



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 22, and 52

[FAC 2005-100; FAR Case 2016-007; Item II; Docket No. 2016-0007; Sequence No. 1]

RIN 9000-AN10

Federal Acquisition Regulation: Non-Retaliation for Disclosure of Compensation Information

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.), Non-Retaliation for Disclosure of Compensation Information. The interim rule also implemented a final rule issued by the Department of Labor.

DATES: Effective: **[Insert date of publication in the FEDERAL REGISTER].**

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 2005-100, FAR Case 2016-007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 81 FR 67732 on September 30, 2016, to implement E.O. 13665, Non-retaliation for Disclosure of Compensation Information. The E.O. was signed April 8, 2014, and was published in the Federal Register at 79 FR 20749 on April 11, 2014. E.O. 13665 amends E.O. 11246 to provide for a uniform policy for the Federal Government to prohibit Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants. The interim FAR rule also implemented the final rule issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL) to implement E.O. 13665. The DOL final rule, entitled "Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions", was published in the Federal Register at 80 FR 54934, on September 11, 2015. The DOL rule revises 41 CFR part 60-1. Two respondents submitted comments on the interim FAR rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of significant changes

There are no changes to the interim rule.

B. Analysis of public comments

Comment: Both respondents strongly supported the interim FAR rule. Both respondents stated that the interim rule is necessary to bring an end to pay secrecy policies and practices that perpetuate discrimination, including the gender pay gap. The respondents also presented rationale as to why the interim rule will benefit businesses, individual workers, and the economy.

Response: Noted.

III. 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, Improving Regulation and Regulatory Review,

emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Executive Order 13771

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA are converting to a final rule, without change, an interim rule that amended the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13665, Non-Retaliation for Disclosure of Compensation Information. E.O. 13665 amended E.O. 11246, Equal Opportunity in Federal Employment. The interim rule also implemented a final rule issued by the Department of Labor (DOL) at 41 CFR part 60-1, published in the Federal Register at 80 FR 54934, on September 11, 2015.

The objective of this rule is to provide for a uniform policy for the Federal Government to prohibit Federal contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants.

No public comments were received in response to the initial regulatory flexibility analysis.

The rule will apply to all entities, both small and other than small. Based on the most current System for Award Management data available, defining small as fewer than 500 employees, then there are 328,552 small contractor firms. Defining small as firms with less than \$35.5 million in revenue, then there are 315,902 small contractor firms. Thus, the total number of small contractor firms that may be impacted by the rule range from 315,902 to 328,552.

Recordkeeping and reporting requirements of the interim rule involved regulatory familiarization and administrative costs associated with incorporating revised language into policies, instructions, notices to employees, and subcontracts. In implementing the additional prohibition, the interim rule required that contractors and subcontractors disseminate the nondiscrimination provision, using language prescribed by the Director of the Office of Federal Contract Compliance Programs (OFCCP), including incorporating the nondiscrimination provision into existing employee manuals and handbooks and posting it electronically or in conspicuous places available to employees and applicants. An analysis of estimated costs of the regulatory changes was performed in the DOL final rule published in the Federal Register at 80 FR 54934, on September 11, 2015. However, this final rule does not have any impact on small entities, because the interim rule has already been in effect since September 30, 2016, and the final rule does not make any changes to the interim rule.

DoD, GSA, and NASA are not aware of any significant alternatives to the rule that would accomplish the stated objectives of the E.O. and the DOL implementing regulations.

It is necessary for the rule to apply to small entities, because E.O. 11246, as amended, applies to all contracts above \$10,000 that are not completely exempted. Every effort has been made to minimize the burdens imposed.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, the information collection authorization is under the DOL final rule issued by the OFCCP of the DOL, which was published in the Federal Register at 80 FR 54934, on September 11, 2015, entitled "Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions", and is assigned Office of Management and Budget (OMB) Control Number 1250-0008. This information collection expires December 31, 2018. The other information collection requirements cited at 1.106 that apply to FAR clause 52.222-26, assigned OMB control numbers 1250-0001 and 1250-0003, cover the general recordkeeping provisions of the laws administered by OFCCP.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: July 31, 2018.

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

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 1, 22, and 52, which was published in the Federal Register at 81 FR 67732 on September 30, 2016, is adopted as a final rule without change.

Billing Code 6820-EP

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