

Contracts BULLETIN

a SMACNA publication



Volume 0, Issue Number 105

June 25, 2009

Contracts Bulletin #105 – FAR Out...! – Understanding Changes To Federal Acquisition Regulations

FAR Out...! – Understanding Changes To Federal Acquisition Regulations to Obtain Stimulus Money

Uncle Sam is giving away a lot of your money (almost \$800 billion) as part of the Stimulus Bill. Getting your hands on some of this money may be tricky unless you understand the changes to the federal acquisition regulations (“FAR”). This Contracts Bulletin provides a brief summary of the new FAR and ways to maximum your ability to benefit from the Stimulus Bill.

What is the Stimulus Bill?

The Stimulus Bill is the common name for the American Recovery and Reinvestment Act of 2009. The Bill was passed by Congress and signed into law by President Obama on February 17, 2009. The Bill’s goal was to provide tax relief and pump approximately \$787 billion into the American economy.

Stimulus funds are earmarked for several important sectors, including infrastructure (~\$81 billion), health care (~\$78 billion), education (~\$58 billion), energy (~\$48 billion), and state and local governments (~\$144 billion). Some areas of infrastructure improvement include weatherization of government buildings, construction of roads and bridges, and updating the electrical energy grid.

SMACNA’s Recovery Trak website provides details and links to a wide variety of infrastructure investment opportunities in buildings and facilities. Public building energy efficiency retrofit work and green building construction markets are prime examples. In addition to the project and agency construction announcements, [Recovery Trak](#) has a special section where real federal, state and local project announcements and “earmarked” spending on local and state projects are detailed.

Federal Acquisition Regulations May Apply

Much of the stimulus money will trickle down into the private sector. However, in order to receive stimulus funds, private businesses may have to abide by the FAR. The FAR govern contracts directly procured from the federal government, and some local and state governments as well.

As of March 31, 2009, five interim FAR have been implemented that affect contracts stemming from the Stimulus Bill. Contractors must continue to abide by all pre-existing FAR as well as these five new interim rules:

- 1. Reporting Requirements (74 C.F.R. §14639)**

The new FAR attempt to ensure greater transparency and accountability by requiring contractors to carefully document and file quarterly reports which itemize the use of stimulus funds. By this Fall, these reports must be completed on-line via the [federal government Web site](#) (the website is currently under construction).

Contractors must ensure all their contracts contain FAR 52.204-11, which requires the primary contractor, and first tier subcontractors, to report the following information on a quarterly basis:

- a. Contract and order number;
- b. Amount of stimulus funds invoiced;
- c. Explanation of completed work (e.g., supplies delivered and services performed);
- d. Estimation of the contractor's overall progress on the contract;
- e. Assessment of the contract's impact on employment (e.g., an estimate of the number of jobs created and retained);
- f. Information regarding five highest compensated officers of the contractor (only applies if the contractor: (i) receives 80% of its annual gross revenues from federal awards, (ii) receives \$25 million or more in federal awards, and (iii) this information is not otherwise publicly available via the Securities and Exchange Commission or the Internal Revenue Service); and
- g. Detailed information about first-tier subcontracts.

Contractors receiving any portion of the stimulus money must comply with these reporting requirements, and all submissions are subject to subsequent audit by governmental authorities.

2. Publicizing Contract Actions (74 C.F.R. §14636)

Contractors must enter information in the [Federal Procurement Data System](#) for any contract action funded by Stimulus money, including:

- a. Identification of action;
- b. A "clear and unambiguous" description of supplies and services; and
- c. A rationale for awarding any action that is not fixed-price and awarded through competitive procedures.

Again, the goal of this new FAR is to reassure the general public that the stimulus money is being put to good use. However, these regulations also increase contractors' costs associated with bookkeeping and compliance.

3. Government Access to Contractors' Employees (74 C.F.R. §14646)

The FAR not only increase the amount of information available to the government and general public, but also provides governmental authorities direct access to contractors' employees and personnel. For instance, the Comptroller General, or Government Accountability Office ("GAO"), and agency inspector generals ("IGs") may audit contractors and subcontractors as well as interview contractors' personnel.

4. Whistleblower Protections (74 C.F.R. §14633)

Contractors accepting stimulus money must notify employees of whistleblower protections. Specifically, employees who complain about a contractor's perceived gross mismanagement, misuse, or waste of stimulus funds or any other violation of the law regarding the use of stimulus funds are protected against adverse employment actions. The idea behind the whistleblower protection is to provide another safeguard to the public that stimulus money is being used in a proper manner, as well as to minimize the risk for individual employees who lodge complaints. However, this provision potentially creates significant liability for contractors who take adverse employment actions against employees who previously made any complaint about a contractor's management or use of stimulus funds.

Employees subject to adverse employment actions are able to assert private causes of action against contractors and obtain remedies that include reinstatement, back pay, and recovery of attorney's fees and court costs.

5. Buy American Requirement (74 C.F.R. §14623)

All federal buildings and public works funded by stimulus money must use construction material produced in the United States. This includes all iron, steel, and other manufactured goods.

Under the new regulation, at least 50% of the components of manufactured construction material must be domestic. Moreover, to the extent foreign manufactured or unmanufactured construction materials are used, a mark-up of 6% to 25% will be applied to the total bid price (not just the foreign-made materials). This FAR has caused difficulties for many contractors, because many building products are constructed or use components manufactured outside the United States.

Form Contracts Make It Easier To Comply With the FAR

Ensuring all the proper FAR terms are incorporated into your government contracts can be tricky. ConsensusDOCS has published a new contract agreement (ConsensusDOCS 752) that is meant to specifically address the complexities of federal subcontracting. The American Institute of Architects (AIA) construction forms currently have no similar provisions.

More Information On The Stimulus Bill And FAR

You can find more information about the Stimulus Bill and FAR requirements by accessing [Recovery](#). You can find more information about federal contracts at [Federal Business Opportunities](#).

You can find more information about the Stimulus Bill and FAR requirements by accessing [SMACNA's Recovery Trak Web site](#).

For a more detailed analysis of the new FAR requirements, consider reading:

- Michael H. Payne and Craig A. Schroeder, *The American Recovery and Reinvestment Act of 2009: What it Means for [Federal Construction Contractors](#)* (2009).
- [Duane Morris](#), *FAR Rules for Stimulus Funded Contracts: Alert 1 – Buy-American Provisions* (2009).

SMACNA wants the Contracts Bulletin to serve our members. Your feedback or topic suggestions are welcomed by Mike McCullion at 703-995-4027, or mmccullion@smacna.org.

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