COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 10, 2019

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dear Chairman Ring:

We write to follow up on the National Labor Relations Board's (NLRB) failure to produce information on its decision to contract out tasks related to its rulemaking on the joint employer standard, and to raise serious concerns regarding this contract. On March 14, 2019, we wrote to you to request information about this decision. On March 22, the NLRB confirmed its intent to contract work that has been performed by Board staff in previous rulemakings. In a June 14 email to the Committee, the NLRB withheld information requested by the undersigned on the categories that the contractor will use to sort public comments and instructions on how to categorize comments. The NLRB lacks justification for refusing to produce the comment categories. The Committee has both the constitutional authority and the duty to conduct oversight, and the NLRB's assertions do not provide any legal or ethical basis for withholding such information. Moreover, we are troubled that the NLRB appears to have violated the Federal Acquisition Regulation (FAR), which protects against contracting out inherently governmental functions, and that the NLRB did not rigorously police for conflicts of interest when awarding the contract.

The NLRB's Refusal to Produce the Comment Categories is Without Merit and Raises Concerns that It Has Prejudged the Outcome of the Rulemaking

The NLRB assured the Committee on March 22, 2019, that the contractor reviewing public comments "will not involve any substantive, deliberative review."[1] Subsequently, the NLRB

[1] Letter from John Ring, Chairman, NLRB, to Robert C. "Bobby" Scott, Chairman, Committee on Education and Labor, and Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor and Pensions (Mar. 22,

determined that it would withhold from the Committee its specific guidance to the contractor on how to categorize and code public comments, on the grounds that the coding categories are "deliberative." In a June 14 email to Committee staff, the NLRB wrote, "it is the categories that are the roadmap of the Agency's deliberative process on the issue of joint employer rulemaking. The documentation of the categories is no different than a preliminary outline of a Board decision draft."[2]

Given that the NLRB has described the contractor's work categorizing public comments as a prerequisite for the agency's substantive review, the agency's admission that it has already created "a preliminary outline of a Board decision draft" raises serious questions as to whether the NLRB has prejudged the merit of the comments and the outcome of the rulemaking. If the categories do not properly address the scope of issues raised in the comments, then what the NLRB has described as a "preliminary outline of a Board decision draft" may amount to prejudicial error.[3]

The arguments for withholding this information are wholly without merit. Accordingly, the Committee again requests that the NLRB produce the list of categories that the contractor has been sorting comments into, as well as any instructions to the contractor on how to categorize such comments, by no later than September 30, 2019. The Committee also requests the following by the same date:

1. A description of how the NLRB developed the comment categories, including whether all current Board Members participated in the drafting of the categories.

2. Any communications between Board Members, including Board Members' staff, regarding development of comment categories and related instructions to the contractor.

3. A description of how the drafting of categories for the pending rulemaking differ from the process used in previous rulemakings. Please include information on whether a "preliminary outline of a Board decision draft" has been used as the basis for categorizing comments in previous rulemakings.

The NLRB Has Failed to Reassure Congress that It Has Not Contracted Out an Inherently Governmental Function

The NLRB's responses to our March 14 letter indicate that it has not abided by its responsibilities under the FAR to protect against contracting out an inherently governmental

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2019) ("[T]his work, which will be overseen by NLRB staff, will not involve any substantive, deliberative review of the comments but will be limited to sorting comments into categories in preparation for their substantive review.").
[2] Email from Office of Congressional Affairs, NLRB, to Committee on Education and Labor staff (June 14, 2019).
[3] 5 U.S.C. § 706 (requiring a reviewing court to "take due account of the rule of prejudicial error" when deciding whether to vacate an agency action); *see also Owner-Operator Independent Derivers Ass'n v. Federal Motor Carrier Safety Administration*, 494 F.3d 188, 202-03 (D.C. Cir. 2007) (finding prejudicial an agency's failure to disclose an internal methodology that was central to the agency's justification for the rule).

function. Subpart 7.503(e) of the FAR requires "the agency head or designated requirements official to provide the contracting officer…a written determination that none of the functions to be performed are inherently governmental."[4] The Committee's March 14 letter requested "copies of any legal determination the Board has made as to its authority to engage a private entity involving the review of public comments, including analysis of how the Board should avoid issues of a private entity performing duties that are 'inherently governmental'…" The NLRB invited Committee staff to view one document that was responsive to this request on June 12, but that document did not discuss whether the functions performed are inherently governmental, and the NLRB stated in emails to Committee staff on June 14 and July 3 that the NLRB possesses no other documents that are responsive to the Committee's request. Because the NLRB never created any written determination that none of the functions performed are inherently governmental, the NLRB violated the FAR.

According to Rule 7.503 of the FAR, inherently governmental functions include the "determination of agency policy, such as determining the content and application of regulations."[5] The FAR also specifies that "[s]ervices that involve or relate to the development of regulations," as well as "services that involve or relate to analyses…to be used by agency personnel in developing policy," "may approach being [inherently governmental functions] because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance."[6]

On July 8, the NLRB produced the underlying contract with Ardelle Associates. According to the Statement of Work, the contractor's assignment includes "conducting initial reviews of comments" and "assigning pre-determined categories to each comment." The assignment also includes "summariz[ing] the content of comments received in a particular pre-determined category." The work performed by Ardelle Associates, at best, approaches being an inherently governmental function, and at worst crosses the line into being an inherently governmental function, depending on the contractor's performance and the NLRB's oversight of the contractor. The NLRB's conduct amplifies this concern with its admission that it did not provide its contracting officer a written determination that the contracted functions are not inherently governmental.

The NLRB's failure to analyze whether it has contracted out an inherently governmental function raises a question as to the role of the summaries the contractor will draft in the rulemaking process. The integrity of the regulatory process is vital to ensure that public comments are fully considered before the agency issues its final rule. If the NLRB relies on contracted work that inaccurately summarizes or categorizes comments—or if the NLRB's categorization and summaries result in a failure to fully consider the detailed substance of the comments—then the NLRB's final rule cannot be found to satisfy its rulemaking obligations.

Accordingly, the Committee requests the following information by no later than September 30, 2019:

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[4] 48 C.F.R. § 7.503(e).
[5] *Id.* at § 7.503(c)(5).
[6] *Id.* at § 7.503(d)(4)-(5).

1. A description of the precise role that the comment summaries will have in the rulemaking process. If Ardelle Associates does not provide summaries of comments, please include in this description an explanation as to why the NLRB included this task in its contract.

2. Any documents or communications governing the NLRB's oversight of work performed under the contract to ensure that Ardelle Associates is accurately categorizing, summarizing, or reviewing the comments in any capacity.

3. The number of hours performed by each individual referred by Ardelle Associates on fulfillment of the contract and the number of hours the NLRB estimates that each individual referred by Ardelle Associates will perform before the completion of the contract.

4. For each NLRB employee assigned to perform work on the rulemaking, please provide the number of hours performed by each employee on the rulemaking to date, and the number of hours the NLRB estimates that each employee will perform before the completion of the rulemaking. If this detailed information is not available, please provide the number of NLRB employees assigned to perform this work and a projection of the total number of hours they will spend on the rulemaking.

5. Summaries prepared by Ardelle Associates of comments that were submitted by the following persons or entities in order to demonstrate examples of summaries prepared by Ardelle Associates:

    a. Chairman Robert C. "Bobby" Scott, House Committee on Education and Labor, and Ranking Member Patty Murray, Senate Committee on Health, Education, Labor and Pensions;
    b. Congressional Progressive Caucus Co-Chairs Mark Pocan and Pramila Jayapal, and other Members of Congress;
    c. American Federation of Labor & Congress of Industrial Organizations (AFL-CIO);
    d. Service Employees International Union;
    e. International Brotherhood of Teamsters;
    f. Society for Human Resource Management;
    g. American Staffing Association;
    h. International Franchise Association;
    i. Chamber of Commerce of the United States of America;
    j. American Association of Franchisees & Dealers; and
    k. NLRB General Counsel Peter B. Robb.

If any number of the above summaries do not exist, please provide an equivalent number of summaries prepared by Ardelle Associates selected at random, not including summaries of comments that are wholly duplicative of other comments.

The NLRB's Contract with Ardelle Associates, Inc. Appears to be Tainted by a Conflict of Interest and Raises Questions about Whether the NLRB Fulfilled Its Duty to Prevent Conflicts of Interest

Subsection 3.101-1 of the FAR requires the following:

> Government business shall be conducted in a manner above reproach and...with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.[7]

This obligation appears to conflict with the technical proposal submitted by Ardelle Associates, Inc., which states, "Ardelle is member[] to a number of organizations giving us access to candidates" to perform the contracted work, and identifies the Society for Human Resource Management and the American Staffing Association as organizations of which Ardelle is a member. Both of these organizations submitted comments in support of the NLRB's proposed rule.

The NLRB's selection of Ardelle Associates runs afoul of the FAR's directive "to avoid strictly any conflict of interest or even the appearance of a conflict of interest." On April 16, 2019, the NLRB wrote in response to the Committee's March 14 letter that "[t]he Designated Agency Ethics Official has not taken any steps to and has not made any plans to evaluate Board solicitations, contracts, purchase orders, or other procurement vehicles" related to the contracted work. This response raises the question of why the NLRB selected Ardelle Associates when it is tied to entities that submitted comments. Because the NLRB has fallen short of the FAR's "impeccable standard of conduct," the contract also raises the question of whether any final rule is tainted by Ardelle Associates's conflict of interest.

Accordingly, the Committee requests the following information by no later than September 30, 2019:

1. A detailed description of any efforts taken by any person employed by the NLRB to evaluate Board solicitations, contracts, purchase orders, or other procurement vehicles that provide for private entities to review comments on rulemakings in order to ensure that such entities do not have conflicts of interest arising from their filing of comments, their membership in any entity that has filed comments, or their potentially being impacted from the rulemaking on joint employer status or future rulemakings. Please include in this description why the Designated Agency Ethics Official did not participate or plan to participate in this evaluation.

[7] *Id.* at § 3.101-1.

2. A detailed explanation as to why the NLRB contracted with Ardelle Associates instead of any contractor that is not tainted by a conflict of interest.

3. A detailed description of what steps the NLRB will take to remedy the appearance a conflict of interest in its contract with Ardelle Associates.

If you have any questions, please contact Kyle deCant, Labor Policy Counsel for the Committee at (202) 226-9416 or Kyle.deCant@mail.house.gov. Please direct all official correspondence to the Committee's Chief Clerk, Tylease Alli, at Tylease.Fitzgerald@mail.house.gov. Thank you for your attention to this matter, and we look forward to your response.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

FREDERICA S. WILSON
Chairwoman
Subcommittee on Health,
Employment, Labor, and Pensions