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## A Construction Law Update

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### Spending the Stimulus: Federal Guidelines and Accountability

President Obama signed the American Recovery and Reinvestment Act (the "Stimulus Act") on February 17, 2009, providing \$787 billion to create and maintain jobs and to spur economic growth. Of the total, tax relief accounts for \$212 billion. The other \$575 billion will be disbursed by Federal agencies through construction and other contracts and grants to state and local governments and nonprofit organizations. The Stimulus Act allocates specified amounts to named Federal agencies for designated programs and activities.

The day after the Stimulus Act became law, the Office of Management and Budget ("OMB") issued its Initial Implementing Guidance (the "Initial Guidance") to Federal agencies that will receive stimulus funds. The Initial Guidance provides the agencies with direction on planning for and authorizing contracts and grants. Like the Stimulus Act itself, the Initial Guidance emphasizes transparency and accountability. Federal agencies will be required to make available a wealth of information about their plans for spending stimulus funds and about the effectiveness of the spending.

The Initial Guidance also includes important information for companies and nonprofits that want to obtain stimulus-funded contracts and grants. They will want to keep track of agency planning and inform themselves of the criteria that will guide awards and the special provisions designed to make stimulus spending transparent and accountable. The following highlights some of the information:

- *Websites.* An OMB-maintained website, [www.recovery.gov](http://www.recovery.gov), will give the public access to stimulus information submitted by the agencies to OMB. In addition, each agency will dedicate a portion of its website to stimulus planning and spending. *Recovery.gov* provides a link to each affected agency's website. Among other things, the agencies must post the following:
  - Weekly Reports. Starting March 3, 2009, each agency must provide a weekly status update, including major planned actions.
  - Recovery Program Plan. Not later than May 1, each agency must submit its Recovery Program Plan. This plan will detail how the agency plans to implement the programs and spend the funds assigned to it.

- *Specific Grant/Contract Information.*
  - By March 9, 2009, agencies will post summaries of proposed competitive grants on [www.grants.gov](http://www.grants.gov). By March 19, agencies will link their *grants.gov* summary to a full description of the competitive grant.
  - Presolicitation notices of proposed contracts will be posted on "FedBizOpps" in accordance with Part 5 of the Federal Acquisition Regulations ("FAR").
  - Information about the availability of loans and loan guarantees will be posted on [www.govloans.org](http://www.govloans.org)
- *Contracting Directives.*
  - Standard contracting rules and procedures will apply, except to the limited extent they are inconsistent with the Stimulus Act. One example: the Act's transparency and accountability provisions supplement standard procedures.
  - "To the maximum extent practicable, contracts using Recovery Act funds shall be awarded as fixed-price contracts (see FAR Subpart 16.2) using competitive procedures."
  - Agencies will "[m]aximize opportunities for small businesses to compete for agency contracts and to participate as subcontractors."
  - Contractors and others, including governmental entities, that receive stimulus funds directly from a Federal agency must have a "DUNS" number (assigned by Dun & Bradstreet) and must register with Central Contractor Registration, a long-standing Federal registration system ([www.ccr.gov](http://www.ccr.gov)). The OMB will issue further guidance as to whether second-tier recipients must register.
  - In light of tight credit markets, agencies may structure contracts to provide government financing of the contractor's cash flow.
  - Contractors and subcontractors on stimulus-funded projects must pay the Davis-Bacon Act prevailing wage. Under that Act, the Department of Labor determines the prevailing wage in localities for various categories of workers.
- *Buy American.* Notably, the Initial Guidance does not elaborate on the Stimulus Act's "Buy American" provision, which is unclear in important respects.
  - The provision prohibits use of stimulus funds for work on a "public building or public work unless all the iron, steel and manufactured goods used in the project are produced in the United States." It remains to be seen how broadly "public works" and "manufactured goods" will be interpreted.

- There are important exceptions.
  - The relevant Federal agency head may waive the requirement for a project if it would be inconsistent with the public interest or would increase the project cost by more than 25 percent, or if U.S.-produced goods are not available in sufficient quantities or quality.
  - International trade agreements override the Buy American requirement if it is inconsistent with them.
  - According to the Stimulus Act conference committee report, the President may waive the Buy American requirement for a project by exercising waiver authority conferred by earlier statutes implementing international trade agreements.
- *Recipient reporting requirements.*
  - Direct recipients of stimulus funds, such as companies that contract with a funding Federal agency, must periodically report information about use of the funds. The information will be posted on *www.recovery.gov*.
  - The information likely will require recipients to create and maintain more detailed records.
  - Indirect recipients, such as state contractors on stimulus-funded projects, likely will be required to maintain more detailed records.
- *Oversight.* The Stimulus Act includes provisions designed to prevent and discover waste, fraud and abuse. Recipients should anticipate a high level of scrutiny.
  - The inspector generals of Federal agencies will follow up diligently on reports of misuse of funds. The Stimulus Act appropriated substantial amounts for this purpose.
  - A newly-created board will oversee agency compliance with contracting and other requirements and will conduct reviews of expenditures.
  - Whistleblowers may bring a claim against their employer for retaliation and may recover damages if their report of stimulus fund misuse was a "contributing factor" to the retaliation.

## **Conclusion**

The Stimulus Act presents tremendous opportunities for those who keep informed and act quickly to identify ways to participate in Federal and state stimulus spending. But the stimulus contracting process will be complex, as will be the accountability and other requirements for those receiving stimulus funds. The Initial Guidance is only the first of what likely will be

several Federal and state stimulus-related pronouncements. Please don't hesitate to call us to assist with your efforts.

*Lane Powell has launched an interdisciplinary team comprised of attorneys from a wide range of practice areas to assist our clients in identifying key opportunities and challenges presented by the American Recovery and Reinvestment Act of 2009 and related administrative policies. Please visit our [website](#) to read additional legal updates prepared by members of Lane Powell's Economic Stimulus task force.*

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