

Office of Government & Public Affairs

January 30, 2012

Office of Procurement and Property Management
Procurement Policy Division
MAIL STOP 9306
US Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-9303

**Reference: Agriculture Acquisition Regulation, Labor Law Violations
Direct Final Rule (76 Fed. Reg. 74722, December 1, 2011), RIN 0599-
AA19, and
Proposed Rule (76 Fed. Reg. 74755, December 1, 2011),
RIN 0599-AA19**

On behalf of the American Council on Education (ACE) and the other higher education associations identified below, I submit the following comments in response to the on the Direct Final Rule (DFR) and the Notice of Proposed Rulemaking (NPRM) as set forth in the December 1, 2011, edition of the *Federal Register*.¹ The DFR and the NPRM would add a subpart to the Agriculture Acquisition Regulation (AGAR) requiring the insertion of a new clause to Department of Agriculture (Department) contracts. Both the subpart and the contract clause are entitled “Labor Law Violations.” Our associations object to the DFR and NPRM because they would impose an unmanageable compliance burden and uncertain compliance risk for colleges and universities that conduct agricultural research under contracts from the Department of Agriculture. We recommend that the Department withdraw both the DFR and NPRM.

Colleges and universities strive to be model employers. They are, in general, among the most progressive employers in wages and salaries, as well as fringe benefits (including health, retirement and paid sick leave, among others). Colleges and universities aim to provide safe conditions in workplaces free from discrimination or harassment. They make every effort to comply fully with federal, state, and local employment laws and regulations. Our members agree with the expectation underlying these rules—that federal contractors should be expected to comply with federal employment rules.

¹ 76 Fed. Reg. 74,722 (December 1, 2011) (direct final rule) and 76 Fed. Reg. 74,755 (December 1, 2011) (notice of proposed rulemaking).

Unfortunately, the DFR and NPRM would impose an unreasonable and unpredictable compliance burden on even the most conscientious contractors. They would require a certification about compliance with “all applicable labor laws” without providing any guidance about the scope of those laws. (For example, are Occupational Safety and Health Administration standards considered labor laws for this purpose?) As written the standard to which contractors will be held is broad and vague.

The DFR and NPRM would require prospective contractors to certify that subcontractors and all suppliers are, to the best of their knowledge, in compliance with all applicable labor laws. It is extraordinarily difficult for a college or university to verify that all of the subcontractors, as well as suppliers, comply with labor laws. A single research group could have more than a hundred subcontractors or suppliers, including vendors that manufacture or distribute research equipment, research materials, or office supplies. It would be very difficult to make a certification about vendors’ compliance with labor laws, even after conducting labor-intensive research into their regulatory history. The qualification “to the best of its knowledge” provides little relief because it does not eliminate the obligation to conduct due diligence into the history of subcontractors and suppliers. Given the threat of a False Claims Act violation, these provisions create an unpredictable risk for contractors.

The Department has given no indication of how it would weigh the significance of any alleged or confirmed violations of labor laws. Would a single allegation be sufficient to trigger “corrective action”? If an employer identifies a labor law violation, such as a failure to pay overtime, and is in the process of correcting it, can it certify that it is “in compliance”? What is the value of reporting allegations of labor law violations, when they have not been adjudicated by the relevant agency? The attention to allegations, and not actual determinations or findings of violations, is particularly troubling considering that large numbers of complaints are found to have no merit by the cognizant agencies.²

Furthermore, the Department has given no explanation about how its review of violations will be coordinated with the adjudication by federal agencies of principal responsibility, including any fines or penalties they may impose.

Stated briefly, the DFR and NPRM put prospective contractors in an untenable position. They are required to make a broad and vaguely worded certification for themselves and their subcontractors and suppliers. Their certifications will be assessed by the Department according to standards that have not been articulated. The DFR and NPRM effectively invite third parties to file allegations of labor law violations that will apparently have the same weight as formal findings by cognizant federal agencies.

² The Equal Employment Opportunity Commission received 99,922 allegations of violations in FY2010 but concluded that there was “no reasonable cause” to believe discrimination had occurred in nearly two-thirds of the cases. [<http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.] In FY2011 the National Labor Relations Board found that just 37 % of charges of unfair labor practices had merit. [http://www.nlr.gov/sites/default/files/documents/189/nlr_2011_par_508.pdf]

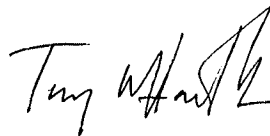
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We are very concerned that the Department issued these rules with minimal explanation and minimal opportunity to comment. We are not aware of evidence suggesting a lapse in enforcement of labor laws that call for an initiative such as the direct final and proposed rules. The Department has certainly not provided that evidence. The Department should, at a minimum, provide a full explanation of the circumstances that led it to promulgate the DFR and NPRM.

The Department should also consider this alternative. Instead of imposing an onerous and time-consuming task on contractors, the Department could obtain any information it needs by asking the federal or state agencies charged with enforcement of labor laws to identify entities that are repeated and willful violators of labor laws (as evidenced by final judgments of those agencies).

For all the foregoing reasons, we respectfully urge the Department to withdraw both the DFR and NPRM.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry W. Hartle". The signature is stylized with a large, sweeping initial "T" and a long, horizontal stroke extending to the right.

Terry W. Hartle
Senior Vice President

TWH/ldw

On behalf of:

American Council on Education

Association of American Universities

Association of Public and Land-grant Universities

College and University Professional Association for Human Resources