

- (iii) Amount of the subcontract award.
- (iv) Date of the subcontract award.
- (v) The applicable North American Industry Classification System (NAICS) code.
- (vi) Funding agency.
- (vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.
- (viii) Subcontract number (the contract number assigned by the prime contractor).
- (ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
- (x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
- (xi) Names and total compensation of each of the subcontractor's five most highly compensated officers, for the calendar year in which the subcontract is awarded if—
  - (A) In the subcontractor's preceding fiscal year, the subcontractor received—
    - (I) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
    - (2) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
  - (B) 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.

(End of clause)

■ 4. Amend section 52.212–5 by revising the date of the clause; and redesignating paragraphs (b)(4) through (b)(42) as (b)(5) through (b)(43), respectively, and adding a new paragraph (b)(4) to read 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) \* \* \*

(4) 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009) (Pub. L. 111–5).

\* \* \* \* \*

[FR Doc. E9–7025 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

**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

**Federal Acquisition Regulation; FAR Case 2009–011, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access**

**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 of Division A.

**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 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.

- *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 2009–011, 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 52.215–2, “Audit and Records–Negotiation.”

Further, FAR 12.504(a)(7) is amended for contracts using Recovery Act funds to apply 41 U.S.C. 254d(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 through the review and audit of contracts using such funds. The interim rule is necessary to implement these measures to both protect, and provide transparency in the use of, Recovery Act funds.

Section 1514 provides for agency inspector general review of concerns raised by the public regarding investments of funds under the Recovery Act. Sections 902 and 1515 provide for respectively, Comptroller General and agency inspector general reviews of any records of the contractor or subcontractor regarding transactions using Recovery Act funds, and the interview of contractor officers or employees concerning such transactions. Section 902 also provides for the Comptroller General to interview subcontractor employees, while nowhere in the Recovery Act is corresponding authority provided to the agency inspector generals. The authority for Comptroller General audits of prime contractors already exists for Part 12 contracts under FAR 52.212–5, “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items” and for Part 15 contracts under FAR 52.215–2, “Audit and Records—Negotiation.” FAR 52.215–2 also provides authority to audit subcontracts, while 52.212–5 does not provide corresponding authority. In the case of Part 13 contracts there are no authorities for the audit of either prime contracts or subcontracts. Likewise, except in the case of modifications involving cost or pricing data, for Part 14 contracts there are no authorities for the audit of either prime contracts or subcontracts.

In the matter of interviewing contractor or subcontractor employees concerning contracting transactions there are no current authorities under the FAR (but see changes under Item VI of this FAC 2005–32, FAR Case 2008–026).

Consequently, for contracts using Recovery Act funds this interim rule provides the following authorities to the Comptroller General:

- For Part 12 contracts the authority to audit subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 15 contracts the authority to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 14 contracts the authority to audit both contracts and subcontracts, and to interview contractor and subcontractor personnel, including

contracts below the simplified acquisition threshold.

The interim rule provides the same authorities in the preceding paragraph to agency inspector generals, with the exception of interviewing subcontractor employees.

### **C. 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 if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination 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 Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to commercial items, as defined at 2.101, both at the prime and subcontract levels.

### **D. 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 commercially available off-the-shelf (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 it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the Administrator, Office of the Federal Procurement Policy, has determined the rule should apply to Commercially Available Off-The-Shelf (COTS) item contracts, as defined at FAR 2.101.

### **E. 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. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination 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 Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 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 it requires contractors to make available existing records of transactions covered by the Act. Contractors are not obligated to create additional records. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 12, 13, 14, 15, 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 2009–011) in correspondence.

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

The Paperwork Reduction Act (Pub. L. 96–511) applies to this interim rule. However, the information collection requirements imposed by the changes to 52.214–26 and 52.215–2 are currently covered by the approved collection

under OMB Control number 9000-0034 entitled, Examination of Records by Comptroller General and Contract Audit: Sections Affected 52.215-2; 52.212-5; 52.214-26, for these existing provisions. The Councils believe changes due to the use of these provisions will not result in a substantial increase in either the burden or the number of entities. However, the Council welcomes comments on both of these items as part of the 60-day comment period.

**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 upon 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 12, 13, 14, 15, and 52**

Government procurement.

Dated: March 25, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 14, 15, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 14, 15, 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 12—ACQUISITION OF COMMERCIAL ITEMS**

■ 2. Amend section 12.301 by revising paragraph (b)(4) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(b) \* \* \*

(4) *The clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause incorporates by reference only those clauses required to implement

provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212-5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

(i) Use the clause with its Alternate I when the head of the agency has waived the examination of records by the Comptroller General in accordance with 25.1001.

(ii) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), the contracting officer shall use the clause with its Alternate II, and may not use Alternate I.

\* \* \* \* \*

■ 3. Amend section 12.504 by revising paragraph (a)(7) to read as follows:

**12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.**

(a) \* \* \*

(7) 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, when a subcontractor is not required to provide cost or pricing data (see 15.209(b)), unless using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

\* \* \* \* \*

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

■ 4. Amend section 13.006 by revising paragraph (d) to read as follows:

**13.006 Inapplicable provisions and clauses.**

\* \* \* \* \*

(d) 52.215-2, Audits and Records—Negotiation, except as used with its Alternate I, when using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

\* \* \* \* \*

**PART 14—SEALED BIDDING**

■ 5. Amend section 14.201-7 by revising paragraph (a) to read as follows:

**14.201-7 Contract Clauses.**

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit and Records-Sealed Bidding, in solicitations and contracts as follows:

(1) Use the basic clause if—

(i) The acquisition will not use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5); and

(ii) The contract amount is expected to exceed the threshold at 15.403-4(a)(1) for submission of cost or pricing data.

(2) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, use the clause with its Alternate I in all solicitations and contracts.

\* \* \* \* \*

■ 6. Amend section 15.209 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(2) to read as follows:

**15.209 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(b)(1) Except as provided in paragraph (b)(2) of this section, the contracting officer shall insert the clause at 52.215-2, Audit and Records-Negotiation (10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133), in solicitations and contracts except those for—

\* \* \* \* \*

(2) When using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5)—

(i) The exceptions in paragraphs (b)(1)(i) through (b)(1)(iii) are not applicable; and

(ii) Use the clause with its Alternate I.

\* \* \* \* \*

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

■ 7. Amend section 52.212-5 by adding Alternate II to read as follows:

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

\* \* \* \* \*

*Alternate II (MAR 2009).* As prescribed in 12.301(b)(4)(ii), substitute the following paragraphs (d)(1) and (e)(1) for paragraphs (d)(1) and (e)(1) of the basic clause as follows:

(d)(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials shall have access to and right to—

(i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.

(e)(1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), and (c), of this clause, the Contractor is not required to flow down any FAR clause in a subcontract for commercial items, other than—

(i) *Paragraph (d) of this clause.* This paragraph flows down to all subcontracts, except the authority of the Inspector General under paragraph (d)(1)(ii) does not flow down; and

(ii) *Those clauses listed in this paragraph (e)(1).* Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(A) 52.203–13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110–252, Title VI, Chapter 1 (41 U.S.C. 251 note)).

(B) 52.219–8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$550,000 (\$1,000,000 for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

(C) 52.222–26, Equal Opportunity (Mar 2007) (E.O. 11246).

(D) 52.222–35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (Sept 2006) (38 U.S.C. 4212).

(E) 52.222–36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793).

(F) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201).

(G) 52.222–41, Service Contract Act of 1965 (Nov 2007) (41 U.S.C. 351, *et seq.*).

(H) 52.222–50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)).

(I) 2.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain

Equipment-Requirements (Nov 2007) (41 U.S.C. 351, *et seq.*).

(J) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services-Requirements (Feb 2009) (41 U.S.C. 351, *et seq.*).

(K) 52.222–54, Employment Eligibility Verification (Jan 2009).

(L) 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations. (Mar 2009) (Pub. L. 110–247). Flow down required in accordance with paragraph (e) of FAR clause 52.226–6.

(M) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247–64.

■ 8. Amend section 52.214–26 by adding Alternate I to read as follows:

**52.214–26 Audit and Records—Sealed Bidding.**

\* \* \* \* \*

*Alternate I (MAR 2009).* As prescribed in 14.201–7(a)(2) substitute the following paragraphs (c) and (e) for paragraphs (c) and (e) of the basic clause:

(c) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(1) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract or a subcontract hereunder; and

(2) Interview any officer or employee regarding such transactions.

(e)(1) Except as provided in paragraph (e)(2), the Contractor shall insert a clause containing the provisions of this clause, including this paragraph (e), in all subcontracts.

(2) The authority of the Inspector General under paragraph (c)(2) of this clause does not flow down to subcontracts.

■ 9. Amend section 52.215–2 by adding Alternate I to read as follows:

**52.215–2 Audit and Records—Negotiation.**

\* \* \* \* \*

*Alternate I (MAR 2009).* As prescribed in 15.209(b)(2), substitute the following paragraphs (d)(1) and (g) for paragraphs (d)(1) and (g) of the basic clause:

(d) *Comptroller General or Inspector General.* (1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General

Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(i) Examine any of the Contractor's or any subcontractor's records that pertain to and involve transactions relating to this contract or a subcontract hereunder; and

(ii) Interview any officer or employee regarding such transactions.

(g)(1) Except as provided in paragraph (g)(2) of this clause, the Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract. The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(2) The authority of the Inspector General under paragraph (d)(1)(ii) of this clause does not flow down to subcontracts.

[FR Doc. E9–7029 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 12 and 52

[FAC 2005–32; FAR Case 2008–026; Item VI; Docket 2009–0013, Sequence 1]

RIN 9000–AL25

#### Federal Acquisition Regulation; FAR Case 2008–026, GAO Access to Contractor Employees

**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 Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) which allows the Government Accountability Office to interview current contractor employees during the audit of the contractor's records. FAR 52.215–2(d)(1), Audit and Records–Negotiation, is revised to allow for the