

Comments of the Texas AFL-CIO State Labor Council and Public Citizen Before The Regulatory Acquisitions Council On The Matter Of Contractor Responsibility Rules

I. Introduction

President George W. Bush has indicated an intent to contract out the jobs of more than 40,000 Federal Workers. To the extent that our Federal Civil Service is being replaced by private contractors, the public has an interest in ensuring that these contractors are, "responsible." At a minimum, responsibility means that private contractors should comply with the same laws that every other citizen, corporation, partnership or entity transacting business in this country abides by.

Pursuant to the Notice published at 66 FR 23134 (May 7, 2001), these comments are filed by the National Association for the Texas AFL-CIO State Labor Federation, a council of more than 50 affiliated labor organizations; and Public Citizen, a national consumer organization of over 150,000 members founded by Ralph Nader. The purpose of these comments is to call the Council's attention to evidence of a fundamental breakdown in the civil rights review process regarding components of the procurement system. This breakdown is dramatically evidenced by the facts surrounding the March 30, 2001 award of a showcase Department of Defense contract to Eagle Global Logistics (Eagle). The showcase contract -- under which Eagle will service Army freight logistics in Florida, Alabama, and Georgia--was awarded to Eagle over 11 competing bidders.

On May 1, 2000 the United States Equal Employment Opportunity Commission (EEOC), in a 104 page decision, found Eagle to be in pervasive violation of civil rights law. Moreover, the EEOC found and charged Eagle with destroying numerous relevant documents and engaging in misrepresentation to the government. In an April 2001, Federal Court filing, the EEOC further identified by name more than 300 individual victims of Eagle's discriminatory practices.

How -- in March of 2001 -- could a contract be awarded by the United States Department of Defense (DOD) without any evident consideration of the EEOC's findings? ¹The information now publically available regarding the Eagle award shows that the "responsible contractor determination" -- at least in regard to civil rights laws --- is broken down on many counts, and, in the Eagle case, was a sham. This information shows:

1. The Department of Defense awarded the multimillion dollar contract with absolutely no knowledge of the EEOC's substantial findings and charges. In a June 14,

¹ This matter was called into question by a report on ABC World News Tonight, June 30, 2001. A transcript of that report is attached hereto as **Exhibit A**.

2001 letter to Congressman Nick Lampson², Secretary of the Army White admitted that the DOD contracting officer “had no knowledge” of the EEOC findings and conclusions.

2. *The Department of Labor (DOL)’s EEO review process turns out to be a sham. Secretary of the Army White states that DOD “gave great deference to the Department of Labor’s endorsement of Eagle.”* However, press reports confirm that the DOL’s clearance process for Eagle amounted to the declaration that “we’ve never heard of them so they must be ok.” There was no effort by the DOL to contact the EEOC even to see if it had heard of Eagle. The DOL reviewers were evidently unaware that the DOL itself had just filed suit in Federal court against Eagle for violation of Federal employment laws.

3. *The DOD determination that Eagle was a responsible contractor was in violation of the “responsible contractor” rules which have now been stayed.* The responsible contractor rules went into effect on January 19, 2001. The Department of the Army contracting office made its responsible contractor determination on March 29, 2001 - - while the rules were in effect. The (now stayed) rules specified that in making the responsible contractor determination, the contracting officer “must consider” (among other items) “adverse decisions by a Federal...commission...indicating violations of law.” The DOD admittedly failed to consider the May, 2000 EEOC decision –as it was plainly and expressly obliged to do by then effective procurement law.

4. *The DOD responsible contractor determination of Eagle demonstrates even the new rule, which the FAR Council has stayed, may not be strong enough to ensure taxpayers are not cheated by scoff laws.* Opponents of the now stayed responsible contractor rule claim that the rule is not needed because procurement law already required the government to assure itself that only responsible contractors are hired. The Eagle contract shows just how porous the strengthened process is – at least where civil rights are involved. The DOD claims that the contracting officer who okayed the Eagle contract based his March 29 determination on an internet search, which the Army claims did not surface the EEOC’s concerns. In fact, as Eagle itself has told the press in an article that appeared in a June 21, 2001 issue of the Houston Chronicle³, a web search should have readily revealed that the EEOC has concerns which require further investigation by the contracting officer.

5. *The government’s ignorance permitted Eagle to engage in misrepresentation about its scofflaw conduct to obtain the award.* As Congressman Nick Lampson wrote to

² This letter is attached hereto as **Exhibit B**.

³This article is attached hereto as **Exhibit C**.

the Secretary of the Army on June 18⁴:

In response to the Department's procurement invitation Eagle falsely attested to the Department that it had not been charged by any agency with "falsification or destruction of records, making false statements," when the EEOC's May 2000 Letter of Determination contains just such determinations and charges

In short, the Eagle contract award shows that the Departments of Defense and Labor failed to do their most basic duty to protect the public, and that their failure violated longstanding procurement laws, the recently stayed contractor responsibility rules, and commonsense. The Eagle case raises the following questions, which must be addressed by the Federal Acquisition Regulatory Council, before it can make any decision revoking the contractor responsibility rules:

1. *What is required to make the Department of Labor's role in clearing potential contractors for civil rights and labor law concerns more than a rubber stamp? For example, should the DOL reviewers be required to communicate with the EEOC? Should the DOL reviewers be required to determine whether the potential contractor is under charge or investigation by DOL itself? The answers to these questions would seem self-evident.*
2. *Why did the Department of Defense fail to comply with the express requirement (of the rules in effect at the time of the March 29 responsibility determination) that DOD procurement officials "must consider" "adverse decisions ...by a Commission ... indicating violations of law." If such a clear mandate can be ignored, why should citizens presume that more ambiguous mandates to consider elements of a contractor's performance will be adhered to?*
3. *Why didn't Department of Defense procurement officials know of information that was readily available – from the web and obviously relevant government agencies (i.e., the EEOC)? The Army's revelation that the determination that Eagle was responsible relied on a web search provides no comfort when such search should have yielded information on the EEOC's concerns.*
4. *What action will the Department of Defense take to determine whether Eagle was up-front with the DOD in attestations made on behalf of the bid?*

⁴This letter is attached hereto as **Exhibit D**.

What action will the DOD take if it determines that Eagle's attestations were not adequate?

II. United States Equal Employment Opportunity Commission v. Eagle

On December 1, 1997, Gilbert Casellas, Chairman of the United States Equal Employment Opportunity Commission, filed a preliminary charge, attached hereto as **Exhibit E**, alleging that Eagle had violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"); and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA") by engaging in the following discriminatory conduct:

- a. failing and/or refusing to recruit and/or hire Blacks, Hispanics, Asians and females into professional, managerial and sales positions because of their race, national origin, sex and age;
- b. failing and/or refusing to promote Blacks, Hispanics and females into managerial and sales positions because of their race, national origin, sex and age;
- c. failing and/or refusing to recruit and/or hire Blacks, Hispanics, Asians and females into warehouse, delivery and truck driver positions because of their race, national origin, sex and age;
- d. demoting females from managerial positions because of their sex and imposing disparate discipline on women, Blacks and Hispanics;
- e. maintaining a hostile working environment against Blacks, Hispanics, Asians and females with respect to terms, conditions and privileges of employment because of their race, national origin and sex,
- f. failing to properly investigate incidents of sexual harassment, failing to discipline wrongdoers and failing to protect employees from sexual harassment;
- g. failing to maintain proper records regarding the hiring of employees; and
- h. failing to file accurate EEO-1 reports.

Pursuant to the Commissioners' Charge," which is used in only rare and compelling circumstances, the Equal Employment Opportunity Commission embarked on a two and a half year investigation. The investigation included interviewing more than 125 witnesses

including approximately twenty company representatives whose testimony was taken through sworn depositions. The EEOC also reviewed thousands of company documents, conducted data analysis and reviewed position statements submitted by the company.

The Letter of Determination, or the Commissioner's findings, was issued by the EEOC on May 1, 2000. A copy of that Letter of Determination in Casellas v. Eagle USA Airfreight Inc. (now "Eagle Global Logistics"), EEOC Charge No. 330 98 0567, is attached hereto as **Exhibit F**. (Eagle, in its representations to shareholders through a second quarter 2001 10Q filing, even acknowledges that the Commissioner's LOD is a, "final determination," by the Commission.) The Letter of Determination substantially confirmed the allegations in commissioner Casellas' charge and further found and/or charged Eagle with the following conduct:

- "Testimony and other evidence supports a finding that both before and after the charge was issued, the company intentionally destroyed evidence and also did not make adequate attempts to preserve evidence regarding the hiring of employees."

LOD at page 7.

- "...the president [of Eagle] and Eagle's outside counsel were given clear written notice in October, 1997, December, 1997, in January, 1998, and thereafter that company documents and other evidence had to be retained during the pendency of the investigation pursuant to Title VII and 29 CFR §1627.3(b)(3). There is abundant evidence of affirmative destruction of relevant evidence both before and after issuance of the charge. There is evidence of unwillingness to assure that relevant evidence would be retained during the pendency of this investigation. For example, witnesses observed the shredding of current applications by Eagle's administrative and human resource departments in mid February, 1998, just a few months after the Commissioner's charge was filed."

LOD at page 7.

- "There is also evidence that the company did not maintain any records or other information bearing on the impact of their selection procedures on employment of protected groups, thereby violating the Commission's Uniform Guidelines on Selection Procedures, 29 CFR § 1607."

LOD at page 8.

- “There is sufficient evidence to support the allegation that Eagle failed entirely to file EEO-1 Reports for the years of 1993 through 1995 (and it may have been required to file those reports as early as 1991). It is therefore determined that respondent willfully and knowingly failed to file annual EEO-1 Reports in 1993, 1994 and 1995 and that it filed inaccurate reports in 1996, 1997 and 1998.”

LOD at page 11.

- “The investigative record suggests that the company purposefully failed to submit the required filing of EEO-1 reports for at least three years, ‘93 to ‘95 and may have had to file the report as early as 1991. There is abundant evidence that the then human resources manager knew Eagle had to file the EEO-1 Report in 1993 and ignored it, choosing to not take any steps to file the EEO-1 until 1996. It bears noting that a review of the hiring records provided by Eagle does not document the hiring of even one black employee prior to 1993. When Eagle finally started filing the EEO-1 reports in 1996, the reports were inaccurate and over represented minority employment in key positions.”

LOD at page 12.

- “The investigative record amply supports findings that Eagle’s president, officers and other corporate managers have personally committed discriminatory employment practices and that respondent has compromised the integrity of the investigative process.”

LOD at page 13.

- “Managers say they were specifically told not to hire women and minorities.”

LOD at page 14.

- “Mr. Crane said that Eagle hadn’t changed any policies or taken any initiatives because of the Commissioner’s charge. (JC, Vol. 1 at pp.34-35) (This was confirmed by John McVaney, the executive vice president, a regional vice president, Randy Mondello (at p. 133 of his administrative deposition, hereafter RM), the vice president of administration, Jon Kennedy (at p. 177 of his November 24, 1998 administrative deposition, hereafter “JK”) and Jane Reindl, the president’s executive assistant.”

LOD at page 15.

- “Former Eagle employees have advised that they were instructed by one of Eagle’s counsel to destroy subpoenaed documents that had not yet been produced and that they were ordered by Eagle’s counsel to create some false evidence which would then be given to the Commission in place of subpoenaed documents.”

LOD at page 17.

- “After extensive interviewing, it was determined that the company almost never hires females or minorities who have not had extensive industry experience but it frequently departs from this pattern in hiring untrained and inexperienced white males for a broad range of positions...”

LOD at page 18.

- “Based on the foregoing assessment as well as evidence summarized hereafter, the evidence establishes that Eagle’s highest corporate and managerial tier have purposely denied employment to qualified females and minorities because of their gender and/or race and/or national origin and have told some of their subordinates to implement this practice.”

LOD at page 19.

- “A review of the voluminous minutes of years of Eagle’s managers’ meetings discloses not even one pre-Charge reference to equal hiring opportunity or equal opportunity recruiting practices and just one reference to this issue after the Commissioner’s charge was filed.”

LOD at page 22.

- “Some witnesses allege a pervasive pattern of discriminatory employment practices. Those particular witnesses claim the root of the problem is a corporate culture established by the founder and his close associates. It has been suggested that Mr. Crane and a few close associates systematically thwarted standard human resources principles and denigrated and undermined some employees who tried to implement appropriate procedures. A key development was

the acknowledgment of serious hiring irregularities in 1996 by the company's own human resources manager, Laurie Parmeter."

LOD at page 22.

- "Some witnesses maintain that core recruitment devices, such as heavy reliance on temporary agencies, underutilization of advertising, and encouraging current employees to refer friends, were explicitly chosen as a means to hide job availability from qualified minorities. Some further contend that applications were purposely destroyed to impede discrimination investigations."

LOD at page 27.

- "It is undisputed that Eagle has not hired blacks in high level management positions."

LOD at page 28.

- "Put more technically, there is statistically significant underutilization of Black and Hispanic drivers..."

LOD at page 32.

III. Dube et al. v. Eagle Global Logistics

Subsequent to the issuance of the Letter Of Determination, a group of private plaintiffs filed a class action suit against Eagle in a case known as Dube et al. v. Eagle Global Logistics. Sworn deposition testimony taken in that case, and independent of the EEOC's Letter of Determination and investigation, includes the following:

- Eagle's former station manager in Detroit testified under oath that he was told by a company Vice President not to advertise for jobs in the Detroit papers because, "if you do that, you know, then you're going to have basically every nigger in Detroit applying for those jobs, and you don't want to have that..."

Sworn deposition testimony of Mark Fierek at page 21-22. (Excerpts from the Fierek deposition are attached hereto as **Exhibit G**).

- One witness, Shirley Bolden, testified to the shredding of job applications during the EEOC's investigation.

A copy of the shredded documents is attached hereto as **Exhibit H**. In addition, the sworn deposition testimony of Shirley Bolden at pages 77-82 is attached hereto as **Exhibit I**.

- The former assistant to CEO James Crane, and a plaintiff in the private party lawsuit, testified to the direction from a high level company officer that no Blacks were to be hired in administrative offices.

Excerpts from the sworn deposition testimony of Kshanti Morris at pages 224-227 are attached hereto as **Exhibit J**.

- The former Human Resources Director of Eagle forced his assistant to download cyber-sex onto a company computer, engaged in constant discussion of murdering his wife and talked openly of having sex with his wife until she bled to death.

Excerpts from the sworn deposition testimony of Debbie Perez-Johnson at pages 154-158 are attached hereto as **Exhibit K**. In addition, excerpts from the sworn deposition testimony of Danielle McDearman at pages 313-315 are attached hereto as **Exhibit L**.

- An Eagle recruiter testified that she was given instructions to only hire, "thin lipped," meaning, "no blacks."

Excerpts from the sworn deposition testimony of Melissa Davis at pages 159-160 attached hereto as **Exhibit M**.

- A former sales representative of Eagle who was part of the company's elite sales force testified to the use of the word nigger in the workplace by at least one supervisor, pay disparities and company sponsored strippers to entertain company clients at an event for the Indianapolis 500.

Excerpts from the sworn deposition testimony of Robin McVeigh at pages 155-159, 184 and 351-354 attached hereto as **Exhibit N**.

- Witnesses testified to a hostile work environment including company subsidized visits to gentleman clubs and places of prostitution.

Excerpts from the sworn deposition testimony of Kshanti Morris at pages 470-471 attached hereto as **Exhibit O**.

- Eagle station managers in Philadelphia and New Jersey testified to being unfamiliar with the company's affirmative action programs.

Excerpt from the sworn deposition testimony of Edward Wartens at page 258 is attached hereto as **Exhibit P**. Excerpts from sworn deposition testimony of Robert Kanavel at pages 224-225 attached hereto as **Exhibit Q**.

- Eagle former vice president overseeing human resources testified to the lack of a job posting program.

Excerpts from the sworn deposition testimony of Gary Abram at page 191 attached hereto as **Exhibit R**.

- A former head of Eagle's Mexican operations testified to a skit paid for at the company's expense and presented at a national sales meeting that denigrated Mexican Americans, as it depicted Texans killing Mexican Americans.

Excerpts from the sworn deposition testimony of Rubin Capaletti at pages 224-225 are attached hereto as **Exhibit S**.

- A former employee at Eagle's Philadelphia station testified that she was asked by Eagle supervisors in charge of hiring to place Xs on applications from African Americans.

Excerpts from the sworn deposition testimony of Noelle Davis at pages 180-181 and 185-186 are attached hereto as **Exhibit T**.

- James Crane's ex-wife and former Eagle owner, Theresa Kay Crane, testified to the existence of a "Program" of discrimination that cultivates an environment that is abusive to women and minorities. This was also confirmed by the deposition testimony of Mark Fierek, former Detroit Eagle Station Manager.

Excerpts from the sworn deposition testimony of Theresa Kay Crane at pages 253-254 are attached hereto as **Exhibit U**. In addition, excerpts from the sworn deposition testimony of Mark Fierek at pages 271-272 are attached hereto as **Exhibit V**.

Unsuccessful in resolving its disputes with Eagle, the EEOC intervened in the private party litigation in January 2001. On April 27, 2001, the EEOC filed a formal Court document called, "The Intervenor's Bill of Particulars," which is attached hereto as **Exhibit**

W. The EEOC's Bill of Particulars identifies, by name, hundreds of current and former Eagle employees who have been victimized by Eagle's discriminatory practices.

IV. Alexis Herman v. Eagle

Eagle's violations of laws protecting workers are not limited to gross incidences of employment discrimination. In August 2000, the Secretary of Labor filed a Federal Court lawsuit in Dallas, Texas against Eagle for violations of the Fair Labor Standards Act, 29 USC Sec. 216. A true and correct copy of the complaint in that case is attached hereto as **Exhibit X**.

V. Conclusion

In essence, facts now publically known about the Department of the Army's March 30, 2001 award to Eagle show that, at least in regard to the Army and the Department of Labor, the civil rights component of the new responsible contractor review, compared to the previous requirement, is not even strong enough. The Eagle contract award reveals that the EEO review process has broken down on all levels.

- (1) The Department of Labor's Office of Federal Contract compliance (OFCCP) review for Eagle amounted to: "we haven't heard of the company, so they must be ok;"
- (2) The Department of the Army claimed that it fulfilled its obligation to determine whether Eagle was a "responsible contractor" because "we looked on the web and couldn't find anything." However, as ABC News has confirmed, any diligent web search should have raised questions about Eagle's EEO compliance;
- (3) The Department of the Army violated the "responsible contractor" rules that were in effect when the "responsibility determination" was made and when the contract was awarded. These rules provided that the Department's procurement official "must consider adverse commission decisions," such as the May, 2000 EEOC decision, which the Department now admits it was totally unaware of;
- (4) Eagle, as spelled out in Congressman Nick Lampson's June 18, 2001 letter to the secretary of the Army, engaged in misrepresentations to the Army in its attestations on behalf of the contract.

In short, the Eagle contract award – a showcase award that merits its own Defense Department website – shows that the new and improved process, which the FAR Council stayed, for assuring compliance with EEO and civil rights rules is still inadequate. It would

be an egregious act to go back to the previous weaker rules instead. The Eagle case shows that the FAR Council should carefully review how federal agencies are implementing the new rule and, if necessary, consider tightening the rule to prevent contractor abuse.

Frank Clemente
Director
Public Citizen's Congress Watch

Emmett Sheppard
Secretary-Treasurer
Texas AFL-CIO State Labor Federation