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Fair Pay and Safe Workplaces Executive Order: Questions and Answers

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Summary

On July 31, 2014, President Obama issued Executive Order 13673, Fair Pay and Safe Workplaces, with the stated intent of “increas[ing] efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws.” The order requires that executive branch procurement contractors disclose information about their compliance with 14 specified federal labor laws and their state equivalents as part of the award process. It also requires that agency contracting officers take these disclosures into consideration when assessing whether prospective vendors have a “satisfactory record of integrity and business ethics” as part of the responsibility determination process. Agencies generally cannot award a procurement contract without determining that the prospective vendor is “affirmatively responsible” for purposes of the contract. In addition, the order imposes certain requirements intended to promote “paycheck transparency” for contractor employees and limit mandatory arbitration of employee claims.

Subsequently, on March 6, 2015, the Department of Labor (DOL) issued guidance regarding the roles and responsibilities of the labor compliance advisors whom the order requires to be appointed within procuring agencies. Then, on May 28, 2015, DOL issued proposed guidance regarding the specific labor law violations to be considered when assessing vendors’ responsibility, and the Federal Acquisition Regulatory Council (FAR Council) proposed amendments to the Federal Acquisition Regulation (FAR) to implement Executive Order 13673.

Executive Order 13673 and its proposed implementing guidance and regulations have prompted debate about both the specific labor and employment policies they seek to promote, as well as the general practice of using the federal procurement process to further social and economic objectives that some have described as “only indirectly related to conventional procurement considerations.” In particular, there have been questions about the President’s authority to impose the requirements of Executive Order 13673; how the requirements of the order compare to preexisting law; and whether the order will result in blacklisting or the *de facto* debarment of government contractors. The term *blacklisting* is sometimes used to describe a practice of formally or informally identifying—sometimes through the compilation of lists—disfavored vendors with whom the government will not do business. The term *de facto* debarment describes the effective exclusion of vendors from the procurement process without the procedural protections afforded to them in formal debarment and suspension proceedings. Depending upon the facts and circumstances of the case, both blacklisting and *de facto* debarment could, if they occur, be found to have deprived contractors of due process in violation of the Fifth Amendment to the U.S. Constitution.

This report provides the answers to these and other questions about Executive Order 13673 and its proposed implementing guidance and regulations. The questions and answers are organized into three sections. The first section provides an overview of the executive order and related materials; the second discusses the order’s relationship to existing law; and the third addresses other questions, including the President’s authority to issue the order. In considering these questions and answers, note that certain DOL guidance and the proposed FAR amendments implementing Executive Order 13673 have not been finalized, and the order is not scheduled to be implemented until 2016, at the earliest.

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On July 31, 2014, President Obama issued Executive Order 13673, Fair Pay and Safe Workplaces, with the stated intent of “increas[ing] efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws.”¹ The order requires that executive branch procurement contractors disclose information about their compliance with 14 specified federal labor laws and their state equivalents as part of the award process.² It also requires that agency contracting officers take these disclosures into consideration when assessing whether prospective vendors have a “satisfactory record of integrity and business ethics” as part of the responsibility determination process.³ Agencies generally cannot award a procurement contract without determining that the prospective vendor is “affirmatively responsible” for purposes of the contract.⁴ In addition, the order imposes certain requirements intended to promote “paycheck transparency” for contractor employees and limit mandatory arbitration of employee claims.⁵

Subsequently, on March 6, 2015, the Department of Labor (DOL) issued guidance regarding the roles and responsibilities of the labor compliance advisors whom the order requires to be appointed within procuring agencies.⁶ Then, on May 28, 2015, DOL issued proposed guidance regarding the specific labor law violations to be considered when assessing vendors’ responsibility,⁷ and the Federal Acquisition Regulatory Council (FAR Council) proposed amendments to the Federal Acquisition Regulation (FAR) to implement Executive Order 13673.⁸

Executive Order 13673 and its proposed implementing guidance and regulations have prompted debate about both the specific labor and employment policies they seek to promote,⁹ as well as the general practice of using the federal procurement process to further social and economic objectives that some have described as “only indirectly related to conventional procurement considerations.”¹⁰ In particular, there have been questions about the President’s authority to

¹ 79 Fed. Reg. 45309, 45309 (Aug. 5, 2014).

² 79 Fed. Reg. at 45309-10.

³ 79 Fed. Reg. at 45310.

⁴ See, e.g., 48 C.F.R. §9.103(b) (“No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”). For more on responsibility determinations, see *infra* “Did agencies have the authority to consider labor law violations in the procurement process prior to Executive Order 13673?” and “What has historically been considered in assessing integrity in the responsibility determination process?”.

⁵ 79 Fed. Reg. at 45314.

⁶ See Beth F. Cobert, Deputy Director for Management, Office of Management and Budget, & Christopher P. Lu, Deputy Secretary, U.S. Department of Labor, Memorandum M-15-08, *Implementation of the President’s Executive Order on Fair Pay and Safe Workplaces*, Mar. 6, 2015, available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2015/m-15-08.pdf>.

⁷ See Dep’t of Labor, Guidance for Executive Order 13673, “Fair Pay and Safe Workplaces”: Proposed Guidance, 80 Fed. Reg. 30574 (May 28, 2015).

⁸ See Dep’t of Defense, Gen. Servs. Admin. & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation, Fair Pay and Safe Workplaces: Proposed Rule, 80 Fed. Reg. 30548 (May 28, 2015).

⁹ See, e.g., The Blacklisting Executive Order: Rewriting Federal Labor Policies through Executive Fiat: Hearing Before the House Education and the Workforce Committee [hereinafter “House Hearing”], Feb. 26, 2015, webcast and witness testimony available at <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=398427>.

¹⁰ Rossetti Constr. Co. v. Brennan, 508 F.2d 1036, 1045 n.18 (7th Cir. 1975) (“It is well established that the procurement process, once exclusively concerned with price and quality of goods and services, has been increasingly utilized to achieve social and economic objectives only indirectly related to conventional procurement considerations.”). There has been particular debate over the degree to which the responsibility determination process should be focused on the contractor’s ability to perform the contract in question, or whether it should be used to impose a “higher standard of corporate ethics, integrity, and compliance with a host of laws, regulations, and norms.”

PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION RELATING TO CONTRACTOR RESPONSIBILITY: (continued...)

impose the requirements of Executive Order 13673; how the requirements of the order compare to preexisting law; and whether the order will result in blacklisting or the *de facto* debarment of government contractors. The term *blacklisting* is sometimes used to describe a practice of formally or informally identifying—sometimes through the compilation of lists—disfavored vendors with whom the government will not do business.¹¹ The term *de facto* debarment describes the effective exclusion of vendors from the procurement process without the procedural protections afforded to them in formal debarment and suspension proceedings.¹² Depending upon the facts and circumstances of the case, both blacklisting and *de facto* debarment could, if they occur, be found to have deprived contractors of due process in violation of the Fifth Amendment to the U.S. Constitution.¹³

This report provides the answers to these and other questions about Executive Order 13673 and its proposed implementing guidance and regulations. The questions and answers are organized into three sections. The first provides an overview of the executive order and related materials; the second discusses the order’s relationship to existing law; and the third addresses other questions, including the President’s authority to issue the order. In considering these questions and answers, note that certain DOL guidance and the proposed FAR amendments have not been finalized,¹⁴ and the order is not scheduled to be implemented until 2016, at the earliest.¹⁵

For a two-page overview of materials discussed in this report, see CRS Report IF10258, *Fair Pay and Safe Workplaces Order: Answers to Questions*, by Rodney M. Perry and Kate M. Manuel.

(...continued)

HEARING BEFORE THE COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES, 106TH CONG., 1ST SESS., 23 (1999) (statement of Steven L. Schooner, Professor, George Washington University School of Law); *see also* John Bryan Warnock, *Principled or Practical Responsibility: Sixty Years of Discussion*, 41 PUB. CONT. L.J. 881 (2012).

¹¹ *See, e.g.*, Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 552 (2009) (“Blacklisting refers to debarment, whereas graylisting has been used to describe suspension.”); Michael L. Closen & Donald G. Weiland, *Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel, and Other Theories to the Relations between General Contractors and Subcontractors*, 13 J. MARSHALL L. REV. 565, 573 (1980) (“Blacklisting is the informal identifying of a general contractor as disapproved or as one to be boycotted ...”).

¹² *See, e.g.*, Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora’s Box*, 29 PUB. CONT. L.J. 637, 676 (2000).

¹³ *See, e.g.*, Peter Kiewit Sons’ Co. v. U.S. Army Corps of Eng’rs, 534 F. Supp. 1139 (D.D.C. 1982), *rev’d on other grounds*, 714 F.2d 163 (D.C. Cir. 1983) (finding that a government directive to hold all awards to a contractor in abeyance due to concerns about the contractor’s integrity, without providing notice or an opportunity for a hearing, constituted *de facto* debarment and deprived the contractor of due process); *Old Dominion Dairy Prods., Inc. v. Sec’y of Def.*, 631 F.2d 953, 955-56 (D.C. Cir. 1980) (“[W]hen a determination is made that a contractor lacks integrity and the Government has not acted to invoke formal suspension and debarment procedures, notice of the charges must be given to the contractor as soon as possible so that the contractor may utilize whatever opportunities are available to present its side of the story before adverse action is taken.”).

¹⁴ *See supra* notes 7 and 8 and accompanying text.

¹⁵ *See, e.g.*, The White House, Office of the Press Sec’y, Fact Sheet, *Fair Pay and Safe Workplaces Executive Order*, July 31, 2014, available at <https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order> (“We expect the Executive Order to be implemented on *new contracts* in stages, on a prioritized basis, during 2016.”) (emphasis added). The Administration has not expressed any intention to apply the order to existing contracts (or new orders under existing contracts), probably because any attempt by the government to unilaterally amend the terms of an existing contract could potentially constitute a breach of contract. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (finding the government liable for breach of contract where Congress enacted legislation depriving parties who had previously contracted with the government of certain rights that they had had under the contract).

Overview of the Order and Related Materials

The questions and answers in this section provide an overview of Executive Order 13673 and related guidance and regulations, including (1) the basic requirements of the order; (2) the 14 federal labor laws to be considered in assessing vendors' responsibility; (3) what state laws are to be seen as equivalent to the specified federal laws; and (4) the responsibilities of the labor compliance advisors whom the order requires to be appointed within procuring agencies.

What does the executive order require?

Executive Order 13673 imposes three obligations on federal contractors and subcontractors. First, the order requires contractors and subcontractors to disclose to the government certain violations of federal and state labor laws. Second, the order obligates contractors to take steps to increase paycheck transparency. Finally, the order limits contractors' ability to require arbitration to resolve certain employment disputes. Note, however, that these obligations have not yet been applied to contractors and subcontractors. The order itself was effective immediately as of the date of its issuance (i.e., July 31, 2014),¹⁶ but implementing guidance and regulations are still being developed. In a written statement also issued on July 31, 2014, the White House indicated that it anticipates that the order's requirements will be implemented as to new contracts "in stages," beginning in 2016.¹⁷

Disclosure Obligations

Perhaps most notably, Executive Order 13673 contains disclosure requirements for contractors and subcontractors. These requirements will obligate contractors bidding or offering on contracts valued over \$500,000 to certify, to the best of their knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment against them within the past three years resulting from violations of federal or state labor laws.¹⁸ (Contractors who make false certifications could be subject to certain penalties, as discussed below. See "What would happen if a contractor falsely certifies as to its labor law violations?"). Agency contracting officers will then have to consider any such violations when considering whether a contractor is eligible for a contract award. More specifically, agency contracting officers must affirmatively determine that a contractor is "responsible" before the contractor can receive a contract,¹⁹ and Executive Order 13673 will require contracting officers to consider labor law violations when making this responsibility determination.²⁰ The order will further require

¹⁶ See 79 Fed. Reg. at 45309.

¹⁷ See *supra* note 15 and accompanying text.

¹⁸ 79 Fed. Reg. at 45309.

¹⁹ Factors considered when making this determination include whether the contractor (1) has adequate resources to perform the contract; (2) can comply with the required or proposed delivery or performance schedule; (3) has a satisfactory performance record; (4) has a satisfactory record of integrity and business ethics; (5) has the requisite experience, skills, and ability to perform a contract, or ability to obtain them; (6) has the necessary production capability and facilities to perform a contract, or ability to obtain them; and (7) is otherwise qualified under applicable laws and regulations to receive a contract. 48 C.F.R. §9.104-1. Executive Order 13673 contemplates contracting officers considering labor law violations when determining whether a contractor has a satisfactory record of integrity and business ethics.

²⁰ 79 Fed. Reg. at 45310.

contractors to certify that they will have subcontractors with contracts exceeding \$500,000 to disclose labor violations from the past three years.²¹ Contractors will then have to consider such disclosures in determining subcontractor responsibility.

After contract award (i.e., during contract performance), contractors and subcontractors that are required to make pre-award disclosures will have to provide, at six-month intervals, updated information on new labor violations.²² These post-award disclosures could lead to, among other things, remedial measures, compliance assistance, or contract termination.²³

Paycheck Transparency Requirements

Executive Order 13673 requires, for work under a contract that is subject to the disclosure requirements discussed above, that contractors provide employees with documentation of “hours worked, overtime hours, pay, and additions to or deductions from pay” in each pay period.²⁴ This requirement will apply only to contractors that are required to maintain wage records under the Fair Labor Standards Act, Service Contract Act, or equivalent state laws.²⁵ Further, this requirement will be deemed met if a contractor complies with state or local laws that are substantially similar to the order’s requirements, as determined by the Secretary of Labor.²⁶

Mandatory Arbitration Prohibition

Executive Order 13673 prohibits mandatory arbitration of claims under Title VII of the Civil Rights Act of 1964 (Title VII) and any torts arising from sexual assault or harassment.²⁷ The order will require government contracts and subcontracts valued over \$1 million to incorporate clauses providing that employees must voluntarily consent to arbitration of such claims.²⁸ However, the order contains three exceptions to this prohibition on mandatory arbitration. First, the prohibitory contract clause will not be included in contracts for acquisition of commercially available off-the-shelf items.²⁹ Second, the prohibition will not extend to employees who are covered by a collective bargaining agreement.³⁰ Finally, the prohibition generally will not apply to contractor

²¹ *Id.*

²² 79 Fed. Reg. at 45310-11.

²³ 79 Fed. Reg. at 45311.

²⁴ 79 Fed. Reg. at 45314.

²⁵ *Id.*

²⁶ *Id.*

²⁷ The order’s mandatory arbitration prohibitions closely mirror the prohibitions of the so-called “Franken Amendment,” P.L. 111-118, §8116, 123 Stat. 3409, 3454-56 (2010), and its implementing regulations, 48 C.F.R. §222.7400-222.7405, which also required contractors and subcontractors with contracts valued over \$1 million to agree not to require arbitration of claims under Title VII and torts arising from sexual assault or harassment. However, the “Franken Amendment,” which Congress enacted through a Department of Defense (DOD) appropriations bill, was limited by its terms to DOD contracts using FY2010 funding. Executive Order 13673’s mandatory arbitration provisions, in contrast, apply to all executive agencies and are not limited to contracts using certain fiscal year funding.

²⁸ *Id.*

²⁹ *Id.* The FAR defines *commercially available off-the-shelf items* as generally including items of supply that are (1) “commercial items,” or items customarily used by the general public or non-governmental entities for purposes other than governmental purposes; (2) sold in substantial quantities in the commercial marketplace; and (3) offered to the government without modification, in the same form in which they are sold in the commercial marketplace. 48 C.F.R. §2.101.

³⁰ 79 Fed. Reg. at 45314.

employees who entered mandatory arbitration agreements before their employers bid on contracts covered by the prohibition.³¹

What federal labor laws are covered?

Executive Order 13673 requires covered contractors and subcontractors to disclose violations of the following 14 federal labor laws (although this requirement has yet to be implemented):

The Fair Labor Standards Act (FLSA). The FLSA contains minimum wage,³² overtime pay,³³ and child labor³⁴ standards applicable to most public and private employers. The Department of Labor’s Wage and Hour Division (WHD) is tasked with enforcing the FLSA, which it does through, for example, investigations, actions to recover back wages, injunctions to prevent FLSA violations, and civil penalties. The act also provides employees with a private right of action to recover back wages.³⁵ Additionally, willful or repeated violations of the act can result in criminal prosecution.³⁶

The Occupational Safety and Health Act of 1970 (OSH Act). Congress enacted the OSH Act to protect worker safety.³⁷ The OSH Act contains two primary enforcement provisions, each of which places a unique obligation upon employers. First, Section 5(a)(1) of the act—the so-called “General Duty Clause”—requires all employers to provide workplaces that are free of potentially harmful hazards.³⁸ Second, the act mandates employer compliance with the Occupational Safety and Health Administration’s (OSHA’s) workplace safety standards.³⁹ OSHA is responsible for enforcing the OSH Act, which it does by promulgating such workplace safety standards, conducting workplace inspections, and issuing citations to employers found to have violated the act.

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The MSPA generally protects migrant and seasonal workers in their dealings with agricultural employers, agricultural associations, and farm labor contractors. These protections include, for example, requiring payment of worker wages when due,⁴⁰ requiring that workers receive itemized statements of earnings and deductions,⁴¹ and ensuring that any housing provided to workers complies with safety standards.⁴² The WHD administers and enforces the MSPA. Enforcement occurs through investigations,⁴³ penalties,⁴⁴ and petitions in district courts for injunctive relief.⁴⁵ Additionally, the

³¹ *Id.*

³² 29 U.S.C. §206.

³³ 29 U.S.C. §207.

³⁴ 29 U.S.C. §212.

³⁵ 29 U.S.C. §216(b).

³⁷ *See* 29 U.S.C. §651(b).

³⁷ *See* 29 U.S.C. §651(b).

³⁸ *See* 29 U.S.C. §654(a)(1).

³⁹ *See* 29 U.S.C. §654(a)(1).

⁴⁰ 29 U.S.C. §1822(a) & §1832(a).

⁴¹ 29 U.S.C. §1821(d)(2) & §1831(c)(2).

⁴² 29 U.S.C. §1823.

⁴³ 29 U.S.C. §1862.

⁴⁴ 29 U.S.C. §1853.

MSPA creates a private right of action for those aggrieved by violations of the act.⁴⁶ Willful and knowing violations of the MSPA can lead to criminal penalties.⁴⁷

The National Labor Relations Act (NLRA). The NLRA provides private sector employees the right to unionize and engage in collective bargaining.⁴⁸ The act is enforced by the National Labor Relations Board, which can, among other things, investigate charges of violations of the act,⁴⁹ decide cases through orders,⁵⁰ and seek enforcement of such orders in the appropriate U.S. Courts of Appeal.⁵¹

The Davis-Bacon Act. The Davis-Bacon Act generally requires those who have contracts with the federal government or District of Columbia valued in excess of \$2,000 for the construction of public buildings or public works to pay locally prevailing minimum wages and fringe benefits.⁵² Both the WHD and the relevant contracting agency are responsible for enforcing the Davis-Bacon Act. Enforcement can occur through investigations,⁵³ withholding or suspending contract payments,⁵⁴ or contract termination.⁵⁵

The Service Contract Act. The Service Contract Act generally applies to service contracts valued over \$2,500 with the federal government or District of Columbia.⁵⁶ The act requires covered contractors to pay service employees locally prevailing wages and fringe benefits, and to provide workplaces that are sanitary and free of hazards.⁵⁷ As with the Davis-Bacon Act, both the WHD and the contracting agency enforce the Service Contract Act. Enforcement occurs through investigations, withholding of contract payments,⁵⁸ or contract termination.⁵⁹

Executive Order 11246 on Equal Employment Opportunity. Executive Order 11246 prohibits covered contractors from discriminating in employment decisions based on race, color, religion, sex, sexual orientation, gender identity, or national origin.⁶⁰ Regulations implementing the order also require contractors with 50 or more employees and \$50,000 or more in contracts to have affirmative action plans to recruit and advance qualified minority and women workers.⁶¹ The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246

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⁴⁵ 29 U.S.C. §1852.

⁴⁶ 29 U.S.C. § 1854.

⁴⁷ 29 U.S.C. §1851.

⁴⁸ 29 U.S.C. §157.

⁴⁹ 29 U.S.C. §161.

⁵⁰ 29 U.S.C. §160(b)-(c).

⁵¹ 29 U.S.C. §160(e).

⁵² See 40 U.S.C. §3142.

⁵³ 29 C.F.R. §22.406-8.

⁵⁴ 29 C.F.R. §22.406-9.

⁵⁵ 29 C.F.R. §22.406-11.

⁵⁶ 41 U.S.C. §6702(a).

⁵⁷ See 41 U.S.C. §6703(1)-(3).

⁵⁸ 48 C.F.R. §22.1022.

⁵⁹ 48 C.F.R. §22.1023.

⁶⁰ 30 Fed. Reg. 12319, 12320 (Sept. 28, 1965).

⁶¹ See 41 C.F.R. §60-2.

through compliance reviews,⁶² complaint investigations,⁶³ and administrative or judicial proceedings.⁶⁴

Section 503 of the Rehabilitation Act of 1973 (Rehab Act). The Rehab Act requires covered contractors and subcontractors to take affirmative action to employ and advance qualified individuals with disabilities.⁶⁵ The act also prohibits covered contractors and subcontractors from discriminating in employment decisions based on disability.⁶⁶ OFCCP enforces the Rehab Act through compliance reviews,⁶⁷ complaint investigations,⁶⁸ and administrative or judicial proceedings.⁶⁹

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA). VEVRA requires covered contractors and subcontractors to take affirmative action to employ and advance qualified veterans and prohibits these contractors and subcontractors from discriminating against veterans in employment decisions.⁷⁰ OFCCP enforces VEVRA through compliance reviews,⁷¹ complaint investigations,⁷² and administrative or judicial proceedings.⁷³

The Family Medical Leave Act (FMLA). The FMLA generally entitles eligible employees to take 12 workweeks of job-protected, unpaid leave during a 12-month period for specified family and medical reasons with continued group health insurance.⁷⁴ WHD is responsible for enforcing the FMLA, which it does by, for example, investigating complaints or bringing actions against employers to ensure compliance and recover damages.⁷⁵ The FMLA also provides employees a private cause of action against employers that violate the FMLA.⁷⁶

Title VII of the Civil Rights Act of 1964 (Title VII). Title VII makes it illegal for an employer to discriminate against an employee on the basis of race, color, religion, national origin, or sex.⁷⁷ The Equal Employment Opportunity Commission (EEOC) generally enforces Title VII, which it does through investigating complaints, seeking settlement,⁷⁸ and, where appropriate, civil action in federal courts.⁷⁹

⁶² 41 C.F.R. §60-1.20.

⁶³ 41 C.F.R. §60-300.61.

⁶⁴ 41 C.F.R. §60-1.26.

⁶⁵ 29 U.S.C. §793.

⁶⁶ 41 C.F.R. §60-741.21.

⁶⁷ 41 C.F.R. §60-741.60.

⁶⁸ 41 C.F.R. §60-741.61.

⁶⁹ 41 C.F.R. §60-741.65.

⁷⁰ See 38 U.S.C. §4212 & 41 C.F.R. §60-300.21.

⁷¹ 41 C.F.R. §60-300.60.

⁷² *Id.*

⁷³ 41 C.F.R. §60-300.65.

⁷⁴ See 29 U.S.C. §2612 & §2614.

⁷⁵ 29 U.S.C. § 2616 & §2617.

⁷⁶ 29 U.S.C. §2617(a)(2).

⁷⁷ 42 U.S.C. §2000e-2.

⁷⁸ 42 U.S.C. §2000e-5(b).

⁷⁹ 42 U.S.C. §2000e-5(f).

The Americans with Disabilities Act of 1990 (ADA). The ADA prohibits discrimination against individuals with disabilities in a range of activities, including transportation, public accommodations, communications, employment, and government services. Four agencies enforce the ADA. The EEOC enforces the provisions on employment, the Department of Transportation enforces provisions related to transit, the Federal Communications Commission enforces provisions covering telecommunication services, and the Department of Justice enforces the act’s protections against discrimination in public accommodations and state and local government services.

The Age Discrimination in Employment Act of 1967 (ADEA). The ADEA prohibits age discrimination in employment against individuals who are at least 40 years old.⁸⁰ The ADEA refers to FLSA’s enforcement provisions, discussed above, and the two are enforced in similar ways—through investigations of complaints, actions to recover back wages, and injunctions to prevent additional violations.⁸¹ The act also provides employees with a private right of action.⁸²

Executive Order 13658 Establishing a Minimum Wage for Contractors. Executive Order 13658 requires that employees working under a service or construction contract or subcontract be paid a minimum wage of at least \$10.10 per hour.⁸³ The WHD is responsible for enforcing Executive Order 13658.⁸⁴

What state laws are to be seen as equivalent to covered federal laws?

Executive Order 13673 also calls for covered contractors and subcontractors to disclose violations of state laws that are equivalent to the 14 federal laws discussed above.⁸⁵ The order does not identify state laws that are equivalent to these federal laws. The recently issued guidance and regulations partially implementing the order provide no additional clarity other than observing that OSHA-approved state health and safety regulatory plans are equivalent state laws.⁸⁶ Both the order and the recently issued Department of Labor guidance anticipate future guidance identifying the state laws that are equivalent to the 14 earlier-mentioned federal laws.

⁸⁰ 29 U.S.C. §623 & §631.

⁸¹ 29 U.S.C. §626.

⁸² *Id.*

⁸³ 79 Fed. Reg. 9851 (Feb. 20, 2014).

⁸⁴ 29 C.F.R. §10.41-44.

⁸⁵ 79 Fed. Reg. at 45310.

⁸⁶ The OSH Act allows states to control occupational safety and health regulation through state plans. *See* 29 U.S.C. §667. If OSHA approves a state plan, which requires, among other things, that the plan provide health and safety protection that is at least as adequate as the protection provided by OSHA, then the state’s plan obligations apply in lieu of OSHA standards and regulations. 29 U.S.C. §667(e). If OSHA state plans were not recognized as equivalent to the OSH Act, then contractors in states with such plans, who are not subject to federal OSHA regulation, would not have to disclose violations of occupational safety and health laws. This potential gap in coverage is likely why recently issued guidance recognizes OSHA state plans as equivalent state laws despite not identifying any other equivalent state laws.

What are labor compliance advisors (LCAs)?

Executive Order 13673 directs agencies to create a new senior position within each agency—the labor compliance advisor, or LCA. The order seems to anticipate LCAs having knowledge of labor laws that contracting officers and contractors may not have and using this knowledge to assist agency contracting personnel and contractors in complying with the order.⁸⁷ LCAs will have two primary responsibilities: (1) they will guide agency contracting officers on proper courses of action after pre- and post-award disclosures of labor law violations; and (2) they will consult with contractors on compliance with labor laws and proper handling of subcontractor labor violations. These responsibilities relate entirely to the order’s disclosure requirements, and have nothing to do with the order’s paycheck transparency or arbitration requirements.

As mentioned previously in this report, prior to contract award, agency contracting officers will have to consider any disclosed labor law violations when determining contractor responsibility.⁸⁸ Once the order is implemented, LCAs will advise contracting officers in evaluating whether these labor law violations render a contractor nonresponsible or warrant any other action (e.g., remedial measures, compliance assistance, action to prevent further violations, or referral to agency suspending and debaring officials).⁸⁹ During contract performance, LCAs will similarly advise contracting officers of appropriate courses of action when contractors disclose violations of labor laws to the agency through their biannual updates.⁹⁰ These courses of action can include appropriate remedial measures, compliance assistance, resolving issues to avoid further violations, contract termination, non-exercise of contract options, and referral to agency suspending and debaring officials.⁹¹

In addition to aiding agency contracting officers, LCAs will be available to assist contractors in meeting their obligations under Executive Order 13673. Unlike agency contracting personnel, who generally will be required to consult with LCAs under the order, contractors will have no obligation to solicit LCA guidance. Rather, LCAs will be available to contractors who wish to use them. LCAs can “coordinate assistance”⁹² between contractors that want help in addressing and preventing violations of labor laws and relevant enforcement agencies, and, along with agency contracting officers and the Department of Labor, can assist contractors in handling subcontractor disclosures of labor violations.⁹³

⁸⁷ The Clinton Administration responsibility regulations, discussed below, made arguably similar provisions for contracting officers to coordinate with agency legal counsel on nonresponsibility determinations based on vendor noncompliance with covered laws, on the grounds that contracting officers are not trained to assess vendors’ compliance with labor or other non-procurement laws. See Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings: Proposed Rule, 65 Fed. Reg. 40830, 40830 (June 30, 2000).

⁸⁸ 79 Fed. Reg. at 45310.

⁸⁹ *Id.*

⁹⁰ 79 Fed. Reg. at 45311.

⁹¹ *Id.*

⁹² It is unclear how, exactly, LCAs may coordinate assistance between contractors and relevant enforcement agencies as the order and recently issued guidance do not address this issue.

⁹³ 79 Fed. Reg. at 45311.

The Order in Comparison to Existing Law

The questions and answers in this section examine how the requirements of Executive Order 13673 compare to current law and what, if any, changes the order may make to the implementation of federal procurement law. They address (1) agencies' authority to consider violations of labor law in the procurement process prior to Executive Order 13673; (2) the factors agencies have historically considered when assessing vendors' integrity and business ethics in the responsibility determination process; (3) whether labor law violations will factor directly into source selection when Executive Order 13673 is implemented; (4) whether the order will result in prequalification of vendors; (5) whether vendors who disclose labor law violations will be debarred or suspended from government contracts; and (6) whether the order will result in any changes to the Certificate of Competency (COC) process used in determining the responsibility of small businesses.

Did agencies have the authority to consider labor law violations in the procurement process prior to Executive Order 13673?

As previously noted, Executive Order 13673 requires contractors to disclose information regarding their compliance with 14 federal labor laws and their state equivalents, which procuring agencies are then required to consider when making responsibility determinations. (See “What does the executive order require?”). Neither the disclosure of labor law violations, *per se*, nor the consideration of such violations in the responsibility determination process was required prior to the issuance of the executive order.⁹⁴ However, the absence of such requirements does not mean that agencies lacked the authority to consider contractors' compliance with labor laws before the order was issued. Rather, as discussed below, agencies could have considered at least certain labor law violations pursuant to their authority to (1) make responsibility determinations; (2) establish qualification requirements and evaluation factors; and (3) debar and suspend contractors.⁹⁵ Any consideration given to labor law violations was, however, generally within agency officials' discretion prior to the issuance of Executive Order 13673,⁹⁶ rather than required, as it is under the order.⁹⁷ Also, the types of violations considered prior to the order tended to be more limited than those to be considered under the order.

⁹⁴ There are other disclosure requirements that could potentially encompass certain labor law violations. See *infra* “Are government contractors required to make other representations or disclosures?”

⁹⁵ Note also that Congress has, at times, enacted appropriations measures that barred the use of appropriated funds to contract with corporations convicted of certain felonies that could potentially relate to labor law violations. See, e.g., Consolidated Appropriations Act, 2012, P.L. 112-74, §631, 125 Stat. 928 (Dec. 23, 2011).

⁹⁶ But see *infra* notes 104-105 and accompanying text for a discussion of the Federal Awardee Performance and Integrity Information System (FAPIIS) and the information contained in it, which contracting officers have been required to consider when making responsibility determinations since 2008.

⁹⁷ That there was formerly some consideration of labor law violations—although not an across-the-board mandate to consider such violations, as there is with Executive Order 13673—has arguably contributed to differences of opinion as to whether the requirements of the order are to be seen as unprecedented, or as an extension of preexisting authorities and practices. There was similar debate about the Clinton Administration regulations (subsequently revoked) that required consideration of contractors' compliance with labor and other laws, as discussed below (see “How does Executive Order 13673 compare to the Clinton Administration's contractor responsibility regulation?”). Compare PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 13 (1999) (statement of Deidre Lee, Administrator, Office of Federal Procurement Policy) (characterizing the requirement to consider contractors' compliance with the law as an extension and clarification of existing law) with *id.* at 24 (statement of (continued...))

Responsibility Determinations

Prior to Executive Order 13673, agencies had discretion to consider labor law violations while making contractor responsibility determinations during the procurement process. As previously noted, agency contracting officers are generally required to determine that prospective vendors are “affirmatively responsible” for purposes of each individual contract prior to contract award.⁹⁸ Vendors who are not seen as affirmatively responsible are “nonresponsible,” and are ineligible to be awarded a contract.⁹⁹ Responsibility has historically been determined by considering seven “general standards” prescribed in statute and the Federal Acquisition Regulation (FAR), which assess whether the vendor has the requisite facilities, personnel, experience, financial resources, and personal attributes to perform the contract.¹⁰⁰ Depending upon the facts and circumstances of the case, labor law violations could be relevant to any of these factors. Most commonly, though, labor law violations appear to have been considered in determining whether contractors satisfied the general standard of having a “satisfactory record of integrity and business ethics.”¹⁰¹ This is because, as discussed below, in assessing this standard, agency contracting officers historically considered whether the contractor, or its principals, officers, or employees, had been convicted or indicted for criminal offenses. (See “What has historically been considered in assessing integrity in the responsibility determination process?”). Such offenses could have involved labor laws,¹⁰² however, contracting officers were generally seen to have broad discretion as to whether they considered criminal offenses, indictments, or other violations involving labor laws in the responsibility determination process prior to 2008. They were not required to consider this information, as they are under Executive Order 13673.¹⁰³

(...continued)

Representative Christian-Christensen) (“[I]t is not just clarification. This is an expansion to include other areas of responsibility that were never included, that have nothing to do with contracting and the work to be done.”).

⁹⁸ See, e.g., 48 C.F.R. §9.103(b) (“No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”). The requirements as to responsibility determinations generally apply to “all proposed contracts with any prospective contractor” located in the United States, its outlying areas, or elsewhere, unless application of these requirements would be “inconsistent with the laws or customs where the contractor is located.” 48 C.F.R. §9.102(a)(1)-(2). However, proposed contracts with foreign, state, or local governments are exempt from these requirements, as are contracts with other U.S. government agencies or instrumentalities, or agencies for people who are “blind or severely disabled.” 48 C.F.R. §9.102(b)(1)-(3).

⁹⁹ 48 C.F.R. §9.103(b) (“In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.”).

¹⁰⁰ 41 U.S.C. §113(1)-(7); 48 C.F.R. §9.104-1(a)-(g). Agencies may also develop and use “special standards” in assessing responsibility in individual procurements when “unusual expertise or specialized facilities are needed.” 48 C.F.R. §9.104-2(a).

¹⁰¹ 41 U.S.C. §113(4); 48 C.F.R. §9.104-1(d).

¹⁰² See, e.g., PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 12 (statement of James Ballentine, Acting Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, Small Business Administration) (“SBA has processed some [Certificates of Competency, issued to establish the responsibility of small businesses, as discussed below] where violations of labor laws ... are alleged, such as violations pertaining to prevailing wage rates under the Davis-Bacon Act.”).

¹⁰³ Prior to 2008, the FAR required contracting officers to obtain “information sufficient to be satisfied” that the prospective contractor was affirmatively responsible. 48 C.F.R. §9.105-1(a). However, they had broad discretion as to the nature and quantity of information considered. See, e.g., *John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999) (“[T]he contracting officer is the arbiter of what, and how much, information he needs.”). Although they were encouraged to consider other information, they were required to consider only “relevant past performance information” prior to 2008. See 48 C.F.R. §9.105-1(c) (2007).

In 2008, Congress established the Federal Awardee Performance and Integrity Information System (FAPIS) and required contracting officers to consult the information contained in it when making responsibility determinations.¹⁰⁴ FAPIS includes, among other things, information on convictions and certain findings of fault or liability involving federal contractors or grantees holding awards valued in excess of \$10 million (total), or their principal officers, within the past five years “in connection with the award ... or performance ... of a Federal contract or grant.”¹⁰⁵ While the creation of FAPIS may have made it more likely that contracting officers would consider certain labor law violations, FAPIS’s information is more limited than the information that would be considered under Executive Order 13673. FAPIS includes only convictions and certain findings of fault or liability involving “larger” contractors and grantees within the past five years “in connection with” the award or performance of a federal contract or grant.¹⁰⁶ The labor law violations to be disclosed under Executive Order 13673, in contrast, are not limited to ones “in connection with” a federal contract or grant.¹⁰⁷ Executive Order 13673’s disclosure requirements also apply to vendors that do not have contracts or grants valued in excess of \$10 million, so long as the vendor has one contract whose value exceeds \$500,000.¹⁰⁸

Specifications and Evaluation Factors

Other authorities that agencies could potentially have relied upon to consider labor law violations prior to Executive Order 13673 are those regarding agency specifications and evaluation factors. *Specifications* are descriptions of agencies’ technical requirements for supplies or services that include criteria for determining whether those requirements are met,¹⁰⁹ while *evaluation factors* are factors used by agencies in so-called “negotiated procurement” to determine which proposal represents the “best value” for the government.¹¹⁰ Prior to Executive Order 13673, agencies could have drafted specifications that took vendors’ compliance with labor laws into account, which, in turn, could have resulted in the bids or offers of vendors who had committed certain violations being found to be nonresponsive and thus ineligible for selection.¹¹¹ Agencies could similarly have drafted evaluation factors that gave certain weight in the selection process to vendors’

¹⁰⁴ Clean Contracting Act of 2008, P.L. 110-417, §872(e), 122 Stat. 4557 (Oct. 14, 2008).

¹⁰⁵ *Id.* at §872(b)-(c), 122 Stat. 4556. FAPIS is also required to contain all terminations for default, administrative agreements, and nonresponsibility determinations relating to federal contracts during this five-year period. *Id.*

¹⁰⁶ P.L. 110-417, at §872(b)-(c), 122 Stat. 4556.

¹⁰⁷ *See* 80 Fed. Reg. at 30579 (reporting not limited to violations under government contracts). Note also that the proposed DOL guidance regarding the labor law violations to be considered when assessing vendors’ responsibility would define *administrative merits determinations* in such a way that such determinations would not necessarily constitute “finding[s] of fault and liability” in civil or administrative proceedings for purposes of FAPIS. *Compare* 80 Fed. Reg. at 30579-80 (“Administrative merits determinations are not limited to notices and findings issued following adversarial or adjudicative proceedings such as a hearing, nor are they limited to notices and findings that are final and unappealable.”) with 48 C.F.R. §52.209-7.

¹⁰⁸ *See* 79 Fed. Reg. at 45309.

¹⁰⁹ *See* Ralph C. Nash, Jr., Steve L. Schooner, Karen R. O’Brien-DeBakey, & Vernon J. Edwards, *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* 542 (3d ed. 2007).

¹¹⁰ *See id.* at 234. Negotiated procurement is one of two main source-selection methods used by the federal government. In negotiated procurements, the procuring agency bargains with offerors after receiving proposals, and awards the contract to the offeror whose proposal rates most highly on evaluation criteria that include, but are not limited to, cost or price. This is in contrast to the other main source selection method, sealed bidding, wherein the procuring agency awards the contract to the lowest-priced, qualified, responsible bidder without conducting negotiations with the bidders.

¹¹¹ *See, e.g.*, PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 13 (noting the possibility of legal violations indicating that contractors are not “capable of doing the contract they are bidding on”).

compliance with labor laws, making vendors with poor records of compliance less likely to be selected for award.¹¹²

In practice, however, consideration of labor law violations in these contexts appears to have been limited, in part, because of certain legal requirements regarding specifications and evaluation factors. Specifically, the Competition in Contracting Act (CICA) of 1984, as amended, generally requires agencies to “develop specifications in the manner necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.”¹¹³ The regulations implementing CICA further require that the evaluation factors developed by procuring agencies represent “key areas of importance and emphasis to be considered in the source selection decision” and “support meaningful comparison and discrimination between and among competing proposals.”¹¹⁴ In other words, agencies’ use of specifications or evaluation factors taking into consideration labor law violations could generally withstand legal challenges only if such consideration was seen as reasonably related to the agency’s minimum needs,¹¹⁵ and not an attempt to “prefer” one vendor or group of vendors over others for reasons unrelated to the agency’s specific needs.¹¹⁶

Debarment and Suspension

Certain labor law violations could also have been considered in the procurement process prior to Executive Order 13673 pursuant to agencies’ authority to debar or suspend (collectively known as “exclude”) contractors. The FAR expressly authorizes debarment from government contracting—or exclusion for a prescribed period of time (often three years)—for “any ... cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor,” as well as for other grounds discussed below.¹¹⁷ (See “Will contractors who disclose violations be debarred or suspended?”). It similarly authorizes suspension—or temporary exclusion pending the outcome of an investigation of the vendor’s conduct or legal proceedings—on this ground.¹¹⁸ These grounds could have resulted in the exclusion of contractors who committed certain violations of labor laws prior to Executive Order 13673.¹¹⁹ In addition, some federal labor laws—

¹¹² See, e.g., *Jordan Pond Co., LLC v. United States*, 115 Fed. Cl. 623, 628 (Fed. Cl. 2014) (solicitation providing for contractors’ “violations or infractions” of labor laws, among other things, to be considered as a subfactor under the “past performance” evaluation factor); *Southwestern Bell Tel. Co.*, B-292476 (Oct. 1, 2003) (request for proposals calling for contractors to be evaluated, in part, based on their record of integrity and business ethics). See also *Premier Vending*, B-256437 (June 23, 1994) (“[T]raditional responsibility factors ... may be used as technical evaluation factors in a negotiated procurement when a comparative evaluation of those areas is warranted.”).

¹¹³ See 10 U.S.C. §2305(a)(1)(A)(iii) (defense agencies); 41 U.S.C. §3306(a)(1)(C) (civilian agencies).

¹¹⁴ 48 C.F.R. §15.304(b)(1)-(2).

¹¹⁵ See, e.g., *Premier Vending*, B-256437 (June 23, 1994) (“The determination of the agency’s minimum needs and the best method of accommodating them is primarily within the agency’s discretion. ... [W]e will not object to the use of particular evaluation factors or an evaluation scheme so long as the criteria used reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests.”) (internal citations omitted).

¹¹⁶ Cf. 48 C.F.R. §3.101-1 (“Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.”).

¹¹⁷ 48 C.F.R. §9.406-2(c).

¹¹⁸ 48 C.F.R. §9.407-2(c).

¹¹⁹ See, e.g., Kelly Sherrill & Kate McQueen, Note, *The High Price of Campaign Promises: Ill-Conceived Labor Responsibility Policy*, 30 PUB. CONT. L.J. 267, 297 (2001) (noting that contractors could have been debarred or suspended for most violations covered by the Clinton Administration’s responsibility regulations, discussed below); Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation; (continued...)

including the Davis-Bacon, Service Contract, Walsh-Healy, and Drug-Free Workplace Acts—specifically require or authorize exclusion from government contracts for convictions or other violations.¹²⁰ However, whether any labor law violations are considered in exclusion proceedings is generally seen to be within agency officials’ discretion. Agency officials generally also have discretion as to whether vendors are debarred or suspended.¹²¹

What has historically been considered in assessing integrity in the responsibility determination process?

Federal statutes and regulations do not define what is meant by “integrity” in the responsibility determination process. Instead, the term has been interpreted by judicial and administrative tribunals to have “its generally accepted connotation of uprightness of character, moral soundness, honesty, probity, and freedom from corrupting influence or practice.”¹²² Consistent with this interpretation, one prominent treatise on government procurement has noted that “most cases” in which a contractor was determined to be nonresponsible based on lack of integrity have involved criminal offenses by the contractor or the contractor’s employees.¹²³ For example, in one early decision, *Domco Chemical Corporation*, the Government Accountability Office (GAO) denied a protest of a nonresponsibility determination based on lack of integrity where a contractor employee had been convicted for criminal offenses, income tax evasion, and fraud, and an officer had been indicted.¹²⁴ Subsequently, in *Traffic Moving Systems, Inc.*, GAO similarly denied a protest of a nonresponsibility determination based on the criminal conviction of the corporation’s president.¹²⁵

(...continued)

Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation: Final Rule, 66 Fed. Reg. 66986, 66989 (Dec. 27, 2001) (adopting the view that debarment and suspension are the best route to avoid dealings with contractors who violate the laws when repealing the Clinton Administration regulations).

¹²⁰ 40 U.S.C. §3144 (debarment for failure to pay prescribed wages for laborers and mechanics under the Davis-Bacon Act); 41 U.S.C. §6504 (debarment for failure to pay the minimum wage, requiring mandatory and uncompensated overtime, use of child labor, or maintenance of hazardous working conditions under the Walsh-Healy Act); 41 U.S.C. §6707 (debarment for failure to pay compensation due to employees under the Service Contract Act); 41 U.S.C. §8102 (debarment for certain violations of the Drug-Free Workplace Act, e.g., failure to publish a statement notifying employees that the unlawful use of controlled substances in the workplace is prohibited; or having so many employees convicted of criminal drug violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace).

¹²¹ Exclusion under the FAR is discretionary, not mandatory. 48 C.F.R. §9.406-2(a) (“The debarring official *may* debar ...”) (emphasis added); 48 C.F.R. §9.407-2(a) (“The suspending official *may* suspend ...”) (emphasis added). Debarment under the Drug-Free Workplace Act is similarly discretionary. *See* 41 U.S.C. §8102. However, debarment under the Davis-Bacon, Service Contract, and Walsh-Healy Acts is mandatory for specified violations, although only for convictions for these violations, and not for other labor law violations. *See* 40 U.S.C. §3144 (Davis-Bacon Act); 41 U.S.C. §6504 (Walsh-Healy Act); 41 U.S.C. §6707 (Service Contract Act).

¹²² *Domco Chemical Corp.*, 48 Comp. Gen. 769, B-165915, B-166340, B-166751 (June 5, 1969).

¹²³ John Cibinic, Jr. & Ralph C. Nash, Jr., *FORMATION OF GOVERNMENT CONTRACTS* 420 (3d ed. 1998). *See also Campaign Promises*, *supra* note 119, at 277 (noting that “integrity and business ethics” has generally been understood to mean that contractor has not been indicted or convicted of crime involving the contractor’s business conduct).

¹²⁴ B-165915, B-166340, B-166751 (June 5, 1969).

¹²⁵ B-248572 (Sept. 3, 1992).

In other cases, nonresponsibility determinations based on lack of integrity have resulted where an agency finds grounds for suspension,¹²⁶ typically involving violations of criminal statutes;¹²⁷ or criminal investigation reports suggest wrongdoing.¹²⁸ Additional grounds have been raised in specific cases, although non-criminal-related grounds seem to have resulted in determinations of nonresponsibility based on lack of integrity less frequently than criminal-related grounds have.¹²⁹

Will labor violations factor directly into source selection?

Executive Order 13673 and its proposed implementing guidance and regulations do not contemplate that contractors' labor violations (or lack thereof) will factor directly into the source selection process in the sense that the vendor with the better record as to labor violations necessarily wins. Instead, under the proposed FAR amendments implementing the order, prospective vendors would be required to represent, as part of their bid or offer, and semiannually thereafter, whether

any administrative merits determination, arbitral award or decision, or civil judgment [was] rendered against [them] within the three-year period prior to the date of [their] offer for violations of labor laws.¹³⁰

Any contractors that fail to make the requisite representation would apparently be ineligible for an award insofar as their bids or offers would be nonresponsive to the terms of the solicitation.

The contracting officer would then review the bids or offers to determine which one is the lowest priced or represents the "best value" for the government. It is at this point that the contracting officer would assess the responsibility of the vendor(s) in line for the proposed award and, in the case of contractors who had represented that they had been implicated in covered labor violations, the contracting officer would request or review information regarding the law(s) violated.¹³¹ The contracting officer would also invite the vendor to submit any additional information that it deems necessary to establish its responsibility (e.g., mitigating circumstances, remedial measures).¹³² The contracting officer would consider all this information in determining whether the vendor is to be seen as responsible for purposes of the contract award. If the vendor were

¹²⁶ See, e.g., Standard Tank Cleaning Corp., B-245364 (Jan. 2, 1992); Mayfair Constr. Co., B-192023 (Sept. 11, 1978); Greenwood's Transfer & Storage Co., Inc., B-186438 (Aug. 17, 1976); Colonial Baking Co., B-185305 (July 20, 1976); P.T. & L. Constr. Co., 55 Comp. Gen. 343, B-183966 (Oct. 2, 1975).

¹²⁷ See FORMATION OF GOVERNMENT CONTRACTS, *supra* note 123, at 420.

¹²⁸ See, e.g., Garten-und Landschaftsbau GmbH Frank Mohr, 90-1 CPD 186, B-237276 (Feb. 13, 1990); Frank Cain & Sons, Inc., 90-1 CPD 44, B-236893 (Jan. 11, 1990).

¹²⁹ ESCO, Inc., B-225565 (Apr. 29, 1987) (allegations of impropriety in the proposal process); Krug Int'l, B-232291.2 (Feb. 6, 1989) (labor mischarging, contract administration, defective pricing).

¹³⁰ 80 Fed. Reg. at 30568.

¹³¹ *Id.* ("If the box at paragraph (q)(2)(ii) of this clause is checked [indicating that the contractor is the subject of covered labor violations] and the Contracting Officer has initiated a responsibility determination and has requested additional information, the Offeror shall provide the following (A) [i]n the [System for Award Management] 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) [t]he labor law violated[;] (2) [t]he case number, inspection number, charge number, docket number, or other unique identification number[;] (3) [t]he date rendered[;] and] (4) [t]he name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision.").

¹³² *Id.* at 30569.

deemed nonresponsible, the contracting officer would turn to the next lowest priced bidder, in the case of procurements conducted via sealed bidding, or the next most highly rated offeror, in the case of negotiated procurements, and assess that vendor's responsibility.¹³³ (The contracting officer could also refer the vendor to agency suspending and debaring officials for exclusion, as discussed below. See "Will contractors who disclose violations be debarred or suspended?").

At no point in this process would the contracting officer weigh Vendor A's record of compliance with labor laws against Vendor B's record in determining which bid is the lowest priced, or which offer represents the "best value." Some commentators have called for vendors' record of compliance with labor and employment laws to be utilized in this way.¹³⁴ However, to date, this is not the approach the Obama Administration has adopted.

Will the executive order result in prequalification of contractors?

Executive Order 13673 does not appear to contemplate the prequalification of vendors, or the development of a qualified bidders list, based on contractors' disclosures. *Prequalification* involves the determination of a vendor's responsibility prior to any solicitation; that is, the "determination of an offeror's eligibility to *compete* for a government contract."¹³⁵ Some states that currently require consideration of contractors' labor law violations in the award of contracts, as Executive Order 13673 does through the responsibility determination process, also rely upon prequalification of vendors. For example, Connecticut bars the award of contracts to persons who have "been cited for three or more willful or serious violations of any occupational safety or health [(OSH)] act" or meet certain other criteria.¹³⁶ It also generally provides for persons to apply for prequalification for state contracts, a process that includes consideration of whether the applicant is disqualified for OSH violations, among other things.¹³⁷

Federal law, however, arguably calls for a different approach, particularly when the executive acts without express statutory authority requiring or permitting the use of prequalification. This is because the Competition in Contracting Act of 1984, as amended, generally constrains agencies' use of *qualification requirements*, or "requirements for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract."¹³⁸ Among other things, CICA prescribes that agencies take specified steps prior to enforcing any qualification requirement. These steps include (1) preparing a written justification stating the necessity for the requirement and why the requirement must be demonstrated before award; and (2) specifying in writing all requirements that offerors (or products) must satisfy to become qualified, with these

¹³³ For more on negotiated procurement and sealed bidding, see *supra* note 110.

¹³⁴ See, e.g., Paul K. Sonn & Tsedeye Gebreselassie, *The Road to Responsible Contracting: Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services*, 31 BERKELEY J. EMP. & LAB. L. 459 (2010) (advocating, among other things, establishing a preference in the selection process for employers that provide good jobs, as determined by factors such as their provision of "living wages," health benefits, and paid sick days to employees); David Madland & Karla Walter, *Uncle Sam's Purchasing Power: How to Leverage Government Spending to Promote Good Jobs*, 31 BERKELEY J. EMP. & LAB. L. 425 (2010) (calling for "job quality" to be considered in negotiated procurements, with significant weight given to low turnover rates, the provision of livable wages, and the availability of quality benefits or paid leave).

¹³⁵ GOVERNMENT CONTRACTS REFERENCE BOOK, *supra* note 109 (emphasis in original).

¹³⁶ CONN. GEN. STAT. §31-57b (2014).

¹³⁷ CONN. GEN. STAT. §41-100 (2014).

¹³⁸ 10 U.S.C. §2319(a) (procurements of defense agencies); 41 U.S.C. §3311(a) (procurements of civilian agencies).

“requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the ... requirement.”¹³⁹ CICA’s provisions here have generally been seen to limit (although not prohibit) the use of prequalification by federal agencies.¹⁴⁰

Will contractors who disclose violations be debarred or suspended?

Contractors who disclose violations of labor laws pursuant to Executive Order 13673 could potentially face debarment or suspension (collectively known as exclusion) as a result of their disclosures, but would not necessarily be excluded as a consequence of disclosing one or more violations. (*Debarment* is an exclusion from government contracting for a prescribed period of time (often three years), while *suspension* is a temporary exclusion, pending an investigation of the vendor’s conduct or legal proceedings involving the vendor.) Executive Order 13673 contemplates agency contracting officers and labor compliance advisors referring matters disclosed to them by contractors to agency suspending and debarring officials for consideration “in accordance with agency procedure.”¹⁴¹ However, it does not purport to require such referral in every case, or in any specific case or cases. Instead, it leaves contracting officers and labor compliance advisors with discretion to determine if and when particular disclosures should be referred to the suspending and debarring officials.¹⁴²

Once a referral is made, suspending and debarring officials would consider whether the disclosed information involves a ground for exclusion under the FAR. As previously noted, these grounds encompass “any ... cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor,”¹⁴³ as well as other grounds noted in **Table 1** below. One or more of these grounds could potentially be found to apply depending upon the facts and circumstances of the case. However, any debarment or suspension proceeding that is conducted would have to comport with the requirements of the FAR, which generally provides for contractors to receive notice and an opportunity for a hearing regarding their exclusion.¹⁴⁴ Such hearings are to take place before any debarment,¹⁴⁵ although they could potentially take place after a suspension.¹⁴⁶ These procedural requirements are intended to protect contractors’ due process rights in the exclusion process.¹⁴⁷

¹³⁹ 10 U.S.C. §2319(b); 41 U.S.C. §3311(b). *See also* 48 C.F.R. Subpart 9.2 (qualifications requirements).

¹⁴⁰ *See, e.g.,* Ralph C. Nash, Jr., *Prequalification: Can It Be Used to Improve the Procurement Process?*, 10 NASH & CIBINIC REP. ¶16 (Apr. 1996) (noting cases in which the use of prequalification has been upheld, or rejected).

¹⁴¹ 79 Fed. Reg. at 45310. *See also* Implementation of the President’s Executive Order, *supra* note 6, Attachment, at pg. 6 (noting that labor compliance advisors are to advise and assist contracting officers and “other agency officials” regarding actions in response to labor law violations, including referral to agency suspending and debarring officials).

¹⁴² *But see infra* note 148 and accompanying text (noting that more consideration may be given to exclusion in cases where the facts and circumstances are such that the possibility of multiple nonresponsibility determinations based on the same information could potentially be said to result in impermissible *de facto* debarment).

¹⁴³ 48 C.F.R. §9.406-2(c) (debarment); 48 C.F.R. §9.407-2(c) (suspension).

¹⁴⁴ *But see Shoot First, Ask Questions Later, supra* note 11, at 551 (opining that companies that are effectively excluded because they have been given a notice of suspension or proposed debarment lack these due process protections).

¹⁴⁵ *See* 48 C.F.R. §9.406-3(b)(1) (“Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor ... an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the ... debarment.”).

¹⁴⁶ *See* 48 C.F.R. §9.407-3(c)(5) (“When a contractor and any specifically named affiliates are suspended, they shall be immediately advised by certified mail, return receipt requested ... [t]hat, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the (continued...)”).

Where the facts and circumstances of the case are such that multiple determinations of nonresponsibility might be made over time based on the same information, agency officials could potentially be inclined toward exclusion in order to avoid the allegations of impermissible *de facto* debarment that could follow from repeated determinations of nonresponsibility, as discussed below. (See ““What is de facto debarment, and will implementation of the order result in de facto debarment of contractors?””). In other cases, however, agency officials may be more likely to encourage contractors whose disclosed violations could constitute grounds for exclusion to enter into labor compliance agreements than they are to debar or suspend them. Several provisions in the proposed materials implementing Executive Order 13673 could be read to suggest a preference for such agreements, rather than for exclusion.¹⁴⁸

Table I. Grounds for Debarment and Suspension under the FAR

Grounds for Debarment (48 C.F.R. §9.406-2)	Grounds for Suspension (48 C.F.R. §9.407-2)
<p>Conviction of or civil judgment for:</p> <p>(1) fraud or a criminal offense in connection with obtaining or performing a government contract or subcontract;</p> <p>(2) violations of antitrust laws relating to the submission of bids or offers;</p> <p>(3) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;</p> <p>(4) intentionally affixing a “Made in America” designation to an ineligible product;</p> <p>(5) any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor</p>	<p>Indictment for or other adequate evidence of:</p> <p>(1) fraud or a criminal offense in connection with obtaining or performing a government contract or subcontract;</p> <p>(2) violations of antitrust laws relating to the submission of bids or offers;</p> <p>(3) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;</p> <p>(4) violations of the Drug-Free Workplace Act;</p> <p>(5) intentionally affixing a “Made in America” designation to an ineligible product;</p> <p>(6) certain unfair trade practices;</p> <p>(7) delinquent federal taxes in an amount exceeding</p>

(...continued)

suspension, including any additional specific information that raises a genuine dispute over the material facts.”).

¹⁴⁷ See, e.g., *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (holding that while government contractors may not have a right to prospective government contracts, “that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such a person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts”). Due process, where it applies, may require that persons receive notice and opportunity to be heard before the government deprives them of life, liberty, or property. U.S. CONST. Amend. V (“No person shall be ... deprived of life, liberty, or property, without due process of law.”).

¹⁴⁸ See, e.g., 79 Fed. Reg. at 45310 (“A contracting officer, prior to making an award, shall, as part of the responsibility determination, provide an offeror ... an opportunity to disclose any steps taken to correct the violations of or improve compliance with the [covered] labor laws ..., including any agreements entered into with an enforcement agency. The agency’s Labor Compliance Advisor ... in consultation with relevant enforcement agencies, shall advise the contracting officer whether 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.”); 80 Fed. Reg. at 30582 (“[P]ervasive violations and violations of particular gravity, among others, will in most cases result in the need for a labor compliance agreement.”). See also Michael Schrier, *Issues of Concern in Proposed Government Contractor Labor Rules*, LAW360, June 2, 2015 (opining that Executive Order 13673 will “fundamentally alter the way federal contractors and subcontractors handle and resolve employment and labor claims and compliance issues involving their entire workforces”).

Grounds for Debarment (48 C.F.R. §9.406-2)	Grounds for Suspension (48 C.F.R. §9.407-2)
<p>A preponderance of the evidence suggests:</p> <p>(1) willful failure to perform in accordance with the terms of one or more contracts; or a history of failure to perform, or of unsatisfactory performance of, one or more contracts;</p> <p>(2) violations of the Drug-Free Workplace Act;</p> <p>(3) intentionally affixing a “Made in America” designation on an ineligible product;</p> <p>(4) certain unfair trade practices;</p> <p>(5) delinquent federal taxes in an amount exceeding \$3,000;</p> <p>(6) knowing failure to timely disclose to the government violations of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations, violations of the civil False Claims Act, or significant overpayments in connection with the award, performance, or closeout of a government contract</p> <p>A determination by the Secretary of Homeland Security or the Attorney General that the contractor is not in compliance with the employment provisions of the Immigration and Nationality Act</p> <p>Any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor</p>	<p>\$3,000;</p> <p>(8) knowing failure to timely disclose to the government violations of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations, violations of the civil False Claims Act, or significant overpayments in connection with the award, performance, or closeout of a government contract;</p> <p>(9) any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a contractor or subcontractor</p> <p>Any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor</p>

Source: Congressional Research Service, based on various sources cited in **Table I**.

Will there be changes in the Certificate of Competency process used in determining the responsibility of small businesses?

The standard responsibility determination process, previously noted (see “Did agencies have the authority to consider labor law violations in the procurement process prior to Executive Order 13673?”), is somewhat different in cases involving “small businesses.”¹⁴⁹ While the contracting officers of the procuring agencies are the arbiters of whether other-than-small businesses are seen to be responsible sources,¹⁵⁰ Section 8(b)(7) of the Small Business Act of 1958, as amended, provides that the Small Business Administration (SBA)—not the contracting officer—is to determine whether small businesses constitute responsible sources. In particular, Section 8(b)(7) requires that agency contracting officers refer the cases of any “otherwise qualified” small businesses that may be seen as nonresponsible to the SBA, which is to investigate the matter and may then certify to the procuring agency as to “all elements of [the firm’s] responsibility,

¹⁴⁹ For purposes of federal procurement law, a small business is one that is “independently owned and operated”; is “not dominant in its field of operation”; and meets any size standards established by the Administrator of Small Business. The Administrator has established standards which specify firm size by North American Industrial Classification System (NAICS) code and provide, for example, that recreational vehicle dealers are small if their annual receipts (averaged over three years) are less than \$32.5 million, while line-haul railroads are small if they have fewer than 1,500 employees. *See generally* 15 U.S.C. §632(a)(1)-(2); 13 C.F.R. §§121.101-121.201.

¹⁵⁰ *See generally* 48 C.F.R. §9.103(b) (“No purchase or award shall be made unless *the contracting officer* makes an affirmative determination of responsibility.”) (emphasis added).

including, but not limited to, capability, competency, capacity, credit, *integrity*, perseverance, and tenacity.”¹⁵¹ If the SBA issues such a certification, known as a Certificate of Competency, the procuring agency is required to accept the SBA’s judgment, and may not require the small business to meet “any other requirements of responsibility.”¹⁵²

Neither Executive Order 13673 nor its proposed implementing materials, to date, appear to contemplate any changes in the Certificate of Competency process. This process could potentially serve to lessen somewhat any adverse effects of the order on small businesses—a topic of concern to some commentators¹⁵³—by providing a check upon agency contracting officers and labor compliance advisors and protecting small businesses from nonresponsibility determinations in borderline cases. However, it seems likely that the SBA would continue to base its determinations as to whether to grant certificates of competency upon the same general standards of responsibility used by the procuring agencies and, thus, would also take any reported violations of labor law into consideration when determining whether to issue a certificate of competency.¹⁵⁴

Other Questions

The questions and answers in this section address the President’s authority to impose the requirements of Executive Order 13673, as well as *de facto* debarment, challenges to responsibility determinations, contractor representations and disclosures on other matters, and penalties for false certifications. This section also addresses the relationship between Executive Order 13673 and certain amendments made to the FAR by the Clinton Administration and subsequently revoked, and potential congressional responses to the executive order.

What is the President’s authority to impose these requirements?

When issuing Executive Order 13673, President Obama expressly noted the authority of 40 U.S.C. §121 and the promotion of “economy and efficiency” in federal contracting.¹⁵⁵ In so doing, he referenced the specific citation to and general language of provisions of the Federal Property and Administrative Services Act of 1949 (FPASA), as amended, which authorize the President to “prescribe policies and directives that [he] considers necessary” to provide the “Federal Government with an economical and efficient system for ... [p]rocuring and supplying property and ... services,” among other things.¹⁵⁶ This is the same authority that President Obama

¹⁵¹ 15 U.S.C. §637(b)(7)(A)-(B) (emphasis added).

¹⁵² 48 C.F.R. §19.602-4(b) (“The contracting officer shall award the contract to the concern in question if the SBA issues a [certificate of competency] after receiving the referral. An SBA-certified concern shall not be required to meet any other requirements of responsibility. SBA [certificates of competency] are conclusive with respect to all elements of responsibility of prospective small business contractors.”).

¹⁵³ See, e.g., Ryan Roberts, Ryan Munitz, & Bryce Chadwick, *The Changing Landscape for Services Contractors*, Jan. 22, 2015, available at <http://www.governmentcontractsblog.com/2015/01/articles/subcontracts/the-changing-landscape-for-services-contractors>. Similar concerns were expressed about the Clinton Administration responsibility regulations, discussed below. See, e.g., PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 1.

¹⁵⁴ Cf. *The High Price of Campaign Promises*, *supra* note 119, at 269 (expressing the view that the SBA was likely to use the Clinton Administration’s responsibility regulations in determining whether to issue certificates of competency during any period when such regulations were in effect).

¹⁵⁵ 79 Fed. Reg. at 45309.

¹⁵⁶ 40 U.S.C. §§101(1) & 121(a).

and other Presidents have previously relied upon when imposing requirements upon the procurement process, as **Table 2** illustrates.

Many requirements imposed by Presidents under the authority of FPASA have been seen to involve “housekeeping” matters,¹⁵⁷ and have not been subject to legal challenge. However, certain requirements have been challenged on the grounds that they exceed the President’s authority.¹⁵⁸ Such challenges have generally failed where a “sufficiently close nexus” between the challenged requirements and economy and efficiency in federal procurement is seen to exist.¹⁵⁹ In applying this “nexus test” in *AFL-CIO v. Kahn*, the U.S. Court of Appeals for the District of Columbia Circuit expressly noted that *economy* and *efficiency* are “not narrow terms,” and can encompass factors such as “price, quality, suitability, and availability of goods or services.”¹⁶⁰ Subsequent courts have taken a similarly broad view, finding that challenged requirements have the requisite nexus if they can be said to have an “attenuated link” to economy and efficiency in procurement,¹⁶¹ or if the President’s explanation for how an order promotes efficiency and economy is “reasonable and rational.”¹⁶²

Only those requirements which are seen to have too attenuated a link to economy and efficiency,¹⁶³ or which are specifically barred by a federal statute,¹⁶⁴ will generally be invalidated. Neither seems likely here under current precedents, at least as to the labor violation provisions that are generally the focus of discussions of Executive Order 13673.¹⁶⁵ President Obama, the

¹⁵⁷ See, e.g., *AFL-CIO v. Kahn*, 618 F.2d 784, 800 (D.C. Cir. 1979) (McKinnon, J., dissenting) (viewing FPASA as intended to give the President “comparatively narrow authority to manage the procurement of federal government property, supplies, and services”); Peter E. Quint, *The Separation of Powers under Carter*, 62 TEX. L. REV. 785, 792 (1984) (“[FPASA] easily could be read as authorizing the President to do little more than issue relatively modest housekeeping regulations relating to procurement practice.”).

¹⁵⁸ See generally archived CRS Report R41866, *Presidential Authority to Impose Requirements on Federal Contractors*, by Kate M. Manuel.

¹⁵⁹ *Chrysler Corporation v. Brown*, 441 U.S. 281, 305 (1979).

¹⁶⁰ 618 F.2d at 789.

¹⁶¹ *UAW-Labor Empl. & Training Corp. v. Chao*, 325 F.3d 360, 362, 366-67 (D.C. Cir. 2003) (“The link may seem attenuated ..., and indeed one can with a straight face advance an argument claiming opposite effects or no effects at all. But in *Kahn*, too, there was a rather obvious case that the order might in fact increase procurement costs (as it plainly did in the short run); under *Kahn*’s lenient standards, there is enough of a nexus.”).

¹⁶² *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726, 738 (S.D. Md. 2009) (“*Liberty Mutual* [which is discussed below] requires that there be a ‘reasonably close nexus’ between the Executive Order and the Procurement Act’s policy goals. ... The Court understand this close nexus requirement to mean little more than that President’s explanation for how an Executive Order promotes efficiency and economy must be reasonable and rational.”).

¹⁶³ See *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981) (striking down a Department of Labor determination that firms that underwrite workers’ compensation policies for federal contractors are subject to the antidiscrimination and affirmative action requirements generally imposed on federal contractors pursuant to Executive Order 11246, as amended, on the grounds that the requirement is too far removed from what Congress had in mind when it authorized the President to issue “policies and directives” promoting economy and efficiency in procurement).

¹⁶⁴ See *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (finding that Executive Order 12954 directing the Secretary of Labor to promulgate regulations providing for the debarment of contractors who hire permanent replacements for striking workers was invalid because the National Labor Relations Act (NLRA) “preserved to employers the right to permanently replace economic strikers as an offset to the employees’ right to strike,” and the executive order conflicted with the NLRA).

¹⁶⁵ But see Ben James, *Obama Order Will Cause Contracting “Chaos,” Att’ys Tell House*, LAW360, Feb. 26, 2015 (noting testimony at a 2015 House hearing to the effect that Executive Order 13673’s provisions regarding mandatory arbitration could run afoul of Federal Arbitration Act). Some commentators had noted that the Clinton Administration regulations, discussed below, were “inconsistent” with FAR provisions requiring agencies to remain “impartial (continued...)”).

Department of Labor, and the FAR Council have all proffered explanations of how disclosure of contractors’ labor law violations will promote economy and efficiency in procurement. For example, in issuing its proposed guidance regarding what violations are to be considered in implementing the order, DOL emphasized that contractors’ labor law violations

create risks to the timely, predictable, and satisfactory delivery of goods and services to the Federal Government, and federal agencies risk poor performance by awarding contracts to companies with histories of labor law violations. Poor workplace conditions lead to lower productivity and creativity, increased workplace disruptions, and increased workforce turnover. For contracting agencies, this means receipt of lower quality products and services, and increased risk of project delays and cost overruns.¹⁶⁶

Given such statements, the link between the labor law disclosure requirements and economy and efficiency appears unlikely to be seen as too attenuated—or unreasonable or irrational—under current precedents, which have opined that an alleged link to procurement is not to be seen as too attenuated just because “one can with a straight face advance an argument claiming opposite effects or no effects at all.”¹⁶⁷ The *Kahn* court similarly noted that economy and efficiency can be said to result even if challenged requirements could result in higher prices.¹⁶⁸ Also, no conflicts between specific statutory requirements and the disclosure or consideration of labor law violations in the responsibility determination process have been noted to date.

**Table 2. Selected Executive Orders Issued, at Least in Part,
Under the Authority of FPASA §§201 and 205**

Executive Order	General Requirements
E.O. 10,579, Regulations Relating to the Establishment and Operation of Interagency Motor-Vehicle Pools and Systems, 19 Fed. Reg. 7925 (Nov. 30, 1954)	Directed that pools or systems based, in whole or in part, on the use of privately owned vehicles and facilities shall be preferred to government ownership of vehicles and facilities to the extent that it is feasible to provide required motor-vehicle services of “satisfactory quality and cost” from commercial or other private sources

(...continued)

concerning any dispute between labor and contractor management.” *See, e.g.*, PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 96. However, conflicts with regulatory provisions that do not have an express statutory basis do not appear to have served as a basis for invalidating executive requirements as to procurement in the past.

¹⁶⁶ 80 Fed. Reg. at 30575. *See also* 79 Fed. Reg. at 453099 (“This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws. Labor laws are designed to promote safe, healthy, fair, and effective workplaces. 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. Helping executive departments and 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.”); 80 Fed. Reg. at 30548 (“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.”).

¹⁶⁷ *UAW-Labor Empl. & Training*, 325 F.3d at 362, 366-67.

¹⁶⁸ *Kahn*, 618 F.2d at 792.

Executive Order	General Requirements
E.O. 12,092, Prohibition Against Inflationary Procurement Practices, 43 Fed. Reg. 51375 (Nov. 1, 1978) (upheld in <i>AFL-CIO v. Kahn</i> , 618 F.2d 784 (D.C. Cir. 1979) (en banc))	Required that agency contracts incorporate clauses obligating contractors, and their subcontractors and suppliers, to comply with certain otherwise voluntary wage and price standards to be established by the Council on Wage and Price Stability pursuant to the order
E.O. 12,432, Minority Business Enterprise Development, 48 Fed. Reg. 32551 (July 18, 1983)	Required each federal agency with “substantial” procurement responsibilities to produce and submit annually to the Cabinet Council on Trade minority business enterprise development plans that include goals and methods for encouraging prime contractors and grantees to use minority business enterprises
E.O. 12,954, Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts, 60 Fed. Reg. 13023 (Mar. 8, 1995) (struck down in <i>Chamber of Commerce v. Reich</i> , 74 F.3d 1322 (D.C. Cir. 1996))	Authorized the Secretary of Labor to debar contractors who permanently replaced lawfully striking workers, and to make findings that it is appropriate to terminate for convenience the contracts of such contractors
E.O. 13,005, Empowerment Contracting, 61 Fed. Reg. 26069 (May 21, 1996)	Directed the heads of specified agencies to develop policies and procedures to ensure that the agencies, to the extent permitted by law, grant qualified large and small businesses appropriate incentives to encourage business activity in areas of general economic distress, including a price or an evaluation credit
E.O. 13,201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, 66 Fed. Reg. 11221 (Feb. 17, 2001) (upheld in <i>UAW-Labor Emp’l & Training Corp. v. Chao</i> , 325 F.3d 360 (D.C. Cir. 2003))	Generally required agencies to incorporate in their contracts terms obligating the contractor to post notices stating that: “Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees.”
E.O. 13,208, Amendment to Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Contractors’ Labor Relations on Federal and Federally Funded Construction Projects, 66 Fed. Reg. 18717 (Apr. 6, 2001)	Provided that agencies may, upon the application of an awarding authority, a recipient of grants or financial assistance, a party to a cooperative agreement, or a construction manager acting on behalf of the foregoing, exempt particular projects from the requirements of any or all of the provisions of Sections 1 and 3 of Executive Order 13202 (pertaining to the use of project labor agreements), if certain conditions are met
E.O. 13,279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 Fed. Reg. 77141 (Dec. 16, 2002)	Amended Section 204 of Executive Order 11,246 to authorize the Secretary of Labor, when he or she deems that “special circumstances in the national interest” so require, to exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of the order (which pertains to contractors’ anti-discrimination obligations) in any specific contract, subcontract, or purchase order
E.O. 13,465, Amending Executive Order 12989, as Amended, 73 Fed. Reg. 33285 (June 11, 2008) (upheld in <i>Chamber of Comm. v. Napolitano</i> , 648 F. Supp. 2d 726 (S.D. Md. 2009))	Directed executive agencies to require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the work authorization of new hires, and of current employees working on the contract
E.O. 13,495, Nondisplacement of Qualified Workers under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009)	Generally required that service contracts include a clause obligating the contractor, and its subcontractors, under a successor contract to offer those employees employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified

Executive Order	General Requirements
E.O. 13,502, Use of Project Labor Agreements for Federal Construction Contracts, 74 Fed. Reg. 6985 (Feb. 6, 2009)	Established that agencies may, in awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, on a project-by-project basis, require the use of project labor agreements by contractors provided certain conditions are met
E.O. 13,513, Federal Leadership on Reducing Text Messaging while Driving, 74 Fed. Reg. 51225 (Oct. 1, 2009)	Required agencies to encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while performing any work for or on behalf of the government

Source: Congressional Research Service, based on various sources cited in **Table 2**.

What is *de facto* debarment, and will implementation of the order result in *de facto* debarment of contractors?

The term *de facto debarment* generally refers to exclusion outside of the formal suspension and debarment process.¹⁶⁹ It can be seen as improper on this basis alone, because it involves agency action that is not in compliance with the law.¹⁷⁰ In addition, conduct that constitutes *de facto* debarment can be seen to violate contractors' rights to due process by depriving them of protected liberty interests in being able to challenge allegations about their integrity that could deprive them of their livelihood without notice or an opportunity for a hearing.¹⁷¹ As was previously discussed, notice and an opportunity for a hearing are provided in exclusion proceedings. (See "Will contractors who disclose violations be debarred or suspended?"). However, they are generally not provided in the responsibility determination process.¹⁷² Repeated determinations of nonresponsibility made upon the same basis have been found to constitute impermissible *de facto* debarment,¹⁷³ as have agency statements or conduct evidencing a refusal to do business with a contractor without formally excluding the contractor.¹⁷⁴

¹⁶⁹ See *supra* note 12 and accompanying text.

¹⁷⁰ See, e.g., *Gonzalez*, 334 F.2d at 576 (recognizing that contractors have a "right not to be debarred except in an authorized and procedurally fair manner"); *Becker & Schwindenhammer, GmbH*, 87-1 CPD 235, B-225396 (Mar. 2, 1987) ("[I]t is improper for a contracting agency to exclude a firm from contracting with it without following the procedures for suspension and debarment ...").

¹⁷¹ See, e.g., *Old Dominion Dairy Prods.*, 631 F.2d at 955-56 ("[W]hen the Government effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity, due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken.").

¹⁷² *But see* Gen. Servs. Admin. (GSA), Acquisition Manual Part 509.105-2(a); 48 C.F.R. §509.105-2(a) (providing for contractors to receive written notice of nonresponsibility determinations, as well as the basis for such determinations, when making bids or offers to GSA).

¹⁷³ See, e.g., *Old Dominion Dairy Prods.*, 631 F.2d 955 (determination of nonresponsibility for one contract based on the fact that a contractor had been found nonresponsible for a prior award); *Becker & Schwindenhammer, GmbH*, 87-1 CPD 235, B-225396 (Mar. 2, 1987) (recognizing multiple determinations of nonresponsibility on the same basis as potentially constituting *de facto* debarment); *Admin., Gen. Servs. Admin.*, 43 Comp. Gen. 140, B-151269 (Aug. 8, 1963) ("It is apparent that the continued refusal to award contracts to a particular company on the basis of nonresponsibility subsequent to the initial determination of nonresponsibility could operate to deny the bidder of the right to defend himself against the charge of nonresponsibility and to indefinitely deprive him of procurement awards from [the] administration.").

¹⁷⁴ See, e.g., *Phillips v. Mabus*, 894 F. Supp. 2d 71 (D.D.C. 2012) (contractor alleged, among other things, that multiple Navy officers had stated the contractor would not be awarded any future contracts); *Trifax Corp. v. Dist. of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003) (government conduct having the "broad effect of largely precluding [the contractor] (continued...)

Some commentators have expressed concern that implementation of Executive Order 13673 will result in the *de facto* debarment of contractors who disclose labor law violations.¹⁷⁵ Others disagree, arguing that vendors will receive more procedural protections under the executive order than under current law, which, as previously noted, generally does not provide for vendors to receive notice or an opportunity for a hearing before being determined to be nonresponsible.¹⁷⁶ Which of these two views proves to be correct seems likely to depend upon how Executive Order 13673 is implemented by the procuring agencies.

The potential for impermissible *de facto* debarment could be said to exist, particularly insofar as the order can be seen as an attempt to standardize agencies' consideration of labor law violations in the responsibility determination process.¹⁷⁷ Standardization could make it more likely for multiple contracting officers to make the same determination as to responsibility based on the same information. Multiple determinations of nonresponsibility based on the same information are not necessarily impermissible, particularly if that information is the most recent information available.¹⁷⁸ However, the order expressly calls for contracting officers to consider labor law violations over the past three years when making responsibility determinations,¹⁷⁹ and determinations based on the same older information could be more likely to be seen as a systematic attempt to exclude a vendor outside the formal exclusion process, than as the result of individual contracting officers independently reaching the same conclusion.¹⁸⁰

On the other hand, agencies could potentially develop practices or procedures whereby they routinely pursue exclusion or labor compliance agreements in situations where there could be

(...continued)

from pursuing government work"); *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594 (D.C. 1993) (exclusion from virtually all government work for a period of time); *Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191 (D.D.C. 1990) (agency refused to award the contractor two contracts for which the contractor had been the lowest bidder because it had determined that the agency should no longer do business with the contractor at the submarine base); *Art-Metal USA, Inc. v. Solomon*, 473 F. Supp. 1 (D.D.C. 1978) (government terminated one contract and held in abeyance the award of another four contracts for which the vendor had bid or offered); *TLT Constr. Co. v. United States*, 50 Fed. Cl. 212, 215 (Fed. Cl. 2012) (categorical statements that contractors will not be awarded any future contracts).

¹⁷⁵ See, e.g., U.S. Chamber of Commerce, Testimony, *The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat*, House Hearing, *supra* note 9, Feb. 26, 2015 (copy on file with the authors).

¹⁷⁶ See, e.g., Testimony, Campaign for Quality Construction et al., *Statement in Support of the Fair Pay and Safe Workplaces Executive Order 13673*, House Hearing, *supra* note 9, Feb. 26, 2015 (copy on file with the authors).

¹⁷⁷ Cf. PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 17 (noting, of the Clinton Administration responsibility regulations, discussed below, that "it appears that the goal is to have every contracting officer determine contractor responsibility the same way"); *Campaign Promises*, *supra* note 119, at 285 ("Logically, if one Contracting Officer deems a contractor generally nonresponsible, then the next Contracting Officer will too. Before long, consecutive nonresponsibility determinations will result in *de facto* debarment ...").

¹⁷⁸ *Standard Tank Cleaning Corp.*, B-245364 (Jan. 2, 1992) ("This in our view did not constitute an exclusion from government contracting or subcontracting or, in other words, a *de facto* debarment or suspension, because while more than one nonresponsibility determination was made they involved virtually contemporaneous procurements of similar services and, were based upon essentially the same current information indicating Standard Tank's lack of responsibility."); *Becker & Schwindenhammer, GmbH*, 87-1 CPD 235, B-225396 (Mar. 2, 1987) ("This ... is not a case of *de facto* suspension or debarment because the nonresponsibility determinations involved practically contemporaneous procurements of similar construction services and were based on current information indicating [the vendor's] lack of responsibility").

¹⁷⁹ See 79 Fed. Reg. at 4513. This three-year time frame appears intended to encompass situations where a firm had one violation 2 ½ years ago and another two weeks ago, and the contracting officer bases the determination of nonresponsibility on the facts and circumstances surrounding the two violations, considered together.

¹⁸⁰ See sources cited *supra* note 173.

multiple determinations of nonresponsibility based on the same older information. If that were the case, *de facto* debarment could potentially be avoided, although labor rights activists and competing vendors might then raise concerns about the award of contracts to entities that they believe ought to have been found nonresponsible based on their labor law violations.¹⁸¹ (See below “Can nonresponsibility determinations be challenged?”).

Can nonresponsibility determinations be challenged?

As previously noted, contractors are generally not entitled to notice and an opportunity for a hearing prior to being found nonresponsible for the award of a federal contract (see “What is *de facto* debarment, and will implementation of the order result in *de facto* debarment of contractors?”). The cases of any “otherwise qualified” small business contractors who might be found nonresponsible must be referred to the SBA, which may certify as to the firm’s responsibility (see “Will there be changes in the Certificate of Competency process used in determining the responsibility of small businesses?”). Outside of the SBA Certificate of Competency process, however, the FAR does not make any provisions for review or appeal of contracting officers’ determinations as to responsibility within (or outside) the procuring agency.

These determinations could, however, potentially be challenged in the course of a bid protest before the procuring agency, the Government Accountability Office, or the U.S. Court of Federal Claims, the three forums with jurisdiction over bid protests.¹⁸² In such a protest, a vendor that was denied an award because it was found to be nonresponsible could contest that determination on the grounds that the determination is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.¹⁸³ Alternatively, a vendor that lost an award to a competitor which was found to be affirmatively responsible could seek to challenge that determination, although GAO regulations, in particular, permit challenges to affirmative determinations of responsibility only in narrow circumstances.¹⁸⁴

¹⁸¹ See, e.g., PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 24 (noting this possibility as to the Clinton responsibility regulations, discussed below).

¹⁸² For purposes of federal law, a *bid protest* involves a written objection to the conduct of government agencies in (1) soliciting or otherwise requesting offers for supplies and services for their direct use or benefit; (2) cancelling such solicitations or requests; (3) awarding or proposing to award a contract; (4) terminating or cancelling a contract due to improprieties involving its award; or (5) converting functions performed by government employees to private sector performance. See 31 U.S.C. §3551(1)(A)-(E). The jurisdiction of the federal district courts over bid protests expired on January 1, 2001. See Administrative Dispute Resolution Act of 1996, P.L. 104-320, §12(d), 110 Stat. 3875 (Oct. 19, 1996). For more on bid protests, see generally CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz.

¹⁸³ See, e.g., Data Integrators, Inc., B-410517 (Dec. 29, 2014) (finding that the challenged nonresponsibility determination was “reasonable” given the record in this case); Rotech Healthcare, Inc., B-409020; B-409020.2 (Jan. 10, 2014) (denying the protest of a nonresponsibility determination where the record showed that the contracting officer “reasonably” considered available information regarding the protester).

¹⁸⁴ See, e.g., CyQuest Bus. Solutions, Inc., B-410366; B-410366.2; B-410366.3 (Dec. 18, 2014) (denying protest challenging an agency’s affirmative determination of responsibility as to another vendor); United Capital Investments Group, B-410284 (Nov. 18, 2014) (same). GAO regulations expressly provide that affirmative determinations of responsibility are generally among the “protest issues not for consideration.” 4 C.F.R. §21.5(c). The only exceptions are if the protest (1) alleges that “special standards” of responsibility specified in the solicitation were not met, or (2) raises “serious concerns” that the contracting officer “unreasonably failed to consider available relevant information or otherwise violated statute or regulation” in determining a vendor was responsible. *Id.* But see B&B Med. Servs., Inc., B-407113.3, B-407113.4 (June 24, 2013) (noting that the information allegedly not considered in this case was “not the sort of information that would be expected to have a strong bearing on [the contracting officer’s] responsibility (continued...)”).

Prevailing in such bid protests could be difficult, though, because the reviewing tribunals afford substantial deference to the contracting officers' determinations as to responsibility on the grounds these determinations are committed to agency discretion by law,¹⁸⁵ and the procuring agencies "must bear the brunt of any difficulties experienced during performance."¹⁸⁶ This generally means that the protester must show that the contracting officer's determination lacked "any reasonable basis," or was arbitrary or made in bad faith.¹⁸⁷ Moreover, in cases of nonresponsibility determinations, review is generally limited to the information available to the contracting officer at the time of the determination.¹⁸⁸ The review could potentially encompass information not considered by the contracting officer in cases where the contracting officer has made an affirmative determination of responsibility.¹⁸⁹ However, affirmative determinations of responsibility are not necessarily seen as invalid just because information exists that is adverse to the contractor, so long as this information was known to and not ignored by the contracting officer when making the determination.¹⁹⁰ Limitations on jurisdiction and standing could also effectively limit vendors' ability to challenge responsibility determinations in certain cases, since the protest forums will generally only hear protests that are seen to be timely.¹⁹¹ The protester may also be required to show that any alleged violations of the law are prejudicial to it, in the sense that the protester would be in line for the award but for the alleged violation.¹⁹²

(...continued)

determination").

¹⁸⁵ See, e.g., FN Manufacturing, Inc., B-297172, B-297172.2 (Dec. 1, 2005); Bernstein & Kleinfeld, 39 Comp. Gen. 705, B-142055 (Apr. 12, 1960).

¹⁸⁶ See, e.g., Herbert Bauer HmbH & Co., 87-2 CPD 142, B-225500.3 (Aug. 10, 1987).

¹⁸⁷ See, e.g., Data Integrators, Inc., B-410517 (Dec. 29, 2014) ("Our Office generally will not disturb a nonresponsibility determination unless a protester can show either that the procuring agency had no reasonable basis for the determination or that it acted in bad faith."); Blocacor, LDA, B-282122.3 (Aug. 2, 1999) (similar); Bernstein & Kleinfeld, 39 Comp. Gen. 705, B-142055 (Apr. 12, 1960) (similar).

¹⁸⁸ See, e.g., Data Integrators, Inc., B-410517 (Dec. 29, 2014); Becker & Schwindenhammer, GmbH, 87-1 CPD 235, B-225396 (Mar. 2, 1987).

¹⁸⁹ See, e.g., FCi Federal, Inc., B-408558.4, B-408558.5, & B-408558.6 (Oct. 20, 2014) (sustaining a protest of an affirmative determination of responsibility where the record showed, among other things, that the contracting officer failed to obtain and consider specific allegations of fraud, instead relying on general media reports); Southwestern Bell Tel. Co., B-292476 (Oct. 1, 2003) (sustaining a protest where the contracting officer was generally aware of misconduct involving the firm and did not obtain sufficient information to find the firm affirmatively responsible).

¹⁹⁰ See, e.g., B&B Med. Servs., Inc., B-407113.3, B-407113.4 (June 24, 2013) (denying a challenge to a determination that a contractor was affirmatively responsible where the record failed to establish that the contracting officer did not consider the information in question); Universal Marine & Industrial Servs., Inc., B-292964 (Dec. 23, 2003) (protest denied where the record showed that the information cited by protester was either erroneous or was considered by the contracting officer); Krug In't., B-232291.2 (Feb. 6, 1989) (denying protest of a determination that a contractor was affirmatively responsible where the record showed the allegedly disqualifying information was reviewed and found acceptable by the contracting officer).

¹⁹¹ See, e.g., 4 C.F.R. §21.2 (rules regarding the timeliness of GAO protests); *Blue & Gold Fleet L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007) (applying timeliness rules akin to those of GAO to certain protests at the court).

¹⁹² See, e.g., Dalma Tech Co., B-411015 (Apr. 22, 2015) ("Competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper.").

Are government contractors required to make other representations or disclosures?

The proposed FAR amendments implementing Executive Order 13673 call for contractors to represent whether there has been any “administrative merits determination, arbitral award or decision, or civil judgment, rendered against [them] within the three-year period preceding the date of the offer for violations of labor laws.”¹⁹³ In addition, in cases where a contractor which has represented that there has been such a determination or judgment is the subject of a responsibility determination because the contractor is line for an award, that contractor must disclose “[t]he labor law violated” and other information to the contracting officer.¹⁹⁴

If these proposed requirements are implemented, the representations and disclosures as to labor law violations would not be the only representations or disclosures that federal contractors are required to make in responding to solicitations or as terms of their contracts. Currently, contractors are required to make representations or certifications regarding whether, among other things, they (1) are inverted domestic corporations,¹⁹⁵ (2) have delinquent federal taxes in an amount greater than \$3,000,¹⁹⁶ or (3) have been convicted of or subject to a civil judgment for specified offenses, including fraud or a criminal offense in obtaining a government contract or subcontract.¹⁹⁷ Federal contractors are also required to disclose certain information, including

- information “sufficient” to identify the nature and extent of any human trafficking offense and the individual(s) responsible for the conduct;¹⁹⁸
- any personal conflict-of-interest violation by a contractor employee performing acquisition functions closely associated with inherently governmental functions;¹⁹⁹ and
- “credible evidence” that a principal, employee, agent, or subcontractor of the contractor has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code, a violation of the civil False Claims Act, or significant overpayments in connection with the award, performance, or closeout of the contract or any subcontract thereunder.²⁰⁰

¹⁹³ 80 Fed. Reg. at 30568. Under the proposed regulations, the contractor’s only option, beyond checking this box, would be to check the box whereby the contractor represents that “[t]here 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.” *Id.*

¹⁹⁴ *Id.* See also *supra* note 131 (noting the storing of contractor’s disclosures in the System for Award Management).

¹⁹⁵ For procurement purposes, a foreign corporation is an inverted domestic corporation if it acquires “substantially all” of the properties held by a U.S. corporation and, after the inversion, at least 80% of its stock is owned, by vote or value, by former shareholders of the U.S. corporation by reason of their holding stock in the U.S. corporation. See generally CRS Report R43780, *Contracting with Inverted Domestic Corporations: Answers to Frequently Asked Questions*, by Kate M. Manuel and Erika K. Lunder.

¹⁹⁶ 48 C.F.R. §52.209-5.

¹⁹⁷ *Id.*

¹⁹⁸ 48 C.F.R. §22.1703(d)(1); 48 C.F.R. §52.222-50(g)(1)(i).

¹⁹⁹ 48 C.F.R. §1103(a)(1)(i) & (6). An inherently governmental function is one that federal law and policy require to be performed by government personnel, not contractor employees. See generally CRS Report R42325, *Definitions of “Inherently Governmental Function” in Federal Procurement Law and Guidance*, by Kate M. Manuel.

²⁰⁰ 48 C.F.R. §3.1003(a)(2), §9.406-2(b)(1)(vi), §9.407-2(a)(8), & §52.203-13(b)(3)(i)(A)-(B). This disclosure (continued...)

What would happen if a contractor falsely certifies as to its labor law violations?

The government has a number of potential avenues of recourse if a contractor were to falsely represent that “[t]here has been *no* administrative merits determination, arbitral award or decision, or civil judgment, rendered against [it] within the three-year period preceding the date of the offer for violations of labor laws,” as is required under the proposed FAR clause.²⁰¹ This proposed clause expressly states that

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* [but is not required to] terminate the contract resulting from this solicitation in accordance with the procedures set forth in [the FAR].²⁰²

Depending upon the facts and circumstances of the case, “other remedies” could include, but are not limited to, liquidated damages, equitable reductions in price or other consideration, reprocurement at the contractor’s expense, and reduction or withholding of award or incentive fees.²⁰³ The contractor could also be subject to negative performance evaluations or debarment or suspension.²⁰⁴ Monetary damages for fraud are also possible, under the civil False Claims Act, the Contract Disputes Act, or the Program Fraud Civil Remedies Act, as discussed in CRS Report R43460, *Contractor Fraud Against the Federal Government: Selected Federal Civil Remedies*, by Brandon J. Murrill.

How does Executive Order 13673 compare to the Clinton Administration’s contractor responsibility regulation?

Commentators have noted similarities between the Fair Pay and Safe Workplaces order and certain amendments that were made to the FAR by the Clinton Administration and subsequently revoked by the George W. Bush Administration.²⁰⁵ The Clinton Administration’s amendments could be said to resemble the Fair Pay and Safe Workplaces order in that they called for contracting officers to consider prospective vendors’ “compliance” with legal requirements in determining whether vendors have a satisfactory record of integrity and business ethics,²⁰⁶ as

(...continued)

obligation extends for three years after final payment on the contract.

²⁰¹ 80 Fed. Reg. at 30568 (emphasis added).

²⁰² *Id.* at 30569 (emphasis added).

²⁰³ See generally 48 C.F.R. Subpart 11.5 (liquidated damages); 48 C.F.R. Subpart 16.4 (reduction or withholding of award and incentive fees); 48 C.F.R. Subpart 46 (reprocurement at contractor’s expense, equitable reductions in price).

²⁰⁴ See generally 48 C.F.R. Subpart 49.4 (termination for default); 48 C.F.R. Subpart 42.15 (evaluations of contractor performance); & 48 C.F.R. Subpart 9.4 (debarment and suspension).

²⁰⁵ See, e.g., U.S. Chamber of Commerce, Labor, Immigration & Employee Benefits Div., *Summary of Issues in E.O. 13673, “Fair Pay and Safe Workplaces” and Proposed Guidance and Regulations*, available at https://www.uschamber.com/sites/default/files/summary_of_problems_with_blacklisting_eo_and_proposed_guidance_and_regs.pdf (last accessed: July 2, 2015).

²⁰⁶ See Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., *Federal Acquisition Regulation: Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings: Final Rule*, 65 Fed. Reg. 80256, 80264 (Dec. 20, 2000).

Executive Order 13673 does (see “What does the executive order require?”). The Clinton-era amendments also called for vendors to make certain representations and disclosures about whether they have been subject to specified legal actions related to violations of covered laws,²⁰⁷ as the FAR amendments proposed by the Obama Administration would do.²⁰⁸

On the other hand, there are some notable differences between the Clinton Administration’s amendments to the FAR and the FAR amendments proposed, to date, by the Obama Administration to implement the Fair Pay and Safe Workplaces order. For example, the Clinton Administration considered compliance with the broad categories of “tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws,”²⁰⁹ while the Obama Administration focuses upon compliance with 14 specific federal labor and employment laws and their state equivalents.²¹⁰ The Clinton Administration also amended the “general standards” of responsibility in Section 9.104-1 of the FAR to prescribe that vendors

[h]ave a satisfactory record of integrity and business ethics including satisfactory compliance with the law including tax laws, labor and employment laws, antitrust laws, and consumer protection laws.²¹¹

The Obama Administration, in contrast, does not propose to amend these standards, but instead would address compliance with labor laws primarily in a new Subpart 22.20 of the FAR, one provision of which would specify that

[t]he contracting officer[’s] duty to consider labor violations under this paragraph [which addresses pre-award evaluation of an offeror’s labor violations] is in addition to the contracting officer[’s] duties under 9.104-5 and 9.104-6 [which are among the FAR provisions addressing responsibility determinations generally].²¹²

In addition, the Clinton Administration amended the FAR provisions regarding the rejection of bids and notifications to unsuccessful offerors to require that contracting officers promptly notify vendors of nonresponsibility determinations and the basis for such determinations.²¹³ The Obama Administration has not proposed any such changes to date, instead leaving in place the preexisting rules regarding notifications of nonresponsibility determinations (i.e., such notifications are generally not made).²¹⁴

²⁰⁷ *Id.* at 80265-66.

²⁰⁸ *See* 80 Fed. Reg. at 30569-71.

²⁰⁹ 65 Fed. Reg. at 80264.

²¹⁰ 80 Fed. Reg. at 30565.

²¹¹ 65 Fed. Reg. at 80264. This was the text of the final rule promulgated by the Clinton Administration. The language initially proposed was somewhat different. *See* Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings: Proposed Rule, 64 Fed. Reg. 37360, 37361 (July 9, 1999) (proposing to amend the general standards of responsibility to specify that “examples of an unsatisfactory record [of integrity and business ethics] may include persuasive evidence of the prospective contractor’s lack of compliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws”). However, this language was modified after criticisms that “persuasive evidence” does not correspond to any recognized legal standard, among other things. *See, e.g.*, PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION, *supra* note 10, at 1.

²¹² *See* 80 Fed. Reg. at 30564, 30566.

²¹³ *See* 65 Fed. Reg. at 80265.

²¹⁴ *See supra* note 172 and accompanying text.

The Clinton Administration’s amendments were revoked by the George W. Bush Administration shortly after their effective date,²¹⁵ making it difficult to assess what their effects on the procurement process would have been. Subsequently, on December 1, 2011, the Department of Agriculture promulgated regulations calling for the incorporation into its contracts of standard terms regarding “labor law violations,” which would have specified that,

In accepting this contract award, the contractor certifies that it is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors of any tier, and suppliers, are also in compliance with all applicable labor laws.²¹⁶

Under these terms, the contractor would also have agreed to “promptly report” to the contracting officer any “formal allegations” or “formal findings” of “non-compliance” with labor laws.²¹⁷ However, like the Clinton Administration’s FAR amendments, these regulations were withdrawn prior to their effective date.²¹⁸

What are Congress’s options in response to the order?

Congress could potentially take various actions—or no action—in response to Executive Order 13673, depending upon its policy preferences. If opposition to the order and its requirements is sufficiently widespread, Congress could enact legislation that would bar implementation of the order. Such legislation could take the form of an appropriations rider, barring the use of appropriated funds to promulgate the proposed FAR amendments or to implement any FAR provisions requiring that contractors disclose violations of labor laws.²¹⁹ Alternatively, Congress could amend existing procurement or other statutes in such a way that these statutes would be contrary to the requirements of the executive order,²²⁰ as Congress did in 2011 in response to a draft executive order reportedly being considered by the Obama Administration that would have required contractors to disclose their political contributions.²²¹ As previously discussed, the President’s authority under FPASA has not been seen to permit the President to impose requirements upon the procurement process that conflict with statutory enactments. (See “What is the President’s authority to impose these requirements?”).

²¹⁵ See Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation: Proposed Rule with Request for Comment, 66 Fed. Reg. 17758 (Apr. 3, 2001); Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. at 66986 *et seq.*

²¹⁶ See Dep’t of Agriculture, Office of Procurement and Property Management; Agriculture Acquisition Regulation, Labor Law Violations: Direct Final Rule, 76 Fed. Reg. 74722 (Dec. 1, 2011). See also Dep’t of Agriculture, Office of Procurement and Property Management; Agriculture Acquisition Regulation, Labor Law Violations: Proposed Rule, 76 Fed. Reg. 74755 (Dec. 1, 2011).

²¹⁷ 76 Fed. Reg. at 74722-23.

²¹⁸ See Dep’t of Agriculture, Office of Procurement and Property Management; Agriculture Acquisition Regulation, Labor Law Violations: Withdrawal, 77 Fed. Reg. 5714 (Feb. 6, 2012); Dep’t of Agriculture, Office of Procurement and Property Management; Agriculture Acquisition Regulation, Labor Law Violations: Withdrawal, 77 Fed. Reg. 5750 (Feb. 6, 2012).

²¹⁹ See, e.g., 146 CONG. REC., daily ed., pp. H6672-H6684 and H6706-H6707 (July 20, 2000) (discussing a floor amendment to H.R. 4871, 106th Cong., that would have barred the use of funds made available under the general government appropriations bill to carry out the FAR amendments proposed by the Clinton Administration).

²²⁰ See, e.g., Just Opportunities in Bidding Act of 2000, S. 2986, 106th Cong. (providing that the Clinton Administration’s responsibility regulations, previously discussed, “shall not take effect and may not be enforced”).

²²¹ See National Defense Authorization Act for FY2012, P.L. 112-81, 125 Stat. 1502-03 (Dec. 31, 2011) (codified, as amended, at 10 U.S.C. §2335).

On the other hand, if Congress were to favor the disclosure requirements, it could enact legislation to codify these requirements, thereby ensuring that they are not repealed by a subsequent administration.²²² Certain procurement-related executive orders issued by prior Presidents have been revoked by later Presidents.²²³ Supporters of the policies underlying the executive order could also enact legislation to make any desired expansions, clarifications, or refinements of the labor violation disclosure or other requirements. For example, in 2008, Congress enacted legislation that extended the so-called “mandatory disclosure rule,” which requires contractors to disclose “credible evidence” of certain criminal violations, among other things, then being developed by the executive, to encompass contracts for commercial items or performed overseas.²²⁴ Such contracts had been excluded by the executive in earlier versions of the rule.²²⁵

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²²² See, e.g., A Bill to Require Contractors with the Federal Government to Possess a Satisfactory Record of Integrity and Business Ethics, H.R. 4081, 107th Cong. (proposing to codify the Clinton Administration responsibility regulations, previously discussed).

²²³ See, e.g., Executive Order 13,264, Amendment to Executive Order 13180, Air Traffic Performance-Based Organization, 67 Fed. Reg. 39243 (June 7, 2002) (removing language from a Clinton Administration order that had designated the provision of air traffic services as an inherently governmental function); Executive Order 12,375, Motor Vehicles, 47 Fed. Reg. 34105 (Aug. 6, 1982) (revoking President Carter’s preference program for fuel efficient passenger vehicles).

²²⁴ Supplemental Appropriations Act, 2008, P.L. 110-252, §6102, 122 Stat. 2386 (June 30, 2008) (“The [FAR] shall be amended within 180 days after the date of the enactment of this Act pursuant to FAR Case 2007-006 (as published at 72 Fed. Reg. 64019, November 14, 2007) or any follow-on FAR case to include provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items.”).

²²⁵ See, e.g., Dep’t of Defense, Gen. Servs. Admin. & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation; FAR Case 2006-007, Contractor Compliance Program and Integrity Reporting: Proposed Rule, 72 Fed. Reg. 64019 (Nov. 14, 2007).