

FAC 2005-32 / FAR Case 2009-010: American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Publicizing Contract Actions
OCPO Regulatory Advisory 09-18

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FEDERAL REGISTER / Vol 74, No. 60 (Pages 14636-14639), March 31, 2009/ Rules and Regulations 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.

Purpose & Description – Case 2009-010 Interim Rule

- The interim rule creates a new Subpart 5.7 to implement Office of Management and Budget (OMB) guidance regarding presolicitation synopses and award announcements for actions awarded using Recovery Act funds.
- The interim rule amends FAR section 4.605 to implement OMB guidance on FPDS reporting of Recovery Act actions and provides corresponding references in Parts 8, 13, and 16.

FAR Parts Affected – Part 4, 5, 8, 13, and 16

Applicability

- All procurement actions that use Recovery Act funding including:
 - New contract awards;
 - Purchase orders and other contracts below the Simplified Acquisition Threshold;
 - Task orders and delivery orders;
 - Modifications; and
 - Blanket purchase agreements and orders issued under them.
- Publicizing requirements apply to actions over \$25,000.

Contractor Requirements

The interim rule does not create any requirements for contractors. The rule only establishes requirements for Government action.

Contracting Officer Responsibilities

For any procurement action that obligates Recovery Act funds, the Contracting Officer must:

Publicizing - -Preaward (FAR 5.704)

- If the action will exceed \$25,000, prepare and transmit a FedBizOpps synopsis for the action. This includes:
 - New contract awards, including letter contracts;

- Purchases orders under FAR Part 13;
 - Task and delivery orders issued under a DHS indefinite delivery contract, GWAC, MAC, other IDIQ contract whether single or multiple award, Federal Supply Schedule contract, or blanket purchase agreement; and
 - Modifications to contracts or orders.
- Follow the instructions at FedBizOpps to identify the proposed contract action funded in whole or in part by the Recovery Act.
 - For task and delivery orders, follow the instructions at FedBizOpps to designate the notice for information purposes only. Concurrently, follow your usual solicitation practice (e.g., e-Buy, fair consideration). The publicizing and response times of FAR 5.203 do not apply.
 - Be sure to include a narrative of the products and services in the description required by FAR 5.207(a)(16).
 - Comply with FAR Part 5 requirements for publicizing and response time. For orders, the Contracting Officer should proceed with requesting proposals or quotations under the applicable procedures (e.g., E-Buy, fair opportunity).

Publicizing – Post-award (FAR 5.705)

- Prepare and transmit a FedBizOpps notice in accordance with FAR 5.301.
- The exceptions of FAR 5.301(b)(3) – (b)(8) do not apply.
- For any contract action over \$500,000, including modifications and orders, publicize the award, including a narrative of the products and services in the description required by FAR 5.207(a)(16).
- At any dollar value, if the action, including modifications and orders, 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. (The FAR as amended by the interim rule provides a table with examples of rational by type of contract action.) Do not include any proprietary information or information that would compromise national security.

FPDS Reporting (FAR 4.605(c))

- When reporting the action to FPDS-NG, follow the instructions at www.fpds.gov to identify the action as one that uses Recovery Act funds.
- Use the attached New Treasury Appropriation Fund Symbols (TAFS) for reporting to FPDS-NG.

Congressional Notification

- DHS' requirement for Congressional Notification applies to Recovery Act funds. Comply with the procedures established in HSAM 3005.303.
- Use the attached New Treasury Appropriation Fund Symbols (TAFS) for completing Block 8 of the DHS Form 2140-01, Contract Award Notification.

Definitions and Key Concepts

- The interim rule amends the FAR to reflect unique requirements: for posting presolicitation notices, announcement of contract awards, entering awards into FPDS, and actions that are not both fixed priced and competitively awarded.
- The interim rule adds a definition at 5.703 for “task or delivery order contract”:

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).

- **Interagency Agreements.** If a Component uses Recovery Act funds in an interagency agreement, the agreement must spell out the assignment of agency roles and responsibilities, including reporting and posting requirements necessary to fulfill the unique requirements of the Recovery Act. This applies to any contracts, orders, or modifications resulting under the interagency agreement. See Section 6.1(5) of OMB’s Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009.
- **Data Integrity.** Data integrity is critical to all reports of DHS procurement actions. Contracting officers are reminded that Congress and the administration are applying unprecedented levels of transparency and accountability to the use of Recovery Act funds. In addition to posting/reporting at FedBizOpps and FPDS, these systems will transmit Recovery Act procurement synopses to Recovery.gov and award information to USASpending.gov. The information will be highly visible and readily available to the public, vendors, industry associations, Congress and others. *Contracting Officers must be vigilant in ensuring that presolicitation notices, award notices, and FPDS-NG entries comply with all formatting requirements, provide accurate information, and are prepared and submitted in a timely manner.*

Impact on DHS Acquisition Policy

OCPO plans to update the HSAM to:

- Require that Interagency agreements (for assisted acquisitions and other) using Recovery Act funds clearly identify agency roles and responsibilities necessary to fulfill the unique requirements of the Recovery Act.
- Include the attached reference tool entitled “Recovery Act – Preaward and Award Notice Requirements” for publicizing and reporting requirements for Recovery Act actions.

For More Information

- To access FAC 2005-32’s interim rule on Publicizing Contract Actions, type **FAC 2005-32** in the “Search Documents” section of Regulations.gov at: <http://www.regulations.gov/search/index.jsp>
- For questions on FAR Case 2009-010, contact Gloria Sochon at (202) 447-5307 or gloria.sochon@dhs.gov.

**American Recovery and Reinvestment Act of 2009
New Treasury Appropriation Fund Symbols (TAFS)**

Component	Account Name	Account #	Amount
USM	Office of the Under Secretary for Management, Recovery Act	70 9/10 0118	\$200,000,000
OIG	Operating Expenses, Recovery Act	70 9/12 0201	\$5,000,000
CBP	Salaries and Expenses, Customs and Border Protection, Recovery Act	70 9/10 0534	\$160,000,000
	Border Security Fencing, Infrastructure and Technology, Recovery Act	70 9/10 0536	\$100,000,000
	Construction, Customs and Border Protection, Recovery Act	70 9/10 0535	\$420,000,000
ICE	Automation Modernization, Immigration and Customs Enforcement, Recovery Act	70 9/10 0546	\$20,000,000
TSA	Aviation Security, Recovery Act	70 9/10 0556	\$1,000,000,000
USCG	Acquisition, Construction, and Improvements, Recovery Act	70 9/10 0617	\$98,000,000
	Alteration of Bridges, Recovery Act	70 9/10 0618	\$142,000,000
FEMA	State and Local Programs, Recovery Act	70 9/10 0563	\$300,000,000
	Firefighter Assistance Grants, Recovery Act	70 9/10 0567	\$210,000,000
	Emergency Food and Shelter, Recovery Act	70 9/10 0708	\$100,000,000
Total			\$2,755,000,000

When reporting Treasury Account Symbol (TAS), format as follows:

For FPDS: TAS::70 0118::TAS, TAS::70 0201::TAS, etc., including a space between “70” and the 4 character account code

For DHS Form 2140-01, Contract Award Notification, Block 8: 700118, 700201, etc., with no spaces.

RECOVERY ACT -- PREAWARD AND AWARD NOTICE REQUIREMENTS 04/01/09

Each requirement applies independently of the others, i.e., each is distinct and may apply to a given procurement.

Notice	FedBizOpps		DHS Congressional Notice – Appropriations Committees	Public Announcement	Requests From Members Of Congress
	Preaward	Award			
Threshold	\$25,000	\$25,000	\$1 million	\$3.5 Million	Upon request
Required By	FAR 5.704	FAR 5.705	HSAM 3005.303	FAR 5.303 HSAM 3005.303	FAR 5.403, HSAM 3005.403
Format	<ul style="list-style-type: none"> Synopsis – follow instructions at www.fedbizopps.gov Must include a clear & unambiguous narrative description of the products &/or services If the solicitation includes either FAR clause 52.225-11 or 52.225-23 the Contracting Officer must 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.” 	<ul style="list-style-type: none"> Synopsis – follow instructions at www.fedbizopps.gov If value exceeds \$500,000, must include a clear & unambiguous narrative description of the products &/or services At any dollar value, if the action was not both fixed-price and competitive, must include in the description the rationale for using other than a fixed-price and/or competitive approach 	<ul style="list-style-type: none"> DHS Form 2140-01 Block 8, Treasury Account (Fund) Symbol: Enter “70” and the 4 character account code with no spaces, e.g.: o 700118, 700201, etc 	<ul style="list-style-type: none"> Satisfied by FedBizOpps Synopsis May issue press releases case-by-case 	DHS Form 2140-01
From/To	<ul style="list-style-type: none"> CO to FedBizOpps FedBizOpps to Recovery.gov 	<ul style="list-style-type: none"> CO to FedBizOpps FedBizOpps to Recovery.gov 	<ul style="list-style-type: none"> CO to OLA OLA to Congress 	<ul style="list-style-type: none"> CO to FedBizOpps Press releases to OPA 	<ul style="list-style-type: none"> CO to OLA OLA to Congress
Time of Submission	<ul style="list-style-type: none"> FAR 5.203 applies except to notices for task & delivery orders which are issued informational purposed only 	<ul style="list-style-type: none"> No required timeframe. Promptly after award 	<ul style="list-style-type: none"> 5 full business days before award: CO to OLA 3 full business days before award: OLA to Congress 	Not before 5:00 p.m. Washington, DC time, Date of Award	As requested
Applies To	<ul style="list-style-type: none"> New contract awards Modifications for additional supplies or services exceeding \$25,000 Task and delivery orders under GWACs, MACs, Schedule contracts, other IDIQ contracts, or BPAs 	<ul style="list-style-type: none"> New contract awards Modifications for additional supplies or services exceeding \$25,000 Task and delivery orders under GWACs, MACs, Schedule contracts, other IDIQ contracts, or BPAs 	<ul style="list-style-type: none"> New contract awards Modifications for additional supplies or services exceeding \$1M (beyond the original scope of the contract) Orders over the estimated value of an IDIQ contract Orders under a BPA awarded under the Commercial Item Test Program Note: Includes awards to small businesses. 	<ul style="list-style-type: none"> New contract awards Modifications for additional supplies or services exceeding \$3.5M (beyond the original scope of the contract) Orders over the estimated value of an IDIQ contract Orders under a BPA awarded under the Commercial Item Test Program 	Detailed information regarding any particular contract
Exclusions		<ul style="list-style-type: none"> Disclosure would compromise national security Awards resulting from acceptance of an unsolicited research proposal and publication of any notice would disclose the originality, innovativeness or proprietary information No other exceptions under FAR 5.301(b) apply. 	<ul style="list-style-type: none"> Modifications within the scope and under the terms of the existing contract Task or delivery orders placed under IDIQ contracts [i.e., GWACs, GSA & VA schedule contracts, EAGLE, or other IDIQ contract vehicles] up to the estimated value of the underlying contract DHS BPAs, and the orders placed under them, established under GSA Schedule contracts in accordance with FAR 8.405 DHS BPAs awarded under the Commercial Item Test Program Contracts using FY2009 funds that involve “substantial risk to human life, health, or safety.” Require notice concurrent with award or immediately thereafter. 	Same as Congressional Notice, plus: <ul style="list-style-type: none"> Contracts placed with the Small Business Administration under Section 8(a) of the Small Business Act Contracts with foreign firms when the place of delivery or performance is outside the United States and its outlying areas Contracts for which synopsis was exempted under 5.202(a)(1). 	None