



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

[FAC 2005-96; FAR Case 2017-015; Docket No. 2017-0002;

Sequence No. 1]

RIN 9000-AN52

**Federal Acquisition Regulation; Removal of Fair Pay and Safe
Workplaces Rule**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a public law that disapproved the final rule, Fair Pay and Safe Workplaces (FAR Case 2014-025), and an Executive Order (E.O.) dated March 27, 2017, that rescinded the prior Executive orders authorizing that rule.

DATES: Effective date: **[Insert Date of Publication in the Federal Register]**.

Applicability dates: See section I.F of the Supplementary Information.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-96, FAR Case 2017-015.

SUPPLEMENTARY INFORMATION:

I. Background

A. The FAR rule implementing E.O. 13673.

FAR Case 2014-025 implemented E.O. 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 (79 FR 45309, August 5, 2014), amended by section 3 of E.O. 13683, dated December 11, 2014 (79 FR 75041, December 16, 2014) and E.O. 13738, dated August 23, 2016 (81 FR 58807, August 26, 2016).

The FAR Case final rule was published in the Federal Register on August 25, 2016, at 81 FR 58562. It was to be effective on October 25, 2016. Certain aspects of the rule were to be phased in. For example, the clause at FAR 52.222-60, Paycheck Transparency (Executive Order 13673), was to be inserted in solicitations starting January 1, 2017, if the estimated value of the resultant contract was to exceed \$500,000.

The Department of Labor (DOL) published "Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces'" on

the same day as the FAR final rule was published (81 FR 58653).

B. Injunction and Federal Acquisition Regulatory Council memorandum.

On October 7, 2016, the Associated Builders and Contractors of Southeast Texas, Inc., the Associated Builders and Contractors, Inc., and the National Association of Security Companies filed a lawsuit in the United States District Court for the Eastern District of Texas (Civil Action No. 1:16-CV-425) seeking to overturn the final rule. On October 13, 2016, the plaintiffs filed an "Emergency Motion for Temporary Restraining Order and Preliminary Injunction."

On October 24, 2016, the District Court issued a "Memorandum and Order Granting Preliminary Injunction." The Court Order (on page 31) stated: "Defendants are enjoined [from] implementing any portion of the FAR Rule or the DOL Guidance relating to the new reporting and disclosure requirements regarding labor law violations as described in E.O. 13673 and implemented in the FAR Rule and DOL Guidance. Further, Defendants are enjoined from enforcing the restriction on arbitration agreements."

The Court Order did not enjoin the Paycheck Transparency clause, FAR 52.222-60. Starting January 1,

2017, this clause was prescribed for solicitations if the estimated value of the resultant contract would exceed \$500,000.

On October 25, 2016, the Federal Acquisition Regulatory Council issued a memorandum to the Chief Acquisition Officers, Senior Procurement Executives, Defense Acquisition Regulations Council, and Civilian Agency Acquisition Council directing that all steps necessary be taken to ensure that the enjoined sections, provisions, and clauses of the final rule would not be implemented until such time as the injunction is terminated. The Council enumerated specific steps to be taken at a minimum, including the following:

1. Ensure that new solicitations do not include representations or clauses that the enjoined coverage of the rule would have required -- i.e., the representation at FAR 52.222-57 and its commercial items version at paragraph (s) of 52.212-3, 52.222-58 and 52.222-59, which would have directed disclosure of labor law violation decisions by offerors or contractors, and 52.222-61, which would have required an offeror or contractor to agree to restrict the use of mandatory pre-dispute arbitration

agreements.

2. If a solicitation had been issued with representations or clauses listed in the previous paragraph 1, amend those solicitations immediately to remove those representations and clauses. Additionally, agencies were directed not to take any action on information, if any, submitted in response to those representations and clauses.

3. Ensure that contracting officers do not implement the procedures in FAR 22.2004-2, 22.2004-3, 22.2004-4, or associated changes in FAR parts 9 and 42.

The FAR Council requested that agencies share these instructions widely among their workforces and posted the Memorandum online. Also, the DOL re-posted the Memorandum at the top of its then-existing information page on the Fair Pay and Safe Workplaces E.O.

In further compliance with the terms of the Court Order, as explained by the FAR Council in its October 25, 2016 Memorandum, GSA's Integrated Award Environment immediately ceased all actions to release the changes for the System for Award Management (SAM) that would have supported bidder and contractor submission of information

on labor law violation decisions, as well as the changes that would have supported public disclosure of this information in the Federal Awardee Performance and Integrity Information System (FAPIIS).

C. FAR rule implementing the injunction.

As an additional step to ensure full awareness of, and compliance with, the Court Order, DoD, GSA, and NASA, on behalf of the FAR Council, took a more comprehensive administrative action to amend the August 25, 2016, final rule to include caveats throughout the rule for each section, provision, and clause that was enjoined by the terms of the Court Order. On December 16, 2016, the rule implementing the injunction was published as a final rule (81 FR 91636).

The Court Order did not enjoin implementation of the coverage on paycheck transparency; therefore, the December 16, 2016, amendments did not impact this aspect of the rule. Starting January 1, 2017, this clause was prescribed for solicitations if the estimated value of the resultant contract was to exceed \$500,000.

D. H. J. Res. 37 (Public Law 115-11).

In March 2017, under the Congressional Review Act (5 U.S.C. chapter 8), Congress passed House Joint Resolution 37 (Public Law 115-11), which stated the following:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation (published at 81 Fed. Reg. 58562 (August 25, 2016)), and such rule shall have no force or effect.

On March 27, 2017, House Joint Resolution 37 was signed into law and became Public Law 115-11.

Under 5 U.S.C. 801(b)(1), a rule shall not take effect or continue if the Congress enacts a joint resolution of disapproval, described under 5 U.S.C. 802. Under 5 U.S.C. 801(f), any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

Congress disapproved the entire FAR rule that was published on August 25, 2016.

As a result, the rule being published today removes that entire rule including the amendments published on December 16, 2016.

By statute, the rule shall be treated as if it had never taken effect. Only FAR 52.222-60, Paycheck Transparency (Executive Order 13673), had gone into effect; it was authorized to be included in solicitations starting on January 1, 2017, and may have been included in recently awarded contracts. This and all other Fair Pay and Safe Workplaces provisions and clauses are unenforceable. See the Applicability paragraph under Dates at the beginning of this preamble for instructions to contracting officers on removal of the clause.

E. Executive Order 13782.

On March 27, 2017, the same date on which H.J. Res 37 was signed, President Trump signed E.O. 13782 (82 FR 15607, March 30, 2017). This E.O. revoked E.O. 13673, section 3 of E.O. 13683, and E.O. 13738, which were the authority for the Fair Pay and Safe Workplaces rule. E.O. 13782 also directed reconsideration of existing rules, regulations, guidance, guidelines, or policies implementing or enforcing E.O. 13673, section 3 of E.O. 13683, and E.O. 13738. The rule published today also implements E.O. 13782.

Public Law 115-11 and E.O. 13782 did not specifically address the DOL Guidance. However, that Guidance has no legal effect in the absence of the FAR rule. Accordingly,

the DOL is publishing its own notice rescinding the DOL Guidance pursuant to Public Law 115-11 and E.O. 13782.

F. Applicability.

This rule applies to solicitations issued and contracts awarded before, on, or after October 25, 2016 - i.e., the effective date of the final FAR rule published in the Federal Register at 81 FR 58562 on August 25, 2016. All clauses identified in the final FAR rule are unenforceable by law and considered to have never taken effect, even if they were included in a contract. Contracting officers are directed to modify, to the maximum extent practicable, existing contracts to remove any solicitation provisions and contract clauses related to the Fair Pay and Safe Workplaces rule because they are unenforceable by law. Since the FAR 52.222-60 clause, Paycheck Transparency (Executive Order 13673), had gone into effect, starting on January 1, 2017, that clause will need to be removed if it was included. Other provisions, i.e., paragraph (s) of FAR 52.212-3, 52.222-57, 52.222-58, 52.222-59, and 52.222-61, had been enjoined by a Court order prior to their effective date and should not have been incorporated into contracts.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The rule being removed (FAR Case 2014-025) was a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. It was a major rule under 5 U.S.C. 804. This rule being published today is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866; it has been determined to be a major rule under 5 U.S.C. 804. This rule removes a prior rule that had been considered a major rule.

The Regulatory Impact Analysis (RIA) that included a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of the final rule under FAR Case 2014-025 is available at <https://www.regulations.gov> as a supporting document under FAR-2014-0025-0933. Exhibit 8 of the RIA presented a

summary of the first-year, second-year, and annualized quantifiable costs of implementing the disclosure and paycheck transparency requirements of the final rule to contractors and subcontractors, as well as the estimated Government costs. The chart below shows the total monetized cost in the first and second year, and annualized costs with a 3 and 7 percent discount to contractors and the Government.

	Monetized year 1 costs	Monetized year 2 costs	Annualized costs, 3% discounting	Annualized costs, 7% discounting
Total employer costs	\$458,352,949	\$413,733,272	\$398,541,816	\$400,939,861
Government costs	15,772,150	10,129,299	10,944,157	11,091,474
Total	\$474,075,099	\$423,862,572	\$409,535,973	\$412,031,335

Most of the 2016 final rule's provisions were preliminarily enjoined before compliance would have been required. (In addition, on March 27, 2017, under E.O. 13782, the President rescinded E.O. 13673, the Order that served as the underpinning of the rule. On the same day, the President signed the Joint Resolution that Congress passed under the Congressional Review Act disapproving the final rule.) Therefore, if the impacts of this final rule are assessed relative to current (and anticipated future) practice, the resulting impacts are negligible. If, on the other hand, this final rule's effects are assessed relative

to a baseline in which regulated entities comply with the 2016 final rule, the costs summarized in the preceding table (minus the relatively small portion that may already have been incurred as entities prepared to comply with the regulatory provisions that were not enjoined) would be eliminated as a result of this rulemaking's removal of the 2016 final rule.

III. Executive Order 13771

Consistent with E.O. 13771 (82 FR 9339, February 3, 2017), Reducing Regulation and Controlling Regulatory Costs, and the Office of Management and Budget (OMB) guidance on implementing E.O. 13771 (April 5, 2017), the annualized cost savings of \$412 million (with a 7 percent discount rate) associated with this final rule have been estimated, as shown in section II, above. (Of particular relevance is the statement in OMB's guidance that costs associated with "regulatory actions overturned by subsequently enacted laws... such as disapprovals of rules under the Congressional Review Act" qualify as cost savings under E.O. 13771.) This rulemaking constitutes a deregulatory action under E.O. 13771.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a

significant FAR revision within the meaning of FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for public comment. However, the rule reduces the burden on small entities as it rescinds the August 25, 2016, Fair Pay and Safe Workplaces (FAR Case 2014-025), major rule.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies to this rule, because this rule removes information collection requirements currently cleared by the Office of Management and Budget (OMB) under OMB clearance 9000-0195, Fair Pay and Safe Workplaces. The final rule, published August 25, 2016, contained the following summary table of the annual estimated cost to the public of the reporting burden:

<u>Table 3. Summary of Table 1 Annual Estimated Total Cost to the Public of Reporting Burden</u>	
Number of respondents	24,183
Responses per respondent	17.3
Total annual responses	417,808
Hours per response	5.19
Total hours	2,166,815
Rate per hour (average)	\$61.43
Total annual cost to public	\$133,109,793

The requirements that would impose these burden hours are now removed from the FAR and OMB clearance 9000-0195 has been discontinued.

List of Subjects in 48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

Government procurement.

Dated: October 11, 2017.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore DoD, GSA, and NASA amend 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106, by removing FAR segments "52.222-57", "52.222-58", "52.222-59" and "52.222-60" and their corresponding OMB Control Number "9000-0195", and the Note to 1.106.

PART 4—ADMINISTRATIVE MATTERS

4.1202 [Amended]

3. Amend section 4.1202 by removing paragraph (a)(22), and Note to paragraph (a)(22), and redesignating paragraphs (a)(23) through (34) as paragraphs (a)(22) through (33), respectively.

PART 9—CONTRACTOR QUALIFICATIONS

9.104-4 [Amended]

4. Amend section 9.104-4 by removing paragraph (b), and Note to paragraph (b), and redesignating paragraph (c) as paragraph (b).

9.104-5 [Amended]

5. Amend section 9.104-5 by removing paragraph (d), and Note to paragraph (d), and redesignating paragraph (e) as paragraph (d).

6. Amend section 9.104-6 by-

a. Revising paragraph (b) (4), and removing Note to paragraph (b) (4); and

b. Removing paragraph (b) (6), and Note to paragraph (b) (6).

The revision reads as follows:

9.104-6 Federal Awardee Performance and Integrity Information System.

* * * * *

(b) * * *

(4) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, e.g., a prior administrative action such as debarment or suspension that has expired or otherwise been resolved, or information relating to contracts for completely different products or services.

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9.105-1 [Amended]

7. Amend section 9.105-1 by removing paragraph (b) (4), and Note to paragraph (b) (4).

9.105-3 [Amended]

8. Amend section 9.105-3 by removing from paragraph (a) "9.105-2 (b) (2) (iii) and".

PART 17—SPECIAL CONTRACTING METHODS

17.207 [Amended]

9. Amend section 17.207 by—
- a. Removing from paragraph (c) (6) "considered;" and adding "considered; and" in its place;
 - b. Removing from paragraph (c) (7) "ratings; and" and adding "ratings." in its place; and
 - c. Removing paragraph (c) (8), and Note to paragraph (c) (8).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITIONS

10. Revise section 22.000 to read as follows:

22.000 Scope of part.

This part—

- (a) Deals with general policies regarding contractor labor relations as they pertain to the acquisition process;
- (b) Prescribes contracting policy and procedures for implementing pertinent labor laws; and

(c) Prescribes contract clauses with respect to each pertinent labor law.

11. Amend section 22.102-2 by—

a. Revising the section heading and paragraph

(c) (1); and

b. Removing paragraph (c) (3), and Note to paragraph

(c) (3).

The revision reads as follows:

22.102-2 Administration.

* * * * *

(c) (1) The U.S. Department of Labor is responsible for the administration and enforcement of the Occupational Safety and Health Act. The Department of Labor's Wage and Hour Division is responsible for administration and enforcement of numerous wage and hour statutes including—

(i) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction);

(ii) 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards;

(iii) The Copeland Act (18 U.S.C. 874 and 40 U.S.C. 3145);

(iv) 41 U.S.C. chapter 65, Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$15,000;

(v) 41 U.S.C. chapter 67, Service Contract Labor Standards.

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22.104 [Removed]

12. Remove section 22.104.

Subpart 22.20 [Removed and Reserved]

13. Remove and reserve Subpart 22.20.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.1502 [Amended]

14. Amend section 42.1502 by removing paragraph (j), and Note to paragraph (j).

42.1503 [Amended]

15. Amend section 42.1503 by—

a. Removing from paragraph (a)(1)(i) “agency labor compliance advisor (ALCA) office (see subpart 22.20),” and removing Note to paragraph (a)(1)(i);

b. Removing from paragraph (a)(1)(ii) “ALCA,” and removing Note to paragraph (a)(1)(ii); and

c. Removing paragraph (h)(5), and Note to paragraph (h)(5) introductory text.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

16. Amend section 52.204-8 by—

a. Revising the date of the provision;

b. Removing paragraph (c) (1) (xvi), and Note to Paragraph (c) (1) (xvi); and

c. Redesignating paragraphs (c) (1) (xvii) through (xxv) as (c) (1) (xvi) through (xxiv), respectively.

The revision reads as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

17. Amend section 52.212-3 by-

a. Revising the date of the provision;

b. Removing from paragraph (a), the following definitions "Administrative merits determination", "Arbitral award or decision", "Civil judgment", "DOL Guidance", "Enforcement agency", "Labor compliance agreement", "Labor laws", and "Labor law decision";

c. Removing Note to paragraph (a); and

d. Removing and reserving paragraph (s), and removing the Note to paragraph (s).

The revision reads as follows:

**52.212-3 Offeror Representations and Certifications—
Commercial Items.**

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS
([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

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18. Amend section 52.212-5 by—

- a. Revising the date of the clause;
- b. Removing paragraphs (b) (35), Note to paragraph (b) (35), and (b) (36), and redesignating paragraphs (b) (37) through (61) as (b) (35) through (59), respectively;
- c. Removing paragraphs (e) (1) (xvii), Note to paragraph (e) (1) (xvii), and (e) (1) (xviii), and redesignating paragraphs (e) (1) (xix) through (xxii) as (e) (1) (xvii) through (xxi), respectively; and
- d. Amending Alternate II by—
 - i. Revising the date of the Alternate; and
 - ii. Removing paragraphs (e) (1) (ii) (P), Note to paragraph (e) (1) (ii) (P), and (e) (1) (ii) (Q) of Alternate II, and redesignating paragraphs (e) (1) (ii) (R) through (U) as (e) (1) (ii) (P) through (S), respectively.

The revisions read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

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Alternate II ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER]) . * * *

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19. Amend section 52.213-4 by revising the date of the clause and paragraph (a) (2) (viii) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

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TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS)
([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

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(a) * * *
(2) * * *

(viii) 52.244-6, Subcontracts for Commercial Items
([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

52.222-57 through 52.222-61 [Removed and Reserved]

20. Remove and reserve sections 52.222-57 through 52.222-61.

21. Amend section 52.244-6 by—

a. Revising the date of the clause; and
b. Removing paragraphs (c) (1) (xiv), Note to paragraph (c) (1) (xiv), and (c) (1) (xv), and redesignating

paragraphs (c) (1) (xvi) through (xx) as (c) (1) (xiv) through (xviii), respectively.

The revision reads as follows:

52.244-6 Subcontracts for Commercial Items.

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SUBCONTRACTS FOR COMMERCIAL ITEMS ([**INSERT ABBREVIATED MONTH AND YEAR OF
DATE OF PUBLICATION IN THE FEDERAL REGISTER**])

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