

# *Contracting With State And Local Governments And Private Parties On Projects Funded By The Stimulus Act*

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The American Recovery And Reinvestment Act Of 2009 (“The Stimulus Act”) And Implementing Regulations Impose Specific Requirements On Contractors And Subcontractors Performing Work On Projects Funded By Stimulus Funds

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# Special Rules Apply To Contracts With State And Local Governments And Private Parties Funded By The Stimulus Act (“Local Contracts”)

- ◆ Whistleblower Protections are Created And Each Employer Must Post A Notice Of Whistleblower Protections
- ◆ New Reporting Requirements Are Imposed On Fund Recipients (The Owner)
- ◆ Audit Rights Are Granted To The US Comptroller General And Inspectors General
- ◆ Special Buy American Act Rules Are Imposed
- ◆ Federal Prevailing Wage Requirements (Davis-Bacon) Are Imposed

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# Stimulus Act Whistleblower Protections – For Local Contracts

- ◆ Section 1553 Of The Stimulus Act Creates Protections For State And Local Government And Contractor Whistleblowers
- ◆ Section 1553(e) Requires Any Employer (Including the Contractor) To Post “Notice of Rights and Remedies” Under Section 1553 At The Job Site

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## Know Your Rights Under the Recovery Act!

### *Did you know?*

The American Recovery and Reinvestment Act of 2009<sup>1</sup> provides protections for certain employees of non-federal employers who make specified disclosures relating to possible fraud, waste and/or abuse of Recovery Act funds.

### *Who is protected?*

Employees of non-federal employers receiving recovery funds. This includes State and local governments, contractors, subcontractors, grantees or professional membership organizations acting in the interest of recovery fund recipients.

### *How are Whistleblowers Protected?*

You cannot be discharged, demoted or otherwise discriminated against as a reprisal for making a protected disclosure.

### *What types of disclosures are protected?*

The disclosure must be made by the employee to the Recovery Accountability and Transparency Board, an Inspector General, the Comptroller General, a member of Congress, a state or federal regulatory or law enforcement agency, a person with supervisory authority over the employee, a court or grand jury, or the head of a federal agency or his/her representatives.

The disclosure must involve information that the employee believes is evidence of:

- gross mismanagement of an agency contract or grant relating to recovery funds;
- a gross waste of recovery funds;
- a substantial and specific danger to public health or safety related to the implementation or use of recovery funds;
- an abuse of authority related to the implementation or use of recovery funds; or
- a violation of law, rule, or regulation related to an agency contract or grant awarded or issued relating to recovery funds.

### *Take Action!*

Log on to [Recovery.gov](http://Recovery.gov) for more information about your rights and details on how to report at [www.recovery.gov](http://www.recovery.gov).

<sup>1</sup> Section 1553 of Division A, Title XV of the American Recovery and Reinvestment Act of 2009, P.L. 111-5

Section 1553  
Whistleblower  
Notice

Recommended by  
NY MTA – Check  
Your Own  
Contract!

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# Stimulus Act Reporting Requirements – For Local Contracts

OMB Memorandum M-09-21 Dated June 22, 2009 -

- ◆ Requires The Fund Recipient (The Public Agency Or Grantee) To Report Using Designated Website
- ◆ The Contractor Is To Supply Information To The Recipient And To Obtain Information From Subcontractors As Required By The Recipient
- ◆ The Consequence For Failure To Comply Is Not Specified (Standard Contract Remedies Apply)

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# Stimulus Act Government Audit Rights – For Local Contracts

- ◆ Section 1515(a)(1) of the Stimulus Act Extends Audit Rights To The Comptroller General and Inspectors General To Books And Records Of Contractors And Subcontractors
- ◆ Section 1515(a)(2) of the Stimulus Act Grants the Comptroller General and Inspectors General the Right To Interview The Contractor's Officers And Employees

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# Buy American - Applicable To Local Construction Contracts

- ◆ Section 1605 Of The Stimulus Act Requires All Iron, Steel, And Manufactured Goods To Be Produced In The United States (Subject To Existing Trade Agreements)
- ◆ Applies To Public Building And Public Works Contracts

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# Buy American - Applicable To Local Construction Contracts

- ◆ Agency Head Can Waive Buy American If US Goods Not Produced In US In Sufficient, Reasonably Available Quantities, Or “Not In The Public Interest” Or If Inclusion Would Cause Cost To Increase By More Than 25%
- ◆ No Clear Guidance On Procedures To Be Employed For These Exceptions – Except That Agency Head Must Post Decisions In The Federal Register

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# Buy American - Applicable To Local Construction Contracts

- ◆ Section 1605(d) Trade Agreements Exception Does Not Apply Because Most Trade Agreements Don't Apply To State and Local Governments
- ◆ Agencies Granting Blanket Waivers For Specific Products (Such As EPA For Wastewater Treatment Equipment) – Should Be Listed In Contract If Applicable

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# Prevailing Wages - Applicable To Local Construction Contracts

Section 1606 Requires That All  
Contractors And Subcontractors On  
“projects funded directly by or assisted in  
whole or in part” by the Stimulus Act must  
pay prevailing wages to “all laborers and  
mechanics” as “determined by the  
Secretary of Labor” in accordance with  
the Davis-Bacon Act

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# *The Federal False Claims Act*

*(Prior to New Amendments)*

31 USC 3729 prohibits:

- 1) Knowing submission of a “false or fraudulent claim to ... officer or employee of the United States Government or member of the Armed Forces”
- 2) A “false statement ... to get a false or fraudulent claim paid or allowed by the Government”
- 3) A conspiracy to “defraud the Government by getting a false or fraudulent claim approved or paid”

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# *The Federal False Claims Act*

## *(As Amended)*

31 USC 3729 prohibits:

- 1) Knowing submission of a “false or fraudulent claim for payment or approval”
- 2) A “false record or statement material to a false or fraudulent claim”
- 3) A conspiracy to “commit a violation”

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# *The Federal False Claims Act*

## *(As Amended)*

[T]he term "claim" --

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

(i) is presented to an officer, employee, or agent of the United States; or

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# *The Federal False Claims Act*

## *(As Amended)*

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded . . .

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# *The Federal False Claims Act*

## *(As Amended)*

**NOW** – The FCA Clearly Applies To  
Local Projects Financed With  
Stimulus Funds

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# FCA Penalties

- ◆ *Civil* penalties of
  - (1) 3 times actual damages;
  - (2) fines of \$5,500 to \$11,000 per false claim; and/or
  - (3) suspension or debarment.
- ◆ *Criminal* penalties of up to 5 years imprisonment for intentional violations

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