underline]:

"a paper document with information concerning the individual's hours worked, overtime, hourly rate of pay, and any additions made to or deductions made from pay, with a description of the reason for the deduction (e.g., health insurance) and the amount deducted for the pay period. An employer may provide the information electronically (i.e., instead of paper format) if written instructions for doing so are provided to the worker AND if the worker provides written permission to do so."

In conclusion, we appreciate the opportunity to provide feedback on the Department of Labor's draft guidance on Executive Order 13673. We applaud the federal government's efforts to improve the federal contracting process by ensuring it is conducting business with responsible contractors and subcontractors that comply with labor laws and regulations. We hope DOL will take into consideration the recommendations we have provided herein, which we believe are in line with the goals of the E.O. and would further help to facilitate responsible federal contracting.

Sincerely,

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