

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2010-0076, Sequence 4]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005-42; Introduction**

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

and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of rules.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005-42. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

**DATES:** For effective dates and comment dates, see separate documents, which follow.

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below in relation to each FAR Case. Please cite FAC 2005-42 and the specific FAR Case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**LIST OF RULES IN FAC 2005-42**

Item	Subject	FAR case	Analyst
I	American Recovery and Reinvestment Act (the Recovery Act) of 2009—Whistleblower Protections	2009-012	Parnell.
II	Electronic Subcontracting Reporting System (eSRS)	2005-040	Cundiff.
III	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions.	2009-010	Jackson.
IV	Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008.	2008-003	Woodson.
V	Additional Requirements for Market Research (Interim)	2008-007	Blankenship.
VI	American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access	2009-011	Chambers.
VII	New Designated Country—Taiwan	2009-014	Sakalos.
VIII	Nonavailable Articles	2009-013	Davis.
IX	Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (Interim).	2009-025	Chambers.
X	Compensation for Personal Services (Interim)	2009-026	Chambers.
XI	Payrolls and Basic Records (Interim)	2009-018	Woodson.
XII	Technical Amendments.		

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-42 amends the FAR as specified below:

**Item I—American Recovery and Reinvestment Act (the Recovery Act) of 2009—Whistleblower Protections (FAR Case 2009-012)**

This rule adopts as final, with changes, an interim rule published in the **Federal Register** at 74 FR 14633 on March 31, 2009, amending the 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.

**Item II—Electronic Subcontracting Reporting System (eSRS)(FAR Case 2005-040)**

This rule amends the Federal Acquisition Regulation (FAR) to adopt as final, with changes, an interim FAR rule published in the **Federal Register** at 73 FR 21779 on April 22, 2008, amending the FAR to implement the use of the Electronic Subcontracting Reporting System (eSRS) to fulfill small business subcontracting reporting requirements. The eSRS, a web-based system, replaces the Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. In addition, this rule adds a new Alternate III to FAR clause 52.219-9 to recognize that there is a circumstance under which contractors will need to use SF 294, rather than eSRS, to submit an Individual Subcontract Report. The contractor will use SF 294 if a contract is not reported in the Federal Procurement Data System because reporting it in that system may disclose information that would compromise national security.

**Item III—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions (FAR Case 2009-010)**

This rule adopts as final, with minor changes, the interim rule published in the **Federal Register** at 74 FR 14636 on March 31, 2009. The interim rule amended the FAR to implement section 6.2 of the Office of Management and Budget (OMB) Memorandum M-09-10, dated February 18, 2009, entitled “Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009” (the Recovery Act). Section 6.2 of the OMB guidance mandates accountability and transparency relative to publicizing contract actions. The OMB guidance requires that the FAR be amended to reflect—

1. Unique requirements for posting of pre-solicitation notices;
  2. Unique requirements for announcing contract awards;
  3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS); and
  4. Unique requirements for actions that are not fixed-price or competitive.
- OMB Memorandum M-09-15, dated April 3, 2009, entitled “Updated

Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” supplements, amends, and clarifies the initial guidance in OMB Memorandum M–09–10. The final rule makes the following amendments:

- FAR 5.704(a)(2) to clarify that modifications of orders are not required to be publicized at the preaward stage.
- FAR 5.704(b) to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions that are at FAR 5.704(b) and available in the Recovery FAQs at the GPE <https://www.fedbizopps.gov>.
- FAR 5.704(c) and 5.705(a) to ensure that the description required by FAR 5.207(a)(16) clearly defines the elements of the requirement to the general public.
- FAR 5.705(b) to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed-price.

**Item IV—Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (FAR Case 2008–003)**

This final rule adopts, with changes, an interim rule published in the **Federal Register** at 74 FR 2731 on January 15, 2009. The rule amends the FAR to implement the requirements of Section 844 of the National Defense Authorization Act for Fiscal Year 2008. The interim rule required the head of an executive agency to make certain justification and approval documents relating to the use of noncompetitive procedures in Federal contracting be posted on the website of an agency and through FedBizOpps. The final rule requires that if the justification is a brand name justification under FAR 6.302–1(c) then it must be posted with the solicitation. Justifications must remain posted for a minimum of 30 days. The final rule clarifies that posting the justification does not apply if it would disclose the executive agency’s needs and disclosure of such needs would compromise national security or create other security risks. The final rule also establishes procedures at FAR 13.501 similar to procedures at FAR 6.305. The rule is intended to enhance competition in Federal contracting and provide greater transparency to the taxpayer.

**Item V—Additional Requirements for Market Research (FAR Case 2008–007) (Interim)**

This interim rule amends the FAR at parts 10, 44, and 52 by adding market research requirements. This change implements Section 826 of Pub. L. 110–181, the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA). As a matter of policy, this provision of law is applied to contracts awarded by all executive agencies. This rule requires that market research must be accomplished before an agency places an indefinite-delivery/indefinite-quantity (ID/IQ) task or delivery order in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold when the contractor is acting as a purchasing agent for the Government. This interim rule is applicable to any solicitations issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of the rule.

**Item VI—American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access (FAR Case 2009–011)**

This final rule adopts, with changes, the interim rule published in the **Federal Register** at 74 FR 14646 on March 31, 2009. This final rule amends the FAR to implement sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act). Collectively, these sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to FAR 52.212–5 “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items” and FAR 52.214–26 “Audit and Records—Sealed Bidding,” and by amending FAR 52.215–2 “Audit and Records—Negotiation.” For the Comptroller General, these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency Inspector Generals receive the same authorities, with the exception of interviewing subcontractor employees.

The changes to the interim rule clarify its application to supplemental agreements, and orders under task- or delivery-order contracts, involving Recovery Act funds.

**Item VII—New Designated Country—Taiwan (FAR Case 2009–014)**

This final rule adopts as final, without change, an interim rule implementing the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. This FAR change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

**Item VIII—Nonavailable Articles (FAR Case 2009–013)**

This final rule amends FAR 25.104(a) to add certain items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

**Item IX—Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009–025) (Interim)**

This interim rule amends the FAR to align the existing FAR clause 52.230–4 with the changes made in Cost Accounting Standards (CAS) Board clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns.

On March 26, 2008, the CAS Board published, without change from the proposed rule (72 FR 32829, June 14, 2007), a final rule in the **Federal Register** at 73 FR 15939 to utilize the clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns. This rule is necessary in order to maintain consistency between CAS and FAR in matters relating to the administration of CAS.

**Item X—Compensation for Personal Services (FAR Case 2009–026) (Interim)**

This interim rule amends the FAR to align the existing FAR 31.205(q)(2)(i) and (ii) with the changes made in Cost Accounting Standards (CAS) Board Standards 412, “Cost Accounting Standard for composition and measurement of pension cost,” and 415, “Accounting for the cost of deferred compensation.” Formerly, the applicable CAS standard for measuring, assigning, and allocating the costs of Employee Stock Ownership Plans (ESOPs) depended on whether the ESOP met the definition of a pension plan at FAR 31.001. Costs for ESOPs meeting the definition of a pension plan at FAR 31.001 were covered by CAS 412, while the costs for ESOPs not meeting the definition of a pension plan at FAR 31.001 were covered by CAS 415. Now, regardless of whether an ESOP meets the definitions of a pension plan at FAR 31.001, all costs of ESOPs are covered by CAS 415.

**Item XI—Payrolls and Basic Records (FAR Case 2009–018) (Interim)**

This interim rule implements changes that the Department of Labor (DOL) instituted regarding the submission of payroll data in their final rule, Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, published in the **Federal Register** at 73 FR 77504 on December 19, 2008. The rule revises FAR 52.222–8, Payrolls and Basic Records, to delete the requirement for submission of full social security numbers and home addresses of individual workers, prime contractor, on weekly payroll transmittals as required on covered construction contracts. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the DOL for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes DOL’s finding that complete social security numbers and home addresses for individual workers is personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.

**Item XII—Technical Amendments**

Editorial changes have been made at FAR 31.205–6, 31.205–16, 49.505, and 52.222–34.

Dated: June 2, 2010.

**Edward Loeb,**

*Acting Director, Acquisition Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-42 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-42 is effective June 16, 2010, except for Items II, III, IV, VI, and VIII which are effective July 16, 2010.

Dated: June 8, 2010.

**Shay D. Assad,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: June 2, 2010.

**Edward Loeb,**

*Acting Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.*

Dated: June 3, 2010.

**William P. McNally,**

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

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**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 3 and 52**

[FAC 2005–42; FAR Case 2009–012; Item I; Docket 2009–0009, Sequence 1]

**RIN 9000–AL19**

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

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense

Acquisition Regulations Council (the Councils) have adopted as final, with changes, 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:* June 16, 2010.

**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 Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2009–012.

**SUPPLEMENTARY INFORMATION:****A. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 14633 on March 31, 2009, to implement the Recovery Act with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. A Technical Amendment was published in the **Federal Register** at 74 FR 22810 on May 14, 2009.

The comment period closed on June 1, 2009. Six comments from two respondents were received. The Councils considered the comments received and concluded that the interim rule should be converted to a final rule with minor changes.

The comments received are discussed below.

a. The first respondent submitted the following 4 comments.

*Comment 1.* The respondent believes that the prescription at FAR 3.907–7 is too broad and should be revised to limit application more specifically to work funded with the Recovery Act funds. Revised language is proposed for FAR 3.907–7 as follows: “Use the clause at 52.203–15, Whistleblower Protections under the ARRA of 2009 in—All solicitations and contracts entirely funded with Recovery Act funds; and All solicitations and contracts funded in part with Recovery Act funds for the work to be funded with those Recovery Act funds.”

*Response.* Section 1553 prohibits reprisals against any employee of a contractor receiving “covered funds” for disclosing certain information related to “covered funds.” The limitation of the applicability of the rule is created by the