August 26, 2015

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street, NW, 2nd Floor
Washington, DC 20405

Submitted via Regulations.gov

Subject: FAR Case 2014-025

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to “Federal Acquisition Regulations; Fair Pay and Safe Workplaces; Proposed Rule” (80 Fed. Reg. 30548, May 28, 2015). POGO is an independent nonprofit organization committed to achieving a more accountable and transparent federal government. A large part of our work involves investigating, exposing, and ultimately proposing solutions for, waste and corruption in federal contracting.

POGO supports the proposed rule implementing President Obama’s Executive Order 13673—“Fair Pay and Safe Workplaces”—which expands reporting and transparency requirements for federal contractors and subcontractors. For several years, POGO has advocated amending the Federal Acquisition Regulation (FAR) to require an evaluation of companies’ labor law compliance backgrounds as part of the pre-award responsibility review. To determine whether companies have a “satisfactory record of integrity and business ethics” as the FAR requires at Subpart 9.104-1, it is necessary for contracting officers to have information about the condition of companies’ workplaces and how their workers are treated.

It’s well-known that companies that contract with the federal government routinely violate laws covering workplace safety and workers’ rights to fair compensation and equal treatment.

2 See also FAR Subpart 3.1002, requiring that “Government contractors must conduct themselves with the highest degree of integrity and honesty.”
POGO’s online database of federal contractor misconduct currently contains 447 instances of actual or alleged labor violations since 1995, for which some of the largest federal vendors paid almost $2.2 billion in fines, penalties, and settlements.4

Contractors that violate labor laws have an unfair advantage over law-abiding contractors. The Executive Order was motivated by the concern that “[c]ontractors who invest in their workers’ safety and maintain a fair and equitable workplace shouldn’t have to compete with contractors who offer low-ball bids—based on savings from skirting the law.”5 Moreover, contractors that violate the law pose a bigger performance risk to the government. A 2013 study by the Center for American Progress Action Fund found that 7 of the 28 companies assessed the largest workplace health and safety and unpaid wage penalties from FY 2005 to FY 2009 had serious problems on federal contracts, including fraud, cost overruns, and poor performance.6

The proposed rule will help level the federal contracting playing field and ensure that taxpayers do not reward companies that commit serious, willful, repeated, or pervasive labor violations. It will help improve contractors’ labor practices and lead to better-quality goods and services for the government.

Although POGO supports the proposed rule, there are ways it can be improved. To ensure the final rule has maximum impact, it is necessary to correct several omissions and loopholes. We respectfully ask the FAR Council to consider the following list of recommended changes.

Disclosure of Criminal Violations

The proposed rule requires the disclosure of “administrative merits determinations,” “arbitrary awards and decisions,” and “civil judgments” resulting from labor law violations. The rule does not mention criminal proceedings, even though several of the laws that trigger disclosure, including the Fair Labor Standards Act and the Occupational Safety and Health Act, prescribe criminal remedies. Contractors are already required to disclose criminal proceedings, but only if they involve the award or performance of a federal or state contract or grant and result in a conviction or an acknowledgment of fault.7 Contractors are also required to make certifications companies that received federal contracts in FY 2009. Eight of the 50 largest workplace health and safety penalties assessed during the same time frame were assessed against 7 other companies that received federal contracts in FY 2009. GAO-10-1033; Majority Staff of the Senate Committee on Health, Education, Labor, and Pensions, Acting Responsibly? Federal Contractors Frequently Put Workers’ Lives and Livelihoods at Risk, December 2013. http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf (Downloaded August 3, 2015) (Hereinafter HELP Majority Staff Report) Forty-nine contractors receiving a total of $81 billion in contracts in FY 2012 were responsible for 1,776 Department of Labor enforcement actions and paid $196 million in restitution and penalties over a 6-year period. (HELP Majority Staff Report) 4 Project On Government Oversight, “Federal Contractor Misconduct Database.” http://www.contractorsmisconduct.org/
to contracting officials about certain contract-related and non-contract related convictions. To eliminate a potential loophole, the final rule should require the disclosure of criminal determinations, decisions, and judgments resulting from labor law violations.

**Disclosure of Settled Cases**

According to the proposed Department of Labor guidance, a private settlement in which the lawsuit is dismissed without any judgment being entered is not considered a “civil judgment” that triggers disclosure. This will substantially weaken the final rule, as legal actions against companies often settle without a formal judgment by a court or tribunal. Nearly half of the thousands of civil, criminal, and administrative instances in POGO’s Federal Contractor Misconduct Database were settled without a final judgment or finding of liability. Contractors, especially those with substantial financial and legal resources at their disposal, will evade disclosure by settling labor cases before a judgment is entered.

A history of settled labor cases can bear directly on a prospective contractor’s record of integrity and business ethics, especially if multiple settlements involve the same worksite or the same type of violation. The final rule should require the disclosure of labor violation cases that were settled without a final judgment, and contracting officers should be required to evaluate such cases as part of the responsibility determination.

**Disclosure of Foreign Labor Law Violations**

The proposed rule requires contractors and subcontractors to disclose violations of 14 federal labor laws and executive orders or equivalent state laws, but not equivalent foreign laws. Many contractors do business in other countries and occasionally violate the labor laws of those countries.

Executive Order 13673 is based on the policy rationale that “contractors 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.” It should be noted that this rationale refers to “labor laws” in general—it makes no distinction on the basis of the jurisdiction or geographical scope of the law. The disclosure requirement should also include violations of non-U.S. equivalents of the 14 listed federal labor laws and executive orders.

**Increased Public Disclosure**

The final rule should require that more labor violation data be made available to the public. The proposed rule requires only “basic information” about violations be made publicly available on the Federal Awardee Performance and Integrity Information System (FAPIIS) database, to wit:

- The labor law that was violated;

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8 FAR Subpart 52.209-5 requires certifications related to convictions or civil judgments rendered against a contractor for crimes related to obtaining, attempting to obtain, or performing a contract or subcontract or the “commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property[.]”
- The case number, inspection number, charge number, docket number, or other unique identification number;
- The date that the determination, judgment, award, or decision was rendered; and
- The name of the court, arbitrator(s), agency, board, or commission that rendered it.

This list was narrowed down from one that originally contained nine categories of information. Of the categories that were discarded, POGO recommends adding the following two to the public disclosure requirement:

- The street address of the worksite where the violation took place (or if the violation took place in multiple worksites, then the address of each worksite); and
- The amount(s) of any penalties or fines assessed and any back wages due as a result of the violation.

In addition, the final rule should also require the public disclosure of documents the contractor submits to demonstrate its responsibility, namely those describing mitigating circumstances, remedial measures, and other steps taken to achieve compliance with labor laws. These additional disclosures would greatly benefit the public without imposing an undue burden on the government.

Longer Disclosure Time Period

There should be a longer time period for labor law violations that contractors and subcontractors are required to disclose. The proposed rule requires the disclosure of violation determinations, decisions, and judgments rendered in the previous three years. Contractors are already subject to a five-year reporting period with regard to misconduct information reported in the FAPIIS database. Having two additional years of labor violation data would allow contracting officers to conduct more thorough responsibility determinations. The time period for reporting labor violations should be increased to five years.

Lower Arbitration Agreement Threshold

There should be a lower dollar amount threshold that triggers the pre-dispute arbitration agreement requirement. The proposed rule requires that contractors and subcontractors who enter into contracts for non-commercial items over $1 million agree not to enter into mandatory pre-dispute arbitration agreements with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

The proposed rule sets a $500,000 threshold for the labor violation disclosure and paycheck transparency requirements. The right to pursue discrimination and sexual assault and harassment claims in a court of law is no less important than the right to be provided a clear statement of earnings. The arbitration agreement requirement should be lowered to $500,000.

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9 Public Law 110-417, § 872(c).
Elimination of COTS and Commercial Item Exceptions

The final rule should not have exceptions for commercially available off-the-shelf (COTS) and commercial item acquisition contracts. In the proposed rule, contractors and subcontractors are exempt from the pre-dispute arbitration agreement requirement on commercial item and COTS contracts. Subcontractors on COTS contracts are additionally exempt from the violation disclosure and paycheck transparency requirements.

The government conducts a substantial amount of business under COTS and commercial item contracts. These exceptions—particularly the COTS exception to subcontractor disclosure—will weaken the final rule and potentially put billions of federal dollars in the hands of contractors with poor labor practices. The quality of responsibility determinations should not fluctuate based on the type of item being purchased. The government’s interests would be better protected if these exceptions were eliminated from the final rule.

Conclusion

POGO supports the proposed rule but believes a few relatively minor modifications can make it much stronger and more effective. We hope the FAR Council will incorporate our suggestions into the final rule. If you have any questions, I can be reached at ngordon@pogo.org or (202) 347-1122.

Sincerely,

Neil Gordon
Investigator