



*Special
Edition*

Special Edition Government Contracts Consulting

Provided by Beason & Nalley, Inc.

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OMB Directive Provides General Guidelines on Accountability & Transparency

How Will Government Contractors Be Affected?

The Office of Management and Budget (OMB) issued a “directive” to government agencies which broadly defines methods for ensuring sufficient “accountability and transparency” of recipients who accept funds under the American Recovery and Reinvestment Act (RA), also known as the Stimulus Act.

The February 18, 2009 directive is designed to jump-start government agencies in laying the foundation for implementing transparency requirements with the oversight of Stimulus spending undertaken by the new Recovery Accountability and Transparency Board. The requirements contained in this directive will clearly apply to any recipient of funds, including Government contractors. Instruments for award will include the traditional contracts as well as grants, loans, and co-op

agreements. Just exactly what provisions are included within these award arrangements, beyond traditional contract, grant, etc. provisions, remain to be seen.

The important accountability objectives, as outlined by OMB, under this directive, and others that will follow, include:

- Ensure funds are awarded and distributed in a prompt, fair, and reasonable manner
- Provide adequate transparency to the general public as to the recipients and uses of funds
- Provide an adequate process of reporting the use of funds, and establish processes that will mitigate unnecessary cost overruns for those funded projects
- Ensure that funds are used for authorized purposes, and the likelihood of fraud, waste, and abuse is reduced
- Ensure funded program goals are achieved

A summary of general measures that will be implemented to achieve accountability objectives are:

- Extensive use of audits of RA funds to identify abusers of fund use, and avert instances of fraud, waste and abuse
- Use of competitive/free and open competition to the maximum extent practical
- Award of funds in a timely manner, and oversight to determine that monies are efficiently utilized to meet deadlines and objectives of funded tasks
- Maintaining a cadre of personnel qualified to oversee the use of the funds
- Detailed oversight to monitor use of monies to minimize cost overruns and improper payments

Depending on the more detailed instructions delivered to procurement commands and other government agencies whom will be responsible for awarding agreements to recipients, the question as to what government contractors should expect, in addition to the layers of regulations already imposed by ordinary contract awards, is difficult to predict.

We do know that awarding government agencies, in conjunction with the Recovery Accountability and Transparency Board, will likely impose added oversight if only by virtue of the “transparency” dialogue that is embedded within the initial OMB directive.

Some additional requirements and/or other possible events/headaches that government contractors should be aware of, should those contractors accept awards earmarked with Stimulus Act monies, are:

- Transparency and accountability can translate into the “general public” being allowed the prerogative or implicitly inciting audits, public hearings, or investigations through ordinary communication with the Recovery Accountability and Transparency Board
- The Recovery Accountability and Transparency Board may be able to conduct its own oversight audits, via a separate and independent oversight

group, notwithstanding the existing government contract audit provisions (ordinarily afforded to DCAA, DOD IG, and other agency specific audit agencies)

- The applicable agency Inspector General’s office (IG) and the GAO are given the authority to audit any contract awarded where Stimulus funds pay for the supplies or services. Such authority is very broad and, although not yet specifically defined, can include direct audits of government contractors, as well as State and Federal Government instrumentalities with the responsibility for award and administration of those contracts. Of particular note, the GAO will have the authority to interview officers and employees of the company (prime contractor) as well as subcontractors. Unlike FAR, which provides very limited access to officers or employees (such as full cooperation in a fraud investigation under the new provisions of FAR subpart 3.10), the GAO will have very broad authority to interview whomever it chooses (or so it appears).
- The Act includes provisions that no funds appropriated under this act “may be used for a project under 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 has an embedded requirement that “not less than prevailing wages are paid under the Davis-Bacon Act to all laborers and mechanics employed by contractors and subcontractors on projects funded or assisted” under this Act
- Government procurement agencies will face more oversight in awarding and monitoring contracts with Stimulus Act funds, and in turn, government contracts awarded may include more requirements and potentially changes in FAR contract provisions
- Changes in the government approval process may occur where, for example, higher-level approval is required for lower-value awards when sole-source procurements are awarded

- The Act allows federal contractors to postpone the E-Verify electronic employment verification program, formerly implemented under a Bush executive order which would have required contractors to use E-Verify until May 21, 2009

Contracting Officers and other procurement agency officials have to be worried that the oversight on top of oversight requirements will limit their authority in contract awards, administration of those awards, and their choice of remedies when contract provisions are not met.

Bottom line to our clients: Those companies who agree to accepting awards where Stimulus Act funds are attached should buckle their seatbelts and be prepared for additional and, possible extreme, regulatory provisions under the accountability philosophy of the OMB directive.

More specific guidance is forthcoming, according to the OMB, regarding individual agency award and administration requirements to ensure “accountability and transparency”. Whether those additional instructions are specific enough to better define the parameters and processes for governing oversight of the use of Stimulus Bill funds remains to be seen.

Government contractors who receive contracts under this Act should be aware that they will be subjected to more stringent cost reporting provisions; additional layers of audit oversight; more scrutiny by the general public, and; perhaps added regulatory provisions (yet to be written) that will go beyond current FAR (and agency supplement) government limitations designed to “punish” violators of the accountability/transparency requirements.

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Upcoming Training

MARCH

Thursday, March 12, 2008

FAR Part 31 Cost Principles

Location:

Beason & Nalley
 Huntsville, AL

Time: 8:15 AM – 4:45 PM

Registration: Contact Lori Beth Miller,

lmiller@beasonnalley.com or register online,

www.beasonnalley.com/events/event031209.html

Tuesday & Wednesday, March 24-25

A Practical Guide to Incurred Cost Submission

Location:

Marvin Conference Center
 Washington DC

Presented by:

Federal Publications Seminars

Tuesday & Wednesday, March 31 – April 1

A Manager’s Guide to EVMS

Location:

Marvin Conference Center
 Washington DC

Presented by:

Federal Publications Seminars

MAY

May 5 – 8

The Masters Institute in Government Contract Costs

Location:

Hyatt Regency La Jolla
 San Diego, CA

Presented by:

Federal Publications Seminars

May 5 – 6

A Practical Guide to Incurred Cost Submission

Location:

Hyatt Regency La Jolla
 San Diego, CA

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