

Thursday February 19, 2009

To: President Erskine Bowles  
Chancellors  
General Administration Council  
Norma Houston, UNC Tomorrow  
Chief Financial Officers  
Chief Research Officers  
Federal Relations Officers  
Other Interested University Parties

From: Kimrey Rhinehardt  
Vice President for Federal Relations

Re: The American Recovery and Reinvestment Act of 2009

**\*Stimulus Implementation Briefing Two: Timelines and OMB Guidance\***

This memorandum contains excerpts from a February 18, 2009 Office of Management and Budget Memo (M-09-10) to the Federal agencies and is the first installment of government-wide guidance for carrying out programs and activities enacted in the American Recovery and Reinvestment Act (“Recovery Act”) of 2009.

The significance of this memo is that the OMB document outlines internal federal timelines and criteria for the agencies. Additionally, the document outlines requirements of the federal agencies in soliciting contracts and grants. This information is particularly useful for the Finance and research operations of the University. A few key pieces of information that I gleaned from the OMB document:

- 1 – Subgrantees and subcontractors are NOT required to report to the Federal Government – only prime awardees.
- 2 – OMB is taking painstaking steps to implement the transparency requirements of the Act. (And so should we when we are asked to provide information to any entity that we may be partnering with.)
- 3 – Job creation calculators will be provided by OMB to the Federal agencies which will therefore not require us to develop similar calculators.
- 4 – Within 20 days of enactment, federal agencies are required to post their grant and contract solicitation summaries to Grants.gov and then within 30 days the solicitation summary must link to the agency’s full solicitation.

5 – As noted in Stimulus Implementation Memo One - every federal stimulus dollar will have its own unique tracking and reporting, apart from regular appropriations.

More broadly, the guidance establishes requirements for various aspects of Recovery Act planning and implementation. These requirements are intended to meet 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 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.*

Additional guidance providing further detail and covering a fuller range of items will be issued within 30-60 days of this memorandum.

### **Transparency and Reporting**

- **Major Communications.** Beginning immediately, agencies receiving Recovery Act funds should determine which major communications are appropriate for posting on Recovery.gov.
- **Formula Block Grant Allocation Reports.** As soon as information becomes available, Federal agencies are required to provide details on the allocations made for each formula block grant.
- **Weekly Updates.** Starting March 3rd, agencies must submit weekly reports providing a breakdown of funding, major actions taken to date, and major planned actions.
- **Monthly Financial Reports.** Starting May 8th, agencies must provide monthly financial reports providing obligations, expenditures, and other financial data by Treasury Account, vendor, and award number, as well as information on allocations of mandatory and entitlement programs by State, county, or other appropriate geographical unit.
- **Award Transaction Data Feeds.** Starting on May 5th, agencies must provide all Recovery Act assistance transactions (primarily grants, loans, and loan guarantees) in the standard format currently provided to USASpending.gov. Agencies must also begin planning now for how they would provide this information on a more frequent basis if a decision is made to do so.
- **Agency Recovery Plan.** No later than May 1st, agencies must provide their “Agency Recovery Plan” that describes both broad recovery goals and the agency’s coordinating efforts. Agencies should work with their Office of Management and Budget (OMB) representative to set an appropriate submission date and review process.

### **Actions Specific to Award Type**

- For **contract** awards, agencies must:
  - In addition to the Federal Acquisition Regulation (FAR) Part 5 requirements for presolicitation and award notices, publish pre-solicitation and award notices of orders under task and delivery order contracts on FedBizOpps;
  - Include special formatting for pre-solicitation and award notices in FedBizOpps and award reporting in the Federal Procurement Data System (FPDS) to distinguish Recovery Act actions;
  - Include terms and conditions in contract documents necessary for effective implementation of Recovery Act data collection and accountability requirements;
  - For each government contract or order (or modification to an existing contract or order) over \$500,000, agencies should provide a summary of the contract or order (or modification to an

existing contract or order), including a description of the required products and services, which will be made available publicly and linked to Recovery.gov; and

- A summary of any contract or order (or modification to an existing contract or order), including a description of the required products and services, using such funds shall be posted in a special section of the web site Recovery.gov unless the contract or order is both fixed-price and competitively awarded.
- For **grant and cooperative agreement awards**, agencies must:
  - Request an expedited “Recovery Act” Catalog of Federal Domestic Assistance (CFDA) number 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;
  - Provide notification of existing CFDA program descriptions that will be modified during the next CFDA update cycle to reflect Recovery Act authorities, financial information, etc.;
  - Within twenty (20) days after enactment of the Recovery Act, agencies shall post funding opportunity announcements (i.e., “synopses”) to Grants.gov;
  - Within thirty (30) days of enactment, the Grants.gov synopsis shall link to the full announcement on the agency website;
  - Include prominent labels and tags in funding opportunity synopses, full funding opportunity announcements, and award notices that clearly distinguish them as “Recovery Act” actions;
  - Begin outreach efforts with potential applicants to create or update their profiles in Dun and Bradstreet Universal Numbering System (DUNS) and Central Contractor Registration (CCR);
  - Provide their Weekly Report allocations for each formula grant award (see section 2.4);
  - Include terms and conditions in award documents necessary for effective implementation of Recovery Act data collection and accountability requirements; and
  - Identify opportunities to streamline data collection to help alleviate reporting burden on funding recipients.
- For **loans and loan guarantees**, agencies must:
  - Request an expedited “Recovery Act” Catalog of Federal Domestic Assistance (CFDA) number 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; modify existing CFDA program descriptions to reflect Recovery Act authorities, financial information, etc.;
  - Publish funding opportunity notices and/or funding allocation information on GovLoans.gov;
  - Include prominent labels and tags in funding opportunity synopses, full funding opportunity announcements, and award notices that clearly distinguish them as Recovery Act actions;
  - Begin outreach efforts with potential applicants to create or update their profiles in Dun and Bradstreet Universal Numbering System (DUNS) and Central Contractor Registration (CCR);
  - Include terms and conditions in loan or loan guarantee award documents necessary for effective implementation of Recovery Act data collection and accountability requirements; and
  - Identify opportunities to streamline data collection to help alleviate reporting burden on funding recipients.

Additional guidance on other reporting requirements will be forthcoming.

### **1.6 What additional responsibilities exist for Executive Branch agencies?**

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

- All applicable anti-discrimination and equal opportunity statutes and regulations. These include (but are not limited to) Titles VI and VII of the Civil Rights Act of 1964; Title IX of the

Education Amendments of 1972; the Rehabilitation Act of 1973; the Fair Housing Act; the Fair Credit Reporting Act; the Home Mortgage Disclosure Act; and the Americans with Disabilities Act; as well as the Uniform Relocation Act.

- The National Environmental Policy 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."

### **2.3 What is required for the formula block grant allocation reports?**

As soon as information becomes available, Federal agencies are required to provide details on the allocations made for each formula block grant. These formula block grant reports should be cleared by the senior accountable official at the agency or his/her designee.

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

Agency plans will be due to OMB no later than May 1st. Agencies should work with their OMB representative to set an appropriate submission date and review process. 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.

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. For example, agencies should describe processes in place for senior managers to regularly review the progress and performance of major programs, including identifying and completing corrective actions. Agency plans should also identify the expected savings (e.g., from energy efficient buildings) and future costs (e.g., having to maintain new facilities) related to implementing the Recovery Act.

Consistent with OMB review process identified above, any component of these plans that are substantially complete prior to May 1st should be posted on agency web pages as soon as available.

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

Agency Program plans will be due to OMB no later than May 1st. Agencies should work with their OMB representative to set an appropriate submission date and review process. These separate plans are required for each Recovery Act program specifically named in the legislation and corresponding to new Treasury accounts established. 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:

- 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 status of compliance with National Environmental Policy Act, National Historic Preservation Act, and related statutes.
- g. *Savings or costs*: expected increases or reductions in future operational costs (e.g., savings due to energy efficient facilities or increased operational costs as a result of having more buildings to manage and maintain).
- h. *Measures*: expected quantifiable outcomes consistent with the intent and requirements of the legislation and the risk management requirements of Section 3.5, with each outcome supported by a corresponding quantifiable output(s) (in terms of incremental change against present level of performance of related agency programs or projects/activities specified in the plan) – 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 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.
- i. *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.
- j. *Transparency*: description of agency program plans to organize program cost and performance information available at applicable recipient levels.
- k. *Accountability*: description of agency program plans for holding managers accountable for achieving Recovery Act program goals and improvement actions identified.
- l. *Barriers to Effective Implementation*: a list and description of statutory and regulatory requirements, or other known matters, which may impede effective implementation of Recovery Act activities and proposed solutions to resolve by a certain date.
- m. *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.

## **2.9 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, loan, or contract) other than an individual and includes a State that receives Recovery Act funds. See Section 1512 of the Recovery Act.

These requirements apply to:

- *Prime recipients.* Reporting requirements only apply to the prime non-Federal recipients of Federal funding, and the subawards (i.e., subgrants, subcontracts, etc.) made by these prime recipients. They do not require each subsequent subrecipient to also report. For instance, a grant could be given from the Federal government to State A, which then gives a subgrant to City B (within State A), which hires a contractor to construct a bridge, which then hires a subcontractor to supply the concrete. In this case, State A is the prime recipient, and would be required to report the subgrant to City B. However, City B does not have any specific reporting obligations, nor does the contractor or subcontractor for the purposes of reporting for the Recovery.gov website. All recipients of Federal funds must continue to comply with existing agency and program reporting requirements.
- *Only recipients receiving awards funded through discretionary appropriations.* 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.

As required by Section 1512 of the Recovery Act and this guidance, each recipient, as described above, is required to report the following information to the Federal agency providing the award 10 days after the end of each calendar quarter, starting on July 10th. 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 obligated and expended to projects or activities. This reporting will also include unobligated Allotment balances to facilitate reconciliations.
- (3) A detailed list of all projects or activities for which recovery funds were obligated and expended, 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) Detailed 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 OMB.

The final guidance issued by OMB for the Recovery Act will lay out in more detail specific reporting instructions and how the data collection for this reporting will work government-wide. OMB is actively pursuing options for collecting some of this information centrally, focusing first on the data required in (4) above in the standard formats currently used by Federal agencies to report to USASpending.gov. OMB is also actively considering how to centralize the collection and reporting of the information required in section (3) above, though the current preference is that, to the extent possible, this data should be collected and reported through existing program level systems. Agencies should develop initial contingency plans for collecting and reporting this information directly on the agency recovery website within the 30 days specified by law.

Instructions for reporting this information will be provided in subsequent guidance. Agencies should be cautious before making investments in new system capabilities before further guidance is issued or before consulting with OMB. Regarding the reporting requirements in 3(d), usual methods for reporting jobs created by a contract do not take into account the time frame over which the jobs are created. As a result, they are likely to be inconsistent with macroeconomic estimates of jobs created at a point in time. For this reason, departments and agencies should use conventional jobs estimates for internal planning purposes only. Uniform reporting requirements for estimates of job creation will be specified at a later time. Federal agencies must instruct recipients covered by these reporting requirements that Recovery Act funds can be used in conjunction with other funding as necessary to complete projects, but tracking and reporting must be separate to meet the reporting requirements of the Recovery Act and this Guidance.

For information related to the Recovery Act to be fully transparent to the public, each agency must develop a list of agency systems which will capture significant program-related information related to the use of Recovery Act funds from recipients, either through existing or new reporting requirements. Further, agencies must identify what information each system captures, if it is publicly available in a user-friendly format, and if not, what technological or policy barriers exist to it being made public. For those systems presently unable to make information public in a userfriendly format, agencies should provide an estimate of resources necessary to achieve full transparency. This list need not include core financial and other systems which make information available through existing financial reporting, USASpending.gov, or other government-wide reporting requirements. Each agency should assemble this list and provide it to the E-Gov Administrator no later than March 15th. Reports can be sent to [recovery@omb.eop.gov](mailto:recovery@omb.eop.gov).

#### **2.11 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.

#### **4.2 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; SF 133 budget execution reports; or data feeds or reports they provide to Recovery.Gov. Within their financial systems, agencies must separately track apportionments, allotments, obligations, and expenditures related to Recovery Act funding. 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.

### **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 and formula allocations.

### (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 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;
- Provide notification 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.

## **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. 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.

#### **5.4 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)

#### **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 review Single Audits of Recovery Act funding and provide a synopsis of 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.
- Agencies must ensure receipt of funds is made contingent on recipients meeting the reporting requirements in Section 1512 of the Act.
- Ensure that there is an award term or condition requiring first tier subawardees 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 subawardees are met no later than the first time Recovery Act data requirements are due.
- 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. A modification may not be necessary if the award term and condition is sufficiently rigorous to meet Recovery Act requirements.
- Make clear that that any funding provided through the Recovery Act that is supplemental to an existing grant 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 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 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. 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 riskier 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 requirements for posting summary information on contracts and orders that are not both fixed-price and did not use competitive procedures in (2) below.

#### **(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. 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 noncompetitive acquisition strategy is contemplated.

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.

A summary of any contract or order (or modification to an existing contract or order), including a description of the required products and services, using such funds shall be posted in a special section of the web site [Recovery.gov](http://Recovery.gov) unless the contract or order is both fixed-price and competitively awarded (see Section 6.2(5) below).

### (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, or agency indefinite-delivery/indefinite-quantity (ID/IQ) contract, they must be reported as “Recovery” actions per Section 6.2(3) and comply with Sections 6.2(4) and (5) below.

### (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](http://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 our agencies. Agencies must provide maximum practicable opportunities for small businesses to compete for agency contracts and to participate as subcontractors in contracts awarded by agencies. Agencies may take advantage of any authorized small business contracting program. If, in making an award to a small business, a non-competitive procedure is used, such as a noncompetitive set-aside under section 8(a) of the Small Business Act, then a summary of any such contract, including a description of the supplies and services, shall be posted in a special section of [Recovery.gov](http://Recovery.gov) (see Section 6.2(5)).

### (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](http://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.

## **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, as described in (1) – (5) below:

### **(1) Unique Requirements for Posting of Presolicitation Notices**

Presolicitation notices must be posted on FedBizOpps (FBO) in accordance with FAR Part 5, including applicable dollar thresholds. Under the Recovery Act, presolicitation notices are required for any order, meeting the FAR Part 5 dollar thresholds, under a task or delivery order contract, including GWACs, multi-agency contracts, GSA Federal Supply Schedule contracts. These notices will be posted in FBO for information purposes only (i.e., the requirements of FAR Subpart 5.203 do not apply). Contracting officers should continue to also use their usual solicitation practice (e.g., e-Buy).

To facilitate transparency and ensure consistency in tracking notices for Recovery Act funds, agencies must use the following special formatting requirements:

- All presolicitation notices must include the word “Recovery” as the first word in the *Title* field in FBO preceding the actual title.
- Presolicitation 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 03FAC, COMMITS, Navy’s SEAPORT-E.*]

### **(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 as described in (1) above. To facilitate transparency and ensure consistency in tracking award announcements for Recovery Act funds, agencies must use the following special formatting requirement:

- All award announcements must include the word “Recovery” as the first word in the *Title* field in FBO preceding the remaining title.

### **(3) Unique Requirements for Entering Awards into the Federal Procurement Data System (FPDS)**

When entering data in FPDS on any action (including modifications) funded by the Recovery Act, agencies must enter the Treasury Account Symbol (TAS) in the *Description of Requirement* field.

(4) Unique Requirements for Contracts, Orders, and Modifications Exceeding \$500,000.

For each government contract or order (or modification to an existing contract or order) over \$500,000, agencies shall provide a summary of the contract or order (or modification to an existing contract or order), including a description of the required products and services, which will be made available publicly and linked to Recovery.gov. Subsequent guidance will provide additional details.

(5) Unique Requirements for Actions that are not Fixed-Price or Competitive

A summary of any contract or order (or modification to an existing contract or order), including a description of the required products and services, using such funds shall be posted in a special section of the web site Recovery.gov unless the contract or order is both fixed-price and competitively awarded. (See table below).

Agencies should also give special attention to the following:

(6) 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).

(7) Acquisition Flexibilities

Agencies should use authorized acquisition flexibilities as appropriate to avoid unnecessary delays in awarding contracts with Recovery Act funds. 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.

(8) 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 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?**

The Recovery Act establishes several special contract requirements. For example, the Recovery Act requires reporting on first-tier subcontractor awards. A FAR case is in process that will accommodate this requirement. Other Recovery Act matters under consideration for FAR coverage or other government wide guidance include:

- Special Buy American Act requirements;
- Additional requirements for contractor reporting; and
- Expanded GAO/OIG access to contractor records.

Agencies must ensure receipt of funds is made contingent on recipients meeting the reporting requirements in Section 1512 of the Act.<sup>11</sup>

### **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

## **Appendix 2 — Agency Recovery Related Web Pages**

Agencies must create their recovery related page within one week of the issuance of this guidance. This section outlines specific requirements for agency recovery related web pages.

### **Requirements**

- Prominent link to Recovery.gov. Agencies should include the “Recovery.gov” graphic prominently on their Recovery pages, linked to [www.recovery.gov](http://www.recovery.gov).
- 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.