



STIMULUS ACT UPDATE: New Implementing Regulations and Focus on Accountability in 16 States

The Obama Administration continues to provide clarity regarding its plans to implement the Stimulus Act. Recently enacted federal regulations and policy directives have underscored the Government's commitment to carefully oversee Stimulus Act expenditures and to minimize potential fraud, waste and abuse.

New Federal Regulations

Effective March 31, 2009, contracts funded by the Stimulus Act will have new Federal Acquisition Regulation ("FAR") clauses that:

- ❖ Expand Buy American Act requirements to cover all of the iron, steel, and manufactured goods used in a Stimulus Act-funded project;
- ❖ Provide protections to whistleblowers who report fraud, waste or abuse;
- ❖ Authorize the Government Accountability Office ("GAO") and contracting agency Inspectors General to have broad access to contractor and subcontractor documents and employees; and
- ❖ Impose reporting requirements. Beginning July 10, 2009, prime contractors will be required to submit quarterly reports with the following information using an online reporting tool at www.federalreporting.gov (for now, still under construction):
 - Basic information about the project, including the stage of completion and the amount of Stimulus Act funds expended;
 - Description of the "employment impact" of the work, including a description and an estimate of the number of "jobs created and jobs retained in the United States";
 - Basic information about subcontracts;
 - Disclosure by primes and first tier subcontractors of the names and annual compensation of the five most highly compensated employees if their companies derive 80% of their annual revenue and \$25 million in annual revenue from federal contracts or grants. However, this reporting requirement will not apply if the required information is already disclosed by the company in filings with the Securities and Exchange Commission.

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For existing contracts that receive Stimulus Act funding, the Contracting Officer will issue a contract modification that will incorporate the new FAR clauses. Although the modification is intended to be bilateral, contractors that decline to agree will be ineligible to receive Stimulus Act money.

Special Audit and Enforcement Focus on 16 States

The GAO, with its special auditing expertise, will lead the Government’s efforts to police the expenditure of Stimulus Act funds. GAO will conduct bimonthly reviews of selected states and localities to examine how Stimulus Act funds are being used and whether they are achieving the stated purposes of the Act. The targeted states are: **Arizona, California, Colorado, Florida, Georgia, Iowa, Illinois, Massachusetts, Michigan, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania and Texas.** These states were selected because they comprise about 65% of the population of the United States and are projected to receive about two-thirds of the Stimulus Act funding.

GAO recently stated that, to carry out this mission,

Experience tells us that the risk for fraud and abuse grows when billions of dollars are going out quickly, eligibility requirements are being established or changed, new programs are being created, or a mix of these characteristics. This suggests the need for a risk-based approach to target for attention specific programs and funding structures based on known strengths, vulnerabilities, and weaknesses, such as a track record of improper payments or contracting problems... By establishing an effective fraud prevention program, agencies can provide reasonable assurance that Recovery Act funds benefit intended recipients. A well-designed fraud prevention program—which can also minimize waste and abuse — should consist of preventive controls, detection and monitoring, and investigations and prosecutions.

Among the “basic principles” that will guide GAO in carrying out its responsibilities is that GAO will “enforce penalties for companies and individuals that commit severe ethics violations or fail to demonstrate acceptable performance and refer suspected fraud to the appropriate agency promptly.” GAO has reportedly hired 100 accountants, auditors and lawyers to perform these audits and investigations.

GAO “FraudNet”

In addition to the whistleblower protections that are now in place, GAO also announced that it was urging private citizens, government workers, contractors, and others to report waste, fraud, abuse, or mismanagement of Stimulus Act funds to “FraudNet.” FraudNet is an e-mail, phone, and fax hotline that processes allegations about federal agencies and fed-



erally funded programs. In making this announcement, GAO stated that it was targeting “evidence or suspicions of abuse” and that reports could be made anonymously and confidentially. GAO may then refer allegations for follow-up to its own investigative units, appropriate Inspector General offices, or to the Justice Department.

Stimulus Act Buy American Provisions

The new regulations implement specific Buy American provisions in section 1605 of the Stimulus Act that prohibit the expenditure of stimulus funds on "a 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." Because section 1605 specifies that these provisions be "applied in a manner consistent with United States obligations under international agreements," the greatest effect will be upon smaller construction contracts: those that don't exceed the current \$7,433,000 trade administration act threshold. For such contracts, all iron, steel and manufactured goods must be produced in the United States. The restriction as to manufactured goods applies only to the end product. Unlike provisions implementing the Buy American Act, there is no requirement that a minimum percentage of components be produced in the United States.

The effect of the regulations upon construction contracts in excess of \$7,433,000 should be much more limited. It appears to be the intent of the regulations that for such contracts, the contractor can supply construction materials from all of the countries that would be permitted under the current Buy American provisions except for those covered by the Caribbean Basin Initiative without getting a waiver. Therefore, goods from other sources normally exempted from the Buy American Act (WTO-GPA goods, goods from countries with trade agreements such as NAFTA, and goods from designated "least developed countries") seem to be treated the same as domestic products, as is currently the case under the standard clauses. Such countries are defined in the applicable new contract clauses as "Recovery Act designated countr(ies)" and equal treatment is accomplished by Clause 52.225-23 (b) which states:

"Construction Materials. (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 ... and the Buy American Act ... do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements-

- (i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all steel, and other manufactured goods used as construction material in the project are produced in the United States; and
- (ii) the Buy American Act by providing a preference for unmanufactured domestic construction material.



(2) The Contractor shall use only domestic *or Recovery Act designated construction material* in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause."

The italicized language appears in the clause that is to be inserted in all contracts to receive Stimulus funds that exceed the dollar threshold for application of applicable trade agreements. *Compare*, Clause 52.225-21(b) for smaller contracts, which does not include the italicized language. (See also, FAR Subpart 25.4.) Not only are these provisions to be included in new awards, but they are also to be inserted in existing agreements that receive stimulus funds by bilateral agreement, which will presumably include any increase in costs.

One problem in interpreting these clauses is that the definition of "foreign construction material" does not exclude "Recovery Act designated country construction material" - creating a monumental ambiguity. If these clauses are badly applied, they could have significant price impacts if more narrowly construed.

To avoid potential exposure, we very strongly recommend that a contractor currently negotiating, or about to be awarded a contract to which these new provisions apply, circulate these new provisions to subcontractors and have them sign off that there are no price changes before signing a price agreement with the Government. This applies most especially to the steel supplier.

To the extent that these provisions bar the use of "foreign materials" the cost for obtaining an exception could be exorbitant. For example, pre-award waiver as to steel is allowed only if it increases the entire contract price by 25%. Post-award waiver requires that the Government receive price concessions as consideration. Moreover, the Contracting Officer would have to publish the reasons for a waiver in the Federal Register. Given this transparency requirement, it is not likely that Government personnel will be easily granting waiver requests.

The Bottom Line

The new FAR clauses and Administration policies clearly suggest even greater vigilance in performing Stimulus Act-funded contracts, particularly in the 16 focus states. Contractors that submit their quarterly reports must carefully review the information for accuracy and completeness or face the possibility that a Government audit could reveal violations of ethics laws such as the False Statements Act or False Claims Act. Now, more than ever, contractors must be sure their compliance programs are operating effectively.