

## Legal Updates & News

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#### Recovery Act Requires Extraordinary Steps by Both Government and Contractors

March 2009

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Transparency and accountability are the hallmarks of the Obama Administration's plans to implement the American Recovery and Reinvestment Act ("Recovery Act") of 2009, which was signed by President Obama on February 17, 2009. In an effort to stimulate the economy, the Recovery Act appropriates \$787 billion for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and state and local fiscal stabilization. Federal agencies will obligate or expend the recovery funds through a variety of funding vehicles, including procurement contracts, grants and cooperative agreements, and loans and loan guarantees. In each case, the funds will be subject to an unprecedented level of transparency and accountability. For government contractors and others, the Recovery Act means opportunity. But, with opportunity comes responsibility; namely, the responsibility to put in place the policies, procedures, and infrastructure to meet the transparency and accountability requirements of the Recovery Act.

#### Related Practices:

[Government Contracts](#)

#### The Guidance

On February 18, 2009, the Office of Management and Budget ("OMB") published initial requirements and guidelines for implementation of the Recovery Act by Federal agencies. The stated goals of the guidance are to ensure that Federal agencies meet the following crucial accountability objectives:

- Funds are awarded and distributed in a prompt, fair and reasonable manner;
- The recipients and uses of all funds are transparent to the public, and the public benefits of these funds are reported clearly, accurately, and in a timely manner;
- Funds are used for authorized purposes and instances of fraud, waste, error, and abuse are mitigated;
- Projects funded under the Recovery Act avoid unnecessary delays and cost overruns; and
- Program goals are achieved, including specific program outcomes and improved results on broader economic indicators.

To this end, the guidance requires agencies to take steps beyond standard practice, including reporting, information collection, budget execution, risk management, and specific actions in connection with award type. Many of these extraordinary steps will directly impact federal contractors and other non-federal recipients of Recovery Act funds.

#### Reporting & Information Collection

The OMB guidance imposes extensive reporting requirements on Federal agencies to meet the accountability and transparency objectives of the Recovery Act and the Administration. The Guidance requires, among other things, that agencies provide reports on obligations and expenditures of Recovery Act funds, formula block grant allocations, award-level transactional data, and agency-wide and program-specific Recovery Act plans. This information will be posted to and available on Recovery.gov and/or agency websites. Recovery.gov is a publicly accessible website established by the Administration to facilitate accountability and transparency. [1] Recovery.gov is intended to be the single, consolidated portal to that information.

To support these reporting requirements, the Recovery Act and its implementing guidance require extensive reporting by the recipients of Federal funding. The Recovery Act defines “recipient” as any entity, other than an individual, that receives Recovery Act funds directly from the Federal government through contract, grant, loan, or otherwise. The term would include federal prime contractors and award recipients. The term also includes states that receive recovery funds.

Under the Act, prime non-federal recipients of recovery funds are required to submit reports to the Federal agency providing the award 10 days after the end of each calendar quarter. The reports must include the following information:

- Total amount of recovery funds received from the agency.
- Amount of recovery funds received that were obligated and expended to projects or activities.
- Detailed list of all projects or activities for which recovery funds were obligated and expended, including an estimate of the number of jobs created or retained by the project or activity.
- Detailed information on any subcontracts or subgrants awarded by the recipient.

OMB promises to provide more detailed reporting and data collection instruction when it issues final Recovery Act guidance.

### ***Risk Management***

The Act establishes the Recovery Act Accountability and Transparency Board to coordinate and conduct oversight of Federal spending of recovery funds to prevent fraud, waste, and abuse. The Board is responsible for monitoring the accountability objectives set forth in the Act, including the following:

- Funds are awarded and distributed in a prompt, fair, and reasonable manner.
- The recipients and uses of all funds are transparent to the public, and the public benefits of these funds are reported in a clear, accurate, and timely manner.
- Funds are used for authorized purposes and instances of fraud, waste, error, and abuse are mitigated.
- Projects funded under the Act avoid unnecessary delay and cost overruns.
- Program goals are achieved.

At present, there are no specific reporting requirements related to risk management, but OMB anticipates the Board may impose reporting requirements once the Board is fully in place. In the meanwhile, the OMB guidance encourages Federal agencies to begin formulating risk management mitigation strategies to meet and track progress toward accountability objectives.

### **Contracts and Grants**

For government contractors and other recipients of the recovery funds, it is not business-as-usual. The OMB guidance imposes a number of requirements on the solicitation, award, and administration of contracts, grants and cooperative agreements beyond those typically required. This is in addition to the reporting requirements noted above.

For contract actions, the OMB guidance directs the award of fixed-price contracts using competitive procedures to the maximum extent practicable, noting that fixed-price contracts expose the government to fewer risks than cost-type contracts and that competition is the cornerstone of our acquisition system.

The guidance notes that the need to commence expenditures and recovery activities as quickly as possible does not itself constitute sufficient grounds for non-competitive awards. Moreover, agencies must post a summary of each contract or order that is not both fixed-price and competitively awarded to a special section of the Recovery.gov website.

The OMB guidance also puts in place unique requirements for posting presolicitation notices and announcing contract awards. More specifically, agencies are required to post presolicitation and award notices for any order under a task or delivery order contract that meets the FAR Part 5 dollar threshold. This goes beyond the current requirements, which do not apply to individual orders under task or delivery order contracts. In addition, agencies are required to provide a summary of each contract or order over \$500,000 that can be accessed through the Recovery.gov website. Other unique contract requirements include reporting on first-tier subcontractor awards, special Buy American Act requirements, and expanded Government Accountability Office and Office of Inspector General access to contractor records. These and other matters are under consideration for FAR coverage or other government-wide guidance.

Like contract actions, grants and cooperative agreements are subject to additional requirements beyond the norm under the Recovery Act and OMB guidance. For example, agencies must provide information in funding opportunity announcements and award notifications on Recovery Act-specific reporting requirements. They must also take steps to initiate additional oversight mechanisms, identify high risk programs to be designated as Single Audit major programs, and make all Single Audit reports available on the internet through a link to the Recovery.gov website. Moreover, agencies must include a requirement that each grantee or sub-grantee who receives recovery funds shall refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds. A similar requirement was implemented for government contractors in December 2008.

### **Show Me the People**

The OMB guidance recognizes what commentators have been pointing out for years; namely, the Federal government does not have the acquisition workforce or resources to properly carry out its acquisition mission. To address these concerns, the guidance suggests several options for hiring additional temporary or term employees quickly. However, it is doubtful that these options will be adequate. Given that the growth in federal contract spending has significantly outpaced the growth in the federal acquisition workforce over the past eight years, the prospects of successfully growing the heretofore undersized workforce to adequately carry out the federal government's responsibilities under the Recovery Act are not too promising. This is likely to translate into missteps in the solicitation, award, and administration of contracts and awards and management of funds.

The Recovery Act will also increase the cost of doing business with the government. Doing business with the government has always necessitated additional overhead to deal with government-unique requirements. The additional reporting and other requirements imposed upon recipients of recovery funds will add to this cost.

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### **Footnotes**

[1]The Administration's web-based approach to transparency and accountability comes as no surprise to those familiar with Federal Funding Accountability and Transparency Act ("FFATA") of 2006, Pub. L. No. 109-282, which President (then Senator) Obama co-sponsored. FFATA requires OMB to establish a single searchable website, accessible to the public, that provides information on federal awards, including contracts, subcontracts, purchase orders, task orders, delivery orders, grants, cooperative agreements, loans and subgrants.

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