AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

FEDERAL REGISTER

Vol. 80 Thursday,
No. 102 May 28, 2015

Part II

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 1, 4, 9, et al.
Federal Acquisition Regulations; Fair Pay and Safe Workplaces; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 17, 22, and 52

[FAR Case 2014–025; Docket No. 2014–0025; Sequence No. 1]

RIN 9000–AM81

Federal Acquisition Regulation; Fair Pay and Safe Workplaces

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement the Executive Order ''Fair Pay and Safe Workplaces'', which is designed to improve contractor compliance with labor laws and increase efficiency and cost savings in Federal contracting. The Executive Order (E.O.) requires that prospective and existing contractors disclose certain labor violations and that contracting officers, in consultation with labor compliance advisors, consider the disclosures, including any mitigating circumstances, as part of their decision to award or extend a contract. The E.O. directs agencies to include clauses in their contracts that require similar disclosures by certain subcontractors so their prime contractors can also consider labor violations when determining the responsibility of subcontractors. The E.O. further requires that processes be established to assist contractors and subcontractors to come into compliance with labor laws. To achieve paycheck transparency for workers, the E.O. requires contractors and subcontractors to provide individuals with information each pay period regarding how they are paid and to provide notice to those workers whom they treat as independent contractors. The E.O. also addresses arbitration of employee claims. This proposed rule, and proposed Guidance being issued simultaneously by the Department of Labor (DOL), are intended to implement the E.O.'s requirements.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before July 27, 2015 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2014–025 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2014–025''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2014–025.'' Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2014–025'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2014–025, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at 202–501–0650, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAR Case 2014–025.

SUPPLEMENTARY INFORMATION:

I. Overview

This proposed rule implements E.O. 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 (79 FR 45309, August 5, 2014). E.O. 13673 was amended by E.O. 13683, December 11, 2014 (79 FR 75041, December 16, 2014) to correct a statutory citation. The policy of the Government is to promote economy and efficiency in procurement by awarding contracts to contractors that comply with labor laws. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable and satisfactory delivery of goods and services to the Federal Government.

It is a longstanding tenet of Federal procurement that before a Federal contract is awarded, a contracting officer must determine that the contractor is a responsible source to do business with the Federal Government. The FAR makes clear that in order to be determined responsible, a prospective contractor must ''have a satisfactory record of integrity and business ethics.'' Underlying the FAR's responsibility requirements is the basic recognition that the Federal procurement process works more efficiently and economically when Federal contractors comply with applicable laws, including labor laws. As section 1 of the E.O. explains, contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and to deliver goods and services to the Federal Government in a timely, predictable, and satisfactory fashion.

In recent years, the Administration and Congress have taken a number of steps to strengthen the quality of responsibility determinations generally as well as the overall integrity of the Federal procurement system. These steps have included:

- Deployment of the Federal Awardee Performance and Integrity Information System (FAPIIS)—a one-stop online source for data to support contracting officers as they determine whether a company has the requisite integrity to do business with the Government;
- Promulgation of a new regulatory requirement that offerors state in certain situations whether they have had criminal, civil, or administrative violations within the past 5 years; and
- Direction to agencies to take steps to strengthen their capability to take suspension and debarment actions when necessary to protect the Government from harm.

These important steps have helped the Government make meaningful progress in its efforts to protect taxpayers from waste and abuse and reinforce public confidence in the Federal procurement system. However, agencies would benefit from additional information about labor violations in order to better determine if a potential contractor is a responsible source. For example, many labor violations, including ones that are serious, willful, repeated, or pervasive, may go unreported despite the contractor self-certification described above and found at FAR 52.209–7, because (i) the current penalty triggers for reporting labor violations in FAPIIS may be higher than the penalties associated with individual labor violations; (ii) a contractor is not required to report if it doesn't currently have at least $10 million in contract actions; and (iii) administrative proceedings required to be reported are limited to those in connection with performance of a Federal contract or grant. Even if information regarding labor violations is made available to the agency, contracting officers lack the expertise and tools to efficiently and effectively evaluate the severity of the violations brought to their attention and

therefore cannot easily determine if a contractor's actions show a lack of business ethics and integrity.

Gaps in current regulatory coverage on labor compliance have been discussed in several reports issued over the past several years looking at labor violations by Federal contractors. GAO issued a report (GAO–10–1033, ''FEDERAL CONTRACTING: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors,'' dated September 2010, *http://www.gao.gov/new.items/d101033.pdf*) finding that almost two-thirds of the 50 largest wage-and-hour violations and almost 40 percent of the 50 largest workplace health-and-safety penalties issued between FY 2005 and FY 2009 were made against companies that went on to receive new Government contracts. A separate study conducted by the Center for American Progress (''At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers,'' dated December 2013, *https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/*) found that one quarter of the 28 companies with the top workplace violations that received Federal contracts had significant performance problems—suggesting a strong relationship between contractors with a history of labor law violations and those with performance problems. While the violations discussed in these reports occurred prior to the implementation of the improvements described above, a report by the United States Senate Health, Education, Labor and Pensions Committee, (''Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk,'' dated December, 2013, *http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf*), found continued awards to contractors with significant health and safety and wage-and-hour violations even after at least some of these improvements had gone into effect.

To improve contractor compliance with labor laws and the consideration of labor violations of Federal contractors and subcontractors, E.O. 13673 directs that the following steps be incorporated into existing procurement processes:

• *Disclosure of labor violations.* The E.O. directs agencies to require offerors to report, for contracts over $500,000 whether there has been an administrative merits determination, civil judgment, or arbitral award or decision rendered against them during the preceding three-year period for violations of any of 14 identified Federal labor laws and executive orders or equivalent State laws (labor laws) — including those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections. These disclosures must be made prior to a finding of responsibility, and semi-annually during performance of any contract containing the requirement, so that contracting officers may consider them prior to exercising an option. Prime contractors must also obtain from subcontractors with whom they have contracts of more than $500,000 other than commercially available off-the-shelf items (COTS) the same labor compliance history that they must themselves disclose.

• *Assessment of disclosures.* Prior to a finding of responsibility, contracting officers must consider contractor disclosures of labor violations as part of their determination of whether a contractor has a satisfactory record of integrity and business ethics. They must seek and consider the analysis and recommendations made by agency labor compliance advisors (ALCAs), a new position created by the E.O. Prime contractors must consider the violations disclosed by their subcontractors at any tier in making responsibility determinations regarding their supply chain. Contracting officers and contractors must consider updates to disclosures and disclosures of any new violations to determine whether action needs to be taken during performance of any contract or subcontract containing the disclosure updates requirement.

• *Assistance to help contractors and subcontractors with labor law violations come into compliance with labor laws.* DOL will be available to consult with contractors and subcontractors that have labor law violations.

Consistent with the E.O., these changes are being implemented through proposed regulations by DoD, GSA and NASA that are informed by proposed Guidance issued by DOL entitled ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces' '' (Guidance). DOL's Guidance focuses on defining labor violations and how to determine whether a labor violation is reportable, what information about labor violations must be disclosed, how to analyze the severity of labor violations, and the role of ALCAs, and of DOL and other enforcement agencies, in addressing violations. The FAR rule incorporates DOL's Guidance and further delineates, through policy statements, solicitation provisions, and contract clauses how, when, and to whom disclosures are to be made and the responsibilities of contracting officers and contractors in addressing violations. The FAR rule, consistent with the DOL Guidance, describes the role of ALCAs, DOL and other enforcement agencies in supporting contracting officers and contractors in making responsibility determinations before award and addressing violations that occur during contract performance. In addition, the FAR rule addresses the ability of contractors and subcontractors to work with DOL and enforcement agencies to facilitate remediation measures, such as labor compliance agreements, and states that Suspending and Debarring Officials should be notified in accordance with agency procedures if a contracting officer concludes that a prospective contractor does not have a satisfactory record of integrity and business ethics.

Specifically:

• With respect to making disclosures, the DOL Guidance defines the terms ''administrative merits determination,'' ''civil judgment,'' and ''arbitral award or decision,'' for each of the fourteen enumerated labor laws and discusses what information related to these determinations must be reported by contractors and subcontractors. The FAR rule creates solicitation provisions and contract clauses that will include these disclosure triggers and explain when the required information described in the DOL Guidance is to be submitted, how it is to be submitted, and to whom it is to be submitted.

Offerors must represent for each solicitation whether they have covered labor violations. They complete the annual representations and certifications in the System for Award Management (SAM), and later in each solicitation identify if the SAM representations are still current. Offerors need not provide information on specific violations (such as the case number, the date rendered, or who made the determination or decision) until requested by the contracting officer, which will occur when a responsibility determination is being made. When asked for the additional required information, the prospective contractor will also be invited to provide to the contracting officer such additional information as the prospective contractor deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (including labor compliance agreements) and other steps taken to achieve compliance with labor laws. Disclosure of basic information about the labor violations will be made publicly available in FAPIIS.

• The DOL Guidance also explains when violations should be considered serious, willful, repeated, or pervasive,

as well as how to identify from among the disclosures that fall within these categories those violations that may warrant heighted attention by ALCAs and contracting officers because of the nature of the violations. The FAR rule provides direction to contracting officers in making responsibility determinations to take into account any disclosed labor violations and advice that ALCAs provide to contracting officers. The rule reminds contracting officers that when reviewing disclosures and ALCA advice, they must consider factors that may mitigate the existence of a labor law violation, such as the extent to which the contractor has remediated the violation and taken steps to prevent its recurrence.

• Regarding assistance, DOL's Guidance explains how contractors and subcontractors can get help from DOL, including the opportunity to receive early guidance from DOL and other enforcement agencies on whether violations are potentially problematic, as well as the opportunity to remedy any problems. The FAR clauses promulgated in this rule address the contractor's ability to communicate with DOL and the requirement for contracting officers to give appropriate consideration to remedial measures or mitigating factors, including any agreements by contractors or other corrective action taken to address violations.

By coordinating their actions, DoD, GSA, and NASA, and DOL seek to create a comprehensive process that is reasonable and manageable, and avoids uncertainty that drives up the cost of doing business with the Government. In addition, consistent with the E.O., this proposed rule seeks to minimize implementation burden for contractors and subcontractors in a number of ways.

• The rule, like the E.O., builds on the existing procurement system, and adopts existing processes that help to minimize burden, such as by allowing agencies to limit the required disclosure of the details of violations to offerors for whom a responsibility determination has been initiated.

• Disclosure requirements are limited to contracts over $500,000 and subcontracts over $500,000 other than COTS items, which excludes the vast majority of transactions (many of which are performed by small businesses), while still capturing the vast majority of contract dollars.

• As explained in DOL's Guidance, the focus of analysis is on those violations that are most concerning and have the greatest bearing on an assessment of a contractor's or subcontractor's integrity and business ethics. As a result, most disclosures, such as minor violations of workplace safety and wage-and–hour requirements, should not trigger specific actions beyond those that would otherwise be directed by DOL or the contracting agency to correct the violation. Where action is required, the focus will be on helping the contractor come into compliance, and taking mitigating steps which may include the development of a labor compliance agreement.

• As explained in DOL's Guidance, contractors and subcontractors will be able to engage with DOL and enforcement agencies early in the process when contractors or subcontractors know that they have violations that may require remediation, so that the results of those engagements can be used by contracting officers to help determine responsibility, and used by contractors to help determine responsibility of subcontractors, without having these steps unnecessarily disrupt the procurement process.

• ALCAs will be appointed by agencies to assist agency contracting officers and coordinate with DOL. As indicated in DOL's Guidance, DOL will create processes that facilitate coordination between ALCAs and DOL so that they may give appropriate consideration to determinations and agreements made by DOL and other enforcement agencies as well as analyses of disclosures that have previously been made by an ALCA. This coordination will help to reduce burden for both contractors and agencies by avoiding redundant, inconsistent, and time consuming evaluations. In accordance with the express terms of the E.O., disclosures are only required for subcontracts with an estimated value over $500,000 other than COTS items.

• DoD, GSA, and NASA, and DOL are proposing to implement the changes addressing subcontracting in phases and seek public input on a phased approach. See section IV. A. Phase-in of Subcontractor Requirements.

• Efforts are underway to develop a single Web site for Federal contractors to use for Federal contract reporting requirements related to labor laws, as well as other reporting requirements as practicable so that compliance is as easy and efficient for businesses as possible.

While the focus of the E.O. is on helping contractors come into compliance, there may be instances where a contractor's actions show a lack of business ethics and integrity that warrants notification to the agency's Suspending and Debarring Official. This could include situations where a disclosure shows a basic disregard for labor laws and an unwillingness to come into compliance, as may be demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations (which the proposed DOL Guidance collectively labels as ''pervasive violations''), with no effort to remediate. Such actions will be subject to careful review. If the Suspending and Debarring Official is notified, such actions shall be subject to review, and if suspension and debarment is necessary, the contractor will be given notice and reasonable opportunity to present facts or arguments in support of its position, in accordance with longstanding principles of fundamental fairness set forth in the FAR.

In addition to the new requirements to improve labor compliance, the rule addresses requirements in the E.O. to ensure workers are given the necessary information each pay period to verify the accuracy of what they are paid. The proposed rule recognizes that a contractor would be in compliance if it provides a worker with a wage statement that complies with a state law whose wage statement laws are substantially similar to the E.O's wage statement requirements (as specified in DOL's Guidance).

Finally, the proposed rule would implement the E.O.'s requirement that contractors and subcontractors who enter into contracts for non-commercial items over $1 million agree not to enter into any mandatory pre-dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

Additional detail on the requirements of the E.O. and how the above steps are reflected in provisions and clauses in the proposed rule are discussed below in section II. ''Background and Implementation of the E.O.''

II. Background and Implementation of the E.O.

E.O. 13673 seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that they understand and comply with labor laws. A number of the E.O.'s requirements are addressed in this proposed rule, including the following:

Section 2 of the E.O. contains contractor disclosure requirements designed to provide contracting officers pertinent information to consider in making responsibility determinations, which will improve contracting officers' ability to award contracts to contractors that have a satisfactory record of

integrity and business ethics. Similar disclosure requirements are required at the subcontractor level.

Section 2(a)(i) of the E.O. establishes that offerors on a contract estimated to exceed $500,000 must represent whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, (as defined in DOL Guidance entitled: ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces' ''), rendered against the offeror, within a three year period preceding the offer, for violations of any of the enumerated labor laws.

Section 2(a)(ii) of the E.O. provides that a contracting officer, as part of the contractor responsibility determination, will provide an opportunity for a prospective contractor to disclose any steps taken to correct the violations of or to improve compliance with the labor laws, including any agreements entered into with an enforcement agency.

Section 3 of the E.O. requires each agency to designate a senior agency official to be an agency labor compliance advisor (ALCA) to assist contracting officers, contractors, the DOL and other relevant enforcement agencies in reviewing and evaluating disclosed information. The ALCA, may also assist subcontractors by referring them to the appropriate DOL office. DOL, as stated in its ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces' '', plans to set up a structure within DOL to consult with ALCAs in carrying out their responsibilities and duties and to be available to consult with contractors and subcontractors.

Section 4 of the E.O. requires DoD, GSA, and NASA, in consultation with DOL, the Office of Management and Budget, and enforcement agencies to identify considerations for determining whether serious, repeated, willful, or pervasive violations of the enumerated labor laws demonstrate a lack of integrity or business ethics. DOL is responsible for developing guidance to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments were issued for serious, repeated, willful, or pervasive violations.

Section 5 of the E.O. addresses paycheck transparency in Federal contracts by requiring that contractors provide individuals performing work under the contract for whom they must maintain wage records under the Fair Labor Standards Act, 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), formerly known as the Davis-Bacon Act, 41 U.S.C. chapter 67, Service Contract Labor Standards, formerly known as the Service Contract Act, or equivalent state laws with a document with basic information about their hours and wages so that individuals will know if they are being paid properly for work performed. In addition, when contractors are treating an individual as an independent contractor, rather than an employee, the contractor must provide a document stating this to the individual.

Section 6 of the E.O. provides that for contracts estimated to exceed $1,000,000, employees and independent contractors of contractors may not be required to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment.

Section 10 of the E.O. states that the E.O. became effective upon signature, and applies to solicitations for contracts as set forth in the FAR final rule.

A. FAR Implementation

The rule proposes to add FAR subpart 22.20, Fair Pay and Safe Workplaces. FAR 22.2002 adds definitions. FAR 22.2004 summarizes the E.O. section 2 disclosure requirements. FAR 22.2005 implements the E.O. section 5 paycheck transparency requirements. FAR 22.2006 implements the E.O. section 6 complaint and dispute transparency requirements.

DoD, GSA, and NASA, in formulating the proposed rule and in consultation with DOL, considered the Guidance DOL has proposed in accordance with Section 4 of the E.O. DoD, GSA, and NASA has identified and prescribed in the proposed rule specifically when, and in what manner, the DOL Guidance must be read and utilized to effectively implement the E.O.

1. Definitions

FAR 22.2002 adds definitions, which also appear at 52.222–BB Compliance with Labor Laws. Definitions of the terms ''administrative merits determination,'' ''agency labor compliance advisor,'' ''arbitral award or decision,'' ''civil judgment,'' ''DOL Guidance,'' ''enforcement agency,'' ''labor compliance agreement,'' ''labor laws,'' ''labor violation,'' ''pervasive violation,'' ''repeated violation,'' ''serious violation,'' and ''willful violation'' appear in FAR 22.2002 and in the clause at FAR 52.222–BB, Compliance with Labor Laws.

The definition of ''labor laws'' is derived from the E.O and includes the following statutes and E.O.s:

—The Fair Labor Standards Act, 29 U.S.C. chapter 8.
—The Occupational Safety and Health Act (OSHA) of 1970.
—The Migrant and Seasonal Agricultural Worker Protection Act.
—The National Labor Relations Act.
—40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.
—41 U.S.C. chapter 67, formerly known as the Service Contract Act.
—E.O. 11246 of September 24, 1965 (Equal Employment Opportunity).
—Section 503 of the Rehabilitation Act of 1973.
—The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.
—The Family and Medical Leave Act.
—Title VII of the Civil Rights Act of 1964.
—The Americans with Disabilities Act of 1990.
—The Age Discrimination in Employment Act of 1967.
—E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors.
—Equivalent State laws as defined in Guidance issued by the Department of Labor. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans).

The proposed rule definitions of ''administrative merits determination,'' ''arbitral award or decision,'' ''civil judgment,'' ''pervasive violation,'' ''repeated violation,'' ''serious violation,'' and ''willful violation'' are based on DOL's Guidance. The definitions of these terms may vary based on the labor law to which they apply. Therefore, the definitions in the DOL Guidance must be read in their entirety in implementing the E.O.

In addition to defining terms, the DOL Guidance explains how to evaluate reported violations (considering whether the violations are serious, repeated, willful, or pervasive); review remediation of the violation(s) and any other mitigating factors; determine if the violations identified warrant remedial measures; and give appropriate consideration to determinations and agreements between contractors and DOL or other enforcement agencies, such as a labor compliance agreement. The DOL Guidance for E.O. 13673, ''Fair Pay and Safe Work Places'' must also be read in its entirety to successfully implement the E.O. and when finalized, will be available at *www*_____. The proposed DOL Guidance is being published simultaneously with this proposed rule.

2. Duties of the Agency Labor Compliance Advisor (ALCA)

Section 3 of the E.O. requires each contracting agency to designate a senior agency official to be an ALCA to provide consistent guidance on whether contractors' actions rise to the level of a lack of integrity or business ethics. ALCAs, in consultation with DOL and other agencies responsible for enforcing labor laws, will help contracting officers to do the following:

- Review information regarding violations reported by contractors;
- Assess whether reported violations are serious, repeated, willful, or pervasive;
- Review the contractor's remediation of the violation and any other mitigating factors; and,
- Determine if the violations identified warrant remedial measures, such as a labor compliance agreement—*i.e.,* an agreement entered into between an enforcement agency and a contractor or subcontractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws or other related matters.

Proposed FAR sections 22.2004–2 and 22.2004–3 implement section 3 of the E.O. by addressing the newly established role of the ALCA, and the relationship of the ALCA with the contracting officer. FAR 22.2004–2 and 22.2004–3 provide details concerning the ALCA obtaining violation information, and furnishing written recommendations to the contracting officer.

3. Compliance With Labor Laws: Pre-award Actions

i. *Contractors.*

The proposed FAR 22.2002, 22.2004, 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673) (and its commercial item equivalent at 52.212–3(q)), and 52.222–AB, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), implement E.O. section 2(a). These requirements emphasize the need to specifically address labor law compliance when determining contractor and subcontractor responsibility.

The FAR provision at 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673), requires an offeror, for solicitations estimated to exceed $500,000, to represent whether it has any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against it, within the preceding three years for violations of the specified labor laws.

The commercial item equivalent of 52.222–AA will appear as new paragraph (q) of 52.212–3, Offeror Representations and Certifications—Commercial Items.

ii. *Contracting officer pre-award duties.*

The proposed FAR 22.2004–2 implements E.O. section 2(a)(ii), (iii) and (vi) by emphasizing the requirement that contracting officers must consider information concerning violations of the specified labor laws when evaluating contractor responsibility under FAR subpart 9.1. The proposed rule requires the contracting officer to confer with the ALCA and consider the ALCA's advice in evaluating any disclosed violations, but reaffirms that the contracting officer solely has the duty to make a responsibility determination of prospective contractors.

If a contracting officer has initiated a responsibility determination for a prospective contractor and the prospective contractor disclosed labor law violations in the representation at 52.222–AA (or its commercial item equivalent at 52.212–3(q)(2)), the contracting officer is instructed to—

- Request that the prospective contractor submit information into the System for Award Management (SAM) _____ (*insert name of reporting module*) *www.sam.gov,* (unless the information is already in the SAM) and is current and complete, or unless the prospective contractor meets an exception to SAM registration (see 4.1102(a)) in which case the following information must be furnished to the contracting officer:
  - ○ The labor law violated.
  - ○ The case number, inspection number, charge number, docket number, or other unique identification number.
  - ○ The date rendered.
  - ○ The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision;
- Ask the contractor for the administrative merits determination, arbitral award or decision, or civil judgment document, as necessary to make an evaluation and support recommendations, if the documents are not otherwise available, and the ALCA has been unable to obtain the documents;
- Request that the prospective contractor provide to the contracting officer such additional information as the prospective contractor deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws;
- Provide the additional information to the ALCA; and
- Request the ALCA provide, within three business days of the request or another time period required by the contracting officer, written advice and recommendation as to the contractor's efforts to comply with the specified labor laws. The ALCA is to make one of the following recommendations:
  - ○ The prospective contractor could be found to have a satisfactory record of integrity and business ethics.
  - ○ The prospective contractor could be found to have a satisfactory record of integrity and business ethics if the process to enter into or enhance a labor compliance agreement is initiated.
  - ○ The prospective contractor could be found to not have a satisfactory record of integrity and business ethics, and the agency suspending and debarring official should be notified, in accordance with agency procedures as contemplated by current FAR provisions.

The recommendation shall include the following, based on the DOL Guidance for E.O 13673, ''Fair Pay and Safe Workplaces:''

- ○ Whether any violations should be considered serious, repeated, willful, or pervasive.
- ○ The number of labor violations (depending on the nature of the violation, in most cases, a single violation may not necessarily give rise to a determination of lack of responsibility).
- ○ Whether the prospective contractor has initiated its own remedial measures.
- ○ The need for, existence of, or whether the prospective contractor is adequately adhering to labor compliance agreements or other appropriate remedial measures.
- ○ Whether the prospective contractor is negotiating in good faith a labor compliance agreement.
- ○ Such supporting information that the ALCA finds to be relevant.

The contracting officer is to make a judgment of contractor responsibility, reviewing the DOL Guidance and the ALCA's recommendation.

Finally, the proposed rule preserves and emphasizes the requirement at FAR 9.103(b), which states that if a contracting officer finds a prospective a small business contractor to be nonresponsible, the matter shall be referred to the Small Business Administration (SBA). If SBA concludes that the small business is responsible, SBA will issue a Certificate of Competency.

iii. *Duties of contractors before awarding a subcontract.*

Sections 2(a)(iv) and (v) of the E.O. require that for subcontracts estimated to exceed $500,000, other than COTS items, the contractor shall require its prospective subcontractors to make similar disclosures to those that the contractor must make; and before awarding a subcontract, the contractor is required to consider the information submitted in determining whether the subcontractor is a responsible source.

The contractor has discretion in how it manages this requirement. A contractor could decide to evaluate all of its prospective subcontractors at all tiers or may manage a process by which subcontractors evaluate lower tier subcontractors. The prime contractor is responsible for establishing the approach that works best for the contractor, based upon factors such as the nature and size of the contract requirement.

The proposed FAR revision sets forth steps that contractors must follow when determining the responsibility of subcontractors related to labor law compliance. The provision at 52.222–AB, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), applies before contract award to subcontracts at any tier in excess of $500,000 except for COTS items, and requires the contractor to follow the procedures in paragraph (c) of the clause at 52.222–BB, Compliance with Labor Laws. When contractors are determining subcontractor responsibility after award of the prime contract, the clause at 52.222–BB, Compliance with Labor Laws applies. Paragraphs (c)(3) through (c)(7) of the clause require the following:

- The contractor shall require a prospective subcontractor to represent to the best of the subcontractor's knowledge and belief whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments, for violations of labor laws rendered against the subcontractor within the three-year period preceding the date of the subcontractor's offer.
- If the prospective subcontractor responds affirmatively, and the contractor initiates a responsibility determination and requests additional information, the prospective subcontractor shall provide to the contractor, the administrative merits determinations, arbitral awards or decisions, or civil judgments documents that were rendered against the subcontractor within the preceding three-year period prior to the subcontractor's offer, and any notice the subcontractor received from DOL advising that it has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of an existing agreement.
- The contractor shall afford a subcontractor an opportunity to provide such additional information as the subcontractor deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), other steps taken to achieve compliance with labor laws, and explanations for delays in entering into a labor compliance agreement within a reasonable period or not meeting the terms of an existing agreement.
- The contractor shall evaluate information submitted by the subcontractor as part of determining subcontractor responsibility and complete the evaluation—
  - For subcontracts awarded or that become effective within five days of the prime contract execution, no later than 30 days after subcontract award; or
  - For all other subcontracts, prior to subcontract award. However, in urgent circumstances, the evaluation shall be completed within 30 days of subcontract award.
- The contractor shall consider the following in evaluating information—
  - The nature of the violations (whether serious, repeated, willful, or pervasive);
  - The number of violations (depending on the nature of the violation, in most cases, a single violation of law may not necessarily give rise to a determination of lack of responsibility;
  - Any mitigating circumstances;
  - Remedial measures taken to address violations, including existence of and compliance with any labor compliance agreements, including whether the subcontractor is still negotiating in good faith a labor compliance agreement; and
  - Any notices the subcontractor received from DOL advising that it has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of an existing agreement.
  - Any advice or assistance provided by DOL,
  - Paragraph (e) states that contractors may consult with DOL regarding subcontractor labor law compliance.
- The contractor shall notify the contracting officer of the following information if the contractor determines that a subcontractor is a responsible source after having been informed that DOL has advised that the subcontractor has not entered into a compliance agreement within a reasonable period or is not meeting the terms of the agreement:
  - The name of the subcontractor; and
  - The basis for the decision.

As explained above, DOL will provide consultation and assistance, upon request, in evaluating contractor and subcontractor information relevant to disclosed labor violations. The DOL guidance explains that DOL will set up a structure within DOL to be available to consult with contractors and subcontractors. The proposed rule limits contracting officer and the ALCA's role, with respect to subcontractor labor violation information, to furnishing assistance such as access to the DOL Guidance and the appropriate contacts at DOL.

4. Compliance With Labor Laws: Actions Post-Award

i. *Contractor and subcontractors.* Proposed FAR 52.222–BB, Compliance with Labor Laws, implements the post-award responsibilities identified in EO sections 2(b)(i) and (iii). The procedures for a contractor considering subcontractor labor violation information when determining the responsibility of subcontractors at 52.222–BB apply to subcontracts awarded after the prime contract is executed.

The contractor and its subcontractors are required to continue to disclose, semi-annually, whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against them for violations of labor laws.

Semi-annually during subcontract performance, subcontractors must determine whether disclosed information is updated, current and complete. If the information is not updated, current and complete, subcontractors must provide updated information to the contractor. If the information is updated, current and complete, no action is required. A subcontractor shall also disclose, within 5 business days, any notification by DOL that it has not entered into a labor compliance agreement within a reasonable period, or is not meeting the terms of an existing labor compliance agreement.

The contractor shall afford subcontractors an opportunity to provide any additional information, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws. If the subcontractor informed the

contractor that it received DOL notices of delay in entering into or non-compliance with the terms of an existing Labor Compliance Agreement, or the contractor otherwise obtained this information, the contractor shall allow the subcontractor to provide explanations and supporting information for such delays and non-compliances. Contractors are responsible for considering information submitted by subcontractors after contract award, with respect to labor law violations and the need for new or enhanced labor compliance agreements. Contractors may consult with DOL in evaluating subcontractor labor law violations. The contractor shall notify the contracting officer of the name of the subcontractor and the basis for the decision if the contractor decides to continue the subcontract after having been informed that DOL has advised that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement.

ii. *Contracting officers.* Proposed FAR 22.2004–3 and paragraph (b) of 52.222–BB implement E.O. section 2(b)(ii). Contracting officers, in consultation with the ALCA, are responsible for considering information submitted by contractors after contract award, regarding labor law violations. Among the actions available to the contracting officer are:

- No action required, continue the contract;
- Refer the matter to DOL for action, which may include a new or enhanced labor compliance agreement;
- Do not exercise an option (see FAR 17.207(c)(8));
- Terminate the contract in accordance with the procedures set forth in FAR Part 49 or 12.403; or
- Notify the agency Suspending and Debarring Official if there are such serious, repeated, willful or pervasive labor violation(s) that the violation(s) demonstrate a lack of integrity or business ethics of a contractor or subcontractor, in accordance with agency procedures.

B. Paycheck Transparency

FAR 22.2005 and 52.222–XX, Paycheck Transparency, implement section 5 of the E.O. The proposed rule requires contractors, for contracts valued in excess of $500,000, to provide in every pay period a document (wage statement, also known as a pay stub) to all individuals performing work under the contract subject to certain wage record statutes. The wage statement lists the individual's hours worked, overtime hours, pay, and additions made to or deductions made from pay. Overtime hours contained in the wage statement shall be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid. If the contractor does not include the hours worked for individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act, the contractor must inform the individual of the exempt status. In addition, if the contractor is treating an individual performing work under a contract as an independent contractor, and not as an employee, the contractor must provide a document to the individual, informing the individual of that status; the document shall be provided prior to commencement of work or at the time a contract with the individual is established. The wage statement and independent contractor notifications must also be provided in languages other than English if a significant portion of the workforce is not fluent in English. These requirements also apply to subcontracts over $500,000 for other than COTS items.

C. Arbitration of Contractor Employee Claims

Proposed FAR 22.2006 and the clause at 52.222–YY, Arbitration of Contractor Employee Claims, implement section 6 of the E.O. The proposed rule requires that contractors agree that the decision to arbitrate claims which arise under title VII of the Civil Rights Act of 1964, or under any tort related to or arising out of sexual assault or harassment, be made only with the voluntary consent of employees or independent contractors after such disputes arise. Exceptions are as follows:

—Contracts and subcontracts of $1,000,000 or less.
—Contracts and subcontracts for the acquisition of commercial items. The E.O. excepts the acquisition of COTS items; these are automatically included in the exception for commercial items; see the existing FAR definition of COTS at 2.101.
—Where employees are covered by a collective bargaining agreement negotiated between the contractor and a labor organization representing the contractor's employees.
—Certain pre-existing arbitration agreements described at 52.222–YY(b)(2).

III. Issues Highlighted for Public Comment

Consistent with section 4 of the E.O. the proposed DOL Guidance and proposed FAR rule have been developed to work together to create a compliance process that is manageable and reasonable. Given the integrated nature of the two documents, they are being published under separate notice on the same day so that respondents have the opportunity to consider the documents holistically in addition to offering comment on the specifics of each document. DoD, GSA, and NASA welcome public comment on any aspect of its rule and especially on the issues highlighted below. Responses to comments regarding subjects covered by DOL guidance will be coordinated with DOL.

A. Equivalent State Laws

DoD, GSA, and NASA and DOL recognize there will be challenges associated with the implementation of section 2 of the E.O. as regards the state laws that DOL determines to be equivalent to the Federal laws enumerated. Therefore, other than the Occupational Safety and Health Administration (OSHA)-approved state plans, the equivalent state law requirement will not be implemented through this rulemaking. DOL will publish additional guidance for comment, and DoD, GSA, and NASA will also publish a subsequent proposed rule to implement the E.O.'s requirements as to equivalent state laws. Public comment will be welcome upon publication of the subsequent proposed FAR rule.

B. Burden Reduction for Small Businesses

Section 4(e) of the E.O. requires DOL and DoD, GSA, and NASA to minimize, to the extent practicable, the burden of complying with the E.O. for Federal contractors and subcontractors and in particular small entities, including small businesses. A number of steps have been taken in this proposed rule to minimize burden, including the following: (1) limiting disclosure requirements to contracts over $500,000, and subcontracts over $500,000 excluding COTS items, which excludes the vast majority of transactions performed by small businesses; (2) limiting initial disclosure from offerors to a simple statement of whether the offeror has any covered labor violations and generally requiring more detailed disclosures only from the apparent awardee; (3) requiring post award updates semi-annually; (4) creating certainty for contractors by having ALCAs coordinate through DOL to promote consistent responses across Government agencies regarding disclosures of violations; (5) considering phasing in requirements for flowdown and disclosure of state labor law

violations so that contractors and subcontractors have an opportunity to become acclimated to new processes; and (6) setting up systems that centralize and avoid redundant reporting of violations. In addition, DOL intends to allow companies to work with DOL and other enforcement agencies to remedy potential problems independent of the procurement process so companies can give their full attention to the procurement process when a solicitation of interest is issued. Comment is sought on additional regulatory or other related steps that might specifically reduce burden for small businesses and other small entities.

C. Public Disclosure of Violation Information

The proposed rule requires prospective prime contractors to publicly disclose whether they have violations of covered laws within the last three years and, for prospective contractors being evaluated for responsibility, certain basic information about the violation (*e.g.,* the law violated, the docket number, the name of the body that made the decision). The rule would not compel public disclosure of additional documents the prospective contractor deems necessary to demonstrate its responsibility, such as mitigating circumstance, remedial measures and other steps taken to achieve compliance with labor laws. The rule is silent on the public disclosure of the administrative merits determinations, arbitral awards or decisions, or civil judgments; some of which are independently available as public records, *e.g.,* civil judgments, and on the public disclosure of labor compliance agreements. Comment is sought on the scope of documents that should be publicly disclosed, and what other changes, if any, should be made regarding disclosure to ensure the right balance has been reached between transparency and the creation of a reasonable environment for contractors to work with enforcement agencies on compliance agreements and other appropriate remediation measures.

D. Use of Technology

Section 4(d) of the E.O. requires the GSA Administrator to develop a single Web site for Federal contractors to use for all Federal contract reporting requirements related to this order. Interested parties may provide feedback through the National Dialogue with information available at *www.cao.gov* on how technology can be used to maximize the efficiency of compliance and reduce reporting burden. Interested parties are advised that such comments will not be considered public comments for the purposes of this proposed rule making.

E. Subcontractor Requirements

The labor compliance requirements of the E.O. apply both to prime contractors and to their subcontractors awarded subcontracts over $500,000 other than for COTS items. DoD, GSA, and NASA and DOL seek to minimize burden for contractors and subcontractors, including small businesses, in meeting new responsibilities related to flowdown of requirements to subcontractors, while also ensuring improved compliance with labor laws by subcontractors within the Federal supply chain.

Prime contractors are required to obtain from subcontractors with whom they have contracts of more than $500,000 the same labor compliance history that they must themselves disclose.

The rule provides that prime contractors may seek assistance from DOL in evaluating subcontractor labor violations and making determinations of responsibility or, for existing subcontracts, evaluating the need for other actions. DoD, GSA, and NASA are also considering alternative language addressing the handling of flowdown, described in section IV. Comments are welcome on the handling of flowdown, both in the proposed rule and in the alternatives described below.

F. Recordkeeping

The recordkeeping burden does not currently include hours for prospective contractors or prospective subcontractors to retain records of their own labor law violations. These labor law violations are significant enough that it is reasonable to assume that a prudent business would retain such determination or decision documents as a normal business practice. However, contractors and subcontractors may choose to set up internal databases to track violations subject to disclosure in a more readily retrievable manner—particularly firms that are larger and more geographically or organizationally dispersed—and may incur associated one-time setup costs. Public comment and information are sought on the need for and cost of setting up these systems, how such costs depend on contractors' size and organizational structure, and the extent to which setting up such systems would reduce recurring disclosure costs in the following years.

IV. Alternatives to the Proposed Rule Regulatory Text for Consideration and Comment

DoD, GSA, and NASA seek to create processes that are clear and manageable, for both prime contractors and their subcontractors, and achieve our intent of requiring that compliance with labor laws becomes a regular component of a contracting officer's assessment of a prime contractor's integrity and business ethics, as well as a prime contractor's assessment of a subcontractor's integrity and business ethics. Three alternatives are presented below: phase-in of subcontractor disclosure requirements, subcontractor disclosures and contractor assessments, and contractor and subcontractor remedies.

A. Phase-In of Subcontractor Disclosure Requirements

Changes proposed through this FAR rule and DOL's Guidance that address requirements associated with subcontracting would be applied to new contracts in phases so that contractors and subcontractors have time to acclimate themselves to their new responsibilities. DoD, GSA, NASA, and DOL welcome public input on phase-in approaches. For solicitations issued and resultant contracts awarded during the phase-in period for subcontractors, the rule would apply only to prime contractors.

B. Subcontractor Disclosures and Contractor Assessments

Under the proposed rule, contractors are required to obtain from subcontractors with whom they have contracts exceeding $500,000 other than COTS items the same labor compliance history that they must themselves disclose. The rule provides that prime contractors may seek assistance from DOL in evaluating subcontractor labor violations and making determinations of responsibility or, for existing subcontracts, evaluating the need for other actions.

As an alternative approach for contractors determining the responsibility of their subcontractors, DoD, GSA, and NASA are considering a process where the contractor directs the subcontractor to consult with DOL on its violations and remedial actions. Under this approach, subcontractors would disclose details regarding their violations to DOL instead of to the prime contractor. The subcontractor would then make a representation back to the prime contractor regarding DOL's response to its disclosure. The rule would provide guidance on the types of

subcontractor representations that would serve as a sufficient basis for the prime contractor to conclude that the prospective subcontractor is a responsible source for purposes of labor compliance, and the additional steps the subcontractor and prime contractor would need to take when DOL advises the subcontractor (or prime contractor) that subcontractor violations have not been adequately remediated.

To minimize impact on procurement lead time, the alternative would allow the prime contractor to make a determination of responsibility if DOL did not provide advice within 3 business days of the subcontractor's request and did not previously advise the subcontractor that the subcontractor needed to enter into a labor compliance agreement to address its violations. However, the subcontractor would be required to inform the contractor within 5 business days of any advice made by DOL concerning the violations at any time during the term of the subcontract (including a notification that the contractor did not enter into an agreement to remediate violations in a reasonable period or did not meet the terms of an existing agreement to mitigate violations) and the prime contractor would be required to consider the information in a timely manner and determine whether action is necessary. If the prime determines that that subcontractor is a responsible source or otherwise retains the subcontractor post-award after being informed of DOL concerns, the prime would be required to inform the contracting officer of its decision and the basis for the decision.

To implement the approach described above, the following language is a possible alternative to the language in paragraph (c) and (d) of FAR 52.222–BB, Compliance with Labor Laws. The public may also comment on whether the final rule should be structured to allow the prime contractor the discretion to select either approach. We invite comments on these approaches, and whether there are additional or alternative procedures that could better achieve the intent of the E.O.

Beginning of alternative paragraphs (c) and (d) of 52.222–BB:

(c) *Subcontractor responsibility.*

(1) The Contractor shall evaluate subcontractor labor violation information when determining subcontractor responsibility.

(2) This clause applies to subcontracts for other than commercially available off-the-shelf items with an estimated value that exceeds $500,000.

(3) The contractor shall require a prospective subcontractor to represent to the best of the subcontractor's knowledge and belief whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments, for violation of labor laws rendered against the subcontractor within the three-year period preceding the date of the subcontractor's offer.

(4) In evaluating subcontractor responsibility, the contractor shall require the subcontractor to disclose all covered labor violations to DOL and may conclude that the prospective subcontractor is a responsible source for purposes of labor compliance under the Executive Order if—

(i) The prospective subcontractor provides a negative response in its representation made pursuant to paragraph (3); or

(ii) The prospective subcontractor, in response to a request made by the Contractor in the context of performing a responsibility determination, responds affirmatively, represents to the best of the subcontractor's knowledge and belief that it has disclosed to DOL any administrative merits determinations, arbitral awards or decisions, or civil judgments documents that were rendered against the subcontractor within the preceding three-year period prior to the subcontractor's offer, and any information that the subcontractor, in its judgment, believes is relevant for DOL's consideration, including remedial actions taken, and—

(A) has been advised by DOL that—

(1) it has no serious, willful, repeated, or pervasive violations; or

(2) it has serious, willful, repeated, and/or pervasive violations and has taken sufficient action to remediate its violations;

(B) the subcontractor is a party to a labor compliance agreement(s) with DOL or other enforcement agency to address all disclosed violations that have been determined by DOL to be serious, willful, repeated and/or pervasive violations and states that it has not been notified by DOL that it is not meeting the terms of its agreement;

(C) the subcontractor has agreed to enter into a labor compliance agreement or is considering a labor compliance agreement(s) with DOL or other enforcement agency to address all disclosed violations that have been determined by DOL to be serious, willful, repeated, and/or pervasive violations and has not been notified by DOL that it has not entered into an agreement in a reasonable period; or

(D) the subcontractor has provided the contractor with information about all disclosed violations that have been determined by DOL to be serious, willful, repeated, and/or pervasive, a description of DOL's advice or proposed labor compliance agreement and an explanation for the subcontractor's disagreement with DOL where the subcontractor has been notified by DOL that it has not entered into an agreement in a reasonable period or is not meeting the terms of the agreement, or where the subcontractor otherwise disagrees with DOL's advice or proposed labor compliance agreement;

(5) If the contractor determines that the subcontractor is a responsible source based on the representation made pursuant to paragraph (4)(ii)(D), the contractor must notify the Contracting Officer of the decision and provide the following information:

(i) The name of the subcontractor; and

(ii) The basis for the decision.

(6) If DOL does not provide advice to the subcontractor within three business days of the subcontractor's disclosure of labor violation information pursuant to paragraph (c)(4) and DOL did not previously advise the subcontractor that it needed to enter into a labor compliance agreement to address labor violations, the contractor may proceed with making a responsibility determination using available information and business judgment.

(d) *Subcontractor updates.*

(1) The Contractor shall require subcontractors to determine, on a semi-annual basis during subcontract performance, whether labor law disclosures provided to DOL pursuant to paragraph (c)(4) are current and complete. If information is current and complete, no action is required. If the information is not current and complete, subcontractors must provide revised information to DOL and make a new representation to the Contractor pursuant to paragraph (c)(4) to reflect any advice provided by DOL or other actions taken by the subcontractor.

(2) The Contractor shall further require the subcontractor to disclose during the course of performance of the contract any notification by DOL, within 5 business days of such notification, that it has not entered into a labor compliance agreement in a reasonable period or is not meeting the terms of a labor compliance agreement to which it is a party, and shall allow the subcontractor to provide an explanation and supporting information for the delay or non-compliance.

(3) The Contractor shall consider, in a timely manner, information obtained from subcontractors pursuant to paragraphs (d)(1) and (2) of this clause, and determine whether action is necessary. Action may include, but is not limited to, requesting that the

subcontractor pursue a new or enhanced labor compliance agreement, requiring other appropriate remedial measures, compliance assistance, resolving issues to avoid further violations, or not continuing with the subcontract, if necessary.

(4) If the Contractor has been informed by the subcontractor or DOL of DOL's determination that the subcontractor has not entered into a labor compliance agreement in a reasonable period or is not meeting the terms of an existing agreement, and the contractor determines to continue the subcontract, the contractor must notify the Contracting Officer of the decision and provide the following information:

(i) The name of the subcontractor; and

(ii) The basis for the decision.

End of alternative paragraphs (c) and (d) of 52.222–BB.

DOD, GSA and NASA encourage respondents to comment on this alternative clause language in addition to the clause in the regulatory text of the proposed rule, including any comments on the relative benefits and drawbacks of each approach.

C. Contractor and Subcontractor Remedies

DOD, GSA, and NASA seek to create accountability for compliance in a manner that provides reasonable time and opportunities for prime contractors and subcontractors to take remedial actions but also results in the application of appropriate steps where remediation is not being accomplished in a timely fashion. A number of steps have been incorporated into the proposed rule, as well as into the alternative approach for evaluating subcontractor responsibility and post-award efforts described above, to achieve these dual goals.

For example, the contracting officer would be made aware of situations where DOL has determined that a prospective or existing contractor or subcontractor with serious, willful, repeated and/or pervasive violations has not entered into a labor compliance agreement in a reasonable period or is not meeting the terms of such agreement. This information would be provided to the contracting officer through the ALCA in the case of violations by the prime contractor and through the prime contractor in the case of violations by the subcontractor. In the latter case, subcontractors would be required to disclose DOL concerns related to entering into or meeting the terms of a compliance plan to the prime contractor, or DOL may inform the prime contractor directly. The prime contractor would then report this information to the contracting officer if the prime contractor selected the subcontractor or retained the subcontractor to continue performing the subcontract.

As an additional step, DOD, GSA, and NASA are considering the following alternative supplemental FAR language to address consideration of compliance with labor laws in the evaluation of contractor performance.

Beginning of alternative supplemental FAR language:

22.2004–5 Consideration of Compliance With Labor Laws in Evaluation of Contractor Performance.

The Contracting Officer, in consultation with the Agency Labor Compliance Advisor (ALCA), shall, as part of the Contractor's performance evaluation under FAR 42.1503(b), consider concerns raised by DOL that the Contractor, or one or more of its subcontractors, has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of an existing compliance agreement to address serious, willful, repeated and/or pervasive violations of covered labor laws. The Contracting Officer's evaluation shall take into account—

(a) The contractor's explanation for any delays in entering into a compliance agreement with respect to its own labor violations and other remediation steps taken; and

(b) The contractor's explanation for finding a subcontractor responsible or retaining the subcontractor, as set forth in 52.222–BB(c)(7) and (d)(5), and any remediation steps taken.

End of alternative supplemental FAR language

The proposed rule (and alternative language) outline available remedies. For example, for subcontracts, remedies include requiring a new or enhanced labor compliance agreement, requiring other appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, or a decision not to continue with the subcontract, if necessary.

DoD, GSA, and NASA welcome comment on whether these remedies, including those in the supplemental language being considered for FAR 22.2004–5, achieve the appropriate balance between the dual goals of providing reasonable time for remedial action and accountability for unjustified inaction and what additional or alternative remedies should be considered.

Impact and Associated Burden of Alternatives

Collateral documents, which include the Regulatory Impact Analysis (RIA), the Paperwork Reduction Act (PRA) Supporting Statement, and Regulatory Flexibility Analysis (RFA), have been prepared reflecting the language of the regulatory text as promulgated in this proposed rule. Potential impacts and associated burdens of the alternative options presented in this section IV were not separately addressed. If, in the final rule promulgation, alternative options are selected, impacts and associated burdens will be reduced as the alternatives are less burdensome and will have a lesser impact.

V. Executive Orders 12866 and 13563

A. 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 rule is a major rule under 5 U.S.C. 804.

B. A Regulatory Impact Analysis that includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this proposed rule *and a discussion of alternatives to this regulatory action* is available in the docket for review. For access to the docket to read background material or comments received, go to *http://www.regulations.gov/*. The E.O. contains specific requirements pertaining to labor law violation disclosures, paycheck transparency, and complaint and dispute transparency. The contractor and subcontractor population that may be impacted by this rule is 22,153 contractors and 3,622 subcontractors for a total of 25,775. Contractors and subcontractors subject to the E.O. will incur a cost to comply. A summary of the total quantifiable cost is listed below.

Summary Table of Quantifiable Costs—The table summarizes the following costs of the E.O.: Review of DOL Guidance and FAR rule, labor law violation disclosure and review, paycheck transparency, and total public and Government costs.

SUMMARY TABLE OF QUANTIFIABLE COSTS

	Year 1	Year 2 and after
Review of DOL Guidance and FAR rule	$12,990,600	$0
Initial Representation of Labor Law Violations	70,445,418	70,445,418
Labor Law Violation Updates	8,524,423	8,524,423
Recordkeeping	1,528,020	1,528,020
Subtotal Labor Law Disclosure and Review	80,497,861	80,497,861
Paycheck Transparency	13,082,561	11,009,461
Total Public Costs	106,571,022	91,507,322
Total Government Costs	7,599,811	7,599,811

Cost of Complaint and Dispute Transparency—DoD, GSA, and NASA and DOL are unable to quantify the overall cost of the complaint and dispute transparency provision contained in section 6 of the E.O. because the potential increase in the number of claimants that would elect to go to trial as a result is unknown. However, the impact is expected to be limited for two primary reasons. First, impact on the Federal contracting community is limited because these requirements are already applicable to Federal contracts awarded by DoD, which is responsible for the majority of Federal contracts. And second, the increase in the size of judgments awarded to employees or independent contractors stemming from a shift toward more cases being litigated in court is considered a transfer payment, not affecting the total resources of the economy.

Benefits, Transfer Impacts, and Accompanying Costs of Disclosing Labor Law Violations—Labor laws are designed to promote safe, healthy, fair, and efficient workplaces. The E.O.'s objective is to increase the Government's ability to contract with companies that are compliant with labor laws, thereby increasing the likelihood of timely, predictable, and satisfactory delivery of goods and services. By making contracting officers aware of previous violations by potential contractors, the E.O. will help the Government identify and work with responsible companies. By encouraging and facilitating responsible behavior by contractors and subcontractors, and by helping the Federal Government identify and contract with responsible firms, the E.O's disclosure requirements are expected to have the following benefits: (1) Improved contractor performance; (2) safer workplaces with fewer injuries, illnesses, and fatalities; (3) reduced employment discrimination; and (4) fairer wages, which can lead to less absenteeism, reduced turnover, higher productivity, and better quality workers who produce higher quality goods and services. For these reasons, it is expected that the rule would lead to improved economy and efficiency in Government procurement. These effects will be accompanied by a combination of cost increases associated with improving compliance with existing legal obligations contained in the covered Labor Laws (not assessed in other sections of this regulatory impact analysis) and cost savings for contractors and society.

Benefits, Transfer Impacts of the Paycheck Transparency Provision—The E.O.'s paycheck transparency provision will likely lead to transfers of value between members of society due to improved compliance with a variety of Federal, state, and local tax and employment laws. This analysis focuses primarily on estimating the transfers associated with reducing the misclassification of employees as independent contractors—one small subset of the likely transfer impacts of paycheck transparency—broken down in terms of (a) Federal tax revenues, and (b) minimum wage and overtime premium pay required under the FLSA.

As a result of improved transparency, individuals and the Federal Government alike will receive money that would otherwise not be earned or collected due to misclassification. In this analysis, the number of affected workers who are likely misclassified currently is 18,892 (33% × 57,249), and at least 20 percent of 18,892, or 3,778, misclassifications will be corrected. The annual impact of correcting 3,778 cases of misclassification is estimated to be at least $11.19 million ($2,963 × 3,778), an amount that will be transferred from employers (and potentially from taxpayers if increased employers' costs are passed through in the form of higher bids for Federal contracts) and will accrue in part to employees and in part to Federal revenues. The most critical factor that determines the size of the transfer estimate is the percentage of misclassifications that will be corrected by the E.O.'s paycheck transparency provision. As noted above, DoD, GSA, and NASA, and DOL estimated that 20 percent of misclassifications will be corrected. As explained, the actual percentage is likely to be much higher than 20 percent, meaning that the $11.19 million figure is likely to be an underestimate of the true annual impact of correcting misclassifications.

Benefits and Transfer Impacts of Complaint and Dispute Transparency Provision—The primary net economic benefit to the public that will derive from the E.O.'s mandatory-arbitration prohibition is reduced discrimination as a result of an increased incentive for employers to avoid it. Increased risk of public exposure, class-action suits and higher damages awards provides an incentive for employers to comply with anti-discrimination laws that arbitration cannot match. As described above, it is generally accepted that discrimination on the basis of race, gender and other prohibited bases results in economic inefficiencies, and reducing such discrimination provides a net economic benefit to the public. DoD, GSA, and NASA, and DOL have not found sufficient data to quantify the expected reduction in discrimination as a result of the E.O.'s mandatory-arbitration prohibition and request public comment on potential methods and sources of data for reaching such an estimate.

This rule will promote economy and efficiency in Federal Government procurement by ensuring that the Government contracts with responsible sources who comply with labor laws. Stability, dependability, accountability and transparency are important elements of economy and efficiency. Contractors and subcontractors performing under Federal contracts that are not compliant with labor laws weaken the contracting infrastructure leaving it susceptible to waste, fraud and abuse, and risk the health, safety,

and well-being of workers in workplaces. Requiring contractors to comply or come into compliance with labor laws will eliminate distractions and complications that arise when the Federal Government contracts with contractors that have a history of noncompliance.

VI. Regulatory Flexibility Act

The proposed revisions may 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.* The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

1. Description of the reasons why action by the agency is being taken.

This proposed rule implements Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 and amended by E.O. 13683, December 11, 2014. The policy of the Government is to promote economy and efficiency in procurement by awarding contracts to contractors that comply with labor laws. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable and satisfactory delivery of goods and services to the Federal Government. The E.O. creates requirements for Federal contractors and subcontractors in three areas: (1) Disclosure of administrative merits determinations, arbitral awards or decisions, or civil judgments, of certain labor laws and Executive Orders (labor laws); (2) notice to individuals of certain pay-related information or their status as independent contractors; and (3) a prohibition on contractor use of pre-dispute arbitration agreements or claims arising under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment. These actions are taken to reinforce protections for workers under Federal contracts and to ensure the Government contracts with companies that have a satisfactory record of business ethics and integrity relating to labor laws governing workplace health and safety, prevention of discrimination, or fair employment and wage practices.

For contracts over $500,000, each prospective offeror must represent whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments (referred to herein as a labor violation) rendered against the offeror, within a 3 year period preceding the offer, for violations of any of the enumerated labor laws. (The definitions of ''administrative merits determinations,'' ''arbitral awards or decisions,'' and ''civil judgments'' are established in the Department of Labor (DOL)'s Guidance for E.O. 13673, Fair Pay and Safe Work Places which will be published for public comment under separate notice.) Likewise, the contractor will require potential subcontractors to disclose whether there have been any labor violations.

Prior to making an award, as part of the responsibility determination, the contracting officer, will request prospective contractors who have had labor violations to identify which of the listed labor laws were violated and provide certain information about the specific violations. The information provided includes—

- The labor law violated;
- The case number, inspection number, charge number, docket number, or other unique identification number;
- The date rendered; and
- The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision.

Additionally, the contracting officer will provide prospective contractors who have had labor violations an opportunity to provide such additional information the contractor deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws. Likewise, contractors when determining the responsibility of prospective subcontractors who have disclosed labor violations must afford this same opportunity to provide additional information to the prospective subcontractors. To assist contracting officers in the review of the labor violations, the E.O. requires each Agency to designate a senior agency official to be an agency labor compliance advisor (ALCA) who will work in consultation with contracting officers and the Department of Labor (DOL) in reviewing and evaluating disclosed information. The purpose of this pre-award review is to provide contracting officers pertinent information to consider in making responsibility determinations, which will improve their ability to make contract awards to contractors who have a satisfactory record of integrity and business ethics in terms of complying with labor laws. It will also allow for screening of contractors who need assistance in complying with labor laws. DOL will be available to assist contractors with entering into labor compliance agreements prior to being considered for contracts. After contract award, the contractor will continue to update the firm's representation that there has been no administrative merits determination, arbitral award or decision, or civil judgment, rendered against it. Likewise, the contractor will require its subcontractors to disclose and update the subcontractor's representation. The DOL is working to provide contractors with the tools they need to operate in compliance with the variety of labor laws enforced by the Agency. By working with firms who report labor violations, the Government is providing assistance to educate employers on Federal labor requirements and practices they must follow to ensure compliance.

The E.O. improves on paycheck transparency in Federal contracts by requiring that contractors provide individuals with a wage statement, also called a pay stub with basic information about their hours and wages so that workers will know if they are being paid properly for work performed. In addition, when contractors are treating an individual as an independent contractor, rather than an employee, the contractor must provide a document stating this to the individual.

The E.O. provides that, for contracts estimated to exceed $1,000,000, contractor employees and independent contractors may not be required to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment.

2. Succinct statement of the objectives of, and legal basis for, the rule.

The President issued Executive Order 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 and amended by E.O. 13683, December 11, 2014. The Constitution and the laws of the United States of America authorize the President to issue Executive Orders pursuant to his authority under ''the Constitution and the laws of the United States,'' expressly including the Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101 *et seq.* The Procurement Act authorizes the President to ''prescribe policies and directives that the President considers necessary to carry out'' the statutory purposes of ensuring ''economical and efficient'' Government procurement and administration of Government property. 40 U.S.C. 101, 121(a). The E.O. establishes that the President considers the requirements included in the E.O. to be necessary to economy and efficiency in Federal contracting (noting that ''contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government'' and that ''helping executive departments and agencies (agencies) to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance'').

The overall objective of the proposed rule is to increase the Government's ability to contract with companies that are compliant with labor laws, thereby increasing the likelihood of timely, predictable, and satisfactory delivery of goods and services.

Generally, the proposed rule applies to contracts estimated to exceed $500,000. The specific objectives of the proposed rule for consideration in this analysis are to—

a. Ensure that when the responsibility process is initiated, contracting officers know whether a prospective contractor has, within the three years preceding the offer, had any administrative merits, arbitral awards or decisions, or civil judgments rendered against the prospective contractor for any of the statutes or Executive Orders listed in the E.O. and in the definition of labor laws at FAR 22.2002 and if so, to list the labor violations. This is done to inform the contracting officer if the offerors consistently adhere to labor laws and is necessary to making a responsibility determination;

b. Assist contracting officers in the review of the labor violations by designating a senior agency official to be an Agency Labor Compliance Advisor (ALCA) who will work in consultation with contracting officers and DOL in reviewing and evaluating disclosed

information. The ALCA will advise the contracting officer whether the contractor's disclosed violations are ''serious,'' ''repeated,'' ''willful,'' and/or ''pervasive,'' (as defined in the DOL Guidance). For prospective contractors during responsibility determination and post-award for updated disclosures, the ALCA will also assist with reviewing remediation of the violation(s), any other mitigating factors, and determining whether a labor compliance agreement between contractors and enforcement agencies is in place or is otherwise needed to address appropriate remedial measures, compliance assistance, and steps to resolve issues and to avoid further violations. DOL only, not Contracting Officers or ALCA's, are available to consult with Contractors regarding subcontractor information. Any contracting officer determination that a prospective small business contractor lacks certain elements of responsibility will be referred to the Small Business Administration for a Certificate of Competency; if they are being paid properly for work performed;

c. Provide prospective contractors, as part of the responsibility determination, an opportunity to disclose any steps taken to correct the labor violations and include any agreements entered into with an enforcement agency. The contracting officer, in consultation with the ALCA, and relevant enforcement agencies will review this information to determine if agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters. The objective of this step is to help firms improve their labor law compliance;

d. Ensure that, post-award, the contractor updates disclosed information about labor violations semi-annually for contracting officer's continued consideration of contract performance and decisions regarding exercise of options;

e. Ensure that contractors know whether a prospective subcontractor, for subcontracts estimated to exceed $500,000 for other than commercially available off-the-shelf (COTS) items, has within the three years preceding the offer, had any administrative merits, arbitral awards or decisions, or civil judgments rendered against the prospective subcontractor for any of the statutes or Executive Orders listed in Executive Order 13673 and in the definition of labor laws at FAR 22.2002 and if so, that the potential subcontractor is provided an opportunity to provide such additional information the subcontractor deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws.

f. Ensure that, for subcontracts estimated to exceed $500,000, for other than COTS items, subcontractors update information disclosed to their prime contractor about labor violations semi-annually and that contractors continue consideration of this information during subcontract performance;

g. Ensure that contractors and subcontractors, for subcontracts estimated to exceed $500,000 other than COTS items, provide individuals, in every pay period, a wage statement (also known as a pay stub) containing the basic information about their such as hours worked, overtime hours, pay, and any additions made to or deductions made from pay, as detailed in the wage statement requirements of DOL's ''Guidance for Executive Order 13673'', Fair Pay and Safe Workplaces;

h. Ensure that individuals who are treated as independent contractors, rather than as employees, are provided documentation of this status by the contractor or subcontractor, for subcontracts estimated to exceed $500,000;

i. Ensure, where a significant portion of the workforce is not fluent in English, the contractor provides the wage statement and the independent contractor notification in English and the language(s) with which the workforce is more familiar; and

j. Ensure that employees and independent contractors of contractors with contracts estimated to exceed $1,000,000 are not required to enter into predispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (except when the employee is subject to a collective bargaining agreement negotiated between the contractor and a labor union representing them, and when valid contracts already exist).

3. Description of and, where feasible, estimate of the number of small entities to which the rule will apply.

The E.O. requires that, in developing the guidance and proposing to amend the FAR, the Secretary of Labor and the FAR Council shall minimize, to the extent practicable, the burden of complying with the E.O. for Federal contractors and subcontractors and in particular small entities, including small businesses, as defined in section 3 of the Small Business Act (15 U.S.C. 632), and small nonprofit organizations. See § 4(e). The intent of the E.O. is to minimize additional compliance burdens and to increase economy and efficiency in Federal contracting by helping more contractors and subcontractors come into compliance with workplace protections, not by denying them contracts.

Compliance with Labor Laws. This rule will impact all small entities who propose as contractors or subcontractors under Federal contracts. An initial representation is required for offerors responding to solicitations estimated to exceed $500,000. Fiscal Year 2013 Federal Procurement Data System (FPDS) data shows that, for actions that would be subject to this requirement (including contracts and purchase orders, but excluding actions that would not be subject to responsibility determination, *e.g.,* task and delivery orders and calls) there were 12,382 awards greater than $500,000 to unique small businesses with an average of five offers per solicitation. The total estimate of small business offerors to which this representation will apply is 61,910 (12,382 × an average of 5 offers per solicitation = 61,910).

Disclosure. The requirement to provide information about labor violations applies to prospective contractors for whom the contracting officer has initiated a responsibility determination, where the prospective contractor represented that it has had labor violation(s). Using FY13 FPDS and the advice of subject matter experts, we estimate 24,477 small businesses will have responsibility determinations initiated and of those, we estimate that 4.05% of these have labor violations for a total estimate of 991 small businesses prospective contractors to which the disclosure requirement will apply. (The number of affirmative responses is estimated from DOL data, which provided an upper and lower bound percentage. The upper bound percentage of 4.05% was applied in order to arrive at a conservative estimate).

Semi-annual Reporting. The requirement for contractors to update their disclosures of (labor) violations semi-annually only applies to those offerors receiving a contract.

Subcontractor Flowdown Disclosure. The requirement for contractors to require potential subcontractors to disclosure whether they have labor violations applies to any subcontract in excess of $500,000 for other than COTS items. Using data reported in Federal Subaward Reporting System (FSRS) on subcontracts over $500,000 and applying the same methodology for calculating as was used for contractors above, we estimate that prospective contractors or contractors will start a responsibility determination on 9,831 offerors. We estimate that 4.05% or 398 small business subcontractors will be required to provide information about the violations they disclosed. Comments are solicited on whether a phased implementation of the rule with respect to application of the rule to subcontracts would be helpful to small businesses. This approach would allow contractors to benefit from the Government implementation and lessons learned. For example, there could be a later applicability date for the requirements for potential subcontractors to disclose labor violations, as well as reviewing and evaluating disclosed labor violations when determining the responsibility of potential subcontractors. Commenters favoring a phased implementation are requested to provide suggested reasonable timeframes with supporting rationale for the recommended timeframe.

State Law Application. Additionally, the FAR Council plans a phased implementation of application of the rule to the Executive Order equivalent state laws (See Sec. 2(a)(i)(O)). As cited in the DOL ''Guidance for Executive Order 13673,'' Fair Pay and Safe Workplaces, DOL plans to publish a second proposed guidance in the **Federal Register** addressing which State laws are equivalent to the 14 Federal labor laws and E.O.s identified in E.O. 13673 and what constitutes an administrative merits determination under each. Currently, per the DOL guidance, only State plans approved by DOL's Occupational Safety and Health Administration (OSHA-approved State plans) are equivalent State laws. A subsequent proposed FAR rule would be published for public comment to implement the second DOL guidance document.

Paycheck Transparency. The Fair Labor Standards Act (FLSA) requires contractors

keep accurate records of hours worked and wages paid to individuals, but the FLSA does not require a contractor to provide individuals a wage statement. However, most states have laws that require employers to provide workers with some form of wage statement. The type of information required varies by state, with some states requiring only a list of deductions and others requiring significantly more information. The document provided to individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act need not include a record of hours worked if the contractor informs the employees of their overtime exempt status. The additional effort required under a contract is that information already required to be recorded at a corporate level must now be provided to individuals in a separate document for each pay period. The rule does not preclude the contractor from providing this information electronically.

Additionally, this rule requires a contractor treating an individual performing work under the contract as independent contractors, and not as an employee, to provide a document to these individual informing them of that status. This is a one-time documentation requirement which will be accomplished prior to commencement of work or at the time a contract with the individual is established. The rule does not preclude the contractor from providing this information electronically. It is estimated that 14,059 small businesses will be impacted by these paycheck transparency requirements.

Arbitration. The number of small businesses with contracts over $1,000,000 is estimated to be 9,822 for prime contractors; 1,964 for first tier subcontractors, 982 for 2nd tier subcontractors; and 491 for third tier subcontractors. However, it should be noted that this limitation on arbitration is already applicable to Department of Defense (DOD) contracts valued at over $1 million, except for commercial items, and that DOD awards the majority of Federal procurement contracts. At this time, there is no data available to estimate the number of small entities who may have arbitral agreements to which this rule will apply. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

Compliance with Labor Laws. Two provisions, 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673) and 52.222–AB, Subcontractor Responsibility Regarding Compliance with Labor Laws (Executive Order 13673), require small businesses responding to a solicitation (for 52.222–AA) or responding to a contractor for a subcontracting opportunity (for 52.222–AB) to disclose whether it has or has not had any administrative merits determinations, arbitral awards or decisions, or civil judgments, of the enumerated list of labor laws within the three-year period preceding the date of their offer. Additionally, under the provisions, if the contracting officer (for 52.222–AA) or the contractor (for 52.222–AB) is making a responsibility determination and the offeror disclosed it had a labor violation, then the offeror will be requested to provided additional information about the disclosed labor violation(s). For the provision at 52.222–AA paragraph (d) requires the contractor, upon request of the contracting officer, to identify which of the listed labor laws were violated and provide certain information about the specific violations. The information provided includes—

- The labor law violated;
- The case number, inspection number, charge number, docket number, or other unique identification number;
- The date rendered; and
- The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision.

This information allows the agency to obtain the labor violation document from DOL. If the agency is unable to obtain the violation document, the agency will ask the offeror for the document.

The provision affords an opportunity for offerors to provide all other such information that the offeror deems necessary to demonstrate its responsibility to the contracting officer. Such information may be related to mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps, taken to achieve compliance with labor laws.

For the provision at 52.222–AB, paragraph (b) requires that, for subcontracts where the estimated subcontract value exceeds $500,000 for other than COTS items, the contractor shall require all prospective subcontractors to represent whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against them for violations of labor laws within the three-year period preceding the date of their offer.

The 52.222–AB provision requires that clause 52.222–BB(c) procedures be followed if the contractor initiates a responsibility determination on the prospective subcontractor. During the responsibility process, if the subcontractor had responded affirmatively to the representation, the contractor shall require the prospective subcontractor to submit the administrative merits determinations, arbitral awards or decisions, and/or civil judgments and any notice the subcontractor received from DOL advising that it has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of an existing agreement.

Additionally, contractors shall afford prospective subcontractors an opportunity to provide such information the prospective subcontractor deems necessary to demonstrate its responsibility to the contractor. Such information may be related to mitigating circumstances, remedial measures such as labor compliance agreements and other steps taken to achieve compliance with labor laws and explanations for delays in entering into a labor compliance agreement within a reasonable period or not meeting the terms of an existing agreement.

The contractor is required to notify the contracting officer of the name of the subcontractor and the basis for the decision if the contractor determines that a subcontractor is a responsible source after having been informed that DOL advised the subcontractor that it has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of such agreement.

Providing information about the labor violations and mitigating information will require businesses to search records for each labor violation, determine how the violation was addressed, and disclose the information. The provision requires contractors to consider the DOL Guidance in making a subcontractor responsibility determination. The provision provides that the contractor may consult with DOL.

The clause at 52.222–BB, Compliance with Labor Laws, requires contractors to, semi-annually update information pursuant to the provision at 52.222–AA. As in the 52.222–AA provision, the clause requires the contractor to furnish a copy of the violation if the contracting officer asks, and gives contractors the opportunity to furnish information on mitigating circumstances.

The clause requires contractors to require subcontractors to update information provided pursuant to provision 52.222–AB semi-annually and give subcontractors the opportunity to provide information on mitigating circumstances. In addition to the semi-annual updates, a subcontractor shall also disclose, within 5 business days, any notification by DOL that it has not entered into a labor compliance agreement within a reasonable period, or is not meeting the terms of an existing labor compliance agreement. The contractor shall notify the contracting officer of the name of the subcontractor and the basis for the decision if the contractor decides to continue the subcontract after having been informed that DOL advised the subcontractor it has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of an existing labor compliance agreement.

The clause requires that contractors consider the information provided and the DOL Guidance in determining whether action is necessary. Such action may include requesting that the subcontractor pursue a new or enhanced labor compliance agreement, requiring other appropriate remedial measures, compliance assistance, resolving issues to avoid further violations, or not continuing with the subcontract, if necessary.

The clause requires contractors to flowdown the clause to subcontracts at all tiers with an estimated value exceeding $500,000 for other than COTS items.

Small business subcontractors may be negatively affected by this proposed rule. A prime contractor or higher tier subcontractor may have difficulty evaluating labor violations, and may find it problematic to find time to learn. This may lead to behaviors such as choosing not to subcontract with a small business which has labor violations, especially if the small business has not initiated the process to negotiate a labor compliance agreement.

Alternatively, a positive impact is that small businesses with a strong record of labor law compliance may receive a greater number of subcontracts, and develop strong relationships with contractors and DOL.

Paycheck Transparency. The clause at 52.222–XX, Paycheck Transparency, requires contractors to provide a document (wage statement) to individuals subject to certain wage record requirements in each pay period. The wage statement must which include hours worked, overtime hours, pay, and any additions made to or deductions made from pay. If the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), the hours worked and overtime hours contained in the wage statement shall be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid.

If contractors choose not to include a record of hours worked for individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act, the contractor must inform the individual of their overtime exempt status. There is no requirement that the contractor inform the individual of the exempt status by means of an additional or separate document or notification.

The clause requires contractors to provide to individuals it is treating as independent contractors with a document so informing the individual.

The clause requires that if a significant portion of the workforce is not fluent in English, the contractor shall provide the wage statement and the independent contractor notification in English and the language(s) with which the workforce is more familiar.

The clause requires contractors to flowdown to all subcontracts exceeding $500,000, for other than COTS items, at any tier, the requirements of the clause.

Arbitration. The clause at 52.222–YY, Arbitration of Contractor Employee Claims, states contractors and subcontractors must agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, shall only be made with the voluntary consent of employees or independent contractors after such disputes arise. This does not apply to:

(1) Employees covered by a collective bargaining agreement negotiated between the contractor and a labor organization representing the employees;

(2) Employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor bidding on a contract containing the clause, implementing Executive Order 13673 the Government contract. This exception does not apply i) if the contractor is permitted to change the terms of the contract with the employee or independent contractor; or ii) when the contract with the employee or independent contractor is renegotiated or replaced.

We estimate that the average contractor will utilize a general manager equivalent to a mid-range GS–14 to review the firms' policies and procedures to ensure they comply with the requirements of the clause. It is estimated this would take approximately thirty minutes.

5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the rule.

DOL will issue guidance to assist Federal agencies in the implementation of the E.O. DOL is working to provide contractors with guidance and the tools they need to operate in compliance with the variety of labor laws enforced by DOL. By working with firms who report labor violations, the Government is providing assistance to educate employers on Federal labor requirements and practices they must follow to ensure compliance.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

The E.O. contains two distinct requirements for contractors and subcontractors seeking or performing covered contracts to provide information. First, contractors will disclose to contracting agencies (and subcontractors will disclose to contractors) certain violations of any of the 14 Federal labor laws identified in the E.O. or any equivalent State laws (the Labor Laws), as well as additional information regarding the disclosed violations. The proposed rule does not implement the equivalent state laws component of the E.O., except for OSHA-approved State Plans. DOL will publish in the **Federal Register** at a later date a second proposed guidance addressing which State laws are equivalent to the 14 Federal labor laws and executive orders identified in the E.O. for which contractors and subcontractors must report violations, and DOD, GSA and NASA will issue a second proposed rule implementing the E.O's requirements with respect to those State laws. Second, they will disclose certain information to their workers performing work under covered contracts to provide the workers greater transparency regarding compensation and employment status. Each requirement will cause contractors and subcontractors to incur a cost of compliance. The E.O. also contains a provision that prohibits contractors and subcontractors with Federal contracts exceeding $1,000,000 from requiring employees and independent contractors to arbitrate certain discrimination and harassment claims. With regard to prospective contractors' disclosure of labor violations, the following alternatives are discussed:

Disclosure of Violations. One alternative to the E.O as implemented by the proposed rule would be to require contracting officers to consider prospective contractors' labor compliance records without the assistance of ALCAs, and without disclosure by contractors of their labor violations. This alternative would avoid any burden on contractors associated with disclosure. It would also eliminate the hiring of ALCAs by contracting agencies. However, the E.O and the proposed rule provide for contractor disclosure and for ALCAs to assist contracting officers because these tools are deemed necessary in order for contracting officers to effectively consider firms' labor compliance records. Without timely information regarding firms' labor violations, and without the support and expert advice of ALCAs, it would not be feasible to expect contracting officers to consider labor violations in an expeditious way, nor would it be possible to achieve consistency across the Government in their consideration of contractors' labor compliance records. A related alternative would be to remove the requirement that prospective contractors disclose their labor violations while leaving the rest of the E.O. and proposed rule intact. In some senses, this is an attractive alternative. In an ideal scenario, a contracting agency's ALCA would be connected to a database that would provide instant access to all of a prospective contractor's labor violations. However, such a system is not feasible in the near future in light of budget and other constraints. Moreover, even if such a system had efficient access to all information housed within any agency of the Government and all publicly available information, it would still not have access to privately conducted arbitration decisions, actions arising from state laws deemed equivalent to Federal statutes enumerated in the E.O., or all civil judgments. The system of disclosure created under the E.O. is the most efficient, least burdensome method of making information about labor violations available currently. OMB, GSA and other Federal agencies are working on systems that will improve the availability of relevant data in the longer term.

Having determined that disclosure of information by contractors and subcontractors is necessary, however, the disclosure provisions contained in the E.O. and the proposed rule are designed to minimize the burden on them. For example, one alternative to the approach taken in the proposed rule would be to require all contractors for which a responsibility determination is undertaken to provide the following nine categories of information regarding their labor violations:

- The date that the violation was rendered;
- The name of the court, arbitrator(s), agency, board, or commission that rendered it;
- The Labor Law that was violated;
- The name of the case, arbitration, or proceeding, if applicable;
- The street address of the worksite where the violation took place (or if the violation took place in multiple worksites, then the address of each worksite);
- The case number, inspection number, charge number, docket number, or other unique identification number;
- Whether the proceeding was ongoing or closed;
- Whether there was a settlement, compliance, or remediation agreement related to the violation; and
- The amount(s) of any penalties or fines assessed and any back wages due as a result of the violation.

This approach would have made the process of considering labor violations more efficient from the perspective of contracting agencies. However, this list was narrowed to the following four categories of information

in order to reduce the burden on contractors while still providing the minimally necessary information:

- The Labor Law that was violated;
- The case number, inspection number, charge number, docket number, or other unique identification number;
- The date that the determination, judgment, award, or decision was rendered; and
- The name of the court, arbitrator(s), agency, board, or commission that rendered it.

Another alternative would be to have all prospective contractors bidding on contracts—not just those for which a contracting officer undertakes a responsibility determination—disclose the information provided above. This would make the procurement process simpler and more expeditious from the perspective of contracting agencies. However, this alternative would increase the burden on contractors relative to the requirement contained in the proposed rule, and it was determined that the proposed rule's more narrowly tailored requirement would retain its effectiveness while minimizing the burden on contractors.

Disclosure Timing for Prime Contractors. With regard to the E.O. and proposed rule provisions, for contracts over $500,000, each prospective offeror must represent whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments (referred to herein as a labor violation) rendered against the offeror, within a 3 year period preceding the offer, for violations of any of the enumerated labor laws. Likewise, the contractor will require potential subcontractors to disclose whether there have been any labor violations. Prior to making an award, as part of the responsibility determination, the contracting officer, will request prospective contractors who have had labor violations to identify which of the listed labor laws were violated and provide certain information about the specific violations. Alternatives to this requirement would be to have contractors and subcontractors disclose at the time of registration (*e.g.* details of violations and mitigating factors). This alternative would capture information on many contractors upfront but causes all contractors to comply whether or not they are a prospective contractor and will be unnecessarily burdensome to company that are not potential candidates for award. Another alternative is to require disclosure only of prospective contractor and subcontractor. This narrows the burden but does not meet the requirements of the EO.

Subcontractor Flow-down/Reporting. With regard to the E.O.'s and proposed rule's provisions regarding subcontractors, one alternative would be to simply exempt subcontractors from any obligations under the E.O. and focus only on prime contractors' records of labor compliance. This alternative would eliminate any burden on subcontractors. It would also reduce the burden on contractors associated with evaluating their prospective subcontractors' labor compliance histories. However, contractors are already required to evaluate their prospective subcontractors' integrity and business ethics, and disregarding subcontractors' labor compliance records in the course of making that determination would undermine the core goals of the E.O. A significant portion of the work performed on Federal contracts is performed by subcontractors, and ensuring their integrity and business ethics is a crucial part of ensuring that taxpayer's money is spent on firms that will do reliable work for the Federal Government and not on rewarding corporations that break the law.

Similarly, the E.O.'s requirements could be limited to first-tier subcontractors. However, for the same reasons as the previous alternative, this alternative would also undermine the core goals of the E.O., given that a significant portion of the work on Federal contracts is performed by subcontractors below the first tier.

Another alternative would be to have the subcontractor report the information to DOL and inform the prime. However, the prime has to make a subcontractor responsibility determination and without this information may not be able to complete their analysis for the determination.

Other alternatives around the implementation date for subcontractor disclosure may minimize the reporting burden upfront to provide contractors an opportunity to familiarize themselves with the process and establish a process to comply with the E.O. For example, instead of requiring subcontractors to immediately comply with the E.O. requirements, these requirements could be phased in (*e.g.,* 1 year phase-in, 3 to 6 month phase-in, or some other realistic timeframe).

Section IV, Alternatives to the proposed rule regulatory text, provides discussion of additional alternatives for consideration and public comment.

The Regulatory Secretariat 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. 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 2014–025), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat has submitted a request for approval of a new information collection requirement concerning FAR case 2014–025, Fair Pay and Safe Workplaces, to the Office of Management and Budget.

A. Annual public reporting burden for this collection of information is estimated at 6.26 hours per response, including the time for reviewing instructions, searching existing data sources, gathering the data needed, reviewing, and submitting the information.

ESTIMATED SUMMARY OF ANNUAL TOTAL COST TO THE PUBLIC OF INFORMATION COLLECTION REPORTING BURDEN

Number of respondents	25,775
Responses per respondent	9.9
Total annual responses	254,668
Hours per response	6.26
Total hours	1,594,171
Rate per hour (average)	$55
Total annual cost to public	$87,389,423

B. Annual public recordkeeping burden for this proposed rule is estimated at 52 hours per recordkeeping action to retain submitted subcontractor information.

ESTIMATED SUMMARY OF ANNUAL TOTAL COST TO THE PUBLIC FOR THE RECORDKEEPING BURDEN

Number of recordkeeping actions	653
Hours per action	52
Total hours	33,956
Hourly rate	$45
Total annual cost	$1,528,020

C. Total estimated summary of the annual cost to the public for information collection reporting and recordkeeping burdens.

ESTIMATED SUMMARY OF ANNUAL TOTAL COST TO THE PUBLIC FOR INFORMATION COLLECTION REPORTING AND RECORDKEEPING BURDENS

Total hours	1,628,127
Total annual cost to public	$88,917,443

D. In order to successfully comply with the requirements of the rule, contractors and subcontractors will initially need to review and become familiar with the FAR rule and the DOL Guidance. We estimate that for this initial requirements review the average contractor will utilize a general manager equivalent to a mid-range GS–14 ($63 hourly rate) and spend approximately eight hours. Therefore, the total cost to contractors and subcontractors for this

effort is estimated to be 25,775 × 8 × $63 = $12,990,600.

E. Request for Comments Regarding Paperwork Burden. Submit comments, including suggestions for reducing this burden, not later than July 27, 2015 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405–0001.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street NW., 2nd floor, Washington, DC 20405. Please cite OMB Control Number 9000–00XX, Title, in all correspondence.

List of Subjects in 48 CFR Parts 1, 4, 9, 17, 22, and 52

Government procurement.

Dated: May 19, 2015.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 4, 9, 17, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 9, 17, 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 following the introductory text, by adding in numerical sequence, FAR segments ''52.222–AA'', ''52.222–AB'', ''52.222–BB'', and ''52.222–XX'' and their corresponding OMB Control Number ''9000–XXXX''.

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.1202 by redesignating paragraphs (a)(19) through (a)(29) as paragraphs (a)(20) through (a)(30), respectively; and adding a new paragraph (a)(19) to reads as follows:

4.1202 Solicitation provision and contract clause.

(a) * * *

(19) 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673).

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 4. Amend section 9.104–4 by redesignating paragraph (b) as paragraph (c); and adding a new paragraph (b) to reads as follows:

9.104–4 Subcontractor responsibility.

* * * * *

(b) For Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, requirements pertaining to labor violations, see subpart 22.20.

* * * * *

■ 5. Amend section 9.104–5 by—

■ a. Revising the section heading;

■ b. Removing from paragraphs (a)(1) and (a)(2) ''see 9.405); and'' and ''exceeds $3,000.'' and adding ''see 9.405);'' and ''exceeds $3,000; and'', respectively;

■ c. Adding paragraph (a)(3); and

■ d. Revising paragraph (b).

The revised and added text reads as follows:

9.104–5 Representation and certification regarding responsibility matters.

(a) * * *

(3) Provide an offeror who does not furnish the certification or such information as may be requested by the contracting officer an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the offeror nonresponsible.

(b) When an offeror provides an affirmative response to the provision at 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its commercial item equivalent at 52.212–3(q), the contracting officer shall follow the procedures in subpart 22.20.

* * * * *

■ 6. Amend section 9.105–1 by adding paragraph (b)(4) to read as follows:

9.105–1 Obtaining information.

* * * * *

(b) * * *

(4) Information provided pursuant to 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its commercial item equivalent at 52.212–3(q), shall be considered in accordance with the procedures described at subpart 22.20.

9.105–3 [Amended]

■ 7. Amend section 9.105–3 by removing from paragraph (a) ''provided in Subpart 24.2'' and adding ''provided in 9.105–2(b)(2)(iii) and subpart 24.2'' in its place.

PART 17—SPECIAL CONTRACTING METHODS

■ 8. Amend section 17.207 by—

■ a. Removing from paragraphs (c)(6) and (c)(7) ''considered; and'' and ''satisfactory ratings.'' and adding ''considered;'' and ''satisfactory ratings; and'' in their places, respectively; and

■ b. Adding paragraph (c)(8).

The added text reads as follows:

17.207 Exercise of options.

* * * * *

(c) * * *

(8) If the contract contains the clause 52.222–BB, Compliance with Labor Laws, and labor law violations were disclosed pursuant to the clause, the contractor's labor law violations and remedial actions and the agency labor compliance advisor recommendations have been considered.

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.000 [Amended]

■ 9. Amend section 22.000 by removing from paragraphs (b) and (c) ''labor laws'' and ''labor law'' and adding ''labor laws and Executive orders'' and ''labor law and Executive orders'' in their places, respectively.

■ 10. Amend section 22.102–2 by—

■ a. Revising the section heading and paragraphs (c)(1)(i) through (c)(1)(v); and

■ b. Adding paragraph (c)(3).

The revised and added text reads as follows:

22.102–2 Administration and enforcement.

* * * * *

(c)(1) * * *

(i) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction)(see subpart 22.4);

(ii) 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards (see subpart 22.3);

(iii) The Copeland Act (18 U.S.C. 874 and 40 U.S.C. 3145) (see 22.403–2);

(iv) 41 U.S.C. chapter 65, Contracts for Materials, Supplies, Articles, and

Equipment Exceeding $15,000 (see subpart 22.6); and

(v) 41 U.S.C. chapter 67, Service Contract Labor Standards (see subpart 22.10).

(2) * * *

(3) Department of Labor's (DOL) administration and enforcement authorities under the aforementioned statutes and under Executive orders implemented in this part do not limit the authority of contracting agencies to otherwise administer and enforce the terms and conditions of agency contracts.

* * * * *

■ 11. Add section 22.104 to read as follows:

22.104 Agency Labor Advisors.

(a) *Appointment of agency labor advisors.* Agencies may designate or appoint labor advisors, according to agency procedures.

(b) *Duties.* Agency labor advisors are generally responsible for the following:

(1) Interface with DOL, agency labor compliance advisors, outside agencies, and other parties in matters concerning interpretation, guidance and enforcement of labor statutes applicable to Federal contracts.

(2) Provide advice and guidance to the contracting agency, contractors, and labor community regarding application of labor statutes, Executive Orders, and implementing regulations in Federal contracts.

(3) Serve as labor subject matter experts on all issues specific to part 22 and its prescribed contract clauses and provisions.

(c) Agency labor advisors are listed at *www.wdol.gov*.

■ 12. Add subpart 22.20 to read as follows:

Subpart 22.20—Fair Pay and Safe Workplaces

Sec.

22.2000 Scope of subpart.
22.2001 Reserved.
22.2002 Definitions.
22.2003 Policy.
22.2004 Compliance with labor laws.
22.2004–1 Contract requirements.
22.2004–2 Pre-award evaluation of an offeror's labor violations.
22.2004–3 Post-award evaluation of a prime contractor's labor violations.
22.2004–4 Contractor pre-award and post-award evaluation of a subcontractor's labor violations.
22.2005 Paycheck transparency.
22.2006 Arbitration of contractor employee claims.
22.2007 Solicitation provisions and contract clauses.

Subpart 22.20—Fair Pay and Safe Workplaces

22.2000 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, dated July 31, 2014.

22.2001 Reserved.

22.2002 Definitions.

As used in this subpart—

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. The notices or findings may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

Agency labor compliance advisor (ALCA) means the senior official designated in accordance with Executive Order 13673. ALCAs are listed at *www.*_____.

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes one that is not final or is subject to being confirmed, modified, or vacated by a court, and includes one resulting from private or confidential proceedings. To determine whether a particular arbitral award or decision is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

Civil judgment means any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular civil judgment is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

DOL guidance means the Department of Labor (DOL) guidance entitled: ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces','' which can be obtained from *www.*_____.

Enforcement agency means any agency granted authority to enforce Federal labor laws. It includes DOL, the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It includes a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, undertake an investigation of potential labor violations.

Labor compliance agreement means an agreement entered into with a Federal enforcement agency, or a State agency designated to administer an OSHA-approved State Plan, to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and Executive Orders—

(1) The Fair Labor Standards Act, 29 U.S.C. chapter 8.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in guidance issued by the Department of Labor. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans).

Labor violation means a violation of a labor law that resulted in an administrative merits determination, arbitral award or decision, or civil judgment.

Pervasive violation means a standard for a labor violation(s), *e.g.,* the number of violations of a requirement or the aggregate number of violations in relation to the size of the prospective contractor. To determine whether a particular violation(s) is pervasive it is necessary to read section III. D. in the DOL guidance.

Repeated violation means a standard for a labor violation(s), *e.g.,* one or more additional labor violations of

substantially similar requirements. To determine whether a particular violation(s) is repeated it is necessary to read section III. C. in the DOL guidance.

Serious violation means a standard for a labor violation(s), *e.g.,* the number of employees affected, the degree of risk imposed, or actual harm done by the violation. To determine whether a particular violation(s) is serious it is necessary to read section III. A. in the DOL guidance.

Willful violation means a standard for a labor violation(s), *e.g.,* whether there was knowledge of, reckless disregard for, or plain indifference to the labor violation. To determine whether a particular violation(s) is willful it is necessary to read section III. B. in the DOL guidance.

22.2003 Policy.

It is the policy of the Federal Government to promote economy and efficiency in procurement by awarding contracts to contractors who promote safe, healthy, fair, and effective workplaces through compliance with labor laws. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services. This policy is promoted by E.O. 13673, Fair Pay and Safe Workplaces.

22.2004 Compliance with labor laws.

22.2004–1 Contract requirements.

(a) *Contracts.* An offeror on a solicitation estimated to exceed $500,000 must represent whether, in the past three years, it was found to have violated labor laws. If an offeror represents it has a violation(s), and if the contracting officer has initiated a responsibility determination, the contracting officer will require the offeror to submit information on the violation(s) and afford the offeror an opportunity to provide information on mitigating circumstances and remedial measures such as labor compliance agreements. The contractor must update the information semi-annually. For further information see the provision and clause prescribed at 22.2007(a) and (c).

(b) *Subcontracts.* Similar requirements apply to contractors as they make responsibility determinations on their prospective subcontractors for subcontracts at any tier estimated to exceed $500,000, except for subcontracts for commercially available off-the-shelf items. For further information see the provision and clause prescribed at 22.2007(b) and (c).

22.2004–2 Pre-award evaluation of an offeror's labor violations.

(a) *General.* (1) Before awarding a contract in excess of $500,000, the contracting officer shall consider information concerning labor violations when determining whether a prospective contractor is a responsible source that has a satisfactory record of integrity and business ethics. The contracting officer duty to consider labor violations under this paragraph is in addition to the contracting officer duties under 9.104–5 and 9.104–6.

(2) The ALCA provides assistance to the contracting officer by obtaining labor violation documents, by using DOL guidance to evaluate the violations and contractor actions taken to address the violations, and by providing a supported recommendation, *e.g.,* whether to pursue a labor compliance agreement.

(b) *Labor law violation evaluation.* When the contracting officer initiates a responsibility determination and a prospective contractor had provided an affirmative response to the representation at paragraph (c) of the provision at 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its equivalent for commercial items at 52.212–3(q)(2)—

(1) The contracting officer shall request that the prospective contractor, for each labor violation—

(i) Enter the following information in SAM _____ (insert name of reporting module) *www.sam.gov,* unless the information is already current and complete in SAM:

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision;

(ii) Provide the information in paragraph (b)(1)(i) of this section to the contracting officer if the prospective contractor meets an exception to SAM registration (see 4.1102(a)); or

(iii) Provide to the contracting officer such additional information as the prospective contractor deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws.

(2) The contracting officer shall—

(i) Request that the ALCA provide written advice and recommendations within three business days of the request, or another time period required by the contracting officer;

(ii) Furnish to the ALCA all relevant information provided to the contracting officer by the prospective contractor;

(iii) Request the ALCA obtain the administrative merits determination(s), arbitral award(s) or decision(s), or civil judgment(s), as necessary to support recommendations, and for each recommendation of an unsatisfactory record of integrity and business ethics. (The ALCA shall notify the contracting officer if the ALCA is unable to obtain any of the necessary document(s). The contracting officer shall request the prospective contractor provide the document(s) to the contracting officer.)

(3)(i) The ALCA shall make one of the following recommendations—

(A) The prospective contractor could be found to have a satisfactory record of integrity and business ethics;

(B) The prospective contractor could be found to have a satisfactory record of integrity and business ethics if the process to enter into or enhance a labor compliance agreement is initiated; or

(C) The prospective contractor could be found to not have a satisfactory record of integrity and business ethics, and the agency Suspending and Debarring Official should be notified in accordance with agency procedures.

(ii) The recommendation shall include the following, using the DOL guidance:

(A) Whether any violations should be considered serious, repeated, willful, or pervasive.

(B) The number of labor violations (depending on the nature of the violation, in most cases, a single violation may not necessarily give rise to a determination of lack of responsibility).

(C) Whether the prospective contractor has initiated its own remedial measures.

(D) The need for, existence of, and whether the prospective contractor is adequately adhering to labor compliance agreements or other appropriate remedial measures.

(E) Whether the prospective contractor is still negotiating in good faith a labor compliance agreement that was recommended as necessary.

(F) Such additional supporting information that the ALCA finds to be relevant.

(4) The contracting officer shall—

(i) Ensure, using DOL guidance and the ALCA's advice and recommendations, that the following have been considered in evaluating prospective contractors:

(A) The nature of the labor violations (whether serious, repeated, willful, or pervasive).

(B) The number of labor violations (depending on the nature of the violation, in most cases, a single violation may not necessarily give rise to a determination of lack of responsibility).

(C) Any mitigating circumstances.

(D) Remedial measures taken to address labor violations, including existence of and compliance with any labor compliance agreements, or whether the prospective contractor is still in good faith negotiating such an agreement;

(ii) Proceed with making a responsibility determination using available information and business judgment if a timely written recommendation is not received from an ALCA; and

(iii) Comply with 9.103(b) when making a determination that a prospective small business contractor is nonresponsible and refer to Small Business Administration for a Certificate of Competency.

22.2004–3 Post-award evaluation of a prime contractor's labor violations.

(a) *Contract requirements.* The contractor is required to continue to disclose in SAM _____ (insert name of reporting module) *www.sam.gov,* semi-annually during performance of the contract, whether there have been labor violations or updates to previously disclosed labor violations, pursuant to the clause at 52.209–BB, Compliance with Labor Laws. The contractor must provide the specified information about each labor violation.

(b) *Labor law violation information.*

(1) The ALCA shall monitor the SAM _____ (insert name of reporting module) for updated information pursuant to paragraph (a) of this section; if the ALCA is unable to obtain any needed relevant documents, the ALCA may request the contracting officer to obtain the documents from the contractor. If the contractor had previously agreed to enter into a labor compliance agreement, the ALCA shall verify, consulting with DOL as needed, whether the contractor is making progress toward, or has entered into the labor compliance agreement. If a labor compliance agreement has been entered into, the ALCA shall verify, consulting with DOL as needed, whether the contractor is meeting the terms of the agreement. If the information indicates that further consideration or action may be warranted, the ALCA shall notify the contracting officer in accordance with agency procedures;

(2) If the contracting officer was notified pursuant to paragraph (1) of this section, the contracting officer shall afford the contractor an opportunity to provide any additional information the contractor may wish to provide for the contracting officer's consideration, *e.g.,* remedial measures and mitigating factors or explanations for delays in entering into or for not meeting the terms of an existing labor compliance agreement. Upon receipt of information under paragraph (1) or this paragraph (2), the contracting officer shall provide the information to the ALCA.

(3) The ALCA shall evaluate the information and provide advice and recommendation regarding appropriate actions for the contracting officer's consideration. The recommendation shall include the following using the DOL guidance:

(i) Whether any violations should be considered serious, repeated, willful, or pervasive.

(ii) The number of labor violations (depending on the nature of the violation, in most cases, a single violation may not necessarily give rise to a determination of lack of responsibility).

(iii) Whether the contractor has initiated its own remedial measures.

(iv) The need for, existence of, and whether the contractor is adequately adhering to labor compliance agreements or other appropriate remedial measures.

(v) Whether the contractor is still negotiating in good faith a labor compliance agreement that was recommended.

(vi) Such other supporting information that the ALCA finds to be relevant.

(4) The contracting officer shall consider such information, including advice and recommendations of the ALCA to determine whether action may be warranted. Appropriate actions may include—

(i) No action required, continue the contract;

(ii) Refer the matter to DOL for action, which may include a new or enhanced labor compliance agreement;

(iii) Do not exercise an option (see 17.207(c)(8));

(iv) Terminate the contract in accordance with the procedures set forth in Part 49 or 12.403; or

(v) Notify the agency Suspending and Debarring Official if there are such serious, repeated, willful or pervasive labor violation(s) that the violation(s) demonstrate a lack of integrity or business ethics of a contractor or subcontractor, in accordance with agency procedures.

22.2004–4 Contractor pre-award and post-award evaluation of a subcontractor's labor violations.

The provision at 52.222–AB, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13763), and the clause at 52.222–BB, Compliance with Labor Laws, have requirements for pre-award subcontractor labor violation disclosures and semi-annual post-award updates during subcontract performance, and evaluations thereof. This applies to subcontracts at any tier estimated to exceed $500,000, other than for commercially available off-the-shelf items.

22.2005 Paycheck transparency.

Executive Order 13673 requires contractors to provide, on contracts that exceed $500,000—

(a) A document (wage statement, also known as a pay stub) in every pay period to all individuals performing work under the contract, for which contractors are required to maintain wage records under the Fair Labor Standards Act (FLSA), Wage Rate Requirements (Construction), Service Contract Labor Standards, and equivalent state laws (see DOL guidance section IV paragraph A for the list of equivalent state laws); and

(b) A document to individuals treated as independent contractors informing them of that status.

22.2006 Arbitration of contractor employee claims.

Executive Order 13673 requires contractors, on contracts exceeding $1,000,000, to agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, be made only with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions.

22.2007 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673), in solicitations that contain the clause at 52.222–BB.

(b) The contracting officer shall insert the provision at 52.222–AB, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), in solicitations that contain the clause at 52.222–BB.

(c) The contracting officer shall insert the clause at 52.222–BB, Compliance with Labor Laws, in solicitations and

contracts that are estimated to exceed $500,000.

(d) The contracting officer shall insert the clause at 52.222–XX, Paycheck Transparency, in solicitations and contracts if the estimated value exceeds $500,000.

(e) The contracting office shall insert the clause at 52.222–YY, Arbitration of Contractor Employee Claims, in solicitations and contracts if the estimated value exceeds $1,000,000, other than those for commercial items.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Amend section 52.204–8 by—

■ a. Revising the date of the provision;

■ b. Redesignating paragraphs (c)(1)(xiv) through (c)(1)(xxi) as paragraphs (c)(1)(xv) through (c)(1)(xxii), respectively; and

■ c. Adding a new paragraph (c)(1)(xiv).

The revised and added text reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Date)

* * * * *

(c)(1) * * *

(i) * * *

(xiv) 52.222–AA, Representation Regarding Compliance with Labor Laws (Executive Order 13673). This provision applies to solicitations expected to exceed $500,000.

* * * * *

■ 13. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. Removing from the introductory text ''(c) through (p)'' and adding ''(c) through (q)'' in its place;

■ c. Adding to paragraph (a), in alphabetical order, definitions ''Administrative merits determination'', ''Arbitral award or decision'', ''Civil judgment'', ''DOL guidance'', ''Enforcement agency'', ''Labor compliance agreement'', ''Labor laws'' and ''Labor violation'';

■ d. Removing from paragraph (b)(2) *''(c) through (p)''* and adding *''(c) through (q)''* in its place; and

■ e. Adding a new paragraph (q).

The revised and added text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Date)

* * * * *

(a) * * *

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. The notices or findings may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to read Section II. B. in the DOL guidance.

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes one that is not final or is subject to being confirmed, modified, or vacated by a court, and includes one resulting from private or confidential proceedings. To determine whether a particular arbitral award or decision is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

Civil judgment means—

(1) In paragraph (h): A judgment or finding of a civil offense by any court of competent jurisdiction.

(2) In paragraph (q): Any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular civil judgment is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

DOL guidance means the Department of Labor (DOL) guidance entitled: ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces','' which can be obtained from *www.*_____.

* * * * *

Enforcement agency means any agency granted authority to enforce Federal labor laws. It includes DOL, the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It includes a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, undertake an investigation of potential labor violations.

* * * * *

Labor compliance agreement means an agreement entered into with a Federal enforcement agency, or a State agency designated to administer an OSHA-approved State Plan, to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and Executive Orders—

(1) The Fair Labor Standards Act, 29 U.S.C. chapter 8.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in guidance issued by the Department of Labor. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans).

Labor violation means a violation of a labor law that resulted in an administrative merits determination, arbitral award or decision, or civil judgment.

* * * * *

(q)(1) The Offeror [] does [] does not anticipate submitting an offer for a solicitation with an estimated contract value of greater than $500,000.

(2) If the Offeror checked ''does'' in paragraph (q)(1) of this provision, the Offeror represents to the best of the Offeror's knowledge and belief [*Offeror to check appropriate block*]:

[ ](i) There has been no administrative merits determination, arbitral award or decision, or civil judgment, rendered against the offeror within the three-year period preceding the date of the offer for violations of labor laws (see definitions in paragraph (a)); or

[ ](ii) There has been an administrative merits determination, arbitral award or decision, or civil judgment, rendered against the Offeror within the three-year period preceding the date of the offer for violations of labor laws.

(3) Responsibility determination. (i) If the box at paragraph (q)(2)(ii) of this clause is checked and the Contracting Officer has initiated a responsibility determination and has requested additional information, the Offeror shall provide the following—

(A) In the SAM _____ (insert name of reporting module) *www.sam.gov,* the following specific information, unless the information is already in the SAM _____ (insert name of reporting module) and is current and complete:

(1) The labor law violated.

(2) The case number, inspection number, charge number, docket number, or other unique identification number.

(3) The date rendered.

(4) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision.

(B) The information in paragraph (A) to the Contracting Officer, if the Offeror meets an exception to SAM registration (see FAR 4.1102(a)).

(C) The administrative merits determination, arbitral award or decision, or civil judgment document, to the Contracting Officer, if the Contracting Officer requires it.

(D) To the Contracting Officer such additional information as the Offeror deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws.

(ii)(A) The Contracting Officer will consider all information provided under (q)(3)(i) as part of making a responsibility determination.

(B) A representation that any violations of labor laws exist will not necessarily result in withholding of an award under this solicitation. Failure of the Offeror to furnish a representation or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(C) The representation in paragraph (q)(2) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation in accordance with the procedures set forth in FAR 12.403.

(iii) The Offeror shall provide immediate written notice to the Contracting Officer if at any time prior to contract award the Offeror learns that its representation was erroneous when submitted or by reason of changed circumstances.

■ 14. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (b)(35) through (b)(54) as paragraphs (b)(38) through (b)(57);
■ c. Adding new paragraphs (b)(35), (b)(36) and (b)(37);
■ d. Redesignating paragraphs (e)(1)(xvi) through (e)(1)(xviii) as paragraphs (e)1)(xviii) through (e)(1)(xx);
■ e. Adding new paragraphs (e)(1)(xvi) and (e)(1)(xvii); and
■ f. Amending alternate II by—
■ 1. Revising the date of the Alternate;
■ 2. Redesignating paragraphs (e)(1)(ii)(O) and (e)(1)(ii)(P) as paragraphs (e)(1)(ii)(Q) and (e)(1)(ii)(R); and
■ 3. Adding new paragraphs (e)(1)(ii)(O) and (e)(1)(ii)(P).

The revised and added text reads 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 (DATE)

* * * * *

(b) * * *

__(1) * * *

__(35) 52.222–BB, Compliance with Labor Laws (DATE) (Executive Order 13673).

__(36) 52.222–XX, Paycheck Transparency (DATE) (Executive Order 13673).

__(37) 52.222–YY, Arbitration of Contractor Employee Claims (DATE). (Executive Order 13673).

* * * * *

(e)(1) * * *

(xvi) 52.222–BB, Compliance with Labor Laws (DATE) (Executive Order 13673).

(xvii) 52.222–XX, Paycheck Transparency (DATE) (E.O. 13673).

* * * * *

Alternate II (DATE). * * *

(e)(1) * * *

(ii) * * *

(O) 52.222–BB, Compliance with Labor Laws (DATE) (Executive Order 13673)

(P) 52.222–XX, Paycheck Transparency (DATE) (E.O. 13673)

* * * * *

■ 15. Amend section 52.213–4 by revising the date of the clause; and paragraph (a)(2)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions–Simplified Acquisitions (Other Than Commercial Items)(DATE)

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (DATE).

* * * * *

■ 16. Add section 52.222–AA to read as follows:

52.222–AA Representation Regarding Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(a), insert the following provision:

Representation Regarding Compliance With Labor Laws (Executive Order 13673) (DATE)

(a) *Definitions.*

Administrative merits determination, arbitral award or *decision, civil judgment, DOL guidance, enforcement agency, labor compliance agreement, labor laws,* and *labor violation* as used in this provision have the meaning given in the clause in this contract entitled 52.222–BB, Compliance with Labor Laws.

(b) The Offeror [ ] does [ ] does not anticipate submitting an offer for a solicitation with an estimated contract value of greater than $500,000.

(c) If the Offeror checked ''does'' in paragraph (b) of this provision, the Offeror represents to the best of the Offeror's knowledge and belief [*Offeror to check appropriate block*]:

[ ](1) There has been no administrative merits determination, arbitral award or decision, or civil judgment, rendered against the offeror within the three-year period preceding the date of the offer for violations of labor laws; or

[ ](2) There has been an administrative merits determination, arbitral award or decision, or civil judgment, rendered against the Offeror within the three-year period preceding the date of the offer for violations of labor laws.

(d) Responsibility determination. (1) If the box at paragraph (c)(2) of this provision is checked and the Contracting Officer has initiated a responsibility determination and has requested additional information, the Offeror shall provide the following—

(i) In the SAM _____ (insert name of reporting module) *www.sam.gov,* the following specific information, unless the information is already in the SAM_____ (insert name of reporting module) and is current and complete:

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision.

(ii) The information in paragraph (i) to the Contracting Officer, if the Offeror meets an exception to SAM registration (see FAR 4.1102(a)).

(iii) The administrative merits determination, arbitral award or decision, or civil judgment document to the Contracting Officer, if the contracting agency is unable to obtain the document.

(iv) To the Contracting Officer such additional information as the Offeror deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws.

(2)(i) The Contracting Officer will consider all information provided under (d)(1) as part of making a responsibility determination.

(ii) A representation that any violations of labor laws exist will not necessarily result in withholding of an award under this solicitation. Failure of the Offeror to furnish a representation or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(iii) The representation in paragraph (c) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation in accordance with the procedures set forth in Part 49.

(3) The Offeror shall provide immediate written notice to the Contracting Officer if at any time prior to contract award the Offeror learns that its representation was erroneous when submitted or by reason of changed circumstances.

(End of provision)

■ 17. Add section 52.222–AB to read as follows:

52.222–AB Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(b), insert the following provision:

Subcontractor Responsibility Matters Regarding Compliance With Labor Laws (Executive Order 13673) (DATE)

(a) *Definitions.*

Administrative merits determination, arbitral award or decision, civil judgment, DOL guidance, enforcement agency, labor compliance agreement, labor laws, and *labor violation* as used in this provision have the meaning given in the clause in this contract FAR 52.222–BB, Compliance with Labor Laws.

(b) *Subcontractor representation.* The requirements of this provision apply to all prospective subcontractors at any tier submitting an offer for subcontracts where the estimated subcontract value exceeds $500,000 for other than commercially available off-the-shelf items. The Offeror shall require these prospective subcontractors to represent to the best of the subcontractor's knowledge and belief whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments, rendered against the prospective subcontractor within the three-year period preceding the date of the offer for a labor violation(s).

(c) *Subcontractor responsibility determination.* If the subcontractor responded affirmatively to paragraph (b) of this provision and the Offeror initiates a responsibility determination, the Offeror shall follow the procedures in paragraph (c) of 52.222–BB, Compliance with Labor Laws.

(End of provision)

■ 18. Add section 52.222–BB to read as follows:

52.222–BB Compliance with Labor Laws.

As prescribed in 22.2007(c), insert the following clause:

Compliance With Labor Laws (Date)

(a) *Definitions.* As used in this clause—

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. The notices or findings may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

Agency labor compliance advisor (ALCA) means the senior official designated in accordance with Executive Order 13673. ALCAs are listed at *www.*_____.

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes one that is not final or is subject to being confirmed, modified, or vacated by a court, and includes one resulting from private or confidential proceedings. To determine whether a particular arbitral award or decision is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

Civil judgment means any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular civil judgment is covered by this definition, it is necessary to read section II. B. in the DOL guidance.

DOL guidance means the Department of Labor (DOL) guidance entitled: ''Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces','' which can be obtained from *www.*_____.

Enforcement agency means any agency granted authority to enforce Federal labor laws. It includes DOL, the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It includes a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, undertake an investigation of potential labor violations.

Labor compliance agreement means an agreement entered into with a Federal enforcement agency, or a State agency designated to administer an OSHA-approved State Plan, to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and Executive Orders—

(1) The Fair Labor Standards Act, 29 U.S.C. chapter 8.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in guidance issued by the Department of Labor. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans).

Labor violation means a violation of a labor law that resulted in an administrative merits determination, arbitral award or decision, or civil judgment.

Pervasive violation means a standard for a labor violation(s), *e.g.,* the number of violations of a requirement or the aggregate number of violations in relation to the size of the prospective contractor. To determine whether a particular violation(s) is pervasive it is necessary to read section III. D. in the DOL guidance.

Repeated violation means a standard for a labor violation(s), *e.g.,* one or more additional labor violations of substantially similar requirements. To determine whether a particular violation(s) is repeated it is necessary to read section III. C. in the DOL guidance.

Serious violation means a standard for a labor violation(s), *e.g.,* the number of employees affected, the degree of risk imposed, or actual harm done by the violation. To determine whether a particular violation(s) is serious it is necessary to read section III. A. in the DOL guidance.

Willful violation means a standard for a labor violation(s), *e.g.,* whether there was knowledge of, reckless disregard for, or plain indifference to the labor violation. To determine whether a particular violation(s) is willful it is necessary to read section III. B. in the DOL guidance.

(b) *Prime contractor updates.* (1) The Contractor shall update, on a semi-annual basis throughout the life of the contract, the information regarding administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against the contractor for a labor violation(s)—

(i) In the System for Award Management (SAM), _____ (insert name of reporting module) *www.sam.gov,* or

(ii) Directly to the Contracting Officer, if the Contractor meets an exception to SAM registration at 4.1102(a).

(2) The Contracting Officer may require the Contractor provide the administrative merits determination, arbitral award or decision, or civil judgment document, if the contracting agency is unable to obtain the document.

(3) The Contracting Officer will afford the Contractor an opportunity to provide any additional information, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), other steps taken to achieve compliance with labor laws, and explanations for delays in entering into or for not meeting the terms of an existing labor compliance agreement before the Contracting Officer decides on any needed action.

(4) The Contracting Officer will consider whether action is necessary. Such action may include a new or enhanced labor compliance agreement, requiring other appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, as well as remedies such as decisions not to exercise an option, contract termination, or notification to the agency Suspending and Debarring Official.

(c) *Subcontractor responsibility.*

(1) The Contractor shall evaluate subcontractor labor violation information when determining subcontractor responsibility.

(2) This applies to subcontracts for other than commercially available off-the-shelf items with an estimated value that exceeds $500,000.

(3) The Contractor shall require a prospective subcontractor to represent to the best of the subcontractor's knowledge and belief whether there have been any

administrative merits determinations, arbitral awards or decisions, or civil judgments, for violation of labor laws rendered against the subcontractor within the three-year period preceding the date of the subcontractor's offer.

(4) If the prospective subcontractor responds affirmatively, and the Contractor initiates a responsibility determination and requests additional information, the prospective subcontractor shall provide to the Contractor the following information:

(i) Administrative merits determinations, arbitral awards or decisions, or civil judgments documents that were rendered against the subcontractor within the preceding three-year period prior to the subcontractor's offer; and

(ii) Any notice from DOL advising that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of an existing agreement.

(5) The Contractor shall afford a subcontractor an opportunity to provide such additional information as the subcontractor deems necessary to demonstrate its responsibility, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), other steps taken to achieve compliance with labor laws, and explanations for delays in entering into or for not meeting the terms of an existing labor compliance agreement.

(6) The Contractor shall evaluate subcontractor information using the DOL guidance as part of a responsibility determination.

(i) The Contractor shall complete the evaluation—

(A) For subcontracts awarded or that become effective within five days of the prime contract execution, no later than 30 days after subcontract award; or

(B) For all other subcontracts, prior to subcontract award. However, in urgent circumstances, the evaluation shall be completed within 30 days of subcontract award.

(ii) The Contractor shall consider the following in evaluating information:

(A) The nature of the violations (whether serious, repeated, willful, or pervasive).

(B) The number of violations (depending on the nature of the violation, in most cases, a single violation may not necessarily give rise to a determination of lack of responsibility).

(C) Any mitigating circumstances.

(D) Remedial measures taken to address labor violations, including existence of and compliance with any labor compliance agreements, or whether the prospective subcontractor is still in good faith negotiating such an agreement.

(E) Any advice or assistance provided by DOL.

(7) The Contractor shall notify the Contracting Officer of the following information if the contractor determines that a subcontractor is a responsible source after having been informed that DOL has advised that the subcontractor has not entered into a compliance agreement within a reasonable period or is not meeting the terms of the agreement:

(i) The name of the subcontractor; and

(ii) The basis for the decision.

(d) *Subcontractor updates.*

(1)(i) The Contractor shall require subcontractors to determine, on a semi-annual basis during subcontract performance, whether labor law disclosures provided pursuant to paragraph (c) of this clause and pursuant to 52.222–AB, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), are updated, current and complete. If the information is not updated, current and complete, subcontractors must provide revised information to the Contractor. If it is updated, current and complete, no action is required.

(ii) The Contractor shall further require the subcontractor to disclose during the course of performance of the contract any notification by DOL, within 5 business days of such notification, that it has not entered into a labor compliance agreement within a reasonable period, or is not meeting the terms of an existing labor compliance agreement, and allow the subcontractor to provide an explanation and supporting information for the delay or non-compliance.

(2) The contractor shall afford subcontractors an opportunity to provide to the contractor any additional information, *e.g.,* mitigating circumstances, remedial measures (to include labor compliance agreements), other steps taken to achieve compliance with labor laws.

(3) The Contractor shall, in a timely manner, consider information obtained from subcontractors pursuant to paragraphs (d)(1) and (2) of this clause, and determine whether action is necessary, *e.g.,* requesting that the subcontractor pursue a new or enhanced labor compliance agreement, requiring other appropriate remedial measures, compliance assistance, resolving issues to avoid further violations, or not continuing with the subcontract, if necessary. The Contractor is encouraged to consult with DOL as necessary to determine an appropriate timeframe for action.

(4) Using DOL guidance, the Contractor shall evaluate subcontractor information to determine if action is necessary. Contractors shall consider the following:

(i) The nature of the violations (whether serious, repeated, willful, or pervasive).

(ii) The number of violations.

(iii) Any mitigating circumstances.

(iv) Remedial measures taken to address labor violations, including existence of and compliance with any labor compliance agreements with DOL or other enforcement agency, or whether the subcontractor is still in good faith negotiating such an agreement.

(v) Any advice or assistance provided by DOL.

(5) The Contractor shall notify the Contracting Officer of the following information if the Contractor decides to continue the subcontract after having been informed that DOL has advised that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement:

(i) The name of the subcontractor; and

(ii) The basis for the decision.

(e) *Consultation with DOL.*

(1) The Contractor may consult with DOL representatives for advice and assistance regarding evaluation of subcontractor labor law violation(s), including the need for new or enhanced labor compliance agreements. (Only DOL representatives are available to consult with Contractors regarding subcontractor information. Contracting Officers or Agency Labor Compliance Advisors may assist with identifying the appropriate DOL representatives.).

(2) Absent advice or assistance from DOL, Contractors may proceed with determining responsibility, or during subcontract performance, if action is necessary using available information and business judgment.

(f) *Subcontractor flowdown.* The Contractor shall include the substance of paragraphs (a), (c), (d), (e), and (f) of this clause, in subcontracts with an estimated value exceeding $500,000, for other than commercially available off-the-shelf items.

(End of clause)

■ 19. Add section 52.222–XX to read as follows:

52.222–XX Paycheck Transparency.

As prescribed in 22.2007(d), insert the following clause:

Paycheck Transparency (Date)

(a) In each pay period, the Contractor shall provide a document (wage statement also known as pay stub) to all individuals performing work under the contract subject to the wage records requirements under the following statutes:

(1) The Fair Labor Standards Act, 29 U.S.C chapter 8.

(2) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (formerly known as the Davis Bacon Act).

(3) 41 U.S.C. chapter 67, Service Contract Labor Standards (formerly known as the Service Contract Act of 1965).

(4) Equivalent state laws identified in DOL Guidance for E.O. 13673, which can be found at www._____.

(b) The wage statement shall list hours worked, overtime hours, pay, and any additions made to or deductions made from pay. The wage statement provided to individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act need not include a record of hours worked if the Contractor informs the individuals of their overtime exempt status. The wage statement shall be issued every pay period and contain the total number of hours worked in the pay period and the number of those hours that were overtime hours. If the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), the hours worked and overtime hours contained in the wage statement shall be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid.

(c) These paycheck transparency requirements shall be deemed to be fulfilled if the Contractor is complying with State or local requirements that the United States

Secretary of Labor has determined are substantially similar to those required by this clause. These determinations of substantially similar wage payment states may be found at www._____.

(d) If the Contractor is treating an individual performing work under a contract as an independent contractor, and not as an employee, the Contractor shall provide a document to the individual. The document will inform the individual of this status. The contractor shall provide the document to the individual prior to commencement of work or at the time a contract is established with the individual.

(e) Where a significant portion of the workforce is not fluent in English, the Contractor shall provide the wage statement required in paragraph (b) of this clause and the independent contractor notification required in paragraph (d) of this clause in English and the language(s) with which the workforce is more familiar.

(f) The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts that exceed $500,000, for other than commercially available off-the-shelf items.

(End of clause)

■ 20. Add section 52.222–YY to read as follows:

52.222–YY Arbitration of Contractor Employee Claims.

As prescribed in 22.2007(e), insert the following clause:

Arbitration of Contractor Employee Claims (DATE)

(a) The Contractor hereby agrees that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, shall only be made with the voluntary consent of employees or independent contractors after such disputes arise.

(b) This does not apply to—

(1) Employees covered by a collective bargaining agreement negotiated between the Contractor and a labor organization representing the employees; or

(2) Employees or independent contractors who entered into a valid contract to arbitrate prior to the Contractor bidding on a contract containing this clause, implementing Executive Order 13673. This exception does not apply:

(i) If the contractor is permitted to change the terms of the contract with the employee or independent contractor; or

(ii) When the contract with the employee or independent contractor is renegotiated or replaced.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts that exceed $1,000,000. This paragraph does not apply to subcontracts for the acquisition of commercial items.

(End of clause)

■ 21. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (c)(1)(xii) through (c)(1)(xiv) as paragraphs (c)(1)(xiv) through (c)(1)(xvi), respectively; and

■ c. Adding new paragraphs (c)(1)(xii) and (c)(1)(xiii).

The revised and added text reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (DATE)

* * * * *

(c)(1) * * *

(xii) 52.222–BB, Compliance with Labor Laws (DATE) (E.O. 13673), if the estimated subcontract value exceeds $500,000, and is for other than commercially available off-the-shelf items.

(xiii) 52.222–XX, Paycheck Transparency (DATE) (E.O. 13673), if the estimated subcontract value exceeds $500,000, and is for other than commercially available off-the-shelf items.

* * * * *

[FR Doc. 2015–12560 Filed 5–27–15; 8:45 am]

BILLING CODE 6820–EP–P