

New Rule for Reporting Executive Compensation and First-Tier Subcontract Awards Under Federal Contracts

July 8, 2010

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 2 of the Federal Funding Accountability and Transparency Act of 2006, as amended by section 6202 of the Government Funding Transparency Act of 2008, which requires the Office of Management and Budget (OMB) to establish a free, public, website containing full disclosure of all Federal contract award information. This rule will require contractors to report executive compensation and first-tier subcontractor awards on contracts expected to be \$25,000 or more, except classified contracts, and contracts with individuals. Effective Date: July 8, 2010. Reference Federal Register: July 8, 2010 (Volume 75, Number 130).

Contracting officers shall include the FAR clause at 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, in accordance with FAR 4.1403, in solicitations issued on or after the effective date of this rule, and resultant contracts. Contracting officers shall modify existing indefinite-delivery indefinite-quantity (IDIQ) contracts on a bilateral basis in accordance with FAR 1.108(d)(3) to include the clause for future orders. This includes modifying blanket purchase agreements under IDIQ contracts. IDIQ contracts include Federal Supply Schedule contracts and task- and delivery-order contracts such as Governmentwide acquisition contracts.

On September 26, 2006, the Federal Funding Accountability and Transparency Act (Transparency Act), Public Law 109-282, 31 U.S.C. 6101 note, was enacted to reduce "wasteful and unnecessary spending," by requiring that OMB establish a free, public, website containing full disclosure of all Federal award information for awards of \$25,000 or more. The Transparency Act required, by January 1, 2009, reporting on subcontract awards by Federal Government contractors and subcontractors. The Transparency Act's initial phase was conducted as a Pilot Program (Pilot), to test the collection and accessibility of the subcontract data. In order to implement the Pilot, a proposed rule was published in the Federal Register, March 21, 2007 (72 FR 13234).

A final rule implementing the Pilot was published in the Federal Register, September 6, 2007 (72 FR 51306). Exempted from the Pilot were solicitations and contracts for commercial items issued under FAR part 12 and classified solicitations and contracts. To minimize the burden on Federal prime contractors and small businesses, the Pilot applied to contracts with a value greater than \$500,000,000 and required the awardees to report all subcontract awards, exceeding \$1,000,000 to the Transparency Act database at <http://www.esrs.gov>. The Pilot terminated January 1, 2009. On June 30, 2008, Section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252) amended the Transparency Act to require the Director of OMB to include an additional reporting element, requiring contractors and subcontractors to disclose information on the names and total compensation of their five most highly compensated officers.

On March 31, 2009, the Councils published in the Federal Register at 74 FR 14639 FAR case 2009-009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Reporting Requirements, which required contractors receiving a Recovery Act funded contract award to provide detailed information on subcontracts, including the data elements required to comply with the Transparency Act. Although the Transparency Act reporting requirements flow down to all subcontracts, regardless of tier, the Recovery Act limited the reporting on subcontract awards to the contractor's first-tier subcontractors.

The Office of Management and Budget directed that the FAR be amended to initiate subcontract award reporting under the Transparency Act:

Subcontract reporting would apply only to first-tier subcontracts;

The rule would phase-in the reporting of subcontracts of \$25,000 or more:

Until September 30, 2010, any newly awarded subcontract must be reported if the prime contract award amount was \$20,000,000 or more;

From October 1, 2010, until February 28, 2011, any newly awarded subcontract must be reported if the prime contract award amount was \$550,000 or more; and

Starting March 1, 2011, any newly awarded subcontract must be reported if the prime contract award amount was \$25,000 or more.

By the end of the month following the month of award of a contract, and annually thereafter, the contractor shall report the names and total compensation of each of the five most highly compensated executives for the contractor's preceding completed fiscal year;

Unless otherwise directed by the contracting officer, by the end of the month following the month of award of a first-tier subcontract, and annually thereafter, the contractor shall report the names and total compensation of each of the five most highly compensated executives for the first-tier subcontractor's preceding completed fiscal year;

There would be a \$300,000 gross income exception for prime contractors and subcontractors; and

Data quality requirements would apply to agencies and contractors.

Many of these directions minimize burden on contractors. The rule will require contractors to report subcontracts of \$25,000 or more, and any modifications made to those subcontracts which change previously reported data.

The reporting requirements of the Transparency Act are sweeping in their breadth, and are intended to empower the American taxpayer with information that may be used to demand greater fiscal discipline from both executive and legislative branches of Government. The Transparency Act reporting requirements apply to all businesses (large, small, disadvantaged small, veteran-owned small, women-owned small, HUBZone small), regardless of business size or ownership.

This rule revises FAR subpart 4.14 and FAR 52.204-10 to implement the Transparency Act reporting requirements. Contracting officers must include the revised clause in solicitations and contracts of \$25,000 or more. The clause is required in commercial item contracts, including commercially available off-the-shelf (COTS) item contracts, as well as actions under the simplified acquisition threshold, meeting the \$25,000 threshold. The clause is not required in classified solicitations and contracts, and contracts with individuals.

Contractors will provide these subcontract reports to the Federal Funding Accountability and Transparency Act Sub-award Reporting System (FSRS) (<http://www.fsrs.gov>). FSRS is a

module of the Electronic Subcontracting Reporting System (eSRS) designed specifically to collect the Transparency Act required data. Contracting officers will be required to modify existing contracts to cover future orders--see the Applicability Date above.

The Councils provide the following determinations with respect to the rule's applicability to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, commercial items, and commercially available off-the-shelf (COTS) items.

1. Applicability to contracts at or below the simplified acquisition threshold. 41 U.S.C. 429 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. If a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them. Therefore, given that the Transparency Act was enacted to reduce "wasteful and unnecessary spending" by requiring that the Office of Management and Budget (OMB) establish a free, public, Web site containing full disclosure of all Federal contract award information, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to solicitations and contracts at or below the simplified acquisition threshold, as defined at 2.101.

2. Applicability to commercial item contracts. 41 U.S.C. 430 governs the applicability of laws to commercial items and is intended to limit the applicability of laws to commercial items. Section 430 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items. Therefore, given that the Transparency Act was enacted to reduce "wasteful and unnecessary spending" by requiring that OMB establish a free, public, Web site containing full disclosure of all Federal contract award information, the FAR Council has determined that it is in the best interest of the Federal Government to apply the rule to commercial items, as defined at FAR 2.101, both at the prime and subcontract levels.

3. Applicability to commercially available off-the-shelf (COTS) item contracts. 41 U.S.C. 431 governs the applicability of laws to the procurement of COTS items, and is intended to limit the applicability of laws to them. Even if a law has been determined to apply to commercial items in general, COTS items may be exempt. Section 431 provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply. The same applies for subcontracts for COTS items. Therefore, given that the Transparency Act was enacted to reduce "wasteful and unnecessary spending" by requiring that OMB establish a free, public, online Web site containing full disclosure of all Federal contract award information, the administrator for Federal Procurement Policy has determined that it is in the best interest of the Federal Government to apply the rule to COTS item contracts and subcontracts, as defined at FAR 2.101.

Interested parties should submit written comments to the Regulatory Secretariat on or before September 7, 2010 to be considered in the formulation of a final rule. Submit comments identified by FAC 2005-44, FAR case 2008-039, by any of the following methods:

Regulations.gov: <http://www.regulations.gov>.

Fax: 202-501-4067.

Mail: General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-44, FAR case 2008-039, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. Please cite FAC 2005-44, FAR case 2008-039. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

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