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Mr. William F. Clark, Director
Office of Government-wide Acquisition Policy
Office of Acquisition Policy
Office of Government-wide Policy

Office of Federal Procurement Policy

Federal Acquisition Regulatory Council

By electronic submission: www.regulations.gov

RE: Office of Federal Procurement Policy; Federal Acquisition Regulation: Pay Equity and Transparency in Federal Contracting; Proposed Rule; FAR Case 2023-021; Docket No. FAR-2023-021; Sequence No.1; 89 Fed. Reg. 5843, (January 30, 2024)

Dear Mr. Clark, the Office of Federal Procurement Policy, and the Federal Acquisition Regulatory Council:

The U.S. Chamber is dedicated to promoting, protecting, and defending America's free enterprise system. Our membership includes many of the largest companies in the country, most of which are involved in federal contracting and would therefore be affected by this Proposed Rule. In addition, more than 96 percent of Chamber member companies have fewer than 100 employees, and a significant number of these members also participate in federal contracts.

The Chamber has a long history of supporting equal pay[1] and unequivocally believes that employees with similar qualifications and roles are to be paid equally. However, the Proposed Rule exceeds statutory authority, conflicts with various well-established contracting requirements, and would not benefit employees. For these

[1] At the outset, the Chamber notes the distinction between "pay equity" in the title of this rulemaking, and "equal pay" as the Chamber supports. The two terms are not interchangeable. "Equity" is commonly understood as a broader term than equal pay, accounting for whether certain identified demographic groups are advancing economically relative to the majority population, rather than just whether they are being paid the same amount for the same job, when accounting for legitimate, non-discriminatory factors that impact pay. Furthermore, "equity" evokes the more amorphous concept of "comparable worth" where dissimilar jobs are compared with the intent of giving them the same value.

and other reasons detailed below, the Chamber believes the Proposed Rule must be withdrawn. If it proceeds, it must be substantially revised to cure the many flaws identified herein.

I. Summary of Proposed Rule

The FAR Council issued a proposed rule entitled "Pay Equity and Transparency in Federal Contracting" ("Proposed Rule") on January 30, 2024. The Proposed Rule would:

> (1) prohibit contractors and subcontractors from seeking and considering information about job applicants' compensation history when making employment decisions about personnel working on or in connection with a government contract; and
>
> (2) require contractors and subcontractors to disclose, in all advertisements for job openings involving work on or in connection with a government contract placed by or on behalf of the contractor or subcontractor, the compensation to be offered to the hired applicant, for any position to perform work on or in connection with the contract.

89 Fed. Reg. 5843. The Proposed Rule also requires contractors and subcontractors to provide to applicants a "notification of rights" that is more than 275 words and would have to be tailored to each job opening. Contractors and subcontractors would be required, under the Proposed Rule, to be provide the lengthy notification, in writing, in each and every "job announcement" or "application process."

II. The Proposed Rule Exceeds the Government's Authority Under the Procurement Act

This Proposed Rule exceeds the government's authority under the Procurement Act because the FAR Council's pursuit of goals beyond economic and efficient contracting exceeds its legal authority. While the FAR Council can promulgate specific, output-related standards to help ensure that the government acquires the goods and services it needs at appropriate prices, the FAR Council has no authority to use government contracts as a vehicle for furthering social policies, or as a backdoor way for the administration to achieve through federal contracting policies what it cannot get enacted through Congress. The FAR Council's attempt to do that here not only exceeds the FAR Council's statutory authorization, but also raises significant Constitutional questions.

The Procurement Act authorizes the President to "prescribe policies and directives…necessary to carry out" the Procurement Act, *i.e.*, to direct the procurement agencies to make the federal contracting system "less duplicative and

inefficient." *Kentucky v. Biden*, 57 F.4th 545, 553 (6th Cir. 2023) (internal quotation marks and citation omitted). While the President is charged with managing federal contracting to advance economy and efficiency, the Procurement Act does not give the President unfettered discretion to use federal procurement to advance unrelated policy goals. *See Louisiana v. Biden*, 55 F.4th 1017, 1023 n.17 (5th Cir. 2022) (observing that "the statement of purpose acts as a set of guidelines within which" any policies directed by an executive order "must reside"); *accord Am. Fed'n of Lab. & Cong. of Indus. Org. v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (stating the Procurement Act is not a "blank check for the President to fill in at his will").

The goals of this Proposed Rule are not within the authority provided by the Procurement Act. In short, the FAR Council lacks statutory authorization to pursue antidiscrimination goals, no matter how laudable they may be, through mechanisms such as the Proposed Rule. And, the goal of the Proposed Rule is clear: to promote pay equity and "demonstrate a commitment to fairness" for contractors' employees, in accordance with Executive Order (E.O.) 14069. That Executive Order, per the Proposed Rule, "established an administration policy of eliminating discriminatory pay practices" amongst Federal contractors. Pay Equity and Transparency in Federal Contracting, 89 Fed. Reg. 5843, 5844 (Jan. 30, 2024).

While the FAR Council presents several explanations for how this Proposed Rule may promote efficiency and economy, none hold water. First, the FAR Council emphasizes that salary range disclosures may help workers negotiate, positing that this "may reduce the costs for Federal contracting." *Id.* at 5848. Notably, the FAR Council does not explain how this supposed additional negotiating power would reduce costs to the government. Second, the FAR Council asserts that salary range disclosures "may lower recruiting costs" and notes that applicants are more likely to respond to job advertisements containing a salary range. *Id.* But, again, the FAR Council does not connect this to increased economy or efficiency. Indeed, if these practices truly did lower recruiting costs, data would suggest that businesses would have voluntarily implemented them, but that has not been the case.

The Proposed Rule also raises Constitutional considerations. In addition to the Procurement Act, President Biden relied on "the authority vested in me as President by the Constitution" to justify Executive Order 14069. But, the Order (and the requirements resulting from the Final Rule) find no support in the President's inherent authority under Article II of the U.S. Constitution, and thus are also in violation of Article II. As established by Article II, the function of the President is—through his subordinate officers and agencies—to execute the duly enacted laws of the United States. The President has broad inherent authority to manage the functioning of the Executive Branch and carry out the other functions assigned to the Office by Article II, such as commanding the armed forces and engaging in international diplomacy. But in executing the laws enacted by Congress, the Executive Branch—including the

President—is necessarily cabined by what those laws say. Put plainly, Article II does not grant the President authority to execute the laws in a manner not authorized by those laws. *See Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-40 (1952) (Jackson, J., concurring).

This Proposed Rule exceeds the government's authority under the Procurement Act and the Constitution. The FAR Council's justifications for how it could be shoehorned into that authority do not salvage the Proposed Rule.

III. Government Contracts Considerations

A. The Proposed Rule Conflicts with Other Federal Requirements Regarding Consideration of Compensation History

Despite its laudable goals, the Proposed Rule will have a significant detrimental effect on government contractors and subcontractors. Most importantly, if implemented, the Proposed Rule will put contractors and subcontractors in a no-win situation by forcing them to choose between complying with conflicting requirements. Primary among these conflicting requirements are the provisions of Federal Acquisition Regulation (FAR) 52.222-46, Evaluation of Professional Employee Compensation.

As the Court of Federal Claims has noted, the provisions of FAR 52.222-46 were "designed to mirror those afforded to other workers under the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 6702(a)." *Sparksoft Corp. v. United States*, 141 Fed. Cl. 609, 624 (2019) (quoting *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 369-70 (2010)) (cleaned up). Because of the Federal Government's tremendous purchasing power, federal government contractors and subcontractors face unique challenges as compared to commercial contractors. As the Government has long recognized, the SCA (and by extension, the provisions of FAR 52.222-46) are "intended to protect Government contractor employees from 'wage busting,'" which is the practice of "lowering employee wages and fringe benefits by incumbent or successor contractors, in an effort to become the low bidders or offerors on Government service contracts, when the employees continue to perform the same jobs." GAO, Statement of R. Keller, Deputy Comptroller General of the United States Before the Subcommittee on Federal Spending Practices and Open Government, Senate Committee on Governmental Affairs on the Office of Federal Procurement Policy, March 2, 1979.[2] That is, because of the federal government's purchasing power (as the world's largest purchaser), employees working for federal contractors – particularly those currently performing on incumbent contracts – were too often faced with situations in which their wage rates were suppressed by companies vying to takeover successor contracts by offering a lower contract price to the government.

[2] Available at https://www.gao.gov/assets/108684.pdf.

See Sparksoft Corp., 141 Fed. Cl. at 624. FAR 52.222-46 specifically calls out these dangers: "[r]ecompetition of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished professional employees. This lowering can be detrimental in obtaining the quality of professional services needed for adequate contract performance." FAR 52.222-46(a).

In connection with achieving its goal of protecting employees of contractors and ensuring that the government continues to obtain high quality work, FAR 52.222-46 specifically envisions that contractors will consider a job applicant's compensation history in determining their prospective compensation. In this regard, FAR 52.222-46(b) cautions contractors that "compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees." The provision warns that "Offerors are cautioned that lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement." *Id.*

In many procurements, this will require contractors to consider the incumbent compensation paid to specific job applicants. This is because many procurements instruct offerors to identify "Key Personnel" in their proposals, i.e., named individuals who will serve in key positions under the contract. Frequently, multiple contractors competing in a procurement will propose the same individual for a position – often the individual currently in that position under the incumbent contract. Pursuant to FAR 52.222-46, companies in that situation will be required to consider the individual's compensation under the predecessor contract. If they fail to consider the applicant's incumbent compensation when setting the applicant's compensation, their proposals could be downgraded or eliminated from the procurement. If the Proposed Rule were enacted, contractors would violate the Proposed Rule by complying with this aspect of FAR 52.222-46 – a result the FAR Council has apparently not considered.

Indeed, in some situations, the Government could find itself participating in and encouraging violation of the Proposed Rule. Specifically, the Proposed Rule prohibits not only "soliciting" but also "considering" information regarding compensation history. With respect to incumbent "key personnel" identified in a contractor's proposal, often the Government will conduct a "cost realism" analysis of contractor proposals to determine whether specific cost elements are realistic for the work to be performed. In connection with such an analysis, the Government may engage in "discussions" in which it informs offerors of any concerns with respect to the realism of their cost elements. With respect to the realism of a key individual's compensation, such communications often include information regarding the compensation history for the position under the incumbent contract. In the common situation in which an offeror has proposed to retain the same individual in the key

position, the Government's discussions could result in a requirement that the company consider the compensation history of an applicant for the position.

Although the conflict with the provisions of FAR 52.222-46 may be the most glaring, this is not the only provision with which the Proposed Rule conflicts. The DOL final rule implementing Executive Order (E.O.) 14055, Nondisplacement of Qualified Workers under Service Contracts (and any forthcoming FAR provisions implementing the corresponding requirements) requires contractors to give service employees from a predecessor contract a bona fide right of first refusal for employment under new Service Contract Act (SCA)-covered contracts, contract-like instruments, or subcontracts for the same or similar work. These bona fide offers to service employees—as defined by the SCA—must be made before the contractor makes offers to other workers. Importantly, in order for an offer to be "bona fide," different employment terms and conditions may not be offered to discourage the employee from accepting the offer. This includes offers with changes to pay, benefits, or terms and conditions. This provision inherently requires contractors to consider applicants' compensation history when crafting an offer to ensure that the offer can be considered "bona fide." As such, similar to the provisions of FAR 52.222-46, contractors are required to consider compensation history in order to comply with these government contracting provisions.

Federal contractors should not be put in the position of having to choose with which legal requirement they will comply, when complying with one will result in violating the other. Moreover, requiring federal contractors to comply with this Proposed Rule will expose them to significant risk that, in the event they are awarded a contract, they will be subject to a bid protest alleging that they failed to comply with the provisions requiring consideration of compensation history.

B. The Proposed Rule Is Inconsistent with Hiring Requirements under DOL's PERM Program

Many Chamber members who participate in federal contracting are also covered by immigration law requirements. This proposed rule is inconsistent with the permanent labor certification program (or PERM) run by the U.S. Department of Labor's Employment and Training Administration (ETA). [3] This proposed rule has two conflicts. First, the PERM regulations do not require that a pay range be included in Job Postings. Second, when including a pay range on Labor Market Testing Job Postings, the PERM regulations require employers to obtain and utilize the "prevailing wage", [4] which can and often does vary from the "good faith" estimate of wages the employer believes will be paid for the position under this proposed regulation. 89

[3] An overview of the PERM process is located here: https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent

[4] https://flag.dol.gov/programs/prevailingwages

Fed. Reg. 5852-53. Accordingly, we request that Job Advertisements for the PERM Labor Market testing be explicitly excluded from the final rule.

C. The Proposed Rule Will Have a Detrimental Impact on Employees of Federal Contractors and Subcontractors

In addition to conflicting with the terms of various provisions governing the conduct of contractors and subcontractors, the Proposed Rule also will likely have the opposite effect on employees from that intended. The Proposed Rule notes that one of the goals of the rule is to help "workers feel that they are valued and their pay is fair." The narrative accompanying the Proposed Rule claims that compensation history bans have been found to "reduce pay gaps that disadvantage certain populations, including women, workers of color and workers entering the labor market during recessions." 89 Fed. Reg. at 5843. However, this statement fails to consider the significant differences between private industry and government contracting. As discussed above, employees of government contractors are in a unique situation that is not comparable to employees in private industry. Commonly in government contracting, companies are required to re-compete for their work every five years. Often, a company's contract with the government is awarded to a different contractor, and the employees who had been working on the contract suddenly find themselves jobless. Such employees are then at the mercy of the newly-awarded contractor: their position with their former employer has been eliminated and they are given the option of either becoming unemployed, or accepting whatever compensation the new awardee offers them.

Provisions such as FAR 52.222-46 and E.O. 14055 serve to protect employees of government contractors from the unfair lowering of their wages. Unlike in private industry, the consideration of an applicant's compensation history is required in order to protect the employee from the disadvantages they will suffer if "wage busting" is permitted to occur. Employees of government contractors therefore ***benefit*** from provisions such as FAR 52.222-46 and E.O. 14055, which mandate the consideration of an applicant's compensation history when setting their compensation.

In short, the justification for the Proposed Rule rests upon the incorrect assumption that strategies effective in private industry will be similarly effective in the realm of government contracting. However, this assumption fails to consider the many complexities and influences unique to government contracting that invalidate the justification for the Proposed Rule. As a result, we urge the FAR Council to remove the prohibition on soliciting or considering compensation history, as this aspect of the rule will do more harm than good to government contractor employees.

D. The Proposed Rule Will Have a Detrimental Impact on the Government's Ability to Retain an Experienced Workforce and Receive Informed and Realistic Proposals

In the normal course of re-competitions for government contracts, particularly those for which the services are performed on government facilities, the government expects benefits from the experienced workforce remaining with the contract, regardless of any change in the prime contractor. This retention of knowledge and expertise, as well as the continuity of personnel, is highly valued and incentivized through evaluation criteria in most solicitations. This is all the more essential for service contracts at government bases and facilities in remote locations. The Proposed Rule would have the unintended likely consequence of removing essential knowledge and consideration of the minimum compensation levels necessary for the government to maintain its skilled contractor workforce.

Further, the government benefits from competitions based on informed and realistic proposals. Proposals developed without insight into compensation history essential to retain and maintain a workforce poses both evaluation and performance risks for the government. Unrealistic proposals may require elimination, thereby reducing the beneficial effects of competition. And, depending on the cost structure of the contract, either the contractor or the government will shoulder the added cost burdens of the minimum levels of compensation necessary to continue effective contract performance.

These detrimental impacts directly counter the purported efficiencies and benefits promised by the Proposed Rule.

IV. Key Provisions of the Proposed Rule Are Flawed

Just as the Proposed Rule ignores competing and conflicting regulations imposed on government contractors, the Proposed Rule ignores other important realities of the hiring process for government contractors and subcontractors and fails to provide sufficient clarity as to certain requirements.

A. The Proposed Rule Fails to Account for Common Practices in Acquisitions

The Proposed Rule, as drafted, applies an across-the-board rule that would prohibit contractors and subcontractors from "considering" compensation history when setting the pay of employees who perform work in connection with a covered contract. The Proposed Rule makes no exception for instances in which a contractor ("Buyer") is acquiring another entity ("Seller") via a corporate transaction. In that context, the Buyer routinely receives, as part of the due diligence process, compensation data relating to the Seller's employees. The Buyer then typically will

make offers of employment to the Seller's employees at their existing wage rates. This practice would, under the Proposed Rule, be unlawful. To the extent the FAR Council proceeds with the Proposed Rule, it should specifically exempt from the requirements instances in which the contractor or subcontractor is relying on compensation data provided by another entity in the context of a corporate transaction.

B. The Proposed Rule Fails to Account for Common Practices Involving Deferred Compensation

The FAR Council ignores a second common practice that would be deemed unlawful under the Proposed Rule: the practice whereby a contractor makes an offer to an employee of another contractor and takes into account deferred and/or unpaid compensation from that employee's current employer. Many corporations provide deferred compensation to employees, either in the form of stock awards that vest over a period of time or deferred monetary bonuses paid at the end of a performance period. When employees with unvested stock awards or as-yet-unpaid performance bonuses are considering moving to another employer, the prospective employer often asks about (or the employee volunteers) any such elements of pay and then the prospective employer "buys out" those amounts as part of its offer to the employee, to ensure the employee does not lose such economic rewards. That practice, too, would be unlawful under the Proposed Rule. To the extent the FAR Council proceeds with the Proposed Rule, it should specifically exempt this common practice from the prohibitions of the Proposed Rule.

C. Extending the Salary Range Posting Requirements to All Who Will Perform Work "in Connection With" a Covered Contract Is Impractical

The Proposed Rule would require contractors and subcontractors to provide salary range information to applicants for any role that performs work "on or in connection with" a covered contract. 89 Fed. Reg. at 5850. This requirement appears to draw upon Executive Order 13706 and its implementing rule, issued in 2016, requiring provision of paid sick leave by contractors to employees who perform work "on or in connection with" a covered contract. The Proposed Rule defines "work on or in connection with the contract" as "work called for by the contract or work activities necessary to the performance of the contract but not specifically called for by the contract." 89 Fed. Reg. at 5853.

Extending the salary range posting requirements to all positions that perform work "on or in connection with" a covered contract is impractical for two reasons. First, unlike the paid sick leave requirements, which pertain to existing employees whom the contractor knows are (or are not) performing work on a federal contract, the

Proposed Rule assumes that employers will know, when posting a position, whether the selected applicant will perform work on a federal contract. That assumption is false. For instance, many federal contractors post roles that will be filled by college students upon graduation – an event that may be months or even years away. Those contractors do not know, when posting the position, precisely what team the selected individual may be assigned to and the work he or she may perform. For instance, large technology companies hire hundreds of software developers each year, straight from college. They often make job offers after a summer internship or in the fall of the applicant's senior year—a year or more before the individual may start work. Those technology companies, at the time they make the offer, do not know which part of the business the new hire may join, much less whether the new hire will perform work that supports purely commercial parts of the business or government contracting parts of the business. Simply put, incorporating into the pre-hire/recruiting context a coverage concept – those who "work on . . . a contract" – that was developed and utilized as to existing employees is flawed and unworkable.

Second, extending coverage to posting for roles that perform work "in connection with" a covered contract, as that term is currently defined, is likewise unworkable. Simply defining the phrase "or in connection with" to mean "work activities necessary to the performance of the contract" – without any further explanation – is unhelpful and creates unmanageable ambiguity. For instance, the Proposed Rule fails to explain whether indirect support such as Human Resources, Finance, or Legal personnel who provide advice and support to employees performing work on a contract are engaged in "work activities necessary to the performance of" the contract. Indeed, this definition leaves wholly unclear whether overhead or "back office" functions, which may, on occasion, touch on the covered contract or just support the operations of the company allowing it to fulfill the government contract, fall within the scope of the Proposed Rule.

If this rule moves forward, it should follow the approach taken in the implementing regulation for E.O. 14026 for the federal contractor minimum wage which excludes workers who spend less than 20 percent of their workweek performing in connection with the government contract from being covered. Doing so would allow most management and administrative positions to be excluded and provide some amount of clarity to how to implement this regulation.

D. The Required "Notice of rights" Provision Is Overly Burdensome

The Proposed Rule requires that covered applicants be given notice of the Rule's provisions and includes required notification language that is more than 275 words long. This extensive and mandatory notification language is unnecessarily burdensome, due both to its length and mandated specificity. The notification language includes not just notice of the prior-salary prohibitions and compensation

disclosure requirements, but also a lengthy description of how to file a complaint. Complying with the notification provision of the Proposed Rule will require contractors to craft individualized notices specific to each covered position because the complaint procedure section must include "[t]he agency that issued the solicitation or awarded the contract or order on which this applicant would primarily work." This requires contractors to identify, in each notice, anywhere from one to thirty-eight (38) different federal agencies, depending upon what contracts the particular position may support. This is untenable because, as explained above, a contractor may not know at the time of recruitment what contract or agency a role will support, or a position could support work for multiple agencies. Indeed, because the Rule covers not just positions directly assigned to a contract, but also roles "working in connection with" a contract, a back-office position potentially covered by the Proposed Rule may support contracts in dozens of agencies, requiring the contractor to include a laundry list of agencies in each posting for such roles.

Furthermore, the notification includes language regarding how an applicant can submit a discrimination complaint to the Office of Federal Contract Compliance Programs (OFCCP), thus addressing discrimination complaints not covered by the Proposed Rule and notification to an agency that otherwise has no connection to the Proposed Rule. This additional language is wholly unnecessary. The "Know Your Rights: Workplace Discrimination is Illegal" poster that must be provided to all applicants already details how an applicant or employee can file a complaint with the OFCCP. There is no need to shoehorn such notice into this Proposed Rule as well. To the extent the FAR Council continues to include a notice provision, it should be succinct and generic so that contractors can more easily incorporate it into their job postings or application process. At a minimum, any revised notice provision should not include the identification of the agency that issued the solicitation or awarded the contract.

E. The Complaint Process Does Not Protect a Contractor's Due Process Rights

The process for an applicant to file a complaint mentioned in the required notice and further described in proposed FAR Subpart 22.XX03 provides no opportunity for a contractor to object or have any due process rights. The procedure spelled out in FAR Subpart 22.XX03(b)(1) is merely that "…the contracting agency will review the complaint, consult with the complainant as necessary to confirm the complainant is a covered applicant and take action as appropriate." 89 Fed, Reg. 5852. There is no provision for the contractor alleged to have committed a violation to respond or provide an explanation, nor is the contracting agency directed to consult with the contractor. As these comments have made clear, provisions of this Proposed Rule conflict with already existing contracting requirements. A contractor accused of

a violation(s) must have an opportunity to present their views and their due process rights must be protected.

Furthermore, contractors should not be held liable for the way the contractor's job postings are posted by third party websites such as Indeed, LinkedIn, etc. Chamber members have reported that they have often seen third party job posters scrape info from their company job postings website, and selectively edit or otherwise misrepresent job opening information when posting the opening on their own websites. Contractors ought not be held accountable for how independent job search websites handle their information.

F. The FAR Council's Failure to Define Subcontractor Creates Further Uncertainty for Employers

The Proposed Rule applies not only to prime contractors, but to all "subcontractors," regardless of tier. However, "subcontractor" is not a defined term, creating further confusion for employers regarding the Proposed Rule's application. The terms "subcontract" and "subcontractor" appear in multiple FAR provisions and are defined in many different subparts. Combining the Code of Federal Regulations and the U.S. Code, there are more than 50 definitions of those terms.[5] The FAR Council's failure to even define the term "subcontractor" here leaves contractors without any idea of which down-stream arrangements may be considered "subcontracts." Indeed, each agency may have its own definition.

FAR Subpart 44, Subcontracting Policies and Procedures, defines a "subcontract" as follows:

> *[A]ny contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders;* FAR 44.101.

That same provision defines a "subcontractor" as "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor." *Id.*

[5] Neither "subcontract" nor "subcontractor" is defined in FAR 2.101, which includes the general definitional provisions applicable to the entire FAR. The National Defense Authorization Act ("NDAA") for Fiscal Year 2016 "Section 809 Panel" identified "27 separate, sometimes overlapping, definitions" for "subcontract" and "subcontractor" – ultimately recommending back in 2018 that a uniform definition of subcontract be established in both the U.S. Code and the FAR. That has still not happened.

Another definition, in FAR Subpart 19.7, The Small Business Subcontracting Program, defines a "subcontract" as follows:

> *[A]ny agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.* FAR 19.701.

Moreover, even these two out of many examples of FAR-based definitions are quite different than the way the OFCCP defines a "subcontract":

> *[A]ny agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee) (i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or (ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.* 41 C.F.R. § 60-1.3.

Not only are the definitions different, but the OFCCP also exempts from its subcontract definition "an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE." *Id.*

Other existing definitions of the term "subcontract" do not contain such an exemption. Are such TRICARE agreements covered by this Proposed Rule? The uncertainty caused by the lack of any definition here creates confusion and will likely generate inconsistent application of the term. If the FAR Council proceeds with the Proposed Rule, it should specifically define the terms "subcontract" and "subcontractor" in a manner that is easily understood by contractors and subcontractors.

G. The Proposed Rule's Definition of Compensation, to Include Particular "Benefits," Is Overly Broad and Ambiguous

The Proposed Rule requires that contractors not only provide salary information in every job posting, but also "a general description of the benefits and other forms of compensation applicable to the job opportunity." "Benefits" is undefined in the Proposed Rule and could cover anything from health insurance to childcare subsidies, to free drinks in the breakroom. This ambiguity will yield inconsistent practices across contractors that will only serve to confuse, rather than better inform, job applicants. Furthermore, the Proposed Rule's extremely broad definition of "compensation" includes not only "benefits" but also "vacation and holiday pay," "stock options and awards," "profit sharing, and retirement." Requiring contractors to

include information regarding these elements in every job posting would be unduly burdensome. More importantly, requiring contractors to include information regarding these elements of compensation does nothing to further the purported intent of the Proposed Rule to reduce pay inequities because such benefits typically do not differ from employee to employee within a role. Rather, these benefits are typically offered across the company or, at least, to everyone in a particular position. As such, these components are not driving any pay disparities, and there is no need to detail all of them in every job posting in order to achieve the Proposed Rule's stated goal. Should the FAR Council proceed with the Proposed Rule, "compensation" should be more narrowly tailored to include only base pay, not benefits.

In addition, there are many factors that go into pay and benefits, and strategically, there may be reasons why a business needs to wait to share pay information about a position until the most strategic opportunity to do so during the recruiting process. The proposed rule takes away this business judgment and forces an employer to share pay information at a preset time that fails to account for the nuances of recruiting and execution of business strategy.

H. The Obligation to Detail Predicted Commission, Bonus and Overtime Pay in Every Job Posting Is Unwarranted

The Proposed Rule further requires that "[w]here at least half of the expected compensation for the advertised position is derived from commissions, bonuses, and/or overtime pay, the Contractor must specify the percentage of overall compensation or dollar amount, or ranges thereof, for each form of compensation, as applicable, that it in good faith believes will be paid for the advertised position." This requirement is simply untenable for most positions.

First, many of these elements are unknown at the time a position is advertised. How much a salesperson will earn in commissions may be wholly or largely dependent upon how much they sell or the territory to which they are ultimately assigned. Overtime pay could be minimal or a significant portion of an employee's compensation depending upon how much overtime they are able to work[6]. Bonuses may be based in whole or in part on company performance or other factors that are likely unknown at the time of hire. Employers cannot realistically be expected to be able to estimate all these elements at the beginning of the recruitment process.

Second, these elements of pay are often not discretionary, but rather are either mandated by law (*e.g.*, the FLSA requires payment of time and a half for overtime), or formulaically applied (*e.g.*, commissions or bonuses paid pursuant to an established

[6] With the Department of Labor now engaged in a rulemaking to raise the salary threshold defining who will qualify for overtime pay, many more employees could be eligible for overtime pay, making this requirement that much more unworkable.

commission or bonus plan applicable to all incumbents in a role). Similar to the benefits discussed above, these elements of compensation are not based on subjective decision making and are not the genesis of pay disparities. As such, including them in the Proposed Rule does not further the FAR Council's stated goal.

Third, the Proposed Rule does not include any exception for job postings for senior leadership positions. The bonus structure for such positions is often highly confidential and propriety information. Such bonuses are also usually highly individualized and may include components such as deferred compensation, as discussed above. It is unreasonable to expect contractors to be able to quantify these amounts in each job posting.

For all these reasons, to the extent the FAR Council proceeds with the Proposed Rule, "compensation" should be limited to base pay.

I. The Proposed "Severability" Provision Is Meaningless

In Section VI, the FAR Council claims that "both the proposed compensation history ban and compensation disclosure requirement, separately and independently," would promote efficiency in the procurement process and, on that basis, asserts that "if any portion of the proposed policy or implementing rule were held to be invalid or unenforceable . . . that portion shall be severable from the remainder of the policy or rule." 89 Fed. Reg. at 5849-50. The FAR Council should delete that provision from any Final Rule because severability is a question for the courts, not the FAR Council, to decide, nor would any court be bound by a FAR Council declaration.

V. The "Identified Costs" for this Proposed Rule Are Fatally Flawed

The "Identified Costs" for this Proposed Rule used to underpin the Paperwork Reduction Act analysis are based on faulty assumptions regarding the time contractors will spend ensuring compliance, the wage rates of the individual employees who will need to dedicate that time, and the repeat nature of the efforts that contractors must undertake. They also do not account for the time contractors will need to spend de-tangling this Proposed Rule's requirements with the requirements of other, conflicting provisions.

A. The Identified Costs Do Not Account for Time Spent Attempting to Reconcile the Rule with Conflicting Provisions

As discussed in Section III above, there are multiple situations in which the requirements of the Proposed Rule could create a direct conflict with the requirements of FAR 52.222-46 and E.O. 14055. Contractors and subcontractors will be required to analyze these competing provisions on a case-by-case basis to assess the extent to which each individual situation creates a conflict between the Proposed

Rule and one or more other provisions applicable to government contractors. This analysis could include obtaining the advice and assistance of counsel with respect to navigating the conflicting provisions, and would likely also require the involvement of company executives who will be required to make business decisions regarding the provisions with which the company will comply, in situations where it is impossible to comply with both.

In situations where a new contractor is preparing a proposal in hopes of winning a follow-on contract, the contractor will be required to consult with counsel to determine how, and to what extent it may—or must—seek to recruit incumbent employees, and how to do so while still complying with the Proposed Rule as well as conflicting provisions of FAR 52.222-46 and E.O. 14055.

After award, contractors may face the significant additional costs of litigation in situations where the company's award is challenged on the basis of its decision to comply with the Proposed Rule and failure to comply with FAR 52.222-46. Indeed, *even if* the contractor has found a way to navigate both provisions to allow for simultaneous compliance, other disappointed offerors are likely to nevertheless raise protests alleging an *apparent* failure to comply with FAR 52.222-46 based solely upon the facial conflict between the two provisions. In such situations, the costs of defending against such a protest could be well over $100,000 per procurement. Such costs will be recurring, as each procurement will involve a different set of facts and will provide another opportunity for a competitor to raise these arguments. On this basis alone, the significant costs imposed by this proposed rule cannot be considered reasonable.

B. Estimated Hours Estimates Are Unrealistic

The Proposed Rule estimates that each Active SAM Registrant[7] will spend one (1) hour "on general familiarization with the rule," two (2) hours on "review and modification of policies," and "three (3) hours on "preparation and training." 89 Fed. Reg. at 5848-49. In short, the FAR Council estimates that contractors will spend a total of just six (6) hours complying with the requirements of the Proposed Rule. *Id.*

These estimates grossly underestimate the time contractors will need to spend preparing for, and ensuring on a go-forward basis, compliance with this Proposed Rule. Under this Proposed Rule, the contemplated compensation disclosure must include several data points—including the expected salary or salary range, a description of benefits, and, where applicable, an estimate of any commissions, bonuses, and/or overtime pay. Performing the analyses required to develop these

[7] Notably, the Proposed Rule applies to other entities that are not registered in SAM, so the FAR Council's estimate of the overall costs of compliance are understated because it ignores the compliance time required of those entities.

estimates will require significantly more than the six (6) total hours estimated by the Proposed Rule, particularly for small businesses, which may not have established pay scales, and for contractors with highly diversified workforces which will need to perform significant analyses to ensure that pay ranges are accurate for a large number of positions.

In addition, most companies now have automated application systems. Requiring employers to place salary ranges would require another change management process just to implement the technology fix, which is only done after a company spends the more than six hours to determine how best to implement the requirements. Finally, there is no estimation of the ongoing time required to ensure future requisitions are accurate given that wages and benefits will be constantly changing. This would require new coding every time changes need to be made to wages.

C. The Proposed Rule Uses Inaccurate Wage Rates

In conducting its analyses of Identified Costs, the FAR Council improperly assumes that each of these review tasks will be performed by personnel in the "Office and administrative support occupations," alone, without any internal or external assistance, and without any consideration of overhead costs associated with those personnel, and therefore assigns an hourly rate of $32.38. This is a deeply flawed assumption and is contradicted by employer experience. Analysis of any Final Rule, review and modification of policies, and implementation of those modified policies (*i.e.* "preparation and training") will not be performed by administrative support staff, but will in fact be performed by Legal, Compliance, and Human Resources professionals. As the preceding sections of these comments indicate, compliance with this Rule would not be a passive, one-time endeavor by contractors; instead, contractors will need to navigate a complex set of interconnected and at times conflicting obligations, likely in consultation with both in-house and outside counsel. Because the FAR Council has not included the wage rates of senior human resources, HRIS and information technology personnel, or legal professionals in the compliance process, the assumption that the wage rate of an Administrative Support personnel alone is required, is flawed. The FAR Council's additional failure to consider overhead costs only undermines further its PRA analysis.

D. Costs Associated with The Proposed Rule Will Be Recurring

The Proposed Rule contemplates that each of these Identified Costs will be a one-time investment by contractors. This assumption is faulty. To the contrary, because this Proposed Rule would create an ongoing obligation, a contractor will necessarily incur costs each and every time it creates and posts a new open position. As the Proposed Rule notes, a "disclosure must indicate the salary or wages, or range

thereof, that the contractor in good faith believes that it will pay for the advertised position and may reflect, as applicable, the contractor's pay scale for that position, the range of compensation for those currently working in similar jobs, or the amount budgeted for the position." 89 Fed. Reg. 5845. Those underlying factors are fluid, as contractors' workforces change, budgets adjust, and wages fluctuate based on the market. Accordingly, compliance with this obligation will require contractors to perform real-time analyses for every new open position, because the salary range identified must, in good faith, be based on the position opened at the time the position is opened. For many contractors, ensuring ongoing compliance with these obligations would likely require significant, near-constant attention from experienced HR and legal professionals. That level of effort and cost is severely underestimated by the FAR Council's estimate.* * *

For the reasons set forth above, the Chamber urges that the FAR Council rescind the Proposed Rule or, at a minimum, overhaul the Proposed Rule to account for all the defects noted above.

Sincerely,

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