

Stimulus: Opportunity, but be Aware!

By: **Brian J. Hundertmark** and
Douglas A. Knight

The American Recovery and Reinvestment Act of 2009, popularly known as the Stimulus Package, became law in February. The Stimulus Package has generated much excitement in the government contracting community and companies are preparing to seize the opportunities that soon will be available. Many of Garson Claxton's clients have asked how to begin to get some of the work.

BACKGROUND

The Stimulus Package is massive. There is almost \$800 billion for new and "shovelready" procurements, including:

- \$282 billion for tax cuts
- \$134 billion for health care
- \$130 billion for social programs
- \$82 billion for education/facilities



Douglas A. Knight

- \$80 billion for infrastructure
- \$23 billion for the power grid
- \$18 billion for federal buildings
- \$11 billion for scientific research
- \$14 billion for other state/local uses

Some of these funds will be used for direct federal contracting, but much will be funneled through state and local government.

The federal government has committed to having these funds obligated within 18 months. The real challenge is then going to be how government employees, in addition to their pre-stimulus workload, are going to quickly and effectively undertake this spending. The expectations are great and the effort daunting.

Therein lies the need for accountability. The Stimulus Package requires significant new "levels of transparency and accountability" to ensure that the funds that will be expended in a relatively short period of time are spent wisely and responsibly.

Immediately upon the signing of the Stimulus Package, the Office of Management and Budget enacted guidelines for the distribution and expenditure of funds. The guidelines establish significant reporting requirements, increased oversight of spending, and public posting of contract activities. These requirements are aimed at increasing the transparency of the stimulus program. The rules have been implemented by the Federal Acquisition Regulations (FAR) on an interim basis.



Brian J. Hundertmark

GUIDELINES

The guidelines contain stringent requirements for competitive bidding, a bias towards fixed price contract vehicles, posting of project details on www.recovery.gov, calculation and posting of job creation statistics, auditor access to project records and company personnel, incentives for whistle-blowers, and potential application of FAR-like requirements to state and local contracts. A few of these merit a more thorough examination.

Competition

The Stimulus Package requires that to the maximum extent possible, contracts shall be awarded as fixed price contracts using competitive procedures. Any contract that does not meet these criteria must be posted under a special section of the publicly available website and state the justification for deviating from the "fixed price/competitive bid" approach. This process is intended to maintain transparency and

largely eliminate sole source awards. While this provides all contractors an opportunity to win work, it does make unlikely the direct award of projects that you as a contractor may be working to obtain on a non-competitive basis.

There are also significant new public notice requirements imposed on the government agencies issuing solicitations and making awards. These requirements apply to all purchases above \$25,000 that are wholly or partially funded by the stimulus package. Contracting officers must utilize fedbizopps.gov to identify all opportunities, describe the products or services acquired and explain the procurement strategy and rationale for the award of the contract.

Disclosure

The Stimulus Package, likewise, imposes significant reporting requirements on contractors receiving stimulus funds. These companies must now: (a) identify all supplies provided or services performed; (b) assess progress towards completion; (c) state the amount of stimulus funds invoiced; (d) describe the overall scope of work; (e) describe the jobs created or retained from the funds; and (f) identify the performance results that are to be achieved during execution. This reporting will be required on a quarterly basis via an on-line reporting tool at federalreporting.gov. The data developed and submitted as a result of these disclosure and reporting requirements will be made publicly available.

Additionally, the Comptroller General may examine any records related to funds made available by the Act. These include any records of prime or

subcontractors that involve or relate to stimulus projects. This authority also extends to the related transaction records of any officer or employee or prime or subcontractors who are involved in such projects. These requirements can be found in the FAR at 48 C.F.R. 52.204-11 and must be included in all contracts funded by the Stimulus Package. This includes existing contracts which would require a contract modification as well as small and commercial item purchase contracts.

OPPORTUNITIES

Opportunities for obtaining new business clearly exist as a result of the Stimu-



lus Package. In order to take advantage of these opportunities, businesses need to know what projects are becoming available and how to address the new disclosure and reporting requirements.

How do you find the opportunities? First, the federal government has created a website dedicated solely to the Stimulus Package: www.recovery.gov. This new website provides information on federal contracting opportunities, links to state sites dedicated to Stimulus Package opportunities, and notices on workshops on how to compete for those opportunities. Second, the tried

and true federal contracting website at www.fedbizopps.gov, at which most competitive government contracting opportunities are posted (whether Stimulus Package-based or not) is still the mainstay for information. Third, direct contact with government contracting officials with whom you have dealt in the past is frequently the best way of obtaining information about in-the-pipeline projects even before they get posted.

How do you get to understand the new requirements? First, review the Office of Management and Budget guidelines. Second, establish the data identification and tracking mechanisms that the Stimulus Package requires, even before competing for a Stimulus Package contract. Third, rely on experienced counsel to address those requirements that are new or different.

\$800 billion is a tremendous amount of money and will certainly create many opportunities for companies that support federal, state, and local government. A key to becoming one of the companies that benefits from the Stimulus Package is to be prepared before opportunity knocks.

For more information, contact Brian J. Hundertmark and/or Douglas A. Knight at (301) 280-2700, or visit www.garsonlaw.com.

Brian J. Hundertmark is senior counsel at Garson Claxton LLC with more than 22 years of experience representing businesses and trade associations in the government contracting field.

Douglas A. Knight is of counsel to Garson Claxton LLC and focuses his practice in government contract law.