

## GOVERNMENT CONTRACTS ALERT: APRIL 2011

### **Watch For “Red Flags” When Evaluating and Reporting Subcontract Information**

Our July 2010 alert presented an overview of the new FAR requirements for reporting executive compensation and subcontract award information. This month we will focus on some specific issues relating to the latter, since a prime contractor in many cases is responsible for reporting to the Government the same “first-tier” subcontractor executive compensation information that it is required to report concerning the executive compensation paid to the prime’s own most highly compensated executives.

As we reported last July, FAR Subpart 4.14 and its implementing clause, FAR 52.204-10 (“Reporting Executive Compensation and First-Tier Subcontract Awards”), require that prime contractors report to the Government specific information concerning certain subcontracts with a value of \$25,000 or more, including the compensation that the prime’s subcontractors pay to their most highly compensated executives, and the names of those executives.<sup>1</sup> Prime contractors are required to inform their subcontractors that the required information will be made public.

FAR 52.204-10 requires that a prime contractor report to [www.fsrs.gov](http://www.fsrs.gov) the required subcontract award information by the end of the month *following* the month of award of a reportable first-tier subcontract, and annually thereafter. So, for example, a reportable subcontract that is awarded sometime in January must first be reported by the end of February.<sup>2</sup>

Contracting officers are supposed to review fsrs.gov information quarterly, and may exercise “appropriate contractual remedies” if a prime contractor fails to comply with subcontractor reporting requirements. In addition to noting a contractor’s failure to report as part of his/her past performance evaluation of a contractor, a contracting officer could conceivably consider a default termination an “appropriate” remedy.

### **The bottom line this month:**

1) Before awarding a subcontract for more than \$25,000, a prime contractor should review the requirements of FAR 52.204-10 to determine if they apply to that subcontract. This may be more difficult than it appears; for example, the FAR does not spell out what documentation a prime contractor should review in determining whether one of its subcontractors had less than \$300,000 in gross income in the previous year.

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<sup>1</sup> There are some exceptions to the reporting requirement. For example, a prime contractor does not have to report subcontracts awarded to a company that had less than \$300,000 in gross income from all sources in the last tax year.

<sup>2</sup> Reporting instructions may be found at [https://www.fsrs.gov/documents/FSRS\\_Awardee\\_User\\_Guide.pdf](https://www.fsrs.gov/documents/FSRS_Awardee_User_Guide.pdf).

2) The FAR also is silent on the type of evidence that a prime can rely on in determining whether one of its subcontractors is exempt from reporting its executives' compensation. As a result, if a subcontractor claims that it is exempt from FAR 52.204-10's requirements for some reason, the prime should obtain from the sub a signed certificate of exemption.

3) A prime contractor should include in all reportable subcontracts for more than \$25,000 a requirement that the subcontractor provide to the prime both initial and updated information required by FAR 52.204-10, including total compensation of the subcontractor's most highly compensated executives.

4) Because the FAR requires that the required subcontract data be made public, a prime contractor should insert a provision, both in its teaming agreements and subsequent subcontracts, that puts the intended subcontractor on notice of this requirement.

5) A prime contractor should provide a remedy in its subcontracts for the subcontractor's failure to provide initial and updated information required by FAR 52.204-10. Remember that the contracting officer will look to the prime contractor, not the subcontractor, in the event he/she discovers a failure to report.

6) Since a prime contractor must file both an initial report and a subsequent report on the anniversary date of each covered subcontract, primes should keep careful records of subcontract award dates. It is best to have one point of contact within your company who is responsible for this effort.

Please contact me with any questions or concerns you may have.

**This alert is intended to be a general summary of the law, and does not constitute legal advice.**