

# CLIENT ALERT

## Stimulus Act Crib Sheet for Government Contractors

Feb.26.2009

On February 12, 2009, Congress passed the American Recovery and Reinvestment Act of 2009 ("Stimulus Act"), which was signed into law by President Obama on February 17, 2009. In addition to Buy American provisions for Iron, Steel, and Manufactured Goods, the Stimulus Act extends the Berry Amendment to purchases by DHS and includes additional oversight and contracting restrictions for contracts that are funded by the Stimulus Act. An overview of those provisions follows:

### **1. Extension of the Berry Amendment Restriction to Purchases by DHS**

Section 604 of the Act extends the existing Berry Amendment restrictions to prohibit the use of "funds appropriated or otherwise available to the Department of Homeland Security . . . for the procurement of" the items described below "if the item is not grown, reprocessed, reused, or produced in the United States."

- Clothing and clothing materials and components;
- Tents, tarpaulins, covers, textile belts, bags, protective equipment, sleep systems, load carrying equipment, textile marine equipment, parachutes, or bandages;
- Cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool ; or
- Any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials

### **2. Additional Oversight**

#### **a. Government Accountability Office Audit Authority**

Section 902 of the Stimulus Act provides statutory authority for the Government Accountability Office ("GAO") to audit "[e]ach contract awarded using [Stimulus Act] funds." This authority includes the right "to examine any records of the contractor or any of its subcontractors, or any State or local agency administering such contract, that directly pertain to, and involve transactions relating to, the contract or subcontract." In addition, the GAO may interview any officer or employee of the contractor or any of its subcontractors, or of any State or local government agency administering the contract, regarding such transactions.

Although GAO historically has had the right to audit government contractors and subcontractors, the authority to interview officers and employees of a contractor or subcontractor is an expansion of GAO's existing audit authority.

#### **b. IG Review of Concerns Raised by the Public**

Section 1514 of the Act directs the Inspectors General to "review, as appropriate, any concerns raised by the public about specific investments using funds made available in this Act." The findings of such reviews (not related to an ongoing criminal proceeding) are required to be "relayed immediately to the head of the department or agency

concerned." Furthermore, the funding must be posted on the IGs' websites and linked to the Recovery and Accountability and Transparency Board's website.

**c. IG Access to Records and Employees.**

Section 1515 grants the IGs the right to audit each "contract or grant awarded using covered funds." As with the GAO, the audit authority of the IG has been expanded to include not only the right "to examine any records of the contractor or any of its subcontractors, or any State or local agency administering such contract," but also to "interview any officer or employee of the contractor or any of its subcontractors, or of any State or local government agency administering the contract, regarding such transactions."

**d. Recovery Accountability and Transparency Board**

Sections 1521-29 of the Act provides for the establishment of a Recovery Accountability and Transparency Board ("Board") "to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse." The membership of this Board will consist of the Inspectors General of the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Justice, Transportation, Treasury, and the Treasury Inspector General for Tax Administration; and "any other Inspector General as designated by the President from any agency that expends or obligates covered funds." The Chairman of the Board will be a Presidential appointee.

The functions of the Board will include:

- Reviewing whether the reporting of contracts and grants using covered funds meets applicable standards and specifies the purpose of the contract or grant and measures of performance;
- Reviewing whether competition requirements applicable to contracts and grants using covered funds have been satisfied;
- Auditing or reviewing covered funds to determine whether wasteful spending, poor contract or grant management, or other abuses are occurring and referring matters it considers appropriate for investigation to the inspector general for the agency that disbursed the covered funds;
- Reviewing whether there are sufficient qualified acquisition and grant personnel overseeing covered funds;
- Reviewing whether personnel whose duties involve acquisitions or grants made with covered funds receive adequate training;
- Reviewing whether there are appropriate mechanisms for interagency collaboration relating to covered funds, including coordinating and collaborating to the extent practicable with the Inspectors General Council on Integrity and Efficiency established by the Inspector General Reform Act of 2008 (Public Law 110-409); and
- Creating and maintaining a public website that will "foster greater accountability and transparency in the use of covered funds."

The Board is also required to submit various reports to Congress and the President including "flash reports" regarding "potential management and funding problems that require immediate attention." All reports submitted to Congress and the President are required to be posted to the Board's website.

To assist in performing these functions, the Board is given audit authority which allows the Board to conduct its own "audits and reviews of spending of covered funds . . . ." To effectuate its audit authority, the Board is authorized to issue subpoenas to not only compel the production of documents but also to compel testimony by individuals. In addition, the Board is authorized to conduct public hearings and can issue subpoenas in connection with such hearings.

Finally, the Act requires Federal agencies to cooperate with and provide information requested by the Board.

#### **e. Enhanced Protection for State and Local Government and Contractor Whistleblowers**

Section 1553 of the Act, also known as the McCaskill Amendment, includes enhanced whistleblower protection for employees of "any non-Federal employer receiving covered funds" that report gross mismanagement, waste, fraud, danger to the public or violation of a law with respect to Stimulus Act funds.

### **3. Contracting Restrictions**

#### **a. Preference for Fixed Price Competitive Contracts**

Section 1554 of the Act provides that "[t]o the maximum extent possible," all contracts funded under this Act "shall be awarded as fixed-price contracts through the use of competitive procedures." If a contract is awarded that is not fixed price or not awarded using competitive procedures, then a summary of that contract must be posted on the Board's website.

#### **b. FAR Requirements**

Section 1610(a) of the Act clarifies that, for Federal contracts, there is no implicit exemption from the otherwise applicable federal procurement statutes and regulations. In particular, Section 1610(a) provides:

None of the funds appropriated or otherwise made available by this Act, for projects initiated after the effective date of this Act, may be used by an executive agency to enter into any Federal contract unless such contract is entered into in accordance with the Federal Property and Administrative Services Act (41 U.S.C. 253) or chapter 137 of title 10, United States Code, and the Federal Acquisition Regulation, unless such contract is otherwise authorized by statute to be entered into without regard to the above referenced statutes.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.