

October 25, 2016

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES
DEFENSE ACQUISITION REGULATIONS COUNCIL
CIVILIAN AGENCY ACQUISITION COUNCIL

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SUBJECT: Court Order Enjoining Certain Sections, Provisions, and Clauses in Federal Acquisition Circular (FAC) 2005-90, Implementing Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces

The purpose of this memorandum is to inform you that the United States District Court for the Eastern District of Texas has issued a preliminary injunction to prevent certain sections, provisions, and clauses of FAR Case 2014-025, the final rule implementing E.O. 13673, Fair Pay and Safe Workplaces, as amended by E.O. 13683 and E.O. 13738, from taking effect on October 25, 2016. A copy of the Court Order is attached for your reference.

As explained below, in accordance with the Court Order, agencies are hereby directed to take all steps necessary with their workforces to comply with the Court Order and ensure the enjoined sections, provisions, and clauses of FAR Case 2014-025 are not implemented unless and until receiving further direction.

On August 25, 2016, a final rule was published in the *Federal Register* (FR): FAC 2005-90, FAR Case 2014-025, Fair Pay and Safe Workplaces, 81 FR 58562 (hereinafter "the final rule"). This final rule implemented E.O. 13673, which was designed to promote contracting efficiency by improving contractor compliance with basic labor standards during the performance of Federal contracts. The final rule contained an effective date of October 25, 2016. This FAR case added coverage in parts 1, 4, 9, 17, 22, 42, and 52.

On October 7, 2016, the Associated Builders and Contractors of Southeast Texas, and the National Association of Security Companies filed a lawsuit in the United States District Court for the Eastern District of Texas, seeking to overturn the final rule, and on October 13, 2016, filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

On October 24, 2016, the day before the rule was to become effective, the Court issued a preliminary injunction to prevent certain sections, provisions, and clauses of the rule from taking effect while the lawsuit is pending.

Specifically, the Court preliminarily enjoined implementation of “any portion of the FAR Rule or DOL Guidance relating to the new reporting and disclosure requirements regarding labor law violations as described in Executive Order 13673 and implemented in the FAR Rule and DOL Guidance.” The Court Order further enjoined implementation of “the restriction on arbitration agreements.” Order at p. 31.

The Court Order does not enjoin implementation of those sections of, or the clause in, the FAR rule addressing the paycheck transparency requirements in the E.O. (i.e., section 5 of E.O. 13673), including FAR 22.2005, 22.2007(d), and clause 52.222-60. This coverage will take effect for new solicitations issued on or after January 1, 2017, as stated in the final rule.

To ensure compliance with the Court Order, agencies shall take all steps necessary to ensure the enjoined sections, provisions, and clauses of the final rule are not implemented until further notice. These steps include the following at a minimum:

1. Ensure new solicitations do not include representations or clauses that the enjoined coverage of the rule would have required -- i.e., the representation at 52.222-57 and its commercial items version at paragraph (s) of 52.212-3, and 52.222-58 and the clause at 52.222-59, to direct disclosure of labor law violation decisions by offerors or contractors, or clause 52.222-61, that would require an offeror or contractor to agree to restrict use of mandatory pre-dispute arbitration agreements.
2. If a solicitation has been issued with representations or clauses listed in paragraph 1, amend those solicitations immediately to remove those representations and clauses. Additionally, agencies shall not take any action on information, if any, submitted in response to those representations and clauses.
3. Ensure contracting officers do not implement the procedures in 22.2002-2, 22.2002-3 22.2002-4 or associated changes in FAR Parts 9 and 42.

In further compliance with the terms of the Court Order, GSA's Integrated Award Environment has halted actions to release the changes for the System for Award Management (SAM) that would support bidder and contractor submission of information on labor law violation decisions as well as the changes that would support public disclosure of this information in the Federal Awardee Performance and Integrity Information System (FAPIS).

The Court Order addresses only the implementation of the final FAR rule. Therefore, agency contracting officers should continue conducting evaluations of offerors, including responsibility determinations, in accordance with laws and regulations that were in effect prior to the effective date of the final FAR rule.

Agencies are requested to share this memorandum widely among their workforces to ensure full awareness of and compliance with the Court Order. The FAR Council is working with DOJ and DOL to determine if there are any additional actions necessary to ensure compliance with the Court Order, including administrative actions that may be needed to address the terms of the Court Order and this memorandum.

Questions regarding this memorandum should be sent to fn-omb-ofpp@omb.eop.gov. Please use "Court Order on E.O. 13673" in the subject line of the message.

Thank you for your immediate attention to this matter.

Attachment



Injunction
Order.pdf