

October 20, 2010

FAS INSTRUCTIONAL LETTER 2011-01

MEMORANDUM FOR ALL FAS and VA ACQUISITION ACTIVITIES

FROM: HOUSTON W. TAYLOR
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SUBJECT: Implementation of the Requirement for Reporting Executive Compensation and First-tier Subcontract Awards

1. Purpose: The purpose of this Instructional Letter (IL) is to provide guidance on the implementation of executive compensation and first-tier subcontract award reporting requirements originating from the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282) (herein referred to as the Transparency Act).
2. Background: The requirements for reporting executive compensation and first-tier subcontract awards information stems from three separate but related statutes aimed at empowering the American taxpayer with information that may be used to demand greater fiscal discipline and accountability from the federal government.

On September 26, 2006, the Transparency Act was enacted to reduce "wasteful and unnecessary spending" by requiring that Office of Management and Budget (OMB) establish a free, public website containing full disclosure of all federal contract award information. In part, the statute required reporting of subcontract awards by January 1, 2009. This initial phase was rolled out in a pilot. On June 30, 2008, the Government Funding Transparency Act of 2008 (Pub. L. 110-252) amended the Transparency Act to include an additional reporting element – requiring contractors and subcontractors to disclose information on the names and total compensation of their five most highly compensated officers. On March 31, 2009, FAR case 2009-009, American Recovery and Reinvestment Act of 2009–Reporting Requirements, was published requiring contractors to provide detailed information on Recovery Act funded contract awards. Included was the provision that limited the reporting on subcontract awards to the contractor's first-tier subcontractors only.

Subsequently, on July 8, 2010, the FAR was amended via FAR Case 2008-039 and Federal Acquisition Circular (FAC) 2005-44 to incorporate an interim rule that requires all contractors to report first-tier subcontract award information and annually report the contractor's and first-tier subcontractors' five most highly paid executives for the contractor and subcontractors' preceding completed fiscal year. This rule applies to all contracts and orders expected to be \$25,000 or more (including options), except classified contracts and contracts with individuals.

In general, the reporting requirements are being phased-in and are as follows:

- Until September 30, 2010, any newly awarded subcontract must be reported if the prime contract award amount was \$20,000,000 or more.

- From October 1, 2010, until February 28, 2011, any newly awarded subcontract must be reported if the prime contract award amount was \$550,000 or more.
- Starting March 2, 2011, any newly awarded subcontract must be reported if the prime contract award amount was \$25,000 or more.

The Director of OMB has exempted any entity that demonstrates its gross income, from all sources, did not exceed \$300,000 in the entity's previous tax year, from reporting the first-tier subcontract award information. Also, contractors and first-tier subcontractors are not required to report the total compensation information required by the rule, unless—

- In the contractor or subcontractor's preceding fiscal year, the contractor or subcontractor received—
 1. 80 percent or more of its annual gross revenue in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
 2. \$25,000,000 or more in annual gross revenue from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
- 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.

3. Effective Date: Date of signature.
4. Termination Date: This IL expires one year from the effective date unless cancelled, extended, or incorporated into a handbook.
5. Applicability. This IL applies to all GSA/FAS acquisition activities awarding and administering contracts, Blanket Purchase Agreements (BPAs), and task and delivery orders, e.g. the award and administration of Federal Supply Schedule contracts, Governmentwide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), and Indefinite Delivery, Indefinite Quantity (IDIQ) contracts. The IL also applies to Department of Veterans Affairs (VA) acquisition activities awarding and administering Federal Supply Schedule contracts.
6. Reference Regulations. FAR Parts 4, 12, 42 and 52 are revised, and a new clause, 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, is prescribed. For the acquisition of commercial items, the clause is incorporated by reference in FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.
7. Instructions/Procedures.

Insert FAR clause 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, in all solicitations, existing contracts, and new contract awards valued at \$25,000 or more that are not classified or awarded to an individual.

A. Federal Supply Schedules

- i. Solicitation Refresh: A solicitation refresh must be done no later **than 60 days** after the effective date of this IL to insert the current version of FAR clause 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, which incorporates FAR clause 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, by reference. The Solicitation Writing System (SWS) will mark this clause as required for all Schedule solicitations.
 - ii. In-House Offers: Schedule offers received prior to the solicitation refresh shall issue a solicitation amendment to incorporate the new clause prior to contract award. When deciding to accept the amendment, each offeror shall have the opportunity to withdraw its offer.
 - iii. Contract Modification: Schedule contracts shall be modified to incorporate the new clause. This shall be accomplished through a typical mass modification that is issued from SWS following a solicitation refresh. There is no need for a separate mass modification. The effective date for existing Schedule contracts will be the date that the modification is executed.
- B. Other FAS Contracts (i.e. Government-wide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), and Indefinite Delivery/Indefinite Quantity (IDIQs))
- i. Solicitations: Unless an exception applies (see above), include FAR clause 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, in solicitations issued on or after the effective date of this rule and any resultant contract.
 - ii. Amendment of Solicitations and Offers: Offers received prior to the inclusion of the clause in solicitations must be amended to include FAR clause 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, prior to contract award.
 - iii. Contract Modification: Other existing FAS contracts (i.e. Government-wide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), and Indefinite Delivery/Indefinite Quantity (IDIQs)) shall be modified within 60 days to incorporate the new clause.
- C. Blanket Purchase Agreements and Task and Delivery Orders
- i. Federal Supply Schedule Blanket Purchase Agreements (BPA): Federal Supply Schedule contracts will be bilaterally modified to incorporate FAR clause 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, to include the clause for future orders, which include orders placed against Federal Supply Schedule BPAs.
 - ii. Task/Delivery Orders: FAR clause 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, is not required to be incorporated into FAS orders that were awarded before the basic contract was modified to include the clause.
- D. Contracts at or Below the Simplified Acquisition Threshold (SAT)

The rule applies to actions under the SAT, meeting the \$25,000 threshold.

8. Questions and Answers.

Where does the contractor report their first-tier subcontracts?

Reporting on first-tier subcontracts is done at the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS) at <http://www.fsrs.gov>.

When and/or how often does reporting on subcontracts occur?

Unless otherwise directed by the contracting officer, reporting must occur by the end of the month following the month of award of a first-tier subcontract with a value of \$25,000 or more, (and any modifications to these subcontracts that change previously reported data).

Are there exceptions to the requirement to report subcontract awards?

Yes. If the contractor in the previous tax year had gross income, from all sources, under \$300,000, the contractor is exempt from the requirement to report subcontractor awards. Similarly, if a subcontractor in the previous tax year had gross income, from all sources, under \$300,000, the contractor does not need to report awards to that subcontractor.

Where does the contractor report their executive compensation?

Reporting on executive compensation is done at the Central Contractor Registration at <http://www.ccr.gov>.

When and/or how often does reporting on executive compensation occur?

By the end of the month following the month of a contract award, and annually thereafter, the contractor shall report the names and total compensation of each of the five most highly compensated executives for the contractor's preceding fiscal year.

What are the conditions under which the contractor is required to report information on executive compensation?

The contractor must report the information if in the contractor's preceding fiscal year, the contractor received:

- 80 percent or more of its annual gross revenues from federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements;
- \$25,000,000 or more of its annual gross revenues from federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- The public does not have access to the information through periodic reports filed with the SEC.

Does the same apply for reporting executive compensation for first-tier subcontractors?

Yes.

Who is responsible for ensuring that contractors comply with the reporting requirements?

In general, the contracting officer at the contract level is responsible for ensuring that both executive compensation and subcontract award information is reported in

accordance with the clause. In cases where orders are placed against an IDIQ contract, such as Federal Supply Schedules, GWACs, MACs, the contract level contracting officer is responsible for verifying the reporting of executive compensation of the prime contractor; however, the ordering level contracting officer is responsible for verifying the reporting of subcontract awards since the contract level contracting officer has no visibility of subcontract information at the order level.

Where does the contracting officer verify that executive compensation has been reported?

Executive compensation can be checked in the Central Contractor Registration (CCR) system. Since July 8, 2010, when the rule went final, contractors who have registered or have renewed their registration have been asked executive compensation questions. The system will not let the contractor proceed with the registration until they answer the questions. As a result, any active record after July 7, 2010 is indicative of the contractor answering questions about and/or reporting executive compensation information.

In the case of both executive compensation and subcontract award information, when does the contracting officer check the respective websites?

In accordance with the clause, the contracting officer should check FSRS for subcontract award information by the end of the month following the month of award of a first-tier subcontract.

The contracting officer should check CCR for executive compensation information by the end of the month following the month of contract award and annually thereafter. The same period applies for a contractor's reporting requirement for a subcontractor's executive compensation information.

As a contracting officer awarding and administering a Federal Supply Schedule, GWAC, MAC, what do I have to do?

The contract level contracting officer should check CCR 30 days after contract award to ensure that the contractor has reported its executive compensation information. In the case of initial implementation to include the new clause in existing Federal Supply Schedule, GWACs, and MACs contracts, the contract level contracting officer should check CCR 30 days after the contractor signs the modification to incorporate FAR clause 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards into the contract. The contract level contracting officer should also check CCR annually thereafter.

What if the contractor fails to comply with the reporting requirements?

If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies. In addition, the contracting officer shall make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under FAR Subpart 42.15-Contractor Performance Information.

Where can I find more information on how to report subcontract awards?

You can find user guides, a webinar, and frequently asked questions at the FSRS website at <http://www.fsrs.gov>.