8.404 Use of Federal Supply Schedules.

(a) General.* * * Therefore, when establishing a BPA (as authorized by 13.303–2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsize the requirement; but see paragraph (e) of this section for orders (including orders issued under BPAs) funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

(e) Publicizing contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(1) Notices of proposed MAS orders (including orders issued under BPAs) that are for “informational purposes only” exceeding $25,000 shall follow the procedures in 5.704 for posting orders.

(2) Award notices for MAS orders (including orders issued under BPAs) shall follow the procedures in 5.705.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

5. Amend section 13.105 by adding paragraph (d) to read as follows:

13.105 Synopsis and posting requirements.

* * * * *

(d) When publicizing contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(1) Notices of proposed MAS orders (including orders issued under BPAs) that are for “informational purposes only” exceeding $25,000 shall follow the procedures in 5.704 for posting orders.

(2) Award notices for MAS orders (including orders issued under BPAs) shall follow the procedures in 5.705.

PART 16—TYPES OF CONTRACTS

6. Amend section 16.505 by revising paragraph (a)(1); and adding paragraph (a)(10) to read as follows:

16.505 Ordering.

(a) * * *

(1) In general, the contracting officer does not synopsize orders under indefinite-delivery contracts; but see 16.505(a)(10) for orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

(10) Publicize orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) as follows:

(i) Notices of proposed orders shall follow the procedures in 5.704 for posting orders.

(ii) Award notices for orders shall follow the procedures in 5.705.

* * * * *


DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 52

[FAC 2005–32; FAR Case 2009–009; Item IV; Docket 2009–0011, Sequence 1]

RIN 0900–AL21

Federal Acquisition Regulation; FAR Case 2009–009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements

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 (the Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which requires contractors to report on their use of Recovery Act funds.

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 if 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 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 2009–009, by any of the following methods:

• Regulations.gov: http://www.regulations.gov. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–009” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2009–009. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2009–009” 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 2009–009, 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 2005–32, FAR case 2009–009. For information pertaining to status or publication schedules, contact the FAR 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. This interim rule implements section 1512, which is also known as the “Jobs Accountability Act.”

Subsection (c) of section 1512 requires contractors that receive awards (or modifications to existing awards) funded, in whole or in part, by the Recovery Act to report quarterly on the use of the funds.

This FAR case adds a new subpart 4.15, and a new clause, 52.204–11. Contracting officers must include the new clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. Commercial item contracts and Commercially Available Off-The-Shelf (COTS) item contracts are covered, as well as actions under the simplified acquisition threshold.

Contracting officers who obligate Recovery Act funds on existing contracts or orders must modify those contracts to add the new clause.
Contracting officers shall ensure that the contractor complies with the reporting requirements of the new clause. Contracting officers are not responsible for validating report content, only that a report was submitted as required. The online reporting tool will allow the contracting officer to monitor this as a matter of contract performance.

Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009.

Therefore, reports shall be submitted no later than the 10th day after the end of each calendar quarter. Contractors will report the information, using the online reporting tool available at http://www.FederalReporting.gov, using instructions at that Web site. The online reporting tool is being developed for use by the July 10th timeframe. The data elements to be reported are outlined in the clause 52.204–11, in paragraph (d).

The Government intends to pre-populate data elements as possible to reduce the burden on contractors and first-tier subcontractors by using information available in other government systems. For instance, the Government is considering pre-populating congressional districts based on nine-digit zip codes, funding agency, NAICS code, and parent DUNS.

While Section 1512(c)(4) requires reporting on all Federal Financial Accountability and Transparency Act (FFATA) data elements, including the compensation information, it limits the reporting to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation disclosure for prime contractors, because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupportable given the transparency goals of both FFATA and the Recovery Act.

B. Determinations

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. Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (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. 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 contracts or subcontracts below the simplified acquisition threshold, the law will apply to them. Therefore, given section 1512 of the Recovery Act which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) 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 contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

2. Applicability to Commercial Item contracts. Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (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. 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 contracts or subcontracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given section 1512, of the Recovery Act, which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) 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 the rule to contracts or subcontracts, as defined at 2.101.

C. Request for Public Comments

The Councils ask for public comments on the interim rule, and the following additional issues:

1. The statute requires a description of the work (implemented at 52.204–11(d)(5)). Should the Government provide a list of broad categories of work under the Recovery Act from which the contractor would select and, if so, what should these be?

2. The definitions of “jobs created” and “jobs retained” are currently based on a conversion of part-time or temporary jobs into “full-time equivalent” (FTE) jobs. In order to do such a conversion, these part-time hours must be divided by the number of hours in a full-time schedule. This interim rule leaves the definition of full-time schedule to each individual company’s discretion based on its existing practices. With respect to the methodology described in the interim rule for estimating jobs created or retained:

—Is the use of FTE and the description provided consistent with existing business practices and systems?

—Is a standardized methodology based on FTE necessary or do contractors have existing practices that adequately address other than full-time jobs to avoid inflating estimated numbers for jobs created and jobs retained? Should the Government allow contractors to use any method consistent with their existing practice as long as the contractor provides an
D. 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 contractors to report on their use of Recovery Act funds. An Initial Regulatory Flexibility Analysis has been prepared and the results of the analysis show that the direct cost of this rule on an average cost-per-contractor basis does not appear to rise to the level of being economically significant (i.e. $100,000,000); however, the Councils request comments on this finding.

Therefore, the Councils have prepared an Initial Regulatory Flexibility Analysis (IRFA) for public comment that is summarized as follows:

This Initial Regulatory Flexibility Analysis has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

This action implements section 1512 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which requires contractors to report quarterly on their use of Recovery Act funds.

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

The objective of the Recovery Act is to create jobs, restore economic growth, and strengthen America’s middle class through measures that modernize the nation’s infrastructure, enhance America’s energy independence, expand educational opportunities, preserve and improve affordable health care, provide tax relief, protect those in greatest need, and provide for other purposes. This rule implements section 1512 of the Recovery Act which requires contractors, as a condition of receipt of funds, to report quarterly on their use of those funds. These reports will be made available to the public. The Recovery Act is designed to provide unprecedented transparency to the American taxpayer.

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

The rule imposes a clause in any award document funded by the Recovery Act, requiring the contractor to publicly disclose information related to the use of funds and specific information about first-tier subcontract awards. This clause requires contractors to report on use of Recovery Act funds. The clause imposes a public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and

6. Are there challenges to obtaining the information required from first-tier subcontractors? If so, how could the rule be changed to ease the submission of this information from both a prime contractor and subcontractor perspective?

7. Would it be useful to provide an Alternate clause that would allow agencies to identify meaningful distinct “projects” within the contract for the purpose of requiring the contractor to report employment impact and progress by “project” rather than for the contract as a whole? For example, if the contract called for work in distinct geographic areas, the report might provide more meaningful information if the contractor were to report employment impact and progress separately by geographic area. This would not require individual reports but rather separate sections within the quarterly report.

8. Currently, this rule requires contractors to report on invoiced amounts because the Government assumed that it would be extremely difficult for the contractor employee responsible for report submission, to report on “receipt of funds.” Would a contractor be able to separately identify when Recovery Act funds were received and be able to identify the payment to particular deliverables? How difficult would this be to track and report on a quarterly basis?

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

Federal Register / Vol. 74, No. 60 / Tuesday, March 31, 2009 / Rules and Regulations 14641
The FAR 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 FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 4 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 2009–009), in all correspondence.

E. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the interim rule contains information collection requirements. Accordingly, the FAR Secretariat forwarded an emergency information collection request for approval of new information collection requirements to the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35, et seq. OMB approved the new information collection requirements as follows:

1. OMB Control No. 9000–0166—One Time Reporting Requirements for Prime Contractors.

2. OMB Control No. 9000–0167—One Time Reporting for First-tier Subcontractors.

3. OMB Control No. 9000–0168—One Time Reporting, Compensation Requirements.

4. OMB Control No. 9000–0169—Quarterly Reporting for Prime Contractors.

Comments on the interim rule as well as the collection will be considered in the revisions to both the rule and the collection.

Any award funded by the Recovery Act will contain the clause at 52.204–11. This clause requires contractors to report on use of Recovery Act funds. The clause imposes public reporting burdens on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and unique prime Federal contractors as of February 2009. The estimate for the number of active and unique prime Federal contractors that will participate in awards funded by the Recovery Act is 20,013. This is based on using a factor of .16 of 129,331, derived by dividing 129,331 by $517B in procurement obligations for fiscal year 2008 or by dividing estimated Recovery Act dollars for contracts ($80B: Government’s best estimate of Recovery Act dollars to be obligated by contracts is between $60 and $80 billion; using $80 billion for calculation purposes) by $517B. Of the estimated 20,013 Recovery Act prime contractors, it is estimated that 20 percent, or 4,003, will be small businesses. It should be noted that this is 20 percent of prime contractors; this should not be confused with the 23 percent small business contracting goal which is based on dollars and that continues to apply to both Recovery Act spending and agencies’ ongoing procurement spending.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is 60,039. This was derived by estimating three first-tier subcontractors for each prime contractor. Of these 60,039 Recovery Act first-tier subcontractors, it is estimated that 25 percent, or 15,010, will be small businesses.

Based on the above, the estimated total number of small businesses, prime and subcontractors, to which this rule will apply is 19,013 and the estimated total number of other than small businesses to which this rule will apply is 61,039.

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 flow-down requirements of paragraph (d)(10) of the clause. Additionally, the information required on the prime contractor award varies from that required for the first-tier subcontract awards. For instance, the elements at paragraphs (d)(1) through (9) are collection burdens associated with the prime contract award while the elements in (d)(10)(i) through (ix) are associated with first-tier subcontracts.

Finally, the elements required by Section 1512 of the Recovery Act are a combination of those that will be updated in each quarterly report, such as jobs created and retained and progress towards completion of the overall purpose and expected outcomes or results of the contract and those that are one-time collection burdens, such as award number and date and all of the reporting requirements for first-tier subcontracts. Therefore, the following analysis separately estimates the burden associated with the one-time reporting elements and those that are updated quarterly. The parenthetical reference after the description of each reporting element refers to the FAR clause. The hours estimated per response include the time for reviewing instructions, searching existing data sources, gathering the data, and completing the collection of information. The estimated total annual burden associated with reporting requirements of FAR 52.204–
One-Time Reporting Elements

1. OMB Control No. 9000–0166—One Time Reporting Requirements for Prime Contractors. One-time reporting elements for which the burden is imposed on the prime contractor include the following:
   a. The award number for both its Government contract and first-tier subcontracts ((d)(1) and (d)(10)(viii));
   b. Program or project title, if any, for its Government contract ((d)(4));
   c. A description of the overall purpose and expected outcomes or results of the contract and first-tier subcontracts, including significant deliverables and, if appropriate, units of measure ((d)(5) and (d)(10)(viii));
   d. Name of the first-tier subcontract ((d)(10)(i));
   e. Amount of the first-tier subcontract award ((d)(10)(iii));
   f. Date of the first-tier subcontract award ((d)(10)(iv));
   g. Applicable North American Industry Classification System (NAICS) code ((d)(10)(v)); and
   h. Funding agency ((d)(10)(vi)).

We estimate the total annual public cost burden for these elements to be $850,544 based on the following:

**Responses:** 20,013.
**Responses per respondent:** 1.25 (reflects estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).
**Total annual responses:** 25,016.
**Preparation hours per response:** .25.
**Total response burden hours:** 12,508.
**Average hourly wages** ($50.00+36.35 percent overhead): 68.00.
**Estimated cost to the public:** $850,544.

2. OMB Control No. 9000–0168—One Time Reporting, Compensation Requirements. A one-time reporting element for which the burden is imposed on certain prime contractors and first-tier subcontractors to publicly disclose the names and total compensation of each of the contractor’s or first-tier subcontractor’s five most highly compensated officers, for the calendar year in which the award was made ((d)(8) and (d)(10)(xi)) (see applicability requirements in the clause at (d)(8) and (d)(10)).

While Section 1512(c)(4) of the Recovery Act requires reporting on all FFATA data elements, including the compensation information, it limits the prime’s reporting responsibility to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation disclosure for prime contractors as well because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupportable given the transparency goals of both FFATA and the Recovery Act.

There are likely to be some prime contractors that already provide public access to the compensation of senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 or section 6104 of the Internal Revenue Code of 1986. For purposes of this analysis, the Government estimates that 5 percent of prime contractors already provide such public access. There are also likely to be some first-tier subcontractors that do not meet either of the revenue thresholds for applicability. For purposes of this analysis, the Government estimates that 5 percent of first-tier subcontractors will not have to disclose compensation information because they do not meet the revenue thresholds.

We estimate the total annual public cost burden for these elements to be $19,392,444, based on the following:

**Responses:** 76,049 (20,013 primes + 5 percent=19,012 + 60,039 first-tier subcontractors-5 percent=57,037).
**Responses per respondent:** 1.25 (reflects estimate that 25 percent of all respondents will have more than one Recovery Act funded award on which to report).
**Total annual responses:** 95,061.
**Preparation hours per response:** 3.
**Total response burden hours:** 285,183.
**Average hourly wages** ($50.00+36.35 percent overhead): $68.00.
**Estimated cost to the public:** $19,392,444.

3. OMB Control No. 9000–0169—Quarterly Reporting for Prime Contractors. Elements updated quarterly for which the burden is imposed on the prime contractor include the following:
   a. The amount of Recovery Act funds invoiced by the contractor, cumulative since the beginning of the contract ((d)(2));
   b. A list of all significant services performed or supplies delivered, including construction, for which the contractor has invoiced ((d)(3));
   c. An assessment of the contractor’s progress towards the completion of the overall purpose and expected outcomes or results of the contract [i.e., not started, less than 50 percent completed, completed 50 percent or more, or fully completed]. This covers the contract (or portion thereof) funded by the Recovery Act ((d)(6));
   d. A narrative description of the employment impact of the Recovery Act funded work ((d)(7)(i) through (ii)); and
   e. For subcontracts valued at less than $25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under $300,000, the contractor shall only report the aggregate number of such first-tier subcontracts awarded in the quarter and their aggregate total dollar amount ((d)(9)).

We estimate the total annual public cost burden for these elements to be $10,206,664, based on the following:

**Responses:** 60,039.
**Responses per respondent:** 1.25 (reflects 4 reports multiplied by a factor of 1.25 to reflect Government’s estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).
**Total annual responses:** 75,049.

The context of these requirements can vary by contract and/or subcontract. For purposes of this analysis, we assume that, on average, each contractor will do quarterly reporting on one Recovery Act-funded subaward. This is similar to the actual average of 1.5 subcontracts per award based on data from the Federal Procurement Data System (FPDS).

We estimate the total annual public cost burden for these elements to be $1,275,816, based on the following:

**Responses:** 60,039.
**Responses per respondent:** 1.25 (reflects estimate that 25 percent of first-tier subcontractors will have more than one Recovery Act funded award on which to report).
**Total annual responses:** 75,049.

Preparation hours per response: .25.
Total response burden hours: 18,762.
**Average hourly wages** ($50.00+36.35 percent overhead): $68.00.
**Estimated cost to the public:** $1,275,816.
agencies are ready to award contracts using funds appropriated by the Act. Without a FAR clause, agencies will be forced to develop their own clause, which would (1) significantly increase the costs for Government as well as contractors who may have to comply with varied clauses and reporting mechanisms. (2) increase the risk of non-compliance, and (3) degrade transparency and public understanding.

Waiting for public comment prior to issuing a clause will require resource-intensive and costly post-award bilateral negotiations and may hinder recovery. 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 4 and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,
Director, Office of Acquisition Policy.

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. Add subpart 4.15 to read as follows:

Subpart 4.15—American Recovery and Reinvestment Act—Reporting Requirements

Sec.

4.1500 Scope of subpart.

4.1501 Procedures.

4.1502 Contract clause.

4.1500 Scope of subpart.

This subpart implements section 1512(c) of Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act), which requires, as a condition of receipt of funds, quarterly reporting on the use of funds. The subpart also implements the data elements of the Federal Funding Accountability and Transparency Act of 2006, as amended (Pub. L. 109–282). Contractors that receive awards (or modifications to existing awards) funded, in whole or in part by the Recovery Act, must report information including, but not limited to—

(a) The dollar amount of contractor invoices;

(b) The supplies delivered and services performed;

(c) An assessment of the completion status of the work;

(d) An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds;

(e) Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and

(f) Specific information on first-tier subcontractors.

4.1501 Procedures.

(a) In any contract action funded in whole or in part by the Recovery Act, the contracting officer shall indicate that the contract action is being made under the Recovery Act, and indicate which products or services are funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the contract instrument.

(b) To maximize transparency of Recovery Act funds that must be reported by the contractor, the contracting officer shall structure contract awards to allow for separately tracking Recovery Act funds. For example, the contracting officer may consider awarding dedicated separate contracts when using Recovery Act funds or establishing contract line item number (CLIN) structures to mitigate commingling of Recovery funds with other funds.

(c) Contracting officers shall ensure that the contractor complies with the reporting requirements of FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

(d) The contracting officer shall make the contractor’s failure to comply with the reporting requirements a part of the contractor’s performance information under Subpart 42.15.

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 ensure that this clause is included 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.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Add section 52.204–11 to read as follows:

52.204–11 American Recovery and Reinvestment Act—Reporting Requirements

As prescribed in 4.1502, insert the following clause:

American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009)

(a) Definitions. As used in this clause—

Contract, as defined in FAR 2.101, means a mutually binding legal relationship obligating the other to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see FAR Part 16.

First-tier subcontract means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act. Jobs created means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas, as defined in FAR 2.101. The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Jobs retained means an estimate of those previously existing positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas, as defined in FAR 2.101. The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Bilateral contract effective by written acceptance or letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see FAR Part 16.

First-tier subcontract means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act. Jobs created means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas, as defined in FAR 2.101. The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Jobs retained means an estimate of those previously existing positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas, as defined in FAR 2.101. The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

(b) General. (1) The Government contract and order number, as applicable.

(2) The amount of Recovery Act funds invoiced by the contractor for the reporting period. A cumulative amount from all the reports submitted for this action will be made available to the public.

(3) A list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in this calendar quarter.

(4) Fiscal year, if any.

(5) A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and, if appropriate, associated units of measure.

(6) An assessment of the contractor’s progress towards the completion of the overall purpose and expected outcomes or results of the contract (i.e., not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act.

(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 only address the impact on the contractor’s workforce. At a minimum, the contractor shall provide—

(i) 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 contractor’s existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and

(ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States and outlying areas. A job cannot be reported as both created and retained.

(8) Names and total compensation of each of the five most highly compensated officers of the Contractor for the calendar year in which the contract is awarded if—

(i) In the Contractor’s preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(B) $25,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(9) For subcontracts valued at less than $25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under $300,000, the Contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount.

(10) For any first-tier subcontract funded in whole or in part under the Recovery Act, that is over $25,000 and not subject to reporting under paragraph 9, the contractor shall require the subcontractor to provide the information described in (i), (ix), (x), and (xi) below 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:

(i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor’s parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.
DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 14, 15, and 52

[FAC 2005–32; FAR Case 2009–011; Item V; Docket 2009–0012, Sequence 1]

RIN 9000–AL20


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 (Recovery Act) with respect to Sections 902, 1514, and 1515, by adding clause (Alternates) for future orders, if applicable.

DATES: Effective Date: March 31, 2009.

Applicability Date: The rule applies to solicitations issued and contracts advertised 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 clauses (Alternates) for future orders, if 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 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 2009–011, by any of the following methods:

- Regulations.gov: http://www.regulations.gov. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–011” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2009–011. Follow the instructions provided to complete the “Public Comment and Submission Form”.

Please include your name, company name (if any), and “FAR Case 2009–011” on your attached document.


- 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 2009–011, 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. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. Please cite FAC 2005–32, FAR case 2009–011. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515, by adding alternate clauses to 52.214–26, “Audit and Records-Sealed Bidding,” 52.212–5, “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items,” and FAR 25.125–2, “Audit and Records-Negotiation.” Further, FAR 12.504(a)(7) is amended for contracts using Recovery Act funds to apply 41 U.S.C. 254(d)(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts that are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Likewise, 13.006(d) is amended for contracts using Recovery Act funds to apply 52.215–2, “Audit and Records-Negotiation” to contracts and subcontracts which are otherwise exempt because they are under the simplified acquisition threshold. This requirement provides further transparency into Federal contracting whose contracts are funded with Recovery Act funds.

B. Discussion

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions are sections 902, 1514, and 1515 which serve to “prevent the fraud, waste, and abuse” of Recovery Act funds.