



CAMPAIGN FOR QUALITY CONSTRUCTION IS COMPRISED OF:
FCA INTERNATIONAL (FCA)
**INTERNATIONAL COUNCIL OF EMPLOYERS OF BRICKLAYERS AND ALLIED
CRAFTWORKERS (ICE)**
MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA (MCAA)
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION (NECA)
**SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL
ASSOCIATION (SMACNA)**
THE ASSOCIATION OF UNION CONSTRUCTORS (TAUC)

**Statement in Support of the Fair Pay and
Safe Workplaces Executive Order 13673**

**On the Hearing of the House Committee on Small Business Subcommittees on
Contracting and Workforce and Investigations, Oversight and Regulations**

“The Blacklist: Are Small Businesses Guilty Until Proven Innocent?”

**Tuesday, September 29, 2015
Room 2360 Rayburn House Office Building**





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Statement in Support of the Fair Pay and Safe Workplaces Executive Order 13673

The FCA International (FCA), the International Council of Employers of Bricklayers and Allied Craftworkers (ICE), the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), and The Association of Union Constructors (TAUC) allied together as the Campaign for Quality Construction (CQC) all support the goals Administration's Fair Pay and Safe Workplaces Executive Order 13673 (EO) in virtually all respects. We have several suggestions for administrative implementation improvements set out below. CQC's purpose is to work with Congress and the regulatory agencies to achieve a workable set of procedures to achieve the laudable goals of the EO, raising the qualification standards in the Federal market and attracting back in top quality performers. CQC acknowledges the added complexity of the pre-award eligibility screening procedures, but supports the judgment that the aims of the policy are worthy of exploring and implementing new and innovative approaches to improve Federal market performance.

The six specialty construction employer associations in our Campaign for Quality Construction (CQC) coalition represent more than 20,000 specialty construction employers, which perform large scope construction projects in public and private construction markets nationwide. CQC firms operate as both prime contractors and subcontractors on commercial, institutional and industrial facility projects of all types, performing mechanical, electrical, plumbing, sheet metal, steel erection, equipment and tool installation, bricklaying and stone work, glazing, drywall and floor finishing, painting, architectural metal and glass installation, and interior finishing aspects of all those types of projects. CQC members operate both as prime contractors and subcontractors on direct Federal construction projects for the full range of Federal Defense and Civilian agencies. CQC employers employ the full range of skilled construction civil and building construction craft workers, including painters, plumbers, pipe fitters, hvac technicians, electricians, sheet metal workers, iron workers, boilermakers, bricklayers, cement masons, as well as carpenters, laborers, and equipment operators. Employment relations with these skilled crafts are governed through use of multiemployer collective bargaining agreements, both national and local, which also include health and welfare, defined benefit pension, and joint apprenticeship and training programs building and maintaining the high skill production craft base in the industry overall.



Bottom line: CQC respectfully contests the title of the hearing – “blacklisting” – as clearly pejorative, and unwarranted by any fair analysis of EO13673 and current regulatory safeguards. CQC suggests this title as a better description of EO 13673: ***“Serving the taxpayers well with improved Federal contract economy, efficiency, and performance through more discerning and uniform Federal prime contractor and subcontractor selection procedures.”*** Similarly, CQC respectfully submits there are no questions of innocence or guilt for small business contractors posed by EO13673 –only benefits accruing from improved competitive conditions for legally compliant small business firms – and all others too – competing in the Federal marketplace.

The EO provides more complete and uniform prime contractor and subcontractor protections in the responsibility determination process than are currently available under current Federal Acquisition Regulation (FAR) screening procedures under FAR Part 9. Employers – primes and subs have more rights, remedies and redress for non-responsibility determinations based on lack of integrity or business ethics under the EO than the current FAR procedures specifically provide. If implemented as suggested below, the EO procedures will offer even greater protections, and thereby immeasurably improve the responsibility determination process for the benefit of agency construction programs, the taxpayers, and legally compliant prime contractors and subcontractors.

The EO is sound public contract administration proprietary policy - CQC also looks forward to working closely with the Congress in this hearing and the Administration in designing implementing regulations that achieve the full intended benefits of the Order for contracting agencies and their construction projects, as well as the intended benefits for the taxpayers and the public overall by achieving superior project performance. CQC will continue to analyze and comment on EO 13673 implementation procedures to ensure that the implementation is fair to the superior and proven prime contractors and subcontractors competing to win work on Federal projects to bring those projects routinely to successful project completion.

CQC’s perspective is multidimensional – accounting for prime contractor and subcontractor roles together - Many of CQC’s member firms perform direct Federal construction projects across the country, either as prime contractors or subcontractors, at various times on different projects as one or the other, so CQC’s perspectives on Federal procurement issues are multi-dimensional. What CQC recommends for prime contractors, impacts our role as subcontractors; and similarly, what we recommend for subcontractors, our members must implement when acting as prime contractors. No other group commenting on procurement and labor policy implementation brings that multidimensional perspective as fully.

The EO promotes high workforce standards for the benefit of the public project owner – the taxpayers - CQC member firms perform jobsite construction work under collective bargaining agreements with



building trades-represented employees. Our pay, benefits, and safety practices fully address and met the goals of EO 13673. Our safety training and workforce development programs are recognized industry wide – private sector owners, such as the Construction Users Roundtable (CURT) (which includes Federal agency participation) even advocate contractor prequalification screening for adequate safety and workforce development records and programs.

CQC member firm workforce development policies, from joint training and apprenticeship programs, innovative military recruitment and on-base accelerated training programs, through to our top-flight pay, health, and pension benefit programs lead the industry. Our clients get the benefit of those high-value systems in first rate technical performance by the highly skilled professional technicians our joint labor/management apprenticeship/journeyman training systems turn out. In addition, CQC associations provide up-to-date, ongoing business administration, technology, supervisory and safety training to our member companies that also compound the performance premium that CQC member firms and their employees deliver to both public and private sector clients in the US and Canada.

The EO complements a number of other key government proprietary interests - CQC has long supported direct Federal procurement policies that raise the competitive bar in the market for Federal construction projects. CQC members firms benefit along with the Federal agencies and taxpayers when the market qualification and performance standards are high. Experienced project owners in both the public and private sectors increasingly rely on procurement policies that guard against the significant risk of contracting with marginal business partners – prime contractors and subcontractors - whose track records on legal compliance and problem-plagued jobs warrant careful screening and contracting safeguards.

CQC supports public project prevailing wage policies as a sound proprietary business judgment by public owners, and public agencies project labor agreement policies for the same reasons - the public owner's sound business judgments must be encouraged and respected. CQC has long been on record with full support of legislative and regulatory efforts to stanch the rampant abuse of misclassification of employees as independent contractors in the construction industry. Similarly, CQC was in the lead among only a few industry groups that supported a precursor of EO 13673, the Contractors and Federal Spending Accountability Act (Section 872 of the 2008 National Defense Authorization Act), which began the contractors legal compliance database that is now the Federal Awardee Performance and Integrity Information System (FAPIIS) that is key to the operation of the policies of EO 13673.

CQC was instrumental in rebutting the exaggerated claims of “blacklisting” back when the measure passed in 2008. CQC pointed out then, as it does in this statement, that EO 13673 preserves the Contracting Officer's discretion to make responsibility determinations in the exercise of the CO's best professional judgment of whether the prospective awardee is capable of performing the project as



proposed. The Contracting Officer's contracting warrant empowers the CO to make that proprietary judgment - nothing in EO 13673 changes that standard. If anything, the EO may be said to rein in that discretion somewhat by providing new review, remedies and redress for prime contractors and subcontractors whose legal compliance records may initially warrant an ineligibility determination based on lack of integrity or business ethics. The EO procedures in this respect are more permissive for firms that would question an initial ineligibility determination. In that sense, the EO provides transparency and uniformity where it does not now fully exist in FAR Part 9 procedures. Taken in that light, the EO can be characterized as the antithesis of a blacklisting provision. Similarly, the specific list of legal compliance review items is no more expansive than current FAR procedures permit for business ethics and legal compliance integrity eligibility determinations. While it is true that the 6-month updated certification requirement is new – it too might be fairly characterized as sound proprietary contract administration vigilance.

In summary, CQC does not presume that Contracting Officers are predisposed to abuses of issuing unwarranted non-responsibility determinations. If anything, the record of past reports shows that haste in making awards has led to overlooking problematic performance records. The CO's mission is to successfully complete the project – the EO should be interpreted to be in entire accord with that aim. If anything, the EO should be characterized as adding Labor Compliance Advisor reviews to guard against unwarranted ineligibility determinations. Also, a fair assessment of the EO would grant that it is much in line with best practices in the private sector, where private sector project owners are careful to prequalify top performing firms on the basis of contract and legal compliance performance backgrounds. To the extent possible, EO 13673 would have direct Federal agencies exercise the same proprietary contract eligibility judgments that are routine in the private sector.

Finally, CQC, along with many other industry groups, has long condemned the practice of post-award subcontract bid shopping and bid peddling on public contract awards, and has long sought implementation of a simple and proven sub bid listing procedure on direct Federal contractor selection procedures to guard against the unethical practice of post-award bid shopping and peddling that all too frequently impairs successful project completion. So, in this sense, with the recommendations below on consolidating the subcontractor eligibility screening process at the time of prime contract award, the EO would also promote a sound and proven subcontractor pre-award naming procedure as a way to better ensure successful implementation of the EO.

CQC comments on regulatory approaches to ensure full effectiveness of the EO policy - CQC's experienced construction project professionals, who have experience as both primes and subcontractors – have reviewed EO13673 and are in full support of its aims and purposes, and are eager to provide their expertise and analysis in helping to propose implementing procedures that achieve the intended purposes of the EO – to raise the competitive bar in the Federal marketplace for the benefit of the government and the taxpayers.



To fully achieve the primary purpose of the EO' main procedure, to carefully and effectively screen the legal compliance records of prospective prime contractors and subcontractors, some innovative approaches should be considered fully in line with existing Federal Acquisition Regulatory policy: in FAR Part 1, promoting Acquisition Team contracting with superior performance teams and conducting business with integrity, fairness and openness (FAR Part 1.102); in FAR Part 3's emphasis on contractor business ethics, and proscriptions against contractor's buying in to contracts; and FAR Part 9, reservation of contracting officer discretion to make independent subcontractor responsibility determinations.

CQC recommends a regulatory approach that would consolidate the legal compliance screening process for both prime contractors and subcontractors in Section 2 of the EO - The EO requires the

prime contractor to make the legal compliance representation/certification to the Contracting Officer in the post-award responsibility determination process, and then to flow down that requirement so that prime contractors require the parallel representation/certification from covered subcontractors to the prime contractor before award of each subcontract under a covered prime contract. The EO says the Labor Compliance Advisor (LCA) shall be available, where appropriate, to assist the prime contractor in assessing subcontractor certifications. We suggest that this process may present some risks to successful project performance that can be avoided in regulations. The problem is that subcontractors who are awarded subcontracts in the middle or late stages of the project may not qualify, necessitating substitutions mid project or later, with the risk of project delays and perhaps claims for increased costs because of the late ineligibility determination. Unscrupulous prime contractors might misapply the eligibility criteria in order to change originally accepted subcontract prices or terms. Also, there is the question of uniformity of application of criteria if the primes are exercising judgments that are not in line with the agency LCA standards, and there are project ramifications because of that variation. The EO says only the LCA shall be available to the prime to help with its responsibility determination of the subcontractor – it's not required. Similarly, the discipline of reporting accuracy may be different when subcontractors are making representations to the prime contractor, as compared with when the prime contractor is making representations to the contracting officer. If False Claims Act discipline applies to the prime contract representations but not the subcontractor representations, then there also may be negative project consequences that could be avoided if regulations were to require all representations to be made to the agency. This would avoid any risk there might be of vicarious liability on the prime contractor for inaccurate subcontractor representations, or inconsistent application of legal compliance evaluation criteria. Moreover, this would provide equitable and equal protection for prime contractors and subcontractors, in those instances where courts and contract bid protest authorities allow businesses that are denied public contracts on the basis of a lack of integrity or business ethics some due process protections in challenging those adverse determinations.



Adopt proven public contracting regulatory approaches to stem persistent bidding abuses and fully and consistently implement the objectives of EO 13673 - The regulatory approach that would help avoid these issues would be to require covered subcontractor naming on all manner of direct Federal prime contractor selections procedures – FAR Part 14 low-bid selections, FAR Part 15, negotiated trade-off, and low-price/technically-acceptable (LPTA) procedures, and multiple award task order (MATOC) and indefinite delivery/indefinite quantity (IDIQ) contracting vehicles. So, if the apparently successful offeror/bidder prime contractor had to list/name the major covered subcontractors in its successful bid/offer, then the Contracting Officer could evaluate both the prime and the covered subcontractors in the initial responsibility determination process. The LCA could be deployed at one time to ensure uniform application of eligibility criteria for all performing contractors on the project. The prime contractor would be relieved of the burden of applying the technical and legalistic evaluation of all covered subcontractors, and thereby would avoid question of fairness and liability for mistakes in that evaluation of the subcontractors. The subcontractor certification would be made to the agency and not the prime contractor. The False Claims Act discipline would be the same for all performing contractors on the project. The regulations would have to make necessary accommodations for late performing subcontractors who incur disqualifying events in the time between the initial responsibility determination and the time of the award of the subcontract, but the earlier eligibility screening for all would help avoid otherwise detectable surprise disqualifications later in the project. Contract equitable adjustments would have to be made in the event the prime is not responsible for a late and warranted subcontractor ineligibility determination.

Other aspects of EO 13673; independent contractor classification notices – CQC also supports the laudable aims of the Executive Order seeking to stem worker misclassification. Rampant misclassification of employees as independent contractors is the scourge of fair competition in the construction industry and lead to abuses under other laws in both public and private sector markets. The Order’s notice provisions are good, but just one step among many more needed to address the serious abuse of worker misclassification for the overall benefit of the industry, public and private owners, and the taxpayers generally.

Attachments:

Campaign for Quality Construction Comments on EO13673 to the FAR Council and Labor Department, August 26, 2015, and

Mechanical Contractors Association of America (MCAA) letter to the Secretary of Labor and Director of Office of Management and Budget on implementation of EO13673, April 21, 2015



General Services Administration
Regulatory Secretariat (MVCB)
Attention: Ms. Flowers
1800 F Street, NW
Washington, DC 20405
FAR Case 2014-025

Ms. Tiffany Jones
U.S. Department of Labor
S-2312
200 Constitution Avenue, NW
Washington, DC 20210
ZIRN 1290-ZA02

August 26, 2015

Subject: Comments on Executive Order 13673, Fair Pay and Safe Workplaces (79 FR 45309, August 5, 2014) to GSA on proposed Federal Acquisition Regulations at 80 FR 30548, May 28, 2015, and Proposed Labor Department Guidance on EO13673 at 80 FR30574, May 28, 2015 (Submitted by mail and by e-mail through www.regulations.gov)

Dear Ms. Flowers and Ms. Jones:

Following are comments on the proposed regulations and guidance on Executive Order 13673 published by your respective agencies on May 28, 2015.

These comments are filed on behalf of a coalition of national construction employer associations, called the Campaign for Quality Construction, which is comprised of: FCAInternational (FCA), the International Council of Employers of Bricklayers and Allied Craft Workers (ICE-BAC); the Mechanical Contractors Association of America (MCAA); the National Electrical Contractors Association (NECA); the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA); and The Association of Union Constructors (TAUC)

The six specialty construction employer associations in our Campaign for Quality Construction (CQC) coalition represent more than 20,000 specialty construction employers, which perform large scope construction projects in public and private construction markets nationwide. CQC firms operate as both prime contractors and subcontractors on commercial, institutional and industrial facility projects of all





types, performing mechanical, electrical, plumbing, sheet metal, steel erection, equipment and tool installation, and painting, architectural metal and glass and interior finishing aspects of all those types of projects. CQC members operate both as prime contractors and subcontractors on direct Federal construction projects for the full range of Federal Defense and Civilian agencies. CQC employers employ the full range of skilled construction civil and building construction craft workers, including painters, plumbers, pipe fitters, hvac technicians, electricians, sheet metal workers, iron workers, boilermakers, bricklayers, cement masons, glaziers, drywall and flooring finishers, as well as carpenters, laborers, and equipment operators. Employment relations with these skilled crafts are governed through use of multiemployer collective bargaining agreements, both national and local, which also include health and welfare, defined benefit pension, and joint apprenticeship and training programs building and maintaining the high skill production craft base in the industry overall.

CQC comments are aimed at helping the FAR Council and DoL to establish a tenable and workable construction prime contractor and subcontractor responsibility screening process that improves competition for Federal construction projects, and increases the likelihood of successful project completions for Federal agency programs and for the direct benefit of the taxpayers. CQC has identified a number of key elements for changes to the proposed regulations that are necessary for EO13673 to achieve its stated goals, as enumerated below.

- 1. The legal compliance assessment of all covered construction prime contractors and subcontractors must be conducted by the government agency – the Labor Department and the agency Labor Compliance Advisor (LCA) in collaboration in some fashion, with the ultimate decision making responsibility and discretion continuing to reside in the Contracting Officer’s warrant to make affirmative responsibility determinations. The legal compliance assessment of the prime contractor and all covered subcontractors also should all be performed at the same time in the pre-award responsibility determination phase of the project – not at the time of subcontract execution.**

CQC submits that the optional approach adopted in the proposed regulations to allow the prime contractor discretion to require covered subcontractors to submit their legal compliance certifications to the Labor Department for review should be made mandatory for construction contracts for all covered subcontractors (first tier and lower tier subs). The prime also should not be allowed to delegate flow-down certification review to subcontractors for them to assess the legal compliance of lower tier





subcontractors. And, the DoL assessment of all covered subcontractors should be performed at the same time as the assessment of the prime contractor – in the pre-award responsibility process to minimize the impact of ineligibility decisions coming later in the project – disrupting successful project completion and increasing chances for project delay, claims, cost overruns and disputes. The subcontractor naming and review process likewise would apply to all contractor selection methods – low-bid, competitive negotiations trade-off methods (best value), low-price/technically acceptable (LPTA), and indefinite delivery/indefinite quantity (IDIQ), and, multiple award task order contracting methods (MATOC).

The reasons for this necessary change are many. We agree with the Congressional comments asserting that the legal compliance assessments of both primes and subs are an inherently governmental function (House of Representatives comments, page 2). We also agree with comment that the legal compliance assessment and mediation between arms-length business partners in an ordinary commercial contracting context is wholly inappropriate (Jenner & Block comments, page 21.). Furthermore, the proposed attenuated, flow-down legal compliance assessments throughout the time schedule of the project is rife with opportunities for inconsistent application of the very complex legal standards in the DoL proposed guidance. If primes were allowed to assess subcontractors throughout the course of the project at the time each successive subcontract is signed, and then also were allowed to delegate that assessment to subs to assess their covered lower tier subcontractors, the opportunities for inconsistent application of the EO standards, and for other mischance, mistakes and misapplication, and consequent project claims, delays, cost increases and other disputes would abound. Similarly, the risks of opportunistic post-award price or other subcontract term and conditions renegotiations in the legal compliance review process also can't be discounted.

Consolidated agency review of all covered firms at the beginning of the process also would bring uniform False Claims Act discipline to the certification process at all contracting tiers. Moreover, because the proposed regulations currently put the legal compliance assessment risk and burden on primes and subcontractors, they may be counterproductive to the aims of EO13673, and have the effect of driving competitors out of the market, fearing claims, disputes, and potential liability for either challenged stringent or lax application of the hyper complex legal judgments called for in the Labor Department Guidance. Some number of otherwise well qualified and responsible firms may abjure competing for Federal projects altogether, as either primes or subs, wanting to stay out of the legal business and focus on their business strengths – building projects.





We should note that construction project supervision and contracting personnel are not trained in law, most often they are former skilled craft workers and project engineers and estimators – builders in one way or another – not lawyers, by choice. One need only skim through the proposed Labor Department guidance to fully apprehend the impossibility of achieving consistent EO13673 standards relying on field supervision assessments. It is immediately apparent that construction project contracting personnel are wholly ill-equipped to assess whether another company’s Title VII adverse impact violations are disqualifying under EO13673 standards, or how to discern culpable Title VII workplace harassment from every day jobsite horseplay or shop talk. The legal case reporters themselves are replete with examples of even judges having difficulty mastering the intricacies of Title VII Uniform Guidelines of Employee Selection Procedures and how to assess the disqualifying potential of a serious or not- so- serious employment screening adverse impact claim or violation. It is patently contrary to the goal of consistent application called for by Section 4 of EO13673 to ask private sector project superintendents/engineers or any other private sector contracting personnel to make the hyper legalistic governmental judgments called for in the DoL proposed Guidance.

The support for revising the proposed regulations to require the Labor Department and LCA to assess both the prime and covered subs in the pre-award responsibility determination process can be grounded in the terms of EO13673, as well as other aspects of the proposed regulations calling for comments on how to reduce the burden of the EO on business and small business. Certainly, having the government accept the burden of applying the Labor Department guidance would be a big relief to both primes and subs, and achieve the aim of consistency called for in the terms of the EO itself in Sections 4 and 7.

Moreover, other provisions of the Federal Acquisition Regulations strongly support this necessary change to the proposal, primarily FAR Part 9.104-4(b) - “When it is in the Government’s interest to do so, the contracting officer may directly determine a prospective subcontractor’s responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, **or substantial subcontracting**). In this case, the same standards used to determine a prime contractor’s responsibility shall be used by the Government to determine subcontractor responsibility.” [Emphasis added]

It should be noted that most construction contract project awards of any significant scope involve a predominate scope of the project let out in subcontract awards – satisfying the parenthetical example in FAR Part 9.104-4(b) entirely.





Also, the proposed FAR rule Regulatory Flexibility analysis on this point is somewhat misleading. On the subcontractor flow-down reporting on page 30563, seemingly dismissing the efficacy of having the Labor Department assess the subcontractors legal compliance, the analysis says: “Another alternative would be to have the subcontractor report the information to DoL and inform the prime. However, the prime has to make a subcontractor responsibility determination and without this information may not be able to complete their analysis for the determination.”

That statement overstates the requirements of the FAR in Part 9.104-4(a), which says only that: “**Generally**, prospective prime contractors are responsible for determining the responsibility of their respective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government’s determination of the prospective prime contractor’s responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor’s responsibility.” [Emphasis added]

Taken on its face, FAR Part 9.104.4 (a) is a rather permissive, “general” statement that a prime has responsibility for qualifying its subcontractors – it is not a hard-and-fast, specific requirement as the regulatory analysis seems to suggest. And, in any case, having the CO/LCA provide the legal compliance screening would not necessarily interfere with any other type of responsibility screening the prime may conduct of subs – if it chooses to do so.

Other provisions in the FAR too may support the consolidated pre-award agency legal compliance screening of primes and subcontractors. For example, FAR Part 1 often is cited for the premise that practices that are not specifically prohibited in the FAR are permissible for agencies. And, there may be other direct examples of prime and subcontractor screening by other agencies, for example, the Office of Federal Contract Compliance Programs (OFCCP) pre-award screening of prime contractor and subcontractor compliance with EO11246 affirmative action requirements.

As to common objections to the type of agency screening called for above, several are typical and unpersuasive in the context of EO13673. The proposed rules, in currently reserving an option for the prime to direct the subcontractor to deliver the certification to DoL and then have the subcontractor report the DoL recommendation back to the prime would seem to be some indirect deference to the time-worn concept of privity of contract. That conceptual restraint is typically now observed in the breach in many ways in advanced public construction contracting methods, with BIM modeling,





integrated project delivery contracting methods combining all firms in a collaborative contracting model, prime and subcontract teams selection and many other examples, including the highly evolved Federal contract subcontract payment clause too serving as examples of “privity” constraints being removed to improve contracting performance. (See, ***Integration at its Finest: Success in High-Performance Building Design and Project Delivery in the Federal Sector***, U.S General Services Administration, Office of High – Performance Green Buildings, Research Report April 14, 2015.) Also, there is a consensus that public agency prequalification of primes and subcontractor does not contravene requirements of full and open competition. (See, ***Fair Pay and Safe Workplaces Executive Order: Questions and Answers***, Congressional Research Service, 7-5700, July 15, 2015, citing Ralph C. Nash, Jr., ***Prequalification: Can it Be Used to Improve the Procurement Process***, 10 Nash & Cibinic Report Sec 16, April 1996 – “[The Competition in Contracting Act] provisions here have generally been seen to limit (although not prohibit) the use of prequalification by federal agencies.”) In summary, prequalification of prime contractors and subcontractors in the private sector and public agencies outside the Federal sector are in fact very common – legal compliance reviews are routinely a part of those prequalification rating systems. See, ***Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps***, American Bar Association, Construction Lawyer, Vol. 27, No. 2. Spring 2007.) For sure, there are significant differences between a prequalification process, and responsibility determination reviews of successful bidders/offerors, but the establishment of the dedicated GSA website for this process is a start in melding the two. The scope of that work for a purchasing system as vast as the U.S Government is challenging, but altogether necessary, and would almost certainly be cost effective in spurring significant improvements in competition for Federal projects and promoting more consistent successful project completions.

2. Support for paycheck transparency provisions.

The CQC supports the paycheck transparency provisions of the EO13673 as they pertain to notices to independent contractors. This is entirely in line with CQC’s long held policy views and initiatives to stem worker misclassification in the construction industry, which has become the bane of fair competition in the industry in public and private sector that must be addressed in a variety of ways, including actions such as EO13673.

3. The proposed regulations should clarify that the prime contractor’s legal compliance certification is required after it wins the contract selection competition, not in its initial offer.

EO13673 by its terms (Section 2) requires agency solicitations to notify offerors that they will be





required to make legal compliance certifications in the pre-award process (which usually means the contractor responsibility determination process), that is, after successful competition for the contract award. However, the proposed regulations (Subsection 22.2004-1) interprets this to mean that offerors must provide the legal compliance certification earlier, that is, with their initial offer, before they win the project. As that may risk the impartiality of the negotiated selection process because of an early indication of legal issues entering into the selection/competitive negotiations decisions, the regulation should be amended so that the certification should be required only after completion of the competition for contract award in the responsibility determination review of the successful offeror or low bidder. While this may not currently be the practice with respect to the other contractor responsibility certifications under FAR Part 9-104-5 and Part 52.209-5, it may still be appropriate for legal compliance certifications to be collected post offer, as provided in FAR Part 9.105-1.

4. The definition of “administrative merits determinations” should be pared back to include only final agency determinations; arbitral award definition should be clarified.

Paring back the “administrative merits determinations” to include only final agency decisions (removing initial NLRB unfair labor practice complaints, and EEOC right to sue letters, for example) would achieve a more equitable assessment of contractor and subcontractor responsibility, on proven records, improving the operation and durability of the EO, and diminishing the attacks on the fairness of the concept, without substantially impairing the goals of the EO, which is culling out truly non-responsible firms based on their established records. Similarly, the EO should clarify that arbitral decisions bearing on collective bargaining issues that don’t amount to statutory violations should be expressly excluded for reporting and LCA/CO consideration. Arbitrator awards pertaining to ordinary collective bargaining agreement terms and conditions disputes are not the types of violations that denote any integrity or business ethics issues – and merely reflect good faith disputes about how to implement complex labor agreement working terms and conditions by workforce supervision at the jobsite.

5. Expand and clarify Contracting Officer possible responses to LCA recommendations.

The provisions of the scope of possible Contracting Officer responses to the Labor Compliance Advisor’s recommendations pertaining to a prime contractors compliance review in proposed pre-award (subsection 22.2004-2 (b)(4), and post-award (subsection 22.2004-3(b)(4) procedures), and parallel provisions relating to prime contractor reviews of subcontractors records (in the event the final regulations continue to reflect the flawed flow-down process argued against in Point 1 above), should be expanded to include an optional response of the CO to an adverse LCA recommendation to permit an award to the firm despite the LCA’s negative assessment. The current list of CO response options says





the response actions may include certain negative actions in response to a negative LCA recommendation, but it is only weakly implied that the Contracting Officer retains business interest proprietary discretion to make a positive responsibility determination over an adverse LCA recommendation. The new provision should give greater weight to the discretion the Contracting Officer currently has to make a judgment in the Government's best interest, based on objective criteria, such as satisfactory past performance in spite of some legal compliance issues, if justified in writing by the Contracting Officer to be in the government's best interest based on verifiable objective criteria. There is no express term in Executive Order 13673 that would override the Contracting Officer's discretion to act contrary to the recommendation of the LCA if it is in the Government's interest to do so.

Respectfully submitted on behalf of the Campaign for Quality Construction, comprised of:

- FCAInternational (FCA)
- International Council of Employers of Bricklayers and Allied Craft Workers (ICE-BAC)
- Mechanical Contractors Association of America (MCAA)
- National Electrical Contractors Association (NECA)
- Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)
- The Association of Union Constructors (TAUC)





April 21, 2015

The Honorable Thomas E. Perez
Secretary
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Shaun Donovan
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20530

Subject: Construction industry groups' support for regulatory implementation of Executive Order 13673

Dear Secretary Perez and Director Donovan:

On April 15, 2015 the Ranking Members of the House Committee on Education and the Workforce and the Committee on Oversight and Government Reform, Representative Robert C. Scott and Representative Elijah E. Cummings respectively, wrote a letter to you urging expeditious regulatory implementation of the Administration's Fair Pay and Safe Workplaces EO13673. That letter referenced the support of the Mechanical Contractors Association of America (MCAA) for the policy aims underlying the EO, and the accompanying Congressional press release also highlighted the backing of several other construction industry associations.

Attached below is a statement for the record that MCAA and the other groups that support EO13673, combined in an alliance called the Quality Construction Alliance, submitted for the record of the hearing conducted by the Committee on Education and the Workforce on February 25, 2015. In the statement, the QCA groups express support for the policy aims of EO13673, and note some necessary regulatory changes in the Federal Acquisition Regulations pertaining to prime contractor and subcontractor responsibility determination procedures to make sure the EO is implemented most effectively.

In summary, QCA recommends that the legal compliance certification review for both prime contractors and major subcontractors be conducted by the Contracting Officer (CO) and Labor Contract Advisor (LCA) at the same time in the prime contract FAR Part 9 pre-award responsibility determination process for either FAR Part 14 low-bid selections, or FAR Part 15 negotiated selection decisions for construction project awards. Specifically, QCA recommends using the existing policy of FAR Part 9-104-4(b) permitting CO review of the subcontractor's responsibility when it is in the Government's interest to do so.

There is ample policy authority to allow OMB/OFPP to make the regulatory changes requiring CO/LCA review of major subcontractor legal compliance certifications in the Government's interest of effective implementation of EO13673. As the QCA statement points out, the current flow-down scheme, requiring an attenuated eligibility screening process by the prime of all subs at the time of subcontract awards, is rife with the potential for misapplication of the standards by the prime contractor, and then late ineligibility determinations and subcontractor substitutions, with attendant claims, disputes, and project delays, and cost overruns. Moreover, the flow-down eligibility screening process presents too many opportunities for post-award renegotiation of



subcontract price and other terms and conditions of performance in the legal compliance review discussions, all to the detriment of successful project completions and the taxpayers' interest in reducing project delays, disputes, claims, and post-award cost increases and cost overruns.

MCAA and the QCA support the aims and purposes of EO13673, as we believe high legal compliance standards in the market for direct Federal construction prime contracts and subcontracts will attract back in quality providers who will perform contracts successfully because of their respect for full legal compliance in project execution. But, in order to achieve that laudable aim, the regulatory procedures must anticipate some obvious problems and exercise regulatory prudence in adopting new and proven prime contractor and subcontractor selection procedures that also will advance the aims of EO13673.

The QCA statement also emphasizes that our members who often perform as prime contractors as well will benefit by the consolidated CO/LCA review of both the prime and major subs at the same time and in the same procedure. With this consolidated agency review, the prime contractor can avoid the liability for claims and disputes relating to the misapplication of the eligibility screening criteria on a pass-through basis, either for misapplication of the criteria in a permissive way or suffering claims and disputes relating to a challenged subcontractor ineligibility determinations. In that way, the project will benefit by the elimination of disputes, and the Government will be able to more readily establish uniform application of the legal compliance eligibility criteria on an agency-wide basis.

Thank you for considering the policy recommendations of the QCA in the interest of achieving the full construction project performance gains envisioned by the Government's sound proprietary policy aims underlying EO13673. Please contact me if you have questions pertaining to the QCA recommendations.

Respectfully submitted,

A handwritten signature in black ink that reads "John McNerney". The signature is written in a cursive, flowing style.

John McNerney, General Counsel
MCAA

Attachment: [Statement in Support of the Fair Pay and Safe Workplaces Executive Order 13673](#)

cc:

The Honorable Robert C. Scott, Ranking Member, House Committee on Education and the Workforce, and

The Honorable Elijah E. Cummings, Ranking Member, House Committee on Oversight and Government Reform