

DOE Acquisition and Financial Assistance Implementation Guide for the American Recovery and Reinvestment Act of 2009

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Preamble

The American Recovery and Reinvestment Act (the Recovery Act) of 2009 was enacted to preserve and create jobs and promote economic recovery, assist those most impacted by the recession, provide investments needed to increase economic efficiency by spurring technological advances in science and health, invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits, stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive State and local tax increases.

The Act appropriated over \$38 billion dollars to the Department of Energy (DOE) to fund contracts and financial assistance agreements for energy related research and development and environmental cleanup and to provide innovative energy loan guarantees.

This Guide is being provided to assist DOE acquisition and financial assistance personnel in the implementation of Recovery Act requirements and supplements guidance contained in the Office of Management and Budget's (OMB) February 18, 2009, guide entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009."

This Guide will be periodically updated/supplemented, as necessary, to address additional information, guidance, and requirements that may result from finalization of Federal Acquisition Regulation (FAR) rules, additional OMB or other Government-wide guidance, lessons learned, agency benchmarking, etc.

Chapter 1 — General Information

1.1 What is the purpose of this Guide?

The purpose of this Guide is to provide guidance on funding acquisition and financial assistance activities (awards and modifications/amendments) with American Recovery and Reinvestment Act of 2009 (Recovery Act) appropriations to ensure the effective use and management of those funds. The Guide outlines necessary changes to standard processes for awarding and administering Recovery Act funds to meet accelerated timeframes and other unique challenges posed by the Act's transparency and accountability framework. This Guide supplements the guidance in the Office of Management and Budget document, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009" (Attachment 1).

1.2 What is the goal of this Guide?

The goal of this Guide is to ensure DOE contracting, through coordination with program and staff office personnel (e.g., legal counsel, finance/budget) are taking the necessary steps to ensure the following objectives are met:

- Recovery Act funds are obligated and distributed in a prompt, fair, and reasonable manner in compliance with applicable laws, regulations, policies, and procedures;
- The entities that receive Recovery Act funding and the manner in which these funds are used are transparent to the public, and the public benefit of these funds are reported clearly, accurately, and in a timely manner;
- Recovery Act funds are used for authorized purposes and instances of fraud, waste, error, and abuse are avoided or mitigated;
- Projects that are funded under the 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 What are the critical requirements or elements of the Recovery Act?

The Recovery Act includes several provisions that require steps beyond standard practice. Many of the critical requirements revolve around special reporting requirements—internal and external, particularly to OMB and to the Recovery.gov website. In addition, there are special timeframes for issuing funding opportunities announcements and for synopsising acquisition and financial assistance opportunities and awards.

The Recovery Act prescribes a time limit for the obligation of funds not later than September 30, 2010. Contracting Officers must obligate all Recovery Act funds by that date. Recovery Act funding will have special Treasury Accounting Symbols to aid in their identification.

Contracting Officers should coordinate directly with their respective site's chief financial officers for assistance in understanding the unique accounting code and systems requirements. Because the Recovery Act funds are time limited, appropriations law also restricts the time that these funds will be available for payments and/or reimbursement of costs. Contracting Officers and other invoice approving officials may only use Recovery Act funds to pay invoices through September 30, 2015. For Management and Operating (M&O) contracts with an integrated accounting system, the Recovery Act funds will not be available for drawdown after September 30, 2015.

Invoices may include requests for payment from projects that are to be reimbursed by both Recovery Act and non-Recovery Act funds, so long as the contractor's/recipient's accounting system segregates the costs and the invoice clearly designates the Recovery Act work.

1.4 Are actions awarded using Recovery Act funding subject to the Headquarters Business Clearance Process?

Yes. The policies and procedures prescribed in DOE Acquisition Guide Chapter 71.1 apply to transactions awarded using Recovery Act funding. In recognition of the objectives of the Recovery Act and the emphasis on expediting acquisition and financial assistance awards under which Recovery Act appropriations will be obligated, the Acquisition Planning and Liaison Division (MA-621) is engaged with and coordinating closely with affected Headquarters Program Office officials and Field Contracting Office Procurement Directors in developing sound, regulatory compliant contracting and financial assistance strategies and decision models to ensure expedited processing of Recovery Act actions; particularly those that may be subject to Headquarters Business Clearance review and approval. Contracting Officers who are working actions to which Recovery Act funding will be obligated should be in close communication with their respective MA-621 Liaison at the earliest practicable stages of strategy development. In addition, Contracting Officers should submit, as early as possible, the Major Procurement/ Assistance Actions Worksheet to MA-621 in order to expedite consideration by MA-621 of actions that will be selected for or waived from Headquarters Business Clearance review and approval.

1.5 What are the key actions that need to be considered regarding administration and oversight of Recovery Act funding?

DOE Heads of Contracting Activities, in conjunction with Field Procurement Directors and Field Chief Financial Officers, shall ensure that:

- Appropriate safeguards are developed and implemented that ensure that financial and business risks are assessed and addressed prior to the initial award of a contract, contract modification, work authorization, or financial assistance instrument.
- Contracting Officer Representatives (CORs) are properly trained to perform COR duties and that there are adequate numbers of CORs to effectively administer the delegated COR responsibilities.

- Contract management plans and oversight activities are revised, as needed, to incorporate the enhanced reporting, transparency, accountability and monitoring requirements applicable to the Department's administration actions. This is to include appropriate processes and practices that provide for the effective management of contractor work scope, costs, and schedule. In addition, contract award fee, performance evaluation management plans, or similar metrics should be revised to effectively assess contractor performance and results. With respect to fee allocation and earning, fees are to be appropriately established in consideration of the work scope, performance risk, and cost.
- With respect to contractor costs and to the extent determined necessary, processes and procedures should be established to ensure that costs incurred by the contractor using Recovery Act funds are reasonable, allocable and allowable.

1.6 What other policy goals should be considered in determining how best to use Recovery Act funds in order to achieve the Act's objectives? (May 2009)

The following considerations should be taken 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. See Chapter 1 of the OMB updated guidance for additional information.

- Ensuring long-term public benefits, optimization of economic and programmatic results.
- Ensuring compliance with equal opportunity laws and principles.
- Promoting local hiring.
- Providing maximum practicable opportunities for small businesses.
- Providing equal opportunity for Disadvantaged Business Enterprises.
- Engaging with community-based organizations.

1.7 What risk considerations will be given to Acquisition? (May 2009)

Risk management is a part of the management of funds under the Recovery Act. Risk management should be considered at the agency, program, Request for Proposals (RFP) or Funding Opportunity Announcements (FOA) and award levels. Some particular questions to consider are:

- a. Do new RFPs 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?

1.8 What to do if a lobbyist ask a question about an FOA or Notice of Inquiry (NOI)?

(1) There is no duty to inquire of each submitter of questions/comments as to whether he/she is a registered lobbyist.

(2) If we know that comments/questions were submitted by a registered lobbyists and DOE posts the comments/questions on the NOI/FOA website, there is no need to post again on another website since the policy is to post the information for transparency purposes and one posting accomplishes that end. If, however, the comment/question will not be posted on the NOI/FOA website or there is no identification of the submitter of the information as a lobbyist, the comment/question should be handled in accordance with agency guidance, i.e., transmit "all written communications you receive from Federally registered lobbyists regarding specific projects, applications or applicants for Recovery Act funding" to Andrea Butler via email to andrea.butler@hq.doe.gov. See also OMB Memo M-09-16 Interim Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds <http://www.whitehouse.gov/omb/asset.aspx?AssetId=1078>.

1.10 Using Recovery Act Funds for Audits for FY2009/FY2010

Recovery Act funds may be used to pay for audit services pursuant to DOE's interagency agreements (IAA) with the Department of Health and Human Services (HHS) or the Defense Contract Audit Agency (DCAA) for work performed prior to September 30, 2010. After October 1, 2010, audit services, even on Recovery Act awards, must be paid with current fiscal year funds.

Recovery Act funds must be obligated on the applicable IAA and may not be submitted to the Working Capital Fund. The cognizant program office should submit a funding memo to the Office of Procurement and Assistance Policy (MA-61) for processing and execution of the Recovery Act funds. Contact Helen Oxberger at 202-287-1332 or Helen.oxberger@hq.doe.gov for additional information.

Chapter 2 — Reporting

2.1 What reporting is required under Recovery Act?

The Recovery Act and OMB require many different types of reporting. Contracting personnel will be directly or indirectly responsible for several aspects of these reporting requirements, including special entries for FedBizOpps, Federal Procurement Data System—Next Generation (FPDS-NG), Grants.gov and Procurement and Assistance Data System (PADS)/Federal Assistance Award Data System (FAADS), special postings of awards to the internet, and ensuring contractor/recipient compliance with the special reporting requirements under Section 1512 of the Recovery Act.

Unless specifically prescribed in this Guide, DOE will not require multiple postings of the same document/information in both Government-wide systems and the agency website (e.g., separate postings of Funding Opportunity Announcements in both Grants.gov and at Energy.gov/Recovery). The Office of Procurement and Assistance Management will provide links on the agency website to Government-wide systems to which Recovery Act actions are to be reported, including Grants.gov, FedBizOpps, and Recovery.gov.

More extensive guidance will be provided once all the Recovery Act processing and reporting requirements have been identified and documented.

2.2 Are there special requirements regarding Requisitions?

In order to track and report Recovery Act funding, Recovery Act and non-Recovery Act funding shall not be combined on a single Requisition, even as separate line items. All requisitions with Recovery Act funding must include the word “**Recovery**” as the first word in the Main | Text | Description block of the Requisition

2.3 What are the new requirements for FedBizOpps (FBO)? (May 2009)

1) All pre- and post-award notices must have the phrase “**Recovery Action**” as the beginning of the subject/title and description fields. For post-award notices, the description must also include the Data Universal Numbering System (DUNS) number for the awardee.

It is particularly important to identify sources sought and other pre-award notices as a Recovery Act transaction to ensure that potential offerors understand the special requirements of the action.

2) A pre-award notice for task and delivery orders over \$25,000 funded in whole or part by the Recovery Act must be publicized on FBO in the same manner as pre-award notices for contracts. The notice should be marked as “For Information Purposes Only.” The publication and response times in FAR 5.203 do not apply to task and delivery orders.

3) A post-award notice for task and delivery orders over \$500,000 funded by the Recovery Act must be publicized on FBO.

- 4) A post-award notice is required for all modifications over \$500,000 to contracts and orders funded by the Recovery Act and must be publicized on FBO.
- 5) Regardless of dollar value, any award of a contract or order that is not fixed-priced must include a rationale for using other than a fixed-priced approach in a post-award notice published on FBO. Any modification to a cost-reimbursable contract or order must also be published with a rationale.
- 6) Regardless of dollar value, any award of a contract or order that is not competitively awarded must include a rationale for using other than a competitive approach in a post-award notice published on FBO. Any modification to a non-competitive contract or order must also be published with a rationale.
- 7) For some actions, manual entry into FBO may be required as Strategic Integrated Procurement Enterprise System (STRIPES) or Industry Interactive Procurement System (IIPS) does not have the capability to send the information to FBO. These actions are those that are not part of a solicitation, such as, modifications and orders. For these actions, when in FBO, you must check the box indicating the action includes Recovery Act funds. Item 1 above is not necessary for manual entries. Each procurement office should have two designated individuals for direct interface with FBO. Information on access to FBO should be requested from Mara Grissom at mara.grissom@hq.doe.gov.
- 8) Contracts, orders and modifications completed prior to the issuance of this guidance must be corrected to ensure that FBO is able to correctly identified the actions as Recovery Act transactions and that any applicable rationales are made public.
- 9) Descriptions on all notices should be reader friendly, i.e. written so that the average citizen can understand the activity being undertaken.
- 10) Notices posted to FBO by DOE contractors must also comply with these requirements.

2.4 What are the new requirements for Grants.gov?

Contracting Officers and Contract Specialists should follow these instructions:

Use the following steps for all FOA on Grants.gov, whether they are created in IIPS or STRIPES:

Use the term “**Recovery Act**” within the Opportunity Title.

Note: FOA’s created in STRIPES must be manually posted in IIPS in order to get to Grants.gov. Please refer to the guidance provided by the STRIPES Financial Assistance Team.

For the Opportunity to be searchable, and listed in the Recovery Act search category at Grants.gov, you must select “Recovery Act” under Category of Funding Activity, when creating

the solicitation in IIPS. This must be done in addition to any other category that may be required.

Once the solicitation has been received and posted at Grants.gov, login to Grants.gov and at the top of the screen under Grants Opportunity Properties, change the Opportunity Category to “Other” and add “Recovery Act” in the Category Explanation text box.

2.5 Are there special Catalog of Federal Domestic Assistance Catalog (CFDA) requirements?

Another searchable identifier for Recovery Act opportunities will be the new “Recovery Act” CFDA numbers. DOE is conducting a data call to the program offices and is in the process of submitting any requests for new CFDA program numbers to the OMB Max web site where they must be approved by the General Services Administration (GSA) and then OMB. The Information Management Systems Division will have the new numbers added to the IIPS, PADS, and STRIPES once they have been approved. Grants.gov will add these new CFDA numbers as they are received from GSA.

Please contact Jennifer Beale at jennifer.beale@hq.doe.gov or at 202-287-1355, with questions concerning the CFDA.

2.6 What are the new requirements for FPDS-NG and PADS?

For the contracting offices not currently using STRIPES, all acquisition awards and modifications involving Recovery Act funds are to be reported to FPDS-NG within 24 hours of the award.

In addition, for offices not currently using STRIPES, all financial assistance awards and interagency/international agreements and modifications with Recovery Act funds are to be reported to PADS within 24 hours of award.

Note: Funding provided for under the Recovery Act cannot be combined with non-Recovery Act funding on a single award or modification, and, accordingly, must be reported to FPDS-NG or PADS as separate base awards or modifications

Requisitioners have been instructed that combining Recovery Act and non-Recovery Act funding on a single requisition is prohibited (see Section 2.2). The basis is to ensure the appropriate segregation, control, and tracking of Recovery Act funding.

Should a requisition be received that includes both Recovery and non-Recovery Act funding, the Contracting Officer must reject the requisition and require resubmission of separate requisitions that must be processed as two separate funding actions (e.g., basic award and modification; two separate modifications).

Reporting the Treasury Accounting Symbol (TAS)

The Treasury Accounting Symbol (TAS) is required for all reports to FPDS-NG and PADS, regardless of whether STRIPES is used or not. The TAS must be reported for all awards or modifications funded by the Recovery Act. The TAS is not required to be reported for non-Recovery Act actions.

For organizations using STRIPES, the Contracting Officer must coordinate with the site Chief Financial Officer to obtain the appropriate TAS for Recovery Act funding until changes to STRIPES/Standard Accounting and Reporting System (STARS) can be accomplished. In the case of organizations not on STRIPES, coordination with the site CFO will be necessary until the office implements STRIPES.

Include the following language in the Description of Work data field, used for the FPDS-NG and PADS reporting, for all awards and modifications that use funding from the Recovery Act:

For FPDS-NG

“TAS::(actual Treasury Accounting Symbol)::TAS Recovery” followed by the actual Description of Work.

For PADS:

“TAS::(actual Treasury Accounting Symbol)::TAS Recovery” followed by the actual Description of Work.

While FPDS-NG supports reporting multiple TAS codes, it does not have the ability to allocate the funding among these codes; therefore, DOE contracting offices must report only one TAS code per award/modification to ensure Recovery Act funding is accurately reported. For funds-in interagency agreements, including those for the Work for Others program, the requesting agency's TAS and agency funding code must be reported, not DOE's codes.

For additional guidance, see OMB Guide, Chapter 2, Section 2.6 (Attachment 1).

2.7 FAADS Reporting and the Nine-digit Zip Code

For financial assistance, the Contracting Officer must report to STRIPES, including the FAADS reporting module, or PADS (PADS if you are not using STRIPES) the full nine-digit zip code for the place of performance.

2.8 What are the other responsibilities of the Contracting Officer for complying with the reporting requirements?

Contracting Officers are responsible for ensuring that contracts and grants, whether new or amended, contain the Recovery Act Reporting Requirements provision. They are responsible for informing contractors and recipients of the reporting requirements and for tracking contractor

and recipient compliance. Contracting Officers are responsible for ensuring that the basic award and each modification has only has one type of funds (i.e., Recovery Act or non-Recovery Act appropriations). They are also responsible for including the appropriate Special Terms and Conditions (Attachments 3 and 4) that include the Recovery Act Reporting provisions.

DOE acquisition personnel are responsible for ensuring the data integrity and quality (accuracy/completeness) of all award information to be reported, including data pertaining to Recovery Act funding. All actions are expected to be reported to FPDS-NG within 24 hours, if the contracting activity is not using STRIPES, and at the time of award if the contracting activity has implemented STRIPES.

2.9 What reporting will be collected from contractors and recipients of Federal funding for reporting on Recovery.gov? (Sept 2009)

The Recovery Act requires extensive quarterly reporting from the prime contractors and recipients of Federal funding. Each award with Recovery Act funds will be required to report general information, status of funding and project completion, and jobs creation/retention within 10 days after the end of each calendar quarter, starting on October 10, 2009.

These reports will include the following data elements, as prescribed by the Recovery Act:

- (1) The total amount of recovery funds received from that agency;
- (2) The amount of recovery funds received that were expended or obligated to projects or activities. This reporting will also included unobligated balances to facilitate reconciliations.
- (3) A detailed list of all projects or activities for which recovery funds were expended or obligated, including—
 - (A) The name of the project or activity;
 - (B) A description of the project or activity;
 - (C) An evaluation of the completion status of the project or activity;
 - (D) An estimate of the number of jobs created and the number of jobs retained by the project or activity; and
 - (E) 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.
- (4) Information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act

of 2006 (P.L. 109-282), allowing aggregate reporting on awards below \$25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

Contracting Officers are responsible for including FAR 52-204-11 in contracts and the special award term (2 CFR 176.50) in grants, cooperative agreements, and Technology Investment Agreements (TIA).

Contractors and Recipients will be responsible for entering this information directly into www.FederalReporting.gov. Additional information on the reporting requirement can be found at http://www.energy.gov/recovery/ARRA_Reporting_Requirements.htm.

2.10 Will these reports be made available to the public?

All reporting will be used to populate Recovery.gov. Agency-wide and program-specific plans will be posted on the agency website on a dedicated page for Recovery Act activities. Acquisition, financial assistance and program officials should remember that accountability and transparency of information are of utmost importance.

2.11 How else will information be provided? (May 2009)

Information on reporting may also be disseminated through STRIPES flashes and other communiqués from the Information Management Systems Division, Office of Contract Management.

Information may also be provided through conference calls with established field groups including the Procurement Policy Advisory Group, Financial Assistance Advisory Council, Procurement Directors, and the internal DOE Interagency Acquisition Environment Users Council.

Chapter 3 — Grants

3.1 What actions, beyond standard practice, should be considered while planning for competitive awards under Recovery Act? (May 2009)

(1) Evaluation Criteria for Award

Contracting Officers should include either a merit review criterion or a program policy factor that allows for evaluation of projects that support the goals of the Recovery Act.

Merit Review Criterion should be tailored to the FOA and address how the application will show merit vis-à-vis the type of activity being proposed and the goals of the Recovery Act.

Program policy factors should be included that indicate a preference for projects that are fast starts and for those with the greatest likelihood of achieving jobs creation and preservation and/or other factors that can measure the projects success of promoting the goals of the Recovery Act, including those listed in Chapter 1.6. A sample factor is provided below.

Preference will be given to Applications that promote and enhance the objectives of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, especially job creation/retention, with special attention to utilization of small and local businesses, and expediting economic recovery with projects that can be finished quickly.

(2) Competition

It is DOE's preference that awards made in support of the Recovery Act be made based on merit and competition. In those instances with sufficient justification to support award on a non-competitive basis, Contracting Officers must ensure that a Determination on Non-competitive Financial Assistance (DNFA) has been approved in accordance with 10 CFR 600.6.

(3) Existing Grants, Cooperative Agreements, and TIAs

To ensure required and appropriate segregation and tracking of Recovery Act funding, the preferred method of obligating Recovery Act funding for projects or activities that are covered under existing financial assistance agreements is to make a separate new award to which only Recovery Act funding will be obligated in lieu of obligating Recovery Act funding via a modification of the existing award. In addition to ensuring appropriate segregation/tracking of Recovery Act funding, this approach is necessary to ensure a clean audit trail of Recovery Act funds and to resolve the inability of the Treasury Department's Automated Standard Application for Payments (ASAP) system to separately cost Recovery Act funding from other appropriations that are obligated to an existing agreement when the ASAP system is used as the payment method. The new award should make reference to the original award and clearly identify those portions of the project(s) or activit(ies) that is/are being funded by Recovery Act funds for completion and payment under the new award.

Recovery Act funds may be obligated to existing award in those instances where:

- (a) All non-Recovery Act funds have been expended, reimbursed, and costed. For these awards, non-Recovery Act funds may not be obligated to the award until all Recovery Act funds have been expended and reimbursed; or
- (b) The activity cannot be broken into two parts. In this instance, payment by ASAP is no longer an option. The agreement should be amended to reflect that payments will be made by the Automated Clearing House System (ACH).

Awards should not allow for payment by both ASAP and ACH.

Recovery Act funds must be tracked and accounted for separately from all other sources of funding for audit and reporting purposes. Contracting Officers must determine if the recipient's financial, accounting, and administrative reporting systems are capable of segregating, tracking, and reporting Recovery Act funding from other appropriations.

(4) Timeliness of Awards

The Recovery Act is intended to create and retain jobs and assist in the recovery of the U.S. economy. Accordingly, awards should be made as quickly as possible (the Act says “commencing expenditures and activities as quickly as possible consistent with prudent management”) and that the projects or activities under the awards should be able to start expending funds soon after award, preferably within 120 days. Expediting awards may require implementation of streamlined evaluation and award processes. When streamlining processes, the accountability and transparency requirements of the Recovery Act as well as sound business judgment must be emphasized to ensure appropriate obligation of Recovery Act funds in compliance with applicable laws, regulations, and policy requirements.

3.2 Are there terms and conditions, beyond standard practice, that must be included in financial assistance agreements under Recovery Act? (May 2009)

The Contracting Officer must include the American Recovery and Reinvestment Act Special Terms and Conditions—Financial Assistance (Attachment 3) into all new and amended awards to which Recovery Act funds will be obligated. These Terms and Conditions will be incorporated into the STRIPES financial assistance templates for your use.

Contracting Officers must also include the interim final award terms issued by OMB. These award terms are for 1) reporting and registration requirements; 2) Buy American requirements; 3) wage rate requirements; and 4) Single Audit Act requirements. These award terms have been added to the STRIPES Special Terms and Conditions template. The reporting and registration and the Single Audit Act requirements should be include in all agreements. Buy American and wage rates are only necessary for construction awards. Prescriptions are noted in STRIPES for each award term.

Agreements that have not been amended to change the reporting requirement for financial reporting to require the submission of SF-425 in place of SF-269, SF-269a and SF-272 should include this revision in the amendment to which Recovery Act funds will be obligated.

3.3 Are Contracting Officers expected to comply with existing administrative grants requirements?

The Recovery Act does not provide for deviations or waivers from standard practices and requirements. Contracting Officers must comply with all laws, regulations, policies, procedures and administrative requirements. If a waiver or deviation is considered necessary, it should be justified and approved in accordance with current procedural requirements. Each deviation/waiver request will be considered consistent with current requirements and authorities.

3.4 What audit tools will be used to ensure accountability for Federal awards under Recovery Act?

(1) Non-Federal entities (States, local governments, 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)¹.

(2) Incurred cost audits will be necessary for most Recovery Act awards during the closeout process.

(3) The Office of Inspector General 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.

3.5 Of what else should Contracting Officers be aware? (May 2009)

(1) The advanced level of accountability and transparency require that the pre and post award files (paper or electronic), be current, accurate, and complete.

(2) Risk Management is an important component of financial assistance programs and the award and administration of financial assistance agreements. Contracting Officers should consider risk and make adjustments in actions as necessary.

(3) All awards should have an assigned Technical Project Officer (TPO).

(4) All reporting requirements should be in compliance with the Act, award terms in Title 2 of the Code of Federal Regulations (previously the OMB Circulars), the Paperwork Reduction Act, and OMB guidance on frequency of reporting. Requests to include reporting requirements that

¹ Technical Single Audit exceptions applicable to a very small percentage of funding are entities expending less than \$500,000 a year are exempt from Single Audit and a few non-Federal entities are permitted to have biennial audits under a grandfathering clause.

do not comply with any of these requirements should not be incorporated until all conditions have been met.

3.6 Are there special consideration for merit and peer reviewers? (Sept 2009)

(1) Contracting Officers and Source Selection officials should pay particular attention to personal and organizational conflicts of interest of merit reviewers. A personal conflict of interest exists when a reviewer has an interest in an application that is likely to bias his or her evaluation of it. An organizational conflict of interest may exist when the employer of the merit reviewer, i.e. a DOE National Laboratory, has an interest in or connection to the application (including, for example, providing key personnel, reliance on an applicant for significant non-Federal funding, potential royalties from use of a technology that is proposed) that could diminish the capacity of the reviewer to evaluate an application in an impartial, technically sound manner, or that may otherwise provide an unfair advantage to the reviewer, the National Laboratory, or the applicant.

Merit reviewers from DOE's National Laboratories or other contractors must be screened for both personal and organization conflicts of interest. In general, it is DOE's policy that a contractor employee may not be part of a merit review panel where his/her employer has submitted an application (including as a team member) for that opportunity. In certain narrow and appropriate circumstances, a conflict of interest waiver may be granted for an individual to participate as a reviewer after a thorough review of the conflict and the acceptance of a mitigation plan. However, in no event will a waiver be granted to permit a reviewer to evaluate an application/proposal from his/her host or affiliated organization. Although it is preferable for there to be no affiliations between submitters and reviewers on any part of a panel, a number of factors may be examined in determining whether to issue a waiver to a reviewer, e.g.,

- Is there sufficient number of qualified reviewers available with no affiliations that raise conflicts?
- Does the reviewer have unique qualifications/expertise in the subject matter area?
- What is the likelihood that the reviewer's evaluation will have a direct and predictable effect on the funding decisions under that FOA? (The smaller the number of applications, the greater the impact; the larger the number of applications, the smaller the impact).
- Did the reviewer participate in the development of his/her organization's submission?
- Can the reviewer review applications in technology areas other than the area for which his/her home organization submitted, particularly if the funding for the FOA has been divided by topic area?
- Can the reviewer be assigned to subject matter reviews that are not in direct competition concept-wise to the reviewer's home institution application?

- Is there a process under the selection plan to eliminate, or have further review of, outlier evaluations?
- Can other mitigation measures be put in place to avoid, neutralize, or mitigate the conflict?
- How large is the funding potential relative to the size of the organization providing the reviewer?
- What is the relationship between the reviewer's employment and remuneration to the success or failure of the applications, e.g., does the institution have a bonus system for employees including the reviewer that is dependent on the funding obtained, or is the continuation of the reviewer's work dependent on the organization obtaining this funding?
- Have the potential conflicts been disclosed thoroughly to allow for an informed decision and formulation of a mitigation plan (if needed)?

Consideration of factors such as these is necessary to determine if a waiver is appropriate and before a reviewer is assigned to participate as a reviewer under a FOA which includes a submission from his/her home organization. Thus, program offices need to ensure that sufficient information is collected regarding prospective reviewers to make informed judgments regarding these matters.

Source Selection Officials and Contracting Officers should ensure that the underlying contracts of these reviewers have the required FAR and Department of Energy Acquisition Regulation (DEAR) clauses and have been updated to reflect Recovery Act activities.

Two new Conflict of Interest/Non-Disclosure Agreement forms have been developed. One form is for use with merit reviewers employed by and M&O contractor. The second form is for all other individuals. See Policy Flash 2009-61 or the STRIPES library for copies of the forms.

(2) The following items must be considered in using non-Federal employees in peer/merit reviews:

- Reviewers must have technical or scientific expertise in area(s) of the applications. Optimally, reviewers should have:
 1. Special knowledge of the science and technical subfields involved in the applications to be reviewed to evaluate competence, intellectual merit, and utility of the proposed activity.
 2. Broader or more generalized knowledge of the science and engineering fields involved in the applications to be reviewed to evaluate the broader impacts of the proposed activity.

- Reviewers must be able to provide high quality, fair and objective reviews.
- Reviewers need to be able to articulate their views succinctly, engage in productive exchanges, actively participate in the discussion of applications other than those specifically assigned, and demonstrate an ability to work collegially in a group setting.
- Reviewers must be free of personal conflicts of interests and their employers must be free of organizational conflicts of interest.
- Reviewers must sign a conflicts of interest and a non-disclosure agreement.
- Reviewers shall not include anyone who, on behalf of the Federal Government, performed or is likely to perform any of the following duties for any of the applications:
 - 1) Providing substantial technical assistance to the applicant;
 - 2) Approving/disapproving or having any decision-making role regarding the application;
 - 3) Serving as the project manager or otherwise monitoring or evaluating the recipient's programmatic performance;
 - 4) Serving as the Contracting Officer or performing business management functions for the project; or
 - 5) Auditing the recipient of the project.
- Reviewers may be paid through a DOE contract (not honorarium) if the contract includes the appropriate FAR and DEAR clauses.
- Reviewers may be paid an honorarium, including time and travel, for participating on a panel.

3.7 What do Contracting Officers need to know about the Davis-Bacon Act and Recovery Act Awards? (May 2009)

Section 1606 of the Recovery Act requires that all laborers and mechanics working on projects funded in whole or in part by and through the Federal Government with Recovery Act dollars be paid wages at the prevailing rate in the locality of performance as determined by the Secretary of Labor. This requirement is unusual for financial assistance awards and will require additional award and administrative activities on the part of the Contracting Officer. This requirement does not apply to State Governments; however, it must be flowed down into all applicable subawards, contracts, and lower-tier subcontracts.

If there is a possibility awards will include construction, alteration, maintenance, or repair type activities:

- Contracting Officers must ensure that the FOA contains language in the instructions for the budget justification file, Part IV, C.3, that requests applicants to provide information on complying with Davis-Bacon. Sample text is provided in Attachment 2—Funding Opportunity Announcement Template.
- Contracting Officers must ensure that the award agreement contains two award provisions: 2 CFR 176.190—Wage Rate Requirements under Section 1606 of the American Recovery and Reinvestment Act of 2009 and Implementing Guidance for 2 CFR 176.190 and the applicable wage determination.
- Contracting Officers must ensure that the appropriate wages are being paid and that the weekly payroll certifications are complete and received. The Department of Labor (DOL) is drafting additional guidance on this area and updates will be provided as soon as the DOL information is received.

3.8 Releasing Application Information (Sept 2009)

Applications, in whole or in part, should not be released to the public prior to selection. Some FOAs contain language requiring the submission of a one page project summary/abstract or statement of project objectives (SOPO) that does not contain proprietary or confidential business information so that the Department can release that document to the public. The standard FOA clause has already been updated in STRIPES and includes appropriate language prescribing this requirement. This language is not to be interpreted as allowing for or requiring pre-award release of that information. Until award, all application information should be considered selection sensitive and withheld. After award, release should be in accordance with standard Freedom of Information Act (FOIA) procedures. Application information labeled as project summary/abstract or SOPO may be released outside of the FOIA process. Project summary/abstracts or SOPO, or portions of, may be released after selection but before award.

3.9 What are the special Buy American requirements? (Sept 2009)

Section 1605 of the Recovery Act 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 as construction material in the project are produced or manufactured in the United States.

Attachment 10 provides additional information in the form of frequently asked questions.

Chapter 4 — Contracts

4.1 Are there actions that must be taken while planning for contract awards under the Recovery Act?

The Recovery Act does not provide for waivers or deviations from the FAR. Therefore, FAR requirements apply to all contracts, interagency agreements, task and delivery orders and modifications that include funds appropriated under the Recovery Act. Contracting Officers may request waivers or deviations, where otherwise appropriate through normal processes. Please clearly identify how the actions under Recovery Act will benefit from the waiver or deviation. Each request will be considered consistent with current requirements and authorities.

Consistent with the accountability and transparency requirements of the Recovery Act, good acquisition planning is critical. Contracting Officers must engage program officials at the earliest practicable stages of the planning process to assist in requirements definition and acquisition strategy development. Key considerations to consider include: competition, contract type; small business participation; small business subcontracting goals; evaluation criteria; how the work will be tasked, how the work will be monitored, and performance measures and metrics to ensure that the objectives of the Recovery Act are met.

- *Competition:* The Recovery Act includes a preference for competitive awards. Although new competitions are not required by the Act, non-competitive awards, including new work that will be added to existing contracts that are subject to the requirements of FAR Part 6 are subject to special reporting requirements of the Act (see Chapter 2). For modifications to existing contracts that were competitively awarded under which Recovery Act funding will be obligated, incremental funding or funding resulting from authorized changes within the existing scope of the contract are not considered non-competitive actions and are therefore not subject to the special reporting requirements of the Act. However, modifications to existing contracts that were awarded non-competitively as well as modifications that will result in new work being added to the contract thus requiring a sole-source justification in accordance with FAR Part 6 are considered to be non-competitive actions and are subject to the special reporting requirements of the Act. This is so whether or not the basic award was competitive.
- *Contract Type:* Funds may be obligated on any new or existing award vehicle, including a Government-wide Acquisition Contract (GWAC), multi-agency contract, GSA Federal Supply Schedule contract, or agency indefinite-delivery/indefinite-quantity contract. GSA Schedule contracts, on the e-Library and GSA Advantage, will identify Recovery Act compliance with an “ARRA” symbol.
- *Small Business Participation and Small Business Subcontracting Goals:* The requirements of the Small Business Act, as implemented in FAR Part 19, apply to all awards to which Recovery Act funding will be obligated. Accordingly, emphasis should be made on ensuring small business participation in acquisition strategy development.

Additionally, when amending current awards with subcontract plans, Contracting Officers should assess and, as appropriate, renegotiate current goaling requirements to include the projects/activities that will be funded using Recovery Act appropriations.

- *Evaluation Criteria:* For all new awards and modifications for projects or activities that will be funded using Recovery Act appropriations, Contracting Officers should evaluate the offeror's/contractor's proposal to assess the offeror's/contractor's ability to accomplish the objectives of the Recovery Act, including job creation and/or preservation and economic recovery in an expeditious manner.
- *Tasking Work:* Contracting Officers must segregate work using Recovery Act funds by awarding a new contract or new task order under an existing indefinite delivery/indefinite quantity contract, including a General Services Administrations Multiple Award Schedules contract. For modifications to existing contracts, Contracting Officers should issue separate task assignments, work authorizations, or contract line items to segregate work performed that will be funding using Recovery Act funding. Each new tasking must clearly state that the work is to be performed using Recovery Act funding and that the contractor needs to segregate tracking and reporting of funds for the work in accordance with the Special Terms and Conditions—Acquisition (Attachment 4).
- *Monitoring Work:* Contracts and Orders that include Recovery Act funds require special oversight and monitoring. Contract administration activities will require a higher degree of diligence and oversight. Contracting Officers and Contracting Officer Representatives need to be aware of the special requirements of the Recovery Act, particularly the segregation and accounting of costs and special reporting requirements. Contracting Officers should coordinate closely with their respective CFO and engage audit support as required to ensure that appropriate systems are in place or established to meet these requirements. More frequent and more formal communication among acquisition, program, financial, legal, and audit staff may be required to ensure the funds are obligated, expended and reported properly. Accordingly, these requirements should be addressed in new or amended Contract Management Plans (ref: DOE Acquisition Guide 42.5).
- *Performance Measures and Metrics:* All new or modified awards must specify performance outcomes and measures that will be used to assess performance of Recovery Act work. While these performance outcomes and measures may subsequently be incorporated into fee incentives, through an Award Fee Plan, Performance Evaluation Management Plan, or other similar document, the contract work scope (e.g., Section C or contract attachment) must tie the Recovery Act work to these outcomes and measures.

4.2 Are there actions, beyond standard practice Contracting Officers must take related to solicitation of offers and award of contracts under Recovery Act? (May 2009)

Yes. While the FAR generally provides the necessary policies and procedures for soliciting offers and awarding contracts, the Recovery Act imposes unique transparency requirements that change the pre-solicitation and award notice process, beyond standard practice, as follows:

(1) Unique Requirements for Posting of Presolicitation Notices

Contracting Officers must post presolicitation notices on FBOs in accordance with FAR Part 5 for orders placed against task and delivery order contracts, including GWACs, multi-agency contracts, and GSA Multiple Award Schedule contracts. These notices will be posted in FBO for information purposes only. The time requirements of FAR 5.203 do not apply. To facilitate transparency and ensure consistency in tracking notices for Recovery Act funds, the notice must use the following special formatting requirements:

- All presolicitation notices must include the word “Recovery Action” as the first word in the *Title* and *Description* fields in FBO.
- Pre-solicitation notices for delivery and task orders must also include the following statement in the *Description* field preceding the actual description:

“THIS NOTICE IS PROVIDED FOR INFORMATION PURPOSES ONLY.
THIS OPPORTUNITY IS AVAILABLE ONLY TO CONTRACTORS UNDER
[contracting officer insert program name. For example: GSA Schedule XXXXX.]

(2) Unique Requirements for Announcing Contract Awards

Contract award notices must also be posted at FBO in accordance with FAR Part 5, including all task and delivery orders and modifications to existing contracts and orders as described in (1) above. To facilitate transparency and ensure consistency in tracking award announcements for Recovery Act funds, the following special formatting requirement must be used:

- All award announcements must include the word “Recovery Action” as the first word in the *Title* and *Description* fields in FBO. The awardee’s DUNS number must be included next in the *Description* field.

If the contract or order is not fixed-price and/or competitive, include in the *Description* field the rationale for using other than a fixed-price or competitive approach. For modifications, it is the underlying contract/order that should be considered for fixed-price and competitive approach. For example, a modification is executed to add within scope work to a cost-reimbursable contract that was competitively awarded. A post-award notice would be published for the modification with a rationale as to why contract/modification was not fixed-priced.

The *Description* field must also include a reader friendly description of the activity, i.e. written so that the average citizen can understand the activity being undertaken.

The following actions are considered competitive for reporting rationales under the Recovery Act:

- Actions listed at FAR 6.1
- Actions listed at FAR 6.2 except sole source 8(a)s (FAR 19.808-1)
- Multiple Award Schedule orders under FAR 8.405-1 and 8.405-2
- Task and Delivery Orders against Multiple Award Contracts which use fair opportunity for award of orders (FAR 16.505(b)(1))

The following actions are considered noncompetitive for reporting rationales under the Recovery Act:

- Actions awarded based on a statutory exception to full and open competition, i.e., a Justification for Other than Full and Open Competition (JOFOC) approved pursuant to FAR 6.303
- Multiple Award Schedule orders with limited source justifications pursuant to FAR 8.405-6
- Sole source simplified acquisitions (see FAR 13.106-1(b), 13.106-3(b)(3) and 13.501(a)(2))
- Orders against task and delivery order contracts that used a statutory exception to fair opportunity pursuant to FAR 16.505(b)(2) and (5)
- Sole source 8(a)s (FAR 19.808-1)
- Sole source small business set-asides (including HUBZone small business (FAR 19.1306) and sole source service-disabled veteran small business awards (FAR 19.1406))

See Attachment 8 for additional information issued by GSA.

(3) Segregation of Costs

As emphasized in Section 4.1, the Recovery Act requires a high degree of accountability and transparency on the use of the funds. Contractors must be able to segregate and track Recovery Act funds from other appropriations and non-federal revenue streams. Contracting, program, financial management and auditing staff will need to be able to identify costs associated with work funded by the Recovery Act.

(4) Responsibility Determinations

As with all acquisitions, Contracting Officers shall ensure that recipients of Recovery Act funds are responsible in accordance with the requirements of FAR Part 9. 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;
- 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. The Excluded Parties List System must be checked before determining a prospective contractor responsible.

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

Additional oversight may be appropriate for work funded under the Recovery Act. In particular, the tracking and auditing of the funds may require additional documentation and review.

Contracts should be actively monitored to ensure that performance, cost, and schedule goals are being met, including:

- Amending, as appropriate, applicable incentive and award fee plans to tie-in the use of Recovery Act funds;
- Ensuring that incentive and/or award fees are effectively administered. (For further guidance, see the Program Office of Federal Procurement Policy memorandum entitled *Appropriate Use of Incentive Contracts*, 12/4/07);
- Requiring amended subcontracting plans, if appropriate, and stress the preference for small business subcontracting on projects funded by the Recovery Act;
- Addressing significant vulnerabilities or performance risks and mitigation plan;
- Addressing contractor oversight (e.g. contractor purchasing systems reviews, compliance reviews, physical inspections, monthly assessment of project status, contract administrations, deliverable reports, etc.);

- Implementing new or revised quality assurance procedures;
- Ensuring and 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.
- For modifications to existing contracts, analyzing the impact on current indirect rates (e.g. provision billing rates), adjusting contract estimated costs and revising rates as appropriate.

The Contracting Officer in coordination with the Contract Management Team (CMT) (Contracting Officer Representative, Technical Monitors, Federal Project Director, Chief Financial Officer, General Counsel, subject matter experts, etc.) should review and update contract management plans as appropriate to addresses their methodology or approach to ensuring that the above list of Recovery Act administration requirements are met. Successfully integrating the CMT increases the opportunity of ensuring issues are addressed in a timely manner and effectively resolved.

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

Contracting Officers must incorporate the Special Terms and Conditions—Acquisition (Attachment 4) into all new and amended contracts and task orders to ensure contractor compliance with the requirements of the Recovery Act. Contracting Officers must incorporate the new FAR Recovery Act clauses,

<http://management.energy.gov/documents/ARRAOverviewofRecoveryActFARClauses.pdf>.

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

Additional audits may be required for contracts using Recovery Act funds. Incurred cost audits should be performed during the closeout process. There will also be additional oversight from outside of DOE. 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.

4.6 Can Recovery Act funds be used in conjunction with Interagency Agreements? (May 2009)

Interagency Agreements may be used to transfer the funds to another agency. Interagency Agreements must spell out the assignment of agency roles and responsibilities to fulfill the unique requirements of Recovery Act. These include, but are not limited to, job creation/retention report development and submission, accurate and timely data reporting, and special posting requirements to agency web sites and Recovery.gov. Planning is essential to ensure work performed under the Interagency Agreement supports the goals of the Recovery Act.

DOE may accept funds-in Interagency Agreements, including those under the Work for Others program, with Recovery Act dollars if the above items are addressed. However, special consideration should be given as to whether or not the acceptance of work funded by the Recovery Act meets the goals of the Act. When reporting the obligation of funds-in dollars to a DOE contract, the requesting agency's TAS and funding code must be reported into FPDS-NG.

4.7 What are the special Buy American requirements? (May 2009)

A FAR interim rule was published on March 31, 2009 (74 FR 14623) to implement section 1605 of the Recovery Act with respect to the unique Buy American provisions. The rule adds Subpart 25.6, American Recovery and Reinvestment Act—Buy American Act—Construction Materials, and new provisions and clauses in Part 52. The new Subpart 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 as construction material in the project are produced or manufactured in the United States.

Contracting Officers must comply with the new prescriptions at 25.1102 for using new FAR provisions and clauses 52.225-21, 52.225-22, 52.225-23, or 52.225-24, and appropriate alternates, in lieu of provisions and clauses 52.225-9, 52.225-10, 52.225-11, or 52.225-12, and appropriate alternates, respectively. Contracting officers also are required to modify existing contracts to include the new FAR clauses for future orders if Recovery Act funds will be used.

DOE Acquisition Letter 2008-06, Domestic and Foreign Procurement Preference Requirements, dated February 19, 2008, included deviations to several FAR clauses relating to the Buy American Act. Pursuant to the Office of Procurement and Assistance Management's coordination with the U.S. Trade Representative's office, no DOE deviations are required for the new FAR clauses relating to the Recovery Act.

The Recovery Act Buy American provisions are for construction projects and the materials needed to complete the project. The new requirements apply only to manufactured goods used directly in construction; those that are components of electronic control systems or other laboratory equipment are not included. Manufactured goods do not include scientific and technical equipment, or equipment used at a construction site, such as desks and chairs.

4.8 What other guidance is there?

- **Attachment 1** of this Guide is a copy of OMB's Initial and Updated Implementing Guidance for American Recovery and Reinvestment Act of 2009.
- **Attachment 5** of this Guide provides more detailed procedural guidance for Contracting Officers to consider when obligating Recovery funding to existing contracts, including special considerations for M&O contracts.
- **Attachment 6** of this Guide provides a model contract modification for incorporating Recovery Act requirements developed by the Office of Environmental Management. This model is not mandatory and should be used, in whole or in part, as may be appropriate for a particular modification.
- **Attachment 7** of this Guide provides a model contract modification for incorporating Recovery Act requirements developed by the Office of Science for M&O contracts. This model is not mandatory and should be used, in whole or in part, as may be appropriate for a particular modification.
- **Attachment 10** of this Guide provides guidance on Buy American requirements for grants and cooperative agreements under ARRA. Excluding the guidance on exceptions, this guidance also is applicable to contracts.

4.9 Where does the executive compensation reporting requirement stem from? (Sept 2009) (Excerpt from the DOE Acquisition and Financial Assistance Implementation Guide for the American Recovery and Reinvestment Act of 2009)

Section 6202 of the Supplemental Appropriations Act of 2008 amended the Federal Funding Accountability and Transparency Act of 2006 to add the requirement for reporting "the names and total compensation of the five most highly compensated officers of the entity for those entities meeting certain dollar threshold and do not otherwise make the information public".

Reporting is required if, for the calendar year in which the award is made:

(A) In the preceding fiscal year, the entity received—

- (1) 80 percent or more of its annual gross revenues from 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.

The term *entity*

The term *entity*

(A) includes, whether for profit or nonprofit—

- (i) a corporation;
- (ii) an association;
- (iii) a partnership;
- (iv) a limited liability company;
- (v) a limited liability partnership;
- (vi) a sole proprietorship;
- (vii) any other legal business entity;
- (viii) any other grantee or contractor that is not excluded by subparagraph (B) or (C); and
- (ix) any State or locality;

(B) on and after January 1, 2009, includes any subcontractor or subgrantee; and

(C) does not include—

- (i) an individual recipient of Federal assistance; or
- (ii) a Federal employee.

Total Compensation means the cash and noncash dollar value earned by the executive during the contractor's past fiscal year. *Total Compensation* is not dependent on the amount reimbursed by the Federal Government through contracts, grants, cooperative agreements, or other awards. See FAR 52.204-11 and section 402 of part 229 of title 17 CFR for additional information.

The five most highly compensated officers for an entity are the five officers receiving the most total compensation in that entity. The top five officers may not necessarily be the top five highest compensated employees of that entity. Officers are individuals designated as an “officer” by statute, or appointed as an officer by (1) a Board of Directors, (2) a Board of Trustees, or (3) a Board of Regents under their powers.

This reporting requirement applies to the entity that entered into a contract, grant, cooperative agreement, or other award with DOE and that has received funding from ARRA. This

requirement also applies to subcontractors and subgrantees/subrecipients under those awards. This requirement applies to the entity that entered into the contract, not to a parent entity or entities, as applicable. Where a separate entity was established for a specific award, the reporting requirement applies to the separate entity, i.e., the limited liability company or other entity, and the five most highly compensated officers of that entity.

Chapter 5 — Management and Operating (M&O) Contracts

5.1 How does the Recovery Act affect M&Os? (MAY 2009)

All Recovery Act requirements apply to M&O contracts. In addition to the guidance contained in Chapter 4 of this Guide, Contracting Officers, in coordination with program officials and site Chief Financial Officers, must consider the following when using Recovery Act funds under an M&O.

- Ensure that the contractor's accounting and financial management systems allow for segregating the Recovery Act funds.
- Ensure that the contractor reviews and updates its Management Control systems pursuant to DEAR 970.0370.
- Ensure that the contractor's integrated accounting system can adequately segregate and report on Recovery Act dollars (i.e., the costs of Recovery Act work can be separately extracted from the system).
- Issue separate work authorizations for each project funded with Recovery Act dollars.
- Assess the need for new or revised subcontracts that may be required to complete the projects funded by the Recovery Act (e.g., consent requirements, amendments to current subcontracting plans).
- Ensure that the Interagency Agreement executed for work performed to be performed in support of other agency requirements under DOE's Work for Others program clearly specify DOE and contractor requirements for use with the other agencies' Recovery Act funds.
- Ensure the contractor updates its organizational conflicts of interest certifications/disclosures and provide DOE with all relevant information, particularly concerning those Lab employees assisting DOE in merit reviews of financial assistance applications. Relevant information, includes, but is not limited to, information about any FOA in which (a) you have submitted or plan to submit an application, (b) you are or will be participating as a team member or potential subgrantee/subcontractor in any capacity, or (c) you have or will have provided support such as intellectual property, personnel, or facilities.

A copy of the model SC modification can be found at Attachment 7.

5.2 Frequently Asked Questions (May 2009)

To date the Department has received a number of questions from DOE acquisition personnel and from industry regarding the impact of certain provisions of the Recovery Act. The following address inquiries received to date to assist Contracting Officers implement and administer contracts under which Recovery Act requirements will apply.

(1) What are the flow-down requirements of the Recovery Act?

The Special Terms and Conditions—Acquisition (Attachment 4) prescribes interim terms and conditions pending the issuance of final Government-wide guidance. In general, the interim terms and conditions should be included in only first tier subcontracts. Some items such as Buy American, Access to Records and Davis Bacon will apply to any level subcontract. The various provisions contained in the Special Terms and Conditions—Acquisition and any DOE supplementing clauses, will be finalized upon issues of final rulemakings in the FAR.

(2) Are inter-contractor purchases/transfers considered subcontracting for the purposes of the special reporting requirements under Section 1512 of the Recovery Act?

(3) For subcontracts previously bid or awarded will any grandfathering apply?

Previously awarded subcontracts that will receive Recovery Act funds must be modified to include the new terms and conditions.

(4) How many times will my contract be modified to change the Special H clause?

DOE has developed interim clauses for use in awards/modifications which obligate Recovery Act funds pending the issuance of final coverage in the FAR. It is anticipated that awards/modifications will have to be further amended upon issuance of the final FAR rules.

(5) Under “definitions”, please give the precise meaning of “Covered funds must be reimbursed by September 30, 2015”.

Because the appropriations have an expiration date of September 30, 2010, all Recovery Act funds obligated to a contract, order or financial assistance agreement must be expended and reimbursed by September 30, 2015, including those funds on contracts with integrated accounting systems.

(6) Under Section B, it states that “Invoices must indicate the portion of the requested payment that is for work funded by the Recovery Act”. This implies that invoices can include both Recovery Act and non-Recovery Act payments on the same invoice. Is that correct?

Yes. Requests for reimbursement should be segregated for work that is tasked/authorized for Recovery Act purposes and work that is not.

(7) Do contracts that use an integrated accounting system need to submit invoices to be reimbursed for Recovery Act funded projects.

No, but the integrated accounting system must be able to report on Recovery Act funds.

(8) The interpretation of the reporting requirements listed in Section H below is that all three conditions must be met to trigger the reporting requirement. Is this a correct interpretation?

Yes. This paragraph implements Sec. 6202 (HR 2642) enacted in the Supplemental Appropriations Act, 2008 (Public Law 110-252).

(9) Why is there a need to reiterate the Audit Access provisions and Davis Bacon implementation?

The Recovery Act requires changes to the FAR access provisions of the Inspector General (IG) and Government Accountability Office (GAO). Special audits and reviews of Recovery Act funds will be conducted. The Davis Bacon provision is simply a reminder if the requirements are already applicable to the contract.

(10) What additional Buy American information can be provided?

The Recovery Act Buy American provisions are for construction projects and the materials needed to complete the project. FAR was amended to add 4 new clauses to implement the requirements of the Recovery Act Buy American provisions. These new clauses are used in place of the current clauses. See Chapter 4.7 and FAR 52.225-21 through 52.225-24.

The new requirements apply only to manufactured goods used directly in construction; those that are components of electronic control systems or other laboratory equipment are not included. Manufactured goods do not include scientific and technical equipment, or equipment used at a construction site, such as desks and chairs.

(11) For ongoing contracts, adding the clause will invoke a change to the contract. Can stimulus money be used to pay for the increased costs due to a change order?

In and of itself, the obligation of Recovery Act dollars and the addition of the special H clause and the new FAR clauses are not cost bearing changes. Consideration to increased costs due to a change order should be based on the actual work to be accomplished with Recovery Act dollars and associated administrative burden from that work. The addition of Recovery Act dollars does not change or override contractual fee policy.

(12) How should the new GAO/IG access requirements be added to M&O contracts that use 970.5232-3?

A class deviation is being prepared that will amend DEAR 970.5232-3, Accounts, Records and Inspection to add the new access requirements. An Acquisition Letter will be issued with the class deviation once it is approved.

Chapter 6 — Purchase Cards

6.1 Purchase Card Usage with Recovery Act Funds (May 2009)

The purchase cardholder must complete the following procedures when purchase card transactions are made using Recovery Act funding:

- Make separate transactions if using non-Recovery Act and Recovery Act funding.
- Notate the Purchase Card Log if there was a purchase made with Recovery Act funding.
- Notate the accounting code beside the applicable transaction on the Statement of Account.
- Forward the signed Statement of Account to the Approving Official for approval.
- Forward the approved Statement of Account to Finance. Finance will make the appropriate entry into the accounting system for reporting purposes.

No additional cards should be established for Recovery Act purchases unless the office is anticipating a high volume of transactions and/or there is a high risk of errors in reconciling transactions to the appropriate Recovery Act accounting codes. Note: if cards are established, the current training and delegation procedures must be followed. In addition, the Purchase Card Agency Program Coordinator must be notified for tracking purposes.

Guidance on the applicability of the Recovery Act FAR clauses is forthcoming.