

American Recovery and Reinvestment Act Contracting Requirements

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Overview of Regulatory Requirements

- First Wave - Interim FAR Rules & OMB Guidance Implementing the Recovery Act
 - Reporting Requirements (FAR Case 2009-009; 74 Fed. Reg. 14639)
 - Buy American Construction Requirements (FAR Case 2009-008; 74 Fed. Reg. 14623)
 - Whistleblower Protections (FAR Case 2009-012; 74 Fed. Reg. 14633)
 - GAO and OIG Access to Records and Employees (FAR Case 2009-011; 74 Fed. Reg. 14646)
 - Publicizing Contract Actions Funded by Recovery Act (FAR Case 2009-010; 74 Fed. Reg. 14636)
 - Mandatory Disclosure for Competitive and Formula Grants (Updated Implementing OMB Guidance, Apr. 3, 2009)
- New FAR Rules Expected
 - Minimum Labor Wage Rates (Recovery Act § 1606)
 - Preference for Fixed-Price, Competitive Contracts (Recovery Act § 1554)

Background

- Recovery Act passed on February 17, 2009
- Five interim FAR rules and request for comments issued on March 31, 2009
- Rules are effective as of March 31 but subject to change
- CODSIA submitted comments challenging certain aspects of the rules and requesting clarification on others
- Rules currently apply to all procurement contracts, both existing and new, funded by the Recovery Act
 - Includes commercial item and commercially available off-the-shelf (COTS) contracts and contracts below the simplified acquisition threshold (e.g., FAR Part 12, 14, and 15 contracts)
- All companies who receive contracts, subcontracts, or task orders funded by the Recovery Act should familiarize themselves with the new requirements

Reporting Requirement

- New FAR clause (52.204-11) imposes reporting requirements on prime contractors
- One-time reporting requirements:
 - (1) General information, such as contract number, project title, and purpose of contract
 - (2) Executive compensation, if applicable (described on following slide)
 - (3) Detailed information on first-tier subcontracts over \$25K
- Quarterly reporting requirements:
 - (1) Amount of Recovery Act funds invoiced
 - (2) Assessment of progress towards completion of the contract/project
 - (3) Narrative description of “employment impact”
- Reports required by 7/10/09 for invoices submitted before 6/30/09; future reports due the 10th day after the end of each quarter
- Reports submitted online; reports will be made available to the public on www.recovery.gov

Reporting Requirement (Cont'd)

– Executive Compensation

- Applies if (1) contracting entity received 80% or more of its annual gross revenue from federal funding in prior FY and (2) federal gross revenue exceeded \$25M in prior FY and (3) compensation information not otherwise publicly available through SEC or IRS filings
- Requires disclosure of total compensation of five most highly-compensated officers/executives (rule inconsistent on use of “officer” and “executive” and will need to be clarified)
- “Total compensation” defined broadly and consistent with SEC regulations
- Contractors will need time to put reporting measures in place
- Other aspects of rule may need to be clarified, *e.g.*, impact of parent entity disclosures on affiliate disclosure obligations

Reporting Requirement (Cont'd)

- **Subcontractors**

- Requires detailed information on first-tier subcontracts awarded by prime contractors with Recovery Act funds:
 - name and address of subcontractor
 - amount of subcontract
 - description of products or services provided
 - primary place of performance
 - total compensation of subcontractor's top-five officers/executives
- Definition could be interpreted broadly to apply to suppliers even if not specifically contracted for Recovery Act work (e.g., for Recovery Act orders placed under a commercial item contract)

Reporting Requirement (Cont'd)

- **Economic Impact**

- Requires reporting of “jobs created” and “jobs retained” as a result of Recovery Act funding
- Although not required, some contractors are being asked to estimate economic impact before award of projects

Buy American Construction

- Prohibits use of funds for construction, alteration, maintenance, or repair of public buildings or public works unless iron, steel, and manufactured goods are produced in United States
- Agency may use exceptions when (i) restrictions inconsistent with public interest; (ii) sufficient U.S. products are not available; or (iii) restrictions would increase costs of project by more than 25%
- Buy American restriction must be applied consistently with U.S. international trade agreements

Whistleblower Protections

- Contractor prohibited from discharging, demoting, or otherwise discriminating against an employee as reprisal for good faith disclosure of the gross mismanagement, misuse, or waste of stimulus funds or a violation of law
- Termination, demotion, critical evaluation, or reassignment could be considered “retaliation”
- As required by the Recovery Act, interim FAR rule shifts the burden to the contractor to prove by clear and convincing evidence that certain action was not retaliatory after the employee makes initial showing
- Interim rule places new affirmative obligation on contractor to post notice of employee’s rights and available remedies; notice posted on company website likely to satisfy posting obligation

GAO and IG Access

- Recovery Act and interim FAR rule gives GAO and agency IGs:
 - (1) access to contractor and subcontractor records pertaining to contracts funded by the Recovery Act; and
 - (2) authority to interview any contractor employee regarding transactions related to funded projects
- Recovery Act and FAR rule also gives GAO authority to interview subcontractor employees regarding transactions related to funded projects; agency IGs do not have similar authority
- Rule does not address a prime contractor's rights with respect to GAO and IG access to its employees and subcontractors, nor does it address the protection of employee rights and procedural due process

Publicizing Contract Actions

- New FAR rule requires agencies to place notice in *FedBizOpps.gov* when a contract or other action will be funded by the Recovery Act
- Rule also requires agencies to enter data in Federal Procurement Data System for Recovery Act contracts
- Interim rule places administrative responsibility on agency conducting acquisition funded by the Recovery Act
- Contractors should diligently review *FedBizOpps.gov* to identify any contract actions that will be funded with stimulus dollars

New FAR Rules Expected

- Labor Wage Rate Requirements
 - Recovery Act requires that laborers and mechanics be paid at the Davis Bacon Act prevailing wages for construction work
 - Although existing regulations implement the Davis Bacon Act, the scope of their applicability to Recovery Act projects is somewhat uncertain
 - Under Davis Bacon Act, prevailing wage requirement applies to laborers and mechanics performing work at the construction site

New FAR Rules Expected (Cont'd)

- Preference for Competitively-Awarded, Fixed-Price Contracts
 - Recovery Act requires that, “to the maximum extent possible,” agencies must award contracts as fixed-price contracts using competitive procedures
 - If competitive, fixed-price contract is not used (e.g., T&M contract, even if competitively awarded), then agencies are to apply greater oversight
 - Expect agencies to further disfavor T&M and cost-reimbursement contracts

Practical Considerations

- Recovery Act requirements will not automatically or unilaterally be incorporated into existing contracts
- Before agreeing to bilateral modification to incorporate the Recovery Act requirements into existing contracts or task orders, contractors may be entitled to price adjustment under terms of contract (e.g., changes/equitable adjustment clause)
- It may be possible to avoid accepting Recovery Act funds, and thus avoid agreeing to Recovery Act requirements in the short term, but eventually contractors likely will be required to make “take it or leave it” decisions
 - For example, GSA Multiple Award Schedule contracts to be updated through mass modifications to include new Recovery Act clauses; contractors who refuse modification could be excluded from Schedule program

QUESTIONS?

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