GSA Office of the Chief Acquisition Officer

APR 9 2009

GSA Acquisition Letter V-09-01

MEMORANDUM FOR ALL GSA CONTRACTING ACTIVITIES

FROM: DAVID A. DRABKIN
ACTING CHIEF ACQUISITION OFFICER

SUBJECT: American Recovery and Reinvestment Act Implementation

1. Purpose. This Acquisition Letter implements, within GSA, Public Law 111-5, the American Recovery and Reinvestment Act of 2009 (also known as the Recovery Act).

2. Background. On February 17, 2009, the President signed Public Law 111-5, the Recovery Act. The Act imposes a number of requirements on Executive Branch departments and agencies receiving Recovery Act funds to meet the broader goals and objectives (e.g. level of transparency and accountability) of the Recovery Act. In addition, the Recovery Act includes a number of requirements to be implemented in Federal Government contracts. On February 18, 2009, the Office of Management and Budget issued Memorandum M-09-10, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009" (the OMB Guidance), to provide standard processes for awarding and overseeing Recovery Act funds and supplemented it with M-09-15, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," dated April 3, 2009. In accordance with the OMB Guidance, agencies receiving Recovery Act funds are to begin immediately to meet the accelerated timeframes and other unique challenges posed by the Recovery Act.

Five Federal Acquisition Regulation (FAR) interim rules were published in the Federal Register on March 31, 2009, in FAC 2005-032, providing authorities, policies, and procedures for governmentwide implementation of the Recovery Act and for special contract procedures contained in the OMB Guidance. The interim rules immediately make available FAR solicitation provisions and contract clauses to include in Government contracts. The FAR interim rules are referenced in paragraph 6 and summarized in Attachment A.

This acquisition letter provides additional guidance to GSA contracting officers awarding and administering contracts and orders. In addition to the award of a new contract, GSA contracting officers may obligate funds provided under the Recovery Act against existing contracts, (including Governmentwide Acquisition

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

contracts (to include Blanket Purchase Agreements (BPAs) placed against FSS contracts), and indefinite delivery/indefinite quantity contracts provided they comply with all competition requirements for use of these contracts.

If Recovery Act funds will be used, contracting officers shall modify existing contracts, on a bilateral basis, to include the Recovery Act FAR clauses contained in the interim rules. This also applies to orders placed against existing contracts and BPAs. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

GSA Schedule Contracts on e-library and GSA Advantage will identify Recovery Act compliance with an "ARRA" symbol. FAS GWACs and other MACs respective web-sites will identify contracts that include the ARRA clause(s).

3. Effective Date. Immediately.

4. Termination Date. This Acquisition Letter remains in effect until revoked or terminated.

5. Applicability. This Acquisition Letter applies to all GSA contracting activities.

6. References. The February 18, 2009, OMB Memorandum M-09-10, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," M-09-15, dated April 3, 2009, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," and FAR Interim Rules, published in FAC 2005-032.

- FAR Case 2009-008, American Recovery and Reinvestment Act of 2009 (the Recovery Act) -- Buy American Requirements for Construction Material;
- FAR Case 2009-009, American Recovery and Reinvestment Act of 2009 (the Recovery Act) -- Reporting Requirements;
- FAR Case 2009-010, American Recovery and Reinvestment Act of 2009 (the Recovery Act) -- Publicizing Contract Actions;
- FAR Case 2009-011, American Recovery and Reinvestment Act of 2009 (the Recovery Act) -- GAO/IG Access; and
- FAR Case 2009-012, American Recovery and Reinvestment Act of 2009 (the Recovery Act) -- Whistleblower Protections.

GSA webpage www.gsa.gov/recovery contains GSA policies and procedures pertaining to the Recovery Act.

7. Instructions/Procedures.

A. Acquisition Planning.

FAR Part 7 applies to all acquisitions using funds provided in the Recovery Act. In addition to the normal requirements provided by FAR Part 7 and GSAM Part 507, acquisition plans for acquisitions using Recovery Act funding must address:

1. How Recovery Act funds will be tracked separately from other funds. OMB guidance requires that recovery and non-recovery funding not be co-mingled.
2. Contract requirements and outcomes expressed in terms of the agency's Recovery Act goals.

Existing acquisition plans should be reviewed and updated as needed to address Recovery Act requirements.

The following are the dollar value thresholds and the level of the approving official for approving acquisition plans or waiving written plans. The HCA may authorize higher level approving officials for the thresholds set out below. For purposes of leasing, the Simplified Leasing Acquisition Threshold (SLAT) is defined in Part 570. The following thresholds are for Recovery Act actions only:

Threshold	**Approving Official**
Below the Simplified Acquisition Threshold (SAT) (SLAT for leases)	Contracting Officer
SAT (SLAT for leases) to, and including, $5.5 million	One Level above the Contracting Officer
Over $5.5 million to, and including, $20 million	Contracting Director
Over $20 million to, and including, $50 million	Assistant Regional Commissioner or an Assistant Commissioner
Over $50 million	HCA

Note: Thresholds shall include all options.

Not later than 7 calendar days after the acquisition plan is approved, if not completed in the Acquisition Planning Wizard (APW), an electronic copy shall be sent to acquisitionplans@gsa.gov and the subject line must include the words

"Recovery Acquisition Plan." Acquisition plans that are fully executed using APW, must include the word "RECOVERY" in the first block in order to identify the acquisition plans that are for acquisitions using Recovery Act funds.

B. Interagency Agreements/RWAs.

Interagency Agreements (IA), also including Reimbursable Work Authorizations (RWA), must define the assignment of agency roles and responsibilities to fulfill the requirements of the Recovery Act. These include but are not limited to, report development and submissions, accurate and timely data reporting and special posting requirements to agency web sites, Recovery.gov, and reporting contract actions into the Federal Procurement Data System (FPDS).

If the interagency agreement is for a Department of Defense (DoD) requirement under the Economy Act, a warranted contracting officer or another official designated by the agency head must approve a Determination and Findings (D&F) in accordance with FAR Subpart 17.5.

On June 6, 2008, the Office of Federal Procurement Policy (OFPP) issued a memorandum entitled, Improving the Management and Use of Interagency Acquisitions, giving direction to agencies for interagency acquisitions and making those directions applicable to acquisitions on or after November 3, 2008. The policy defined clear lines of responsibility between the requesting agency and the servicing agency. The OFPP directive contained 14 elements pertaining to general terms and conditions and 17 elements pertaining to requirements and funding. The contracting officer shall refer to the OFPP Memorandum for further information with respect to establishing roles and responsibilities between the agencies.

When Public Buildings Service (PBS) activities use Recovery Act Funds, contracting officers utilizing the Reimbursable Work Authorization process for contract actions should follow the directions for receipt and acceptance of RWAs at the below site:

PBS InSite, Reimbursable Services Division under the left tab entitled "ARRA Related":

http://pbsportal.pbs.gsa.gov:7777/portal/page?_pageid=82,530634&_dad=portal&_schema=PORTAL

The Reimbursable Work Authorization, GSA Form 2957 (Rev.03/2009), supplemented with all necessary attachments may serve as the IA, if all of requirements of an IA are satisfied.

C. Preference for Fixed-price and Competitive Procedures.

1. To the maximum extent practicable, contracts using Recovery Act funds shall be awarded as fixed-price contracts using competitive procedures.

2. The types of fixed-price contracts are listed at FAR Subpart 16.2. Cost contracts are listed at FAR Subpart 16.3; these are not fixed-price. Time and material, and labor-hour contracts are listed at FAR Subpart 16.6; these are also not fixed-price contracts. Note that the Recovery Act does not require a firm-fixed-price contract.

The FAR limits the use of other than a fixed-price contract as follows:

- "Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract." (FAR 16.301-2)

- "A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence." (FAR16.601(c))

- "A labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor. See ...16.601(c)... for application and limitations, for time-and-materials contracts that also apply to labor-hour contracts." (FAR 16.602)

3. All required FAR justifications, documentation, or determination and findings must be prepared and placed in the file. For example, a Determination and Findings (D&F) or documentation is required at FAR 16.601(d), 12.207(b), or 8.405-2(e)(7)(i) for selecting other than fixed-price (e.g., time and material, labor hour).

While contracts awarded under the Multiple Award Schedule (MAS) program are fixed price contracts (with economic price adjustment), certain task orders placed under those contracts may not be fixed price, e.g. Labor Hour. A MAS contract for services awarded based on hourly rates may be considered a fixed price contract. However, a task order placed against that MAS contract is considered to be a labor hour order (not fixed price) when the order is awarded 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. In addition, materials are not to be acquired under the order.

If the task order is awarded using the MAS contract hourly rates multiplied times estimated hours to arrive at a requested 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. Under this order, the contractor assumes the risk of underestimating the number of hours required to complete the requirements of the task order.

4. See paragraph D.5 for posting the rationale for an action unless the action is both fixed-price and competitive. The D&F or documentation may provide the basis for the rationale required to be posted. Paragraph D.5 lists which actions are considered competitive for this purpose.

D. Reporting Requirements.

1. Unique Requirements for Posting of Pre-solicitation Notices (FAR 5.704)

Pre-solicitation notices, including "sources sought" or "request for expressions of interest," shall be posted on FedBizOpps (FBO) in accordance with FAR Part 5. Contracting officers shall use the instructions at FBO (Buyers FAQs) to identify proposed actions funded in whole or in part by the Recovery Act.

When submitting pre-award notices using files transfer protocol (ftp) or e-mail, users must have "Recovery" as the first word in the title (<SUBJECT> tag within the template) for a notice. Note: "Recovery" must be the first word and spelled exactly; letter case will not have an effect.

If logging in directly to FBO to post pre-award notices, contracting officers must identify whether or not it is a Recovery Act action by selecting the "yes" radio button for the field "Is this a Recovery and Reinvestment Act action" on the "Notice Details" form (Step 2) located below the "NAICS Code" field.

2. Posting of Orders

Notices of proposed contract actions are required for orders of $25,000 or more, funded in whole or in part by the Recovery Act. This includes orders under task or delivery order contracts, including Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule contracts (to include Blanket Purchase Agreements (BPAs) placed against FSS contracts). These notices are for "informational purposes only," therefore, FAR 5.203 does not apply. Contracting officers should concurrently use their usual solicitation practice (e.g., e-Buy).

The announcement in FBO must begin with "This notice is provided for informational purposes only. This opportunity is available only to contractors under [insert program name. e.g. GSA Schedule 03FAC, COMMITS, Navy's SeaPort-e]."

Contracting Officers shall ensure that they include a narrative of the products and services (including construction) that is clear and unambiguous to the general public. For example, a contract for roof repair of a GSA building should read "This contract is for the repair of the roof on the GSA building in Kansas City, MO." Supplies would similarly be descriptive: "This purchase order is for the acquisition of tree thinning equipment (saws, rakes, etc.) in the Colorado State Park to assist in wild fire prevention."

Best practices:

- Ask yourself if someone outside the Government could understand what is being purchased.
- Address the what, where, and how questions.

3. Unique Requirements for Announcing Contract Awards (FAR 5.705)

Contract award notices must be posted on FedBizOpps in accordance with FAR Part 5. All Recovery Act award announcements must follow instructions at FedBizOpps.

Notices of award are also required for orders funded in whole or in part by the Recovery Act.

4. Unique Requirements for Entering Awards in the FPDS

Any new award or modification entered into FPDS that contains Recovery Act funds must have the Treasury Account Symbol (TAS) entered in the *Description of Requirement* field.

Implementing guidance and information about entering the Treasury Account Symbol (TAS) in the Description of Requirement field in FPDS to identify any action (including modifications) funded in whole or in part by the Recovery Act may be found at:

https://www.fpds.gov

Please refer to the "What's New" section under "American Recovery and Reinvestment Act". Once the FPDS-NG User's Manual is opened, search the document for "Treasury Accounting Symbol" to find the references.]

You should coordinate with your budget/finance office to identify the applicable TAS. Standard data validation practices currently required by the Office of Federal Procurement Policy (OFPP) assure the accuracy of contracting data, including data on contracts awarded under the Recovery Act.

If the award or modification you are reporting to FPDS contains more than one recovery Treasury Account Symbol, you should report the predominant Treasury Account Symbol based on dollars obligated ("predominant" is measured by whichever account has the most dollars obligated.)

Additional information concerning the identification of Recovery Act funded actions and other special instructions may be found under the "Buyers FAQs" at

https://www.fbo.gov/index?cck=1&au=&ck=

Contracting officers must make sure that the competition information entered into FPDS is correct and matches the information provided on FBO.

Contracting officers must enter clear and concise descriptions of the supplies or services being procured, taking care not to use technical or industry jargon.

Co-mingled funds (Recovery Act and non-Recovery Act on the same contract action report) cannot be reported. Two separate contract action reports must be done.

5. Contracts, Orders, and Modifications Exceeding $500,000

For any contract action exceeding $500,000 ensure that the description required by 5.207(a)(16) includes a narrative of the products and services (including construction) that is clear and unambiguous to the general public. This includes all modifications to any contracts, and orders under task or delivery order contracts.

6. Actions that are not both Fixed-Price and Competitive

a. For all contract actions of any dollar value, including modifications to any contracts and orders under task or delivery order contracts, that are not both fixed-price and competitively awarded, the publication of the award notice shall describe the rationale for using other than a fixed-priced and/or competitive approach. These notices and the rationale will be available to the public at FBO, so do not include any proprietary information or information that would compromise national security.

b. The following table provides examples for when a rationale is required.

Posting of Rationale - Examples

	Description of Contract Action	Rationale Required
(1)	A contract is competitively awarded and is fixed-price	Not Required
(2)	A contract is awarded that is not fixed-price	Required
(3)	A contract is awarded without competition	Required

(4)	An order is issued under a new or existing single award IDIQ contract	Required if order is made under a contract described in (2) or (3)
(5)	An order is issued under a new or existing multiple award IDIQ contract	Required if one or both of the following conditions exist: i. the order is not fixed-price ii. the order is awarded pursuant to an exception to the competition requirements applicable to the underlying vehicle (e.g., award is made pursuant to an exception to the fair opportunity process)
(6)	A modification is issued*	Required if modification is made: i. to a contract described in (2) or (3) above; or ii. to an order requiring posting as described in (4) or (5) above
(7)	A contract or order is awarded pursuant to a small business contracting authority (e.g., SBA's section 8(a) program)	Required if one or both of the following conditions exist: i. the contract or order is not fixed-price ii. the contract or order was not awarded using competition (e.g., a non-competitive 8(a) award)

* Note: Applies also to modifications to an existing contract or order.

c. The following actions are considered competitive for purpose of reporting rationales under the Recovery Act:

- Actions listed at FAR 6.1

- Actions listed at FAR 6.2 except sole source 8(a)s (19.808-1)[1].
- Multiple Award Schedule orders under 8.405-1 and 8.405-2
- Orders against task and delivery order contracts which used fair opportunity to compete (16.505(b)(1))

d. The following actions, which are permissible under statute and regulation, are considered noncompetitive for purposes of reporting rationales under the Recovery Act:

- Actions which used a statutory exclusion to full and open competition (these will have a Justification for other than full and open competition under FAR 6.303.)
- Multiple Award Schedule orders with limited source justifications under 8.405-6.
- Simplified acquisitions that were sole sourced (13.106-1(b), (13.106-3(b)(3), 13.501(a)(2))
- Orders against task and delivery order contracts which used a statutory exclusion to the fair opportunity to compete (16.505(b)(2) and (5))
- Sole source 8(a)s (19.808-1).
- Sole source small business set-asides (including HUBZone small business (19.1306), and sole source service-disabled veteran small business awards (19.1406)).

e. The rationale for not awarding a competitive fixed-price contract or order (or modification to an existing contract or order) must be included in your award synopsis posting. The D&F, justification or documentation for the applicable FAR exception to use competitive and/or fixed price procedures may provide the basis for the rationale. The rationale should include the type of contract awarded, an explanation for the choices to award a non-fixed-price and/or non-competitive contract, and the appropriate FAR reference for award of a non-fixed-price and/or non-competitive contract.

Note: Sample rationale language is provided in Attachment B.

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[1] The April 3, 2009, updated guidance (M-09-15) from OFPP on page 54 states, "Under the 8(a) BD Program, smaller contracts are typically awarded on a noncompetitive basis and larger contracts are awarded through competitive set-asides. The current 8(a) BD competition thresholds are $5.5 million for contracts assigned manufacturing industry codes and $3.5 million for all other contracts. SBA has procedures in place whereby its Director of Business Development, when requested, may permit an agency to conduct competitive procurements under the usual competitive thresholds. Pursuant to this authority, for contracts funded by the Recovery Act, an agency may request a blanket waiver from SBA for competitions for construction or information technology (IT) services below the competition thresholds. Agencies may also request specific waivers (i.e., on a case-by-case basis) for industries other than construction and IT. Requests should be sent to 8aBD2@sba.gov. Go to http://www.sba.gov/idc/groups/public/documents/sba_program_office/8abd_8a_competitive_waiver.pdf for additional information. For noncompetitive HUBZone awards, see FAR 19.1306. For noncompetitive SDVOSB awards, see FAR 19.1406."

The information posted on FBO regarding contracting type and extent of competition must match what is reported to FPDS in accordance with FAR 4.6.

E. Modifications.

If Recovery Act funds will be used, contracting officers shall modify existing contracts, on a bilateral basis, to include the Recovery Act FAR clauses contained in the Interim rules. This also applies to orders. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds on the contract or order.

Attachment A

Summary of FAR Cases

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

This interim rule implements the Buy American provision, section 1605, of the American Recovery and Reinvestment Act of 2009. 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. This means that the requirement to purchase only U.S. or designated-country iron, steel, and manufactured goods applies if any Recovery Act funding whatsoever is used. In addition, the requirement to utilize the clauses listed below in lieu of other FAR Part 25 Buy American and Trade Agreement clauses applies if any Recovery Act funds whatsoever are used.

Section 1605 also provides for waivers under three circumstances. These are the same as the three circumstances justifying a waiver to the Buy American Act (BAA). However, in order to justify a waiver for unreasonable cost, a 25% (vs. 6% for the BAA) evaluation factor must be applied to the total contract cost (vs. the cost of the component for the BAA). Any waiver issued for any of the three circumstances must be published in the Federal Register within two weeks,

The rules are contained in FAR Subpart 25.6, formerly reserved. The interim rule substitutes four new provisions and clauses (with appropriate alternates), to be used when contracting with funds appropriated by the Recovery Act, for the four clauses otherwise used in construction contracts to implement the Buy American Act and U.S. obligations under applicable trade agreements. Specifically, when using Recovery Act appropriated funds, contracting officers will use—

- 52.225-21, Required Use of American Iron, Steel, and Manufactured Goods--Buy American Act-Construction Materials, instead of 52.225-9, Buy American Act—Construction Materials;
- 52.225-22, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods--Buy American Act—Construction Materials, instead of 52.225-10, Notice of Buy American Act Requirement—Construction Materials;
- 52.225-23, Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials Under Trade Agreements, instead of 52.225-11, Buy American Act—Construction Materials under Trade Agreements; and
- 52.225-24, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials under Trade Agreements, instead of 52.225-12, Notice of Buy

American Act Requirement—Construction Materials under Trade Agreements.

If the clause 52.225-21 is used, then the clause 52.225-22 must be used, with or without its Alternate I. These two clauses should be used if the value of the project is under $7,443,000. Alternate I must be used with 52.225-22 if there is insufficient time available (before receipt of offers) to process a determination regarding the inapplicability of the Buy American Act.

If the clause at 52.225-23 is used, then the clause at 52.225-24 must be used, with or without Alternates. These two clauses should be used if the value of the project is over $7,443,000. Each of these two clauses has an Alternate to be used if the value of the option is between $7,443,000 and $8,817,449. There is also an Alternate to 52.225-24 that is to be used if there is insufficient time available (before receipt of offers) to process a determination regarding the applicability of the Buy American Act.

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

This rule 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 10th day after the end of each calendar quarter.

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

One of the provisions of the OMB guidance is to provide accountability and transparency relative to publicizing contract actions. The OMB guidance requires that the FAR be amended to reflect:

1. Unique requirements for posting of pre-solicitation notices.
2. Unique requirements for announcing contract awards.
3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS).
4. Unique requirements for actions that are not fixed-price or competitive.

In order to implement Section 6.2 of the OMB Guidance M-09-10, FAR Parts 4, 5, 8, 13, and 16 are amended as follows:

1. 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 American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), in accordance with the instructions at https://www.fpds.gov.
2. Subpart 5.7 is added to direct the contracting officer to use the Governmentwide Point of Entry (https://www.fedbizopps.gov) to (a) identify the action as funded by the Recovery Act; (b) post pre-award notices for orders exceeding $25,000 for "informational purposes only;" (c) describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and (d) 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.
3. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

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

Under the interim rule the following new authorities are provided to the Comptroller General for contracts using Recovery Act funds:

- Part 12 contracts-- The authority to audit subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.

- Part 15 contracts-- The authority to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.

- Part 14 contracts--The authority to audit both contracts and subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.

The interim rule provides the same authorities to agency inspector generals, with the exception of interviewing subcontractor employees.

Except for classified solicitations and contracts, in all solicitations and contracts and modifications funded in whole or in part with Recovery Act funds Contracting Officers shall implement the interim rule as follows:

- Part 12 contracts--Insert Alternate II to 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

- Part 14 contracts--Insert Alternate I to 52.214-26 Audit and Records—Sealed Bidding.

- Part 15 contracts--Insert Alternate I to 52.215-2 Audit and Records—Negotiation.

FAR Case 2009-012, American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Whistleblower Protections

FAR Subpart 3.9 is revised to add section 3.907. Section 3.907 provides procedures for whistleblower protection, when using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

FAR 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.

GSA Contracting Officers are required to include the new clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act) in all solicitations and contracts funded in whole or in part with Recovery Act funds. Any modified contracts funded by Recovery Acts funds shall also include the clause at 52.203-15.

Attachment B

Rationale for actions that are not both fixed-price and competitive

Provided below is sample rationale. The samples are general in nature; the contracting officer must add the specific explanation for each contract action. The rationale should include the type of contract awarded and the rationale for the choices to use a non-competitive and/or non-fixed-price contract.

1. Rationale for Non-Fixed-price

The D&F or documentation for the specific requirement may provide the basis for the rationale required for posting (See FAR 16.601(d), 12.207(b), or 8.405-2(e)(7)(i)).

- *"This is a cost plus fixed fee contract. This procurement was not awarded as a fixed-price contract because uncertainties involved in contract performance did not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. In addition, the contract was for the performance of research or preliminary exploration or study, and the level of effort required was unknown."(FAR 16.301-2 and 16.306)*

- *"This is a time-and-materials contract. This procurement was not awarded as a fixed-price contract because it was not possible at the time of award of the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. The high degree of complexity, and uniqueness of the requirement to the Government did not make a fixed-price contract suitable. (FAR16.601(c))"*

- *"This is a time and materials order for commercial services. This procurement was not awarded as fixed-price because it was not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. Market research revealed that the type of service required is usually done on a time and materials basis.* (FAR 12.207(b))"

- *"This is a labor-hour order under a GSA Multiple Award Schedule contract. Materials are not required by the contractor. This procurement was not awarded as a fixed-price order because it was not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. The*

requirement did not include a specific task based on a reasonably definite functional or detailed specification to request a fixed-price. In addition, market research revealed that the type of service required is usually done on a labor hour basis. Further, the required services on the schedule were priced at hourly rates. (FAR 8.405-2(e)(7)(i)"

2. Rationale for Non-Competitive Award

Provided below is sample rationale. The samples are general in nature; the contracting officer must add the specific explanation for each contract action. The justification for the applicable FAR exception to the competitive procedures may provide the basis for the rationale of the non-competitive award (See FAR 6.303, 8.405-6, 13.106-1(b),13.106-3(b)(3), 13.501(a)(2), and 16.505(b)(2))

a. *Part 6 Other Than Full and Open Competition*

- *"This procurement was awarded using other than full and open competition because there was only one responsible source and no other supplies or services would satisfy agency requirements. Market research revealed that the Government's minimum needs could only be satisfied by unique supplies or services available from only one source or only one supplier with unique capabilities.* (FAR 6.302-1)."

- *"This procurement was awarded using other than full and open competition because there is an unusual and compelling urgency and a delay in award of a contract would result in serious injury, financial or other, to the Government. The supplies or services were required to eliminate a life or mission threatening situation. "* Note: An improper use of this authority would be for a requirement whose urgency derives from expiring funds or lack of adequate planning. *(FAR 6.302-2)"*

- *"This procurement was awarded using other than full and open competition because it was necessary to maintain a facility, producer, manufacturer, or other supplier for furnishing these supplies\services in case of a national emergency. The Contracting Officer should identify the nature of the expected national*

emergency and the critical item produced by the source or supplier (FAR 6.302-3).

- *"This procurement was awarded using other than full and open competition because full and open competition need not be provided for when precluded by the terms of an international agreement or a treaty between the United States and a foreign government or international organization or the written directions of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government. The firm awarded the contract must be specified in an official Letter of Offer and Acceptance. (FAR 6.302-4)"*

- *"This procurement was awarded using other than full and open competition because a sole source award was made* under the 8(a) Program 15 U.S.C. 637. *The contract award was made pursuant to the procedures at FAR Subpart 19.8. (See also FAR 6.302-5)"*

- *"This procurement was awarded using other than full and open competition because a sole source award was made* under the HUBZone Act of 1997—15 U.S.C. 657a. *The contract award was made pursuant to the procedures at FAR Subpart 19.1306. (See also FAR 6.302-5)"*

b. Multiple Award Schedule orders with limited source justifications under 8.405-6.

- *"This procurement was awarded restricting consideration of schedule contractors to fewer than required in 8.405-1 or 8.405-2 because only one source was capable of responding due to the unique or specialized nature of the work. Market research revealed that only one source possessed the capabilities to meet the Government's unique requirements (FAR 8.405-6(b)(1))";*

- *"This procurement was awarded restricting consideration of schedule contractors to fewer than required in 8.405-1 or 8.405-2 because the new work is a logical follow-on to an original Federal Supply Schedule order. The original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures and was not*

previously issued under sole source or limited source procedures. Phase I of the requirement was awarded on the original order. Phase II was awarded as a follow-on to the same contractor because Phase II was identified as a potential follow-on in the original solicitation, and it is unlikely that any other sources can provide the services required to meet the Government's needs. (FAR 8.405-6)(b)(2))"

c. Simplified acquisitions that were sole sourced (13.106-3(b)(3), 13.106-1(b), and 13.501(a)(2))

- *"This procurement was awarded as a sole source using simplified acquisition procedures in accordance with FAR 13.106-3(b)(3), which allows the contracting officer to include additional statements explaining the absence of competition, if only one source is solicited and the acquisition does not exceed the simplified acquisition threshold or allows the contracting officer to include additional statements supporting the award decision if other than price-related factors were considered in selecting the supplier;"*

- *"This procurement was awarded as a sole source using simplified acquisition procedures in accordance with FAR 13.106-1(b), which allows the contracting officer to solicit from a single source for purchases not exceeding the simplified acquisition threshold, if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available (e.g., urgency, exclusive licensing agreements, brand name or industrial mobilization);"*

- *"This procurement was awarded as a sole source using simplified acquisition procedures in accordance with FAR 13.501(a), which allows the contracting officer to award sole source acquisitions; there was only one responsible source and no other supplies or services would satisfy agency requirements."*

d. Orders against task and delivery order contracts which used a statutory exclusion to the fair opportunity to compete (16.505(b)(2)

- *"This order was awarded using a statutory exception to fair opportunity. The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays. It was urgent to award the order to the identified source to avoid a shut down of the system. The system is required to operate continuously to meet the Government's mission. FAR 16.505(b)(2)(i)"*

- *"This order was awarded using a statutory exception to fair opportunity. The contractor was the only awardee capable of providing the supplies or services required at the level of quality required because the supplies or services ordered were unique or highly specialized. The contractor designed, developed, created and/or patented the procedures required to meet the Government's needs. No other contractor possesses the highly specialized skills, experience and techniques to provide the level of quality needed by the Government. FAR 16.505(b)(2)(ii)"*

The Office of Management and Budget Memorandum, M-09-15, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," dated April 3, 2009 states, "In light of the Administration's commitment to high levels of accountability and transparency, special attention should be given to maintaining strong internal controls over Recovery Act program funds. High risk associated with the award and expenditure of Recovery Act program funds, merit increased oversight by the Agency." The Recovery Accountability and Transparency Board, established by the Act, Congress and the Office of Management and Budget will oversee and monitor implementation of the Recovery Act through periodic reporting on the use and expenditure of funds. As such, the updated guidance directs agencies to pay special attention to certain areas related to acquisition that will use Recovery Act funds. Provided below are the items.

OMB Guidance, M-09-15, Citation	**Pay special attention to the items provided below related to acquisitions that will use Recovery Act funds.**
Sec. 6.1(1), pg. 52	Select a contract type that supports requirements for meaningful and measurable outcomes consistent with agency plans for, and the goals of, the Recovery Act. The President's Memorandum of March 4, 2009, on "Government Contracting" established a preference for fixed-price contracts.
Sec. 6.1(1), pg. 52 and Sec. 3.8.e, pg. 32	Using other than a fixed-price contract may be appropriate but requires paying special attention to ensuring that sufficient qualified acquisition personnel are available to perform contract administration to mitigate the government's risk. When riskier contract types are proposed provide appropriate oversight so that all alternatives have been considered and that qualified staff is available for monitoring performance to mitigate risks.

Sec. 6.1, (2), pg. 53	Promote competition to the maximum extent practicable. The President's Memorandum of March 4, 2009, on "Government Contracting" stated that it is the policy of the Federal Government that executive agencies shall not engage in noncompetitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards are in place to protect the taxpayer.
Sec. 3.8.g, pg. 32	Ensure receipt of funds is made contingent on recipients meeting the reporting requirements in Section 1512 of the Act. Contracting officers must include the new clause (52.204-11) in solicitations and contracts funded in whole or in part with Recovery Act funds, Contracting officers shall ensure that the contractor complies with the reporting requirements of the new clause. (See FAR case 2009-009)
Sec. 3.8.h, pg. 32	Structure acquisitions to result in meaningful and measurable outcomes that are consistent with agency plans and that promote the goals of the Recovery Act. The evaluation criteria for award should include those that bear on the measurement and likelihood of achieving these outcomes.
Sec. 3.8.i, pg. 32	Consider alternatives to contract financing, including structuring contract line items to allow invoicing and payments based upon interim or partial deliverables, milestones, percent-of-completion, etc. Ensuring consideration of contractor cash flow during acquisition planning will mitigate schedule and performance risks to the government and reduce costs to the contractor associated with financing in a tight credit market.
Sec. 3.8. j, pg. 32	Evaluate workforce needs in order to appoint qualified Contracting Officers, Contracting Officer Technical Representatives (COTRs), and Program Managers with certification levels appropriate to the complexity of Recovery Act projects.
Sec. 6.1, pg. 52	Mitigate schedule, cost, and performance risk.
Sec. 6.1, pg. 52	Maximize opportunities for small businesses to compete for agency contracts and to participate as subcontractors.

Sec. 6.1, pg. 52	Use supplies and services provided by nonprofit agencies employing people who are blind or severely disabled as provided in FAR Subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled.
Sec. 6.1, pg. 52 and 6.2(2), pg. 58	Expeditiously award contracts using available streamlining flexibilities. Agencies are cautioned that the Recovery Act does not independently trigger use of emergency procurement authorities in FAR Part 18, Emergency Acquisitions.
Sec. 6.1(8), pg. 55	Continue to comply with the requirements of FAR Part 23, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace, when acquiring supplies and services using Recovery Act funds.
Sec. 6.2, (1), pg. 57	Place special emphasis on responsibility determinations and pre-award surveys. FAR Part 9, Contractor Qualifications addresses contractor qualifications.
Sec. 6.2, (3), pp. 57-58	The Davis-Bacon Act and Service Contract Act apply to contract actions using Recovery Act funds. Agencies must follow the same laws, principles, procedures, and practices in awarding contracts with Recovery Act funds as they do with other funds.
Sec. 6.3, (1), pg. 59	Ensure that incentive and award fees are effectively administered. (For further guidance, see the OFPP memorandum entitled *Appropriate Use of Incentive Contracts,* 12/4/07).
Sec. 6.3, (1), pg. 59	Implement quality assurance procedures established for the contract.
Sec. 6.3, (1), pg. 59	Document timely inspection and acceptance of deliverables.
Sec. 6.3, (1), pg. 59	Use all available tools to identify and remedy deficiencies related to contractor performance, cost, and schedule (e.g., Quality Assurance Surveillance Plans, cure notices, show cause letters).
Sec. 6.3, (1), pg. 59	Complete timely contractor performance evaluations that accurately reflect the contractor's actual performance, supported by appropriate documentation.
Appendix 4.4, pg. 86	New Requests for Proposals issued under Recovery Act initiatives should contain the necessary language to satisfy the requirements of the Recovery Act.
Appendix 4.4, pg. 86	Contracts shall be awarded in a prompt, fair, and reasonable manner.

Appendix 4.4, pg. 86	Contracts or orders awarded using Recovery Act funds shall include the specific clauses required (See Recovery Act FAR Cases.)
Appendix 4.4, pg. 86	Contracts awarded using Recovery Act funds should be transparent to the public and reported clearly, accurately and in a timely manner(e.g., required reporting to FPDS, FedBizopps)
Sec. 6.5, pg. 60	Proper documentation must be maintained for each contract award. FAR Part 4, Administrative Matters, prescribes policies and procedures related to the proper documentation of contract files.
Sec. 1.14, pg. 9	GSA SmartPay® purchase cards can be used for official purchases in support of the Recovery Act.
Sec. 6.1 (5), p.54	Interagency Agreements. When using assisted acquisitions, Interagency Agreements must spell out the assignment of agency roles and responsibilities to fulfill the unique requirements of the Recovery Act.