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The New Federal Contractor Transparency Rules

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February 2011

One response to the shortage of experienced federal contracting personnel and qualified DCAA auditors is to turn the job over to the public at large. That seems to be the plan when it comes to the new federal contractor transparency initiatives, the most recent of which is the rule that will make the Federal Awardee Performance and Integrity Information System (FAPIS) available to the public after April 15, 2011. Like the business model adopted by Wikileaks, the concept appears to be that posting selected contractor performance data on the Internet will be like hiring 300 million inspectors general. As with many government initiatives, the results are likely to cost more and achieve less than anticipated.

Executive Compensation Disclosures

The requirement for some federal contractors and subcontractors to report executive compensation comes from the Government Funding Transparency Act of 2008. The new Federal Acquisitions Regulation clause on executive compensation reporting first went into effect in 2009, along with the broad reporting requirements included in the American Recovery and Reinvestment Act (ARRA).

Under the ARRA reporting clause, FAR 52.204-11, contractors and first-tier subcontractors that meet applicable revenue thresholds are required to disclose the "total compensation" of their five most highly compensated officers. The executive compensation reporting requirements first applied to ARRA have now been extended to all federal contracts.

The new clause, FAR 52.204-10, was published on July 8, 2010. The reporting requirements apply only to contractors and subcontractors that meet three criteria:

1. Their gross revenues from federal contracts, subcontracts, grants or subgrants must be at least \$25 million;
2. Their gross revenues from federal contracts, subcontracts, grants or subgrants must be at least 80 percent of their total revenues; and
3. The executive compensation data is not otherwise publicly available through "periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 or section 6104 of the Internal Revenue Code of 1986."

Reporting First-Tier Subcontract Awards over \$25,000

The ARRA requirement to report first-tier subcontract awards has similarly been extended to all federal contracts. After March 1, 2011, prime contractors must report a broad array of information about all first-tier subcontracts of \$25,000 or more. The reporting requirements include the name and address of the subcontractor, the subcontractor's DUNS number, the amount of the subcontract, the place of performance, a description of the products or services being provided, and the applicable NAICS Code.

Although privately-held contractors would normally

regard the details of their executive compensation and subcontract awards as proprietary and therefore exempt from inspection by the public, the new FAR clauses make it clear that the reported data will be available for inspection on the internet. Reports will be filed electronically at www.fsr.gov and available to the public at www.usaspending.gov. It will be interesting to see how the government presents the data it receives. Looking at the available data reported by ARRA contractors may be a good starting point. ARRA data is available in a Microsoft Excel file at www.recovery.gov.

FAPIS

The federal transparency initiative does not end with executive compensation and subcontract awards. An interim FAR clause published on January 24, 2011, advises contractors that data contained in the Federal Awardee Performance and Integrity Information System will also be available to the public. Under FAR 52.209-9, "all information posted in FAPIS on or after April 15, 2011, except past performance reviews, will be publicly available."

Past performance reviews will be excluded from the public version of FAPIS, but "information regarding responsibility matters" will be included. That would include suspensions or debarments, default terminations, and other events that bear on a contractor's responsibility.

Moreover, government employees are no longer the only source of such information. FAR 52.209-7, which will appear in solicitations for contracts expected to exceed \$500,000 and in contracts awarded to companies that have "current active federal contracts and grants with total value greater than \$10,000,000," imposes affirmative reporting obligations on the contractor itself.

The self-reporting requirement in FAR 52.209-7 would apply in four scenarios:

- **Conviction in a criminal proceeding.** The reporting requirement would arise if the offeror or any of its principals is convicted in a criminal proceeding relating to a federal contract awarded to or performed by the offeror.
- **Finding of fault in a civil proceeding.** An offeror would be required to report the disposition of a civil proceeding relating to a federal contract awarded to or performed by the offeror in which the offeror or any of its principals is found liable and assessed a fine, penalty, reimbursement, restitution or damages of \$5,000 or more.
- **Finding of fault in an administrative proceeding.** An offeror would be required to report the disposition of an administrative proceeding relating to a federal contract awarded to or performed by the offeror in which the offeror or any of its principals is found liable and assessed a fine or penalty of at least \$5,000 or more or reimbursement, restitution or damages in excess of \$100,000.
- **Admission of fault or liability in a settlement.** An offeror would be required to report a settlement of a reportable civil, administrative or criminal proceeding if the settlement contains an admission of fault.

There are obvious limits to the self-reporting obligation imposed by FAR 52.209-7. Settlements that include language disclaiming any fault or liability would fall outside the rule, for example, as would matters unrelated to a federal contract or grant awarded to or performed by the contractor and matters resolved more than five years before the certification is made.

In existing contracts that do not have FAR 52.209-7, there may even be some discretion in how the requirement is implemented. The instructions accompanying the new clause direct contracting officers to negotiate a "bilateral modification" with the contractor and suggest that an "alternate resolution" may be available.

Even assuming that a contractor is subject to the reporting requirement, there is no prohibition against the inclusion of material that would mitigate negative inferences that might be drawn from information reported under this clause. Whenever a government representative adds information to a FAPIIS record, the affected contractor will receive notification and an opportunity to respond in writing. The contractor's comments will be retained along with the associated information.

Posting Contract Documents on the Internet . . . Not Yet

The federal contracting transparency initiatives will not yet include the publication of actual contract documents on the Internet. According to a Federal Register notice published on February 10, 2011, the FAR Councils have withdrawn that proposal, at least for now.

The proposal to put the text of federal contract documents online was formally raised on May 13, 2010. That day, the FAR Councils published an advance notice of proposed rulemaking reflecting their belief that such on-line access would soon be a requirement. Despite the problems that internet access to contract documents might create, the assumption that it would be part of the effort to increase transparency in contracting seemed well-founded. Federal spending on contracts had doubled in the preceding ten years. Congress had passed the *Federal Funding Accountability Act of 2006*, the *Government Funding Transparency Act of 2008*, and the *American Recovery and Reinvestment Act of 2009*. Early in 2009, President Obama issued a number of policy directives mandating increased transparency. Posting contracts on the Internet was just part of the trend.

Now it appears that the problems with putting federal contracts online could not easily be resolved or ignored. In its February 10, 2011 notice, the FAR Councils acknowledge that the majority of those who submitted comments were concerned about the conflict between automatic posting of contract documents and the protections afforded by the Freedom of Information Act (FOIA). Of course the FOIA protection most closely linked with federal contracting is Exemption 4, which provides that trade secrets and confidential commercial or financial information need not be released to the public.

Rather than suggesting a solution to this problem or

simply announcing its disagreement, the FAR Councils took a more balanced approach. The notice announcing the withdrawal of the proposal to post contracts on the internet acknowledges that "FOIA regulations and procedures . . . must be closely examined by the FOIA experts and adequately addressed." *76 Fed. Reg. 7523 (Feb. 10, 2011)*. Existing FOIA regulations and procedures include a requirement that contractors be given notice and an opportunity to object to the impending public release of their proprietary information.

Moving Forward

Certainly, not all contractor data is confidential. There is a legitimate public interest in combating fraud, waste and abuse in federal contracting. But it is not at all clear that the transparency initiatives currently underway will promote the desired result. Detection of fraud, waste and abuse will not be enhanced simply by requiring contractors to identify their highly paid executives or the names of their subcontractors.

The new reporting requirements will increase the cost of contract administration. Contractors will be required to implement yet another new administrative mechanism that allow them to meet the requirement for accuracy, currency and completeness of their self-reporting certification.

Another obvious negative consequence of the new transparency requirements is that they will further reduce the universe of companies that might be willing to endure the red tape required to perform government contracts. We need a contracting environment that will encourage good companies to do business with the federal government.

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