

# Government Contracts Blog

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## GAO Allowed to Interview Current Contractor Employees During the Audit of the Contractor's Records

In an attempt to promote "protection" and "provide transparency," the FAR Councils recently issued a final rule formally mandating Government Accountability Office ("GAO") auditor access to interview contractor personnel during an audit of the contractor's records. This final rule published on October 14, 2009 adopted, without change, an interim rule issued March 31, 2009, implementing section 871 of the Duncan Hunter National Defense Authorization Act for 2009 ("Section 871"), as codified at 41 U.S.C. 254d(c)(1) and 10 U.S.C. 2313(c)(1). The American Recovery and Reinvestment Act of 2009 (the "Recovery Act") provides a similar interview right, but the Recovery Act provision extends that right to agency inspector generals. Congress limited Section 871 interview rights to the GAO.

Only contracts containing the March 2009 version of either (1) FAR 52.214-26, Audit and Records—Sealed Bidding or (2) FAR 52.215-2, Audit and Records—Negotiation and contracts awarded thereafter are subject to the new GAO audit access requirements.

The same types of contracts that were previously exempt from the Audit and Records clauses remain exempt. All other types of contracts are not so lucky. For contracts awarded after March 2009, expect to see this new version of the Audit and Records clauses. The contracts exempt from the Audit and Records clauses are:

1. Acquisitions not exceeding the simplified acquisition threshold;
2. Acquisitions of utility services (at rates not exceeding those offered to the general public); and
3. Acquisition of commercial items.

Acquisitions for commercial items remain exempt from the Audit and Records clause, unless the acquisition is funded by Recovery Act, because Section 871 did not explicitly state that the statutory changes apply to commercial item contracts. *See* 74 Fed. Reg. 52851; 74 Fed. Reg. 14646. If the commercial item acquisition is funded by the Recovery Act, the contract will contain the appropriate Audit and Records clause and will grant GAO or Inspector General ("IG") access to interview contractor employees.

Both Audits and Records clauses contain "flowdown provisions" requiring prime contractors to include the clauses in certain subcontracts. For negotiated procurements, subcontracts that exceed the simplified acquisition threshold and are either (1) a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable type; (2) require cost or pricing data; or (3) require certain reporting, must contain the Audits and Records. Prime contractors must ensure this clause in the appropriate subcontracts, and subcontractors will be well-served to not accept inclusion of the clause when it is not necessary.

Therefore, Contractors are well advised to implement processes and procedures both to comply with the new access and to protect their rights.

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