

FAC 2005-32; FAR Case 2009-012: American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Whistleblower Protections
OCPO Regulatory Advisory 09-17

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Item II—American Recovery and Reinvestment Act (Recovery Act) – Whistleblower Protections (Interim Rule) (FAR Case 2009-012) Subpart 3.9 of the Federal Acquisition Regulation (FAR) is revised to add Section 3.907. Section 3.907 provides procedures for whistleblower protection when using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5). Section 3.907 prohibits non-Federal employers from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of officials. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. A new clause 52.203-15 is added to require contractors to post rights and remedies for whistleblower protections under Section 1553 of the American Recovery and Reinvestment Act.

Purpose & Description – FAR Case 2009-012 Interim Rule

- Implements Section 1553 of the Recovery Act, and applies to all contracts funded in whole or in part (e.g., through subcontracts) by that Act.
- Provides definitions, policy and procedures for whistleblower protection specific to Recovery Act-funded transactions. Existing FAR whistleblower procedures in FAR Sections 3.901 through 3.906 do not apply to Recovery Act-funded transactions.

FAR Parts Affected: Parts 3 and 52

Applicability

- All acquisitions funded in whole or in part (e.g., through subcontracts) by the Recovery Act.
- Applies to contracts both above and below the simplified acquisition threshold; contracts for commercial items, at both the prime and subcontract levels; and commercially available off-the-shelf item contracts. (See definitions for simplified acquisition, commercial items, and commercially available off-the-shelf items at FAR 2.101)
- Solicitations issued and contracts awarded on or after March 31, 2009.
- Existing contracts if future orders will use Recovery Act funds.

Contractor Requirements

- Contractors and subcontractors receiving funds under the Recovery Act are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing covered information to certain categories of officials.
- In order to be eligible for receipt of Recovery Act funds, contractors must accept bilateral modifications to existing contracts to include the FAR clause *for future orders*. Contractors refusing are *not* eligible for receipt of Recovery Act funds.
- In accordance with FAR 52.203-15, contractors are required to post notices of whistleblower protections and include the substance of the posting requirement in all subcontracts.

Contracting Officer Responsibilities

- As prescribed at FAR 3.907-7, insert the clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, in all solicitations and contracts funded in whole or in part with Recovery Act funds.
- Contracting Officers must bilaterally modify existing contracts to include the FAR clause *for future orders or new line items* when Recovery Act funds will be used. In the event that contractor refuses to accept such a modification, the contractor will not be eligible for receipt of the Recovery Act funds.
- Contracting Officers must notify and coordinate with appropriate officials following receipt of a complaint of reprisal of the type described in FAR 3.907-2. Coverage regarding procedures will be added to the Department of Homeland Security Acquisition Manual (HSAM). (See “Impact on DHS Acquisition Policy/Systems” section below for coverage.)

Definitions and Key Concepts

- This rule prohibits non-Federal employers that receive funds under the Recovery Act from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of officials/entities that are identified in the subsection, e.g., the Recovery Accountability and Transparency Board, an Inspector General (IG), the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct, the head of a Federal agency. (See “Impact on DHS Acquisition Policy/Systems” section of this Advisory for a related HSAM delegation.)
- Existing FAR whistleblower procedures at FAR 3.901 through 3.906 *do not* apply to transactions funded under the Recovery Act. FAR 3.902 makes the distinction between existing FAR whistleblower protections and those applicable to the Recovery Act.
- FAR 3.907-1 provides five definitions (four of which are new). The definitions provide key terms that set parameters for implementing Section 3.907’s policy and procedures, e.g., *covered information, non-Federal employer*.
- A contractor/subcontractor employee who believes that he or she has been subject to reprisal is authorized to submit a complaint to the IG of the agency that awarded the contract.
 - FAR 3.907-3 provides documentation requirements for complaint submission and requires Contracting Officers who receive a complaint to forward it to the Office of Inspector General, agency legal council or to appropriate official in accordance with agency procedures. (See “Contracting Officer Responsibilities” section of this Advisory for agency procedures.)
 - FAR 3.907-4 provides procedures for Inspector Generals to investigate complaints. With limited exception, within 180 calendar days of receiving the complaint, the IG must prepare a report of findings and provide it to the person who submitted the complaint, their employer, the Head of the Contracting Activity, and the Recovery Accountability and Transparency Board. The rule allows for certain extensions of the time period. If the person submitting a complaint receives an IG decision not to conduct or continue an investigation, he or she has certain rights to pursue a civil remedy.
 - FAR 3.907-5 provides detailed guidance regarding access to IG investigative files.
 - FAR 3.907-6 describes situations in which a disclosure may be considered to be a contributing factor in a reprisal (burden of proof); and rebuttal opportunities. A person

adversely affected by an order issued by the head of the agency has 60 days following order issuance to file a petition seeking review of the order in the U.S. Court of Appeals or a circuit in which the reprisal is alleged to have occurred. (At DHS, the HCA is delegated the head of agency authorities identified in FAR 3.907-2 and 3.907-6. See "Impact on DHS Acquisition Policy/Systems" section below for agency procedures implementing FAR 3.907-6).

Impact on DHS Acquisition Policy/Systems

- Anticipated procedural guidance in an upcoming HSAM revision is as follows:
 - Include at 3003.907-3(c), the following procedures for Contracting Officer action upon receipt of a complaint of reprisal:

3003.907-3 Procedures for filing complaints.
(c) Contracting officers who receive a complaint of reprisal of the type described in FAR 3.907-2 shall forward it to the DHS Office of Inspector General, Office of Investigations, and notify and coordinate with:

 - (i) The Component HCA and Component legal counsel;*
 - (ii) If the complaint of reprisal applies to additional DHS contracts, the Component HCA responsible for those contracts; and*
 - (iii) If the complaint of reprisal applies to an order placed under another agency's contract, the Contracting Officer for the Servicing agency contract.*
 - Make the following designations/delegations in HSAM 3003.907-2 **Policy**, and HSAM 3003.907-6 **Remedies and enforcement authority**.

3003.907-2 Policy.
The HCA is designated as "the head of a Federal agency" for purposes of (FAR) 48 CFR 3.907-2.

3003.907-6 Remedies and enforcement authority.
The HCA is delegated the head of agency authorities identified in (FAR) 48 CFR 3.907-6.

For More Information

- To access FAC 2005-32's interim rule on Whistleblower Protections for Contractor Employees, type **FAC 2005-32** in the "Search Documents" section of Regulations.gov at: <http://www.regulations.gov/search/index.jsp>
- For questions on FAR Case 2009-012, contact Gloria Sochon at (202) 447-5307 or Gloria.Sochon@dhs.gov.