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On behalf of the

Society for Human Resource Management

Presented to the

Small Business Administration Office of Advocacy

Roundtable on the FAR Council’s Fair Pay and Safe Workplaces Rule

Wednesday, July 22, 2015
Good Afternoon, I am Debbie Norris, Vice President of Human Resources at Merrick & Company, a federal contractor headquartered in Greenwood Village, Colorado just outside Denver. I am pleased to be here today as a member of the Society for Human Resource Management, or SHRM, to discuss my significant concerns with the proposed rule issued by the Federal Acquisition Regulatory Council (FAR) and guidance issued by the Department of Labor (DOL) to implement the Executive Order on Fair Pay and Safe Workplaces.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world’s largest HR membership organization devoted to human resource management. SHRM has more than 575 affiliated chapters within the United States and more than 275,000 members, a significant percentage of whom work in organizations that currently hold contracts with the federal government or seek to enter the federal contracting field.

Merrick & Company is an employee-owned company with about 490 employees. We have been in business for over 60 years and have a broad scope of services that we provide to federal and commercial clients. Our primary federal clients are the Departments of Defense, Energy, Agriculture, Homeland Security, the National Science Foundation, and the U.S. Antarctic Program. In FY 2014 we managed 329 federal contracts worth $52 million in annual revenue and approximately 108 subcontractors were paid $12.7 million.

Let me first make clear that we share the President’s goal of providing fair pay and a safe workplace—after all, who isn’t for that? In fact, as Vice President of Human Resources at Merrick, I work to provide a safe workplace and to help make us an employer of choice -- not just because it is the right thing to do but because it provides us a competitive advantage in our industry. We have been recognized as a Best Company to Work for in Colorado five different times. We have also been recognized nationally as a Best Firm to Work For through the ZweigWhite conference. Our internship program has been recognized as Best Practice in the Denver Metro Area. I mention these awards because, despite the fact that my company invests significant time and resources on compliance and creating a sought-after work environment, we believe the new FAR rules will have a significant and negative impact on our ability to maintain current contracts and compete for new ones.

As a small business working in the federal contracting world we must track a variety of size thresholds just to determine which federal, state or local laws and regulations apply to us. As noted before, we not only try to be an employer of choice, but, we also spend a tremendous amount of time ensuring that we are in compliance with all applicable laws. In addition, we are required to meet the FAR requirements in all of our contracting activities and are subject to Defense Contract Audit Agency (DCAA) audits and pricing requirements. In order to meet DCAA time-keeping requirements as well as other reporting requirements, Merrick has invested millions of dollars in a new enterprise system to track information and meet all of our federal contracting requirements.

As you can see, we invest significant resources to ensure compliance. As a result, we have several concerns with the proposed regulation and DOL guidance. The proposed regulation requires reporting of any “administrative merits determination, civil judgment, or arbitral award or decision rendered against [a federal contractor] during the preceding three-year period for violations of any of 14 identified Federal labor laws and executive orders or equivalent State laws.”
I am greatly concerned about the requirement to report non-final agency actions. It is not uncommon for companies to undergo agency investigations, and even be issued a notice of a violation, that turns out to be unfounded. I am concerned that if non-final agency actions are considered by the contracting officer as part of the responsibility determination, companies like mine could lose a contract as a result of cases or investigations that are not yet final or are eventually dismissed. For example, the Equal Employment Opportunity Commission receives nearly 100,000 charges a year, but not even 0.5% of those charges mature into lawsuits.

In addition, an unfortunate outcome of considering non-final agency actions is that federal contractors will feel pressured to settle a claim, even if they feel they have done nothing wrong. If a contractor has a big contract award coming up, they will fear that even an unfounded and unresolved issue could reflect poorly on them during the decision-making process. In our experience, government investigations and processes typically take a long time to resolve complaints or investigations. I would like to offer one example. As a federal contractor, Merrick files an annual Equal Employment Opportunity or EEO-1 report and Affirmative Action Plan. We are audited by the Office of Federal Contract Compliance Programs or OFCCP whenever they deem necessary but not on any regular schedule. We are currently part of a desk audit that started in September 2014 and we have provided all requested documentation to the agency. After nearly two years, we have still not received a determination from the OFCCP. The desk audit takes weeks of preparation and depending on the timing of the audit, we may need to complete a mid-year Affirmative Action Plan which requires us to spend many additional hours in addition to hiring a consultant for assistance working on a mid-year affirmative action plan. In the meantime if the proposed rule were to go into effect as drafted we have potentially reportable agency actions that remain unresolved and we worry about the impact this could have on future federal contracts. For these reasons, SHRM believes that the regulations should only require the reporting of final, non-appealable determinations.

With the proposed regulations’ broad definition, collecting and reporting on information deemed a “labor violation” will not be an easy task and is compounded by the need to oversee the labor law compliance of our subcontractors. Doing so will require federal contractors to create a company-wide, centralized electronic record of federal, and eventually state, violations over the past three years. Federal contractors will also have to require their subcontractors to collect this data as well. In addition, contractors will have to determine, in consultation with the DOL contracting officers and labor compliance officers, whether a subcontractor is a “responsible source” and to take remedial action when necessary and report all of this information every six months. Merrick has 18 different offices in eight states and the District of Columbia as well as offices in Mexico and Canada. We run our HR department from our headquarters in Colorado, tracking violations on a corporate-wide basis, and will have to ensure each office is accurately reporting this information to us.

Additional compliance and tracking requirements may require my company to hire more staff resulting in costs that will ultimately be passed onto the federal government. Currently whenever the OFCCP requests an audit, for example, it means my employees will work overtime to meet the demanding 30-day requirement to respond. When staff time is directed to responding to compliance requirements, it takes away from the HR department’s focus on the needs of our employees and meeting our business objectives. Federal contractors will likely handle this situation in one of two ways—they will either try to make do with existing staff which may result in a failure to meet the contracting obligations or they will hire additional staff which will end up costing the government more.
We also have several concerns regarding the new Agency Labor Compliance Advisors (ALCA). First, the proposed regulation adds another level of oversight and delay through the ALCA—which are layered on top of the existing relationship between the contracting officer and the company. Currently, the contracting officer has broad discretion to refer any contractor for a responsibility determination review and possible suspension or debarment. Under the proposal, contracting officers are required to “seek and consider the analysis and recommendations made by [ALCAs]” who are meant to coordinate with DOL under the proposed regulation.

ALCAs, by the nature of their duties, will be interpreting labor laws at both the federal and state levels. This responsibility to not only interpret federal law but state law in of itself is curious – particularly given the complexity, overlapping and sometimes conflicting state and federal laws. The federal contractors who are required to interact with the ALCAs are greatly exposed when they take advice regarding legal compliance with these laws. For example, can a contractor rely on the advice that the ALCA provides for compliance and will such reliance constitute a good faith defense? It is unclear from the proposed regulations whether the enforcement agencies will be bound by and follow the same interpretation that the ALCAs provide. If federal contractors are not able to appeal the determinations of the ALCAs, they are unable to properly present their views to a neutral body. Small business, in particular, will be at risk since they are less likely to have in-house legal counsel or access to outside counsel, leaving them completely reliant on the ALCA’s determination, possibly to their great detriment.

In addition, the newly created ALCAs will most certainly result in delay and an inefficient contracting process. When we are trying to negotiate a contract through the contracting officer, it can already take longer than anticipated to get a working contract. In the meantime, we have employees who are idle waiting to work. When these employees are not working on projects, revenue is lost to the organization.

We are also concerned that the information requested through the proposed rule could damage the relationships between prime contractors and subcontractors. Prime contractors should not be placed in an enforcement or legal interpretation role—that should instead be handled directly between subcontractors and the government. Reporting of a labor violation could be a competitive advantage to the primes and lead to blacklisting of subcontractors. A prime contractor will not want to do business with a subcontractor with any kind of labor violation, no matter how minor, because it could slow down the evaluation and awarding of the potential contract or jeopardize the award of the contract altogether. Our company serves as both a prime contractor and a subcontractor on various contracts.

Finally, as federal contractors, we already report information to the federal government. Rather than placing additional and duplicative data collecting and reporting requirements on federal contractors, the federal government should seek to use the data it already collects. By adding duplicative reporting requirements, we will need to figure another way to manage compliance reporting. Most likely we will not have the staff in house to manage this and will have to hire an additional staff person to meet the requirements. While it is unlikely we will have any violations since we have not had any in the past, we still have to track and report against 14 different federal laws plus state laws that already have their own set of compliance standards.

Again, I appreciate the opportunity to express my concerns with the proposed rule on behalf of SHRM and our 275,000 members. I hope that the federal government will make modifications to ensure that businesses can afford to remain federal contractors.