

offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225-23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225-23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 3 and 52

[FAC 2005-32; FAR Case 2009-012; Item II; Docket 2009-0009, Sequence 1]

RIN 9000-AL19

#### Federal Acquisition Regulation; FAR Case 2009-012, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections

**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 implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or

discriminating against an employee as a reprisal for disclosing information.

**DATES:** *Effective Date:* March 31, 2009.

*Applicability Date:* The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clause for future orders, if the Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of the Recovery Act funds.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-32, FAR case 2009-012, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-012" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2009-012. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2009-012" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services

Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005-32, FAR case 2009-012, 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:** For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501-4082. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-32, FAR case 2009-012.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule implements section 1553 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to the protection of whistleblowers, by adding a new section

3.907, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 and a new clause at FAR 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, and its prescription in FAR 3.907-7.

On February 17, 2009, the President signed Public Law 111-5, the American Recovery and Reinvestment Act of 2009, including a number of provisions to be implemented in Federal Government contracts. Among these provisions is Section 1553 of the Recovery Act, "Protecting State and Local Government and Contractor Whistleblowers". This requirement promotes transparency in Federal contracting.

##### B. Discussion

FAR 3.907 provides that non-Federal employers receiving funds under the Recovery Act are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials or a person with supervisory authority over the employee. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. FAR 3.907-7 prescribes a new clause at 52.203-15.

##### C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103-355, the Federal Acquisition Streamlining Act (FASA) (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 them. The FASA provides that 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 section 1553 of the Recovery Act, which extends whistleblower protections to employees of contractors that receive contracts funded under the Recovery Act, and the initial implementing guidance for the Recovery Act issued on February 18,

2009 by the Director of the Office of Management and Budget committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to acquisitions at or below the simplified acquisition threshold, as defined at FAR 2.101.

#### **D. Applicability to Commercial Item Contracts**

Section 8003 of Public Law 103–355, the FASA (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. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory 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 section 1553 of the Recovery Act, which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information the employee reasonably believes is evidence of information listed in section 1553(a), the FAR Council has determined that the rule should apply to contracts for commercial items, as defined at FAR 2.101, at both the prime and subcontract levels.

#### **E. Applicability to Commercially Available Off-the-Shelf (COTS) Item Contracts**

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (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. Clinger-Cohen 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.

Therefore, given section 1553 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing

information the employee reasonably believes is evidence of information listed in section 1553(a), the Administrator, Office of the Federal Procurement Policy, has determined that the rule should apply to COTS item contracts, as defined at FAR 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under section 6 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.

#### **F. Regulatory Flexibility Act**

The Councils do not expect this interim rule to 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 this rule applies similar, but not identical, whistleblower protections to contractor and subcontractor employees as currently covered in FAR Subpart 3.9. Likewise, this rule only applies to contracts funded in whole or in part with the Recovery Act funds. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 3 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–32, FAR Case 2009–012) in all correspondence.

#### **G. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

#### **H. 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 the American Recovery and Reinvestment Act of 2009 became effective on enactment, and contracts using funds appropriated by the Recovery Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, 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 3 and 52**

Government procurement.

Dated: March 25, 2009.

#### **Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 3 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 3 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 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST**

■ 2. Revise section 3.900 to read as follows:

##### **3.900 Scope of subpart.**

(a) Sections 3.901 through 3.906 of this subpart implement 10 U.S.C. 2409 and 41 U.S.C. 265, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355).

(b) Section 3.907 of this subpart implements Section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

##### **3.902 [Removed and Reserved]**

■ 3. Remove and reserve section 3.902.

■ 4. Add sections 3.907 through 3.907–7 to read as follows:

##### **3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).**

##### **3.907–1 Definitions.**

As used in this section—  
*Board* means the Recovery Accountability and Transparency Board established by Section 1521 of the Recovery Act.

*Covered funds* means funds appropriated by or otherwise made available by the Recovery Act.

*Covered information* means information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation

related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds.

*Inspector General* means an Inspector General appointed under the Inspector General Act of 1978. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

*Non-Federal employer*, as used in this section, means any employer that receives Recovery Act funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

### 3.907-2 Policy.

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities or their representatives:

- (1) The Board.
- (2) An Inspector General.
- (3) The Comptroller General.
- (4) A member of Congress.
- (5) A State or Federal regulatory or law enforcement agency.
- (6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.
- (7) A court or grand jury.
- (8) The head of a Federal agency.

### 3.907-3 Procedures for filing complaints.

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.907-2, may submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The covered information giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act; and
- (5) The specific nature and date of the reprisal.

(c) A contracting officer who receives a complaint of reprisal of the type described in 3.907-2 shall forward it to the Office of the Inspector General, agency legal counsel or to the

appropriate official in accordance with agency procedures.

### 3.907-4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

### 3.907-5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section shall have access to the investigation file of the Inspector General, in accordance with the Privacy Act, 5 U.S.C. 552a. The investigation of the Inspector General shall be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the non-Federal employer shall have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(c) The Inspector General may exclude from disclosures made under 3.907-5(a) or (b)—

- (1) Information protected from disclosure by a provision of law; and
- (2) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the Inspector General determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An Inspector General investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

### 3.907-6 Remedies and enforcement authority.

(a) *Burden of Proof.* (1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.907-2 was a contributing factor in the reprisal.

(ii) A disclosure may be demonstrated as a contributing factor in a reprisal for

purposes of this paragraph by circumstantial evidence, including—

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal.* The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907-6(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an Inspector General report in accordance with section 1553 of the Recovery Act, the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.907-2 and shall either issue an order denying relief in whole or in part or shall take one or more of the following actions:

- (1) Order the employer to take affirmative action to abate the reprisal.
- (2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which shall have jurisdiction over such an action without regard to the amount in controversy if

- (i) The head of an agency—
  - (A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order issued under this section, the head of the agency shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection may obtain review of the order's conformance with the law, and this section, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency.

**3.907-7 Contract Clause.**

Use the clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 in all solicitations and contracts funded in whole or in part with Recovery Act funds.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 5. Add section 52.203-15 to read as follows:

**52.203-15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009**

As prescribed in 3.907-7, use the following clause:

**Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Mar 2009)**

(a) The Contractor shall post notice of employees rights and remedies for whistleblower protections provided under section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

(b) The Contractor shall include the substance of this clause including this paragraph (b) in all subcontracts.

(End of clause)

■ 6. Amend section 52.212-4 by revising the date of the clause and paragraph (r) to read as follows:

**52.212-4 Contract Terms and Conditions—Commercial Items.**

\* \* \* \* \*

**Contract Terms and Conditions—Commercial Items (MAR 2009)**

\* \* \* \* \*

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 3701, *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; Section 1553 of the American Recovery and Reinvestment Act of 2009 relating to whistleblower protections for contracts funded under that Act; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

\* \* \* \* \*

(End of clause)

■ 7. Amend section 52.212-5 by—

- a. Revising the date of the clause;
- b. Redesignating paragraphs (b)(3) thru (b)(41) as paragraphs (b)(4) thru (b)(42), respectively, and adding a new paragraph (b)(3); and
- c. Redesignating paragraphs (e)(1)(iii) thru (e)(1)(xiii) as paragraphs (e)(1)(iv) thru (e)(1)(xiv), respectively, and adding a new paragraph (e)(1)(iii). The revised and added text reads as follows:

**52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.**

\* \* \* \* \*

**Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Mar 2009)**

\* \* \* \* \*

(b) \* \* \*  
(3) 52.203-15, Whistleblower Protections under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111-5).

\* \* \* \* \*

(e)(1) \* \* \*  
(iii) 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111-5). Applies to subcontracts funded under the Act.

\* \* \* \* \*

(End of clause)

■ 8. Amend section 52.213-4 by revising the date of the clause and paragraph (a)(2)(vi) to read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).**

\* \* \* \* \*

**Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Mar 2009)**

(a) \* \* \*  
(2) \* \* \*  
(vi) 52.244-6, Subcontracts for Commercial Items. (MAR 2009)

\* \* \* \* \*

■ 9. Amend section 52.244-6 by revising the date of the clause; redesignating paragraphs (c)(1)(ii) thru (c)(1)(viii) as paragraphs (c)(1)(iii) thru (c)(1)(ix), respectively, and adding a new paragraph (c)(1)(ii).

**52.244-6 Subcontracts for Commercial Items.**

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**Subcontracts for Commercial Items (Mar 2009)**

\* \* \* \* \*

(c)(1) \* \* \*  
(ii) 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111-5). Applies to subcontracts funded under the Act.

\* \* \* \* \*

(End of clause)

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 4, 5, 8, 13, and 16**

[FAC 2005-32; FAR Case 2009-010; Item III; Docket 2009-0010, Sequence 1]

RIN 9000-AL24

**Federal Acquisition Regulation; FAR Case 2009-010, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions**

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

**ACTION:** Interim rule with request for comments.