

# PUBLICATION

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## New Rules for Government Contracting Put More Responsibilities on Contractors

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On March 31, 2009, the Federal Register (Volume 74, Number 60) published new rules governing projects funded by the American Recovery and Reinvestment Act of 2009 (Recovery Act). Several of these rules provide the government with additional rights, and others charge contractors with additional responsibilities. 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. Here is what you should know.

### Reporting Requirements (Interim Rule)

This interim rule requires contractors to report information related to work funded, in whole or in part, by the Recovery Act. To make such reporting possible, Contracting Officers are instructed to structure contract awards to allow for separate tracking of Recovery Act funds. This may be accomplished, for example, by establishing separate contracts or discrete Recovery Act funded line items. The reporting tool, presently under construction, will be at <http://www.FederalReporting.gov>. Reports related to invoices submitted prior to June 30, 2009 are due on July 10, 2009. Thereafter, reports must be submitted by the 10th day after the end of each calendar quarter.

Information to be reported quarterly includes: (a) amount of Recovery Act funds invoiced; (b) services performed; (c) purpose of the contract and expected outcomes; (d) assessment of progress; (e) number and type of jobs created or retained because of work funded by the Recovery Act; and (f) specific information about first-tier subcontractors.

Additionally, contractors who receive at least 80% of gross revenues from Federal sources must report "names and total compensation of each of the five most highly compensated officers ...." This requirement only applies to contractors who receive \$25 million or more in gross revenue from Federal sources. An exception to compensation reporting exists, however, where the public already has access the information through periodic reports filed under the Securities Exchange Act or the Internal Revenue Code. Otherwise, each prime contractor and first-tier subcontractor will have to disclose the required compensation information.

### GAO/IG Access (Interim Rule)

This interim rule provides specific authority for audit and review of Recovery Act funded contracts and subcontracts. It also provides the Comptroller General with authority to interview any officer or employee of a contractor or subcontractor regarding any transaction related to a contract or subcontract funded by the Recovery Act. Inspectors General are also given limited interview authority that does not include subcontractor personnel.

### Whistleblower Protections (Interim Rule)

This interim rule protects state, local, and contractor employees who provide information related to mismanagement or waste of funds appropriated under the Recovery Act. The rule lists authorities to whom such information may be disclosed and provides remedies for employees who believe they have been

discharged, demoted, or discriminated against as a reprisal for making disclosures. The rule also requires contractors to post a notice regarding whistleblower protections.

### **Buy American Requirements for Construction Material (Interim Rule)**

This interim rule prohibits the use of Recovery Act funds for construction, alteration, maintenance, or repair of a public building or public work unless all iron, steel, and manufactured goods used in the project are produced in the United States. This rule must be applied in a manner consistent with U.S. obligations under international agreements. Moreover, the least developed countries (minus Caribbean Basin countries) will be treated as "designated countries" and provided certain allowances. The rule provides for waiver where:

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.

Contracting officers are directed to investigate suspected violations of this rule and, where a violation is found, consider requiring removal and replacement of the unauthorized foreign construction material. If removal and replacement would be detrimental to the interests of the Government, the contracting officer may determine that material need not be removed and replaced. Such a determination does not constitute a formal exception to the rule, nor does it affect the Government's right to suspend or debar a contractor, subcontractor, or supplier or to reduce the contract price or terminate the contract for default.

Contracting with the Federal Government entails compliance with an ever-changing set of regulations. With changes coming quickly, the contractor must stay informed and must be prepared make required adjustments, sometimes mid-contract. This is a cost of doing business in the present environment.