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SUBCOMMITTEE ON WORKFORCE PROTECTIONS JOINTLY WITH THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

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CHAIRMAN WALBERG, CHAIRMAN ROE, CONGRESSWOMAN WILSON, CONGRESSMAN POLIS AND MEMBERS OF BOTH SUBCOMMITTEES, I appreciate the opportunity to appear before you today to discuss the impact of the Fair Pay and Safe Workplaces Executive Order issued on July 31, 2014. While the Administration has not promulgated interim or proposed rules to implement the Executive Order ("EO"), the potential negative impact of this EO cannot be overstated. As the former Administrator for Federal Procurement Policy at the Office of Management and Budget, I can tell you with a high degree of certainty, that this EO will: (1) grind essential federal purchases to a standstill, (2) alter the current legal relationship between prime contractors and subcontractors, (3) illegally and unfairly exclude responsible companies from doing business with the federal government, (4) devastate small businesses, and (5) substantially increase the government's costs of buying goods and services. The potential disruption and damage is particularly troubling because adequate mechanisms already exist in our current procurement system to exclude companies with unacceptable labor practices.

Unnecessary Bureaucratic Processes Created by the Executive Order

The EO creates vast new bureaucratic processes for contractors, subcontractors, and federal contracting officers to ensure that "parties who contract with the Federal government . . .

understand and comply with labor laws." The EO is grounded in an assertion that "[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government." While this statement may be true, it does not follow (as postulated by the EO), that creating extensive bureaucratic processes will actually increase understanding of or compliance with labor laws, all of which already provide remedial mechanisms crafted by Congress and the Executive Branch that penalize and should deter non-compliance. Indeed, there is little doubt that the high costs of this EO to contractors, subcontractors, the government, and the taxpayer far outweigh the potential benefit of increased productivity and the timely, predictable, and satisfactory delivery of goods and services to the federal government that might be achieved by a greater level of understanding and compliance with labor laws.

Specifically, this EO creates a time-consuming process for prime contractors and the federal government that requires the following seven new steps be taken prior to each contract award exceeding $500,000:

* Prime Contractor Reporting: the prime contractor must report actual and potential[1] labor violations at the federal and state level from the past three years
* Contracting Officer Review: the contracting officer must review the actual and potential labor violations submitted by the prime contractor
* Labor Compliance Advisor Review: the labor compliance advisor must review the actual and potential labor violations submitted by the prime contractor

[1] This testimony refers to "potential" labor law violations because the EO requires reporting of all "administrative merits determinations" without defining that phrase. Thus, it is unclear whether certain determinations, including a decision by the General Counsel's office of the National Labor Relations Board to issue complaint following its investigation of an unfair labor practice charge, constitute an "administrative merits determination," or whether only a subsequent decision issued by an administrative law judge is sufficient to trigger the reporting requirement.

* Consultation with Enforcement Authorities: the labor compliance advisor must consult with enforcement authorities at the federal and state level to determine "whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters."

* Consultation by Contracting Officer: the contracting officer must consult with the labor compliance officer subsequent to the labor compliance advisor's consultation with federal and state enforcement authorities

* Responsibility Determination: the contracting officer must determine whether the prime contractor is a "responsible source that has a satisfactory record of integrity and business ethics . . . ."

The EO requires all seven steps for each contract award at each federal agency, even when separate awards are being made to the same company. So, if Company X and the Department of Veterans Affairs go through all seven steps to execute a $1 million contract on Thursday, February 26th, the Department of Defense would have to go through the same seven steps to execute a different $1 million contract with Company X on Friday, February 27th. Each determination of responsibility must be made based on the current award decision being considered by each contracting officer, not a prior award. Considering that in fiscal year 2014, the U.S. government executed 99,822 different contract actions over $500,000, adding these seven steps to almost 100,000 contract actions each year while assuming the government contracting process will not grind to a halt borders on the irrational.[2]

As though the new process and information required prior to contract award for almost 100,000 actions is somehow an insufficient burden, the EO requires that virtually the same process be repeated every six months after prime contract award:

[2] Source data: www.usaspending.gov. Because the EO is unclear regarding the application of the requirements to task and delivery orders under existing long term contracts, this testimony has assumed that the EO will be applicable to all new contract actions exceeding $500,000. It is conceivable that the regulations could interpret the EO to apply only to new contracts and not apply to new awards of task or delivery orders.

* Prime Contractor Reporting: prime contractor must report actual and potential labor violations at the federal and state level every six months

* Contracting Officer Review: the contracting officer must review actual and potential labor violations submitted by the prime contractor and "similar" information obtained through other sources every six months

* Consultation by Contracting Officer: the contracting officer must consult with the labor compliance officer to determine if "action is necessary" every six months

* Action by Contracting Officer: After reviewing the prime contractor's submission every six months and reviewing similar information obtained from other sources and consulting with the labor compliance advisor, the contracting officer must decide whether "agreements requiring appropriate remedial measures, compliance assistance" or contract termination are necessary

Again, the EO requires these actions for each contract held by each prime contractor every six months. If one contractor has 100 different contracts at ten different agencies, the actual and potential labor violations will need to be considered individually, 100 different times by each contracting officer on each contract for the same company.

But the new burdens on the prime contractors and federal contracting officers imposed by the EO do not end there. After contract award, the prime contractor must take the following steps with proposed subcontractors to ensure compliance with state and federal labor laws:

* Subcontractor Reporting: Each prime contractor must require each subcontractor with a potential subcontract value exceeding $500,000 to report actual and potential labor violations at the federal and state level prior to subcontract award.

* Determination of Responsibility: Prior to the award of a subcontract exceeding 500,000, the prime contractor must review the information on actual and potential labor violations at the state and federal level and determine "whether the subcontractor is a responsible source that has a satisfactory record of integrity and business ethics".

The EO assures prime contractors that a contracting officer, labor compliance advisor, the Department of Labor, and relevant enforcement agencies "shall be available, as appropriate, for consultation with a [prime] contractor to assist in evaluating the information on labor compliance

submitted by a subcontractor." Adding more to the burden and similar to post-award prime contract reporting, every six months during contract performance, the prime contractor must require the subcontractor to update the information reported on actual and potential violations of labor law. With this subcontractor information in hand, every six months, the prime contractor must determine whether "action is necessary" against the subcontractor on each subcontract. According to the EO, action by the prime contractor could include requiring appropriate "remedial measures" or "compliance assistance" for the subcontractor. And once again, the EO promises that the contracting officer, the labor compliance advisor, and the Department of Labor will be "available" to assist the contracting officer in deciding what action against the subcontractor is appropriate.

Federal Contracting Would Grind to a Halt

Based upon over two decades of experience in federal procurement, inside and outside the government, I have little doubt that if the EO is implemented as written, purchases by the federal government will grind to a halt. Whether it is the purchase of equipment necessary for our warfighter, getting checks out the door to our senior citizens, or ensuring the safety of our food, none of it gets done without federal contractors. Our federal contracting officers do not have the bandwidth to review extensive volumes of labor information, consult with the labor compliance advisors, determine appropriate remedial action, and consult with prime contractors regarding the labor practices of hundreds of thousands of subcontractors. And I reiterate – there is already a whole body of labor law, and labor law remedies, designed by Congress and the Executive Branch to ensure labor law compliance, so there is no sensible reason to introduce this duplicative and inefficient bureaucracy.

If the burden on contracting officers seems overwhelming, consider the burden on the newly created labor compliance advisor. The current understanding is that each federal agency, except the Department of Defense, would have one labor compliance advisor. So for example, in fiscal year 2014, the labor compliance advisor at the Department of Veterans Affairs would have been responsible for reviewing actual and potential labor violations, consulting with relevant enforcement authorities, and consulting with the contracting officer for the 4,751 contract actions that were executed in 2014. The same labor compliance advisor at the Department of Veterans Affairs would also have to be available to assist prime contractors with considering actual and potential labor violations of thousands of subcontractors. The EO also calls out the following additional duties assigned to each labor compliance advisor:

* Meet quarterly with the Deputy Secretary, Deputy Administrator
* Work with the acquisition workforce, agency officials, and agency contractors to promote greater awareness and understanding of labor law requirements, including recordkeeping, reporting, and notice requirements, as well as best practices for obtaining compliance with these requirements
* Coordinate assistance for agency contractors seeking help in addressing and preventing labor violations
* Provide assistance to contracting officers regarding appropriate actions to be taken in response to violations identified prior to or after contracts are awarded, and address complaints in a timely manner
* Consult with the agency's Chief Acquisition Officer and Senior Procurement Executive, and the Department of Labor as necessary, in the development of regulations, policies, and guidance addressing labor law compliance by contractors and subcontractors
* Make recommendations to the agency to strengthen agency management of contractor compliance with labor laws
* Publicly report, on an annual basis, a summary of agency actions taken to promote greater labor compliance, including the agency's response pursuant to this order to serious, repeated, willful, or pervasive violations of the requirements of the labor laws

* Participate in the interagency meetings regularly convened by the Secretary of Labor pursuant to section 4(b)(iv) of this order

How is it possible for one labor compliance advisor to perform all these functions for over 4,500 contract actions, hundreds of contractors, and thousands of subcontractors? How could the labor compliance advisor do anything but create a process for reviewing *some*, but not all of the contract actions? How could that be done fairly and objectively without targeting particular companies?

But let's consider a more difficult labor compliance advisor position. In fiscal year 2014, the Department of Defense executed 61,528 contract actions over $500,000. Assuming the Department of Defense hires five labor compliance advisors and assuming these five labor compliance advisors work 40 hours/week for 50 weeks of the year, they will have a total of 10,000 hours to commit to over 60,000 contract actions. The Department of Defense labor compliance advisor will have less than 10 minutes per prime contract action to review the actual and potential labor violations, consult with relevant enforcement authorities, and consult with the contracting officer, not to mention the time required for the hundreds of thousands of subcontractors. And where will the labor compliance advisors find the time for the recurring six month reviews?

Simply put, there are not enough hours in the day or employees in the federal government to implement this EO as written. If an attempt is made to implement this EO, federal purchases will either grind to a halt, or a system will have to be created to pick and choose which federal contractors need "special attention" by labor compliance advisors. As contemplated, the federal government will either be unable to purchase essential goods and services or be forced to create a system that unfairly targets contractors for special attention to their labor practices. And all of

this is purportedly driven by a belief that this new bureaucracy will lead to a greater level of understanding and compliance with labor laws by federal contractors and subcontractors and will result in increased productivity and the timely, predictable, and satisfactory delivery of goods and services to the federal government.

The Current System Has Effective Remedies for Unsatisfactory Labor Records

A significant and wholly unanswered question, is why this process bureaucracy is being created when the current system has more than adequate remedies to prevent companies with unsatisfactory labor records from being awarded federal contracts. Indeed, the federal government has a robust system for determining whether companies and individuals should be excluded from federal contracting. 48 C.F.R. Part 9. The suspension and debarment official within each federal agency has broad discretion to exclude a company 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." 48 C.F.R. 9.407-2(c); 9-406-2(c). A federal contractor can also be excluded based upon a preponderance of evidence of (1) a "history of failure to perform, or of unsatisfactory performance of, one or more contracts" or (2) "willful failure to perform in accordance with the terms of one or more contracts". 48 C.F.R. 9.406-2(b)(1)(i). These exclusion remedies are more than sufficient to root out companies with unacceptable labor practices. If failure to comply with labor laws actually affects performance, the suspension and debarment official can debar the company for an unsatisfactory record of performance. If the contractor's labor record is not bad enough to affect performance, but raises questions of present responsibility, the suspension and debarment officials have broad discretion to suspend or debar a contractor for issues of business integrity that could affect contract performance. Indeed, it is difficult to understand the difference between an individual

contracting officer making a determination under the EO that a company is a "responsible source that has a satisfactory record of integrity and business ethics . . . ." on an individual contract basis and an agency suspension and debarment official making a determination of the "present responsibility" of a contractor. The primary distinction being that the suspension and debarment official will be making one decision for the entire federal government using a well-established process with significant due process protections in place for contractors.

With a robust suspension and debarment system that includes the necessary elements of due process, including a true opportunity to be heard before being excluded from federal procurements, why does the EO propose a painstaking contract-by-contract analysis of each prime contractor and subcontractor's labor practices by a contracting officer with a repeat every single six months? How could it not be better to approach this issue through the current suspension and debarment system, a system that allows for the thorough and complete examination of the present responsibility of the Company for the entire federal government? The suspension and debarment process allows for a complete review of a prime contractor or subcontractor's labor practices in a fair and impartial manner. With such a robust 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 contracting officers.

The system proposed by the EO can only result in either: (1) overlapping and inconsistent decisions to exclude companies, or (2) the *de facto* debarment of federal contractors and subcontractors. But let's take an example to show the crippling and potentially illegal effects of one contracting officer's decision not to award to a contractor a single contract action. If, for example, a contracting officer at the Department of Defense decides that a particular contractor

should not be awarded a contract based upon labor compliance issues, that contracting officer could logically try to reduce the crushing workload by sharing the results of his review of labor practices with another contracting officer for the same contractor on a different contract action. When that second contracting officer uses the first contracting officer's determination and work product to decide not award to the contractor, the federal government has illegally and improperly effectuated a *de facto* debarment of the contractor from federal contracting without due process. As the United States Court of Appeals for the District of Columbia Circuit held, for each contract award, due process requires that the contractor be "notified of the specific charges concerning the contractor's lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer . . . that the allegations are without merit" before being denied a contract award. *Old Dominion Dairy Prods. Inc. v. Sec'y of Def.,* 631 F.2d 953,968 (D.C. Cir. 1980). In our example, the second contracting officer has failed to afford the company due process rights to challenge the finding that the company lacks integrity to be awarded the second contract. Indeed, the first contracting officer appears to have taken on the role of a suspension and debarment official, deciding for the entire federal government that a particular company lacks the integrity required to do business with the entire federal government.

The current regulations and case law require that responsibility decisions affecting more than one contract action be made by the properly designated agency suspension and debarment official. The regulations and case law require a single decision-maker to ensure due process and avoid inconsistent and overlapping decisions. However, under this EO, without the illegal and improper sharing of contractor labor practice decisions among contracting officers, labor compliance advisors, and agencies, it is hard to imagine how there will not be multiple and inconsistent decisions about each contractor's labor compliance practice. It is even harder to

imagine when prime contractors are also required to make a present responsibility decision regarding subcontractors -- a concept that seems to wholly ignore the practical realities of federal contracting -- that all large prime contractors also serve as subcontractors to many other companies on different federal procurements. With the existing and robust suspension and debarment process in the capable hands of objective agency officials that make decisions about the present responsibility of companies for the entire federal government with proper due process, it is impossible to understand why the EO proposes to have contracting officers making decisions on a contract-by-contract basis.

The EO Fundamentally Alters the Prime Contractor and Subcontractor Relationship

The EO fails to appreciate or understand the current arms-length nature of the contractual relationship between federal prime contractors and subcontractors. In order to ensure that prime contractors are getting the best products and services for the lowest price from subcontractors, current federal statutes and regulations generally require real competition and true arms-length negotiation. Asking prime contractors to meddle in how other companies resolve, settle, and mediate labor issues is a recipe for trouble. What is the prime contractor's potential liability if the prime contractor determines that a subcontractor is not responsible, but a federal agency considering that same subcontractor for a prime contract opportunity considers the company responsible? What if one prime contractor determines that a subcontractor is not responsible but all the others find the contractor responsible? These unanswered (and potentially unanswerable) questions create tremendous uncertainty in the prime contractor relationship with subcontractors. With prime contractors required to make responsibility decisions regarding subcontractor relationships, prime contractors will need to develop mechanisms to reduce their risk of

increased liability. Uncertainty and potential increased risk is normally handled in the free market through increased prices. These increased prices will ultimately be passed along to the agencies and the taxpayers.

Another problematic scenario may result from the requirement that subcontractors disclose their labor compliance to prime contractors. Company A is a prime contractor, and requires Company B to disclose its labor law compliance, in accordance with the EO, in order to bid on a contract. However, elsewhere in the Federal (or commercial) marketplace, Company A and Company B are competitors. Is Company B now disadvantaged with respect to new opportunities, because it has turned over this information to Company A?

Substantial Price Increases/Reduced Competition

Every new reporting requirement and every new process step added to the federal procurement process increases the price of goods and services to the federal government. To implement this EO, contractors will have to create new systems for collecting and reporting of actual and potential labor violations from the state and federal level. Additional personnel will have to be assigned to collect and organize data as well as negotiate with the labor compliance advisor and the contracting officer. There is a price to new reporting and new personnel. That price will be passed onto the government and ultimately the taxpayer. If the cost is too high, many commercial companies will stop doing business with the federal government or simply refuse to do business in the first place. The reduction in the number of companies competing for federal business will also increase prices. The fewer the number of competitors, the less the competition, the higher the prices.

Impact on Small Businesses

The devastating impact of this EO on small businesses cannot be underestimated. While it should be relatively simple and inexpensive for small businesses to collect and report their own labor violations, it will be impossible and cost prohibitive for small businesses to try to collect information regarding their subcontractors and make responsibility determinations related to subcontractors. Because many small businesses rely on other businesses (including large businesses) to perform substantial portions of their federal contracts, small businesses will be faced with the overwhelming task of trying to collect and understand labor violations made by some of the largest businesses in the world and then make a responsibility determination based upon that information. If for example, a small business in Virginia wins a $5 million information technology contract at the Department of Defense, but needs to subcontract $500,000 to a multi-billion dollar/multi-national information technology company to successfully complete the work, the small business will be tasked with collecting and understanding all federal labor laws and the labor laws of all 50 states, as well as determining whether this large multi-national company has taken sufficient remedial steps to improve labor practices. Even if the federal contracting officer, labor compliance advisor, or the Department of Labor answers the phone to help this small business make a decision, it is a monumental task that the small business will not be capable of performing. Ultimately, small businesses will be left in the difficult decision of willfully failing to meet the prime contract requirements for them to collect and assess labor information from their large business subcontractors or simply not do business as a prime contractor.

Conclusion

The articulated rational for this EO fails objective scrutiny. The suspension and debarment process was created and operates with the purpose of fairly and objectively excluding companies that are not responsible from doing business with the federal government. Through the suspension and debarment process, the federal government makes a single unified decision based upon all the available evidence and affords contractors an appropriate level of due process. This EO is either throwing due process out the door or creating a monstrous alternative to determining the present responsibility of contractors and subcontracts that can only result in chaotic and inconsistent results with significant litigation to sort out the liability. While the first sentence of the EO states that it is being issued "in order to promote economy and efficiency in procurement," its effect will be quite the opposite. Rather than create efficiency, the EO conflicts with the existing suspension and debarment process; introduces unnecessary, additional, and duplicative remedies for labor law violations already in place to ensure labor compliance; and creates the chilling specter of an enforcement system in which labor compliance advisors "choose" which companies need special attention.

This concludes my prepared remarks. I am happy to answer any questions you may have.