

## **DRAFT Procurement Guidance**

### **T3.17 American Recovery and Reinvestment Act (March 2009)**

#### **A. Implementation of Recovery and Reinvestment Act for Contracts**

##### **1. General Requirements**

- a. The American Recovery and Reinvestment Act (“Recovery Act”), Public Law 111-5, authorizes additional F&E funding for improvements to power systems, air route traffic control centers, air traffic control towers, terminal radar approach control facilities, and navigation and landing equipment. The FAA has identified priority F&E projects within the aforementioned areas. Special contracting requirements described in this guidance apply to any procurement funded through the Recovery Act.
- b. The Recovery Act does not provide authority to waive any documentation or approval required for procurement planning, solicitation, evaluation, and award. The Contracting Officer (CO) must comply with existing AMS policy and guidance for any project funded through the Recovery Act.
- c. The Recovery Act requires special reporting from both contractors and FAA. Timeliness and accuracy of data is critical.
- d. Thorough and complete contract documentation and data reporting is especially important considering Recovery Act requirements for increased oversight and review by the Inspector General (IG) and General Accountability Office (GAO).
- e. The ATO Office of Finance will track status and funding for Recovery Act projects. COs will provide their program offices with estimated procurement lead times and status of solicitation, evaluation and award of Recovery Act projects.

##### **2. Public Announcement**

- a. The CO must post presolicitation announcements for Recovery Act actions exceeding \$25,000 on FAA Contract Opportunities. This includes presolicitation announcement for any order expected to exceed \$25,000 under a task or delivery order contract, including Government Wide Acquisition Contracts (GWAC), multi-agency contracts, and Federal Supply Schedule contracts, and will be posted under FAA Contract Opportunities.
- b. For Recovery Act procurements, the following special formatting is required for public announcements:

- (1) All presolicitation notices must include the word “RECOVERY” as the first word in the title field preceding the actual title in the announcement.

(2) Presolicitation notices for task and delivery 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 \_\_\_\_\_ (insert name, e.g., BITS, COMMITS.)”

(3) Contract award announcements are required for any contract, task and delivery orders exceeding \$25,000, including GWAC, multi-agency contracts, and Federal Supply Schedule contracts. To facilitate transparency and ensure consistency in tracking award announcements for Recovery Act funds, the CO must insert the word “RECOVERY” as the first word in the title field preceding the remaining title in the FAA Contract Opportunities.

### **3. Solicitation and Award**

a. *Separate Tracking of Recovery Act Funds.* To maximize transparency of Recovery Act funds required for reporting by the contractor, the CO should structure contract awards to allow for separately tracking Recovery Act funds. For example, the CO should consider awarding dedicated separate contracts when using Recovery Act funds or establishing CLIN structures to mitigate co-mingling of Recovery funds and other funds.

b. *Contractor Reporting Clause.* The CO must insert AMS clause 3.17-1 “American Recovery and Reinvestment Act-Reporting Requirements” in all solicitations, contracts, orders, and modifications funded in whole or in part with Recovery Act funds, except classified solicitations, contracts, and orders. COs must not use Recovery Act funds on existing contracts and orders if this clause is not incorporated.

c. *Buy American Act for Recovery Construction.* Existing FAA Buy American-Steel and Manufactured Products guidance and clause meet the intent of Recovery Act requirements for domestic preference for steel, iron, and manufactured products. All solicitations, contracts, orders, and modifications must include the AMS clause 3.6.4-5 “Buy American--Steel and Manufactured Products” and AMS provision 3.6.4-17 “Certification Regarding Steel and Manufactured Products.”

d. *Inspector General Oversight.* To allow for oversight on use of Recovery Act funding, all solicitations, contracts, orders, and modifications must include the AMS clause 3.17-2 “Authority of the Inspector General Relating to Contracts Using American Recovery and Reinvestment Act Funding.”

e. *Procurement Milestones.* Upon receiving a procurement request that cites Recovery Act funds, the CO must send notification to the requesting program office to include:

- The PR Number: \_\_\_\_\_
- The date PR was received: \_\_\_\_\_
- The planned date of SIR issuance: \_\_\_\_\_
- The planned date of award: \_\_\_\_\_

Program offices will use these milestones to track the obligation of their Recovery Act funded requirements and report on the status of the funds. After the milestones are established, the CO should be prepare updates to program offices upon request.

f. *Management Notification.* The CO must notify senior management, e.g., Chief Operating Officer or Associate Administrator, through the CO's respective management chain, of any award over \$25,000 using recovery funds. Notification should occur before signing the award. The notification will be through email and include a subject line "Recovery Act Contract Award," and the contractor's name, brief description of service/supplies, dollar amount, contract type, whether a new award or modification to an existing contract, and period of performance. A courtesy copy of this notification must also be sent to ATO Capital Program Formulation Group (AJF-25) at headquarters.

#### **4. Reporting**

a. *Contractor Reporting on Use of Funds.*

(1) Contractors that receive awards (including modifications) funded by the Recovery Act must report information including, but not limited to, the dollar amount of contractor invoices, the supplies delivered and services performed and the amount for which the contractor has invoiced, an assessment of the completion status of the work, an estimate of jobs created and retained as a result of the Recovery Act funded award, names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded, and specific information on first-tier subcontractors. (See AMS clause 3.17-1 "American Recovery and Reinvestment Act-Reporting Requirements" for information about specific data elements required.)

(2) Contractors must report data using the forms "American Recovery and Reinvestment Act Report" These forms must be submitted electronically (in MS Excel format) and monthly (by the 10<sup>th</sup> of the month, beginning in May 2009) to an FAA mail box for Recovery Act reporting:

9-AJF-CWP-StimulusTracking@faa.gov

b. *Failure to Report.* The CO must make the contractor's failure to comply with the reporting requirements a part of the contractor's past performance information.

#### **5. FPDS Requirements**

a. *TAS Code.* When entering data in FPDS on any action (including modifications) funded by the Recovery Act, the CO must enter the Treasury Account Symbol (TAS) in the *Description of Requirement* field. The TAS code must be entered with "TAS:." preceding the code and "::.TAS" following the code. The TAS code for FAA actions is 69 1304. The entry would appear as follows: TAS::69 1304::.TAS

b. *Actions over \$500,000.* For a Recovery Act contract or order (or modification to an existing contract or order) over \$500,000, the CO must include “RECOVERY” as the first word in the contract description.

c. For all Recovery Act actions, regardless of dollar amount, that are not fixed price or are not competitively awarded, the CO must prepare a summary consistent with above, and post at Recovery.gov., but see chart below:

*Posting of Notice/Summary on Special Section*

<b>Description of Contract Action</b>	<b>Posting on Special Section of Recovery.Gov</b>
(1) A contract is competitively awarded and is fixed price	Not Required
(2) A contract is awarded that is not fixed price	Required
(3) A contract is awarded without competition	Required
(4) An order is issued under a new or existing single award IDIQ contract	Required if order is made under a contract described in (2) or (3)
(5) An order is issued under a new or existing multiple award IDIQ contract	Required if one or both of the following conditions exist: i. the order is not fixed price ii. the order is awarded pursuant to an exception to the competition requirements applicable to the underlying vehicle (e.g., award is made pursuant to an exception to the fair opportunity process)
(6) A modification is issued	Required if modification is made: i. to a contract described in (2) or (3) above; or ii. to an order requiring posting as described in (4) or (5) above

**6. Whistleblower Protections under the American Recovery and Investment Act**

a. This implements Section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), and applies to all contracts funded in whole or in part by that Act.

b. *Definitions.*

“Board” means the Recovery Accountability and Transparency Board established by Section 1521 of ARRA.

"Covered information" means information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross

waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation related to an agency contract (including the competition for a negotiation of a contract) awarded or issued relating to covered funds.

"Covered funds" means funds appropriated by or otherwise made available by the ARRA.

"Inspector General" means an Inspector General appointed under the Inspector General Act of 1978, as amended. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties must be performed by an official designated by the head of the executive agency.

"Non-Federal employer," as used in this section, means any employer that receives ARRA funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

*c. General.*

(1) Non-Federal employers are prohibited from discharging, demoting or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities:

- (a) The Board.
- (b) An Inspector General.
- (c) The Comptroller General.
- (d) A member of Congress.
- (e) A State or Federal regulatory or law enforcement agency.
- (f) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.
- (g) A court or grand jury.
- (h) The head of a Federal agency, or its representatives.

(2) A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) must forward it to legal counsel or to the appropriate party in accordance with agency procedures.

*d. Procedures for filing complaints.*

(1) An employee who believes that he or she has been subject to reprisal prohibited by ARRA Section 1553, should submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(2) The complaint must be signed and must contain—

- (a) The name of the contractor;
- (b) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (c) The covered information giving rise to the disclosure;
- (d) The nature of the disclosure giving rise to the discriminatory act; and
- (e) The specific nature and date of the reprisal.

*e. Procedures for investigating complaints.*

(1) Except as provided under T3.17.A.6.d.(1), unless the Inspector General determines that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint, the Inspector General will investigate the complaint, and upon completion of the investigation submit a report of the findings to—

- (a) The employee and any person acting on the employee's behalf;
- (b) The employee's employer;
- (c) The head of the appropriate agency; and,
- (d) The Board.

(2) Except as provided at Section T3.17.A.6.e.(1)(c), the Inspector General will, not later than 180 days after receiving a complaint under T3.17.A.6.e.(1):

(a) Make a determination that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has been previously invoked to resolve such complaint; or

(b) Submit a report under T3.17.A.6.e.

(c) If the Inspector General is unable to complete an investigation under this section in time to submit a report within 180 days after receiving the complaint—

(i) If the employee submitting the complaint agrees to the extension of time, the Inspector General will submit a report under T3.17.A.6.e. within such additional period of time as must be agreed upon between the Inspector General and the employee submitting the complaint.

(ii) The Inspector General should extend the period for not more than 180 days without obtaining the agreement of the person submitting the complaint to such extension,

provided that the Inspector General provides a written explanation for the decision which will be provided to both the employee submitting the complaint and the non-Federal employer.

(d)(i) The Inspector General should decide not to conduct or continue an investigation upon providing to the employee submitting the complaint and the employee's employer a written explanation.

(ii) Upon receipt of the Inspector General's decision not to conduct or continue an investigation, the employee must immediately assume the right to a civil remedy under ARRA Section 1553 (c)(3).

*f. Access to Investigative File of Inspector General.*

(1) The non-Federal employee alleging reprisal under this section must have access to the investigation file of the Inspector General, in accordance with the Privacy Act, 5 U.S.C. § 552a. The investigation of the Inspector General must be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(2) In the event the employee alleging reprisal brings a civil action under T3.17.A.6.g., the person alleging the reprisal and the non-Federal employer must have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(3) The inspection should exclude from disclosures made under T3.17.A.1.f.—

(a) Information protected from disclosure by a provision of law; and

(b) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the inspector general determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(4) An Inspector General investigating an alleged reprisal under this section should not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with the 5 U.S.C. 552a.

*g. Remedies and enforcement authority.*

(1) *Burden of Proof.*

(a) *Disclosure as contributing factor in reprisal.*

(i) An employee alleging a reprisal under this section must be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in T3.17.A.6.c. was a contributing factor in the reprisal.

(ii) A disclosure should be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including--

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal.* The head of an agency should not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907-7(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an Inspector General report under T3.17.A.6.d., the head of the agency concerned must determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.907-3 and must either issue an order denying relief in whole or in part or must take one or more of the following actions:

(i) Order the employer to take affirmative action to abate the reprisal.

(ii) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)(1) The complainant must be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant should bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which must have jurisdiction over such an action without regard to the amount in controversy if

(i) The head of an agency—

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint under section 3.17.A.6.c, or in the case of an extension of time section 3.17.A.6.c, within 30 days after the expiration of the extension of time; or

(C) Decides under 3.17.A.6.c(i) not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action must, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order, the head of the agency must request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court should grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under this section should obtain review of the order's conformance with the law, and this section, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review should be filed more than 60 days after issuance of the order by the head of the agency.

## **B. Clauses**

[Click here to access clauses.](#)

## **C. Forms**

Click here to access forms.