

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR—2007–002, Sequence 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–20; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–20 as a pilot program. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov/>.

DATES: For effective dates and comment dates, see the document following this notice.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–20, FAR Case 2006–029. Interested parties may also visit our website at <http://www.regulations.gov>. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

RULE LISTED IN FAC 2005–20

Subject	FAR case	Analyst
Federal Funding Accountability and Transparency Act (FFATA) - Reporting Requirement of Subcontractor Award Data	2006–029	Woodson.

SUPPLEMENTARY INFORMATION: A summary of the FAR rule follows. For the actual revisions and/or amendments to this FAR case, refer to FAR Case 2006–029.

FAC 2005–20 amends the FAR as specified below:

Federal Funding Accountability and Transparency Act (FFATA) - Reporting Requirement of Subcontractor Award Data (FAR Case 2006–029)

This final rule amends the Federal Acquisition Regulation (FAR) to require that contractors report specific subcontract awards to a public database. The Federal Funding Accountability and Transparency Act of 2006 (FFATA) (Pub. L. 109–282) requires the existence and operation of a searchable website that provides public access to information about Federal expenditures. This final rule establishes a pilot program to test the collection and accession of subcontract award data. As a result, subcontracts awarded and funded with Federal appropriated funds will eventually be disclosed to the public in a single searchable website. However, information reported under the pilot program will not be disclosed to the public.

Dated: August 29, 2007.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–20 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–20 is effective September 6, 2007.

Dated: August 27, 2007.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: August 29, 2007.

Al Matera,

Acting Senior Procurement Executive, General Services Administration.

Dated: August 28, 2007.

Sheryl Goddard,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FIR Doc. 07–4338 Filed 9–5–07; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 12, and 52

[FAC 2005–20; FAR Case 2006–029; Docket 2007–0001; Sequence 5]

RIN 9000–AK72

Federal Acquisition Regulation; FAR Case 2006–029, Federal Funding Accountability and Transparency Act (FFATA) - Reporting Requirement of Subcontractor Award Data

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require that contractors report specific subcontract awards to a public database as a pilot program. The Federal Funding Accountability and Transparency Act of 2006 (FFATA) (Pub. L. 109–282) requires the existence and operation of a searchable website that provides public access to information about Federal expenditures.

DATES: Effective Date: September 6, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-20, FAR case 2006-029.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to establish a pilot program to test the collection and accession of subcontract award data. As a result, subcontracts awarded and funded with Federal appropriated funds will be disclosed to the public in a single searchable website. However, information reported under the pilot program will not be disclosed to the public.

The FFATA requires the existence and operation of a searchable website that provides public access to information about Federal expenditures. Section 2(d) of the FFATA requires that a pilot program be established to test the collection and accession of subcontract award data.

In order to implement Section 2(d) of the FFATA, the Councils are adding a new Subpart to FAR Part 4, with an associated clause in FAR Part 52, which addresses reporting subcontract awards. The pilot program will terminate no later than January 1, 2009.

This rule applies to contracts with values equal to or greater than \$500 million awarded and performed in the United States, and requires the awardees to report all first tier subcontract awards exceeding \$1 million to the FFATA database at www.esrs.gov. The Councils chose these thresholds to ensure that a sufficient number of subcontract award reports will be entered in the database to permit assessment of its effectiveness without imposing a significant burden on contractors during the pilot program. The Government does not guarantee the reliability of the data reported. The Government has no mechanism to verify the data submitted. Before completion of the pilot program, the Councils will initiate a separate rulemaking process to establish the requirements for the final subcontract reporting database pursuant to the statute. This rule does not apply to classified contracts or commercial item contracts issued under FAR Part 12.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 13234 on March 21, 2007. Seventeen respondents submitted comments in response to the proposed rule. A discussion of the comments is provided below. No changes were made

to the rule as a result of those comments.

1. *Burden Imposed and Usefulness of Database.* Thirteen comments were received concerning the burden that will be imposed on contractors in order to capture the required data in the final subcontract reporting database. Some contractors currently do not collect the specific subcontractor data and may need to create a new system of collection. Respondents were concerned about the cost of software modifications necessary to collect the information required by FFATA. In addition, the manual input is perceived to be labor intensive and the cost to ensure compliance, as well as cost to audit, will be significant to both the contractor and the Government. It was suggested that the pilot threshold of \$1 million was a reasonable threshold and it should be maintained in final reporting requirements in order to relieve some of the burden associated with the rule. Another comment related to the threshold suggested that the threshold should balance the data aggregation costs with the resulting benefits of providing the data to the public. One respondent suggested that the contractor should not have to report to the public because there are sufficient Government agencies that already monitor contractor performance and, therefore, a public database would not be necessary. One respondent requested that the rule be clarified to require reporting at the task order level, as reporting the required information at the onset of the contract (IDIQ or requirements contracts) would not accomplish the goal of FFATA. No other comments were received regarding the proposed pilot program. Five respondents submitted comments regarding the impact and burden of FFATA final reporting requirements on small business indicating that the burden on small businesses would be particularly heavy.

Response: The FFATA of 2006 mandates the existence and operation of a single searchable website, accessible by the public to require full disclosure of all transactions of \$25,000 or more involving Federal funds. The Councils must comply with the statute when the final reporting requirements are established. The definition of "subcontract" in FAR clause 52.204-10 refers to the definition of "contract" which would include all types of commitments that obligate the Government to an expenditure of appropriated funds, including task orders. According to the FFATA data definitions, available at the FFATA reporting website, "award amount" is defined as the amount of support

provided in the award, based on obligations. The contractor should report a subcontract when the money is obligated. If obligation happens at the time the IDIQ is awarded then the contractor would report the amount of the award in the FFATA database at the time of the IDIQ award. If money is obligated at the time each task/delivery order is issued, then the contractor would report the amount of the award in the FFATA database at the time of award of the order. In addition, the clause provides a definition of "subcontract," which is based on the FAR definition at 2.1, and includes bilateral contract modifications. If additional money is obligated by a bilateral subcontract modification, then that amount must also be reported in the FFATA database as a separate record. The pilot program will not allow the modification of an existing record, but the respondents recommendation will be considered when establishing the final requirements. The comments regarding small business are addressed in paragraph B, Regulatory Flexibility Act, of this notice.

2. *Duplicate Collection Requirement.* Five comments were received regarding the existence of current databases that would be viewed as providing sufficient information to comply with the law. The existing databases or system of collecting subcontract information include the Federal Procurement Data System (FPDS), the Electronic Subcontracting Reporting System, small business subcontracting plans, and IRS Form 1099. It was also suggested that the Councils consider coordinating with other unspecified financial mechanisms that are currently under development.

Response: The Councils agree that information contained in existing data collection systems/databases should be utilized as much as possible to fulfill the requirements of FFATA. However, required subcontract information is not available from existing Federal systems/databases. Therefore, a certain amount of data must be provided by the contractor through a single searchable website as prescribed by Section 2(b)(1) of FFATA. Accordingly, the final rule remains unchanged.

3. *Verification and Validation of Data in the FFATA Database.* Three respondents question the usefulness of a system that the Government cannot validate. Four comments were received suggesting that the Government needs to establish a means of ensuring compliance and accuracy of the data available in the FFATA database.

Response: While the Government does not have a mechanism to verify or validate subcontract data input by a

contractor, the Government will use routine contract administration oversight to ensure contractor compliance with the FAR clause at 52.204-10, Reporting Subcontract Awards. The final rule therefore remains unchanged.

4. Reporting Period. Six comments were received requesting clarification of the reporting requirements for the pilot program and suggesting alternative timeframes for reporting data. Clarification was requested regarding reporting of the initial award of a subcontract and subsequent extensions in the period of performance or an exercise of an option for the same subcontract. It was suggested that the FFATA database allow for updates of existing records. One respondent believes that quarterly reporting would be burdensome. Another respondent suggested changing the reporting requirement to 90 days after subcontract award.

Response: The reporting periods for the pilot program are sufficient to allow contractors to successfully report subcontract awards. The suggestion to have the FFATA database allow for updates of existing records, including the suggestion to tie the reporting periods to the period of performance, will be given consideration when the final reporting requirements are established.

5. Security Issues. Nine comments were received expressing concerns about industrial, national, and other security issues. Since the database will be public, anyone, including terrorists, will have access to the information. Providing names and addresses of contractors/subcontractors in a public database creates unnecessary risks in a national, operational, and human security sense and will undermine the Government mission and national security. It was suggested that reporting requirements exclude any item constituting a weapon system or components thereof and any item subject to the International Traffic in Arms Regulation. One respondent believes that security will not be compromised because the requirement clearly exempts classified solicitations and contracts.

Response: FFATA mandates the existence and operation of a single searchable website, accessible by the public to require full disclosure of transactions of \$25,000 or more involving Federal funds. The specific data elements, including names and addresses, are required for each Federal award, including subcontracts. However, Section 3 of FFATA stipulates that the Act does not require disclosure

of classified information, and the FAR rule exempts classified contracts that may be applicable to industrial, national, and other security issues, and the pilot database only applies to prime contracts awarded and performed in the United States. Accordingly, the Councils have determined that no change is necessary.

6. Competition. Eleven respondents expressed concerns regarding competition. In general, disclosure of information will provide unwarranted competitive advantages to competitors. Comments received stated that the name and location of subcontractors is considered confidential proprietary business information and should not be provided to the public. Longstanding laws (e.g., Freedom of Information Act (FOIA) and Trade Secrets Act) are designed to protect contractors' and subcontractors' confidential and proprietary business information. Courts have interpreted Exemption 4 of FOIA to preclude the disclosure of certain contractor pricing information, finding that the release of pricing information, particularly line item prices and option year prices, may result in substantial competitive harm to a contractor. The FFATA database will provide competitors with source and price information that could be used to develop procurement strategies that undermine future business. In addition, posting pilot program information goes beyond the requirements of FFATA and could present serious risks to both contractors and subcontractors (e.g., competitors may gain insight into a contractor's team partners). It is believed that the public will misunderstand the basis of awards (e.g., a contract awarded on a basis other than lowest price). One respondent believes that the rule went beyond the FFATA requirements and suggests that the Councils work with the Office of Management and Budget (OMB) to establish the pilot program. One respondent believes that FFATA infringes on important commercial business practices, making it difficult to continue beneficial relationships that serve both commercial and Government customers.

Response: FFATA requires the existence and operation of a single searchable website, accessible by the public that includes specific information for Federal awards. The Councils must comply with the requirements of the law when the final reporting requirements are established. Under 41 U.S.C. 405 and 421, the Office of Federal Procurement Policy at OMB oversees the issuance of the FAR. OMB approves all FAR rules before

publication, including this final rule and its proposed rule. The information reported under the pilot program will not be disclosed to the public.

7. Applicability. Six comments were received regarding applicability of the rule. Some required clarification of applicability and others suggested changes in the application of the rule.

Clarification was requested as to whether the reference to the term "contract number" in the FAR clause at 52.204-10 applied to the prime contract number or subcontract number/purchase order number, and whether "subcontractor location including address" applied to the billing address of the subcontractor. It was also requested that clarification be provided regarding the assumption that a contract was classified when it contained a Department of Defense, Contract Security Classification Specification (DD Form 254).

Certain respondents strongly suggested that final reporting requirements be limited to first tier subcontracts because no privity of contract relationship exists between subcontractors and the Government, while a single respondent believed that the requirement to report all subcontracts, regardless of tier, was reasonable and would ensure consistency in reporting and maximize visibility into Federal spending. In addition, two respondents indicated that the final reporting requirements should not apply to commercial contractors because it will be excessively burdensome for them to identify and report on Government contracts and items purchased as company inventory should not be reportable. Concerns that commercial subcontractors might have their subcontract prices and other sensitive information disclosed on a public website raises concerns regarding the Federal Acquisition Streamlining Act of 1994 (FASA). FASA generally exempts laws from applying to commercial item subcontracts unless the statute specifically refers to that section. The respondent further stated that the final reporting requirements should not apply to contracts awarded or performed outside the United States. Extending the reporting requirements to contracts awarded or performed outside the United States will stretch the resources of an already overtaxed acquisition workforce in foreign countries. In addition, certain foreign countries may prohibit release of financial information outside the country. One respondent suggested that a limited set of data should be reported for sensitive but unclassified contracts (e.g., do not

include the place of performance location).

Response: Regarding clarifications of applicability, the reference to “contract number” in FAR 52.204–10 refers to the prime contract number or purchase order number assigned by the Government, consistent with the FAR convention of all references to “contractor” meaning the recipient of a Government contract. The subcontractor location including address refers to the principal business location of the subcontractor receiving the award. The Councils expect the FFATA database to include helpful information regarding field definitions. The DD Form 254 is the basic document for conveying to contractors the applicable classified areas of information involved in a classified effort. The classification may be related to various attachments or supplement documents or a facility and would be identified in the body of the DD Form 254. The rule does not apply to classified contracts.

The FAR clause at 52.204–10 does not require reporting of subcontract awards below the first tier. In addition, the clause is not required in solicitations and contracts for commercial items issued under FAR Part 12. However, comments received regarding the applicability to commercial contractors and to contracts awarded or performed outside the United States will be considered in formation of the final requirements. Therefore, the final rule remains unchanged.

8. Unique Identifier for Subcontractors. Eight comments were received regarding whether the unique subcontractor identifier should be the “data universal numbering system (DUNS”) number, the Taxpayer Identification Number (TIN), some other number, or a non-numerical unique identifier. One respondent requested clarification as to whether the unique identifier was the prime contract number. Six respondents favored the DUNS number because it is well-established as the unique identifier for tracking Federal prime contractors. Since many subcontractors are also prime contractors on other contracts, using the DUNS number would eliminate any confusion regarding what role they are playing, prime or subcontractor. Two respondents favored the use of the TIN as a unique identifier because subcontractors are not required to obtain a DUNS number. There are limited controls on the issuance of DUNS numbers and therefore they are considered to be less reliable than the TIN.

Response: Use of the DUNS number is expected to be the most cost-effective

identifier for reporting awards in the FFATA database. It is the common identifier used in most Federal systems/databases to identify contractors. Any contractor or subcontractor needing to obtain a DUNS number may do so by visiting www.dnb.com/us. For the Pilot Program, the unique identifier for the subcontractor will be defined in the FFATA pilot database. Therefore, the final rule remains unchanged.

9. Definition of Subcontract. One comment was received stating that the proposed definition of “subcontract” (see FAR clause 52.204–10) would lead to confusion over which business entity is entering into the subcontract. The respondent suggested that the definition be revised to be more closely aligned to the definition found at FAR 44.101.

Response: The definition at FAR clause 52.204–10 was adapted from the FAR 44.101 definition of “subcontract” and means “* * * any contract entered into by the Contractor to furnish supplies or services for performance of this contract * * *.” The definition is clear and, therefore, remains unchanged in the final rule.

10. Conflict with DFARS 252.204–7000, Disclosure of Information. Two comments were received regarding the apparent conflict of FFATA with Defense Federal Acquisition Regulation Supplement (DFARS) Clause 252.204–7000, Disclosure of Information. The DFARS clause prohibits the disclosure of any part of the contract unless the contracting officer provides written approval. Clarification is requested as to whether the FFATA clause supersedes DFARS 252.204–7000.

Response: This comment is outside the scope of this FAR rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the contract dollar threshold for the application of the pilot program is \$500 million. The number of small businesses receiving such large prime contract awards is estimated to be miniscule to none.

Comments were received regarding the impact of FFATA final reporting requirements on small business. One respondent stated that historically,

small businesses have not been required to track subcontract awards by contract and implementing the final reporting requirements of FFATA would mean that they would need to develop a tracking system. A respondent stated that FFATA would increase costs associated with hiring resources to track and input data. In addition, another respondent stated that many small businesses may not be familiar with regulations and laws related to subcontract reporting.

The public comments and results of the pilot program will be considered when the final reporting requirements are established, with a goal of minimizing burdens imposed on small businesses.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the final rule contains information collection requirements. Accordingly, the FAR Secretariat has forwarded a request for approval of a new information collection requirement concerning OMB Control Number 9000–00XX, FFATA Reporting Requirement of Subcontractor Award Data, to OMB under 44 U.S.C. 3501, *et seq.* Public comments concerning this request will be invited through a subsequent **Federal Register** notice.

List of Subjects in 48 CFR Parts 4, 12, and 52

Government procurement.

Dated: August 29, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 12, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 12, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Add subpart 4.14 to read as follows:

Subpart 4.14—Reporting Subcontract Awards

4.1400 Scope of subpart.

This subpart implements section 2(d) of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. No. 109–282) by establishing a pilot program for a single searchable website, which will eventually be available to the public at no charge, that includes information on Federal subcontracts. This pilot program will expire not later than January 1, 2009. Information

reported under the pilot program will not be disclosed to the public.

4.1401 Contract clause.

(a) Except as provided in paragraph (b) of this section, insert the clause at 52.204-10, Reporting Subcontract Awards, in all solicitations and contracts with values of \$500,000,000 or more when the contract will be awarded and performed in the United States.

(b) The clause is not required in—
(1) Solicitations and contracts for commercial items issued under FAR Part 12; or

(2) Classified solicitations and contracts.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 12.503 by adding new paragraph (a)(6) to read as follows:

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial services.

(a) * * *
(6) 31 U.S.C. 6101 note, Pub. L. 109-282, Federal Funding Accountability and Transparency Act of 2006, requirement to report subcontract data.
* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Add section 52.204-10 to read as follows:

52.204-10 Reporting Subcontract Awards.

As prescribed in 4.1401(a), insert the following clause:

REPORTING SUBCONTRACT AWARDS
(SEP 2007)

(a) *Definition. Subcontract*, as used in this clause, means any contract as defined in FAR Subpart 2.1 entered into by the Contractor to furnish supplies or services for performance of this contract. It includes, but is not limited to, purchase orders and changes and

modifications to purchase orders, but does not include contracts that provide supplies or services benefiting two or more contracts.

(b) Section 2(d) of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. No. 109-282) requires establishment of a pilot program for a single searchable website, available to the public at no charge that includes information on Federal subcontracts.

(c) Within thirty days after the end of March, June, September, and December of each year through 2008, the Contractor shall report the following information at www.esrs.gov for each subcontract award with a value greater than \$1 million made during that quarter. (The Contractor shall follow the instructions at www.esrs.gov to report the data.)

- (1) Name of the subcontractor.
- (2) Amount of the award.
- (3) Date of award.
- (4) The applicable North American Industry Classification System code.
- (5) Funding agency or agencies.
- (6) Award title descriptive of the purpose of the action.
- (7) Contract number.
- (8) Subcontractor location including address.
- (9) Subcontract primary performance location including address.
- (10) Unique identifier for the subcontractor.

(End of clause)
[FR Doc. 07-4336 Filed 9-5-07; 8:45 am]
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR—2007—002; Sequence 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-20; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This Small Entity Compliance Guide has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2005-20 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2005-20 which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Laurieann Duarte, FAR Secretariat, (202) 501-4755. For clarification of content, contact the analyst whose name appears in the table below.

RULE LISTED IN FAC 2005-20

Subject	FAR case	Analyst
Federal Funding Accountability and Transparency Act (FFATA) - Reporting Requirement of Subcontractor Award Data	2006-029	Woodson.

SUPPLEMENTARY INFORMATION: A summary of the FAR rule follows. For the actual revisions and/or amendments to this FAR case, refer to FAR Case 2006-029.

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program to test the collection and accession of subcontract award data. As a result, subcontracts awarded and funded with Federal appropriated funds will eventually be disclosed to the public in a single searchable website. However, information reported under the pilot program will not be disclosed to the public.