

**American Recovery and Reinvestment Act:
CONTRACTING WITH GOVERNMENT ENTITIES**

The new federal stimulus law, known as the American Recovery and Reinvestment Act of 2009 (the “Recovery Act”), represents approximately \$787 billion in federal government spending and tax relief. The law was enacted with the intention that government agencies spend this money quickly. In fact, the funds made available under the Recovery Act are to be fully distributed by September 30, 2010. *See Recovery Act* §1603. Moreover, it is the stated goal of the Recovery Act that at least 50% of funds available for infrastructure investment shall be used on activities that can be initiated within the Recovery Act’s first four months. *See Recovery Act* §1602. While the most significant portion of the stimulus package in the Recovery Act is dedicated to tax relief (approximately \$288 billion), the balance is to be spent by federal agencies in the following areas:

- State and Local Fiscal Relief - \$144 Billion
- Infrastructure and Science - \$111 Billion
- Protecting the Vulnerable - \$81 Billion
- Health Care - \$59 billion
- Education and Training – \$53 Billion
- Energy - \$43 Billion
- Other - \$8 Billion

For more information on the Recovery Act and how the funds will be distributed visit www.recovery.gov and www.nj.gov/recovery.

With so much money being spent so quickly, entrepreneurial businesses must be fully prepared to take advantage of and benefit from this significant economic opportunity. Through the use of formula grants or competitive contracts, Recovery Act funds may come directly from a federal agency or indirectly from a state agency that has received Recovery Act funds. To the maximum extent possible, contracts funded pursuant to the Recovery Act are to be awarded as fixed-price contracts through the use of competitive procedures. *See Recovery Act* §1554. This article is intended to provide an overview of relevant basic considerations and useful information related to contracting with federal and New Jersey state government agencies.

Contracting with the Federal Government

According to the United States Small Business Administration’s (“SBA”) Web site (www.sba.gov), the federal government is the world’s largest buyer of goods and services. With the Recovery Act, the world’s largest buyer will get bigger.

Most businesses in the United States are considered small businesses. Significantly, federal agencies are required by statute to consider small businesses for procurement opportunities. As such, federal agencies must provide maximum practicable opportunities for small businesses to compete for agency contracts and to participate as subcontractors in contracts awarded by such agencies. *See 15 U.S.C. §631 et seq.* Consistent with this mandate, the government has set goals for contracting with

small businesses. Specifically, it intends to buy at least 23% of all its goods and services from small businesses. It should be noted that this is not a requirement; just a goal. *See* 15 *U.S.C.* §644. Moreover, according to a 2006 report prepared by the SBA's Office of Advocacy, small businesses received close to 40% of the subcontracting dollars in connection with federal procurement contracts. However, size alone does not guarantee that businesses will be awarded federal contracts. Contractors doing business with the federal government must meet certain qualifications and follow specific procedures for contracting. Visiting the SBA's Web site and its guide "What is a Small Business?" may be helpful in determining if a company qualifies as a small business for the purpose of contracting with the federal government. See www.sba.gov/contractingopportunities/owners/basics/GC_SMALL_BUSINESS.html.

Contracting Procedures

The government contracts with businesses through the use of standardized buying procedures and rules outlined in Federal Acquisition Regulations ("FAR"). *See* 48 *C.F.R.* §1.000 *et seq.* Depending on the circumstances, the specifications and the amount of the contract, federal agencies use different procedures for contracting including simplified procedures, sealed competitive bidding and contracting by negotiation.

The government may generally use streamlined and simplified procedures for certain small contracts such as micro-purchases (which are generally under \$3,000) and other purchases under \$100,000. *See* 48 *C.F.R.* §13.003. These procedures are designed to reduce practical and administrative costs associated with the sealed bidding process. For example, such purchases do not require competitive sealed bidding and the government may use a government purchase card for payment. While competition remains the cornerstone of contracting with the federal government, certain contracts are not subject to full and open competition. Significantly, purchases between \$3,000 and \$100,000 are set aside for small businesses. *See* 48 *C.F.R.* §13.003.

A second common contracting method for federal agencies is the use of sealed competitive bidding. During the bid process, the relevant agency prepares and publicizes an invitation for bids which includes description of product or service, instructions, conditions for purchase including delivery and payment. In accordance with the terms of the invitation for bid, contractors submit their sealed bids for the particular contract. Subsequently, the bids are opened in public setting and the contract is awarded to the lowest bidder that is most advantageous to the government and fully responsive to government's needs. *See* 48 *C.F.R.* §14.101.

If sealed bidding is not used, the contracts are negotiated contracts. *See* 48 *C.F.R.* §15.100. Contracting by competitive negotiation that is not done with the use of simplified procedures is usually reserved for contracts over \$100,000 that involve (i) highly technical services and/or products, (ii) when there is an urgent or compelling need for the services or products or (iii) where there is only one responsible source for the services or products. *See* 48 *C.F.R.* §6.302 *et seq.* The negotiation process starts with a solicitation and request for proposals (RFPs) or quotations (RFQs) from qualified businesses. The offers are then evaluated and select competitive offers partake in bargaining discussions. These discussions result in competitors submitting their best and final offers. Finally, the contract is awarded to the source that is the most advantageous to the government and fully responsive to government's needs. *See* 15 *C.F.R.* §15.612.

The procedures set forth in the FAR are detailed and voluminous and most importantly require strict adherence. To successfully contract with government entities, it is essential that any participating contractor educate himself or herself on the process and the requirements for doing business with such entities.

Getting Started and Registration

A good starting point for a business that wants to learn more about doing business with the federal government is www.Acquisition.gov. This Web site was designed to help businesses that partner with the government learn more about business opportunities, regulations governing such contracts, and systems, resources and training related to such contracting opportunities.

Any organization or business entity wishing to do business with the federal government under a FAR-based contract must be registered in the primary vendor database known as the Central Contractor Registration ("CCR") before being awarded a contract. *See* 48 *C.F.R.* §4.1100 *et seq.* To register in the CCR, a registrant must submit detailed information about its business, including general identification information, corporate information, goods and services information, financial information and contact information. Examples of the types of information required for the registration process include (but are not limited to): business name, type of business, taxpayer identification number, DUNS number, number of employees, North American Industry Classification System ("NAICS") code, Standard Industrial Classification (SIC) code, Product Service (PSC) code, Federal Supply Code, financial institution, ABA routing number, remittance address, and credit card information. Before a business attempts to register it should gather the all of the required information. Accordingly, registrants need to identify the NAICS codes that their businesses operate within and then apply for a DUNS number. All government contractors can receive a DUNS number assigned by Dun & Bradstreet at no charge within 72 hours when applying online. *See* <http://fedgov.dnb.com/webform/displayHomePage.do>.

Creating a profile in the CCR also allows businesses to create a profile on the SBA's Dynamic Small Business Search ("DSBS"). The DSBS allows government agencies, large prime contractors and the general public to view a company's business information and capabilities. It is in each company's best interest to keep these profiles up to date and accurate. To register in the CCR or for more information about the CCR registration process visit the CCR Web site at www.ccr.gov.

Businesses must also be registered with the Online Representations and Certifications Application ("ORCA") system. This system is complementary with CCR and allows contractors to enter their Representations and Certifications required in connection with all federal contracts just once. A company's Representations and Certifications should be kept up to date and must be updated annually. To register with ORCA or for more information about ORCA visit the ORCA Web site at www.orca.gov.

Finding Opportunities and Certifications

Notices of opportunities for contracting with the federal government are posted on the FedBizOpps.gov Web site. Contracting opportunities posted on the FedBizOpps.gov Web site are for

contracts worth \$25,000 or more. *See* 48 *C.F.R.* §5.201. To view and search these business opportunities with federal agencies visit www.fbo.gov.

Even if a business is not suited to be the prime contractor under a large federal contract, it may be able to subcontract with the prime contractor that was awarded the large contract. Such subcontracting opportunities are posted and may be searched online at the SBA's Subcontracting Network (Sub-Net). <http://web.sba.gov/subnet>.

Business opportunities with the federal government may also be found by contacting the applicable federal agency directly or visiting its Web site.

As noted above, certain contracting opportunities are set aside for small and other disadvantaged businesses. Eligible businesses should seek proper certification to take advantage of contracting preferences with government entities. The following are the three relevant certifications administered by the SBA to assist small businesses in contracting with the federal government:

- Historically Underutilized Business Zone Program (HUBZone Program) – assists small businesses located in urban and rural communities that have been designated as a HUB-Zone and employ staff located in this area. For more information on HUB-Zones and HUBZone Certification visit www.sba.gov/hubzone or <https://eweb1sp.sba.gov/hubzone/internet/index.cfm>,
- Section 8(a) Business Development Program – assists eligible socially and economically disadvantaged individuals, including counseling, training and potential federal procurement opportunities. For more information on the Section 8(a) Business Development Program visit www.sba.gov/8abd or <http://www.sba.gov/aboutsba/sbaprograms/8abd/index.html>, and
- Small Disadvantaged Business Certification Program - assists businesses that are 51% owned or controlled by individuals who are socially or economically disadvantaged. Businesses may apply with the procuring agency for certification of their status as Small Disadvantaged Businesses for federal prime contracts or subcontracts. Businesses may also represent that it qualifies as a Small Disadvantaged Business for a federal subcontract if it believes in good faith that it so qualifies. *See* 13 *C.F.R.* §124.1001 *et seq.* For more information on Small Disadvantaged Business Certifications visit www.sba.gov/sdb.

In order to successfully take advantage of the federal contracting opportunities it is essential that participating businesses educate themselves about the process, qualifications and conditions applicable to federal government contracting. The SBA provides online training courses, in-person counseling services and specialized procurement representatives to explain the federal procurement process. For example, the SBA's Web site offers a free online course outlining participation in federal contract programs with "Business Opportunities: A Guide to Winning Federal Contracts" available at <http://www.sba.gov/services/training/onlinecourses/index.html>. Other Web sites that are helpful to businesses seeking to contract with the federal government are www.business.gov and www.gsa.gov.

Additional Considerations for Recovery Act Contracts

In furtherance of the Recovery Act's goal to provide unprecedented levels of accountability and transparency in connection with the spending of taxpayer money, the Office of Management and Budget (the "OMB") issued its Initial Implementing Guidance for federal agencies receiving Recovery Act funds on February 18, 2009. This guidance adds requirements beyond the standard practices of soliciting and granting competitive contract awards. Pre-solicitation and award notices posted on the FedBizOpps Web site and contract award reporting on the Federal Procurement Data System (www.fpds.gov) must be formatted to distinguish contracts related to the Recovery Act. In addition, Recovery Act contracts will include terms and conditions related to implementing data collection and accountability requirements of the Recovery Act. The full text of the OMB's Initial Implementing Guidance is available at <http://www.recovery.gov/files/Initial%20Recovery%20Act%20Implementing%20Guidance.pdf>.

Contracting with the State of New Jersey

The State of New Jersey expects that over a three year period it will receive approximately \$17.5 billion in Recovery Act funds. Of that amount, approximately \$10 billion will be given to the State for needed services, infrastructure investment and overall assistance. See <http://www.nj.gov/recovery/understanding.html>. As funds will be made available to a variety of state public entities under the Recovery Act, contracting opportunities will likely arise on both the State and local level in New Jersey. For a general overview of what may become available in New Jersey visit the State's 2009 Recovery and Reinvestment Plan Web site at <http://www.nj.gov/recovery/> and click on the heading "Understanding the American Recovery and Reinvestment Act and How It Will Affect New Jersey."

Like the federal government, the State of New Jersey and local agencies, including among others municipalities, school districts and county colleges, utilize a variety of contracting procedures. Thus, contracts are competitively bid, negotiated and or entered into via RFP competitive contracting procedures. Because state and local government agencies are governed by different public contracting statutes and regulations, bid specifications, front-end documents and RFP requirements may vary. For example, *N.J.S.A. 52:34-6 et seq.*, governs state agency purchases by the New Jersey Department of Treasury's Division of Purchase and Property, *N.J.S.A. 40A:11-1 et seq.* governs municipal contracts, *N.J.S.A. 18A:18A-1 et seq.* governs school district contracts and *N.J.S.A. 18A:64A-25.1 et seq.* governs county college contracts.

Contracts that fall below the bid threshold are not competitively bid. The bid threshold varies from agency to agency, generally ranging between \$21,000 to \$29,000. The bid threshold for State construction projects is \$48,000. However, quotations from at least two bidders are required in most instances if the contract amount is below the bid threshold. Also, contracts need not be competitively bid if they fall under certain exceptions under the above laws. These exceptions vary depending on which contracting public entity is involved. See for example, *N.J.S.A. 18A:18A-5* (school districts) and *N.J.S.A. 40A:11.5* (municipalities).

Vendor Homepage – Bidding Opportunities

While contracting with public entities can be difficult given the number of laws and regulations that must be followed, the Department of Treasury's Division of Purchase and Property is an excellent source for determining what is needed before contracting with the State. Visit the Division's Vendor Home page at <http://www.state.nj.us/treasury/purchase/vendor.shtml>. This site will lead you to a number of sources. For example, visit "Doing Business with the Division of Purchase and Property" for links to an array of information. The Vendor Homepage also has a links to term contracts and price lists as well as links to the N.J. Treasury's Division of Property Management & Construction, the N.J. Department of Transportation Procurement Division, the Sports and Exposition Authority, the Port Authority of N.Y. & N.J. and the N.J. Department of Banking & Insurance.

Vendors can also submit bids in response to RFPs for statewide contracts. The Division of Purchase and Property maintains a bid list of contractors who are eligible for contracts not only with State agencies, but also with local entities. Contractors bid on contracts and remain eligible for specific periods of time. Inclusion on the bid list can expand opportunities to work around the State because local entities may, under certain conditions, contract with bidders previously approved by the State's Division of Purchase and Property without public bidding. Visit <http://www.state.nj.us/treasury/purchase/vendor.shtml> and click on the tab vendor information. The State also has a site entitled "Taking Care of Business" at <http://www.nj.gov/njbusiness/contracting/bid/> with easy links to statewide contract opportunities.

Set aside requirements provide special opportunities for minority and women owned businesses. There is an online form for certification as a Minority or Women's Business Entity ("MBE/WBE"). Information on the certification process and the online MBE/WBE Form can be accessed by going to the "Taking Care of Business" portal at www.nj.gov/njbusiness/contracting/minority and clicking on the appropriate links. There is also a small business set-aside program. Information in this regard and access to online registration can be accessed at http://www.nj.gov/njbusiness/contracting/services/small_business_set_aside.shtml and following links to the form.

Business Registration and Registration by a Foreign Entity

In New Jersey, all businesses must be registered with the New Jersey Department of Treasury, Division of Revenue. If you are a new business, you can view a checklist of what you must do to get registered at <http://www.nj.gov/njbusiness/starting/>. One key requirement for contracting with the State is obtaining a Business Registration Certificate. No New Jersey public agency is permitted to enter into a contract with a business entity unless it holds a Business Registration Certificate. Information on obtaining a Business Registration Certificate is available at <http://www.state.nj.us/treasury/revenue/busregcert.htm>. The Web site also includes links that provide a wealth of other information relating to the public contracting process in New Jersey. A Business Registration Certificate may be obtained online at https://www1.state.nj.us/TYTR_BRC/jsp/BRCLoginJsp.jsp.

If the vendor is not a New Jersey company, it must register as a foreign entity. The Division of Revenue provides helpful information on registering. The “NJ Business Gateway Registry Service” at www.state.nj.us/njbgs via links, will lead you to information on registering (start with the “I Want To” list and click on “Form/Register a Business”). The bottom line is that a foreign corporation, limited liability company, limited partnership and limited liability partnership must file a formation/authorization certificate with the State. This can be completed online. Out-of-state businesses must also file for tax and employer purposes and can do this via online registration as well. All links are at the Division of Revenue Web site easily reached through the Gateway site.

Pre-qualification of Vendors for all Public Works Contracts

Generally, public works contracts are contracts for construction on public buildings. The various statutes have slightly different definitions. For State agency and school district contracts, all contractors that work on a public works project must be pre-qualified by the N.J. Department of Treasury’s Division of Property Management and Construction (“DPM&C”). Visit “How to do Business with the DPM&C” at http://www.state.nj.us/treasury/dpmc/pub_how_to_do_business_with_division.html for guidance on how to apply for and be classified as a pre-qualified contractor. Different requirements apply for municipal contracts depending on the municipality. See, *N.J.S.A.* 40A:11-25.

The net result of the pre-qualification classification process is that the contractor will receive an aggregate rating which in effect notifies public contracting units regarding the contractor’s capacity to perform under the contract. If the contractor’s rating is too low relative to the cost of the contract together with the cost of uncompleted contracts, the contractor will not be able to successfully bid on the contract.

There are also pre-qualification requirements if the project involves a school facilities project, meaning a project funded through the Schools Development Authority (“SDA”). The SDA contracts directly with construction contractors and under certain circumstances, school districts will be the contracting body for SDA funded projects. For information on the SDA go to <http://www.njsda.gov/Business/CV/index.html>.

Other Standard Requirements

Vendors/contractors should be aware of other standard requirements for many public contracts.

- Equal Employment Opportunity compliance - visit the Division of Contract Compliance Web site at http://www.state.nj.us/treasury/contract_compliance/ for information on this important issue.
- Pay to Play – Adherence to political contributions requirements is very important because improper compliance can bar a vendor from entering into certain public contracts for an extended period of time. For a quick overview of State agency pay to play compliance requirements for State contracts visit <http://www.state.nj.us/treasury/purchase/execorder134.htm>. Do not rely on this site if

political contributions have been made in the past and/or are anticipated in the future. If so, consultation with legal counsel is recommended to deal with this difficult subject.

- Prevailing Wage for all Public Works Contracts - visit the Department of Labor and Workforce Development site at http://lwd.dol.state.nj.us/labor/wagehour/wagerate/prevailing_wage_determinations.html for information on wage rates and other important information.

Public entities are required to choose the lowest responsible bidders and are not permitted to waive certain requirements set forth in the specifications and front-end documents if the bidder makes a mistake in its bid. Therefore, failure to strictly adhere to what is required in the specifications and front-end documents when submitting a bid may result in rejection of the bid even when that bid is the lowest and there is nothing to suggest that the bidder is not capable of performing adequately under the contract. Therefore, attention to detail is important when preparing a bid for a public contract of any kind. Failure to fully comply could result in rejection of the bid. For valuable information on the overall bidding process, visit the Division of Local Government Services' Web site at <http://www.nj.gov/dca/lgs/lpcl/index.shtml#BusinessRegistration>.

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This article is only intended to summarize some of the basic considerations for contracting with government entities and some additional consideration in connection with the Recovery Act. As noted, this area of law is immense in size and scope. Specific business needs and contracting opportunities require a more detailed and intensive examination. This article is not to be construed as legal advice. If you have any questions about anything you read in this article or any other business related legal issues please contact:

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