

## **Recovery Act Reporting Requirements**

On March 31, 2009, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued an interim rule amending the FAR to implement Division A, Section 1512 of the Recovery Act to require 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.

The interim rule adds to the FAR a new Subpart 4.15, “American Recovery and Reinvestment Act – Reporting Requirements.” Under Subpart 4.15, all solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts, must contain a new clause, 52.204-11.

The new clause must be included in all new contracts funded under the Recovery Act and must be added to existing contracts if Recovery Act funds will be used to pay for performance of the existing contracts. Contracts for “commercial items” and for “COTS” items are covered by the reporting requirements. The new clause also requires the prime contractor to collect and report information as described in the clause from first-tier subcontractors. If a contractor submits invoices for work funded by the Recovery Act before June 30, 2009, the contractor is required to submit the first report covered by the new clause no later than July 10, 2009. Subsequent reports are due within 10 days after the end of each calendar quarter in which the contractor invoices for additional amounts funded by the Act.

### **Reporting Requirements**

Pursuant to Subpart 4.15 and contract clause 52.204-11, contractors that receive awards (or modifications to existing awards) funded, in whole or in part by the Recovery Act, must report the following information through the online reporting tool available at [www.FederalReporting.gov](http://www.FederalReporting.gov):

1. Contract and order number, as applicable
2. The amount of Recovery Act funds invoiced by the contractor for the reporting period
3. A list of all significant services performed or supplies delivered for which the contractor invoiced in the calendar quarter
4. Program or project title, if any

5. A description of the overall purpose and expected outcome or results of the contract, including significant deliverables and, if appropriate, associated units of measure
6. An assessment of the contractor's progress towards completion of the overall purpose and expected outcomes or results of the contract
7. A narrative description of the employment impact of work funded by the Recovery Act (*i.e.*, jobs created and jobs retained). At a minimum, the contractor must provide a brief description of the types of jobs created and jobs retained in the United States and outlying areas; and an estimate of the number of jobs created and jobs retained by the prime contractor in the United States and outlying areas.

“Jobs created” covers only prime contractor positions established in the United States and outlying areas and is defined as “an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the [Recovery Act].”

“Jobs retained” covers only prime contractor positions established in the United States and outlying areas and is defined as “an estimate of those previously existing filled positions that are retained as a result of funding by the [Recovery Act].”

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, in the contractor's preceding fiscal year, the contractor received
  - 80 percent or more of the contractor's annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
  - \$25,000,000 or more in annual gross revenues from Federal contracts; and
  - the public does not have access to information about 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.

“Total compensation” means the cash and noncash dollar value earned by the executive during the contractor's past fiscal year, including but not limited to salary and bonus, awards of stock, stock options, and stock appreciation rights, earning for services under non-equity incentive plans, changes in pension value, above-market earning on deferred compensation which is not

tax-qualified, and other compensation including 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.

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 must 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 above, the contractor shall provide the following detailed information regarding first-tier subcontracts:
  - a unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company
  - name of the subcontractor
  - amount of the subcontract award
  - date of the subcontract award
  - the applicable North American Industry Classification System (NAICS) code
  - the funding agency
  - a description of the products or services being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract
  - subcontract number (the contract number assigned by the prime contractor)
  - subcontractor's physical address
  - subcontractor's primary performance location
  - 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, in the subcontractor's preceding fiscal year, the contractor received

- 80 percent or more of the contractor's annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- \$25,000,000 or more in annual gross revenues from Federal contracts; and
- the public does not have access to information about 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.

These requirements are likely to prove onerous. Even the seemingly simple information required by paragraphs (1) through (6) above may be difficult to collect, particularly if the contractor has a number of covered awards, within the 10 days permitted under the clause.

The requirements in paragraph (7) for reporting the number of "full-time-equivalent" jobs created or retained as a result of performance may be very difficult, especially for large companies performing large contracts.

Depending on how it is interpreted, the compensation reporting requirements of paragraph (8) may impose no new burdens on publicly-traded companies, but they will require closely-held companies, non-profit organizations, and other recipients of Recovery Act funding to report details about executive compensation that have previously been confidential. One likely area of confusion is the requirement that "the Contractor" report compensation for its five most highly compensated employees. Given the cross-reference to the SEC reporting requirements, we assume that "the Contractor" means the legal entity that is required to file reports under the SEC rules and not every wholly-owned subsidiary that may happen to be the recipient of an individual contract. In some cases, calculation of the amount of compensation other than cash payments may be difficult.

Because only first-tier contracts for less than \$25,000 are exempt from the subcontractor reporting requirements, the task of collecting and digesting subcontractor data from multiple first-tier subcontractors on large projects could involve a very significant administrative effort.

There are estimates in the Federal Register notice of the amount of time that will be needed to prepare the required reports. Contractors that intend to comment on the regulations should pay particular attention to the reasonableness of those estimates. The average estimated time for collection of the subcontract information

(15 minutes) is particularly optimistic, but all of the estimates seem unrealistically low.

### **Contracting Officer Responsibilities**

Under new Subpart 4.15, Section 4.1502, contracting officers must ensure that clause 52.204-11 is included in any existing contract or order that will be funded with Recovery Act funds. Thus, contracting officers who obligate Recovery Act funds on existing contracts or orders must modify those contracts to add clause 52.204-11. 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. In the event a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

Moreover, under new Subpart 4.15, Section 4.1500, whenever Recovery Act funds are used (regardless of the contract instrument), the contracting officer must structure contract awards to allow for separate tracking of Recovery Act funds. For example, the contracting officer may award separate contracts when using Recovery Act funds or establish contract line item number (CLIN) structures to mitigate commingling of Recovery Act funds with other funds.

Finally, under Section 4.1501, contracting officers must exercise “appropriate contractual remedies” if a contractor fails to comply with reporting requirements for Recovery Act funds. This section also requires contracting officers to make the contractor’s failure to comply with reporting requirements a part of the contractor’s performance information.

### **First Reporting Deadline is July 10, 2009**

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 must be submitted no later than the 10<sup>th</sup> day after the end of each calendar quarter.

### **Comments Due 60 Days After Publication**

Comments on the new Subpart 4.15 are due sixty (60) days after publication in the Federal Register.

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