

Implementation of American Recovery and Reinvestment Act – Policy and Guidance

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**Homeland
Security**



Introduction: Recovery Act - Impact on Procurement

- The American Recovery and Reinvestment Act of 2009 (Recovery Act)
 - Pub. L. 111-5 enacted February 17, 2009
 - Establishes principals for transparency and accountability
 - Establishes requirements for Federal contracts and IAAs
- OMB Guidance
 - Initial February 18, 2009
 - Updated April 3, 2009
- FAR Implementation, FAC 2005-32
- Presidential Memorandum of March 20, 2009
- CPO memoranda to HCAs
 - March 12, 2009 and April 13, 2009



OMB Guidance Highlights – Section 1 General Information

- Executive Branch goals and responsibilities
 - Ensuring long-term public benefits, optimization of economic and programmatic results
 - Compliance with equal opportunity laws and principles
 - Promoting local hiring
 - Providing maximum opportunities for small business
 - Providing equal opportunity for disadvantaged business enterprises
 - Encouraging sound labor practices
 - Engaging with community-based organizations



OMB Guidance Highlights – Section 1 (cont.)

- Executive Branch goals and responsibilities (cont.)
 - Compliance with
 - Statutes, regulations, EOs that apply to expenditure of funds
 - National Environmental Policy Act
 - Section 1605 Buy-American provisions for construction (see FAR Case 2009-008 and Regulatory (Reg.) Advisory 09-16)
 - Section 1606 Davis-Bacon Act
 - DOL is preparing additional guidance and preparing to conduct reviews
- Timely and accurate reporting
 - Includes tracking and being prepared to report on administrative costs funded by other appropriations



OMB Guidance Highlights – Section 1 (cont.)

- Use of purchase cards
 - OK for official purchases in support of the Recovery Act
 - *DHS*
 - Follow established Component procedures
 - Ensure you can separately identify and track Recovery Act purchase card transactions
- Agency guidance
 - Must be posted at www.dhs.gov/recovery
 - *DHS*
 - Contracting Activity must provide a copy of any Recovery Act guidance to Thomas Mason, OCPO



OMB Guidance Highlights – Section 2 Agency Plans & Public Reporting

2.2	Major Communications	Immediate/Ongoing
2.3	Funding Notification Report	Immediate/Ongoing
2.4	Weekly Financial and Activity Report	Weekly/Ongoing
2.5	Monthly Financial Report	Cancelled
2.6	Award-level Reporting (as required for USAspending.gov)	Immediate/Ongoing
2.7	Agency-wide Recovery Act Plans	Draft May 1st/ Final May 15th
2.8	Program-specific Recovery Act Plans	
2.10	Recipient reporting	Starting 10/10/09



OMB Guidance Highlights – Section 2 (cont.)

- Major communications
 - Clear, short, focused
 - Requires clearance by agency senior accountable official or designee
 - Requires approval by OMB
 - *DHS*
 - Includes Congressional notifications
 - Follow existing procedures and timeframes, OCPO is identifying Recovery Act actions submitted to OLA for review by OMB
- Recipient reporting
 - Section 1512
 - See FAR Case 2009-009, Acquisition Advisory 09-19



OMB Guidance Highlights – Section 3 Governance, Risk Mgmt & Program Integrity

- Recovery Act Accountability and Transparency Board
 - Responsible for coordinating and conducting oversight of Federal spending under the Recovery Act to prevent waste, fraud, and abuse
- *DHS*
 - Acquisition Directive 102-01 - Acquisition Review Board will ensure that the Acquisition Review Process incorporates appropriate risk management considerations
 - Special OSS reviews of Recovery Act procurements
- In addition: DHS OIG reviews



OMB Guidance Highlights – Section 4 Budget Execution

- Prohibition on commingling Recovery Act funds with other appropriations
 - Must be able to track and report on Recovery Act funds through close-out
 - *DHS*
 - Contracting Officers must issue a discrete contract action (new award, order, or modification as appropriate) for any procurement using Recovery Act funds
- TAFS information
- Recovery Act funds
 - Not to be used for fixed costs (e.g., space)
 - Not to be used for administrative costs (e.g., personnel)
 - May be allowed for direct contractor support of a Recovery Act project
 - Contact Gloria Sochon, OCPO, for any questions



OMB Guidance Highlights – Section 6 Contracts

- **The FAR applies**
 - Consider the following elements during acquisition planning
- Contract type selection, including sufficient qualified personnel and appropriate oversight
- Preference for fixed-price contracts
- Competition – maximum extent practicable
- Rationale required for any action that is not both fixed-price and competitive (See FAR Case 2009-010 and Reg. Advisory 09-18)
- Acquisition objectives and evaluation criteria
- Use of existing contracts
 - Additional publicizing requirements (See FAR Case 2009-010 and Reg. Advisory 09-18)



OMB Guidance Highlights – Section 6 (cont.)

- Interagency agreements
 - Be sure to define roles and responsibilities for unique Recovery Act requirements
 - *DHS*
 - Congressional notification requirements apply to awards resulting under IAAs. Follow HSAM 3005.303 procedures.
- Small business participation
 - Provide maximum practicable opportunities for small businesses to compete and participate
 - Publicizing requirements apply to noncompetitive opportunities as well as competitive ones (e.g., 8(a))
- Javits-Wagner-O'Day Act – Ability One
 - Mandatory use of Procurement List applies
 - Additional opportunities are encouraged



OMB Guidance Highlights – Section 6 (cont.)

- Contract Financing and Structuring Contract Deliverables
 - Promote economic stimulus goals
- Publicizing and reporting Recovery Act procurement actions
 - Expanded requirements include task and delivery orders, GSA Schedule orders, others
 - See FAR Case 2009-010 and Reg. Advisory 09-18
- Responsibility determinations
 - Place special emphasis on responsibility determinations and pre-award surveys
 - Avoid “false economy” of awarding solely based on lowest evaluated price



OMB Guidance Highlights – Section 6 (cont.)

- Acquisition Flexibilities
 - No new basis for JOTFOC
 - No basis to use emergency authorities
 - The contracting officer may use existing flexibilities
- Ensure appropriate post-award performance management
- Expect reporting on:
 - Progress against program schedule and performance objectives
 - Qualification and number of acquisition and program management staff
 - Use of competition
 - Timeliness of awards
 - Dollars obligated and expended



Recovery Act FAR Cases - General

- Effective upon issuance, March 31, 2009
- If using an existing contract, the Contracting Officer must issue a bilateral modification IAW FAR 1.108(d)(3) incorporating the applicable new clauses established in these cases. If the contractor does not accept the clauses, it is not eligible to receive Recovery Act funds.
- Rules and clauses apply to:
 - Commercial item contracts (except Buy-American)
 - COTS contracts (except Buy-American)
 - Contracts below the SAT



FAR Case 2009-008, Reg. Advisory 09-16 BAA Requirement for Construction Material

- Prohibits use of funds appropriated for the Recovery Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.
- Section 1605 requires that the Buy American requirement be applied in a manner consistent with U.S. obligations under international agreements



FAR Case 2009-008, Reg. Advisory 09-16 BAA Requirement for Construction Material

- Contracting Officers may allow incorporation of foreign construction materials on the basis of three exceptions
 - Iron, steel, or manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality (HCA must make this determination),
 - Inclusion of U.S. iron, steel, and manufactured goods will increase the cost of the project by more than 25%, or
 - Applying the domestic preference would be inconsistent with the public interest (HCA must make this determination).



FAR Case 2009-008, Reg. Advisory 09-16 BAA Requirement for Construction Material

- Contracting Officers must incorporate the applicable contract clauses --

<i>Instead of:</i>	<i>Use:</i>
52.225-9, Buy American Act— Construction Materials	52.225-21, Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act— Construction Materials,
52.225-10, Notice of Buy American Act Requirement— Construction Materials	52.225-22, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials
52.225-11, Buy American Act— Construction Materials under Trade Agreements;	52.225-23, Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act— Construction Materials Under Trade Agreements,
52.225-12, Notice of Buy American Act Requirement— Construction Materials under Trade Agreements	52.225-24, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials under Trade Agreements



FAR Case 2009-008, Reg. Advisory 09-16 BAA Requirement for Construction Material

- If the solicitation includes either FAR 52.225-11 or 52.225-23 the Contracting Officer must insert the following notice in the synopsis:
 - *“One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.”*
- When a waiver is granted
 - The contract must include a list of the excepted materials, and
 - A notice must be published in the Federal Register within two weeks of the date of the waiver unless the construction material is listed at FAR 25.104 as being already domestically unavailable. See FAR 25.603(b)(2) for the content of the notice.



FAR Case 2009-008, Reg. Advisory 09-16 BAA Requirement for Construction Material

- Contractors
 - Are prohibited contractors, with certain exceptions, from using Recovery Act funds for U.S. construction projects to purchase iron, steel, or other manufactured goods not produced in the U.S.
 - May request a pre-award waiver from the Contracting Officer for specifically identified construction materials
 - May request a waiver post-award, with an explanation of why the need for a waiver was not reasonably foreseeable
- OCPO POC: Jerry Olson



FAR Case 2009-009, Reg. Advisory 09-19 Reporting Requirements

- Contractors must report use of Recovery Act funds to www.FederalReporting.gov
 - Required for all work funded in whole or in part by the Recovery Act
 - Site to be available for July 10, 2009 report
- New FAR Subpart 4.15, *American Recovery and Reinvestment Act – Reporting Requirements*
 - Contract clause, FAR 52.204-11, American Recovery and Reinvestment Act – Reporting Requirements
 - Establishes definitions for: contract, first-tier subcontract, jobs created, jobs retained, and total compensation
 - Instructs the contractor where, when, how, and what must be reported



FAR Case 2009-009, Reg. Advisory 09-19 Reporting Requirements (cont.)

- Contracting Officers must:
 - Incorporate the new clause at FAR 52.204-11
 - Structure contracts to allow separate tracking of Recovery Act funds
 - Dedicated contract awards
 - Separate CLINs funded by discrete (stand-alone) modifications
 - Ensure contractor compliance with the reporting requirement. If contractor does not, then:
 - Exercise appropriate contract remedies
 - Document as part of performance evaluation



FAR Case 2009-009, Reg. Advisory 09-19 Reporting Requirements (cont.)

- Contractor reports include (but are not limited to):
 - Dollar amount of contractor invoices
 - Supplies delivered and services performed
 - Assessment of the completion status of work
 - Estimate of # of jobs created and # of jobs retained
 - Names and total compensation of each of the 5 most highly compensated officers for the calendar year
 - Specific information on first-tier subcontractors
- Contractor reports due July 10 (for invoices submitted prior to June 30) and not later than the 10th day after each following calendar quarter
- OCPO POC: Kathy Strouss



FAR Case 2009-010, Reg. Advisory 09-18 Publicizing Contract Actions

- Implements OMB guidance for publicizing and reporting Recovery Act contract actions
- Applies to all procurement actions that use Recovery Act funds, including:
 - New contract awards, including letter contracts
 - Purchase orders under FAR Part 13
 - Task and delivery orders under single or multiple award IDIQ contracts, including DHS contracts, GWACs, MACs, and GSA Schedule contracts
 - Modifications
 - Blanket purchase agreements and orders issued under them
- Only exception is for national security information



FAR Case 2009-010, Reg. Advisory 09-18

Publicizing Contract Actions (cont.)

- Publicizing
 - Applies to actions >\$25,000
 - Preaward
 - Follow instructions at www.FedBizOpps.gov to identify the action as a Recovery Act action
 - Include a clear and unambiguous narrative of the products and services in the description
 - Contract actions:
 - Comply with FAR Part 5 requirements for publicizing and response time
 - Task and delivery orders:
 - Follow FedBizOpps instructions to identify the action for information purposes only
 - Proceed with applicable ordering procedures (e.g., E-Buy, Fair Opportunity)
 - For construction, include the notice required by FAR 5.207(c)(13)(iii)



FAR Case 2009-010, Reg. Advisory 09-18

Publicizing Contract Actions (cont.)

- Publicizing (cont.)
 - Postaward
 - Congressional notification requirements apply
 - Follow existing procedures and timeframes, OCPO is identifying Recovery Act actions submitted to OLA for review by OMB
 - Follow instructions at www.FedBizOpps.gov to identify the action as a Recovery Act action
 - If the contract action >\$500,000, include a clear and unambiguous narrative of the products and services in the description
 - At any dollar value, if the contract is not both fixed-price and competitively awarded, include the rationale for using other than a fixed-priced and/or competitive approach



FAR Case 2009-010, Reg. Advisory 09-18 Publicizing Contract Actions (cont.)

- FPDS Reporting
 - Follow the instructions at www.fpds.gov to identify the actions as one that uses Recovery Act funds
- Treasury Appropriation Fund Symbols (TAFS) provided with Reg. Advisory 09-18
 - Use for FPDS and Congressional notifications
- OCPO POC: Gloria Sochon



FAR Case 2009-011, Reg. Advisory 09-20 GAO/IG Access

- Adds alternate clauses to FAR that enable Comptroller General and Inspector General:
 - Reviews of any records of the contractor or subcontractor regarding transactions using Recovery Act funds
 - Interviews of contractor personnel
 - Comptroller General interview authority flows down to subcontractor personnel, IG authority does not
- In addition, the Act creates the Recovery Accountability and Transparency Board (the Board) which may also audit and review spending at the contract level



FAR Case 2009-011, Reg. Advisory 09-20 GAO/IG Access (cont.)

- Contracting officers must incorporate the appropriate alternate clause
- Contractors and subcontractors
 - Not obligated to create additional records
 - Must make available existing records of transactions covered by the Act
 - Must make employees available for interviews
- OCPO POC: Teri McConahie



FAR Case 2009-012, Reg. Advisory 09-20 Whistleblower Protections

- Provides definitions, policy and procedures for whistleblower protection specific to Recovery Act-funded transactions
- Whistleblower procedures in FAR 3.901- 3.906 do not apply to Recovery Act actions
- Contracting Officers must:
 - Incorporate the clause at FAR 52.203-15
 - Upon receipt of a complaint of reprisal, notify and coordinate with
 - Component HCA and legal counsel,
 - The HCA of any other affected Component, and
 - If related to an order under another agency's contract, the Contracting Officer for the servicing agency



FAR Case 2009-012, Reg. Advisory 09-20 Whistleblower Protections (cont.)

- Contractors and subcontractors:
 - Are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing covered information to designated entities
 - Must post notices of whistleblower protections
 - DHS OIG is considering whether to design a standard poster, none is available at this time
- OCPO POC: Gloria Sochon



Presidential Memorandum

- *“Ensuring Responsible Spending of Recovery Act Funds”*
 - Merit-based decision-making
 - Identify projects with the greatest potential to achieve Recovery Act goals
 - Avoiding Funding of imprudent projects
 - Recovery Act prohibitions: No funding for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool
 - Projects that do not further Recovery Act goals
 - Ensuring transparency of registered lobbyist communications



Presidential Memorandum (cont.)

- Registered lobbyist communications
 - Applies to lobbyists covered under the Lobbying Disclosure Act of 1995
 - Lobbyist views regarding a particular project, application or applicant must be writing
 - Written views posted to www.dhs.gov/recovery within 3 days of receipt
 - At the outset of any oral communication, inquire whether any participant is a registered lobbyist
 - Oral communications may cover policy issues but not particular projects, applications or applicants
 - *DHS*
 - Refer any lobbyist to Mui Erkun, DHS Industry Liaison
 - DHS is preparing further implementing instructions



Additional OCPO Guidance

- Transparency, accountability and data integrity
 - Be accurate, complete and timely
 - Follow FedBizOpps and FPDS requirements for identifying Recovery Act actions
 - Provide sound, clear rationale for noncompetitive or other than fixed price actions
- Federal Supply Schedules
 - GSA) negotiating with Schedule contractors to incorporate the Recovery Act clauses established in FAC 2005-32 into the Schedule contracts
 - An “ARRA” symbol will appear on GSA Advantage®, Schedules eLibrary, and e-Buy to identify contractors who have accepted the new clauses



Additional OCPO Guidance (cont.)

- Refer media contacts to Larry Orluskie, Director of Communications



Resources

- DHS Online Portal: [Acquisition](#)
 - DHS Recovery Act guidance and policies; link to regulatory advisories
- www.regulations.gov
 - FAR Cases, search on “FAC 2005-32”
- www.dhs.gov/recovery
 - DHS plans, reports, policies, announcements
- www.recovery.gov
 - Investments; opportunities; impact; news; FAQ; accountability and transparency; fraud, waste and abuse; agency progress and resources
- www.whitehouse.gov/omb/recovery_default/
 - OMB guidance, FAQ, registered lobbyist disclosure form