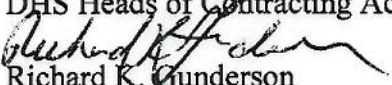


APR 13 2009



Homeland  
Security

MEMORANDUM FOR: DHS Heads of Contracting Activities  
FROM:   
Richard K. Gundersen  
Acting Chief Procurement Officer  
SUBJECT: Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009

This memorandum transmits updated guidance on the American Recovery and Reinvestment Act of 2009 ("Recovery Act" or "Act") to Department of Homeland Security (DHS) Components receiving appropriations under the Act. The Office of Management and Budget (OMB) issued memorandum number M-09-15, *Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009*, on April 3, 2009. In addition, on March 20, 2009, the President issued a memorandum on *Ensuring Responsible Spending of Recovery Act Funds*. This memorandum highlights key updates and provides additional instructions that supplement those in my memorandum of March 12, 2009, for implementation in DHS.

OMB's updated guidance is available at <http://www.whitehouse.gov/omb/management>. The updates supplement, amend, and clarify the initial guidance issued on February 18, 2009 (*Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, M-09-10*). These updates are based on ongoing input received from citizens, State and local government officials, grant and contract recipients, and Federal personnel. The President's memorandum addresses merit-based decision-making for grants, avoiding imprudent or prohibited projects, and transparency in communications with registered lobbyists.

Key updates in areas related to procurement and supplemental guidance provided to Components and Contracting Activities include:

**Merit-based Decisionmaking and Avoiding Prohibited/Imprudent Activities.** Agencies are to use merit-based selection criteria in identifying projects to be funded under the Recovery Act. Every project funded must have a demonstrated or potential ability to meet the goals of the Act. Section 1604, Division A, of the Recovery Act prohibits using any funds made available under the Act for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool. (Presidential memo, Sections 1 and 2)

**Communications with Lobbyists and Media.** No executive department or agency official shall consider the views of any registered lobbyist concerning particular projects under the Recovery Act unless they are submitted in writing. Upon scheduling or at the outset of any oral communication with any person or entity concerning particular projects under the Recovery Act, Government personnel must inquire whether any of the individuals or parties is a lobbyist

registered under the Lobbying Disclosure Act of 1995. If so, the lobbyist may not attend or participate in the telephonic or person-to-person contact, but may submit a communication in writing. All written communications received from a registered lobbyist must be posted on [www.dhs.gov/recovery](http://www.dhs.gov/recovery) within three (3) days of receipt. Refer the lobbyist to Mui Erkun, Procurement Ombudsman and Industry Liaison for DHS, at [Mui.Erkun@dhs.gov](mailto:Mui.Erkun@dhs.gov) or 202-447-5300. In the near future, DHS plans to designate an Industry Liaison for each Component. (Presidential memo, Section 3)

On April 7, 2009, the Director of OMB issued memorandum number M-09-16, *Interim Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds*. DHS is reviewing the memorandum and will provide more information in the near future.

In addition, any and all DHS Component personnel are reminded to refer any contacts from a reporter, editor, or member of the media to Larry Orluskie, Director of Communications, at [larry.orkuskie@dhs.gov](mailto:larry.orkuskie@dhs.gov) or (202) 282-8783. Individuals should not do an interview, have a background discussion, or commit to participating in anything, but direct the requester to Mr. Orluskie. Any document or material discussing DHS policy, procedures, and operations prepared for and intended for release to the public must be cleared through Mr. Orluskie.

**Policy Goals.** Section 1.6 of the updated guidance identifies several goals that agencies are to consider, to the extent permitted by law and practicable, in using Recovery Act funds including:

- Ensuring long-term public benefits, optimization of economic and programmatic goals
- Ensuring compliance with equal opportunity laws and principles
- Promoting local hiring
- Providing maximum practicable opportunities for small business
- Providing equal opportunity for Disadvantaged Business Enterprises
- Encouraging sound labor practices
- Engaging with community-based organizations

**Davis-Bacon Act.** The Davis-Bacon Act applies to actions that use Recovery Act funds. This includes funds sent to other entities to procure on behalf of DHS, e.g., airport authorities. (OMB Guide, Sections 1.7 and 6.2)

**Tracking Incidental Recovery Act Expenses.** OMB reporting requirements apply only to Recovery Act funds. Federal agencies, including DHS, will incur some incidental Recovery-related expenses that must be funded by regular appropriations. This may include administrative costs such as overhead, which is not currently reported upon. However, if asked by OMB or Congress, DHS and its Components must be prepared to report on the amount or percentage of funds that were spent on administrative activities. Components are encouraged to maintain records of direct costs incurred related to administering the Recovery Act, such as personnel, system modifications, etc. The calculation and tracking of overhead costs will follow existing agency practice or guidance an agency develops for its Recovery-related activities. (OMB Guide, Sections 1.8 and 4.8-4.10)

**Purchase Cards.** GSA SmartPay® purchase cards can be used for official purchases in support of the Recovery Act, consistent with OMB Circular A-123, Appendix B, and agency policy. However, cardholders must reconcile purchases to the accounting code(s). Contracting Activities should follow established Component procedures and ensure they can separately identify and track Recovery Act purchase card transactions. (OMB Guide Section 1.14)

**Component-level Recovery Act Guidance.** A Contracting Activity may determine that it needs to issue supplemental guidance or policy for implementing the Recovery Act. The Contracting Activity shall provide a copy of all such guidance/policy to Thomas Mason, OCPO, who is serving as the Lead Action Officer for the DHS Senior Accountable Official. Guidance/policy for recipients must be posted at [www.dhs.gov/recovery](http://www.dhs.gov/recovery) and disseminated to external stakeholders. (OMB Guide, Section 1.15)

**Financial and Activity Reports:** Component Heads and Heads of Contracting Activities need to be aware of a key change to reporting requirements that affects all sub-activities. The Weekly Report has been replaced by the ongoing Financial and Activity Reports, which are required to be updated by agencies as significant funding announcements and actions occur. The Monthly Financial Report has also been eliminated, and is replaced by the ongoing Financial and Activity Reports. (OMB Guide, Sections 2.1 and 2.4)

By email on April 9, 2009, OMB advised agencies that it received considerable feedback on the “Funding Notification Report” formally named the “Formula Block Grant Allocation Report” that was identified in the updated guide. Based on this feedback, OMB is working with a small interagency work group to refine the template and instructions to address agency concerns. Once complete, the updated template and instructions will be posted to the MAX location where all the reporting templates are located:

<https://max.omb.gov/community/x/doC2Dw>

To avoid having to make further changes to the template, OMB is asking that agencies continue to use the original “Formula Block Grant Allocation Report” for one more week. OMB hopes to have a revised “final” report template by close of business April 10, 2009. This revision would go into effect on April 20, 2009.

**National Environmental Policy Act (NEPA).** The Council on Environmental Quality (CEQ) released an initial NEPA guidance memorandum on March 11, 2009, requiring that all agencies using Recovery Act funds for projects subject to the NEPA are to submit information on the status and progress of those projects and activities beginning on April 9, 2009. (OMB Guide, Section 2.16 and Appendix 7)

**DHS Risk Management Reviews.** For effective risk management of acquisitions under the Recovery Act, DHS will apply the procedures set forth in DHS Acquisition Directive 102-01. The Acquisition Review Board will ensure that the Acquisition Review Process incorporates appropriate risk management considerations. (OMB Guide, Sections 3.4 and 3.5 and DHS Acquisition Directive 102-01)



**Treasury Appropriation Fund Symbols (TAFS).** TAFS are now available online at <https://max.omb.gov/community/x/-4BeDw>. First time users will need to register to obtain access to MAX. (OMB Guide, Section 4.5)

**Prohibition on Co-mingling Recovery Act Funds.** OMB has prohibited agencies from co-mingling Recovery Act funds with other monies. Agencies in some cases may need to use Recovery Act funds in conjunction with other funds to complete projects. They may do so, but they must separately track and report the use of Recovery Act funds for these projects through final payment and close-out (i.e., the financial system as well as any related procurement system must be able to separately track and report Recovery Act funds through the entire life-cycle). In DHS, Contracting Officers must issue a discrete contract action (new award, order, or modification as appropriate) for any procurement using Recovery Act funds. Together with the instructions at FAR 4.605(c) and [www.fpds.gov](http://www.fpds.gov), this will ensure that DHS is able to accurately distinguish and track Recovery Act-funded-actions in FPDS. (OMB Guide, Section 4.3)

**Interagency Agreements.** If a Component uses an interagency agreement to accomplish any Recovery Act activity/project, the agreement document must include clear roles and responsibilities to fulfill the unique requirements of the Act including report development and submission, accurate and timely data reporting, and special posting requirements to agency web sites and Recovery.gov. DHS-unique Congressional notification requirements continue to apply. (Section 6.1(5))

**Awards to Small Business.** OMB encourages agencies to take advantage of authorized small business contracting programs. Many of these program use competitive set-aside procedures. If an authorized non-competitive procedure is used, such as a non-competitive 8(a) award, the posting procedures in FAR 5.705 apply. (OMB Guide, Section 6.1(6))

**Contracting Officer Warrants.** The HCA may appoint additional Contracting Officers (i.e., issue new warrants) in response to increased work resulting from Recovery Act activities. The HCA must maintain a separate record of such warrants. (OMB Guide, Section 6.7)

**New FAR Coverage.** Five interim FAR rules issued in FAC 2005-32 on March 31, 2009, implement Recovery Act requirements that were previous addressed in Section 6 of the OMB Guidance. The rules provide more comprehensive coverage on several issues and required contract clauses. A summary of the rules and the new Contracting Officer responsibilities follows. A sixth rule in FAC 2005-32 implements General Accounting Office (GAO) and Office of Inspector General (OIG) access rights under the National Defense Authorization Act of for Fiscal Year 2009 (NDAA) (P.L. 110-417). For detailed, formal guidance refer to the FAR Cases and corresponding April 1, 2009, Acquisition Regulatory Advisories provided to you electronically and posted on DHSOnline.

**American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material (FAR Case 2009-008)**

This interim rule implements the Buy American provision, section 1605, of the Recovery Act. It prohibits the 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. However, section 1605 requires that the Buy American requirement be applied in a manner consistent with U.S. obligations under international agreements. Moreover, because Congress intended that least developed countries be excepted from section 1605, least developed countries can continue to be treated as designated countries. Section 1605 also provides for waivers under certain limited circumstances. OCPO anticipates that within DHS the rule will have the most significant affect on the Transportation Security Administration which is not covered by Trade Agreements. See OCPO Regulatory Advisory 09-16.

**American Recovery and Reinvestment Act of 2009 (the Recovery Act)—  
Whistleblower Protections (Interim) (FAR Case 2009-012)**

Subpart 3.9 of the FAR is revised to add section 3.907. Section 3.907 provides procedures for whistleblower protection, when using funds appropriated or otherwise provided by the Recovery Act. Section 3.907 provides that non-Federal employers are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. A new clause 52.203-15 is added to require contractors to post rights and remedies for whistleblower protections under Section 1553 of the American Recovery and Reinvestment Act. The OCPO Regulatory Advisory provides agency procedures for instances when the Contracting Officer receives a report of a violation directly (to be incorporated in the HSAM). See OCPO Regulatory Advisory 09-17.

**American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing  
Contract Actions (FAR Case 2009-010)**

This interim rule implements the OMB's Guidance, M-09-10, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," dated February 18, 2009, section 6.2. FAR Part 4 requires the Contracting Officer to enter data in the Federal Procurement Data System on any action funded in whole or in part by the Recovery Act, in accordance with the instructions at <https://www.fpds.gov>. Actions under \$25,000 may be Subpart 5.7 is added to direct the Contracting Officer to use the Governmentwide Point of Entry (<https://www.fedbizopps.gov>) to 1) identify the action as funded by the Recovery Act; 2) post pre-award notices for orders exceeding \$25,000 for "informational purposes only;" 3) describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and 4) provide a rationale for awarding any action, including modifications and orders, that is not both fixed-price and competitive, and include the rationale for using other than a fixed-price and/or competitive approach. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

The requirements of HSAM 3005.303 for Congressional notification do apply to actions funded exclusively with Recovery Act funds. See OCPO Regulatory Advisory 09-18.

Section 6.2 of the Guidance provides information on where to find detailed instructions for posting at FedBizOpps and reporting to FPDS-NG.

*Data integrity is critical to all reports of DHS procurement actions.* Contracting Officers are reminded that Congress and the Administration are applying unprecedented levels of transparency and accountability to the use of Recovery Act funds. In addition to posting/reporting at FedBizOpps and FPDS, these systems will transmit Recovery Act procurement synopses to Recovery.gov and award information to USASpending.gov. The information is highly visible and readily available to the public, vendors, industry associations, Congress and others. *Contracting Officers must be vigilant in ensuring that presolicitation notices, award notices, and FPDS-NG entries comply with all formatting requirements, provide accurate information, and are prepared and submitted in a timely manner.*

**American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements (FAR Case 2009-009)**

This interim rule implements section 1512 of Division A of the Recovery Act, which requires contractors to report on their use of Recovery Act funds. The rule adds a new subpart 4.15, and a new clause, 52.204-11. Contracting Officers must include the new clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This clause applies to commercial item contracts and commercially-available-off-the-shelf (COTS) item contracts as well as actions under the simplified acquisition threshold. Contracting Officers who wish to use Recovery Act funds on existing contracts should modify those contracts to add the clause. Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10<sup>th</sup> day after the end of each calendar quarter. See OCPO Regulatory Advisory 09-19.

**American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access (FAR Case 2009-011)**

This interim rule implements Sections 902, 1514, and 1515 of the Recovery Act. Collectively, these Sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds. These Recovery Act provisions are implemented in new alternate clauses to 52.212-5, “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items”, 52-214-26, “Audit and Records—Sealed Bidding,” and 52.215-2, “Audit and Records—Negotiation”. For the Comptroller General these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency inspector generals receive the same authorities, with the exception of interviewing subcontractor employees. See OCPO Regulatory Advisory 09-20.

**GAO Access to Contractor Employees (FAR Case 2008-026)**

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 12 and 52. Clauses 52.215-2, Audit and Records-Negotiation and 52.214-26, Audit and Records-Sealed Bidding are being modified to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule will not apply to the acquisition of commercial items; therefore, FAR 12.503 will be amended to add the exemption of this rule. This change implements Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110-417). See OCPO Regulatory Advisory 09-21.

**DHS-unique Requirements – Textiles.** In addition to the FAR provisions which apply to all Federal contracts using Recovery Act funds, Section 604 requires, with certain exceptions, that DHS procure textiles and fibers from U.S. sources. While OCPO anticipates that only TSA will be significantly affected by this provision, it contains language that makes it applicable to some degree to all Components. OCPO, in collaboration with Office of General will issue specific guidance on this issue. Components should identify any requirements subject to this restriction during acquisition planning. For additional information, please contact Jerry Olson, Senior Procurement Analyst, at (202) 447-5197 or [jerry.olson@dhs.gov](mailto:jerry.olson@dhs.gov).

**Note on Federal Supply Schedules.** The General Services Administration (GSA) is negotiating with its Federal Supply 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.

Contracting Officers must make certain to properly identify and report task orders placed under a Schedule contract. If a task order is awarded using the Schedule contract hourly rates multiplied times estimated hours to arrive at a total price, and the contractor is to be paid the total price regardless of the actual hours expended, then the task order may be considered fixed price. If a task order is issued with a ceiling price, for a certain level of effort based on estimated hours multiplied by the contract hourly rates, and the contractor is to be paid the hourly rates for actual hours expended, then the order is not fixed price but a labor-hour type.

**Applicability of the FAR.** Contracting Officers are reminded that the FAR applies to actions using Recovery Act funds. Except as provided in the specific coverage related to Recovery Act actions, all provisions of the FAR apply. The Act did not create any new emergency authorities or basis for justifying other than full and open competition. FAR Part 7 requirements for acquisition planning apply. Documentation requirements apply, including determinations and findings and justifications for other than full and open competition. These documents should be consistent with and support the rationale for not competing an action or not using a fixed price contract type as reported under FAR 5.705(b). Noncompetitive actions are subject to review by the OIG and the Recovery Accountability and Transparency Board. Ensure that written justifications are clear and signed by the appropriate officials, including competition advocates.

**Reporting Fraud Waste, Abuse, and Mismanagement.** Supporting accountability over the use of Recovery Act funds includes the ability to identify improper activities or weaknesses in

programs that warrant scrutiny. A DHS employee or DHS contractor employee who has knowledge of fraud, waste, abuse, or mismanagement in the use of Recovery Act funds may make a report either to the DHS OIG or to GAO:

- The employee may make a confidential report involving DHS programs or operations to the DHS OIG at the Hotline at 1-800-323-8603, fax Hotline at 202-254-4292, email at [DHSOIGHOTLINE@dhs.gov](mailto:DHSOIGHOTLINE@dhs.gov), or in writing to Department of Homeland Security, Office of Inspector General, Office of Investigations, Hotline, Washington, DC 20528. More information is available at [http://www.dhs.gov/xoig/about/gc\\_1163703329805.shtm](http://www.dhs.gov/xoig/about/gc_1163703329805.shtm)
- The employee may make a confidential report to GAO's FraudNet at 1-800-424-5454, e-mail to [fraudnet@gao.gov](mailto:fraudnet@gao.gov); fax to (202) 512-3086, or in writing to GAO FraudNet, 441 G Street, NW, Mail Stop 4T21, Washington, DC 20548. More information is available at <http://www.gao.gov/fraudnet/fraudnet.htm>.

**Future Guidance.** OMB plans to issue updated guidance within 30 to 60 days. As relevant information is provided, OCPO will issue updates.

Please direct questions or comments about this memorandum to Gloria Sochon, Senior Procurement Analyst, at (202) 447-5307 or email [gloria.sochon@dhs.gov](mailto:gloria.sochon@dhs.gov).

#### Attachments

Attachment A: OMB *Updated Implementing Guidance for the American Recovery Act and Reinvestment Act of 2009*

Attachment B: Presidential memorandum, March 20, 2009, *Ensuring Responsible Spending of Recovery Act Funds*

cc: DHS Acquisition Policy Board Members