

FAR Council Specifies New Rules Applicable To Contracts Involving "Recovery Act" Funds

On March 31, 2009, the FAR Council issued regulations to implement provisions of the American Recovery and Reinvestment Act of 2009 ("Recovery Act") applicable to government contracting. The impact that these regulations will have on federal contractors and subcontractors is as follows, to the extent that the contract or subcontract is funded in whole or in part with Recovery Act funds:

- A. The government contracting officer should identify when an existing or new contract is being funded in part or completely with Recovery Act funds. Contracting officers are encouraged to award either separate, Recovery Act-only contracts or separate Recovery Act CLINs under a contract. FAR 4.1501
- B. Prime contractors are required to report quarterly using an online tool as follows:
 1. Contract number
 2. Amount
 3. List of significant services and products
 4. Program or project title
 5. Overall purpose and expected outcome
 6. Assessment of current progress
 7. Description of employment impact and types of jobs created
 8. Prime contractors and subcontractors that receive more than 80% of annual revenue from federal contracts, subcontracts, loans, grants, and cooperative agreements and have gross revenues in excess of \$25 million per year from federal sources must report the name and total compensation of the 5 most highly compensated officers.

FAR 52.204-11

- C. Prime contractors are required to collect and report the following from their first tier subcontractors receiving more than \$25,000 in Recovery Act funds:
 1. Duns Number
 2. Subcontractor name
 3. Dollar amount of subcontract award
 4. Date of subcontract award
 5. Applicable NAICS code
 6. Funding agency
 7. Description of products or services
 8. Subcontract number assigned by the prime contractor
 9. Subcontractor's address

10. Subcontractor's performance location

11. Names and total compensation of subcontractor's 5 most highly compensated officers if the subcontractor receives more than 80% of its annual revenues from the federal government and has more than \$25 million in annual revenues from federal sources.

FAR 52.204-11

For subcontracts under \$25,000 and for those subcontractors that had a gross income of less than \$300,000, the prime contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount.

D. First-tier subcontractors are required to report quarterly to the prime contractor as follows:

1. DUNS Number
2. Physical address
3. Primary performance location

FAR 52.204-11

E. Prime contractors must provide the Comptroller General (Government Accountability Office) and the agency Inspector General access to:

1. Prime contract and subcontract records that pertain to and involve transactions related to the prime contract
2. Officers or employees of the prime contractor with regard to contract transactions.

FAR 52.215-2, Alt 1 and 52.212-5, Alt II

F. Subcontractors must provide the Comptroller General and the agency Inspector General access to:

1. Subcontract records that pertain to and involve transactions related to the prime contract.
2. Subcontractors need not provide access to officers and employees to agents of the Inspector General.

FAR 52.215-2, Alt I and 52.212-5, Alt II

G. Prime contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee who reports:

1. Gross mismanagement of funds
2. Gross waste of funds
3. A substantial and specific danger to the public health and safety
4. An abuse of authority
5. A violation of law, rule or regulation.

FAR 3.907-2

H. For Recovery Act contracts and subcontracts for the construction, alteration, maintenance or repair of a public building or public work:

1. The public building or public work must be located in the United States
2. All iron, steel and other manufactured goods used as construction material must be produced or manufactured in the United States unless:
 - i. A nonavailability determination has been made by the Agency
 - ii. The cost is unreasonable meaning the cost of domestic manufactured construction material is more than 25 percent of foreign manufactured construction material and the cost of domestic unmanufactured construction material is more than 6 percent of foreign unmanufactured construction material
 - iii. The Agency determines that it would be inconsistent with the public interest to apply the restrictions
3. For construction contracts with an estimated value of \$7,443,000 or more, construction material from a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country or a least developed country shall be treated as domestic construction material.

FAR 25.6

- I. Of note, for Recovery Act contracts government contracting officers are now required to report the following in fedbizopps.gov:
 1. A description of any contract action including task orders and delivery orders exceeding \$500,000 with a narrative that describes in clear English the products or services being acquired
 2. A description of any contract action, regardless of dollar value, including task orders and delivery orders, that is not awarded as a fixed price contract or is not awarded with competition and a rationale as to why it was not a fixed price contract or not competitively awarded.

FAR 5.705