

Government Contracts Blog

Posted at 6:51 AM on August 17, 2010 by Sheppard Mullin

The Transparency Monster Strikes Again: New Reporting Requirements For Executive Compensation And First-Tier Subcontract Awards

By [Keith R. Szeliga](#)

On July 8, 2010, the FAR Councils issued an interim rule, effective immediately, that requires contractors to report information regarding executive compensation and first-tier subcontract awards. *See* 75 Fed. Reg. 39414. The interim rule implements the Federal Funding Accountability and Transparency Act of 2006 (“FFATA”) (Pub. L. No. 109-282), as amended by the Government Funding Transparency Act of 2008 (“GFTA”) (Pub. L. No. 110-252). In accordance with the requirements of FFATA and GFTA, **the Government will disseminate the information reported under the interim rule – including the names and total compensation of the contractor’s five most highly compensated executives – to the general public** via the USASpending.gov website.

The preamble to the interim rule acknowledges that the new reporting requirements are “sweeping in their breadth.” The requirements are implemented by a new contract clause (FAR 52.204-10) that must be included in all contracts, except those valued at less than \$25,000, classified contracts, and contracts with individuals. *See* FAR 4.1401(a); FAR 4.1403. There are no exemptions for commercial items, COTS items, procurements at or below the simplified acquisition threshold, or small businesses of any type. In addition, the preamble directs contracting officers to modify existing IDIQ contracts, on a bilateral basis, to include the new reporting requirements in future orders.

Executive Compensation

The executive compensation reporting requirement applies if:

1. The contractor, in its preceding fiscal year, received: (a) at least 80% of its annual gross revenue from federal contracts, subcontracts, loans, grants, and cooperative agreements and (b) \$25 million or more in annual gross revenues from federal contracts, subcontracts, loans, grants, and cooperative agreements; and

2. The public does not already have access to information about the compensation of the relevant executives via the contractor's SEC reports. *See* FAR 52.204-10(b)(2).

Where these conditions are met, the interim rule provides that “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....” FAR 52.204-10(b)(2) (emphasis added).

The interim rule defines the term “executive” to include “officers, managing partners, or any other employees in management positions.” FAR 52.204-10(a). Although quite broad, this definition would not appear to include partners or shareholders without management authority.

The interim rule's definition of “total compensation,” also contained in FAR 52.204-10(a), is virtually all encompassing. The term is defined as “the cash and non-cash dollar value earned by the executive during the contractor's preceding fiscal year,” including:

1. Salary and bonus;
2. Awards of stock, stock options, and stock appreciation rights;
3. Earnings for services under non-equity incentive plans;
4. Change in pension value;
5. Above-market earnings on deferred compensation that is not tax-qualified; and
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

Although the interim rule enumerates the components of total compensation, it does not require contractors to report those components separately. Only total compensation, in the aggregate, must be reported.

First-Tier Subcontract Awards

For each “first-tier subcontract” valued at \$25,000 or more, FAR 52.204-10(c)(1) requires contractors to report the following information:

- The name and DUNS Number of the subcontractor and its parent
- The date and amount of the subcontract award

- A general description of the products or services
- The subcontract number
- The subcontractor's address and place of performance
- The prime contract and order number
- The awarding and funding agency names and codes
- The Government contracting office code
- The Treasury account symbol
- The applicable NAICS code

The interim rule defines a “first-tier subcontract” as follows:

“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.

FAR 52.204-10(a).

The subcontract reporting requirements will be phased in based on the dollar value of the prime contract. *See* FAR 52.204-10(e). Until September 30, 2010, the first-tier subcontract reporting requirement will apply to prime contracts valued at \$20 million or more. From October 1, 2010 until February 28, 2011, the threshold will decrease to \$550,000. Starting on March 1, 2011, the requirement to report first-tier subcontract awards will apply to all prime contracts with a value of at least \$25,000.

The interim rule also includes a separate requirement for contractors to report “the names and total compensation of each of the five most highly compensated executives for each first-tier subcontractor.” FAR 52.204-10(c)(3). The requirement to report subcontractor executive compensation applies if all of the following conditions are met:

1. The first-tier subcontract is valued at \$25,000 or more;

2. The first-tier subcontractor, in its preceding fiscal year, received: (a) at least 80% of its annual gross revenue from federal contracts, subcontracts, loans, grants, and cooperative agreements and (b) \$25 million or more in annual gross revenues from federal contracts, subcontracts, loans, grants, and cooperative agreements; and
3. The public does not already have access to information about the compensation of the relevant executives via the first-tier subcontractor's SEC reports.

Penalties for Non-Compliance

The preamble to the interim rule directs contracting officers to exercise “appropriate contractual remedies” if a contractor fails to comply with the reporting requirements. Presumably, such remedies could range from the issuance of a cure notice to termination for default. In addition, contracting officers are instructed to include instances of non-compliance in the contractor's past performance information. As always, reporting false or misleading information could result in liability under the False Claims Act and/or the False Statements Act.

Coping with the New Rule

Compliance with the interim rule is likely to raise a number of issues for both prime contractors and first-tier subcontractors. For example:

- Must a contractor report compensation paid to its executives by parent or affiliated entities?
- Does “total compensation” include compensation from outside sources, such as Board memberships?
- Should a contractor resist the Government's attempt to incorporate the new reporting requirements into existing IDIQ contracts?
- How exactly does a contractor distinguish between reportable first-tier subcontracts and non-reportable supplier agreements?
- What happens if a first-tier subcontractor refuses to incorporate the new reporting requirements into subcontracts under existing IDIQ contracts?
- What happens if a first-tier subcontractor refuses to provide the required information?
- What specific policies and procedures should a contractor implement to ensure compliance with the interim rule?

We are available to assist you with these and any other questions you may have regarding the

new reporting requirements.

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