

HOW WILL THE STIMULUS BILL IMPACT GOVERNMENT CONTRACTING?

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Tax Act of 2009 (also referred to as “the Stimulus Bill”). Although the Stimulus Bill has been widely reported as including approximately \$787 Billion in government spending and tax cuts, the specific details regarding how the Stimulus Bill will actually be implemented have not been as widely reported. The spending under the Stimulus Bill addresses specific and targeted areas including: Information Technology (such as the creation of a system of electronic medical records), Energy (such as a new power grid and building efficiency programs), Transportation infrastructure (including highways and bridges), Scientific Research (including 10 billion to NIH for research and 3 billion to NSF), Military Construction (such as modernization of medical facilities), Education Programs and school construction, Environmental cleanup projects, and SBA loans.

The spending covered by the Stimulus Bill is intended to be disbursed on an expedited basis through different vehicles, including government contracts. The rush to spend money through an acquisition process that is not known for its speed presents numerous challenges. Moreover, the Stimulus Bill challenges an ill-equipped procurement community with a rigorous oversight regime. Over the coming months, as the implementation of the Stimulus Bill crystallizes, more issues for government contractors will undoubtedly emerge. So far, there are reports that the government is relying on existing contracting vehicles. In addition, it is clear that the new requirements will emphasize disclosure, transparency and increased oversight in the procurement process.

On March 31, 2009, a series of draft rules were published which are designed to implement certain aspects of the stimulus provisions relating to government contracting. For example, the implementing rules call for the addition of a new clause (FAR 52.204-11) that require contractors and subcontractors to file new reports on the use of stimulus funds, including in some limited situations, the compensation for some of their highest paid executives .

The following is a brief summary of a few of the key provisions of the Stimulus Bill relating to government contracting that we have identified.

The Government Shall Use Competitive Fixed-Price Contracting As Much As Possible.

Congress included language in the stimulus law that requires that: “To the maximum extent possible, contracts funded under this act shall be awarded as fixed-price contracts through the use of competitive procedures as much as possible.” The Stimulus Bill also includes a requirement that nonfixed-price contracts that are awarded without competition must be posted in a special section of Recovery.gov, the portal to key information on how the government is spending the stimulus money. The award of competitive fixed-price contracts over time and material contracts might arguably save money, although the procurement of such contracts will be more difficult to engineer for an understaffed acquisition workforce. Furthermore, the separate goals of stimulating the economy through increased contracting activity and improving procurement oversight, including more limits on no-bid contracts, would seem to be at odds. Accomplishing one of these goals, let alone both of them, will be a real challenge

Three Per Cent (3%) Withholding Tax Provision Is Delayed For One Year.

A controversial provision set to be effective on December 31, 2010, which would require the government to set-aside 3% per cent of prime contract proceeds for businesses who sell goods and services to federal, state and local governments has been extended one year. This provision is intended as a cost offset to help reduce the difference between what taxpayers owe and what they actually pay to the Internal Revenue Service. Critics of this provision have been trying to kill it outright. For the time-being, they will have to settle for a delay in its implementation. They point out that this provision adversely affects small business government contractor cash flow and reduces the amount of money available for payroll, new business investment, and everyday expenses. Also some contractors do not make a three per cent profit on their projects and will be operating with a loss if this provision is made effective.

E-Verify Dropped From Stimulus Bill.

Senate and House conferees removed a provision that would have required companies to verify the immigration status of their workers. Business groups opposed this provision, which some believe, creates significant delays in hiring new employees.

Rigorous Audit and Oversight Provisions

Inspector Generals – The Stimulus Bill appropriates over \$200 million to various agency Inspector Generals. The IGS have broad authority to investigate allegations of wrongdoing and examine contractor and subcontractor records and accords an IG with a statutory right “to interview any employee of the contractor, grantee, subgrantee, or agency regarding such transactions”.

Recovery Accountability and Transparency Board (“RAT Board”). The Stimulus Bill creates an oversight board which is empowered to conduct “oversight of covered funds to prevent fraud waste, abuse”. The Board will issue reports and can conduct its own investigations with the power to subpoena and compel testimony and to “contract out” its support functions. The Board can also ask that an inspector general conduct or refrain from conducting an audit or investigation. Some groups have complained that the new Board may threaten the independence of agency IGs.

GAO Investigations. The GAO is to conduct oversight regarding the use of stimulus dollars and issue reports. Parties receiving stimulus monies must agree to the GAO audit process which gives GAO access to contractor records and the right to interview employees.

Whistle-blower Protections. The Stimulus Bill contains protections for state and local government workers and private contractors who expose corruption.

Strict New Reporting Requirements

Under an interim rule issued on March 31, 2009, a new clause, FAR 52.204-11, calling for strict new reporting requirements, will be inserted in contracts funded in whole or in part from the Stimulus Bill, including existing contracts. The clause requires the preparation of quarterly reports describing funds invoiced, a description of the employment impact of work funded by the Stimulus Bill, and in some limited cases, the total compensation for the five highest compensated officers of the contractor. In addition, this new provision also calls for limited reporting requirements for subcontractors. For more details on the new interim reporting requirements see 74 Fed. Reg. 14639 (March 31, 2009).

Buy-American Provisions Survived in the Stimulus Bill But Have Been Moderated.

The Stimulus Bill requires that iron, steel and manufactured goods used in projects funded by the Bill need to be “produced in the United States” and that this provision must be “applied in a manner consistent with United States obligations under international agreements”. This language is a compromise between those who sought strong Buy America language and those organizations who worry that the provision will trigger trade wars.

SUMMARY

We will continue to monitor the implementation of the Stimulus Bill as it pertains to the government contracting process. If you need any additional information concerning these new requirements, or other issues relating to government contracting, you can contact **Ken Brody of David, Brody & Dondershine, LLP at 703-264-2220 or KBrody@dbd-law.com**.

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