

2009 Federal Stimulus Act: Opportunities and Risks

February 2009

Executive Summary

Not since World War II has the federal government sought to spend so much money in so little time, with such a sense of urgency. The American Recovery and Reinvestment Act of 2009 (the “Recovery Act” or the “Act”) presents tremendous opportunities for companies involved in infrastructure, including engineering, construction and supply contractors. At the same time, the sprawling Act includes many specific requirements and compliance risks that companies need to understand. There are also many downstream oversight and enforcement risks associated with the funds provided by the Recovery Act. We have identified and summarized the most important opportunities and risks.

Section I: Opportunities

Section I is a table that provides a summary of the principal sections of the Act that provide funding for infrastructure and construction projects. We identify the amounts available, the method by which the funds are to be disseminated and the purposes for which the funds are intended. This table is intended as a useful guide to the Act, not an exhaustive summary.

Section II: Restrictions and Compliance Issues

Section II identifies and analyzes provisions in the Act that restrict uses of the funds, including the controversial Buy American provision, award preferences and environmental requirements. We also identify several compliance issues, including reporting requirements, and compliance program and mandatory disclosure provisions imposed by the Federal Acquisition Regulation.

Section III: Oversight and Enforcement Risks

Section III identifies and summarizes the risks that companies will face downstream after projects are awarded. These risks include inspector general audits, oversight by the newly constituted Recovery Accountability and Transparency Board, potential antitrust actions, lawsuits alleging fraud under the False Claims Act and congressional oversight and investigations.

Section I: Opportunities

The following table provides a summary of most of the funds made available by the Recovery Act for infrastructure and construction projects. We have grouped the funds by the disbursing agency and have identified the amount, likely method of distribution and intended uses for the funds. We have provided some of the more important restrictions the Act imposes on the use or dissemination of funds, but in some cases there are more detailed restrictions found in the Act. This table is intended as a useful guide to the Act, not an exhaustive summary.

Opportunities Under the American Recovery and Reinvestment Act of 2009

Program	Amount	Distribution Method	Uses and Restrictions
AGRICULTURE DEPARTMENT			
Agriculture Building and Facilities and Rental Payments	\$24 million	Federal contracts	Funds for construction, repair and improvement activities.
Agriculture Research Service Maintenance	\$176 million	Federal contracts	Funds for deferred maintenance on Agricultural Research Service facilities. Priority given to critical deferred maintenance and to projects that can be commenced and completed promptly.
Rural Water and Waste Disposal Program	\$1.38 billion	Discretionary federal grants and loans to rural communities	Funds for drinking water and wastewater treatment facilities with priority to smaller (10,000 or fewer) and poorer communities. Recipients to include municipalities, counties, special purpose districts, Indian tribes and nonprofits.
Rural Broadband Infrastructure Deployment	\$2.5 billion	Grants, loans and loan guarantees. The Rural Utilities Service will make competitive grants and loans through its distance learning, telemedicine and broadband programs.	Funds for broadband infrastructure in rural areas with insufficient access to broadband service to facilitate economic development. Priority given to projects that will provide end-users with competition, areas with the highest proportion of residents without broadband service and applications that demonstrate the project can be promptly commenced and completed.
Rural Community Facilities Program	\$130 million	Federal financing for local governments, nonprofit corporations and Indian tribes.	Funds for health care facilities, emergency services, libraries and other community needs such as child day care facilities.
Forest Service Capital Improvement and Maintenance	\$650 million	Federal contracts	Funds for road, bridge and trail maintenance, including related watershed restoration and ecosystem enhancement projects.
COMMERCE DEPARTMENT			
Economic Development Assistance Program	\$50 million	Funds to be transferred to federally authorized regional economic development commissions	

Program	Amount	Distribution Method	Uses and Restrictions
Broadband Technology Opportunities Program	\$4.7 billion (total)	Competitive grants to state and local governments, nonprofits and public-private partnerships	At least \$250 million for competitive grants for innovative programs to encourage sustainable broadband. At least \$200 million to upgrade technology and capacity at public computing centers (libraries and community colleges). Private entities, including broadband service and infrastructure providers, are eligible to receive grants under the program, if in the public interest.
National Institute of Standards and Technology: Scientific and Technical Research and Services	\$360 million	Federal contracts and competitive grants	\$180 million for construction of research facilities. \$180 million for grants for the construction of research science buildings.
National Oceanic and Atmospheric Administration: Operations, Research and Facilities	\$600 million	Federal contracts	Funds for procurement, acquisition and construction. Additional \$230 million for operations, research and facilities.

DEFENSE DEPARTMENT

Operation and Maintenance, Army	\$1.474 billion	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Navy	\$657 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Marine Corps	\$113 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Air Force	\$1.095 billion	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Army Reserve	\$98 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.

Program	Amount	Distribution Method	Uses and Restrictions
Operation and Maintenance, Navy Reserve	\$55 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Marine Corps Reserve	\$39 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Air Force Reserve	\$13 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Army National Guard	\$266 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Operation and Maintenance, Air National Guard	\$25 million	Federal contracts	Funds to improve, repair and modernize Defense Department facilities; restore and modernize real property, including barracks; and invest in energy efficiency.
Defense Health Program	\$400 million	Federal contracts	Funds to improve, repair and modernize military medical facilities and invest in energy efficiency of military medical facilities.
Defense Environmental Cleanup	\$5.127 billion	Federal contracts	Environmental cleanup.
Army Corps of Engineers	\$4.6 billion	Federal contracts and discretionary grants	<p>Funds to accelerate ongoing work or begin new projects that can be completed in one year. The Corps must use funds for projects that can be executed quickly and without additional budget authority.</p> <p>\$2 billion for construction, of which \$200 million is for water-related environmental infrastructure assistance.</p> <p>\$375 million for the Mississippi River and tributaries.</p> <p>\$2.075 billion for operations and maintenance.</p> <p>\$100 million for formerly utilized sites remedial action program.</p>

Program	Amount	Distribution Method	Uses and Restrictions
Military Construction: Army	\$180 million	Federal contracts	\$80 million for design and construction of child development centers. \$100 million for design and construction of warrior transition complexes.
Military Construction: Navy and Marine Corps	\$280 million	Federal contracts	\$80 million for design and construction of child development centers. \$100 million for design and construction of troop housing. \$100 million for energy conservation and alternative energy projects.
Military Construction: Air Force	\$180 million	Federal contracts	\$80 million for design and construction of child development centers. \$100 million for design and construction of troop housing.
Military Construction: Army National Guard	\$50 million	Federal contracts	Funds for construction projects.
Military Construction: Air National Guard	\$50 million	Federal contracts	Funds for construction projects.
Military Construction: Defense-Wide	\$1.45 billion	Federal contracts	\$1.33 billion for construction of military hospitals. \$1.2 billion allocated for the Energy Conservation Investment Program.
Family Housing Construction: Army	\$34.5 million	Federal contracts	Funds for construction projects.
Family Housing Construction: Air Force	\$80 million	Federal contracts	Funds for construction projects.

EDUCATION DEPARTMENT

State Fiscal Stabilization Fund	\$39.5 billion	States receive funding based on a population formula	Funds allocated to enhance local school budgets. Funds may be used for school modernization, renovation or repair, including modification, renovation and repairs that are consistent with a recognized green building rating system.
Education for the Disadvantaged	\$13 billion	Formula grants to states to make awards to local education agencies (LEAs)	Funds for local school performance improvement. \$3 billion for school improvement grants.

Program	Amount	Distribution Method	Uses and Restrictions
Impact Aid Construction	\$100 million	Grants are awarded both by formula and competition to LEAs	Funds for emergency repairs and modernization for LEAs that receive Impact Aid.

ENERGY DEPARTMENT

Energy Efficiency and Conservation Block Grant Program	\$3.2 billion	Cities with populations over 35,000 and counties with populations over 200,000 receive funding by formula; local governments that do not receive formula funding are eligible for pass-through funding from states	Funds may be used for, among other purposes, the implementation and installation in government buildings of renewable energy technology that generates electricity from renewable resources. \$2.8 billion for formula grants. \$400 million for competitive grants.
State Energy Program	\$3.1 billion	Formula and discretionary grants	
Smart Grid	\$4.5 billion	Grants	Grant funds to electric utilities to support modernization of the electrical grid and enhance the security and reliability of the grid.
Non-Defense Environmental Cleanup	\$483 million	Federal contracts	Environmental cleanup.

ENVIRONMENTAL PROTECTION AGENCY

Hazardous Substance Superfund	\$600 million	Federal contracts	Funds for cleanup at existing Superfund sites and for initiation of construction at new sites.
Brownfields	\$100 million	Competitive grants to state and local governments	Funds for environmental site assessment and cleanup.
Leaking Underground Storage Tank Trust Fund	\$200 million	Grants to state and local governments	

Program	Amount	Distribution Method	Uses and Restrictions
GENERAL SERVICES ADMINISTRATION			
Real Property Activities: Federal Buildings Fund	\$5.5 billion	Federal contracts	\$4.5 billion for the conversion of GSA facilities to High-Performance Green Buildings. \$750 million for federal buildings and courthouses. \$300 million for border stations and land ports of entry.
HEALTH AND HUMAN SERVICES DEPARTMENT			
Indian Health Facilities	\$415 million	Federal contracts	Funds for health facilities construction projects.
Health Resources & Services Administration: Community Health Centers	\$2 billion	Formula and discretionary grants	\$1.5 billion for construction and renovation of facilities and IT equipment for public health centers, including community health centers. \$500 million for grants to health centers.
National Institutes of Health (NIH): National Center for Research Resources	\$1 billion	Federal grants or contracts	Funds to construct, renovate or repair existing non-federal research facilities.
NIH: Buildings and Facilities	\$500 million	Federal contracts	Funds for repair, construction and improvement projects for NIH facilities.
HOMELAND SECURITY DEPARTMENT			
Office of the Under Secretary for Management	\$200 million	Federal contracts	Funds for planning, design and construction associated with consolidation of the Department of Homeland Security headquarters.
U.S. Customs: Border Security Fencing, Infrastructure and Technology	\$420 million	Federal contracts	Funds for planning, management, design and construction at land border ports of entry.
Coast Guard: Alteration of Bridges	\$142 million	Federal contracts	Funds for the alteration or removal of obstructive bridges.
Federal Emergency Management Agency: State and Local Programs	\$300 million	Formula grants to state and local governments	Funds to upgrade security for infrastructure assets.

Program	Amount	Distribution Method	Uses and Restrictions
Firefighter Assistance Grants	\$210 million	Competitive grants to fire departments	Funds for modifying, upgrading or constructing fire stations.
Disaster Assistance Direct Loan Program Account		Loans to communities that have had their local economy significantly impacted by a presidentially-declared disaster	If a local government suffered a loss of 25 percent or more in tax revenues following a declared disaster, the entity is eligible to receive loans for amounts up to 50 percent of its pre-disaster annual operating budget.

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Public Housing Capital Fund	\$4 billion	Formula and discretionary grants	Grants for public housing authorities. \$3 billion through existing formula. \$1 billion for competitive grants.
Community Development Block Grants	\$1 billion	Formula program	
Home Investment Partnerships	\$2.25 billion	Formula funding	Funds for state and local governments to expand supply of affordable housing to low-income and very-low-income persons.
Community Development Fund: Redevelopment of Abandoned and Foreclosed Homes	\$2.25 billion	Competitive grants to state and local governments and nonprofit entities	Grants to redevelop abandoned and foreclosed homes.
Assisted Housing Stability, Energy and Green Retrofit Investments	\$250 million	Grants and loans	Funds for energy retrofit and green investments in assisted housing.
Lead Hazard Reduction Program	\$100 million	Competitive grants to state and local governments	Funds to evaluate and reduce lead-based paint health hazards.

Program	Amount	Distribution Method	Uses and Restrictions
INTERIOR DEPARTMENT			
Bureau of Reclamation	\$1 billion	Discretionary grants or federal contracts	Funds for development, maintenance, management and restoration of water and related natural resources in 17 Western states. \$126 million to be used for water reclamation and reuse projects. \$60 million to be used for rural water projects, primarily water intake and treatment facilities. \$50 million may be used on projects authorized by the Central Utah Project Completion Act. \$50 million may be used for projects authorized by the California Bay-Delta Restoration Act.
Bureau of Land Management	\$305 million	Federal contracts	\$125 million for maintenance, rehabilitation and restoration of facilities and for remediation of abandoned mines and wells. \$180 million for construction and repair of roads, bridges, trails, and property, and for retrofitting existing facilities for energy efficiency.
Fish and Wildlife Service	\$115 million	Federal contracts	Funds for construction and repair of roads, bridges, trails and property, and for retrofitting existing facilities for energy efficiency.
U.S. Geological Survey	\$140 million	Federal contracts	Funds for repair, construction and restoration of facilities.
National Park Service	\$735 million	Federal contracts	\$146 million for deferred maintenance of facilities and trails and other repair and rehabilitation projects. \$589 million for construction and repair (and energy-efficient retrofits) of roads and facilities, as well as other critical infrastructure projects.
Bureau of Indian Affairs	\$450 million	Federal contracts	Funds for repair and restoration of roads, replacement school construction, school improvements and repairs, and detention center improvements and repairs.
Smithsonian Institution Facilities Capital	\$25 million	Federal contracts	Funds for repair and maintenance of existing facilities.

Program	Amount	Distribution Method	Uses and Restrictions
LABOR DEPARTMENT			
Office of the Job Corps	\$250 million	Federal contracts	Funds for construction, acquisition and rehabilitation of Job Corps centers.
NATIONAL SCIENCE FOUNDATION			
Academic Research Facilities Modernization Program	\$200 million	Grants	Funds for the repair or renovation of obsolete laboratories and research facilities at higher education institutions, nonprofit research institutions and research museums.
Major Research Equipment and Facilities Construction	\$400 million	Federal contracts	
SOCIAL SECURITY ADMINISTRATION			
Limitation and Administration Expenses	\$500 million	Federal contracts	Funds for replacement of the National Computer Center.
STATE DEPARTMENT			
Diplomatic and Consular Programs	\$90 million	Federal contracts	Funds for urgent facilities requirements for passport and training functions.
International Boundary and Water Commission	\$220 million	Federal contracts	Funds for repair and rehabilitation related to water quantity program.
TRANSPORTATION DEPARTMENT			
FAA Facilities and Equipment	\$200 million	Federal contracts	Funds for improvements to FAA infrastructure.
Airport Improvement Program	\$1.1 billion	Discretionary grants	Grant funds for airport construction projects. 50 percent of grants to be awarded within 120 days and the remainder within one year.

Program	Amount	Distribution Method	Uses and Restrictions
Highway Program	\$27.5 billion	Funds distributed by formula to states, with a portion suballocated to metropolitan areas	<p>After set-asides for federal lands, territories, oversight and other items, \$27.5 billion should be apportioned to states via formula. Half of the \$27.5 billion is apportioned to states through Surface Transportation Program formula and the other half is apportioned through the FY 2008 obligation limitation ratio distribution.</p> <p>States have 120 days after apportionment (apportionment must be made within 21 days of the law's enactment) to obligate the first 50 percent of their highway apportionments and until one year after apportionment to obligate the remainder. The 50 percent of the funds not obligated within that time will be redistributed to other states that have met their obligation requirement. Suballocated funds are <i>not</i> subject to the 120-day redistribution requirement. The secretary of transportation can exempt states from the redistribution requirement only with extreme circumstances and after giving notice to Congress.</p>
Supplemental Discretionary Grants	\$1.5 billion	Discretionary grants	<p>Grants to state and local governments and transit agencies for surface transportation projects of national, regional and metropolitan area impact. Highway and transit projects are eligible, as are passenger rail and freight rail transportation projects and port infrastructure investments, including multimodal port facilities.</p> <p>Maximum grant is \$300 million and minimum grant is \$20 million (but the secretary of transportation can waive the minimum size threshold).</p> <p>Not more than 20 percent of the \$1.5 billion can be allocated to any particular state.</p> <p>\$200 million of program is available to pay subsidy and administrative costs of projects eligible for TIFIA financing.</p>
Transit: Capital Assistance	\$6.9 billion	Urbanized and rural formula grants	<p>\$100 million for discretionary grants to make transit systems more energy efficient.</p> <p>Remainder is distributed 80 percent by urbanized area formula, 10 percent by the non-urbanized area formula and 10 percent by the high-growth and high-density formula.</p> <p>Same obligation and redistribution process as for highways applies.</p>

Program	Amount	Distribution Method	Uses and Restrictions
Transit: Fixed Guideway Infrastructure Investment	\$750 million	Fixed Guideway Modernization Formula	
Transit: Capital Investment Grants	\$750 million	New Starts discretionary grants	Priority given to projects under construction or able to obligate funds within 150 days.
High Speed Rail/Intercity Passenger Rail	\$8 billion	Discretionary grants	Grants for intercity passenger rail and high speed rail.
Amtrak	\$1.3 billion		Capital projects.
TREASURY DEPARTMENT			
Western Area Power Administration	\$3.25 billion	Borrowing authority. WAPA may borrow from the Treasury Department an amount, in the aggregate, not to exceed \$3.25 billion in outstanding repayable balances.	Funds for constructing, financing, facilitating, planning, operating, maintaining or studying construction of new or upgraded electricity power lines and related facilities with at least one terminus within the area served by WAPA. Funds for delivering or facilitating the delivery of power generated by renewable energy resources.
VETERANS AFFAIRS DEPARTMENT			
Veterans Health Administration: Medical Facilities	\$1 billion	Federal contracts	Funds for non-recurring maintenance for medical facilities, including energy projects.
State Extended Care Facilities	\$150 million	Grants	Funds to assist states to acquire or construct state nursing home and domiciliary facilities or to modify existing facilities.
BONDS AND CREDITS			
Private Activity Bonds			Interest on private activity bonds issued in 2009 and 2010 excluded from Alternative Minimum Tax (AMT). AMT relief for private activity bonds issued after 2003 and refunded in 2009 and 2010.
New Markets Tax Credit		Distributed by the Treasury Department	Increases available credits for each of 2008 and 2009 to \$5 billion from \$3.5 billion.

Program	Amount	Distribution Method	Uses and Restrictions
Recovery Zone Bonds		New category of tax credit bonds. Each state receives share of national allocation based on percentage of job losses to national average. State allocations are suballocated to local municipalities.	Authorizes \$10 billion in recovery zone economic development bonds and \$15 billion in recovery zone facility bonds. Bonds can be used to finance infrastructure, job training, education and economic development in areas with high poverty, unemployment and foreclosures.
Withholding Requirement and Certain Governmental Payments For Goods and Services			Delays requirement that governmental entities withhold three percent on payments for goods and services from contractors for one year. Delay is extended from December 31, 2010 to December 31, 2011.
Qualified School Construction Bonds		New category of tax credit bonds.	\$11 billion allocated for each of 2009 and 2010. Bonds available only if all proceeds used for construction, rehabilitation or repair of public school facilities or the acquisition of land for such facilities.
Qualified Zone Academy Bonds		Public schools in empowerment and enterprise zones designed to cooperate with businesses to enhance curriculum and increase graduation and employment rates are eligible.	Additional \$1.4 billion in issuing authority for state and local governments in 2009 and 2010 to issue tax credit bonds to finance expenses, including renovations, equipment purchases and teacher training.
Build America Bonds		Gives state and local governments the option to issue tax credit bonds or tax exempt bonds in 2009 and 2010.	Governments issuing tax credit bonds can elect to receive direct payment from federal government equal to subsidy that otherwise would have been delivered through federal tax credit.

Section II: Restrictions and Compliance Issues

The Recovery Act includes a variety of restrictions imposed on funds appropriated or otherwise made available. In addition, there are several immediate compliance issues that companies need to heed as they compete for Recovery Act funds and perform work pursuant to Recovery Act programs.

Buy American Restrictions

The Act includes a controversial Buy American provision. As enacted, the Act provides—

None of the funds appropriated or otherwise made available by the Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

The Act provides two exceptions to this rule. First, the Buy American restriction does not apply if the head of a department or agency finds that: (1) the restrictions would be against the public interest; (2) iron, steel or relevant manufactured goods are not produced domestically in sufficient quantities or of satisfactory quality; or (3) use of domestic products would increase the cost of a project by more than 25 percent. Second, the Act provides that the Buy American restriction must be applied in a manner consistent with “United States obligations under international agreements.”

The effect of this Buy American provision will vary depending on the program and the agency providing the funding. First, the language of the statute provides significant wiggle room. By its terms, no restrictions are imposed on projects that involve activities outside the “construction, alteration, maintenance, or repair of a public building or public work,” and it is unclear how broadly “manufactured goods” will be interpreted. Second, and more significantly, the proviso requiring application consistent with U.S. trade obligations will be applied differently depending on the type of project, the agency providing the funding and the scope of trade agreements with various countries.

Companies receiving Recovery Act funds will need to read solicitations carefully and determine whether the Buy American provision applies to their projects and, if so, take steps to ensure compliance. Among other things, companies may need to identify their sources of supply for the work to be performed, determine what items might qualify as “manufactured goods” and review their procurement processes to ensure that iron, steel and manufactured goods are not procured in a noncompliant manner.

Preference for Competitively Awarded Fixed-Price Contracts

The Act provides that “to the maximum extent possible,” contracts funded under the Act “shall be awarded as fixed-price contracts through the use of competitive procedures.” The Act further indicates that federal agencies must award contracts using competitive procedures as specified in the Federal Acquisition Regulation (FAR), unless other statutes authorize non-competitive awards. Any contracts not awarded as competitively awarded fixed-price contracts are to be posted on the Recovery.gov Web site.

The Act does not require grants, cooperative agreements or other funding vehicles to be awarded through the use of competitive procedures, although the original Senate bill included such a requirement. However, the Office of Management and Budget (OMB) has issued preliminary guidance concerning the Recovery Act that, among other things, calls for awarding grants and cooperative agreements on a competitive basis “to the maximum extent practicable.” (See http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-10.pdf.)

Preference for Quick-Start Activities

The Act requires that a preference be given to infrastructure projects that can be “started and completed expeditiously”—the so-called shovel-ready projects. The Act identifies a goal of using at least 50 percent of the funds on projects that can be initiated within 120 days of enactment. The Act also provides that all grant funds should be deployed to maximize job creation and economic benefit. Certain programs have more stringent requirements. For example, for transportation infrastructure projects, a state *must* obligate 50 percent of its funds within 120 days or the Department of Transportation will reprogram the amount of the 50 percent not obligated to other states.

Companies interested in receiving Recovery Act funds will be well advised to make contact as quickly as possible with relevant personnel in the disbursing agencies and fund recipients, to assist them in determining which projects can be started and completed

“expeditiously” and which projects will lead to significant job creation. Given the speed with which agencies and fund recipients must obligate Recovery Act funds, early customer contact is critical.

Applicability of the National Environmental Policy Act

All projects funded under the Act must comply with the National Environmental Policy Act (NEPA) to the extent applicable. While this requirement is consistent with existing law, it will make it more difficult to move projects forward—particularly those that have only been through state environmental review. While there was an effort to streamline the NEPA review process, the Act provides only that adequate resources within the funds made available must be devoted to ensuring that applicable reviews are conducted under NEPA. The Act provides that the “shortest existing applicable process” under NEPA shall be utilized. As a result, only projects that have already completed the NEPA process or that are eligible for a categorical exclusion likely will qualify.

Wage Rate Requirements

The Act provides that the prevailing wage requirements of the Davis-Bacon Act apply to all laborers and mechanics employed by contractors and subcontractors on projects funded in whole or in part under the Act. Companies that are not familiar with the Davis-Bacon Act must take steps to understand and comply with its requirements.

Period of Availability of Funds

All appropriated funds will remain available for obligation until September 30, 2010, unless an earlier or later date is specified in the Act.

Use Limitations

No funds may be used by a state or local government, or any private entity, for a casino, aquarium, zoo, golf course or swimming pool.

Central Contractor Registration Database

All funding recipients must register with the federal government’s Central Contractor Registration database. This requirement applies both to public entities and to contractors.

Federal Contractor Compliance Program Requirements

All contractors and subcontractors performing under contracts subject to the FAR must comply with a new FAR provision that imposes requirements concerning compliance programs. At a minimum, contractors’ compliance programs must include provisions for: (1) effective training programs; (2) screening of company “principals” to ensure that they have not engaged in conduct that would conflict with the company’s ethics code; (3) high-level management responsibility; (4) adequate resources for ethics and compliance; and (5) “full cooperation” with government agencies performing investigations.

Most companies that have done work as contractors or subcontractors have existing compliance programs. But in light of the new FAR regulation, almost all companies will need to update their compliance programs and practices to ensure compliance with the new rule.

Federal Contractor Mandatory Disclosure Requirements

Under the same new FAR rule, all contractors with FAR-covered contracts must timely disclose to the Inspector General “credible evidence” of criminal violations, violations of the civil False Claims Act or any significant overpayments received under the contract. The rule provides that a contractor must disclose not only its own conduct, but also the conduct of any “principal, employee, agent, or subcontractor.” Contractors have an obligation to disclose credible evidence of violations on all ongoing contracts, as well as on all contracts that have been closed within the past three years. Importantly, the failure to make timely disclosure of credible evidence is cause for suspension or debarment.

This new mandatory disclosure rule requires all contractors to consider revisions to their compliance programs. First, contractors need to consider adopting methods by which they ensure that they can periodically identify information known to company officers and employees about possible criminal violations, FCA violations and significant overpayments on the part of their own company and their subcontractors. Second, contractors need to consider adopting procedures for investigating whether such information rises to the level of “credible evidence” that must be reported. Third, contractors need to determine how they will comply with the requirement to “look back” to conduct under all contracts that have been closed for less than three years.

Certifications by Recipients of Funds

The Act specifies that, for all funds provided to states and local governments for infrastructure investments, the governor, mayor or other chief executive must certify that the infrastructure investment has been fully reviewed as required by law and is an appropriate use of taxpayer dollars. The certification shall include a description of the investment, the estimated total cost and the estimated total amount of funds to be used. All certifications must be posted on a government Web site, and no funds will be made available until an appropriate certification is made. This certification requirement will likely mean that state and local governments will oversee projects more carefully than usual.

Reports on Use of Funds

The Act provides that all recipients of funds under the Act must submit reports to the federal agency that provided the funds, whether the recipient is a contractor, grantee, or state or local government. The reports must identify: (1) the total funds received; (2) the amount expended or obligated; (3) a list of projects or activities with details on completion status (and, for state and local governments, the purpose, total cost and rationale for the project), the estimated number of jobs created and retained and the name of a person to contact if the federal agency has any concerns; and (4) detailed information on subcontracts or subgrants awarded. These reports must be made publicly available, and the Congressional Budget Office and Government Accountability Office (GAO) must comment on these reports. All fund recipients must submit their first report within 180 days of the Act’s enactment.

These mandatory reporting requirements will impose important record-keeping requirements on contractors and grantees that receive funds directly from a federal agency. All companies that receive such funds directly must take care to ensure they have adequate records to support the information that they are obligated to provide, including accurate information as to project completion status and detailed information on subcontracts and subgrants awarded. Moreover, the mandatory reporting requirements imposed on state and local government recipients will likely lead them to scrutinize and oversee projects with particular care.

Potential Need for Compliance with the E-Verify Program

All federal contractors and subcontractors will need to comply with the E-Verify program of the Department of Homeland Security (DHS) after May 21, 2009, unless the program is delayed or canceled. The E-Verify program will require all contractors and subcontractors to check the immigration status of all employees on all projects over \$100,000. As currently structured, the program would require contractors to perform immigration checks within 30 days of receiving a new contract and within three days of assigning a new employee to an ongoing contract. Subcontractors would be required to perform immigration checks on all projects over \$3,000.

In December 2008, the U.S. Chamber of Commerce filed suit in U.S. District Court challenging the government’s authority to mandate the E-Verify program. DHS accordingly delayed implementation of the program until May 21, 2009. The new administration might further delay implementation, or modify or cancel the program altogether.

If the E-Verify program becomes mandatory, contractors and subcontractors will need to review the E-Verify program requirements carefully and ensure compliance. The process can be burdensome and time-consuming, but failure to comply could lead to drastic consequences.

Future Compliance with GSA Database Reporting Requirement

Sometime in 2009, a new FAR provision will be promulgated imposing very significant reporting requirements on all companies that receive contracts or grants over \$500,000 in value. Although the rule has not yet been promulgated, the statute mandating its promulgation requires that companies must report information relating to several types of “proceedings,” including civil, criminal and administrative proceedings relating to federal grants and contracts, if such proceedings result in a finding of fault or liability or

result in a settlement. The statute also requires reporting of any suspensions, debarments, or administrative agreements that resolve suspension or debarment proceedings, as well as reporting of any default terminations. Furthermore, the statute requires disclosure “to the maximum extent practical” of similar information with respect to *state* contracts and proceedings. The statute specifies that this information must be provided for the most recent five-year period, and most companies must keep the information updated on a semiannual basis. All of this information is to be included in a database that will be maintained by the General Services Administration and made available to contracting officers and other government personnel.

Although the FAR rule has not been promulgated, it is likely to impose significant new burdens on recipients of Recovery Act funds. Companies will likely need to adopt procedures to ensure they collect the required information as to all state and federal contracts and grants going back five years and collect the required information on a timely basis for future semiannual reporting. Moreover, companies will need to assess carefully how to report the information in order to minimize the risk that information will be released under the Freedom of Information Act (FOIA) or unnecessarily affect determinations of present responsibility. We strongly urge all recipients of Recovery Act funds to pay close attention to this impending FAR rule, which could have far-reaching consequences.

Section III: Oversight and Enforcement Risks

The Act includes several provisions designed to guarantee that funds are used for their intended purposes and contemplates a great deal of oversight. Moreover, it is very likely that the disbursing agencies, the Department of Justice (DOJ) and Congress will employ extensive resources to guard against waste, fraud and abuse in connection with Recovery Act funds.

Recovery Accountability and Transparency Board Oversight

The Act establishes a Recovery Accountability and Transparency Board (the “Recovery Board”) to coordinate and conduct oversight of funds to prevent waste, fraud and abuse. The Recovery Board will be supported by OMB and will include as its members the inspectors general of each agency that has received Recovery Act funds. The Recovery Board is expected to review whether competition requirements and other requirements for use of Recovery Act funds have been met, oversee interagency collaboration, conduct its own audits and identify instances of waste, fraud or abuse that should be investigated by the appropriate agency. The Recovery Board is also empowered to hold public hearings and issue subpoenas to compel testimony of non-federal witnesses.

In addition, the Act provides for a Recovery Independent Advisory Panel consisting of five members appointed by the president, to provide recommendations to the Recovery Board on additional actions to be taken to prevent waste, fraud and abuse.

The OMB has issued a 62-page memorandum concerning the Recovery Act that, among other things, provides guidance to agencies on risk management measures to be adopted. (See http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-10.pdf) The guidance confirms that each agency is expected to adopt risk mitigation strategies, to adopt audit and investigation protocols to oversee Recovery Act funds and to implement record-keeping systems that will permit tracking of all Recovery Act funds.

Inspector General Reviews

The Recovery Act provides additional funding for the inspectors general of all the federal agencies that will disburse the stimulus funds. For example, \$20 million is provided to the Department of Transportation (DOT) inspector general and \$15 million to the Department of Housing and Urban Development (HUD) inspector general. Inspectors general are authorized to examine the records of any contractor or grantee, or any subcontractor or subgrantee, and to interview any officers or employees of a company that has received Recovery Act funds.

The Act also specifies that federal inspectors general shall review concerns raised by the public about Recovery Act funds and shall provide findings both to the relevant agency and to the public on a Web site linked to the Recovery.gov Web site. Findings made available to the public may be redacted to remove information exempt from disclosure under FOIA.

It is likely that inspectors general will be particularly diligent in conducting reviews, audits and investigations and in investigating “tips” provided by members of the public. Given the additional funding provided by the Act, the existence of the Recovery Board and the likelihood of congressional oversight of any perceived failures, inspector general offices can be expected to oversee Recovery Act projects with particular diligence. It will therefore be particularly important for contractors and grantees receiving Recovery Act funds to follow stringently their company policies and compliance processes, including record keeping, quality assurance, time charging, cost accounting and billing policies and processes.

False Claims Act Enforcement

The civil False Claims Act likely applies to all funds available under the Recovery Act. In brief, the False Claims Act imposes treble damages and penalties for the knowing submission of false claims or for the use of false statements to get false claims paid, where federal funds are involved. An action to recover these damages and penalties can be asserted either by the United States, or by a person acting as a “qui tam” plaintiff. A successful qui tam plaintiff can recover up to 30 percent of the amount awarded the government, as a bounty.

Importantly, the False Claims Act may be amended this year in several ways that would increase the potential for liability, curtail available defenses and increase the likelihood of qui tam lawsuits. Specifically, there are proposals that the statute should be amended to clarify that it encompasses claims made to states and other third parties, as long as the federal government provided the funds. There are also proposals that would effectively eliminate the requirement that qui tam plaintiffs comply with Rule 9(b) of the Federal Rules of Civil Procedure, and eliminate the requirement that qui tam plaintiffs demonstrate their actions are not based on

public disclosures of information. Finally, there are proposals that would increase the statute of limitations from six years to eight or 10 years, permit the increased use of civil investigative demands (including pre-litigation depositions) and authorize government employees to bring qui tam suits, under certain circumstances.

Because of the huge sums of money being disseminated under the Recovery Act, it is likely that plaintiffs' lawyers will be focused on bringing qui tam lawsuits concerning Recovery Act programs. To minimize the possibility of False Claims Act lawsuits, companies receiving Recovery Act funds must, of course, follow all contract and grant requirements carefully, and follow normal company policies and compliance processes. Moreover, there are certain labor practices and strategies that can be adopted to minimize the risk that employees will file qui tam lawsuits. FAR-covered contractors must adopt and follow compliance processes to ensure that allegations of False Claims Act violations are investigated and any "credible evidence" of such a violation is disclosed to the inspector general. Finally, all contractors and grantees should stay tuned to the possibility of amendments to the False Claims Act, which may require changes in their compliance programs and labor policies.

Whistleblower Claims

The Act prohibits any form of retaliation against any whistleblower employed by a state or local government, contractor or other recipient of Recovery Act funds for engaging in protected activity. The protected activity includes making any disclosure to the Recovery Board, an inspector general or other federal or state official concerning potential waste, fraud or abuse; danger to the public; or violations of laws, rules or regulations related to contracts and grants. These anti-retaliation protections are not extended to federal government employees. The Act provides that the inspectors general must investigate all non-frivolous complaints of retaliation and specifies that, in the absence of agency action, a whistleblower can file an action in federal District Court seeking compensatory damages. The Act provides a relatively lenient burden of proof, permitting recovery if the whistleblower can demonstrate that the protected activity was a "contributing factor" in the reprisal and permitting proof to be made by circumstantial evidence.

The anti-retaliation provisions of the Recovery Act supplement the anti-retaliation provisions of the False Claims Act, and companies can expect that, in some circumstances, they could be subjected to claims under both statutes. It appears that the lessened burden of proof and the broad definition of protected activity found in the Recovery Act will, in some circumstances, afford whistleblowers an avenue of relief where no claim would be available under the False Claims Act. Companies receiving Recovery Act funds should review their employment and labor policies to determine if changes are desirable to minimize the risks of whistleblower claims.

Antitrust Enforcement

The antitrust laws, obviously, will apply to all corporate activities aimed at securing funds made available by the Act. There is reason to believe that the DOJ Antitrust Division is gearing up for increased enforcement of the antitrust laws in connection with the Recovery Act funds.

To avoid an investigation or enforcement action, any company competing for projects funded by the Recovery Act must avoid all appearance of collusion or other anticompetitive actions. Most importantly, companies must avoid any actions that might lead to inferences of bid-rigging, market allocation, price-fixing or other anticompetitive behavior.

Congressional Investigation and Oversight

The sheer size of the Recovery Act—to say nothing of the speed with which it has been constructed—makes the program a prime target for vigorous congressional oversight in the 111th Congress. Just as the recent TARP legislation has already led to numerous congressional oversight hearings this year, a number of senior congressional leaders have already promised similar oversight for the Recovery Act. For example, Rep. Edolphus Towns (D-NY), chairman of the House Oversight and Government Reform Committee, has pledged to conduct oversight of the use of stimulus funds. He has promised that his committee will be watchful of the stimulus package "to see if it's doing what it should be doing," because "I'm concerned about some things we're hearing about contractors who will get a contract and then they won't even pay the taxes on their contract And, of course, the other part, aside from that, is the waste, fraud and abuse that goes on in our contracts." His concerns were recently echoed by Ranking Member Darrell E. Issa (R-CA), who also called for "rigorous oversight of stimulus funds."

Likewise, leading Democratic senators have already announced new oversight of federal contracting and procurement. Senate Homeland Security Committee Chairman Joseph Lieberman (I-CT) has created a new subcommittee, chaired by Senator Claire

McCaskill (D-MO) (a former prosecutor), charged with overseeing and investigating the terms of federal contracts. Senator McCaskill said, “last year we made major strides in contracting accountability by establishing the Wartime Contracting Commission, and while I look forward to those investigations, we all know that outrageous contracting abuses occur in every facet of government. I can't wait to get to work saving huge money for taxpayers. They deserve it.”

Such oversight will focus not only on traditional procurement issues but also on any charges that Congress may view as inappropriate. As seen in recent criticisms of the TARP recipients, this may involve salaries and bonuses, bills for parties, luxury travel and marketing items. Just recently the DOT inspector general released a report to Congress critical of such expenses incurred by Federal Highway Administration contractors. In response, both the inspector general and Rep. James Oberstar (D-MN), chairman of the Transportation and Infrastructure Committee, announced plans for continued oversight of such “inappropriate charges” under the new Recovery Act.

Criminal Enforcement

Federal and, where applicable, state criminal laws will apply to corporate activities concerning Recovery Act funds. Given the high profile of the Recovery Act funds and the likelihood of congressional oversight, federal and state prosecutors can be expected to devote significant attention to allegations of fraud or other criminal activity related to these funds.

Conclusion

Akin Gump is ready to help you realize the opportunities and manage the risks.

We frequently assist companies in exploring contracting opportunities and expanding their sales to the federal government as well as to state and local governments. We help develop access strategies, work with buyers, respond to solicitations and negotiate contracts and agreements. We also advise clients on the laws and regulations that apply to federal, state and local government contracts and help clients adopt and revise compliance programs. Our team includes former members of Congress, cabinet and White House officials, and congressional and executive branch staff members.

Our lawyers also help manage the risks and disputes that can arise in connection with government contracts. We routinely handle bid protests and disputes and have extensive experience with defending antitrust, false claims and debarment issues. We have also helped many clients respond to investigations conducted by inspectors general and Congress. Our team includes lawyers who have previously worked in every relevant government agency and office, including congressional investigative staff, and the antitrust, civil and criminal divisions of the DOJ.

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