



---

March 21, 2022

Submitted via Federal eRulemaking portal (<https://www.regulations.gov>)

Crandall Watson, Chief  
Procurement Policy Division  
Office of Contracting and Procurement  
U.S. Department of Agriculture  
1400 Independence Avenue, S.W.  
Washington, DC 20250-9303  
(202) 720-7529  
[Procurement.Policy@usda.gov](mailto:Procurement.Policy@usda.gov)

**Re: Formal Comments on Agriculture Acquisition Regulation (AGAR) Proposed Rule RIN 0599-AA28; Docket No. USDA-2022-0002**

Dear Chief Watson,

On behalf of the members of the National Restaurants Association and the Restaurant Law Center, I submit these comments in response to the Notice of Proposed Rulemaking (NPRM) from the Office of Procurement and Property Management of the U.S. Department of Agriculture that would require the addition of a new “Labor Law Violations” clause in their contracts.

We object to the inclusion of the clause as it appears in the NPRM, particularly because of the possibility of it expanding later to other types of federal contracts.

The clause imposes two extraordinarily burdensome requirements on federal contractors while serving no practical utility to the U.S. Department of Agriculture. The first problematic requirement demands that the contractor certifies, for itself, as well as for all tiers of

subcontractors and suppliers, that *every* entity is in compliance with “all applicable labor laws.”

This certification is in turn made subject to all of the penalties under the False Claims Act. The phrase “all applicable labor laws” is extremely ambiguous. The scope seems to imply that it also includes state and local laws and regulations.

At the same time, the NPRM does not define the term “compliance” or how compliance or noncompliance will be determined. For example, the U.S. Department of Labor (DOL) and the Wage and Hour Division have difficulty determining if their own employees are exempt from the overtime requirements of the Fair Labor Standards Act. Given the DOL’s struggles with this law, could any federal contractor ever, with complete confidence, certify that it, as well as all tiers of subcontractors and suppliers, are “in compliance” with the Fair Labor Standards Act?

Other federal and state laws have similar areas of uncertainty. In addition, it is unclear if a minor, unintentional, technical, or paperwork error from the contractor, or one of the contractor’s subcontractors or suppliers, prevents the contractor from certifying that it is in compliance.

The proposed rule may also subject the contractor to vigorous yet “corrective action” for labor law violations carried out by its subcontractors or suppliers where an apportionment of fault may not independently apply to the contractor.

The second problematic requirement demands that the contractor promptly report when “adjudicated evidence of noncompliance occurs.” The language of the proposed rule could be interpreted to require the contractor to report such occurrences not only by the contractor, but also by all of the contractor’s subcontractors and suppliers. Moreover, the phrase “adjudicated evidence of noncompliance occurs” is haplessly vague, ambiguous, uncertain, and undefined.

Additionally, the proposed rule may be interpreted to require reporting even if the ultimate allegations are found to be meritless or frivolous. Evaluating a contractor's qualifications based on piecemeal "evidence" denies the contractor an opportunity to defend against false allegations before judgment and punishment is served. Further, the proposed rule unfairly overlooks cases in which "evidence of noncompliance" may exist, but is subsequently cured or remedied prior to any corrective action, where a law, rule, regulation, or enforcing entity/agency provides a lawful opportunity to do so.

Finally, the Department of Agriculture should not begin to enforce federal and state labor laws. Interpretation and enforcement of these regulations should be left to the agencies specifically delegated to handle those issues, such as the National Labor Relations Board, the DOL, and the numerous other federal and state agencies. Every one of these agencies has its own monitoring and enforcement mechanisms as well as remedies to ensure contractor compliance.

It is clear that this new contract clause needs further analysis. For the reasons stated above, we ask that this controversial NPRM be withdrawn.

Sincerely,



Angelo I. Amador  
Regulatory Counsel

\*I would like to thank outside counsel for their assistance in drafting these comments:



Derek Havel, Partner  
Richard Azada, Associate  
**SheppardMullin**  
Los Angeles