



This document is scheduled to be published in the Federal Register on 11/02/2011 and available online at <http://federalregister.gov/a/2011-27779>.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 22, and 52

[FAC 2005-54; FAR Case 2010-006; Item I; Docket 2010-0106;

Sequence 1]

RIN 9000-AL76

Federal Acquisition Regulation; Notification of Employee Rights
Under the National Labor Relations Act

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Department of Labor (DOL) regulations that implemented the Executive Order (E.O.), Notification of Employee Rights Under Federal Labor Laws.

DATES: Effective Date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Ms. Clare McFadden, Procurement Analyst, at (202) 501-0044, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-54, FAR Case 2010-006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 75 FR 77723 on December 13, 2010, to implement E.O. 13496, Notification of Employee Rights Under Federal Labor Laws, as implemented by the DOL. The E.O. requires contractors to display a notice for employees of their rights under Federal labor laws, and the DOL has determined that the notice shall include employee rights under the National Labor Relations Act. Public comments were due on or before February 11, 2011. Three respondents submitted nine comments on the interim rule.

II. Discussion and Analysis of the Public Comments

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as the result of those comments are provided as follows:

A. General comments

Comment: One respondent stated support for the interim rule and urged that a final rule be adopted as quickly as possible. The respondent noted that the need to

facilitate timely implementation of the E.O. constitutes a compelling reason for issuance of an interim rule.

Response: An interim rule was published to facilitate the implementation of the E.O., and this rule is being converted to a final rule, herein.

Comment: Another respondent referred to the interim rule as an "invasion of privacy," comparing this to a requirement to post the Constitution, Bill of Rights, or tax laws.

Response: The comment is noted but does not warrant a change to the FAR. The FAR is implementing a requirement of the E.O. and the DOL regulations. The E.O. is premised on the policy that it is beneficial to the Government to rely on contractors whose employees are informed of their rights under Federal labor laws.

B. Comment on the FAR text

Comment: A respondent recommended deleting the phrase at FAR 22.1605(a) "including acquisitions for commercial items and commercially available off-the-shelf items."

Response: DOL is the regulatory agency with primary responsibility for implementation of the E.O. The DOL final rule does not provide an exception for the acquisition of commercial items, including commercially available off-the-shelf items. Therefore, the FAR rule must be consistent with the DOL rule in its application to commercial items.

C. Comments on FAR clause 52.212-5

Comment: A respondent noted that the clause should be listed as subsection (28), not (27), at FAR 52.212-5(b).

Response: The correction to the number has been made.

Comment: A respondent requested the deletion of the phrase "flow down required in accordance with paragraph (f) of FAR clause 52.222-40" at 52.212-5(e)(1)(vii) and 52.212-5 Alternate II(e)(1)(ii)(G).

Response: As noted earlier (see response at section II.B. above), the FAR is implementing the DOL final rule. The DOL rule very specifically set the requirements for flow down of the requirement for posting the National Labor Relations Act poster to subcontracts at all tiers that exceed \$10,000.

D. Comments on FAR clause 52.222-40

Comment: A respondent requested clarification of the clause at FAR 52.222-40 so that it is obvious whether contractors and subcontractors are required to use the DOL poster or have permission to create a company-specific poster, as long as the latter meets the DOL's size, form, and content requirements.

Response: The language at FAR 22.1602(a) and at FAR 52.222-40(a) indicates that an employer does not have to use the DOL poster but can use its own poster as long as it

includes the requisite information - the DOL's size, form, and content requirements.

Comment: A respondent suggested revising FAR 52.222-40(a)(1) to read as follows:

"Physical posting of the employee notice shall be in conspicuous places in and about the plants and offices of contractors and subcontractors, in the languages employees speak, so that the notice is prominent and readily seen by employees who are covered by the National Labor Relations Act and engage in activities related to the performance of the contract."

The respondent stated that the following language at FAR 52.222-40(a), regarding where the poster must be posted and what languages must be used in the poster, is redundant:

". . . in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically, in the languages employees speak, in accordance with 29 CFR 471.2 (d) and (f)."

Response: DOL's final rule was published in the Federal Register at 75 FR 28368 on May 20, 2010, and it incorporated that agency's requirements for implementation of the E.O. at 29 CFR 471. The FAR is being updated to incorporate the DOL requirements into corresponding sections of the FAR. Since DOL has the primary responsibility for implementation of the E.O., it is not appropriate to make any substantive change in the FAR clause.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is 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 not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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., because the rule implements the Department of Labor's (DOL) final rule that implemented E.O. 13496, Notification of Employee Rights Under Federal Labor Laws. This E.O. requires contractors to display a notice to employees of their rights under Federal labor laws, and the DOL has determined that the notice shall include employee

rights under the National Labor Relations Act. DOL certified in its final rule (published in the Federal Register at 75 FR 28368 on May 20, 2010, with an effective date of June 21, 2010) that its rule would not have a significant economic impact on a substantial number of small entities. After reviewing DOL's certification, DoD, GSA, and NASA concurred that no regulatory flexibility analysis was needed. DoD, GSA, and NASA did not receive comments from small entities in response to the invitation to do so included in the FAR interim rule that published in the Federal Register at 75 FR 77723 on December 13, 2010.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 1, 2, 22, and 52

Government procurement.

Dated: October 21, 2011.

/s/

Laura Auletta,
Acting Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Interim Rule Adopted as Final without Change

Accordingly, the interim rule amending 48 CFR parts 1, 2, 22, and 52, which was published in the Federal Register at 75 FR 77723 on December 13, 2010, is adopted as a final rule without change.

[BILLING CODE 6820-EP]

<FRDOC> [FR Doc. 2011‐27779 Filed 11‐1‐11; 8:45 am]

<BILCOD>BILLING CODE 6820‐14‐P

[FR Doc. 2011-27779 Filed 11/01/2011 at 8:45 am; Publication Date:

11/02/2011]