

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 synopses 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 contract actions shall follow the procedures in 5.704 for posting orders.

(2) Award notices 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 synopses 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.

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[FR Doc. E9–7019 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 4 and 52**

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

RIN 9000–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. Thereafter, 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 as many 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, North American Industry Classification System (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. 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 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 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 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 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 commercial items, as defined at 2.101, both at the prime and subcontract levels.

3. *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 that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply. The same applies for subcontracts for COTS 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 Administrator, Office of the Federal Procurement Policy, has determined that it is in the best interest of the Federal Government to apply the rule to Commercially Available Off-The-Shelf (COTS) item contracts and subcontracts, as defined at FAR 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

explanation of the methodology, including a description of how part-time and temporary employees are addressed?

—If the Government were to standardize the number of hours in a “full-time schedule,” would this increase the burden of reporting on jobs created or retained?

3. If the Government were to require companies to separately invoice for all supplies or services funded by the Recovery Act, what challenges would this pose? Are there any benefits?

4. Is there information not customarily provided that would make it easier for companies to segregate their invoices to separately identify items funded by the Recovery Act?

5. 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?

6. Does the definition of “Total compensation” used in the clause provide sufficient clarity? If not, what specifically should be clarified?

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.

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 unique prime Federal contractors. 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, of which 4,003 or 20 percent are estimated to be small businesses. It is also noted that this is 20 percent of prime contractors, which 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 or three times the number of prime contractors. 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.

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

The rule requires Federal prime contractors, both small and other than small businesses, to report quarterly on their use of funds received under the Recovery Act. The rule applies to all Federal contractors regardless of size or business ownership. Such a report would probably be prepared by a company contract administrator or contract manager or a company subcontract administrator. The information required in the report is primarily information that companies would maintain for their own business purposes including, but not limited to, contract or other award number, the dollar amount of invoices, the supplies or services delivered, a broad assessment of progress towards completion, the estimated number of new jobs created or retained resulting from the award, and first-tier subcontract information (or aggregate information if the subcontract is less than \$25,000, or the subcontractor is an individual or had gross income in the previous tax year of less than \$300,000). While most of the data elements impose only one-time burden collection, some will require quarterly updates.

There are three data elements required in the report that will likely require some additional effort: (1) Estimating the cumulative number of jobs created each calendar quarter, (2) estimating the cumulative number of jobs retained each calendar quarter, and (3) providing the name 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, which applies at both the prime and first-tier subcontract level. The rule also requires the prime contractor to report certain information, required by the Federal Funding Accountability and Transparency Act of 2006 (FFATA), about first-tier subcontracts (though all awards under \$25,000 will be aggregated, eliminating the need to report transaction-level data). The prime contractor will have most of this information in the subcontract award document, such as the name of the subcontractor, award number, and date of award. However, the prime contractor will have to obtain four of the elements directly from the first-tier subcontractor: (1) The unique identifier (DUNS Number) “for awards of \$25,000 or more” as well as for the

subcontractor's parent company, if the subcontractor has a parent company, (2) subcontractor's physical address, (3) subcontract primary performance location, and (4) the compensation information described earlier as required by FFATA and reflected in section 1512 of the Recovery Act.

With respect to the DUNS Number, we anticipate that most first-tier subcontractors have a DUNS Number as it is a requirement for receipt of any Government contract. However, a company that never received nor anticipated a Government contract might not have a DUNS number and will have to register for one with Dunn and Bradstreet. The registration process is not burdensome, can be done online or by phone, and requires only information any company would have on hand for business purposes. First-tier subcontractors are not required to register in the Central Contractor Registration (CCR) as a consequence of this rule.

With respect to compensation information, this requirement results from FFATA and will not apply if the public has access to information about 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. Otherwise, each prime contractor and first-tier subcontractors will have to disclose the compensation information if it received (1) 80 percent or more of annual gross revenues in Federal awards; and (2) \$25M or more in annual gross revenue from Federal awards. Because this requirement of FFATA became law on December 26, 2007, we anticipate that those companies to which it applies are aware of the requirement and have been preparing to provide this information.

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

The rule includes the reporting requirements stipulated by FFATA in FAR Case 2008-039 FFATA flow-down and 2008-037 Financial Disclosure.

These cases are in process and as they are finalized, they will be amended to ensure that they do not duplicate, overlap, or conflict with the requirements of this interim rule.

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

The rule requires Federal prime contractors to respond to all of the reporting requirements, eliminating some of the reporting burden on first-tier subcontractors despite the fact that they will have to provide some information to the prime contractor. Also, all of the reporting elements applied to first-tier subcontractors, a significant percentage of which will be small businesses, are one-time collection burdens. The Government believes that the rule will further minimize the reporting burden on Government contractors, including all small businesses, as well as other businesses, by using existing Federal acquisition/registration systems to pre-populate certain data elements.

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 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 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-

11 is \$31,725,468, based on the following:

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)(vii));
- d. Name of the first-tier subcontractor ((d)(10)(ii));
- 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:

Respondents: 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: .5.

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:

Respondents: 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. 9000-0167—One Time Reporting for First-tier Subcontractors.*

One-time reporting elements for which the burden is imposed only on the first-tier subcontractor include the following:

- a. Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company ((d)(10)(i));
- b. Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable((d)(10)(ix)); and
- c. Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable ((d)(10)(x)).

The Government expects that most first-tier subcontractors will have a DUNS number. However, if a company

has never received nor anticipated a Government contract, it would be required to register for a DUNS number which is not an onerous process and can be done online or by phone using information a company would have on hand for business purposes.

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

Respondents: 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.

4. *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:

Respondents: 20,013.

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: 100,065.

Preparation hours per response: 1.5.
Total response burden hours: 150,098.
Average hourly wages (\$50.00+36.35 percent overhead): \$68.00.
Estimated cost to the public:
 \$10,206,664.

F. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than June 1, 2009 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite the applicable OMB Control No.: 9000-0166; 9000-0167; 9000-0168; or 9000-0169, and FAR Case 2009-009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

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

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite the applicable OMB Control No.: 9000-0166, 9000-0167; 9000-0168; or 9000-0169, and FAR Case 2009-009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

The Paperwork Reduction Act applies to this interim rule.

G. 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 on February 17, 2009, and

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 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements. If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies.

(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 seller 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 (see definition 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 filled 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 (see definition 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.

Total compensation means the cash and noncash dollar value earned by the executive during the contractor's past fiscal year of the following (for more information see 17 CFR 229.402(c)(2)):

(1) *Salary and bonus.*

(2) *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

(3) *Earnings for services under non-equity incentive plans.* Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

(4) *Change in pension value.* This is the change in present value of defined benefit and actuarial pension plans.

(5) *Above-market earnings on deferred compensation which is not tax-qualified.*

(6) *Other compensation.* For example, severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property if the value for the executive exceeds \$10,000.

(b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.

(c) 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. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.

(d) The Contractor shall report the following information, using the online reporting tool available at <http://www.FederalReporting.gov>.

(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 maintained by the government's on-line reporting tool.

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

(4) Program or project title, 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) \$25,000,000 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.

- (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