



FEDERAL CONTRACTS



REPORT

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Contractor Accountability

A Contractor's Guide To The Federal Bailouts

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Faced with an economic crisis of historic proportions, the federal government has unleashed an unprecedented wave of spending to try to stabilize the financial system and stimulate economic growth – first with the \$700 billion TARP program, and more recently with the \$789 billion stimulus package. Given the massive amounts of spending associated with these programs, and the rapid decline in economic activity in the commercial sector, these programs represent an attractive opportunity for traditional government contractors, as well as companies that may be considering entering into the government marketplace for the first time.

At the same time, there is considerable risk and uncertainty surrounding these programs. First, even though these initiatives were intended to quickly stabilize and stimulate the economy, questions abound about how these massive spending initiatives will actually be implemented, and about how they will ultimately impact federal contractors. In addition, the statutes, implementing regulations, and other guidance include a number of significant restrictions, including: rigid oversight mechanisms and audit exposure; potentially onerous organizational and personal conflict of interest rules; limits on executive compensation; numerous certification and reporting obligations; potentially broad “Buy American” restrictions; and a little-noticed but significant provision of OMB’s implementing guidance that would impose mandatory disclosure obligations on federal grantees who receive “credible evidence” of

fraud and other wrongdoing in connection with the receipt or use of bailout funds.

This article provides an overview of the contracting provisions of the TARP and the Recovery Act, and identifies the key provisions that contractors and other potential recipients of federal bailout funds should be aware of as they evaluate the significant opportunities and risks associated with these programs.

The TARP

Overview

The Troubled Asset Relief Program was created by the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 (EESA). Under the EESA, which was signed into law on October 3, 2008, the Treasury Department is authorized “to purchase and insure certain types of troubled assets” and “to take such actions as the secretary deems necessary” for the purposes of “providing stability to and preventing disruption in the economy and financial system and protecting taxpayers.”¹ Originally introduced by the Treasury as a two-and-a-half page proposal, the Act eventually grew into a complex statute spanning nearly one hundred and seventy pages.

Although the TARP was originally envisioned as a program to purchase troubled assets, the focus of the program shifted almost immediately after the Act was

¹ Pub. L. No. 110-343, § 101.

signed into law. Thus, the majority of TARP funds expended to date have involved direct investments of capital by Treasury into various financial institutions to increase those institutions' "Tier 1" capital, through programs such as the "Capital Purchase Program,"² the "Systemically Significant Failing Institutions Program,"³ and the "Targeted Investment Program."⁴ In addition, the Treasury has used its broad authority under the TARP to provide loans to the U.S. auto industry through the "Automotive Industry Financing Program."⁵

As additional TARP funds are released, new programs and strategies for stabilizing the economy are likely to be introduced—programs like the recently announced "Term Asset-Backed Securities Loan Facility" (TALF), which is designed to spur private investment in a variety of different asset-backed securities. Whatever the strategy, however, contractors are expected to play a key role in the administration and operation of the TARP.⁶

Procurement Authority

To carry out its broad mandate under the EESA, Treasury was granted specific authority to enter into contracts and to "waive specific provisions of the Federal Acquisition Regulation upon a determination that urgent and compelling circumstances make compliance with such provisions contrary to the public interest."⁷ In addition, Treasury was granted authority to use its existing "financial agent" authority to "designat[e] financial institutions as financial agents of the federal government" for purposes of administering the TARP.⁸

To date, Treasury has used its procurement authority to award somewhere in the neighborhood of fifteen contracts, with a total value of approximately \$7 million, to acquire legal, accounting, financial and other services necessary to administer the TARP. These contracts have been awarded using a combination of competitive procedures, "GSA Schedule buys," and sole-source procurements based on "unusual and compelling urgency."⁹ According to procurement guidance issued by Treasury, certain procurements may be set aside for small businesses (including VOSBs, SD-VOSBs, HUBZones, SDBs, and WOSBs), even though there are no requirements for Treasury to set aside its financial agent contracts for small businesses.¹⁰

Organizational Conflicts of Interest

Under Section 108 of the EESA, Treasury is required to adopt conflict of interest rules to "address and man-

age or to prohibit conflicts of interest that may arise in connection with the administration and execution" of the TARP.¹¹ Treasury issued interim guidance on conflict of interests on October 6, 2008, which was followed by a more extensive interim regulation on January 21, 2009, that covers both Organizational Conflicts of Interest ("OCI") and Personal Conflicts of Interest ("PCI").¹²

This interim rule applies to any "retained entity" that seeks or holds a "contract or financial agency agreement . . . for services under the TARP," except for entities that provide "administrative services identified by the TARP Chief Compliance Officer."¹³ Under the regulations, a "retained entity" is broadly defined to include individuals (except for individuals hired as "special government employees"), as well as subcontractors and consultants hired to perform TARP services.¹⁴

For purposes of the Treasury regulation, an OCI is defined as "a situation in which the retained entity has an interest or relationship that could cause a reasonable person with knowledge of the relevant facts to question the retained entity's objectivity or judgment to perform under the arrangement, or its ability to represent the Treasury."¹⁵ Under the interim regulation, an OCI must be disclosed and mitigated or waived by Treasury.¹⁶ To allow Treasury to evaluate any potential OCIs, the rule requires TARP contractors to provide detailed information concerning potential conflicts, including information regarding "all other business or financial interests" of the contractor or its related entities which "could conflict" with the contractor's obligations under its agreement with Treasury, as well as a description of all OCIs and potential OCIs.¹⁷

The contractor must also certify that these representations are "complete and accurate in all material respects" at the time of submission, and must re-certify at least annually (or more frequently if required by Treasury) that it has no OCIs or that it has taken or plans to take action to mitigate any OCIs.¹⁸ Finally, contractors must retain records supporting their certifications, including information relied upon in formulating any mitigation plans.

Personal Conflict Of Interest Rules

In addition to these OCI rules, the Treasury regulation includes equally burdensome rules regarding PCIs. Like the OCI rules, these PCI rules apply to any retained entity (including individuals, subcontractors and consultants) retained to provide services (other than "administrative services") under the TARP.

For purposes of these rules, a PCI is defined as "a personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectiv-

² See <http://www.treasury.gov/initiatives/eesa/program-descriptions/cpp.shtml>.

³ See <http://www.treasury.gov/initiatives/eesa/program-descriptions/ssfip.shtml>.

⁴ See <http://www.treasury.gov/initiatives/eesa/program-descriptions/tip.shtml>.

⁵ See <http://www.treasury.gov/initiatives/eesa/program-descriptions/aifp.shtml>.

⁶ See "Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency," GAO-09-161, December 2008 at 58 (available at <http://www.gao.gov/new.items/d09161.pdf>).

⁷ Pub. L. No. 110-343, § 107(a).

⁸ Pub. L. No. 110-343, § 101(c)(3).

⁹ See <http://www.treasury.gov/initiatives/eesa/contracts.shtml>.

¹⁰ See <http://www.treasury.gov/initiatives/eesa/docs/small-business-participation.pdf>.

¹¹ Pub. L. No. 110-343, § 108(a).

¹² 74 Fed. Reg. 3430 (Jan. 21, 2009).

¹³ 31 C.F.R. § 31.201.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 31 C.F.R. § 31.211(a).

¹⁷ 31 C.F.R. § 31.211(b)(3).

¹⁸ 31 C.F.R. §§ 31.211(d), (g).

ity or judgment in such performance, or his or her ability to represent the interests of the Treasury.”¹⁹

To determine whether a PCI exists, TARP contractors are required to gather detailed information from “management officials and key individuals,” including information regarding the “personal, business and financial relationships” of the contractor’s management officials and key individuals, as well as their spouses, minor children and other family members.²⁰ Within 10 days of award, and at least annually thereafter, the contractor must certify that no PCIs exist, or that any PCIs have been mitigated or waived by Treasury.²¹

Procurement Integrity Restrictions And Certifications

As part of the extensive conflict of interest rules issued in January 2009, Treasury included a provision that prohibits prospective TARP contractors from engaging “directly or indirectly” in any discussion of “future employment or business opportunity” with any Treasury employee who has “personal or direct responsibility for that procurement.”²² In addition, these rules prohibit TARP contractors from offering, giving or promising anything of value to any Treasury employee, except as permitted under the Governmentwide Ethics Rules at 5 C.F.R. Part 2635.²³ Finally, these rules prohibit TARP contractors from soliciting or obtaining any non-public information that was “prepared for use by Treasury for the purpose of evaluating an offer, quotation or response”²⁴

To some extent, these restrictions are similar to existing laws that are familiar to government contractors, such as the Procurement Integrity Act and the criminal gift and gratuities statutes. However, the Treasury regulations go further and require that, before entering into any new contract or modification, the contractor must *certify* that: (1) the contractor is aware of these restrictions, has made a reasonable inquiry, and is not aware of any violations; and (2) each employee involved in the preparation of a proposal has certified that he or she is aware of and will comply with these restrictions, is not aware of any violations, and will report any violation to the contractor immediately.²⁵ Therefore, similar to the new FAR mandatory disclosure rules,²⁶ TARP contractors will need to implement internal controls to detect, assess and (if necessary) report instances of improper conduct.

Limits On Executive Compensation

Section 111 of the EESA requires that “[a]ny financial institution that sells troubled assets to the Secretary under this Act” is subject to limits on executive compensation, including limits on “golden parachutes” and on payment of bonuses by institutions that take “unnecessary and excessive risks.”²⁷ In addition, Section 302 of the Act prohibits institutions that have sold one or more troubled assets under the TARP from claiming an

income tax deduction of more than \$500,000 in executive compensation.²⁸ In February 2009, Congress enacted additional restrictions on executive compensation as part of the Recovery Act, which among other things defined the term “golden parachute,” and clarified that the restrictions on executive compensation apply to “any entity that has received or will receive financial assistance under the financial assistance provided under the TARP” (as opposed to just those that have “sold troubled assets”).²⁹

To implement these statutory limits, Treasury issued interim regulations in October 2008 and January 2009, regarding limits on executive compensation for “any financial institution that participates in the [Capital Purchase Program].”³⁰ Among other things, these regulations require that recipients of TARP funds annually certify that they have reviewed their executive compensation agreements to ensure that they do not encourage executive officers to take “unnecessary and excessive risk.”³¹

Contractors should note, however, that under the plain terms of both the statutes and regulations, the restrictions on executive compensation apply only to “financial institutions” that have participated in the TARP program—for example, financial institutions that have sold assets to Treasury, or that “participate in the CPP.” There is nothing in the statutes or regulations governing the TARP to indicate that the restrictions on executive compensation apply to contractors engaged under the FAR or Treasury’s financial agent authority, or that these restrictions somehow “flow down” to entities other than the financial institutions that have directly participated in the TARP program.³²

Requirement To Employ American Workers

Under Section 1611 of the recently-enacted Recovery Act (a provision entitled the “Employ American Workers Act”), a “recipient of funding” under the TARP is prohibited from hiring an H-1B visa employee unless that company is in compliance with all of the existing requirements for an “H-1B dependent employer.”³³ This means, for example, that an H-1B dependent employer is prohibited from laying off an American worker 90 days before or 90 days after filing the petition to hire an H-1B visa employee, and must certify that the employer has made good faith efforts to find American workers

²⁸ Pub. L. No. 110-343, § 302.

²⁹ Pub. L. No. 111-5, § 7001.

³⁰ See 30 C.F.R. § 30.1 Q-1; <http://www.treas.gov/press/releases/hp1364.htm>.

³¹ 30 C.F.R. §§ 30.3 Q-3, 30.6 Q-6.

³² Indeed, the terms of Treasury’s recently announced “Term Asset-Backed Securities Loan Facility” (the “TALF”) – a program designed to spur private investment in the market for asset backed securities – expressly state that participants in that program are not subject to executive compensation restrictions. See <http://www.federalreserve.gov/newsevents/press/monetary/monetary20090303a2.pdf> at 14-15 (“Executive compensation restrictions are targeted towards ensuring that executives of institutions that receive government support are not unjustly enriched at the taxpayers’ expense. Given the goals of the TALF and the desire to encourage market participants to stimulate credit formation and utilize the facility, the restrictions [on executive compensation] will not be applied to TALF sponsors, underwriters, and borrowers as a result of their participation in the TALF.”).

³³ Pub. L. No. 111-5, § 1611(b) (1).

¹⁹ 31 C.F.R. § 31.201.

²⁰ 31 C.F.R. § 31.212(b).

²¹ 31 C.F.R. §§ 31.212(d), (e).

²² 31 C.F.R. § 31.216(a) (1).

²³ 31 C.F.R. § 31.216(a) (2).

²⁴ 31 C.F.R. § 31.216(a) (3).

²⁵ 31 C.F.R. § 31.216(b).

²⁶ See generally 73 Fed. Reg. 67064 (Nov. 12, 2008).

²⁷ Pub. L. No. 110-343, § 111.

before hiring H-1B visa employees.³⁴ These restrictions sunset two years after the Recovery Act was enacted.³⁵

Oversight And Audits Of TARP Activities

In granting Treasury the broad authorities contained in the EESA, Congress also mandated a rigorous system of oversight and supervision of TARP activities. This rigorous system of oversight includes monitoring by four separate entities:

- The special inspector general for the TARP (SIG TARP), a position created by Section 121 of the EESA for the purpose of “conduct[ing], supervis[ing], and coordinat[ing] audits and investigations” in accordance with the Inspectors General Act;
- The Financial Stability Oversight Board, a board composed of the heads of Treasury, FHA, HUD, the SEC and the Federal Reserve, which is charged under Section 104 of the Act with reviewing the Secretary’s administration of the TARP;
- The Congressional Oversight Panel (oversight panel), which is required under Section 125 of the Act to report to Congress every 30 days regarding the administration of the TARP program, including reports on “the use of contracting authority and administration of the program”; and
- The Government Accountability Office, which is charged under Section 116 of the Act with “ongoing oversight of the activities and performance of the TARP and of any agents and representatives of the TARP (as related to the agent or representative’s activities on behalf of or under the authority of the TARP),”

These oversight mechanisms apply to both financial institutions accepting TARP funds, as well as contractors supporting the administration of the TARP. Thus, for example, the SIG TARP indicated in its first report that one of its primary areas of focus will be on testing “compliance with the policies, procedures, regulations, terms, and conditions that are imposed on TARP participants,” and has warned about the potential for fraud in the TALF program.³⁶ Meanwhile GAO’s first report on the TARP singled out concerns over Treasury’s perceived failure to finalize “necessary oversight procedures for its growing number of contractors and financial agents,” as well as its “substantial reliance on the private sector”³⁷

Whistleblowers And Potential Liability Under The False Claims Act

In addition to the rigorous formal oversight mandated by the EESA, Senator Chuck Grassley has urged the Secretary of the Treasury and the Attorney General to ensure that Treasury treats seriously whistleblower

complaints relating to the use of TARP funds, to “ensure taxpayers aren’t taken to the cleaners by unscrupulous individuals.”³⁸

Senator Grassley has also urged the Department of Justice to investigate and prosecute instances of fraud in connection with the bailout program “to the fullest extent of the law” – including use of the federal False Claims Act, 31 U.S.C. § 3729, which would allow the government (or private relators acting on behalf of the government) to seek treble damages for false or fraudulent claims for payment made in connection with the TARP and CCP programs. In particular, Senator Grassley has suggested that Treasury be prepared to use the FCA to bring suit against “any entity that submits false or fraudulent information in an application to Treasury in order to obtain federal funds available through the CPP,” as well as any entity that makes “any fraudulent statements or submissions made to induce the government to purchase . . . assets” under the TARP.³⁹

Separately, the SIG TARP has suggested that, based on recent experience in the wake of Hurricane Katrina, Iraq reconstruction, and other emergency situations, “we are looking at the potential exposure of tens if not hundreds of billions of dollars in taxpayer money lost to fraud.”⁴⁰ To combat this suspected fraud, the SIG TARP has recommended that recipients of TARP funds be required to establish internal controls to ensure compliance with any conditions placed on the use of TARP funds, and provide signed certifications to the government regarding their compliance with those conditions.⁴¹

Thus, entities receiving federal funds under the TARP and CPP should be aware of the potential liability they may face under the FCA, and be prepared to implement appropriate internal controls to prevent and detect improper conduct in connection with the use of TARP funds.

The American Recovery and Reinvestment Act

Overview

The American Recovery and Reinvestment Act (Recovery Act), Pub L. No. 111-5, was signed into law on February 17, 2009, in an effort to “preserve and create jobs,” to “spur[] technological advances in science and health,” and to “invest in transportation, environmental protection and other infrastructure”⁴² Towards this end, the Act includes billions of dollars of additional funding for a wide variety of projects – projects ranging from investment in Health IT, to modernization and energy efficiency of federal buildings – and directs the President and the heads of the executive agencies to

³⁴ *Id.*

³⁵ Pub. L. No. 111-5, § 1611(b) (2).

³⁶ Office of the Special Inspector General for the Troubled Asset Relief Program, “Initial Report to the Congress,” Feb. 6, 2009 at 93 (“SIG TARP Initial Report”) (available at http://www.sig tarp.gov/reports/congress/2009/SIGTARP_Initial_Report_to_the_Congress.pdf).

³⁷ See “Testimony Before the Committee on Financial Services, House of Representatives,” GAO-09-266T, Dec. 10, 2008 at 7 (available at <http://www.gao.gov/new.items/d09266t.pdf>) (indicating that Treasury “plans to rely on contractors and financial agents in several key areas” of the TARP program).

³⁸ See http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=18128

³⁹ *Id.*

⁴⁰ Testimony of Special Inspector General Neil Barofsky before the House Committee On Financial Services, Subcommittee on Oversight and Investigations, Feb. 24, 2009 (available at http://www.sig tarp.gov/reports/testimony/2009/Testimony_Before_the_House_Committee_on_Financial_Services_Subcommittee_on_Oversight_and_Investigations.pdf).

⁴¹ SIG TARP Initial Report at 23.

⁴² Pub. L. No. 111-5, § 3(a).

“commence[e] expenditures and activities as quickly as possible consistent with prudent management.”⁴³

Pursuant to the provisions of the Act regarding transparency and accountability,⁴⁴ agencies have begun to publicly post their plans for spending the funds allocated by the Act.⁴⁵ For example, the Department of Defense announced plans to spend \$4.2 billion to upgrade facilities and improve energy efficiency,⁴⁶ while the Department of Homeland Security has announced plans to spend \$720 million for construction at land ports of entry, and \$1 billion for explosives detection systems and checkpoint screening equipment.⁴⁷ Meanwhile, GSA’s Public Building Service has announced plans to use some \$5.5 billion to renovate and construct federal buildings and courthouses—including some \$4.5 billion to convert federal buildings to “high-performance green buildings.”⁴⁸ Under initial guidance issued by OMB, agencies will be required to clearly identify activities undertaken pursuant to the Recovery Act and provide weekly updates regarding their use of Recovery Act funds, including contracts awarded and other actions taken to date, as well as other “major planned actions.”⁴⁹

Procurement And Grant Authority

The Recovery Act does not contain any new procurement or grant authority, per se. Instead, it requires that any contract be awarded in accordance with the Federal Property and Administrative Services Act (41 U.S.C. § 251 et seq., 10 U.S.C. Chapter 137) and the FAR unless, otherwise authorized by statute.⁵⁰ Nevertheless, to guide agencies in their efforts to implement the Recovery Act as quickly as possible, on February 18, 2009, OMB issued initial implementing guidance to agencies regarding implementation of the Recovery Act. This guidance includes a number of provisions regarding the award and structuring of contracts and grants, including:

- A preference for using *fixed-price, competitively-awarded* contracts “to the maximum extent practicable,”⁵¹ as called for under Section 1554 of the Recovery Act.⁵² At the same time, OMB recognizes that contracts other than fixed price contracts may be appropriate, provided agencies have sufficient acquisition personnel to perform appropriate con-

tract administration.⁵³ OMB also advises that, at least with respect to the award of grants, agencies should consider the appropriateness of “limited competitions among existing high-performing projects versus full and open competitions and formula allocations.”⁵⁴

- A requirement for agencies to structure contracts to include “*meaningful and measurable outcomes*” that promote the goals of the Recovery Act, such as “jobs creation and preservation.”⁵⁵
- Instructions for agencies to consider structuring contracts to include *contract financing* and other alternatives (e.g., interim or partial deliverables, milestones, percentage-of-completion) to assist contractors that may be having difficulty securing sufficient cash flow to fund their operations because of the current credit crisis.⁵⁶
- Suggestions for use of existing “*acquisition flexibilities*,” including use of streamlined procedures for the award of commercial item contracts.⁵⁷ At the same time, agencies are cautioned that the Recovery Act by itself does not justify use of the “contingency contracting procedures” at FAR Part 18.⁵⁸

OMB has indicated that additional, more detailed guidance regarding the implementation of the Recovery Act will be issued within 30-60 days of the original issue date.

Mandatory Disclosure Obligations For Grantees And Subgrantees

One little-noticed, but significant provision contained in OMB’s initial guidance relates to the issue of mandatory disclosures of wrongdoing in connection with the use of Recovery funds. Under the recently-issued FAR rule on “Contractor Business Ethics Compliance Program and Disclosure Requirements,” federal contractors are already subject to suspension and debarment for failure to disclose “credible evidence” of certain wrongdoing.⁵⁹ By its terms, however, the FAR mandatory disclosure rule applies only to federal procurement contracts that are subject to the FAR.⁶⁰ In fact, the FAR Councils expressly stated in the background to the mandatory disclosure rule that this reporting obligation “applies only to contracts using appropriated funds, not to grants. . . . This [mandatory disclosure] rule is not imposing any requirements on grant recipients.”⁶¹

Despite the FAR Councils’ clear statements regarding the applicability of the disclosure rules, and despite the lack of any specific provision in the Recovery Act dealing with mandatory disclosures, OMB’s initial guidance to agencies requires that all grants issued under the Recovery Act include a provision mandating disclosure of wrongdoing to the agency Inspector General:

Agencies must . . . [i]nclude the requirement that each grantee or sub-grantee awarded funds made

⁴³ Pub. L. No. 111-5, § 3(b).

⁴⁴ Pub. L. No. 111-5, § 1126(c).

⁴⁵ See <http://www.recovery.gov/?q=content/agencies>.

⁴⁶ See <http://www.defenselink.mil/recovery/>

⁴⁷ See <http://www.dhs.gov/xopnbiz/recovery.shtm>

⁴⁸ See http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=25806.

⁴⁹ See Executive Office of the President, Office of Management and Budget, “Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,” Feb. 18, 2009 at ¶ 1.5 (“OMB Initial Guidance”) (available at <http://www.recovery.gov/files/Initial%20Recovery%20Act%20Implementing%20Guidance.pdf>).

⁵⁰ Pub. L. No. 111-5, § 1610(a).

⁵¹ *Id.* at ¶ 6.1(2).

⁵² Pub. L. No. 111-5, § 1554 (“To the maximum extent possible, contracts funded under this Act shall be awarded as fixed-price contracts through the use of competitive procedures. A summary of any contract awarded with such funds that is not fixed-price and not awarded using competitive procedures shall be posted in a special section of the website established in section 1526.”)

⁵³ OMB Initial Guidance at ¶ 6.1(1).

⁵⁴ *Id.* at ¶ 5.1(2).

⁵⁵ *Id.* at ¶¶ 5.1(1), 6.1(3).

⁵⁶ *Id.* at ¶ 6.1(9).

⁵⁷ *Id.* at ¶ 6.2(7).

⁵⁸ *Id.*

⁵⁹ See generally 73 Fed. Reg. 67064 (Nov. 12, 2008).

⁶⁰ See *id.* (noting that the FAR mandatory disclosure rules does not apply to grants, since “[t]he FAR does not apply to contracts awarded using grant money”).

⁶¹ *Id.*

available under the Recovery Act shall promptly refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds.⁶²

Whether the OMB's final, more detailed guidance will include any additional or different guidance regarding mandatory disclosure by grantees remains to be seen. In the meantime, grants issued pursuant to the Recovery Act may already include language requiring grantees and subgrantees to report to the IG whenever they have "credible evidence" of certain wrongdoing.⁶³ Therefore, grantees and subgrantees receiving Recovery funds should be aware of this disclosure obligation and be prepared to implement appropriate internal controls to prevent, detect, assess and (if necessary) report misconduct in connection with Recovery Act grants.

Reporting Obligations

Section 1512 of the Recovery Act, which is known as the "Jobs Accountability Act," imposes extensive reporting obligations on any "recipient" of Recovery Act funds, which includes recipients of any contract, grant or loan that uses Recovery funds.⁶⁴ For example, recipients are required to submit detailed quarterly reports regarding their use of Recovery funds, including information regarding:

- The total amount of Recovery funds received from the agency, and the amount expended or obligated to projects or activities;
- A detailed list of all projects or activities for which Recovery funds were expended or obligated, to include the name and description of the project, an evaluation of the completion status of the project, and an estimate of the number of jobs created and the number of jobs retained by the project;
- For infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under the Recovery Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment; and
- Detailed information on any subcontracts or subgrants awarded by the recipient.⁶⁵

According to OMB's initial guidance, OMB is working to define a standard term and condition to implement the reporting requirements in Section 1512.⁶⁶ In the meantime, OMB's initial guidance indicates that these reporting requirements "only apply to the prime non-federal recipients of federal funding, and the sub-

awards (i.e., subgrants, subcontracts, etc.) made by these prime recipients. They do not require each subsequent subrecipient to also report."⁶⁷

Of note, the Recovery Act expressly requires agencies to require that "as a condition of receipt of funds under this Act, federal agencies shall require any recipient of such funds to provide the information required" under Section 1512.⁶⁸ Contractors should be mindful that, because submission of reports is an express condition on the receipt of funds, this requirement could have potential implications under the FCA. Accordingly, contractors should use care to ensure that the information contained in these reports is accurate and complete.

Buy American Restrictions

One of the more controversial aspects of the Recovery Act relates to the Act's "Buy American" restrictions. One of these restrictions, contained in Section 1605, prohibits (with certain exceptions) the use of Recovery funds 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."⁶⁹ Another provision, Section 604, prohibits FEMA from acquiring certain clothing, textiles and other equipment (including tents and body armor) unless those items are grown, processed or "reused" in the United States.⁷⁰

According to OMB, a FAR rule or other government-wide guidance on the Recovery Act's Buy American provisions is "under consideration." In the meantime, however, significant questions surround the application of these Buy American restrictions. One fundamental issue concerns the definition and scope of products subject to these restrictions. Although much of the debate on this issue centered on the use of domestic steel on highways, roads and other transportation projects, the final Buy American provision, Section 1605, applies to any "manufactured goods" used in connection with a "public building or public work." Because these terms are not defined,⁷¹ it remains to be seen how broadly these restrictions will be interpreted and applied.

Another fundamental issue concerns the standards for determining whether a product has been "produced in the United States." Under the regulations governing highway transportation projects (which the Recovery Act's Buy American provisions seem to be modeled after), in order for steel or iron to have been "produced" in the United States, "[a]ll steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel

⁶⁷ OMB Initial Guidance at ¶ 2.9.

⁶⁸ Pub. L. No. 111-5, § 1512(f).

⁶⁹ Pub. L. No. 111-5, § 1605(a).

⁷⁰ Pub. L. No. 111-5, § 604.

⁷¹ FAR Subpart 22.4, which governs contracts involving construction, does define a "public building or public work" as a "building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a federal agency to serve the interest of the general public regardless of whether title thereof is in a federal agency." FAR 22.401. This suggests that the Recovery Act's Buy American provisions, which apply to contracts involving a "public building or public work," apply only to contracts for construction and not every public contract issued under the Act.

⁶² OMB Initial Guidance at ¶¶ 5.9, 7.4.

⁶³ See, e.g., "OJJDP FY 09 Recovery Act Internet Crimes Against Children Task Force Program Grants," U.S. Department of Justice, at 12 (available at <http://ojjdp.ncjrs.gov/grants/solicitations/FY2009/ARRAICTaskForceProgram.pdf>); NIH "Standard Terms and Conditions American Recovery and Reinvestment Act of 2009 Division A Funds" at ¶ 7 (available at http://grants.nih.gov/grants/policy/NIH_HHS_ARRA_Award_Terms.pdf).

⁶⁴ Pub. L. No. 111-5, § 1512.

⁶⁵ Pub. L. No. 111-5, § 1512(c).

⁶⁶ OMB Initial Guidance at n.8.

additives.”⁷² Similarly, for a “manufactured product” to have been produced in the United States for purposes of federally funded highway projects, “[a]ll of the manufacturing processes for the product must take place in the United States; and [a]ll of the components of the product must be of U.S. origin.”⁷³ By contrast, an item of supply is considered a “domestic end product” for purposes of the existing Buy American Act restrictions in the FAR, if the item of supply is (1) “manufactured in the United States” and (2) “the cost of domestic components . . . exceed[s] 50 percent of the cost of all the components.”⁷⁴ And, under a recently-issued FAR rule, the “cost of component” portion of the existing FAR test has been waived for commercial-off-the-shelf (“COTS”) items.⁷⁵ Until more definitive guidance is issued, it remains to be seen which of these tests apply to contracts awarded under the Recovery Act.

Health IT Contracting

The Recovery Act includes extensive provisions to encourage investment in Health Information Technology (HIT).⁷⁶ In addition to providing billions of dollars to fund the development of HIT, the Act creates a new Office of the National Coordinator for Health Information Technology, which among other things is responsible for developing HIT standards to address, inter alia:

- The development and use of technologies that protect the privacy of health information, promote security, and prevent unauthorized access;
- The implementation of a nationwide HIT infrastructure to facilitate the accurate exchange and use of health information; and
- The use of electronic health records to improve the quality of health care, and to ensure comprehensive collection of patient demographic data.⁷⁷

In addition to providing for various grants and other initiatives relating to HIT, the Act requires that all contracts or agreements with health care providers, health plans or health insurance issuers in connection with federal government administered or sponsored health care programs must adhere to the HIT standards that are to be developed under the Act.⁷⁸

Oversight

Like the TARP, the Recovery Act includes an extensive system of oversight and supervision by a number of independent bodies. First, the Recovery Act calls for the creation of a new stand-alone entity known as the Recovery Accountability and Transparency Board, whose members will include various agency IGs, who have been granted express authority to conduct audits and reviews, and to issue subpoenas for documents and testimony, and to conduct hearings.⁷⁹

Second, agency IGs have been tasked under the Recovery Act to review, as appropriate, any concerns

raised by the public about specific investments made using funding from the Act.⁸⁰

Third, the Act also creates a new Recovery Independent Advisory Panel consisting of five experts in economics, finance, contracts and other fields, who are tasked with making recommendations to prevent waste, fraud and abuse.⁸¹

Fourth, the Recovery Act tasks the GAO, the third investigative entity, with making periodic reports on the use of Recovery Act funds and posting portions of these reports on a public website.⁸²

Consistent with the Act’s emphasis on transparency, all of the oversight entities are required to make their reports (including audits) available to the public via the Recovery Board website. However, the Act also allows for redactions of information that is exempt under FOIA 5 U.S.C. § 552,⁸³ which is an important protection for contractors whose confidential proprietary information may be included in such reports.

Whistleblower Protection

Section 1553 of the Recovery Act contains whistleblower protections for employees of any private, state, or local government entity that receives a contract, grant, or other payment from Recovery funds.⁸⁴ These whistleblower provisions protect an employee from any adverse employment action as a reprisal for reporting evidence of:

- gross mismanagement of a contract or grant, or a gross waste of covered funds;
- a substantial and specific danger to public health or safety related to the implementation of stimulus funds;
- an abuse of authority related to the implementation of stimulus funds; or
- a violation of law, rule, or regulation related to a contract awarded as part of the stimulus.⁸⁵

Under the whistleblower provision, an employee can prove retaliation by demonstrating that a disclosure was a “contributing factor in the reprisal,” or by showing that “the official undertaking the reprisal knew of the disclosure” or that the reprisal “occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.”⁸⁶

Davis-Bacon Wage Rate Requirements

Section 1606 of the Recovery Act provides that “all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the federal government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with [the Davis-Bacon Act].”⁸⁷ As drafted, the statute raises a number of questions, including: (1) whether the Davis-Bacon wage re-

⁷² 49 C.F.R. § 661.5(a)-(b).

⁷³ 49 C.F.R. § 661.5(d).

⁷⁴ FAR 25.101(a).

⁷⁵ 74 Fed. Reg. 2713 (Jan. 15, 2009).

⁷⁶ See generally Pub. L. No. 111-5, Title XIII, Health Information Technology For Economic and Clinical Health (HITECH) Act.

⁷⁷ Pub. L. No. 111-5, §§ 3002(b)(2)(B), 3004.

⁷⁸ Pub. L. No. 111-5, § 13112.

⁷⁹ Pub. L. No. 111-5, §§ 1521-30.

⁸⁰ Pub. L. No. 111-5, § 1514(a).

⁸¹ Pub. L. No. 111-5, § 1541.

⁸² Pub. L. No. 111-5, § 901.

⁸³ See Pub. L. No. 111-5, §§ 901(a)(2), 1514(a), 1526(b)(4)(B), 1526(d).

⁸⁴ Pub. L. No. 111-5, § 1553.

⁸⁵ Pub. L. No. 111-5, § 1553(a).

⁸⁶ Pub. L. No. 111-5, § 1553(c)(1)(A).

⁸⁷ Pub. L. No. 111-5, § 1606.

quirements apply to all contracts funded by the Recovery Act, or only to construction contracts in excess of \$2,000, as provided for in current law;⁸⁸ and (2) whether the prevailing wage applies to all laborers on the “project,” as opposed to those employees “on site,” as provided for in current law.⁸⁹ According to OMB’s initial guidance regarding the application of the Davis-Bacon Act to Recovery Act contracts, however, agencies are to “follow the same laws, principles, procedures, and practices in awarding contracts with Recovery Act funds as they do with other funds.”⁹⁰

Conclusion

Given the massive amount spending involved, the Recovery Act and the TARP present a significant opportunity for federal contractors, grantees and other potential beneficiaries of these ambitious programs. At the same time, these programs include extensive oversight mechanisms, reporting and certification obligations, and other restrictions that present potential traps for the unwary—particularly for commercial companies that are unfamiliar with government contracting. Therefore, contractors are advised to assess the risks as well as the rewards of these contracting opportunities

carefully, and to ensure that they fully understand their obligations before entering into this highly regulated environment.

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⁸⁸ FAR 22.403-1.

⁸⁹ *Id.*

⁹⁰ OMB Initial Guidance at ¶ 6.2(8).