August 26, 2015

VIA FEDERAL ERULEMAKING PORTAL (http://www.regulations.gov)
General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F. Street, NW, 2nd Floor
Washington, DC  20405-0001

Ms. Tiffany Jones
U.S. Department of Labor
Room S-2312
200 Constitution Ave., N.W.
Washington, DC  20210

Re:  Comments on the Proposed Federal Acquisition Regulation: Fair Pay and Safe Workplaces (FAR Case 2014-025) (Docket No. 2014-025; Sequence No. 1) and Comments on the Department of Labor’s Proposed Guidance (ZRIN 1290-ZA02)

Dear Ms. Flowers and Ms. Jones:

The Society for Human Resource Management, Council for Global Immigration and the College and University Professional Association for Human Resources submit these comments in response to the FAR Council’s Notice of Proposed Rulemaking (Docket No. 2014-025; Sequence No. 1)\(^1\) and the Department of Labor’s Proposed Guidance (ZRIN 1290-ZA02).\(^2\) Both documents (hereinafter referred to collectively as “the Proposals”), were published on May 28, 2015 to implement Executive Order 13673, titled “Fair Pay and Safe Workplaces.”

BACKGROUND ON SHRM, CFGI AND CUPA-HR

Founded in 1948, the Society for Human Resource Management (“SHRM”) is the world’s largest human resources (“HR”) membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, SHRM is the

---


leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and 2 subsidiary offices in China, India and United Arab Emirates.

Council for Global Immigration (“CFGI”), founded in 1972 as the American Council on International Personnel, is a strategic affiliate of SHRM. It is a nonprofit trade association comprised of leading multinational corporations, universities, and research institutions committed to advancing the employment-based immigration of high-skilled professionals. CFGI bridges the public and private sectors to promote sensible, forward-thinking policies that foster innovation and global talent mobility.

College and University Professional Association for Human Resources (“CUPA-HR”) serves as the voice of human resources in higher education, representing more than 18,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master’s institutions, 57 percent of all bachelor’s institutions, and 600 two-year and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 states.

SHRM, CFGI and CUPA-HR have many HR professionals working for small and large government contractors and subcontractors among our members. These contractors and subcontractors represent a wide range of industries, including higher education, cutting edge research, defense, energy, environmental, health, construction and many others. It is in the mutual interest of federal contractors and the federal government to have a contracting process that is efficient and does not impose undue burdens.

For all intents and purposes, SHRM, CFGI and CUPA-HR members are the people who make affirmative action work. They are the ones implementing equal employment opportunity laws and policies on the ground, not only among government contractors but also among employers and employees in general. It will be our members who most directly will be responsible for implementing the final regulations and guidance. In what follows, we will present our responses to the Proposals.

As noted by President Obama when he announced the Fair Pay and Safe Workplaces Executive Order 13673 (“EO 13673” or the “Executive Order”), the “vast majority” of federal contractors and subcontractors play by the rules.³ SHRM, CFGI and CUPA-HR members work for these organizations and our members agree with the underlying objective of the proposed regulations and guidance—that federal contractors should comply with the labor and employment laws.

SHRM, CFGI and CUPA-HR understand that the Proposals are written in light of the framework set forth in EO 13673. It is our collective judgment that the Proposals as drafted would impose significant new and unnecessary burdens and obligations across the entire federal contractor community to address the shortcomings of an admittedly small minority. We believe the Proposals are fundamentally flawed, needlessly vague, provide little guidance, create procedures that would harm the procurement process, and impose requirements on contractors and subcontractors that are impractical and hugely expensive. Although we understand that other commenters will address specific legal difficulties, we share in the concern that basic due process rights are being ignored or overlooked. In response to our concerns, we respectfully request that the Proposals, in some circumstances, be withdrawn. In other instances, we believe the Proposals should be significantly modified and have suggested alternatives to the Proposals that, in our view, would meet the goals of the EO 13673 while ensuring that the final regulations and guidance comport with the requirements of law and address the concerns contained in these comments and raised by others in the federal contracting community.

I. THE “RESPONSIBILITY DETERMINATION” DUPLICATES AND COMPLICATES CURRENT PROCUREMENT SYSTEM

A. The Scope of the ALCA’s Responsibilities Is Vague and Overbroad

At the core of the Proposals is a “responsibility determination,” an assessment of a contractor’s *bona fides* and its worthiness to be a federal government contractor, viewed solely in terms of its record of compliance with a number of unspecified workplace laws. At the heart of the responsibility determination is the Agency Labor Compliance Advisor (“ALCA”), who must make a recommendation that significantly affects the contracting officer’s responsibility determination. From our perspective, the ALCAs are being asked to do an impossibly large task. Furthermore, the ALCAs are being asked to perform their duties without clear standards or unambiguous criteria.

Here is a summary of the responsibilities of the ALCA:

> [P]rovide consistent guidance on whether contractors’ actions rise to the level of a lack of integrity or business ethics. As a general matter, [A]LCAs will coordinate assistance for contractors that seek help in addressing and preventing Labor Laws violations. And in consultation with the Department and other agencies responsible for enforcing the Labor Laws, [A]LCAs will help contracting officers to: Review information regarding violations reported by contractors; assess whether reported violations are serious, repeated, willful, or pervasive; review the contractor’s remediation of the violation and any other mitigating factors; and determine if the violations identified warrant remedial measures, such as a labor

---

5 The Agency Labor Compliance Advisors are referred to as “ALCAs” in the proposed FAR regulation but “LCAs” in the proposed DOL guidance. These comments refer to them as ALCAs. Compare id. at 30549 with Guidance for Exec. Order 13673, 80 Fed. Reg. at 30576.
The Order’s reporting requirement continues after an award is made. Semiannually during the performance of the contract, contracting agencies shall require contractors to update the information provided about their own Labor Laws violations and to obtain the required information for covered subcontracts. If a contractor reports information regarding Labor Laws violations during contract performance or similar information is obtained through other sources, a contracting officer, in consultation with the [A]LCA, shall consider whether action is necessary. Such action may include entering into agreements requiring appropriate remedial measures and measures to avoid further violations, as well as declining to exercise an option on a contract, contract termination in accordance with relevant FAR provisions, or referral to the agency suspending and debarring official.

With such a team of decision-makers at each and every federal agency, contractors would face a constant flow of inconsistency in both determinations of what constitutes a “violation” and what remedies are appropriate for such violations. After reviewing problems created by the Proposals, SHRM, CFGI and CUPA-HR will suggest reasonable alternatives, based on existing law and prior experience that it believes can address the profound difficulties the current Proposals create.

1. The Vague and Ambiguous Definitions of “Violations” Can Only Yield Questionable Determinations

The unreasonable breadth of the responsibilities placed on the ALCA can only be understood in terms of the vagueness and ambiguity of the violations that must be assessed by the ALCA.

The Proposals require contracting agency responsibility determinations to take into account ALCA recommendations based on allegations or, worse, agency determinations that may later be withdrawn by the agency or rejected by a court, administrative law judge or review board. This process would not be in the service of the goal of ensuring that agencies will work only with those contractors with track records of compliance. Rather, compliant bidders and contractors would be unjustly denied opportunities, and the government would be irrationally and unreasonably deprived of the services of outstanding providers.

Some examples from the Proposals illustrate this point.

The proposed guidance requires the reporting of administrative merits determinations, which means any of the notices or findings, “whether final or subject to appeal or further

---

7 Id.
review,” that are listed in the guidance.\(^8\) One of the examples of a reportable administrative merits determination is a letter of determination issued by the Equal Employment Opportunity Commission (“EEOC”) “that reasonable cause exists to believe than an unlawful employment practice has occurred or is occurring.”\(^9\) Yet, such a determination merely means the EEOC has determined that “it is more likely than not” that the charging party or other persons were subject to discrimination on the bases prohibited by an EEOC-enforced statute.\(^10\) This is a preliminary conclusion based on an investigation, which is often cursory. Although the EEOC is unable to conciliate a large number of cases in which it finds reasonable cause, the agency only litigates a small percentage of these cases. Therefore, a large number of cases where reasonable cause has been found are essentially dropped by the EEOC. Under the proposed FAR regulations, all of these reasonable cause determinations will be reportable, despite the fact that EEOC may have determined that there is insufficient cause to proceed to litigation, and despite the fact that the contractor never had an opportunity to challenge the EEOC’s determination.\(^11\)

The proposed guidance also provides that a complaint issued by a Regional Director of the National Labor Relations Board (“NLRB”) is an “administrative merits determination” that must be disclosed.\(^12\) Yet, this type of complaint does not represent a finding by the agency. Instead, although the issuance of a complaint may indicate that the Regional Director has reasonable cause to believe that a violation has occurred, it may also merely indicate that there is a conflict in the evidence or simply be the pursuit of a new theory of interest to the General Counsel.\(^13\) In any event, the complaint does no more than initiate the adjudication process before an administrative law judge, yet, as proposed, a bidding contractor could be shut out of the contracting process based on this “violation.”\(^14\)

As these examples illustrate, the Proposals do not provide a rational relationship between the definition of a disclosable administrative merits determination and the aim of the Executive Order to ferret out contractors and subcontractors that do not comply with federal and state labor

\(^8\) Id. at 30579.

\(^9\) Id.

\(^10\) EEOC Compliance Manual § 40.2.

\(^11\) For example, in FY2012, there were 4,207 reasonable cause findings by the EEOC. EEOC ENFORCEMENT & LITIGATION STATISTICS: ALL STATUTES, FY 1997-FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Aug. 20, 2015). In this same year, there were 2,616 unsuccessful conciliations. Id. However, the EEOC only filed 155 suits. EEOC ENFORCEMENT & LITIGATION STATISTICS: LITIGATION STATISTICS, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Aug. 20, 2015). In FY2013, the EEOC found reasonable cause in 3,515 cases. EEOC ENFORCEMENT & LITIGATION STATISTICS: ALL STATUTES, FY 1997-FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Aug. 20, 2015). In this same year, there were 2,078 unsuccessful conciliations. Id. However, the EEOC only filed 148 suits. EEOC ENFORCEMENT & LITIGATION STATISTICS: LITIGATION STATISTICS, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Aug. 20, 2015). In FY2014, the EEOC found reasonable cause in 2,745 cases. EEOC ENFORCEMENT & LITIGATION STATISTICS: ALL STATUTES, FY 1997-FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Aug. 20, 2015). In this same year, there were 1,714 unsuccessful conciliations. Id. However, the EEOC only filed 167 suits. EEOC ENFORCEMENT & LITIGATION STATISTICS: LITIGATION STATISTICS, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Aug. 20, 2015).


\(^13\) See, e.g., McDonald’s USA, LLC, and Fast Food Workers Committee and Service Employees International Union, CTW, CLC, et al., 02–CA–093893 (Aug. 14, 2015).

\(^14\) NLRB Rules and Regulations § 102.15.
laws. Contrast the Proposals with FAR 52.209-7(a), which define an “administrative proceeding” as:

[A] non-judicial process that is *adjudicatory in nature* in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and State level *but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.*\(^\text{15}\)

The Proposals also require ALCAs to weigh the violations disclosed by contractors and subcontractors and determine whether they are “serious,” “willful,” “repeated,” or “pervasive.”\(^\text{16}\) The DOL guidance purports to have “purposely excluded violations . . . that could be characterized as inadvertent or minimally impactful” when crafting the definitions of “serious,” “willful,” “repeated,” and “pervasive” violations, stating an intent to include only those violations that fall within a “subset of . . . violations that are most concerning and bear on an assessment of a contractor’s . . . integrity and business ethics.”\(^\text{17}\) The definitions, however, are so broad and all-encompassing that they provide no clear guidance as to these violations which can debar a contractor from the process.

The current definition of “serious” creates no such “limited subset” of violations that are “most concerning” or that in any meaningful way whatsoever bear on an assessment of a contractor’s integrity and business ethics. Quite the contrary is true, as is evident in the context of Occupational Safety and Health Act violations cited by the Occupational Safety and Health Administration (“OSHA”). OSHA data for 2009-2013, for example, show that the vast majority of all OSHA citations issued—approximately 75 percent—are classified as “serious” violations by the agency.\(^\text{18}\) Even if one assumes that every one of the issued citations does, in fact, reflect a regulatory violation of the cited standard, which is not the case, these “serious” citations do not provide any meaningful indication that an employer is not a responsible federal government contractor or subcontractor with integrity and business ethics.

“Serious” citations that would be considered evident of a contractor’s lack of integrity and business ethics would include, for example:

- Failing to ensure that the riser height or tread depth on a stairway system on a construction site have a variation that is not more than ¼ inch (0.6 cm).\(^\text{19}\)

\(^\text{15}\) FAR 52.209-7(a) (emphasis added).
\(^\text{17}\) Id. at 30582.
\(^\text{19}\) 29 C.F.R. § 1926.1052(a)(3).
• Failing to ensure that, when operating in California, any hydraulic or pneumatic hold-downs on metal shears provide a clearance of “not more than 3/8 inch between the table and the bottom of the guard”;\textsuperscript{20} or

• Failing to ensure that a supervisor completing a permit-required confined space form include the date he/she has completed the form next to his/her name.\textsuperscript{21}

Citations issued for these technical violations of the cited OSHA standards might well be “serious” in the context OSHA intends, which is that an employee could possibly be seriously injured if the regulation is violated. However, they simply would not provide evidence that the contractor lacks business ethics and integrity.

Moreover, it is not uncommon for a “serious” classification accorded the initial citation to be reclassified to “other than serious” by OSHA in the context of a challenge to the citation based on the evidence that no employees were exposed to the hazard. While the proposed FAR regulations allow for a process to provide information about the reclassification to the contracting agency, the reclassification may come well after the agency has conducted its responsibility determination and made its choice of contractors.

Under the proposed guidance, a violation will also be deemed “‘serious’ if it resulted in $5,000 or more in fines and penalties, or $10,000 or more in back wages.”\textsuperscript{22} The proposed guidance cites “recent enforcement data” to assert that only a small minority of cases result in fines and/or back-wage awards in excess of the $5,000/$10,000 threshold.\textsuperscript{23} Although the proposed guidance does not provide a citation to the enforcement data for verification and review, we assume that the data are limited to collected fines and back-wage awards, not the amount initially assessed by the agency, which typically are higher. As the proposed guidance makes clear, “the threshold amounts for fines and penalties are measured by the amount ‘assessed.’”

If an administrative merits determination, for example, assesses $6,000 in civil monetary penalties against a contractor or subcontractor but later that amount is reduced to $4,000 in settlement negotiations or only $4,000 is collected, the underlying violation is serious based on the assessed amount. The Department believes that the amount assessed is a better indication of seriousness because civil monetary penalties may be reduced for reasons unrelated to the seriousness of the violation. If the amount assessed was later reduced, the contractor or subcontractor should provide that information as a possible mitigating factor.\textsuperscript{24}

\textsuperscript{20} Cal. Code Regs. tit. 8 § 4227(b).
\textsuperscript{21} 29 C.F.R. § 1910.146(c).
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 30584.
Monetary penalties or back-wage assessments may be reduced for a variety of reasons. In SHRM, CFGI and CUPA-HR’s experience, assessments are frequently reduced because the employer is able to demonstrate that it did not commit all of the alleged violations, or that the agency’s calculations were inaccurate. Thus, the original assessment is an incomplete indication of the seriousness of the violation and should not be proposed as the yardstick against which the gravity of the violation is measured. Additionally, characterizing the reduced amount that the agency agrees to and accepts as a mitigating factor is not a fair or legally accurate approach either—the final, reduced amount paid should be the only amount reported and considered because the initially assessed amount is immaterial, and has been voluntarily reduced by the enforcement agency, based on the additional information provided by the employer.

The Proposals provide that a violation will be deemed a “repeat” violation if the violations are of the same “type of violation.” The concept of a repeat violation is established, for example under the Fair Labor Standards Act (“FLSA”), and it means that the same kinds of violations have occurred. In contrast, “repeat violation” is more broadly defined in the new guidance. Specifically, the proposed guidance states that to be deemed “repeat” the claims do not have to be “exactly the same” and that it is sufficient to share “essential elements in common.”

As a result, this proposed definition presents numerous inconsistencies. For example, would a Title VII claim for sexual harassment be considered a repeat violation if the contractor previously had an OFCCP show cause notice on a sex-based hiring discrimination claim? Or would a violation of Title VII for sex discrimination involving a woman and a probable cause finding in a separate charge filed by a man alleging race discrimination constitute a repeat violation? Would separate probable cause findings in separate charges involving different discrimination statutes enforced by the EEOC (e.g., Employee A’s charge under Title VII and Employee B’s charge under the Age Discrimination in Employment Act) constitute a repeat violation? There are countless examples that could be provided that illustrate why the broad and undefined criteria, such as that proposed in DOL’s guidance, fail to provide the contracting community and the ALCA with meaningful guidance or an enforceable standard for assessing federal contractors’ eligibility. In addition, would the same type of charge, but with different facts, raised in different states and at different contractor facilities by different people and involving different personnel, be a “repeat” violation under federal or state laws? The Proposals standards are too vague and should be wholly revised.

2. The Proposals Do Not Provide Transparent Decisional Standards for the Responsibility Determinations

The job of the ALCA is made even more difficult because of the absence of clear decisional rules. This void in the Proposals guarantees that contractors will have no way of knowing whether a determination has been fairly, equitably and lawfully made. How, for example, is an ALCA to weigh the difference between an OSHA citation and an EEOC determination letter? An FLSA violation and a disputed ADA accommodation? The Proposals

25 Id. at 30587.
provide no clear standards. Further, the proposed rule requires the ALCA to be familiar not only with an untold number of analogous but not identical state workplace laws but offers no guidance on how to give the state law “violations” appropriate weight and significance in making a responsibility determination—in the context of a uniquely federal procurement. Indeed, the Proposals do not identify applicable state laws. And most important of all, how much of anything will yield a recommendation by the ALCA that a contractor lacks “integrity and business ethics,” or a determination of “not responsible” by the contracting officer based on that recommendation? On this most critical issue, the Proposals offer very little clarity to federal contractors. How can the contractor community and other stakeholders in and outside the government have confidence in the responsibility determination if the ALCA cannot demonstrate and identify the legal basis for the determination? The Proposals will likely create a process that promotes, indeed, generates legal challenges to determinations made based on ambiguous definitions and unarticulated decisional standards.

In sum, nowhere in the Proposals are any criteria provided for how labor law “violations” are to be assessed, including violations of not just federal but comparable state labor laws. Finally, nowhere in the Proposals are there standards by which a contractor can know if it has been treated in accordance with known criteria.

**B. A Clear Definition of “Violation” Will Bring a Clear Solution to the Responsibility Determination**

While we support the intent of the Proposals, we believe the ALCAs have an impossible task. We believe that the solution to this problem is apparent. Similar “contractor responsibility” regulations were proposed during the Administration of President Clinton. Those regulations more fully acknowledged the need for a practical approach. Those regulations required the reporting of judgments (not preliminary agency assessments) such as convictions and civil judgments; indictments for the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract; and adverse decisions by federal administrative law judges, boards or commissions.

In addition, we note that, consistent with current FAR provisions, the entity that will be performing the contract or that currently holds the contract is the only appropriate reporting unit for violations. The ALCA and contracting officer will consider those disclosures in making a responsibility determination. We urge the FAR Council and DOL, if it deems reporting of non-contract performance labor law violations to be essential to the procurement process, to only

---

30 See FAR 9.104-3(c): “Affiliated concerns […] are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliate’s past performance and integrity when they may adversely affect the prospective contractor’s responsibility.” See also FAR 42.1502 (stating past performance evaluations “are generally for the entity, division, or unit that performed the contract or order.”). We recommend that reporting be at the Commercial and Government Entity (“CAGE”) Code level. Any other approach imposes significantly greater reporting burdens and is not reasonably related to an assessment of whether a specific entity that will perform the federal contract passes muster under the responsibility criteria.
require disclosure of final adjudications with respect to the entity performing the contract, as currently contemplated by the FAR.  

II.  THE REPORTING OBLIGATION IS NEEDLESSLY BURDENSOME

A.  The Number of “Labor Laws” and the Temporal Scope of the Required Disclosures Are Unreasonable

The Proposals require “contracting agencies to include provisions in their solicitations requiring that the contractor represent, to the best of its knowledge and belief, whether there have been any administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against it within the preceding three years for violations of the Labor Laws.”  

The Proposals define the term “administrative merits determination” as any of the notices or findings listed in the proposal “issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the Labor Laws.”  

The Proposals define “enforcement agency” as “any agency that administers the federal Labor Laws, such as the Department [of Labor] and its agencies, the Occupational Safety and Health

---

31 See FAR 52.209-7, the provision cited by the FAR Council to demonstrate the need for an extension of procurement regulations to labor matters. FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30548. That provision adverts to the disclosures entered in the Federal Awardee Performance and Integrity Information System (“FAPIIS”), which must be “current, accurate, and complete as of the date of submission of this offer with regard to the following information:

(1) Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions:

(i) In a criminal proceeding, a conviction.
(ii) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more.
(iii) In an administrative proceeding, a finding of fault and liability that results in: (A) The payment of a monetary fine or penalty of $5,000 or more; or (B) The payment of a reimbursement, restitution, or damages in excess of $100,000.
(iv) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision.”

FAR 52.209-7.


Review Commission, the Equal Employment Opportunity Commission, and the National Labor Relations Board.\textsuperscript{34}

SHRM, CFGI and CUPA-HR are particularly concerned with this disclosure requirement. No current law or regulation requires that records of such breadth and variety be collected, collated or retained. More directly, we know of no organization that currently maintains a centralized file of the wildly disparate named “violations.” In addition, the Proposals do not provide for the time that will be required to create a systemic process to collect and report the dispersed and disaggregated data. Further, the Proposals are silent with respect to the enormous cost—in both time and money—of creating and maintaining a system to gather and report such a huge amount of data. This omission, alone, requires a re-examination of the disclosure requirements. For many federal contractors, especially those with facilities in different locations in different states and, thus, facing the job of tracking countless actions under numberless laws, the task of tracking the requested information is simply beyond their current or future capability. SHRM, CFGI and CUPA-HR believe this massive burden is unnecessary and that the disclosure requirement should be withdrawn. As detailed below, existing requirements provide the government with the information it needs.

\textbf{B. Federal Agencies Already Possess the Required Information}

The enforcement agencies should already have all of the information that the Proposals would require contractors and subcontractors to provide with regard to administrative merits determinations. Yet, instead of requiring the enforcement agencies to produce that information from their existing databases, the Proposals would impose significant burdens on contractors and subcontractors to provide information about administrative merits determinations that they currently are not even required to maintain. The Proposals provide no justification for imposing on federal contractors and subcontractors the duplicative task of providing the information that already is in the records of the enforcement agencies. The enforcement agencies themselves are in the best position to provide the information because the agencies already maintain and compile such data, which is routinely used for enforcement targeting, Congressional reports, budget requests, and other purposes.

If the purpose of the Proposals is to allow for labor compliance agreements with those few contractors for whom their existing record creates a question about responsibility, then these Proposals should require that assessment first, using existing data prior to imposing this additional burden on the rest of the contractor community.

\textbf{C. If the Proposals Are Unchanged, Then the Effective Date Should Be Three Years After Publication}

If the FAR Council and DOL elect to reject the better alternatives of 1) limiting disclosures to final adjudications; and 2) having the federal agencies report on their own activities and records, we then respectfully request that at least three years after the date on which the final regulations and guidance take effect is the earliest point at which contractors and

\textsuperscript{34} Id. (footnotes omitted).
subcontractors be required to disclose administrative merits determinations that occurred during the preceding three-year period. Even a three-year delay assumes that contractors actually could begin to collect the required enforcement data for future reporting immediately after the Proposals become effective—an unreasonable assumption. Contractors should be afforded an additional period of time—at least 12 months—to develop the data collection processes to be able to respond to the new data reporting obligations.

D. The Semi-Annual Reporting Requirements is Unreasonably Burdensome and Overbroad

The Proposals require that, where a contractor is awarded a government contract, it must update the disclosure of labor violations provided with its offer every six months throughout the life of that government contract. This is, presumably, designed to provide the contracting officer with updated information regarding a contractor’s labor law violations for the purposes of termination of a contract or other remedial measures. However, this semi-annual reporting requirement over the life of each contract is unduly burdensome and over-broad for a number of reasons: (1) it requires reporting on any violation even where it does not arise in connection with a federal contract, subcontract or grant; and (2) it is not tied to the specific procurement lifecycle.

Though the proposed regulation’s reporting on procurements of more than $500,000 and timeline of representation at time of offer and semi-annually is akin to the FAR 52.209-7 reporting regime for Federal Awardee Performance and Integrity System (“FAPIIS”), the proposed regulation is significantly different from and more onerous than that regime. For example, the FAPIIS reporting regime was established by statute and requires reporting only on adjudicated matters occurring within the last five years that specifically relate to the award or performance of federal contracts and grants, federal contract terminations due to default, a Federal suspension or debarment, or a Federal administrative agreement entered into by the person and the Federal government in that period to resolve a suspension or debarment proceeding.36

Moreover, the reporting done through FAPIIS provides the contractor a mechanism to object to the posting of information publicly that is subject to Freedom of Information Act

---

36 See, e.g., The Duncan Hunter National Defense Authorization Act of 2009, P. L. 110-417, § 872 (Oct. 14, 2008) (requiring the development and maintenance of information system that contains specific information on integrity and performance of covered Federal agency contractors and grantees); FAR 52.209-7 (requiring reporting by contractors that hold at least $10,000,000 in federal contracts and grants and defining in 52.209-7 “reportable matters” to be “(1) Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions: (i) In a criminal proceeding, a conviction. (ii) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more. (iii) In an administrative proceeding, a finding of fault and liability that results in-(A) The payment of a monetary fine or penalty of $5,000 or more; or (B) The payment of a reimbursement, restitution, or damages in excess of $100,000. (iv) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision.”); FAR 52.209-9 (requiring semiannual updates on FAPIIS for life of contract).
(“FOIA”) protections from disclosure and it permits the contractor to provide its response or mitigating information alongside the reported violation so that the reported matter is viewed in context.\textsuperscript{37}

The typical federal procurement process requires that an offeror be evaluated during the procurement process to determine whether it is currently responsible for purposes of being awarded a government contract.\textsuperscript{38} The offeror will typically provide a certification to the contracting officer asserting that it is currently responsible and eligible for award, that is, not debarred, not convicted of a crime related to its business ethics and practices, and not indicted for a similar offense.\textsuperscript{39} This certification is contemporaneous with the offeror’s submission of a proposal so as to allow the contracting officer to review all information and make a determination as to whether the offeror should or should not be awarded a contract.\textsuperscript{40} The contracting officer, however, will once again evaluate the present responsibility of a contractor at the point where it considers exercising an option under an existing contract.\textsuperscript{41} If the contractor is suspended or debarred, it cannot receive an option exercise except where the contracting officer finds there is compelling reason to do so and prepares a written determination to that effect.\textsuperscript{42}

In contrast, the proposed FAR regulations require contractors who have been awarded a contract to submit information on the covered violations every six months during the life of the contract in order to determine whether to permit the contractor to continue performing under an already-awarded contract.\textsuperscript{43} Current FAR requirements do not provide that the government will automatically terminate an existing contract merely on the ground that there has been violation, even where the violation has led to a debarment or suspension of the contractor.\textsuperscript{44} Indeed, government contracts enable the government to carry out its business. A process that disrupts a contract that is being properly and timely performed would hinder the government’s ability to carry out its mission. The approach embodied in the proposed FAR regulations would mark a significant shift in how the government procurement process operates, and such a fundamental shift is neither required nor justified to implement the Executive Order provisions.

If the purpose of the proposed FAR regulations is to provide the contracting officer with timely information to determine whether to exercise an option, then collection of information tied to the time for consideration of option exercise would make better sense. Collection of information not tied to a procurement consideration point is significantly burdensome and serves no useful purpose in light of the stated goals of the Executive Order.

\begin{itemize}
\item \textsuperscript{37} FAR 52.209-9.
\item \textsuperscript{38} FAR 9.103.
\item \textsuperscript{39} FAR 52.209-5.
\item \textsuperscript{40} See, e.g., FAR 9.104-7(a), 52.209-5.
\item \textsuperscript{41} FAR 9.405-1(b) (“For contractors debarred, suspended, or proposed for debarment, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities shall not-(1) Place orders exceeding the guaranteed minimum under indefinite quantity contracts; (2) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or (3) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.”).
\item \textsuperscript{42} Id.
\item \textsuperscript{43} FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30570.
\item \textsuperscript{44} FAR 9.405-1(b).
\end{itemize}
Further, the proposed FAR regulations suffer from lack of clarity. The proposed FAR regulations do not state when this six-month reporting requirement begins. In addition, the proposed FAR regulations do not clarify whether companies must submit this information to FAPIIS pursuant to each contract or whether a company may update the information once every six months to cover the reporting requirements for all of their contracts.

This lack of clarity is problematic, particularly where a contractor has multiple contracts. The open FAR case on the proposed rule estimates that there are approximately 22,153 contractors and 3,622 subcontractors, a total of 25,775 entities, that the government has at least identified as likely to be impacted by this rule. Further, it is unknown how many contract actions these contractors may have that fall under the reporting threshold. The proposed procurement reporting and semi-annual reporting requirements to be issued will pose an enormous burden and expense on the contractors that hold these and other contracts. And, it is feasible that, given the volume of procurements and contracts, the reporting requirement could result in requiring contractors to report on their violations on a daily basis and through multiple contracts. The sheer volume of reporting is untenable, and the database to which the contractor would be required to report would need to be vast to accommodate this considerable amount of reporting information. This creates a significant reporting burden that quickly will become untenable for almost all contractors, and likely the government itself.

The unprecedented scope of the disclosures requested is a burden that cannot and should not be borne by contractors. SHRM, CFGI and CUPA-HR recommend that the government agencies involved in the procurement draw on the resources of other government agencies to acquire the data about contractor responsibility, as is currently the practice. With respect to semi-annual reporting, as demonstrated, such reporting becomes an endless, ultimately pointless task that burdens the contractors and adds no useful information to the responsibility determination. We respectfully suggest that it be deleted from the final regulations.

III. **THE LABOR COMPLIANCE AGREEMENT IS UNNECESSARY AS IT IS NOT CLEARLY LINKED TO A SPECIFIC PROBLEM**

The Proposals create an opportunity for federal enforcement agencies to impose requirements on contractors and subcontractors through the newly established “labor compliance agreements” that are not required—or even authorized—for violations under a federal or state statute or regulation. The proposed FAR regulation 22.2004-2(b)(3)(i) provides that the ALCA must make one of the following recommendations—

(A) The prospective contractor could be found to have a satisfactory record of integrity and business ethics;
(B) The prospective contractor could be found to have a satisfactory record of integrity and business ethics if the process to enter into or enhance a labor compliance agreement is initiated; or
(C) The prospective contractor could be found to not have a satisfactory record of integrity and business ethics, and the

---

agency Suspending and Debarring Official should be notified in accordance with agency procedures.\textsuperscript{46}

The “labor compliance agreement” is defined in DOL’s guidance as “an agreement entered into between an enforcement agency . . . and a contractor or subcontractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other related matters.”\textsuperscript{47}

Importantly, there is no delineation in the Proposals as to what might be deemed an “appropriate remedial measure,” and it appears that an enforcement agency would have complete discretion to dictate the terms of a labor compliance agreement. A contractor or subcontractor would have no choice but to accept those terms if it hoped to win the contract or subcontract award. Such a “Hobson’s choice” raises concerns that the labor compliance agreement will be used to improperly expand the remedial authority of the contracting agencies. For example, might OSHA require that a bidder adopt and implement an Injury and Illness Prevention Program (“I2P2”), a heat stress program, or an ergonomics program, for instance, in order to be deemed a responsible bidder? Could OSHA also require abatement of a hazard for which the contractor has been issued a citation, despite the fact that employers are not required to abate the alleged hazard pending resolution of the contest of the OSHA citation?\textsuperscript{48} Could a contractor be required to comply with increased reporting obligations absent a Conciliation Agreement? Absent clearly articulated standards, the government is left with untrammeled discretion and the contractor bereft of any defense. This is a prime example of illicit arbitrary authority.

The purpose of the labor compliance agreement is never fully explained in the Proposals. The violations that any contractor reports are in the past and, presumably, have been addressed. Remediation has occurred; penalties have been assessed. A historical record has been supplied. If that is the case, what is the labor compliance agreement for? On the other hand, if past violations have not been addressed, presumably, the contractor would be deemed “irresponsible,” and there would be no need to impose in the labor compliance agreement what has not yet been satisfied by the contractor. The only remaining purpose of the labor compliance agreement is “leverage” against a bidder, an extra-legal mechanism for exacting “remedies” that could not otherwise be imposed.

The imposition of additional remedies and sanctions through the labor compliance agreement process is unnecessary and creates arbitrary and uncertain outcomes and costs for contractors. Accordingly, we recommend that the labor compliance agreement provision be deleted.

IV. CLARIFICATION IS NEEDED REGARDING THE PAYCHECK TRANSPARENCY REQUIREMENTS

\textsuperscript{46} Id. at 30566.
\textsuperscript{48} See OSHA Field Operations Manual, CPL 02-00-150, Ch. 7, § IV(b) (Apr. 22, 2011). In situations where an employer contests either (1) the period set for abatement or (2) the citation itself, the abatement period generally shall be considered not to have begun until there has been an affirmation of the citation and abatement period. In accordance with the Act, the abatement period begins when a final order of the Review Commission is issued.
The Proposals require contractors and subcontractors to provide workers whom they treat as independent contractors with a document informing the individual of the independent contractor status. While we understand that the notice must be provided to workers whom the contractor or subcontractor treats as a 1099 worker, the proposal is unclear as to whether the notice must also be given to workers who are W-2 employees of another employer (e.g., a temporary staffing agency), but not of the contractor or subcontractor. We respectfully suggest that the final regulation and guidance not apply to W-2 employees of labor staffing and similar agencies and that the required notice be given only to those workers to whom the contractor or subcontractor provides an IRS Form 1099.

V. THE PROHIBITION ON ARBITRATION AGREEMENTS IS UNRELATED TO THE PURPOSES OF THE EXECUTIVE ORDER

At Sec. 22-2006, the proposed regulation, purporting to implement Section 6 of Executive Order 13673, prohibits certain contractors from requiring mandatory arbitration on a pre-dispute basis of any claims arising “under Title VII or under any tort related to or arising out of sexual assault or harassment.” There are a number of exceptions to this general rule. The first is for arbitration agreements reached by “voluntary consent of employees or independent contractors after such disputes arise.” The other exceptions are:

- Contracts and subcontracts of $1,000,000 or less.
- Contracts and subcontracts for the acquisition of commercial items...
- Where employees are covered by a collective bargaining agreement negotiated between the contractor and a labor organization representing the contractor’s employees.
- Certain pre-existing arbitration agreements described at 52.222-YY(b)(2).

In most respects, this FAR proposed regulation is an expansion of the “Franken Amendment” and its implementing regulations, which imposed a similar limitation on defense contractors. However, that measure was a Congressional response to a particular case of abuse. The FAR proposed regulation not only has little rationale or justification, it also usurps Congressional authority in an area where Congress has made clear it can and will act. The Proposals should delete this provision and the FAR Council should recognize that considering the fate of arbitrations is a legislative and not a regulatory function.

Further, the FAR proposed regulation does not offer an explanation for how an expanded limitation on arbitration relates to the stated purposes of the proposed regulation, either with respect to identifying “responsible” contractors or in increasing the efficiency of contractors. We

---

51 Id. at 30554.
52 Id.
54 48 C.F.R. pts. 212 and 222.
believe the FAR proposed regulation will burden large contractors, or at least, those without collective bargaining agreements.

Furthermore, the Franken Amendment makes no exception for arbitrations under labor agreements nor are such arbitrations mentioned in the EO 13673. The proposed regulation offers no explanation of how the reach of the statute can be altered or amended in this regulation. As written, defense contractors would be faced with contradictory regulatory rules, one prohibiting all pre-dispute arbitrations of Title VII claims, etc., and one excepting pre-dispute arbitrations of those claims under collective bargaining agreements. There is no articulated basis for a limitation on arbitrations beyond that already approved by Congress and this extension should be excised.

In addition, the numerous exceptions question the entire usefulness of the limitation. If pre-dispute arbitration agreements for Title VII and related tort claims are appropriate for most contractors,\(^{55}\) what possible benefit is derived by limiting such pre-dispute arbitration agreements in the remaining situations?

Arbitration is often a *preferred* mode of dispute resolution. The costs and delays of formal judicial adjudications—all of which will be passed on to the government—have justly been the subject of repeated criticisms from every branch of government. Most significantly, the Supreme Court has recently and repeatedly stated its support for the expansive use of arbitration as contemplated under the Federal Arbitration Act.\(^ {56}\) Yet, even in the face of such precedents, the proposed regulation offers no explanation or rationale for including this provision.

We believe the Franken Amendment offers more than sufficient protections against the abuses that generated it. There is no basis for applying limitations on pre-dispute arbitration to *every* government contractor meeting the threshold criteria. Additionally, the exception for arbitrations pursuant to collective bargaining agreements evidences that the FAR proposed regulation improperly penalizes those contractors who do not have collective bargaining agreements. This is an additional, independent basis for challenging the Proposals as presented. For the abovementioned reasons, we urge that this proposal be deleted.

However, if a limitation on pre-dispute arbitration agreements is retained in the final regulations, we recommend that the interpretation the Department of Defense gave the interim Franken Amendment be used here as well: “The term ‘contractor’ is narrowly applied only to the entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected.”\(^ {57}\) Additionally, under the Franken Amendment, there are no exceptions for collective bargaining agreements. The FAR proposed regulation should be amended to mirror the statute. Such an amendment would bring some measure of uniformity in

---

\(^{55}\) See, e.g., FAR: Fair Pay and Safe Workplaces, 80 Fed. Reg. at 30550 (disclosure threshold “excludes vast majority of transactions”).


the interpretation and application of statutory and regulatory limitations on arbitrations on Title VII and related tort claims.

VI. THE PROPOSALS PLACE UNREASONABLE AND UNNECESSARY BURDENS ON CONTRACTORS AND THE PROCUREMENT PROCESS

A. The Proposals Will Create Significant Delays in Making Procurement Awards

The Proposals will create a burdensome, multi-tiered regulatory scheme with perpetual reporting and oversight that raises significant risks of delaying procurement awards and interfering with contract performance at all levels.

Because the Proposals would require that contractors report on all tiers of their supply chain, the requirement to submit certified reports of violations with the proposal will require the prime contractor to start very early to accumulate the information needed to make such a certification, or risk that the contractor will be unable to prepare and submit a bid or proposal because it has been unable to obtain information needed for its certification in a timely manner. Further, if and when a contracting officer initiates a responsibility determination and requests mitigating information, the contractor (and its subcontractors) will need time to respond.

The contracting agencies will have to factor in the time for contractors to obtain information for its own, as well as its subcontractors’ certified reports, as well as the time it will take for the ALCA to sort through and evaluate the reports being provided by all competitors in a particular procurement, to determine when to seek mitigating information, to assess that information, and to work with the contractor (or subcontractor) and DOL, or other enforcement agency, and the contracting officer to enter into labor compliance agreements and make recommendations. Further, since each contracting agency will have only one ALCA to evaluate all of the disclosures and since, as is suggested by the Proposals, DOL will establish a group within DOL to advise the agency ALCAs, it seems likely that DOL, rather than the contracting agencies, will be deciding the terms and conditions under which contractors are to be deemed responsible enough to receive awards. By law, only the contracting officer has the authority to decide contract awards; the proposed rule would effectively nullify this authority. 58

B. Proposal Fundamentally Alters the Prime and Subcontractor Relationship

We are very concerned that the reporting obligations in the proposed rule requiring subcontractors to report violations to prime contractors would damage relationships between contractors. Many of our members often serve as both a prime contractor and a subcontractor on various contracts and the Proposals both burden and complicate those roles.

Prime contractors should not be asked to be either an enforcer or a legal interpreter of subcontractor conduct. Those responsibilities should instead be borne directly by subcontractors

58 FAR 2.101 (defining “contracting officer” as “a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.”); FAR 4.101 (“Only contracting officers shall sign contracts on behalf of the United States.”).
and reported directly to the government. By making a prime contractor the intermediary, the relationship between a prime and a subcontractor is fundamentally altered. By reporting a labor violation, for example, a prime could create a competitive advantage and lead to the disqualification of disfavored subcontractors. On the other hand, no prime contractor will want to do business with a subcontractor with any kind of labor violation, no matter how minor, because it could slow down the evaluation and awarding of the potential contract or jeopardize the award of the contract altogether. We urge that the final regulations place the obligation for reporting “violations” directly on the subcontractor.

C. The Proposals Will Open the Floodgates of Bid Protests and Litigation and Result in Long Delays in the Procurement Process

The proposed rules will increase the litigation relating to federal procurements, from protests relating to responsibility determinations, to claims relating to the non-exercise of options based on responsibility determinations, to suspension debarment, to FOIA and reverse FOIA litigation.

1. Protests and SBA Responsibility Appeals

The determinations required by the Proposals will lead to challenges to (1) the contracting officer’s responsibility determinations; (2) the elimination of an offeror from the competitive range; (3) the decision not to award to the offeror; and (4) the decision to award to another offeror. These challenges will take the form of bid protests at the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. Additionally, for small business responsibility matters, the small business can appeal nonresponsibility determinations through the Small Business Administration (“SBA”) area office and up that chain.

This predictable increase in the number of protests and appeals will result in extensive delays in the procurements in which they are raised. For example, certain protests to the U.S. Government Accountability Office (“GAO”) when timely filed will result in imposition of an automatic stay of the procurement, its award and contract performance, pending the 100-day period allotted for GAO’s consideration of the protest. The stay will remain in place absent the agency’s establishment of urgent and compelling circumstances to justify overriding this automatic stay. Further, in the event a protest is filed at the Court of Federal Claims directly, or as an appeal seeking de novo review of a protest filed at the agency or GAO, the Court can issue a preliminary injunction to enjoin the procurement, award and performance, pending disposition of that protest. Notably, there is no time limit on when the Court is required to issue a decision on a protest. Moreover, there is the additional opportunity to appeal such protests to the U.S. Court of Appeals for the Federal Circuit.

59 FAR 33.103.
60 FAR 33.104.
61 FAR 33.105. See generally FAR 15.507 (protests against award).
62 FAR 19.602-1.
In addition, in the case where responsibility questions arise, the contracting officer can only refer one matter at a time for a single acquisition to the SBA.\textsuperscript{63} Thus, if multiple small businesses are being considered for an award and such questions are raised, the SBA would be required to consider each of these in turn. In the interim, no award could issue for a period of at least 15 business days following receipt of a referral.\textsuperscript{64}

2. **Contract Disputes Act Appeals**

In addition, reporting of violations could trigger adverse performance evaluations or lead to decisions not to exercise options based on responsibility determinations. The FAR provides specific processes for responding to and appealing performance evaluations.\textsuperscript{65} In addition, where a contracting officer determines that a contractor is not responsible, such that the contract should be terminated for default or options not exercised, there may be grounds to bring claims under the contract. Based on claims that the contracting officer acted arbitrarily and capriciously; there is also a right to appeal any final contracting officer decision on these grounds under the Contract Disputes Act.\textsuperscript{66}

3. **FOIA and Reverse FOIA Appeals**

Given that there would be public access to reports filed under the proposed rule and the risks that information reported could be compiled in a manner that might expose contractor proprietary or competition-sensitive information, it is likely that all manner of FOIA requests might be lodged by the public and that contractors will seek to enforce FOIA’s exemptions from disclosure for trade secrets and/or proprietary, commercial or financial information. Denials or grants of FOIA requests require considerable administrative activities to retrieve, review and issue decisions, and then handle any appeals at the agency level, or in the U.S. District and Appellate Courts.

VII. **THE PROPOSALS’ COST/BENEFIT ANALYSIS AND ESTIMATE OF BURDEN HOURS ARE FLAWED**

The Proposals significantly underestimate the cost of complying with the proposed regulations and guidance and fail to take a number of costs and burden hours into account. SHRM’s, CFGI’s and CUPA-HR’s members typically carry out a wide range of the HR functions, and are familiar with the typical record keeping protocols and processes that are in place now in most federal contract. Based on the knowledge and experience of SHRM’s, CFGI’s and CUPA-HR’s members, it is apparent that there are significant and material errors and omissions in the burden estimates. For example, there is no estimate of the cost of establishing data bases for the collection of information regarding countless violations of scores of federal and state labor laws or of purchasing data-base services from outside vendors. Nor do the Proposals recognize that if a contractor or DOL determines that a subcontractor must enter

\textsuperscript{63} FAR 19.602-1(d).
\textsuperscript{64} FAR 19.602-1(e).
\textsuperscript{65} See generally FAR pt. 42.15.
\textsuperscript{66} See, e.g., id.; FAR pt. 33.2.
into a labor compliance agreement, at some point during an ongoing contract, the additional costs incurred would now be borne by the contractor; those costs are not included in the estimates.

The estimates are wildly suspect in every respect. For example, the Proposals state:

In order to successfully comply with the requirements of the rule, contractors and subcontractors will initially need to review and become familiar with the FAR rule and the DOL guidance. We estimate that for this initial requirements review the average contractor will utilize a general manager equivalent to a mid-range GS-14 ($63 hourly rate) and spend approximately eight hours.⁶⁷

As HR professionals employed by large companies, with multiple divisions and business units, SHRM, CFGI and CUPA-HR members would need to devote substantially more than eight hours in reviewing and understanding their new obligations. To spend only eight hours on this substantial task would be an indication that a contractor or subcontractor did not take its new obligations seriously. It would be foolhardy for any of SHRM’s, CFGI’s and CUPA-HR’s members to determine that a single mid-range manager would be the only employee who must review and understand the new obligations. Given the enormity of the data collection and reporting requirements proposed, multiple managers in each business unit must fully understand the new requirements.

In addition, it will be incumbent on each federal contractor and subcontractor to educate and train key field and headquarters managers, as well as the employees who will input letters, notifications, emails and other documents received from federal and state enforcement agencies, concerning charges, violations, notices and determinations. Record keepers will need to have knowledge of the federal and state laws, work closely with the legal department in reviewing documents, and be responsible for the submission of all required documentation. Although SHRM’s, CFGI’s and CUPA-HR’s members may have broad-based knowledge of workplace compliance matters, few if any could assume these broadened responsibilities for compliance and training without significant training themselves. These proposed changes are not simply new tasks that can be “added on” to the existing human resources professionals.

In sum, we maintain that it is impossible for the FAR Council or DOL to estimate the cost and burden of the Proposals and, thus, for the SHRM, CFGI and CUPA-HR members to provide meaningful comment, because the Proposals are incomplete. By failing to identify equivalent state laws, the Proposals fail to take into account the costs and burdens of tracking and disclosing violations of hundreds of additional laws and the costs and burdens of entering into labor compliance agreements with respect to those additional laws. By refusing to estimate the cost of creating and maintaining the vast and complex systems required to identify, collate, and report all the unspecified “violations” requested, the Proposals fail to meet their statutory obligations. The final regulations must be delayed until fully-articulated costs can be published for Notice and Comment.

---

VIII. CONCLUSION

In conclusion, SHRM, CFGI and CUPA-HR appreciate the opportunity to express our sincere concerns with the Proposals on behalf of our members. As outlined, we believe the Proposals are needlessly vague, provide little guidance, create procedures that would harm the procurement process, and impose requirements on contractors and subcontractors that are impractical and hugely expensive. In response to our concerns, we respectfully request that the Proposals, in some circumstances, be withdrawn. In other instances, we believe the Proposals should be significantly modified and have suggested alternatives to the Proposals. We welcome the opportunity to work with the FAR Council and the Department of Labor to improve the current procurement process in a way that works for employees and federal contractors alike. If not withdrawn, we hope that the Federal government will make modifications as recommended, to ensure that organizations—large and small—can afford to remain contractors.

Respectfully submitted,

Michael P. Aitken
Vice President of Government Affairs
Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314

Lynn Shotwell
Executive Director
Council for Global Immigration
1800 Duke Street
Alexandria, VA 22314

Joshua A. Ulman
Chief Government Relations Officer
College and University Professional Association for Human Resources
Center Point Commons
1811 Common Points Drive
Knoxville, TN 37932