



April 1, 2024

Honorable Robin Carnahan
Administrator
U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405

Re: Office of Federal Procurement Policy; Federal Acquisition Regulation: Pay Equity and Transparency in Federal Contracting; Docket No. FAR-2023-0021

Dear Administrator Carnahan:

On behalf of more than 8,000 members of the transportation construction industry, the American Road & Transportation Builders Association (ARTBA) offers the following comments on the U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, and the Office of Federal Procurement Policy (collectively “agencies”)’s proposed rule regarding pay equity in government contracting.¹

ARTBA’s diverse membership includes entities from both the public and private sectors, which plan, design, build and maintain the nation’s transportation infrastructure assets across all modes. Our members are committed to effectively utilizing the unprecedented federal funding from the Infrastructure Investment and Jobs Act (IIJA).² Prioritizing safety, environmental stewardship, and the timely completion of projects, ARTBA members play a vital role in executing essential infrastructure repairs and enhancements to the nation’s transportation networks.

Many of our members contract directly with federal agencies on construction projects, on which they would need to comply with this proposal. While ARTBA endorses the principle of pay equity and fairness in government contracting, uncertainties within this proposed rule may introduce regulatory ambiguity and confusion for our members. We therefore respectfully urge the agencies to address these concerns and ensure that forthcoming policies on these issues do not inadvertently impose additional costs or hinder the prompt delivery of projects.

¹ Office of Federal Procurement Policy; Federal Acquisition Regulation: Pay Equity and Transparency in Federal Contracting, 89 Fed. Reg. 5,843, (January 30, 2024).

² Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

Background

On March 15, 2022, President Biden issued Executive Order (EO) 14069, titled “Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency.” Through this directive, the Biden Administration ordered federal agencies to establish policies aimed at eliminating discriminatory pay practices. The agencies cite this EO as the basis for issuing the proposed rule.³

The rule would impose two main requirements: (1) it would prohibit employers “in connection with” federal contracts from soliciting information about a job applicant’s compensation history during the hiring process, and (2) it would require contractors and subcontractors to disclose the compensation to be offered, including a description of benefits or other forms of non-salary-based compensation.⁴

While the agencies assert that the rule will not impose significant burdens on regulated entities due to salary history bans and compensation disclosure requirements in many states, this proposed rule raises numerous unanswered questions and may in fact increase regulatory burdens.

Comments on the Proposed Rule

- I. The proposed rule raises ambiguities and uncertainties for contractors.
 - a. *The agencies should properly describe what is meant by work performed “in connection with” a federal contract.*

As written, the proposal has a broad application to work performed either directly on or “in connection with” a federal contract.⁵ The definition of “in connection with” remains unclear from the proposed language. The agencies have also invited feedback regarding which contractors and subcontractors fall under the rule’s coverage and the extent of contracts to be included in the regulations. ARTBA suggests the agencies narrow the scope of the rule, limiting its application to contractors and subcontractors with a direct contractual relationship to the specific federal project in question, and only for work directly related to these federal contracts.

Within teams working on any federal contract, there may exist numerous entities connected to the contract but not classified as subcontractors. For instance, materials suppliers may have ties to a government contract without a direct contractual agreement. They might supply materials to a contractor or subcontractor for use on various projects, some federally contracted and others not. In those instances, they may not even know that they are providing materials for a federal contract. Therefore, it would be impractical, burdensome, and ineffective for the agencies to mandate that such parties adhere to the same regulatory requirements.

³ *Supra* note 1 at 5,843-5,844.

⁴ *Id.* at 5,843-5,845.

⁵ *Id.* at 5,844.

Moreover, through consultations with ARTBA members, it has been indicated that their suppliers would likely cease collaboration if mandated to provide such information, as federal contract work constitutes only a small portion of their overall revenue. ARTBA suggests that the agencies offer clarification regarding the term "in connection with" and, as indicated above, ensure that the scope is not excessively broad.

b. The term "certain positions" is overly broad and must be better defined.

Within the proposed rule, the agencies state that contractors and subcontractors are prohibited from inquiring about compensation history "for certain positions."⁶ However, the rule does not specify which positions fall under this category. ARTBA suggests that the agencies clearly define this terminology and ensure it is not overly broad.

II. Federal contracting hiring practices should not impede market competition and employee development.

One requirement of the proposal is that employers disclose the offered salary range for the position.⁷ While ARTBA supports transparency in providing this information, the agencies should ensure that these disclosure requirements do not excessively constrain wage growth. The rule also mandates a description of benefits and non-salary-based compensation to be offered, including the percentage or overall dollar amount of each form of compensation.⁸ As currently formulated, this requirement presents challenges.

First, employers utilize non-salary-based compensation as incentives for high-performing employees. For instance, a high-achieving employee might receive bonuses or additional paid vacation days. Requiring detailed, upfront disclosure could disrupt the employer's efforts to incentivize excellence in the performance of new employees. Similarly, the practice could create tension if existing employees are not offered certain incentive-based compensation mentioned in job postings. Additionally, such disclosure can compromise proprietary hiring practices, intended to acquire the best talent in a competitive labor market. Therefore, the proposal could undermine practices benefiting these candidates specifically and industry employees generally.

Second, the disclosure of the "general benefits" offered for the position is problematic. Based on feedback from ARTBA members, the association notes that disclosing certain benefits may violate provider policies, as many insurance and benefits packages are tailored to specific companies and intended to remain confidential. ARTBA suggests that the agencies prioritize transparency in salary offerings and permit generic descriptions of benefits (e.g., paid time off, bonuses, medical insurance offered), without necessitating disclosure of specific amounts or details. This approach ensures companies retain flexibility to incentivize high-performing employees and maintain

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 5,845.

competitiveness in the market.

Conclusion

For the reasons described, ARTBA recommends that the agencies revise their proposal to provide further clarity to the rule. The agencies should ensure these requirements are not overly expansive and do not hinder a contractor's capacity to attract and retain talent. For additional information or inquiries, please contact Prianka Sharma, vice president and counsel for regulatory affairs, at psharma@artba.org.

Sincerely,

Prianka Sharma

Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs
American Road & Transportation Builders Association