

Reporting Executive Compensation and First-Tier Subcontract Awards

Written by Nick Sanders
Tuesday, 31 July 2012 00:00

In July, 2010, FAC 2005-44 implemented FAR Case 2008-039 on an interim basis. We told you about the interim rule in this pithy [blog article](#) . As we told you, the interim rule had 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.

Contractors that were required to comply with the new rule included those that—

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Received 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements in the preceding fiscal year; and

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Received \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements in the preceding fiscal year; and

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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.

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We opined on the interim rule as follows—

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.

Well, FAC 2005-60, just published on July 26, 2012, implemented the [final rule](#) on this topic. The final rule contains some changes from the interim rule. Readers should note that any contract that contains the interim (July 2010) 52.204-10 contract clause language is supposed to be modified ("on a bilateral basis") to update the clause to this July 2012 revision.

The rule-makers had to deal with a number of negative public comments, most of which complained about things over which the rule-makers had little discretion. Readers, when there is a statute requirement, the FAR Councils pretty much have to implement it. That said, the rule-makers seemed to relish using what discretion they had to implement the statutory requirement on commercial item contracts and classified contracts. We're just sayin'.

The final rule applies to all contracts valued at \$25,000 or more. Period.

The first-tier subcontract reporting requirement applies to "first-tier subcontracts," as defined by the provision/clause language at 52.204-10 (July 2012 version). The definition of "first-tier subcontract," for purposes of complying with this rule, is—

First-tier subcontract means a subcontract awarded directly by the Contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term

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arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs.

The executive compensation reporting requirement is the same as for the interim rule. No changes there.

Prime contractors have one month after award to report their first-tier subcontract awards. They must report the same data items as were listed in the interim rule. No changes there.

As with the interim rule, prime contractors must also report executive compensation of their first-tier subcontractors. No changes there. However, the final rule provides that—

The [Prime] Contractor is required to report information on a first-tier subcontract covered by paragraph (d) when the subcontract is awarded. Continued reporting on the same subcontract is not required unless one of the reported data elements changes during the performance of the subcontract. The Contractor is not required to make further reports after the first-tier subcontract expires.

So our opinion of this reporting requirement hasn't really changed. This is going to add a little bit of work to the Supply Chain Management personnel in the Prime Contractors. There will be some rough patches during implementation, because some smaller companies won't easily accept that they need to provide the required compensation data. But there's a statute and a FAR provision/clause that supports the requirement.

So kvetch all you want, you still have to comply. And so do your first-tier subcontractors.