

**The Cumulative Burden of President Obama's Executive Orders on Small
Contractors
Testimony before the Committee on Small Business
United States House of Representatives
Subcommittee on Investigations, Oversight and Regulations
And
Subcommittee on Contracting and Workforce**

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Chairman Chabot, Ranking Member Velazquez, and Members of the Subcommittees, thank you for the opportunity to appear before you this morning. I am here this morning on behalf of the National Defense Industrial Association, the nation's oldest and largest defense industry association, comprised of nearly 1,600 corporate and 90,000 individual members. While several Executive Orders (EOs) issued in recent years have, or will have, a detrimental impact on small businesses that contract with the federal government, such as the Department of Labor's so-called "Overtime Rule", for the purposes of my testimony this morning I would like to focus on the EOs specific to government procurement or federal contractors.

Small businesses are a critical component of the U.S. economy, serving as a catalyst for economic development, providing employment opportunities, and as the engine of new ideas and innovations. Accordingly, the Federal Government has established programs to ensure participation opportunities to small businesses to fulfill the public policy objectives of the Federal Acquisition Regulation (FAR), and access a source of innovative products and services for Federal Government customers. Explicit and implicit in the desired outcomes for small business programs is achieving effective competition by maximizing small business participation and enabling small businesses to grow through diversification of the goods and services they provide and expansion into the nongovernmental marketplace.

Several EOs and Presidential Memoranda specific to government procurement or federal contractors have overwhelmed small business contractors and undermined small business goals. Small businesses have borne the cost of having to understand not only additions and changes to the Federal Acquisition Regulation (FAR) and

regulations of various Departments and agencies, but also how the agencies will implement those changes. This requires careful study of resulting agency procedures, guidance, and instructions, in addition to projecting workforce behaviors, which are largely driven by the actual or perceived interpretation of the original regulations by oversight actors (Government Accountability Office, agency Inspectors Generals, etc.). Once those are understood, small businesses must incur significant initial and reoccurring compliance costs. These costs place a burden on small business, and take the place of investments in research and development (R&D), human capital, and other means to grow businesses.

As outlined at the onset of the FAR, the guiding principles of the Federal Acquisition System are to satisfy government customers by maximizing use of commercial products and services, utilizing contractors with superior past performance, and promoting competition. At the same time, the Federal Acquisition System is to minimize operation costs, conduct business with fairness and integrity and fulfill policy objectives. The EOs attempt to fulfill the latter two guiding principles, but in the process, undermine each of the others.

The rationale for the procurement-related EOs have been to “promote economy and efficiency in procurement” through their intended outcomes. Industry does not necessarily disagree with the logic, but rather, how that efficiency and economy is achieved. Supporting documentation for the EO on Fair Pay and Safe Workplace states, “the vast majority of federal contractors play by the rules.”¹ However, the implementation approach to each of the EOs punishes that vast majority of good actors through costly, government-unique compliance requirements – a particularly inefficient means to promote efficiency. In fact, the proliferation of government-unique requirements imposed by the EOs undermines efficiency and economy by limiting the government to suppliers that are willing and able to comply. This neither promotes competition, innovation, nor does it maximize the use of commercial products and services.

Further, the most efficient and economic means to fulfill the public policy objectives of the EOs is to alter government buying practices. For example, the rationale for the Fair Pay and Safe Workplaces EO is “Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government.” Thus, if the government makes contract awards based on the offeror that provides a good or service for the best value, or in other words, the offeror most likely to deliver or perform on time, predictably, and with satisfactory performance, it would have chosen an offeror that adheres to existing labor laws and

¹ See “FACT SHEET: Fair Pay and Safe Workplaces Executive Order.” Available at: <https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>.

has workplace practices that enhance productivity. Unfortunately as industry has long pointed out, the government has poor buying habits that have equated “best value” with “lowest cost” and valued compliance to government-unique requirements over actual performance in delivering goods and services, creating a perverse incentive to “race to the bottom” to win contracts.

Congress has already passed sufficient legislation to ensure protections of federal contractor employees, and to ensure that the government only contracts with responsible sources. Rather than using EOs to alter the enforcement or interpretation of legislation, the Federal Government should ensure that they are enforcing existing laws to ensure protections for workers, and then alter buying practices to reward best value.

A major frustration for small businesses is that in many cases they agree with the intended outcome of an EO such as, providing for the well being of federal contractor employees, or making sure that competitors play by the rules, but object to the process by which the EOs have been developed and implemented and the resulting burdens. This starts with the Federal Government’s assessment of burdens on small entities. The Small Business Administration’s (SBA) independent Office of the Advocate² has commented that the Federal Government underestimated the compliance costs and entities affected in implementing regulations for Fair Pay and Safe Workplaces, Paid Sick Leave for Federal Contractors, and Establishing a Minimum Wage for Federal Contractors EOs. Unfortunately, since the EOs are published without the public vetting inherent in the legislative process, the public has no means of providing input, or accountability, on the likely burdens prior to publication.

This lack of engagement with small businesses prior to development of the EO, or their implementing regulations, has resulted in unnecessarily burdensome requirements. For instance, the proposed rule to implement EO 13706, “Establishing Paid Sick Leave for Federal Contractors,” requires federal contractors to “calculate an employee’s accrual of paid sick leave no less frequently than at the conclusion of each workweek,” and provide an employee in writing their accrued sick leave at the employee’s request. However, most companies have internal business systems calibrated for bi-weekly or semi-monthly pay periods, which is the same frequency for employees to input hours worked or taken for leave. Forcing small businesses to invest in customized business systems or man hours to adjust to these intervals, while accommodating the various standard and nonstandard employee schedules within their business, is unnecessary, and does not “increase efficiency and cost savings in the work performed by parties that contract with the Federal Government,” as the EO intends. Or in the case of the “Fair Pay and Safe Workplaces” EO, the implementing “guidance,” was not subjected to the rulemaking process, despite its “regulatory nature,” as pointed out by the SBA Office of

² Regulatory comments by the SBA Office of Advocacy can be found here: <https://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters>.

the Advocate. Further, implementation of the EOs have not provided adequate compliance support for small businesses. For example, the FAR rules implementing EO 13627, "Strengthening Protections Against Trafficking In Persons In Federal Contracts," was made effective without Congressionally-mandated guidance to help contractors comply with new requirements, severely limiting the ability of small business to comply most effectively with new regulations.

One EO in particular, Fair Pay and Safe Workplaces, is simply unfair to businesses of all sizes. Under this EO, small businesses would have to disclose alleged and adjudicated violations of 14 Federal laws and EOs in addition to yet-to-be fully-determined equivalent state laws in the preceding three years to either government contracting officers (COs), or the Department of Labor (DoL). Once disclosed, the DoL or CO (with help from agency labor compliance advisors [ALCAs]) would determine, based on the details of the alleged or adjudicated violations and any mitigating factors, whether they are serious, repeated, willful, and/or pervasive in making a responsibility determination.

Aside from the enormous associated compliance burden, the EO unfairly places these subjective determinations in the hands of COs who are incredibly risk averse and untrained in labor law. Although they are able to seek the advice of an ALCA, DoD alone for instance, has nearly 24,000 contracting officers (COs) that enter into contracts worth billions of dollars annually, with only one DoD ALCA and a handful of representatives. Common sense indicates that the small-dollar contracts that SBs compete for as primes would at the bottom of the list of priorities for ALCAs, leaving the onus on COs to assess and interpret actual and alleged violations and a range of mitigating factors, and leaving scarce resources for the government to engage with small business to develop and implement labor compliance plans. This aligns with industry's long-stated contention that this EO is punitive-based, with the intent of blacklisting businesses, rather than the supposed intent of "helping companies improve."

Small businesses are not only concerned with the collective impacts of the EOs on their bottom-line, but also the detrimental impacts they will have on government customers and their ability to carry out missions, the most consequential of which is national security. In recent years, the Department of Defense (DoD), Federal Government's biggest spender by a substantial margin, has placed a renewed emphasis on innovation and acquisition reform, led by top officials in the Office of the Secretary of Defense and the Services. These efforts have been initiated as a result of the current state of the acquisition process, which is unable to keep up with the rapid pace of technological innovation and security threats, and the reality that innovation is driven by private sector R&D, requiring DoD to access nontraditional and commercial suppliers that have historically been deterred from the government marketplace by procurement policies, to stay at the forefront of technological innovation.

Unfortunately, the EOs undermine these initiatives. The resultant accumulation of government-unique requirements and their compliance costs will continue to deter new suppliers from entering the government marketplace and drive exits by firms already selling to the government, restricting competition. Further, Fair Pay and Safe Workplaces, alone, figures to drive a substantial increase in bid protests, slowing down the acquisition process even more.

In closing, several of the recent EOs have, through flawed processes, installed burdensome, unnecessary, inefficient, and in many cases duplicative and overlapping regulatory regimes that have the cumulative effect of dramatically increasing the cost of doing businesses with the federal government. Over time, these will decrease efficiency and economy in federal procurement, while undermining small business growth and development, and limiting the Federal Government's access to innovative products and services to fulfill their needs, in direct contradiction of ongoing initiatives.

Thank you again for the opportunity to appear before you this morning and I am happy to answer any questions you may have.