



441 G St. N.W.
Washington, DC 20548

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September 8, 2016

The Honorable Ron Johnson
Chairman
The Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Jason Chaffetz
Chairman
The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

Subject: *Department of Defense, General Services Administration, and National Aeronautics and Space Administration: Federal Acquisition Regulation; Fair Pay and Safe Workplaces*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) (collectively, the agencies) entitled "Federal Acquisition Regulation; Fair Pay and Safe Workplaces" (RIN: 9000-AM81). We received the rule on August 22, 2016. It was published in the *Federal Register* as a final rule on August 25, 2016. 81 Fed. Reg. 58,562.

The final rule, issued jointly by DOD, GSA, and NASA, amends the Federal Acquisition Regulation (FAR) to implement Executive Order 13,673, Fair Pay and Safe Workplaces. The Order is designed to increase efficiency and cost savings in federal contracting by improving contractor compliance with labor laws. The Department of Labor simultaneously issued final guidance to assist federal agencies in implementation of the Executive Order in conjunction with the FAR final rule.

Enclosed is our assessment of the agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our

review of the procedural steps taken indicates that the agencies complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Jeffrey A. Koses
Senior Procurement Executive
General Services Administration

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF DEFENSE,
GENERAL SERVICES ADMINISTRATION,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
ENTITLED
“FEDERAL ACQUISITION REGULATION;
FAIR PAY AND SAFE WORKPLACES”
(RIN: 9000-AM81)

(i) Cost-benefit analysis

The Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) (collectively, the agencies), performed a cost benefit analysis in conjunction with the Regulatory Impact Analysis (RIA) and which was summarized in the final rule. The Department of Labor (DOL), in its capacity as the lead program agency for implementation, also contributed to the RIA. The final rule presents a subject-by-subject analysis of the benefits and costs of the final rule, followed by a summary of these benefits and costs, including the total benefits and costs over the 10-year period of analysis. The subject-by-subject analysis sections of the RIA provide comprehensive and detailed discussion of the estimating methodologies used. The agencies included a table (Exhibit 8) that presented a summary of the first-year, second-year, and annualized quantifiable costs final rule disclosure and paycheck transparency requirements to contractors and subcontractors, as well as the estimated government costs. It also includes both the first-year and second-year impacts because the final rule's requirement for contractors and subcontractors to report labor law violations will be phased in over 3 years. The agencies incorporated by reference, a summary of monetized costs of the final rule, from RIA Exhibit 8, and stated that the monetized costs displayed are the yearly summations of the calculations that were described. The total monetized year one costs for both employer and government is \$474,075,099 and the total monetized year two costs for both are \$423,862,572. The annualized costs for both with a 3 percent discounting and 7 percent discounting are \$409,535,973 and \$412,031,335, respectively.

The agencies state that in the final analysis, as in the proposed analysis, there were insufficient data to accurately quantify the benefits presented. The agencies invited respondents to provide data that would allow for more thorough benefit estimations; however no data were received that could be used to quantify the benefits of the final rule. The agencies state that they discussed the benefits and showed relevant peer-reviewed studies and other published reports that often quantitatively demonstrate that fair pay and safe workplaces would lead to improved contractor performance, fewer injuries and fatalities, reduced employment discrimination, less absenteeism, and higher productivity at work. Discussion was presented on: improved contractor performance; safer workplaces; reduced employment discrimination; fairer wages; enforcement cost savings and transfer impacts for the government, contractors, and society; transfer impacts of the paycheck transparency provision; non-quantified impacts of the paycheck transparency provision; and benefits and transfer impacts of the complaint and dispute transparency provision.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The agencies have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the RFA which contains six discrete types of information, and which the final rule summarized: (1) rule objectives; (2) significant Initial Regulatory Flexibility Analysis issues raised by the public; (3) disposition of comments from the Chief Counsel for Advocacy of the Small Business Administration (SBA); (4) impact to small entities; (5) estimated compliance requirements; and (6) steps to minimize impact on small entities. The FRFA estimates that 17,943 small businesses (7,626 prime contractors and 10,317 subcontractors) will be impacted by the rule's requirements, noting that this rule will impact all small entities who propose as contractors or subcontractors on solicitations and resultant contracts estimated to exceed \$500,000. The number of impacted small entities is derived by estimating a total of 24,183 impacted contractors (13,866 prime contractors and 10,317 subcontractors), then deducting the number of impacted small businesses (7,626 prime contractors and 10,317 subcontractors). The FRFA includes an exhibit from the RIA that outlines overall employer costs of \$458,352,949, in year one, which accounts for 12 compliance activities--review the executive order, make an initial representation, provide additional information, review subcontractor information, update the determination, provide additional information, consider subcontractors' updated information, establish a tracking system, implement a status notice, issue status notices, update payroll systems, and distribute wage statements. The FRFA also identifies other significant alternatives to the rule that were considered, which affect the impact on small entities, and why each was rejected.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The agencies did not address the Unfunded Mandates Reform Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On May 28, 2015, a FAR proposed rule was published. 80 Fed. Reg. 30,548. Public comments were due July 27, 2015. DOL also published its proposed guidance on May 28, 2015 (80 Fed. Reg. 30,574). A first extension of the period for public comments on the FAR rule, to August 11, 2015, was published on July 14, 2015. A second extension, to August 26, 2015, was published on August 5, 2015. According to the agencies, there were 927 respondents that made comments on the FAR proposed rule. Including mass mailings, about 12,600 responses were received on the FAR proposed rule. Respondent organizations typically submitted their responses to both the DOL and FAR dockets. The agencies state that they worked together and with DOL to closely coordinate review and disposition of the comments.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

According to the agencies, the PRA applies. The final rule contains information collection requirements. The Office of Management and Budget (OMB) has cleared this information collection requirement under OMB Control Number 9000-0195, titled: Fair Pay and Safe Workplaces. The PRA supporting statement provides a description of the requirements of the rule that contains information collection requirements and indicates that they are contained in two solicitation provisions and two contract clauses:

- Provision 52.222-57, Representation Regarding Compliance with Labor Laws (Executive Order 13,673) (which is repeated at paragraph(s) of 52.212-3 Offeror Representations and Certifications—Commercial Items),
- Provision 52.222-58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13,673),
- Clause 52.222-59, Compliance with Labor Laws (Executive Order 13,673), and
- Clause 52.222-60, Paycheck Transparency (Executive Order 13,673).

The agencies state that the PRA supporting statement contains a discussion of the public comments submitted to the proposed rule information collection analysis and supporting statement. The agencies state further that the public comments were considered in developing the estimates for the final rule supporting statement. The supporting statement estimates were prepared in coordination with, and relied heavily on, the final RIA. The RIA is a joint FAR Council and DOL product with substantial analysis provided by DOL in its capacity as a program agency and advisor to the FAR Council on labor matters. The agencies summarized and estimated the PRA burden in a table stating that the number of respondents are 24,183, the number of responses per respondent are 17.3, the total annual responses are 417,808, the hours per response are 5.19, the total hours are 2,166,815, the rate per hour (average) \$61.43, and the total annual cost to public \$133,109,793.

Statutory authorization for the rule

The final rule states that it was promulgated under the authority of Executive Order 13,673, Fair Pay and Safe Workplaces. 79 Fed. Reg. 45,309 (August 5, 2014), amended by a December 11, 2014, Executive Order 13,683, 79 Fed. Reg. 75,041 (December 16, 2014) to correct a statutory citation and further amended by an Executive Order to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents, and the under the authority of 40 U.S.C. §121(c); 10 U.S.C. chapter 137; and 51 U.S.C. § 20113.

Executive Order No. 12,866 (Regulatory Planning and Review)

According to the agencies, this is a significant regulatory action and, therefore, was subject to review under the Order.

Executive Order No. 13,132 (Federalism)

The agencies did not address the Federalism Order.