PROCUREMENT ROUND TABLE

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April 22, 2022

Tiffany J. Taylor
Senior Procurement Executive (SPE)
Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

Dear Ms. Taylor:

The Procurement Round Table (PRT) is a non-profit, non-partisan organization comprised of 60 former senior federal acquisition officials and experts focused on advancing the practice of acquisition across government. Given the centrality of acquisition to the right functioning of government, our goal is to provide whatever assistance we can to leaders charged with executing this critical function.

It is in this spirit that we share our views on USDA's February 17, 2022, proposed amendments to the department's acquisition regulations that includes proposed new certifications regarding compliance with federal labor laws. 87 FR 9005, February 17, 2022, https://www.govinfo.gov/content/pkg/FR-2022-02-17/pdf/2022-01751.pdf. We endorse efforts to ensure that the government contracts only with responsible companies and that the acquisition system has the tools and capacity to achieve that goal. Those tools must facilitate fair and consistent decision-making by contracting officers. We do not believe the proposed Agriculture Acquisition Regulations (AGAR) rule meets those standards.

1. Fair and consistent application of the rule would require a degree of legal and analytical expertise that goes beyond that which contracting professionals are, or should be expected to be, trained or prepared for.

2. The proposed rule sets forth broad requirements for reporting and vague directions for award decisions without providing any objective criteria by which contracting officers can make a reasoned decision as to how to use or apply the information. It provides no framework to assist a contracting officer in assessing which violations, or types of violations, are unintentional or administrative in nature versus those that might indicate a willful act. Nor does it provide any framework by which a contracting officer can assess the relative severity of different kinds of violations. Minor infractions could easily have the same severe penalties as gross violations.

3. The lack of a logical process for making important judgments is exacerbated by the complexity of several of the covered laws. As one example, implementation of the Service Contract Act is highly complex, and implementation is a common, ongoing challenge for federal contracting officers and companies. Companies must often make judgments as to the appropriate wages and benefits for a position when the work involved is not explicitly reflected in the Department of Labor Directory of Occupations. When those (or government) wage determinations are found to be incorrect, sometimes months or more after the fact, workers are required to be compensated. Often, there is little evidence or suggestion of intentionality. Yet, each of these administrative errors are technical violations of the law and reportable under the proposed rule. Because the rule provides no objective criteria or framework for determining the relative severity or intent associated with different kinds of "violations," the result could easily be the exclusion of ethical, high-performing, companies from future government procurements. It will cause additional delays in already lengthy procurement lead times and likely increase protests and litigation.

4. Where questions of business ethics or responsibility arise, the analyses and decision-making are normally conducted by trained agency suspension and debarment officials, or by the Department of Labor, which is statutorily responsible for the enforcement of labor laws.

5. A rule with this impact and scope ought not be promulgated by one agency but should be considered and debated governmentwide. Contractor suspensions have government wide impact because contractors often compete for work at numerous federal agencies and contractor exclusion from government contracting can have dire consequences for more than one agency.

6. The complexity and ambiguity of this proposed rule will add further compliance risk and burden to the performance of any contract containing the proposed clauses and will surely discourage nontraditional and innovative commercial companies, that currently do not do business with the Government, from bringing their new technologies and innovations to Federal contracting.

We are deeply concerned that, if adopted unchanged, implementation of the proposed rule will place inordinate additional pressures on already over-burdened Department of Agriculture contracting officers (and those of other agencies), that they will have little choice but to take the path of least resistance; i.e., excluding companies that appear to have a large number of "violations," regardless of the nature, severity, or circumstances surrounding them, or to their relevance to government contracting at all. Contracting officers do not have the time, resources or expertise to conduct these reviews and analyses.

We believe this proposal will fail to achieve its intended objectives and would set an unusually troublesome precedent. It will also further complicate the acquisition system and overly burden the acquisition workforce and the Labor Department Office workforce that is actually responsible for enforcement of the applicable labor laws.

If you have questions or wish to discuss this further, please do not hesitate to contact the undersigned.

Sincerely,

Terry Raney

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