

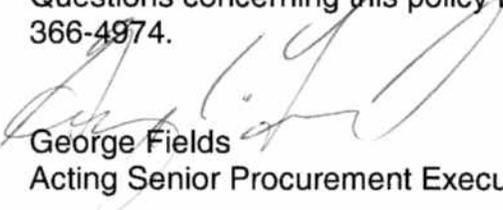
Acquisition Policy  
DOT DASH  
2010-14

**Date:** July 28, 2010  
**To:** Chief of the Contracting Office (COCO)  
Acquisition Personnel  
**From:** Office of the Senior Procurement Executive  
**Subject:** Federal Acquisition Circular (FAC) 2005-42

**Summary:** Federal Acquisition Circular 2005-42, which makes changes to the Federal Acquisition Regulation (FAR), was published in the June 16, 2010, issue of the Federal Register. Unless otherwise specified, all FAR and other directive material contained in FAC 2005-42 is effective June 16, 2010, except for Items II, III, IV, VI, and VIII which are effective July 16, 2010. A summary of the changes are attached.

This DASH and its attachment will be available online at the following website:  
<http://www.dot.gov/ost/m60>, under Breaking News or Quick Picks, Policy DASH.

Questions concerning this policy DASH should be directed to Lenita Ahmadi at (202) 366-4974.



George Fields  
Acting Senior Procurement Executive, M-61

Attachment

ATTACHMENT (1)

Federal Acquisition Regulation Circular (FAC) 2005-42 amends the Federal Acquisition Regulation (FAR) as specified below:

List of Rules in FAC 2005-42

- I. American Recovery and Reinvestment Act (the Recovery Act) of 2009-Whistleblower Protections
- II. Electronic Subcontracting reporting System
- III. American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Publicizing Contract Actions
- IV. Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008
- V. Additional Requirements for Market Research
- VI. American recovery and Reinvestment Act of 2009 (Recovery Act) –GAO/IG Access
- VII. New Designated Country-Taiwan
- VIII. Nonavailable Articles
- IX. Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns
- X. Compensation for Personal Services
- XI. Payrolls and Basic Records
- XII. Technical Amendments

SUPPLEMENTARY INFORMATION: Summary of FAR rule follows:

**Item I-American Recovery and Reinvestment Act (the Recovery Act of 2009-Whistleblower Protections (FAR Case 2009-012)**

This rule adopts as final, with changes, an interim rule published in the *Federal Register* at 74 FR 14633 on March 31, 2009, amending the FAR to implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protection State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.

**Item II-Electronic Subcontracting Reporting System (eSRS) (FAR Case 2005-040)**

This rule amends the Federal Acquisition Regulation (FAR) to adopt as final, with changes, an interim FAR rule published in the *Federal Register* at 73 FR 21779 on April 22, 2008, amending the FAR to implement the use of the Electronic Subcontracting Reporting System (eSRS) to fulfill small business subcontracting reporting requirements. The eSRS, a web-based system, replaces the Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. In addition, this rule adds a new Alternate III to FAR clause 52.219-9 to recognize that there is a circumstance under which contractors will need to use SF 294, rather than eSRS, to submit an Individual Subcontract Report. The contractor will use SF 294 if a contract is not reported in the Federal Procurement Data System because reporting it in that system may disclose information that would compromise national security.

**Item III-American recovery and Reinvestment Act of 2009 (the Recovery Act-Publicizing Contract Actions (FAR Case 2009-010)**

This rule adopts as final, with minor changes, the interim rule published in the *Federal Register* at 74 FR 14636 on March 31, 2009. The interim rule amended the FAR to implement section 6.2 of the Office of Management and Budget (OMB) Memorandum M-09-10, dated February 18, 2009, entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009" (the Recovery Act. Section 6.2 of the OMB guidance mandates accountability and transparency relative to publicizing contract actions. The OMB guidance requires that the FAR be amended to reflect-

1. Unique requirements for posting of pre-solicitation notices;
2. Unique requirements for announcing contract awards;

3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS); and
4. Unique requirements for actions that are not fixed-price or competitive.

OMB Memorandum M-09-15, dated April 3, 2009, entitled "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," supplements, amends, and clarifies the initial guidance in OMB Memorandum M-09-10. The final rule makes the following amendments:

- FAR 5.704(a)(2) to clarify that modifications of orders are not required to be published at the preaward stage.
- FAR 5.704(b) to require contracting officers to identify proposed contract actions, funded in whole or in part by the Recovery Act, by using the instructions that are at FAR 5.704(b) and available in the Recovery FAQs at the GPE <https://www.fedbizopps.gov>.
- FAR 5.704(c) and FAR 5.705(a) to ensure that the description required by FAR 5.207(a)(16) clearly defines the elements of the requirement to the general public.
- FAR 5.705(b) to require contracting officers to include in the description of the contract action a statement specifically noting if the action was not awarded competitively, or was not fixed-price, or was neither competitive nor fixed price.

**Item IV-Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (FAR Case 2008-003)**

This final rule adopts, with changes, an interim rule published in the *Federal Register* at 74 FR 2731 on January 15, 2009. The rule amends the FAR to implement the requirements of Section 844 of the National Defense Authorization Act for Fiscal Year 2008. The interim rule required the head of an executive agency to make certain justification and approval documents relating to the use of noncompetitive procedures in Federal contracting be posted on the website of an agency and through FedBizOpps. The final rule requires that if the justification is brand name justification under FAR 6.302-1(c) then it must be posted with the solicitation. Justifications must remain posted for a minimum of 30 days. The final rule clarifies that posting the justification does not apply if it would disclose the executive agency's needs and disclosure of such needs would compromise national security or create other security risks. The final rule also establishes procedures at FAR 13.501 similar to procedures at FAR 6.305. The rule is intended to enhance competition in Federal Contracting and provide greater transparency to the tax payer.

**Item V-Additional Requirements for Market Research (FAR Case 2008-007) Interim**

This interim rule amends the FAR at part 10, 44, and 52 by adding market research requirements. This change implements Section 826 of Pub. L. 110-181, the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA). As a matter of policy, this provision of law is applied to contracts awarded by all executive agencies. This rule requires that market research must be accomplished before an agency places an indefinite-delivery/indefinite-quantity (ID/IQ) task or delivery order in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold when the contractor is acting as a purchasing agent for the Government. This interim rule is applicable to any solicitation issued and contracts (to include any subcontracts issued under such contracts) awarded on or after the effective date of the rule.

**Item VI-American Recovery and Reinvestment Act of 2009 (Recovery Act) – GAO/IG Access (FAR Case 2009-011)**

This final rule adopts, with changes, the interim rule published in the *Federal Register* at 74 FR 14646 on March 31, 2009. This final rule amends the FAR to implement sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act). Collectively, these sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to FAR 52.212-5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items" and FAR 52.214-26 "Audit and Records-Sealed Bidding," and by amending FAR 52.215-2 "Audit and Records-Negotiation." For the Comptroller General, these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency Inspector Generals receive the same authorities, with the exception of interviewing subcontractor employees.

The changes to the interim rule clarify its application to supplemental agreements, and orders under task or delivery –order contracts, involving Recovery Act funds.

**Item VII-New Designated Country –Taiwan (FAR Case 2009-014)**

This final rule adopts as final, without change, an interim rule implementing the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. The FAR change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

### **Item VIII-Nonavailable Articles (FAR Case 2009-013)**

This final rule amends FAR 25.104(a) to add certain items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

### **Item IX-Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009-025) Interim**

This interim rule amends the FAR to align the existing FAR clause 52.230-4 with the changes made in Cost Accounting Standards (CAS) Board clause, Disclosure and Consistency of Cost Accounting Practices-Foreign Concerns.

On March 26, 2008, the CAS Board published, without change from the proposed rule (72 FR 32829, June 14, 2007), a final rule in the *Federal Register* at 73 FR 15939 to utilize the clause, Disclosure and Consistency of Cost Accounting Practices-Foreign Concerns, the CAS-covered contracts and subcontracts awarded to foreign concerns. This rule is necessary in order to maintain consistency between CAS and FAR in matters relating to the administration of CAS.

### **Item X-Compensation for Personal Services (FAR Case 2009-026)**

This interim rule amends the FAR to align the existing FAR 31.205(q)(2)(i) and (ii) with the changes made in Cost Accounting Standards (CAS) Board Standards 412, "Cost Accounting Standard for composition and measurement of pension cost," and 415, "Accounting for the cost of deferred compensation." Formerly, the applicable CAS standard for measuring, assigning, and allocating the costs of Employee Stock Ownership Plans (ESOPs) depended on whether the ESOP met the definition of a pension plan at FAR 31.00. Costs for ESOPs meeting the definition of a pension plan at FAR 31.001 were covered by CAS 412, while the costs for ESOPs not meeting the definition of a pension plan at FAR 31.001 were covered by CAS 415. Now, regardless of whether an ESOP meets the definitions of a pension plan at FAR 31.001, all costs of ESOPs are covered by CAS 415.

### **Item XI-Payrolls and Basic Records (FAR Case 2009-018) (Interim)**

This interim rule implements changes that the Department of Labor (DOL) instituted regarding the submission of payroll data in their final rule, Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, published in the *Federal Register* at 73 FR 77504 on December 19, 2008. This rule revises FAR 52.222-8, Payrolls and Basic Records, to delete the requirement for submission of full social security numbers and home

addresses of individual workers, prime contractor, on weekly payroll transmittals as required on covered construction contracts. The rule requires contractors and subcontractors to maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting officer, the contractor, or the Wage and Hour Division of the DOL for purposes of an investigation or audit of compliance with prevailing wage requirements. The rule recognizes DOL's finding that complete social security numbers recognizes DOL's finding that complete social security numbers and home address for individual workers is personal information to the worker and that any unnecessary disclosure and submittal of such information creates an exposure to identity theft and the invasion of privacy for workers.