

On July 8, 2010, FAR 201.16-4 was published in the [Federal Register](#), implementing FAR Case 2008-039 (“Reporting Executive Compensation and First-Tier Subcontract Awards”) as an interim rule, “to implement section 2 of the Federal Funding Accountability and Transparency Act of 2006, as amended by section 6202 of the Government Funding Transparency Act of 2008, which requires the Office of Management and Budget (OMB) to establish a free, public, website containing full disclosure of all Federal contract award information.” Well, then.

What does the rule require? There are two fundamental requirements:

1. Prime contractors will need to report “executive compensation” (see 31.205-6(p) for limitations on the allowability of executive compensation) for its five most highly compensated executives. In addition, the prime will need to report the compensation for the top five most highly compensated executives of its first-tier subcontractors.
2. Prime contractors will need to report all first-tier subcontract awards valued in excess of \$25,000.

The new rule revised FAR Part 4.14 (including renaming the section from “Reporting Subcontract Awards” to “Reporting Executive Compensation and First-Tier Subcontract Awards”) and implemented a new solicitation provision/contract clause (52.204-10, “Reporting Executive Compensation and First-Tier Subcontract Awards”). The solicitation provision/contract clause is to be included in all solicitations and contracts valued at \$25,000 or more, except for classified contracts and contracts with individuals.

Qualifying contractors must report annually on the executive compensation of the entity’s top five most highly compensated employees to <http://www.ccr.gov>. Qualifying contractors include those who, in the preceding fiscal year—

- Received 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- Received \$25,000,000 or more in annual gross revenues 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 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.

Prime contractors must also report the executive compensation of their qualifying first-tier subcontractors top five most highly compensated employees to <http://www.fsrs.gov>

. First-tier subcontractors qualify for reporting based on the same three conditions listed above.

With respect to the second requirement (i.e., reporting awards of first-tier subcontracts), the new rule provided—

- 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 1, 2011, any newly awarded subcontract must be reported if the prime contract award amount was \$25,000 or more.

The following information must be reported (subject to the above phase-in requirements)—

- Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.
- Name of the subcontractor.
- Amount of the subcontract award.
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Date of the subcontract award.

- A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.
- Subcontract number (the subcontract number assigned by the Contractor).
- Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district.
- Subcontractor's primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district.
- The prime contract number, and order number if applicable.
- Awarding agency name and code.
- Funding agency name and code.
- Government contracting office code.
- Treasury account symbol (TAS) as reported in FPDS.
- The applicable North American Industry Classification System code (NAICS).

The new rule applies to contract actions below the simplified acquisition threshold, acquisitions of commercial items, and acquisitions of commercially available off-the-shelf (COTS) items. Failure to comply with the new reporting requirements—

Written by Administrator
Wednesday, 14 July 2010 00:00

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 Subpart 42.15.

We also note that the new rule has a powerful definition of first-tier subcontract. Historically, the FAR has lacked such a definition; there is a definition in Part 44 but it is not especially useful. Accordingly, we were pleased to see the FAR Councils tackle the potentially contentious issue. Here is how the new rule defines “first-tier subcontract”—

First-tier subcontract means a subcontract awarded directly by a Contractor to furnish supplies or services (including construction) for performance of a prime contract, but excludes supplier agreements with vendors, such as long-term arrangements for materials or supplies that would normally be applied to a Contractor's general and administrative expenses or indirect cost.

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Here's a [great write-up](#) of the new rule, published by the law firm Crowell & Moring.

When we looked at the rule, on first blush it appeared that the new requirements are going to be burdensome. But on second look we're not so sure. First, most of the larger contractors will be exempted from the compensation reporting requirements because they already publish executive compensation information to the Securities & Exchange Commission. Second, some of the commercial contractors will be exempted from the compensation reporting requirements because they don't receive more than 80 percent of their revenue from the Federal government. Finally, the very smallest contractors will be exempted from the compensation reporting requirements because they receive less than \$25 million in annual Federal revenue. Those exemptions are going to reduce significantly the number of entities for whom exemption compensation information will need to be reported. That will leave the requirement to report first-tier subcontract awards, which will be borne by the prime contractors. And they should be able to handle the additional reporting requirements. We hope.

FAR Revised to Enhance Transparency and To Add Additional Mandatory Reporting Requirements

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