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Regulations

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Councils Issue Interim Recovery Act Regulations

Stung by procurement blunders and contractor excesses in contracting for hurricane relief and wartime operations in Iraq, the Government March 31 issued interim regulations implementing oversight measures mandated in the American Recovery and Reinvestment Act of 2009, P.L. 111-5. The new rules seek increased transparency, competition and oversight in Recovery Act contracting.

Publicizing Contract Actions—The interim rules issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council include new requirements for publicizing contract actions funded in whole or part by the Recovery Act. The rules also implement February guidance from the Office of Management and Budget. See 51 GC ¶ 60.

Federal Acquisition Regulation pt. 4 now requires contracting officers to enter data on Recovery Act-funded contracts in the Federal Procurement Data System. New provisions in FAR subpt. 5.7 direct COs to use the www.fedbizopps.gov Web site to post notices identifying Recovery Act-funded contracting actions. COs must describe the contract products and services in language that is “clear and unambiguous to the general public.”

In addition to the usual FAR publication requirements, the interim rules impose new notice requirements for actions funded by the Recovery Act. For “informational purposes only,” COs must post notices of proposed orders worth \$25,000 or more under task or delivery order contracts. And FAR 5.705 now requires COs to publicize an award notice for any contracting action valued over

\$500,000, including orders under task or delivery order contracts and contract modifications. “Regardless of dollar value,” COs must provide a rationale for not using a fixed-price contract and competitive award procedures.

Reporting and Oversight—The Recovery Act requires agency inspectors general to review public concerns about the use of Recovery Act funds and created the Recovery Accountability and Transparency Board with broad powers to coordinate with IGs to report on use of Recovery Act funds.

To facilitate transparency and oversight, the interim rules require contractors to report on their use of Recovery Act funds. COs must include a new clause imposing the reporting duties in all solicitations and contracts using any Recovery Act funds, except classified solicitations and contracts. The new clause expressly extends the reporting requirements to commercial-item contracts, commercially available off-the-shelf (COTS) item contracts and actions using simplified acquisition procedures. To use Recovery Act funds on an existing contract, COs must modify the contract to include the new reporting clause.

In addition to identifying data, contractors must report (1) the amount of Recovery Act funds covered by invoices; (2) the work covered by invoices; (3) the purpose and expected outcome of the contract; (4) progress on the work; (5) a narrative description of the employment impact of the work; and (6) for some contractors with a large amount of revenue from federal grants, contracts and cooperative agreements, the names and total compensation of the contractor’s five most highly compensated officers. The clause also requires contractors to report information, including information on highly paid officers, for some first-tier subcontractors.

Covered contractors submitting invoices before June 30 for work paid for with Recovery Act funds must submit reports by July 10. After that, reports are due quarterly. Contractors must use an online reporting tool, which the Government plans to have available by July 10. COs must ensure that contractors submit the reports.

To boost the effectiveness of Government auditing, the rules authorize audits of all contracts and subcontracts that use Recovery Act funds. The comptroller general can conduct audits and interview contractor and subcontractor employees. IGs have the same authority, with the exception of interviewing subcontractor employees. The rules also extend audit and interview rights to commercial-item contracts, COTS contracts and contracts using simplified acquisition procedures. A similar new rule, issued as part of the same Federal Acquisition circular, implements § 871 of the National Defense Authorization Act for Fiscal Year 2009 and authorizes the U.S. Comptroller General to interview current contractor employees for audits of contractor records.

In addition to increased formal oversight, the councils issued rules implementing Recovery Act provisions designed to encourage informal oversight by whistleblowers. The new rules implement § 1553 of the Recovery Act, which prohibits non-federal employers from retaliating against employees that report abuse. Entities receiving Recovery Act funds may not discharge, demote or otherwise retaliate against an employee for disclosing information that the employee reasonably believes is evidence of a gross waste of funds, gross mismanagement of a subcontract or contract, danger to public health or safety, an abuse of authority or a violation of law. The protections apply if the employee discloses the information to certain state or federal officials, supervisors or investigators working for the employer, or a court or grand jury.

The whistleblower provisions also set time limits for the Government to take action on employee retaliation complaints, establish procedures for granting employee access to IG investigative files, and provide remedies and enforcement authority.

Buy American—The new rules implement the Recovery Act's Buy American provision, which bars the use of Recovery Act funds for construction, alteration, maintenance or repair of a building, and other projects unless the iron, steel and manufactured goods in the project are produced in the U.S. See related story, 51 GC ¶ 115, this issue. The Recovery Act limits the scope of the Buy American provision by requiring that the provision comply with U.S. obligations under international agreements. The Recovery Act also notes that least-developed countries are exempt from the restrictions. Many commentators have criticized the Buy American provisions. See Burgett, Leibowitz and Ertley, Feature Comment, "How Will

Buy America Restrictions Affect Economic Stimulus Spending?" 51 GC ¶ 51; Schooner and Yukins, Feature Comment, "Tempering 'Buy American' in the Recovery Act—Steering Clear of a Trade War," 51 GC ¶ 78; Matlachak, Feature Comment, "No Way BAA: Domestic Preferences and the Stimulus Package," 6 IGC ¶ 9.

The new rules take effect March 31. Comments are due by June 1. 74 Fed. Reg. 14621 (March 31, 2009).

◆ **Practitioner's Comment**—The new interim FAR rules, which impose detailed reporting requirement on contractors and some subcontractors, may provide the basis for significant future False Claims Act liability. These reporting rules could increase that liability based on current law. If the amendments now making their way through both houses of Congress are passed, these potential liabilities increase substantially because many of the defenses now available under the FCA will be eliminated.

First, FAR Case 2009-008 provides additional Buy American requirements under the Recovery Act. A number of FCA cases have been brought against contractors based on alleged violations of the Buy American Act, and to the extent these interim rules expand (or confuse) those requirements, contractors can be sure that qui tam relators will use any such BAA violation as the basis for an FCA lawsuit.

Second, FAR Case 2009-009 implements § 1519 of the Recovery Act, which requires contractors that receive awards funded in whole or in part by the Recovery Act to report quarterly on the use of Recovery Act funds. All Recovery Act-funded contractors (except those funded under classified solicitations and contracts) are subject to the quarterly reporting requirement. COs must make a contractor's failure to comply with the reporting requirements a part of the contractor's performance information under FAR subpt. 42.15. As a result, a qui tam relator or the Department of Justice may argue that the failure to report or the reporting of inaccurate information, is "material" to the Government, and thus could be the basis for an FCA action.

Specifically, the proposed clause at FAR 52.204-11 mandates that quarterly reports include information such as (a) the dollar amount of contractor invoices; (b) the supplies delivered or services performed; (c) assessment of the completion status of the work; (d) estimates of the number of jobs created or retained as a result of Recovery Act funds; and

(e) the names and total compensation of the contractor's five most highly compensated employees for the calendar year in which the contract is awarded, to the extent that such information is not otherwise publicly reported under the securities laws. Some of this information—the services performed, completion status, estimate of jobs created—could easily be viewed as incorrect by a whistleblower or qui tam relator, and the argument will be that the Government relied on those data as a basis for continuing to fund the project or for some other reason.

The major issue will be determining any damages that may apply in addition to the civil penalties available under the FCA. Nonetheless, contractors should expect the argument that, if certain information deemed inaccurate had been properly reported, the contract would have been terminated or modified. For example, if a contractor estimates that a certain number of jobs were created, knowing that this estimate is grossly overstated, a qui tam relator

or Government lawyer could easily argue that, had the estimate been accurate, the CO would not have continued the contract. These are issues of fact that may require a trial.

Finally, the quarterly reports must include certain first-tier subcontractor information, the nature and amount of which depends upon the size of the subcontractor and the value of the subcontract. FCA cases have been based on the failure to properly supervise a subcontractor and the submission to the Government of inaccurate subcontractor information. These reporting requirements constitute additional supervision that will be scrutinized if the subcontractor's information turns out to be inaccurate.



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