

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

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

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

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

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

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

### 3.907-7 Contract Clause.

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

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

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

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

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

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

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

(End of clause)

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

(End of clause)

■ 7. Amend section 52.212-5 by—

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

(End of clause)

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

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

\* \* \* \* \*

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

(a) \* \* \*

(2) \* \* \*

(vi) 52.244-6, Subcontracts for Commercial Items. (MAR 2009)

\* \* \* \* \*

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

### 52.244-6 Subcontracts for Commercial Items.

\* \* \* \* \*

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

\* \* \* \* \*

(c)(1) \* \* \*

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

\* \* \* \* \*

(End of clause)

[FR Doc. E9-7020 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, 5, 8, 13, and 16

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

RIN 9000-AL24

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

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

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

**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 Office of Management and Budget (OMB) Guidance M-09-10, dated February 18, 2009, entitled, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009" (the Recovery Act), with respect to publicizing contract actions.

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

*Applicability Date:* This rule applies on or after the effective date of this rule to: (1) Solicitations issued, (2) contracts awarded, and (3) orders issued under existing task and delivery order contracts as defined in the rule.

*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 2009-010, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-010" under the heading "Comment or Submission." Select the link "Send a Comment or Submission" that corresponds with FAR Case 2009-010. Follow the instructions provided to complete the "Public Comment and Submission Form." Please include your name, company name (if any), and "FAR Case 2009-010" 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 2009-010, 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:** Ms. Millisa Gary, Procurement Analyst, at (202) 501-0699 for clarification of content. Please cite FAC 2005-32, FAR case 2009-010. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This interim rule implements Section 6.2 of the OMB Memorandum M-09-10,

"Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," (Pub. L. 111-5) (Recovery Act). In addition, this rule enables the Governmentwide Point of Entry (<https://www.fedbizopps.gov>) to be leveraged for the purpose of fulfilling sections 1526(c)(4) and 1554 of Division A of the Recovery Act.

On February 17, 2009, the President signed the Recovery Act. On February 18, 2009, the Director of OMB issued initial implementing guidance. One of the provisions of the OMB guidance is to provide 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 presolicitation notices.
2. Unique requirements for announcing contract awards.
3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS).
4. Unique requirements for actions that are not fixed-price or competitive.

##### **B. Discussion**

In order to implement Section 6.2 of the OMB Guidance M-09-10, FAR Parts 4, 5, 8, 13, and 16 are amended as follows:

1. Part 4 requires the contracting officer to enter data in the Federal Procurement Data System on any action funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), in accordance with the instructions at <https://www.fpds.gov>.
2. Subpart 5.7 is added to direct the contracting officer to use the Governmentwide Point of Entry (<https://www.fedbizopps.gov>) to (a) identify the action as funded by the Recovery Act; (b) post pre-award notices for orders exceeding \$25,000 for "informational purposes only;" (c) describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and (d) provide a rationale for awarding any action, including modifications and orders, that is not both fixed-price and competitive, and include the rationale for using other than a fixed-price and/or competitive approach.
3. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

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.

##### **C. 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 the OMB guidance affects only internal government operations and provides a strong preference for using small businesses for the Recovery Act programs wherever possible. The interim rule does not impose any additional requirements on small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 4, 5, 8, 13, and 16 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 2009-010) in correspondence.

##### **D. Paperwork Reduction Act**

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

##### **E. 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 Recovery Act became effective upon enactment, and contracts using funds appropriated by the 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 4, 5, 8, 13, and 16**

Government procurement.

Dated: March 25, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 5, 8, 13, and 16 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 5, 8, 13, and 16 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. Amend section 4.605 by adding paragraph (c) to read as follows:

##### 4.605 Procedures.

\* \* \* \* \*

(c) The contracting officer, when entering data in FPDS, shall use the instructions at <https://www.fpds.gov> to identify any action funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

#### PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Add Subpart 5.7 to read as follows:

##### Subpart 5.7—Publicizing Requirements under the American Recovery and Reinvestment Act of 2009

Sec.

5.701 Scope.

5.702 Applicability.

5.703 Definitions.

5.704 Publicizing-preaward.

5.705 Publicizing-post-award.

##### Subpart 5.7—Publicizing Requirements under the American Recovery and Reinvestment Act of 2009

##### 5.701 Scope.

This subpart prescribes posting requirements for presolicitation and award notices for actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act). The requirements of this subpart enhance transparency to the public.

##### 5.702 Applicability.

This subpart applies to all actions expected to exceed \$25,000 funded in whole or in part by the Recovery Act. Unlike subparts 5.2 and 5.3, this subpart includes additional requirements for orders and for actions that are not both fixed-price and competitive.

##### 5.703 Definition.

As used in this subpart—

*Task or delivery order contract* means a “delivery order contract,” and a “task order contract,” as defined in 16.501–1. For example, it includes Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), and other indefinite-delivery/indefinite-quantity contracts, whether single award or multiple award. It also

includes Federal Supply Schedule contracts (including Blanket Purchase Agreements under Subpart 8.4).

##### 5.704 Publicizing-preaward.

(a)(1) Follow the publication procedures at 5.201.

(2) In addition, notices of proposed contract actions are required for orders of \$25,000 or more, funded in whole or in part by the Recovery Act, which are issued under task or delivery order contracts. These notices are for “informational purposes only,” therefore, 5.203 does not apply. Contracting officers should concurrently use their usual solicitation practice (*e.g.*, e-Buy).

(b) Contracting officers shall use the instructions at the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>) to identify proposed contract actions funded in whole or in part by the Recovery Act.

(c) Ensure that the description required by 5.207(a)(16) includes a narrative of the products and services (including construction) that is clear and unambiguous to the general public.

##### 5.705 Publicizing-post-award.

Follow usual publication procedures at 5.301, except that the following supersede the exceptions at 5.301(b)(3) through (8):

(a) For any contract action exceeding \$500,000, including all modifications and orders under task or delivery order contracts, publicize the award notice and ensure that the description required by 5.207(a)(16) includes a narrative of the products and services (including construction) that is clear and unambiguous to the general public.

(b) Regardless of dollar value, if the contract action, including all modifications and orders under task or delivery order contracts, is not both fixed-price and competitively awarded, publicize the award notice and include in the description the rationale for using other than a fixed-priced and/or competitive approach. These notices and the rationale will be available to the public at the GPE, so do not include any proprietary information or information that would compromise national security. The following table provides examples for when a rationale is required.

##### POSTING OF RATIONALE—EXAMPLES

Description of contract action	Posting rationale on special section of recovery.gov
(1) A contract is competitively awarded and is fixed-price.	Not Required.

##### POSTING OF RATIONALE—EXAMPLES—Continued

Description of contract action	Posting rationale on special section of recovery.gov
(2) A contract is awarded that is not fixed-price..	Required
(3) A contract is awarded without competition..	Required
(4) An order is issued under a new or existing single award IDIQ contract.	Required if order is made under a contract described in (2) or (3).
(5) An order is issued under a new or existing multiple award IDIQ contract.	Required if one or both of the following conditions exist: (i) The order is not fixed-price. (ii) The order is awarded pursuant to an exception to the competition requirements applicable to the underlying vehicle ( <i>e.g.</i> , award is made pursuant to an exception to the fair opportunity process).
(6) A modification is issued.	Required if modification is made: (i) To a contract described in (2) or (3) above; or (ii) To an order requiring posting as described in (4) or (5) above.
(7) A contract or order is awarded pursuant to a small business contracting authority ( <i>e.g.</i> , SBA's section 8(a) program).	Required if one or both of the following conditions exist: (i) The contract or order is not fixed-price; (ii) The contract or order was not awarded using competition ( <i>e.g.</i> , a non-competitive 8(a) award).

(c) Contracting officers shall use the instructions at the Governmentwide Point of Entry (GPE) (<https://www.fedbizopps.gov>) to identify actions funded in whole or in part by the Recovery Act.

##### PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 4. Amend section 8.404 by revising the last sentence in paragraph (a); and by adding a new paragraph (e) to read as follows:

**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.

\* \* \* \* \*

[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.