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FAR Councils Issue Five Interim Rules Implementing Key Provisions of the American Recovery and Reinvestment Act of 2009

On March 31, 2009, the FAR Councils issued five interim rules implementing important provisions of the American Recovery and Reinvestment Act of 2009 ("Recovery Act" or "the Act"), Pub. L. 111-5, affecting government contracts funded or partially funded by Recovery Act appropriations. To further the Act's goal of maintaining transparency over the use of such funds, these rules, among other things: create affirmative (and potentially burdensome) reporting obligations on the part of contractors; require certain contracting actions to be published online; and allow government officials to interview contractor and subcontractor employees during audits. Perhaps most significantly, one of the new rules prohibits government contractors from retaliating against employees that report on the alleged misuse of Recovery Act funds and creates a new source of liability, including a civil cause of action, for government contractors that retaliate against such employees.

These rules apply to solicitations and contracts awarded on or after March 31, 2009, including those for the purchase of commercial items and acquisitions below the simplified acquisition threshold. Additionally, contracting officers are required to modify existing contracts, on a bilateral basis, to include the new implementing clauses if future orders will use Recovery Act funds.

Whistleblower Protections (FAR Case 2009-012)

This interim rule implements Section 1553 of the Recovery Act, which establishes protections for whistleblowers of employers that receive funds under the Act. Specifically, a new FAR 3.907 prohibits non-federal employees from "discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information" to the government. The rules define covered information as information that the employee reasonably believes is evidence of gross mismanagement or gross waste of Recovery Act funds, or a violation of law or regulation related to an agency contract funded by Recovery Act funds. A new FAR Clause 52.203-15 requires contractors to post notices of rights and remedies for whistleblowers under the Act.

This rule also establishes procedures for filing complaints of reprisal to agency inspector generals. If an employee affirmatively establishes that his or her disclosure of covered information was a contributing factor for the reprisal, and the employer is unable to show by clear and convincing evidence that it would have taken action in the absence of the disclosure, agencies are authorized to provide relief. Such relief includes: ordering the employer to take affirmative action to abate the reprisal; reinstatement of the employee

along with the payment of compensatory damages, benefits, and back pay; and payment of attorneys' fees related to the filing of the reprisal complaint. The rule also creates a de novo civil cause of action in federal district court if the agency denies relief or fails to investigate the complaint. Moreover, the rule requires agencies to request the Department of Justice to file an enforcement action in district court if an employer fails to comply with an order from the agency.

Publicizing Contract Actions (FAR Case 2009-010)

Pursuant to FAR Subpart 5.7, agencies are required to post proposed contracting actions online (at https://www.fedbizopps.gov), explaining in clear and unambiguous language the products or services to be acquired. This rule implements the Recovery Act requirements that: (1) contracting actions exceeding $25,000 funded or partially funded by the Act be posted online in order to enhance public transparency; and (2) award notices, including modifications and orders under task order contracts, exceeding $500,000 be posted online. The notices required under this rule do not replace existing publication requirements for government contracting opportunities.

The most significant aspect of this rule may be that it mandates that notices for any contract action (regardless of value) that is not fixed-price or competitively awarded must include the agency's rationale for using other than fixed-price and/or a competitive approach. See FAR 5.705(b) (as amended). As a result, contractors receiving cost-type contracts funded by the Recovery Act may anticipate greater scrutiny not only from the public, but from competitors and disappointed offerors that may be considering potential grounds for a bid protest.

Contractor Reporting Requirements (FAR Case 2009-009)

This rule implements the Recovery Act's requirements that contractors report quarterly on their use of Recovery Act funds. Reports under this rule will be posted online and available to the public for review. The rule creates a new FAR Clause 52.204-11 which will be incorporated into contracts funded or partially funded by Recovery Act appropriations, including contracts for commercial-off-the-shelf items and contracts below the simplified acquisition threshold.

Under the new clause, contractors must report, among other things, the amount of Recovery Act funds invoiced during the reporting period, all significant services or supplies delivered, a description of the overall purposes and expected outcome or results of the contract, and an assessment of the contractor's progress toward the completion of the overall purpose. Contractors must also describe the employment impact of the work funded by the Act, which includes providing an estimate of the number of jobs created or retained by the prime contractors.

Large contractors receiving Recovery Act funds must also report the names and total compensation of each of the five most highly compensated officers for the year in which the contract was awarded. This information is only required, however, if the contractor receives $25 million or more in annual gross revenue from federal contracts, 80% or more of its annual gross revenue is from federal contracts, and the information is not already available to the public under Securities Exchange disclosure laws. Many of these requirements flow-down to certain subcontractors receiving more than $25,000 in Recovery Act funds.

Government Accountability Office/Inspector General Access (FAR Case 2009-011)

This interim rule creates alternate clauses for FAR 52.214-26, Audit and Records—Sealed Bidding, FAR 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. The alternative clauses are to be used in any contract receiving Recovery Act funds, including commercial contracts, contracts for commercial-off-the-shelf items, and contracts below the simplified acquisition threshold.

The alternate clauses grant the Government Accountability Office ("GAO") access to examine any of the contractor's or subcontractor's records that relate to transactions under the contracts and to allow them to interview any officer or employees regarding such transactions. The alternates also grant agency inspector generals the same authority, but only at the prime contractor level (i.e., inspector generals may not interview subcontractor employees).

The issuance of this rule coincides with a similar interim rule implementing a provision in the National Defense Authorization Act of 2009, which amends these same FAR clauses to allow the GAO to interview current employees relating to transactions under their contracts, except under commercial item contracts. See FAR Case 2008-026. Thus, GAO now has similar authority to interview contractor employees when conducting audits, even under contracts not funded by the Recovery Act.

Buy American Act Requirements for Construction Material (FAR Case 2009-008)

Section 1605 of the Recovery Act applies the Buy American Act's domestic source restrictions to construction projects funded by the Act, to the extent such restrictions are not inconsistent with trade agreements. These restrictions apply to any recipient of Recovery Act funds, including state and local governments and their contractors. Specifically, the implementing rule prohibits the use of Recovery Act funds or appropriations made available under the Act for construction, alteration, maintenance, or repair of a public building or public work unless: (1) the public building/work is in the United States; and (2) all of the steel, iron, and "manufactured goods" used in the project are produced or manufactured in the United States. FAR 25.602(a) (as amended). The rule also requires that manufacturing processes in the production of iron and steel take place in the United States, and that any unmanufactured construction material be of domestic origin.

Notably, there is no express restriction on the source of components or subcomponents of manufactured construction material under the Recovery Act's Buy American provision. In this regard, the new regulation appears to differ from existing Buy American regulations, which require at least 50% of the components of a manufactured end product to be domestic. See FAR 25.003. Thus, as long as construction material is manufactured in the United States, material containing entirely foreign components and subcomponents will apparently not be prohibited by the Recovery Act's restrictions.

Additionally, the new Recovery Act restrictions utilize a different evaluation preference scheme for construction material than the existing preference under the broader existing Buy American rules. Under the new rule, a 25% mark-up will be applied to the total price of an offer when foreign steel, iron, and other manufactured goods that are part of the construction material are included in an offer. This mark-up is particularly significant because it applies to the entire offer rather than only to the cost of the foreign material. Further, a 6% mark-up will be

applied to foreign unmanufactured construction material, but only to the price of the material (i.e., not the entire offer).

Finally, for acquisitions subject to U.S. trade agreements, the source restrictions for manufactured and unmanufactured construction material purchased using Recovery Act funds apply to "eligible" construction material from the numerous designated countries. Designated countries include members of the World Trade Organization Government Procurement Agreement, the North American Free Trade Agreement (and other free trade agreements), and least-developed countries. However, unlike the existing Trade Agreements Act regulations, countries from the Caribbean Basin are not designated countries for purposes of Recovery Act funds.

Practitioner's Tips:

- The goal of these rules is to increase public transparency over the use of Recovery Act funds and to ensure that the funds are properly spent and managed. If any of your contracts will be funded or partially funded by Recovery Act appropriations, you should anticipate significantly more oversight than may be customary and be prepared to track the use of these funds in greater detail.

- Increased oversight begins with your own employees. Unlike civil false claims whistleblower suits, in which an employee must allege fraud, the Recovery Act whistleblower rule allows your employees to report what they believe to be gross mismanagement or waste of Recovery Act funds to trigger a government investigation—a much broader and perhaps more subjective threshold. While the employees may not allege fraud or false claims, an ensuing investigation by the agency may open the door to government allegations of fraud or other wrongdoing, and may even lead to a suspension and debarment action. Therefore, it is especially important that any recipient of Recovery Act funds exercise an even greater degree of care in performing and managing its contracts. In addition, contractors should review their internal compliance and reporting procedures to ensure that employees report any problems to management as soon as possible.

- Contractors must be mindful of the interplay between the Recovery Act reporting requirements and the mandatory disclosure provisions that went into effect in December 2008. Pursuant to the mandatory disclosure provisions, contractors must disclose, in writing, whenever they have credible evidence that a principal, employee, agent, or subcontractor has committed (1) a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuities or (2) a violation of the civil False Claims Act.

- The Recovery Act rules require contracting officers to modify existing contracts, on a bilateral basis, to include the implementing clauses if future orders will be funded by appropriations under the Act. Contractors should carefully determine the extent of increased costs associated with the new requirements (e.g., quarterly reporting requirements) when negotiating an adjustment to the contract price.

- The public and your competitors will likely track and scrutinize your performance based on your quarterly reports. Performance problems, such as delays or cost overruns, will likely attract increased public attention and affect the agency's approach toward resolving such problems. Thus, contractors must ensure that they have adequate controls in place to identify potential performance problems in a timely manner.

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