

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR–2010–0076, Sequence 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–44; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of an interim rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–44. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://regulations.gov/>.

DATES: For effective date, see separate document, which follows.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below in relation to the FAR case or subject area. Please cite FAC 2005–44 and the FAR case number. Interested parties may also visit our Web site at <http://acquisition.gov/far>. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

RULE LISTED IN FAC 2005–44

| Subject | FAR case | Analyst |
|--|----------|---------|
| Reporting Executive Compensation and First-Tier Subcontract Awards | 2008–039 | Woodson |

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments to this FAR case, refer to FAR case 2008–039.

FAC 2005–44 amends the FAR as specified below:

Reporting Executive Compensation and First-Tier Subcontract Awards (FAR Case 2008–039)

This interim rule amends the Federal Acquisition Regulation to implement section 2 of Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110–252), which requires the Office of Management and Budget (OMB) to establish a free, public, website containing full disclosure of all Federal contract award information. This rule will require contractors to report executive compensation and first-tier subcontract awards on contracts and orders expected to be \$25,000 or more (including all options), except classified contracts and contracts with individuals. This information will be available to the public. To minimize the burden implementing the Transparency Act will impose on both Federal agencies and contractors, the Councils intend to implement the reporting requirements in a phased approach:

1. Until September 30, 2010, any newly awarded subcontract must be reported if the prime contract award amount was \$20,000,000 or more.

2. 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.

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

The rule is applicable to all solicitations and contracts with a value of \$25,000 or more. The clause is required in commercial item contracts, including commercially available off-the-shelf (COTS) item contracts, as well as actions under the simplified acquisition threshold, meeting the \$25,000 threshold. The clause is not required in classified solicitations and contracts, and contracts with individuals.

Dated: July 2, 2010.

Edward Loeb,
Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–44 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–44 is effective July 8, 2010.

Dated: July 2, 2010.

Linda W. Nielson,
Deputy Director, Defense Procurement and Acquisition Policy (Defense Acquisition Regulations System).

Dated: June 30, 2010.

Edward Loeb,
Acting Deputy Associate Administrator for Acquisition Policy, Office of Acquisition Policy, U.S. General Services Administration.

Dated: June 29, 2010.

William P. McNally,
Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 2010–16693 Filed 7–7–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 12, 42, and 52

[FAC 2005–44; FAR Case 2008–039; Docket 2010–0093, Sequence 1]

RIN 9000–AL66

Federal Acquisition Regulation; FAR Case 2008–039, Reporting Executive Compensation and First-Tier Subcontract Awards

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) 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. This rule will require contractors to report executive compensation and first-tier subcontractor awards on contracts expected to be \$25,000 or more, except classified contracts, and contracts with individuals.

DATES: *Effective Date:* July 8, 2010.

Applicability Date: Contracting officers shall include the FAR clause at 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, in accordance with FAR 4.1403, in solicitations issued on or after the effective date of this rule, and resultant contracts. Contracting officers shall modify existing indefinite-delivery indefinite-quantity (IDIQ) contracts on a bilateral basis in accordance with FAR 1.108(d)(3) to include the clause for future orders. This includes modifying blanket purchase agreements under IDIQ contracts. IDIQ contracts include Federal Supply Schedule contracts and task- and delivery-order contracts such as Governmentwide acquisition contracts.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before September 7, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-44, FAR case 2008-039, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2008-039" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "FAR Case 2008-039". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2008-039" on your attached document.

- *Fax:* 202-501-4067.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room

4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-44, FAR case 2008-039, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. Please cite FAC 2005-44, FAR case 2008-039. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

On September 26, 2006, the Federal Funding Accountability and Transparency Act (Transparency Act), Public Law 109-282, 31 U.S.C. 6101 note, was enacted to reduce "wasteful and unnecessary spending," by requiring that OMB establish a free, public, website containing full disclosure of all Federal award information for awards of \$25,000 or more. The Transparency Act required, by January 1, 2009, reporting on subcontract awards by Federal Government contractors and subcontractors. The Transparency Act's initial phase was conducted as a Pilot Program (Pilot), to test the collection and accessibility of the subcontract data. In order to implement the Pilot, a proposed rule was published in the **Federal Register**, March 21, 2007 (72 FR 13234).

A final rule implementing the Pilot was published in the **Federal Register**, September 6, 2007 (72 FR 51306). Exempted from the Pilot were solicitations and contracts for commercial items issued under FAR part 12 and classified solicitations and contracts. To minimize the burden on Federal prime contractors and small businesses, the Pilot applied to contracts with a value greater than \$500,000,000 and required the awardees to report all subcontract awards, exceeding \$1,000,000 to the Transparency Act database at <http://www.esrs.gov>. The Pilot terminated January 1, 2009.

On June 30, 2008, Section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252) amended the Transparency Act to require the Director of OMB to include an additional reporting element, requiring contractors and subcontractors to disclose information on the names and total

compensation of their five most highly compensated officers.

On March 31, 2009, the Councils published in the **Federal Register** at 74 FR 14639 FAR case 2009-009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements, which required contractors receiving a Recovery Act funded contract award to provide detailed information on subcontracts, including the data elements required to comply with the Transparency Act. Although the Transparency Act reporting requirements flow down to all subcontracts, regardless of tier, the Recovery Act limited the reporting on subcontract awards to the contractor's first-tier subcontractors.

The Office of Management and Budget directed that the FAR be amended to initiate subcontract award reporting under the Transparency Act:

- Subcontract reporting would apply only to first-tier subcontracts;
- The rule would phase-in the reporting of subcontracts of \$25,000 or more:

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

- By the end of the month following the month of award of a contract, and annually thereafter, the contractor shall report the names and total compensation of each of the five most highly compensated executives for the contractor's preceding completed fiscal year;

- Unless otherwise directed by the contracting officer, by the end of the month following the month of award of a first-tier subcontract, and annually thereafter, the contractor shall report the names and total compensation of each of the five most highly compensated executives for the first-tier subcontractor's preceding completed fiscal year;

- There would be a \$300,000 gross income exception for prime contractors and subcontractors; and

- Data quality requirements would apply to agencies and contractors.

Many of these directions minimize burden on contractors.

The rule will require contractors to report subcontracts of \$25,000 or more, and any modifications made to those

subcontracts which change previously reported data.

The reporting requirements of the Transparency Act are sweeping in their breadth, and are intended to empower the American taxpayer with information that may be used to demand greater fiscal discipline from both executive and legislative branches of Government. The Transparency Act reporting requirements apply to all businesses (large, small, disadvantaged small, veteran-owned small, women-owned small, HUBZone small), regardless of business size or ownership.

This rule revises FAR subpart 4.14 and FAR 52.204–10 to implement the Transparency Act reporting requirements. Contracting officers must include the revised clause in solicitations and contracts of \$25,000 or more. The clause is required in commercial item contracts, including commercially available off-the-shelf (COTS) item contracts, as well as actions under the simplified acquisition threshold, meeting the \$25,000 threshold. The clause is not required in classified solicitations and contracts, and contracts with individuals.

Contractors will provide these subcontract reports to the Federal Funding Accountability and Transparency Act Sub-award Reporting System (FSRS) (<http://www.fsrs.gov>). FSRS is a module of the Electronic Subcontracting Reporting System (eSRS) designed specifically to collect the Transparency Act required data.

Contracting officers will be required to modify existing contracts to cover future orders—see the Applicability Date above.

B. Determinations

The Councils provide the following determinations with respect to the rule's applicability to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, commercial items, and commercially available off-the-shelf (COTS) items.

1. *Applicability to contracts at or below the simplified acquisition threshold.* 41 U.S.C. 429 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. If a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition

threshold, the law will apply to them. Therefore, given that the Transparency Act was enacted to reduce “wasteful and unnecessary spending” by requiring that the Office of Management and Budget (OMB) establish a free, public, Web site containing full disclosure of all Federal contract award information, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to solicitations and contracts at or below the simplified acquisition threshold, as defined at 2.101.

2. *Applicability to commercial item contracts.* 41 U.S.C. 430 governs the applicability of laws to commercial items and is intended to limit the applicability of laws to commercial items.

Section 430 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items. Therefore, given that the Transparency Act was enacted to reduce “wasteful and unnecessary spending” by requiring that OMB establish a free, public, Web site containing full disclosure of all Federal contract award information, the FAR Council has determined that it is in the best interest of the Federal Government to apply the rule to commercial items, as defined at FAR 2.101, both at the prime and subcontract levels.

3. *Applicability to commercially available off-the-shelf (COTS) item contracts.* 41 U.S.C. 431 governs the applicability of laws to the procurement of COTS items, and is intended to limit the applicability of laws to them. Even if a law has been determined to apply to commercial items in general, COTS items may be exempt. Section 431 provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply. The same applies for subcontracts for COTS items. Therefore, given that the Transparency Act was enacted to reduce “wasteful and unnecessary spending” by requiring that OMB establish a free, public, online Web site containing full disclosure of all Federal contract award information, the Administrator for Federal Procurement Policy has determined that it is in the best interest of the Federal Government to apply the rule to COTS item contracts

and subcontracts, as defined at FAR 2.101.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

This interim rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because it requires contractors to report information on first-tier subcontract awards of \$25,000 or more, except classified contracts and contracts with individuals. The rule also requires contractors to report the names and total compensation of each of the contractor's and first-tier subcontractors' five most highly compensated executives for the contractor and its subcontractor's preceding completed fiscal year. The rule requires that first-tier subcontractors provide the total compensation information to the contractor for reporting purposes. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

1. Reasons for the action.

This action implements the Federal Funding Accountability and Transparency Act (“Transparency Act”), (Pub. L. 109–282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110–252), enacted to reduce “wasteful and unnecessary spending” by requiring that the Office of Management and Budget (OMB) establish a free, public, online database containing full disclosure of all Federal contract award information.

2. Objectives of, and legal basis for the rule.

The objective of the rule is to empower the American taxpayer with information that may be used to demand greater fiscal discipline from both executive and legislative branches of Government. The legal basis for the rule is the Transparency Act and the Government Funding Transparency Act of 2008. According to the sponsors of the Transparency Act, the new database will deter “wasteful and unnecessary” spending, since Government officials will be less likely to earmark funds for special projects if they know the public could identify how much money was awarded to which organizations, and for what purposes.

3. Description and estimate of the number of small entities to which the rule will apply.

The rule applies to all contracts and subcontracts, of \$25,000 or more and any modifications to those subcontracts that change previously reported data. The clause is not required in classified solicitations and contracts, and contracts with individuals. The rule requires contractors to report first-

tier subcontract award information and annually report the contractor's and first-tier subcontractors' five most highly compensated executives for the contractor and subcontractor's preceding completed fiscal year. To arrive at an estimate of the number of small businesses to which the rule would apply, the Councils queried the Federal Procurement Data System (FPDS) for FY 09 contract award information. Based on the FPDS data collected there were 188,712 unique DUNS numbers for contractors Governmentwide. Within this group 146,905 were reported as small businesses based on the Contracting Officer's Determination of Business Size. The Government does not have a system in place that provides information on the actual number of first-tier subcontracts awarded by Government prime contractors, but believes the vast majority of first-tier subcontractors will be small businesses. Using a formula previously used in FAR Case 2009-009, American Recovery and Reinvestment Act of 2009 (Recovery Act)—Reporting Requirements, it is estimated that the number of small businesses that may be first-tier subcontracts and be subject to the rule will be three times the number of small businesses that received prime contract awards.

Given that understanding, the number of small businesses that may be awarded first-tier subcontracts and be subject to the rule's reporting requirements under FAR 52.204-10(c)(1)(i) through (xiv) is estimated to be 440,715 (146,905 x 3). This does not take into account a reduction for the exception for entities that had gross income, from all sources, under \$300,000.

To calculate the number of small businesses that may be subject to the rule's requirement to report the contractor's and first-tier subcontractors' five most highly compensated executives, for the contractor and first-tier subcontractor's preceding completed fiscal year, the Councils estimate that number to be 29,381 or 20 percent of the number of unique DUNS numbers (146,905) Governmentwide in FPDS in FY 09. This estimate is based on the assumption that the vast majority of small businesses will be exempt from the compensation reporting requirement because they will meet the exemptions in section 2(e) and section 2(b)(1)(F) of the Transparency Act (see item 6 below).

Accordingly, the Councils believe 617,001 is a reasonable estimate of the total number of small businesses, both as prime and first-tier subcontractors to whom the rule will apply.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The rule requires prime contractors to report first-tier subcontract data on first-tier subcontract awards of \$25,000 or more, in <http://www.fsrs.gov>. The rule also requires contractors to report, at <http://www.ccr.gov>, the names and total compensation of each of the contractor's five most highly

compensated executives, for the contractor's preceding completed fiscal year in which the awards were made, and to make a similar report for subcontractors at <http://www.fsrs.gov>. The rule applies to all businesses (large, small, disadvantaged small, veteran-owned small, HUBZone small, women-owned small), regardless of business size or ownership. The professional skills necessary for the preparation of the report would probably be prepared by a company office or division manager or a company subcontract administrator.

Section 2(e) of the statute allows the Director, OMB, to exempt any entity that demonstrates its gross income, from all sources, did not exceed \$300,000 in the entity's previous tax year, from reporting the first-tier subcontract award information, until the Director determines that the imposition of the reporting requirement will not cause undue burden on the entity. The Director has exempted them.

Also, contractors and first-tier subcontractors are not required to report the total compensation information required by the rule, unless—

a. In the contractor or subcontractor's preceding fiscal year, the contractor or subcontractor received—

1. 80 percent or more of its annual gross revenue in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

2. \$25,000,000 or more in annual gross revenue from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

b. The public does not have access to information about the compensation of the senior 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.

Additionally, the rule minimizes the burden on small entities by phasing-in reporting requirements. Beginning on the date of publication of the rule, contractors report newly awarded subcontracts exceeding \$20 million; starting October 1, 2010, contractors report newly awarded subcontracts of \$550,000 or more; starting March 1, 2011 they report newly awarded subcontracts of \$25,000 or more.

Many contractors received contract funds under the American Recovery and Reinvestment Act of 2009, and therefore are familiar with the basic idea of reporting this kind of information into a database.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule follows the September 6, 2007 Pilot Program final rule FAR Case 2006-029, which has expired. It also follows the Recovery Act reporting rule, FAR Case 2009-009, which also requires the public to report into a database on Recovery Act monies; because of this, there will be some duplication of reporting into databases.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

The alternatives to the rule would have a heavier burden on small entities. For example, the reporting tier could go below the first-tier subcontract; the \$300,000 exception would not be used; there would be no pre-population of some data elements; there would be no phase-in periods and the \$25,000 threshold would apply immediately.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the Regulatory Secretariat. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-44, FAR Case 2008-039) in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the interim rule contains information collection requirements. Accordingly, the Regulatory Secretariat forwarded an emergency information collection request for approval of a new information collection requirement to the Office of Management and Budget under 44 U.S.C. Chapter 35, et seq. OMB approved the new information collection requirement as OMB Control No. 9000-0177. Comments to the interim rule as well as the information collection requirement will be considered in the revisions to both the rule and the collection.

The rule requires that all solicitations and contracts of \$25,000 or more contain the clause at FAR 52.204-10. The clause flows down to first-tier subcontracts. Reporting is phased-in.

The rule also requires contractors, unless otherwise directed by a contracting officer, to report first-tier subcontracts in accordance with the data elements at FAR paragraphs 52.204-10(c)(1)(i) through (xiv) to <http://www.fsrs.gov> by the end of the month following the month in which the subcontract award is made.

Additionally, FAR 52.204-10(c)(2) and (3) require certain contractors and first-tier subcontractors to publicly disclose the names and total compensation of

each of the contractor and subcontractor's five most highly compensated executives for the preceding completed fiscal year in which the award was made. The FAR clause requires this compensation disclosure for contractors as well because to exclude contractors while requiring disclosure for first-tier subcontractors would be unsupported given the transparency goals of the Transparency Act. The clause imposes public reporting burdens on contractors and first-tier subcontractors performing under a Government contract.

Based on the FPDS data collected, there were 188,712 unique DUNS numbers for contractors Governmentwide. Of this amount 146,905 were small businesses and 41,707 were other than small businesses. The Councils believe that 6256 or 15 percent of the other than small businesses do not disclose the compensation information 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, and therefore would be subject to the rule. Given the number of small businesses (29,381) that will be subject to the compensation reporting requirement, the Councils estimate that total number of prime contractors and first-tier subcontractors to whom the reporting requirement under FAR 52.204-10(c)(2) and (3) would apply is 35,637.

Based on the above and the calculations below, the Councils estimate the annual burden associated with reporting requirements of FAR 52.204-10 to be \$22,608,776. The public reporting for this burden is estimated to average .5 hour per response for reporting under FAR 52.204-10(c)(1)(i) through (xiv), and .5 reporting hour under FAR 52.204-10(c)(2) and (3). The reporting burden includes the time for reviewing instructions, and reporting the data. It does not cover the time required to conduct research or the time to obtain the information for the data elements.

1. *Reporting Elements under FAR 52.204-10(c)(1)(i) through (xiv)*. We estimate the total annual public cost burden for these elements to be \$21,397,118 based on the following:

The annual reporting burden is estimated as follows:

Respondents: 629,327 (number of first-tier subcontractors (440,715) + prime small (146,905) and other than small businesses (41,707)).

Responses per Respondent: 1.

Total Annual Responses: 629,327.

Preparation Hours per Response: .5.

Total Response Burden Hours:

314,664.

Average Hourly Wages (\$50.00 + 36.35% overhead): \$68.00.

Estimated Cost to the Public:

\$21,397,118.

2. *Reporting Elements Under FAR 52.204-10(c)(2) and (3)*. Given FPDS data for unique DUNS numbers for FY 09, the Councils estimate that 29,381 or 20 percent of small businesses with unique DUNS numbers in FPDS will be required to report the total compensation information due to the presumption that the majority of such businesses, both as prime and first-tier subcontractors will be exempt from the reporting requirement, because they meet the exceptions provided by the Transparency Act. The Councils believe that only 6256 or 15 percent of the other than small businesses (41,707) with unique DUNS in FPDS would be subject to the reporting requirement, because it presumes that 85 percent of the other than small businesses already provide the total compensation information 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.

Therefore, the Councils believe that 35,637 first-tier subcontractors and prime contractors would be required to disclose the compensation information.

We estimate the total annual public cost burden for this element to be \$1,211,658 based on the following:

Respondents: 35,637 subcontractors and prime contractors.

Responses per Respondent: 1.

Total Annual Responses: 35,637.

Preparation Hours per Response: .5.

Total Response Burden Hours: 17,819.

Average Hourly Wages (\$50.00 + 36.35% overhead): \$68.00.

Estimated Cost to the Public:

\$1,211,658.

E. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than September 7, 2010 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000-0177, Federal Funding Accountability and Transparency Act (Transparency Act), in all correspondence.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR,

and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (MVCB), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control No. 9000-0177, Federal Funding Accountability and Transparency Act (Transparency Act), in all correspondence.

F. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Federal Funding Accountability and Transparency Act (Transparency Act) (Pub. L. 109-282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252), required the reporting of subcontract award data by January 1, 2009. This rule is a follow-up to the Pilot Program rule in FAR Case 2006-029, published March 21, 2007 (72 FR 13234) as a proposed rule, and September 6, 2007 (72 FR 51306) as a final rule; the preamble discussions notified the public to expect the final program thresholds to be at the greatly lowered thresholds in the statute, for example, requiring the reporting of subcontracts of \$25,000 or more. Failure to implement the statute as required will undermine the Transparency Act's intent to empower the American taxpayer with information that may be used to demand greater fiscal discipline from both executive and legislative branches of Government. However, pursuant to 41 U.S.C. 418b and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4, 12, 42, and 52

Government procurement.

Dated: July 2, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 12, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 12, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Revise subpart 4.14 to read as follows:

Subpart 4.14—Reporting Executive Compensation and First-Tier Subcontract Awards

Sec.

4.1400 Scope of subpart.

4.1401 Applicability.

4.1402 Procedures.

4.1403 Contract clause.

Subpart 4.14—Reporting Executive Compensation and First-Tier Subcontract Awards

4.1400 Scope of subpart.

This subpart implements section 2 of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110–252), which requires contractors to report subcontract award data and the total compensation of the five most highly compensated executives of the contractor and subcontractor. The public may view first-tier subcontract award data at <http://usaspending.gov>.

4.1401 Applicability.

(a) This subpart applies to all contracts with a value of \$25,000 or more, except classified contracts and contracts with individuals.

(b) The reporting requirements will be phased-in according to the schedule in 52.204–10(e).

(c) For all phases, reporting of subcontract information will be limited to the first-tier subcontractor.

4.1402 Procedures.

(a) Agencies shall ensure that contractors comply with the reporting requirements of 52.204–10, Reporting Executive Compensation and First-Tier Subcontract Awards. Agencies shall review contractor reports on a quarterly basis to ensure the information is consistent with contract information. The agency is not required to address data for which the agency would not normally have supporting information, such as the compensation information

required of contractors and first-tier subcontractors. However, the agency shall inform the contractor of any inconsistencies with the contract information and require that the contractor correct the report, or provide a reasonable explanation as to why it believes the information is correct. Agencies may review the reports at <http://www.fsr.gov>.

(b) When contracting officers report the contract action to the Federal Procurement Data System (FPDS) in accordance with FAR subpart 4.6, certain data will then pre-populate from FPDS, to assist contractors in completing and submitting their reports. Contracts reported using the generic DUNS number allowed at FAR 4.605(b)(2) will interfere with the contractor's ability to comply with this reporting requirement, because the data will not pre-populate from FPDS.

(c) If the contractor fails to comply with the reporting requirements, 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.

(d) There is a reporting exception in 52.204–10(d) for contractors and subcontractors who had gross income in the previous tax year under \$300,000.

4.1403 Contract clause.

(a) Except as provided in paragraph (b) of this section, the contracting officer shall insert the clause at 52.204–10, Reporting Executive Compensation and First-Tier Subcontract Awards, in all solicitations and contracts of \$25,000 or more.

(b) The clause is not required in—

(1) Classified solicitations and contracts; or

(2) Solicitations and contracts with individuals.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.503 [Amended]

■ 3. Amend section 12.503 by removing and reserving paragraph (a)(6).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.1501 [Amended]

■ 4. Amend section 42.1501 by adding the words “the contractor's reporting into databases (see subparts 4.14 and 4.15);” after the word “satisfaction;”.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Revise section 52.204–10 to read as follows:

52.204–10 Reporting Executive Compensation and First-Tier Subcontract Awards.

As prescribed in 4.1403(a), insert the following clause:

Reporting Executive Compensation and First-Tier Subcontract Awards (JUL 2010)

(a) *Definitions.* As used in this clause:

Executive means officers, managing partners, or any other employees in management positions.

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.

Total compensation means the cash and noncash dollar value earned by the executive during the Contractor's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)):

(1) *Salary and bonus.*

(2) *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

(3) *Earnings for services under non-equity incentive plans.* This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

(4) *Change in pension value.* This is the change in present value of defined benefit and actuarial pension plans.

(5) *Above-market earnings on deferred compensation which is not tax-qualified.*

(6) Other compensation, if the aggregate value of all such other compensation (e.g., severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

(b) Section 2(d)(2) of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110–252), requires the Contractor to report information on subcontract awards. The law requires all reported information be made public, therefore, the Contractor is responsible for notifying its subcontractors that the required information will be made public.

(c)(1) Unless otherwise directed by the contracting officer, by the end of the month following the month of award of a first-tier subcontract with a value of \$25,000 or more, (and any modifications to these subcontracts that change previously reported data), the

Contractor shall report the following information at <http://www.fsr.gov> for each first-tier subcontract. (The Contractor shall follow the instructions at <http://www.fsr.gov> to report the data.)

(i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.

(iii) Amount of the subcontract award.

(iv) Date of the subcontract award.

(v) 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.

(vi) Subcontract number (the subcontract number assigned by the Contractor).

(vii) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district.

(viii) Subcontractor's primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district.

(ix) The prime contract number, and order number if applicable.

(x) Awarding agency name and code.

(xi) Funding agency name and code.

(xii) Government contracting office code.

(xiii) Treasury account symbol (TAS) as reported in FPDS.

(xiv) The applicable North American Industry Classification System code (NAICS).

(2) By the end of the month following the month of a contract award, and annually thereafter, the Contractor shall report the names and total compensation of each of the five most highly compensated executives for the Contractor's preceding completed fiscal year at <http://www.ccr.gov>, if—

(i) In the Contractor's preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

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

(ii) 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. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at <http://www.sec.gov/answers/execomp.htm>.)

(3) Unless otherwise directed by the contracting officer, by the end of the month following the month of a first-tier subcontract with a value of \$25,000 or more, and annually thereafter, the Contractor shall report the names and total compensation of each of the five most highly compensated executives for each first-tier subcontractor for the subcontractor's preceding completed fiscal year at <http://www.fsr.gov>, if—

(i) In the subcontractor's preceding fiscal year, the subcontractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

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

(ii) 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. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at <http://www.sec.gov/answers/execomp.htm>.)

(d)(1) If the Contractor in the previous tax year had gross income, from all sources, under \$300,000, the Contractor is exempt from the requirement to report subcontractor awards.

(2) If a subcontractor in the previous tax year had gross income from all sources under \$300,000, the Contractor does not need to report awards to that subcontractor.

(e) Phase-in of reporting of subcontracts of \$25,000 or more.

(1) Until September 30, 2010, any newly awarded subcontract must be reported if the prime contract award amount was \$20,000,000 or more.

(2) 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.

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

(End of clause)

- 6. Amend section 52.212-5 by—
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (b)(4) through (b)(42) as (b)(5) through (b)(43), respectively; and adding a new paragraph (b)(4);

The revised and added text reads as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JUL 2010)

* * * * *

(b) * * *

—(4) 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards (JUL 2010) (Pub. L. 109-282) (31 U.S.C. 6101 note).

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- 7. Amend section 52.213-4 by—
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (a)(2)(i) through (a)(2)(vii) as (a)(2)(ii) through

(a)(2)(viii), respectively; and adding a new paragraph (a)(2)(i);

The revised text reads as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (JUL 2010)

(a) * * *

(2) * * *

(i) 52.204-10 Reporting Executive Compensation and First-Tier Subcontract Awards (JUL 2010) (Pub. L. 109-282) (31 U.S.C. 6101 note).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010-0077, Sequence 6]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-44; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This Small Entity Compliance Guide has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of the summary of the rule appearing in Federal Acquisition Circular (FAC) 2005-44 which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding this rule by referring to FAC 2005-44 which precedes this document. These documents are also available via the Internet at http://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005-44 and the specific FAR case number. For information pertaining to status or publication schedules, contact the