

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR–2009–0001, Sequence 3]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005–32; Introduction**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of final and interim rules, and technical amendments and corrections.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–32. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available

via the Internet at <http://acquisition.gov/far>.

**DATES:** For effective dates and comment dates, see separate documents which follow.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2005–32 and specific FAR case number(s). Interested parties may also visit our Web site at <http://acquisition.gov/far>. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**LIST OF RULES IN FAC 2005–32**

Item	Subject	FAR case	Analyst
I .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material (Interim).	2009–008	Murphy.
II .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections (Interim).	2009–012	Parnell.
III .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions (Interim).	2009–010	Gary.
IV .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements (Interim).	2009–009	Woodson.
V .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access (Interim) ..	2009–011	Chambers.
VI .....	GAO Access to Contractor Employees (Interim) .....	2008–026	Neurauter.

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–32 amends the FAR as specified below:

**Item I—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material (Interim) (FAR Case 2009–008)**

This interim rule implements the Buy American provision, section 1605, of the American Recovery and Reinvestment Act of 2009. It prohibits the use of funds appropriated for the Recovery Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. However, section 1605 requires that the Buy American requirement be applied in a manner consistent with U.S. obligations under international agreements. Moreover, because Congress intended that least developed countries be excepted from section 1605, least developed countries can continue to be treated as designated countries. Section 1605 also provides

for waivers under certain limited circumstances.

**Item II—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections (Interim) (FAR Case 2009–012)**

Subpart 3.9 of the Federal Acquisition Regulation (FAR) is revised to add section 3.907. Section 3.907 provides procedures for whistleblower protection, when using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

Section 3.907 provides that non-Federal employers are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority.

A new clause 52.203–15 is added to require contractors to post rights and remedies for whistleblower protections

under Section 1553 of the American Recovery and Reinvestment Act.

**Item III—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions (Interim) (FAR Case 2009–010)**

This interim rule implements the Office of Management and Budget’s Guidance, M–09–10, “Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” dated February 18, 2009, section 6.2. Federal Acquisition Regulation (FAR) 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>. Subpart 5.7 is added to direct the contracting officer to use the Governmentwide Point of Entry (<https://www.fedbizopps.gov>) to (1) Identify the action as funded by the Recovery Act; (2) post pre-award notices for orders exceeding \$25,000 for “informational purposes only;” (3) describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and (4) 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. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

**Item IV—American Recovery and Reinvestment Act of 2009 (The Recovery Act)—Reporting Requirements (Interim) (FAR Case 2009–009)**

This interim rule implements 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. The rule 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. This clause applies to Commercial item contracts and Commercially-Available-Off-The-Shelf (COTS) item contracts as well as actions under the Simplified Acquisition Threshold.

Contracting officers who wish to use Recovery Act funds on existing contracts should modify those contracts to add the clause.

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 shall be submitted no later than the 10th day after the end of each calendar quarter.

**Item V—American Recovery and Reinvestment Act of 2009 (The Recovery Act)—GAO/IG Access (Interim) (FAR Case 2009–011)**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009. Collectively, these Sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to 52.212–5, “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items”, 52–214–26, “Audit and Records—Sealed Bidding,” and 52.215–2, “Audit and Records—Negotiation”. For the Comptroller General these alternate clauses provide

specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency inspector generals receive the same authorities, with the exception of interviewing subcontractor employees.

**Item VI—GAO Access to Contractor Employees (Interim) (FAR Case 2008–026)**

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 12 and 52. Clauses 52.215–2, Audit and Records—Negotiation and 52.214–26, Audit and Records—Sealed Bidding are being modified to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule will not apply to the acquisition of commercial items; therefore, FAR 12.503 will be amended to add the exemption of this rule. This change implements Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417).

Dated: March 25, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005–32 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 2005–32 is effective March 31, 2009.

Dated: March 24, 2009.

Shay D. Assad,

*Director, Defense Procurement And Acquisition Policy.*

Dated: March 24, 2009.

Rodney P. Lantier,

*Acting Senior Procurement Executive & Acting Deputy Chief Acquisition Officer Office of the Chief Acquisition Officer U.S. General Services Administration.*

Dated: March 24, 2009.

William P. McNally,

*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*

[FR Doc. E9–7027 Filed 3–30–09; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1, 5, 25, and 52**

[FAC 2005–32; FAR Case 2009–008; Item I; Docket 2009–0008, Sequence 1]

RIN 9000–AL22

**Federal Acquisition Regulation; FAR Case 2009–008, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material**

**AGENCY:** 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 American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) with respect to the Buy American provision, section 1605 in Division A. This rule does not cover procurements funded with Federal financial assistance such as Federal grants. Additional guidance will be provided by the Office of Management and Budget with respect to the application of section 1605 to procurements funded with Federal financial assistance.

**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 clauses for future orders, 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 2009–008, by any of the following methods:

• *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–008” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2009–008. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2009–008” 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 2009–008, 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. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. Please cite FAC 2005–32, FAR case 2009–008. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This interim rule implements the Recovery Act with respect to the unique Buy American provision, section 1605 of the Recovery Act, by adding a new Subpart 25.6, entitled “American Recovery and Reinvestment Act—Buy American Act—Construction Materials,” and adding new provisions and clauses at Part 52, with conforming changes to Subparts 1.1, 5.2, 25.0, 25.2, and 25.11.

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions is section 1605, entitled “Buy American.” It prohibits the use of funds appropriated or otherwise made available by the Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. The law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances:

1. Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;

2. Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent; or

3. Applying the domestic preference would be inconsistent with the public interest.

The implementation of section 1605 is expected to stimulate the economy by increasing and maintaining jobs in the United States in the steel, iron, and manufactured construction materials industries and providing new opportunities to construction firms to win contracts for construction and public works projects.

**B. Discussion**

Because of the need to appropriately segregate the unique Buy-American provisions of the Recovery Act from the requirements of the Buy American Act and the Trade Agreements Act, the Councils have decided to include them in a separate subpart of FAR Part 25. Subpart 25.6, currently reserved, will be entitled “American Recovery and Reinvestment Act—Buy American Act—Construction Materials.” A reference to Subpart 25.6 was added to the “Scope” section of Subpart 25.2, Buy American Act—Construction Materials.

Subpart 25.6 includes a policy statement at 25.602 that repeats the prohibition against using funds appropriated by the Recovery Act for U.S. construction projects to purchase iron, steel, or other manufactured goods that were not produced in the U.S. It also notes that unmanufactured construction materials remain covered by the provisions of the Buy American Act. The exceptions to this policy (see Background section above) are similar to those for the Buy American Act, but the Recovery Act requires publication in the **Federal Register** of the detailed written justification that the agency used to make an exception to the statute. The Councils welcome comments on additional steps that may enhance transparency consistent with the goals of the Recovery Act.

In order to enable implementation of the policy, the interim rule includes definitions of “steel,” “manufactured construction material,” “unmanufactured construction material,” “domestic construction material,” and “foreign construction material.” These definitions are drawn from existing Federal domestic-sourcing laws and the longstanding interpretations that have evolved from them. It also includes a cross reference

to the definition of “public work” at FAR 22.401, which defines “public building or public work” to mean “uilding or work, the construction, prosecution, completion, or repair of which \* \* \* is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.”

Because section 1605 does not specify a requirement that significantly all the components of construction material must also be domestic, as does the Buy American Act, the definition of domestic construction material under this interim rule does not include a requirement relating to the origin of the components of domestic manufactured construction material. Unmanufactured construction material is not specifically addressed in section 1605 of the Recovery Act. However, the Recovery Act’s purpose of creating jobs and stimulating domestic demand is well served by applying the Buy American Act to unmanufactured construction material.

The rules for preaward determination of the inapplicability of section 1605 and the Buy American Act are at FAR 25.604.

Section 25.605 addresses the evaluation of offers containing foreign construction material based on an approved exception for unreasonable cost. If the contracting officer determines that an exception based on unreasonable cost of domestic construction material applies, the contracting officer must evaluate the offer by adding to the offered price—

(1) 25 percent of the offered price, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(2) 6 percent of the value of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

The text of Subpart 25.6 makes it clear that a determination to waive the applicability of section 1605 should be made prior to award. However, section 25.606 recognizes certain limited circumstances in which a postaward waiver could be made, but only with adequate consideration from the contractor. A contractor’s noncompliance with section 1605 is addressed at FAR 25.607.

Prescriptions for the use of all of the solicitation provisions and contract clauses applicable to FAR Part 25 are

included in a single subpart, 25.11. The Councils have modified section 25.1102, entitled "Acquisition of Construction," to add a new paragraph that substitutes four new provisions and clauses (with appropriate alternates), to be used when contracting with funds appropriated by the Recovery Act, for the four clauses otherwise used in construction contracts to implement the Buy American Act and U.S. obligations under applicable trade agreements. Specifically, when using Recovery Act appropriated funds, contracting officers will use—

- 52.225–21, Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials, instead of 52.225–9, Buy American Act—Construction Materials;

- 52.225–22, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials, instead of 52.225–10, Notice of Buy American Act Requirement—Construction Materials;

- 52.225–23, Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials Under Trade Agreements, instead of 52.225–11, Buy American Act—Construction Materials under Trade Agreements; and

- 52.225–24, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials under Trade Agreements, instead of 52.225–12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements.

The clauses are unique in that, for Recovery Act-funded construction projects, the 25 percent price adjustment factor for non-U.S. iron, steel, and other foreign manufactured construction material excepted from the section 1605 requirement on the basis of unreasonable cost is applied to the entire price of the project, not only to the cost of the foreign materials. The 6 percent adjustment for the Buy American Act is retained and applied to the cost of foreign unmanufactured goods excepted from the requirements of the Buy American Act on the basis of unreasonable cost. Given the applicability of the Recovery Act to iron, steel, and manufactured goods, the definition of "component" is unnecessary in these clauses, because the definition of domestic construction material no longer includes a requirement relating to the origin of components.

However, if trade agreements apply to the acquisition, the use of the provision and clause 52.225–23 and 52.225–24, respectively, ensures that eligible

construction material from designated countries is treated in accordance with Subpart 25.4. No evaluation factor is applied to offers on the basis of using eligible construction material. This provision and clause retain the same basic processes that are used in the standard construction clauses, except for the specific changes that have been addressed relating to new requirements of section 1605 of the Recovery Act.

In the Recovery Act conference report, Congress expressed its intent that least developed countries be excepted from section 1605 and that they retain their status as designated countries. However, with respect to Caribbean Basin countries, Congress did not express a similar intent. Therefore, Caribbean Basin countries are not included as designated countries with respect to the Recovery Act.

### C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

Therefore, given section 1605 of the Recovery Act, which establishes Buy American requirements for projects funded by the Recovery Act, the FAR Council has determined that this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) 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.

### D. 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.*, for the following reasons. This interim rule will only impact an offeror that wants to use

non-U.S. iron, steel, and other manufactured goods in a construction project in the United States. The Councils believe that there are adequate domestic sources for these materials, and the Office of Management and Budget (OMB) guidance M–09–10 issued February 18, 2009, entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," provides a strong preference for using small businesses for Recovery Act projects wherever possible. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 5, 25, and 52 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 2009–008), in all correspondence.

### E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0141. However, the information collection requirements imposed by the provisions 52.225–22 and 52.225–24 are currently covered by the approved information collection requirements for provisions 52.225–9 and 52.225–11 (OMB Control number 9000–0141, entitled Buy American Act—Construction—FAR Sections Affected: Subpart 25.2; 52.225–9; and 52.225–11). While the Councils believe no changes will be needed to the collection due to the interim regulation, comments are welcome during the 60 day comment period with regard to the data elements, the burden, or any other part of the collection.

### F. 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 American Recovery and Reinvestment Act of 2009 became effective upon enactment, and contracts using funds appropriated by the Recovery 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 1, 5, 25, and 52

Government procurement.

Dated: March 25, 2009.

#### Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 5, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 5, 25, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

#### 1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory paragraph, by adding, in numerical sequence, FAR segments 52.225–21 and 52.225–23, and their corresponding OMB Control Number 9000–0141.

### PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.207 by revising paragraph (c)(13)(iii) to read as follows:

#### 5.207 Preparation and transmittal of synopses.

\* \* \* \* \*

(c) \* \* \*

(13) \* \* \*

(iii) If the solicitation will include the FAR clause at 52.225–11, Buy American Act—Construction Materials under Trade Agreements, 52.225–23, Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials under Trade Agreements, or an equivalent agency clause, insert the following notice in the synopsis: “One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.”

\* \* \* \* \*

### PART 25—FOREIGN ACQUISITION

■ 4. Amend section 25.001 by revising paragraph (c)(1) and adding a new paragraph (c)(4) to read as follows:

#### 25.001 General.

\* \* \* \* \*

(c) \* \* \*

(1) The Buy American Act uses a two-part test to define a “domestic end product” or “domestic construction material” (manufactured in the United

States and a formula based on cost of domestic components). The component test has been waived for acquisition of commercially available off-the-shelf items.

\* \* \* \* \*

(4) When using funds appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), the definition of “domestic manufactured construction material” requires manufacture in the United States but does not include a requirement with regard to the origin of the components.

#### 25.002 [Amended]

■ 5. Amend the table in section 25.002, by removing from the sixth row “[Reserved]” and adding “American Recovery and Reinvestment Act—Buy American Act—Construction Materials” in its place, and in the fifth column adding “X”.

■ 6. Add Subpart 25.6 to read as follows:

#### Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

Sec.

25.600 Scope of subpart.

25.601 Definitions.

25.602 Policy.

25.603 Exceptions.

25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.

25.605 Evaluating offers of foreign construction material.

25.606 Postaward determinations.

25.607 Noncompliance.

#### Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

##### 25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

##### 25.601 Definitions.

As used in this subpart—  
*Domestic construction material* means—

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States.

*Foreign construction material* means a construction material other than a domestic construction material.

*Manufactured construction material* means any construction material that is not unmanufactured construction material.

*Recovery Act designated country* means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

*Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

*Unmanufactured construction material* means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

##### 25.602 Policy.

Except as provided in 25.603—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (as defined at 22.401) unless—

(1) The public building or public work is located in the United States; and

(2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.

(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

##### 25.603 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the Recovery Act or the Buy American Act:

(1) *Nonavailability*. The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(2) *Unreasonable cost*. The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.605.

(3) *Inconsistent with public interest*. The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(b) *Determinations*. When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) The head of the agency shall publish a notice in the **Federal Register** within two weeks after the determination is made, unless the construction material has already been determined in the FAR to be domestically nonavailable (see list at 25.104). The notice shall include—

(i) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”;

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) *Acquisitions under trade agreements*. (1) For construction contracts with an estimated acquisition value of \$7,443,000 or more, *also see* Subpart 25.4. Offers of products determined to be eligible products per Subpart 25.4 shall receive equal consideration with domestic offers per Subpart 25.4.

(2) For purposes of the Recovery Act, designated countries do not include the Caribbean Basin Countries.

**25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.**

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act

for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225–22 or 52.225–24, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225–21 or 52.225–23, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(c) Determination based on unreasonable cost of domestic construction material.

**(1) Iron, steel, and other manufactured construction material.**

The contracting officer must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

(2) *Unmanufactured construction material*. The contracting officer must compare the cost of each foreign unmanufactured construction material to the cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the contracting officer shall determine that the cost of the unmanufactured construction material is unreasonable.

**25.605 Evaluating offers of foreign construction material.**

(a) If the contracting officer has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with section 25.604, then the contracting officer shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction

material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.

(3) Total evaluated price = offered price + (.25 × offered price, if (a)(1) applies) + (.06 × cost of foreign unmanufactured construction material, if (a)(2) applies).

(b) If two or more offers are equal in price, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of 52.225–21, or paragraph (b)(3) of 52.225–23), the contracting officer must add the excepted materials to the list in the contract clause.

**25.606 Postaward determinations.**

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225–21 or 52.225–23 and/or other readily available information.

(c) If a determination, under 25.603(a), is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate

consideration is at least the differential established in 25.605(a).

#### 25.607 Noncompliance.

The contracting officer must—

(a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act in accordance with 25.606.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspension or debarment official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

■ 7. Amend section 25.1102 by adding an introductory paragraph; revising paragraph (c)(1); and adding paragraph (e) to read as follows:

#### 25.1102 Acquisition of construction.

When using funds other than those appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act), follow the prescriptions in paragraphs (a) through (d) of this section. Otherwise, follow the prescription in paragraph (e).

\* \* \* \* \*

(c) \* \* \*

(1) List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, other than designated country construction material.

\* \* \* \* \*

(e)(1) When using funds appropriated under the Recovery Act for construction, use provisions and clauses 52.225-21, 52.225-22, 52.225-23, or 52.225-24 (with appropriate Alternates) in lieu of the provisions and clauses 52.225-9, 52.225-10, 52.225-11, or 52.225-12 (with appropriate Alternates), respectively, that would be applicable as prescribed in paragraphs (a) through (d) of this section if Recovery Act funds were not used.

(2) When using clause 52.225-23, list foreign construction material in paragraph (b)(3) of the clause as follows:

(i) *Basic clause.* List all foreign construction material excepted from the requirements of the Buy American Act, other than Recovery Act designated country construction material.

(ii) *Alternate I—*List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, unless the excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.

#### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add section 52.225-21 through 52.225-24 to read as follows:

##### 52.225-21 Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials.

As prescribed in 25.1102(e), insert the following clause:

##### Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials (MAR 2009)

(a) *Definitions.* As used in this clause—

*Construction material* means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also

includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

*Domestic construction material* means—

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States.

*Foreign construction material* means a construction material other than a domestic construction material.

*Manufactured construction material* means any construction material that is not unmanufactured construction material.

*Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

*United States* means the 50 States, the District of Columbia, and outlying areas.

*Unmanufactured construction material* means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

(b) *Domestic preference.* (1) This clause implements—

(i) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111-5), by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act (41 U.S.C. 10a-10d) by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraph (b)(3) and (b)(4) of this clause.

(3) This requirement does not apply to the construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate "none"]

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable.

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of Section 1605 of the Recovery Act or the Buy American Act.*

(1)(i) Any Contractor request to use

foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction

project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does

not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material is noncompliant with section 1605 of the American Recovery and Reinvestment Act or the Buy American Act.

(d) *Data.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

**FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON**

Construction material description	Unit of measure	Quantity	Cost (dollars) *
Item 1:			
Foreign construction material .....	_____	_____	_____
Domestic construction material .....	_____	_____	_____
Item 2:			
Foreign construction material .....	_____	_____	_____
Domestic construction material .....	_____	_____	_____

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.] [Include other applicable supporting information.]

\*Include all delivery costs to the construction site.]

(End of clause)

**52.225-22 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials.**

As prescribed in 25.1102(e), insert the following provision:

**NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS—BUY AMERICAN ACT—CONSTRUCTION MATERIALS (MAR 2009)**

(a) *Definitions.* “Construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction

material,” “steel,” and “unmanufactured construction material,” as used in this provision, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials” (Federal Acquisition Regulation (FAR) clause 52.225-21).

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination

before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225-21 in the request. If an offeror has not requested a determination regarding the inapplicability of 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) *Evaluation of offers.* (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer

requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) *Alternate offers.* (1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at FAR 52.225–21, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of the clause at FAR 52.225–21 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at FAR 52.225–21 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

*Alternate I (MAR 2009)*. As prescribed in 25.1102(e), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the

American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225–21.

**52.225–23 Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements.**

As prescribed in 25.1102(e), insert the following clause:

**Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements MAR 2009)**

(a) *Definitions.* As used in this clause—

*Construction material* means an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

*Domestic construction material* means— (1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States.

*Foreign construction material* means a construction material other than a domestic construction material.

*Free trade agreement (FTA) country construction material* means a construction material that—

(1) Is wholly the growth, product, or manufacture of an FTA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different construction material distinct from the materials from which it was transformed.

*Least developed country construction material* means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

*Manufactured construction material* means any construction material that is not unmanufactured construction material.

*Recovery Act designated country* means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (FTA) (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore); or

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia).

*Recovery Act designated country construction material* means a construction material that is a WTO GPA country construction material, an FTA country construction material, or a least developed country construction material.

*Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

*United States* means the 50 States, the District of Columbia, and outlying areas.

*Unmanufactured construction material* means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

*WTO GPA country construction material* means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act (41 U.S.C. 10a–10d) do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

*[Contracting Officer to list applicable excepted materials or indicate “none”.]*

(4) The Contracting Officer may add other construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable.

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the overall cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of section 1605 of the Recovery Act or the Buy American Act.*

(1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction

materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than that covered by trade agreements is noncompliant with the applicable Act.

(d) *Data.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON

Construction material description	Unit of measure	Quantity	Cost (dollars)*
<i>Item 1:</i>			
Foreign construction material .....	_____	_____	_____
Domestic construction material .....	_____	_____	_____
<i>Item 2:</i>			
Foreign construction material .....	_____	_____	_____
Domestic construction material .....	_____	_____	_____

*[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.][Include other applicable supporting information.]*

*[\* Include all delivery costs to the construction site.]*

(End of clause)

*Alternate I (MAR 2009).* As prescribed in 25.1102(e), add the following

definition of “Bahrainian, Mexican, or Omani construction material” to

paragraph (a) of the basic clause, and substitute the following paragraphs (b)(1) and (b)(2) for paragraphs (b)(1) and (b)(2) of the basic clause:

*Bahrainian, Mexican, or Omani construction material*” means a construction material that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act, by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

**52.225–24 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials under Trade Agreements.**

As prescribed in 25.1102(e), insert the following provision:

**Notice of Required Use Of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements (MAR 2009)**

(a) *Definitions.* “Construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction material,” “Recovery Act designated country construction material,” “steel,” and “unmanufactured construction material,” as used in this provision, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel,

and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements” (Federal Acquisition Regulation (FAR) clause 52.225–23).

(b) *Requests for determination of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225–23 in the request. If an offeror has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) *Evaluation of offers.* (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) *Alternate offers.* (1) When an offer includes foreign construction material, other than Recovery Act designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–23, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate

Standard Form 1442 for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225–23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225–23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material, and the offeror shall be required to furnish such domestic or Recovery Act designated country construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

*Alternate I (MAR 2009).* As prescribed in 25.1102(e), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determination of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225–23.

*Alternate II (MAR 2009).* As prescribed in 25.1102(e), add the definition of “Bahrainian, Mexican, or Omani construction material” to paragraph (a) and substitute the following paragraph (d) for paragraph (d) of the basic provision:

(d) *Alternate offers.* (1) When an offer includes foreign construction material, except foreign construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–23, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate

offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225-23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225-23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 3 and 52

[FAC 2005-32; FAR Case 2009-012; Item II; Docket 2009-0009, Sequence 1]

RIN 9000-AL19

#### Federal Acquisition Regulation; FAR Case 2009-012, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections

**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 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:* 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 for future orders, if the 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 the 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 2009-012, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-012" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2009-012. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2009-012" 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 2009-012, 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:** For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501-4082. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-32, FAR case 2009-012.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule implements section 1553 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to the protection of whistleblowers, by adding a new section

3.907, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 and a new clause at FAR 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, and its prescription in FAR 3.907-7.

On February 17, 2009, the President signed Public Law 111-5, the American Recovery and Reinvestment Act of 2009, including a number of provisions to be implemented in Federal Government contracts. Among these provisions is Section 1553 of the Recovery Act, "Protecting State and Local Government and Contractor Whistleblowers". This requirement promotes transparency in Federal contracting.

##### B. Discussion

FAR 3.907 provides that non-Federal employers receiving funds under the Recovery Act are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials or a person with supervisory authority over the employee. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. FAR 3.907-7 prescribes a new clause at 52.203-15.

##### C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103-355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

Therefore, given section 1553 of the Recovery Act, which extends whistleblower protections to employees of contractors that receive contracts funded under the Recovery Act, and the initial implementing guidance for the Recovery Act issued on February 18,

2009 by the Director of the Office of Management and Budget committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to acquisitions at or below the simplified acquisition threshold, as defined at FAR 2.101.

#### **D. Applicability to Commercial Item Contracts**

Section 8003 of Public Law 103–355, the FASA (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given section 1553 of the Recovery Act, which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information the employee reasonably believes is evidence of information listed in section 1553(a), the FAR Council has determined that the rule should apply to contracts for commercial items, as defined at FAR 2.101, at both the prime and subcontract levels.

#### **E. Applicability to Commercially Available Off-the-Shelf (COTS) Item Contracts**

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of COTS items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given section 1553 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing

information the employee reasonably believes is evidence of information listed in section 1553(a), the Administrator, Office of the Federal Procurement Policy, has determined that the rule should apply to COTS item contracts, as defined at FAR 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) 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.

#### **F. 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 this 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 funded in whole or in part with the Recovery Act funds. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 3 and 52 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 2009–012) in all correspondence.

#### **G. Paperwork Reduction Act**

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

#### **H. 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 American Recovery and Reinvestment Act of 2009 became effective on enactment, and contracts using funds appropriated by the Recovery 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 3 and 52**

Government procurement.

Dated: March 25, 2009.

#### **Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 3 and 52 as set forth below:

■ 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. Revise section 3.900 to read as follows:

##### **3.900 Scope of subpart.**

(a) Sections 3.901 through 3.906 of this subpart implement 10 U.S.C. 2409 and 41 U.S.C. 265, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355).

(b) Section 3.907 of this subpart implements Section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

##### **3.902 [Removed and Reserved]**

■ 3. Remove and reserve section 3.902.

■ 4. Add sections 3.907 through 3.907–7 to read as follows:

##### **3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).**

##### **3.907–1 Definitions.**

As used in this section—  
*Board* means the Recovery Accountability and Transparency Board established by Section 1521 of the Recovery Act.

*Covered funds* means funds appropriated by or otherwise made available by the Recovery Act.

*Covered information* means 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.

*Inspector General* means an Inspector General appointed under the Inspector General Act of 1978. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

*Non-Federal employer*, as used in this section, means any employer that receives Recovery Act funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

### 3.907-2 Policy.

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities or their representatives:

- (1) The Board.
- (2) An Inspector General.
- (3) The Comptroller General.
- (4) A member of Congress.
- (5) A State or Federal regulatory or law enforcement agency.
- (6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.
- (7) A court or grand jury.
- (8) The head of a Federal agency.

### 3.907-3 Procedures for filing complaints.

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.907-2, may submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The covered information giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act; and
- (5) The specific nature and date of the reprisal.

(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 the Inspector General, agency legal counsel or to the

appropriate official in accordance with agency procedures.

### 3.907-4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

### 3.907-5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section shall have access to the investigation file of the Inspector General, in accordance with the Privacy Act, 5 U.S.C. 552a. The investigation of the Inspector General shall be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the non-Federal employer shall have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(c) The Inspector General may exclude from disclosures made under 3.907-5(a) or (b)—

- (1) Information protected from disclosure by a provision of law; and
- (2) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the Inspector General determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An Inspector General investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

### 3.907-6 Remedies and enforcement authority.

(a) *Burden of Proof.* (1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.907-2 was a contributing factor in the reprisal.

(ii) A disclosure may be demonstrated as a contributing factor in a reprisal for

purposes of this paragraph by circumstantial evidence, including—

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal.* The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907-6(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an Inspector General report in accordance with section 1553 of the Recovery Act, the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.907-2 and shall either issue an order denying relief in whole or in part or shall take one or more of the following actions:

- (1) Order the employer to take affirmative action to abate the reprisal.
- (2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which shall have jurisdiction over such an action without regard to the amount in controversy if

- (i) The head of an agency—
  - (A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(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]

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**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 (e.g., award is made pursuant 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 (e.g., 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 (e.g., 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 synopsize 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 synopsize 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.

Contracting officers shall ensure that the contractor complies with the reporting requirements of the new clause.

Contracting officers are not responsible for validating report content, only that a report was submitted as required. The online reporting tool will allow the contracting officer to monitor this as a matter of contract performance.

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 shall be submitted no later than the 10th day after the end of each calendar quarter. Contractors will report the information, using the online reporting tool available at <http://www.FederalReporting.gov>, using instructions at that Web site. The online reporting tool is being developed for use by the July 10th timeframe. The data elements to be reported are outlined in the clause 52.204–11, in paragraph (d).

The Government intends to pre-populate as many data elements as possible to reduce the burden on contractors and first-tier subcontractors by using information available in other Government systems. For instance, the Government is considering pre-populating congressional districts based on nine-digit zip codes, funding agency, North American Industry Classification System (NAICS) code, and parent DUNS.

While Section 1512(c)(4) requires reporting on all Federal Financial Accountability and Transparency Act (FFATA) data elements, including the compensation information, it limits the reporting to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation disclosure for prime contractors, because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupported given the transparency goals of both FFATA and the Recovery Act.

## B. Determinations

The Councils provide the following determinations with respect to the rule's applicability to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, commercial items, and commercially available off-the-shelf (COTS) items.

1. *Applicability to contracts at or below the simplified acquisition threshold.* Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not

greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them. Therefore, given section 1512 of the Recovery Act which requires that prime contractors report information on their use of Recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

2. *Applicability to Commercial Item contracts.* Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given section 1512, of the Recovery Act, which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply the rule to commercial items, as defined at 2.101, both at the prime and subcontract levels.

3. *Applicability to Commercially Available Off-The-Shelf (COTS) item contracts.* Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of commercially available off-the-shelf

(COTS) items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply. The same applies for subcontracts for COTS items.

Therefore, given section 1512, of the Recovery Act which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the Administrator, Office of the Federal Procurement Policy, has determined that it is in the best interest of the Federal Government to apply the rule to Commercially Available Off-The-Shelf (COTS) item contracts and subcontracts, as defined at FAR 2.101.

## C. Request for Public Comments

The Councils ask for public comments on the interim rule, and the following additional issues:

1. The statute requires a description of the work (implemented at 52.204–11(d)(5)). Should the Government provide a list of broad categories of work under the Recovery Act from which the contractor would select and, if so, what should these be?

2. The definitions of “jobs created” and “jobs retained” are currently based on a conversion of part-time or temporary jobs into “full-time equivalent” (FTE) jobs. In order to do such a conversion, these part-time hours must be divided by the number of hours in a full-time schedule. This interim rule leaves the definition of full-time schedule to each individual company's discretion based on its existing practices. With respect to the methodology described in the interim rule for estimating jobs created or retained:

- Is the use of FTE and the description provided consistent with existing business practices and systems?
- Is a standardized methodology based on FTE necessary or do contractors have existing practices that adequately address other than full-time jobs to avoid inflating estimated numbers for jobs created and jobs retained? Should the Government allow contractors to use any method consistent with their existing practice as long as the contractor provides an

explanation of the methodology, including a description of how part-time and temporary employees are addressed?

—If the Government were to standardize the number of hours in a “full-time schedule,” would this increase the burden of reporting on jobs created or retained?

3. If the Government were to require companies to separately invoice for all supplies or services funded by the Recovery Act, what challenges would this pose? Are there any benefits?

4. Is there information not customarily provided that would make it easier for companies to segregate their invoices to separately identify items funded by the Recovery Act?

5. Are there challenges to obtaining the information required from first-tier subcontractors? If so, how could the rule be changed to ease the submission of this information from both a prime contractor and subcontractor perspective?

6. Does the definition of “Total compensation” used in the clause provide sufficient clarity? If not, what specifically should be clarified?

7. Would it be useful to provide an Alternate clause that would allow agencies to identify meaningful distinct “projects” within the contract for the purpose of requiring the contractor to report employment impact and progress by “project” rather than for the contract as a whole? For example, if the contract called for work in distinct geographic areas, the report might provide more meaningful information if the contractor were to report employment impact and progress separately by geographic area. This would not require individual reports but rather separate sections within the quarterly report.

8. Currently, this rule requires contractors to report on invoiced amounts because the Government assumed that it would be extremely difficult for the contractor employee responsible for report submission, to report on “receipt of funds.” Would a contractor be able to separately identify when Recovery Act funds were received and be able to identify the payment to particular deliverables? How difficult would this be to track and report on a quarterly basis?

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.

#### D. Regulatory Flexibility Act

This interim rule may 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 it requires contractors to report on their use of Recovery Act funds. An Initial Regulatory Flexibility Analysis has been prepared and the results of the analysis show that the direct cost of this rule on an average cost-per-contractor basis does not appear to rise to the level of being economically significant (*i.e.* \$100,000,000); however, the Councils request comments on this finding.

Therefore, the Councils have prepared an Initial Regulatory Flexibility Analysis (IRFA) for public comment that is summarized as follows:

This Initial Regulatory Flexibility Analysis has been prepared consistent with 5 U.S.C. 603.

##### 1. Reasons for the action.

This action implements section 1512 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which requires contractors to report quarterly on their use of Recovery Act funds.

##### 2. Objectives of, and legal basis for, the rule.

The objective of the Recovery Act is to create jobs, restore economic growth, and strengthen America's middle class through measures that modernize the nation's infrastructure, enhance America's energy independence, expand educational opportunities, preserve and improve affordable health care, provide tax relief, protect those in greatest need, and provide for other purposes. This rule implements section 1512 of the Recovery Act which requires contractors, as a condition of receipt of funds, to report quarterly on their use of those funds. These reports will be made available to the public. The Recovery Act is designed to provide unprecedented transparency to the American taxpayer.

##### 3. Description and estimate of the number of small entities to which the rule will apply.

The rule imposes a clause in any award document funded by the Recovery Act, requiring the contractor to publicly disclose information related to the use of funds and specific information about first-tier subcontract awards. This clause requires contractors to report on use of Recovery Act funds. The clause imposes a public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and unique prime Federal contractors. The estimate for the number of active and unique prime federal contractors that will participate in awards funded by the Recovery Act is 20,013, of which 4,003 or 20 percent are estimated to be small businesses. It is also noted that this is 20 percent of prime contractors, which should not be confused with the 23 percent small business contracting goal which is based on dollars and that continues to apply to both Recovery

Act spending and agencies' ongoing procurement spending.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is 60,039 or three times the number of prime contractors. Of these 60,039 Recovery Act first-tier subcontractors, it is estimated that 25 percent, or 15,010, will be small businesses.

Based on the above, the estimated total number of small businesses, prime and subcontractors, to which this rule will apply is 19,013 and the estimated total number of other than small businesses to which this rule will apply is 61,039.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The rule requires Federal prime contractors, both small and other than small businesses, to report quarterly on their use of funds received under the Recovery Act. The rule applies to all Federal contractors regardless of size or business ownership. Such a report would probably be prepared by a company contract administrator or contract manager or a company subcontract administrator. The information required in the report is primarily information that companies would maintain for their own business purposes including, but not limited to, contract or other award number, the dollar amount of invoices, the supplies or services delivered, a broad assessment of progress towards completion, the estimated number of new jobs created or retained resulting from the award, and first-tier subcontract information (or aggregate information if the subcontract is less than \$25,000, or the subcontractor is an individual or had gross income in the previous tax year of less than \$300,000). While most of the data elements impose only one-time burden collection, some will require quarterly updates.

There are three data elements required in the report that will likely require some additional effort: (1) Estimating the cumulative number of jobs created each calendar quarter, (2) estimating the cumulative number of jobs retained each calendar quarter, and (3) providing the name 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, which applies at both the prime and first-tier subcontract level. The rule also requires the prime contractor to report certain information, required by the Federal Funding Accountability and Transparency Act of 2006 (FFATA), about first-tier subcontracts (though all awards under \$25,000 will be aggregated, eliminating the need to report transaction-level data). The prime contractor will have most of this information in the subcontract award document, such as the name of the subcontractor, award number, and date of award. However, the prime contractor will have to obtain four of the elements directly from the first-tier subcontractor: (1) The unique identifier (DUNS Number) “for awards of \$25,000 or more” as well as for the

subcontractor's parent company, if the subcontractor has a parent company, (2) subcontractor's physical address, (3) subcontract primary performance location, and (4) the compensation information described earlier as required by FFATA and reflected in section 1512 of the Recovery Act.

With respect to the DUNS Number, we anticipate that most first-tier subcontractors have a DUNS Number as it is a requirement for receipt of any Government contract. However, a company that never received nor anticipated a Government contract might not have a DUNS number and will have to register for one with Dunn and Bradstreet. The registration process is not burdensome, can be done online or by phone, and requires only information any company would have on hand for business purposes. First-tier subcontractors are not required to register in the Central Contractor Registration (CCR) as a consequence of this rule.

With respect to compensation information, this requirement results from FFATA and will not apply if the public has access to information about compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. Otherwise, each prime contractor and first-tier subcontractors will have to disclose the compensation information if it received (1) 80 percent or more of annual gross revenues in Federal awards; and (2) \$25M or more in annual gross revenue from Federal awards. Because this requirement of FFATA became law on December 26, 2007, we anticipate that those companies to which it applies are aware of the requirement and have been preparing to provide this information.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule includes the reporting requirements stipulated by FFATA in FAR Case 2008-039 FFATA flow-down and 2008-037 Financial Disclosure.

These cases are in process and as they are finalized, they will be amended to ensure that they do not duplicate, overlap, or conflict with the requirements of this interim rule.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

The rule requires Federal prime contractors to respond to all of the reporting requirements, eliminating some of the reporting burden on first-tier subcontractors despite the fact that they will have to provide some information to the prime contractor. Also, all of the reporting elements applied to first-tier subcontractors, a significant percentage of which will be small businesses, are one-time collection burdens. The Government believes that the rule will further minimize the reporting burden on Government contractors, including all small businesses, as well as other businesses, by using existing Federal acquisition/registration systems to pre-populate certain data elements.

The FAR Secretariat will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 4 and 52 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 2009-009), in all correspondence.

#### E. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the interim rule contains information collection requirements. Accordingly, the FAR Secretariat forwarded an emergency information collection request for approval of new information collection requirements to the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35, *et seq.* OMB approved the new information collection requirements as follows:

1. OMB Control No. 9000-0166—One Time Reporting Requirements for Prime Contractors.

2. OMB Control No. 9000-0167—One Time Reporting for First-tier Subcontractors.

3. OMB Control No. 9000-0168—One Time Reporting, Compensation Requirements.

4. OMB Control No. 9000-0169—Quarterly Reporting for Prime Contractors.

Comments on the interim rule as well as the collection will be considered in the revisions to both the rule and the collection.

Any award funded by the Recovery Act will contain the clause at 52.204-11. This clause requires contractors to report on use of Recovery Act funds. The clause imposes public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and unique prime Federal contractors as of February 2009. The estimate for the number of active and unique prime Federal contractors that will participate in awards funded by the Recovery Act is 20,013. This is based on using a factor of .16 of 129,331, derived by dividing 129,331 by \$517B in procurement obligations for fiscal year 2008 or by dividing estimated Recovery Act dollars for contracts (\$80B: Government's best estimate of Recovery Act dollars to be obligated by contracts is between \$60 and \$80 billion; using \$80 billion for calculation purposes) by \$517B. Of the estimated 20,013 Recovery Act prime contractors,

it is estimated that 20 percent, or 4,003, will be small businesses. It should be noted that this is 20 percent of prime contractors; this should not be confused with the 23 percent small business contracting goal which is based on dollars and that continues to apply to both Recovery Act spending and agencies' ongoing procurement spending.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is 60,039. This was derived by estimating three first-tier subcontractors for each prime contractor. Of these 60,039 Recovery Act first-tier subcontractors, it is estimated that 25 percent, or 15,010, will be small businesses.

Based on the above, the estimated total number of small businesses, prime and subcontractors, to which this rule will apply is 19,013 and the estimated total number of other than small businesses to which this rule will apply is 61,039.

Though Section 1512 requires that the reports be completed by the prime contractor for all data elements, for practical purposes, the prime contractor will have to obtain certain information from their first-tier subcontractors, hence the flow-down requirements of paragraph (d)(10) of the clause. Additionally, the information required on the prime contractor award varies from that required for the first-tier subcontract awards. For instance, the elements at paragraphs (d)(1) through (9) are collection burdens associated with the prime contract award while the elements in (d)(10)(i) through (ix) are associated with first-tier subcontracts.

Finally, the elements required by Section 1512 of the Recovery Act are a combination of those that will be updated in each quarterly report, such as jobs created and retained and progress towards completion of the overall purpose and expected outcomes or results of the contract and those that are one-time collection burdens, such as award number and date and all of the reporting requirements for first-tier subcontracts. Therefore, the following analysis separately estimates the burden associated with the one-time reporting elements and those that are updated quarterly. The parenthetical reference after the description of each reporting element refers to the FAR clause. The hours estimated per response include the time for reviewing instructions, searching existing data sources, gathering the data, and completing the collection of information. The estimated total annual burden associated with reporting requirements of FAR 52.204-

11 is \$31,725,468, based on the following:

*One-Time Reporting Elements*

1. *OMB Control No. 9000-0166—One Time Reporting Requirements for Prime Contractors.* One-time reporting elements for which the burden is imposed on the prime contractor include the following:

- a. The award number for both its Government contract and first-tier subcontracts ((d)(1) and (d)(10)(viii));
- b. Program or project title, if any, for its Government contract ((d)(4));
- c. A description of the overall purpose and expected outcomes or results of the contract and first-tier subcontracts, including significant deliverables and, if appropriate, units of measure ((d)(5) and (d)(10)(vii));
- d. Name of the first-tier subcontractor ((d)(10)(ii));
- e. Amount of the first-tier subcontract award ((d)(10)(iii));
- f. Date of the first-tier subcontract award ((d)(10)(iv));
- g. Applicable North American Industry Classification System (NAICS) code ((d)(10)(v)); and
- h. Funding agency ((d)(10)(vi)).

We estimate the total annual public cost burden for these elements to be \$850,544 based on the following:

*Respondents:* 20,013.

*Responses per respondent:* 1.25 (reflects estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).

*Total annual responses:* 25,016.

*Preparation hours per response:* .5.

*Total response burden hours:* 12,508.

*Average hourly wages* (\$50.00+36.35 percent overhead): 68.00.

*Estimated cost to the public:* \$850,544.

2. *OMB Control No. 9000-0168—One Time Reporting, Compensation Requirements.* A one-time reporting element for which the burden is imposed on certain prime contractors and first-tier subcontractors to publicly disclose the names and total compensation of each of the contractor's or first-tier subcontractor's five most highly compensated officers, for the calendar year in which the award was made ((d)(8) and (d)(10)(xi)) (see applicability requirements in the clause at (d)(8) and (d)(10)).

While Section 1512(c)(4) of the Recovery Act requires reporting on all FFATA data elements, including the compensation information, it limits the prime's reporting responsibility to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation

disclosure for prime contractors as well because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupported given the transparency goals of both FFATA and the Recovery Act.

There are likely to be some prime contractors that already provide public access to 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. For purposes of this analysis, the Government estimates that 5 percent of prime contractors already provide such public access. There are also likely to be some first-tier subcontractors that do not meet either of the revenue thresholds for applicability. For purposes of this analysis, the Government estimates that 5 percent of first-tier subcontractors will not have to disclose compensation information because they do not meet the revenue thresholds.

We estimate the total annual public cost burden for these elements to be \$19,392,444, based on the following:

*Respondents:* 76,049 (20,013 primes-5 percent=19,012+60,039 first-tier subcontractors-5 percent=57,037).

*Responses per respondent:* 1.25 (reflects estimate that 25 percent of all respondents will have more than one Recovery Act funded award on which to report).

*Total annual responses:* 95,061.

*Preparation hours per response:* 3.

*Total response burden hours:* 285,183.

*Average hourly wages* (\$50.00+36.35 percent overhead): \$68.00.

*Estimated cost to the public:* \$19,392,444.

3. *OMB Control No. 9000-0167—One Time Reporting for First-tier Subcontractors.*

One-time reporting elements for which the burden is imposed only on the first-tier subcontractor include the following:

- a. Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company ((d)(10)(i));
- b. Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable((d)(10)(ix)); and
- c. Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable ((d)(10)(x)).

The Government expects that most first-tier subcontractors will have a DUNS number. However, if a company

has never received nor anticipated a Government contract, it would be required to register for a DUNS number which is not an onerous process and can be done online or by phone using information a company would have on hand for business purposes.

We estimate the total annual public cost burden for these elements to be \$1,275,816, based on the following:

*Respondents:* 60,039.

*Responses per respondent:* 1.25 (reflects estimate that 25 percent of first-tier subcontractors will have more than one Recovery Act funded award on which to report).

*Total annual responses:* 75,049.

*Preparation hours per response:* .25.

*Total response burden hours:* 18,762.

*Average hourly wages* (\$50.00+36.35 percent overhead):\$68.00.

*Estimated cost to the public:* \$1,275,816.

4. *OMB Control No. 9000-0169—Quarterly Reporting for Prime Contractors.* Elements updated quarterly for which the burden is imposed on the prime contractor include the following:

a. The amount of Recovery Act funds invoiced by the contractor, cumulative since the beginning of the contract ((d)(2));

b. A list of all significant services performed or supplies delivered, including construction, for which the contractor has invoiced ((d)(3));

c. An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (*i.e.*, not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act ((d)(6));

d. A narrative description of the employment impact of the Recovery Act funded work ((d)(7)(i) through (ii)); and

e. 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 shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount ((d)(9)).

We estimate the total annual public cost burden for these elements to be \$10,206,664, based on the following:

*Respondents:* 20,013.

*Responses per respondent:* 1.25 (reflects 4 reports multiplied by a factor of 1.25 to reflect Government's estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).

*Total annual responses:* 100,065.

*Preparation hours per response:* 1.5.  
*Total response burden hours:* 150,098.  
*Average hourly wages* (\$50.00+36.35 percent overhead): \$68.00.  
*Estimated cost to the public:* \$10,206,664.

#### F. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than June 1, 2009 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite the applicable OMB Control No.: 9000-0166; 9000-0167; 9000-0168; or 9000-0169, and FAR Case 2009-009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite the applicable OMB Control No.: 9000-0166, 9000-0167; 9000-0168; or 9000-0169, and FAR Case 2009-009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

The Paperwork Reduction Act applies to this interim rule.

#### G. 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 American Recovery and Reinvestment Act of 2009 became effective on enactment on February 17, 2009, and

agencies are ready to award contracts using funds appropriated by the Act. Without a FAR clause, agencies will be forced to develop their own clause, which would (1) significantly increase the costs for Government as well as contractors who may have to comply with varied clauses and reporting mechanisms, (2) increase the risk of non-compliance, and (3) degrade transparency and public understanding. Waiting for public comment prior to issuing a clause will require resource-intensive and costly post-award bilateral negotiations and may hinder recovery. 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 and 52

Government procurement.

Dated: March 25, 2009.

#### Al Matera,

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4 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 4—ADMINISTRATIVE MATTERS

■ 2. Add subpart 4.15 to read as follows:

##### Subpart 4.15—American Recovery and Reinvestment Act—Reporting Requirements

Sec.

4.1500 Scope of subpart.

4.1501 Procedures.

4.1502 Contract clause.

##### 4.1500 Scope of subpart.

This subpart implements section 1512(c) of Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act), which requires, as a condition of receipt of funds, quarterly reporting on the use of funds. The subpart also implements the data elements of the Federal Funding Accountability and Transparency Act of 2006, as amended (Pub. L. 109-282). Contractors that receive awards (or modifications to existing awards) funded, in whole or in part by the Recovery Act, must report information including, but not limited to—

(a) The dollar amount of contractor invoices;

(b) The supplies delivered and services performed;

(c) An assessment of the completion status of the work;

(d) An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds;

(e) Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and

(f) Specific information on first-tier subcontractors.

#### 4.1501 Procedures.

(a) In any contract action funded in whole or in part by the Recovery Act, the contracting officer shall indicate that the contract action is being made under the Recovery Act, and indicate which products or services are funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the contract instrument.

(b) To maximize transparency of Recovery Act funds that must be reported by the contractor, the contracting officer shall structure contract awards to allow for separately tracking Recovery Act funds. For example, the contracting officer may consider awarding dedicated separate contracts when using Recovery Act funds or establishing contract line item number (CLIN) structures to mitigate commingling of Recovery funds with other funds.

(c) Contracting officers shall ensure that the contractor complies with the reporting requirements of 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements. If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies.

(d) The contracting officer shall make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under Subpart 42.15.

#### 4.1502 Contract clause.

Insert the clause at 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements in all solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. 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. Contracting officers shall ensure that this clause is included in any existing contract or

order that will be funded with Recovery Act funds. Contracting officers may not use Recovery Act funds on existing contracts and orders if the clause at 52.204-11 is not incorporated.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Add section 52.204-11 to read as follows:

### 52.204-11 American Recovery and Reinvestment Act—Reporting Requirements

As prescribed in 4.1502, insert the following clause:

#### American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009)

(a) *Definitions.* As used in this clause—

*Contract*, as defined in FAR 2.101, means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see FAR Part 16.

*First-tier subcontract* means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act.

*Jobs created* means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

*Jobs retained* means an estimate of those previously existing filled positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked

divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

*Total compensation* means the cash and noncash dollar value earned by the executive during the contractor’s past fiscal year of the following (for more information see 17 CFR 229.402(c)(2)):

(1) *Salary and bonus.*

(2) *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

(3) *Earnings for services under non-equity incentive plans.* Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

(4) *Change in pension value.* This is the change in present value of defined benefit and actuarial pension plans.

(5) *Above-market earnings on deferred compensation which is not tax-qualified.*

(6) *Other compensation.* For example, 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.

(b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.

(c) 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 shall be submitted no later than the 10th day after the end of each calendar quarter.

(d) The Contractor shall report the following information, using the online reporting tool available at <http://www.FederalReporting.gov>.

(1) The Government contract and order number, as applicable.

(2) The amount of Recovery Act funds invoiced by the contractor for the reporting period. A cumulative amount from all the reports submitted for this action will be maintained by the government’s on-line reporting tool.

(3) A list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in this calendar quarter.

(4) Program or project title, if any.

(5) A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and, if appropriate, associated units of measure.

(6) An assessment of the contractor’s progress towards the completion of the

overall purpose and expected outcomes or results of the contract (*i.e.*, not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act.

(7) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and only address the impact on the contractor’s workforce. At a minimum, the contractor shall provide—

(i) A brief description of the types of jobs created and jobs retained in the United States and outlying areas (see definition in FAR 2.101). This description may rely on job titles, broader labor categories, or the contractor’s existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and

(ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States and outlying areas. A job cannot be reported as both created and retained.

(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—

(i) In the Contractor’s preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(B) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(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 shall 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, the contractor shall require the subcontractor to provide the information described in (i), (ix), (x), and (xi) below to the contractor for the purposes of the quarterly report. The contractor shall advise the subcontractor that the information will be made available to the public as required by section 1512 of the Recovery Act. The contractor shall provide detailed information on these first-tier subcontracts as follows:

(i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor’s parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.

- (iii) Amount of the subcontract award.
- (iv) Date of the subcontract award.
- (v) The applicable North American Industry Classification System (NAICS) code.
- (vi) Funding agency.
- (vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.
- (viii) Subcontract number (the contract number assigned by the prime contractor).
- (ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
- (x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
- (xi) 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—
  - (A) In the subcontractor's preceding fiscal year, the subcontractor received—
    - (I) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
    - (2) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
  - (B) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(End of clause)

■ 4. Amend section 52.212–5 by revising the date of the clause; and redesignating paragraphs (b)(4) through (b)(42) as (b)(5) through (b)(43), respectively, and adding a new paragraph (b)(4) to read 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) \* \* \*

(4) 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009) (Pub. L. 111–5).

\* \* \* \* \*

[FR Doc. E9–7025 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 12, 13, 14, 15, and 52**

[FAC 2005–32; FAR Case 2009–011; Item V; Docket 2009–0012, Sequence 1]

RIN 9000–AL20

**Federal Acquisition Regulation; FAR Case 2009–011, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access**

**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 American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515 of Division A.

**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 clauses (Alternates) for future orders, 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 2009–011, by any of the following methods:

• *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–011” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2009–011. Follow the instructions provided to complete the “Public Comment and Submission Form”.

Please include your name, company name (if any), and “FAR Case 2009–011” 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 2009–011, 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. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. Please cite FAC 2005–32, FAR case 2009–011. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This interim rule implements the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515, by adding alternate clauses to 52.214–26, “Audit and Records–Sealed Bidding,” 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.”

Further, FAR 12.504(a)(7) is amended for contracts using Recovery Act funds to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts that are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Likewise, 13.006(d) is amended for contracts using Recovery Act funds to apply 52.215–2, “Audit and Records–Negotiation” to contracts and subcontracts which are otherwise exempt because they are under the simplified acquisition threshold. This requirement provides further transparency into Federal contracting whose contracts are funded with Recovery Act funds.

**B. Discussion**

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions are sections 902, 1514, and 1515 which serve to “prevent the fraud, waste, and abuse” of Recovery Act

funds through the review and audit of contracts using such funds. The interim rule is necessary to implement these measures to both protect, and provide transparency in the use of, Recovery Act funds.

Section 1514 provides for agency inspector general review of concerns raised by the public regarding investments of funds under the Recovery Act. Sections 902 and 1515 provide for respectively, Comptroller General and agency inspector general reviews of any records of the contractor or subcontractor regarding transactions using Recovery Act funds, and the interview of contractor officers or employees concerning such transactions. Section 902 also provides for the Comptroller General to interview subcontractor employees, while nowhere in the Recovery Act is corresponding authority provided to the agency inspector generals. The authority for Comptroller General audits of prime contractors already exists for Part 12 contracts under FAR 52.212–5, “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items” and for Part 15 contracts under FAR 52.215–2, “Audit and Records—Negotiation.” FAR 52.215–2 also provides authority to audit subcontracts, while 52.212–5 does not provide corresponding authority. In the case of Part 13 contracts there are no authorities for the audit of either prime contracts or subcontracts. Likewise, except in the case of modifications involving cost or pricing data, for Part 14 contracts there are no authorities for the audit of either prime contracts or subcontracts.

In the matter of interviewing contractor or subcontractor employees concerning contracting transactions there are no current authorities under the FAR (but see changes under Item VI of this FAC 2005–32, FAR Case 2008–026).

Consequently, for contracts using Recovery Act funds this interim rule provides the following authorities to the Comptroller General:

- For Part 12 contracts the authority to audit subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 15 contracts the authority to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 14 contracts the authority to audit both contracts and subcontracts, and to interview contractor and subcontractor personnel, including

contracts below the simplified acquisition threshold.

The interim rule provides the same authorities in the preceding paragraph to agency inspector generals, with the exception of interviewing subcontractor employees.

### **C. Applicability to Commercial Item Contracts**

Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. FASA provides if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to commercial items, as defined at 2.101, both at the prime and subcontract levels.

### **D. Applicability to Commercially Available Off-The-Shelf (COTS) Item Contracts**

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of commercially available off-the-shelf (COTS) items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the Administrator, Office of the Federal Procurement Policy, has determined the rule should apply to Commercially Available Off-The-Shelf (COTS) item contracts, as defined at FAR 2.101.

### **E. Applicability to Contracts at or Below the Simplified Acquisition Threshold**

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them. Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) 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.

### **F. 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 it requires contractors to make available existing records of transactions covered by the Act. Contractors are not obligated to create additional records. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 12, 13, 14, 15, and 52 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 2009–011) in correspondence.

### **G. Paperwork Reduction Act**

The Paperwork Reduction Act (Pub. L. 96–511) applies to this interim rule. However, the information collection requirements imposed by the changes to 52.214–26 and 52.215–2 are currently covered by the approved collection

under OMB Control number 9000-0034 entitled, Examination of Records by Comptroller General and Contract Audit: Sections Affected 52.215-2; 52.212-5; 52.214-26, for these existing provisions. The Councils believe changes due to the use of these provisions will not result in a substantial increase in either the burden or the number of entities. However, the Council welcomes comments on both of these items as part of the 60-day comment period.

**H. 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 American Recovery and Reinvestment Act of 2009 became effective upon enactment, and contracts using funds appropriated by the Recovery 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 12, 13, 14, 15, and 52**

Government procurement.

Dated: March 25, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 14, 15, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 14, 15, 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 12—ACQUISITION OF COMMERCIAL ITEMS**

■ 2. Amend section 12.301 by revising paragraph (b)(4) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(b) \* \* \*

(4) *The clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause incorporates by reference only those clauses required to implement

provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212-5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

(i) Use the clause with its Alternate I when the head of the agency has waived the examination of records by the Comptroller General in accordance with 25.1001.

(ii) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), the contracting officer shall use the clause with its Alternate II, and may not use Alternate I.

\* \* \* \* \*

■ 3. Amend section 12.504 by revising paragraph (a)(7) to read as follows:

**12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.**

(a) \* \* \*

(7) 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, when a subcontractor is not required to provide cost or pricing data (see 15.209(b)), unless using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

\* \* \* \* \*

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

■ 4. Amend section 13.006 by revising paragraph (d) to read as follows:

**13.006 Inapplicable provisions and clauses.**

\* \* \* \* \*

(d) 52.215-2, Audits and Records—Negotiation, except as used with its Alternate I, when using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

\* \* \* \* \*

**PART 14—SEALED BIDDING**

■ 5. Amend section 14.201-7 by revising paragraph (a) to read as follows:

**14.201-7 Contract Clauses.**

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit and Records-Sealed Bidding, in solicitations and contracts as follows:

(1) Use the basic clause if—

(i) The acquisition will not use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5); and

(ii) The contract amount is expected to exceed the threshold at 15.403-4(a)(1) for submission of cost or pricing data.

(2) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, use the clause with its Alternate I in all solicitations and contracts.

\* \* \* \* \*

■ 6. Amend section 15.209 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(2) to read as follows:

**15.209 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(b)(1) Except as provided in paragraph (b)(2) of this section, the contracting officer shall insert the clause at 52.215-2, Audit and Records-Negotiation (10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133), in solicitations and contracts except those for—

\* \* \* \* \*

(2) When using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5)—

(i) The exceptions in paragraphs (b)(1)(i) through (b)(1)(iii) are not applicable; and

(ii) Use the clause with its Alternate

I.

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 7. Amend section 52.212-5 by adding Alternate II to read as follows:

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

\* \* \* \* \*

*Alternate II (MAR 2009).* As prescribed in 12.301(b)(4)(ii), substitute the following paragraphs (d)(1) and (e)(1) for paragraphs (d)(1) and (e)(1) of the basic clause as follows:

(d)(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials shall have access to and right to—

(i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.

(e)(1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), and (c), of this clause, the Contractor is not required to flow down any FAR clause in a subcontract for commercial items, other than—

(i) *Paragraph (d) of this clause.* This paragraph flows down to all subcontracts, except the authority of the Inspector General under paragraph (d)(1)(ii) does not flow down; and

(ii) *Those clauses listed in this paragraph (e)(1).* Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(A) 52.203–13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110–252, Title VI, Chapter 1 (41 U.S.C. 251 note)).

(B) 52.219–8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$550,000 (\$1,000,000 for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

(C) 52.222–26, Equal Opportunity (Mar 2007) (E.O. 11246).

(D) 52.222–35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (Sept 2006) (38 U.S.C. 4212).

(E) 52.222–36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793).

(F) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201).

(G) 52.222–41, Service Contract Act of 1965 (Nov 2007) (41 U.S.C. 351, *et seq.*).

(H) 52.222–50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)).

(I) 2.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain

Equipment-Requirements (Nov 2007) (41 U.S.C. 351, *et seq.*).

(J) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services-Requirements (Feb 2009) (41 U.S.C. 351, *et seq.*).

(K) 52.222–54, Employment Eligibility Verification (Jan 2009).

(L) 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations. (Mar 2009) (Pub. L. 110–247). Flow down required in accordance with paragraph (e) of FAR clause 52.226–6.

(M) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247–64.

■ 8. Amend section 52.214–26 by adding Alternate I to read as follows:

**52.214–26 Audit and Records—Sealed Bidding.**

\* \* \* \* \*

*Alternate I (MAR 2009).* As prescribed in 14.201–7(a)(2) substitute the following paragraphs (c) and (e) for paragraphs (c) and (e) of the basic clause:

(c) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(1) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract or a subcontract hereunder; and

(2) Interview any officer or employee regarding such transactions.

(e)(1) Except as provided in paragraph (e)(2), the Contractor shall insert a clause containing the provisions of this clause, including this paragraph (e), in all subcontracts.

(2) The authority of the Inspector General under paragraph (c)(2) of this clause does not flow down to subcontracts.

■ 9. Amend section 52.215–2 by adding Alternate I to read as follows:

**52.215–2 Audit and Records—Negotiation.**

\* \* \* \* \*

*Alternate I (MAR 2009).* As prescribed in 15.209(b)(2), substitute the following paragraphs (d)(1) and (g) for paragraphs (d)(1) and (g) of the basic clause:

(d) *Comptroller General or Inspector General.* (1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General

Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(i) Examine any of the Contractor's or any subcontractor's records that pertain to and involve transactions relating to this contract or a subcontract hereunder; and

(ii) Interview any officer or employee regarding such transactions.

(g)(1) Except as provided in paragraph (g)(2) of this clause, the Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract. The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(2) The authority of the Inspector General under paragraph (d)(1)(ii) of this clause does not flow down to subcontracts.

[FR Doc. E9–7029 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 12 and 52

[FAC 2005–32; FAR Case 2008–026; Item VI; Docket 2009–0013, Sequence 1]

RIN 9000–AL25

#### Federal Acquisition Regulation; FAR Case 2008–026, GAO Access to Contractor Employees

**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 Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) which allows the Government Accountability Office to interview current contractor employees during the audit of the contractor's records. FAR 52.215–2(d)(1), Audit and Records–Negotiation, is revised to allow for the

required access by inserting before the period: “and to interview any current employee regarding such transactions”. FAR 52.214–26(c), Audit and Records-Sealed Bidding is revised to allow for the required access by inserting before the period: “and also the right to interview any current employee regarding such transactions”.

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

*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 2008–026, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–026” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2008–026. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2008–026” 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 2008–026, 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. Suzanne Neurauter, Procurement Analyst, at (202) 219–0310 for clarification of content. Please cite FAC 2005–32, FAR case 2008–026. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) added language allowing the Comptroller General to interview current employees regarding transactions being examined during an audit of contracting records. The Act revises 41 U.S.C. 254d(c)(1) and 10 U.S.C. 2313(c)(1) by inserting before the period: “and to interview any current

employee regarding such transactions”. To implement the Act, FAR clauses 52.215–2, Audit and Records-Negotiation and 52.214–26, Audit and Records-Sealed Bidding, are amended to add the required statutory language. The statute did not specify that Section 871 apply to commercial item contracts and therefore was not applied to FAR clause 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Order-Commercial Items. Section 34 of the Office of Federal Procurement Policy Act (OFPP), 41 U.S.C. 430, exempts commercial item acquisitions from new provisions of law, such as Section 871, unless (1) the law provides criminal or civilian penalties, (2) the law expressly refers to 41 U.S.C. 430 and states that it applies to commercial item contracts, or (3) the FAR Council makes a written determination that it would not be in the best interest of the Federal Government to exempt commercial item contracts. Thus, this new provision was added to the list of inapplicable laws at FAR 12.503(a).

This is a significant regulatory action and, therefore, was subject to review under Section 6 of Executive Order 12886, 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 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, at 5 U.S.C. 601, *et seq.* Only a small number of small businesses are audited by GAO. Currently many GAO audits of small business contractors include contractor employee interviews. This Act is designed to cover those incidents in which contractor employees are not able to be interviewed. Therefore, it is not anticipated that interviewing any current employee regarding such contract transactions will have a significant impact.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 12 and 52 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 2008–026 in all correspondence.

**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.*

**D. 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 to implement statutory requirements of Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) which went into effect October 14, 2008. The Act revises 41 U.S.C. 254d (c)(1) and 10 U.S.C. 2313 (c)(1) by inserting before the period: “and to interview any current employee regarding such transactions”. To implement the Act, the clauses at FAR 52.215–2(d)(1) and 52.214–26(c) are amended to add the required statutory language. The Councils believe that the interim rule in the FAR will provide the contracting officer the relevant regulatory guidance needed when addressing requirements outlined in this rule. 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 12 and 52**

Government procurement.

Dated: March 25, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 12 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12 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 12—ACQUISITION OF COMMERCIAL ITEMS**

■ 2. Amend section 12.503 by adding paragraph (a)(8) to read as follows:

**12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.**

(a) \* \* \*

(8) 41 U.S.C. 254d(c)(1) and 10 U.S.C. 2313(c)(1), GAO Access to Contractor Employees, Section 871 of Pub. L. 110–417 (see 52.214–26 and 52.215–2).

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 3. Amend section 52.214–26 by revising the date of the clause and paragraph (c) to read as follows:

**52.214–26 Audit and Records—Sealed Bidding.**

\* \* \* \* \*

**Audit and Records-Sealed Bidding (MAR 2009)**

\* \* \* \* \*

(c) *Comptroller General.* In the case of pricing any modification, the Comptroller General of the United States, or an authorized representative, shall have the same rights as specified in paragraph (b) of this clause and also the right to interview any current employee regarding such transactions.

\* \* \* \* \*

(End of clause)

■ 4. Amend section 52.215–2 by revising the date of the clause and paragraph (d)(1) to read as follows:

**52.215–2 Audit and Records—Negotiation.**

\* \* \* \* \*

**Audit and Records—Negotiation (MAR 2009)**

\* \* \* \* \*

(d) *Comptroller General.* (1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder and to interview any current employee regarding such transactions.

\* \* \* \* \*

(End of clause)

[FR Doc. E9–7030 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 Chapter 1**

[Docket FAR–2009–0002, Sequence 3]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005–32; Small Entity Compliance Guide**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–32 which amend the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–32 which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Hada Flowers, FAR Secretariat, (202) 208–7282. For clarification of content, contact the analyst whose name appears in the table below.

**LIST OF RULES IN FAC 2005–32**

Item	Subject	FAR case	Analyst
I .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material (Interim).	2009–008	Murphy.
II .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections (Interim).	2009–012	Parnell.
III .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions (Interim).	2009–010	Gary.
IV* .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements (Interim).	2009–009	Woodson.
V .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access (Interim).	2009–011	Chambers.
VI .....	GAO Access to Contractor Employees (Interim) .....	2008–026	Neurauter.

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–32 amends the FAR as specified below:

**Item I—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material (Interim) (FAR Case 2009–008)**

This interim rule implements the Buy American provision, section 1605, of the American Recovery and Reinvestment Act of 2009. It prohibits the use of funds appropriated for the Recovery Act for

any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. However, section 1605 requires that the Buy American requirement be applied in a manner consistent with U.S. obligations under international agreements. Moreover, because Congress intended that least developed countries be excepted from section 1605, least developed countries can continue to be treated as designated countries. Section 1605 also provides for waivers under certain limited circumstances.

**Item II—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections (Interim) (FAR Case 2009–012)**

Subpart 3.9 of the Federal Acquisition Regulation (FAR) is revised to add section 3.907. Section 3.907 provides procedures for whistleblower protection, when using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

Section 3.907 provides that non-Federal employers are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials. This section

further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority.

A new clause 52.203–15 is added to require contractors to post rights and remedies for whistleblower protections under Section 1553 of the American Recovery and Reinvestment Act.

**Item III—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions (Interim) (FAR Case 2009–010)**

This interim rule implements the Office of Management and Budget's Guidance, M–09–10, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," dated February 18, 2009, section 6.2. Federal Acquisition Regulation (FAR) 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>. Subpart 5.7 is added to direct the contracting officer to use the Governmentwide Point of Entry (<https://www.fedbizopps.gov>) to (1) identify the action as funded by the Recovery Act; (2) post pre-award notices for orders exceeding \$25,000 for "informational purposes only;" (3) describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and (4) 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. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

**Item IV—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements (Interim) (FAR Case 2009–009)**

This interim rule implements 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. The rule 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. This clause applies to Commercial item contracts and Commercially-Available-Off-The-Shelf (COTS) item contracts as well as actions under the Simplified Acquisition Threshold.

Contracting officers who wish to use Recovery Act funds on existing contracts should modify those contracts to add the clause.

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 shall be submitted no later than the 10th day after the end of each calendar quarter.

**Item V—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access (Interim) (FAR Case 2009–011)**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009.

Collectively, these Sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to 52.212–5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items," 52–214–26, "Audit and Records—Sealed Bidding," and 52.215–2, "Audit and Records—Negotiation." For the Comptroller General these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency inspector generals receive the same authorities, with the exception of interviewing subcontractor employees.

**Item VI—GAO Access to Contractor Employees (Interim) (FAR Case 2008–026)**

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 12 and 52. Clauses 52.215–2, Audit and Records-Negotiation and 52.214–26, Audit and Records-Sealed Bidding are being modified to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule will not apply to the acquisition of commercial items; therefore, FAR 12.503 will be amended to add the exemption of this rule. This change implements Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417).

Dated: March 25, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

[FR Doc. E9–7024 Filed 3–30–09; 8:45 am]

**BILLING CODE 6820–EP–P**