

Statement of
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“The Blacklisting Executive Order: Rewriting
Federal Labor Policies Through Executive Fiat”

Joint Hearing of the
Workforce Protections
&
Health, Employment, Labor, and Pensions
Subcommittees

House Committee on Education and the
Workforce

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Introduction

Chairman Walberg, Chairman Roe, Ranking Member Polis, Ranking Member Wilson, and Members of the Subcommittees, thank you for the invitation to testify before you this morning on behalf of the Professional Services Council's nearly 400 member companies and their hundreds of thousands of employees across the nation.¹ The issue of today's hearing is an important one with a long history and its effects must be fully understood and considered before there should be any consideration of imposing its requirements on contractors.

Let me be clear that PSC supports the underlying intent of the Fair Pay and Safe Workplaces Executive Order that we are focusing on today.² Logically, it is unfair that contractors with repeated, willful, and pervasive violations of labor laws gain a competitive advantage over the vast majority of contractors that are acting diligently and responsibly to comply with a complex web of labor requirements. That said, we are strongly opposed to this Executive Order because it goes far beyond its stated intent and is unnecessarily excessive, largely unworkable and inexecutable. More specifically, the Executive Order will act as a de facto blacklisting of well-intentioned, ethical businesses, further restrict competition for contracts, create procurement delays, and add to the cost of doing business with the government. And despite its laudable intent, the Executive Order will also create significant new implementation and oversight costs for the government for what even the administration acknowledges is a relatively small problem. In simple terms, this Executive Order lacks crucial, fundamental characteristics of fairness, logic, and objectivity.

About the Executive Order

Executive Order 13673 (E.O.) seeks to ensure that only those contractors who abide by a myriad of federal and "equivalent" state labor laws are permitted to receive federal contracts.³ The E.O. and its supporting materials state that the E.O. is necessary because of instances in which companies have failed to comply with existing laws related to

¹ For 40 years, PSC has been the leading national trade association of the government technology and professional services industry. PSC's nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states. See www.pscouncil.org.

² Executive Order 13673 issued on July 31, 2014; Fed Reg 45309, et seq, available at <http://www.gpo.gov/fdsys/pkg/FR-2014-08-05/pdf/2014-18561.pdf>,

³ To date, there is no federal requirement that imposes a contractual obligation to comply with state laws. The E.O. will require the Department of Labor to determine when labor laws are "equivalent."

wage requirements, workplace safety, and employer anti-discrimination. However, the E.O. also recognizes that the “vast majority of federal contractors play by the rules,”⁴ which itself raises serious questions about the necessity of such a sweeping and significant new compliance regime.

To achieve its intended goal, the E.O. would require that federal procurements for goods and services over \$500,000 include a provision in the solicitation requiring every prospective contractor (offeror) to represent, to the best of the offeror’s knowledge and belief, whether there have been any administrative merits determinations, arbitral award decisions, or civil judgments, as may be defined in yet-to-be-issued guidance—not rules—by the Department of Labor, rendered against the offeror within the preceding three year period, for violations of 14 enumerated federal labor laws and their equivalent state laws. Examples of the laws that would be covered by the E.O. include the Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), the National Labor Relations Act, the Davis-Bacon Act, and the Service Contract Act.

Based on the information received from offerors, government contracting officers must make a determination about each offeror’s present responsibility, thus determining whether the offeror is suitable for a contract award.

If awarded the contract, the awardee must require all of its subcontractors to also disclose to the awardee any of its labor-related findings and the awardee must evaluate any disclosure by subcontractors and make a determination regarding whether their subcontractors are “presently responsible sources” with satisfactory records of integrity and business ethics.

The E.O. would also create a new function within each agency and require the appointment of a senior official to serve as the “Labor Compliance Advisor” (LCA). It tasks LCAs with assisting agency contracting officers with making decisions about contractors’ compliance with labor laws and whether contractors are “presently responsible.” The LCA is also to provide assistance to the agency suspension and debarment official when initiating suspension and debarment proceedings. Finally, the LCA is to assist prime contractors with making their decisions about their subcontractors’ “present responsibility.”

⁴ Fact Sheet: Fair Pay and Safe Workplaces Executive Order, available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>.

The E.O. directs the Department of Labor to provide certain definitions of key provisions and additional guidance regarding the implementation of the E.O. The E.O. also directs the FAR Council to develop a proposed rule to implement the E.O. However, the E.O. does not provide any specific timeline for action, although we are aware of the administration's desire to have it fully implemented by January 2016.

History

The Fair Pay and Safe Workplaces Executive Order is similar in several respects to previous initiatives under the Clinton administration. I am familiar with this history because, at that time, I was a deputy undersecretary of defense and served as the primary lead for DoD on those proposed rules. I can assure you that, even at that time, there was a great deal of concern across the administration about whether that proposed rule was fair or implementable and whether it would hinder the Defense Department's (or other agencies') ability to effectively partner with essential and "responsible" private sector entities. In my view, those concerns remain valid today, as well, particularly since this E.O. goes well beyond the prior version.

As you may know, building on a commitment from then-Vice President Gore in 1996, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in 2000 published a proposed rule called the "Contractor Responsibility Rule."⁵ The driving force behind the proposal was actually a single case, albeit a significant one, involving a company with scores of labor violations. At stake was the core question of whether a company could be denied a federal contract solely on the basis of legal violations unrelated to its ability to perform on the contract. Many of us believed the concept of "present responsibility," a fundamental concept of federal acquisition law, clearly signaled that the answer to the question was "yes." However, others disagreed and the company was awarded additional work. As a result, as one of its last regulatory acts, the Clinton administration issued the final version of the "Contractor Responsibility Rule."⁶ Then, as now, the intent was laudable. But then, as now, the rule was poorly thought-out, overly broad, and completely inexecutable. And, as you may also know, the final rule was rescinded by the Bush administration just a few weeks later.

Since then, however, the issue at the heart of that debate—the government's ability to deny a contract award on the basis of broad compliance with federal law—has largely

⁵ 65 Fed Reg 40830, et seq, published on June 30, 2000, available at <http://www.gpo.gov/fdsys/pkg/FR-2000-06-30/pdf/00-16266.pdf>.

⁶ 65 Fed Reg 80256, et seq, published on Dec. 20, 2000, available at <http://www.gpo.gov/fdsys/pkg/FR-2000-12-20/pdf/00-32429.pdf>.

been settled. Over the last decade, numerous cases, from Enron to British Petroleum, have repeatedly demonstrated the government's authority to deny contract awards to companies with documented, pervasive, and willful violations of law, even when those violations were entirely unrelated to the company's performance on a government contract. Nonetheless, the Fair Pay and Safe Workplaces E.O. shares many of the same attributes as its Clinton-era predecessor: it is poorly thought-out and constructed, overly broad and of fundamentally questionable fairness. It is also unnecessary. There is no debate today about whether pervasive violations of law, including federal labor laws, can be used as the reason to deny future federal contracts to a company through suspension and debarment procedures. And there is no real debate as to whether the government already has at its disposal any number of tools to penalize bad actors.

Challenges

As I stated previously, the E.O. poses a number of implementation challenges that renders it unworkable. It would also create a number of unintended consequences, and most notably, is completely unnecessary. While we learn more about the adverse effects of the E.O. every day, there are many aspects that we will not know about until well into implementation. I hope we do not get to that point because this E.O. has too many undefined terms, too few objective standards, and too much potential for adversely affecting the federal procurement process.

The Executive Order is Unnecessary

There is no evidence of a widespread problem of pervasive, repeated or willful violations of labor laws by federal contractors. As the White House Fact Sheet accompanying the E.O. states, the vast majority of contractors play by the rules. That is not to say that there are not instances where contractors have violated labor laws. And some of these infractions may well have been intentional. But the fact is that the laws involved are so complex and challenging to execute that many companies, sometimes at the direction of the government itself, take actions that result in honest mistakes. Yet, each mistake is, technically, a violation of law and these honest, administrative errors make up the vast bulk of "violations." Beyond that, there are numerous existing mechanisms and processes available to federal agencies that are more suitable and less intrusive than the E.O. for dealing with those cases in which there has been nefarious intent.

First, contracting officers are already required to evaluate each offeror to determine whether it is a "responsible" contractor, and that evaluation is based on the totality of the contractor's performance history. FAR 9.104 states that such determination is to

include whether the contractor has a satisfactory record of integrity and business ethics. To assist contracting officers with making such determinations, contracting officers are required to review government maintained databases, including the former Excluded Parties List System (EPLS)—which lists all suspended or debarred contractors—and the Federal Awardee Performance Information and Integrity System (FAPIIS), which contains information about previous non-responsibility determinations, contract terminations, and any criminal, civil and administration agreements in which there was a finding or acknowledgement of fault by a contractor tied to the performance of a federal contract.

In addition, under FAR 9.4, which outlines the federal government’s suspension and debarment structure, federal agencies have the authority to suspend or debar a contractor for a number of enumerated actions, including for “commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.” This catch-all provision provides the necessary authority for suspension and debarment action against a contractor for violations of, among other things, federal labor laws. This authority is also reiterated in several places on the DoL website, and specifically on DoL’s published fact sheets outlining the penalties for contractor violations of the Service Contract Act.⁷ In addition to the FAR suspension and debarment process, the Department of Labor has independent statutory authority to debar a contractor for significant federal labor law violations.

Examples of other existing remedies include criminal prosecutions, civil actions, substantial fines, liquidated damages, and contract terminations. Federal contractors know these actions are serious as each of them carries significant consequences. The E.O., however, fails to acknowledge that the existing remedial actions even exist, let alone are effective, and instead assumes that only stripping contractors of their contracts or denying them the ability to compete for new federal work will act as a deterrent. In fact, based on the president’s own assertion that the vast majority of federal contractors play by the rules, the existing deterrents and the current system for reviewing and adjudicating potential violations of labor laws are working effectively. That said, we recognize that there will be bad actors, but, again, based on historical GAO reports and the data in Senator Harkin’s report (discussed in greater detail below), it is clear that contractors that violate federal labor laws are already being identified by DoL and the procuring agencies and that action is being taken against those that violate the law.

⁷ DoL Fact Sheet #67: The McNamara-O’Hara Service Contract Act (SCA), July 2009, available at <http://www.dol.gov/whd/regs/compliance/whdfs67.pdf>.

With regard to labor law violations, it is important to recognize that it is the Department of Labor that initiates reviews and administers federal contractors' compliance with federal labor laws through a number of DoL offices, such as the Wage and Hour Division and the Office of Federal Contract Compliance Programs. As such, the result of any reviews, including settlement agreements, penalties, or other punitive actions, should be known and recorded by the Department of Labor. If this is not happening, the administration would be better served by focusing on improving its own data collection and information sharing efforts rather than adopting another costly, complex compliance and reporting regime.

There is little evidence to demonstrate that the above existing authorities are not, or could not, be effective on their own, without creating new and significant bureaucracies as required by the E.O. In fact, much of the information collection that the E.O. imposes on contractors is information that the government already has. Rather than creating duplicative and burdensome reporting requirements, the government should examine its existing reporting mechanisms and identify and correct any shortcomings without duplicating that effort by imposing additional requirements on industry.

The Executive Order is Excessive

Many of the most complicated challenges associated with the E.O. are created by its expansion of, or redundancy with, the current compliance regime, while providing very little additional benefit to the government. For example, the E.O. fails to limit reporting requirements to findings directly tied to federal laws only. By expanding the reporting requirements to include findings related to "equivalent state laws," the E.O. adds significant and unneeded complexity. First, DoL does not have jurisdiction over these often disparate state laws. Nor does it have access to the associated compliance activities or penalties they impose on companies. Second, it is unreasonable to expect that any of the LCAs will have even marginal knowledge or understanding of even a few, let alone all 50 states' labor laws, administrative processes, and/or due process rights afforded to federal contractors who do business in those states.

Adding to the complexity of the E.O.'s inclusion of state labor laws is the fact that the E.O. does not limit reporting of state activity to violations tied to the performance of a federal contract. It is common for federal contractors to compete in the commercial marketplace in addition to the work done for the federal government, but it is also common that companies separate their federal and commercial business units for ease of complying with a myriad of other federal government-unique compliance, oversight

and reporting regimes. Because of this expansive coverage, companies would have to initiate a substantial data collection effort from all business units, even if the vast majority of its total revenue is derived from its commercial business. Additionally, because the E.O. fails to limit reporting of findings to only those in which there is a finding or acknowledgement of fault by the contractor, the reporting burden will be much more intensive than necessary or appropriate to meet the objectives of the E.O.

Given the E.O.'s inclusion of state labor laws beyond those tied to a contractors' performance of federal contracts, and the fact that there need not be a finding or acknowledgement of fault to trigger a report and review, it is easy to see just how massive a data collection and reporting effort will need to be undertaken by those companies simply wishing to bid on a federal contract. Many will sit out the competition because of it, even if there are no company violations, particularly because compliance reporting is required twice per year.

Ultimately, the E.O. should be focused on federal contractors, their compliance with federal laws, and on their performance of federal contracts. It is nonsensical to create a vast reporting structure that seeks to capture information that has nothing to do with the performance of federal contracts and expands well beyond federal labor laws, or in which the company was neither found to have committed, or admitted to, any wrongdoing.

In recent years there have been a few reports seeking to highlight instances in which companies with labor law violations have received, or continued to perform, federal contracts. These reports are riddled with flaws that seek to paint a picture of contractor abuse that is woefully inaccurate. One such report, published by the office of Senator Tom Harkin in December 2013, reaches back to 2007 to identify contractors with OSHA and wage violations even if those violations had nothing to do with the companies' work under a federal contract. Also, the report included a listing of top contractors that were tied to instances in which back wages were owed to their employees. What the report failed to highlight is that, in nearly half of the top 15 cases listed in the report, the contractor was not at fault for the violations. Many contract-related cases involving back pay occur because the contracting agency, i.e. the government, failed to include required Service Contract Act or Davis-Bacon Act clauses or correct wage determinations into the contract. While long viewed as technical or administrative errors, they have never been objectively considered evidence of willful behavior. Yet under these circumstances, federal contractors are often adversely affected by mistakes by the government. Also concerning is that the report failed to limit its finding to cases

that had been fully resolved, thus falsely inflating the appearance of contractor violations. We have seen time and again determinations later overturned by administrative bodies or the courts, but the E.O., like the Harkin Report, fails entirely to account for such actions.

The Executive Order is Ambiguous and Unworkable

The E.O. requirement that prime contractors mandate their subcontractors to report their violations of labor laws will be exceptionally onerous, if not impossible, for prime contractors to administer and creates a number of unintended consequences related to prime and subcontractor relationships.

First, the E.O. requires prime contractors to update their certification of compliance with labor laws every six months and requires the same reporting and certification by their subcontractors at identical intervals. The reporting burden on prime contractors for just reporting and certifying for their company is onerous in and of itself as discussed above. Adding subcontractor reporting adds a significant level of complexity to the information collection and related mitigating processes outlined in the E.O. Primarily, prime contractors cannot, and should not, be tasked with ensuring the labor compliance of their subcontractors or their entire supply chain on a recurring basis when such compliance is entirely unrelated to the federal contract under which the prime and subcontractor are partnered. Some larger contractors, for example, have supply chains and subcontracting agreements numbering in the tens of thousands. Just to review this number of companies is unexecutable even if only a limited number of companies have a reported violation of the E.O.'s covered labor laws. But if one-third of a large companies' supply chain has even a minor violation of a covered labor law, that could be 10,000 cases that need to be reviewed by the company and possibly by both the contracting officer and the yet-to-be created Labor Compliance Advisors. Not only do the companies not have the resources to conduct the reviews, the federal government would also be overwhelmed by responsibility reviews of even minor cases that would ultimately be cleared.

Second, the E.O.'s subcontractor flow-down requirement means that subcontractors will be providing sensitive business compliance information to their prime contractors. But the E.O. fails to recognize that many companies that subcontract with each other also compete against each other for other federal contracting opportunities. This business dynamic raises legitimate concerns by companies who do not want to provide information to their prime contractors because the prime contractor could use even minor infractions to gain a competitive advantage, or to initiate a contract award

protest, against the company in a future acquisition in which the companies were competing against each other. Again, why are we creating a vast new reporting regime, and placing the burden on industry, to collect information that the government already has, or should have, access to through existing channels?

Third, the E.O. requires a pre-award assessment of labor compliance on a proposal-by-proposal basis. For companies that bid on multiple opportunities, these reviews mean that different contracting officers, and different LCAs, will be making assessments about a contractor's labor record and may come to different conclusions after reviewing identical information about a contractor's historical compliance with labor laws. This subjective analysis means that, in some cases, a contractor could be determined to be "presently responsible" by one contracting officer but based on identical information found to be not "presently responsible" by another contracting officer. This lack of consistency creates enormous risk and uncertainty for both the government and contractors. Alternatively, once one contracting officer or LCA makes a determination that a contractor is not a responsible source, based on their individual subjective analysis, then it is foreseeable that every other contracting officer will make the same determination to avoid inconsistency or having to justify a different conclusion. Contracting officers are not labor law experts. Since contracting officers are faced with burgeoning workloads and pressure to get contracts awarded quickly, it is also foreseeable that a contracting officer would avoid making any award to a contractor with any labor violation simply to avoid the time, burden, and delay associated with coordinating with the LCA or having to justify making such an award. Under these scenarios, and given the fact that mere allegations would be considered during reviews, a contractor would be confronted with a de facto debarment without being afforded the due process that is required to be provided to contractors under existing suspension and debarment regulations.

Fourth, in order for the E.O. to be implemented in a workable manner, the federal agencies would have to hire a significant number of new staff to serve as (and support) the role of the LCAs. Within the Department of Defense alone, the LCA would be required to support the activities of approximately 24,000 contracting officers and hundreds of contracting offices. Additionally, the LCA would need significant additional resources to support prime contractors seeking guidance about whether potential subcontractors' violations warrant a decision by the prime contractor not to award a subcontract to the entity. As stated above, for some large prime contractors that have several thousand subcontractors and suppliers, the needed reliance on the LCA could be tremendous. Even if the federal government could somehow ramp up its capacity to

provide LCAs and related resources to the federal agencies and prime contractors, a significant amount of time would be needed to effectively train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. The cost of hiring and training new personnel will be substantial.

Fifth, the E.O. is riddled with undefined and ambiguous terms that add to the complexity of adopting a meaningful approach. For example, the E.O. directs contractor disclosure of any “administrative merits determination, arbitral award or decision, or civil judgment (as defined in guidance to be issued by the Department of Labor)” against the offeror within the preceding three year period for violations of any number of listed federal or “state equivalent labor laws.” Currently, it is unclear how the term “administration merit determination,” or “arbitral award or decision” would be defined. Because of the implications of such “decisions or determinations” under the E.O., it is essential that such terms be fully and objectively defined and that the definitions clearly state that such decisions or determinations are only based on cases that have been fully adjudicated. Such an approach is crucial, considering that, during initial conversations between industry and DoL, some DoL officials stated their view that mere allegations about contractor violations of labor laws could be taken into consideration by the federal government. Again, taking such an aggressive approach would rob contractors of their due process rights and assumes guilt well in advance of a fully adjudicated finding. To include in the definition findings that are not fully adjudicated raises the risk of situations where an agency prematurely takes action detrimental to a company (and the government buyers) when the allegation may be reviewed and ultimately dismissed.

The term “serious, repeated, willful or pervasive nature of any violation,” must also be fully and objectively defined by DoL. The E.O. states that where no existing statutory definitions are available, DoL would be tasked with “developing the standards.” Of particular concern is how “repeated” may be defined. Is a company with hundreds of federal contracts and thousands of employees to be treated the same way as a very small company when both are found to have “repeated” violations of labor laws?

The Executive Order will Cause Procurement Delays

The federal contracting process is already widely criticized for being overly burdensome and too slow. The E.O. could add significant delays to the federal procurement process pending resolution of even the smallest of infractions that would eventually lead to a contracting officer’s affirmative responsibility determination. Such delays may be further exacerbated by disputes between LCAs and contracting officers about a contractor’s present responsibility. Further questions must also be addressed regarding

how such disputes are to be resolved. Delays would also be driven by prime contractors having to delay moving forward with contract performance while they await support and guidance from LCAs about the present responsibility of any of their subcontractors. Finally, the increase in procurement award protests because of the E.O. standards will further lengthen the time of the federal contract award process.

The Executive Order Will Result in Less Competition for Federal Contracts and Increased Costs of Doing Business with the Government

In addition to the substantial reporting and related costs associated with complying with the E.O., the E.O. will subject contractors to significant risks. Such risks include increased liability associated with potential false claims or false statements accusations because of inaccurate reporting or certifications of compliance under the E.O. Rather than risking such liability and complying with burdensome and costly requirements of the E.O., some companies will simply choose not to do business with the federal government.

Ultimately, this only hurts federal agencies by denying them the ability to access companies that may be able to offer the best and most cost-effective solutions. The E.O. will also discourage new entrants from coming into the federal marketplace because of the significant business risks and extraordinary requirements not required in the commercial sector. These effects on the federal marketplace are particularly concerning because they are contrary to this administration's separate initiatives aimed at reducing regulatory burdens and reducing the cost of doing business with the government in the hope that more commercial companies, and particularly small businesses, will compete for federal contracts.

Conclusion

Mr. Chairmen, this Executive Order fails on so many fronts that it can never be effectively implemented in its current form. As I stated when I opened my statement, more can be done to ensure that intentional violators of the law do not receive federal contracts. But this Executive Order is not the right approach. It should be rescinded and the administration, Congress and industry should be tasked to work together to find alternative solutions that rely considerably on the existing regulatory and statutory framework. I have already offered PSC's engagement to key representative of the Executive Branch. It is essential that Congress also be engaged in this process, and that is why I commend and thank you for your attention to this issue and for holding this hearing today. PSC looks forward to working with you, the Congress and the administration on needed improvements. Thank you for the invitation to appear here today. I look forward to answering any questions you might have.