

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

August 6, 2015

The Honorable Anne Rung
Administrator
Office of Federal Procurement Policy
Executive Office of the President
1650 Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Re: RIN 9000-AM81; Docket No. FAR-2014-0025; Proposed Rule for Executive Order 13673, "Fair Pay and Safe Workplaces"

Dear Administrator Rung:

We are writing to express concern about the Federal Acquisition Regulatory (FAR) Council's proposed rule to implement Executive Order 13673, "Fair Pay and Safe Workplaces," and its reliance on an incomplete companion guidance proposal from the U.S. Department of Labor (DOL).¹ The proposed guidance lacks key information needed for the public to properly evaluate the FAR Council's proposal. Therefore, we urge the FAR Council to suspend its proposed rule until DOL issues a completed guidance proposal. Failure to take the requested action will deprive the public of the opportunity to fully review and respond to these proposals with substantive written comments.

The FAR Council's proposed rule, issued on May 28, 2015, provided for a 60-day comment period ending on July 27, which was extended to August 26.² The proposal runs some 130 pages and relies heavily on a 106-page proposed guidance document issued simultaneously with DOL's proposed guidance, which also carries an identical comment period. The proposed rule requires federal contracting agencies to consider current and prospective contractors' history of federal and state labor, employment and safety law violations when awarding certain federal contracts.³ DOL's proposed guidance is intended to provide detail on which federal and state violations are reportable, how they should be reported, and how contractors' compliance records will ultimately be evaluated by contracting agencies once received.⁴

¹ The Department of Labor and Federal Acquisition Regulatory Council, May 27, 2015
<http://www.dol.gov/opa/media/press/asp/oasp20151046.htm>

² The Federal Register, *Federal Acquisition Regulation; Fair Pay and Safe Workplaces; Second Extension of Time for Comments*, August 5, 2015 <https://www.federalregister.gov/articles/2015/08/05/2015-19169/federal-acquisition-regulation-fair-pay-and-safe-workplaces-second-extension-of-time-for-comments>

³ The Federal Register, *Federal Acquisition Regulation; Fair Pay and Safe Workplaces*, May 28, 2015
<https://www.federalregister.gov/articles/2015/05/28/2015-12560/federal-acquisition-regulation-fair-pay-and-safe-workplaces>

⁴ The Federal Register, *Guidance for Executive Order 13673: "Fair Pay and Safe Workplaces,"* May 28, 2015
<https://www.federalregister.gov/articles/2015/05/28/2015-12562/guidance-for-executive-order-13673-fair-pay-and-safe-workplaces>

The Honorable Anne Rung

August 6, 2015

Page 2 of 3


Unfortunately, DOL's proposed guidance was intentionally published before it was completed, leaving significant issues unresolved – including whether prime contractors will be required to facilitate subcontractor reporting, and how contractors are expected to report violations of equivalent state labor laws. These factors will significantly increase the compliance costs and administrative burdens of any final rule. It is simply not possible to provide useful feedback without this critical information. In light of these vital omissions, it is unclear how the FAR Council was able to fairly and adequately assess the costs of its proposal.

In order to ensure a complete public record with all necessary feedback and accurate data from affected entities, we request that the FAR Council withdraw its proposed rule. We have similarly asked DOL to withdraw its guidance proposal because it is too incomplete to serve as a basis for full notice and comment. If the Administration decides to continue to pursue this policy, we have requested that DOL provide a completed proposed guidance to the FAR Council so the Council can more appropriately evaluate the costs of its proposed rule. Once both proposals are completed, we request that they undergo the same Office of Information and Regulatory Affairs (OIRA) review process as the original proposals. If approved by OIRA, the proposals should be published on the same date in the *Federal Register*, and made available for significantly longer public comment periods than were originally offered.


The credibility of the FAR Council's cost analysis of this proposal is also of chief concern to us. The current, incomplete guidance proposal provided by DOL leaves so many important details unresolved, in fact, that we question the ability of the Council's economic and regulatory analysts to measure the proposal's compliance burden on federal contractors. Given these concerns, we request that the Council provide us with any assumptions, formulas, reports and underlying data used to complete its analysis. In addition, the FAR Council should provide detailed information regarding any costs omitted from the agency's analysis, along with explanations as to why such costs did not warrant inclusion. This data should be delivered to the undersigned along with your response to this letter.

Please provide a full response to our requests no later than August 21, 2015. If you are unable to comply in this timeframe, or you have any questions, please instruct your staff to contact Patrick Bailey with the Committee on Homeland Security and Governmental Affairs at (202) 224-4751, or Kyle Fortson with the Committee on Health, Education, Labor, and Pensions at (202) 224-6770.

Sincerely,



Ron Johnson
Chairman
Senate Committee on Homeland Security
& Governmental Affairs



Lamar Alexander
Chairman
Senate Committee on Health,
Education, Labor and Pensions

The Honorable Anne Rung

August 6, 2015

Page 3 of 3



James Lankford
Chairman
Subcommittee on Regulatory Affairs and
Federal Management
Senate Committee on Homeland Security
& Governmental Affairs



Johnny Isakson
Chairman
Subcommittee on Employment and
Workplace Safety
Senate Committee on Health,
Education, Labor and Pensions