

[Alerts and Updates]

FAR Rules for Stimulus-Funded Contracts: Alert 5 - Federal Publication of Contract Actions

May 26, 2009

In our earlier Alerts, we noted the recent issuance of five FAR Counsel Interim Rules.¹ In our [May 5, 2009 Alert](#), we discussed in more detail the rule that involved incorporation of existing and modified requirements of adherence to "Buy American" requirements mandated by the American Recovery and Reinvestment Act of 2009 ("ARRA" or the "Stimulus Package."). Our [May 6, 2009 Alert](#) discussed the new, enhanced whistleblower protections provided by ARRA. Our [May 14, 2009 Alert](#) discussed the new contractor (and subcontractor) reporting requirements attached to ARRA-funded projects. In our [May 15, 2009 Alert](#), we discussed the enhanced oversight of ARRA-funded projects by the U.S. Government Accountability Office (GAO) and federal agencies' Inspectors General's offices.

In this fifth and final Alert of the series, we will discuss the rule requiring federal agencies to publicize contract actions funded by ARRA.

Federal Publication of Contract Actions (FAR Case 2009-010)

FAR Subpart 5.7 now requires agencies to enter into the Federal Procurement Data System and announce online at www.fedbizopps.gov contracting actions funded in whole or in part by ARRA. The requirements are obviously aimed at furthering the goal of transparency and holding agencies and contracting officials highly accountable for ARRA-funded contracts. The rule requires contracting officers to post the following for any covered contract action:

- Identification of an action as funded in whole or in part by ARRA²;
- Presolicitation notices of all proposed contract actions expected to exceed \$25,000 that are funded in whole or in part by ARRA, including a clear and unambiguous narrative description of the products and services requested³;
- Notice of award for any action exceeding \$500,000, including modifications and orders under task or delivery order contracts, including a clear and unambiguous narrative description of the products and services⁴; and
- Notice of award of any nonfixed price or noncompetitive contract—*regardless of dollar value*—and, for such contract actions, the aforementioned descriptive narrative must state the rationale for using other than a fixed-price and/or competitive approach.⁵ This is likely to enable either unsuccessful bidders or other competitors to review the notice of award and potentially take action.

These requirements do not supplant, and are in addition to, existing publishing requirements. As of March 31, 2009, the rule is effective and applies to solicitations issued, contracts awarded and orders issued under task and delivery contracts, as they are defined in the rule.

Observations and Practice Pointers

- The reporting requirements for federal agencies are likely to be extensive.

- At a recent conference attended by representatives of the U.S. General Services Administration and the U.S. Army Corps of Engineers, both agencies indicated that they would be relying substantially on the contractors (and subcontractors) to assist them in gathering the information required by the FAR and ARRA.
- One question may be whether an increase of new reporting will amount to information overload.
- When the rule is submitted to the public for comment⁶, an issue may be whether the threshold of posting all transactions expected to exceed \$25,000 is too low.
- It may benefit contractors by ensuring that noncompetitive procurements, where there is legitimate interest from others, cannot slip by.
- The announcement of so many awards is likely to give competitors of existing contractors greater knowledge of ARRA-funded contracts.
- Contracting officers may be challenged in attempting to articulate the rationale for use of a non-fixed-price and/or a noncompetitive approach without divulging proprietary information or information that could compromise national security.
- Considering the additional burdens on contracting officers, it is unknown whether necessary information regarding covered contracts can be publicized timely, so as to allow the rule to serve its intended purpose.

For Further Information

If you have any questions regarding this Alert or would like more information, please contact [Robert A. Prentice](#), [Richard P. Dyer](#), [Kenneth H. Lazaruk](#), [Daniel E. Toomey](#), any [member](#) of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. ARRA FAR Interim Rules, 74 Federal Register 14,622 (Mar. 31, 2009).
2. FAR 5.704(b).
3. FAR 5.704(a)(2).
4. FAR 5.705(a).
5. FAR 5.705(b).
6. Comments are due by June 1, 2009.