

# FEDERAL CONTRACTS PERSPECTIVE

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## FAC 2005-96 REMOVES FAIR PAY AND SAFE WORKPLACES RULE

Federal Acquisition Circular (FAC) 2005-96 has amended the Federal Acquisition Regulation (FAR) to remove the changes that implemented President Obama’s Executive Order 13673, Fair Pay and Safe Workplaces, which required federal contractors with contracts and subcontracts exceeding \$500,000 to disclose labor law violations of 14 labor laws and executive orders (and “equivalent state laws”). Enforcement of this executive order and the implementing FAR changes in FAC 2005-90 had been suspended by a district court on the grounds that they permitted “disqualification based solely upon ‘administrative merits determinations’ that are nothing more than allegations of fault asserted by agency employees and do not constitute final agency findings of any violation at all...” In addition, the Department of Labor has rescinded its guidance on enforcing Executive Order 13673 (the guidance had been issued simultaneously with FAC 2005-90).

CONTENTS	
FAC 2005-96 Removes Fair Pay Rule .....	1
IRS to Assess Contractors’ Tax Compliance .....	3
Number of Protests Decreased by 7% in FY 2017 .....	4

Among the 14 laws and executive orders covered by Executive Order 13673 were the Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Executive Order 11246 of September 24, 1965, Equal Employment Opportunity.

Besides imposing the reporting requirement, the executive order required contractors and subcontractors to provide their workers on federal contracts with information each pay period regarding how their pay is calculated (a wage statement) and provide notice to those workers whom they treat as independent contractors. This portion of the executive order, and the resulting FAR changes, were *not* suspended by the court injunction because they had not yet gone into effect.

In response to the court injunction, FAC 2005-93 was issued to add the following note to each paragraph added or changed by FAC 2005-90: “Note to paragraph \_\_\_\_: By a court order issued on October 24, 2016, this paragraph \_\_\_\_ is enjoined indefinitely as of the date of the order. The enjoined paragraph will become effective immediately if the court terminates the injunction. At that time, DOD [Department of Defense], GSA [General Services Administration], and NASA [National Aeronautics and Space Administration] will publish a document in the *Federal Register* advising the public of the termination of the injunction.”

Shortly after his inauguration, President Trump issued Executive Order 13782 and signed Public Law 115-11 to revoke Executive Order 13673, including the paycheck requirement.. The most significant FAR deletions in FAC 2005-96 are:

- FAR subpart 22.20, Fair Pay and Safe Workplaces, which contained the policies and procedures to implement Executive Order 13673.
- FAR 52.222-57, Representation Regarding Compliance With Labor Laws (Executive Order 13673).
- FAR 52.222-58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).
- FAR 52.222-59, Compliance with Labor Laws (Executive Order 13673).
- FAR 52.222-60, Paycheck Transparency.
- FAR 52.222-61, Arbitration of Contractor Employee Claims (Executive Order 13673).

Despite the removal of the rules and procedures pertaining to Executive Order 13673, all of the 14 labor laws and executive orders remain in effect, and contractors must continue certifying and providing information regarding violations to the appropriate federal databases.

By removing these rules and procedures, it is estimated that the public will save more than \$133 million annually (an estimated 24,183 contractors would save 2,166,815 hours at \$61.43/hour preparing the required reports). The \$133 million will not be charged to the government as overhead costs.

**EDITOR’S NOTE:** For more on Executive Order 13673, see the September 2014 *Federal Contracts Perspective* article “Obama Issues Order Requiring That Contractors Provide ‘Fair Pay and Safe Workplaces’.” For more on FAC 2005-90, see the September 2016 *Federal Contracts Perspective* article “FAC 2005-90 Establishes ‘Fair Pay and Safe Workplaces’ Representation.” For more on the court injunction, see the November 2016 *Federal Contracts Perspective* article “Executive Order 13673, Fair Pay and Safe Workplaces, Put on Hold by Court.” For more on FAC 2005-93, see the January 2017 *Federal Contracts Perspective* article “FAC 2005-93 Puts FAC 2005-90 Fair Pay Rule on Hold.” For more on Executive Order 13782 and the revocation of Executive Order 13673, see the April 2017 *Federal Contracts Perspective* article “Trump Revokes Obama’s Fair Pay and Safe Workplaces Executive Order.”

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## IRS TO ASSESS CONTRACTORS' TAX COMPLIANCE

Contracting officers of the Internal Revenue Service (IRS), part of the Department of the Treasury, will begin conducting “tax checks” of offerors’ taxpayer return information when making their responsibility determinations prior to contract award.

There are various federal laws and regulations that prohibit the federal government from entering into a contract with an offeror where the agency is aware of an unpaid federal tax liability unless the agency has considered suspension or debarment and has made a determination that this further action is not necessary to protect the interests of the government, most recently Sections 744 and 745 of the Consolidated and Further Continuing Appropriations Act, 2015 (Public Law 113-235) (see FAR subpart 9.1, Responsible Prospective Contractors, particularly FAR 9.104-5, Representation and Certifications Regarding Responsibility Matters). The Department of the Treasury has determined that an IRS contractor’s compliance with the tax laws is a tax administration matter and that taxpayer return information is needed for determining an offeror’s eligibility to receive an award.

However, Title 26 of the U.S. Internal Revenue Code, Section 6103, Confidentiality and Disclosure of Returns and Return Information (26 U.S.C. 6103), requires that tax returns and tax information be confidential *unless* the taxpayer authorizes such disclosure (“(c) The secretary may...disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer’s request...”). Therefore, the Department of the Treasury is amending the Department of the Treasury Acquisition Regulation (DTAR) to require “IRS contracting officers [to] include a provision in all solicitations, regardless of dollar value, which contains a consent to disclosure to be signed and dated by a person authorized to act on behalf of the offeror...In the absence of a signed and dated consent to disclosure in an offer, taxpayer return information of the offeror may not be disclosed, which subsequently may remove the offeror from eligibility to receive an award.”

The following are the significant changes being made to the DTAR to implement this interim rule:

- DTAR subpart 1009.70, Tax Check Requirements, is added to “prescribe the IRS policies and procedures for performing a tax check on the apparent successful offeror to determine eligibility to receive an award.”
  - DTAR 1009.7001, Definitions, defines a “tax check” as “an IRS process that accesses and uses taxpayer return information to support the government’s determination of an offeror’s eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have a delinquent federal tax liability...”
  - DTAR 1009.7004, Procedures, requires the IRS contracting officer to request a tax check of the offeror (“the contracting officer shall not proceed with award, at any dollar value, until a tax check has been performed on the apparent successful offeror”). If the tax check shows the offeror has a delinquent federal tax liability, the offeror is ineligible for award unless “the offeror provides the contracting officer with documentation, within the timeframe specified by the contracting officer, that demonstrates the offeror’s tax status

as being paid-in-full or that an approved payment agreement is in place...If the tax check demonstrates the offeror as tax compliant then the offeror is eligible for award, assuming all other standards of responsibility have been met.”

- DTAR 1009.7005, Solicitation Provision, requires the IRS contracting officer to include DTAR 1052.209-70, Notice and Consent to Disclose and Use of Taxpayer Return Information, in all IRS solicitations regardless of dollar value, including solicitations for acquisition of commercial items (including commercially-available off-the-shelf items).
- DTAR 1052.209-70, Notice and Consent to Disclose and Use of Taxpayer Return Information, includes the definitions in DTAR 1009.7001, the policy declaration in DTAR 1009.7003, Policy, the procedures in DTAR 1009.7004, and the “Consent to Disclosure” agreement:

I hereby consent to the disclosure of taxpayer return information (as defined in 26 U.S.C. 6103(b)(2)) as follows: the Department of the Treasury, Internal Revenue Service, may disclose the results of the tax check conducted in connection with the offeror’s response to this solicitation, including taxpayer return information as necessary to resolve any matters pertaining to the results of the tax check, to the authorized representatives of [insert OFFEROR NAME] on this offer. I am aware that in the absence of this authorization, the taxpayer return information of [insert OFFEROR NAME] is confidential and may not be disclosed, which subsequently may remove the offer from eligibility to receive an award under this solicitation.

This interim rule is effective November 16, 2017. Comments on the interim rule must be submitted by January 18, 2018, by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail: Department of the Treasury, Office of the Procurement Executive, Attn: Thomas O’Linn, 1722 I Street NW, Mezzanine – M12C, Washington, DC 20006.

## **NUMBER OF PROTESTS DECREASED BY 7% IN FY 2017**

The Government Accountability Office (GAO) issued its annual letter on bid protests to various Congressional committees, in which it reported that 2,596 protests, cost claims, and requests for reconsideration were filed in Fiscal Year (FY) 2017, a 7% decrease from the 2,789 filed in FY 2016 (the number of FY 2016 protests was the largest number of protests filed since FY 1995).

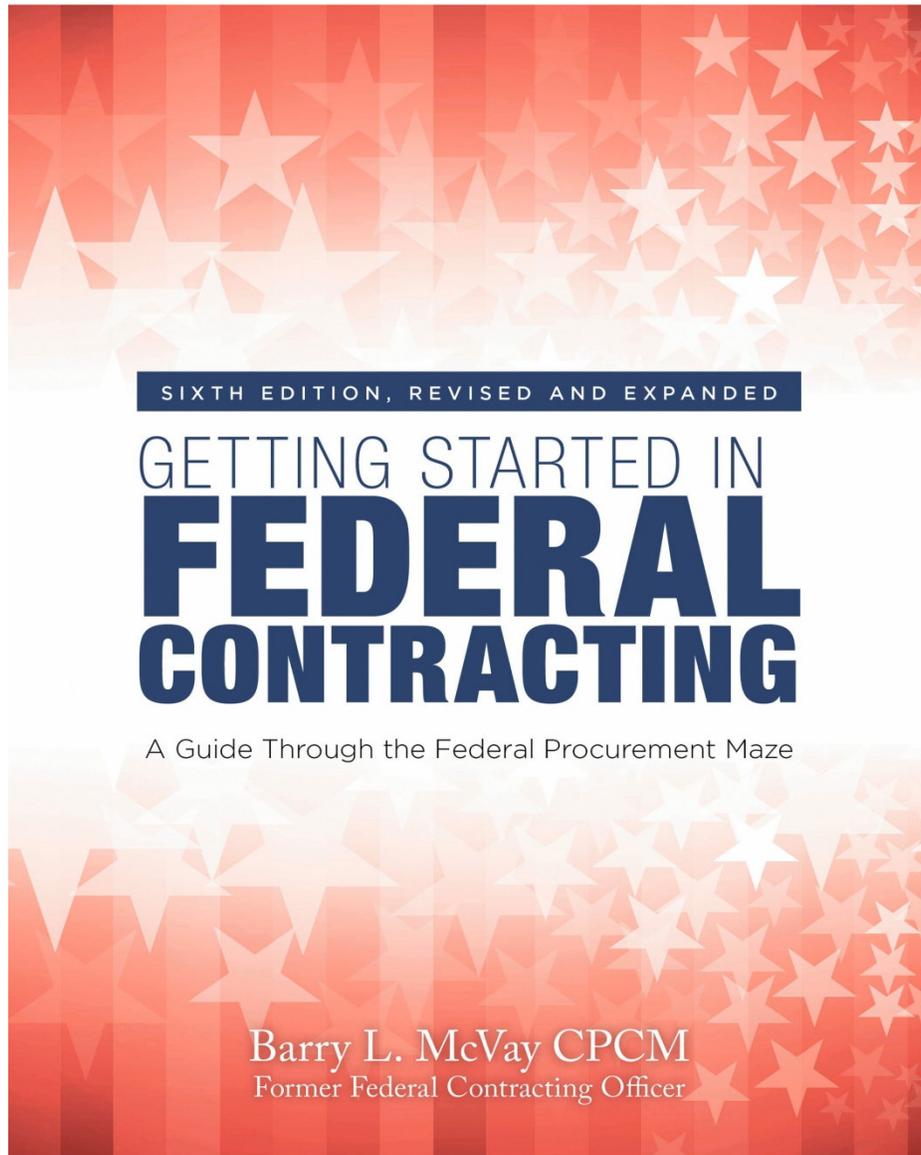
The FY 2017 protest sustain rate (the number of GAO decisions in favor of the protestor versus the number of all protests) was 17%, compared to the 23% sustain rate for FY 2016 and 12% sustain rate for FY 2015. The 47% effectiveness rate (the protestor obtained some form of relief from the agency either as a result of voluntary corrective action by the agency or a GAO decision sustaining the protest) was higher than the 46% effectiveness rate for FY 2016 and the 45% effectiveness rate for FY 2015.

GAO's review of its decisions shows the most prevalent reasons for sustaining protests during FY 2017 were: (1) unreasonable technical evaluation; (2) unreasonable past performance evaluation; (3) unreasonable cost or price evaluation; (4) inadequate documentation of the record; and (5) flawed selection decision. In comparison, the most prevalent reasons for sustaining protests during FY 2016 were: (1) unreasonable technical evaluation; (2) unreasonable past performance evaluation; (3) unreasonable cost or price evaluation; and (4) flawed selection decision.

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