



Government Contracting: Alaska State and Federal Issues

UPDATES AND INFORMATION FOR YOUR COMPANY'S SUCCESS.

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CONSTRUCTION NEWSLETTER FOCUSING ON FEDERAL AND STATE CONTRACTING ISSUES.

Introduction

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Christine Williams, a born and bred Alaskan, has joined Perkins Coie LLP, a large national firm with offices across the country and the globe. Christine regularly lectures on state and federal construction issues and provides updates to her clients. If you would like to receive this newsletter as a part of keeping abreast of current issues in contracting, it will be necessary to sign up by replying to cwilliams@perkinscoie.com. If you would like to have specific topics addressed, please drop Christine a line or give her a call at (907) 263-6931. Christine will be speaking at the Alaska General Contractors ("AGC") fall conference in November as well as the Construction Law Conference put on by the Seminar Group in October.

A little about Perkins Coie LLP. Perkins Coie is a law firm that has been around for nearly 100 years and has consistently ranked in *Fortune Magazine's* Top 100 places to work. Perkins has the distinct honor to have no less than 143 of its lawyers recognized by the *Best Lawyers in America*. Perkins also has strong Alaska roots and commitments, with its Anchorage office having been opened over 33 years ago and still going strong. It is because of this strong track record and commitment to Alaska that Christine joined Perkins and is proud to be a member of that community. Christine joins other nationally recognized lawyers in the Government Contracts and Construction field and is excited about the opportunities this presents to her clients. Christine would like to thank the Perkins team in contributing to this newsletter, especially the easy reference FAR clauses, and the Executive Compensation and Subcontractor Award Reporting. These updates, as well as more information on the team members, may be found at: http://www.perkinscoie.com/services/Services_Detail.aspx?service=595d6377-d4e6-4457-926d-5ed2fcff834d&op=updates&limit=6.

AREAS OF EMPHASIS

- Construction Spending and the Economy: What's Really Going On?
- Construction Spending in Alaska through the Recovery Act I & II: What is Being Spent and the Reporting Requirements
- Executive Compensation Reporting and First-Tier Reporting Requirements under Federal Contracts
- New FAR Clause

Construction Spending and the Economy: What's Really Going On?

Another large construction season hit Alaska and the nation; however, many questions still remain on how strongly the national and state economies are recovering. Cautiously, construction industry forecasters are predicting either some growth or minimum loss in jobs and spending. This newsletter will examine construction industry spending trends and reporting requirements under American Recovery and Reinvestment Act ("ARRA") and ARRA II, the new federal reporting requirements regarding executive compensation and first-tier subcontracting reporting as well as providing a handy guide to federal regulations in the construction field.

Construction Spending in Alaska through the Recovery Act I & II: What is Being Spent and the Reporting Requirements

An important boost to the construction industry nationwide and in Alaska was the influx of construction spending from the ARRA at a time when the AGC of Alaska estimates that public construction spending in Alaska will be down 5% to \$2.6 billion. This decrease is less overall in the construction industry in Alaska, with the total construction spending forecasted to reach \$7.0 billion, which reflects a decrease of about 3%. Privately financed construction, representing approximately 63% of total construction spending, according to the AGC, suffered the least, with a decline predicted to be only 1%. Construction spending is a large contributor to the Alaska economy, with approximately 25,000 people employed in the area, with workers having an average earning of about \$60,000 per year.

In parallel to the privately financed construction spending, the overall Alaska economy shrunk by only about 1% in 2009. Notably, however, it was the first time the Alaska economy contracted in 22 years.

ARRA allocated \$300 million for transportation-related projects and in December of last year, the House of Representatives passed a second jobs-creation bill or ARRA II, which would deliver hundreds of millions more dollars to the construction industry in Alaska. ARRA I required that most of the projects eligible for funding be "shovel ready" or already in place. ARRA II follows that path with shortened deadlines, leaving the State of Alaska with 50-51 days to make each project bid ready, including all FHWA review of plans, specifications and estimates, environmental permits, right of way certification, obligation paperwork and any other necessary actions. Under ARRA II, which is not yet passed,

the total days of procurement would also pass quickly, with the average time from advertising of the contract to final contract awarded being 39 days.

Federal funding brings with it federal regulations and reporting requirements. The State of Alaska has produced a "Supplemental Terms and Conditions for Contracts using ARRA Funds." The Supplemental Terms inserts some federal clauses into State contracts, but also requires a timely report containing the information outlined below.

- The total amount of ARRA funds received by the Contractor during the Reporting Period;
- The amount of ARRA funds that were expended or obligated during the Reporting Period;
- A detailed list of all projects or activities for which ARRA funds were expended or obligated, including: (i) the name of the project or activity; (ii) a description of the project or activity; (iii) an evaluation of the completion status of the project or activity; and (iv) an estimate of the number of jobs created and the number of jobs retained by the project or activity;
- For any subcontracts equal or greater than \$25,000: (i) the name of the entity receiving the subcontract; (ii) the amount of the subcontract; (iii) the transaction type; (iv) the NAICS code; (v) the CFDA number; (vi) program source; (vii) An award title descriptive of the purpose of each funding action; (viii) the location of the entity receiving the subcontract; (ix) the primary location of the subcontract, including the city, state, congressional district and country; and (x) a unique identifier of the entity receiving the subcontract and the parent entity of the Contractor, should the entity be owned by another; (xi) the names and total compensation of the five most highly compensated officers of the company if it received: (1) 80% or more of its annual gross revenues in Federal awards; and (2) \$25 million or more in annual gross revenue from Federal awards.

Although section d.xi, Executive Compensation, first appeared in ARRA, it has now become a federal reporting requirement in general, as set forth below. The reporting requirements and Supplemental Terms and Conditions may be found at the State of Alaska website <http://www.dec.state.ak.us/commish/arra/Contracts%2oARRA%2oSupplemental%2oTerms%2oand%2oConditions%2oFinal%2o6%2o26%2o09.pdf>.

Executive Compensation Reporting and First-Tier Reporting Requirements under Federal Contracts

Under a new Federal Acquisition Regulation ("FAR") requirement, effective July 8, 2010, federal contractors must disclose first-tier

subcontractor award information for contracts valued at \$25,000 or more. In addition, contractors must report, under certain circumstances, executive compensation information for both the prime contractor and its first-tier subcontractors.

The new FAR provision broadly applies to all businesses regardless of a business's size or ownership. Further, it applies to contracts for commercial items and commercial off-the-shelf items. Finally, it applies to contracts at or below the simplified acquisition threshold (provided the contract value is \$25,000 or more).

New FAR Clause

The requirement is implemented through an interim rule and new clause, FAR 52.204-10 (Reporting Executive Compensation and First-Tier Subcontract Awards). Federal contracting officers are required to include the clause in all solicitations and contracts of \$25,000 or more, except in the cases of classified contracts or contracts with individuals. For existing Indefinite Delivery-Indefinite Quantity ("ID/IQ") contracts (such as Federal Supply Schedule and Government-wide acquisition contracts), federal contracting officers have the discretion to include the clause in contracts of \$25,000 or more before issuing new orders. This includes the discretion to add the clause to blanket purchase agreements under ID/IQ contracts.

The clause implements Section 2 of the Federal Funding Accountability and Transparency Act of 2006, as amended by Section 6202 of the Government Funding Transparency Act of 2008, which requires the Office of Management and Budget to establish a free, public website containing full disclosure of all federal contract award information. The government will make this information available at www.USASpending.gov.

Subcontractor Award Reporting

The interim rule requires a contractor to report first-tier subcontracts valued at \$25,000 or more. A "first-tier subcontract" is a subcontract awarded directly by a contractor to furnish supplies or services (including construction) for performance of a prime contract, but excludes supplier agreements with vendors, such as long-term arrangements for materials or supplies that would normally be charged to a contractor's general and administrative or other indirect cost account. In filing a report, the contractor must follow the instructions at www.frs.gov.

There are two notable exceptions to subcontractor award reporting requirements. First, the prime contractor is exempt if its gross income from all sources was under \$300,000 in the previous tax year. Second, the contractor does not have to report any awards made to a subcontractor whose gross income from all sources was under \$300,000 in the previous tax year.

Subcontractor award reporting requirements are being phased in. Until September 30, 2010, any newly awarded subcontract must be reported if the prime contract award amount is \$20 million or more. From October 1, 2010, until February 28, 2011, any newly awarded subcontract must be reported if the prime contract award amount is \$550,000 or more. Beginning March 1, 2011, any newly awarded subcontract must be reported if the prime contract award amount is \$25,000 or more.

Executive Compensation Reporting

In addition to subcontractor award reporting requirements, the contractor is obligated to report its executive compensation when (i) the contractor's annual revenue from federal sources (federal contracts and subcontracts, grants and subgrants, loans, and cooperative agreements) is \$25 million or more, (ii) 80% of its annual revenue is derived from federal sources, and (iii) the public does not have access to the contractor's executive compensation information through SEC or IRS filings.

Similarly, the contractor is obligated to report the executive compensation of a subcontractor (in the case of a first-tier subcontract with a value of \$25,000 or more) when (i) the subcontractor's annual revenue from federal sources is \$25 million or more, (ii) 80% of its annual revenue is derived from federal sources, and (iii) the public does not have access to the subcontractor's executive compensation information through SEC or IRS filings. When obligated to report, the contractor must report the total compensation of its and/or its subcontractor's five highest-paid executives. An "executive" is an officer, managing partner or any other employee in a management position. "Total compensation" means the cash and noncash dollar value earned by the executive during the contractor's preceding fiscal year.

The contractor must file the executive compensation reports at www.ccr.gov and similar reports for subcontractors at www.frs.gov.

POST-AWARD DEBRIEFING — FAR 15.506

- Offeror, upon written request received by agency w/in 3 days after offeror received contract award notice, shall be debriefed. (a)(1)
- To max. extent practicable, debriefing should occur w/in 5 days after receipt of request. (a)(2)
- At a minimum, the debriefing shall include:
 - Evaluation of significant weaknesses or deficiencies in the offeror's proposal; (d)(1)
 - Overall evaluated cost/price, technical rating if applicable, of successful/debriefed offeror, past performance on debriefed offeror; (d)(2)
 - Offerors' overall rankings, if developed; (d)(3)
 - Summary of the rationale for award; (d)(4)
 - Responses to relevant questions about whether procedures were followed. (d)(6)

COMMERCIAL ITEM

FAR 2.101

- Any item, other than real property, customarily used by the general public or by non-gov'tal entities for purposes other than gov'tal purposes, and that (i) has been sold, leased, or licensed to the general public; or (ii) has been offered for sale, lease, or license to the general public; (1)
- Any item that evolved from an item described in paragraph (1) through advances in technology or performance and that is not yet available in the comm'l marketplace, but will be available in comm'l marketplace in time to satisfy delivery requirements under a gov't solicitation; (2)
- See (3) – (8) for add'l comm'l item descriptions.

INTERNAT'L TRAFFIC IN ARMS REGULATIONS

22 CFR 120 et seq.

- Determine if desired item to export or manufacture (i.e., hardware, technical data, and/or services) is covered in U.S. Munitions List (USML). ITAR 121
- If not sure if desired export is covered by USML, file Commodity Jurisdiction request. ITAR 120.4
- If item to export or manufacture is on USML, register w/Dir. of Def. Trade Controls. ITAR 122
- After registration, you may apply for export license.
- D-Trade online is used for most licensing.
- Department of State-issued license or approval is required prior to export of defense article, technical data or defense service or entry into certain agreements. ITAR 123, 124, & 125

IG SUBPOENAS

The Inspector General Act of 1978, 5 USC Appendix IG Purpose: to conduct audits and investigations; recommend policies to promote economy, efficiency and effectiveness of programs and operations; and prevent and detect fraud and abuse. § 2

IG Authority: to access all relevant records, reports, audits, reviews, documents, papers, recommendations, or other available material; and require by subpoena the production of all information, documents, reports, answers, records, accounts, papers and other data and documentary evidence necessary in the performance of the functions assigned by this Act. § 6

Enforced: by appropriate US district court order. § 6

TERMINATIONS

FAR 49

For Default: "If contractor can establish...contractor was not in default or failure to perform is excusable; i.e., arose out of causes beyond the control and without the fault or negligence of the contractor, the default clauses...provide that termination for default will be considered to have been a termination for convenience...and the rights and obligations of the parties governed accordingly." 49.401(b)

For Convenience (Fixed-Price): "A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of contract, including a reasonable allowance for profit." 49.201(a)

POST-AWARD GAO PROTEST

4 CFR 21 as implemented in FAR 33.1

- Calendar day unless otherwise stated. 33.101
- Day of act, event, or default from which designated period begins to run is not included. 33.101(1)
- When agency receives notice of protest from GAO w/in 10 days after award or w/in 5 days after debriefing, whichever is later, contracting officer shall immediately suspend performance or terminate award, unless performance authorized by head of contracting activity. 33.104(c)
- GAO may hold hearing upon request. 33.104(e)
- GAO issues its recommendation w/in 100 days from date of filing of the protest with the GAO, or w/in 65 days under express option. 33.104(f)

BUY AMERICAN ACT

41 USC § 101a et seq. as implemented in FAR 25

- Requires acquisition of domestic end products for public use inside U.S. unless exception applies:
 - It is inconsistent with public interest; 25.103(a)
 - Items are not "mined, produced, or manufactured in the [U.S.] in sufficient and reasonably available commercial quantities...of satisfactory quality;" (b)
 - Cost of domestic end product is unreasonable; (c)
 - Information technology that is comm'l item. (e) – Requires, for manufactured end products, two-part test to define domestic end product: 25.101(a)
 - Article must be manufactured in the U.S.; and
 - Cost of domestic components must exceed 50 percent of the cost of all the components. (1), (2)
- Trade Agreements Act: See 19 USC § 2501 et seq.

TECH DATA RIGHTS — NONCOMM'L ITEMS

DFARS 252.227-7013

- Unlimited: "rights to use, modify, reproduce, perform, display, release, or disclose...in whole or in part, in any manner, and for any purpose...and to have or authorize others to do so." (a)(15)
- Gov't Purpose: "include[s] competitive procurement, but does not include the rights to use, modify, reproduce, release, perform, display, or disclose...for commercial purposes." (a)(11)
- Limited: "rights to use, modify, reproduce, release, perform, display, or disclose technical data...within the government." (a)(13)
- Specifically Negotiated License Rights: "such rights as the parties consider appropriate," but not less than limited rights for gov't. (b)(4)

FALSE CLAIMS ACT

31 USC § 3729 et seq.

- Action Constituting Bases for Liability: seven enumerated acts including, but not limited to: "any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." (a)(1)
- Knowing and Knowingly Defined: "a person, with respect to information – (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud required." (b)

SUSPENSION & DEBARMENT

FAR 9

- Suspension: "serious action to be imposed on the basis of adequate evidence, pending investigation or legal proceedings, when it has been determined immediate action is necessary to protect government interest." 9.407-1(b)(1)
- Debarment – Factors Considered: standards of conduct/ internal controls; timely self-disclosure; contractor's investigation/results made available; cooperation; restitution; disciplinary action taken; remedial measures; revised review and control procedures and ethics training; time to eliminate circumstances that led to cause for debarment; whether mgmt. recognizes and understands seriousness of misconduct. 9.406-1(a)

COST OR PRICING DATA (COPD)

10 USC § 2306a as implemented in FAR 2 & 15

- COPD: "all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties...prudent buyers and sellers would reasonably expect to affect price negotiations significantly." 2.101
- Contracting officer must obtain COPD only if they conclude no 15.403-1(b) exception applies. 15.403-4(a)(1)
- Threshold for obtaining COPD is \$650K. Id.
- Certification required in accordance w/15.406-2.
- Certificate does not constitute representation as to accuracy of contractor's judgment on estimate of future costs or projections. It applies to data upon which judgment or estimate was based. Id.(b)

FOREIGN CORRUPT PRACTICES ACT (FCPA)

15 USC §§ 78dd-1 et seq.

- FCPA has two principal parts:
 - 1) Anti-Bribery Provisions: prohibit corrupt payments, or giving or offering anything of value, to foreign officials, directly or indirectly, for the purpose of obtaining or keeping business or to advance a business objective.
 - 2) Accounting/Record-Keeping Provisions: require companies registered w/the Securities & Exchange Commission and listed on US stock exchanges:
 - a) to make and maintain accurate books & records; and
 - b) to implement internal controls to prevent and detect FCPA violations.
- Exception: Payment to expedite or secure "performance of routine governmental actions."

CHANGE ORDERS

FAR 43.2

- Generally, gov't contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, w/in the general scope of the contract. 43.201(a)
- Contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally funded contracts the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost or Limitation of Funds clause. 43.201(b)
- Change orders shall be issued by the contracting officer except when authority is delegated to an administrative contracting officer. 43.202

CONTRACT DISPUTES ACT

41 USC §§ 601 et seq.

- Claims must be submitted w/in 6 yrs of accrual. § 605(a)
- Claims >\$100,000: contractor shall certify claim made in good faith, supporting data are accurate and complete to the best of their knowledge and belief, amount requested accurately reflects contract adjustment for which contractor believes gov't liable and certifier duly authorized to certify claim on behalf of contractor. § 605(c)(1)
- Failure by contracting officer to issue decision w/in period required is a deemed denial. § 605(c)(5)
- May appeal to agency Board of Contract Appeals w/in 90 days, or to US Court of Federal Claims w/in 12 months, of receipt of gov't decision. §§ 606, 609

GOVERNMENT ETHICS

- 1-Year Compensation Ban: Former gov't officer/ employee who served in 1 of several enumerated positions (e.g., Source Selection Authority), or made 1 of several enumerated decisions (e.g., award), on a contract >\$10M, is prohibited from accepting compensation from that contractor (unless separate division/affiliate not producing same/similar product/service). 41 USC § 423(d)
- Lifetime Ban: Former gov't officer/employee may not knowingly, w/intent to influence, communicate, or appear before gov't on matters they participated in personally/ substantially. 18 USC § 207(a)(1)
- 2-Year Representation Ban: Applies to matters pending under officer/employee's responsibility 1 year before gov't service ended. 18 USC § 207(a)(2)