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Recovery Act Stimulus Funds: New Opportunities and Complexities

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On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the Recovery Act),¹ which includes \$787 billion in funding intended to provide a stimulus to the U.S. economy. This total amount includes \$212 billion in tax incentives and \$575 billion in funds that will be expended through a combination of direct federal spending and grants and loans to states, local governments, and private nonprofits. These moneys will spur a broad array of construction projects, including transportation and other physical infrastructure, federal facilities, energy-efficiency improvements, environmental cleanup, and affordable housing.

The Recovery Act also extends or expands several existing municipal bond programs and provides for new bond financing programs intended to stimulate development and construction opportunities. The Build America Bonds program gives governmental issuers several options with respect to issuing tax credit and federally subsidized bonds in 2009 and 2010 in lieu of traditional tax-exempt bonds. It creates a Recovery Zone Bond program

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The Conflict Between Arbitration Agreements and the Enforcement of Mechanics' Lien Claims

By Edward B. Gentilcore

Welcome to the land of mechanics' liens, where the statutes are as diverse as the makeup of the states in our nation that have them. This is a place where, in many, if not most instances, both strict compliance and strict construction rule the day, putting the statutes at odds with situations

that they were not designed to encounter. Consider another prevalent aspect of the construction landscape: Although some parties and even the available form documents are moving away from mandatory arbitration, arbitration agreements continue to be used with

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comprising \$15 billion in authorization for recovery zone facility bonds (tax-exempt private activity bonds) and \$10 billion in authorization for recovery zone economic development bonds (tax credit bonds), to be issued in 2009 and 2010 to spur development in established recovery zones. The Recovery Act also authorizes \$11 billion in Qualified School Construction Bonds (tax-credit bonds for new school construction) for each of 2009 and 2010.

The U.S. Office of Management and Budget (OMB) has outlined five main

goals for the federal government's implementation of the Recovery Act: (1) award and distribute funds in a prompt, fair, and reasonable manner; (2) ensure that the recipients and uses of the funds are transparent to the public and that the resulting benefits are reported clearly, accurately, and promptly; (3) ensure that funds are used for authorized purposes and to mitigate potential for fraud, waste, error, and abuse; (4) avoid unnecessary project delays and cost overruns; and (5) achieve specific program outcomes and improved results on economic indicators.²

New Opportunities = New Risks

The Recovery Act's unprecedented infusion of money into the U.S. economy is largely targeted at relatively quick (shovel-ready) construction projects around the country. This infusion brings substantial opportunities, as well as substantial risks, particularly for construction industry participants inexperienced in federal projects. Even before the Recovery Act, companies working on federally funded projects faced risks that do not exist in private commercial work. And now the Recovery Act establishes new and expanded procurement, transparency, and oversight measures designed to track the expenditure of funds and to prevent and expose fraud, waste, and abuse. These measures increase the risks and burdens on both government owners and private companies receiving and spending funds under the Recovery Act.

One of the best ways to address the risks associated with the use of Recovery Act funds and to ensure compliance with the federal government's goals for the implementation of the Recovery Act is to be aware of the requirements and put the necessary procedures in place to address them. This article highlights some of the most significant issues owners and contractors need to be aware of when using funds available under the Recovery Act. For government owners, this article presents key issues that affect the bidding process and contract negotiations. For

contractors, subcontractors, grantees, and subgrantees, this article presents issues to consider when bidding on and performing contracts to diminish risks involved in projects funded by the Recovery Act.

Preference for Competitive Fixed-Price Contracts

Section 1554 of the Recovery Act states that, to the maximum extent possible, contracts funded under the Recovery Act must be awarded as fixed-price contracts through competitive procedures. This provision is not limited to contracts executed directly with federal agencies; it is drafted broadly to cover contracts with states and municipalities that fund projects with dollars received under the Recovery Act. Moreover, any funded contract that is *not* fixed-price and *not* awarded competitively has to be summarized on the new "Recovery.gov" website.³

Fixed-price contracts generally place on the contractor maximum risk and full responsibility for cost overruns. Overruns are all the more likely when the requirements of a project are not sufficiently defined at the outset. Significantly, the Recovery Act expresses a preference for quick-start projects, which may result in projects with poorly defined requirements.⁴ Thus, the use of fixed-price contracts in a hurry-up environment could be a combustible formula for contractors, who need to be very careful about the projects they choose to pursue. This approach also has a downside for non-federal owners and grantees, as contractors may include large contingencies in bid prices to account for the risks inherent in an ill-defined scope of work, thus inflating pricing. Thus, more well-defined requirements should lead to tighter and more realistic bids and less potential for disputes.

Buy American Requirements

The Recovery Act includes two different sets of domestic preference requirements. The first, in section 604, is likely not going to be relevant to most construction projects. It applies to the procurement of items directly

The following are some of the largest appropriations related to construction work:

- **Federal Highway Administration:** \$27.5 billion in grant funds for state and local governments for surface transportation, rail, and port projects
- **General Services Administration:** \$5.5 billion for the Federal Buildings Funds
- **U.S. Army Corps of Engineers:** \$2 billion for water-related environmental infrastructure projects
- **Department of Defense:** \$5.9 billion for facilities improvements
- **Department of Energy:** more than \$11 billion to support energy-efficiency initiatives and \$4.5 billion for improvements to the national electrical grid
- **Department of the Interior:** more than \$1.3 billion for construction on federal and tribal lands
- **Environmental Protection Agency:** more than \$1.3 billion for environmental cleanup and \$6 billion for clean water projects
- **Department of Housing and Urban Development:** \$4 billion for public housing capital improvements

related to national security by the Department of Homeland Security.

The other set of requirements, in section 1605, mandates that projects for the construction, alteration, maintenance, or repair of public buildings or public works must use iron, steel, and manufactured goods produced in the United States. The only exceptions are in the case that (1) application of the requirements would be inconsistent with the public interest, (2) iron, steel, and relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, and (3) including iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.⁵ If a federal agency decides that one of the exceptions applies, the agency must publish a detailed justification in the Federal Register. Also, following concerns expressed by other countries, Congress included a provision stating that the requirements are to be applied in a manner consistent with U.S. obligations under international agreements.

The Buy American provisions in section 1605, although relatively short, create significant complexities, in part because of the language concerning international agreements. These complexities are highlighted in two sets of interim rules published in the Federal Register earlier this year implementing section 1605. The first set of rules, Buy American Requirements for Construction Material,⁶ amends the Federal Acquisition Regulation (FAR) and applies to federal agency procurement contracts, as opposed to procurements funded with federal financial assistance. The second, Financial Assistance Awards,⁷ applies to financial assistance awards—grants, cooperative agreements, and loans. These two sets of rules, while generally implementing the same legislation, nonetheless contain differences, including different clauses and certain distinct definitions. The rules for procurement contracts, for example, also implement another statute—the Buy American

Act⁸—with respect to “unmanufactured construction materials.”

Given the substantial complexities in these interim rules, contractors and award recipients should become familiar with the rules (and watch for amendments to those rules), and they should take great care in reviewing and complying with Buy American provisions in solicitations and contracts or awards. If contractors and recipients believe the Buy

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American requirements should not apply to certain items or materials, they should verify that belief with the appropriate government official *prior to award*—a step that is permitted under both the contract rules⁹ and financial assistance rules.¹⁰ It is in contractors’ and recipients’ interests to verify such inapplicability prior to award, as the interim rules state that post-award requests may be denied if the contractor or recipient could have made the request before award.¹¹ Similarly, government officials should keep in mind that the interplay among the various Buy American provisions and international treaties is complex. Government officials could benefit from seeking legal counsel for assistance interpreting applicable requirements, and should work closely with contractors and grantees to make sure that all relevant parties have reached a clear

understanding about the scope of such requirements for each project. The importance of complying with the Recovery Act’s Buy American requirements is underscored in the interim rules, which include provisions stating that if noncompliance is sufficiently serious, the government should consider terminating the contract or award and submitting a report to the relevant agency’s suspending or debarring official.¹²

Labor Requirements

Section 1606 of the Recovery Act provides, with respect to all projects funded by the Recovery Act, that laborers and mechanics employed by contractors and subcontractors must be paid wage rates determined under the Davis-Bacon Act. In most cases, this will likely increase project labor costs.

Several recent executive orders, although not associated with the Recovery Act specifically, may also affect labor requirements for projects funded under the Recovery Act. In particular, Executive Order 13502, Use of Project Labor Agreements, encourages federal departments to require the use of Project Labor Agreements (PLAs) for large-scale construction projects on a case-by-case basis to support labor-management stability for “efficient and timely completion of construction projects.”¹³ A PLA binds all contractors and subcontractors to the same rules, such as allowing nonunion and union contractors to bid on the same contract; guaranteeing against strikes; and establishing binding procedures for resolving labor disputes. Federal agencies may include such requirements in future regulations for projects funded by the Recovery Act. This will require more, perhaps lengthy, negotiation on a case-by-case basis at project start-up.

OMB has also issued guidance encouraging the use of local labor for projects funded by the Recovery Act. Specifically, OMB has encouraged federal departments to maximize benefits of Recovery Act projects by “supporting projects that seek to ensure that the people who live

in the local community get the job opportunities that accompany the investment."¹⁴ Contractors should be prepared that this emphasis may translate into specific bid criteria that give preferences for local hiring commitments. Such requirements may increase costs or require hiring more, smaller subcontractors, rather than one large subcontractor. The OMB guidance also encourages preferences for projects that use community-based organizations to connect "disadvantaged people with economic opportunities."¹⁵ Following this guidance, federal agencies, grantees, or owners may require contractors to participate in unique local job-training requirements.

Small Businesses and Disadvantaged Business Enterprises

Use of funds from the Recovery Act is also expected to support small businesses, which in turn stimulates economic growth and creates jobs. OMB guidance states that "agencies should provide maximum practicable opportunities for small businesses to compete and participate as prime and subcontractors."¹⁶ Federal agencies have also been directed to provide equal opportunities for disadvantaged business enterprises to the extent allowed by law.¹⁷

Time Frames

One of the basic goals of the Recovery Act is to encourage project construction in a quick time frame. The Recovery Act contains guidelines designed to ensure that funds are obligated and contracts are executed quickly. Governments, grantees, and contractors that can hit the ground running will benefit the most. Different agencies and programs have a variety of guidelines for how quickly funds must be obligated. For example, the Federal Highway Administration will be allocating \$27.5 billion in supplemental grant funds for surface transportation, rail, and port projects. Fifty percent of those funds must be obligated within 120 days after apportionment to the state, and 100 percent of funds must be obligated within one year after

apportionment to the state.¹⁸ In many other cases, grant recipients have to obligate funds within 180 days of receipt. Funds not obligated within the required time frames will be rescinded by the federal government and reallocated to other projects.

One requirement for many construction projects that can often delay timing is review under the National Environmental Policy Act (NEPA). Section 1609(b) of the Recovery Act

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provides that "[a]dequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized." Thus far, official action has not been taken to streamline or otherwise expedite NEPA review, causing some concern that NEPA review could slow project implementation.

Reporting

With the incentives for construction created by the Recovery Act also come considerable new reporting burdens on contractors, grantees, and owners associated with projects funded under the act. The Recovery

Act requires that any entity receiving Recovery Act funds directly from the federal government, including through contract, grant, or loan, must provide quarterly reports concerning, among other things, the funds received, a detailed description of the project, job creation numbers, and detailed information on any subcontracts or subgrants awarded.¹⁹ If a project is funded with a combination of Recovery Act funds and other funds, the expenditure of Recovery Act funds must be separately tracked and reported. Such reports are to be made publicly available.

Oversight and Compliance

The federal government has multiple laws and remedies it can use in connection with alleged fraud relating to projects using federal funds, as well as vast resources for auditing and investigating such projects. These laws and the federal investigative machinery impose burdens and risks on companies that receive federal funds, and the burdens and risks are increased by the Recovery Act.

The act authorizes federal inspectors general (IGs) to examine records of contractors, grantees, subcontractors, and subgrantees pertaining to contracts and grants using Recovery Act funds, and it also authorizes IGs to interview any officer or employee of contractors, grantees, and subgrantees.²⁰ The Recovery Act grants similar powers to the General Accountability Office (GAO).²¹ In addition, the Recovery Act provides millions of dollars in funding for various IG offices and the GAO.

The Recovery Act also created a Recovery Accountability and Transparency Board composed of certain IGs to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse.²² The board can conduct audits, hold public hearings, and issue subpoenas to compel testimony from non-federal individuals.²³ Under the Recovery Act, the board will maintain the new "Recovery.gov" website to foster greater accountability and transparency in the use of covered funds. The website must include, among several

other items, detailed data on federal contracts and grants that expend covered funds.²⁴

In addition, the Recovery Act contains lengthy provisions establishing protections for state and local government and contractor whistleblowers.²⁵ An employee of any non-federal employer receiving covered funds may not be discriminated against as a reprisal for disclosing to specified entities or persons information the employee reasonably believes is evidence of “a gross waste of covered funds”; a violation of law, rule, or regulations related to an agency contract or grant using covered funds; and other circumstances.²⁶ A whistleblower can bring an action in federal court for damages against the employer after exhausting his or her administrative remedies.²⁷

In November 2008, the federal government published a final rule—the Contractor Business Ethics Compliance Program and Disclosure Requirements—that dramatically extends the government’s antifraud powers.²⁸ In general, the rule provides that a contractor can be debarred from government contracting for a knowing failure to disclose to the government certain information, including credible evidence of a violation of the civil False Claims Act (FCA).²⁹ In addition, OMB has issued guidance on the Recovery Act that instructs agencies to include a similar requirement in grants and cooperative agreements funded under the Recovery Act, stating that grantees and subgrantees must promptly refer to an appropriate IG any credible evidence that a principal, an employee, an agent, a contractor, a subgrantee, a subcontractor, or other person has submitted a false claim under the FCA or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds.³⁰ Further, the Department of Justice IG has issued a document stating that, “beyond what is required by the OMB guidance, granting agencies also should require the grantee or sub-grantee when they become aware of any overpayment

of funds distributed to the grantee or sub-grantee to promptly report to the OIG and granting agency that overpayment.”³¹

Finally, a few words about the FCA are warranted. The FCA is the government’s most powerful weapon against fraud in federal programs. The FCA imposes treble damages and penalties for, among other acts, knowingly presenting a false claim for payment to the federal government, or knowingly making or using a false record or statement to get a false claim paid by the federal government. The term “knowingly” does not require a specific intent to defraud but includes acting in reckless disregard of the truth or falsity of the information. Also, the FCA permits private citizens (relators) to bring claims on behalf of the government and to obtain a percentage of any recovery. On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA),³² which amended the FCA to broaden liability and enhance the ability of the Department of Justice and relators to bring actions. The amendments provide that the FCA cover certain situations in which false claims are presented to entities other than the government, such as to a prime contractor if the money claimed is to be spent on the government’s behalf and the government provided part of the money claimed. Given that the Recovery Act appropriates vast amounts of money to be used for projects that will not involve federal agency contracts, such as state construction projects, companies performing work under such projects should pay particular attention to the FCA amendments.

“Green” Contracting Opportunities

The unprecedented level of funding for “green” projects adds another consideration for contractors—an edge for those already versed in green building and an incentive to learn new technologies for those who are not. Overall, it has been estimated that the Recovery Act provides about \$94 billion in funding for clean energy companies and

projects, through direct spending as well as tax incentives and other financing programs. For example, the General Services Administration will be spending \$4.5 billion on energy efficiency upgrades to federal facilities; states will receive more than \$11 billion in funding for energy efficiency retrofits and weatherization of public buildings and private homes and businesses; and about half of the Department of Defense’s \$6 billion of construction and repair projects identified to date are for energy efficiency and alternative energy projects. Given the magnitude of stimulus funds committed to the energy sector, it is an excellent time for contractors and subcontractors to gain experience in the construction and utilization of clean energy technology.

Several key websites include the most up-to-date information about federal contracting opportunities funded by the Recovery Act and associated rules and regulations.

www.Recovery.gov

The main federal website for information related to the Recovery Act, including information about time frames, grant awards and contracts, and formula allocations.

www.FedBizOpps.gov

Lists announcements of all proposed federal contracts expected to exceed \$25,000, including all major solicitations, contract awards, subcontracting opportunities, surplus property sales, and foreign business opportunities. The site includes a special list of contracts funded by the Recovery Act. (Use the “Search Recovery Opportunities” button.)

www.Grants.gov

Includes a list of grant opportunities from 26 different federal agencies. For grant opportunities related to the Recovery Act, use the “Recovery Act Opportunities” link from the homepage.

Some Early Experiences

As this article goes to press, the federal government has announced that already more than \$73 billion in funds from the Recovery Act have been disbursed and that thousands of projects funded by the Recovery Act have been started. Much of this first wave includes backlogged surface transportation projects, such as highway and airport improvements. Initial experience with these projects reveals a higher number of bidders for each project than foreseen, and, as a result, bids are lower than expected. For example, the U.S. Department of Transportation announced that bids for transportation work were coming in 10–30 percent below expectations.³³ With such heavy competition for work, bidders must be more sophisticated than ever in preparing bids while being mindful of the requirements under the Recovery Act. Similarly, government owners should carefully review low bids for their scope to ensure that they have accounted for the full implementation costs of the contracting requirements, especially wages,

reporting and oversight, and time frames for completion. For transportation projects, low bids can still be a win-win for both owners and contractors. The Department of Transportation has announced that cost savings from low bids for projects funded by the Recovery Act must be used for other projects eligible under the Recovery Act, which means additional contracting opportunities.³⁴

Finally, there has been some public concern about the speed of decision making required to meet the Recovery Act's aggressive deadlines. For example, in Texas, a public advocacy organization led public protests to raise questions about the state's decision-making process for the use of its transportation funds provided by the Recovery Act, raising the concern that the state had not undertaken adequate planning and prioritization efforts.³⁵ Therefore, government owners should emphasize transparency in the selection and prioritization of projects funded by the Recovery Act.

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Endnotes

1. American Recovery and Reinvestment Recovery Act of 2009, Pub.L. No. 111-5 (2009) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf.

2. Memorandum for the Heads of Departments and Agencies: Updating Implementing Guidance for the American Recovery and Reinvestment Recovery Act of 2009, at 1 (Apr. 3, 2009), available at www.recovery.gov/sites/default/files/m09-15.pdf.

3. See also Memorandum for the Heads of Executive Departments and Agencies: Government Contracting (Mar. 4, 2009), available at www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government.

4. See Recovery Act § 1602.

5. *Id.* § 1605.

6. 74 Fed. Reg. 14,623 (Mar. 31, 2009) (to be codified at 48 C.F.R. pts. 1, 5, 25, and 52).

7. 74 Fed. Reg. 18,449 (Apr. 23, 2009) (to be codified at 2 C.F.R. pt. 176).

8. 41 U.S.C. §§ 10a–10d (2006).

9. 74 Fed. Reg. at 14,627 (FAR 25.604).

10. 74 Fed. Reg. at 18,453 (§ 176.100).

11. See 74 Fed. Reg. at 14,627 (FAR 25.606); 74 Fed. Reg. at 18,453 (§ 176.120).

12. 74 Fed. Reg. at 14,628 (FAR 25.607); 74 Fed. Reg. at 18,453–54 (§ 176.130).

13. Exec. Order No. 13,502, 74 Fed. Reg. 74 (Feb. 6, 2009).

14. Memorandum for the Heads of Departments and Agencies, *supra* note 2, at 5.

15. *Id.* at 6.

16. *Id.* at 5.

17. *Id.* at 6.

18. Recovery Act, div. A, tit. XII.

19. *Id.* § 1512.

20. *Id.* § 1515.

21. *Id.* § 902 (with reference to contractors and subcontractors).

22. *Id.* §§ 1521–22.

23. *Id.* § 1524.

24. *Id.* § 1526.

25. *Id.* § 1553.

26. *Id.* § 1553(a).

27. *Id.* § 1553(c)(3).

28. Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008).

29. 31 U.S.C. §§ 3729–33 (2006).

30. Memorandum for the Heads of Departments and Agencies: Initial Implementing Guidance for the American Recovery and Reinvestment Recovery Act of 2009, at 37 (Feb. 18, 2009), available at [www.recovery.gov/files/Initial Recovery Act Implementing Guidance.pdf](http://www.recovery.gov/files/Initial%20Recovery%20Act%20Implementing%20Guidance.pdf).

31. Inspector General, U.S. Dep't of Justice, Improving the Grant Management Process 6 (2009), available at www.usdoj.gov/oig/special/s0903/final.pdf.

32. Pub. L. No. 111-21 (2009) (enrolled bill available at <http://thomas.loc.gov/cgi-bin/query/C?c111.:/temp/~c111OgbY5O>).

33. Press Release, U.S. Dep't of Transportation, U.S. Transportation Secretary LaHood Says Cost Savings Returned to States (Apr. 20, 2009), available at www.dot.gov/affairs/2009/dot5509.htm.

34. *Id.*

35. Jessica Sondgeroth, *Advocacy Groups Protest TxDOT Stimulus Projects*, NEWS8AUSTIN (Mar. 3, 2009), available at www.news8austin.com/content/your_news/?SecID=278&ArID=233887.

Save the Date

April 22–April 23, 2010
Austin, Texas

The ABA Forum on the Construction Industry Annual Meeting, cosponsored by the Construction Litigation Committee, will focus on sustainable design and construction issues. Historically, the Construction Litigation Committee has presented a plenary program, and hosted a breakfast program and a Dutch treat dinner for members.

April 21–April 24, 2010
New York, New York

ABA Section of Litigation Annual Conference. The committee will be submitting several programs for consideration and will host a networking lunch.