



VIA ELECTRONIC SUBMISSION

April 1, 2024
William F. Clark
Director
Office of Government-wide Acquisition Policy
General Services Administration
1800 F St NW
Washington, DC 20405

Re: RIN: 9000-AO69, Office of Federal Procurement Policy; Federal Acquisition Regulation: Pay Equity and Transparency in Federal Contracting [FAR case 2023-021; Docket No. FAR—2023-0021; Sequence No. 1]

Dear Mr. Clark:

Associated Builders and Contractors hereby submits the following comments to the Federal Acquisition Regulatory Council in response to the above-referenced Notice of Proposed Rulemaking published in the Federal Register on Jan. 30, 2024.¹

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 23,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.²

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)³ and industry workforce employment (nearly 81% of the construction industry is employed by small businesses).⁴ In fact, construction companies that employ fewer than 100 construction

¹ See <https://www.federalregister.gov/documents/2024/01/30/2024-01343/office-of-federal-procurement-policy-federal-acquisition-regulation-pay-equity-and-transparency-in>.

² For example, [ABC's 34th National Excellence in Construction Awards program from 2024](#).

³ U.S. Census Bureau 2021 County Business Patterns:

<https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.html>.

⁴ 2022 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2022), at page 4, <https://advocacy.sba.gov/wp-content/uploads/2022/08/Small-Business-Economic-Profile-US.pdf>.

professionals comprise 99% of construction firms in the United States and account for 69% of all construction industry employment.⁵

In addition to small business member general contractors and subcontractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local government customers procuring construction contracts subject to respective private and government acquisition policies and regulations.

For example, according to data extracted from [usaspending.gov](https://www.usaspending.gov) and compared to ABC membership, of the \$233.5 billion worth of federal NAICS 23-classified construction contracts within the United States and territories awarded from FY 2009-FY 2023 exceeding \$35 million, ABC prime contractors won more than 50% of the 2,221 federal contracts and 52% of all such contracts by value.⁶

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC Comments in Opposition to the Proposed Rule

ABC opposes the proposed rule's requirement that restricts compensation history inquiries and consideration and requires salary range disclosures. The FAR Council lacks the authority under the governing statutes to impose these requirements. In addition, the requirements directly conflict with obligations imposed by other federal regulations. Finally, the burdens and conflicts imposed by the NPRM will deter competition on federal contracts due to increased compliance costs and a lack of clarity for the regulated community.

For the reasons outlined in detail below, the FAR Council must withdraw this misguided proposal to avoid impeding fair and open competition among federal contractors.

I. The Proposed Rule Violates the Plain Language of the Federal Property and Administrative Services Act

ABC is concerned that, as written, the NPRM conflicts with the plain language of the Federal Property and Administrative Services Act (Procurement Act), which only authorizes the government to "prescribe policies and directives" that are deemed necessary to carry out the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. It does not authorize the FAR Council to enact

⁵ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2021, available at <https://data.census.gov/table/CBP2021.CB2100CBP?q=CBP2021.CB2100CBP&hidePreview=true>.

⁶ TheTruthAboutPLAs.com <https://thetruthaboutplas.com/wp-content/uploads/2023/12/ABC-Members-Won-A-Significant-Number-of-Large-Scale-Federal-Contracts-of-35M-FY09FY23-030524.png>.

changes to federal procurement policy with the goal of promoting social policies that are favored by the administration.

The proposed rule does not contain any evidentiary support for its claims that the proposed changes will actually achieve greater efficiency in federal procurement. For example, the proposal fails to explain how salary range disclosures would reduce the costs of federal contracting or how these disclosures would reduce recruiting costs. As is evident from the discussion of specific provisions of the NPRM below, the proposed rule is likely to create greater inefficiencies.

The courts have recently ruled on attempts by the federal government to implement expansive policy changes through federal contracting requirements, including a decision by the U.S. Court of Appeals for the 11th Circuit finding the Biden administration lacked the authority to impose a COVID-19 vaccination mandate on federal contractors through the procurement process. The court made clear that the Procurement Act only permits the president to impose policies and directives that promote economy and efficiency in federal procurement.⁷

The proposed rule cannot be reasonably interpreted to fall within the statutory authority granted by the Procurement Act and should be withdrawn.

II. The Proposed Rule Directly Conflicts with Existing Regulations Regarding Evaluation of Employee Compensation and Nondisplacement of Qualified Workers and, Consequently, Deters Competition in Federal Procurement

The proposed rule directly conflicts with existing federal regulations, and this tension will deter potential contractors and subcontractors from competing for federal contract awards.

The Federal Acquisition Regulation (FAR) 52.222-46, Evaluation of Professional Employee Compensation,⁸ requires companies bidding on contracts to “submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract.” The regulation requires the government to consider the compensation plan’s “impact upon recruiting and retention, [and] its realism.” The provision is intended to protect government contractor employees from receiving lower wages for performing the same work as contractors seek to lower bid prices with the goal of winning federal awards. Practically speaking, however, contractors must consider the salary history of any incumbent employees they are proposing to hire as part of their bid on the contract to avoid violating FAR 52.222-46, despite the NPRM’s prohibition against this exact activity.⁹

Additionally, the NPRM conflicts with the recently finalized U.S. Department of Labor regulation, Nondisplacement of Qualified Workers under Service Contracts,¹⁰ which

⁷ <https://media.ca11.uscourts.gov/opinions/pub/files/202114269.pdf>.

⁸ <https://www.acquisition.gov/far/52.222-46>.

⁹ <https://www.federalregister.gov/d/2024-01343/p-166>.

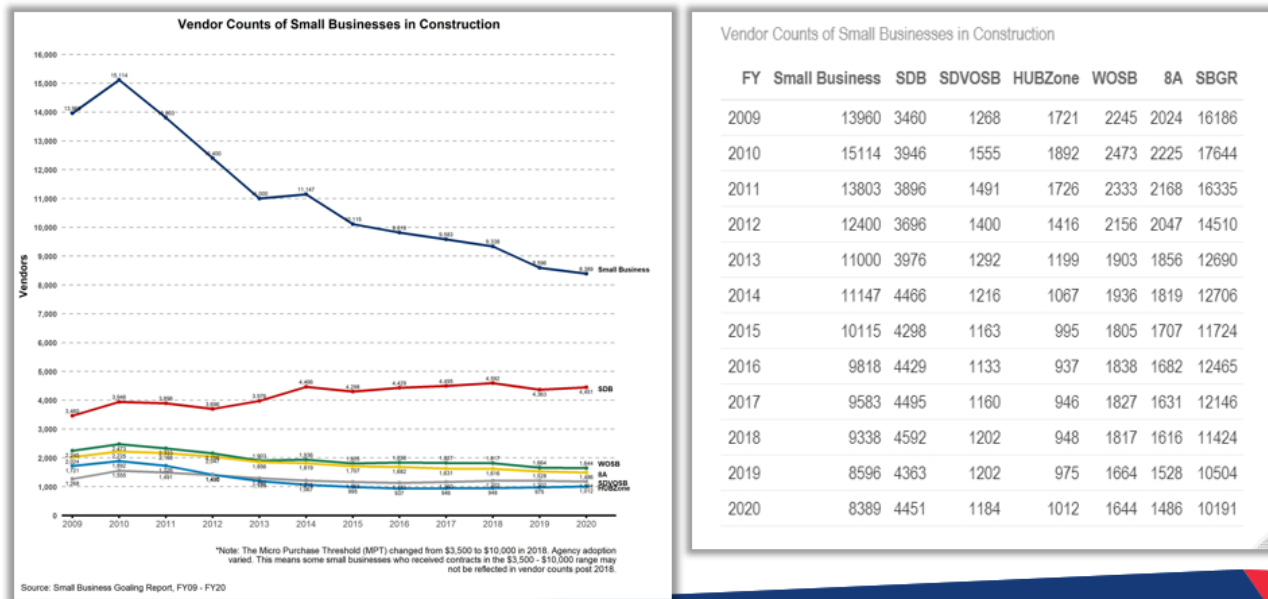
¹⁰ <https://www.federalregister.gov/documents/2023/12/14/2023-27072/nondisplacement-of-qualified-workers-under-service-contracts>.

mandates that contractors present a “bona fide” offer of employment to incumbent employees of a predecessor contract. The contractor may not change terms of employment, including compensation. Therefore, to comply with the DOL’s regulation, contractors must consider salary history to ensure they provide a “bona fide” offer, despite the fact that this would be prohibited by the FAR Council’s proposed rule.

The addition of the proposed rule’s conflicting requirements to an already complicated and burdensome federal contracting process works to the detriment of economy and efficiency in procurement and could result in delays in service to federal agencies.

Furthermore, and perhaps most importantly, the NPRM will provide added disincentive for small businesses to engage in federal contracting. Already small businesses have been discouraged from bidding on federal contracts due to the regulatory environment. Small businesses have suffered a 60% decline in the number of firms awarded federal contracts from 2010-2020, according to data from the Small Business Administration (SBA).¹¹

ABC | **Number of Construction Industry Small Businesses Awarded Federal Contracts Declined 60% From 2010-2020**



The decline in the number of small businesses awarded federal contracts directly correlates with increasing federal regulatory burdens. Small business contractors may instead choose to bid on private and state/local government contracts that provide increased regulatory clarity

¹¹ Chart available at: <https://thetruthaboutplas.com/wp-content/uploads/2022/09/60-percent-decline-of-small-businesses-awarded-federal-construction-contracts-2010-to-2020.png>. The data was prepared by an SBA economist who said, “The charts represent data on vendors who have received obligations. The definition of ‘small’ comes from the contracting officer’s determination when the contract was awarded. The COs follow the NAICS size standards.” Data is from FPDS that can be publicly accessed through sam.gov: <https://sam.gov/reports/awards/standard>.

and lower compliance expenses. The proposed rule's conflicting requirements risk exacerbating this issue.

The FAR Council should withdraw this proposed rule, so federal contractors are not forced to pick between conflicting legal requirements.

III. The Proposed Rule's Salary Range Requirements Are Impractical and Overly Broad

The NPRM's language requires contractors and subcontractors to provide salary range disclosures for roles that involve work "on or in connection with" a federal contract that is subject to the proposed rule's requirements.¹² This work is defined 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."¹³

Determining which job applications will be subject to this disclosure requirement will not be feasible for federal contractors and subcontractors, particularly within the construction industry. The proposal presumes that employers can easily determine whether job applicants will be working on federal contracts. In order to meet the rapidly changing needs of a construction firm, contractors must engage in frequent hiring cycles and utilize seasonal workforces. It will often not be possible for a contractor to determine ahead of time which projects a given worker may be assigned to.

Additionally, the proposed rule's coverage of applicants that will work "in connection with" a federal contract is overly broad and fails to provide necessary clarity. Depending on how this provision is interpreted, nearly all employees of a federal contractor could be deemed to be performing work "in connection with" a federal contract given that their work supports the overall functioning of the contractor, thereby helping them to complete the contract.

If the FAR Council chooses to move forward with this proposed rule, it must more clearly define the scope of the salary range disclosure requirements and adapt them to be workable and easily interpreted by federal contractors.

IV. Lack of Clarity and Due Process in Complaints

The proposed rule outlines a complaint process for job applicants that believe the rule's requirements have been violated.¹⁴ As currently described, this process raises serious due process concerns and does not clearly define the potential consequences for violations of the rule.

The NPRM does not direct the contracting agency to contact the contractor facing an alleged violation in any way prior to making a determination. This means that contractors may not have any opportunity to respond to the complaint or defend themselves against the

¹² <https://www.federalregister.gov/d/2024-01343/p-164>.

¹³ *Id.*

¹⁴ <https://www.federalregister.gov/d/2024-01343/p-169>.

complaint. If the proposed rule moves forward, the FAR Council must clearly establish a complaint procedure that protects the due process rights of federal contractors.

Further, the NPRM provides little insight into the consequences for violations of the requirements it outlines, only stating that contracting agencies should “take action as appropriate.” The lack of clarity introduces significant uncertainty for federal contractors, which may deter them from bidding on federal contracts due to the unclear risks imposed by the proposed rule.

Conclusion

For the reasons listed above, ABC believes that the FAR Council must withdraw the NPRM in its entirety to avoid serious legal concerns and avoid unnecessarily imposing additional regulatory complexity and compliance costs that will impair economy and efficiency in federal procurement.

Thank you for the opportunity to submit comments in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" and last name "Brubeck" clearly distinguishable.

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