

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 non-competitive 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 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 Governmentwide 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.

(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 non-competitive 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 (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.

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

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

(9) Contract Financing and Structuring Contract Deliverables

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

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

Alternatives to contract financing include structuring contract line items to allow invoicing and payments based upon interim or partial deliverables, milestones, percent-of-completion, etc. Ensuring consideration of contractor cash flow during acquisition planning will mitigate schedule and performance risks to the government and reduce costs to the contractor associated with financing in a tight credit market.

(10) Tribal Self-Determination Contracts

See Chapter 2 regarding tribal self-determination contracts.

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

Yes. While the FAR generally provides the necessary policy and procedure for solicitation of offers and award of contracts, the Recovery Act imposes unique transparency requirements that change the pre-solicitation and award notice process, beyond standard practice, 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. The TAS code should be entered with TAS:: preceding the code and ::TAS following the code. The code itself should have spaces between the segments, i.e., Agency code (2 characters) would be entered followed by a space then the Account code (4 characters) followed by a space and then the Subaccount code (3 characters) which is optional and would only be included by those agencies utilizing this segment of the code. The entry would appear as follows:

TAS::XX XXXX XXX::TAS

Agencies should coordinate with their budget/finance offices to identify the applicable TAS codes.

Standard data validation practices currently required by the Office of Federal Procurement Policy (OFPP) assure the accuracy of contracting data, including data on contracts awarded under the Recovery Act.

(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).

Posting of Notice/Summary on Special Section

	Description of Contract Action	Posting on Special Section of Recovery.Gov
(1)	A contract is competitively awarded and is fixed price	Not Required
(2)	A contract is awarded that is not fixed-price	Required
(3)	A contract is awarded without competition	Required
(4)	An order is issued under a new or existing single award IDIQ contract	Required if order is made under a contract described in (2) or (3)
(5)	An order is issued under a new or existing multiple award IDIQ contract	Required if one or both of the following conditions exist: <ul style="list-style-type: none"> 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: <ul style="list-style-type: none"> i. to a contract described in (2) or (3) above; or ii. to an order requiring posting as described in (4) or (5) above
(7)	A contract or order is awarded pursuant to a small business contracting authority (e.g., SBA's section 8(a) program)	Required if one or both of the following conditions exist: <ul style="list-style-type: none"> i. the contract or order is not fixed-price ii. the contract or order was not awarded using competition (e.g., a non-competitive 8(a) award)

Subsequent guidance will provide additional details.

In general, if a question arises about whether to provide public disclosure of information, agencies should promote transparency to the maximum extent practicable when consistent with national security interests.

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

**Generally Available Acquisition Flexibilities
A Quick Reference**

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

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

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

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

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

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

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

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

(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 governmentwide 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.¹¹

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

¹¹ OMB will work with the relevant personnel from the Federal community to define a standard term and condition for all awards related to section 1512 reporting requirements that can be implemented in the short-term. OMB will also work with agencies to develop a standard term and condition that aligns to additional accountability requirements (e.g., prevention of misuse of funds).

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

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

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

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

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

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

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

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

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

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

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