IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, *et al.*, Plaintiffs, v. ANNE RUNG, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, et al. Defendant.	Case No. 16-cv-00425

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Consistent with long-standing statutory and regulatory authority, the President issued Executive Order 13673, "Fair Pay and Safe Workplaces," 78 Fed. Reg. 45309 (2014) (E.O. 13673), and the rules and guidance implementing it. E.O. 13673 is intended to ensure federal agencies have the information they need, as stewards of taxpayer dollars, when determining whether contractors are responsible sources that are committed to abiding by the law, including labor laws. Under this existing process for determining contractor responsibility, federal agencies already have the authority to consider labor law violations as a factor, but generally do not because they lack both sufficient information about contractors' records of compliance and guidance on when violations add up to an unsatisfactory record of integrity and business ethics. To close these gaps, E.O. 13673 creates a limited new requirement for federal contractors to disclose information about labor law violation decisions rendered against them, and directed contracting agencies to consider those violations – particularly "serious," "repeated," "willful," and "pervasive" violations – as part of the responsibility determination. In August 2016,

pursuant to the E.O., the Federal Acquisition Regulatory Council issued implementing regulations, and the Department of Labor (DOL) issued related guidance.

Plaintiffs challenge these various actions. And although they waited far too long after those actions were taken to justify emergency relief, and in the absence of any sort of convincing showing of imminent harm, they have asked the Court to grant a temporary restraining order and preliminary injunction preventing the E.O. and implementing regulations and guidance from taking effect next Tuesday. As explained below, Plaintiffs satisfy none of the requirements for such relief. Therefore, Plaintiffs' motion should be denied.[1]

BACKGROUND

I. Overview of the Federal Procurement Process

The Federal Property and Administrative Services Act of 1949 (the Procurement Act) was enacted in order to "provide for the Federal Government with an economical and efficient system for . . . procurement and supply." 40 U.S.C. § 101. The statute provides the President with broad authority to "prescribe policies and directives that the President considers necessary to carry out" the purpose of the statute. *Id.* § 121(a). Through the Office of Federal Procurement Policy Act of 1974, Congress established the Federal Acquisition Regulatory Council to assist in the coordination of Government-wide procurement policy through the creation of the Federal Acquisition Regulation (FAR), the principal set of regulations governing the federal acquisition process. Pub. L. No. 93-400, 88 Stat. 796; *see* 48 C.F.R. § 1.101 *et seq.* (the FAR). Federal

[1] This memorandum is being filed in opposition to Plaintiffs' motion for temporary restraining order and preliminary injunction (ECF No. 4) even though time for a response to a motion for a preliminary injunction has not expired. *See* Local Rule CV 7(e) (providing a party fourteen days from the date a motion was served to file a response). The question of whether further briefing on the preliminary injunction is appropriate is one that can be discussed with the Court at the hearing on October 21, 2016.

contracting officers enforce the procurement rules in the FAR by inserting standardized solicitation provisions and clauses directly into either the solicitation for the contract or the contract itself. *See* FAR Part 52; *id.* § 2.101.

Separate from the process of selecting a contractor to perform the work, contracting officers have an additional duty to protect the integrity and efficiency of the federal contracting process by assuring that contracts are only awarded to "responsible" sources. FAR § 9.103. This duty is grounded in statute. *See* 10 U.S.C. § 2305(b); 41 U.S.C. §§ 3702(b), 3703. Congress has defined the term "responsible source" to include a number of relevant factors to be considered, including that the prospective contractor "has a satisfactory record of integrity and business ethics." 41 U.S.C. § 113(4). Thus, for every procurement contract, an agency contracting officer must consider whether the contract awardee has a satisfactory record of integrity and business ethics, *see* FAR § 9.104-1(d), and then make an "affirmative determination" of responsibility, *id.* § 9.103(b). Contracting officers (COs) generally do not perform a responsibility determination for every bidder, but rather only perform determinations for contractors whom they have already chosen as the apparent awardee of the contract or at least within the competitive range. *See* FAR § 9.105-1. Long-standing existing law requires contractors to make a variety of disclosures of certain tax delinquencies, criminal convictions, indictments, civil judgments, and charges, in order to enable contracting officers to make the required responsibility determination. *See, e.g.*, FAR §§ 52.209-5, 52.209-7.

II. E.O. 13673, "Fair Pay and Safe Workplaces"

The President signed the E.O. on July 31, 2014, with express reference to his authority under the Procurement Act to promote economy and efficiency in government contracting. *See* E.O. § 1, 79 Fed. Reg. 45309. As the E.O. explains, "[c]ontractors 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." *Id.* By increasing the availability of information about labor law compliance to the COs tasked with awarding federal contracts, the E.O. seeks to "reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance." *Id.*

The E.O. contains three discrete new requirements for certain federal contractors and subcontractors: (1) disclosure of any findings of labor law violations (under 14 enumerated federal statutes and executive orders covering labor and employment, anti-discrimination, and workplace safety protections) within the prior three years to the contracting agency; (2) the provision of wage statements and notice of independent contractor status to certain workers on federal contracts and subcontracts; and (3) a limit on entering into new pre-dispute arbitration clauses in employment agreements on covered contracts. *See* E.O. §§ 2, 5, 6, 79 Fed. Reg. at 45309-14. Each requirement is implemented though the inclusion of a separate contract clause in solicitations for contracts valued at specified threshold amounts. *Id.*

The E.O. instructs the Federal Acquisition Regulatory Council to issue implementing regulations and DOL to develop related guidance. E.O. §§ 4(a), 7, 79 Fed. Reg. 45312, 45314. The E.O. requires each agency to designate an agency official to be an agency labor compliance advisor (ALCA) who shall provide advice to contracting officers in evaluating labor law violations as part of the CO's responsibility determinations. E.O. § 3, 79 Fed. Reg. 45311-12.

III. FAR Rule and DOL Guidance

Consistent with their obligations under the E.O., the Federal Acquisition Regulatory Council and DOL issued a proposed rule and proposed guidance, respectively, on May 28, 2015,

and solicited public comment. *See* 80 Fed. Reg. 30548 (proposed rule); 80 Fed. Reg. 30574 (proposed guidance). After extending the comment period to 90 days, the Council and DOL published a final rule and final guidance in the Federal Register on August 25, 2016. *See* 81 Fed. Reg. 58562 (final rule); 81 Fed. Reg. 58654 (final guidance).

A. DOL Guidance

DOL's guidance defines the determinations, judgments, awards and decisions that must be disclosed. 81 Fed. Reg. at 58719-23. The guidance limits the definition of each of these terms to decisions in which an agency, a court, or an arbitrator (1) found that the contractor violated one of the covered laws or (2) enjoined the contractor from violating one or more of those laws. *Id.* The guidance also provides a complete list of documents issued by each of the relevant enforcement agencies that constitute administrative merits determinations. 81 Fed. Reg. at 58720. Each of these is a written document issued to employers following an investigation by the relevant enforcement agency, and includes a notice or finding by the enforcement agency that one of the labor laws identified in the E.O. has been violated. *Id.*

To assist ALCAs and COs in comparing labor violations across different statutes, the guidance also defines certain terms used in the E.O. – "serious," "repeated," "willful," and "pervasive." 81 Fed. Reg. at 58723-33. Consistent with the instruction in the E.O, the guidance uses existing statutory definitions, where available, to define these terms. For example, for the definition of "willful" violations, the guidance adopts existing standards in the Occupational Safety and Health Act, the Fair Labor Standards Act, and several anti-discrimination laws, for purposes of those statutes. *Id.* at 58730-31.

B. FAR Rule Responsibility Procedures

The final FAR rule implements the E.O.'s responsibility-related requirements by providing language to be included in solicitations and contracts that meet the relevant dollar-value threshold. *See* 81 Fed. Reg. at 58646-58650. Initially, on October 25, 2016, agencies are to begin including the provision and clause only in solicitations for contracts valued at $50 million or more. *Id.* at 58644. On April 25, 2017, the threshold is lowered to $500,000. *Id.*

The rule only applies to solicitations issued after October 25, 2016. It has no effect on contracts already being performed, or contracts to be awarded pursuant to solicitations which are issued prior to October 25, 2016. *See* FAR Rule, 81 Fed. Reg. at 58575, 58589; DOL Guidance, 81 Fed. Reg. 58741. This has no effect on new task orders (regardless of amount) under existing GSA Multiple Award Schedule contracts or other types of existing base contracts that pre-date the effective date of the disclosure requirements. *See* FAR Rule 81 Fed. Reg. 58562.

In the final rule, the Federal Acquisition Regulatory Council constructed a two-step disclosure process to minimize the disclosure burden to all contractors. Initially, at the same time they make other required disclosures unrelated to the E.O., all bidders on a covered solicitation need only indicate "yes-or-no" as to whether they have or have not had findings of violations of the covered labor laws within the reporting period. *See* 81 Fed. Reg. at 58647. Contractors will disclose additional information only if a contracting officer initiates a responsibility determination, *id*., which generally only occurs for prospective contractors the CO has chosen as the apparent awardee, or at least identified as being within the competitive range. *See* FAR § 9.105-1. The required additional disclosure generally will be limited to: (i) the labor law found to have been violated, (ii) the case or identification number, (iii) the date the decision

was rendered, and (iv) the name of the entity that rendered the determination or decision. 81 Fed. Reg. at 58647.

Both the E.O. and the final FAR rule provide that a prospective contractor that makes an additional disclosure must be given the opportunity to provide any additional information it deems necessary to demonstrate its responsibility, such as mitigating circumstances, remedial measures and other steps taken to achieve compliance with the relevant labor law(s). *Id*. With the advice and assistance of the contracting agency's ALCA, contracting officers will then determine, based upon all of the information provided, whether a prospective contractor's labor violations demonstrate a satisfactory record of integrity and business ethics and whether additional action is needed.

The existence of even "serious," "repeated," "willful," or "pervasive" violations will not automatically make a contractor nonresponsible; nor will it automatically trigger the need for remedial action. Regardless of the gravity or numerosity of violations, an ALCA will take into consideration any mitigating circumstances that the contractor provides. *See* 81 Fed. Reg. at 58641-42. Even if the contractor discloses violations that are "serious," "repeated," "willful," or "pervasive," a satisfactory record recommendation may still be appropriate where "under the totality of the circumstances the existence of the violations is outweighed by mitigating factors or other relevant information." *See* 81 Fed. Reg. at 58735. Even if an ALCA were to make a negative recommendation to the CO, the CO is not required to follow the ALCA's recommendation, and has the ultimate discretion as to whether to find the contractor responsible and award a contract notwithstanding any violations. *See* 81 Fed. Reg. at 58642; FAR preamble, 81 Fed. Reg. 58570. If a prospective contractor believes a contracting officer's responsibility determination is unlawful, it may challenge the determination before the GAO or in the Court of

Federal Claims. *See, e.g.*, *Remington Arms Co., LLC v. United States*, 126 Fed. Cl. 218, 230-31 (2016); *In re Gaver Industries, Inc.*, B-412428 (Comp. Gen.), 2016 CPD P 57, 2016 WL 490605 (Feb. 9, 2016).

C. Phase-in and Preassessment

Along with several other steps taken to minimize the burden of the E.O.'s disclosure requirements, the final FAR rule provides for a significant phase-in period. *See* FAR Preamble, 81 Fed. Reg. at 58565-66. For the first year that the regulations are effective – beginning October 25, 2016 – only prime contracts are covered. 81 Fed. Reg. 58644. Subcontractor disclosures will not be required until October 25, 2017; will cover only subcontracts under prime contracts awarded pursuant to solicitations issued on or after that date; and will never cover subcontracts for commercial off-the-shelf items. *Id*. Initially, the disclosure requirements will be included only in solicitations valued at $50 million or more. *Id*. The disclosure requirements will be included in solicitations valued at $500,000 or more beginning on April 25, 2017. *Id*. The rule also phases in the three-year disclosure period. Contractors will not need to disclose any findings of labor law violations dated prior to October 25, 2015. 81 Fed. Reg. at 58646-58650. Thus, the initial period for which labor law violations must be disclosed is limited to one year and will gradually increase to three years by October 25, 2018. Finally, in order to reduce the burden on contractors, the DOL guidance provides for a preassessment process by which contractors can voluntarily submit information regarding labor law violationsto DOL independent of a particular procurement and receive advice about whether remedial measures may be necessary. 81 Fed. Reg. at 58739.

D. Paycheck Transparency

Through a separate contract provision, the FAR regulations also implement the paycheck transparency requirements in the E.O. 81 Fed. Reg. 58650-51. This clause requires that covered contractors and subcontractors give certain workers wage statements (i.e., information concerning hours worked, overtime hours, pay, and any additions to or deductions made from their pay) and, for workers who are treated as independent contractors, notices informing them of their independent contractor status. The requirements do not become effective until January 1, 2017. 81 Fed. Reg. at 58644.

E. Pre-Dispute Arbitration Agreements

Effective October 25, 2016, the E.O. and FAR regulations prohibit companies with federal contracts of $1 million or more from requiring their workers to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act, or from torts related to sexual assault or harassment. 81 Fed. Reg. at 58644; 58651. This does not otherwise valid pre-existing arbitration agreements.

ARGUMENT

As the Supreme Court has stressed, "[a] preliminary injunction is an extraordinary and drastic remedy" that "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (quotation omitted); *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974); *see also Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (preliminary injunctive relief is "an extraordinary remedy . . . to be treated as the exception rather than the rule."). A preliminary injunction is a "drastic remedy" that "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (emphasis in original). "The decision to

grant a preliminary injunction is to be treated as the exception rather than the rule." *Miss. Power & Light Co.*, 760 F.2d at 621. A plaintiff seeking preliminary injunctive relief must demonstrate that (1) there is a substantial likelihood that he or she will prevail on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013) (citation omitted); *see also Enterprise Intern., Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) ("[I]f the movant does not succeed in carrying its burden on *any one* of the four prerequisites, a preliminary injunction may not issue and, if issued, will be vacated on appeal.") (emphasis added). *Miss. Power & Light Co.*, 760 F.2d at 621 ("[A preliminary injunction] should only be granted if the movant has clearly carried the burden of persuasion on all four *Callaway* prerequisites."). Plaintiffs have failed to demonstrate any of these factors by a clear showing, and their motion should be denied.

I. PLAINTIFFS DO NOT HAVE A SUBSTANITAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

A. E.O. 13673, the FAR Rule, and the DOL Guidance Are Within the Executive Branch's Authority under the Procurement Act and Are Not Preempted by Federal Labor Laws.

Plaintiffs do not have a substantial likelihood of success on their claims that Executive Order 13673, FAR Rule and DOL guidance are beyond the Executive Branch's authority or otherwise preempted by federal labor laws. *See* Pls' Emergency Mot. For TRO, ECF No. 4 ("Pls' Mem.) at 15-18. The Procurement Act grants the President authority to "prescribe policies and directives that the President considers necessary to carry out" its purpose of "provid[ing] the Federal Government with an economical and efficient system" for procuring and supplying property and services. 40 U.S.C. §§ 101, 121. As courts, including the Fifth Circuit, have

recognized, the Procurement Act authority is broad. *See, e.g.*, *City of Albuquerque v. U.S. Dep't of Interior,* 379 F.3d 901, 914 (10th Cir. 2004) ("Congress chose to utilize a broad delegation of authority in [the Procurement Act]."); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n. 1 (5th Cir. 1967) ("Congress has committed to the President broad discretion to 'prescribe such policies and directives.'"). Regulatory programs established by Executive Order under the President's Procurement Act authority need have only "a sufficiently close nexus" to the criteria of "economy and efficiency" to survive judicial scrutiny. *AFL-CIA v. Kahn,* 618 F.2d 784, 792 (D.C. Cir. 1979) (noting that the Procurement Act gives the President "direct and broad-ranging authority").

Based on that authority, courts have upheld Executive Orders imposing various labor related requirements on government contractors. *See Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971) (upholding E.O. 11246 and the implementing DOL regulations requiring bidders on any federal or federally-assisted construction contracts for projects to submit an acceptable affirmative action program that includes specific goals for the utilization of minority workers in six skilled crafts); *Kahn*, 618 F.2d at 792-93 (upholding E.O. 12092, which directed agencies to incorporate in their contracts clauses requiring compliance with certain wage and price standards that were otherwise voluntary); *UAW-Labor Emp't and Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (upholding E.O. 13201, which required federal contractors to post notices at their facilities informing employees of their rights not to join a union or pay mandatory dues for costs unrelated to representational activities); *Nat'l Ass'n of Mftr v. Perez,* 103 F. Supp. 3d 7 (D.D.C. Cir. 2015) (upholding E.O. 13496 requiring notice to employees of rights under the National Labor Relations Act); *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009) (upholding E.O. 13465 and its implementing

regulations directing agencies to require their contractors to use the electronic employment verification system to verify whether their hires are authorized to work in the United States).

In *UAW*, the D.C. Circuit Court found that the President had the authority under the Procurement Act to require federal contractors to post notices at their facilities informing employees of their rights not to join a union or pay mandatory dues for costs unrelated to representational activities. 325 F.3d at 366-67. In that case, the President had determined that "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced," and the "availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." *Id.* at 366 (quoting E.O. 13201). Although the court observed that "[t]he link may seem attenuated (especially since unions already have a duty to inform employees of these rights), and indeed one can with a straight face advance an argument claiming [the] opposite effects or no effects at all," the court nevertheless upheld the Executive Order because under the "lenient standards [for determining whether the President has acted within his Procurement Act authority], there is enough of a nexus." *Id.* at 366-67.

E.O. 13673 and the implementing regulations and guidance at issue here likewise fall within the President's power under the Procurement Act. As explained in E.O., the 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" which are "designed to promote safe, healthy, fair and effective workplaces." E.O. § 1, 79 Fed. Reg. 45309. "Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predicable, and satisfactory delivery of goods and services to the Federal Government." *Id.* The requirements

set forth in the Order and implementing regulations and guidance help the executive departments and agencies "to identify and work with contractors with track records of compliance [which] will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance." *Id.*

In their brief, Plaintiffs fail to acknowledge the broad powers granted the President under the Procurement Act. Instead, Plaintiffs focus on the fact that Congress has not required agencies to consider alleged violations of labor and employment laws in making responsibility determinations. *See* Pls' Mem. at 15. But that focus misses the mark because, as explained above, this is not a case in which the statute "limits a thing to be done in a particular mode," *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974), or prescribes "the means it has deemed appropriate." *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n. 4 (1994). Instead, the Procurement Act provides the President broad authority to "prescribe policies and directives that the President considers necessary to carry out [the Act]." 40 U.S.C. § 121(a). Accordingly, Plaintiffs do not, and cannot, demonstrate that they have a substantial likelihood of success on their claim that the Executive Branch lacked the authority to issue E.O.13673, the FAR Rule and DOL guidance.

Plaintiffs also do not have a substantial likelihood of prevailing on their claim that E.O. 13673, the FAR Rule and DOL guidance somehow conflict with or are preempted by federal labor laws. In their brief, Plaintiffs do not point to any provision in the FAR Rule or the DOL guidance that is in direct conflict with any federal labor law. Courts have rejected such claims where, as here, there is no direct conflict. For example, in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, the Third Circuit rejected a claim that Executive Order

11246 conflicted with Title VII of the Civil Rights Act because it required contractors to articulate "specific goals for utilization of available minority manpower" while Title VII states that employers cannot be required to grant preferential treatment on account of workplace imbalances. 442 F.2d at 172. The court held that Title VII did not prohibit agencies from imposing a new requirement under other statutory authority, namely the Procurement Act.

Courts have also rejected claims alleging that the requirements imposed by other Executive Orders violate or are preempted by the National Labor Relations Act ("NLRA"). For example, in *National Association of Manufacturers v. Perez,* 103 F. Supp. 3d 7, 14-15 (D.D.C. 2015), the court found that there was no direct conflict because although the NLRA does not require posting of employee rights, the refusal to post was not a prohibited activity under 8(c) or protected under section 7 of the National Labor Relation Board (NLRB). *Id.* The court further found that even if the NLRB lacked the authority to promulgate a rights posting requirement under the NLRA, "that statutory limitation does not prohibit the Department of Labor from advancing policy goals under the Procurement Act through a rights posting." *Id.* at 25. Similarly, in *UAW* the Court rejected challenges to the posting requirement, holding that preemption under *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959), operated only as to activities arguably protected or prohibited by the NLRA, not those on which the NLRA is silent. 325 F.3d at 363.

Contrary to Plaintiffs' contention, *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1344 (D.C. Cir. 1996), does not hold otherwise. In that case, plaintiffs challenged an Executive Order 12954, which authorized the Secretary of Labor to disqualify employers who hired permanent replacement workers during lawful strikes from certain contracts. In that case, the court found that the Executive Order and implementing regulations "promise a direct conflict with the

NLRA." *Id.* at 1338. The court found that "the NLRA preserves to employers the right to permanently replace economic strikers as an offset to the employees' right to strike" (*id.* at 1332), and that the Executive Order and implementing regulation "alter[ed] the delicate balance of bargaining and economic power that NLRA establishes." *Id.* at 1337. In addition, the DOL regulations conflicted with the NLRA because provisions allowed the Secretary to assume responsibility for determining when the "labor dispute" ends, thereby creating a potential conflict between the Executive Order and NLRA with respect to the recognition of the union as the exclusive representative. *Id.* at 1338. There is no such direct conflict here.

Plaintiffs' reliance on *Wisconsin Department of Industry, Labor, & Human Relations v. Gould*, 475 U.S. 282, 283 (1986), is likewise misplaced. In that case, the United States Supreme Court invalidated a *state* statute that "flatly prohibited state purchases" from repeat NLRA violators. *Id.* at 289. That case is distinguishable for several reasons. First, the executive action at issue here is national in scope, and deals with federal procurement policy, and thus does not suffer from the federal supremacy and national uniformity concerns at the heart of NLRA preemption.[2] Second, in *Gould*, Wisconsin stated that the purpose of the statute was to deter labor law violations. 475 U.S. at 287. *See also Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008) (noting that the legislative purpose of the preempted statute "is not the efficient procurement of goods and services but the furtherance of a labor policy."). In contrast, the E.O. 13673 here is designed to pursue a proprietary interest in promoting "economy and efficiency" in

[2] *See N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 529 (1979) (highlighting the "interest in national uniformity underlying the doctrine"); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (noting that the basis of labor law preemption has been Congress' wish for the "uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies") (citations omitted).

government contracting. *See* DOL Guidance, 81 Fed. Reg. at 58660 (noting that the purpose of the Order, like other existing responsibility-related disclosure requirements is "proprietary" and "not to penalize"). Moreover, under the E.O. and implementing regulations and guidance, a violation of a labor law will not automatically result in the denial of work to a contractor. 81 Fed. Reg. 58641. Even an ALCA recommendation of nonresponsibility or a CO's finding of nonresponsibility is not a pronouncement of disbarment. Debarments are handled by the agency suspending and disbarring official under FAR subpart 9.4. Instead, contracting officers and labor compliance advisers must consider violations, their severity, and mitigating factors when assessing responsibility.

Accordingly, Plaintiffs have failed to establish any likelihood of success on their claim that E.O. 13673 and the implementing FAR Rule and DOL guidance conflict or are preempted by any federal labor law.

B. The FAR Rule and DOL Guidance Memorandum Are Not Arbitrary and Capricious.

Plaintiffs' claim that the FAR Rule and DOL guidance are arbitrary and capricious also has no merit. *See* Pls' Mem. at 18-20. As Plaintiffs acknowledge, under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), an agency regulation or action is reviewed "solely to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Hernandez v. Reno,* 91 F.3d 776, 779 (5th Cir. 1996). That review is "highly deferential," and forbids a court "from substituting [its] judgment for that of the agency." *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hospital,* 374 F.3d 362, 366 (5th Cir. 2004) (citations and quotations omitted); *accord Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). So long as the agency "gave at least minimal consideration to relevant facts contained in the record," and articulate[d] a rational relationship between the facts

found and the choice made, its decision is not arbitrary and capricious." *Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994) (citations and footnotes omitted).

Here, both the rule and the guidance meet that test because the Federal Acquisition Regulatory Council and the DOL considered the comments received and explained the basis for their actions. *See* 81 Fed. Reg. 58565-58631, 81 Fed. Reg. 58657-58716 (considering and discussing public comments on proposed rule and guidance). In their brief, Plaintiffs assert that FAR Rule and DOL guidance are arbitrary and capricious because (1) nonfinal and appealable decisions are included in the definition of an "administrative merits determination" and (2) the disclosure requirement allegedly imposes significant additional costs and expenses on the members of their associations. Id. Contrary to Plaintiffs' assertion, the decisions reached by the Federal Acquisition Regulatory Council and DOL on those issues are not arbitrary or capricious. The inclusion of nonfinal and appealable determinations in the definition is reasonable because DOL limited the definition to "a finite number of findings, notices, and documents – only those issued 'following an investigation by a relevant enforcement agency.'" 81 Fed. Reg. at 58565-58666. As DOL explained, if the definition were limited to final determinations, it would exclude all decisions which a contractor is contesting. "Excluding these determinations would in many cases result in particularly long delay between the prohibited conduct and the obligation to disclose." *Id.* at 58666. DOL further found that Plaintiffs' assertion "that administrative merits determinations are routinely overturned is not the case." *Id.* For example, the NLRB's litigation success rate before ALJs and the Board was 88 percent, and 80 percent of the Board decisions were enforced in whole or in part by courts of appeal. *Id.* With respect to OSHA citations, less than 2 percent are later vacated. *Id.* Moreover, the definition of an administrative merits determination simply delineates the scope of the contractors' disclosure obligation. As the DOL

explains, "[n]ot all disclosed Labor Law decisions are relevant to a recommendation regarding the contractor's integrity and business ethics." *Id.* "Only those that involve violations classified as serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ACLA's written analysis and advice." *Id.* Furthermore, when disclosing violations, a contractor has the opportunity to submit additional information relevant to demonstrating responsibility. *Id.* And disclosing a violation will not automatically disqualify a contractor from being awarded work.

Defendants also considered the comments submitted regarding the alleged burden created by the challenged actions. As the preamble to its rule states, the Federal Acquisition Regulatory Council considered the comments by contractors regarding potential burden and sought to minimize the identified burden by making changes to the proposed regulations. 81 Fed. Reg. at 58565-66. As explained *supra* at 30-31, the final rule provides for a measured phase-in process for the disclosure of labor law decisions.

Accordingly, contrary to Plaintiffs' assertion, Defendants considered the comments, and Defendants explained the rationale for their actions while also carefully focusing their requirements.

C. EO 13673, the FAR Rule and DOL Guidance Do Not Violate the First Amendment.

Plaintiffs also cannot demonstrate a substantial likelihood of success on their argument that the limited requirement for a prospective contractor, as part of the solicitation process, to disclose to COs labor law violations decisions rendered against it violates the First Amendment. Plaintiffs' attempt to portray the disclosure of such information to the government to assist it in fulfilling its responsibilities and obligations as "compelled speech" finds no support in case law. Indeed, Plaintiffs cite no case holding that requests for factual information by the government in

such a context has been held to violate the First Amendment. Indeed, courts have rejected First Amendment claims charactering requirements to provide factual information to the government as compelled speech. *See United States v. Arnold,* 740 F.3d 1032, 1034 -35 (5th Cir. 2014) (requirement for sex offender to register); *United States v. Sindel,* 53 F.3d 874, 877-78 (8th Cir. 1995) (requiring completion of tax form). As the court explained in *Sindel*, "[t]here is no right to refrain from speaking when 'essential operations of government may require it for the preservation of an orderly society – as in the case of compulsion to give evidence in court.'" 53 F.3d at 878 (quoting *West Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 645 (1943) (Murphy, J., concurring).[3]

Plaintiffs' reliance on *National Association of Manufacturers v. SEC (NAM),* 748 F.3d 359 (D.C. Cir. 2014), on rehearing, 800 F.3d 518 (D.C. Cir. 2015), rehearing *en banc* denied, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015), is misplaced. In *NAM*, the court found that a Securities and Exchange Commission regulation requiring issuers to state on their website whether their products used gold, tantalum, tin, and tungsten originating in and around the

[3] Even if FAR disclosures could be characterized as "compelled speech," they should be upheld under the lenient test set for in *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 650-52 (1985), for disclosure of factual information. As the Supreme Court explained, there are "material differences between disclosure requirement and outright prohibitions on speech" because the "First Amendment interests are substantially weaker than those at stake when speech is actually suppressed." *Id.* Disclosure requirements in the commercial context are upheld as long as they are reasonably related to government interest and not unduly burdensome. *See, e.g., Milavetz Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 248 (2010) (upholding statute requiring debt relief agency attorneys to provide make certain factual disclosure to consumer debtors regarding bankruptcy laws); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 884 (1992) (upholding state law requiring physicians to provide factual information about the risks of abortions and options available to a patient if she chose not to have an abortion); *Zauderer,* 471 U.S. at 650-52 (upholding a requirement that attorneys disclose certain information regarding legal fees in their advertisements); *American Meat Inst. v. U.S. Dep't of Agriculture,* 760 F.3d 18 (2014) (*en banc)* (upholding "country-of-origin" disclosures on certain commodities).

Democratic Republic of the Congo ("DRC conflict" minerals) violated the First Amendment. The facts in that case are not analogous to the facts here in several ways. First, as the SEC acknowledged, the regulations "were directed at achieving overall social benefits," and not "intended to generate measurable, direct economic benefits to investors or issuers," and thus the requirements were "quite different from the economic or investor protection benefits that [SEC] rules ordinarily strive to achieve." 800 F.3d at 522 (quoting 77 Fed. Reg. at 56,350). Here, on the other hand, E.O. 13673 and the implementing FAR Rules and DOL Guidance are directly related to the purpose of the economic and efficiency purposes of the Procurement Act. E.O. § 1, 79 Fed. Reg. at 45309. The disclosures are designed to assist the government in determining whether the contractor is making the determination whether company is a responsible contractor. E.O. § 2, 79 Fed. Reg. 45309-10. Second, as the court found, the statement "whether a product [was] 'conflict free' or 'not conflict free' – was hardly 'factual and non-ideological.'" 800 F.3d at 530 (quoting 748 F.3d at 371). As the court explained: "Products and minerals do not fight conflicts. The label '[not]' conflict free is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups." *Id.* Contrary to Plaintiffs' assertion, the disclosures at issue here are not "compel[ing] government contractors to 'publicly condemn' themselves by stating whether they have violated one or more labor or employment laws." Pls' Mem. at 12. Instead, the challenged disclosure requirement simply requires a government contractors to make a purely factual statement whether a federal agency, arbitrator, or court has issued a merits determination finding that it violated certain labor laws in which Congress has separately imposed various obligations.

The other "compelled speech" cases cited by Plaintiffs are also not analogous because they involve forced political speech, not factual disclosures made to the government in the context of soliciting for government contracts. *See Riley v. Nat'll Fed. of the Blind of N.C.,* 487 U.S. 781, 797 (1988) (law requiring fundraisers to disclose retained revenues to potential donors); *Wooley v. Maynard*, 430 U.S. 705 (1977) ("Live Free or Die" motto on automobile license plate); *W.Va. State Bd. of Edu. v. Barnett,* 319 U.S. 624 (1943) (requirement for students to recite Pledge of Allegiance); *Texas State Troopers Ass'n v. Morales,* 10 F. Supp. 2d 628 (N.D. Tex. 1998) (statute requiring disclosure of percentage of any donation withheld by fundraiser, if greater than 10% of the donation).[4] As the Supreme Court has recognized, the Constitution "accords a lesser protection to commercial speech than political speech." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980), and an entity "constitutionally protected interest in not providing any particular factual information . . . is minimal." *Zauderer,*471 U.S. at 651. Likewise, the cases cited by Plaintiff regarding First Amendment protections for contractors involve prohibitions on political speech, not disclosure of factual information to the government. *See, e.g., Perry v. Sindermann,* 408 U.S. 593 (1972) (termination of professor's contract for publicly criticizing the university's administration); *Bd. of Cty Comm'rs v. Umbehr,* 518 U.S. 668 (1996) (termination of independent contractor in retaliation of exercise of First Amendment rights); *O'Hare Truck Service, Inc. v. City of*

[4] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006), also provides no support to Plaintiffs' First Amendment argument. In that case, law schools challenged the constitutionality of the Solomon Amendment which required the Department of Defense to deny funding to institutions of higher learning that prohibited military representatives access and assistance in recruiting. The Supreme Court rejected the plaintiffs' claim that the Amendment compelled the law schools to speak the government message.

Northlake, 518 U.S. 712 (1996) (removal from city's rotation list of available towing services based on refusal to support a political party).

Accordingly, Plaintiffs have failed to establish a likelihood of success on their First Amendment claim.

D. Plaintiffs Have Not Alleged a Valid Due Process Claim.

Plaintiffs allege that the FAR rule and the DOL Guidance violate their due process rights by depriving them of their interests without a hearing to contest such allegations. On a facial constitutional challenge, plaintiffs must show that under no circumstances could the E.O. and the FAR rule be constitutional. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Plaintiffs have failed to clearly demonstrate that there are no circumstances under which the E.O. and the FAR rule could be constitutional.

Plaintiffs have failed to demonstrate that any liberty interest is implicated here. Plaintiffs' citation to *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953 (D.C. Cir. 1980) is inapposite. Contractors' liberty interests are not implicated when, as here, the government finds an offeror unsuitable only for a particular contract. *See Kartseva v. Dep't of State*, 37 F.3d 1524, 1528 (D.C. Cir. 1994). While Plaintiffs argue that the disclosure requirement violates their right to be free from being "stigmatized," courts have rejected the proposition that reputational damage alone can be the basis for a due process claim. *See Wheeler v. Miller*, 168 F.3d 241, 249 (5th Cir. 1999). Nor would an adverse responsibility determination carry a "stigma" a prospective contractor's chances at being awarded contracts in the future, because a pre-award responsibility determination is limited to a specific contract – it does *not* bind the government on any future or separate contracts. *See* FAR § 9.105-2(a)(1); 81 Fed. Reg. at 58588 and 58698 (noting that "the FAR requires contracting officers - with the assistance of

ALCAs - to make independent decisions in every case based on the information provided by contractors during the respective solicitation process").

Even assuming a liberty interest is implicated, the E.O. and rule provide contractors with more than sufficient process by mandating that any contractor that discloses labor law violation information be given an opportunity to be heard about any information the contractor "deems necessary to demonstrate its responsibility" prior to the ALCA's recommendation and contracting officer's responsibility determination. 81 Fed. Reg. at 58647. This process is also provided post-award in response to any information from "other sources." 81 Fed. Reg. at 58643. *See Moore v. Miss. Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989) (deprivation of liberty interest requires denial of an "opportunity to be heard"); *Shermco Indus., Inc. v. Sec'y of the Air Force*, 584 F. Supp. 76, 89 (N.D. Tex. 1984) (holding that a contractor's "right of rebuttal" is a sufficient "hearing" for purposes of due process).[5]

Finally, along with all of the other procedural protections in the FAR that remain unaffected by the E.O., contractors continue to have the right to file a bid protest to challenge the denial of a contract and receive a hearing regarding the negative responsibility determination, although a high degree of deference is given to the contracting officer's determination. *See* FAR Subpart 33.1 (describing bid protest mechanisms); *Rosenstein v. City of Dallas*, 876 F.2d 392, 395 (5th Cir. 1989) (requiring only a post-decisional opportunity to clear one's name in order to

[5] As a related matter, Plaintiffs' scenario of "faceless" third parties manipulating the "other source" process with baseless complaints, Pls' Mem. at 15, which implicitly alleges that enforcement agencies would collude with the third parties to reach findings of violations, has no place in a facial constitutional challenge. *See Shays v. FEC*, 528 F.3d 914, 930 (D.C. Cir.2008) ("[A]s a court reviewing this facial challenge we must presume that the [agency] will enforce its rule in good faith.") (citing *Sullivan v. Everhart*, 494 U.S. 83, 94 (1990)). Even if it did, contractors would have the opportunity to present allegations or evidence of such manipulation to the ALCA and contracting officer prior to any responsibility determination.

sufficiently protect liberty interests)[6]. The E.O. and the rule make no changes to the bid protest remedies available to contractors. Likewise, the E.O. and the rule also do not in any way affect the existing due process procedures provided for suspension and debarment – to the contrary, the rule expressly states that COs should pursue these remedies where "appropriate" and "in accordance with . . . procedures" for those remedies in the FAR. 81 Fed. Reg. 58643 (citing FAR part 49, § 12.403, § 9.406-3(a), and § 9.407-3(a)).

Accordingly, Plaintiffs have failed to show any liberty interest implicated by the EO or the rule, and the EO and the rule clearly provide any contractor with the opportunity to be heard by mandating that Cos afford any contractor that makes a disclosure the ability to present all information it deems relevant before any responsibility determination is made.

E. Plaintiffs Have Not Shown that the Paycheck Transparency Provision is Unlawful and Arbitrary.

Plaintiffs next argue that this Court should set aside the portion of the E.O. and rule requiring a certain degree of "paycheck transparency." Pls' Mem. at 22.

As an initial matter, Plaintiffs did not bring this as a cause of action in their complaint. *See Smith v. Bell*, 2010 WL 5678674 at *2 (E.D. Tex. Sept. 7, 2010) (unpublished) ("[A] party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint.") (citing *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994)). The transparency requirement is mentioned only briefly in a single sentence in the middle of a three-sentence paragraph, and is never again raised.

[6] *Rosenstein* involved a police officer who was fired from his job for allegedly making harassing phone calls to a co-worker. 876 F.2d at 394-95. The court recognized that there was a liberty interest in being *discharged* from public employment under circumstances that also damage an individual's representation. *Id*. at 395. However, that is inapplicable to the present case, because prospective contractors do not have a liberty interest in being awarded any particular contract. *See Kartseva*, 37 F.3d at 1528.

Pl. Compl. ¶ 7. Although it is itemized as a separate argument in Plaintiffs' motion for temporary restraining order and injunctive relief, Pls' Mem. at 22, it consists of only a single paragraph, and Plaintiffs provide no legal authority in support of the argument. While it is difficult to discern exactly what Plaintiffs' argument is regarding why the paycheck transparency portion of the new regulations should be struck down, they have provided no clear demonstration that they are likely to succeed on this claim.

The paycheck transparency clause requires that contractors must provide, on contracts that exceed $500,000, a wage statement (or "pay stub") to certain individuals performing work as an employee under the contract for whom employers are required to maintain wage records under the Fair Labor Standards Act (FLSA), the Davis-Bacon Act, or the Service Contract Act, each pay period. 81 Fed. Reg. at 58606; 58650-51. The wage statement "must include the total hours worked in the pay period, the number of those hours that were overtime hours, the rate of pay, the gross pay, and itemized additions made to or deductions taken from gross pay." *Id*. Contractors do not have to provide information regarding hours worked for employees who are exempt from the overtime provisions of the FLSA. *Id*. Contractors are also required to provide any individual performing work as an independent contractor with a simple written notification of that individual's independent contractor status. 81 Fed. Reg. at 58610.

The purpose of this requirement "is to increase transparency in compensation information and employment status, which will enhance workers' awareness of their rights, promote greater employer compliance with labor laws, and thereby increase economy and efficiency in Government contracting." 81 Fed. Reg. at 58606. If workers are aware of their pay and their rights, this will make employers more likely to comply with the relevant labor laws and allow disputes to be resolved sooner. 81 Fed. Reg. at 58704. As the rule notes, "a number of studies

suggest a strong relationship between labor law compliance and performance," 81 Fed. Reg. 58564, so by increasing compliance with labor laws, this serves to increase the performance and efficiency of government contractors. These are legitimate governmental goals that are served by making sure that contractors' workers are provided with basic information regarding their employment status and wages. Although Plaintiffs make the vague, conclusory allegation that these requirements are "burdensome," Pls' Mem. at 22, they fail to provide any evidence or explanation of this. The information on the wage statements is generally information that contractors collect and monitor anyway, 81 Fed. Reg. at 58704-05 (noting that the "the relevant laws already required that the employer keep a record of the rate of pay"), so the only possible burden on contractors is providing this information to their employees on a regular basis, which should be minimal.

Similarly, the requirement that a government contractor provide a one-time written statement to any individual it treats as an independent contractor prior to engaging that individual serves the purpose of providing clarity to any individual unsure about his or her employment status, and it is difficult to conceive of a more minimal burden upon contractors. While Plaintiffs seem to allege that the regulations are conflicting as to what constitutes an "independent contractor" for the purpose of the regulations, the regulations specifically address this concern:

> Employers already make a determination of whether a worker is an employee (or an independent contractor) whenever they hire a worker. The E.O. does not affect this responsibility; it only requires the contractor to provide the worker with notice of the determination that the contractor has made. If the contractor has determined that the worker is an independent contractor, then the employer must provide the notice.

81 Fed. Reg. at 58611. The language indicating that whether an individual is an "independent contractor" or not under any particular legal definition of that term is still governed by the relevant law, not the government contractor's label and notice, simply means that a government

contractor may not alter the status of an individual who otherwise meets (or does not meet) the requirements to be an "independent contractor" under a given statute simply by providing him or her with this written notice.

The paycheck transparency requirement serves several important governmental purposes while imposing minimal burdens upon government contractors. Plaintiffs have not identified any contrary source of law or provided any explanation for why this requirement is arbitrary and capricious. Accordingly, Plaintiffs have failed to clearly demonstrate a likelihood of success on the merits on this argument.

F. Plaintiffs Have Not Shown that the FAR Rule Violates the Federal Arbitration Act.

Plaintiffs' sixth and final cause of action asserts that the regulations violate the Federal Arbitration Act (FAA). The regulations require that any prospective contractors and subcontractors who enter into contracts with the Government must agree not to enter into any mandatory pre-dispute arbitration agreement with their employees (or independent contractors) for any matter arising under Title VII of the Civil Rights Act or any tort action arising out of sexual harassment or assault. According to Plaintiffs, this violates 9 U.S.C. § 2. Plaintiffs' argument is based upon a misinterpretation of 9 U.S.C. § 2, and they have failed to make a clear showing of likelihood of success on the merits of this claim.

The statutory section in question, 9 U.S.C. § 2, provides, in relevant part that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628-29 (2009). As an initial matter, this statute is silent on all matters except whether an existing arbitration agreement should be enforceable. The statutory provision

cited by plaintiffs is completely silent as to whether arbitration agreements are preferred or encouraged as a matter of national policy.

Plaintiffs argue, however, quoting the Supreme Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction. Corp.*, 460 U.S. 1, 24 (1983), that 9 U.S.C. § 2 establishes "a liberal federal policy favoring arbitration agreements." Pls' Mem. at 22. Plaintiffs misinterpret this quote, which is taken out of context. That case involved a dispute over a contract which did contain an arbitration clause, but one party to the contract argued that the dispute should be governed by state law instead of the arbitration clause. The Court rejected this argument, noting that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary*." *Moses H. Cone*, 460 U.S. at 24 (emphasis added). The second part of this sentence, which Plaintiffs omit in their brief, makes clear that the Court was holding that in situations where an arbitration agreement exists between two contracting parties, the FAA favors the enforcement of that clause over conflicting state laws or rules. Or, as the Supreme Court has held more recently, the FAA reflects "a national policy favoring arbitration of claims *that parties contract to settle in that manner*." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *cf. Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (noting that the FAA was enacted "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.").

Plaintiffs' citation to the Supreme Court's decision in *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), is similarly unavailing. Pls' Mem. at 23. The question before the Court in that case involved only whether consumers who signed arbitration agreements should be compelled into arbitrating their claims, a question the Court answered in the affirmative.

However, the Court did not hold that there was any sort of federal policy or preference for parties to agree to arbitration in contracts.

The relevant case law cites to the federal policy "favoring arbitration" only in addressing questions of whether existing arbitration agreements should be enforced. It does not prohibit or discourage limitations on *creating* pre-dispute, forced arbitration agreements or require such agreements. In other words, the FAA does not require arbitration and companies are not required to include mandatory arbitration agreements in employment contracts. Where the President acts as a proprietor, he is free under the Procurement Act to impose requirements on federal contractors that promote economy and efficiency in contracting. Because prohibiting forced arbitration relates to these goals, the provision is authorized under the Procurement Act.

Indeed, Congress has recognized that similar restrictions or limitations on arbitration for certain types of claims may result in more efficient outcomes. In 2009, an amendment to the Department of Defense Appropriations Act restricted the ability of certain Department of Defense (DOD) contractors and subcontractors to enter into or enforce mandatory arbitration agreements with their employees in the case of discrimination or sexual assault. No contractors have challenged this provision, but it is indistinguishable from the E.O.'s provision. Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act), "imposes… the refinement and restriction of what has been restated by the Supreme Court as a 'national policy favoring arbitration of claims that parties contract to settle in that manner.'" *Pezza v. Investors Capital Corp.*,767 F. Supp. 2d. 225, 226 (D. Mass. 2011) (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). Specifically, under the section relating to whistleblowers in Dodd-Frank, "no pre-dispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."

18 U.S.C. § 1514A(e)(2). Courts have consistently upheld and applied this provision. *See, e.g.*, *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 421 (S.D.N.Y. 2012). Thus, contrary to Plaintiffs' argument that the federal government strongly favors arbitration, Congress has recognized instances in which arbitration is not the most efficient means of resolving a matter, and these limitations on arbitration agreements have been upheld.

Accordingly, these regulations limiting arbitration agreements as to certain types of disputes for certain contractors are not contrary to the FAA, and are allowable under the Procurement Act. Plaintiffs have failed to clearly demonstrate a likelihood of success on the merits as to this cause of action.

II. PLAINTIFFS HAVE NOT DEMONSTRATED A SUBSTANTIAL THREAT OF IRREPARABLE HARM

As noted above, Plaintiffs' allegations of harm fall far short of what is required for an injunction to issue. It is not sufficient for Plaintiffs to merely demonstrate a *possibility* of irreparable harm. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008) (a preliminary injunction cannot be based on a mere "possibility" of irreparable harm to the plaintiff). Instead, even if Plaintiffs demonstrate a likelihood of success on the merits, their motion for injunctive relief should be denied unless they demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC*, 55 U.S. at 22.

A. The Regulatory Requirements Are Being Phased In

As an initial matter, although the FAR rule becomes effective October 25, 2016, many of the requirements are not immediately applicable and are being phased in over the course of the following year. This was specifically designed to allow both the Government and contractors time to prepare for and adjust to the new requirements.

The requirements are implemented through specific solicitation provisions and clauses in covered contracts. *See* 81 Fed. Reg. at 58644. This means that the rule will have *no* impact on any government contract currently in effect (including new task orders issued on contracts currently in effect), but rather will only apply on new solicitations issued after October 25, 2016, and contracts resulting from those solicitations. 81 Fed. Reg. at 58741. Furthermore, although the FAR provides shorter deadlines for certain limited types of contracts, in general a solicitation must provide a deadline for a receipt of bids of at least 30 days from the date that the solicitation is issued. FAR § 5.203(c). This means that any prospective contractor would not likely have to make any disclosures of labor law violations prior to November 24, 2016, and even at that point, prospective contractors will be required only to indicate (yes or no) whether they have violations to disclose – not to disclose information about the violations themselves.

At least initially, this requirement will only apply to a very small subset of prospective contractors and subcontractors, as well. For the first six months of the rule, the only prospective contractors that will be required to make such disclosures will be prospective bidders on solicitations with an estimated value of $50,000,000 or more. On April 25, 2017, the rule will begin to apply to all solicitations with an estimated value of $500,000 or more. And it is not until October 25, 2017, over a year away, that disclosures would be required for subcontractors. Accordingly, any potential harm would apply only to a very limited subset of government contractors when the rule first takes effect on October 25, 2016.

B. Plaintiffs Have Failed To Allege Any Likely Irreparable Harm

The only arguments made by Plaintiffs that they would potentially suffer any irreparable harm if the court denies their motion for a temporary restraining order and injunctive relief are arguments that a First Amendment violation standing alone constitutes an irreparable injury and

that any Fifth Amendment similarly constitutes an *ipso facto* irreparable injury. However, as explained above, Plaintiffs have failed to clearly show a likelihood of success on the merits of either their First Amendment or Fifth Amendment claim, so these arguments should not be sufficient to constitute irreparable harm. Furthermore, many courts have found that the assertion of a First Amendment violation does not automatically require a finding of irreparable injury. *See, e.g., Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003). "Unless a governmental directive limits protected speech directly . . . , the Second Circuit has required that the First Amendment Plaintiffs seeking an injunction demonstrate that the challenged governmental action has had or likely will have an actual chilling effect on speech." *Pinscottano v. Murphy*, 317 F. Supp. 2d 97, 103 (D. Conn. 2004). Plaintiffs' First Amendment challenges involve disclosures, not any direct restrictions on speech. As the Supreme Court held in *Zauderer*, 471 U.S. at 651, an entity's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal." Here, Plaintiffs have not explained why answering an initial "yes/no" question as to findings of labor law violations, with the possibility of providing further, more detailed information later in the process, violates any strong constitutional interest or would have any chilling effect on speech. Similarly, many courts have rejected the proposition that a Fifth Amendment due process claim automatically constitutes an irreparable injury. *See Air Transp. Int'l LLC Co. v. Aerolease Fin. Grp., Inc.*, 993 F. Supp. 118, 125 (D. Conn. 1998); *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996).

Otherwise, Plaintiffs make no specific allegation of irreparable harm, and they do not, and cannot, make any concrete allegation of any irreparable harm that would result from government contractors complying with the regulations at issue. Indeed, any "irreparable harm"

alleged by Plaintiffs would be inherently speculative. While Plaintiffs strongly object to the regulatory requirement that contractors must disclose to the procuring agency whether they have been found to have violated any of a specified list of fourteen federal labor and employment laws, they fail to address the fact that there is no automatic impact of any such disclosure on a contractor's chances of being awarded a procurement. A prospective contractor's answer to this question only becomes relevant later in the procurement process, when the contracting officer initiates a responsibility determination for the limited number of prospective awardees of a contract or at least within the competitive range. *See* FAR § 9.105-1 (suggesting that contracting officers limit requests for information about responsibility matters to the lower bidder or to "those offerors in range for award"). Thus, because the responsibility determination is typically made very late in the procurement process for a limited subset of bidders, the "yes-or-no" answer in the initial bid will have no impact for most prospective contractors.

Furthermore, the rule and guidance are explicit and clear that there is no automatic disqualification for any contractor based on a specific number or type of violation disclosed. Disclosed findings of violations that are not serious, willful, repeated, or pervasive will not be considered. Regardless of the gravity or numerosity of violations, an ALCA is specifically required by the regulations to take into consideration any mitigating circumstances that the contractor provides. *See*81 Fed. Reg. at 58641. Simply put, the process established by the regulation explicitly rejects any sort of automatic disqualification process, and instead sets up a process where a contractor is given ample opportunity to provide mitigating and explanatory evidence regarding any finding, and any decision made is based upon the totality of the circumstances. *See* FAR preamble 81 Fed. Reg. at 58570 ("Consistent with well-established contracting law principles and practices, the rule requires that determinations regarding a

prospective contractor's responsibility be made by the particular contracting officer responsible for the procurement, on a case-by-case basis.").

In the event that any of Plaintiffs' prospective contractors do receive an adverse responsibility determination that they believe prejudices them for either a specific procurement or future procurements, they would not be without recourse. Contracting officers currently make responsibility determinations regularly, and when prospective contractors believe these determinations were made improperly, they can, and do, file bid protest challenges to those decisions before either the Government Accountability Office, *see, e.g.*, *In re Gaver Industries, Inc.*, B-412428 2016 CPD (Comp. Gen. Feb. 9, 2016), or bring a suit in the Court of Federal Claims under 28 U.S.C. § 1491(b), *see Remington Arms Co. v. United States*, 126 Fed. Cl. 218, 230-31 (2016).

Beyond their First Amendment and Fifth Amendment arguments, Plaintiffs have failed to identify any concrete irreparable harm that is likely to occur absent injunctive relief. To the extent Plaintiffs are alleging harms that could result from the responsibility determination process that *could* occur before a final determination is made by this Court on the legality of the regulations, this is precisely the type of speculative harm allegations that courts have held cannot form the basis of irreparable harm for the purposes of granting injunctive relief. *See Winter v. NRDC*, 55 U.S. at 22 ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury.") (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1); *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) ("[An injunction] will not be granted against something merely feared as liable to occur at some indefinite time in the future."); *Janvey v. Alguire*, 647 F.3d 585, 601 (5th Cir. 2011) (holding that in order to obtain a preliminary injunction, the party seeking such relief

must show that the threatened harm is "more than mere speculation"); *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) (holding that "an unfounded fear on the part of the applicant" is insufficient to justify a temporary injunction).

Finally, we note that Plaintiffs' allegation of irreparable harm is undercut by their delay in seeking injunctive relief. The DOL guidance and FAR were published on August 25, 2016, but Plaintiffs waited until October 13, 2016 – less than 2 weeks until the rules were to take effect – to file their motion for temporary restraining order and preliminary injunction. ECF No. 4. "Equity aids the vigilant." *Carver v. Liberty Mut. Ins. Co.*, 277 F.2d 105, 109 (5th Cir. 1960). A delayed filing of a motion for injunctive relief weakens any claim of irreparable injury. *See, e.g.*, *Smith v. Johnson*, 440 F.3d 262 (5th Cir. 2006); *Craig v. Gregg Cty.*, 988 F.2d 18, 20 (5th Cir. 1993).

III. THE REQUESTED INJUNCTIVE RELIEF IS NOT IN THE PUBLIC INTEREST

Plaintiffs bear the burden of proving both that "the threatened harm to [their interests] will outweigh any potential injury the injunction may cause the opposing party" and that "the injunction, if issued, will not be adverse to public interest." *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986). These two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941)).

The E.O. was signed in order to increase economy and efficiency in government contracting. *See* E.O. § 1, 79 Fed. Reg. at 45309. As the E.O. explains, "[c]ontractors 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." *Id.* As the final rule explains in greater detail, this conclusion was reasonably based upon relevant research. 81 Fed. Reg. 58564. The rule notes that "a number of studies suggest a significant percentage of the most egregious labor law violations identified in recent years have involved companies that received Federal contracts." *Id*. The rule specifically cites to two reports issued by the GAO in the mid-1990s, as well as a more recent GAO report regarding workplace health-and-safety and wage-and-hour violations between Fiscal Year 2005 and Fiscal Year 2009, in support of this conclusion. *Id*. The rule also notes that "a number of studies suggest a strong relationship between labor law compliance and performance." *Id*. It cites to a 2003 report issued by the Fiscal Policy Institute and a 2013 study conducted by the Center for American Progress in support of this conclusion. *Id*.

Increasing the economy and efficiency of Government contracts provides benefits to the Government itself and to all American taxpayers. This is unquestionably a matter of public interest, and the E.O., the FAR rule, and the DOL guidance explain how and why these requirements will serve that goal. Delaying the implementation of these requirements will delay these important public benefits, and therefore the public interest in this case would be underserved by granting Plaintiffs' motion.

For the reasons given above, Plaintiffs are not entitled to any temporary restraining order or preliminary relief. But even if the Court were to grant some form of relief, the Court should not grant Plaintiffs' request for a nationwide injunction. An injunction "should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), a principle that become all the more important when the federal government is the defendant, *cf. United States v. Mendoza*, 464 U.S. 154, 159-63 (1984).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' motion for a temporary restraining order and preliminary injunction be denied.

Respectfully submitted,

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October 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2016, I electronically filed a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/Martin M. Tomlinson
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