

**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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**BILLING CODE 6820–EP–S**

**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

definition of covered information, which means only information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds. It does not apply to information relating to problems not associated with the use of covered funds.

Section 1553 defines "Covered funds" to mean any contract, grant, or other payment received by a contractor if—

(1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(2) At least some of the funds are appropriated or otherwise made available by the Recovery Act.

As defined in section 1553, covered funds is broader than just funds appropriated or otherwise made available by the Recovery Act.

Since the prohibition of reprisals applies to any employee of the contractor receiving the covered funds, the clause prescription as stated in the interim rule at FAR 3.907–7 is correct. However, the Councils have revised the definition of "covered funds" at FAR 3.907–1 to be more consistent with the statutory definition, and have revised the flowdown in the clause at FAR 52.203–15(b) to apply only to subcontracts that are funded in whole or in part with the Recovery Act funds.

*Comment 2.* The respondent states that because section 1553 of the Recovery Act is implemented by FAR 52.203–15 and included in contracts for commercial items by FAR 52.212–5(b)(3), it is not necessary to amend paragraph (r) of FAR 52.212–4.

*Response.* The Councils agree. The newly added language at FAR 52.212–4(r) is deleted.

*Comment 3.* The respondent states that the clause at FAR 52.203–15 should be indicated as a "check-off" clause as has been noted for FAR 52.212–5(b)(4), and FAR 52.204–11 (FAR Case 2009–009).

*Response.* The Councils agree. However, it is not necessary to make any further changes to the rule. This is a checklist being interpreted correctly by the U.S. National Archives and Records Administration and the U.S. Government Printing Office.

*Comment 4.* The respondent states that it is unnecessary to include the reference to FAR 52.203–15 in paragraph (e)(1) of FAR 52.212–5 because this was incorporated under FAR Case 2009–011.

*Response.* The Councils partially agree. The Technical Amendment to the rule, published in the **Federal Register** at 74 FR 22810 on May 14, 2009, moved this paragraph to the Alternate II.

b. The second respondent submitted 2 comments to the interim rule.

*Comment 1.* The respondent believes that the rule should be amended to require the contracting officer to immediately forward the complaint ONLY to the Office of Inspector General (OIG).

*Response.* The Councils partially agree. The language in FAR 3.907–3(c) is revised to add "and to other designated officials in accordance with agency procedures (e.g., agency legal counsel)" so that agencies are informed as well as the OIG.

*Comment 2.* The respondent believes that the Recovery Act grants authority concerning the extension of time for investigating complaints and the determination on whether or not to investigate or to discontinue an investigation to the IG, not to the agency head as stated in FAR 3.907–6(c)(1).

*Response.* The Councils agree that subsection (b) of section 1553 gives the authority to the IG. However, FAR 3.907–6(c)(1) reflects the wording of subsection (c)(3) of section 1553. The FAR did not create any new authority here.

In addition, the Councils added a reference, at FAR 52.203–15, to the web address where contractors may obtain a whistleblower poster developed by the Recovery Accountability and Transparency (RAT) Board.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget review under section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 rule applies similar, but not identical, whistleblower protections to contractor and subcontractor employees as currently covered in FAR subpart 3.9.

Likewise, this rule only applies to contracts awarded with Recovery Act funds.

## C. 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.*

## List of Subjects in 48 CFR Parts 3 and 52

Government procurement.

Dated: June 2, 2010.

**Edward Loeb,**

*Acting Director, Acquisition Policy Division.*

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 14633 on March 31, 2009, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 3 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 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Amend section 3.907–1 by revising the definition of "Covered funds" to read as follows:

### 3.907–1 Definitions.

\* \* \* \* \*

*Covered funds* means any contract payment, grant payment, or other payment received by a contractor if—

(1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(2) At least some of the funds are appropriated or otherwise made available by the Recovery Act.

\* \* \* \* \*

■ 3. Amend section 3.907–3 by revising paragraph (c) to read as follows:

### 3.907–3 Procedures for filing complaints.

\* \* \* \* \*

(c) A contracting officer who receives a complaint of reprisal of the type described in 3.907–2 shall forward it to the Office of Inspector General and to other designated officials in accordance with agency procedures (e.g., agency legal counsel).

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.203–15 by revising the date of the clause, and paragraphs (a) and (b) to read as follows:

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

\* \* \* \* \*

WHISTLEBLOWER PROTECTIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (JUN 2010)

(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) (Recovery Act).

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts that are funded in whole or in part with Recovery Act funds.

\* \* \* \* \*

## 52.212–4 [Amended]

■ 5. Amend section 52.212–4 by removing the clause date “(Mar 2009)” and adding “(JUN 2010)” and removing from paragraph (r) “Section 1553 of the American Recovery and Reinvestment Act of 2009 relating to whistleblower protections for contracts funded under that Act;”.

■ 6. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (b)(3) “(Mar 2009)” and adding “(JUN 2010)” in its place; and

■ c. Revising paragraph (e)(1)(ii)(B) of Alternate II.

The revised 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 (JUN 2010)

\* \* \* \* \*

### Alternate II \* \* \*

\* \* \* \* \*

(e)(1) \* \* \*

(ii) \* \* \*

(B) 52.203—15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (JUN 2010) (Section 1553 of Pub. L. 111–5).

\* \* \* \* \*

■ 7. 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) (JUN 2010)

(a) \* \* \*

(2) \* \* \*

(vi) 52.244–6, Subcontracts for Commercial Items (JUN 2010).

\* \* \* \* \*

■ 8. Amend section 52.244–6 by revising the date of the clause and paragraph (c)(1)(ii) to read as follows:

## 52.244–6 Subcontracts for Commercial Items.

\* \* \* \* \*

SUBCONTRACTS FOR COMMERCIAL ITEMS (JUN 2010)

\* \* \* \* \*

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

(ii) 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (JUN 2010) (Section 1553 of Pub. L. 111–5), if the subcontract is funded under the Recovery Act.

\* \* \* \* \*

[FR Doc. 2010–14189 Filed 6–15–10; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Parts 1, 4, 19, 52, and 53

[FAC 2005–42; FAR Case 2005–040; Item II; Docket 2008–0001, Sequence 26]

RIN 9000–AK95

### Federal Acquisition Regulation; FAR Case 2005–040, Electronic Subcontracting Reporting System (eSRS)

**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 (Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to require that contractors' small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than Standard Form 294 - Subcontract Report for Individual Contracts and Standard Form 295 - Summary Subcontract Report.

**DATES:** *Effective Date:* July 16, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. For information pertaining to status or publication

schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–42, FAR Case 2005–040.

### SUPPLEMENTARY INFORMATION:

#### A. Background

The Councils published an interim rule in the **Federal Register** at 73 FR 21779 on April 22, 2008, to implement in the FAR the use of the Electronic Subcontracting Reporting System (eSRS) to fulfill small business subcontracting reporting requirements. The eSRS is a web-based system under the umbrella of the Integrated Acquisition Environment. It replaces Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. The eSRS is intended to streamline the small business subcontracting program reporting process and provide the data to agencies in a manner that will enable them to more effectively manage the program.

The interim rule also amended FAR subpart 19.7 and related clauses to clarify existing small business subcontracting program requirements.

The FAR interim rule was not intended to change any of the requirements for the individual or summary subcontract reports. Its purpose was only to require submission of subcontract reports electronically, rather than in hardcopy.

Nineteen commenters submitted comments on the interim rule. A discussion of those comments and the changes made to the rule as a result of those comments is provided below.

The comments will be discussed in three overall categories. Those that pertain to the FAR rule itself, those that do not pertain to the FAR rule, and those that were submitted in response to the Councils' question in the **Federal Register** notice for the interim rule concerning whether the reporting period covered by a Summary Subcontract Report for a commercial subcontracting plan should remain the Government's fiscal year, or be the contractor's fiscal year.

The comments submitted that did not pertain to the FAR rule itself covered such things as changes that need to be made to eSRS to ensure that the instructions in that electronic system are consistent with this FAR rule, changes that need to be made to electronic business systems that interface with eSRS, and changes that need to be made to regulations that supplement the FAR. These comments will be referred to the appropriate Government officials for their consideration. These comments will not be addressed individually in this