EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

April 3, 2009

M-09-15

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: Peter R. Orszag
Director

SUBJECT: Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, P.L. 111-5 ("Recovery Act" or "Act").

This memorandum transmits the second installment of government-wide guidance for carrying out programs and activities enacted in the American Recovery and Reinvestment Act ("Recovery Act") of 2009. Please bring this memorandum and attachment to the attention of any personnel within your organization that you expect to be involved in these matters.

The guidance issued today supplements, amends, and clarifies the initial guidance issued by the Office of Management and Budget (OMB) on February 18, 2009, (*Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, M-09-10*). All significant updates to M-09-10 are outlined in Section 1.5 of the attached guidance. These updates are based on ongoing input received from the public, Congress, State and local government officials, grant and contract recipients, and Federal personnel.

Significant work is underway at all levels of government and in communities across the nation to carry out the Recovery Act effectively. The attached guidance is intended to reinforce this progress by clarifying existing requirements and establishing additional steps that must be taken to facilitate the accountability and transparency objectives of the Recovery Act.

Specifically, in implementing the Recovery Act, departments and agencies should bear in mind the President's commitment to ensuring that public funds are expended responsibly and in a transparent manner to further the job creation, economic recovery, and other purposes of the Recovery Act. To that end:

(1) *Merit-Based Decision-Making*. Consistent with the President's Memorandum of March 20, 2009, *Ensuring Responsible Spending of Recovery Act Funds*, departments and agencies should develop transparent, merit-based selection criteria that will guide their available discretion in committing, obligating, or expending funds under the Recovery Act for grants and other forms of Federal financial assistance.

(2) *Long-term public benefits, optimizing economic and programmatic results*. Also consistent with the President's March 20, 2009, Memorandum, departments and agencies should support projects that have, among other things and to the greatest extent, a demonstrated or potential ability to deliver programmatic results; optimize economic activity and the number of jobs created or saved in relation to the Federal dollars obligated; and achieve long-term public benefits by, for example, investing in technological advances in science and health to increase economic efficiency and improve quality of life; investing in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; fostering energy independence; or improving educational quality.

(3) *Targeting assistance consistent with other policy goals*. Federal agencies should take additional policy considerations into account, to the extent permitted by law and practicable, when determining how best to use Recovery Act funds for achieving the Act's objectives, such as supporting projects that ensure compliance with equal opportunity laws and principles, support small businesses including disadvantaged business enterprises, engage in sound labor practices, promote local hiring, and engage with community-based organizations. These policy goals are outlined further in the attached guidance document, at Section 1.6.

An open dialogue on this guidance and other policies and requirements of the Recovery Act is essential to effective implementation. Therefore, the attached guidance includes instructions for how the public can provide additional input and feedback. Specifically, questions and feedback about this memorandum or the guidance document can be addressed to recovery@omb.eop.gov and should have the term "guidance feedback" in the title of the email. OMB will issue a subsequent memorandum within the next 30 to 60 days clarifying any updates to the guidance based on feedback received.

Thank you for your cooperation.

Attachment

Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009

Table of Contents

SECTION 1 – GENERAL INFORMATION **1**

SECTION 2 – AGENCY PLANS AND PUBLIC REPORTING **12**

SECTION 3 – GOVERNANCE, RISK MANAGEMENT, AND PROGRAM INTEGRITY **29**

SECTION 4 – BUDGET EXECUTION **38**

SECTION 5 – GRANTS AND COOPERATIVE AGREEMENTS **47**

SECTION 6 – CONTRACTS **52**

SECTION 7 – LOANS AND LOAN GUARANTEES **63**

APPENDICES **67**

- **APPENDIX 1 – DETAILED INSTRUCTIONS ON TRANSMITTING MATERIALS** 68
- **APPENDIX 2 – AGENCY RECOVERY RELATED WEB PAGES** 71
- **APPENDIX 3 – AGENCY AND PROGRAM DATA ELEMENTS** 74
- **APPENDIX 4 – RISK CONSIDERATIONS** 85
- **APPENDIX 6 – AGENCY RISK TEMPLATE** 87
- **APPENDIX 7 – COUNCIL ON ENVIRONMENTAL QUALITY NEPA REPORTING GUIDANCE** 88
- **APPENDIX 8 – INTERIM FAR RULES** 94
- **APPENDIX 9 – INTERIM FINAL GUIDANCE FOR FEDERAL FINANCIAL ASSISTANCE** 121

Section 1 – General Information

1.1 What is the purpose of this Guidance?

The purpose of this Guidance is to promulgate an updated set of government-wide requirements and guidelines that Federal agencies must implement or prepare for in order to effectively manage activities under the American Recovery and Reinvestment Act (Recovery Act) of 2009.

The Guidance outlines necessary enhancements to standard processes for awarding and overseeing funds to meet accelerated timeframes and other unique challenges posed by the Recovery Act's transparency and accountability framework. More specifically, the Guidance:

- Answers questions and clarifies issues related to the mechanics of implementing the Recovery Act;
- Provides clarification on what information will be reported on Recovery.gov and what information will be required to be reported on agency websites;
- Instructs agencies on steps that must be taken to meet these reporting requirements, including incorporation of recipient reporting requirements in award documentation and communications with funding recipients; and
- Establishes a common framework for agencies to manage the risks associated with implementing Recovery Act requirements.

1.2 What is the goal of this Guidance?

The goal of this Guidance is to establish and clarify the required steps Federal agencies must take to meet the following crucial accountability objectives:

- Funds are awarded and distributed in a prompt, fair, and reasonable manner;
- The recipients and uses of all funds are transparent to the public, and the public benefits of these funds are reported clearly, accurately, and in a timely manner;
- Funds are used for authorized purposes and potential for fraud, waste, error, and abuse are mitigated;
- Projects funded under this Act avoid unnecessary delays and cost overruns; and
- Program goals are achieved, including specific program outcomes and improved results on broader economic indicators.

1.3 Under what authority is this Guidance being issued?

This Guidance is issued under the authority of 31 U.S.C. 1111; Reorganization Plan No. 2 of 1970; Executive Order 11541; the Chief Financial Officers Act of 1990 (Pub. L. 101-576); the Office of Federal Procurement Policy Act (41 U.S.C. Chap. 7); the Federal Funding Accountability and Transparency Act of 2006 (P.L. 109-282); and the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

1.4 To which agencies does this Guidance apply?

The provisions of this Guidance apply to all Federal departments and agencies involved in or impacted by the Recovery Act or which otherwise perform services for agencies that receive such appropriations.

The Head of the applicable Federal agency is responsible for the requirements in this Guidance and must determine what, if any, specific actions at the bureau or sub-agency level will be required to meet these responsibilities.

1.5 What are the most significant updates to the Guidance since it was last issued on February 18, 2009?

- **Updates to Section 2, Agency Plans and Public Reporting:**
    - The Weekly Financial and Activity Report, originally scheduled to be replaced by a monthly report, will continue.
    - The Monthly Financial Report has been eliminated.
    - The Formula and Block Grant report has been replaced by the Funding Notification Report, which covers all award types.
    - The standard data elements for the Agency and Program plans have been finalized (see Appendix 3).
    - The requirements for recipient reporting are clarified as follows:
    - Data elements for recipient reporting have been finalized and have been issued as changes to the Federal Acquisition Regulations (FAR) and Title 2 (see Appendices 8 and 9).
    - Recipient reporting required by Section 1512 of the Recovery Act will be collected centrally.
    - Requirements for the July 10th and October 10th reporting deadlines have been clarified (see Section 2.11).
    - The data elements for the Council on Environmental Quality's reporting requirements have been developed (see Appendix 7).

- **Updates to Section 3, Governance and Risk Management:**
    - The roles and responsibilities for overseeing risk have been clarified.
    - The risk accountability framework has been updated.
    - Additional details on risk reporting requirements have been provided.
    - The discussion of agency specific risk management activities and added supporting appendices has been expanded.
    - A section on program integrity (improper payments) has been added.

- **Updates to Section 4, Budget Execution:**

- Removed the discussion of the requirement for agencies to create new TAFSs, as they have already completed this work.
- Removed the discussion of the need for agencies to prepare initial apportionment requests expeditiously, as they have already completed this work.
- Removed the discussion of OMB's plans to issue a Bulletin on apportionment instructions and Budget Data Request, as these actions have already taken place.
- Reorganized the section into questions and answers on general guidance for budget execution; administrative and fixed costs; apportionments (general guidance and transfers); agency reporting on SF 133s and to Recovery.gov; and, a small miscellaneous category.
- Clarified and expanded the discussion on using Recovery Act funds for fixed costs and administrative costs.
- Emphasized that agencies cannot report administrative or incidental costs paid for by non-Recovery Act funds in a way that would make these costs look like Recovery Act funds.
- Clarified and expanded the discussion of requirements for any TAFS that receives a transfer of Recovery Act funds (the TAFS must use one or more Category B projects to separated Recovery Act funds).

- **Updates to Section 5, Grants:**

  - An interim portal for agencies to use in submitting Recovery Act Catalog of Federal Domestic Assistance (CFDA) program descriptions and providing notifications of future program description submissions has been established. The interim portal is located on OMB MAX at https://max.omb.gov/community/x/QIOXDw.
  - A new part 176 has been added to Title 2 of the Code of Federal Regulations to provide interim final guidance and standard award terms for grants, cooperative agreement and loan awards funded with Recovery Act funds needed to implement selected provisions in the Recovery Act:

    - Subpart A–Reporting and Registration Requirements under Section 1512 of the American Recovery and Reinvestment Act of 2009.
    - Subpart B–Buy American Requirement under Section 1605 of the American Recovery and Reinvestment Act of 2009.
    - Subpart C—Wage Rate Requirements under Section 1606 of the American Recovery and Reinvestment Act of 2009.
    - Subpart D—Single Audit Information for Recipients of Recovery Act Funds

- **Updates to Section 6, Contracts:**

  - Five new FAR cases were published in Federal Acquisition Circular 2005-32, 74 FR 14621, that implement the following sections of Division A of the Recovery Act

        - Section 1605 – FAR Case 2009-008, American Recovery and Reinvestment Act – Buy American Requirements for Construction Material;
        - Section 1512 – FAR Case 2009-009, American Recovery and Reinvestment Act – Reporting Requirements;
        - Sections 1526(c)(4) and 1554 – FAR Case 2009-010, American Recovery and Reinvestment Act – Publicizing Contract Actions;
        - Sections 902, 1514, and 1515 – FAR Case 2009-011, American Recovery and Reinvestment Act – GAO/IG Access; and
        - Section 1553 – FAR Case 2009-012, American Recovery and Reinvestment Act – Whistleblower Protections.
    - Guidance previously provided in Sections 6.2(1) – (5) in the OMB initial implementing guidance issued February 19, 2009, is now in the FAR and supplemented with instructions at https://www.fpds.gov and https://www.fedbizopps.gov (see Section 6.2 of this document for additional information)
    - There is additional discussion regarding small business participation in Recovery Act efforts.

- **Updates to Section 7, Loans and Loan Guarantees:** Clarification is provided that Sec. 1512 recipient reporting applies to 100% guarantees financed through the Federal Financing Bank (FFB).

1.6 What other policy goals should an agency consider in determining how best to use Recovery Act funds in order to achieve the Act's objectives?

All Federal agencies should take the following considerations into account, to the extent permitted by law and practicable, when determining how best to use Recovery Act funds for achieving the Act's objectives.

- Ensuring long-term public benefits, optimization of economic and programmatic results. In accordance with the President's Memorandum of March 20, 2009 on "Ensuring Responsible Spending of Recovery Act Funds," departments and agencies "shall develop transparent, merit-based selection criteria that will guide their available discretion in committing, obligating, or expending funds under the Recovery Act for grants and other forms of Federal financial assistance. Such criteria shall be consistent with legal requirements, may be tailored to the particular funding activity, and shall be formulated to ensure that the funding furthers the job creation, economic recovery, and other purposes of the Recovery Act."

  As the President's Memorandum further outlined, "merit-based selection criteria shall be designed to support particular projects, applications, or applicants for funding that have, to the greatest extent, a demonstrated or potential ability to:

  "(i) deliver programmatic results;

"(ii) achieve economic stimulus by optimizing economic activity and the number of jobs created or saved in relation to the Federal dollars obligated;

"(iii) achieve long-term public benefits by, for example, investing in technological advances in science and health to increase economic efficiency and improve quality of life; investing in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; fostering energy independence; or improving educational quality; and

"(iv) satisfy the Recovery Act's transparency and accountability objectives."

In evaluating projects for funding, departments and agencies accordingly should allocate Recovery Act funds toward projects that will achieve long-term public benefits as outlined above, optimize economic activity, deliver programmatic results, and meet transparency and accountability objectives.

- Ensuring compliance with equal opportunity laws and principles: Federal civil rights laws and principles are at the core of our nation's commitment to ensuring that everyone has a chance to share in economic opportunity. All Federal agencies should take steps to ensure that recipients of Recovery Act funds comply fully with their responsibilities under the full range of civil rights laws, including (but not limited to) Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, and Titles I and Title V of the Americans with Disabilities Act of 1990. Wherever possible, agencies should implement appropriate oversight mechanisms to ensure that Recovery Act funds are expended in a manner consistent with civil rights obligations. Furthermore, to the extent possible and consistent with the principles underlying our national commitment to civil rights and equal opportunity, agencies should encourage recipients to implement best practices for ensuring that all individuals – regardless of race, gender, age, and national origin – benefit from the Recovery Act.

- Promoting local hiring: Departments and agencies should seek to maximize the economic benefits of a Recovery Act-funded investment in a particular community by supporting projects that seek to ensure that the people who live in the local community get the job opportunities that accompany the investment.

- Providing maximum practicable opportunities for small businesses. Small businesses play a critical role in stimulating economic growth and creating jobs. Because support of small businesses furthers the economic growth and job creation purposes of the Recovery Act, agencies should support projects that provide maximum practicable opportunities for small businesses. In the sphere of government contracting, agencies should provide maximum opportunities for small businesses to compete and participate as prime and subcontractors in contracts awarded by agencies, while ensuring that the government procures services at fair market prices. Accordingly, agencies are strongly encouraged to take advantage of authorized small business contracting programs to create opportunities for small businesses. Agencies' Offices of Small Disadvantaged Business Utilization and SBA's District Offices can assist with market research to help identify qualified and capable small business sources,

both at the national and local level, including small businesses that may be able to respond quickly to solicitations and otherwise get their firms contract-ready.

- Providing equal opportunity for Disadvantaged Business Enterprises: Agencies should seek to provide equal opportunities for Disadvantaged Business Enterprises (DBE) in awarding contracts under the Recovery Act, to the extent allowed by law.

- Encouraging sound labor practices: The federal government invests substantial resources in enforcing wage and hour, occupational safety and health, and collective bargaining laws, to ensure that American workers are safe and treated fairly. All other things being equal, agencies awarding Recovery Act funds should seek to support entities that have a sound track record on these issues and are creating good jobs. This will strengthen the recovery effort and the economic prospects of American workers.

- Engaging with community-based organizations: Agencies should seek to support projects that make effective use of community-based organizations in connecting disadvantaged people with economic opportunities.

1.7 What additional responsibilities exist for Executive Branch agencies?

The Executive Branch shall distribute Recovery Act funds in accordance with:

- All anti-discrimination and equal opportunity statutes, regulations, and Executive Orders that apply to the expenditure of funds under Federal contracts, grants, cooperative agreements, loans, and other forms of Federal assistance. Grant-making agencies shall ensure that their recipients comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and any program-specific statutes with anti-discrimination requirements. Generally applicable civil rights laws also continue to apply, including (but not limited to) the Fair Housing Act, the Fair Credit Reporting Act, the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964, the Equal Educational Opportunities Act, the Age Discrimination in Employment Act, and the Uniform Relocation Act.
- The National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, and related statutes, including requirements for plans and projects to be reviewed and documented in accordance with those processes.
- Section 1605 of the Recovery Act, which provides (subject to certain exceptions) that "[n]one of the funds appropriated or otherwise made available by this 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."
- Section 1606 of the Recovery Act, which requires the payment of not less than the prevailing wages under the Davis-Bacon Act to "all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act."

1.8 What are the guiding principles of Recovery Act reporting for the Federal agencies?

Timely and accurate reporting by the Federal agencies provides both the Congress and taxpayers an ability to track and monitor all Recovery funds with the level of transparency and accountability envisioned in the Act. Reporting, as outlined in this Guidance document, presents a "full picture" of the total funds provided in the Recovery Act. Therefore: (1) an agency that received funds in the Recovery Act is to report on those Recovery funds only. An agency that did not receive Recovery funds will not report on any Recovery-related activities that are funded through its regular (i.e. non-Recovery) appropriations; and (2) in the instance that Recovery Act funds are used to supplement existing non-Recovery activities or contracts, only those Recovery funds used will be reported, and none of the existing, non-Recovery funding will be subject to the reporting requirements. It is important to note that an agency not directly receiving Recovery funds in the Act may receive Recovery funds through an interagency transfer. In that case, the agency would report on the Recovery funds because all Recovery funds must be reported. Further details on the execution of such transactions are included in Section 4 of this guidance.

It is expected that any of the Federal agencies will incur some incidental Recovery-related expenses to be funded by regular appropriations. This can include administrative costs such as overhead, which is not currently reported upon. However, if asked by OMB or Congress, an agency must be prepared to report on the amount or percentage of funds that were spent on administrative activities. This includes funds used to reimburse non-Recovery funding used for Recovery-related administrative activities. The calculation and tracking of overhead costs should follow existing agency practice or guidance an agency develops for its Recovery-related activities.

The only exception to the "Recovery funds only" reporting requirements is for Inspectors General oversight reporting. The IG reporting, to include both Recovery and non-Recovery funds used (i.e. costs absorbed) for IG oversight of the Recovery Act, enables a calculation of total dollars spent on Recovery oversight throughout the government.

1.9 What is the process for the public to provide input on the provisions of this Guidance?

OMB is requesting input from the public on this Guidance. In particular, OMB is interested in public views on Section 2 and provisions related to recipient reporting. Questions and feedback about this guidance document should be submitted by April 17th, 2009 to recovery@omb.eop.gov and should have the term “guidance feedback” in the title of the email.

To ensure consideration of your comments or feedback, submit all public comments related to the FAR cases (Federal Acquisition Circular 2005-32, 74 FR 14621) and Title 2 regulations using the instructions in the Federal Register version of these issuances. These are available for reference in Appendices 8 and 9.

1.10 Will additional Guidance be issued?

Yes. OMB will continue to supplement and clarify Recovery Act guidance through either Frequently Asked Questions that will be published on Recovery.gov or more formal updates to this Guidance document. Of note, OMB will issue a memorandum within the next 30 to 60 days clarifying any updates to the guidance based on public input received.

In addition, OMB has created the Recovery Act Architecture Package to support shared understanding of technical requirements and solution approaches across all stakeholders. This document will be updated on an ongoing basis based on public input received.

1.11 Are there specific instructions for transmitting required reporting to OMB or to other appropriate recipients?

Throughout this Guidance there are numerous instances where Federal agencies are required to submit information to OMB or to other locations. Specific reporting instructions are provided in Appendices 1 and 2 of this Guidance.

1.12 Does this Guidance automatically provide Federal agencies with a waiver of existing legislative or administrative requirements?

No. If an agency believes it is appropriate to seek a waiver of an existing requirement in order to facilitate effective implementation of the Recovery Act, the agency shall pursue such waiver consistent with existing processes.

1.13 Will OMB be issuing guidance on the President's Memorandum of March 20th, 2009, entitled Ensuring Responsible Spending of Recovery Act Funds?

The President's Memorandum, *Ensuring Responsible Spending of Recovery Act Funds*, establishes requirements for ensuring merit-based awards, avoiding imprudent projects, and disclosing communications with lobbyists. All Federal personnel involved in Recovery Act implementation must closely review this Memorandum and take all necessary steps to ensure full compliance.

In particular, Federal agencies must ensure that program-specific guidance, criteria or application materials align to the requirements in the Memorandum for merit-based awards. As appropriate, Federal agencies are encouraged to explicitly reference the President's Memorandum and the merit-based criteria contained therein. In addition, Federal agencies must also immediately alert all personnel involved in Recovery Act activities of the lobbying restrictions now in effect pursuant to the Memorandum.

The Memorandum indicates that "The Director of OMB shall assist and, as appropriate, issue guidance to the heads of executive departments and agencies to carry out their responsibilities under this memorandum." OMB has begun working with Federal agencies to identify any issues or matters related to the Memorandum that require further clarification or guidance. Any such clarification or guidance will be issued expeditiously.

1.14 What are the relevant requirements and issues related to purchase card use under the Recovery Act?

- GSA SmartPay® purchase cards can be used for official purchases in support of the Recovery Act, consistent with OMB Circular A-123, Appendix B, and agency policy. Purchase cards use a streamlined and cost-effective business process compatible with the need to quickly and transparently support the delivery of Recovery Act programs to the taxpayer and other beneficiaries.
- Cardholders should follow typical transaction reconciliation procedures, but must reconcile purchases to the accounting code(s) and provide appropriate Recovery Act transaction description(s) (if applicable) as specified by agency policy for Recovery Act transactions.
- Purchases below the micro-purchase threshold using the GSA SmartPay® purchase cards should be recorded in Agency systems in accordance with existing Agency policy. Purchases above the micro-purchase threshold using the GSA SmartPay® purchase cards should be reported through the Federal Procurement Data System – Next Generation (FPDS-NG). GSA SmartPay® purchase cards continue to be available for use as a payment mechanism under purchase orders and contracts annotated as required by your agency policy this Guidance.
- Additional purchase card accounts can be established with a Recovery Act accounting code as a default. However, agencies should exercise caution in doing so to ensure that the total number of purchase cards issued remains manageable, appropriate Agency/Organization Program Coordinator span of control is maintained, and internal controls consistent with OMB Circular A-123, Appendix B, remain in effect. These "dedicated" purchase cards should only be established in circumstances where agencies anticipate a high volume of Recovery Act -related transaction activity and/or there is a high risk of errors in reconciling transactions to the appropriate Recovery Act accounting code(s). Furthermore, agencies should explore the use of cardless accounts under the GSA SmartPay® program where a high volume of Recovery Act -related transactions with a particular vendor is expected.
- Initially, all transactions, including purchase card spending, will be included in the gross outlay reporting by TAFS, not by individual transaction. Instructions on more detailed reporting may be included in future updates to this guidance.
- For more information, please contact the General Services Administration's Office of Charge Card Management at (703) 605 – 2808 or via e-mail at gsa_smartpay@gsa.gov.

1.15 What actions must a Federal agency take when it issues guidance for recipients (e.g., state and local governments) regarding the Recovery Act?

When a Federal agency issues guidance on the Recovery Act, the agency must immediately post the guidance on the agency's Recovery Act web page. In addition, the agency must disseminate the guidance, to the maximum extent practical, to a broad array of external stakeholders (e.g., Governors, State Legislatures, state program offices, local government officials, etc.) and respond promptly to their queries about the guidance. Federal agencies are encouraged to engage state and local governments during the development of any relevant guidance.

1.16 What are agency responsibilities under Section 1151 of the Recovery Act?

Section 1151 of the Recovery Act amends the Internal Revenue Code (Title 26 of the United States Code) to increase the monthly tax exclusion amount for the aggregate of employer-provided commuter highway vehicle transportation and transit pass benefits from $120 to $230 per month. Since the maximum monthly transit pass benefit offered to Federal employees in the National Capital Region (NCR) is equal to the maximum amount of transit passes that the Internal Revenue Code allows employees to exclude from their income, this change raises the ceiling on the amount of tax-free transit pass benefits that Federal employees in the NCR may receive each month as reimbursements for their commuting costs.

As the provision states, the increased ceiling takes effect on March 1, 2009, which is the first month beginning on or after the date of enactment of the Act (February 17, 2009). The sunset date for the increase is January 1, 2011.

Federal agencies are required to offer employees in the National Capital Region the transit pass fringe benefit. As discussed above, this section increases the monthly tax exclusion amount for the aggregate of employer-provided commuter highway vehicle transportation and transit pass benefits from $120 to $230 per month.

- Section 2 of Executive Order 13150, incorporated into statute by section 3049 of SAFETEA-LU, as amended (5 U.S.C. 7905 note), requires that Federal agencies within the NCR implement a "'transit pass' transportation fringe benefit program" for qualified employees in amounts approximately equal to employee commuting costs, not to exceed the maximum authorized by 26 U.S.C. 132(f)(2).
- The requirements of Executive Order 13150 regarding transit passes pertain only to Federal agencies within the NCR **(**defined in Section 2 of Executive Order 13150 as "the District of Columbia; Montgomery, Prince George's, and Frederick Counties in Maryland; Arlington, Fairfax, Loudon, and Prince William Counties in Virginia; and all cities now or hereafter existing in Maryland or Virginia within the geographic area bounded by the outer boundaries of the combined area of said counties."). Accordingly, Federal agencies outside the National Capitol Region **may** provide a transit pass transportation fringe benefit program for their employees**,** but they are not required to do so**.**

Per general appropriations law principles, unless otherwise authorized, the increased benefit for the transit pass transportation fringe benefit program may not be used to pay for parking at Metro

(WMATA) or mass transit facilities. [Note: An agency could have specific legal authority to provide parking benefits, or may also provide parking benefits on a limited basis pursuant to a specific legal determination. DOT does not interpret the Executive Order as specifically authorizing parking benefits.]

Please visit http://transerve.dot.gov/documents/arraimplementation.htm for implementation guidance.

Section 2 – Agency Plans and Public Reporting

2.1 What reporting is required under the Recovery Act?

The Initial version of this guidance included eight different levels of reporting necessary to meet accountability and transparency objectives of the Recovery Act and this guidance. This update to the guidance modifies the previous reporting model. Most significantly, given the continued demand for timely reporting, the formula block grant allocation reports have been replaced with regularly submitted Funding Notification reports, described in more detail in Section 2.3. Also, the previously required monthly financial report has been eliminated, with weekly reporting continuing for the foreseeable future.

The reporting requirements in this guidance apply at the department or agency level, except those reporting requirements in Section 2.10.

Note: Each reporting requirement below should be considered a part of the agency-wide and program-specific plans required in Sections 2.7 and 2.8. Thus, the planning process begins immediately and certain aspects of the plan will be made available on Recovery.gov and agency websites as they are ready for publication. The plans required by May 1st in Sections 2.7 and 2.8 will build off these earlier planning documents and fill in the remaining required elements.

Section	Reporting Requirement	Period
2.2	Major Communications	Immediate/Ongoing
2.3	Funding Notification Report (previously Formula Block Grant Allocation Report)	Immediate/Ongoing
2.4	Weekly Financial and Activity Report	Weekly/Ongoing
2.5	Monthly Financial Report	Cancelled
2.6	Award-level Reporting (as required for USAspending.gov)	Immediate/Ongoing
2.7	Agency-wide Recovery Act Plans	Draft May 1st/ Final May 15th
2.8	Program-specific Recovery Act Plans	
2.10	Recipient reporting	Starting 10/10/09

2.2 What communications materials are agencies required for posting to Recovery.gov?

All Federal agencies receiving Recovery Act funds should determine which major communications are appropriate for posting to the 'News' section of Recovery.gov. These materials should be in a press release format, and include a clear heading and short (no more than 5 sentences) overview of the main communications points. Items should be of interest to a broad cross section of the American public, and focus on Presidential priorities and programs with a major impact.

In addition, agencies should provide notification of any major press events or videos produced for the implementation of the Recovery Act. All communications materials should be cleared by the senior accountable official at the agency or his/her designee.

Instructions for reporting this information are included in Appendix 1.

2.3 What is required for the Funding Notification Report?

Federal agencies are required to provide information on the funding notifications made for all award types. Agencies must submit a Funding Notification Report for all funding included in agency communications. Agencies must also submit information on significant solicitations or other actions which will be publically available through other information sources, including publication on the agency website, FedBizOpps.gov, Grants.gov, GovLoans.gov, etc.

For funding announced to the press or released to Congress, the funding notification should be submitted immediately in as much detail as is known. For funding announced through a series of small announcements – for instance solicitations posted to FedBizOpps.gov – these notices can be aggregated and sent in no less than every 48 hours after the notices are made available publicly. In addition, solicitation amounts should be aggregated if publication of an individual amount could compromise award negotiations.

The definition of Funding Notifications below will be used through this guidance:

Term	Definition
Funding Notifications	Amount of funds that agencies have publicly announced as being available to entities outside of the Federal Government. Includes funds available immediately through formula or block grants, through the solicitation of applications or proposals for award in the future, or through any other public notification. Grants, contracts, loans, loan guarantees, cooperative agreements, and other forms of assistance are all subject to this reporting requirement. Agencies should report the subsidy available for the cost of loans or loan guarantees and/or the face value of the awards. Any funds announced for use related exclusively to Salaries and Expenses can be excluded from this exercise. Amounts reported should be cumulative since enactment.

These Funding Notification reports should be cleared by the senior accountable official at the agency or his/her designee.

Agencies should use the existing Formula Block Grant Allocations template and process through the April 7th. The new template will be available by COB on April 7th, and should begin being used immediately. Information on these reports should be cumulative – so additional rows should be added to the spreadsheet as additional notifications entered.

Additional instructions for reporting this information are included in Appendix 1.

2.4 What is required for the Weekly Financial and Activity Reports (previously the weekly report)?

Earlier guidance indicated that the weekly reports required by this section would eventually be replaced by the monthly financial report required by Section 2.5. However, given the continued demand for timely reporting, the weekly reports will be continued.

These reports will require agencies to report Obligations and Gross Outlays as defined by this section. The reporting frequency and detail may change slightly over time, reflecting the information needs of the Administration and the public. Agencies should begin exploring the accounting and process changes required to update Obligations and Gross Outlays more frequently than a weekly report.

Total appropriations will no longer be a part of this report, as this information does not change and can be collected from authoritative sources.

Starting immediately, all agencies receiving Recovery Act funds will submit the following information to OMB, representing cumulative, year-to-date recovery activity by Treasury Account[1]:

- Total Obligations and Gross Outlays, as defined in this section. These amounts should be updated by COB Tuesday for all activity through the previous Friday.
- A short bulleted list of the major actions taken to date and major planned actions. "Major" actions include those of likely interest to senior government officials, Congress, and the public.

Agencies should use the existing template and process for the April 7th report. The new template will be available by COB on April 7th and should be used for the report due the week of April 13th. The templates and data definitions for the Weekly Financial and Activity Report can be found here: https://max.omb.gov/community/x/doC2Dw. Additional instructions for reporting this information are included in Appendix 1.

These weekly reports should be cleared by the senior accountable official at the agency or his/her designee.

The tables below define Obligations and Gross Outlays for purposes of the reporting required in this guidance. Please note that the title "Total Expenditures" has now been updated to Total Gross Outlays (As noted in OMB Circular A-11, Gross Outlays are also called Disbursements).

Term	Definition
Obligations, as adjusted	A binding agreement that will result in outlays, immediately or in the future. Budgetary resources must be available before obligations can be incurred legally. This term includes obligations as well as recoveries of the current and prior year obligations. Recoveries of prior year obligations are reported as budgetary resources in budget execution reporting rather than as obligations. Here is a link to the definition in OMB Circular A-11. http://www.whitehouse.gov/omb/circulars/a11/current_year/s20.pdf

[1] Credit reform financing accounts are excluded from the Weekly Financial and Activity Report at this time.

Gross Outlays, as adjusted	Amount of obligations paid. Includes payments in the form of cash (currency, checks, or electronic fund transfers) and in the form of debt instruments (bonds, debentures, notes, or monetary credits) when they are used to pay obligations. This term includes obligations paid as well as refunds of payments made in current and prior years. Refunds collected from prior year obligations that have been paid are reported as budgetary resources in budget execution reporting rather than as gross outlays. Here is a link to the definition in OMB Circular A-11. http://www.whitehouse.gov/omb/circulars/a11/current_year/app_f.pdf

This reporting is designed to capture data elements available in Agency core financial systems, and mirror what is reported to FACTS II to meet Central Agency reporting requirements. This information should be reconcilable to quarterly FACTS II submissions and SF 224 (and related) monthly submissions. Reconciliation guidance will be developed in the near future.

The financial information agencies report on must use the same USSGL account balances they report to FACTS II. The table below shows the USSGL accounts that constitute obligations and gross outlays.

Term	USSGL Accounts
Obligations, as adjusted	4801 – Undelivered Orders - Obligations, Unpaid 4802 – Undelivered Orders - Obligations, Prepaid/Advanced 4871[2] - Downward Adjustments of Prior-Year Unpaid Undelivered Orders - Obligations, Recoveries 4881 – Upward Adjustments of Prior-Year Undelivered Orders - Obligations, Unpaid 4882 – Upward Adjustments of Prior-Year Undelivered Orders - Obligations, Prepaid/Advanced 4901 – Delivered Orders - Obligations, Unpaid 4902 – Delivered Orders - Obligations, Paid 4981 –Upward Adjustments of Prior-Year Delivered Orders - Obligations, Unpaid 4982 – Upward Adjustments of Prior-Year Delivered Orders - Obligations, Paid
Gross Outlays, as adjusted	4802 – Undelivered Orders - Obligations, Prepaid/Advanced 4872[3] - Downward Adjustments of Prior-Year Prepaid/Advanced Undelivered Orders - Obligations, Refunds Collected 4882 – Upward Adjustments of Prior-Year Undelivered Orders - Obligations, Prepaid/Advanced 4902 – Delivered Orders - Obligations, Paid 4982 – Upward Adjustments of Prior-Year Delivered Orders - Obligations, Paid

Below is a link to the Treasury Financial Manual. Section V includes a cross walk that shows the USSGL accounts that agencies report for Obligations and Gross Outlays.

[2] Amounts reported in this USSGL account are reported as budgetary resources in budget execution reporting in accordance with the OMB Circular A-11.
[3] Ibid.

http://www.fms.treas.gov/ussgl/tfm_releases/08-03/ussgl_08-03.pdf

OMB continues to review the financial reporting requirements identified in the initial guidance, namely the reporting obligations and gross outlays by object class, vendor, contract/grant/loan number, program and other to be identified data elements. OMB intends to pilot this expanded financial reporting requirement with several Agencies in order to assess and validate the availability and timeliness of information. Upon successful completion of the pilot, OMB may publish the new reporting data elements/format and report start date. Additional information will be provided in future guidance, and agencies will be given sufficient time to prepare before significantly expanded reporting requirements take effect.

2.5 What is required for the monthly financial reports?

The initial version of this guidance indicated that the agency weekly reports would be replaced by a monthly reporting requirement. Given the continued demand for timely reporting, the monthly financial report is eliminated and agencies are required to provide regularly updated Weekly Financial and Activity Reports (see Section 2.4 in this document).

The initial version of this guidance also required each agency to submit monthly reports no later than eight work days after the end of the month providing allocations of all mandatory and other entitlement programs by State, county, or other appropriate geographical unit. This requirement has now been moved to Section 2.6, and should be included in the FAADS PLUS submission for USASpending.gov.

2.6 What is required for award level transaction data?

Recovery Act award obligations will be reported according to the current procedures for USASpending. Agencies should immediately begin including Recovery Act awards in their USASpending files. To facilitate this reporting, the USASpending.gov guidance is being updated and will be reissued shortly following the release of this guidance. The update to the USASpending.gov guidance includes important changes to the current procedures for USASpending.gov, including:

- An acceleration of the reporting deadlines from 20 days after the end of the period to 5 days.
- The inclusion of new reporting requirements for aggregate data.
- Changes to USASpending.gov operations to improve data quality, including new procedures for modifying incorrect records.

If agencies are not able to meet these requirements for their March 20th and April 20th FAADS PLUS submissions, no later than May 5th agencies must have in place the capability to clearly identify Recovery Act awards in their USASpending files, and must also be able to retroactively identify any awards submitted before May 5th as Recovery or non-Recovery.

Given the high priority placed on the accurate display of information related to Recovery Act on Recovery.gov, agencies are responsible for pre-dissemination review of all information that will appear on Recovery.gov. All agencies must ensure all reporting related to Recovery Act funding is complete and accurate and complies with the agency's Information Quality Act guidelines. Each agency on its Recovery.gov page shall provide its point-of-contact for information quality.

2.7 What is required for agency-wide Recovery Act plans?

Consistent with sound program management principles, each agency receiving recovery funds must develop formal documented plans for how the recovery funds will be applied and managed. Draft Agency plans will be due to OMB no later than May 1st and must be finalized no later than May 15th. Agencies should work with their OMB representative to set an appropriate review process.

See Appendix 3 for the initial reporting instructions and required data fields for the information which will be required to be entered into the government-wide system.

The Agency Plan should describe both broad Recovery Act goals and how different parts of the agency are coordinating efforts toward successful implementation and monitoring. The agency must provide a summary table that lists each Recovery Act program and the amount of Recovery Act funds covered by the plan broken-out by appropriation title. Agencies must describe processes in place for senior managers to regularly review the progress and performance of major programs, including identifying areas of risk and completing corrective actions.

Agency Inspectors General should submit a unified agency and program plan that is separate from their agency's plan and appropriately tailored to IG activities and functions.

Consistent with the OMB review process identified above, any components of these plans that are substantially complete should be posted on agency web pages as soon as available, once approved by OMB and the agency Senior Accountable Official (SAO).

2.8 What is required for program-specific Recovery Act plans?

Agencies will also submit separate plans for each program funded by the Recovery Act. Draft Agency Program plans will be due to OMB no later than May 1st, and must be finalized no later than May 15th. Agencies should work with their OMB representative to set an appropriate submission date and review process. Agencies and RMOs have flexibility to determine the appropriate way to define a Recovery "Program"; however, there must be a clear mapping to the Treasury accounts which have been established. Agencies should also map Recovery Act program definitions to existing program definitions as appropriate.

See Appendix 3 for the initial reporting instructions and required data fields for the information which will be required to be entered into the government-wide system for reporting on Recovery.gov.

To the extent possible, each agency's Recovery Program Plan should be a summary of the specific Recovery Act projects and activities planned.

Each Recovery Program Plan must minimally include the following information. The specific information that will be required to also be entered into a government-wide system can be found in Appendix 3:

a. Funding Table: agency funding listed by program, project, and activity categories, as possible. Funds returned to the program or any offsetting collections received as a result of carrying out recovery actions are to be specifically identified.
b. Objectives: a general Recovery Act description of the program's Recovery Act objectives and relationships with corresponding goals and objectives through on-going agency programs/activities. Expected public benefits should demonstrate cost-effectiveness and be clearly stated in concise, clear and plain language targeted to an audience with no in-depth knowledge of the program. To the extent possible, Recovery Act goals should be expressed in the same terms as programs' goals in departmental Government Performance Results Act strategic plans.
c. Activities: kinds and scope of activities to be performed (e.g. construction, provision of services, conduct of research and development, assistance to governmental units or individuals, etc.).
d. Characteristics: types of financial awards to be used (with estimated amount of funding for each), targeted type of recipients, beneficiaries and estimated dollar amounts of total Recovery Act funding for Federal in-house activity, non-federal recipients and methodology for award selection.
e. Delivery Schedule: schedule with milestones for major phases of the program's activities (e.g. the procurement phase, planning phase, project execution phase, etc., or comparable) with planned delivery date(s).
f. Environmental Review Compliance: description of the plan for compliance with National Environmental Policy Act, National Historic Preservation Act, and related statutes, including dependency of other project milestones on environmental review processes and potential impact of environmental reviews on project implementation.
g. Measures: expected quantifiable outcomes consistent with the intent and requirements of the legislation and the risk management requirements of Section 3, with each outcome supported by a corresponding quantifiable output(s) – agencies must specify the length of the period between measurements (e.g., monthly, quarterly), the measurement methodology, and how the results will be made readily accessible to the public. The measures currently used to report programs' performance in relationship to these goals (consistent with Administration policy) should be retained (in terms of incremental change against present level of performance of related agency programs or projects/activities specified in the plan). In addition to reducing burden on grant recipients and contractors, use of existing measures will allow the public to see the marginal performance impact of Recovery Act investments.

h. Monitoring/Evaluation: description of the agency process for periodic review of program's progress to identify areas of high risk, high and low performance, and any plans for longer term impact evaluation.
i. Transparency: description of agency program plans to organize program cost and performance information available at applicable recipient levels.
j. Accountability: description of agency program plans for holding managers accountable for achieving Recovery Act program goals and improvement actions identified.
k. Barriers to Effective Implementation: a list and description of statutory and regulatory requirements, or other known matters including personnel skills gaps, which may impede effective implementation of Recovery Act activities and proposed solutions to resolve by a certain date.
l. Federal Infrastructure Investments: a description of agency plans to spend funds effectively to comply with energy efficiency and green building requirements and to demonstrate Federal leadership in sustainability, energy efficiency and reducing the agency's environmental impact.

Consistent with the OMB review process identified above, any components of these plans that are substantially complete should be posted on agency web pages as soon as available, once approved by OMB and the Agency Senior Accountable Official (SAO).

2.9 What is required in the program-specific plan for Federal Infrastructure Investments?

Agency plans must include a description of how the agency plans to spend funds effectively to comply with energy efficiency and green building requirements and to demonstrate Federal leadership in sustainability, energy efficiency and reducing the agency's environmental impact.

Statutory and executive order requirements on new construction, major renovations, repair and alterations and major energy projects include:

- Energy Efficient Buildings. Ensuring the design of new buildings and major renovations are at least 30 percent more efficient than ASHRAE 90.1-2004 for commercial buildings and the International Energy Conservation Code for residential buildings (Energy Policy Act of 2005, Section 109 – Energy Code for New Federal Commercial and Multi-Family High-Rise Residential Buildings (10 CFR Part 434), http://www.energycodes.gov/federal/exist_fedcom.stm).

- Sustainable Design and Construction. Ensuring all new construction and major renovation comply with all of the *Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings* (Executive Order 13423 http://www1.eere.energy.gov/femp/regulations/eo13423.html). This will help the agency stay on-track to meet the requirement that, by 2015, 15 percent of the existing Federal capital asset buildings in the Department's inventory incorporate the *Guiding Principles* (Executive Order 13423). The five Guiding Principles include:

- Optimize energy performance
- Employ integrated design principles (and controls)
- Protect and conserve water
- Enhance indoor environmental quality
- Reduce environmental impact of materials

- Energy Efficiency Capital Equipment. Ensuring that any large capital energy investment in an existing building that involves replacement of installed equipment employs the most energy efficient designs, systems, equipment and controls that are life-cycle cost effective. (Energy Independence and Security Act of 2007 Section 434).

- Metering. Ensuring that all appropriate facilities are metered by 2012 for electric, and no later than 2016 for steam and natural gas as applicable (Energy Policy Act of 2005 and Energy Independence and Security Act of 2007; 42 U.S.C. 8253(e)) http://www1.eere.energy.gov/femp/pdfs/necpa_amended.pdf).

- Solar Hot Water. Ensuring that, if lifecycle cost-effective, as compared to other reasonably available technologies, not less than 30 percent of the hot water demand for each new Federal building or Federal building undergoing a major renovation be met through the installation and use of solar hot water heaters (Energy Independence and Security Act of 2007 Section 523).

Resources are available to assist agencies in complying with these with requirements. Agencies are encourage to consult with DOE's Federal Energy Management Program and with GSA's Office of Federal High Performance Green Buildings to: take advantage of technical assistance opportunities; leverage the greatest level of energy and green performance from available ARRA funds, including considering the use of energy saving performance contracts (ESPC) and utility energy savings contracts (UESC) to maximize investments; establish sustainable practices to be used throughout the life cycle of facilities; and identify opportunities to demonstrate innovative and emerging energy and green building technologies and concepts. Agencies should be prepared to report asset-level energy cost savings and consumption reduction resulting from meeting these Federal infrastructure investment requirements. Further guidance on how to calculate energy cost savings is forthcoming.

2.10 What reporting will be collected from recipients of Federal funding for reporting on Recovery.gov?

The Recovery Act and this guidance require extensive reporting from recipients of Federal funding. The Recovery Act defines "recipient" as any entity that receives Recovery Act funds directly from the Federal Government (including Recovery Act funds received through grant, cooperative agreement, loan, or contract) other than an individual and includes a State that receives Recovery Act funds. See Section 1512 of the Recovery Act.

These reporting requirements apply to the prime non-Federal recipients of Federal funding. The prime recipient is responsible for reporting on their use of funds as well as any sub-awards (i.e.,

sub-grants, subcontracts, etc.) they make. This level of reporting, as required by the Recovery Act, will provide unprecedented transparency into how and where Federal funds are spent. For example:

- For the approximate $60 billion in Federal contract dollars under the Recovery Act, detailed information will be available for the Federal contracts awarded, how the prime contractor is using the funds they have been provided, and any subcontracts awarded by the prime contractor.
- For the more than $300 billion in grants covered by the recipient reporting requirements in the Recovery Act, detailed information on use of funds will be available for the Federal grants awarded, how the prime recipient of the grant is using the funds they have been provided, and any sub-awards made by the primary recipient. The following additional detail will help clarify how far down reporting reaches –
    - For the approximate $85 billion in competitive grant awards, information will be available from the local organization that is the primary recipient of the award, including any sub-recipients that receive funds.
    - For the approximate $75 billion in Education grants, information will be available from the State on how they are using the funding, including the local school districts receiving funds.
    - For the approximate $8 billion in Housing funds, information will be available from the local housing authority on how they are using the funding, including reporting on what entities, if any, they distribute funding to.
    - For the approximately $37 billion in highway and transit formula funding, grant recipients will be required to report on contractors they hire for various projects.

In limited circumstances, recovery funds will go from a Federal agency to a State, and then to a local government or other local organization. In this case, the current reporting model will not track funds to subsequent recipients beyond these local governments or other organizations. OMB plans to expand the reporting model in the future to also obtain this information, once the system capabilities and processes have been established.

These reporting requirements only apply to non-Federal recipients who receive funding provided through discretionary appropriations. The reporting requirements do not apply to funding received through entitlement or other mandatory programs, except as specifically required by OMB. At this time OMB has not extended these reporting requirements to any entitlement or other mandatory programs.

As required by Section 1512 of the Recovery Act and this guidance, each recipient as described above is required to report on a number of data elements. Detailed information on the data elements, which recipients will be required to report upon to comply with Section 1512 of the Recovery Act, will be provided by Federal agencies to funding recipient in the standard terms and conditions of individual award agreements. Please see Appendix 8 for the terms and conditions for Contracts information and Appendix 9 for the terms and conditions applicable to grants, loans, and other assistance.

2.11 When will the recipient reporting required by Section 1512 begin?

Section 1512(f) of the Recovery Act requires recipient reporting to begin 180 days after enactment, and for reports to be submitted by recipients 10 days after the end of each calendar quarter. This results in an initial statutory reporting deadline of October 10, 2009, with quarterly reports due 10 days after the end of each calendar quarter thereafter.

Agencies should instruct recipients to submit reports by October 10, 2009, which cover cumulative activity since the passage of the Recovery Act, including all sub-awards (or modifications to existing awards) made which utilize Recovery Act funding. Therefore, agencies must require recipients to maintain cumulative data through the October 10th reporting period.

OMB will work with agencies to determine the most appropriate method for collecting information from recipients for July 10th reporting.

Detailed reporting instructions will be made available at www.FederalReporting.gov no less than 45 days before the October 10, 2009 reporting deadline.

2.12 Will OMB publish standardized guidance on the recipient reporting required by Section 1512 of the Recovery Act that will apply across all federal agencies?

Yes. Recovery Act reporting requirements must be consistent across agencies, and OMB has coordinated the development of standard terms and conditions for Federal grants, loans, contracts and other awards. While Federal agencies will continue to have discretion in the data they choose to collect for their programs, the information required for display on Recovery.gov will be standardized to the extent possible. Please see Appendix 8 for the terms and conditions for Contracts information and Appendix 9 for the terms and conditions applicable to grants, loans, and other assistance.

The current terms and conditions leave significant discretion to Federal agencies on how recipients should report the quantitative outputs and outcomes the result from the projects and activities. To the extent possible, agencies should instruct recipients to collect and report performance information as part of their quarterly submissions that is consistent with the agency's program performance measures.

Detailed reporting instructions will be made available at www.FederalReporting.gov within no less than 45 days before a reporting deadline.

There may be some cases in which agencies have finalized their award terms and conditions before the government-wide language became available. Federal agencies should ensure any discrepancies are identified and corrected before reporting begins.

2.13 What are the requirements for reporting the number of jobs created?

There are two distinct types of jobs reports that the Recovery Act requires.

First, the Council of Economic Advisers, in consultation with OMB and Treasury, are required by the Recovery Act to submit quarterly reports to Congress that detail the impact of programs funded through Recovery funds on employment, economic growth, and other key economic indicators. The Council of Economic Advisers has developed macro-level job estimates at both the national and State levels. OMB and agencies will continue to partner with CEA on these quarterly reports and other questions regarding macro-level jobs estimates. Agencies with questions about reporting macro-level or indirect jobs estimates should continue to contact Council of Economic Advisers at (202) 395-5084.

The second type of job estimates should be submitted by recipients of Recovery funds for each project or activity, as required by Section 1512(c)3(D) of the Recovery Act. These reporting requirements only apply to non-Federal recipients who receive funding provided through discretionary appropriations. In order to ensure recipient reporting of estimated jobs created or retained, OMB has worked with agencies to include job reporting requirements in the terms and conditions of contract, grant, and loan agreements. On March 31st, changes to the Federal Acquisition Regulation were published on reporting for contracts that includes jobs reporting requirements (See FAR Case 2009-009 at Appendix 8 of this document or at 74 FR 14639). Other financial assistance programs (including grants and loans programs) will adopt the same guidelines for reporting project and activity level jobs estimates, which will be published in the Federal Register. Changes to jobs guidance resulting from consideration of public comments submitted on these interim rules will be communicated to agencies.

For recipient reporting of jobs, the requirements state that prime recipients should provide a description of the employment impact of the Recovery Act funded work, including the types of jobs (e.g., job titles or broader labor categories), and an estimate of the number of jobs created or retained by project and activity or contract. Only jobs that are compensated should be reported. Recipients should report full-time equivalent (FTE) estimates cumulatively created or retained for each calendar quarter. FTE calculations are based on aggregate hours worked to ensure temporary or part-time labor is not overstated. Grant recipients are also encouraged to clarify in their narrative job description where projects or activities are funded by multiple Federal awards as well as specifying the jobs attributable to Recovery Act funds as part of the project or activity total. If known, grant recipients will also address the impact on the workforces of sub-recipients. Certain recipients, such as those funded by Department of Transportation, have job reporting requirements that go beyond Section 1512 and should comply with program and agency-specific requirements. At a minimum, each recipient shall provide:

(1) A brief description of the types of jobs created or jobs retained in the United States and outlying areas. "Jobs created" means those new positions created and filled, or previously existing unfilled positions that are filled, as a result of Recovery Act funding. "Jobs or positions retained" means those previously existing filled positions that are retained as a result of Recovery Act funding. Recipient descriptions may rely on job titles, broader labor categories, or the recipients existing practice for describing jobs as long as the terms used are widely understood and explain the general nature of

the work. Note that a job cannot be reported as both created and retained. See the definition for "outlying areas" in FAR Part 2.101.

(2) An estimate of the number of jobs created and jobs retained in the United States and outlying areas. At a minimum, this estimate shall include any new positions created and any existing filled positions that were retained to support or carry out Recovery Act projects or activities managed directly by the recipient, and if known, by sub-recipients. The number shall be expressed as "full-time equivalent" (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the recipient. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter. Because FTE is calculated based on aggregate hours worked, temporary or part-time labor is not overstated. Recipients are encouraged to include information in their narrative used to calculate the FTE figure.

Prime Recipients are also encouraged to work closely with their Governors and State Workforce Investment Boards to facilitate the listing of all jobs generated through the Recovery Act on their State Job Banks. Links to State job banks are available at the Department of Labor's Employment and Training Administration sponsored CareerOneStop Web site (www.jobbankinfo.org). In order to foster greater accountability and transparency in the use of Recovery funds, recipients should also note that the Act requires the Federal government to include links to and information about how to access job and registered apprenticeship opportunities, local employment agencies, and State Job Banks on Recovery.gov

2.14 Will recipient information be collected centrally, or should agencies modify current systems to collect this information?

OMB intends to oversee the development a central collection system for the information required to be reported by Section 1512 of the Act. Since the Initial Guidance was issued, OMB has concluded that the development of a central collection and reporting capability is likely to lower system development costs across the Federal government, improve the consistency of the data collected, improve access to the information by citizens and others outside federal agencies, and prevent recipients from having to enter data into separate systems for multiple agencies.

As this system is developed, existing agency capabilities and reporting requirements will be accommodated to the extent possible, and duplication of effort minimized. There will be two main exceptions to a standardized, central approach:

- Addition of agency and program specific data elements. The central system will be developed with the flexibility to collect agency and program specific reporting elements from recipients in addition to the standard information required by Section 1512. Agencies should work with OMB to develop capabilities within the central system to collect agency and program specific information, and the system will deliver this information to the Agency as well as make it available on Recovery.gov. For additional information see Section 2.15.

Limited exemptions from central collection. In some limited circumstances where Section 1512 reporting is required in addition to new and existing agency or program specific reporting requirements, OMB may allow agencies to collect Section 1512 information in existing systems and deliver this data to a central repository in a standard format and according to a fixed schedule. In order to be considered for an exception agencies should develop a short plan identifying: (1) the existing systems collecting this information, (2) how the information collected in these systems would be presented to a central system in a standard format, (3) development costs for meeting the Recovery Act reporting requirements using these systems, (4) clear delineation of gaps if any in business processes, data elements or semantics, quality and integrity, or other between the requirements of this guidance and the central system, and the proposed approach of the agency, and (5) plan for testing and certifying compliance with Recovery Act requirements and maintaining that compliance going forward. Agencies should refrain from investing in system modifications pending approval from OMB.

OMB is moving aggressively to develop the capability to centrally collect the recipient reports due on October 10th, 2009. For planning purposes, agencies should assume the central system capability will be online and available no less than 45 days before the October 10th, 2009, statutory quarterly reporting deadline. Detailed reporting instructions will be made available at www.FederalReporting.gov.

2.15 If an Agency determines that additional recipient reporting is necessary for effective oversight of Recovery Act funds, beyond that required by Section 1512, can this information also be collected? This could include additional data fields or a requirement to collect information from sub-recipients directly instead of just from the prime recipient.

The reporting required by Section 1512 of the Recovery Act is the minimum which must be collected. Agencies requiring additional information for oversight should rely on existing authorities and reflect these requirements in their award terms and conditions as necessary, following existing procedures. Agencies choosing to collect additional data elements must coordinate their requests in advance with OMB and design their requests to be fully complementary with OMB Recovery Act data models and reporting standards. To the extent possible, agencies should assume this additional information will be collected in the central reporting tool currently being developed by OMB, and that all additional information collected from recipients will be made available on Recovery.gov.

In addition, the Director of the Office of Management and Budget has the authority under the Federal Funding Accountability and Transparency Act of 2006 (the Transparency Act) to require Federal agencies to collect information from all Federal recipients on all tiers of sub-awards. The Director also has the authority under the Transparency Act to expand reporting requirements to include additional relevant information. To the extent agencies feel there is a clear and compelling case for immediately expanding recipient reporting requirements beyond those specified in the Recovery Act or beyond existing agency authority, agencies should raise these cases to OMB by submitting a recommendation in writing to recovery@omb.eop.gov and their OMB contacts.

2.16 Is there reporting required for the Section 1609(c) provision on National Environmental Policy Act (NEPA) status and progress?

Yes. The Council on Environmental Quality (CEQ) released an initial NEPA guidance memorandum on March 11, 2009, and an updated and revised guidance memorandum on April 3, 2009. The April memorandum requires all agencies using Recovery Act funds for projects subject to the NEPA are to submit information on the status and progress of those projects and activities using the instructions and spreadsheet attached to the April 3, 2009, memorandum and included in Appendix 7 of this Guidance. The first report must be submitted to recovery@ceq.eop.gov on April 9th.

The Section 1609(c) NEPA reporting will continue to evolve as CEQ works with the agencies and OMB to refine the data elements and improve the process to best implement this provision within the Act.

2.17 What role should Federal agencies require States to play in the collection and transmission of information required under Section 1512 of the Recovery Act?

For those programs where the State is the primary recipient of Recovery Act funds, Federal agencies should provide States the flexibility to determine the optimal approach for collecting and transmitting to the Federal government data required by Section 1512 of the Recovery Act. For example, a State may prefer to create a central point of contact responsible for transmitting all Section 1512 data to the Federal government's central collection solution (or to the individual Federal agency, if appropriate). Alternatively, a State may prefer to have individual State agencies or recipients separately report to the Federal government rather than relying on a single point of contact to consolidate the information centrally for transmission. In all cases, however, Federal agencies should expect the State to assign a responsible office to oversee Section 1512 data collection to ensure quality, completeness, and timeliness of data submissions. This State office should play a critical role in assisting Federal agency efforts to obtain quality, complete, and timely data submissions.

For those programs where the State is not the primary recipient, this Guidance does not create any specific role or expectation for States concerning Section 1512 data reporting. In these cases, Federal agencies are still required to initiate oversight mechanisms for quality, completeness, and timeliness of data submissions.

2.18 How will agencies implement tribal self-determination contracting authorities with Recovery Act funding?

Section 1610(b) of the Recovery Act allows the Department of the Interior's Bureau of Indian Affairs and other non-BIA bureaus, the Department of Health and Human Services' Indian Health Service, and the Department of Housing and Urban Development to use existing self-determination contracting authorities with Indian tribes. However, it also requires the appropriate Secretary to "incorporate provisions to conform the agreement with the provisions of this Act regarding the timing for use of funds and transparency, oversight, reporting, and accountability,

including review by the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office, consistent with the objectives of this Act."

In their Agency-wide Recovery Act plans, DOI, HHS, and HUD shall identify how they will incorporate these provisions into tribal self-determination contracts that are used for Recovery Act funds. Agencies are currently developing tribal contract language. Agency officials with questions about ARRA tribal contract language should contact their OMB representative.

2.19 Will these reports be made available to the public?

Yes. All reporting described above may be used to populate Recovery.gov or agency recovery websites. Agency-wide and program-specific plans will be posted on agency websites, on a dedicated page for Recovery Act activities. See Section 2.12 and Appendix 2 for more information on agency websites.

2.20 What are the requirements for agency websites?

Agencies are not required to develop ***new*** websites dedicated to recovery efforts. The initiative is designed to create one portal where the public can find and analyze information and report potential fraud, waste and abuse pertaining to the Recovery Act. As such, www.recovery.gov is intended as the single, consolidated portal to that information. Multiple websites will confuse the public.

Each agency should, however, dedicate a section of its primary website to Recovery Act activities within one week of issuance of this guidance. Those pages must be consistently identified with a url that identifies the key entry page to that information with a "/recovery" extension, i.e. www.agency.gov/recovery.

See Appendix 2 for a description of specific requirements and best practices for agency websites.

2.21 What impact do the new data reporting requirements under Recovery Act have on pre-existing data collection requirements?

This Guidance is intended to ensure the government-wide reporting requirements in the Recovery Act are fulfilled and that all necessary data to populate Recovery.gov is available. All other reporting requirements in the Recovery Act and existing law must continue to be fulfilled and should be made transparent on agency recovery websites.

In the short term, agencies should not change standard reporting for awards, unless there is a legal or other compelling justification. However, if the Recovery Act requires modifications or additions, agencies should integrate new and existing procedures to streamline data collection and to minimize funding recipients' burden. Cases that may require waivers to existing standards to accommodate Recovery Act reporting requirements will be evaluated by the

Recovery Act Accountability and Transparency Board (see Section 3.1) and OMB in the context of a government-wide review of data reporting.

2.22. What procedures will agencies follow to comply with relevant requirements of the Paperwork Reduction Act?

The collections of information that will be necessary to comply with Recovery Act disclosure and transparency provisions will be subject to OMB review and approval under the Paperwork Reduction Act of 1995 (PRA). In recognition of the need to act quickly to collect information from recipients of Recovery Act funds, OMB will allow agencies to request "emergency processing" of information collection requests under OMB's PRA regulations (5 CFR 1320.13).

Each request for emergency processing needs to be accompanied by a written determination that the information collection is necessary to implement provisions of the Recovery Act. In addition, the agency is to submit information indicating that it has taken all practicable steps to consult with interested agencies and members of the public in order to minimize the burden of the collection of information.

1. Public notice. The agency is to publish in the *Federal Register* a notice that the emergency clearance request has been submitted to OMB for review (unless such notice is waived by OMB). This notice is to include a statement that the agency is requesting emergency processing within a specified time period.

2. Potential OMB Actions. OMB will approve or disapprove an emergency collection of information within a reasonable time period, provided that such time period is consistent with the purposes of the PRA. An inconsistent time period is one that does not permit OMB to evaluate independently whether the proposed collection of information:

- Is necessary for the proper performance of the agency functions;
- Imposes unnecessary or excessive burden;
- Unnecessarily duplicates other available information;
- Maximizes practical utility; and
- Otherwise meets the substantive criteria embodied within the PRA.

Section 3 – Governance, Risk Management, and Program Integrity

3.1 What is the role of Recovery Act Accountability and Transparency Board (the "Board") in coordinating government-wide policy on the Recovery Act?

The Board is responsible for coordinating and conducting oversight of Federal spending under the Recovery Act to prevent waste, fraud, and abuse. One way the Board will fulfill these responsibilities is by monitoring the accountability objectives of the law, including the following:

- Funds are awarded and distributed in a prompt, fair, and reasonable manner;
- The recipients and uses of all funds are transparent to the public, and the public benefits of these funds are reported clearly, accurately, and in a timely manner;
- Funds are used for authorized purposes and instances of fraud, waste, error, and abuse are mitigated;
- Projects funded under this Act avoid unnecessary delays and cost overruns; and
- Program goals are achieved, including specific program outcomes and improved results on broader economic indicators.

3.2 What is the role of OMB in coordinating government-wide policy on the Recovery Act?

OMB will coordinate Recovery Act activities until the Board is in place. Once the Board is fully in place, OMB will support the Board in its oversight of Recovery Act implementation, including working with agencies to meet full reporting and performance of the accountability objectives. Additionally, Federal agencies will be expected to continue to work directly with OMB on implementation issues related to the Recovery Act.

3.3 Are agencies required to designate a Senior Accountable Official for Recovery Act activities?

Yes, agencies are required to designate a Senior Accountable Official for Recovery Act activities. This individual should have responsibility and authority to coordinate across agency bureaus, program offices, and programs. It is recommended that the Senior Accountable Official be at the level of sub-cabinet or Deputy Secretary, and lead regular reviews of recovery planning, implementation, reporting, and performance. The Senior Accountable Official should also designate a person or office for maintaining their agency's Recovery Act content on their website.

3.4 Should agencies establish a Risk Management Council to periodically review and assess Recovery Act performance?

Rather than establishing a new Council, agencies are encouraged to leverage their existing Senior Management Council (see OMB Circular A-123) to oversee Recovery Act performance across the agency, including risk management. The Senior Management Council should be comprised of the Chief Financial Officer, the Senior Procurement Executive, the Chief Human Capital Officer, the Chief Information Officer, Performance Improvement Officer, and the managers of programmatic offices. The agency's Senior Accountable Official should also participate and assume a leadership role. Agencies should also consider having their Office of General Counsel and Office of Inspectors General serve in advisory roles on the Senior Management Council.

The Council should review Recovery Act reporting and performance across the agency; establish and oversee development and implementation of agency guidance to identify and mitigate risk; and ensure the correction of weaknesses relating to Recovery Act. The Council should analyze findings and results from quarterly or monthly performance reviews, coordinated by the agency's Performance Improvement Officer, to help determine the highest risk program areas.

3.5 Are there other organizations that agencies should use to periodically review, assess, and manage Recovery Act risk?

Agencies should leverage existing organizations and entities to review, assess, and manage Recovery Act risk, including their Senior Assessment Team (see Appendix A to OMB Circular A-123). The Senior Assessment Team is often a subset of the agency's Senior Management Council.

Agencies should also consider working with interagency Councils (e.g., Chief Financial Officers Council, Chief Information Officers Council) as well as using their field operations' Federal Executive Boards as coordinating mechanisms to share information, prevent duplication of effort, and identify opportunities for collaboration. The Federal Executive Boards are interagency organizations located outside of Washington, D.C., in 28 geographic areas with a significant federal population. Federal Executive Boards are also a resource for addressing shared human capital challenges (e.g., joint recruitment activities, interagency details to support Recovery activities). For additional information on the Boards, please see www.feb.gov and direct questions to your agency's Office of Personnel Management Human Capital Officer.

3.6 Are there certain risks that all agencies must include as part of their risk mitigation process?

Yes, there are specific risks that all agencies must include as part of their risk mitigation process. These risks can also be thought of as "accountability objectives," which are outlined in Section 3.1 above. This means that if agencies are not meeting an accountability objective, such as effectively mitigating the risk of fraud, there may be a risk of not meeting the broader goals of the Recovery Act (e.g., job creation, economic growth).

Figure 1, illustrates the government-wide accountability. The framework places the objectives under the phase(s) of the funding lifecycle where, if necessary, those risks will be monitored and

mitigated: pre-award, performance-period, post performance. It further categorizes the objectives into the following risk objectives:

- Strategic – meeting high-level goals;
- Operations – effectively and efficiently using of its resources; and
- Reporting Compliance – meeting applicable reporting requirements.

Figure 1, Recovery Act Accountability Framework and Objectives

<table>
<tr><th></th><th colspan="2">Pre-Award</th><th colspan="2">Performance Period</th><th>Post-Performance Period</th></tr>
<tr><td rowspan="3">Strategic</td><td colspan="5">Program Outcomes and Economic Outcomes Achieved</td></tr>
<tr><td colspan="5">Competitive (and Fixed Price) Opportunities Maximized</td></tr>
<tr><td colspan="5">Wasteful Spending, Fraud, and Abuse Identified and Minimized</td></tr>
<tr><td rowspan="3">Operations</td><td colspan="2">Funds Obligated Timely</td><td>Funds Expended Timely</td><td>Undelivered Orders Minimized</td><td>Sunset of Recovery Requiremements</td></tr>
<tr><td colspan="5">Improper Payments Minimized</td></tr>
<tr><td colspan="5">Timely and Accurate Data Reported to Recovery.gov</td></tr>
<tr><td rowspan="2">Reporting Compliance</td><td>Agency and Program Plans Approved</td><td colspan="4">Agency and Program Plan Milestones Completed by Estimated Dates</td></tr>
<tr><td>Spend-Plan Approved</td><td colspan="4">Spend-Plan Milestones Completed by Estimated Dates</td></tr>
</table>

3.7 What are the reporting requirements for these common risk areas?

To assess how well the Federal government and funding recipients are progressing in meeting the objectives, agencies' progress will be tracked against the following accountability measures:

a. <u>Funds Obligated Timely</u>
   Percent of funds obligated according to obligation plan
b. <u>Funds Expended Timely</u>
   Percent of funds expended according to outlay plan
c. <u>Competitive Opportunities Maximized</u>
   Percent of obligated Recovery Act dollars competed through contracts or orders
   Percent of obligated Recovery Act dollars awarded on fixed-price actions
   Percent of obligated Recovery Act discretionary grant dollars competed
d. <u>Undelivered Orders Minimized</u>
   Percent and amount of funds within specific aging ranges

Many of the reporting attributes for the measures above are included in Section 2, Agency Plans and Public Reporting (specifically for a and b above). Separate guidance will be issued for capturing information for items c and d. While the majority of monthly updates and reporting

will be aggregated by Department and TAFS, agencies should have the ability to disaggregate this information to better pinpoint areas for risk mitigation and contingency planning.

3.8 Are there specific risk mitigation actions that all agencies should consider?

Yes, specific risk mitigation actions are included throughout this Guidance and include, but are not limited to, the following:

a. Ultimately, agencies must determine what award method(s) will allow recipients to commence expenditures and activities as quickly as possible consistent with prudent management and statutory requirements. Agencies may consider obligating funds provided under the Recovery Act on an existing grant, including, but not limited to, a continuation or renewal grant.
b. To enable timeliness of awards, agencies should engage in aggressive outreach to potential applicants to begin application planning activities, including the process for Central Contractor Registration (CCR) and obtaining a Dun and Bradstreet Universal Numbering System (DUNS) number. Outreach can also include efforts to update and validate existing CCR and DUNS registration data.
c. Consider weighting selection criteria to favor applicants for assistance with demonstrated ability to deliver programmatic result and accountability objectives included in the Recovery Act.
d. Adapt current performance evaluation and review processes to include the ability to report periodically on completion status of the program or activity, and program and economic outcomes, consistent with Recovery Act requirements. Establish procedures to validate the accuracy of information submitted on a statistical basis and/or risk based approach as approved by OMB.
e. Using other than fixed-price contracts requires agencies to pay special attention to ensuring that sufficient qualified acquisition personnel are available to perform contract administration to mitigate the government's risk. When riskier contract types are proposed, agencies should provide appropriate oversight so that all alternatives have been considered and that qualified staff is available for monitoring performance to mitigate risks.
f. Agencies should review their internal procurement review practices to promote competition to the maximum extent practicable. For instance, agencies might lower the dollar thresholds at which higher level review is required when a non-competitive acquisition strategy is contemplated.
g. Agencies must ensure receipt of funds is made contingent on recipients meeting the reporting requirements in Section 1512 of the Act.
h. Agencies must structure acquisitions to result in meaningful and measurable outcomes that are consistent with agency plans and that promote the goals of the Recovery Act. The evaluation criteria for award should include those that bear on the measurement and likelihood of achieving these outcomes.
i. Consider alternatives to contract financing, including structuring contract line items to allow invoicing and payments based upon interim or partial deliverables, milestones, percent-of-completion, etc. Ensuring consideration of contractor cash flow during

acquisition planning will mitigate schedule and performance risks to the government and reduce costs to the contractor associated with financing in a tight credit market.

j. Evaluate workforce needs in order to appoint qualified Grants Officers, Contracting Officers, Contracting Officer Technical Representatives (COTRs), and Program Managers with certification levels appropriate to the complexity of Recovery Act projects.

k. Identify mission-critical human capital needs for Recovery Act implementation, and assess the gap between their current workforce and Recovery Act human capital requirements. To identify their workforce needs and gaps, agencies must use competency-based workforce planning methodologies, drawing on existing data available in their human resource information systems, learning management systems, competency assessment survey results and other data sources.

Sections 4 through Section 7 include additional detail on the items above.

3.9 Should agencies undertake efforts to identify, prioritize, and mitigate implementation risks associated with the Recovery Act and specific to their agency and programs?

Yes, beyond the "common risks" discussed above, agencies should also be identifying, prioritizing, and mitigating agency / program specific-risks. Whereas the common risks may impact the larger objectives of the Recovery Act (i.e., job creation, economic growth), agency risk management efforts should focus on items that may negatively impact the achievement of programmatic objectives. Whenever possible, agencies should leverage existing practices (e.g., assessments required in the body and appendices of OMB Circular A-123) to identify and manage risk.

3.10 How should agencies begin developing such a plan?

Agencies should also begin their planning by determining whether final action has been taken regarding weaknesses or deficiencies disclosed by prior audits and investigations in program areas under which Recovery Act funds are authorized. If final action has not been completed, agencies should: (1) expedite such action to preclude the continuance of such weaknesses or deficiencies in the administration of Recovery Act funded programs; or (2) provide an explanation of why such corrective actions cannot or should not be taken in the administration of Recovery Act funded programs.

Then, as with the common government-wide risks, agencies should identify common agency risks and corresponding accountability objectives. Agencies should begin by assessing their overarching management capabilities in human capital, financial management, procurement management, grants management, loan management, and information management. The Senior Management Council (i.e., Chief Financial Officer, Senior Procurement Executive, Chief Human Capital Officer, and Chief Information Officer) should assess the agency's ability to support Recovery Act requirements in those areas. Specifically, within each management area, senior leadership should assess their people, processes, and technology to determine where it may need to deploy and coordinate resources to meet the initial demands of obligating funds and public reporting. See Appendix 5, Management and Risk Considerations, for possible questions

agencies may want to consider in evaluating overarching management capabilities to Recovery Act funding.

3.11 How do agencies identify risks?

For programs that receive Recovery Act funding, agencies should consider creating a risk profile for each program. The risk profile would identify the initial risk level (i.e., high, medium, low) of each program based on the responses to a series of question regarding the program. Agencies should consider the following questions when developing the risk profiles and assessing initial risk (note that the following list is intended to be illustrative):

a. Which programs are receiving the most funding;
b. Are program outputs and outcomes clear and measurable;
c. Are existing resources sufficient to achieve program objectives and proper award and management in accordance with statutory and regulatory requirements;
d. Who is (are) the final recipient(s) of funds (e.g., contractor, sub-contractor, state, locality, educational institution);
e. Does the entity responsible for the program have a proven history of appropriately managing federal funds?
f. Is this a new program for which the recipient may not have an existing administrative structure?
g. Does the program typically stay within schedule and cost goals, when applicable;
h. Are there current audit (e.g., financial statement audit, programmatic audits, GAO audits, single-audit) findings associated with this program;
i. Are existing internal controls sufficient to mitigate the risk of waste, fraud, and abuse adequately;
j. Are there performance issues with current or potential funding recipients; and
k. Are there leading indicators (e.g., history of not meeting schedule and cost goals, program audit findings) or lagging indicators (e.g., error measurements) to monitor ongoing program performance?

Once an agency has answered these or similar questions for each program receiving funding and determined a possible risk level (i.e., high, medium, low), it should group and stratify programs according to risk level. The program risk groups can highlight to management places where it may need to place additional or less oversight. However, each program manager will need to assess individual programs to identify specific risks that may prevent programmatic outcomes from occurring and focus efforts those with the highest likelihood of occurring and impact if not mitigated. Section 3.12 speaks to risk mitigation.

Agencies should also develop a process for documenting, monitoring, and reassessing risk throughout Recovery Act funding availability and project close-out.

3.12 What risk mitigation actions must agencies take for risks specific to their agency and programs?

Depending on the answers to the questions suggested in Section 3.11, agencies should develop mitigation plans that align with specific risks. At a minimum, agencies should prepare mitigation plans for those risks with the highest probability of occurrence and the greatest impact if not mitigated. Whenever possible, agencies should identify quantifiable measures of performance, including ranges of acceptable and unacceptable performance. Along with mitigation actions, agencies should also identify a "trigger" to determine if it should initiate a contingency plan. Triggers could include program performance falling outside of an acceptable range or not completing critical actions by specified dates.

3.13 What are the reporting requirements for these agency-specific risk areas?

Per Section 3.5 above, agencies will eventually be required to report on their risk management efforts to OMB and / or the Board, including performance measures for the accountability objectives with associated performance ranges. However, agencies risk assessments, mitigation plans, and reporting for risks specific to an agency or program will initially be for internal agency use. Agencies must include details in program-specific planning documents details on how managers will be held accountable for achieving recovery program goals.

When meeting with OMB and / or the Board, agency reporting should focus on mitigation actions related to the risks with the highest likelihood of occurrence and greatest impact on program performance. Agencies should also be prepared to discuss and provide their contingency plans (and the triggers of initiating the contingency plans) should mitigation actions prove unsuccessful. Appendix 6 includes a sample of an Agency Risk Template for possible presentation to OMB and / or the Recovery Board.

3.14 Does the Office of Personnel Management offer any tools that my agency can use to match the right talent with the right job and hire as quickly as possible?

Currently, there are many, important hiring flexibilities available to agencies.

The Chief Human Capital Officers Act of 2002 provided new hiring authorities which, coupled with those that already existed, have the potential for dramatically improving agencies' ability to get the right people in the right jobs at the right time.

OPM has a number of tools on its website to help agencies understand and implement human resources flexibilities that may serve their needs under the Recovery Act and the agency Chief Human Capital Officer can provide advice and assistance on using these flexibilities:

- The Human Resources Flexibilities and Authorities in the Federal Government handbook provides detailed information on staffing, benefits, compensation, work/life and other HR flexibilities. The Handbook can be accessed at: http://www.opm.gov/omsoe/hr-flex/HumanResourcesFlexibilities_and_AuthoritiesHandbook.pdf
- The Federal Hiring Flexibilities Resource Center provides guidance on hiring flexibilities and includes an interactive tool to help determine the appropriate flexibility based on

particular needs. The Resource Center can be accessed at: http://www.opm.gov/Strategic_Management_of_Human_Capital/fhfrc/default.asp

- The Hiring/Recruitment Video Library is a Web-based learning tool featuring vignettes on a number of hiring flexibilities, including direct hire, veterans' appointing authorities, and excepted service hiring. The Video Library can be accessed at: http://www.opm.gov/video_library/Recruitment/Hiring/Index.asp
- The Hiring Toolkit provides strategies, tools and techniques to help agencies improve their hiring processes. The Toolkit can be accessed at: http://www.opm.gov/hiringtoolkit/

When deciding which hiring flexibility to use, agencies should assess their needs in relationship to the duration of the funding. Therefore, they should strongly consider temporary or term appointments with durations consistent with the monies.

OPM will continue working closely and directly with agencies impacted by the Recovery Act so they understand the range of currently available human resources flexibilities and will partner with agencies to develop effective human capital strategies aimed at meeting program objectives under the Act.

To support the goals of transparency and accountability for activities carried out under the Act, OPM will also provide oversight so that agencies are exercising human resources flexibilities effectively, efficiently, and in accordance with merit system principles. For additional questions, please contact your agency's OPM Human Capital Officer or for other OPM questions please email generalinquiries@opm.gov.

3.15 Are there actions, beyond standard practice, that agencies must take with respect to identifying, measuring, and recovering improper payments made with Recovery Act funding?

Agencies should continue to use Appendix C to Circular A-123, Requirements for Effective Measurement and Remediation of Improper Payments, with respect to identifying, measuring, reporting, and recovering improper payments made with Recovery Act funding.

Agencies may want to consider performing risk-based payment sampling as part of pre-payment reviews for Recovery Act funds. For example, risk based sampling could include targeting high risk vendors, grantees, or payment types where payments were identified as erroneous during agency audits, single audits, or recovery audits. For agencies that measure their programs and activities in arrears, such pre-payment (or earlier post payment) reviews may better inform agencies on errors that they may be able to prevent before disbursement.

3.16 Do pre-existing programs and activities that received substantial Recovery Act funding have to re-risk assess for risk susceptibility?

A pre-existing program that received substantial Recovery Act funding would only have to re-risk assess if it had been previously identified as being low-risk. According to Part I, Paragraph E of Appendix C to Circular A-123, if a program experiences a significant change in legislation and/or a significant increase in funding level, agencies are required to re-assess the program's risk susceptibility during the next annual cycle, even if it is less than three years from the last risk assessment. Existing programs that are already classified as being susceptible to significant error (and received significant Recovery Act funding) should continue to conduct annual error measurements.

3.17 Do agencies need to error measure program outlays separately for non-Recovery Act and Recovery Act outlays?

No, agencies are not required to report a separate error measurement for Recovery Act outlays unless (1) the Recovery Act program is new (i.e., there is no equivalent non-Recovery Act program or activity) and (2) the agency has identified the program as being susceptible to significant improper payments. When preparing their annual measurement, agencies are encouraged to "isolate" or "flag" payments in their statistical sample that were funded by the Recovery Act and assess whether those errors were due to actions specific to Recovery Act implementation.

Section 4 – Budget Execution

4.1 Can you describe how this Section is organized?

Yes. This section is organized into the following categories: general guidance (sections 4.2 – 4.7); administrative and fixed costs (sections 4.8 – 4.10); apportionments (general guidance and transfers) (sections 4.11 – 4.18); agency reporting on SF 133s (section 4.19); and, a small miscellaneous category (sections 4.20 – 4.22).

4.2 Can you say where to find general guidance on budget execution?

Yes. OMB publishes general guidance on budget execution in OMB Circular A-11. Sections 120 and 121 address apportionments, and Section 130 addresses budget execution reporting. Here is a link to OMB Circular A-11.

http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc

In addition, OMB provided guidance relating specifically to the Recovery Act on February 25 in Bulletin No. 09-02, Budget Execution of the American Recovery and Reinvestment Act appropriations. The guidance was sent to the heads of all executive branch departments and agencies. Here is a link to the bulletin.

http://www.whitehouse.gov/omb/assets/bulletins/b09-02.pdf

OMB also issued Budget Data Request (BDR) 09-11, Inventory of American Recovery and Reinvestment Act TAFSs, on March 11. The BDR was sent to agency budget offices. Based on agency responses to the BDR, OMB may issue additional guidance in the form of a new Bulletin.

4.3 Can agencies co-mingle Recovery Act and non-Recovery Act funds?

No. To maximize transparency of Recovery Act spending required by Congress and the Administration, agencies must not co-mingle Recovery Act funds with other funds in apportionment requests they prepare for OMB; and, SF 133 budget execution reports. Within their financial systems, agencies must establish an internal fund code and separately track apportionments, allotments, obligations, and gross outlays related to Recovery Act funds.

Agencies in some cases may need to use Recovery Act funds in conjunction with other funds to complete projects. They may do so, but they must separately track and report the use of Recovery Act funds for these projects.

4.4 Will agencies always use newly established TAFSs to record and report Recovery Act financial activity?

No. The Recovery Act and Administration policy require Treasury to create and agencies to use new TAFSs to record and report Recovery Act financial activity. This requirement applies to both Division A and Division B of the Recovery Act. The Treasury Department Financial Management Service (FMS) has created more than 200 new TAFSs that receive budget authority from the Recovery Act. FMS working with agencies has also created 100 additional new TAFSs that will receive non-expenditure transfers or expenditure transfers.

The Act provided the Director of OMB with authority to waive the requirement, and the Director did so for 18 TAFSs.

An agency with a TAFS that receives Recovery Act funds "second hand" via non-expenditure transfer or expenditure transfer must comply with all applicable requirements in all sections of this guidance. These requirements also apply to "third hand" recipients; for example, a TAFS that receives Recovery Act funds transfers some or all of those funds to another TAFS (second hand recipient), and this TAFS then transfers funds to a third TAFS. Agencies have worked with FMS to create dozens of new TAFSs that will receive Recovery Act funds via transfers. Taking this action will make it easier for these agencies to keep the Recovery Act funds separate from all other funds.

4.5 Has FMS established every new TAFS needed in connection with the Recovery Act?

Yes. Between February 18 and March 11, FMS working with OMB provided agencies with about 300 new TAFSs needed in connection with the Recovery Act. The list is posted on the Budget Execution and Recovery Funding page of the Budget Community; the URL is

https://max.omb.gov/community/x/-4BeDw

OMB will revise the list from time to time if agencies or FMS find a need to create a new TAFS.

4.6 Some provisions of the Recovery Act provide supplemental budget authority for existing programs, projects, and activities. Will agencies have new or different reporting requirements – in addition to their normal or standard requirements – for these existing programs?

No.

4.7 Are agencies required to obligate Recovery Act funds prior to obligating non-Recovery Act funds?

No. This question only applies in cases when Congress appropriates Recovery Act funds to programs where Congress has previously appropriated funds. In those cases, agencies should determine the most appropriate sequence of obligation to maximize program efficiency. In

making this determination, agencies need to explore ways to effectively expedite recovery expenditures in a manner that does not compromise program objectives or increase the risk of unintended consequences (e.g., accounting and/or payment errors, waste, fraud, etc.)

4.8 Can agencies use Recovery Act funds to pay fixed costs?

In general, the answer is no. In many cases, agencies receive Recovery Act funds for a program, project, or activity for which Congress provided appropriations in a prior Act. In these cases, agencies should not use Recovery Act funds to pay fixed costs such as rent. For example, if an agency pays rent to the General Services Administration (GSA) from an existing appropriation, and provides space within the building for staffers who carry out Recovery Act activities, the agency should not pay GSA rent using the Recovery Act funds.

An agency should consult with OMB if it believes unusual circumstances related to a specific program, project or activity warrant considering an exception to this rule.

4.9 Can agencies use Recovery Act funds to pay administrative costs?

Sometimes. Agencies must exercise judgment and ensure that they comply with all applicable provisions in the Act when they pay for administrative costs. In general, agencies should not use Recovery Act funds to pay incidental administrative costs, e.g. paper for the copy machines. In addition, agencies should not generally use Recovery Act funds to pay for telecommunications services or IT desktop support services. Administrative costs generally correspond to the following object classes described in Section 83 of OMB Circular A-11:

Object Class	Object Class Name
111	Full-time permanent
113	Other than full-time permanent
115	Other personnel compensation
117	Military personnel
118	Special personal services payments
119	Total personnel compensation
121	Civilian personnel benefits
122	Military personnel benefits
130	Benefits for former personnel
210	Travel and transportation of persons
220	Transportation of things
231	Rental payments to GSA
232	Rental payments to others
233	Communications, utilities, and miscellaneous charges

Object Class	Object Class Name
240	Printing and reproduction
260	Supplies and materials

Agencies must exercise judgment in determining whether specific costs are administrative even if the object class in general is administrative. For example, agency costs for the supervision, inspection, and overhead of construction, maintenance, and repair projects, as well as costs for project design activities, might not be considered administrative. Agencies should contact their normal OMB representative if they have questions.

There are many provisions in the Act that cap the Recovery Act funds that agencies use for administrative costs. Agencies must ensure that they comply with all applicable provisions of the Act. Here are two examples:

> *"In addition to other available funds, of the funds made available to the Rural Development mission area in this title, not more than 3 percent of the funds can be used for administrative costs to carry out loan, loan guarantee and grant activities funded in this title…"*
>
> *"Provided further, That not more than 3 percent of funds provided under this heading may be used for administrative costs, and this limitation shall apply to funds which may be transferred to the FCC."*

4.10 Should agencies report administrative or incidental costs paid for by Non-Recovery Act funds?

No. Agencies must not report administrative or incidental costs paid for by Non-Recovery Act funds in any way that would make these costs look like Recovery Act funds. As noted elsewhere in this section, agencies must not co-mingle Recovery Act and non-Recovery Act funds.

4.11 How will OMB apportion a TAFS that has exclusively Recovery Act funds?

OMB will apportion a TAFS receiving Recovery Act funds the same way it apportions any other TAFS. In some cases, this will involve apportioning funds by time period (Category A). In other cases this will involve apportioning funds by project (Category B).

4.12 Will agencies need to prepare apportionment requests using special conventions for a TAFS that has Recovery Act and non-Recovery Act funds?

Yes. Agencies must ensure that their apportionment requests use discrete Category B projects for Recovery Act funds in a TAFS that has both kinds of funds. Using Category B projects in this manner provides a basis for agencies to separate obligations financed through Recovery Act

funds in their financial systems, to show the obligations separately in budget execution reports, and to submit other financial data on Recovery Act activities. An agency must ensure that its latest approved apportionment for any TAFS with both Recovery Act and non-Recovery Act funds uses one or more Category B projects that separate the Recovery Act funds before it incurs obligations.

In addition, apportionment requests for a TAFS that has both Recovery Act and non-Recovery Act funds must use a line split to separately show Recovery Act and non-Recovery Act budget authority. The budget authority is normally shown on Line 3A1; the stub should read "Recovery Act budget authority".

4.13 Is special treatment required with regard to authority from offsetting collections on an apportionment request for a TAFS that has both Recovery Act and non-Recovery Act funds?

Yes. When a TAFS has Recovery Act and non-Recovery Act funds, agencies must separately show authority from offsetting collections from Recovery Act funds on their apportionment requests. Agencies will use a line split value of "9" on the apportionment to do this, and will preface the line stub with the phrase "Recovery Act". Here are the lines that require the line split and "Recovery Act" stub:

Line Number	Description
3D1A	BA: Offsetting Collections - Earned, Collected
3D1B	BA: Offsetting Collections - Earned, Change in receivables from Fed sources
3D2A	BA: Change in unfilled customer orders - Advance received
3D2B	BA: Change in unfilled customer orders - Without advance from Fed sources
3D3	BA: Offsetting collections - Anticipated
3D4	BA: Offsetting Collections - Previously unavailable
3D5A	BA: Expenditure transfers from trust funds - Collected
3D5B	BA: Expenditure transfers from trust funds - Change in receivables
3D5C	BA: Expenditure transfers from trust funds - Anticipated

The reason to distinguish authority from offsetting collections that come from Recovery Act funds is to accumulate sufficient information on offsetting collections to calculate net outlays. FACTS II data that underlie the SF 133 reports identify obligations and gross outlays associated with Recovery Act funds. However, the FACTS II data cannot be used to determine the amount of collections associated with Recovery Act funding in a TAFS that has both Recovery Act and non-Recovery Act funding. To cross-check net outlays, OMB will compile obligations and gross outlays from FACTS II as well as authority from collections – as a proxy for actual collections – in the apportionments. As the authority from offsetting collections lines include cash and non-cash transactions, OMB may ask the agency at a later time for the portion of the lines that were actually realized.

4.14 Does a TAFS that receives any transfer in of Recovery Act funds need to follow all the guidance in this memorandum when reporting on Recovery Act funded activities?

Yes. TAFSs receiving non-expenditure transfers or expenditure transfers of Recovery Act funds have the same reporting requirements as any other TAFS that receives Recovery Act funds. In addition, as noted earlier in this section, these TAFSs have additional requirements with regard to their apportionments, allotments, or other mechanisms they use to track obligations to the TAFS that transferred the funds.

4.15 Is special treatment required on apportionment requests when a TAFS uses a non-expenditure transfer to shift funds to a different TAFS?

Yes. OMB Bulletin 09-02 automatically apportions a TAFS that receives non-expenditure transfers of Recovery Act funds to create separate Category B projects to track and report obligations financed from these funds. Agencies should consult with their OMB examining divisions to ask whether they should submit a separate apportionment request in these cases. A recipient of a non-expenditure transfer that plans to order goods or services from another government account must follow the guidance in the section below on expenditure transfers.

FMS processes all requests for non-expenditure transfers using its NET system, and provides this information to OMB on a weekly basis. OMB publishes reports on the Budget Community that show non-expenditure transfers; the URL is:

https://max.omb.gov/community/x/pwCwBQ.

4.16 Is special treatment required on apportionment requests for a TAFS that is involved in an interagency agreement?

Yes. As background, Section 130.9 in Circular A-11 uses the words "ordering agency \ ordering account" and "performing agency \ performing accounts" to describe the parties involved in interagency agreements. This guidance follows A-11 by also using the words ordering and performing.

Ordering account. An agency with a TAFS with Recovery Act funds that plans to order goods and services from another government account via expenditure transfer – whether the authority is from the Economy Act or other legislation – must first submit an apportionment request to OMB. The request must include at least one Category B project with a stub that starts with the phrase "Recovery Act Interagency Agreement". The purpose of this requirement is to acquire sufficient information to facilitate reconciliation between ordering agency obligations and performing agency obligations.

Performing account. Any performing TAFS that receives an expenditure transfer of Recovery Act funds must submit an apportionment request to OMB. The request must include at least one Category B project that the agency proposes to use to track and report the obligations financed

from the Recovery Act funds. Furthermore, a performing TAFS that receives a transfer of Recovery Act funds and then uses these same funds to order goods and services from another TAFS must inform the performing agency that the funding source is the Recovery Act. The performing agency must then submit an apportionment request to OMB that includes at least one Category B project that it will use to track and report the obligations financed from these funds.

4.17 Are there special reporting requirements for a "performing TAFS" when the "ordering TAFS" uses recovery funding?

Yes. To the degree practical, agencies should flag the use of Recovery Act funds when making new inter-agency agreements. OMB will publish a list of performing TAFSs on the Budget Community web site the week of March 22. The URL is

https://max.omb.gov/community/x/-4BeDw.

Performing agencies must ensure that they can separately record and report obligations and gross outlays financed from offsetting collections that originate from Recovery Act budget authority. This includes making sure that they use Category B projects to separate obligations financed through Recovery Act funds. The stubs for these Category B projects used in budget execution reports must start with the phrase "Recovery Act". While a performing account may not have specific Category B projects for each ordering accounts, it should use allotments or other means to track obligation activity to each ordering account. The requirements in this paragraph are not needed for budget execution, per se, but are attempting to leverage the budget execution framework to respond to the needs of Recovery.gov.

Performing agencies will report obligations and gross outlays in their budget execution reports and in other reports on Recovery Act activities. They may also report back to ordering agencies as part of normal inter-agency processes.

GSA and other performing agencies should begin to plan how to handle these requirements and modify inter-agency agreements or processing Interagency Payment and Collection (IPAC) transactions to help them fulfill these requirements.

4.18 Is there a best practice model agencies can follow when they have a TAFS that is a performing account that receives Recovery Act funds?

Yes. The transparency requirement necessitates that a clear line of sight be established between a TAFS that receives Recovery Act budget authority (the ordering account), a second TAFS that receives an expenditure transfer (the performing account), and a vendor that the performing account purchases goods or services from. In a best practice model, a performing account will take the following steps in its apportionments and in its systems to maintain this clear line of sight.

- Agencies that have a TAFS with authority to perform reimbursable work may use the TAFS to perform work financed from an ordering account that uses Recovery Act (RA) funds.

- An agency with a performing TAFS will submit an apportionment request to OMB that shows anticipated offsetting collections for each ordering TAFS that is anticipated to use Recovery Act funds. The agency will use judgment in identifying these TAFSs, and the amount of reimbursable income from each TAFS. The agency will use a separate line – 3D3, BA: Offsetting Collections – Anticipated – for each ordering TAFS.

- The agency will use a separate Category B project for each ordering TAFS that it expects will place an order using Recovery Act funds.

- OMB may provide a footnote that allows the agency to incur additional obligations without submitting a reapportionment if the TAFS realizes collections that exceed the collections provided on the anticipated line.

- When circumstances warrant it, the agency will submit reapportionment requests. For example, the agency may receive orders from additional TAFS that it did not originally think would place an order.

- The agency with the performing account will use a separate Category B project for each ordering TAFS that uses Recovery Act funds. The stubs for these projects will read, "Recovery Act Reimbursable Work from ##-####/####-####". [The # signs signify a TAFS, e.g. 21-X-0100 or 57-2009/2010-1300.]

- An agency with a performing account that has offsetting collections from both Recovery Act and non-Recovery Act sources will normally establish a separate Internal Fund Code in its Funds Control table and in other components of its financial system. Doing so will facilitate keeping these funds separate.

- An agency will include supplemental information that OMB needs to help speed up its review and approval processes. While this will vary, a common example is a brief description of the work to be performed.

4.19 Will agencies that receive Recovery Act funds need to take any special actions to report spending in FACTS II \ SF 133 budget execution reports?

It depends on whether the TAFS has only Recovery Act funds or a mix of Recovery Act funds and other funds. Agencies with a TAFS that receives only Recovery Act funds will have no special reporting requirements beyond what they normally do, i.e. reporting obligations by time period (Category A) or project (Category B). The stubs for Category B projects do not need to use special naming conventions, e.g. they do not need to start with the words, Recovery Act.

Agencies with a TAFS with both Recovery Act and non-Recovery Act funds must use Category B projects to show obligations incurred from Recovery Act funds. The stubs for each Category B project financed from Recovery Act funds must start with the words "Recovery Act".

4.20 Do Inspectors' General need to follow special rules in reporting their own Recovery Act spending?

Yes. Inspectors' General (IGs) will separately report obligations associated with oversight of Recovery Act programs. Following regular reporting practices, IGs will report independently of the Department or agency they oversee. The Recovery Act includes provisions that provide supplemental funding to some IGs to carry out additional oversight of activities funded by the Act. IGs will report these funds separately in their budget execution reports. IGs will also report other funds not provided through the Recovery Act that they otherwise use to monitor Recovery Act programs in their agencies. The purpose of these requirements is to provide the Administration with a basis to inform Congress and the public how much money IGs are obligating on oversight of Recovery Act funded activities.

4.21 Do agencies need to follow different processes in handling recoveries, upward adjustments, or downward adjustments of Recovery Act funds?

No. TAFSs funded exclusively from the Recovery Act do not need to follow different processes in handling of recoveries, upward adjustments, or downward adjustments. After processing requests and identifying the TAFSs that will have both Recovery Act and non-Recovery Act funds, OMB may issue additional guidance on this topic. The expectation is that very few TAFSs will include Recovery Act and non-Recovery Act funds.

4.22 Will OMB possibly ask for additional reporting beyond the other requirements described in this section?

Yes. OMB may ask for supplemental reporting about a given TAFS if circumstances in the future warrant it.

Section 5 – Grants and Cooperative Agreements

5.1 Are there actions, beyond standard practice, that agencies must take while planning for competitive and formula grant awards under Recovery Act?

Yes.

(1) Determining Grant Objectives and Evaluation Criteria for Award

Agencies should structure grants to result in meaningful and measurable outcomes that are consistent with agency plans and that promote the goals of the Recovery Act. The evaluation criteria for award should include those that bear on the measurement and likelihood of achieving these outcomes, such as, jobs creation and preservation.

(2) Competition

Although the Recovery Act calls on agencies to commence expenditures and activities as quickly as possible consistent with prudent management, this statement, by itself, does not constitute a sufficient justification to support award of a federal grant on a non-competitive basis. Agencies are expected to follow the same laws, principles, procedures, and practices in awarding discretionary grants with Recovery Act funds as they do with other funds. Agencies should review their internal policies with a goal towards promoting competition to the maximum extent practicable. In conducting this review, agencies may want to consider the appropriateness of limited competitions among existing high-performing projects versus full and open competitions.

(3) Existing Grants

Ultimately, agencies must determine what award method(s) will allow recipients to commence expenditures and activities as quickly as possible consistent with prudent management and statutory requirements. Agencies may consider obligating funds provided under the Recovery Act on an existing grant, including, but not limited to, a continuation or renewal grant. Because Recovery Act funds must be tracked and accounted for separately, supplements to existing agreements are not recommended as there is a greater risk that the grant recipient will be unable to track and report Recovery Act funds separately. Also, agreements must spell out the assignment of agency roles and responsibilities to fulfill the unique requirements of the Recovery Act. These include, but are not limited to, report development and submission, accurate and timely data reporting, and special posting requirements to agency web sites and Recovery.gov.

(4) Timeliness of Awards

Agencies need to assess existing processes for awarding formula allocations and announcing, evaluating and awarding discretionary grant opportunities to comport with the objective to make awards timely.

To enable timeliness of awards, agencies should engage in aggressive outreach to potential applicants to begin application planning activities, including the process for Central Contractor Registration (CCR) and obtaining a Dun and Bradstreet Universal Numbering System (DUNS) number. Outreach can also include efforts to update and validate existing CCR and DUNS registration data.

(5) Other Planning Activities

The following activities should also be part of the planning process for Recovery Act grants:

- Request an expedited "Recovery Act" Catalog of Federal Domestic Assistance (CFDA) number in OMB MAX at https://max.omb.gov/community/x/r4C2Dw for new Recovery Act programs or existing programs for which the Recovery Act provides for compliance requirements that are significantly different for the Recovery Act funding. Under this expedited process, OMB's review period is 3 business days unless the RMO notifies the agency through MAX that additional time is needed to review;
- Attach to the agency child page at https://max.omb.gov/community/x/r4C2Dw a list of existing CFDA program descriptions that will be modified during the next CFDA update cycle to reflect Recovery Act authorities, financial information, etc.;
- Work with managers and staff at all levels of the agency so that they can plan and secure the resources needed to implement the Recovery Act requirements;
- Coordinate with agencies with similar grant programs to determine if there are ways to consolidate resources and efforts during the planning, award, and post-award stages of the grant cycle; and
- Review reporting responsibilities outlined in Section 2 of this Guidance and initiate necessary planning and implementation.
- Follow interim final guidance in 2 CFR part 176 on using standard award terms in assistance awards funded in part or in whole with Recovery Act funds.

5.2 Are there actions, beyond standard practice, that agencies must take related to solicitation and evaluation of competitive grants awarded under Recovery Act?

Yes. Federal agencies must:

- Provide information in funding opportunity announcements and award notifications on Recovery Act-specific reporting requirements.
- Within twenty (20) days after enactment of the Recovery Act, agencies shall post funding opportunity announcements (i.e., "synopses') to Grants.gov. Information about specific requirements (e.g., use of funds, certification, data reporting, performance measures, etc.) under the Recovery Act should be in the full funding announcement unless a waiver is granted by the agency's RMO. The Grants.gov synopsis shall link to the full announcement on the agency website within thirty (30) days of enactment. In the interim, the synopsis should link to an agency instruction on when the full announcement is expected to become available.

- Consider weighting selection criteria to favor applicants for assistance with demonstrated ability to deliver programmatic result and accountability objectives included in Recovery Act.

5.3 What are the requirements for use of Grants.gov?

- For "find," agencies are required to post synopses to Grants.gov, consistent with the requirements in section 5.2 above.
- For "apply," agencies should follow the guidance in the OMB memorandum to agencies dated March 9, 2009, "Recovery Act Implementation – Improving Grants.gov and Other Critical Systems" (M-09-14). Note that all notifications for using alternate systems should me emailed to the E-gov office.

Agencies who currently use the "apply" function for Grants.gov must consult with OMB prior to initiating a separate solution for Recovery Act awards.

5.4 Are Federal agencies expected to initiate additional oversight requirements for grants, such as mandatory field visits or additional case examinations for error measurements, to comply with grant rules and regulations?

Yes. Agencies must take steps, beyond standard practice, to initiate additional oversight mechanisms in order to mitigate the unique implementation risks of the Recovery Act. At a minimum, agencies should be prepared to evaluate and demonstrate the effectiveness of standard monitoring and oversight practices.

(1) Performance Management and Accountability

Agencies must adapt current performance evaluation and review processes to include the ability to report periodically on completion status of the program or activity, and program and economic outcomes, consistent with Recovery Act requirements.

Agencies in consultation with the Inspectors General, shall establish procedures to validate the accuracy of information submitted on a statistical basis and/or risk based approach as approved by OMB.

(2) Internal Controls Assessment

Consistent with normal practices, agencies must use appropriate internal control assessments to assess the risk of program waste, fraud, and/or abuse. Using the aforementioned risk assessments, agencies must have defined strategies, developed with input from the Inspector General for the agency, to prevent or timely detect waste, fraud, or abuse.

Also, consistent with Section 3 of this Guidance, agencies should initiate additional measures, as appropriate, to address higher risk areas.

5.5 Are agencies expected to comply with existing administrative grants requirements?

Yes. Agencies are expected to follow administrative requirements as directed OMB Circular A-102, Grants and Cooperative Agreements with States and Local Governments, the agency's adoption of the grants management common rule; and OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Learning, Hospitals, and other Non-profit Organizations. (see 2 CFR part 215); and to enforce their recipients' compliance with their respective adoptions of the Grants Management Common Rule and 2 CFR part 215.

5.6 What audit tools will be used to drive accountability for Federal awards under the Recovery Act?

- Non-Federal entities (States, local governments, tribes, and non-profit organizations) are required by the Single Audit Act Amendments of 1996 (Single Audit) and OMB Circular A-133 to have an annual audit of their Federal awards (e.g., grant programs).
- Consistent with Section 3 of this Guidance, Federal agencies will perform a risk analysis of Recovery Act programs and request OMB to designate any high risk programs as Single Audit major programs, i.e., programs which must be tested in a particular year.
- In addition to single audits, OIGs will use risk assessment techniques where data is available to identify high risk programs and non-Federal entities to be targeted for priority audits, inspections, and investigations with faster turnaround reporting.
- OIGs will perform audits and inspections of their respective agencies awarding, disbursing, and monitoring of Recovery Act funds to determine whether safeguards exist to for funds to be used for their intended purposes.

5.7 What steps will be taken to make Single Audits effective in promoting accountability of Recovery Act grants?

- OMB will use the OMB Circular A-133 Compliance Supplement to notify auditors of compliance requirements which should be tested for Recovery Act awards. OMB will issue interim updates as necessary to keep Recovery Act requirements current.
- Offices of Inspectors General (OIGs) will reach out to the auditing profession and provide technical assistance and training as well as perform quality control reviews to ensure single audits are properly performed and improper payments and other non-compliance is fully reported. OIGs will perform follow-up reviews of Single Audit quality with emphasis on Recovery Act funds and report the results on Recovery.gov.

5.8 How will transparency be provided for the results of Single Audits?

- For fiscal years ending September 30, 2009 and later, all Single Audit reports filed with the Federal Audit Clearinghouse (FAC) will be made publicly available on the internet. A link will be provided from Recovery.gov.
- Federal agencies will prepare and submit to OMB synopses of single audit findings relating to obligations and expenditures of Recovery Act funding.

5.9 Are there terms and conditions, beyond standard practice, that must be included in competitive and formula grant agreements under Recovery Act?

Agencies must:

- Use the agency's standard award terms and conditions on award notices, where applicable, unless they conflict with the requirements of the Recovery Act. In the case where the Recovery Act requirement conflicts with an agency's standard award term or condition, the agency's award term or condition should be modified, as necessary, to ensure compliance with the Recovery Act requirement.
- Ensure other award terms needed to implement the agency/program-specific provisions and general provisions of the Recovery Act are included on awards. Note that OMB has issued standard award terms for agencies to use in implementing Sections 1512, 1605 and 1606 for grants, cooperative agreements and loans. Agencies must ensure that they use any terms and conditions that implement other Recovery Act provisions, where applicable and as appropriate, such provisions in Sections 1511, 1515, 1553, 1604, and 1609.
- Ensure that there is an award term or condition requiring first tier sub-awardees to begin planning activities, including obtaining a DUNS number (or updating the existing DUNS record), and registering with the Central Contractor Registration (CCR). Prime recipients and Federal agencies must establish mechanisms to meet Recovery Act data collection requirements. Agencies should work with prime recipients to ensure that DUNS and CCR requirements for first tier sub-awardees are met no later than the first time Recovery Act data requirements are due.
- Make clear that that any funding provided through the Recovery Act is one-time funding.
- Include the requirement that each grantee or sub-grantee awarded funds made available under the Recovery Act shall promptly refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds.

Section 6 – Contracts

6.1 Are there actions, beyond standard practice, that agencies must take while planning for contract awards under the Recovery Act?

The critical importance of the Recovery Act, and the funds it will make available to stimulate the American economy, require heightened management attention on acquisition planning in order to:

- Mitigate schedule, cost, and performance risk;
- Define contract requirements that deliver meaningful and measurable outcomes consistent with agency plans and the goals of the Recovery Act;
- Obtain maximum practicable competition;
- Maximize opportunities for small businesses to compete for agency contracts and to participate as subcontractors;
- Use supplies and services provided by nonprofit agencies employing people who are blind or severely disabled as provided in FAR Subpart 8.7;
- Expeditiously award contracts using available streamlining flexibilities;
- Apply sufficient and adequately trained workforce to responsibly plan, evaluate, award, and monitor contracts (see Section 6.6 and 6.7 below for further workforce guidance);
- Ensure an adequate number of qualified government personnel are available to perform inherently governmental functions during the acquisition life-cycle; and
- Provide appropriate agency oversight at critical decision points.

Key considerations during the acquisition planning process include the following:

(1) Contract Type Selection

FAR Part 16 addresses contract types. The objective of contract type selection and negotiation is to ensure reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. Agencies should emphasize the importance of selecting a contract type that supports requirements for meaningful and measurable outcomes consistent with agency plans for, and the goals of, the Recovery Act. Fixed-price contracts (FAR Subpart 16.2) provide maximum incentive for the contractor to control costs and perform effectively and impose a minimum burden upon the contracting parties. These contracts expose the government to the least risk. Fixed-price contracts can also accommodate market fluctuations or other contingencies, when appropriate, using economic price adjustments. The President's Memorandum of March 4, 2009, on "Government Contracting" established a preference for fixed-price contracts. Using other than a fixed-price contract may be appropriate but requires agencies to pay special attention to ensuring that sufficient qualified acquisition personnel are available to perform contract administration to mitigate the government's risk. When other than fixed-price contract types are proposed, agencies should provide appropriate oversight to ensure that all alternatives have been considered and that qualified staff is available for monitoring performance to mitigate risks. See FAR Section 5.705 for requirements for posting a rationale for any action that is not both fixed-price and competitive.

(2) Competition

Although the law calls on agencies to commence expenditures and activities as quickly as possible consistent with prudent management, this statement, by itself, does not constitute a sufficient justification to support award of a federal contract on a non-competitive basis. Agencies are expected to follow the same laws, principles, procedures, and practices in awarding non-competitive contracts with Recovery Act funds as they do with other funds. Competition is the cornerstone of our acquisition system. The benefits of competition are well established. Competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results. The President's Memorandum of March 4, 2009, on "Government Contracting" stated that it is the policy of the Federal Government that executive agencies shall not engage in noncompetitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards are in place to protect the taxpayer. Agencies should review their internal procurement review practices to ensure they promote competition to the maximum extent practicable. For instance, agencies might lower the dollar thresholds at which higher level review is required when a non-competitive acquisition strategy is contemplated using Recovery Act funds

To the maximum extent practicable, contracts using Recovery Act funds shall be awarded as fixed-price contracts (See FAR Subpart 16.2) using competitive procedures. These procedures include those identified under FAR Subparts 6.1, 6.2, and 16.505(b)(1) and Subsections 8.405-1 and 8.405-2. Existing fixed-price contracts that were competitively awarded may be used to obligate funds expeditiously.

See FAR Section 5.705 for requirements for posting a rationale for any action that is not both fixed-price and competitive.

(3) Determining Acquisition Objectives and Evaluation Criteria for Award

Agencies should structure acquisitions to result in meaningful and measurable outcomes that are consistent with agency plans and that promote the goals of the Recovery Act. The evaluation criteria for award should include those that bear on the measurement and likelihood of achieving these outcomes.

(4) Existing Contracts

If agencies obligate funds provided under the Recovery Act on an existing order or contract, including but not limited to a Government-wide Acquisition Contract (GWAC), multi-agency contract, General Services Administration (GSA) Federal Supply Schedule contract (including a Blanket Purchase Agreement under FAR Subpart 8.4), or agency indefinite-delivery/indefinite-quantity (ID/IQ) contract, they must be reported as “Recovery” actions per FAR Section 4.605(c) and Subpart 5.7.

(5) Interagency Agreements

When using assisted acquisitions, Interagency Agreements must spell out the assignment of agency roles and responsibilities to fulfill the unique requirements of the Recovery Act. These include, but are not limited to, report development and submission, accurate and timely data reporting, and special posting requirements to agency web sites and Recovery.gov.

(6) Small Business Participation

Small businesses play a critical role in stimulating economic growth and creating jobs. They are the engine of our economy, and provide creativity, innovation and technical expertise to support federal departments and agencies. Because support of small businesses furthers the economic growth and job creation purposes of the Recovery Act, agencies should provide maximum practicable opportunities for small businesses to compete and participate as prime and subcontractors in contracts awarded by agencies, while ensuring that the government procures services at fair market prices.

Small business set-asides allow for agencies to use competitive procedures to identify and select small businesses from the commercial marketplace to provide products and services to government agencies. See FAR Subpart 19.5. A number of additional small business authorities provide for agencies to make awards both competitively and noncompetitively to various types of small businesses to further the government's enacted socioeconomic policy goals. By doing so, these programs help agencies maximize small business participation in federal contracting which, in turn, helps small businesses maximize the economic benefits they provide to their communities.

Examples of Small Business Authorities

Program	Competitive Set-Aside Authority	Noncompetitive Award Authority
8(a) Business Development (BD)	FAR Subpart 19.8	FAR 19.805[4]
Historically Underutilized Business Zone (HUBZone) Small Businesses	FAR Subpart 19.13	FAR 19.1306
Service-disabled veteran-owned small businesses	FAR Subpart 19.14	FAR 19.1406

[4] Under the 8(a) BD Program, smaller contracts are typically awarded on a noncompetitive basis and larger contracts are awarded through competitive set-asides. The current 8(a) BD competition thresholds are $5.5 million for contracts assigned manufacturing industry codes and $3.5 million for all other contracts. SBA has procedures in place whereby its Director of Business Development, when requested, may permit an agency to conduct competitive procurements under the usual competitive thresholds. Pursuant to this authority, for contracts funded by the Recovery Act, an agency may request a blanket waiver from SBA for competitions for construction or information technology (IT) services below the competition thresholds. Agencies may also request specific waivers (i.e., on a case-by-case basis) for industries other than construction and IT. Requests should be sent to 8aBD2@sba.gov. Go to http://www.sba.gov/idc/groups/public/documents/sba_program_office/8abd_8a_competitive_waiver.pdf for additional information. For noncompetitive HUBZone awards, see FAR 19.1306. For noncompetitive SDVOSB awards, see FAR 19.1406.

(SDVOSB)		

Accordingly, to further the aims of the Recovery Act, agencies are strongly encouraged to take advantage of authorized small business contracting programs, which may include use of noncompetitive authorities, to create opportunities for small businesses. Specifically, agency program, acquisition, and small business offices should work together in planning acquisitions to identify: (1) requirements that can be met effectively with the help of small businesses and (2) the small business contracting authority that is best suited for a given requirement. Agencies' Offices of Small Disadvantaged Business Utilization and SBA's District Offices can assist with market research to help identify qualified and capable small business sources, both at the national and local level, including small businesses that may be able to respond quickly to solicitations and otherwise get their firms contract ready.

If, in making an award to a small business, a non-competitive procedure is used, such as an award made non-competitively under the 8(a) BD Program, agencies must follow the posting procedures at FAR Section 5.705(b). These procedures permit the public to see how the award of stimulus dollars to all contractors, including small business contractors, was conducted.

(7) Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) - AbilityOne

To maximize participation of Americans who are blind or severely disabled in our economic recovery, agencies must continue to purchase required goods and services on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, which are produced or provided by qualified nonprofit agencies employing such individuals. Agencies are encouraged to pursue additional opportunities to award contracts to AbilityOne sources as authorized by the Javits-Wagner-O'Day Act. See FAR Subpart 8.7 and www.abilityone.gov.

(8) Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

Agencies must continue to comply with the requirements of FAR Part 23 when acquiring supplies and services using Recovery Act funds.

(9) Contract Financing and Structuring Contract Deliverables

Agencies should give special attention to structuring contract deliverables to promote the economic stimulus goals (including expenditure timeframes) of the Recovery Act.

Contract financing is not a normal practice in commercial item fixed-price contracting. However, tight credit markets may make it difficult for some contractors to secure the cash flow they need to fund their operations. Increased management and oversight must be provided if government financing is provided to ensure accountability for these taxpayer funds.

Alternatives to contract financing include structuring contract line items to allow invoicing and payments based upon interim or partial deliverables, milestones, percent-of-completion, etc.

Ensuring consideration of contractor cash flow during acquisition planning will mitigate schedule and performance risks to the government and reduce costs to the contractor associated with financing in a tight credit market.

(10) Tribal Self-Determination Contracts

See Chapter 2 regarding tribal self-determination contracts.

6.2 Are there actions, beyond standard practice, that agencies must take related to solicitation of offers and award of contracts under the Recovery Act?

Yes. While the FAR generally provides the necessary policy and procedure for solicitation of offers and award of contracts, the Recovery Act imposes unique transparency requirements that change the pre-solicitation and award notice process, beyond standard practice. A recent change to the FAR provides special instructions to contracting officers on their use of the Government-wide Point of Entry (https://www.fedbizopps.gov) and the Federal Procurement Data System when Recovery Act funds are used. For instance, the FAR now requires:

- A rationale for using other than fixed-price or competitive approaches in award notices at https://www.fedbizopps.gov;
- A description at https://www.fedbizopps.gov of supplies and services that is clear and unambiguous to support public transparency and understanding of the procurement; and
- Special posting requirements for modifications as well as orders under task and delivery order contracts.

These FAR changes were issued in Federal Acquisition Circular (FAC) 2005-32, 74 FR 14621. See FAR Case 2009-010, American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Publicizing Contract Actions. The changes appear in the FAR at Section 4.605(c) and Subpart 5.7 which implement the instructions provided in OMB's initial implementing guidance issued February 18, 2009. For instance, the guidance previously in Sections 6.2(1)-(3) in the initial implementing guidance is now included in the FAR in Sections 4.605 and 5.704 supplemented with specific instructions available at

- https://www.fpds.gov in the "What's New" section under "American Recovery and Reinvestment Act" regarding entering the Treasury Account Symbol (TAS) in the *Description of Requirement* field in FPDS to identify any action (including modifications) funded in whole or in part by the Recovery Act. Agencies should coordinate with their budget/finance offices to identify the applicable TAS. Standard data validation practices currently required by the Office of Federal Procurement Policy (OFPP) assure the accuracy of contracting data, including data on contracts awarded under the Recovery Act; and
- https://www.fedbizopps.gov under "Buyer FAQs" regarding
    - identifying Recovery Act funded actions; and
    - special instructions for including using the "informational purposes only" statement when posting notices of proposed contract actions for orders to be

issued under task and delivery order contracts, a requirement imposed in the February 18, 2009 initial implementing guidance that is now at FAR Section 5.704(a)(2).

Additionally, the guidance previously in Sections 6.2(4) and (5) is now implemented in FAR Sections 5.705(a) and (b).

Agencies should ensure that their descriptions of procurements use language appropriate for a more general audience, avoiding industry-specific terms and acronyms without plain language explanations. Taxpayers, the media, and others are using our business systems to gain insight on how Recovery Act funds are being spent.

Please refer to Federal Acquisition Circular (FAC) 2005-32, 74 FR 14621, for FAR Case 2009-010, American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Publicizing Contract Actions. The changes are at FAR Section 4.605(c) and Subpart 5.7.

In general, if a question arises about whether to provide public disclosure of information, agencies should promote transparency to the maximum extent practicable when consistent with national security interests and restrictions on release of proprietary information or information covered under the Privacy Act.

Agencies should also give special attention to the following:

(1) Responsibility Determinations

FAR Part 9 addresses contractor qualifications. Agencies should place special emphasis on responsibility determinations and pre-award surveys. The award of a contract based solely on lowest evaluated price can produce a false economy, increasing performance, cost, and schedule risk. FAR Subpart 9.103 states that a prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors. The general standards for responsibility include that the prospective contractor have:

- Adequate financial resources to perform the contract or the ability to obtain them;
- The ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- A satisfactory record of past performance, integrity, and business ethics;
- The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; and
- The necessary production, construction, and technical equipment and facilities, or the ability to obtain them.

Additionally, the prospective contractor must be otherwise qualified and eligible to receive an award under applicable laws and regulations. Agencies are reminded that they should review the Excluded Parties List System (see FAR Subpart 9.404) before determining that a prospective contractor is responsible. When an acquisition poses unique risks, agencies may also use special

responsibility standards to mitigate the risk. If an Agency cannot obtain sufficient information to make a determination of responsibility, a pre-award survey should be requested unless the contract will have a fixed-price at or below the simplified acquisition threshold or will involve the acquisition of commercial items (see FAR Subsection 9.106-1).

(2) Acquisition Flexibilities

Agencies should use authorized acquisition flexibilities as appropriate to avoid unnecessary delays in awarding contracts with Recovery Act funds. See Table below. Agencies are cautioned that the Recovery Act does not independently trigger use of emergency procurement authorities in FAR Part 18. These authorities are triggered in limited, statutorily identified, circumstances, such as in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States. See FAR 18.001. Unless one of these circumstances exists, the special emergency authorities in FAR Part 18 shall not be used.

Generally Available Acquisition Flexibilities
A Quick Reference

Small Dollar Acquisitions under the Simplified Acquisition Threshold (SAT) ($3,000 to $100,000)

- ✓ Various flexibilities are provided in connection with publicizing -- e.g., an oral solicitation may be efficient for actions up to $30,000 & other actions for which there is an exception to notice; response time may be less than 30 days provided a response time is reasonable (FAR 5.101, 5.202, 5.203, 13.106-1).

Acquisitions under the test program for commercial items
($100,000 to $5,500,000)

- ✓ Acquisition generally may be treated like a purchase under the SAT, with certain exceptions (see FAR Part 13.501)

Commercial Item Acquisitions
(over $5,500,000)

- ✓ FAR Part 12 policies & procedures apply, including optional streamlined procedures for evaluation & solicitation.
- ✓ Wait period after notice & before issuance of solicitation may be reduced (FAR 5.203(a)).
- ✓ Based on circumstances, the contracting officer may allow for fewer than 30 day response time for receipt of offers (FAR 12.205, 5.203(b)).

Non-commercial item acquisitions
(over $100,000)

- ✓ Some acquisitions of non-commercial items may qualify to use FAR Part 12 (FAR 12.102(f) & (g)).
- ✓ Offerors may be allowed to give oral presentations (FAR 15.102).

(3) Davis-Bacon Act and Service Contract Act.

The Davis-Bacon Act and Service Contract Act apply to contract actions using Recovery Act funds. Agencies must follow the same laws, principles, procedures, and practices in awarding contracts with Recovery Act funds as they do with other funds.

6.3 Are there actions, beyond standard practice, that agencies must take related to the monitoring of contracts under Recovery Act?

Agencies must provide for appropriate oversight of contracts to ensure outcomes that are consistent with and measurable against agency plans and goals under the Act. It is critical that agencies evaluate their workforce needs so that they are able to appoint qualified Contracting Officers, Contracting Officer Technical Representatives (COTRs), and Program Managers with certification levels appropriate to the complexity and risk of Recovery Act projects. In addition, agencies should actively monitor contracts to ensure that performance, cost, and schedule goals are being met, including:

- Ensuring that incentive and award fees are effectively administered. (For further guidance, see the OFPP memorandum entitled *Appropriate Use of Incentive Contracts*, 12/4/07);
- Implementing quality assurance procedures established for the contract;
- Documenting timely inspection and acceptance of deliverables;
- Promptly using all available tools to identify and remedy deficiencies related to contractor performance, cost, and schedule (e.g., Quality Assurance Surveillance Plans, cure notices, show cause letters); and
- Completing timely contractor performance evaluations that accurately reflect the contractor's actual performance, supported by appropriate documentation.

6.4 Are there terms and conditions, beyond standard practice, that must be included in contract agreements under the Recovery Act?

Yes. The Federal Acquisition Regulation (FAR) has been changed to implement contract-related Recovery Act requirements (see Appendix 8). These changes were implemented through interim rules in FAC 2005-32, 74 FR 14621. These FAR changes implement the following sections of Division A of the Recovery Act:

- Section 1605 – FAR Case 2009-008, American Recovery and Reinvestment Act (the Recovery Act) – Buy American Requirements for Construction Material;
- Section 1512 – FAR Case 2009-009, American Recovery and Reinvestment Act (the Recovery Act) – Reporting Requirements;
- Sections 902, 1514, and 1515 – FAR Case 2009-011, American Recovery and Reinvestment
  Act (the Recovery Act) – GAO/IG Access; and
- Section 1553 – FAR Case 2009-012, American Recovery and Reinvestment Act (the Recovery Act) – Whistleblower Protections.

Additionally, FAC 2005-32 includes FAR Case 2009-010, American Recovery and Reinvestment Act (the Recovery Act) – Publicizing Contract Actions. This case provides special instructions to contracting personnel regarding entering Recovery Act funded actions in the Federal Procurement Data System (FPDS) and publicizing actions at the government-wide point of entry (GPE) (https://www.fedbizopps.gov).

6.5 Are there actions, beyond standard practices, that agencies must take related to oversight and audit of contracts awarded under Recovery Act?

Agencies already have in place processes and procedures to continuously monitor and improve the effectiveness of internal control associated with their programs. In light of the Administration's commitment to high levels of accountability and transparency, special attention should be given to maintaining strong internal controls over Recovery Act program funds. High risk associated with the award and expenditure of Recovery Act program funds, merit increased oversight by the Agency. In addition, the Recovery Accountability and Transparency Board, established by the Act, Congress and the Office of Management and Budget will oversee and monitor implementation of the Recovery Act through periodic reporting on the use and expenditure of funds. Reporting will be in a variety of areas including:

- Progress against program schedule and performance objectives;
- Qualification and number of acquisition, grants and program management staff
- Use of competition;
- Timeliness of awards; and
- Dollars obligated and expended

Agencies should identify any special reporting requirements required by the Act and take action to ensure the information will available for timely reporting.

Agencies are reminded that proper documentation must be maintained for each contract award. FAR Part 4 prescribes policies and procedures related to the proper documentation of contract files.

6.6 We know we will need more acquisition people to carry out our agency's responsibilities under Recovery Act. How do we meet this need?

Once you've determined your workforce needs, determine if there are agency resources that can be reallocated. If there are immediate, temporary needs that cannot be filled from within your agency, OFPP and the Federal Acquisition Institute can assist in identifying human capital and other resources. Assistance could be in a variety of forms, such as interagency collaboration, details, or teaming.

If you identify a need for short-term supplemental acquisition personnel, please consult with your agency Chief Human Capital Officer (CHCO) when planning how to meet your agency human capital needs. Also consult with your OMB representative. Below is guidance that might be helpful in hiring additional temporary or term employees quickly.

- Re-hiring Federal retirees. The GSA Modernization Act (P.L. 109-313) amended the OFPP Act with provisions relating to reemployment of retired acquisition-related professionals (defines as those in the GS-1102 and GS-1105 series and other series with significant acquisition-related duties). The OFPP memorandum of Sept 4, 2007, *Plans for hiring reemployed annuitants to fill acquisition-related positions* http://www.whitehouse.gov/omb/procurement/workforce/090407_reemployed.pdf provides details on how to use this authority to re-hire retired Federal professionals without impacting their annuity. The authority includes special provisions for temporary emergency need and provided your agency has documentation for each annuitant, your agency head can approve multiple people for hiring at a time. If your agency has not already developed a plan for this authority, consult with your CHCO on building the plan, obtaining approval, and implementation.

- Direct Hire Authority. The Services Acquisition Reform Act (P.L. 108-136) authorized direct hire authority for civilian agencies. Once an agency head determines there is a shortage of acquisition professionals (which includes personnel in the GS-1102, GS-1105, and other series with significant acquisition-related duties), the agency can announce jobs, rate applications, hold a large-scale event with agency personnel to conduct interviews and make offers the same day as interviews. If your agency has not already developed a plan for this authority, consult with your CHCO on building the plan, obtaining approval, and implementation.

- Hiring Veterans. Based on the Veterans' Recruitment Appointment (VRA) Authority (P.L. 107-288) and 5 CFR 307, agencies may also identify and rapidly hire qualified professionals (through the GS-11 or equivalent grade). This is a non-competitive appointment authority that your CHCO can help you use.

- Hiring Persons with Disabilities. Using Schedule A appointments as outlined in 5 CFR 213, agencies may identify and rapidly hire qualified professionals with disabilities. This is a non-competitive appointment authority that your CHCO can help you use.

For more comprehensive guidance on hiring flexibilities, please consult with your CHCO who can guide you through OPM's Human Resources Flexibilities and Authorities in the Federal Government handbook at: http://www.opm.gov/omsoe/hr-flex/HumanResourcesFlexibilities_and_AuthoritiesHandbook.pdf.

If multiple agencies are interested in hiring a substantial number of professionals under any of these authorities, OFPP and the CAOC may consider facilitating a large-scale recruitment initiative to identify interested candidates. OFPP will reach out to agencies shortly to determine the interest and need for a coordinated activity.

6.7 Do we need to separately track contracting officer warrants issued for Recovery Act activities?

To support human capital workload analysis and ensure data are available for any potential oversight or audit activity, developing the ability to identify any new contracting officer warrant authority issued in support of the Recovery Act is advisable. The same advice applies for any changes in existing contracting officer warrants.

Section 7 – Loans and Loan Guarantees

7.1 What actions, beyond standard practice, must agencies take while planning for awarding loans and loan guarantees under Recovery Act?

Consistent with standard agency practices, Federal credit policies under OMB Circular A-129, and the Administration's commitment to accountability and transparency, planning and administration of loan and loan guarantee awards pursuant to the Recovery Act is critical to:

- Optimize policy goals and minimize risk;
- Ensure awards are consistent with requirements outlined the Presidential Memorandum issued March 20, 2009, maximizing programmatic and Recovery Act goals consistent with other statutory or regulatory requirements,
- Ensure adequate programmatic oversight and management; and
- Make information available to the public, consistent with the Recovery Act, as required through this and other guidance.

In addition to the transparency provisions, consistent with statutory and regulatory requirements, standard agency practices, and Federal credit policies under OMB Circular A-129, key considerations during the planning process include the following areas:

(1) Compliance with Statutory Provisions

Agencies should evaluate specific program provisions, and incorporate necessary information collection and other requirements into opportunity notices, applications, award agreements, and processes to ensure adequate oversight and management, and compliance with any unique provisions under the Recovery Act.

(2) Competition

In accordance with the President's Memorandum of March 20, 2009, on "Ensuring Responsible Spending of Recovery Act Funds," agencies shall take steps to ensure that Recovery Act funds are expended for projects that further the job creation, economic recovery, and other purposes of the Recovery Act. In this same vein, in accordance with the President's memorandum, agencies shall ensure that Recovery Act funds are <u>not</u> used for projects that (1) are prohibited by Section 1604 of Division Act of the Act, (2) are similar to the projects described in Section 1604, or (3) are imprudent or otherwise do not further the job creation, economic recovery and other purposes of the Act. Moreover, consistent with the President's Memorandum of March 4, 2009, on "Government Contracting," agencies shall rely on competitive processes (and use noncompetitive processes only in those circumstances where their use can be fully justified and where appropriate safeguards have been put in place to protect the taxpayer). Finally, agencies shall ensure that other requirements are carried out in a manner that is consistent with all applicable statutes and regulations, as well as OMB guidance (if an agency thinks that it may be necessary for the agency to depart from OMB guidance in order to implement the Recovery Act,

please bring this issue to the attention of OMB's budget representative so that it can be discussed).

(3) Financial Assistance Objectives and Evaluation Criteria

Agencies should develop specific performance goals and target measures prior to developing a funding opportunity notice for loan and loan guarantee awards. Agencies shall obtain sufficient information from applicants, to evaluate the degree to which the Federal assistance would meet the desired program outcomes in making award decisions. Where competition is permitted by program authorization, agencies shall publish criteria for determining the best use of funds for each opportunity notice.

(4) Performance Measure, Accountability, and Reporting

Agencies should also establish systems or other processes using existing systems to capture, validate, evaluate, and report information regarding the loan and loan guarantee award to periodically assess and report performance against expected results, consistent with Recovery Act reporting requirements. Information may be from borrowers, lenders or other relevant sources. Such systems or processes may include development of a standard format for award recipients to report summary information on the award and use of funds, and making such information available as required under this guidance. Reviews of spending shall be designed to proactively identify and minimize risk.

7.2 What are the requirements related to loan and loan guarantee announcements under the Recovery Act?

Opportunity notices for awards made pursuant to the Recovery Act must include criteria for eligibility, evaluation criteria, terms and conditions, and contact information. Agencies may use the GovLoans.gov web portal in conjunction with agency websites and existing agency marketing and outreach initiatives to assure public awareness of loan and loan guarantee availability under the Recovery Act. For more information on announcements of funding for loans and loan guarantees through GovLoans.gov, please contact the GovBenefits.gov program management office at (202) 693-4219, or email GovBenefits@dol.gov.

7.3 Are Federal agencies expected to initiate additional requirements related to the implementation and monitoring of loans and loan guarantees under Recovery Act?

Yes. Agencies must take steps, beyond standard practice, to mitigate the unique implementation risks of the Recovery Act. At a minimum, agencies should be prepared to evaluate and demonstrate the effectiveness of standard monitoring and oversight practices.

(1) Performance Management and Accountability

Agencies may need to adapt current performance evaluation and review processes to report periodically on completion status of the program or activity, and program and economic outcomes, consistent with Recovery Act requirements. Agencies in consultation with the Inspectors General, shall establish procedures to validate the accuracy of information submitted on a statistical basis and/or risk based approach as approved by the Office of Management and Budget (OMB).

(2) Internal Controls Assessment

Consistent with normal practices, agencies must use appropriate internal control assessments to assess the risk of program waste, fraud, and/or abuse. Using the aforementioned risk assessments, agencies must have defined strategies to prevent or timely detect waste, fraud, or abuse, developed with input from the Inspector General for the agency. Consistent with Section 3 of this Guidance, agencies should initiate additional measures, as appropriate, to address higher risk areas.

7.4 Are there terms and conditions, beyond standard practice, that must be included in loan and loan guarantee agreements under Recovery Act?

Agencies must ensure receipt of funds is made contingent on recipients meeting the reporting requirements in Section 1512 of the Act.[5] Section 1512 covers awards that are directly funded by Recovery Act funds, including direct loans, and 100% guaranteed loans funded through the Federal Financing Bank. In addition, agencies shall establish requirements that recipients of awarded funds made available under the Recovery Act shall promptly refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds. Other Recovery Act requirements may apply. For example, as outlined in the Presidential Memorandum, *Ensuring Responsible Spending of Recovery Act Funds,* issued March 20th, which directs agencies to not provide funding for projects of the type described in Section 1604 of the Recovery Act, as well as those that are similar to those described in 1604, as well as other projects that are imprudent or that do not further the job creation, economic recovery, and other purposes of the Recovery Act. agencies must have terms that funds are not used for prohibited purposes, and other types of imprudent purposes.

7.5 Are there actions, beyond standard practices, that agencies must take related to oversight and audit of loan and loan guarantees awarded under Recovery Act?

While Recovery Act does not mandate specific requirements, additional steps beyond standard practice, may need to be taken to mitigate the unique implementation risks. At a minimum, agencies should be prepared to evaluate and demonstrate the effectiveness of standard

[5] OMB and Federal agencies are working to develop a standard term and condition that applies to Section 1512 reporting, and other requirements of the Recovery Act. See Section 2.10 of this guidance for more information.

monitoring and oversight practices. Also, consistent with Section 3 of this Guidance, agencies should initiate additional measures, as appropriate, to address higher risk areas.

7.6 What audit tools will be used to ensure accountability for Federal loans and loan guarantees under the Recovery Act?

- OIGs will perform audits and inspections of their respective agencies awarding, disbursing, and monitoring of Recovery Act funds to determine whether safeguards exist to ensure the funds are used for their intended purposes.
- Non-Federal entities (States, local governments, tribes, and non-profit organizations) are required by the Single Audit Act Amendments of 1996 (Single Audit) and OMB Circular A-133 to have an annual audit of their Federal awards (e.g., grant programs).
- Consistent with Section 3 of this Guidance, Federal agencies will perform a risk analysis of Recovery Act programs and request OMB to designate any high risk programs as Single Audit major programs, i.e., programs which must be tested in a particular year.
- In addition to single audits, OIGs will use risk assessment techniques where data is available to identify high risk programs and non-Federal entities to be targeted for priority audits, inspections, and investigations with faster turnaround reporting.[6]

7.7 How will transparency be provided for the results of Single Audits?

- For fiscal years ending September 30, 2009, and later, all Single Audit reports filed with the Federal Audit Clearinghouse (FAC) will be made publicly available on the internet. A link will be provided from Recovery.gov.
- Federal agencies will prepare and submit to OMB synopses of single audit findings relating to obligations and expenditures of Recovery Act funding.

[6] Single audits normally are not received until at least 9 months after the end of the non-Federal entity's fiscal year. OIG audits can be completed and reported on more of a real time basis.

APPENDICES

Appendix 1 – Detailed Instructions on Transmitting Materials

This appendix currently includes data transmission instructions for the following near-term information flows: Major Communications (Section 2.2), Funding Notifications (Section 2.3), and Financial and Activity Reports (Section 2.4).

For all Major Communications, Funding Notifications, and Financial and Activity Reports, agencies are required to provide a feed (preferred: Atom 1.0, acceptable: RSS) of the data to enable content delivery via subscription. The required data can either be supplied in the feed, or the feed can point to a file at the agency using the convention noted below. If an agency is immediately unable to publish feeds, the agency should post each near term data flow to a URL directory convention suggested below: www.agency.gov/recovery/year/month/date/reporttype. For example, HUD would be expected to post at the following URLs:

- Major Communications: www.HUD.gov/recovery/2009/02/16/comms
- Funding Notifications: www.HUD.gov/recovery/2009/02/16/notification
- Financial and Activity Reports: www.HUD.gov/recovery/2009/03/01/financial

In addition to posting the files either via feed or the URL structure, agencies are also required to email the files to the following email address: recoveryupdates@gsa.gov. Emails should have a subject in the following format: Official Agency Abbreviation, Report Type. For example:

- HUD, Major Communications
- HUD, Funding Notifications
- HUD, Weekly Report #X

Notes: (1) The body of the email should include the appropriate completed template as an attachment and should include the name, title, and contact information for the submitter. Templates for these files can be found at https://max.omb.gov/community/x/doC2Dw; (2) With respect to the process for agencies data submissions described above, OMB is currently testing alternatives to the current email submission process including a web-based interface. Further guidance on this is forthcoming.

Major Communications: Agencies are asked to submit major announcements for potential posting as 'News' on Recovery.gov. The announcements should be written in the normal agency press release format, and include a short summary paragraph in the following format:

PRESIDENT OBAMA ANNOUNCES ECONOMIC ADVISORY BOARD

February 17, 2009 – President Barack Obama today signed an executive order establishing the new Economic Recovery Advisory Board. Modeled on the Foreign Intelligence Advisory Board created by President Dwight D. Eisenhower the Board will provide an independent voice on economic issues and will be

charged with offering independent advice to the President as he formulates and implements his plans for economic recovery.

Data elements for the Major Communications feed should include:

Major Communications Data: (Based on Recovery Act Guidance)		
Data Elements	**Description**	**Field Type**
Headline	Short title of communication	varchar(45)
Hyperlink	Link to communications	varchar(250)
Communication Type	Type of Major Communication (Press Release, Video, Press Event, Other)	varchar(45)
Summary	Short (no more than 5 sentences) overview of the main communications points	Up to 65535 characters
Body	Text of Major Communication	Up to 65535 characters
Time/Date	Date and time of communication	MMDDYYYY HH:MM
Tags	Additional citizen friendly tags that can be used on Recovery.gov to help present the news items	varchar(45)

Funding Notification Report: As required by Section 2.3, Agencies should provide Funding Notification information as soon as it becomes available. There are two components of the Funding Notification Reports, one for information in which the recipient and their geographic location is known, and the other for solicitations or other announcements in which the recipient is unknown. Agencies must provide the "required" data elements for all reports, and must provide as many of the data elements labeled as "If known" as possible.

For funding announced to the press or released to Congress, the funding notification should be submitted immediately in as much detail as is known. For funding announced through a series of small announcements – for instance solicitations posted to FedBizOpps.gov – these notices can be aggregated and sent in no less than every 48 hours after the notices are made available publicly. In addition, solicitation amounts should be aggregated if publication of an individual amount could compromise award negotiations.

Information on these reports should be cumulative – so additional rows should be added to the spreadsheet as additional notifications entered.

Agencies should use the existing Formula Block Grant Allocations template and process through the April 7th. The new template will be available by COB on April 7th, and should begin being used immediately. The templates and data definitions for the updated Funding Notifications Report can be found here: https://max.omb.gov/community/x/doC2Dw.

Weekly Financial and Activity Reports: As required by Section 2.4, obligation and gross outlay data is to be reported no less frequently than weekly, with Friday's data available no later than

the following Tuesday. Required amounts should be reported as zero if unknown at the time of reporting.

Agencies should use the existing template and process for the April 7th report. The new template will be available by COB on April 7th, and should be used for the report due the week of April 13th. The templates and data definitions for the Weekly Financial and Activity Report can be found here: https://max.omb.gov/community/x/doC2Dw.

Note on Federal Solicitation Data: The Recovery Act requires that Recovery.gov include links to contract and financial assistance solicitations. Contract solicitations will be published through the Federal Business Opportunities website (www.fbo.gov) and Federal financial assistance solicitations will be published through Grants.gov. The legislation does not state any specific data field requirements for contract or financial assistance solicitations to be presented on Recovery.gov.

Appendix 2 – Agency Recovery Related Web Pages

As discussed in Section 2.12 of this guidance, agencies are not required to develop ***new*** websites dedicated to American Recovery and Reinvestment Act (Recovery Act) efforts. Each agency should dedicate a page of its primary website to Recovery Act activities (entitled "[Insert Agency Name] Information Related to the American Recovery and Reinvestment Act of 2009". Those pages must be consistently identified with a URL that identifies the key entry page to that information with a "recovery" standard extension, i.e. www.agency.gov/recovery. Agencies must create their recovery related page within one week of the issuance of this guidance.

This section outlines specific requirements and best practices for agency recovery related web pages.

Requirements

In order to facilitate transparency to the public, agencies must follow some minimum common formats for their Recovery Act pages. These include:

- Page titles. To help the public find the information via commercial and government search engines, agencies should use a consistent page title for their main Recovery Act page ("Agency X Information Related to the American Recovery and Reinvestment Act of 2009").

- Main headings. Each agency's Recovery Act key entry page should include the following main headings:

    - "Overview of the American Recovery and Reinvestment Act of 2009 (Recovery Act). The American Recovery and Reinvestment Act of 2009 (Recovery Act) was signed into law by President Obama on February 17th, 2009. It is an unprecedented effort to jumpstart our economy, create or save millions of jobs, and put a down payment on addressing long-neglected challenges so our country can thrive in the 21st century. The Act is an extraordinary response to a crisis unlike any since the Great Depression, and includes measures to modernize our nation's infrastructure, enhance energy independence, expand educational opportunities, preserve and improve affordable health care, provide tax relief, and protect those in greatest need."

    - "Implementing the American Recovery and Reinvestment Act of 2009 (Recovery Act)". Agencies should include a short paragraph or bullets giving an overview of implementation of the Recovery Act for your agency.

    - "Agency Plans and Reports". This section should include agency plans and reports as required by this guidance, the Recovery Act, or as determined by the agency. This includes agency and program specific reports required by the Recovery Act.

- "Learn more about our programs". Agencies should use this section to highlight program plans and other programmatic activities. There are no specific formatting requirements for this section.

- Prominent link to Recovery.gov. Agencies should include the "Recovery.gov" graphic prominently on their Recovery pages, linked to www.recovery.gov. Agencies can find the recovery graphic at https://max.omb.gov/community/x/7QCtDw.

- Legislation. Agencies should include a link to the final legislation on their main Recovery page.

- How to Apply. Agencies should have prominent links to Grants.gov and FBO.gov so that people and entities that want to apply or bid for grants, contracts, loans or loan guarantees have a clear and consistent avenue to learn more and act.

- Link to agency Inspector General (IG) website. Include a link to the IG's websites to allow for fraud reporting and easy access to IG reports.

- Transparency & reporting. Agencies will also be using the web for transparency and reporting that is required for compliance with the Recovery Act. Please see Appendix 1 for more information.

Best practices

Agencies should have a prominent link to their Recovery Act key entry page from their home page and from other relevant sections of their site where visitors are likely to look for this information. For example, agencies should link to their Recovery Act section from their "Performance and Budget" page and their "Grants" page, where applicable. Agencies should also link to their Recovery Act page from relevant program areas that are receiving funding from Recovery Act.

- Content should be written in plain language and follow government-wide best practices for plain language (see: http://www.usa.gov/webcontent/managing_content/writing_and_editing.shtml).

- Agencies should ensure that all content, including printable reports, is accessible to people with disabilities and meets requirements of Section 508 of the Rehabilitation Act of 1973 as well as any agency specific Section 508 procedures. Agencies should ensure that large documents are presented in a way for users to easily scan their contents and download them.

- To ensure maximum transparency and accountability, agencies should provide contact information for the person or office responsible for maintaining their agency's Recovery Act content. Agencies should also provide contact information for the office of the senior accountable agency official responsible for Recovery Act activities.

- As they develop their web content, agencies should follow general government-wide web best practices developed by the Federal Web Managers Council, published on WebContent.gov: http://www.usa.gov/webcontent/reqs_bestpractices/best_practices.shtml

Appendix 3 – Agency and Program Data Elements

Recovery.Gov Agency and Program Plan Requirements

1. Process for Submissions of Agency and Program Plans

(1) Submission of Plans. Agencies should post Word files of their agency and program plans to https://max.omb.gov/community/x/hgIOEQ and send via email to their OMB contacts no later than May 1st. Agencies should work with their OMB contacts well in advance of the May 1st deadline on their draft plans including measures, funding tables, milestones, etc.

(2) Entering Plan Information to Government-Wide System. Agencies should also enter information from agency and program plans into government-wide system, similar the PARTWeb application, by May 1st. Some information entered into the tool may replace the need for this information to also be included in the Word file submissions (e.g. funding tables). This tool can be accessed at https://max.omb.gov/community/x/hgIOEQ beginning the week of April 6th.

(3) OMB Review. OMB will review agency and program plans and work with agencies to finalize by May 15th. Once a plan is approved, OMB will save the plan to a separate section on the MAX community site. Agencies are responsible for incorporating changes/updates into centralized tool based on final resolution of plans.

(4) OMB Final Approval. OMB will provide final approval of information in the government-wide system for submission to the Recovery Accountability and Transparency Board for publishing on Recovery.gov by May 15th.

(5) Agency Publishing. Agencies are responsible for publishing their OMB-approved agency and program plans on their agency sites. Agencies must check ensure consistency with information in government-wide system.

2. Required Data Elements

I. Agency-Wide Recovery Plan for Recovery.gov (Q2.7 of Guidance)		
Data Field	**Field Type**	**Description of Data Element**
Agency ID		MAX ID for Agency (will be auto-populated)
Agency Name	Characters (250)	
Broad Recovery Goals	Characters (4000)	Describe the Agencies broad recovery goals in terms of the American Recovery and Reinvestment Act of 2009 including outputs, outcomes or expected efficiencies.
List of Recovery Programs within Agency	Multiple entries Parent-child to program specific plans	List each Program that is receiving money from the recovery Act. Each Program will be required to have its own program plan in the section below.
Funding Table	See Part 2	See Part 2 of this Appendix for detailed funding table. This funding table will capture the agency plan for obligations and gross outlays. Actual funding will be captured through agency financial reporting.
Competition on Contracts (excludes contracts under grants)	Characters (4000)	The agency shall review its past competition achievements and describe the steps taken and planned to maximize competition wherever practicable for ARRA-funded contracts. The discussion shall include a projection of the expected rate of competition based on anticipated ARRA dollars (not numbers of contracts) and the rationale for the projection. If the agency projects a decline in the rate of competition, the plan shall address steps to be taken by fiscal quarter to address this. Agencies should achieve increased competition rates over time.
Contract Type (excludes contracts under grants)	Characters (4000)	The agency shall review its use of fixed-price contracts as a % of all dollars spent and describe the steps taken and planned to maximize the use of fixed-price contracts wherever practicable for ARRA-funded contracts. The discussion shall include a projection of the expected use of fixed-price contracts based on anticipated ARRA dollars (not numbers of contracts) and the rationale for the projection. If the agency projects a decline, the plan shall address steps to be taken by fiscal quarter to address this. Agencies should achieve increased use of fixed-price contracts over time.

Description of Agency accountability mechanisms.	Characters (4000)	Describe how the agency will review performance results and engage agency senior leaders, including holding managers and strategic partners accountable for achieving goals and mitigating risks.
II. Program-Specific Recovery Plan for Recovery.gov (Q 2.8 of Guidance)		
Does this program align with an existing PART program?	Y/N	Choose PART from pick list.
Does this program align with an existing CFDA program?	Y/N	Choose CFDA from pick list.
If it does not correspond to existing PART or CFDA please enter in Program Title	Characters (4000)	Enter in non-existing program title or pre-populate with customer's choice of title using CFDA title first
1. Objectives:		
Program Purpose	Characters (XXXX)	A very brief statement of specific objectives stated in terms of what the program is intended to accomplish along with the goals toward which the program is directed. Program Purpose should also be tailored to specifically discuss recovery funding.
Public Benefits	Characters (4000)	This section translates objectives into the uses of a program, to develop a clearer understanding of the program's objectives and expected benefits to the public. It describes the potential uses for the assistance provided to meet stated objectives, and the specific restrictions placed upon the use of funds.
2. Projects and Activities:		
Kinds and scope of projects and activities to be performed	Characters (4000)	Describe the type of projects and activities that will be performed under this program.
List of Projects and Activities	List	For each Project and Activity, give a short description of the Project and Activity and associated funding. This list should correspond to the Projects and Activities that will be reported on by recipients of funding.
3. Characteristics:		
Types of Financial Awards to be used.	Characters (4000) Pull down menu from CFDA Multi-select	Select the type(s) of Federal Assistance using the Catalog of Domestic Assistance codes. A full list of codes is included in Part 3 of this Appendix. For each financial award chosen in this section, a corresponding type of recipient and type of beneficiary must also be chosen.
Type of Recipient	Characters (4000) Pull down menu from	The main types of funding recipients. Multiple types can be selected for each financial award type.

	CFDA Multi-select	A full list of codes is included in Part 3 of this Appendix.
Type of Beneficiary	Characters (4000) Pull down menu from CFDA Multi-select	The main types of program beneficiaries. Multiple types can be selected for each financial award type. A full list of codes is included in Part 3 of this Appendix.
4. Major Planned Program Milestones:		
Schedule with milestones for major phases of the program's delivery	Characters (4000)	Describe the work schedule to complete the milestones for this program and projects. Include any relevant hyperlinks to agency web pages where additional project plans exist. Agencies will have the ability to include as many milestones as is appropriate.
Milestone #1	Characters (4000)	
Expected Completion Date for Milestone #1	**Date**	
Milestone #2	Characters (4000)	
Expected Completion Date for Milestone #2	**Date**	
Milestone #X	Characters (4000)	
Expected Completion Date for Milestone #X	**Date**	
5. Monitoring and Evaluation:		
Monitoring/Evaluation: Description of Agency periodic Review & review of Partners progress (See Section I of Q 2.8 on Program Plan guidance)	Characters (4000)	Describe the process by which the agency will identify and mitigate challenges/risks including the progress of the project and performance of grantees, contractors, etc.. Include a hyperlink to agency web pages where additional project plans exist. The program must have sufficient oversight capacity. This capacity may be demonstrated by a program that: • Has a reporting system in place to document grantees' use of funds in eligible activity categories; • Conducts site visits to a substantial number of grantees on a regular basis; • Audits grantee performance; and • Tracks actual expenditures to verify that funds are used for their designated purpose.
6. Measures:		Note: If a PART program code was given, measures will be pre-populated as a choice for Measures Text in a pull down menu. The PART measures can be modified as needed.

		Agencies will be able to enter as many measures as appropriate, though the number of measures should be kept to a minimum.
Measure Text	Characters (4000)	Enter in the measure text
Measure Type	Characters (4000)	Output, Outcome, Efficiency
Measure Frequency	Characters (4000)	Long-term, Annual, Quarterly, Monthly
Direction of Measure	+/-	Chose whether the measure actual should be increasing or decreasing
Unit of Measure	Characters (150)	The unit of measure should be clearly separately from the measure text and targets should be numeric only.
Explanation of Measure	Characters (4000)	Describe the measure in more detail including analysis of trends and target.
Year	Characters (20)	Enter in the year of the data
Original Program Target	Number (20)	Enter in the programs' planned target without the additional ARRA funding. Target should be strictly numeric values.
Revised Full Program Target	Number (20)	Enter in the programs' complete revised target with the additional ARRA funding.
Target (incremental change in performance)	Number (20)	Enter in the incremental change in performance. For example, if your normal program produces 10 units and with the additional ARRA funding is estimated to produce 15 units, the incremental value will be 5 units.
Actual	Characters (20)	Actuals will be updated as frequently as collected by the agency, based on the Measure Frequency.
Goal Lead	Name	List the name of the lead agency SES official responsible for achieving the goal.
7. Transparency and Accountability:		
Description of the program's collection of grantee performance data on an annual basis and make it available to the public in a transparent and meaningful manner	Characters (4000)	Describe how agencies organize program costs and performance information at all recipient levels. Include a hyperlink to agency web pages where additional project plans exist or grantee reports exist. The program should be collecting, compiling and disseminating grantee performance information in an accessible manner, such as via a web site or widely available program reports. Data should be both aggregated on a program-wide level and disaggregated at the grantee level. The assessment about the appropriate level of aggregation of results may depend upon needs to protect certain data, such as

		classified data, personal data or, for a limited span of time, intellectual property.
8. Federal Infrastructure Investments:		
Description of Agency plans to spend funds effectively to comply with energy efficiency and green building requirements.	Characters (4000)	Description of the program's process to ensure that the direct Federal investment in Federal infrastructure comply with energy efficiency and green building requirements. At a minimum, plans should address how the agency will: meet the requirements outlined in the OMB Recovery guidance; take advantage of technical assistance opportunities (drafting, reviewing or improving design proposals, incorporating on-site renewable energy, etc.); leverage the greatest level of energy and green performance from available stimulus funds, including consideration of ESPC and UESC; establish green practices that can be used throughout the life cycle of facilities; and identify opportunities to demonstrate innovative and emerging green building technologies and concepts.

3. Recovery Obligation and Gross Outlay Monthly Plan

For each TAFS, an plan detailing expected obligations and gross outlays will be provided. The example below shows the information that will be collected, but is for illustrative purposes only. The information will be entered into a web form.

3 Examples	TAFS (pick from dropdown)	Appropriated to TAFS ($000s)	Program Allocations		Planned Obligations and Gross Outlays ($000s)													
			BA Allocation ($000s)	Program Name	Funding Type	Funding Year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
One account funding one program ($250 Total)	Account Title A (XX-XXXX XXXX/XXXX)	250	250	Program 001	Obligation	2009												
					Gross Outlay	2009												
					Obligation	20XX												
					Gross Outlay	20XX												
Two accounts funding one program ($450 total for Program 2)	Account Title B (XX-XXXX XXXX/XXXX)	400	450	Program 002	Obligation	2009												
					Gross Outlay	2009												
					Obligation	20XX												
					Gross Outlay	20XX												
	Account Title C (XX-XXXX XXXX/XXXX)	50			Obligation	2009												
					Gross Outlay	2009												
					Obligation	20XX												
					Gross Outlay	20XX												
One account funding two programs ($125 total for Account D)	Account Title D (XX-XXXX XXXX/XXXX)	125	100	Program 003	Obligation	2009												
					Gross Outlay	2009												
					Obligation	20XX												
					Gross Outlay	20XX												
			25	Program 004	Obligation	2009												
					Gross Outlay	2009												
					Obligation	20XX												
					Gross Outlay	20XX												

4. Values for Lists

Types of Financial Awards to be used.

Code	Value
A	Formula Grants - Allocations of money to States or their subdivisions in accordance with distribution formulas prescribed by law or administrative regulation, for activities of a continuing nature not confined to a specific project.
B	Project Grants - The funding, for fixed or known periods, of specific projects. Project grants can include fellowships, scholarships, research grants, training grants, traineeships, experimental and demonstration grants, evaluation grants, planning grants, technical assistance grants, survey grants, and construction grants.
C	Direct Payments for Specified Use - Financial assistance from the Federal government provided directly to individuals, private firms, and other private institutions to encourage or subsidize a particular activity by conditioning the receipt of the assistance on a particular performance by the recipient. This does not include solicited contracts for the procurement of goods and services for the Federal government.
D	Direct Payments with Unrestricted Use - Financial assistance from the Federal government provided directly to beneficiaries who satisfy Federal eligibility requirements with no restrictions being imposed on the recipient as to how the money is spent. Included are payments under retirement, pension, and compensatory programs.
E	Direct Loans - Financial assistance provided through the lending of Federal monies for a specific period of time, with a reasonable expectation of repayment. Such loans may or may not require the payment of interest.
F	Guaranteed/Insured Loans - Programs in which the Federal government makes an arrangement to identify a lender against part or all of any defaults by those responsible for repayment of loans.
G	Insurance - Financial assistance provided to assure reimbursement for losses sustained under specified conditions. Coverage may be provided directly by the Federal government or through private carriers and may or may not involve the payment of premiums.
H	Sale, Exchange, or Donation of Property and Goods - Programs which provide for the sale, exchange, or donation of Federal real property, personal property, commodities, and other goods including land, buildings, equipment, food and drugs. This does not include the loan of, use of, or access to Federal facilities or property.
I	Use of Property, Facilities, and Equipment - Programs which provide for the loan of, use of, or access to Federal facilities or property wherein the federally owned facilities or property do not remain in the possession of the recipient of the assistance.
J	Provision of Specialized Services - Programs that provide Federal personnel directly to perform certain tasks for the benefit of communities or individuals. These services may be performed in conjunction with nonfederal personnel, but they involve more than consultation, advice, or counseling.
K	Advisory Services and Counseling - Programs which provide Federal specialists to consult, advise, or counsel communities or individuals to include conferences, workshops, or personal contacts. This may involve the use of published information, but only in a secondary capacity.
L	Dissemination of Technical Information - Programs that provide for the publication and distribution of information or data of a specialized or technical nature frequently through clearinghouses or libraries. This does not include conventional public information services designed for general public consumption.
M	Training - Programs that provide instructional activities conducted directly by a Federal agency for individuals not employed by the Federal government.
N	Investigation of Complaints - Federal administrative agency activities that are initiated in

	response to requests, either formal or informal, to examine or investigate claims of violations of Federal statutes, policies, or procedure. The origination of such claims must come from outside the Federal government.
O	Federal Employment - Programs that reflect the government-wide responsibilities of the Office of Personnel Management in the recruitment and hiring of Federal civilian agency personnel.

Types of Recipients

Government

- Federal
- Interstate
- Intrastate
- State (Includes District Of Columbia; Includes Institutions Of Higher Education And Hospitals)
- Local (Excludes Institutions Of Higher Education And Hospitals)
    - County
    - City or Township
- Special District Government
- Independent School District
- Sponsored Organization
- Public Nonprofit Institution/Organization (Includes Institutions Of Higher Education, Hospitals)
- Other Public Institutions/Organizations
- Federally Recognized Indian Tribal Governments
- U.S. Territories And Possessions (Includes Institutions Of Higher Education, Hospitals)

Non-Government - General

- Individual/Family
- Minority Group
- Specialized Group (Health Professional, Student, Veteran)
- Small Business (Less Than 500 Employees)
- Profit Organization
- Private Nonprofit Institution/Organization (Includes Institutions Of Higher Education, Hospitals)
- Quasi-Public Nonprofit Institution/Organization
- Other Private Institution/Organization
- Anyone/General Public
- Native American Organization

Types of Beneficiaries

- Federal
- Interstate
- Intrastate
- State
- Local
    - County
    - City or Township
- Special District Government
- Regional Organization
- Independent School District
- Sponsored organization
- Public nonprofit institution/organization
- Other public institution/organization

- Federally Recognized Indian Tribal Governments
- U. S. Territories
- Individual/Family
- Minority group
- Specialized group (e.g. health professionals, students, veterans)
- Small business (as defined in 13 CFR part 121)
- Indian/Native American Tribal Government (Federally Recognized)
- Indian/Native American Tribal Government (Other than Federally Recognized)
- Indian/Native American Tribally Designated Organization
- Public/Indian Housing Authority
- Nonprofit with 501C3 IRS Status (Other than Institution of Higher Education)
- Nonprofit without 501C3 IRS Status (Other than Institution of Higher Education)
- Private Institution of Higher Education
- Individual
- For-Profit Organization (Other than Small Business)
- Hispanic-serving Institution
- Historically Black Colleges and Universities (HBCUs)
- Tribally Controlled Colleges and Universities (TCCUs)
- Alaska Native and Native Hawaiian Serving Institutions
- Non-domestic (non-US) Entity
- Profit organization
- Private nonprofit institution/organization
- Quasi-public nonprofit organization
- Other private institution/organization
- Anyone/general public
- Native American Organizations
- Health Professional
- Education Professional
- Student/Trainee
- Graduate Student
- Scientist/Researchers
- Artist/Humanist
- Engineer/Architect
- Builder/Contractor/Developer
- Farmer/Rancher/Agriculture Producer
- Industrialist/Business person
- Small Business Person (an owner or employee as defined in 13 CFR Part 121)
- Consumer
- Homeowner
- Land/Property Owner
- African American
- American Indian
- Spanish Origin
- Asian
- Other Non-White
- Migrant
- U.S. Citizen
- Refugee/Alien
- Veteran/Service person/Reservist (including dependents)
- Women
- Persons with Disabilities
- Physically Afflicted (e.g. TB, Arthritis, Heart Disease)
- Mentally Disabled

- Drug Addict
- Alcoholic
- Juvenile Delinquent
- Infant (0-5)
- Preschool
- School
- Child (6-15)
- Youth (16-21)
- Senior Citizen (60+)
- Unemployed
- Welfare Recipient
- Pension Recipient
- Moderate Income
- Low Income
- Major Metropolis (over 250,000)
- Other Urban
- Suburban
- Rural
- Education (0-8)
- Education (9-12)
- Education (13+)
- Other

Appendix 4 – Risk Considerations

PROGRAM RISK CONSIDERATIONS

1. OVERARCHING/PERFORMANCE

a. Are the programs under Recovery Act for my organization following the existing procedures or new procedures?
b. Are specific Recovery Act fund objectives and requirements incorporated into agency policies?
c. Does my organization have staff adequately trained to effectively implement Recovery Act requirements?
d. Has my organization provided new requirements, conditions, and guidance to the recipients regarding Recovery Act?
e. Does my organization have reporting mechanisms in place to collect the required data from recipients to meet Recovery Act transparency requirements?
f. Is there an agency-wide methodology for measuring performance? What are the key performance metrics?
g. Are there any process metrics, or are the metrics primarily outcome-oriented?
h. Does my organization have a corrective action plan process in place to promptly resolve the audit findings identified that may impact the ability to successfully implement Recovery Act?
i. Has my organization established a governance body to oversee / manage the overall implementation of Recovery Act?

2. REPORTING

a. Is the necessary reporting under Recovery Act in place?
b. Has your organization implemented communication vehicles to ensure Recovery Act data is promptly reported on the agency's website?
c. Are reports published under Recovery Act reviewed and approved?
d. Are reports issued accurate and have the data fields required under Recovery Act?
e. Do reports tell agency management what is happening on a timely basis?
f. Are issues identified through established reports addressed on a timely basis?
g. Are reports issued on the effectiveness of risk management strategies and tactics timely?
h. Are risk management strategies and tactics properly monitored?

3. HUMAN CAPITAL

a. Has my organization identified qualified personnel to oversee the Recovery Act funds?
b. Does my organization have sufficient level of personnel to manage the Recovery Act programs (for instance, Grant, Contracting, Financial Management, or IT personnel, etc.)?
c. Are they empowered to make decisions and administer the Recovery Act programs?

d. Are program officials trained in the performance management requirements?
e. Has my organization considered using alternative hiring methods allowed under the Recovery Act?

4. ACQUISITION

a. Do new Requests for Proposals issued under Recovery Act initiatives contain the necessary language to satisfy the requirements of the Recovery Act?
b. Are Contracts awarded in a prompt, fair, and reasonable manner?
c. Do new contracts awarded using Recovery Act funds have the specific terms and clauses required?
d. Are contracts awarded using Recovery Act funds transparent to the public? Are the public benefits of the funds used under these contracts reported clearly, accurately and in a timely manner?
e. Are funds used for authorized purposes and the potential for fraud, waste, error, and abuse minimized and/or mitigated?
f. Do projects funded under Recovery Act avoid unnecessary delays and cost overruns?
g. Are there any performance issues identified with regards to (potential) contractor? Are there follow up actions to address the performance issues?

5. FINANCIAL

a. Has my organization established separate Treasury Account Fund Symbols to ensure Recovery Act funds are clearly distinguishable?
b. Are there controls in place to ensure that Recovery Act funds are not commingled with other agency funds?
c. Are existing internal controls sufficient to mitigate the risks of fraud, waste, and abuse?

6. SYSTEM

a. Are financial and operational systems configured to manage and control recovery funds?
b. Can financial and operational systems support the increase in volume of contracts, grants and loans etc.?
c. Are the appropriate data elements identified that must be captured, classified and aggregated for analysis and reporting to meet Recovery Act requirements?

Appendix 6 – Agency Risk Template

AGENCY SPECIFIC RECOVERY ACT RISKS AND MITIGATIONS

RISK DESCRIPTION	MITIGATION DESCRIPTION	ASSESSMENT MEASURE	TRIGGER FOR CONTINGENCY PLAN	RESPONSIBLE OFFICE AND OFFICIAL
PROGRAM OR ACTIVITY (INCLUDING TAFS)				
PROGRAM OR ACTIVITY (INCLUDING TAFS)				
PROGRAM OR ACTIVITY (INCLUDING TAFS)				

Appendix 7 – Council on Environmental Quality NEPA Reporting Guidance

AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA)
SECTION 1609(c) REPORTING GUIDANCE

Using the attached spreadsheet, agencies must provide their first Section 1609(c) report to CEQ on the status of NEPA compliance for ARRA projects and activities no later than April 9, 2009. That report will include all ARRA funded projects and activities through April 3, 2009. April 3, 2009, is the "End date for this Report".

Executive Branch departments and agencies must provide their second Section 1609(c) report to CEQ on April 30, 2009, for all activities and projects funded through April 24, 2009. That ARRA Section 1609(c) report will report on the NEPA status and progress of all ARRA funded projects and activities through April 24, 2009. April 24, 2009, is the "End Date for this Report."

Based on those two reports, CEQ will prepare the Section 1609(c) report due to Congress no later than May 18, 2009.

Subsequent department and agency Section 1609(c) reports must be submitted to CEQ on or before July 15, 2009, and every 90 days thereafter through October 15, 2011. These quarterly reports will include the NEPA status and progress on all Recovery Act projects and activities through the last day of the previous month (the "End Date for this Report"). The reports are cumulative and must contain information previously reported with relevant updates and additions.

The Section 1609 reports must be submitted to CEQ at recovery@ceq.eop.gov. The submission must include the completed spreadsheets and a brief cover memo identifying the point(s) of contact for further information as well as explanation(s) of how the spreadsheets were completed (see instructions below).

To ensure the information quality of Section 1609(c) reports, the department or agency funding the project or activity under the ARRA will be responsible for reporting the status of all NEPA compliance associated with the project or activity – including any environmental review and documentation prepared by or for an approving or permitting agency, a grantee or a contractor. In those cases where more than one NEPA review is prepared, the status of the "NEPA action" and "Date NEPA is Done" columns on page 2 of the attached spreadsheet would reflect the latest NEPA action taken. In cases involving NEPA work performed by contractors, the department or agency funding the project or activity under the ARRA should work with the contracting officer to develop any necessary special contract provisions, if the contractor should provide the agency with information necessary for Section 1609 reporting.

Use the following instructions to complete page 1 of the attached spreadsheet:

- The department or agency name, end date of the report, submitter, and contact information for the submitter are entered at the top of page 1.

- The information in columns B (Treasury Appropriations Fund Symbol); D (Total ARRA Appropriations – for the Title/Program reported on that line) and L (Total Obligations – for the ARRA Funded Projects and Activities reported on that line) is available from the department or agency financial officers responsible for ARRA funding.

- The information in column C (Title/Program) must be entered **after** the entries are made on page 2. The Title/Program entry must be identical on both pages for the spreadsheet to function properly.

- The number of ARRA funded projects and activities are entered in column E. When the department or agency is using estimates or is aggregating projects or activities, the cover memo must explain the method for determining the estimate or aggregate.

- The determination that NEPA procedures are not applicable is reported in column F. For example: (1) when there is no NEPA analysis or documentation required because there is no agency discretion for NEPA analysis; (2) when NEPA is statutorily waived (e.g. Clean Water Act Section 511(c)); or (3) when the activity or project is under another process that is functionally equivalent to NEPA (functional equivalence is limited to certain EPA programs such as CERCLA); then the total number of such determinations will be reported on page 1 of the attached spreadsheet in the "NEPA Not Applicable" column with the total number of such projects and activities. There are no entries on page 2 for such projects and activities.

- The remaining columns on page 1 (G, H, I, J, and K) are automatically imported from page 2.

- The total obligations in column L reflect the amounts that will result in outlays, immediately or in the future, for a project or activity.

Use the following instructions to complete page 2 of the attached spreadsheet:

- The "Title/Program" from column C on page 1 is repeated in column B of page 2.

- The "Description of the Project/Activity" in column C is determined by the reporting department or agency and must be one that is unique and which clearly identifies the specific ARRA projects and activities (e.g., agency project identification number). Executive Branch departments and agencies can report on either individual projects and activities or groups of projects or activities when the projects or activities are similar and comply with NEPA in the same way.

- The "NEPA Action" is reported with the number of projects and activities in column D. The number is determined by the number of similar projects/activities that use the same NEPA action. For example, if 57 grants under the same grant program were categorically excluded, the grants can be reported on one line by entering "57" in

column D. Agencies must explain the basis for grouping the projects/activities in the cover memo (i.e., all grants are for similarly activities that are categorically excluded are reported on the same line and those that are pending completion are reported on a separate line).

- The type of NEPA action (i.e., ce, ea or eis) is reported in column E.

- The status of the NEPA action (i.e., pending, done, or withdrawn) is reported in column F.

    - Categorical Exclusion (ce) actions are reported as "pending" in those cases where a ce is not completed (i.e., done) on the end date of the report. The ce is reported as "done" after the determination has been made that there are no extraordinary circumstances or after finalizing the document when the agency prepares documentation for the ce. The cover memo must describe how the date was determined (e.g., the date the documentation was completed; the date the latest ce documentation for a group of similar projects/activities using the same ce was completed).

    - Environmental Assessment (ea) actions are reported as "pending" after initiation (e.g., public involvement as practicable, if not practicable then date of intra/inter-agency involvement). The ea is reported as "done" after completion of the EA/FONSI (and any associated mitigation action plan).

    - Environmental Impact Statement (eis) actions are reported as "pending" after the Notice of Intent is published. The eis is reported as "done" when the Record of Decision is completed (i.e., signed or published) following the final EIS or any supplemental NEPA review and documentation.

    - If any projects/activities are withdrawn or cancelled, then "withdrawn" is entered in column F.

- Columns G and H entries are automatically made; consequently, no information should be entered those columns.

- When the NEPA action is done, the date it is done is entered in column I. When a group of similar projects/activities using the same type of NEPA action is reported on one line, then the date of the most recently completed NEPA action is reported and the method for determining the reportable date must be described in the cover memo. When an agency uses a date other than the date a document is signed, the cover memo should explain the basis for the date.

- Enter "yes" or "no" in column J to indicate whether all applicable Federal environmental compliance requirements for the activity or project are completed – such as the requirements in the National Historic Preservation Act, Endangered Species Act, and Clean Water Act. Federal environmental compliance requirements

include those delegated to other governmental entities (e.g., CWA section 401 certifications).

Substantial delays in completing NEPA reviews and documentation should be reported to CEQ by sending an e-mail message to recovery@ceq.eop.gov that identifies the project, its current status, all known reasons for the delay, and a point of contact (name, title, organization, phone, cell phone and e-mail).

# # #

NEPA ARRA Section 1609 Report Data (Page 1 of 2) [4x4 Apr 03 09]

Department or Agency Name:

End Date for this Report:

Submitter Name:

Submitter Contact Info (E-mail / Phone):

No.	Treasury Appropriation Fund Symbol	Title/Program	Total ARRA Appropriation for Projects and Activities	Number of ARRA Funded Projects / Activities	NEPA Not Applicable	Total Categorical Exclusion Actions	Total Environmental Assessment Actions	Total Environmental Impact Statement Actions	All NEPA Actions for the Recovery Act Funded Activity or Project	Number of projects withdrawn	Total Obligations for Projects and Activities
				Total	Total	Total CE Actions	Total EA Actions	Total EIS Actions	Total Actions	Total	
1											
2											
3											
4											
5											
6											
7											
8											
9											
10											
11											
12											
13											
14											
15											
16											
17											
18											
19											
20											
21											
22											
23											
24											
25											
26											
27											
28											
29											
30											
31											
32											
33											
34											
35											
36											
37											
38											
39											
40											
41											
42											
43											

Update | Projects & Activities

NEPA ARRA Section 1609 Report Data (Page 2 of 2) [dtd Apr 03 09]

No.	Title/Program	Project/Activity Description	NEPA Action: Enter the number of NEPA actions with the same status and completion date. Enter ce for Categorical Exclusion; ea for Environmental Assessment; or eis for Environmental Impact Statement.		NEPA Status: Enter pending, done, or withdrawn.	Number of Completed NEPA Actions for the Recovery Act Funded Activity or Project	Number of Pending NEPA Actions for the Recovery Act Funded Activity or Project	Date NEPA is Done (mm/dd/yyyy)	All federal environmental reviews and documents are completed
			TOTAL ACTIONS:			TOTAL COMPLETED:	TOTAL PENDING:		Total Yes
			Quantity	NEPA Action					
1									
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									

Update | Projects & Activities

and include the rationale for using other than a fixed-price and/or competitive approach. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

Item IV—American Recovery and Reinvestment Act of 2009 (The Recovery Act)—Reporting Requirements (Interim) (FAR Case 2009–009)

This interim rule implements section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which requires contractors to report on their use of Recovery Act funds. The rule adds a new subpart 4.15, and a new clause, 52.204–11. Contracting officers must include the new clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This clause applies to Commercial item contracts and Commercially-Available-Off-The-Shelf (COTS) item contracts as well as actions under the Simplified Acquisition Threshold.

Contracting officers who wish to use Recovery Act funds on existing contracts should modify those contracts to add the clause.

Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.

Item V—American Recovery and Reinvestment Act of 2009 (The Recovery Act)—GAO/IG Access (Interim) (FAR Case 2009–011)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009. Collectively, these Sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to 52.212–5, ''Contract Terms and Conditions Required to Implement Statutes orExecutive Orders—Commercial Items'', 52–214–26, ''Audit and Records—Sealed Bidding,'' and 52.215–2, ''Audit and Records—Negotiation''. For the Comptroller General these alternate clauses provide specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency inspector generals receive the same authorities, with the exception of interviewing subcontractor employees.

Item VI—GAO Access to Contractor Employees (Interim) (FAR Case 2008–026)

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 12 and 52. Clauses 52.215–2, Audit and Records—Negotiation and 52.214–26, Audit and Records—Sealed Bidding are being modified to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule will not apply to the acquisition of commercial items; therefore, FAR 12.503 will be amended to add the exemption of this rule. This change implements Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417).

Dated: March 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–32 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–32 is effective March 31, 2009.

Dated: March 24, 2009.

Shay D. Assad,

Director, Defense Procurement And Acquisition Policy.

Dated: March 24, 2009.

Rodney P. Lantier,

Acting Senior Procurement Executive & Acting Deputy Chief Acquisition Officer Office of the Chief Acquisition Officer U.S. General Services Administration.

Dated: March 24, 2009.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. E9–7027 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 5, 25, and 52

[FAC 2005–32; FAR Case 2009–008; Item I; Docket 2009–0008, Sequence 1]

RIN 9000–AL22

Federal Acquisition Regulation; FAR Case 2009–008, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) with respect to the Buy American provision, section 1605 in Division A. This rule does not cover procurements funded with Federal financial assistance such as Federal grants. Additional guidance will be provided by the Office of Management and Budget with respect to the application of section 1605 to procurements funded with Federal financial assistance.

DATES: *Effective Date*: March 31, 2009.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clauses for future orders, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–008, by any of the following methods:

• *Regulations.gov: http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–008'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–008. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–008'' on your attached document.

• *Fax*: 202–501–4067.

• *Mail*: General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, *Attn*: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–008, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. Please cite FAC 2005–32, FAR case 2009–008. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements the Recovery Act with respect to the unique Buy American provision, section 1605 of the Recovery Act, by adding a new Subpart 25.6, entitled ''American Recovery and Reinvestment Act—Buy American Act—Construction Materials,'' and adding new provisions and clauses at Part 52, with conforming changes to Subparts 1.1, 5.2, 25.0, 25.2, and 25.11.

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions is section 1605, entitled ''Buy American.'' It prohibits the use of funds appropriated or otherwise made available by the Act for any 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 law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances:

1. Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;

2. Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent; or

3. Applying the domestic preference would be inconsistent with the public interest.

The implementation of section 1605 is expected to stimulate the economy by increasing and maintaining jobs in the United States in the steel, iron, and manufactured construction materials industries and providing new opportunities to construction firms to win contracts for construction and public works projects.

B. Discussion

Because of the need to appropriately segregate the unique Buy-American provisions of the Recovery Act from the requirements of the Buy American Act and the Trade Agreements Act, the Councils have decided to include them in a separate subpart of FAR Part 25. Subpart 25.6, currently reserved, will be entitled ''American Recovery and Reinvestment Act—Buy American Act—Construction Materials.'' A reference to Subpart 25.6 was added to the ''Scope'' section of Subpart 25.2, Buy American Act—Construction Materials.

Subpart 25.6 includes a policy statement at 25.602 that repeats the prohibition against using funds appropriated by the Recovery Act for U.S. construction projects to purchase iron, steel, or other manufactured goods that were not produced in the U.S. It also notes that unmanufactured construction materials remain covered by the provisions of the Buy American Act. The exceptions to this policy (see Background section above) are similar to those for the Buy American Act, but the Recovery Act requires publication in the **Federal Register** of the detailed written justification that the agency used to make an exception to the statute. The Councils welcome comments on additional steps that may enhance transparency consistent with the goals of the Recovery Act.

In order to enable implementation of the policy, the interim rule includes definitions of ''steel,'' ''manufactured construction material,'' ''unmanufactured construction material,'' ''domestic construction material,'' and ''foreign construction material.'' These definitions are drawn from existing Federal domestic-sourcing laws and the longstanding interpretations that have evolved from them. It also includes a cross reference to the definition of ''public work'' at FAR 22.401, which defines ''public building or public work'' to mean ''uilding or work, the construction, prosecution, completion, or repair of which * * * is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.''

Because section 1605 does not specify a requirement that significantly all the components of construction material must also be domestic, as does the Buy American Act, the definition of domestic construction material under this interim rule does not include a requirement relating to the origin of the components of domestic manufactured construction material. Unmanufactured construction material is not specifically addressed in section 1605 of the Recovery Act. However, the Recovery Act's purpose of creating jobs and stimulating domestic demand is well served by applying the Buy American Act to unmanufactured construction material.

The rules for preaward determination of the inapplicability of section 1605 and the Buy American Act are at FAR 25.604.

Section 25.605 addresses the evaluation of offers containing foreign construction material based on an approved exception for unreasonable cost. If the contracting officer determines that an exception based on unreasonable cost of domestic construction material applies, the contracting officer must evaluate the offer by adding to the offered price—

(1) 25 percent of the offered price, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(2) 6 percent of the value of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

The text of Subpart 25.6 makes it clear that a determination to waive the applicability of section 1605 should be made prior to award. However, section 25.606 recognizes certain limited circumstances in which a postaward waiver could be made, but only with adequate consideration from the contractor. A contractor's noncompliance with section 1605 is addressed at FAR 25.607.

Prescriptions for the use of all of the solicitation provisions and contract clauses applicable to FAR Part 25 are

included in a single subpart, 25.11. The Councils have modified section 25.1102, entitled ''Acquisition of Construction,'' to add a new paragraph that substitutes four new provisions and clauses (with appropriate alternates), to be used when contracting with funds appropriated by the Recovery Act, for the four clauses otherwise used in construction contracts to implement the Buy American Act and U.S. obligations under applicable trade agreements. Specifically, when using Recovery Act appropriated funds, contracting officers will use—

- 52.225–21, Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials, instead of 52.225–9, Buy American Act—Construction Materials;
- 52.225–22, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials, instead of 52.225–10, Notice of Buy American Act Requirement—Construction Materials;
- 52.225–23, Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials Under Trade Agreements, instead of 52.225–11, Buy American Act—Construction Materials under Trade Agreements; and
- 52.225–24, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials under Trade Agreements, instead of 52.225–12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements.

The clauses are unique in that, for Recovery Act-funded construction projects, the 25 percent price adjustment factor for non-U.S. iron, steel, and other foreign manufactured construction material excepted from the section 1605 requirement on the basis of unreasonable cost is applied to the entire price of the project, not only to the cost of the foreign materials. The 6 percent adjustment for the Buy American Act is retained and applied to the cost of foreign unmanufactured goods excepted from the requirements of the Buy American Act on the basis of unreasonable cost. Given the applicability of the Recovery Act to iron, steel, and manufactured goods, the definition of ''component'' is unnecessary in these clauses, because the definition of domestic construction material no longer includes a requirement relating to the origin of components.

However, if trade agreements apply to the acquisition, the use of the provision and clause 52.225–23 and 52.225–24, respectively, ensures that eligible construction material from designated countries is treated in accordance with Subpart 25.4. No evaluation factor is applied to offers on the basis of using eligible construction material. This provision and clause retain the same basic processes that are used in the standard construction clauses, except for the specific changes that have been addressed relating to new requirements of section 1605 of the Recovery Act.

In the Recovery Act conference report, Congress expressed its intent that least developed countries be excepted from section 1605 and that they retain their status as designated countries. However, with respect to Caribbean Basin countries, Congress did not express a similar intent. Therefore, Caribbean Basin countries are not included as designated countries with respect to the Recovery Act.

C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

Therefore, given section 1605 of the Recovery Act, which establishes Buy American requirements for projects funded by the Recovery Act, the FAR Council has determined that this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, for the following reasons. This interim rule will only impact an offeror that wants to use non-U.S. iron, steel, and other manufactured goods in a construction project in the United States. The Councils believe that there are adequate domestic sources for these materials, and the Office of Management and Budget (OMB) guidance M–09–10 issued February 18, 2009, entitled ''Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' provides a strong preference for using small businesses for Recovery Act projects wherever possible. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 5, 25, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–32, FAR case 2009–008), in all correspondence.

E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0141. However, the information collection requirements imposed by the provisions 52.225–22 and 52.225–24 are currently covered by the approved information collection requirements for provisions 52.225–9 and 52.225–11 (OMB Control number 9000–0141, entitled Buy American Act—Construction—FAR Sections Affected: Subpart 25.2; 52.225–9; and 52.225–11). While the Councils believe no changes will be needed to the collection due to the interim regulation, comments are welcome during the 60 day comment period with regard to the data elements, the burden, or any other part of the collection.

F. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective upon enactment, and contracts using funds appropriated by the Recovery Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this

interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 5, 25, and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 5, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 5, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory paragraph, by adding, in numerical sequence, FAR segments 52.225–21 and 52.225–23, and their corresponding OMB Control Number 9000–0141.

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.207 by revising paragraph (c)(13)(iii) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(c) * * *

(13) * * *

(iii) If the solicitation will include the FAR clause at 52.225–11, Buy American Act—Construction Materials under Trade Agreements, 52.225–23, Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials under Trade Agreements, or an equivalent agency clause, insert the following notice in the synopsis: ''One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.''

* * * * *

PART 25—FOREIGN ACQUISITION

■ 4. Amend section 25.001 by revising paragraph (c)(1) and adding a new paragraph (c)(4) to read as follows:

25.001 General.

* * * * *

(c) * * *

(1) The Buy American Act uses a two-part test to define a ''domestic end product'' or ''domestic construction material'' (manufactured in the United States and a formula based on cost of domestic components). The component test has been waived for acquisition of commercially available off-the-shelf items.

* * * * *

(4) When using funds appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), the definition of ''domestic manufactured construction material'' requires manufacture in the United States but does not include a requirement with regard to the origin of the components.

25.002 [Amended]

■ 5. Amend the table in section 25.002, by removing from the sixth row ''[Reserved]'' and adding ''American Recovery and Reinvestment Act—Buy American Act—Construction Materials'' in its place, and in the fifth column adding ''X''.

■ 6. Add Subpart 25.6 to read as follows:

Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

Sec.
25.600 Scope of subpart.
25.601 Definitions.
25.602 Policy.
25.603 Exceptions.
25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.
25.605 Evaluating offers of foreign construction material.
25.606 Postaward determinations.
25.607 Noncompliance.

Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

25.601 Definitions.

As used in this subpart—

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States.

Foreign construction material means a construction material other than a domestic construction material.

Manufactured construction material means any construction material that is not unmanufactured construction material.

Recovery Act designated country means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

Unmanufactured construction material means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

25.602 Policy.

Except as provided in 25.603—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (as defined at 22.401) unless—

(1) The public building or public work is located in the United States; and

(2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.

(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

25.603 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the Recovery Act or the Buy American Act:

(1) *Nonavailability*. The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(2) *Unreasonable cost*. The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.605.

(3) *Inconsistent with public interest*. The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(b) *Determinations*. When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) The head of the agency shall publish a notice in the **Federal Register** within two weeks after the determination is made, unless the construction material has already been determined in the FAR to be domestically nonavailable (see list at 25.104). The notice shall include—

(i) The title ''Buy American Exception under the American Recovery and Reinvestment Act of 2009'';

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) *Acquisitions under trade agreements*. (1) For construction contracts with an estimated acquisition value of $7,443,000 or more, *also see* Subpart 25.4. Offers of products determined to be eligible products per Subpart 25.4 shall receive equal consideration with domestic offers per Subpart 25.4.

(2) For purposes of the Recovery Act, designated countries do not include the Caribbean Basin Countries.

25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225–22 or 52.225–24, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225–21 or 52.225–23, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(c) Determination based on unreasonable cost of domestic construction material.

(1) *Iron, steel, and other manufactured construction material*. The contracting officer must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

(2) *Unmanufactured construction material*. The contracting officer must compare the cost of each foreign unmanufactured construction material to the cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the contracting officer shall determine that the cost of the unmanufactured construction material is unreasonable.

25.605 Evaluating offers of foreign construction material.

(a) If the contracting officer has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with section 25.604, then the contracting officer shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.

(3) Total evaluated price = offered price + (.25 × offered price, if (a)(1) applies) + (.06 × cost of foreign unmanufactured construction material, if (a)(2) applies).

(b) If two or more offers are equal in price, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of 52.225–21, or paragraph (b)(3) of 52.225–23), the contracting officer must add the excepted materials to the list in the contract clause.

25.606 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225–21 or 52.225–23 and/or other readily available information.

(c) If a determination, under 25.603(a), is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate

consideration is at least the differential established in 25.605(a).

25.607 Noncompliance.

The contracting officer must—

(a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act in accordance with 25.606.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspension or debarment official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

■ 7. Amend section 25.1102 by adding an introductory paragraph; revising paragraph (c)(1); and adding paragraph (e) to read as follows:

25.1102 Acquisition of construction.

When using funds other than those appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act), follow the prescriptions in paragraphs (a) through (d) of this section. Otherwise, follow the prescription in paragraph (e).

* * * * *

(c) * * *

(1) List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, other than designated country construction material.

* * * * *

(e)(1) When using funds appropriated under the Recovery Act for construction, use provisions and clauses 52.225–21, 52.225–22, 52.225–23, or 52.225–24 (with appropriate Alternates) in lieu of the provisions and clauses 52.225–9, 52.225–10, 52.225–11, or 52.225–12 (with appropriate Alternates), respectively, that would be applicable as prescribed in paragraphs (a) through (d) of this section if Recovery Act funds were not used.

(2) When using clause 52.225–23, list foreign construction material in paragraph (b)(3) of the clause as follows:

(i) *Basic clause*. List all foreign construction material excepted from the requirements of the Buy American Act, other than Recovery Act designated country construction material.

(ii) Alternate I—List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, unless the excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add section 52.225–21 through 52.225–24 to read as follows:

52.225–21 Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials.

As prescribed in 25.1102(e), insert the following clause:

Required Use of American Iron, Steel, and Manufactured Goods-Buy American Act—Construction Materials MAR 2009)

(a) *Definitions*. As used in this clause—

Construction material means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States.

Foreign construction material means a construction material other than a domestic construction material.

Manufactured construction material means any construction material that is not unmanufactured construction material.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

United States means the 50 States, the District of Columbia, and outlying areas.

Unmanufactured construction material means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

(b) *Domestic preference*. (1) This clause implements—

(i) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5), by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act (41 U.S.C. 10a–10d) by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraph (b)(3) and (b)(4) of this clause.

(3) This requirement does not apply to the construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate ''none'']

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable.

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of Section 1605 of the Recovery Act or the Buy American Act.* (1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material is noncompliant with section 1605 of the American Recovery and Reinvestment Act or the Buy American Act.

(d) *Data.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON

Construction material description	Unit of measure	Quantity	Cost (dollars) *
Item 1:			
Foreign construction material	_____	_____	_____
Domestic construction material	_____	_____	_____
Item 2			
Foreign construction material	_____	_____	_____
Domestic construction material	_____	_____	_____

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of reponse; if oral, attach summary.] [Include other applicable supportinginformation.]

**Include all delivery costs to the construction site.]*

(End of clause)

52.225–22 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials.

As prescribed in 25.1102(e), insert the following provision:

NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS—BUY AMERICAN ACT—CONSTRUCTION MATERIALS (MAR 2009)

(a) *Definitions.* ''Construction material,'' ''domestic construction material,'' ''foreign construction material,'' ''manufactured construction material,'' ''steel,'' and ''unmanufactured construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Required Use of Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials'' (Federal Acquisition Regulation (FAR) clause 52.225–21).

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225–21 in the request. If an offeror has not requested a determination regarding the inapplicability of 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) *Evaluation of offers.* (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer

requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) *Alternate offers.* (1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at FAR 52.225–21, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of the clause at FAR 52.225–21 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at FAR 52.225–21 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

Alternate I (MAR 2009]). As prescribed in 25.1102(e), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225–21.

52.225–23 Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials under Trade Agreements.

As prescribed in 25.1102(e), insert the following clause:

Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements MAR 2009)

(a) *Definitions.* As used in this clause—

Construction material means an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Domestic construction material means— (1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States.

Foreign construction material means a construction material other than a domestic construction material.

Free trade agreement (FTA) country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of an FTA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different construction material distinct from the materials from which it was transformed.

Least developed country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

Manufactured construction material means any construction material that is not unmanufactured construction material.

Recovery Act designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (FTA)(Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore); or

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia).

Recovery Act designated country construction material means a construction material that is a WTO GPA country construction material, an FTA country construction material, or a least developed country construction material.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

United States means the 50 States, the District of Columbia, and outlying areas.

Unmanufactured construction material means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

WTO GPA country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act (41 U.S.C. 10a–10d) do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

_____

[Contracting Officer to list applicable excepted materials or indicate ''none''.]

(4) The Contracting Officer may add other construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable.

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the overall cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of section 1605 of the Recovery Act or the Buy American Act.*

(1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than that covered by trade agreements is noncompliant with the applicable Act.

(d) *Data.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON

Construction material description	Unit of measure	Quantity	Cost (dollars)*
Item 1:			
Foreign construction material	_____	_____	_____
Domestic construction material	_____	_____	_____
Item 2:			
Foreign construction material	_____	_____	_____
Domestic construction material	_____	_____	_____

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.][Include other applicable supporting information.]

[Include all delivery costs to the construction site.]*

(End of clause)

Alternate I (MAR 2009). As prescribed in 25.1102(e), add the following definition of ''Bahrainian, Mexican, or Omani construction material'' to

paragraph (a) of the basic clause, and substitute the following paragraphs (b)(1) and (b)(2) for paragraphs (b)(1) and (b)(2) of the basic clause:

Bahrainian, Mexican, or Omani construction material'' means a construction material that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(b) *Construction materials*. (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act, by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

52.225–24 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials under Trade Agreements.

As prescribed in 25.1102(e), insert the following provision:

Notice of Required Use Of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements (*MAR 2009*)

(a) *Definitions*. ''Construction material,'' ''domestic construction material,'' ''foreign construction material,'' ''manufactured construction material,'' ''Recovery Act designated country construction material,'' ''steel,'' and ''unmanufactured construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Required Use of Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements'' (Federal Acquisition Regulation (FAR) clause 52.225–23).

(b) *Requests for determination of inapplicability*. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225–23 in the request. If an offeror has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) *Evaluation of offers*. (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) *Alternate offers*. (1) When an offer includes foreign construction material, other than Recovery Act designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–23, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225–23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225–23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material, and the offeror shall be required to furnish such domestic or Recovery Act designated country construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

Alternate I (MAR 2009). As prescribed in 25.1102(e), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determination of inapplicability*. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225–23.

Alternate II (MAR 2009). As prescribed in 25.1102(e), add the definition of ''Bahrainian, Mexican, or Omani construction material'' to paragraph (a) and substitute the following paragraph (d) for paragraph (d) of the basic provision:

(d) *Alternate offers*. (1) When an offer includes foreign construction material, except foreign construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–23, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate

offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225–23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225–23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

[FR Doc. E9–7031 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3 and 52

[FAC 2005–32; FAR Case 2009–012; Item II; Docket 2009–0009, Sequence 1]

RIN 9000–AL19

Federal Acquisition Regulation; FAR Case 2009–012, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.

DATES: *Effective Date:* March 31, 2009.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clause for future orders, if the Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of the Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–012, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–012'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–012. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–012'' on your attached document.

- *Fax:* 202–501–4067.
- Mail: General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–012, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–32, FAR case 2009–012.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements section 1553 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to the protection of whistleblowers, by adding a new section 3.907, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 and a new clause at FAR 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, and its prescription in FAR 3.907–7.

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, including a number of provisions to be implemented in Federal Government contracts. Among these provisions is Section 1553 of the Recovery Act, ''Protecting State and Local Government and Contractor Whistleblowers''. This requirement promotes transparency in Federal contracting.

B. Discussion

FAR 3.907 provides that non-Federal employers receiving funds under the Recovery Act are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials or a person with supervisory authority over the employee. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. FAR 3.907–7 prescribes a new clause at 52.203–15.

C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

Therefore, given section 1553 of the Recovery Act, which extends whistleblower protections to employees of contractors that receive contracts funded under the Recovery Act, and the initial implementing guidance for the Recovery Act issued on February 18,

2009 by the Director of the Office of Management and Budget committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to acquisitions at or below the simplified acquisition threshold, as defined at FAR 2.101.

D. Applicability to Commercial Item Contracts

Section 8003 of Public Law 103–355, the FASA (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given section 1553 of the Recovery Act, which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information the employee reasonably believes is evidence of information listed in section 1553(a), the FAR Council has determined that the rule should apply to contracts for commercial items, as defined at FAR 2.101, at both the prime and subcontract levels.

E. Applicability to Commercially Available Off-the-Shelf (COTS) Item Contracts

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of COTS items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given section 1553 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information the employee reasonably believes is evidence of information listed in section 1553(a), the Administrator, Office of the Federal Procurement Policy, has determined that the rule should apply to COTS item contracts, as defined at FAR 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

F. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule applies similar, but not identical, whistleblower protections to contractor and subcontractor employees as currently covered in FAR Subpart 3.9. Likewise, this rule only applies to contracts funded in whole or in part with the Recovery Act funds. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 3 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–32, FAR Case 2009–012) in all correspondence.

G. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

H. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective on enactment, and contracts using funds appropriated by the Recovery Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 3 and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director,Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 3 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 3 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Revise section 3.900 to read as follows:

3.900 Scope of subpart.

(a) Sections 3.901 through 3.906 of this subpart implement 10 U.S.C. 2409 and 41 U.S.C. 265, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355).

(b) Section 3.907 of this subpart implements Section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

3.902 [Removed and Reserved]

■ 3. Remove and reserve section 3.902.

■ 4. Add sections 3.907 through 3.907–7 to read as follows:

3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).

3.907–1 Definitions.

As used in this section—

Board means the Recovery Accountability and Transparency Board established by Section 1521 of the Recovery Act.

Covered funds means funds appropriated by or otherwise made available by the Recovery Act.

Covered information means information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation

related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds.

Inspector General means an Inspector General appointed under the Inspector General Act of 1978. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

Non-Federal employer, as used in this section, means any employer that receives Recovery Act funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

3.907–2 Policy.

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities or their representatives:

(1) The Board.

(2) An Inspector General.

(3) The Comptroller General.

(4) A member of Congress.

(5) A State or Federal regulatory or law enforcement agency.

(6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

(7) A court or grand jury.

(8) The head of a Federal agency.

3.907–3 Procedures for filing complaints.

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.907–2, may submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The covered information giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act; and

(5) The specific nature and date of the reprisal.

(c) A contracting officer who receives a complaint of reprisal of the type described in 3.907–2 shall forward it to the Office of the Inspector General, agency legal counsel or to the appropriate official in accordance with agency procedures.

3.907–4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

3.907–5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section shall have access to the investigation file of the Inspector General, in accordance with the Privacy Act, 5 U.S.C. 552a. The investigation of the Inspector General shall be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the non-Federal employer shall have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(c) The Inspector General may exclude from disclosures made under 3.907–5(a) or (b)—

(1) Information protected from disclosure by a provision of law; and

(2) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the Inspector General determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An Inspector General investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

3.907–6 Remedies and enforcement authority.

(a) *Burden of Proof.* (1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.907–2 was a contributing factor in the reprisal.

(ii) A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal.* The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907–6(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an Inspector General report in accordance with section 1553 of the Recovery Act, the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.907–2 and shall either issue an order denying relief in whole or in part or shall take one or more of the following actions:

(1) Order the employer to take affirmative action to abate the reprisal.

(2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which shall have jurisdiction over such an action without regard to the amount in controversy if

(i) The head of an agency—

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order issued under this section, the head of the agency shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection may obtain review of the order's conformance with the law, and this section, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency.

3.907–7 Contract Clause.

Use the clause at 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 in all solicitations and contracts funded in whole or in part with Recovery Act funds.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 52.203–15 to read as follows:

52.203–15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009

As prescribed in 3.907–7, use the following clause:

Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Mar 2009)

(a) The Contractor shall post notice of employees rights and remedies for whistleblower protections provided under section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

(b) The Contractor shall include the substance of this clause including this paragraph (b) in all subcontracts.

(End of clause)

■ 6. Amend section 52.212–4 by revising the date of the clause and paragraph (r) to read as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

Contract Terms and Conditions—Commercial Items (MAR 2009)

* * * * *

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 3701, *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51–58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; Section 1553 of the American Recovery and Reinvestment Act of 2009 relating to whistleblower protections for contracts funded under that Act; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

* * * * *

(End of clause)

■ 7. Amend section 52.212–5 by—

a. Revising the date of the clause;

b. Redesignating paragraphs (b)(3) thru (b)(41) as paragraphs (b)(4) thru (b)(42), respectively, and adding a new paragraph (b)(3); and

c. Redesignating paragraphs (e)(1)(iii) thru (e)(1)(xiii) as paragraphs (e)(1)(iv) thru (e)(1)(xiv), respectively, and adding a new paragraph (e)(1)(iii). The revised and added text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Mar 2009)

* * * * *

(b) * * *

(3) 52.203–15, Whistleblower Protections under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111–5).

* * * * *

(e)(1) * * *

(iii) 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111–5). Applies to subcontracts funded under the Act.

* * * * *

(End of clause)

■ 8. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(vi) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Mar 2009)

(a) * * *

(2) * * *

(vi) 52.244–6, Subcontracts for Commercial Items. (MAR 2009)

* * * * *

■ 9. Amend section 52.244–6 by revising the date of the clause; redesignating paragraphs (c)(1)(ii) thru (c)(1)(viii) as paragraphs (c)(1)(iii) thru (c)(1)(ix), respectively, and adding a new paragraph (c)(1)(ii).

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Mar 2009)

* * * * *

(c)(1) * * *

(ii) 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111–5). Applies to subcontracts funded under the Act.

* * * * *

(End of clause)

[FR Doc. E9–7020 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 5, 8, 13, and 16

[FAC 2005–32; FAR Case 2009–010; Item III; Docket 2009–0010, Sequence 1]

RIN 9000–AL24

Federal Acquisition Regulation; FAR Case 2009–010, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Office of Management and Budget (OMB) Guidance M–09–10, dated February 18, 2009, entitled, ''Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009'' (the Recovery Act), with respect to publicizing contract actions.

DATES: *Effective Date*: March 31, 2009

Applicability Date: This rule applies on or after the effective date of this rule to: (1) Solicitations issued, (2) contracts awarded, and (3) orders issued under existing task and delivery order contracts as defined in the rule.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–010, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–010'' under the heading ''Comment or Submission.'' Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–010. Follow the instructions provided to complete the ''Public Comment and Submission Form.'' Please include your name, company name (if any), and ''FAR Case 2009–010'' on your attached document.

- *Fax*: 202–501–4067.
- *Mail*: General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–010, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Millisa Gary, Procurement Analyst, at (202) 501–0699 for clarification of content. Please cite FAC 2005–32, FAR case 2009–010. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Section 6.2 of the OMB Memorandum M–09–10, ''Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' (Pub. L. 111–5) (Recovery Act). In addition, this rule enables the Governmentwide Point of Entry (*https://www.fedbizopps.gov*) to be leveraged for the purpose of fulfilling sections 1526(c)(4) and 1554 of Division A of the Recovery Act.

On February 17, 2009, the President signed the Recovery Act. On February 18, 2009, the Director of OMB issued initial implementing guidance. One of the provisions of the OMB guidance is to provide accountability and transparency relative to publicizing contract actions. The OMB guidance requires that the FAR be amended to reflect:

1. Unique requirements for posting of presolicitation notices.
2. Unique requirements for announcing contract awards.
3. Unique requirements for entering awards into the Federal Procurement Data System (FPDS).
4. Unique requirements for actions that are not fixed-price or competitive.

B. Discussion

In order to implement Section 6.2 of the OMB Guidance M–09–10, FAR Parts 4, 5, 8, 13, and 16 are amended as follows:

1. Part 4 requires the contracting officer to enter data in the Federal Procurement Data System on any action funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), in accordance with the instructions at *https://www.fpds.gov*.

2. Subpart 5.7 is added to direct the contracting officer to use the Governmentwide Point of Entry (*https://www.fedbizopps.gov*) to (a) identify the action as funded by the Recovery Act; (b) post pre-award notices for orders exceeding $25,000 for ''informational purposes only;'' (c) describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and (d) provide a rationale for awarding any action, including modifications and orders, that is not both fixed-price and competitive, and include the rationale for using other than a fixed-price and/or competitive approach.

3. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the OMB guidance affects only internal government operations and provides a strong preference for using small businesses for the Recovery Act programs wherever possible. The interim rule does not impose any additional requirements on small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 4, 5, 8, 13, and 16 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–32, FAR Case 2009–010) in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

E. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Recovery Act became effective upon enactment, and contracts using funds appropriated by the Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4, 5, 8, 13, and 16

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 5, 8, 13, and 16 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 5, 8, 13, and 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Amend section 4.605 by adding paragraph (c) to read as follows:

4.605 Procedures.

* * * * *

(c) The contracting officer, when entering data in FPDS, shall use the instructions at *https://www.fpds.gov* to identify any action funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Add Subpart 5.7 to read as follows:

Subpart 5.7—Publicizing Requirements under the American Recovery and Reinvestment Act of 2009

Sec.
5.701 Scope.
5.702 Applicability.
5.703 Definitions.
5.704 Publicizing-preaward.
5.705 Publicizing-post-award.

Subpart 5.7—Publicizing Requirements under the American Recovery and Reinvestment Act of 2009

5.701 Scope.

This subpart prescribes posting requirements for presolicitation and award notices for actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act). The requirements of this subpart enhance transparency to the public.

5.702 Applicability.

This subpart applies to all actions expected to exceed $25,000 funded in whole or in part by the Recovery Act. Unlike subparts 5.2 and 5.3, this subpart includes additional requirements for orders and for actions that are not both fixed-price and competitive.

5.703 Definition.

As used in this subpart—

Task or delivery order contract means a ''delivery order contract,'' and a ''task order contract,'' as defined in 16.501–1. For example, it includes Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), and other indefinite-delivery/indefinite-quantity contracts, whether single award or multiple award. It also includes Federal Supply Schedule contracts (including Blanket Purchase Agreements under Subpart 8.4).

5.704 Publicizing-preaward.

(a)(1) Follow the publication procedures at 5.201.

(2) In addition, notices of proposed contract actions are required for orders of $25,000 or more, funded in whole or in part by the Recovery Act, which are issued under task or delivery order contracts. These notices are for ''informational purposes only,'' therefore, 5.203 does not apply. Contracting officers should concurrently use their usual solicitation practice (*e.g.*, e-Buy).

(b) Contracting officers shall use the instructions at the Governmentwide Point of Entry (GPE) (*https://www.fedbizopps.gov*) to identify proposed contract actions funded in whole or in part by the Recovery Act.

(c) Ensure that the description required by 5.207(a)(16) includes a narrative of the products and services (including construction) that is clear and unambiguous to the general public.

5.705 Publicizing-post-award.

Follow usual publication procedures at 5.301, except that the following supersede the exceptions at 5.301(b)(3) through (8):

(a) For any contract action exceeding $500,000, including all modifications and orders under task or delivery order contracts, publicize the award notice and ensure that the description required by 5.207(a)(16) includes a narrative of the products and services (including construction) that is clear and unambiguous to the general public.

(b) Regardless of dollar value, if the contract action, including all modifications and orders under task or delivery order contracts, is not both fixed-price and competitively awarded, publicize the award notice and include in the description the rationale for using other than a fixed-priced and/or competitive approach. These notices and the rationale will be available to the public at the GPE, so do not include any proprietary information or information that would compromise national security. The following table provides examples for when a rationale is required.

POSTING OF RATIONALE—EXAMPLES

Description of contract action	Posting rationale on special section of recovery.gov
(1) A contract is competitively awarded and is fixed-price.	Not Required.
(2) A contract is awarded that is not fixed-price..	Required
(3) A contract is awarded without competition..	Required
(4) An order is issued under a new or existing single award IDIQ contract.	Required if order is made under a contract described in (2) or (3).
(5) An order is issued under a new or existing multiple award IDIQ contract.	Required if one or both of the following conditions exist: (i) The order is not fixed-price. (ii) The order is awarded pursuant to an exception to the competition requirements applicable to the underlying vehicle (*e.g.*, award is made pursuant to an exception to the fair opportunity process).
(6) A modification is issued.	Required if modification is made: (i) To a contract described in (2) or (3) above; or (ii) To an order requiring posting as described in (4) or (5) above.
(7) A contract or order is awarded pursuant to a small business contracting authority (*e.g.*, SBA's section 8(a) program).	Required if one or both of the following conditions exist: (i) The contract or order is not fixed-price; (ii) The contract or order was not awarded using competition (*e.g.*, a non-competitive 8(a) award).

(c) Contracting officers shall use the instructions at the Governmentwide Point of Entry (GPE) (*https://www.fedbizopps.gov*) to identify actions funded in whole or in part by the Recovery Act.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 4. Amend section 8.404 by revising the last sentence in paragraph (a); and by adding a new paragraph (e) to read as follows:

8.404 Use of Federal Supply Schedules.

(a) *General.** * * Therefore, when establishing a BPA (as authorized by 13.303–2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsize the requirement; but see paragraph (e) of this section for orders (including orders issued under BPAs) funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

(e) Publicizing contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(1) Notices of proposed MAS orders (including orders issued under BPAs) that are for ''informational purposes only'' exceeding $25,000 shall follow the procedures in 5.704 for posting orders.

(2) Award notices for MAS orders (including orders issued under BPAs) shall follow the procedures in 5.705.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 5. Amend section 13.105 by adding paragraph (d) to read as follows:

13.105 Synopsis and posting requirements.

* * * * *

(d) When publicizing contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(1) Notices of proposed contract actions shall follow the procedures in 5.704 for posting orders.

(2) Award notices shall follow the procedures in 5.705.

PART 16—TYPES OF CONTRACTS

■ 6. Amend section 16.505 by revising paragraph (a)(1); and adding paragraph (a)(10) to read as follows:

16.505 Ordering.

(a) * * *

(1) In general, the contracting officer does not synopsize orders under indefinite-delivery contracts; but see 16.505(a)(10) for orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

(10) Publicize orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) as follows:

(i) Notices of proposed orders shall follow the procedures in 5.704 for posting orders.

(ii) Award notices for orders shall follow the procedures in 5.705.

* * * * *

[FR Doc. E9–7019 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 52

[FAC 2005–32; FAR Case 2009–009; Item IV; Docket 2009–0011, Sequence 1]

RIN 9000–AL21

Federal Acquisition Regulation; FAR Case 2009–009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which requires contractors to report on their use of Recovery Act funds.

DATES: *Effective Date*: March 31, 2009

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clause if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–009, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–009'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–009. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–009'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, *Attn*: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–009, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. Please cite FAC 2005–32, FAR case 2009–009. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009 (the ''Recovery Act''), including a number of provisions to be implemented in Federal Government contracts. This interim rule implements section 1512, which is also known as the ''Jobs Accountability Act.'' Subsection (c) of section 1512 requires contractors that receive awards (or modifications to existing awards) funded, in whole or in part, by the Recovery Act to report quarterly on the use of the funds.

This FAR case adds a new subpart 4.15, and a new clause, 52.204–11. Contracting officers must include the new clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. Commercial item contracts and Commercially Available Off-The-Shelf (COTS) item contracts are covered, as well as actions under the simplified acquisition threshold.

Contracting officers who obligate Recovery Act funds on existing contracts or orders must modify those contracts to add the new clause.

Contracting officers shall ensure that the contractor complies with the reporting requirements of the new clause. Contracting officers are not responsible for validating report content, only that a report was submitted as required. The online reporting tool will allow the contracting officer to monitor this as a matter of contract performance.

Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter. Contractors will report the information, using the online reporting tool available at *http://www.FederalReporting.gov*, using instructions at that Web site. The online reporting tool is being developed for use by the July 10th timeframe. The data elements to be reported are outlined in the clause 52.204–11, in paragraph (d).

The Government intends to pre-populate as many data elements as possible to reduce the burden on contractors and first-tier subcontractors by using information available in other Government systems. For instance, the Government is considering pre-populating congressional districts based on nine-digit zip codes, funding agency, North American Industry Classification System (NAICS) code, and parent DUNS.

While Section 1512(c)(4) requires reporting on all Federal Financial Accountability and Transparency Act (FFATA) data elements, including the compensation information, it limits the reporting to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation disclosure for prime contractors, because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupportable given the transparency goals of both FFATA and the Recovery Act.

B. Determinations

The Councils provide the following determinations with respect to the rule's applicability to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, commercial items, and commercially available off-the-shelf (COTS) items.

1. *Applicability to contracts at or below the simplified acquisition threshold.* Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them. Therefore, given section 1512 of the Recovery Act which requires that prime contractors report information on their use of Recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

2. *Applicability to Commercial Item contracts.* Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given section 1512, of the Recovery Act, which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply the rule to commercial items, as defined at 2.101, both at the prime and subcontract levels.

3. *Applicability to Commercially Available Off-The-Shelf (COTS) item contracts.* Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of commercially available off-the-shelf (COTS) items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply. The same applies for subcontracts for COTS items.

Therefore, given section 1512, of the Recovery Act which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the Administrator, Office of the Federal Procurement Policy, has determined that it is in the best interest of the Federal Government to apply the rule to Commercially Available Off-The-Shelf (COTS) item contracts and subcontracts, as defined at FAR 2.101.

C. Request for Public Comments

The Councils ask for public comments on the interim rule, and the following additional issues:

1. The statute requires a description of the work (implemented at 52.204–11(d)(5)). Should the Government provide a list of broad categories of work under the Recovery Act from which the contractor would select and, if so, what should these be?

2. The definitions of ''jobs created'' and ''jobs retained'' are currently based on a conversion of part-time or temporary jobs into ''full-time equivalent'' (FTE) jobs. In order to do such a conversion, these part-time hours must be divided by the number of hours in a full-time schedule. This interim rule leaves the definition of full-time schedule to each individual company's discretion based on its existing practices. With respect to the methodology described in the interim rule for estimating jobs created or retained:

—Is the use of FTE and the description provided consistent with existing business practices and systems?

—Is a standardized methodology based on FTE necessary or do contractors have existing practices that adequately address other than full-time jobs to avoid inflating estimated numbers for jobs created and jobs retained? Should the Government allow contractors to use any method consistent with their existing practice as long as the contractor provides an

explanation of the methodology, including a description of how part-time and temporary employees are addressed?

—If the Government were to standardize the number of hours in a ''full-time schedule,'' would this increase the burden of reporting on jobs created or retained?

3. If the Government were to require companies to separately invoice for all supplies or services funded by the Recovery Act, what challenges would this pose? Are there any benefits?

4. Is there information not customarily provided that would make it easier for companies to segregate their invoices to separately identify items funded by the Recovery Act?

5. Are there challenges to obtaining the information required from first-tier subcontractors? If so, how could the rule be changed to ease the submission of this information from both a prime contractor and subcontractor perspective?

6. Does the definition of ''Total compensation'' used in the clause provide sufficient clarity? If not, what specifically should be clarified?

7. Would it be useful to provide an Alternate clause that would allow agencies to identify meaningful distinct ''projects'' within the contract for the purpose of requiring the contractor to report employment impact and progress by ''project'' rather than for the contract as a whole? For example, if the contract called for work in distinct geographic areas, the report might provide more meaningful information if the contractor were to report employment impact and progress separately by geographic area. This would not require individual reports but rather separate sections within the quarterly report.

8. Currently, this rule requires contractors to report on invoiced amounts because the Government assumed that it would be extremely difficult for the contractor employee responsible for report submission, to report on ''receipt of funds.'' Would a contractor be able to separately identify when Recovery Act funds were received and be able to identify the payment to particular deliverables? How difficult would this be to track and report on a quarterly basis?

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

This interim rule may have a significant economic impact on a substantial number of small entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it requires contractors to report on their use of Recovery Act funds. An Initial Regulatory Flexibility Analysis has been prepared and the results of the analysis show that the direct cost of this rule on an average cost-per-contractor basis does not appear to rise to the level of being economically significant (*i.e.* $100,000,000); however, the Councils request comments on this finding.

Therefore, the Councils have prepared an Initial Regulatory Flexibility Analysis (IRFA) for public comment that is summarized as follows:

This Initial Regulatory Flexibility Analysis has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

This action implements section 1512 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which requires contractors to report quarterly on their use of Recovery Act funds.

2. Objectives of, and legal basis for, the rule.

The objective of the Recovery Act is to create jobs, restore economic growth, and strengthen America's middle class through measures that modernize the nation's infrastructure, enhance America's energy independence, expand educational opportunities, preserve and improve affordable health care, provide tax relief, protect those in greatest need, and provide for other purposes. This rule implements section 1512 of the Recovery Act which requires contractors, as a condition of receipt of funds, to report quarterly on their use of those funds. These reports will be made available to the public. The Recovery Act is designed to provide unprecedented transparency to the American taxpayer.

3. Description and estimate of the number of small entities to which the rule will apply.

The rule imposes a clause in any award document funded by the Recovery Act, requiring the contractor to publicly disclose information related to the use of funds and specific information about first-tier subcontract awards. This clause requires contractors to report on use of Recovery Act funds. The clause imposes a public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and unique prime Federal contractors. The estimate for the number of active and unique prime federal contractors that will participate in awards funded by the Recovery Act is 20,013, of which 4,003 or 20 percent are estimated to be small businesses. It is also noted that this is 20 percent of prime contractors, which should not be confused with the 23 percent small business contracting goal which is based on dollars and that continues to apply to both Recovery Act spending and agencies' ongoing procurement spending.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is 60,039 or three times the number of prime contractors. Of these 60,039 Recovery Act first-tier subcontractors, it is estimated that 25 percent, or 15,010, will be small businesses.

Based on the above, the estimated total number of small businesses, prime and subcontractors, to which this rule will apply is 19,013 and the estimated total number of other than small businesses to which this rule will apply is 61,039.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The rule requires Federal prime contractors, both small and other than small businesses, to report quarterly on their use of funds received under the Recovery Act. The rule applies to all Federal contractors regardless of size or business ownership. Such a report would probably be prepared by a company contract administrator or contract manager or a company subcontract administrator. The information required in the report is primarily information that companies would maintain for their own business purposes including, but not limited to, contract or other award number, the dollar amount of invoices, the supplies or services delivered, a broad assessment of progress towards completion, the estimated number of new jobs created or retained resulting from the award, and first-tier subcontract information (or aggregate information if the subcontract is less than $25,000, or the subcontractor is an individual or had gross income in the previous tax year of less than $300,000). While most of the data elements impose only one-time burden collection, some will require quarterly updates.

There are three data elements required in the report that will likely require some additional effort: (1) Estimating the cumulative number of jobs created each calendar quarter, (2) estimating the cumulative number of jobs retained each calendar quarter, and (3) providing the name and total compensation of each of the five most highly compensated officers of the contractor for the calendar year in which the contract is awarded, which applies at both the prime and first-tier subcontract level. The rule also requires the prime contractor to report certain information, required by the Federal Funding Accountability and Transparency Act of 2006 (FFATA), about first-tier subcontracts (though all awards under $25,000 will be aggregated, eliminating the need to report transaction-level data). The prime contractor will have most of this information in the subcontract award document, such as the name of the subcontractor, award number, and date of award. However, the prime contractor will have to obtain four of the elements directly from the first-tier subcontractor: (1) The unique identifier (DUNS Number) ''for awards of $25,000 or more'' as well as for the

subcontractor's parent company, if the subcontractor has a parent company, (2) subcontractor's physical address, (3) subcontract primary performance location, and (4) the compensation information described earlier as required by FFATA and reflected in section 1512 of the Recovery Act.

With respect to the DUNS Number, we anticipate that most first-tier subcontractors have a DUNS Number as it is a requirement for receipt of any Government contract. However, a company that never received nor anticipated a Government contract might not have a DUNS number and will have to register for one with Dunn and Bradstreet. The registration process is not burdensome, can be done online or by phone, and requires only information any company would have on hand for business purposes. First-tier subcontractors are not required to register in the Central Contractor Registration (CCR) as a consequence of this rule.

With respect to compensation information, this requirement results from FFATA and will not apply if the public has access to information about compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. Otherwise, each prime contractor and first-tier subcontractors will have to disclose the compensation information if it received (1) 80 percent or more of annual gross revenues in Federal awards; and (2) $25M or more in annual gross revenue from Federal awards. Because this requirement of FFATA became law on December 26, 2007, we anticipate that those companies to which it applies are aware of the requirement and have been preparing to provide this information.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule includes the reporting requirements stipulated by FFATA in FAR Case 2008–039 FFATA flow-down and 2008–037 Financial Disclosure.

These cases are in process and as they are finalized, they will be amended to ensure that they do not duplicate, overlap, or conflict with the requirements of this interim rule.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

The rule requires Federal prime contractors to respond to all of the reporting requirements, eliminating some of the reporting burden on first-tier subcontractors despite the fact that they will have to provide some information to the prime contractor. Also, all of the reporting elements applied to first-tier subcontractors, a significant percentage of which will be small businesses, are one-time collection burdens. The Government believes that the rule will further minimize the reporting burden on Government contractors, including all small businesses, as well as other businesses, by using existing Federal acquisition/registration systems to pre-populate certain data elements.

The FAR Secretariat will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 4 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–32, FAR case 2009–009), in all correspondence.

E. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the interim rule contains information collection requirements. Accordingly, the FAR Secretariat forwarded an emergency information collection request for approval of new information collection requirements to the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35, *et seq.* OMB approved the new information collection requirements as follows:

1. OMB Control No. 9000–0166—One Time Reporting Requirements for Prime Contractors.
2. OMB Control No. 9000–0167—One Time Reporting for First-tier Subcontractors.
3. OMB Control No. 9000–0168—One Time Reporting, Compensation Requirements.
4. OMB Control No. 9000–0169—Quarterly Reporting for Prime Contractors.

Comments on the interim rule as well as the collection will be considered in the revisions to both the rule and the collection.

Any award funded by the Recovery Act will contain the clause at 52.204–11. This clause requires contractors to report on use of Recovery Act funds. The clause imposes public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and unique prime Federal contractors as of February 2009. The estimate for the number of active and unique prime Federal contractors that will participate in awards funded by the Recovery Act is 20,013. This is based on using a factor of .16 of 129,331, derived by dividing 129,331 by $517B in procurement obligations for fiscal year 2008 or by dividing estimated Recovery Act dollars for contracts ($80B: Government's best estimate of Recovery Act dollars to be obligated by contracts is between $60 and $80 billion; using $80 billion for calculation purposes) by $517B. Of the estimated 20,013 Recovery Act prime contractors, it is estimated that 20 percent, or 4,003, will be small businesses. It should be noted that this is 20 percent of prime contractors; this should not be confused with the 23 percent small business contracting goal which is based on dollars and that continues to apply to both Recovery Act spending and agencies' ongoing procurement spending.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is 60,039. This was derived by estimating three first-tier subcontractors for each prime contractor. Of these 60,039 Recovery Act first-tier subcontractors, it is estimated that 25 percent, or 15,010, will be small businesses.

Based on the above, the estimated total number of small businesses, prime and subcontractors, to which this rule will apply is 19,013 and the estimated total number of other than small businesses to which this rule will apply is 61,039.

Though Section 1512 requires that the reports be completed by the prime contractor for all data elements, for practical purposes, the prime contractor will have to obtain certain information from their first-tier subcontractors, hence the flow-down requirements of paragraph (d)(10) of the clause. Additionally, the information required on the prime contractor award varies from that required for the first-tier subcontract awards. For instance, the elements at paragraphs (d)(1) through (9) are collection burdens associated with the prime contract award while the elements in (d)(10)(i) through (ix) are associated with first-tier subcontracts.

Finally, the elements required by Section 1512 of the Recovery Act are a combination of those that will be updated in each quarterly report, such as jobs created and retained and progress towards completion of the overall purpose and expected outcomes or results of the contract and those that are one-time collection burdens, such as award number and date and all of the reporting requirements for first-tier subcontracts. Therefore, the following analysis separately estimates the burden associated with the one-time reporting elements and those that are updated quarterly. The parenthetical reference after the description of each reporting element refers to the FAR clause. The hours estimated per response include the time for reviewing instructions, searching existing data sources, gathering the data, and completing the collection of information. The estimated total annual burden associated with reporting requirements of FAR 52.204–

11 is $31,725,468, based on the following:

One-Time Reporting Elements

1. *OMB Control No. 9000–0166—One Time Reporting Requirements for Prime Contractors*. One-time reporting elements for which the burden is imposed on the prime contractor include the following:

a. The award number for both its Government contract and first-tier subcontracts ((d)(1) and (d)(10)(viii));

b. Program or project title, if any, for its Government contract ((d)(4));

c. A description of the overall purpose and expected outcomes or results of the contract and first-tier subcontracts, including significant deliverables and, if appropriate, units of measure ((d)(5) and (d)(10)(vii));

d. Name of the first-tier subcontractor ((d)(10)(ii));

e. Amount of the first-tier subcontract award ((d)(10)(iii));

f. Date of the first-tier subcontract award ((d)(10)(iv));

g. Applicable North American Industry Classification System (NAICS) code ((d)(10)(v)); and

h. Funding agency ((d)(10)(vi)).

We estimate the total annual public cost burden for these elements to be $850,544 based on the following:

Respondents: 20,013.

Responses per respondent: 1.25 (reflects estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).

Total annual responses: 25,016.

Preparation hours per response: .5.

Total response burden hours: 12,508.

Average hourly wages ($50.00+36.35 percent overhead): 68.00.

Estimated cost to the public: $850,544.

2. *OMB Control No. 9000–0168—One Time Reporting, Compensation Requirements*. A one-time reporting element for which the burden is imposed on certain prime contractors and first-tier subcontractors to publicly disclose the names and total compensation of each of the contractor's or first-tier subcontractor's five most highly compensated officers, for the calendar year in which the award was made ((d)(8) and (d)(10)(xi)) (see applicability requirements in the clause at (d)(8) and (d)(10)).

While Section 1512(c)(4) of the Recovery Act requires reporting on all FFATA data elements, including the compensation information, it limits the prime's reporting responsibility to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation disclosure for prime contractors as well because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupportable given the transparency goals of both FFATA and the Recovery Act.

There are likely to be some prime contractors that already provide public access to the compensation of senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 or section 6104 of the Internal Revenue Code of 1986. For purposes of this analysis, the Government estimates that 5 percent of prime contractors already provide such public access. There are also likely to be some first-tier subcontractors that do not meet either of the revenue thresholds for applicability. For purposes of this analysis, the Government estimates that 5 percent of first-tier subcontractors will not have to disclose compensation information because they do not meet the revenue thresholds.

We estimate the total annual public cost burden for these elements to be $19,392,444, based on the following:

Respondents: 76,049 (20,013 primes-5 percent=19,012+60,039 first-tier subcontractors-5 percent=57,037).

Responses per respondent: 1.25 (reflects estimate that 25 percent of all respondents will have more than one Recovery Act funded award on which to report).

Total annual responses: 95,061.

Preparation hours per response: 3.

Total response burden hours: 285,183.

Average hourly wages ($50.00+36.35 percent overhead): $68.00.

Estimated cost to the public: $19,392,444.

3. *OMB Control No. 9000–0167—One Time Reporting for First-tier Subcontractors.*

One-time reporting elements for which the burden is imposed only on the first-tier subcontractor include the following:

a. Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company ((d)(10)(i));

b. Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable((d)(10)(ix)); and

c. Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable ((d)(10)(x)).

The Government expects that most first-tier subcontractors will have a DUNS number. However, if a company has never received nor anticipated a Government contract, it would be required to register for a DUNS number which is not an onerous process and can be done online or by phone using information a company would have on hand for business purposes.

We estimate the total annual public cost burden for these elements to be $1,275,816, based on the following:

Respondents: 60,039.

Responses per respondent: 1.25 (reflects estimate that 25 percent of first-tier subcontractors will have more than one Recovery Act funded award on which to report).

Total annual responses: 75,049.

Preparation hours per response: .25.

Total response burden hours: 18,762.

Average hourly wages ($50.00+36.35 percent overhead):$68.00.

Estimated cost to the public: $1,275,816.

4. *OMB Control No. 9000–0169—Quarterly Reporting for Prime Contractors*. Elements updated quarterly for which the burden is imposed on the prime contractor include the following:

a. The amount of Recovery Act funds invoiced by the contractor, cumulative since the beginning of the contract ((d)(2));

b. A list of all significant services performed or supplies delivered, including construction, for which the contractor has invoiced ((d)(3));

c. An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (*i.e.*, not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act ((d)(6));

d. A narrative description of the employment impact of the Recovery Act funded work ((d)(7)(i) through (ii)); and

e. For subcontracts valued at less than $25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under $300,000, the contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount ((d)(9)).

We estimate the total annual public cost burden for these elements to be $10,206,664, based on the following:

Respondents: 20,013.

Responses per respondent: 1.25 (reflects 4 reports multiplied by a factor of 1.25 to reflect Government's estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).

Total annual responses: 100,065.

Preparation hours per response: 1.5.
Total response burden hours: 150,098.
Average hourly wages ($50.00+36.35 percent overhead): $68.00.
Estimated cost to the public: $10,206,664.

F. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than June 1, 2009 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite the applicable OMB Control No.: 9000–0166; 9000–0167; 9000–0168; or 9000–0169, and FAR Case 2009–009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite the applicable OMB Control No.: 9000–0166, 9000–0167; 9000–0168; or 9000–0169, and FAR Case 2009–009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

The Paperwork Reduction Act applies to this interim rule.

G. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective on enactment on February 17, 2009, and agencies are ready to award contracts using funds appropriated by the Act. Without a FAR clause, agencies will be forced to develop their own clause, which would (1) significantly increase the costs for Government as well as contractors who may have to comply with varied clauses and reporting mechanisms, (2) increase the risk of non-compliance, and (3) degrade transparency and public understanding. Waiting for public comment prior to issuing a clause will require resource-intensive and costly post-award bilateral negotiations and may hinder recovery. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4 and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Add subpart 4.15 to read as follows:

Subpart 4.15–American Recovery and Reinvestment Act—Reporting Requirements

Sec.
4.1500 Scope of subpart.
4.1501 Procedures.
4.1502 Contract clause.

4.1500 Scope of subpart.

This subpart implements section 1512(c) of Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act), which requires, as a condition of receipt of funds, quarterly reporting on the use of funds. The subpart also implements the data elements of the Federal Funding Accountability and Transparency Act of 2006, as amended (Pub. L. 109–282). Contractors that receive awards (or modifications to existing awards) funded, in whole or in part by the Recovery Act, must report information including, but not limited to—

(a) The dollar amount of contractor invoices;

(b) The supplies delivered and services performed;

(c) An assessment of the completion status of the work;

(d) An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds;

(e) Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and

(f) Specific information on first-tier subcontractors.

4.1501 Procedures.

(a) In any contract action funded in whole or in part by the Recovery Act, the contracting officer shall indicate that the contract action is being made under the Recovery Act, and indicate which products or services are funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the contract instrument.

(b) To maximize transparency of Recovery Act funds that must be reported by the contractor, the contracting officer shall structure contract awards to allow for separately tracking Recovery Act funds. For example, the contracting officer may consider awarding dedicated separate contracts when using Recovery Act funds or establishing contract line item number (CLIN) structures to mitigate commingling of Recovery funds with other funds.

(c) Contracting officers shall ensure that the contractor complies with the reporting requirements of 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements. If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies.

(d) The contracting officer shall make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under Subpart 42.15.

4.1502 Contract clause.

Insert the clause at 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements in all solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This includes, but is not limited to, Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule (FSS) contracts, or agency indefinite-delivery/indefinite-quantity (ID/IQ) contracts that will be funded with Recovery Act funds. Contracting officers shall ensure that this clause is included in any existing contract or

order that will be funded with Recovery Act funds. Contracting officers may not use Recovery Act funds on existing contracts and orders if the clause at 52.204–11 is not incorporated.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Add section 52.204–11 to read as follows:

52.204–11 American Recovery and Reinvestment Act—Reporting Requirements

As prescribed in 4.1502, insert the following clause:

American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009)

(a) *Definitions*. As used in this clause—

Contract, as defined in FAR 2.101, means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq*. For discussion of various types of contracts, see FAR Part 16.

First-tier subcontract means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act.

Jobs created means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as ''full-time equivalent'' (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Jobs retained means an estimate of those previously existing filled positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as ''full-time equivalent'' (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Total compensation means the cash and noncash dollar value earned by the executive during the contractor's past fiscal year of the following (for more information see 17 CFR 229.402(c)(2)):

(1) *Salary and bonus.*

(2) *Awards of stock, stock options, and stock appreciation rights*. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

(3) *Earnings for services under non-equity incentive plans*. Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

(4) *Change in pension value*. This is the change in present value of defined benefit and actuarial pension plans.

(5) Above-market earnings on deferred compensation which is not tax-qualified.

(6). *Other compensation*. For example, severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property if the value for the executive exceeds $10,000.

(b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.

(c) Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.

(d) The Contractor shall report the following information, using the online reporting tool available at *http://www.FederalReporting.gov*.

(1) The Government contract and order number, as applicable.

(2) The amount of Recovery Act funds invoiced by the contractor for the reporting period. A cumulative amount from all the reports submitted for this action will be maintained by the government's on-line reporting tool.

(3) A list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in this calendar quarter.

(4) Program or project title, if any.

(5) A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and, if appropriate, associated units of measure.

(6) An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (*i.e.*, not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act.

(7) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and only address the impact on the contractor's workforce. At a minimum, the contractor shall provide—

(i) A brief description of the types of jobs created and jobs retained in the United States and outlying areas (see definition in FAR 2.101). This description may rely on job titles, broader labor categories, or the contractor's existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and

(ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States and outlying areas. A job cannot be reported as both created and retained.

(8) Names and total compensation of each of the five most highly compensated officers of the Contractor for the calendar year in which the contract is awarded if—

(i) In the Contractor's preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(B) $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(9) For subcontracts valued at less than $25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under $300,000, the Contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount.

(10) For any first-tier subcontract funded in whole or in part under the Recovery Act, that is over $25,000 and not subject to reporting under paragraph 9, the contractor shall require the subcontractor to provide the information described in (i), (ix), (x), and (xi) below to the contractor for the purposes of the quarterly report. The contractor shall advise the subcontractor that the information will be made available to the public as required by section 1512 of the Recovery Act. The contractor shall provide detailed information on these first-tier subcontracts as follows:

(i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.

(iii) Amount of the subcontract award.

(iv) Date of the subcontract award.

(v) The applicable North American Industry Classification System (NAICS) code.

(vi) Funding agency.

(vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.

(viii) Subcontract number (the contract number assigned by the prime contractor).

(ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.

(x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.

(xi) Names and total compensation of each of the subcontractor's five most highly compensated officers, for the calendar year in which the subcontract is awarded if—

(A) In the subcontractor's preceding fiscal year, the subcontractor received—

(*1*) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

(*2*) $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

(B) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(End of clause)

■ 4. Amend section 52.212–5 by revising the date of the clause; and redesignating paragraphs (b)(4) through (b)(42) as (b)(5) through (b)(43), respectively, and adding a new paragraph (b)(4) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (MAR 2009)

* * * * *

(b) * * *

_ (4) 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009) (Pub. L. 111–5).

* * * * *

[FR Doc. E9–7025 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 14, 15, and 52

[FAC 2005–32; FAR Case 2009–011; Item V; Docket 2009–0012, Sequence 1]

RIN 9000–AL20

Federal Acquisition Regulation; FAR Case 2009–011, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515 of Division A.

DATES: *Effective Date:* March 31, 2009.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clauses (Alternates) for future orders, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–011, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–011'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–011. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–011'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–011, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. Please cite FAC 2005–32, FAR case 2009–011. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515, by adding alternate clauses to 52.214–26, ''Audit and Records–Sealed Bidding,'' 52.212–5, ''Contract Terms and Conditions Required to Implement Statutes or Executive Orders–Commercial Items,'' and FAR 52.215–2, ''Audit and Records-Negotiation.''

Further, FAR 12.504(a)(7) is amended for contracts using Recovery Act funds to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts that are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Likewise, 13.006(d) is amended for contracts using Recovery Act funds to apply 52.215–2, ''Audit and Records-Negotiation'' to contracts and subcontracts which are otherwise exempt because they are under the simplified acquisition threshold. This requirement provides further transparency into Federal contracting whose contracts are funded with Recovery Act funds.

B. Discussion

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions are sections 902, 1514, and 1515 which serve to ''prevent the fraud, waste, and abuse'' of Recovery Act

funds through the review and audit of contracts using such funds. The interim rule is necessary to implement these measures to both protect, and provide transparency in the use of, Recovery Act funds.

Section 1514 provides for agency inspector general review of concerns raised by the public regarding investments of funds under the Recovery Act. Sections 902 and 1515 provide for respectively, Comptroller General and agency inspector general reviews of any records of the contractor or subcontractor regarding transactions using Recovery Act funds, and the interview of contractor officers or employees concerning such transactions. Section 902 also provides for the Comptroller General to interview subcontractor employees, while nowhere in the Recovery Act is corresponding authority provided to the agency inspector generals. The authority for Comptroller General audits of prime contractors already exists for Part 12 contracts under FAR 52.212–5, ''Contract Terms and Conditions Required to Implement Statutes or Executive Orders–Commercial Items'' and for Part 15 contracts under FAR 52.215–2, ''Audit and Records–Negotiation.'' FAR 52.215–2 also provides authority to audit subcontracts, while 52.212–5 does not provide corresponding authority. In the case of Part 13 contracts there are no authorities for the audit of either prime contracts or subcontracts. Likewise, except in the case of modifications involving cost or pricing data, for Part 14 contracts there are no authorities for the audit of either prime contracts or subcontracts.

In the matter of interviewing contractor or subcontractor employees concerning contracting transactions there are no current authorities under the FAR (but see changes under Item VI of this FAC 2005–32, FAR Case 2008–026).

Consequently, for contracts using Recovery Act funds this interim rule provides the following authorities to the Comptroller General:

- For Part 12 contracts the authority to audit subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 15 contracts the authority to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 14 contracts the authority to audit both contracts and subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.

The interim rule provides the same authorities in the preceding paragraph to agency inspector generals, with the exception of interviewing subcontractor employees.

C. Applicability to Commercial Item Contracts

Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. FASA provides if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to commercial items, as defined at 2.101, both at the prime and subcontract levels.

D. Applicability to Commercially Available Off-The-Shelf (COTS) Item Contracts

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of commercially available off-the-shelf (COTS) items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the Administrator, Office of the Federal Procurement Policy, has determined the rule should apply to Commercially Available Off-The-Shelf (COTS) item contracts, as defined at FAR 2.101.

E. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them. Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

F. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it requires contractors to make available existing records of transactions covered by the Act. Contractors are not obligated to create additional records. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 12, 13, 14, 15, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–32, FAR Case 2009–011) in correspondence.

G. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) applies to this interim rule. However, the information collection requirements imposed by the changes to 52.214–26 and 52.215–2 are currently covered by the approved collection

under OMB Control number 9000–0034 entitled, Examination of Records by Comptroller General and Contract Audit: Sections Affected 52.215–2; 52.212–5; 52.214–26, for these existing provisions. The Councils believe changes due to the use of these provisions will not result in a substantial increase in either the burden or the number of entities. However, the Council welcomes comments on both of these items as part of the 60-day comment period.

H. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective upon enactment, and contracts using funds appropriated by the Recovery Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 12, 13, 14, 15, and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director,Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 14, 15, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 14, 15, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 12.301 by revising paragraph (b)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(4) *The clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212–5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

(i) Use the clause with its Alternate I when the head of the agency has waived the examination of records by the Comptroller General in accordance with 25.1001.

(ii) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), the contracting officer shall use the clause with its Alternate II, and may not use Alternate I.

* * * * *

■ 3. Amend section 12.504 by revising paragraph (a)(7) to read as follows:

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) * * *

(7) 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, when a subcontractor is not required to provide cost or pricing data (see 15.209(b)), unless using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.006 by revising paragraph (d) to read as follows:

13.006 Inapplicable provisions and clauses.

* * * * *

(d) 52.215–2, Audits and Records—Negotiation, except as used with its Alternate I, when using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

PART 14—SEALED BIDDING

■ 5. Amend section 14.201–7 by revising paragraph (a) to read as follows:

14.201–7 Contract Clauses.

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214–26, Audit and Records-Sealed Bidding, in solicitations and contracts as follows:

(1) Use the basic clause if—

(i) The acquisition will not use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5); and

(ii) The contract amount is expected to exceed the threshold at 15.403–4(a)(1) for submission of cost or pricing data.

(2) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, use the clause with its Alternate I in all solicitations and contracts.

* * * * *

■ 6. Amend section 15.209 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(2) to read as follows:

15.209 Solicitation provisions and contract clauses.

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, the contracting officer shall insert the clause at 52.215–2, Audit and Records-Negotiation (10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A–133), in solicitations and contracts except those for—

* * * * *

(2) When using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5)—

(i) The exceptions in paragraphs (b)(1)(i) through (b)(1)(iii) are not applicable; and

(ii) Use the clause with its Alternate I.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.212–5 by adding Alternate II to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Alternate II (MAR 2009). As prescribed in 12.301(b)(4)(ii), substitute the following paragraphs (d)(1) and (e)(1) for paragraphs (d)(1) and (e)(1) of the basic clause as follows:

(d)(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials shall have access to and right to—

(i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.

(e)(1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), and (c), of this clause, the Contractor is not required to flow down any FAR clause in a subcontract for commercial items, other than—

(i) *Paragraph (d) of this clause.* This paragraph flows down to all subcontracts, except the authority of the Inspector General under paragraph (d)(1)(ii) does not flow down; and

(ii) *Those clauses listed in this paragraph (e)(1).* Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(A) 52.203–13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110–252, Title VI, Chapter 1 (41 U.S.C. 251 note)).

(B) 52.219–8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $550,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

(C) 52.222–26, Equal Opportunity (Mar 2007) (E.O. 11246).

(D) 52.222–35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (Sept 2006) (38 U.S.C. 4212).

(E) 52.222–36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793).

(F) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201).

(G) 52.222–41, Service Contract Act of 1965 (Nov 2007) (41 U.S.C. 351, *et seq.*).

(H) 52.222–50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)).

(I) 2.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements (Nov 2007) (41 U.S.C. 351, *et seq.*).

(J) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services-Requirements (Feb 2009) (41 U.S.C. 351, *et seq.*).

(K) 52.222–54, Employment Eligibility Verification (Jan 2009).

(L) 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations. (Mar 2009) (Pub. L. 110–247). Flow down required in accordance with paragraph (e) of FAR clause 52.226–6.

(M) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247–64.

■ 8. Amend section 52.214–26 by adding Alternate I to read as follows:

52.214–26 Audit and Records—Sealed Bidding.

* * * * *

Alternate I (*MAR 2009*). As prescribed in 14.201–7(a)(2) substitute the following paragraphs (c) and (e) for paragraphs (c) and (e) of the basic clause:

(c) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(1) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract or a subcontract hereunder; and

(2) Interview any officer or employee regarding such transactions.

(e)(1) Except as provided in paragraph (e)(2), the Contractor shall insert a clause containing the provisions of this clause, including this paragraph (e), in all subcontracts.

(2) The authority of the Inspector General under paragraph (c)(2) of this clause does not flow down to subcontracts.

■ 9. Amend section 52.215–2 by adding Alternate I to read as follows:

52.215–2 Audit and Records—Negotiation.

* * * * *

Alternate I (MAR 2009). As prescribed in 15.209(b)(2), substitute the following paragraphs (d)(1) and (g) for paragraphs (d)(1) and (g) of the basic clause:

(d) *Comptroller General or Inspector General.* (1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(i) Examine any of the Contractor's or any subcontractor's records that pertain to and involve transactions relating to this contract or a subcontract hereunder; and

(ii) Interview any officer or employee regarding such transactions.

(g)(1) Except as provided in paragraph (g)(2) of this clause, the Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract. The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(2) The authority of the Inspector General under paragraph (d)(1)(ii) of this clause does not flow down to subcontracts.

[FR Doc. E9–7029 Filed 3–30–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12 and 52

[FAC 2005–32; FAR Case 2008–026; Item VI; Docket 2009–0013, Sequence 1]

RIN 9000–AL25

Federal Acquisition Regulation; FAR Case 2008–026, GAO Access to Contractor Employees

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) which allows the Government Accountability Office to interview current contractor employees during the audit of the contractor's records. FAR 52.215–2(d)(1), Audit and Records-Negotiation, is revised to allow for the

Appendix 9 – Interim Final Guidance for Federal Financial Assistance

OFFICE OF MANAGEMENT AND BUDGET

2 CFR PART 176

Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards

AGENCY: Office of Federal Financial Management**,** Office of Management and Budget (OMB).

ACTION: Interim final guidance to agencies.

SUMMARY: The Office of Federal Financial Management (OFFM) is establishing government-wide guidance and standard award terms for agencies to include in financial assistance awards (namely, grants, cooperative agreements, and loans) as part of their implementation of sections 1512, and 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5). This guidance does not cover all award terms that may be needed on financial assistance awards funded directly or assisted by the Federal government under the Recovery Act. The focus of this guidance is on implementing Recovery Act provisions that may require greater clarification in order to foster consistent application across the Federal Government. Under the interim final guidance, agencies would use the standard award terms in their financial assistance awards to require recipients and sub-recipients (first-tier that are not individuals) to maintain current registrations in the Central Contractor Registration (CCR) database; to require recipients to report quarterly on project or activity status,

sub-grant and subcontract information; to notify recipients of the domestic sourcing ("Buy American") requirements that apply to certain iron, steel and manufactured goods; to notify recipients of the wage rate requirements that apply to certain projects; and to ensure proper accounting and reporting of Recovery Act expenditures in single audits.

DATES: This effective date of this interim final guidance is April 3, 2009. To be considered in preparation of the final guidance, comments on the interim final guidance must be received by no later than ***[insert date that is 60 days after date of publication in the FEDERAL REGISTER]***.

ADDRESSES: Due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt. We cannot guarantee that comments mailed will be received before the comment closing date.

Comments may be sent to via http://www.regulations.gov – a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the Federal Register and that are open for comment. Simply type "Recovery Act Guidance" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received by the date specified above will be included as part of the official record.

Electronic mail comments may also be submitted to: Marguerite Pridgen at mpridgen@omb.eop.gov. Please include "Recovery Act Guidance" in the subject line and the

full body of your comments in the text of the electronic message and not as an attachment. Please include your name, title, organization, postal address, telephone number, and e-mail address in the text of the message. Comments may also be submitted via facsimile to 202-395-3952.

Comments may be mailed to Marguerite Pridgen, Office of Federal Financial Management, Office of Management and Budget, Room 6025, New Executive Office Building, Washington, DC 20503.

COMMENTS: All responses will be summarized and included in the request for OMB approval.

FOR FURTHER INFORMATION CONTACT: Marguerite Pridgen, Office of Federal Financial Management, Office of Management and Budget, telephone (202)395-7844 (direct) or (202)395-3993 (main office) and e-mail: Marguerite_E._Pridgen@omb.eop.gov.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. Section 1512(c) of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5, hereafter referred to as "the Recovery Act" or "the Act") requires, as a condition of receipt of funds, quarterly reporting on the use of funds. The data elements proposed for reporting the information described in section 1512(c) were published in the Federal Register on April 1, 2009 [74 FR 14824]. An entity that

receives assistance funding under the Recovery Act must report information including, but not limited to,

i. the total amount of recovery funds received from that agency;

ii. the amount of recovery funds received that were expended or obligated to projects or activities; and

iii. a detailed list of all projects or activities for which recovery funds were expended or obligated, including—

1. the name of the project or activity;
2. a description of the project or activity;
3. an evaluation of the completion status of the project or activity;
4. an estimate of the number of jobs created and the number of jobs retained by the project or activity; and
5. for infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under this Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.

iv. Detailed information on any subcontracts or sub-grants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006, as amended (Public Law 109-282, hereafter referred to as "the Transparency Act"), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget. The Transparency Act identifies specific data elements that the website (USAspending.gov) must include for each federal award and

authorizes OMB to specify additional elements for other relevant information. A 2008 amendment to the Transparency Act called the "Government Funding Transparency Act of 2008" (Public Law 110-252) added a requirement to collect compensation information on certain chief executive officers (CEOs) of the recipient and sub-recipient entity. An entity that receives assistance funding under the Recovery Act must report information required under the Transparency Act including, but not limited to,

1. The name of the entity receiving the award;
2. The amount of the award;
3. The transaction type;
4. The funding agency;
5. The Catalog of Federal Domestic Assistance number;
6. The program source;
7. The location of the entity receiving the award, including four data elements for the city, State, Congressional district, and country;
8. The location of the primary place of performance under the award, including four data elements for the city, State, Congressional district, and country;
9. A unique identifier of the entity receiving the award;
10. A unique identifier of the parent entity of the recipient, should the recipient be owned by another entity; and
11. The names and total compensation of the five most highly compensated officers of the company if it received (1) 80% or more of its annual gross revenues in Federal awards; and (2) $25M or more in annual gross revenue from Federal

awards.

B. Section 1512(h) of the Recovery Act requires recipients of Recovery Act funds, including those receiving funds directly from the Federal government, to register in the Central Contractor Registration (CCR) database at www.ccr.gov. Because recipients must report information on their first-tier contracts and awards, the proposed guidance also would establish a requirement for sub-recipient registration in the CCR as a way to help ensure consistent reporting of data about each entity and thereby make the data more useful to the public. Without the requirement, multiple recipients doing business with the same entity may use different variations of the entity's name, address, or parent organization when they each report on their awards to the entity. It should be noted that in order to register in CCR, a valid Data Universal Numbering System (DUNS) Number is required.

C. Section 1605 of the Recovery Act requires that projects, funded by the Recovery Act, for the construction, alteration, maintenance, or repair of a public building or public work use American iron, steel, and manufactured goods in the project unless one of the specified exemptions applies. The Act provides that this requirement be applied in a manner consistent with U.S. obligations under international agreements. Definitions of "manufactured good," "public building and public work," and other terms as they pertain to the Buy American guidance in 2 CFR part 176 are found in 176.140 and 176.160.

D. Section 1606 of the Recovery Act requires the payment of Davis-Bacon Act (40 USC 31) wage rates to "laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and

through the Federal Government" pursuant to the proposed Recovery Act.

E. To maximize the transparency and accountability of funds authorized under the Recovery Act as required by Congress and in accordance with 2 CFR 215, sub-part ___. 21 "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and other Non-Profit Organizations" and OMB Circular A-102 Common Rules provisions, recipients agree to maintain records that identify adequately the source and application of Recovery Act funds. Guidance and an award term are provided in part 176 to help ensure that recipients understand their responsibilities with respect to tracking, accounting and reporting transactions during the award and in preparing audit documentation and reports in accordance with OMB Circular A-133, if applicable.

II. NEXT STEPS

We will consider all comments received on the interim final version of the OMB guidance as we develop the final guidance. Federal agencies that award grants, cooperative agreements, and other financial assistance awards will immediately implement this interim final guidance through the appropriate award terms. The award terms on awards made while this interim final version of this guidance is in effect do not need to be modified to reflect any modified award terms in the final guidance unless specifically required in the final guidance.

List of Subjects in 2 CFR Part 176

Assistance awards, Authorized agency action official, Award officials, Buy American, Classified, Davis-Bacon Act, Grants, Cooperative agreements, Loans, Recovery Act , Wage rate.

Danny Werfel,

Deputy Controller.

For the reasons set forth above, the Office of Management and Budget proposes to amend 2 CFR chapter I by adding a part 176 to read as follows:

PART 176-AWARD TERMS FOR ASSISTANCE AGREEMENTS THAT INCLUDE FUNDS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, PUBLIC LAW 111-5

Sec.

176.10 Purpose of this part.

176.20 Agency Responsibilities (General).

176.30 Definitions.

Subpart A–Reporting and Registration Requirements under Section 1512 of the American Recovery and Reinvestment Act of 2009.

176.40 Procedure.

176.50 Award term- Reporting and Registration Requirements under Section 1512 of the Recovery Act.

Subpart B–Buy American Requirement under Section 1605 of the American Recovery and Reinvestment Act of 2009.

176.60 Statutory Requirement.

176.70 Policy.

176.80 Exceptions.

176.90 Non-application to acquisitions covered under international agreements.

176.100 Timely determination concerning the inapplicability of section 1605 of the Recovery Act.

176.110 Evaluating proposals of foreign iron, steel, and/or manufactured goods.

176.120 Determinations made on late requests.

176.130 Noncompliance.

176.140 Award term- Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.

176.150 Notice of Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.

176.160 Award term- Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements)—Section 1605 of the American Recovery and Reinvestment Act of 2009.

176.170 Notice of Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements)—Section 1605 of the American Recovery and Reinvestment Act of 2009.

APPENDIX – to Subpart B of 2 CFR part 176-- U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations under International Agreements.

Subpart C—Wage Rate Requirements under Section 1606 of the American Recovery and Reinvestment Act of 2009.

176.180 Procedure.

176.190 Award term- Wage Rate Requirements under Section 1606 of the American Recovery and Reinvestment Act of 2009.

Subpart D—Single Audit Information for Recipients of Recovery Act Funds

176.200 Procedure.

176.210 Award term- Schedule of Expenditures of Federal Awards and Responsibilities for Informing Sub-recipients.

Authority: American Recovery and Reinvestment Act of 2009, Public Law 111-5; Federal Funding Accountability and Transparency Act of 2006, (Public Law 109-282), as amended.

PART 176- AWARD TERMS FOR ASSISTANCE AGREEMENTS THAT INCLUDE FUNDS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, PUBLIC LAW 111-5

§176.10 Purpose of this part.

This part establishes Federal government-wide award terms for financial assistance awards, namely, grants, cooperative agreements, and loans, to implement the cross-cutting requirements of the American Recovery and Reinvestment Act of 2009, Public Law 111-5 ("Recovery Act"). These requirements are cross-cutting in that they apply to more than one agency's awards.

§176.20 Agency Responsibilities (General).

(a) In any assistance award funded in whole or in part by the Recovery Act, the award official shall indicate that the award is being made under the Recovery Act, and indicate what projects and/or activities are being funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the assistance type.

(b) To maximize transparency of Recovery Act funds required for reporting by the assistance recipient, the award official shall consider structuring assistance awards to allow for separately tracking Recovery Act funds.

(c) Award officials shall ensure that recipients comply with the Recovery Act requirements of Subpart A. If the recipient fails to comply with the reporting requirements or other award terms, the award official or other authorized agency action official shall take the appropriate enforcement or termination action in accordance with 2 CFR part 215.62 or the agency's implementation of the OMB Circular A-102 grants management common rule.

(d) The award official shall make the recipient's failure to comply with the reporting requirements a part of the recipient's performance record.

§176.30 Definitions.

As used in this part--

"Award" means any grant, cooperative agreement or loan made with Recovery Act funds.

"Award official" means a person with the authority to enter into, administer, and/or terminate financial assistance awards and make related determinations and findings.

"Classified" or "classified information" means any knowledge that can be communicated or any documentary material, regardless of its physical form or characteristics, that—

(1) (i) Is owned by, is produced by or for, or is under the control of the United States Government; or (ii) Has been classified by the Department of Energy as privately generated restricted data following the procedures in 10 CFR 1045.21; and

(2) Must be protected against unauthorized disclosure according to Executive Order 12958, Classified National Security Information, April 17, 1995, or classified in accordance with the Atomic Energy Act of 1954.

"Recipient" means any entity other than an individual that receives Recovery Act funds in the form of a grant, cooperative agreement or loan directly from the Federal Government.

"Recovery funds" or "Recovery Act funds" are funds made available through the appropriations of the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

"Sub-award" means –

i. A legal instrument to provide support for the performance of any portion of the substantive project or program for which the recipient received this award and that the recipient awards to an eligible sub-recipient;

ii. The term does not include the recipient's procurement of property and services needed to carry out the project or program (for further explanation, see §___.210 of the

attachment to OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations”).

iii. A sub-award may be provided through any legal agreement, including an agreement that the recipient or a sub-recipient considers a contract.

“Subcontract” means a legal instrument used by a recipient for procurement of property and services needed to carry out the project or program.

“Sub-recipient” or “Sub-awardee” means a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program. A sub-recipient may also be a recipient of other Federal awards directly from a Federal awarding agency. Guidance on distinguishing between a sub-recipient and a vendor is provided in §___.210 of OMB Circular A-133.

Subpart A–Reporting Requirement under Section 1512 of the American Recovery and Reinvestment Act of 2009.

§176.40 Procedure.

The award official shall insert the standard award term in this Subpart in all awards funded in whole or in part with Recovery Act funds, except for those that are classified, awarded to individuals, or awarded under mandatory and entitlement programs, except as specifically required by OMB, or expressly exempted from the reporting requirement in the Recovery Act.

§176.50 Award term--Reporting and Registration Requirements under Section 1512 of the Recovery Act.

Agencies are responsible for ensuring that their recipients report information required under the Recovery Act in a timely manner. The following award term shall be used by agencies to implement the recipient reporting and registration requirements in section 1512:

Reporting and Registration Requirements under Section 1512 of the American Recovery and Reinvestment Act of 2009, Public Law 111-5

(a) This award requires the recipient to complete projects or activities which are funded under the American Recovery and Reinvestment Act of 2009 ("Recovery Act") and to report on use of Recovery Act funds provided through this award. Information from these reports will be made available to the public.

(b) The reports are due no later than ten calendar days after each calendar quarter in which the recipient receives the assistance award funded in whole or in part by the Recovery Act.

(c) Recipients and their first-tier recipients must maintain current registrations in the Central Contractor Registration (www.ccr.gov) at all times during which they have active federal awards funded with Recovery Act funds. A Dun and Bradstreet Data Universal Numbering System (DUNS) Number (www.dnb.com) is one of the requirements for registration in the Central Contractor Registration.

(d) The recipient shall report the information described in section 1512(c) using the reporting instructions and data elements that will be provided online at www.FederalReporting.gov and ensure that any information that is pre-filled is corrected or updated as needed.

(End of award term)

Subpart B–Buy American Requirement under Section 1605 of the American Recovery and Reinvestment Act of 2009.

§176.60 Statutory Requirement.

Section 1605 of the Recovery Act prohibits use of recovery funds 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 law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances:

(a) Iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;

(b) Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent; or

(c) Applying the domestic preference would be inconsistent with the public interest.

§176.70 Policy.

Except as provided in 176.80 or 176.90--

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (see definitions at 176.140 and 176.160) unless—

(1) The public building or public work is located in the United States; and

(2) All of the iron, steel, and manufactured goods used in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.

(ii) There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States.

(b) Paragraph (a) shall not apply where the Recovery Act requires the application of alternative Buy American requirements for iron, steel, and manufactured goods.

§176.80 Exceptions.

(a) When one of the following exceptions applies in a case or category of cases, the award official may allow the recipient to use foreign iron, steel and/or manufactured goods in the project without regard to the restrictions of section 1605 of the Recovery Act:

(1) Nonavailability. The head of the Federal department or agency may determine that the iron, steel or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 48 CFR 25.104(a) and the procedures at 48 CFR 25.103(b)(1) also apply if any of those articles are manufactured goods needed in the project.

(2) Unreasonable cost. The head of the Federal department or agency may determine that the cost of domestic iron, steel, or relevant manufactured goods will increase the cost of the overall project by more than 25 percent in accordance with 176.110.

(3) Inconsistent with public interest. The head of the Federal department or agency may determine that application of the restrictions of section 1605 of the Recovery Act would be inconsistent with the public interest.

(b) Determination. When a determination is made for any of the reasons stated in this section that certain foreign iron, steel, and/or manufactured goods may be used—

(1) The award official shall list the excepted materials in the award; and

(2) The head of the Federal department or agency shall publish a notice in the Federal Register within two weeks after the determination is made, unless the item has already been determined to be domestically nonavailable. A list of items that are not domestically available is at 48 CFR 25.104(a). The Federal Register notice or information from the notice may be posted by OMB to Recovery.gov. The notice shall include—

(i) The title "Buy American Exception under the American Recovery and Reinvestment Act of 2009";

(ii) The dollar value and brief description of the project; and

(iii) A detailed written justification as to why the restriction is being waived.

§176.90 Non-application to acquisitions covered under international agreements.

(a) Acquisitions covered by international agreements. Section 1605(d) of the Recovery Act provides that the Buy American requirement in section 1605 shall be applied in a manner consistent with U.S. obligations under international agreements.

(1) The Buy American requirement set out in 176.70 shall not be applied where the iron, steel or manufactured goods used in the project are from a Party to an international agreement, listed in paragraph (2), and the recipient is required under an international agreement, described in the Appendix to this Subpart, to treat the goods and services of that Party the same as domestic goods and services. This obligation shall only apply to projects with an estimated value of $7,443,000 or more and projects that are not specifically excluded from the application of those agreements.

(2) The international agreements that obligate recipients that are covered under an international agreement to treat the goods and services of a Party the same as domestic goods and services and the respective Parties to the agreements are:

(i) The World Trade Organization Government Procurement Agreement (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom);

(ii) The following Free Trade Agreements:

(A) Dominican Republic-Central America-United States Free Trade Agreement (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua);

(B) North American Free Trade Agreement (NAFTA) (Canada and Mexico);

(C) United States-Australia Free Trade Agreement;

(D) United States-Bahrain Free Trade Agreement;

(E) United States-Chile Free Trade Agreement;

(F) United States-Israel Free Trade Agreement;

(G) United States-Morocco Free Trade Agreement;

(H) United States-Oman Free Trade Agreement;

(I) United States-Peru Trade Promotion Agreement; and

(J) United States-Singapore Free Trade Agreement; and

(iii) United States-European Communities Exchange of Letters (May 15, 1995): Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom.

§176.100 Timely determination concerning the inapplicability of section 1605 of the Recovery Act.

(a) The head of the Federal department or agency involved may make a determination regarding inapplicability of section 1605 to a particular case or to a category of cases.

(b) Before Recovery Act funds are awarded by the Federal agency or obligated by the recipient for a project for the construction, alteration, maintenance, or repair of a public building or public work, an applicant or recipient may request from the award official a determination concerning the inapplicability of section 1605 of the Recovery Act for specifically identified items.

(c) The time for submitting the request and the information and supporting data that must be included in the request are to be specified in the agency's and recipient's request for applications and/or proposals, and as appropriate, in other written communications . The content of those communications should be consistent with the notice in 176.150 or 176.170, whichever applies.

(d) The award official must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(e) In making a determination based on the increased cost to the project of using domestic iron, steel, and/or manufactured goods, the award official must compare the total estimated cost of the

project using foreign iron, steel and/or relevant manufactured goods to the estimated cost if all domestic iron, steel, and/or relevant manufactured goods were used. If use of domestic iron, steel, and/or relevant manufactured goods would increase the cost of the overall project by more than 25 percent, then the award official shall determine that the cost of the domestic iron, steel, and/or relevant manufactured goods is unreasonable.

§176.110 Evaluating proposals of foreign iron, steel, and/or manufactured goods.

(a) If the award official receives a request for an exception based on the cost of certain domestic iron, steel, and/or manufactured goods being unreasonable, in accordance with section 176.80, then the award official shall apply evaluation factors to the proposal to use such foreign iron, steel, and/or manufactured goods as follows:

(1) Use an evaluation factor of 25 percent, applied to the total estimated cost of the project, if the foreign iron, steel, and/or manufactured goods are to be used in the project based on an exception for unreasonable cost requested by the applicant.

(2) Total evaluated cost = project cost estimate + (.25 x project cost estimate, if (a)(1) applies).

(b) Applicants or recipients also may submit alternate proposals based on use of equivalent domestic iron, steel, and/or manufactured goods to avoid possible denial of Recovery Act funding for the proposal if the Federal government determines that an exception permitting use of the foreign item(s) does not apply.

(c) If the award official makes an award to an applicant that proposed foreign iron, steel, and/or manufactured goods not listed in the applicable notice in the request for applications or proposals, then the award official must add the excepted materials to the list in the award term.

§176.120 Determinations on late requests.

(a) If a recipient requests a determination regarding the inapplicability of section 1605 of the Recovery Act after obligating Recovery Act funds for a project for construction, alteration, maintenance, or repair (late request), the recipient must explain why it could not request the determination before making the obligation or why the need for such determination otherwise was not reasonably foreseeable. If the award official concludes that the recipient should have made the request before making the obligation, the award official may deny the request.

(b) The award official must base evaluation of any late request for a determination regarding the inapplicability of section 1605 of the Recovery Act on information required by paragraphs (c) and (d) of the applicable notice at 176.150 or 176.170 and/or other readily available information.

(c) If a determination, under 176.80 is made after Recovery Act funds were obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official must amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis of the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other appropriate actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or manufactured goods. When the basis for the exception is the unreasonable cost of domestic iron, steel, and/or manufactured goods the award official shall adjust the award amount or the budget, as appropriate, by at least the differential established in 176.110(a).

§176.130 Noncompliance.

The award official must—

(a) Review allegations of violations of section 1605 of the Recovery Act;

(b) Unless fraud is suspected, notify the recipient of the apparent unauthorized use of foreign iron, steel, and/or manufactured goods and request a reply, to include proposed corrective action; and

(c) If the review reveals that a recipient or sub-recipient has used foreign iron, steel, and/or manufactured goods without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act in accordance with 176.120.

(2) Consider requiring the removal and replacement of the unauthorized foreign iron, steel, and/or manufactured goods.

(3) If removal and replacement of foreign iron, steel, and/or manufactured goods used in a public building or a public work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Federal Government, the award official may determine in writing that the foreign iron, steel, and/or manufactured goods need not be removed and replaced. A determination to retain foreign iron, steel, and/or manufactured goods does not constitute a determination that an exception to section 1605 of the Recovery Act applies, and this should be stated in the determination. Further, a determination to retain foreign iron, steel, and/or manufactured goods does not affect the Federal Government's right to reduce the amount of the award by the cost of the steel, iron, or manufactured goods that are used in the project or to take enforcement or termination action in accordance with the agency's grants management regulations.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate remedies, such as withholding cash payments pending correction of the deficiency, suspending or terminating the award, and withholding further awards for the project. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with the agency's debarment rule implementing 2 CFR part 180. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

§176.140 Award term- Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.

When awarding Recovery Act funds for construction, alteration, maintenance, or repair of a public building or public work that does not involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the following award term:

REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—SECTION 1605 OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

(a) **Definitions**. As used in this award term and condition—

"Manufactured good" means a good brought to the construction site for incorporation into the building or work that has been--

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

“Public building” and "public work" means a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

“Steel” means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

(b) *Domestic preference*.

(1) This award term and condition implements Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act)(Pub. L. 111-5), by requiring that all iron, steel, and manufactured goods used in the project are produced in the United States except as provided in paragraph (b)(3) and (b)(4) of this term and condition.

(2) This requirement does not apply to the material listed by the Federal Government as follows:

_____

[**Award official to list applicable excepted materials or indicate “none”**]

(3) The award official may add other iron, steel, and/or manufactured goods to the list in paragraph (b)(2) of this term and condition if the Federal government determines that—

(i) The cost of the domestic iron, steel, and/or manufactured goods would be unreasonable. The cost of domestic iron, steel, or manufactured goods used in the project is

unreasonable when the cumulative cost of such material will increase the cost of the overall project by more than 25 percent;

(ii) The iron, steel, and/or manufactured good is not produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of Section 1605 of the Recovery Act.*

(1)(i) Any recipient request to use foreign iron, steel, and/or manufactured goods in accordance with paragraph (b)(3) of this term and condition shall include adequate information for Federal Government evaluation of the request, including—

(A) A description of the foreign and domestic iron, steel, and/or manufactured goods;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods cited in accordance with paragraph (b)(3) of this term and condition.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this term and condition.

(iii) The cost of iron, steel, and/or manufactured goods material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any recipient request for a determination submitted after Recovery Act funds have been obligated for a project for construction, alteration, maintenance, or repair shall explain why the recipient could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the recipient does not submit a satisfactory explanation, the award official need not make a determination.

(2) If the Federal government determines after funds have been obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official will amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is the unreasonable cost of the domestic iron, steel, or manufactured goods, the award official shall adjust the award amount or redistribute budgeted funds by at least the differential established in 2 CFR 176.110(a).

(3) Unless the Federal Government determines that an exception to section 1605 of the Recovery Act applies, use of foreign iron, steel, and/or manufactured goods is noncompliant with section 1605 of the American Recovery and Reinvestment Act.

(d) **Data**. To permit evaluation of requests under paragraph (b) of this term and condition based on unreasonable cost, the Recipient shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC ITEMS COST COMPARISON

Description	Unit of Measure	Quantity	Cost (Dollars)*
Item 1:			
Foreign steel, iron, or manufactured good	_____	_____	_____

Domestic steel, iron, or manufactured good	_____	_____	_____
Item 2:	_____	_____	_____
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good			

[**List name, address, telephone number, email address, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.**]
[**Include other applicable supporting information.**]
[*** Include all delivery costs to the construction site.**]

(End of award term)

§176.150 Notice of Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.

When requesting applications or proposals for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair of a public building or public work, and do not involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the following notice:

REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—SECTION 1605 OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

(a) Definitions. "Manufactured good," "public building and public work," and "steel," as used in this notice, are defined in the 2 CFR 176.140.

(b) **Requests for determinations of inapplicability**. A prospective applicant requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5)(Recovery Act) should submit the request to the award official in time to allow a determination before submission of applications or proposals. The prospective applicant shall include the information and applicable supporting data required by

paragraphs (c) and (d) of the award term and condition at 2 CFR 176.140 in the request. If an applicant has not requested a determination regarding the inapplicability of 1605 of the Recovery Act before submitting its application or proposal, or has not received a response to a previous request, the applicant shall include the information and supporting data in the application or proposal.

(c) *Evaluation of project proposals*.

If the Federal government determines that an exception based on unreasonable cost of domestic iron, steel, and/or manufactured goods applies, the Federal Government will evaluate a project requesting exception to the requirements of section 1605 of the Recovery Act by adding to the estimated total cost of the project 25 percent of the project cost, if foreign iron, steel, or manufactured goods are used in the project based on unreasonable cost of comparable manufactured domestic iron, steel, and/or manufactured goods.

(d) Alternate project proposals.

(1) When a project proposal includes foreign iron, steel, and/or manufactured goods not listed by the Federal Government at paragraph (b)(2) of the award term and condition at 2 CFR 176.140, the applicant also may submit an alternate proposal based on use of equivalent domestic iron, steel, and/or manufactured goods.

(2) If an alternate proposal is submitted, the applicant shall submit a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of the award term and condition at 2 CFR 176.140 for the proposal that is based on the use of any foreign iron, steel, and/or manufactured goods for which the Federal Government has not yet determined an exception applies.

(3) If the Federal government determines that a particular exception requested in

accordance with paragraph (b) of the award term and condition at 2 CFR 176.140 does not apply, the Federal Government will evaluate only those proposals based on use of the equivalent domestic iron, steel, and/or manufactured goods, and the applicant shall be required to furnish such domestic items.

(End of notice)

§176.160 Award term- Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements)—Section 1605 of the American Recovery and Reinvestment Act of 2009.

When awarding Recovery Act funds for construction, alteration, maintenance, or repair of a public building or public work that involves iron, steel, and/or manufactured goods materials covered under international agreements, the agency shall use the following award term:

(a) **Definitions**. As used in this award term and condition—

"Designated country" --

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom;

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore); or

(3) A United States-European Communities Exchange of Letters (May 15, 1995) country:

Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom.

“Designated country iron, steel, and/or manufactured goods” --

(1) Is wholly the growth, product, or manufacture of a designated country; or

(2) In the case of a manufactured good that consist in whole or in part of materials from another country, has been substantially transformed in a designated country into a new and different manufactured good distinct from the materials from which it was transformed.

"Domestic iron, steel, and/or manufactured good" --

(1) Is wholly the growth, product, or manufacture of the United States; or

(2) In the case of a manufactured good that consists in whole or in part of materials from another country, has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed. There is no requirement with regard to the origin of components or subcomponents in manufactured goods or products, as long as the manufacture of the goods occurs in the United States.

“Foreign iron, steel, and/or manufactured good" means iron, steel and/or manufactured good that is not domestic or designated country iron, steel, and/or manufactured good.

“Manufactured good” means a good brought to the construction site for incorporation into the building or work that has been--

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

“Public building” and "public work" means a public building of, and a public work of, a

governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

"Steel" means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

(b) *Iron, steel, and manufactured goods*.

(1) This award term and condition implements

(i) Section 1605(a) of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act), by requiring that all iron, steel, and manufactured goods used in the project are produced in the United States; and

(ii) Section 1605(d), which requires application of the Buy American requirement in a manner consistent with U.S. obligations under international agreements. The restrictions of section 1605 of the Recovery Act do not apply to designated country iron, steel, and/or manufactured goods. The Buy American requirement in section 1605 shall not be applied where the iron, steel or manufactured goods used in the project are from a Party to an international agreement that obligates the recipient to treat the goods and services of that Party the same as domestic goods and services. This obligation shall only apply to projects with an estimated value of $7,443,000 or more.

(2) The recipient shall use only domestic or designated country iron, steel, and

manufactured goods in performing the work funded in whole or part with this award, except as provided in paragraphs (b)(3) and (b)(4) of this term and condition.

(3) The requirement in paragraph (b)(2) of this term and condition does not apply to the iron, steel, and manufactured goods listed by the Federal Government as follows:

_____

[**Award official to list applicable excepted materials or indicate "none"**]

(4) The award official may add other iron, steel, and manufactured goods to the list in paragraph (b)(3) of this award term and condition if the Federal government determines that—

(i) The cost of domestic iron, steel, and/or manufactured goods would be unreasonable. The cost of domestic iron, steel, and/or manufactured goods used in the project is unreasonable when the cumulative cost of such material will increase the overall cost of the project by more than 25 percent;

(ii) The iron, steel, and/or manufactured goods is not produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of section 1605 of the Recovery Act or the Buy American Act.*

(1)(i) Any recipient request to use foreign iron, steel, and/or manufactured goods in accordance with paragraph(b)(4) of this term and condition shall include adequate information for Federal Government evaluation of the request, including—

(A) A description of the foreign and domestic iron, steel, and/or manufactured goods;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods cited in accordance with paragraph (b)(4) of this term and condition.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this term and condition.

(iii) The cost of iron, steel, or manufactured goods shall include all delivery costs to the construction site and any applicable duty.

(iv) Any recipient request for a determination submitted after Recovery Act funds have been obligated for a project for construction, alteration, maintenance, or repair shall explain why the recipient could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the recipient does not submit a satisfactory explanation, the award official need not make a determination.

(2) If the Federal government determines after funds have been obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official will amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other appropriate actions taken to cover costs associated with acquiring

or using the foreign iron, steel, and/or relevant manufactured goods.. When the basis for the exception is the unreasonable cost of the domestic iron, steel, or manufactured goods, the award official shall adjust the award amount or redistribute budgeted funds, as appropriate, by at least the differential established in 2 CFR 176.110(a).

(3) Unless the Federal Government determines that an exception to the section 1605 of the Recovery Act applies, use of foreign iron, steel, and/or manufactured goods other than designated country iron, steel, and/or manufactured goods is noncompliant with the applicable Act.

(d) **Data**. To permit evaluation of requests under paragraph (b) of this term and condition based on unreasonable cost, the applicant shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC ITEMS COST COMPARISON

Description	Unit of Measure	Quantity	Cost (Dollars)*
Item 1:			
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good	_____	_____	_____
Item 2:	_____	_____	_____
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good			

[**List name, address, telephone number, email address, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.**]
[**Include other applicable supporting information.**]
[*** Include all delivery costs to the construction site.**]

[**List name, address, telephone number, email address, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.**]
[**Include other applicable supporting information**.]
[* **Include all delivery costs to the construction site)**.]

(End of award term)

§176.170 Notice of Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements)—Section 1605 of the American Recovery and Reinvestment Act of 2009.

When requesting applications or proposals for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair of a public building or public work, and involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the following notice:

NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS (COVERED UNDER INTERNATIONAL AGREEMENTS)—SECTION 1605 OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

(a) **Definitions.** "Designated country iron, steel, and/or manufactured goods," "foreign iron, steel, and/or manufactured good," "manufactured good," "public building and public work," and "steel," as used in this provision, are defined in 2 CFR 176.160(a).

(b) **Requests for determinations of inapplicability**. A prospective applicant requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5)(Recovery Act) should submit the request to the award official in time to allow a determination before submission of applications or proposals. The prospective applicant shall include the information and applicable supporting data required by paragraphs (c) and (d) of the award term and condition at 2 CFR 176.160 in the request. If an applicant has not requested a determination regarding the inapplicability of 1605 of the Recovery

Act before submitting its application or proposal, or has not received a response to a previous request, the applicant shall include the information and supporting data in the application or proposal.

(c) *Evaluation of project proposals*.

If the Federal government determines that an exception based on unreasonable cost of domestic iron, steel, and/or manufactured goods applies, the Federal Government will evaluate a project requesting exception to the requirements of section 1605 of the Recovery Act by adding to the estimated total cost of the project 25 percent of the project cost if foreign iron, steel, or manufactured goods are used based on unreasonable cost of comparable domestic iron, steel, or manufactured goods.

(d) *Alternate project proposals.*

(1) When a project proposal includes foreign iron, steel, and/or manufactured goods, other than designated country iron, steel, and/or manufactured goods, that are not listed by the Federal Government in this Buy American notice in the request for applications or proposals, the applicant may submit an alternate proposal based on use of equivalent domestic or designated country iron, steel, and/or manufactured goods.

(2) If an alternate proposal is submitted, the applicant shall submit a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of the award term and condition at 2 CFR 176.160 for the proposal that is based on the use of any foreign iron, steel, and/or manufactured goods for which the Federal Government has not yet determined an exception applies.

(3) If the Federal government determines that a particular exception requested in accordance with paragraph (b) of the award term and condition at 2 CFR 176.160 does not apply,

the Federal Government will evaluate only those proposals based on use of the equivalent domestic or designated country iron, steel, and/or manufactured goods, and the applicant shall be required to furnish such domestic or designated country items.

(End of notice)

APPENDIX – to Subpart B of 2 CFR part 176-- U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations under International Agreements.

STATES	Entities Covered	Exclusions	Relevant International Agreements
Arizona	Executive branch agencies		-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Arkansas	Executive branch agencies, including universities but excluding the Office of Fish and Game	construction services	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Peru TPA -U.S.-Singapore FTA
California	Executive branch agencies		-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Singapore FTA
Colorado	Executive branch agencies		-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Peru TPA -U.S.-Singapore

			FTA
Connecticut	-Department of Administrative Services -Department of Transportation -Department of Public Works -Constituent Units of Higher Education		-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Delaware	-Administrative Services (Central Procurement Agency) -State Universities -State Colleges	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -DR-CAFTA (except Honduras) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Florida	Executive branch agencies	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Peru TPA -U.S.-Singapore FTA
Georgia	-Department of Administrative Services -Georgia Technology Authority	beef; compost; mulch	-U.S.-Australia FTA
Hawaii	Department of Accounting and General Services	software developed in the state; construction	-WTO GPA (except Canada) -DR-CAFTA (except Honduras) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Idaho	Central Procurement Agency (including all colleges and universities subject to central purchasing oversight)		-WTO GPA (except Canada) -DR-CAFTA (except Honduras) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA

Illinois	-Department of Central Management Services	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Peru TPA -U.S.-Singapore FTA -U.S.-EC Exchange of Letters (applies to EC Member States for procurement not covered by WTO GPA and only where the state considers out-of-state suppliers)
Iowa	-Department of General Services -Department of Transportation -Board of Regents' Institutions (universities)	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Kansas	Executive branch agencies	construction services; automobiles; aircraft	-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Kentucky	Division of Purchases, Finance and Administration Cabinet	construction projects	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Louisiana	Executive branch agencies		-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA

			-U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Maine	-Department of Administrative and Financial Services -Bureau of General Services (covering state government agencies and school construction) - Department of Transportation	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Singapore FTA
Maryland	-Office of the Treasury -Department of the Environment -Department of General Services -Department of Housing and Community Development -Department of Human Resources -Department of Licensing and Regulation -Department of Natural Resources -Department of Public Safety and Correctional Services -Department of Personnel -Department of Transportation	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA

Massachusetts	-Executive Office for Administration and Finance -Executive Office of Communities and Development -Executive Office of Consumer Affairs -Executive Office of Economic Affairs -Executive Office of Education -Executive Office of Elder Affairs -Executive Office of Environmental Affairs -Executive Office of Health and Human Service -Executive Office of Labor -Executive Office of Public Safety -Executive Office of Transportation and Construction		-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Michigan	Department of Management and Budget	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Singapore FTA
Minnesota	Executive branch agencies		-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Mississippi	Department of Finance and Administration	services	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Peru TPA -U.S.-Singapore FTA

Missouri	-Office of Administration -Division of Purchasing and Materials Management		-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Montana	Executive branch agencies	goods	-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Nebraska	Central Procurement Agency		-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
New Hampshire	Central Procurement Agency	construction-grade steel (including requirements on subcontracts), motor vehicles; coal	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
New York	-State agencies -State university system -Public authorities and public benefit corporations, with the exception of those entities with multi-state mandates	construction-grade steel (including requirements on subcontracts); motor vehicles; coal; transit cars, buses and related equipment	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Peru TPA -U.S.-Singapore FTA
North Dakota			-U.S.-EC Exchange of Letters (applies to EC Member States and only where the state considers out-of-state suppliers)
Oklahoma	Department of Central Services and all state agencies and departments subject to the Oklahoma Central Purchasing Act	construction services; construction-grade steel (including	-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Peru TPA -U.S.-Singapore

		requirements on subcontracts); motor vehicles; coal	FTA
Oregon	Department of Administrative Services		-WTO GPA (except Canada) -DR-CAFTA (except Honduras) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Pennsylvania	Executive branch agencies, including: -Governor's Office -Department of the Auditor General -Treasury Department -Department of Agriculture -Department of Banking -Pennsylvania Securities Commission -Department of Health -Department of Transportation -Insurance Department -Department of Aging -Department of Correction -Department of Labor and Industry -Department of Military Affairs -Office of Attorney General -Department of General Services -Department of Education -Public Utility Commission -Department of Revenue -Department of State -Pennsylvania State Police -Department of Public Welfare	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Singapore FTA

	-Fish Commission -Game Commission -Department of Commerce -Board of Probation and Parole -Liquor Control Board -Milk Marketing Board -Lieutenant Governor's Office -Department of Community Affairs -Pennsylvania Historical and Museum Commission -Pennsylvania Emergency Management Agency -State Civil Service Commission -Pennsylvania Public Television Network -Department of Environmental Resources -State Tax Equalization Board -Department of Public Welfare -State Employees' Retirement System -Pennsylvania Municipal Retirement Board -Public School Employees' Retirement System -Pennsylvania Crime Commission -Executive Offices		
Rhode Island	Executive branch agencies	boats, automobiles, buses and related equipment	-WTO GPA (except Canada) -DR-CAFTA (except Honduras) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA

South Dakota	Central Procuring Agency (including universities and penal institutions)	beef	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Tennessee	Executive branch agencies	Services; construction	-WTO GPA (except Canada) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Singapore FTA
Texas	Texas Building and Procurement Commission		-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Peru TPA -U.S.-Singapore FTA
Utah	Executive branch agencies		-WTO GPA (except Canada) -DR-CAFTA (except Honduras) -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Peru TPA -U.S.-Singapore FTA
Vermont	Executive branch agencies		-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
Washington	Executive branch agencies, including: -General Administration -Department of Transportation -State Universities	fuel; paper products; boats; ships; and vessels	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA

West Virginia			-U.S.-EC Exchange of Letters (applies to EC Member States and only where the state considers out-of-state suppliers)
Wisconsin	Executive branch agencies, including: -Department of Administration -State Correctional Institutions -Department of Development -Educational Communications Board -Department of Employment Relations -State Historical Society -Department of Health and Social Services -Insurance Commissioner -Department of Justice -Lottery Board -Department of Natural Resources -Administration for Public Instruction -Racing Board -Department of Revenue -State Fair Park Board -Department of Transportation -State University System		-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Wyoming	-Procurement Services Division -Wyoming Department of Transportation -University of Wyoming	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	-WTO GPA (except Canada) -DR-CAFTA -U.S.-Australia FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Singapore FTA
OTHER SUB-FEDERAL ENTITIES	**Entities Covered**	**Exclusions**	**Relevant International Agreements**
Puerto Rico	-Department of State	construction	-DR-CAFTA

	-Department of Justice -Department of the Treasury -Department of Economic Development and Commerce -Department of Labor and Human Resources -Department of Natural and Environmental Resources -Department of Consumer Affairs -Department of Sports and Recreation	services	-U.S.-Peru TPA
Port Authority of New York and New Jersey		restrictions attached to Federal funds for airport projects; maintenance, repair and operating materials and supplies	-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Port of Baltimore		restrictions attached to Federal funds for airport projects	-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
New York Power Authority		restrictions attached to Federal funds for airport projects; conditions specified for the State of New York	-WTO GPA (except Canada) -U.S.-Chile FTA -U.S.-Singapore FTA
Massachusetts Port Authority			U.S.-EC Exchange of Letters (applies to EC Member States and only where the Port Authority considers out-of-state suppliers)
Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville, and San Antonio			U.S.-EC Exchange of Letters (only applies to EC Member States and where the city considers out-of-city suppliers)

OTHER ENTITIES	Entities Covered	Exclusions	Relevant International Agreements
Rural Utilities Service (waiver of Buy American restriction on financing for all power generation projects)			-WTO GPA -DR-CAFTA -NAFTA -U.S.-Australia FTA -U.S.-Bahrain FTA -U.S.-Chile FTA -U.S.-Morocco FTA -U.S.-Oman FTA -U.S.-Peru TPA -U.S.-Singapore FTA
Rural Utilities Service (waiver of Buy American restriction on financing for telecommunications projects)			-NAFTA -U.S.-Israel FTA

General Exceptions: The following restrictions and exceptions are excluded from U.S. obligations under international agreements:

1. The restrictions attached to Federal funds to states for mass transit and highway projects.
2. Dredging.

The World Trade Organization Government Procurement Agreement (WTO GPA) Parties: Aruba, Austria, Canada, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom.

The Free Trade Agreements and the respective Parties to the agreements are:

(1) Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA): Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua;
(2) North American Free Trade Agreement (NAFTA): Canada and Mexico;
(3) United States-Australia Free Trade Agreement (U.S.-Australia FTA);
(4) United States-Bahrain Free Trade Agreement (U.S.-Bahrain FTA);
(5) United States-Chile Free Trade Agreement (U.S.-Chile FTA);
(6) United States-Israel Free Trade Agreement (U.S.-Israel FTA);
(7) United States-Morocco Free Trade Agreement (U.S.-Morocco FTA);
(8) United States-Oman Free Trade Agreement (U.S.-Oman FTA);
(9) United States-Peru Trade Promotion Agreement (U.S.-Peru TPA); and
(10) United States-Singapore Free Trade Agreement (U.S.-Singapore FTA).

United States-European Communities Exchange of Letters (May 30, 1995) (U.S.-EC Exchange of Letters) applies to EC Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom.

Subpart C—Wage Rate Requirements under Section 1606 of the American Recovery and Reinvestment Act of 2009.

176.180 Procedure

The award official shall insert the standard award term in this Subpart in all awards funded in whole or in part with Recovery Act funds.

176.190 Award term- Wage Rate Requirements under Section 1606 of the Recovery Act

When issuing announcements or requesting applications for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair the agency shall use the following award term:

Wage Rate Requirements under Section 1606 of the American Recovery and Reinvestment Act of 2009

a) Section 1606 of the Recovery Act requires that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the Recovery Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.

Pursuant to Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. 3145, the Department of Labor has issued regulations at 29 CFR Parts 1, 3, and 5 to implement the Davis-Bacon and related Acts. Regulations in 29 CFR 5.5 instruct agencies concerning application of the standard

Davis-Bacon contract clauses set forth in that section. Federal agencies providing grants, cooperative agreements, and loans under the Recovery Act shall ensure that the standard Davis-Bacon contract clauses found in 29 CFR 5.5(a) are incorporated in any resultant covered contracts that are in excess of $2,000 for construction, alteration or repair (including painting and decorating).

(b) For additional guidance on the wage rate requirements of section 1606, contact your awarding agency. Recipients of grants, cooperative agreements and loans should direct their initial inquiries concerning the application of Davis-Bacon requirements to a particular federally assisted project to the Federal agency funding the project. The Secretary of Labor retains final coverage authority under Reorganization Plan Number 14.

Subpart D—Single Audit Information for Recipients of Recovery Act Funds

176.200 Procedure.

The award official shall insert the standard award term in this Subpart in all awards funded in whole or in part with Recovery Act funds.

176.210 Award term- Recovery Act Transactions listed in Schedule of Expenditures of Federal Awards and Recipient Responsibilities for Informing Sub-recipients.

The following award term shall be used by agencies to clarify recipient responsibilities regarding tracking and documenting Recovery Act expenditures:

Recovery Act Transactions listed in Schedule of Expenditures of Federal Awards and Recipient Responsibilities for Informing Sub-recipients

(a) To maximize the transparency and accountability of funds authorized under the American Recovery and Reinvestment Act of 2009 (Public Law 111-5)(Recovery Act) as required by Congress and in accordance with 2 CFR 215, subpart ___. 21 "Uniform Administrative Requirements for Grants and Agreements" and OMB A-102 Common Rules provisions, recipients agree to maintain records that identify adequately the source and application of Recovery Act funds.

(b) For recipients covered by the Single Audit Act Amendments of 1996 and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," recipients agree to separately identify the expenditures for Federal awards under the Recovery Act on the Schedule of Expenditures of Federal Awards (SEFA) and the Data Collection Form (SF-SAC) required by OMB Circular A-133. This shall be accomplished by identifying expenditures for Federal awards made under Recovery Act separately on the SEFA, and as separate rows under Item 9 of Part III on the SF-SAC by CFDA number, and inclusion of the prefix "ARRA-" in identifying the name of the Federal program on the SEFA and as the first characters in Item 9d of Part III on the SF-SAC.

(c) Recipients agree to separately identify to each sub-recipient, and document at the time of sub-award and at the time of disbursement of funds, the Federal award number, CFDA number, and amount of Recovery Act funds. When a recipient awards Recovery Act funds for an existing program, the information furnished to sub-recipients shall distinguish the sub-awards of incremental Recovery Act funds from regular sub-awards under the existing program.

(d) Recipients agree to require their sub-recipients to include on their SEFA information to specifically identify Recovery Act funding similar to the requirements for the recipient SEFA described above. This information is needed to allow the recipient to properly monitor sub-

recipient expenditure of ARRA funds as well as oversight by the Federal awarding agencies, Offices of Inspector General and the Government Accountability Office

(End of award term)