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TRUMP REVOKES OBAMA'S FAIR PAY AND SAFE WORKPLACES EXECUTIVE ORDER

President Trump has issued Executive Order 13782 and signed House Joint Resolution 37 to revoke President Obama's Executive Order 13673, Fair Pay and Safe Workplaces, which required each offeror, prior to award of a contract or subcontract exceeding \$500,000, to represent "whether there has been any administrative merits determination, arbitral award or decision, or civil judgment... rendered against the offeror within the preceding three-year period for violations" of any of 14 labor laws and executive orders and "equivalent state laws," even if the offeror was not performing or bidding on a covered contract at the time of the determination, decision, or judgment. The contracting officer was to consider the offeror's representation "when determining whether the prospective contractor is responsible and has a satisfactory record of integrity and business ethics." Among the laws 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, and the Age Discrimination in Employment Act.

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To implement Executive Order 13673, the Federal Acquisition Regulation (FAR) Council issued Federal Acquisition Circular (FAC) 2005-90, which added FAR subpart 22.20, Fair Pay and Safe Workplaces, and the Department of Labor (DOL) issued 52 pages of guidance intended to assist contractors with complying with the executive order.

A fact sheet issued with Executive Order 13673 observed that "the vast majority of federal contractors have clean records. The Department of Labor estimates that the overwhelming majority of companies with federal contracts have no federal workplace violations in the past three years." However, the FAR final rule stated that it would cost **\$474,000,000** in the first year to implement the rule and **\$260,000,000** each year afterward to maintain tracking mechanisms and business systems, and to file required reports.

On October 24, 2016, the day before the FAC and the DOL guidance were to take effect, the District Court for the Eastern District of Texas granted an injunction suspending implementation of the parts of Executive Order 13673, FAC 2005-90, and the DOL guidance that imposed new reporting requirements regarding labor law violations until a final decision on the merits was issued (the court did *not* issue an injunction against the "paycheck transparency" portion of Executive Order 13673, FAC 2005-90, and the DOL guidance, which required contractors to

provide wage statements and notice of any independent contractor relationship to their covered workers, because it was not scheduled to take effect until 2017).

The judge in the case pointed out that each of the 14 labor laws specify debarment procedures, after full hearings and final adjudications, for contractors that violate the statutory requirements specifically directed at government contractors. “It defies reason that Congress gave explicit instructions to suspend or debar government contractors who violate these government-specific labor laws only after a full hearing and final decision, but intended to leave the door open to government agencies to disqualify contractors from individual contract awards without any of these procedural protections...The [executive] order and [FAR] rule appear to conflict directly with every one of the labor laws they purport to invoke by permitting 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...There is no statutory basis to treat these ‘administrative merits determinations’ as final and binding while they are still being contested or when they are settled without admission of fault. Thus, it appears to be a denial of fundamental statutory and constitutional rights for the executive order and FAR rule to so act...These and other non-final determinations by a single agency official do not constitute reportable ‘violations’ under any reasonable definition and should not be considered in contracting decisions.”

On March 27, 2017, President Trump signed House Joint Resolution 37, which states “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.” The disapproved rule is FAC 2005-90.

Concurrently with the signing of House Joint Resolution 37, President Trump issued Executive Order 13782 revoking Executive Order 13673 (as well as Section 3 of Executive Order 13683, and Executive Order 13738, both of which amended Executive Order 13673). By revoking Executive Order 13673 in its entirety, President Trump has revoked both the reporting requirements *and* the payment transparency requirements that the District Court left in force.

The joint resolution was passed in accordance with the Section 251 of the Contract with America Advancement Act of 1996 (Public Law 104-121), which permits Congress to disapprove of regulations issued by federal agencies by passing a joint resolution.

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 the FAR rule and the DOL guidance, 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.”

EDITOR’S NOTE: All of these 14 laws remain in force, and contractors have to continue certifying and providing information regarding violations to various federal databases.

Vivina McVay, Editor-in Chief

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FY16 SPENDING UP 7.6% OVER FY15, TO \$473 BILLION

Federal contracting spending in Fiscal Year (FY) 2016 increased by 7.6% from the spending level in FY 2015 of \$439.5 billion to \$473.2 billion.

The biggest dollar increase winner was the Department of Defense, which saw its spending increase 8.5% from \$274.4 billion to \$297.7 billion. The biggest dollar loser was the Department of Agriculture, which saw its contract spending drop from \$6.15 billion to \$5.77 billion, a 6.2% decrease. The biggest percentage increase winner was the Millenium Challenge Corporation, which saw its spending increase 27.9%, from \$80 million to \$102.5 million.

The following are the largest agencies' FY 2016 spending versus their FY 2015 spending:

Department/Agency	FY 2016 Spending	FY 2015 Spending
Defense	\$297,686,698,873	\$274,423,009,714
Energy	\$28,278,604,484	\$25,175,924,495
Health and Human Services	\$24,000,453,263	\$22,032,007,737
Veterans Affairs	\$22,683,774,651	\$20,129,805,991
National Aeronautics and Space Admin	\$17,275,432,463	\$15,909,467,081
Homeland Security	\$13,525,924,569	\$13,436,580,214
General Services Administration	\$10,345,493,624	\$9,535,462,554
State	\$8,714,585,478	\$8,116,378,471
Justice	\$7,455,834,557	\$7,807,664,442
Transportation	\$6,750,915,443	\$6,083,518,267
Treasury	\$6,208,242,377	\$5,705,446,113
Agriculture	\$5,766,430,194	\$6,145,608,270
Agency for International Development	\$4,656,445,660	\$4,873,458,255
Interior	\$4,388,502,266	\$4,145,313,742
Commerce	\$3,194,578,056	\$3,151,753,376
Education	\$2,464,188,684	\$2,667,836,124
Labor	\$1,820,010,065	\$1,975,440,349
Social Security Administration	\$1,495,676,627	\$1,638,496,044
Environmental Protection Agency	\$1,363,331,523	\$1,390,077,495
Housing and Urban Development	\$1,016,574,179	\$1,163,491,043
Office of Personnel Management	\$936,263,981	\$924,202,884
National Science Foundation	\$419,776,373	\$422,325,979
Securities and Exchange Commission	\$419,312,948	\$399,531,514
Pension Benefit Guaranty Corporation	\$326,787,350	\$283,946,430
Smithsonian Institution	\$280,602,419	\$288,242,237
Nuclear Regulatory Commission	\$209,146,944	\$222,309,635
National Archives and Record Admin.	\$164,107,258	\$156,303,802
Broadcasting Board of Governors	\$159,325,339	\$175,012,271
Small Business Administration	\$104,643,231	\$107,700,832
Millenium Challenge Corporation	\$102,528,117	\$80,180,811
Federal Communications Commission	\$99,448,637	\$107,644,674
Others	\$839,578,025	\$865,307,968
TOTAL	\$473,153,217,658	\$439,539,448,814

SBA INTENDS TO TERMINATE RUBBER GLOVES NONMANUFACTURER RULE WAIVER

The Small Business Administration (SBA) is proposing to terminate the class waiver to the nonmanufacturer rule for Rubber Gloves (*e.g.*, electrician's, examination, household-type, surgeon's) Manufacturing, under Product Service Code (PSC) 9320 (Rubber Fabricated Materials, and the North American Industry Classification System (NAICS) code 339113 (Surgical Appliance and Supplies Manufacturing).

Paragraph (h) of Section 303 of the Business Opportunity Development Reform Act of 1988 (Public Law 100-656), enacted November 15, 1988, requires those with federal contracts that are set-aside for small businesses (or for service-disabled veteran-owned small businesses, Historically Underutilized Business Zone [HUBZone] small businesses, or women-owned small businesses), or awarded through the 8(a) program to provide the product of a small business manufacturer or processor if the recipient is not the actual manufacturer or processor (see paragraph (f) of FAR 19.102, Size Standards). This is called the "nonmanufacturer rule." However, SBA may waive this requirement if there are no small business manufacturers or processors for that product. SBA granted a waiver to the nonmanufacturer rule for rubber glove manufacturing on May 1, 2008 (see the June 2008 *Federal Contracts Perspective* article "Three Nonmanufacturer Rules Waived, One Proposed").

SBA has received a request to terminate the current class waiver to the nonmanufacturer rule because, according to the request, there is a small business manufacturer available to participate in the federal market for this class of product. The requester provided evidence that this small business manufacturer has submitted offers on solicitations for government contracts within the last 24 months. (**EDITOR'S NOTE:** The small business size standard for businesses providing products under NAICS code 339113 is 750 employees.)

If the class waiver is terminated, small businesses receiving contracts for covered rubber gloves through a set-aside (or the 8(a) program) will no longer be able to provide the product of any manufacturer regardless of the size of the business – the small business contractor will have to provide rubber gloves manufactured by a small business.

SBA is seeking comments on the proposed termination of the class waiver to the nonmanufacturer rule for rubber gloves. Comments are to be provided by March 29, 2017, identified as "Docket ID SBA-2017-0002," by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) Roman Ivey, Program Analyst, Small Business Administration, Office of Government Contracting, 409 3rd Street SW, Washington, DC 20416.

EDITOR'S NOTE: The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; part 121, Small Business Size Standards; under paragraph (b) of 121.406, How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB [women-owned small business] or EDWOSB [economically disadvantaged women-owned small business] set-aside, or 8(a) contract? The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products? A complete list of products for which the nonmanufacturer rule has been waived is available at https://www.sba.gov/sites/default/files/articles/NMR%20CLASS%20WAIVER%20LIST-AS%20OF%2001-01-2015_3.pdf.

REVISION OF VAAR TO ADHERE TO FAR PROPOSED

The Department of Veterans Affairs (VA) is proposing to amend and update its VA Acquisition Regulation (VAAR) to revise or remove any policy that has been superseded by changes in the Federal Acquisition Regulation (FAR), to remove any procedural guidance that is internal to the VA, and to incorporate new regulations and policies.

In addition, VA is proposing to correct inconsistencies within the VAAR, remove redundant and duplicate material already covered by the FAR, delete outdated material or information, and appropriately renumber VAAR text, clauses and provisions to conform to the FAR format, numbering, and arrangement. This VAAR revision will be conducted in phases; this is the first phase of that effort, and it addresses VAAR part 816, Types of Contracts, VAAR part 828, Bonds and Insurance, and the associated provisions and clauses in VAAR part 852, Text of Provisions and Clauses.

Finally, each VAAR section proposed for removal is being considered for inclusion in VA's new collection of internal agency operating procedures, the VA Acquisition Manual (VAAM), and delegations of authorities that are removed from the VAAR will be included in the VAAM as internal agency guidance.

The following are the proposed changes to the VAAR in this phase:

- VAAR part 816, Types of Contracts
 - VAAR subpart 816.1, Selecting Contract Types, would be deleted. It consists of VAAR 816.102, Policies, which contains procedural guidance and a delegation of authority that is internal to VA and will be placed in the VAAM.
 - VAAR subpart 816.2, Fixed-Price Contracts, would be added. It would consist of one section, VAAR 816.203, Fixed-Price Contracts with Economic Price Adjustment, and that would consist of one subsection, VAAR 816.203-4, Contract Clauses. VAAR 816.203-4 would consist of prescriptions for the various economic price adjustment clauses: new VAAR 852.216-71, Economic Price Adjustment of Contract Price(s) based on a Price Index; and the following VA-specific clauses that were previously uncodified: VAAR 852.216-72, Proportional Economic Price Adjustment of Contract Price(s) based on a Price Index; VAAR 852.216-73, Economic Price Adjustment – State Nursing Home Care for Veterans (ALT #1); VAAR 852.216-74, Economic Price Adjustment – Medicaid Labor Rates (ALT #2); and VAAR 852.216-75, Economic Price Adjustment – Fuel Surcharge.
 - VAAR 816.504, Indefinite-Quantity Contracts, would be deleted because a class deviation from VAAR 816.504 prohibits the use of estimated quantity clauses. In addition, VAAR 852.216-70, Estimated Quantities, would be removed.
 - VAAR 816.505, Ordering, would be amended to include the title and office of the task and delivery order ombudsman (“the Associate Deputy Assistant Secretary (ADAS) for Procurement Policy, Systems and Oversight”).

- VAAR subpart 816.7, Agreements, would be added. It would consist of VAAR 816.770, Consignment Agreements, which would define and describe the consignment agreement acquisition method used for satisfying the need for immediate and on-going requirements.
 - VAAR subpart 816.70, Unauthorized Agreements, would be deleted because its contents, VAAR 816.7001, Letters of availability, covers a procurement method that is no longer in use in VA.
- VAAR part 828, Bonds and Insurance
- VAAR subpart 828.1, Bonds and Other Financial Protections
 - VAAR 828.101, Bid Guarantees, and its subsections, VAAR 828.101-2, Solicitation Provision or Contract Clause, and VAAR 828.101-70, Safekeeping and Return of Bid Guarantee, would be deleted. The guidance in VAAR 828.101-2 is duplicative of that in FAR 28.101-2, and the information in VAAR 828.101-70 is considered procedural and more appropriate in the VAAM.
 - In VAAR 828.106, Administration, the subsection VAAR 828.106-6, Furnishing Information, would be deleted since it includes an internal delegation of authority, and the subsection VAAR 828.106-70, Bond Premium Adjustment, to be amended to clarify the prescription for VAAR 852.228-70, Bond Premium Adjustment (“the contracting officer shall insert the clause at 852.228-70, Bond Premium Adjustment, in solicitations and contracts when performance and payment bonds, or payment protection is required”).
 - VAAR subpart 828.2, Sureties and Other Security for Bonds, would be deleted in its entirety because it contains internal procedural guidance that is more appropriate in the VAAM.
 - In VAAR subpart 828.3, Insurance, paragraph (a) of the section VAAR 828.306, Insurance Under Fixed-Price Contracts, would be amended to clarify the prescription for VAAR 852.228-71, Indemnification and Insurance (“the contracting officer shall insert the provision at 852.228-71, Indemnification and insurance, in solicitations when utilizing term contracts, or contracts of a continuing nature, for ambulance, automobile and aircraft service”). In addition, VAAR 852.228-71 would be amended to correct typographical and grammatical errors.
 - In VAAR subpart 828.71, Indemnification of Contractors, Medical Research or Development Contracts, VAAR 828.7101, Approval for Indemnification, would be deleted since it contains internal procedural information. Then VAAR subpart 828.71 would be renumbered as VAAR subpart 828.70 to conform to the FAR numbering scheme specified in paragraph (a) of FAR 1.303, Publication and Codification. VAAR 828.7100, Scope of Part, would be renumbered as VAAR 828.7000; VAAR 828.7102, Extent of Indemnification, would be renumbered as VAAR 828.7001; and VAAR

828.7103, Financial Protection, would be renumbered as VAAR 828.7002 (remember that VAAR 828.7101 would be deleted by this proposed rule). Finally, VAAR 852.228-73, Indemnification of Contractor-Hazardous Research Projects, would be added require contractors to have appropriate insurance coverage when performing work of a hazardous nature.

Comments on this proposed rule must be submitted no later than May 12, 2017, identified as “RIN 2900-AP82 – Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014-V002 – parts 816, 828),” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) mail or hand-delivery: Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1068, Washington, DC 20420; or (3) fax: 202-273-9026.

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