

CLIENT ALERT

FAR Council Issues Final Rule on Reporting Executive Compensation and First-Tier Subcontract Awards

August 22, 2012

On July 26, 2012, the FAR Council issued a final rule entitled “Reporting Executive Compensation and First-Tier Subcontract Awards.” The final rule, which takes effect on August 27, 2012, follows an interim rule issued on July 8, 2010. Both the interim and final rule implement a section of the Federal Funding Accountability and Transparency Act of 2006, as amended by a section of the Government Funding Transparency Act of 2008, which requires OMB to establish a free, public web site containing full disclosure of all federal contract award information.

The July 8, 2010 interim rule required that contractors: (1) report information on subcontract awards for all first-tier subcontracts valued at more than \$25,000; and (2) under certain circumstances, report information regarding executive compensation. The final rule reviews the comments received on the interim rule, but does not make significant changes. This client alert provides an overview of the interim rule and the changes in the final rule.

Reporting Subcontract Awards

The reporting requirements for subcontract awards are largely unchanged in the final rule. Following the award of each first-tier subcontract with a value of \$25,000 or more, the rule requires the contractor to report specified information, including the name of the subcontractor, the amount of the subcontract award, and a description of the products or services being provided under the subcontract. A complete list of subcontractor information that must be reported is set forth in FAR § 52.204-10. Reporting of subcontract information, however, is not required where either the prime contractor or the subcontractor had a gross income of \$300,000 or less in the previous tax year.

The final rule modified the definition of “first-tier subcontract” to clarify that the definition does not include the contractor’s supplier agreements with vendors, such as long-term 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.

Reporting Executive Compensation

Requirements of the Interim Rule

The July 8, 2010 interim rule required that, for all contracts of more than \$25,000, by the end of the month following the month of award of a contract, and annually thereafter, contractors must report the names and total compensation of the contractor’s five most highly paid executives for the preceding fiscal year. This reporting requirement is applicable only if:

- (1) In the preceding fiscal year, the contractor received 80% or more of its annual gross revenues from federal contracts, subcontracts, loans, grants, subgrants, and cooperative agreements;
- (2) In the preceding fiscal year, the contractor received \$25 million or more in annual gross revenues from federal contracts, subcontracts, loans, grants, subgrants, and cooperative agreements; and
- (3) The public does not already have access to the information through reports filed under the Securities Exchange Act of 1934 or the Internal Revenue Code of 1986.

The interim rule also required that if a first-tier subcontract is awarded, and the subcontractor meets the reporting thresholds listed above, the prime contractor must report the names and total compensation of the subcontractor's five most highly paid executives for the preceding fiscal year.

Changes in the Final Rule

Like the requirements for reporting subcontract awards, the executive compensation reporting requirements are largely unchanged in the final rule. Notably, the final rule does not implement any change to the interim rule to explicitly require that a contractor include the revenues of its affiliates in determining whether the contractor meets the revenue thresholds for reporting executive compensation. In fact, the opposite appears to be envisioned by this comment to the final rule: “[t]he rule requires reporting by the contractor. The contractor is the legal entity that signed the contract.”

In addition to changing the definition of “first-tier subcontract” as discussed above, the following are several other noteworthy changes in the final rule for reporting executive compensation:

- Under the interim rule, reporting requirements were not applicable to “contracts with individuals.” The final rule contains no exception for contracts with individuals. The comments explain that this exception was removed because no such exception exists in the implementing statute.
- Under the interim rule, there was an exception for “classified contracts.” The final rule provides for no such exception, but clarifies that nothing in the rule shall require the disclosure of classified information.
- The interim rule required that executive compensation be reported by the end of the month following the month of the award of a contract. The final rule requires that executive compensation be reported as part of the contractor's annual registration requirement in the Central Contractor Registration database (now found at sam.gov).

Please contact Jon Williams or Brian Wilbourn at 202-857-1000 if you have questions about the final rule.