

48 CFR 422 Direct Final Rule
48 CFR 422 Proposed Rule

Office of Procurement and Property Management;
Agriculture Acquisition Regulation,
Labor Law Violations

United States Department of Agriculture
Office of Procurement and Property Management (OPPM)

76 Fed. Reg. 74,722-23, 74,755-56 (December 1, 2011)

RIN 0599-AA19

January 24, 2012

Comments of the Equal Employment Advisory Council

The Equal Employment Advisory Council (EEAC) respectfully submits the following comments in response to the United States Department of Agriculture (USDA), Office of Procurement and Property Management's (OPPM) Direct Final Rule and Proposed Rule (hereinafter "the proposal") amending the Agriculture Acquisition Regulation (the "AGAR") to add a new contract clause at subpart 422.70 entitled "Labor Law Violations." EEAC's comments are significantly adverse to the Direct Final Rule and Proposed Rule. For the reasons presented below, we respectfully request that both be withdrawn.

Summary of EEAC's Comments

The new contract clause would require all USDA contractors to certify that they, their subcontractors at any tier, and their suppliers are in compliance with "all applicable labor laws," subject the contractor to liability under the False Claims Act (FCA) if their certification is incorrect, and require contractors to report promptly to the contracting officer "formal" allegations or formal findings of non-compliance of labor laws.

Contrary to USDA's characterization of this rulemaking as "a non-controversial action" upon which USDA "expects no adverse comments," the proposal is highly controversial, and is likely to solicit other significant adverse comments in addition to those being submitted by EEAC.

For example, the sheer breadth and practical infeasibility of the certification requirement, coupled with the specter of potential False Claims Act (FCA) liability, makes the proposed contract clause onerous and punitive in the extreme. The reporting requirement is also vague and unduly burdensome, and potentially exposes contractors to “blacklisting” by USDA contracting officers.

In EEAC’s view, USDA’s proposal cannot be fixed by merely addressing in some manner the concerns we identify in these comments. Rather, EEAC submits that the proposal is fatally flawed and should be withdrawn.

EEAC’s Interest in the Rulemaking

EEAC is a national nonprofit association of major employers formed in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC’s membership is comprised of nearly 300 of the nation’s largest private sector companies, collectively providing employment to more than 20 million people throughout the United States alone. EEAC’s directors and officers include many of the nation’s leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation of fair employment policies and practices. EEAC’s members are firmly committed to the principles of equal employment opportunity.

EEAC’s members are major U.S. companies that are subject to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651 *et seq.*, the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, the Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101 *et seq.*, the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, the Employee Polygraph Protection Act (EPPA), 29 U.S.C. §§ 2001 *et seq.*, and other traditional labor laws. Some also are subject to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. §§ 1801 *et seq.*, the Federal Mine Safety and Health Act (MSHA), 30 U.S.C. §§ 801 *et seq.*, the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. §§ 901 *et seq.*, the Railway Labor Act (RLA), 46 U.S.C. §§ 151 *et seq.*, the Walsh-Healy Public Contracts Act (PCA), 41 U.S.C. §§ 35 *et seq.*, the McNamara-O’Hara Service Contract Act (SCA), 41 U.S.C. §§ 351 *et seq.*, the Davis-Bacon Act (DBA), 40 U.S.C. §§ 3141 *et seq.*, and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. §§ 3701 *et seq.* EEAC members also are subject to labor laws in the individual states.

In addition, all of EEAC’s members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, the Civil Rights Act of 1866, 42 U.S.C. § 1981 (§ 1981), the Civil Rights Act of 1991 (CRA 1991), the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, the Equal Pay Act (EPA), 29 U.S.C. § 206(d), the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.*, the Immigration

Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, and myriad state and local laws that ban discrimination on various grounds.

Further, the vast majority of EEAC members are federal government contractors subject to the equal employment opportunity (EEO) and affirmative action (AA) requirements of Executive Order (E.O.) 11246 and its implementing regulations, Sections 503 and 504 of the Rehabilitation Act of 1973 (“Rehab Act”), 29 U.S.C. §§ 793-794, and the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA), 38 U.S.C. § 4211 *et seq.* Federal agencies with which EEAC members contract include the USDA.

Most EEAC members also are subject to § 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, as well as many of the myriad other federal laws that provide “whistleblower” retaliation protection.

EEAC’s members thus have a substantial interest in USDA’s proposal. Presented below are our specific comments.

The Term “All Applicable Labor Laws” Is Impossibly Vague

The proposal would add to the AGAR a subpart and contract clause, to be included in all USDA contracts that exceed the simplified acquisition threshold, including all contract options, requiring contractors to certify that they, their subcontractors, and their suppliers are in compliance with “all applicable labor laws.” The proposal does not define the key term “all applicable labor laws.”

At a minimum, we surmise, the term “all applicable labor laws” would be read to encompass the NLRA and RLA. Further, it is reasonable to assume that USDA intends the term also to include the FLSA, the OSH Act, the WARN Act, MSPA, MSHA, the LHWCA, the PCA, the SCA, the DBA, and the CWHSSA, as well as corresponding labor laws in various states.

Under common usage, the term “labor laws” normally is not read to include those laws generally referred to as “employment laws,” for example, those laws that prohibit discrimination in the workplace based on a protected characteristic. Without any explanation from the USDA as to how it defines this key term “all applicable labor laws,” however, we presume that USDA could read it broadly to take in the many other federal laws that constitute “employment laws,” such as Title VII, § 1981, CRA 1991, the ADEA, the ADA, the EPA, IRCA, and the various whistleblower protection laws, plus the many similar state and local laws. Conceivably, it could even be read to include the EEO/AA laws and requirements applicable only to federal contractors: E.O. 11246, the Rehab Act, and VEVRAA.

Indeed, other language in the proposal suggests that USDA does intend the proposal to reach this broadly. The final sentence of the contract clause states that USDA will “cooperate as appropriate regarding labor laws applicable to the contract which are enforced by other agencies.” The reference to “other agencies,” in the plural, confirms that USDA is talking about more than just the National Labor Relations Board, which enforces the NLRA.

Accordingly, the potentially all-encompassing and undefined term “all applicable labor laws” gives the proposal an incredibly broad reach.

The Certification Requirement Is Infeasible

As a practical matter, it would be infeasible for any large company to certify with any certainty that at any given moment, it is 100% in compliance with “all applicable labor laws,” however defined. EEAC member companies, as noted above, are committed to maintaining fair employment practices, including legal compliance. Among other things, EEAC member companies post the various notices required by federal and state agencies concerning federal and state employment requirements. They maintain fair employment policies and practices, train supervisors in the complexities of federal and state law, and enforce these laws within the company. EEAC member companies also maintain internal procedures enabling employees to report concerns including potential legal violations. They conduct prompt investigations whenever issues arise, and take appropriate action on the results.

Nevertheless, even the most conscientious company cannot possibly know for sure whether or not, perhaps at some lower level of management in a business unit or far-flung location, some violation of some law has occurred. Many labor and employment laws are complex and nuanced, as evidenced by the plethora of regulations, guidance documents, and court decisions that impact employers’ compliance obligations. We respectfully submit that a large employer that is subject to the federal laws listed above and which operates in multiple states is never going to be able to *certify* that it is in 100% compliance with “all applicable labor laws,” however defined.

The practicality of being able to accurately certify that a company’s subcontractors and suppliers are likewise in compliance is even more remote. Contracts often involve subcontracts at multiple tiers. While contractors can insist upon contract clauses with their subcontractors mandating certain requirements, they lack the ability to actually police their subcontractors’ and suppliers’ employment practices. Moreover, although USDA’s proposal would require the contractor to certify subcontractor and supplier compliance only “to the best of its knowledge,” this phrase may not, and probably would not, absolve a company, *e.g.*, in the unusual case in which some supervisor in a remote location had actual knowledge that a subcontractor or supplier had violated a law, even where company management had none.

Further, the proposal does not address the situation in which a contractor, subcontractor or supplier stands accused of a violation, the employer denies the violation, and the dispute remains unresolved. Virtually every large employer has at least one open labor or employment claim at any given time, and most have more. If a company in this situation certifies to USDA that it is in compliance with “all applicable labor laws” and is later ruled to be in violation, would the company be deemed to have submitted a false certification?

While it may be a worthy ideal, requiring companies to certify that they, not to mention their subcontractors and suppliers, are in compliance with “all applicable labor laws” is in fact a practical impossibility.

Imposing False Claims Act Liability on Contractors Would Be Onerous and Punitive

According to the proposal, a certification under the new contract clause would be a certification for purposes of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. The FCA is a Civil War-Era law that was enacted to combat widespread fraud against the U.S. War Department involving everything from overbilling to substandard munitions and rotten rations. The FCA prohibits fraud by federal contractors and others who receive money from the government. It allows the government to bring a lawsuit for up to three times the amount of actual damages resulting from the fraud, as well as for civil penalties against the violator. It also allows an individual to bring a lawsuit, called a *qui tam* suit, on the government's behalf, against a company that allegedly committed fraud against the government, and if successful, to keep a portion of the award.

Under USDA's proposal, any company that certifies that it, and its subcontractors and suppliers, are in compliance with the labor laws and turns out to be mistaken can be liable to the government under the False Claims Act and the substantial penalties available thereunder. It also opens up yet another avenue for putative whistleblowers to go bounty hunting among federal contractors.

Given the potential breadth of the proposed contract clause, and the practical impossibility of the certification requirement, exposing a contractor to liability for falsely certifying simply adds injury to insult, and renders USDA's proposal especially onerous and punitive.

The Reporting Requirement Is Vague and Burdensome

According to the proposal, under the contract clause, "[t]he contractor is responsible for promptly reporting to the contracting officer when *formal* allegations or *formal* findings of non-compliance of labor laws are determined." 76 Fed. Reg. at 74723 and 74756 (emphasis added). Again, as is the case with other key terms in the proposal, the key term "formal" is not defined.

The reference to "formal allegations" thus makes the proposal vague and unworkable. Had the proposal merely required contractors to report to USDA a finding by an agency or court that the contractor was not in compliance with a labor law, it might have been comprehensible, that is, if there were any way to understand what the USDA might mean by "all applicable labor laws." The reference to "formal allegations," however, implies that a contractor must report to USDA any time a complaint is filed against it with a federal, state or local agency or a federal or state court. Indeed, since the term "formal allegations" is undefined, it could also be read to include complaints filed with the contractor itself, either through its own internal complaint system or via a representation letter from a union, advocacy group, or private plaintiff's counsel. Including unproven allegations explodes the reporting requirement to unmanageable proportions.

Moreover, the proposal says nothing about what the contracting officer is expected to *do* with this information once it is reported. By simply including the reporting requirement, the proposal thus raises the specter of controversial Clinton-era regulations, 64 Fed. Reg. 37,359-61 (July 9, 1999), and 65 Fed. Reg. 40,829-34 (June 30, 2000), ultimately withdrawn, that would

have allowed contracting officers to “blacklist” certain contractors for purported labor and employment law violations.¹

We are concerned that USDA’s proposal, like the discredited “blacklisting” regulations, may be read to authorize and, indeed, encourage contracting officers to base decisions to award or deny government contracts on their own subjective determinations regarding bidders’ legal compliance and EEO/AA practices — highly complex determinations of fact and law that contracting officers simply are not qualified by training or experience to make.

Accordingly, the proposal raises the ugly possibility that a company that has never been adjudged guilty of any unlawful employment practice might nevertheless be denied government contracts simply because an agency such as the Equal Employment Opportunity Commission (EEOC) has issued an as yet unadjudicated complaint or charge accusing the company of an unintentional “pattern or practice” of unlawful discrimination under Title VII, the ADEA, the ADA, or the EPA; or because the Office of Federal Contract Compliance Programs (OFCCP) has issued an administrative complaint or show cause notice charging the company with as yet unproven violations of the nondiscrimination or affirmative action requirements of E.O. 11246, § 503 of the Rehabilitation Act, or VEVRAA; or the Labor Department has brought an action under the FMLA or USERRA; or the Justice Department has alleged a pattern or practice violation under IRCA; or because some advocacy group or would-be class-action plaintiff has filed an as yet untried lawsuit accusing the company of multiple employment law violations.

The federal EEO laws by design make it extremely easy for a complaining party to make a *prima facie* showing of intentional discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If unrebutted, such a showing might perhaps impress a contracting officer as persuasive evidence of a substantial violation of law. But it is well-established in EEO law that, once a complainant makes a *prima facie* showing of discrimination, the employer must be given an opportunity to present an explanation. If the employer presents a legitimate business reason for its actions, then no violation of law can be found unless the complaining party, in turn, proves that the employer’s explanation was pretextual and that the employer’s real motives were discriminatory. See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

If the proposal allows contracting officers to take action against contractors based on mere allegations of wrongdoing, then it effectively would deprive prospective contractors of this fundamental right to respond to the allegations against them. In essence, the proposal would allow contracting officers to take adverse action based on one-sided evidence, without affording contractors a chance to challenge such evidence at a hearing and present legitimate business reasons for their actions.

Federal contractors have fought long and hard to establish the right, now firmly recognized in the context of OFCCP enforcement proceedings, to be afforded due process of law — including a hearing and opportunity to present evidence and cross-examine witnesses — before being subjected to sanctions, declared nonresponsible, or debarred from federal

¹ The “blacklisting” regulations went into effect, 65 Fed. Reg. 80,256-66 (December 20, 2000) (effective January 19, 2001), but only briefly, and were suspended, 66 Fed. Reg. 17,754-56, 17,758-60 (April 3, 2001), and later revoked. 66 Fed. Reg. 66,984-90 (December 27, 2001).

contracting based on allegations accusing them of violating EEO/AA laws or regulations. See 41 C.F.R. §§ 60-30.1 *et seq.* See also *Firestone Synthetic Rubber & Latex Co. v. Marshall*, 507 F. Supp. 1330, 1333 n.3 (E.D. Tex. 1981) (“No order of debarment shall issue ... without the opportunity for a hearing before an ALJ, with the right to counsel, to present evidence, and to cross-examine witnesses”) (citation omitted). Adoption of the proposal by USDA would represent an unacceptable step backward to the days before these safeguards were put in place, when some federal agencies denied prospective contractors contracting opportunities without due process.

In addition, adoption of the proposal would render contractors vulnerable to pressure by labor unions, advocacy groups, plaintiffs’ class action attorneys, and others, who seek to accomplish other ends by filing or threatening to file a labor law complaint and thereby jeopardize the company’s standing as a government contractor.

Conclusion

For all of these reasons, EEAC respectfully urges that both the Direct Final Rule and the Proposed Rule be withdrawn. We thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Jeffrey A. Norris". The signature is written in a cursive style with a large, stylized initial 'J'.

Jeffrey A. Norris
President