



J. Kevin Bridston

Partner and General Counsel
303.295.8104
Denver
kbridston@hollandhart.com

Are You Ready for Stimulus Act Challenges?

Are You Ready for Stimulus Act Challenges?

Insight — 3/17/2009

The American Recovery and Reinvestment Act of 2009 (Stimulus Act) stands as one of the most significant pieces of federal legislation in American history. While most of the attention regarding the Act has focused on its \$212 billion in tax relief and \$575 billion in new federal spending, the Act poses significant challenges for both government agencies and the private contractors who serve them. Contractors should anticipate a high volume of projects and funding that will strain existing capabilities. The need for reliable subcontractors to absorb these increased demands will be at a premium, and contractors will need to employ heightened due diligence procedures to weed out underperformers and comply with government subcontracting standards. Contractors should also expect RFPs with quick turn around times and more than the normal amount of ambiguity, which will increase the risk of bidding on mostly firm, fixed price contracts. This will inevitably lead to an increase in bid protest activities as “haste makes waste.” Contractors who do not anticipate this brave new world of government contracting stand to forfeit enormous opportunities and may be unable to sidestep significant minefields. Holland & Hart is uniquely positioned to help both the experienced and inexperienced contractor navigate these troubled waters as explained below.

First, one of the biggest challenges for government agencies responding to the Stimulus Act will be the enormous workload demands placed on contracting officers, requirements officials, program managers, engineers, cost estimators and contract administrators, who will be expected to turn RFPs at the speed of light (by government contracting standards). In this regard, the Stimulus Act contemplates that funding will be quickly obligated to qualifying projects. Thus, in most cases the money will only be available until September 30, 2010. Agencies are required to give preferential treatment to projects that can be completed expeditiously, and has set a goal of using 50% of Stimulus Act funding within 120 days of February 17, 2009, the date that the Act was signed into law. This means the ability of government contractors to identify and respond to RFPs in an expeditious, technically competent and fiscally responsible manner will be at a premium. Although the government's initial focus will be on “shovel ready” projects in an effort to avoid some of the problems created by a need for speed, inevitable requirements changes and contract repricing will complicate the normal contracting process.

Second, this influx of federal procurement opportunities does not come without substantial pitfalls for the unwary contractor. For those familiar with the Federal Acquisition Regulation (FAR), some of these may not be new. However, the level of federal oversight and enforcement will be

unprecedented. A few examples are illustrative of the likely problems to be encountered:

1. To the maximum extent practicable, all Stimulus Act contracts will be firm, fixed price and competitively awarded, placing maximum risk on potential bidders. Non-competitive contracts will be summarized and listed on a Government website, increasing the likelihood of GAO bid protests.
2. Pursuant to the Stimulus Act, OMB has issued new guidelines that require accountability and transparency for all recipients of Stimulus Act funds. All contractors and grantees will be required to file quarterly reports with their contracting agency and provide detailed information on the expenditure of funds, the percentage of project completion, subcontracting information, and the creation of jobs. Since the submission of reports is a condition precedent for receiving funds under the Stimulus Act, the provisions of the False Claims Act will apply, which increases the potential for criminal and civil penalties.
3. The same OMB guidelines also list specific “accountability objectives” that are designed to mitigate the government's risk when entering into Stimulus Act contracts. The guidelines suggest contract award criteria, such as a contractor's ability to finance the work, complete the project on time, and finish the work within budget. Contracting agencies are expected to put more emphasis on responsibility determinations and pre-award surveys, as well as a demonstrated ability to achieve programmatic results and the objectives of the Stimulus Act. All of this suggests that larger, more established companies stand to gain the lion's share of Stimulus Act work, although existing small business and 8(a) programs remain intact under the Act.
4. All contracts and subcontracts in excess of \$5 million will be subject to new Code of Business Ethics requirements and all contractors will be required to self-report “significant” contract overpayments and violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations, including False Claims Act violations. Failure to report can result in government-wide suspension or debarment without regard to the \$5 million contract threshold amount.
5. Subject to standard trade agreement exceptions, no funds appropriated under the Stimulus Act may be used for a public construction project unless all iron, steel and manufactured goods used in the project are “produced in the United States.” What constitutes “manufactured goods” is conceivably quite broad.
6. All laborers and mechanics employed by contractors and subcontractors on projects funded or assisted under the Stimulus Act must be paid the prevailing wage rate under the Davis-Bacon Act. Violations will be subject to Department of Labor enforcement action.
7. The Stimulus Act allows all federal contractors to postpone the use of the E-Verify electronic employment verification system until May

21, 2009. However, after that date, contractors who have their E-Verify operating agreement revoked will be subject to government-wide suspension or debarment.

8. The Act creates a Recovery Accountability and Transparency Board with broad oversight powers, including the power to conduct investigations, issue subpoenas, conduct direct audits of government contractor records, and interview all officers and employees of any contractor or subcontractor receiving Stimulus Act funds. The Act has budgeted \$84 million for the Board, which will have an independent watchdog role that is separate from existing audit agencies such as DCAA, DCMA, and agency Inspector Generals. All of this portends much more invasive federal oversight of Stimulus Act projects, with the potential for False Claims Act prosecutions or negative contract price adjustments under standard FAR contract clauses.

Third, a new compliance-driven regime for government contractors will be one of the central pillars of the Stimulus Package. One of the primary lessons that the government took away from the multitude of emergency contracting snafus in Iraq and Afghanistan is the need for enhanced contract oversight. In a sign of this new emphasis on accountability for government contractors, President Obama has just issued an Executive Order requiring all federal agencies to develop guidance by July 1, 2009 for the review and identification of wasteful or non-essential government contracts. Those contracts falling into either category will be subject to modification or cancellation. The fact that President Obama expects to save \$40 billion per year from this initiative is indicative of its intended scope.

In light of the preceding discussion, experienced and novice government contractors alike will be challenged by this evolving government contracts environment. Holland & Hart presents the needed interdisciplinary problem-solving approach to help meet these challenges and provide its clients with an integrated approach to meet government requirements. Whether the issues involve highway construction, mass transit, GSA lease back projects, green building requirements, renewable energy, or DOD MILCON, Holland & Hart is your one stop shop for program success.

If you have questions regarding Stimulus Act issues, please contact Kevin Bridston, Charlie Lucy, or John Scorsine to receive personalized attention.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP.

Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.