

Dated: June 25, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 2, 4, 7, 10, 13, 18, 26, and 52, which was published in the **Federal Register** at 74 FR 52847 on October 14, 2009, is adopted as a final rule without change.

[FR Doc. 2010-15914 Filed 7-1-10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 52

[FAC 2005-43; FAR Case 2010-008; Item III; Docket 2010-0008, Sequence 1]

RIN 9000-AL63

Federal Acquisition Regulation; FAR Case 2010-008, Recovery Act Subcontract Reporting Procedures

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to revise the clause at FAR 52.204-11. This interim rule does not require renegotiation of existing Recovery Act contracts that include the clause dated March 2009. This change will require first-tier subcontractors with Recovery Act funded awards of \$25,000 or more, to report jobs information to the prime contractor for reporting into <http://FederalReporting.gov>. It also will require the prime contractor to submit its first report on or before the 10th day after the end of the calendar quarter in which the prime contractor received the award, and quarterly thereafter.

DATES: *Effective Date:* July 2, 2010.

Applicability Date: The changes to the original clause will be used for all new solicitations and contracts issued on or after the effective date of this interim rule. This change is not required for task and delivery orders where the original

clause dated March 2009 is already in the underlying task and delivery order contract. This change is not required when modifying existing contracts that contain the clause dated March 2009. Therefore, this interim rule does not require renegotiation of existing Recovery Act contracts that include the clause dated March 2009.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before August 31, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-43, FAR case 2010-008, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2010-008" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "FAR Case 2010-008." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2010-008" on your attached document.

- *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 2005-43, FAR case 2010-008, 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. Karlos Morgan, Procurement Analyst, at (202) 501-2364 for clarification of content. Please cite FAC 2005-43, FAR case 2010-008. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

On February 17, 2009, the President signed Public Law 111-5, the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"), including a number of provisions to be implemented in Federal Government contracts. On March 31, 2009, the Councils published FAR Case 2009-009 in the **Federal Register**, (74 FR 14639) as an interim rule amending the FAR to implement section 1512 of the Recovery Act, which requires contractors to report

on their use of Recovery Act funds. A correction was published May 14, 2009 (74 FR 22810). The FAR interim rule added a new subpart 4.15, and a new clause, 52.204-11, requiring contracting officers to include the clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts.

This new interim rule revises the clause and instructs contracting officers to include the clause in all new solicitations and contracts issued on or after the effective date of this interim rule. This revised clause is not required for any existing contracts, or task and delivery orders issued under a contract, that contain the original clause FAR clause 52.204-11 dated March 2009. Therefore, no renegotiation is required. However, the revised clause will be required for any new Recovery Act funded task or delivery orders if the underlying task or delivery order contract does not contain FAR clause 52.204-11, dated March 2009.

The revised clause requires first-tier subcontractors to report jobs information to the prime contractor for reporting into <http://FederalReporting.gov>. It also requires prime contractors to submit their first quarterly report into <http://FederalReporting.gov> on or before the 10th day following the end of the calendar quarter in which the prime contractor received its award and submit quarterly thereafter. The revised clause also refers contractors and their first-tier subcontractors to a set of Frequently Asked Questions (FAQs) available online. Contractors subject to 52.204-11 were initially notified of the FAQs through a **Federal Register** notice (74 FR 48971), published on September 25, 2009.

This is a significant regulatory action and, therefore, was 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

This interim rule may 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 it requires quarterly reporting on subcontractor jobs under newly awarded Recovery Act funded contracts.

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

1. Reasons for the action.

This action is being implemented to obtain jobs information on first-tier subcontracts of \$25,000 or more funded by the Recovery Act.

2. Objectives of, and legal basis for, the rule.

The FAR Council has authority to promulgate regulations it believes are necessary. OMB has determined that obtaining publicly reported jobs information at the subcontractor level on new contracts is desirable. This interim rule also requires that prime contractors begin to report in the calendar quarter in which the contract was awarded, even if no invoice has been submitted.

3. Description and estimate of the number of small entities to which the rule will apply.

The rule revises the clause requiring quarterly reporting of direct jobs for prime contractors and all first-tier subcontracts of \$25,000 or more, funded by the Recovery Act. The clause also requires the first quarterly report to be submitted on or before the 10th day following the end of the calendar quarter in which the prime contractor was awarded the Recovery Act funded contract. This revised clause will only be required in new solicitations and contracts issued on or after the effective date of the interim rule. The revised clause is not required for task and delivery orders where the underlying task or delivery order contract already contains the original clause FAR 52.204-11 dated March 2009. This clause is not required for any existing contracts, or task and delivery orders issued under a contract, that contain the original clause FAR 52.204-11 (March 2009). Therefore, the interim rule does not require renegotiation of any existing awards that already contain the original clause. The original clause imposed a public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. This interim rule will increase the burden on both prime contractors and first-tier subcontractors who receive new awards. However, because the Federal Government estimates it has already obligated the majority of the Recovery Act funded contracts (80 percent), the impact is more limited. According to the Federal Procurement Data System (FPDS), there are currently 23,346 Recovery Act-funded contract awards. If that number represents 80 percent of all awards, then there are an estimated 5,833 Recovery Act-funded actions left to be awarded. FPDS further shows that of the 23,346 awards already made, 41 percent of them have been to small businesses (this reflects the percentage of awards, not dollars obligated which is currently 29 percent). Therefore, of the 5,833 contracts remaining to be awarded, 2,392 will be awarded to small business.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is estimated at 7,874. This is based on an assumption that there will be more first-tier subcontractors for higher dollar awards. It is estimated that there will be three first-tier subcontractors for each award of \$550,000 or more; two first-tier subcontractors for each award between \$100,000 and \$449,999; and one first-tier subcontractor for each award between \$25,000 and \$100,000. By analyzing FPDS

data, we determined that the highest dollar range represents 21 percent of all Recovery awards with the middle and lowest ranges representing 25 percent and 22 percent, respectively. The remaining 32 percent is made up of awards of \$25,000 or below. Of the 7,874 first-tier subcontractors it is estimated that 25 percent, or 1,969, will be small businesses.

Based on the above, including the assumption that awards under \$25,000 will have no subcontractors, the total number of small businesses, prime and subcontractors, to which this interim rule will apply is estimated at 3,595 and the total number of other than small businesses to which this rule will apply is estimated at 8,245.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

This interim rule applies to all Federal contractors regardless of size or business ownership. It is in addition to what was previously required of all Federal contractors and first-tier subcontractors, requiring the quarterly reporting of jobs information for all first-tier subcontracts of \$25,000 or more. Such reporting would probably be prepared by a company contract administrator or contract manager or a company subcontract administrator. The information necessary to calculate the jobs is primarily information that companies would maintain for their own business purposes. The reporting burden is quarterly.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

FAR Case 2009-009, American Recovery and Reinvestment Act of 2009 (Recovery Act)—Reporting Requirements, is related to this rule (*see* 74 FR 16469, published on March 31, 2009).

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

The interim rule does not require that first-tier subcontractors enter their jobs information directly into <http://FederalReporting.gov>, which eliminates the burden associated with Central Contractor Registration (CCR). CCR is required in order to use <http://FederalReporting.gov>. It also eliminates the burdens associated with registering in <http://FederalReporting.gov> and other burdens associated with the use of that system. The prime contractor will input the first-tier subcontractor's jobs information into <http://www.FederalReporting.gov>. However, the first-tier subcontractor will have to calculate the number of jobs that are funded by the Recovery Act each calendar quarter and report that information to the prime contractor in sufficient time that the prime contractor can submit the report. To help alleviate some of the burden, a set of Frequently Asked Questions is available at http://www.whitehouse.gov/omb/recovery_faqs_contractors. One of these FAQs provides a detailed example on how to calculate the jobs funded by the Recovery Act.

The Regulatory Secretariat will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the Regulatory Secretariat. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-43, FAR Case 2010-008) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the interim rule contains information collection requirements. Accordingly, the Regulatory Secretariat forwarded an emergency information collection request for approval of a new information collection requirement to the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.* OMB approved the new information collection requirement as OMB Control No. 9000-0176, Quarterly Reporting for First-tier Subcontractors. Comments on the interim rule as well as the information collection will be considered in the revisions to both the rule and the information collection.

Any award funded by the Recovery Act that was awarded prior to the effective date of this interim rule contained the original clause at 52.204-11, dated March 2009. Any award funded by the Recovery Act that is awarded on or after the effective date of this interim rule will contain the revised clause at 52.204-11. The revised clause imposes additional collection requirements not contained in the original clause at 52.204-11 dated March 2009. The revised clause requires first-tier subcontractors with Recovery Act funded awards of \$25,000 or more, to report jobs to the prime contractor for reporting into <http://FederalReporting.gov>. It also requires the prime contractor to submit its first report on or before the 10th day after the end of the calendar quarter in which the prime contractor received the award, and quarterly thereafter.

Because the Federal Government estimates it has already awarded the majority of the Recovery Act funded contracts (80 percent), the impact of this collection is limited. According to the Federal Procurement Data System (FPDS), there are currently 23,346

Recovery Act-funded contract awards. If that number represents 80 percent of all awards, then there are an estimated 5,833 Recovery Act-funded actions left to be awarded. FPDS further shows that of the 23,346 awards already made, 41 percent of them have been to small businesses (this reflects the percentage of awards, not dollars obligated which is currently 29 percent). Therefore, of the 5,833 contracts remaining to be awarded, an estimated 2,392 will be awarded to small business.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is estimated at 7,874. This is based on an assumption that there will be more first-tier subcontractors for higher dollar awards. It is estimated that there will be three first-tier subcontractors for each award of \$550,000 or more; two first-tier subcontractors for each award between \$100,000 and \$449,999; and one first-tier subcontractor for each award between \$25,000 and \$100,000. By analyzing FPDS data, we determined that the highest dollar range represents 21 percent of all Recovery awards with the middle and lowest ranges representing 25 percent and 22 percent, respectively. The remaining 32 percent is made up of awards of \$25,000 or below. Of the 7,874 first-tier subcontractors, it is estimated that 25 percent, or 1,969, will be small businesses.

Based on the above, including the assumption that awards under \$25,000 will have no subcontractors, the total number of small businesses, prime and subcontractors, to which this interim rule will apply is estimated at 3,595 and the total number of other than small businesses to which this rule will apply is estimated at 8,245.

Though Section 1512 requires that the reports be completed by the prime contractor for all data elements, for practical purposes, the prime contractor will have to obtain certain information from their first-tier subcontractors, hence the need for the revised flow-down requirements in paragraph (d)(10). In addition to the burden of first-tier subcontractors having to collect and report jobs information to the prime contractor, there is also the burden on the prime contractor for preparing and monitoring subcontractors who will have to collect and report this information to the prime.

Annual Reporting Burden

We estimate the total annual public cost burden for these elements to be \$2,950,792, including the time for reviewing instructions, searching existing data sources, gathering and

maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

First-tier Subcontract Respondents: 7,874.

Responses per respondent: 4 (reflects quarterly reports).

Total annual responses: 31,496.

Preparation hours per response: 1.0.

Total response burden hours: 31,496.

Average hourly wages (\$50.00 + 36.35 percent overhead): \$68.00.

Estimated cost to the public: \$2,141,728.

Prime Contract Respondents: 3,966.

Responses per respondent: 4 (reflects quarterly reports).

Total annual responses: 15,864.

Preparation hours per response: .75.

Total response burden hours: 11,898.

Average hourly wages (\$50.00 + 36.35 percent overhead): \$68.00.

Estimated cost to the public: \$809,064.

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than August 31, 2010 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite the applicable OMB Control No.: 9000-0176 and FAR Case 2010-008, Recovery Act Subcontract Reporting Procedures, in all correspondence.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (MVCB), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite the applicable OMB Control No.: 9000-0176 and FAR Case 2010-008, Recovery Act Subcontract Reporting Procedures, in all correspondence.

E. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because most of the funds provided under the American Recovery and Reinvestment Act of 2009 for obligation on Federal contracts, must be obligated by September 2010. In order to obtain the additional information on jobs prior to the statutory requirement to obligate most Recovery funds on contracts by September 2010, the requirements must be implemented immediately. However, pursuant to 41 U.S.C 418b and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4 and 52

Government procurement.

Dated: June 25, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

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

■ 1. The authority citation for 48 CFR parts 4 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. Revise section 4.1502 to read as follows:

4.1502 Contract clause.

Insert the clause at 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements in all solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This includes, but is not limited to, Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule (FSS) contracts, or agency indefinite-delivery/indefinite-quantity (ID/IQ) contracts that will be funded with Recovery Act funds. Contracting officers shall include this clause in any existing contract or order that will be funded with Recovery Act funds. Contracting officers may not use Recovery Act funds on existing

contracts and orders if the clause at 52.204-11 is not incorporated. This clause is not required for any existing contracts, or task and delivery orders issued under a contract, that contains the original clause FAR 52.204-11 (March 2009).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Amend section 52.204-11 by—
 - a. Removing from the clause heading “(MAR 2009)” and adding “(JUL 2010)” in its place;
 - b. Revising paragraphs (a) and (c);
 - c. Revising paragraph (d)(7) introductory text;
 - d. Removing from paragraph (d)(7)(i) the word “contractor’s” and adding the word “Contractor’s” in its place;
 - e. Revising paragraphs (d)(7)(ii) and (d)(10) introductory text; and
 - f. Adding paragraph (d)(10)(xii).

The added and revised text reads as follows:

52.204-11 American Recovery and Reinvestment Act—Reporting Requirements.

* * * * *

(a) *Definitions.* For definitions related to this clause (e.g., contract, first-tier subcontract, total compensation etc.) see the Frequently Asked Questions (FAQs) available at http://www.whitehouse.gov/omb/recovery_faqs_contractors. These FAQs are also linked under <http://www.FederalReporting.gov>.

* * * * *

(c) Reports from the Contractor for all work funded, in whole or in part, by the Recovery Act, are due no later than the 10th day following the end of each calendar quarter. The Contractor shall review the Frequently Asked Questions (FAQs) for Federal Contractors before each reporting cycle and prior to submitting each quarterly report as the FAQs may be updated from time-to-time. The first report is due no later than the 10th day after the end of the calendar quarter in which the Contractor received the award. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter. For information on when the Contractor shall submit its final report, see http://www.whitehouse.gov/omb/recovery_faqs_contractors.

(d) * * *

(7) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and address the impact on the Contractor’s and first-tier subcontractors’ workforce for all first-tier subcontracts valued at \$25,000 or more. At a minimum, the Contractor shall provide—

* * * * *

(ii) An estimate of the number of jobs created and jobs retained by the prime Contractor and all first-tier subcontracts valued at \$25,000 or more, in the United

States and outlying areas. A job cannot be reported as both created and retained. See an example of how to calculate the number of jobs at http://www.whitehouse.gov/omb/recovery_faqs_contractors.

* * * * *

(10) For any first-tier subcontract funded in whole or in part under the Recovery Act, that is valued at \$25,000 or more and not subject to reporting under paragraph 9, the Contractor shall require the subcontractor to provide the information described in paragraphs (d)(1)(i), (ix), (x), (xi), and (xii) of this section to the Contractor for the purposes of the quarterly report. The Contractor shall advise the subcontractor that the information will be made available to the public as required by section 1512 of the Recovery Act. The Contractor shall provide detailed information on these first-tier subcontracts as follows:

* * * * *

(xii) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and address the impact on the subcontractor’s workforce. At a minimum, the subcontractor shall provide—

(A) A brief description of the types of jobs created and jobs retained in the United States and outlying areas (see definition in FAR 2.101). This description may rely on job titles, broader labor categories, or the subcontractor’s existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and

(B) An estimate of the number of jobs created and jobs retained by the subcontractor in the United States and outlying areas. A job cannot be reported as both created and retained. See an example of how to calculate the number of jobs at http://www.whitehouse.gov/omb/recovery_faqs_contractors.

* * * * *

52.212-5 [Amended]

- 4. Amend section 52.212-5 by removing from the clause heading “(June 2010)” and adding “(JUL 2010)” in its place; and removing from paragraph (b)(4) “MAR 2009” and adding “(JUL 2010)” in its place.

[FR Doc. 2010-15908 Filed 7-1-10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005-43; FAR Case 2008-023; Item IV; Docket 2009-0017, Sequence 1]

RIN 9000-AL29

Federal Acquisition Regulation; FAR Case 2008-023, Clarification of Criteria for Sole Source Awards to Service-Disabled Veteran-Owned Small Business Concerns

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) are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to clarify the criteria that need to be met in order to conduct a sole source Service-disabled Veteran-owned Small Business (SDVOSB) concern acquisition.

DATES: *Effective Date:* August 2, 2010

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-43, FAR Case 2008-023.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published a proposed rule in the **Federal Register** at 74 FR 23373 on May 19, 2009, to revise the language in FAR 19.1406(a)(1) to clarify the criteria that need to be met in order to conduct a sole source SDVOSB concern acquisition. The final rule contains language that more closely mirrors the Veterans Benefit Act of 2003 (15 U.S.C. 657f). The final rule revises the language in FAR 19.1306(a)(1), which deals with sole source awards to Historically Underutilized Business Zone (HUBZone) small business concerns based on 15 U.S.C. 657a(b), to match the language in FAR 19.1406(a)(1) to alleviate confusion on the appropriate use of the criteria needed to conduct a sole source SDVOSB concern acquisition.