Delivering for Taxpayers:
Taking on Contractor Fraud and Abuse and Improving Jobs for Millions of America’s Workers

The federal government spends more than $500 billion on contracts each year for a broad range of goods and services. The U.S. Department of Labor has estimated that approximately 24,000 businesses have federal contracts, employing about 28 million workers—which works out to just over one in five of our nation’s private-sector workers.

We can and should leverage these investments to create good jobs for workers and their families. In fact, Congress has enacted laws to provide that taxpayer-supported jobs are not driving down wages and working conditions across entire industries.

But despite these protections, too many workers on federal contracts—and especially women workers—have low-quality jobs. Federal contractors (and would-be contractors) face tremendous pressure to cut costs to win new contracts, especially as agencies increasingly turn to lowest-bidder contracting. This “race to the bottom” undermines federal contracting law’s intent by driving down wages. According to a 2014 Dēmos analysis of firms that receive a significant portion of their revenue from federal funds, well more than one-third of jobs at those firms pay poverty or near-poverty wages. Women in particular make up 71 percent of the low-wage workers on these jobs—about 5.6 million workers. Worse yet, a series of recent reports have shown that too many federal contractors go so far as to break the law by stealing workers’ wages and cutting corners on health and safety or other core workplace protections just to win contracts or raise their profits.

When federal contracting agencies do business with companies that break the law, there are a lot of losers:

- Workers and their families take home less pay and work in unsafe conditions—leaving taxpayers footing the bill for bad (and potentially dangerous) jobs. In the extreme case, some large federal contractors have paid back tens of millions of dollars in stolen back wages, and others have been assessed more than a million dollars in penalties for their safety and health violations.
• Contractors that don’t pay their workers are likely to be the same ones that fail to perform for taxpayers. Time after time, the contractors who shortchange their workers are the same ones who don’t deliver for taxpayers.8

• And responsible contractors themselves struggle to compete against those who don’t play by the rules, pushing down wages and workplace standards across the industry.

We need a variety of legal and policy reforms to better protect workers, responsible contractors, and taxpayers alike. But in advance of such larger policy initiatives, there are steps that federal contracting officers can and should take right now to protect our nation’s workers and federal contractors who play by the rules.

Taxpayer-Supported Jobs Should Be Good Jobs

Government contracting has a long history as the “primary—if sometimes unintended—driver of economic, industrial, social, and scientific development.”9 Likewise, government contracting can and should be driving the creation of good jobs for workers across our economy.

Federal contractors are subject to the core labor and employment laws that cover most employers in the United States, including the Fair Labor Standards Act (establishing minimum wage and overtime requirements); the Occupational Safety and Health Act (protecting workers health and safety in the workplace); Title VII of the Civil Rights Act of 1964 (barring discrimination in employment on the basis of race and sex); the Americans with Disabilities Act (doing the same with respect to disabilities); and the National Labor Relations Act (encouraging collective bargaining and prohibiting certain unfair labor practices).

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But government contractors are also subject to a range of longstanding labor standards and protections above and beyond most other employers, depending on the type of contract, ranging from the Davis Bacon and Related Acts (prevailing wages in construction) and the Service Contract Act (prevailing wages in services) to the Public Contracts Act (prevailing wages for suppliers of certain goods and supplies) and equal employment opportunity and affirmative action requirements (applying to most contractors who do more than $10,000 in government business each year).10 The Obama administration established additional protections to prevent the displacement of employees when federal contracts switched hands, a $10.10 minimum wage for federal contract workers, paid sick leave for federal contractors, and additional equal employment opportunity protections barring discrimination on the basis of sexual orientation, gender identity, or national origin.11

Laws like the Service Contract Act exist precisely to help ensure that government jobs do not drive down wages and working conditions, not only for taxpayer-supported jobs themselves
but across entire industries. In the August 1965 hearings on the SCA, then–Solicitor of Labor Charles Donahue identified the core problem that the law intends to solve:

> While I do not wish to imply that low-wage rates are universal in the service industry, the fact that they exist at all is indefensible, particularly where Government contracts are involved... Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage.\(^\text{12}\)

To achieve its purpose, the SCA empowers the Department of Labor to establish prevailing wages for workers on federal contracts. The bill passed with overwhelming support—by a voice vote in the House—and was signed by President Lyndon Johnson.\(^\text{13}\)

These laws have certainly had some impact. The equal employment opportunity protections applicable to federal contract workers have resulted in a more diverse workforce. By the mid-1980s, economic research based on workforce diversity disclosures suggested that "both minority and female employment have increased faster at establishments subject to [the] affirmative action" requirements of Executive Order 11246.\(^\text{14}\) No doubt there is room for improvement in terms of the distribution of opportunities. A 2014 Dēmos study found that 35 percent of taxpayer-supported workers are people of color, including 45 percent of the low-wage subset of those workers.\(^\text{15}\) Women constitute 61 percent of taxpayer-supported workers, and 71 percent of the low-wage subset of those workers.\(^\text{16}\)

And while wages for federal contract workers beat private-sector medians, the Dēmos study reveals substantial room for improvement on this front as well, especially on the low end:

> One-third of [taxpayer-supported] workers earn less than the private sector median wage of $15.84 per hour ($32,900 annually), and 38 percent earn poverty or near-poverty wages, earning less than 150 percent of the federal poverty threshold for a family of four.\(^\text{17}\)

Still, taken together, federal contracting laws hold the promise of driving better employment across the federally contracted workforce and our broader economy—so long as these protections are actually enforced.

**Cut One Corner, Cut Them All**

The challenge is that too many contractors are routinely breaking these laws. In a 2010 study, the Government Accountability Office found that 25 of the 50 largest Wage and Hour Division assessments over a five-year period involved 20 companies with federal contracts in 2009.\(^\text{18}\) GAO also found that eight of the largest safety and health penalties assessed over the same period involved seven other companies with federal contracts in 2009.\(^\text{19}\) Likewise, the Senate Health, Education, Labor and Pensions Committee Majority Staff released a report in 2013 finding that federal contractors made up almost 30 percent of the top violators of wage-and-hour laws, and that federal contractors accounted for 18 of the 100 largest penalties issued by the Occupational Safety and Health Administration between 2007 and 2012.\(^\text{20}\) And the problem persists: Just last year, Senator Elizabeth Warren released a report
finding that 66 of the largest 100 federal contractors—representing nearly $240 billion in taxpayer dollars in 2015—have violated federal labor laws. Dēmos has estimated that contractors’ violations in wage-and-hour laws alone result in their workers losing up to $2.5 billion each year.

CONTRACTOR SPOTLIGHT: GENERAL DYNAMICS

General Dynamics Corporation is the third-largest recipient of federal contracts in the nation. Last year alone, federal agencies obligated more than $15 billion in contracts to the company. On top of that, General Dynamics receives hundreds of millions of dollars in government subsidies nationwide.

But representatives of the Communications Workers of America report that General Dynamics pays wages as low as $10.35 per hour to workers at call centers covered by the Service Contract Act. Worse yet, the company has an established record of employment law violations. For example, after a 2011 acquisition of Vangent, the company’s General Dynamics Information Technology (GDIT) unit operates numerous call centers for federal agencies. Since 2007, an analysis of publicly available enforcement data reveals that GDIT and Vangent have agreed to pay at least $4.2 million in back wages assessed by the Labor Department’s Wage and Hour Division (WHD), including $3.8 million in back wages for violations of the Service Contract Act and $439,000 for violations of the Fair Labor Standards Act.

WHD records obtained through the Freedom of Information Act provide additional context for the cases resulting in the back wages listed above, and for the continuing allegations of violations despite promises of future compliance. For instance, WHD investigated GDIT’s call center in Coralville, Iowa for failing to pay for pre- and post-shift work between 2010 and 2012. WHD found that the company tracked employees’ work time through its telephone systems and did not record all hours worked. Also, according to WHD interviews, “employees were advised by supervisors not to report time before and after their shift when they were working but not answering telephone calls.” In 2013, the company agreed to pay 719 employees a total of $372,588 and promised to comply in the future.

More troubling, a recent analysis by the Communications Workers of America suggests that GDIT could owe its workers as much as $107 million more in back wages. CWA has called on WHD to investigate the systematic misclassification and underpayment of more than 10,000 GDIT workers employed at the call centers that the company operates under contracts for the Centers for Medicare and Medicaid Services. CWA has filed related complaints with the WHD involving GDIT call centers in eight states, providing evidence that GDIT has classified these workers at lower pay rates than their actual duties require under the SCA. For example, at its call center in Hattiesburg, Mississippi, CWA has alleged that thousands of current and former employees were classified into the wrong positions, leading to GDIT underpaying its full-time employees there by amounts ranging from $3,682 to $6,572 per year. Other federal data suggest that the affected workforce is disproportionately made up of women, and many affected worksites have large shares of workers who are people of color.
A contractor’s employment and labor violations could reveal just the tip of the iceberg when it comes to the company's business practices. A 2013 report by the Center for American Progress built upon the 2010 GAO study to show that “the companies with the worst records of harming workers were also often guilty of shortchanging taxpayers through poor performance on government contracts and similar business agreements in ways that defraud the government or otherwise provide a bad value of taxpayers.” The report found that among the 28 companies that had the largest health-and-safety or wage-and-hour workplace violations (by dollar value) between 2005 and 2009 and then received federal contracts, one quarter had “significant performance problems” ranging from fraudulent billing to cost overruns to falsifying test results and even an oil-rig explosion.

**CONTRACTOR SPOTLIGHT: XPO LOGISTICS**

Industry publications have named XPO Logistics the top logistics company in the nation. Forbes ranks it the 67th largest employer in the nation across all industries, by number of employees, reportedly around 97,000. One analysis by the International Brotherhood of Teamsters suggests that the company’s total federal outlays since 2016 could total almost $219 million with all options values factored in.

But courts and administrative agencies alike have repeatedly found XPO and companies affiliated with XPO liable for a range of employment and labor law violations in recent decades, including misclassifying drivers as independent contractors rather than employees. Federal and state courts have decided as a matter of law that drivers at these companies were employees—not independent contractors—under both California and Massachusetts law in wage-and-hour litigation leading to more than $18 million in one final judgment and two settlements. The California Division of Labor Standards Enforcement has issued two other decisions against these companies, initially awarding about $1.8 million in damages to misclassified drivers for labor code violations, with both cases currently on appeal. According to federal enforcement data, XPO and its current subsidiaries have agreed to pay more than $300,000 in back wages assessed by WHD for federal wage-and-hour violations since 2006, including $30,621.50 for 23 employees in Service Contract Act violations. And just this past February, a class-action lawsuit was filed in California state court, alleging that XPO conducted a “deliberate scheme to misclassify their truck drivers as independent contractors, thereby denying them the fundamental protections due to employees under California law.”

XPO and its subsidiaries have faced labor and employment law claims beyond wage-and-hour violations as well. Courts have enforced against XPO three decisions in which the National Labor Relations Board found that the company refused to bargain after workers voted to form unions. Previously, in 2015, a federal appeals court affirmed a jury verdict for $1.5 million in compensatory and punitive damages against an XPO acquisition called New Breed Logistics for sexual harassment and retaliation in a case brought by the Equal Employment Opportunity Commission. Similar claims are alleged to be ongoing: this year, 11 women filed EEOC charges against XPO for sexual harassment, several of whom work in the same Memphis, Tennessee warehouse where the prior illegal discrimination took place.

One concrete and high-profile example involves CGI Federal, the company tasked with building healthcare.gov, the website for individuals to enroll for coverage under the Affordable Care Act. That website’s rocky rollout in the fall of 2013 was well documented, to say the least. But as the Senate HELP Report showed, the company had a history of employment law violations that was telling. While CGI Federal itself had two wage-and-hour
violations totaling $134,149 in liability, its parent company and similarly named entities had a significant record of violations totaling $1.7 million between 2007 and 2012, including four wage-and-hour violations and nine safety and health violations. Federal contracting officers should be able to use a company’s labor and employment law violations as a "canary in the coalmine" to identify possible performance problems later, because contractors who cut corners on employment protections are the same ones likely to cut corners elsewhere on contracts.

The Rise and Fall of the Fair Pay Executive Order

The Obama administration recognized the importance of carefully examining companies competing for government contracts to ensure that taxpayer dollars aren't being used to reward companies that are cutting corners. President Obama signed the Fair Pay and Safe Workplaces Executive Order on July 31, 2014, building on the longstanding principle of procurement law that federal agencies may only award contracts to “responsible prospective contractors.” The Fair Pay Order created a mechanism for prospective contractors to disclose their labor and employment law violations, and for agency contracting officers to review those disclosures prior to approving contracts.

Entrenched government contractors fiercely opposed this commonsense reform. No wonder, since the Senate HELP Report found that 49 federal contractors alone were cited for 1,776 separate labor and employment law violations, totaling $196 million in penalties and assessments during the relevant time period. The Fair Pay Order promised to reset incentives so that contractors would stop shortchanging workers or exposing them to harms.

A single federal judge preliminarily enjoined the government from implementing the Fair Pay Order in October 2016. Early the following year, Congress passed and President Trump signed a resolution disapproving the federal procurement regulations implementing the Fair Pay Order, effectively mooting further litigation. President Trump further rescinded the Fair Pay Order itself on the same day.

Contracting Officers Can Still Engage in Due Diligence

Federal regulations have long required that contracting officers make an “affirmative determination of responsibility” before awarding a contract. The Fair Pay Order created a mechanism to ensure that federal contracting officers had access to key information and guidance about labor law violations to facilitate this “responsibility determination.” Even though the Fair Pay Order was rescinded, contracting officers have the same authority and responsibility that they had previously to account for a potential contractor’s record of employment law violations when determining whether to enter into a federal contract, at least when they have information of such violations. In the absence of constructive action by
the Trump administration, NELP has published a separate guidance to contracting officers explaining this authority.61

As more fully explained in NELP’s guidance, well-established principles of procurement law require contracting officers to make an “affirmative determination of responsibility” before awarding a contract.62 Absent information “clearly indicating” responsibility, the contracting officer must make a “determination of non-responsibility.”63

As Congress recently noted in a conference report, the Federal Acquisition Regulation (FAR) expressly requires that contractors must have adequate “safety programs applicable to materials to be produced or services to be performed” in order to be responsible.64

In fact, contracting officers have a long history of exercising their discretion to account for a range of employment law violations when they know about those violations prior to making a responsibility determination.65 As early as 1976, an Air Force contracting officer determined that a prospective contractor was not responsible because it had failed to pay prevailing wages and benefits on six prior service contracts.66 In 1985, an Army contracting officer likewise found a bidder to be non-responsible after learning that the contractor had not paid the prevailing wage in the construction of a prior project.67 In both of these cases, subsequent bid protests were denied.

As a practical matter, even absent the disclosures required in the Fair Pay Order, contracting officers already have a clear path to more systematically evaluating employment law violations when they are making responsibility determinations for new contracts. First, they can quickly search the small number of widely available government enforcement databases that list enforcement actions involving particular employers, or even just one of the government or non-governmental databases that aggregate these datasets.68 Second, they should continue to evaluate any relevant information that is provided to them, as they long have done so routinely.69

**Contracting officers continue to have the authority and responsibility to take into account a potential contractor’s record of employment law violations when determining whether to enter into a federal contract.**

Contracting officers can use these same resources to make responsibility determinations when awarding task orders or delivery orders under indefinite delivery vehicles (IDVs) such as indefinite delivery/indefinite quantity contracts. IDVs are now used for approximately half of total contract obligations by federal agencies.70 It is a best practice, consistent with the FAR, to make an affirmative determination of responsibility before placing each additional task or delivery order under an IDV.71

Contracting officers who more systematically account for employment law violations in their procurement decisions would have multiple positive impacts:
They create incentives for federal contractors to comply with important labor and employment protections and ensure that government contracts aren’t creating bad jobs;

They alleviate the downward competitive pressure on responsible contractors who follow the law, and who currently find themselves competing with contractors who are willing to cut corners on labor and employment protections to outbid them; and

They identify contractors who have not complied with labor and employment laws in the past and who may have performance problems in the future.

**We Still Need Federal Reforms**

Beyond these first steps, key policy reforms would ensure that federal contracts lead to family-sustaining jobs for our nation’s workers:

- Labor laws should be strengthened to give more workers the freedom to join together. Under the current labor law regime, employers can violate the law with relative impunity. These reforms would have the greatest impact in creating good jobs. Unionized workplaces, with their ability to do ongoing monitoring and their built-in whistleblower protections, are more likely to follow the law, not to mention to provide higher wages and better benefits.

- Federal procurement laws and policies should be reformed to ensure that government contracting delivers the best value for taxpayers by rewarding employers that invest in their workforces with quality jobs. Jobs to Move America’s U.S. Employment Plan provides a compelling model for procurement reform that rewards “equipment manufacturers who commit to creating good jobs, invest[] in domestic manufacturing facilities, and provid[e] training to people facing barriers to employment.” Indeed, a 2016 UCLA Law School analysis of that plan’s implementation found that “there is no evidence that [this plan] has unduly inhibited competition [in terms of] the pool of potential bidders or the ultimate contract price.” Studies of raising standards through living-wage laws have suggested that agencies could actually lower costs; for example, a case study of San Francisco International Airport showed that instituting a living wage lowered turnover from 94.7 to 18.7 percent annually, saving employers more than $4,200 per employee in turnover costs, and boosted morale and customer service.

- Even without additional legal authority, the Office of Management and Budget could provide guidance to contracting officers on how to consider labor and employment law violations in making responsibility determinations, and at minimum, offer training on how to access relevant federal databases that track such violations. Moreover, the federal government could invest in tools and resources to compile and share information more effectively about contractors’ records of legal compliance and their track record in fulfilling their contractual duties. These sorts of improvements would help contracting officers provide better value to taxpayers alongside important transparency around a major source of federal spending.

- Likewise, federal contracting agencies should make better use of existing administrative remedies to block contractors who skirt the rules, including suspension and debarment.
It is important to note that systemic reforms must be paired with additional resources for implementation. Contracting agencies need those resources to adequately implement these requirements.

### RECENT PROGRESS

Even after the Fair Pay Executive Order was disapproved by the current Congress, advocates have continued to pursue policies that promote contractors’ compliance with employment laws:

- Congress enacted a provision of the National Defense Authorization Act for 2018 that included a provision requiring a report on how the defense department considers safety and health violations in making responsibility determinations,\(^{80}\) in addition to report language “direct[ing] the Secretary of Defense to ensure that contracting officials award contracts consistent with federal acquisition regulations, including those required safety elements.”\(^ {81}\)

- The City of Boston adopted an ordinance in December 2016 providing that permitting officers may deny an application for, revoke, or suspend any permit involving a contractor with a history of “engaging in unsafe, hazardous or dangerous practices based on work safety histories or concerns,” including OSHA violations.\(^ {82}\)

- Other lawmakers across the country are considering similar protections. Travis County, Texas, has passed a version of this law, and lawmakers from the State of Massachusetts are considering their own.\(^ {83}\)

### Additional Resources


Endnotes


4 Hiltonsmith and Daily, 15.

5 Hiltonsmith and Daily at Démos find that women make up 71.2 percent of low-wage workers in the federally supported workforce. Ibid, 18. They also estimate that 8 million workers are in the low-wage portion of this workforce overall. Ibid, 2.

Federal Contractor May Owe $107 Million in Back Wages

Contact the author:


13 Ibid. 16.


15 Hiltonsmith & Daily. 18.

16 Ibid.

17 Ibid. 15.


19 Ibid.

20 Health, Education, Labor & Pensions Committee Majority Staff.

21 Office of Senator Elizabeth Warren.


24 Ibid.


26 Daniel Bass, e-mail message to author, August 27, 2018 (on file with author). Until recently, the pay was as low rate as $9.64 per hour. Ibid.


23 Wage and Hour Division, “Compliance Action Report and Case Narrative for WHD Case ID 1676237,” October 12, 2017 (on file with author). Note that General Dynamics acquired Vangent during the period of the Wage and Hour Division’s investigation, and General Dynamics owned Vangent at the conclusion of the investigation.

25 Ibid, 13

31 Ibid, 7.


35 Communications Workers of America (Jan. 31, 2018).

36 Ibid.


38 Communications Workers of America (Jan. 31, 2018).


40 Walter and Madland, 1.

41 Ibid.


45 Terrence Witherspoon, e-mail message to author, August 29, 2018 (on file with author).


46 See Ramirez v. Pacer Cartage, Inc., No. 2:15-cv-03830, 2017 BL 165618 (C.D. Cal. May 16, 2017) (finding that the company had misclassified five drivers and ordering the company to pay $958,659.27 plus fees and costs) (currently pending appeal to the Ninth Circuit, Nos.17-55940 & 17-55935 (9th Cir.)


51 EEOC v. New Breed Logistics, 962 F. Supp. 2d 1001 (W.D. Tenn. 2013) (denying New Breed’s motion for judgment as a matter of law or a new trial after a jury returned a verdict against New Breed on the EEOC’s claims of sexual harassment and retaliation, and awarded compensatory and punitive damages, following a trial held from April 30, 2013 to May 7, 2013), affirmed, 783 F.3d 1057, 1061 (6th Cir. 2015). Note that XPO acquired New Breed in September of 2014, after the facts arising leading to this case.


54 See Health, Education, Labor & Pensions Committee Majority Staff, xv.


60 Federal Acquisition Regulation 9.103(b).

contracting-officers-consider-labor-employment-law-violations-making-legally-required-responsibility-determinations/

62 Federal Acquisition Regulation 9.103(b).

63 Ibid.


69 A 2013 Congressional Research Service report describes the extraordinary breadth of the discretion that contracting officers have to consider the information that they need in making responsibility determinations, citing to Comptroller General opinions. Kate M. Manuel, Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures, (Washington, DC: Congressional Research Service, 2013), 11, accessed Aug. 25, 2018, https://fas.org/spg/crs/misc/840433sp.pdf. In short, so long as they consult the Federal Awardee Performance and Integrity System (FAPIIS), “what other information, if any, contracting officers consider remains within their discretion.” Ibid. In two bid protests previously outlined for example, neither contracting officer received notice of the respective violations from the prospective contractor directly. See Greenwood’s Transfer & Storage Co., Inc.; General Painting Co.


75 See generally Sonn and Gebreselassie.


78 Sonn and Gebreselassie, 3. This report also lists other examples of the benefits of high-road contracting for taxpayers.
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About NELP

The National Employment Law Project is a non-partisan, not-for-profit organization that conducts research and advocates on issues affecting low-wage and unemployed workers. For more about NELP, visit www.nelp.org.

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