

FAC 2005-32 / FAR Case 2009-009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)--- Reporting Requirements
OCPO Regulatory Advisory 09-19, Revision 2

FAC 2005-32 / FAR Case 2009-009 Issued	March 31, 2009
FAC 2005-32 / FAR Case 2009-009 Effective	March 31, 2009
Federal Register Notice on Federal Reporting	August 25, 2009

FEDERAL REGISTER / Vol 74, No. 60 (Pages 14639-14646), March 31, 2009/ Rules and Regulations 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 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 to actions under the Simplified Acquisition Threshold.

Civilian Agency Acquisition Council letter 2009-01 (dated July 2, 2009): The Civilian Agency Acquisition Council Chairperson has requested civilian agencies inform contracting officers that the July 10th, 2009 date for contractor reporting has changed. Federal contractors are not required to report at www.federalreporting.gov on July 10, 2009, the information required by the clause at FAR 52.204-11, American Recovery and Reinvestment Act - Reporting Requirements. This clause was published in Federal Acquisition Circular 2005-32 on March 31, 2009. The Office of Management and Budget posted an announcement at www.federalreporting.gov notifying federal contractors that they are not required to report information on July 10, 2009. However, federal contracts that submit an invoice prior to June 30, 2009 for Recovery Act funded contract performance have been instructed to maintain the data required by FAR 52.204-11. Cumulative reporting will begin with the October 10, 2009 deadline required by Section 1512 of Division A of the American Recovery and Reinvestment Act of 2009. This delayed reporting is necessary while the reporting tool and final rule for the FAR case 2009-009 are under development. In addition to the notice at www.federalreporting.gov, the FAR Council will issue a notice in the Federal Register.

FEDERAL REGISTER / Vol 74, No. 163 (Page 42877), August 25, Rules and Regulations; FAR Case 2009-009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements The Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (the Councils) are issuing this notice to inform Federal contractors that the Recovery Accountability and Transparency Board (“the Board”) has announced the availability of the registration at federalreporting.gov. Federal contractors required to report on their use of Recovery Act funds by FAR clause 52.204-11 are encouraged to register early.

Purpose & Description: FAR Case 2009-009, Interim Rule, August 25, 2009 Federal Register Notice & OFPP Guidance

- Implements section 1512 of the Recovery Act.
- Requires Contractors to report on their use of Recovery Act funds (via www.FederalReporting.gov) for all work funded in whole or in part, by the Recovery Act.
- This website is being developed for use by the July 10th October 10th timeframe, the date of the first required contractor posting of information.
- In accordance with the August 25, 2009 Federal Register Notice, registration is now open to Federal contractors. The tool will be available for entry of reporting information on October 1, 2009.

FAR Parts Affected: Parts 4 & 52

- Adds new FAR Subpart 4.15, entitled “American Recovery and Reinvestment Act-Reporting Requirements” to include new sections 4.1500, *Scope of subpart*; 4.1501, *Procedures*; 4.1502, *Contract clause*.

- FAR 4.1501 and 4.1502 provide the Contracting Officer responsibilities and procedures and identify the new clause which instructs the contractor where, when, how, and what must be reported for contracts involving Recovery Act funds.
- Adds one new clause, FAR 52.204-11, American Recovery and Reinvestment Act-Reporting Requirements. The clause adds definitions to include: *Contract*; *First Tier-subcontract*; *Jobs created*; *Jobs retained*; and *Total Compensation*.

Applicability

- Applies to all solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This includes 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.
- Applies to contracts both above and below the simplified acquisition threshold; contracts for commercial items; and commercially available off-the-shelf item contracts. (See definitions for simplified acquisition, commercial items, and commercially available off-the-shelf items at FAR 2.101)
- Section 1512 reporting requirements are limited to prime contractors and first tier subcontractors.
- Contracting Officers and contractors are assisted with applicability for this reporting requirement and instrument types with a definition of “contract” in the new FAR clause, 52.204-11. That definition includes, “...orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance;...”

Contractor Requirements

- See interim rule’s FAR 4.1500 description (below) and the new FAR clause 52.204-11 for the specific contractor reporting responsibilities and requirements.
- Contractors must report the contract, business and job information, via the online reporting tool available at www.FederalReporting.gov, using the instructions at the website in concert with the FAR clause, 52.204-11 requirements. ~~This website is presently under development for use by the July 10th-October 10th timeframe.~~
- To comply with the reporting required by FAR 52.204-11, Federal contractors must first register at www.FederalReporting.gov. Registration is now open to Federal contractors. For more information on the registration and authorization process, go to the website.
- The reporting tool will be available on October 1, 2009. Reports, which are due October 10, 2009, can only be submitted once registration has been authorized.
- Reporting on invoices submitted prior to June 30, 2009 are due no later than July 10, 2009. After those dates, contractor reports must be submitted no later than the 10th day after the end of each calendar quarter. (See CAAC letter of July 2, 2009 information above for reporting dates and other information.)

Contracting Officer Responsibilities

- Include the new clause, 52.204-11 “American Recovery and Reinvestment Act-Reporting Requirements” in all solicitations and contracts funded with Recovery Act funds.
- Contracting Officers must bilaterally modify (IAW FAR 1.108(d)(3)) existing contracts to include the new FAR clause if Recovery Act funds will be used. If the contractor will not accept the modification, the contractor is not eligible for receipt of Recovery Act funds.
- See FAR 4.1501 and 4.1502 descriptions for specific Contracting Officer responsibilities which include:

- Structuring the contract awards to allow for separate tracking of Recovery Act funds, to include awarding dedicated contracts or establishing contract line item number (CLIN) structures to mitigate commingling of Recovery funds with other funds.
- Ensuring that the contractor complies with the reporting requirement. The Contracting Officer shall exercise appropriate contract remedies should the contractor fail to comply and shall make the contractor's failure to comply with the reporting requirements part of the contractor's performance information under Subpart 42.15. ~~However, "Contracting Officers are not responsible for validating content, only that a report was submitted by the contractor as required."~~
- OFPP has advised that Contracting Officers are to review contractor reports for significant errors and gross omissions, but will not be required to validate information such as the compensation or jobs data reported by contractors. Examples of "significant errors and gross omissions" will be provided in future OFPP guidance and would include obvious errors such as a contractor who reports \$1,000,000 in invoices on a \$100,000 award.
- For contracts and delivery or task orders that use Recovery Act funds awarded/issued prior to July 8, 2009, the Contracting Officer may either send a letter to the contractor or issue a modification to advise the contractor of the new reporting date.
- Contracting Officers should include a notice of the change in reporting date in solicitations under which no award has yet been made, new solicitations, new contracts, and new task and delivery orders that use Recovery Act funds.

Definitions and Key Concepts

- FAR 4.1500 states, "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."
- Contracting Officers and contractors are assisted with applicability for this reporting requirement and instrument types with a definition of "contract" in the new FAR clause, 52.204-11. That definition includes, "...orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance;..."

Impact on DHS Acquisition Policy

- No changes to the HSAR or HSAM are anticipated.
- Additional guidance with more explicit description of roles and responsibilities will be issued by OCPO via an Acquisition Alert.

For More Information

- To access FAC 2005-32's interim rule on Reporting Requirements, type **FAC 2005-32** in the "Search Documents" section of Regulations.Gov at <http://www.regulations.gov/search/index.jsp>

- To access the Federal Register Notice issued on August 25, 2009, type **42877** in the “Search Documents” section of Regulations.Gov at <http://www.regulations.gov/search/index.jsp> and scan for FAR Case 2009-009.
- DHS Contracting Officers who may have questions on FAR Case 2009-009 should contact Kathy Strouss at (202) 447-5273 or Kathy.Strouss@dhs.gov or Gloria Sochon at (202) 447-5307 or Gloria.Sochon@dhs.gov