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 80 FR 75908 on December 4, 2015, is adopted as a final rule without change.

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

I. Background

DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13665, entitled “Non-Retaliation for Disclosure of Compensation Information,” and a final rule issued by the Department of Labor.

II. Discussion and Analysis

A. The DOL regulation implements E.O. 13665 by revising the equal opportunity clause to prohibit contractors from discharging, or in any manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant.

B. The FAR implements E.O. 11246 in FAR subpart 22.8, FAR clause 52.222–26, Equal Opportunity, and related clauses. This interim rule adds the new discrimination prohibition and incorporates the definitions “compensation,” “compensation information,” and “essential job functions” from the DOL final rule (41 CFR 60–1.3) within FAR subpart 22.8 and the clauses that are prescribed in FAR subpart 22.8 as follows:

1. 52.202, General. Inserts the new discrimination prohibition.

2. 52.222–26, Equal Opportunity. Inserts definitions for the terms “compensation,” “compensation information,” and “essential job functions,” and 52.222–26(c)(5), which prohibits contractors from discharging, or in any manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant.

C. Conforming changes were made in the FAR clauses 52.212–5, 52.213–4, and 52.244–6.

III. Executive Orders 12866 and 13563

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. This is 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. This interim rule is not a major rule under 5 U.S.C. 604.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis (IRFA) has been prepared consistent with 5 U.S.C. 603. The analysis is summarized as follows:

This interim rule is necessary to implement E.O. 13665, Non-Retaliation for Disclosure of Compensation Information (amending E.O. 11246, Equal Opportunity in Federal Employment) as implemented by the final rule issued by the DoD at 81 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.

The rule will apply to all entities, both small and other than small. Based on the most current data available in the System for Award Management (SAM), there are 328,552 small contractor firms with fewer than 500 employees and 315,902 small contractor firms with less than $35.5 million in revenue. 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 rule involve regulatory familiarization and administrative costs associated with incorporating revised language into policies, instructions, notices to employees, and subcontracts. In implementing the additional prohibition, the rule requires 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 final rule published in the Federal Register at 80 FR 54934, on September 11, 2015. DoL estimated the total cost of their final rule at $85.00 per company.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

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 when a contractor has contracts or subcontracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding $10,000 that are not completely exempted. Every effort has been made to minimize the burdens imposed on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2016–007), in correspondence.

V. 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 Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (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 OMB Control Number 1250–0008, Prohibitions Against Pay Secrecy Policies and Actions. This information collection expires December 31, 2018. The other information collection requirements cited at 1.106 that apply to FAR clause 52.225–26, assigned OMB control numbers 1250–0001 and 1250–0003, cover the general recordkeeping provisions of the laws administered by OFCCP.

VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. It is important that the FAR is immediately revised to include the requirements of E.O. 13665, entitled “Non-Retaliation for Disclosure of Compensation Information” and the Department of Labor implementing regulation published in the Federal Register at 80 FR 54934, on September 11, 2015 that requires the Federal Government to establish a uniform policy that prohibits 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. This action is necessary because DOL’s final rule became effective on January 11, 2016, and section 6 of the E.O. expressly states that the order “shall apply to contracts entered into on or after the effective date of rules promulgated by the Department of Labor.” Issuance of an interim rule allows for the requirements to be included in solicitations and contracts immediately and puts contractors on clear notice of legal responsibilities that are already in effect. If the FAR rule is not issued as an interim rule, this new requirement will not be incorporated into contracts, and contractors will be put at unnecessary risk of non-compliance with the E.O. and labor rule. More importantly, this may unnecessarily delay action by contractors in providing the important protections for contractor employees that the E.O. and labor rule are designed to provide. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

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

Government procurement.

Dated: September 19, 2016.

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

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

1. The authority citation for 48 CFR parts 1, 22, 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 in the table by removing from FAR segment “52.222–26” the OMB control number “1250–0003” and adding “1250–0001, 1250–0003, and 1250–0008” in its place.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 3. Amend section 22.802 by revising paragraph (a) to read as follows:

22.802 General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all agencies—

(1) Include this clause in all nonexempt contracts and subcontracts (see 22.807); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor—

(i) To promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin; and

(ii) To prohibit contractors from discharging, or in any other manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee’s essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor’s legal duty to furnish information.

■ 4. Amend section 22.809 by revising the introductory text to read as follows:

22.809 Enforcement.

Upon written notification to the contracting officer, the Deputy Assistant Secretary may direct one or more of the following actions, as well as administrative sanctions and penalties, be taken against contractors found to be in violation of E.O. 11246, the regulations of the Secretary of Labor, or the applicable contract clauses:

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 52.212–5 by—

■ a. Revising the date of the clause and paragraphs (b)(28) and (e)(1)(v); and

■ b. In Alternate II, revising the date of the alternate and paragraph (e)(1)(i)(E).

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 (Sept 2016) * * * * *

(b) * * * *(28) 52.222–26, Equal Opportunity (Sept 2016) [E.O. 11246].

* * * * *

Alternate II (Sept 2016). * * * *

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Alternate II (Sept 2016). * * * *

* * * * *

(28) 52.222–26, Equal Opportunity (Sept 2016) [E.O. 11246].

* * * * *

52.222–26 Equal Opportunity. * * * * *

Equal Opportunity (Sept 2016) [E.O. 11246].

(a) * * *

Compensation means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

Compensation information means the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, the desire of the Contractor to attract and retain a particular employee for the value the employee is perceived to add to the Contractor’s profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and Contractor decisions, statements and policies related to setting or altering employee compensation.

Essential job functions means the fundamental job duties of the employment position an individual holds. A job function may be considered essential if—

(1) The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

(2) The function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

* * * * *

(c) * * *

(5)(i) The Contractor shall not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee’s essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in

* * * * *
response to a formal complaint or charge, in
furtherance of an investigation, proceeding,
hearing, or action, including an investigation
conducted by the employer, or is consistent
with the Contractor's legal duty to furnish
information.
(ii) The Contractor shall disseminate the
prohibition on discrimination in paragraph
(c)(3)(ii) of this clause, using language
prescribed by the Director of the Office of
Federal Contract Compliance Programs
(OFCCP), to employees and applicants by—
(A) Incorporation into existing employee
manuals or handbooks; and
(B) Electronic posting or by posting a copy
of the provision in conspicuous places
available to employees and applicants for
employment.

8. Amend section 52.244–6 by
revising the date of the clause and
paragraph (c)(1)(vi) to read as follows:

52.244–6 Subcontracts for Commercial
Items.

Subcontracts for Commercial Items (Sept
2016)

(c)(1) * * * *

(vi) 52.222–26, Equal Opportunity
(Sept 2016) [E.O. 11246].

* * * *

[FAC Doc. 2016–23196 Filed 9–29–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATION

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 2, 4, 6, 18, 19, and 52
[FAC 2005–91; FAR Case 2015–032; Item
IV; Docket No. 2015–0032; Sequence No.
1]

RIN 9000–AN13

Federal Acquisition Regulation; Sole
Source Contracts for Women-Owned
Small Businesses

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have
adopted as final, with a minor edit, an
interim rule amending the Federal
Acquisition Regulation (FAR) to
implement regulatory changes made by
the Small Business Administration
(SBA) that provide for authority to
award sole source contracts to
economically disadvantaged women-
owned small business concerns and to
women-owned small business concerns
eligible under the Women-Owned Small
Business (WOSB) Program.


FOR FURTHER INFORMATION CONTACT: Ms.
Mahruka Uddowla, Procurement
Analyst, at 703–605–2868 for
clarification of content. For information
pertaining to status or publication
schedules, contact the Regulatory
Secretariat Division at 202–501–4755.
Please cite FAC 2005–91, FAR Case
2015–032.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an
interim rule in the Federal Register at
80 FR 81888 on December 31, 2015, to
implement regulatory changes that the
SBA has made in its final rule published in
the Federal Register at 80 FR 55019,
on September 14, 2015, concerning sole
source award authority under the WOSB
Program. SBA’s final rule implements
the statutory requirements of paragraph
(a)(3) of section 825 of the Carl Levin and
Howard P. “Buck” McKeon National
Defense Authorization Act (NDAA) for
Fiscal Year (FY) 2015, Public Law
113–291, granting contracting officers the
authority to award sole source contracts
to economically disadvantaged women-
owned small business (EDWOSB)
concerns and to WOSB concerns eligible
under the WOSB Program. Four
respondents submitted comments on the
interim 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. All four
respondents expressed support of the
interim rule. Therefore, no further
change to the interim rule is required as
a result of the public comments, but
there is a minor edit to 19.1505(a)(1).

III. Applicability to Contracts at or
Below the Simplified Acquisition
Threshold and for Commercial Items,
Including Commercially Available Off-
the-Shelf Items

This rule adopts as final the
amendments to the FAR clauses at
52.219–29, Notice of Set-Aside for, or
Sole Source Award to, Economically
Disadvantaged Women-owned Small
Business Concerns, and 52.219–30,
Notice of Set-Aside for, or Sole Source
Award to, Women-Owned Small
Business Concerns Eligible Under the
Women-Owned Small Business
Program, in order to implement
paragraph (a)(3) of section 825 of the
NDAA for FY 2015. The Federal
Acquisition Regulatory Council,
prospective to the authority granted in 41
U.S.C. 1905 and 1906, and the
Administrator, Office of Federal
Procurement Policy, pursuant to the
authority granted in 41 U.S.C. 1907, have
determined that the application of this
statutory authority to contracts at or
below the simplified acquisition
threshold and to contracts for
commercial items and commercially
available off-the-shelf items, is in the
best interests of the Federal
Government.

IV. 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. 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.

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:

This rule implements paragraph (a)(3) of
section 825 of the Carl Levin and Howard P.
‘Buck’ McKeon National Defense
Authorization Act for Fiscal Year 2015,
Public Law 113–291. (Fiscal Year 2015
NDAA). Section 825 of the Fiscal Year 2015
NDAA included language granting
contracting officers the authority to award
sole source contracts to Women-Owned
Small Businesses (WOSBs) and Economically
Disadvantaged Women-Owned Small
Businesses (EDWOSBs) under the WOSB
Program. The purpose of this rule is to
finalize the procedures whereby Federal
agencies may award sole source contracts to
WOSBs and EDWOSBs eligible under the
WOSB Program. The rule provides an
additional tool for Federal agencies to ensure
that WOSBs have an equal opportunity to
participate in Federal contracting and
ensures consistency among SBA’s
socioeconomic small business contracting
programs.