

## ACQUISITION PROVISIONS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (H.R. 1)

On February 13, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (H.R. 1) (Act). The Act contains an announced US\$150 billion investment in our nation's infrastructure. The Act proposes such expenditures through a combination of block grants to the states, cooperative agreements, General Services Administration (GSA) Schedules, and other vehicle funding. The Act will fund infrastructure expenditures for public transit, high-speed rail, safeguarding of roads, bridges, dams, ports, and water systems; broadband expansion throughout the country; foreclosure assistance; the National Institutes of Health, community health centers, the Indian Health Service, and the US Department Health and Human Services Information Technology security, among other things.

The Act and the Office of Management and Budget (OMB) are implementing guidance to agencies with unprecedented levels of transparency and reporting requirements. The Act sets forth new provisions applying to funding accomplished through federal contracts.

This client advisory summarizes the specific, new acquisition-related provisions in the Act. We have not attempted to summarize the entire Act, or even note every acquisition-related provision. Rather, we present below the major acquisition-related provisions relating specifically to contract spending under the Act. We also made no attempt to address separate provisions governing grant and cooperative agreement spending under block grant and other provisions of the Act.

### CONTRACTING PROVISIONS UNDER THE ACT

**Buy American (Section 604)**, applicable to the US Department of Homeland Security (DHS), includes Buy American provisions for textile materials acquired by DHS using funds under the Act. The restrictions do not apply to purchases below the simplified acquisition threshold. Section 604 also requires training on the requirements of this provision, for members of the DHS acquisition workforce who purchase textiles on a regular basis.

**US Government Accountability Office (GAO) Oversight (Section 902)** authorizes the Comptroller General to (1) examine the records of any contractor, any of its subcontractors, or any state or local agency administering contracts with funds issued under the Act; and (2) interview any officer or employee of a contractor or

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subcontractor, or any state or local government employee administering the contract regarding such transactions.

**State and Local Certifications (Section 1511)** provides that the governor, mayor, or other chief executive must certify covered funds are made available to state or local governments for infrastructure investments, that the infrastructure investment has received the full review, that vetting, as required by law, is occurring, and that the chief executive accepts responsibility that the infrastructure investment is an appropriate use of taxpayer dollars. State and local agencies may not receive infrastructure investment funding under the Act unless the certification is made and posted on the Recovery Accountability and Transparency Board's (Transparency Board's) website.

**Inspectors General Review (Section 1515)** provides agency Inspectors General the same rights as the Comptroller General is provided under Section 901—to examine records and interview personnel related to any contracts *or grants* issued with funds under the Act.

**Transparency Board (Section 1521)** establishes the Recovery Accountability and Transparency Board. The Transparency Board's purpose is to coordinate and conduct oversight of the Act's funds to prevent fraud, waste, and abuse.

**Functions of Transparency Board (Section 1523)** establishes the functions of the Transparency Board, which include: (1) reviewing whether the reporting of contracts and grants meet applicable standards; (2) reviewing whether applicable competition requirements have been satisfied; (3) auditing covered funds to determine whether wasteful spending, poor management, or other abuses are occurring; (4) reviewing whether there are sufficient qualified acquisition and grant personnel overseeing covered funds; and (5) reviewing whether such acquisition personnel receive adequate training.

**Transparency Board Website (Section 1526)** provides for a Transparency Board website that, among other things, will provide detailed data on contracts awarded by the federal government, including information on the competitiveness

of the contracting process, information about the process that was used for award of contracts, and for contracts over US\$500,000, a summary of the contract.

**Whistleblower Protection (Section 1553)** provides protection for state and local government and contractor whistleblowers. Any employee of any non-federal employer receiving covered funds may not be discharged or otherwise discriminated against as a reprisal for disclosure of gross mismanagement, abuse, or violation of law, as specified under the Section.

**Special Contracting Provisions (Section 1554)** provides that to the maximum extent possible and appropriate, contracts funded under the Act shall be awarded as fixed-price contracts through the use of competitive procedures. The Section also requires that information on any contract that is not fixed-price and not awarded using competitive procedures be posted in a special section on the Transparency Board's website.

**Preference for Quick-Start Activities (Section 1602)** establishes a preference for activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated no later than 120 days after the date of the enactment of the Act (February 17, 2009). Recipients shall also use grant funds in a manner that maximizes job creation and economic benefit.

**Period of Availability (Section 1603)** provides that all funds appropriated under the Act shall remain available for obligation until September 30, 2010, unless expressly provided otherwise under the Act.

**Limit on Funds (Section 1604)** restricts funds appropriated, or otherwise made available under the Act, from use by any state or local government or, any private entity, for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.

**Wage Rate Requirements (Section 1606)** provides that all laborers and mechanics employed by contractors and subcontractors on projects funded directly or assisted, in whole

or in part, by and through the federal government pursuant to the Act must be paid at not less than the local prevailing wage rates as determined by the Secretary of Labor.

**Bailout Bill Reform (Section 1608).** Reform of Contracting Procedures Under Section 107(b) of the Emergency Economic Stabilization Act of 2008 (EESA) amends Section 107(b) by adding the statement “individuals with disabilities and businesses owned by individuals with disabilities (for purposes of this subsection the term ‘individual with disability’ has the same meaning as the term ‘handicapped individual’ as that term is defined in section 3(f) of the Small Business Act (15 U.S.C. § 632(f))...).” Section 107(b) of the EESA previously read as follows:

**(b) ADDITIONAL CONTRACTING REQUIREMENTS.—**

In any solicitation or contract where the Secretary has, pursuant to subsection (a), waived any provision of the Federal Acquisition Regulation pertaining to minority contracting, the Secretary shall develop and implement standards and procedures to ensure, to the maximum extent practicable, the inclusion and utilization of minorities (as such term is defined in section 1204(c) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1811 note)) and women, and minority- and women-owned businesses (as such terms are defined in section 21A(r)(4) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(r)(4))), in that solicitation or contract, including contracts to asset managers, servicers, property managers, and other service providers or expert consultants.

**Compliance with the FAR (Section 1610)** requires that federal agencies using funds appropriated under the Act for projects initiated after the effective date of the Act, must comply with Federal Property and Administrative Services Act (41 U.S.C. § 253) and the Federal Acquisition Regulation (FAR), unless such contract is otherwise exempt from the FAR.

## OMB IMPLEMENTING GUIDANCE

On February 18, 2009, five days after the Act’s signing, OMB issued a Memorandum for the Heads of Departments

and Agencies (Memorandum) providing initial guidance for implementation of the Act. Section 6 of the 60 page document provides guidance for contracts. In issuing contracts under the Act, the Memorandum directs agencies to:

- mitigate schedule, cost, and performance risks;
- define contract requirements that deliver meaningful and measurable outcomes consistent with agency plans and goals of the Act;
- obtain maximum practicable competition;
- maximize opportunities for small businesses to compete for agency contracts and to participate in subcontracting;
- use supplies and services provided by nonprofit agencies employing people who are blind or severely disable as provided in FAR Subpart 8 (the Javits-Wagner-O’Day Act preferences);
- expeditiously award contracts using streamlining flexibilities;
- apply sufficiently and adequately trained personnel to responsibly plan, evaluate, award, and monitor contracts;
- ensure an adequate number of qualified government personnel are able to perform inherently governmental functions during the acquisition life-cycle; and
- provide appropriate agency oversight at critical decision points.

The Memorandum further:

- stresses the importance of using the appropriate contract vehicles suited to each purchase, while at the same time establishing a preference for fixed-price contracts. The Memorandum cites the incentive to control costs that fixed price contracts impose, while at the same time noting the need for additional oversight over other than fixed-price contracts that involve more risk for the Government.
- emphasizes the need for competition which it calls the “cornerstone of [the federal] acquisition system.” The Memorandum states a preference for fixed-price contracts awarded through competition. Evidencing a lesson learned from Hurricane Katrina and other prior

emergencies, the Memorandum states that urgency by itself does not excuse competition.

- directs agencies to establish acquisition objectives, develop evaluation criteria for award and follow them, use existing contract vehicles where necessary or possible, use interagency agreements for specifically expressed assigned goals, and support socioeconomic goals of small business contracting, Javits-Wagner-O'Day Act preferences for blind and severely disabled Americans, and Native American tribal self-determination contracts;
- establishes requirements for soliciting contracts that exceed FAR requirements—most notably requiring that solicitations to expend Act funds use the word “Recovery” in the title of the pre-solicitation notice. Such notices must be advertised at a minimum on the new website: [“recovery.gov.”](http://recovery.gov) The Memorandum directs agencies to pay close attention to contractor responsibility and to review the Excluded Parties List System for debarred or suspended contractors before contracting.
- requests agencies to use authorized flexible contracting procedures whenever possible, such as the Simplified Acquisition Threshold, with purchases up to US\$100,000 for commercial items and a test program for commercial items between US\$100,000 and US\$5.5 million. Commercial items acquired under FAR Part 12 (in excess of US\$5.5 million) and FAR Part 12 Streamlining procedures for some non-commercial acquisitions over US\$100,000 may sometime utilize oral discussions.
- stresses the need for monitoring and oversight on contracts.
- emphasizes the Administration’s commitment to transparency and accountability and
- directs agencies to determine if they have a sufficient workforce to implement the Act. If the agency determines it may not, then the memorandum encourages interagency collaboration on personnel, rehiring federal retirees under the GSA Modernization Act (P.L. 109-313), as implemented by the Office of Federal Procurement Policy (OFPP)

Memorandum of September 4, 2007, utilizing the direct hire authority granted by the Services Acquisition Reform Act, P.L. (108-136) (SARA) for civilian agencies; hiring veterans under the Veteran’s Recruitment Appointment Authority (P.L. 107-288) on a non-competitive basis, and hiring persons with disabilities, using Schedule A appointments as outlined in 5 C.F.R. 213.

While many of the provisions of the Act and the Memorandum simply repeat policies and procedures set forth in existing procurement statutes and regulations, the breadth of the commitment to efficient, competitive, transparent, and cost-effective expenditures is evident. It remains to be seen if this ambitious goal-setting to implement these laudable goals is realized.

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*We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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