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March 21, 2022

Mr. Crandall Watson
Chief, Procurement Policy Division
Office of Contracting and Procurement
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

By electronic submission: www.regulations.gov

Re: Proposed Amendments to Agriculture Acquisition Regulations; 87 Fed. Reg. 9005 (February 17, 2022); RIN 0599–AA28

Dear Mr. Watson:

The U.S. Chamber of Commerce (Chamber), appreciates the opportunity to comment on the Agriculture Department's (USDA) proposed amendments to the Agriculture Acquisition Regulation (AGAR), 87 Fed. Reg. 9005 (February 17, 2022). In particular, the Chamber strongly opposes USDA's proposed new AGAR contract clauses requiring contractors to report labor law violations for themselves as well as all tiers of subcontractors and suppliers, and any measures taken to remedy labor law violations by the contractor and any tier of subcontractor. These provisions are not supported by any authority and USDA has provided no explanation, supporting data, or context to justify them. In addition, they will create significant burdens and False Claims Act exposure for companies bidding on or working on USDA contracts. Accordingly, the Chamber believes these proposed sections must be withdrawn.

A significant portion of Chamber members are federal contractors and subcontractors. The Chamber also represents many state and local chambers of commerce and other associations who, in turn, represent many additional contractors and subcontractors. Many of these contractors work on contracts governed by the AGAR.

The labor law violations sections (Subpart 422.70—Labor Law Violations; section 452.222-70 (Labor Law Violations contract clause); section 452.222-71 (Past Performance Labor Law Violations contract clause))[1] are similar to a contract clause USDA attempted to create in 2011 through a direct final regulation.[2] After receiving strongly negative comments, USDA withdrew the provision. Here, USDA is including the labor law violations

[1] See 87 Fed. Reg. 9012, 9017.
[2] The trigger for reporting in the 2011 direct final regulation was "when formal allegations or formal findings of non-compliance of labor laws are determined," 76 Fed. Reg. 74723 (December 1, 2011), while the trigger for reporting in this version is "when adjudicated evidence of noncompliance occurs" 87 Fed. Reg. 9017. Problems with this trigger are discussed *infra.* The 2011 regulation did not include a Past Performance Labor Law Violations clause.

clauses amidst an array of other benign AGAR code changes as if the new labor law violations requirements were just an update or other innocuous adjustment. This is not at all the case; these are new code sections with no corresponding FAR sections, and no antecedents in AGAR code. While USDA is pursuing these changes through a traditional NPRM, instead of a direct final regulation, the effect is still the same—USDA is attempting to create a new requirement where nothing of the kind previously existed and without stating any basis or substantive authority.

The Proposed New Labor Law Violations Sections Are Not Authorized, or Justified, and Their Impact is Not Analyzed

USDA provides no specific authority for including the new labor law violations code sections. The statutory authority cited by USDA for the rulemaking, 5 U.S.C. 301 and 40 U.S.C. 486(c), merely provide general authority for the department to proscribe regulations necessary for the operations of the department, and authorize regulations necessary to effectuate procurement and supplying. Nowhere is there statutory authority that would suggest creating a burdensome new reporting requirement related to labor law violations. Indeed, if such a provision was necessary, it would have been included in the FAR previously and not left to USDA to create.

Furthermore, USDA provides no explanation or justification for why these provisions are necessary. The only explanation in the preamble for the overall rulemaking is that "[t]he Department of Agriculture (USDA) identified parts of the AGAR which required updating or streamlining based on updates to acquisition law, regulations, and internal USDA policies. USDA's review indicated that almost all parts of the AGAR required revision. Accordingly, USDA has reviewed and revised substantially all parts of the AGAR." 87 Fed. Reg. 9005. This suggests that all of the sections being revised previously existed and are just being "updated or streamlined." The proposed labor law violations sections are entirely new and not at all consistent with mere updating and streamlining.

Finally, and consistent with not highlighting the new labor law violations sections, there is no discussion, recognition, or analysis of the impact and burden these new requirements will impose. This impact will be substantial as the Labor Law Violations contract clause states that "In accepting this contract award, the contractor certifies that it is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors of any tier, and suppliers, are also in compliance with all applicable labor laws."[3] 87 Fed. Reg. 9017. The contractor is to collect any information about

[3] The full list of labor laws is: (a) The Fair Labor Standards Act; (b) The Occupational Safety and Health Act; (c) The Migrant and Seasonal Agricultural Workers Protection Act; (d) The National Labor Relations Act; (e) The Davis-Bacon Act; (f) The Service Contract Act; (g) Executive Order 11246 (Equal Employment Opportunity); (h) Section 503 of the Rehabilitation Act of 1973; (i) The Vietnam Era Veterans' Readjustment Assistance Act; (j) The Family and Medical Leave Act; (k) Title VII of the Civil Rights Act of 1964; (l) The Americans with Disabilities Act of 1990; (m) The Age Discrimination in Employment Act of 1967; (n) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); (o) Equivalent State laws, as defined by the Secretary of Labor in guidance. (p) Executive Order 13627 (Strengthening Protections Against Trafficking in Persons in Federal Contracts). 87 Fed. Reg. 9017

noncompliance from its subcontractors and suppliers and report this information regarding legal issues being addressed by its subcontractors and suppliers to the U.S. Department of Agriculture thereby compelling Department of Agriculture prime contractors to monitor and report on business activities of its vendors which have no relationship to the contract being awarded.. For a large company, determining whether all subcontractors of any tier, as well as suppliers, are in compliance is likely to be a mammoth task. In addition, there will be considerable confusion about who is covered: how is supplier defined? Would fuel suppliers to a fleet of trucks used to deliver goods be considered a supplier?

Even for the contractor itself, determining compliance with all the labor laws involved could be a tremendous challenge considering the various divisions and subdivisions that could be involved in compliance issues with laws such as the Fair Labor Standards Act or Occupational Safety and Health Act, to name just two. In addition to the array of federal labor and employment laws, contractors are to report any "adjudicated evidence of non-compliance" with "equivalent state laws" for the contractor or any subcontractor or supplier. The term "adjudicated evidence of non-compliance" is not defined in the proposal nor does it appear in any of the statutes or regulations underpinning the listed labor laws.[4] This will add further burden and complications to submitting the information.

Not only do contractors have to provide any information relating to "adjudicated non-compliance" for all the subcontractors and suppliers, but the offeror must also "certif[y] to the best of the offeror's knowledge and belief, that they, and any subcontractor at any tier, are in compliance with all previously required corrective actions for adjudicated labor law violations." This information will be taken into consideration by the USDA contracting official to "determine whether a contractor is a responsible source that has a satisfactory record of integrity and business ethics." *Id.* This information is to be updated every six months by the contractor and all subcontractors. Again, the burden for developing this information related to remedial and corrective measures will be substantial, yet USDA provides absolutely no discussion or analysis describing this impact.

Furthermore, there is no time limit for capturing when the corrective actions took place. How far back does a contractor or subcontractor have to go to capture a corrective action? Is it only during the performance of the contract? The absence of any further explanation for these provisions will lead to tremendous confusion and uncertainty.

Adjudicated Evidence of Noncompliance Is a Vague and Unknowable Term

As indicated earlier, the trigger for reporting a labor law violation is "when adjudicated evidence of noncompliance occurs." *Id.* This term is not a known term of law, nor is it further defined or explained. Adjudication of a violation implicates many different types of procedures across the different labor and employment laws listed and among the states and localities which have their own related laws and procedures. While this seems

[4] See FN 3, *supra*.

to suggest some level of due process protection for the employers involved, as compared to the mere "formal allegations or formal findings" from the 2011 regulation, what level of due process is not clear. USDA's reliance on this novel and undefined term to trigger reporting of labor law violations will create confusion and uncertainty and in fact is perhaps even more expansive than the 2011 requirements.

For example, would a contractor be required to report a violation under OSHA if a citation had been challenged at the administrative law judge level (the first level of adjudication) but the company intended to appeal it further to the Occupational Safety and Health Review Commission and then to federal court? If a company settles an OSHA violation noted during an inspection but files a notification for modification of abatement, is that deemed a reportable event under the proposed AGAR clause? If the Equal Employment Opportunity Commission (that enforces Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act) declines to proceed with a discrimination charge but the employee has not acted on their Notice of Right to Sue, would that be considered adjudicated? Or what is the status if a charge is settled or mediated before any agency determination? Similarly, what level of adjudication triggers reporting of an unfair labor practice charge filed with the National Labor Relations Board? ULPs are a frequent pressure tactic of unions when seeking to unionize a company or during contract negotiations. Furthermore, every statute cited in the list of reportable labor law violations has its own investigation, enforcement and remedial provision to be enforced by a government agency or a private allegedly aggrieved individual or party. Thus, there is no void left to be filled by superimposing a non-related procurement obligation on top of an already long-standing and legally defined enforcement process for labor and employment laws dating back to the 1930's. There is no reason to believe Department of Agriculture contracting officers bring any special expertise to this process.

The Labor Law Violations Provisions Will Expose Contractors to False Claims Act Actions

The proposed contract clause for labor law violations explicitly states that "[t]he Department of Agriculture considers certification under this clause to be a certification for purposes of the False Claims Act." *Id.* The False Claims Act (FCA) allows private persons to file suit for violations of the FCA on behalf of the government, or the government to file an action itself. A suit filed by an individual on behalf of the government is known as a "*qui tam*" action, and the person bringing the action is referred to as a "relator." The FCA provides for severe sanctions including treble damages and potential debarment from government contracts.

If adopted, the proposed contract language will impose new certification requirements on USDA contractors and will expose them to potentially increased FCA liability for novel claims neither defined nor grounded in statutory authority. For example, contractors may have to consider whether to conduct additional investigations into their subcontractors' and suppliers' operations in order to certify their compliance with labor laws. These requirements will undoubtedly further cause roadblocks to efficient

government procurement by adding time delays, legal impediments and increased costs. Considering the many layers of operations some companies have, and the need to know everything about all subcontractors' and suppliers' labor law violations records (including state violations), there is extremely high potential for FCA claims and exposure due to the proposed contract clause.

This heightened exposure to FCA claims would provide tremendous opportunities to organized labor and other groups to wage campaigns against USDA contractors and seek greater leverage to force them to agree to a variety of demands. Such tactics are already used during organizing campaigns and contract negotiations.

USDA's NPRM Suffers from Several Significant Rulemaking Flaws

As a result of conducting no analysis on the impact of the proposed labor law violations provisions, the NPRM does not comply with Executive Order 12866, the Regulatory Flexibility Act, and the Paperwork Reduction Act. In addition, the comment period of 32 days is inadequate given the necessity to determine the burdens and complications that would result from the proposed labor law violations provisions.

The rulemaking does not comply with E.O. 12866.

E.O. 12866 requires that agencies submit their proposed rules to the Office of Information and Regulatory Affairs (OIRA) so that they can be reviewed to see if they are significant and therefore qualify for interagency review.[5] USDA claims that this rulemaking is merely "an internal rule of agency procedure and therefore not a significant regulatory action under Executive Order 12866." 87 Fed. Reg. 9005. While the bulk of the code amendments in this rulemaking may only be internal rules of agency procedure, the labor law violations provisions most certainly are not. Regardless, the determination of whether this rulemaking is significant is OIRA's to make, not USDA's. This rulemaking should have been submitted to OIRA for review, most notably for an assessment of the costs and benefits of the labor law violations provisions.

The rulemaking does not comply with the Regulatory Flexibility Act.

Similarly, the Regulatory Flexibility Act (RFA) generally requires agencies to prepare an Initial Regulatory Flexibility Analysis (IRFA) for any rule subject to notice and comment procedures under the Administrative Procedure Act. Among other components, an IRFA is to contain:

(1) a description of the reasons why action by the agency is being considered;
(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

[5] *See,* OIRA FAQs, "What does it mean when a regulatory action is determined to be significant?": "…OIRA is responsible for determining which agency regulatory actions are 'significant' and, in turn, subject to interagency review." available at https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp (accessed March 18, 2022).

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record… 5 U.S.C. 603(b).

Agencies are relieved of this requirement if they can certify that the proposed regulation will not "have a significant economic impact on a substantial number of small entities" and support it with "a statement providing the factual basis for such certification." 5 U.S.C. 605(b). In this rulemaking, USDA relies on its assertion that the entire rulemaking merely amends and updates the AGAR sections to be consistent with the FAR, and therefore certifies that the rulemaking qualifies for the exception to conducting an IRFA. As noted throughout, the labor law violations provisions are *de novo* provisions, and will, in fact, impose significant burdens on many small businesses involved in USDA contracts. In the absence of any data or analysis on this point, USDA's self-serving assertion that the rulemaking will not have "a significant economic impact on a substantial number of small entities" does not qualify as a factual basis necessary to support claiming the exception to conducting an IRFA.

The rulemaking does not comply with the Paperwork Reduction Act.

Relatedly, USDA claims the proposed rule "does not contain any information collection requirements that require approval of the Office of Management and Budget under the Paperwork Reduction Act." 87 Fed. Reg. 9005. Again, USDA relies on the assertion that the entire rulemaking contains no such information collection because it merely amends and updates AGAR sections to be consistent with the FAR.

However, when the information is required to be *submitted in response to a rule that is applicable to the general public* rather than any specific entities, OMB clearance is required regardless of the anticipated number of respondents.

Generally, *any information that the public is asked to provide should be presumed to require OMB clearance unless OMB makes a determination to the contrary.*

Under the PRA, *"the public" includes individuals, partnerships, corporations*, universities, nonprofit organizations, State, local, and tribal governments and agencies, and other associations and organizations, whether foreign or domestic.[6]

USDA's claim entirely ignores the new requirement for contractors and offerors to submit to USDA contracting personnel any violations of the listed labor and employment

[6] Paperwork Reduction Act Guide, version 2.0, United States Office of Personnel Management, April 2011, p. 6; available at https://www.opm.gov/about-us/open-government/digital-government-strategy/fitara/paperwork-reduction-act-guide.pdf (accessed March 18, 2022), emphasis added.

laws, and any corrective actions taken with respect to violations of these laws. Such submissions are precisely the type of information collection for which the PRA requires clearance and approval from OMB.

The 32-day comment period is inadequate for interested parties to develop meaningful comments.

By burying the labor law violations provisions in the midst of an array of otherwise innocuous AGAR code changes, USDA seems to be attempting to get this inserted without giving it proper attention and notice. While 32 days may be adequate to respond to the other items in the rulemaking, it is wholly inadequate for parties affected by and interested in the labor law violations provisions. As described in these comments, these provisions would create tremendous and disruptive burdens for USDA contractors and those bidding on USDA contracts. Thirty days is generally considered the minimum comment period for any proposed regulation, but the priority is that the agency provide interested parties a meaningful opportunity to comment. USDA's 32-day comment period fails to provide that opportunity.

Conclusion

USDA's proposed contract clauses requiring submission of labor law violations by any contractor and all tiers of subcontractors along with suppliers, along with submissions of corrective measures by all tiers of contractors will impose significant burdens on contractors and offerors. These provisions will also create new exposure under the False Claims Act. Finally, USDA's rulemaking does not satisfy various rulemaking requirements. For all of these reasons, the labor law violations provisions must be withdrawn from USDA's rulemaking to amend the AGAR.

Sincerely,

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U.S. Chamber of Commerce