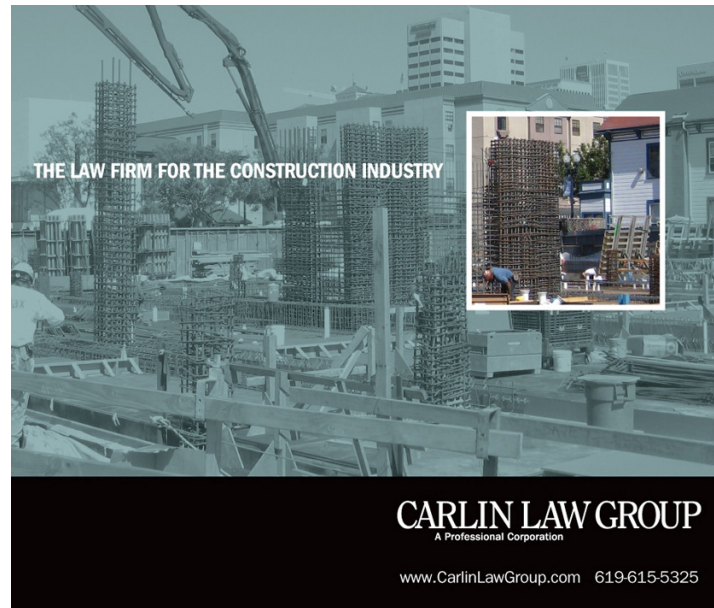


Federal Acquisition Regulations: What Every Surety Professional Should Make Sure Their Clients Know



Surety Association of San Diego

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What are the Federal Acquisition Regulations?

- The Federal Acquisition Regulations (FAR's) are a substantial and complex set of rules governing the federal government's contracting process.
- Federal contracts incorporate the Federal Acquisition Regulations (FAR's) by reference.
- Federal contracts impose the FAR rules & requirements on contractors.

What is the Significance of the FAR's

- It is imperative that contractors doing business with the federal government are aware of and comply with the FAR's incorporated into their contracts.
- There are many costly pitfalls for those who do not take time to review and understand the provisions in their contracts.
- Failure to comply with the FAR's can result in contract termination & bond liability, debarment and potential civil and/or criminal penalties under the False Claims Act, Truth in Negotiations Act and other similar federal statutes.

Contractor Code of Business Ethics and Conduct (FAR 52.203-13)

- Contractors shall have a **written** code of business ethics and conduct within **30 days** after award of a federal contract.
- A copy of the code shall be made available to each employee engaged in performance of the contract.
- Contractors shall establish an ongoing business ethics awareness and compliance program **within 90 days** after contract award:
 - Shall exercise diligence to prevent & detect criminal activity
 - Shall promote organizational culture encouraging ethical conduct and commitment to compliance with the law.
- Contractors shall notify OIG & Contracting Officer of credible evidence of criminal violation of fraud, conflict of interest, bribery or gratuity violations or violations of the False Claims Act by any of contractor's or its subcontractors' personnel.
- Failure to comply can result in enhanced sentences and penalties under the Federal Sentencing Guidelines in the event of a violation.

Display of Hotline Posters & Whistleblower Protections under the Recovery Act

(FARs 52.203-14 & 52.203-15)

- During contract performance, Contractors shall prominently display any agency or Department of Homeland Security (DHS) fraud hotline poster in common work areas and at contract work sites.
- If a Contractor maintains a company website as a method of providing information to employees, the Contractor shall also display electronic versions of the posters on the website.
- The FAR allows an exemption from posting agency hotline posters, other than any required DHS poster, if the Contractor already has an ethics and conduct awareness program in place.
- The Contractor shall post notice of employees' rights and remedies for whistleblower protections provided under The American Reinvestment and Recovery Act.
- The substance of the FAR whistleblower clause shall be included in all subcontracts that are funded in whole or in part with Recovery Act funds.

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Reporting Executive Compensation

(FAR 52.204-10)

By the end of the month following the month of a contract award, and annually thereafter, Contractors shall report the names and total compensation of each of the five most highly compensated executives for the Contractor's preceding completed fiscal year at <http://www.ccr.gov>, IF in the Contractor's preceding fiscal year, the Contractor received:

- 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- The public does not have access to information about the compensation of the executives through periodic Securities Exchange Act reports.

Contractor shall also report the foregoing info for each subcontractor that meets the foregoing prerequisites.

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Reporting First-Tier Subcontract Awards

(FAR 52.204-10)

- Unless otherwise directed by the Contracting Officer, **by the end of the month following the month of award**, Contractors shall report the following specific subcontractor information for all first-tier subcontracts with a value of \$25,000 or more:
 - Name and address of subcontractor, its DUNS & NAICS numbers, subcontract amount, date of subcontract award, description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract, etc.
- Exception for subcontractors with gross income from all sources of less than \$300k in prior tax year.
- Contractor shall report the required subcontractor information via www.fsrs.gov.
- As of March 1, 2011, First Tier Subcontractor reporting requirements applied if the prime contract award amount was \$25,000 or more.

American Recovery and Reinvestment Act

Reporting Requirements (FAR 52.204-11)

- In 2009, Congress passed the American Recovery and Reinvestment Act (the Recovery Act or ARRA) which had as one of its goals unprecedented levels of accountability and transparency in government spending.
- **No later than the 10th day** following the end of each calendar quarter, the Contractor must provide reports for all work funded, in whole or in part, by the Recovery Act (using the online reporting tool available at <http://www.FederalReporting.gov>). Reports must include statement of:
 - Significant services performed, assessment of progress toward completion, description of employment impact on contractor & subcontractors' workforce (types of jobs created, estimate of jobs created/retained) etc.
- Each Contractor shall require each subcontractor to provide Contractor with the information needed to make its report.
- Contractor shall include in its report information on the names and total compensation of the 5 most highly compensated officers of Contractor and its subcontractors **IF** prerequisites to executive compensation stated earlier are met.
- **All of the foregoing information is made public**

Buy American Act – Construction Materials & Notice of Buy American Act

(FARs 52.225-9 & 52.225-10)

- The Contractor must use only domestic construction material in performing the contract.
 - Commercially available off-the-shelf (COTS) items may meet domestic requirement.
- However, the Contracting Officer may add other foreign construction material **if** the Government determines that:
 - The cost of domestic construction material would be unreasonable; or
 - The restriction to buy American for a particular construction material would be impracticable or inconsistent with the public interest; or
 - The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.
- Unless the Government determines that an exception to the Buy American Act applies, use of foreign construction material is noncompliant with the Buy American Act.
- An offeror requesting a determination regarding the inapplicability of the Buy American Act should submit the request to the Contracting Officer in time to allow a determination **before submission of offers**.
- If the Govt's evaluation of bids results in a tie between an offeror that requested the substitution of foreign construction material based on unreasonable cost and an offeror that did not request an exception, the Contracting Officer will award to the offeror that did **not** request an exception based on unreasonable cost.

Buy American Act – Construction Materials under Trade Agreements & Notice of Buy

American Act Requirement

(FARs 52.225-11 & 52.225-12)

- The Buy American Act restrictions are waived for designated country construction materials. The designated countries are listed in FAR 52.225-11.
- That means that the Contractor must use only domestic or designated country construction material in performing the contract.
- An offeror requesting a determination regarding the inapplicability of the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers.

Required Use & Notice of American Iron, Steel, and Manufactured Goods – Buy American Act – Construction Materials

(FARs 52.225-21 & 52.225-22)

- All manufactured construction material in the project must be manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel must have been produced in the United States.
- If the Government determines after contract award that an exception to the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material.
- Unless the Government determines that an exception to the Recovery Act or the Buy American Act applies, use of foreign construction material is noncompliant with the Recovery Act or the Buy American Act.
- However, the restrictions of the Recovery Act and the Buy American Act do not apply to designated country unmanufactured construction materials. Designated countries are listed in FAR 52.225-23.
- An offeror requesting a determination regarding the inapplicability of the Recovery Act or the Buy American act should submit the request to the Contracting Officer in time to allow a determination before submission of offers.

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Schedules for Construction Contracts

(FAR 52.236-15)

- The Contractor must prepare and submit three copies of a practicable schedule to the Contracting Officer **within five days** after the work commences on the contract.
- If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may **withhold approval of progress payments** until the Contractor submits the required schedule.
- If the Contracting Officer determines that the Contractor has fallen behind the approved schedule, the Contractor shall take necessary steps to improve its progress, without additional cost to the Government.
- Failure of the Contractor to comply with these requirements shall be grounds for a determination by the Contracting Officer that the Contractor is not working with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer **may terminate the Contractor's right to proceed** with the work, or any separable part of it, in accordance with the default terms of the contract.

Government Delay of Work

(FAR 52.242-17)

- If the performance of all or any part of the work of this contract is delayed or interrupted:
 - By an act of the Contracting Officer that is not expressly or impliedly authorized by the contract, *or*
 - By a failure of the Contracting Officer to act within the time specified in the contract, or within a reasonable time if not specified,
- An adjustment (excluding profit) shall be made for **any increase in the cost of performance of this contract** caused by the delay or interruption and the contract shall be modified in writing accordingly.
- Claim is limited to costs incurred 20 days prior to Contractor notice to Contracting Officer of action or failure to act that is causing delay.
- Claim amount must be submitted as soon as practicable after end of delay but not later than final payment under contract.

Changes - Fixed-Price

(FAR 52.243-1)

- The Contracting Officer may at any time, by written order, and **without notice to the sureties**, make changes within the general scope of the contract in any one or more of the following:
 - Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications;
 - Method of shipment or packing;
 - Place of delivery.
- If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- The Contractor must assert its right to an adjustment under this clause **within 30 days** from the date of receipt of the written order.

Changes -Other

(FAR 52.243-4)

- The Contracting Officer may, at any time, **without notice to the sureties**, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes:
 - In the specifications (including drawings and designs);
 - In the method or manner of performance of the work;
 - In the Government-furnished property or services; or
 - Directing acceleration in the performance of the work.
- Any other written or oral order from the Contracting Officer that causes a change **shall be treated as a change order**; provided that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) the Contractor regards the order as a change order.
- In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.
- The Contractor must assert its right to an adjustment under this clause **within 30 days after** (1) receipt of a written change order or (2) the furnishing of a written notice, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government.
- No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

Changes and Changed Conditions

(FAR 52.243-5)

- The Contracting Officer shall **not** make an equitable adjustment unless:
 - The Contractor has submitted and the Contracting Officer has received the required written notice; **or**
 - The Contracting Officer waives the requirement for the written notice.
- The Contractor must promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in the contract or unknown unusual physical conditions at the site before proceeding with the work.
- Failure to agree to any adjustment shall be a dispute under the Disputes clause.

Change Order Accounting & Notification of Changes

(FARs 52.243-6 & 52.243-7)

- The Contracting Officer may require change order accounting whenever the estimated cost of a change or series of related changes **exceeds \$100,000**.
- The Contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable, direct costs of work, both changed and not changed, allocable to the change.
- The Contractor shall maintain such accounts until the parties agree to an equitable adjustment for the changes ordered by the Contracting Officer, or the matter is conclusively disposed of in accordance with the Disputes clause.
- The FAR requires prompt reporting of Government conduct that the Contractor considers to constitute a change to the contract.

Default (Fixed-Price Construction)

(FAR 52.249-10)

- If the Contractor refuses or fails to do the work or any separable part with the diligence required to ensure its completion within the time specified in the contract, or fails to complete the work within the specified time, the Government may **terminate the right to proceed with the work** (or the separable part of the work) that has been delayed.
- In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.
- The Contractor **and its sureties shall be liable** for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated.
- This liability includes any increased costs incurred by the Government in completing the work.

Excusable Delays

(FAR 52.249-14)

- The Contractor shall **not** be in default because of any failure to perform the contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor (except for default of subcontractors).
- Examples of these causes are acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, strikes, unusually severe weather, etc.
- Default includes failure to make progress in the work so as to endanger performance.
- If the failure to perform is **caused by the failure of a subcontractor** at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, *unless*—
 - The subcontracted supplies or services were obtainable from other sources;
 - The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and
 - The Contractor failed to comply reasonably with this order.

Conclusion

- These are just some general rules from Part 52 of the FAR's.
- It is important for contractors to read and understand the FAR provisions in their contracts in order to assess the requirements and financial risk they and their surety are committed to.
- Compliance with the FAR's is essential to obtain timely payment and avoid civil or criminal liability and penalties.