CONTRACT MANAGEMENT

State agencies shall award any contracts funded, in whole or in part, with ARRA funds, subject to the following:

1. Award fixed-price contracts whenever possible.
2. Engage in competitive bidding with fair and open competition. Agencies are expected to follow the same statutes and regulations in awarding ARRA contracts as they do in awarding with other funds.
3. Judiciously limit non-competitive procurements. As always, this type of procurement is limited to very specific statutory conditions outlined in KRS 45A.095 and the same levels of approval will apply to these documents as to any other "Not practicable or sole source requests".
4. If a contract is not awarded on a fixed-price and competitive basis, the ARRA requires that the contract be posted in a special section of a website to be established in accordance with ARRA, Section 1526. Further guidance on this website will be forthcoming.
5. The scope of solicitations and resulting contracts (including personal service contracts) should be drafted in a manner which ensures that performance measures are meaningful, measurable, time bound, results-oriented, and consistent with agency plans and the goals of the ARRA. For example, contract terms should address what happens in the event of a failure to complete the project, meet milestones, or successfully execute deliverables.
6. State agencies and sub-recipients of ARRA funds shall use ARRA funds in a manner that maximizes local job creation and economic growth. While Kentucky has no in-state preference laws, agencies should seek to maximize the economic benefits of Recovery Act-funded investment in a particular community by supporting projects that seek to ensure that the people who live in the local community benefit from the job opportunities that accompany the investment.

STANDARD TERMS AND CONDITIONS FOR CONTRACT AND GRANTS

New Solicitations: Agencies should include the "Standard Terms and Conditions for Contracts and Grants Using ARRA Funds" located at: http://eprocurement.ky.gov/ in any new solicitations and resulting award documents, which may use ARRA funds.

Existing Contracts: In addition, if any existing contracts (including personal service contracts) are used to make ARRA purchases, the existing contracts should also be modified accordingly.

Updates: Additional Federal guidance on ARRA boilerplate is still forthcoming and FAC will update the terms and conditions at http://eprocurement.ky.gov/ as additional guidance become available. A copy of these Standard Terms and Conditions for Contracts and Grants Using ARRA Funds is attached for convenience herein.

EXECUTIVE ORDER 2008-011 APPROVAL PROCESS ("The EO-1 Process")

The federal government is still in the process of developing detailed guidance to the states on how to comply with the transparency requirements of the ARRA. As such guidance becomes clearer; the Commonwealth may choose to use existing initiatives, such as the EO-1 process, to comply with such transparency requirements.

Agencies are cautioned that the information submitted during the EO-1 process may be publicly made available as part of these transparency efforts. Accordingly, all information provided on the EO-1 should clearly and concisely describe the program that will be conducted, the types of expenditures that are anticipated, and the outcomes that are expected.

USE OF EXISTING FAC MASTER AGREEMENTS (PRICE CONTRACTS)

FAC has established several hundred FAC Master Agreements (Price Contracts) for use by multiple agencies. Most of these agreements will not be utilized to make purchases using ARRA funds. However, to the extent any of these agreements are utilized for this purpose, each FAC Master Agreement will need to be modified to comply with ARRA specific requirements, prior to any purchase being made. Accordingly, agencies shall not use existing FAC Master Agreements to make purchases using ARRA funds, unless and until:

(1) The agency head or authorized designee provides prior notification to the procurement agency in FAC which established the contract, of the need for such future use; and
(2) FAC modifies the contract to comply with ARRA specific requirements, prior to the agency proceeding with purchase.

The agency head or an authorized designee may notify FAC Office of Procurement Services of such requests by emailing Don Speer (Don.Speer@ky.gov) and Rose Caudle (Rose.Caudle@ky.gov). Agencies may notify the FAC Division of Engineering and Contract Administration by emailing Paul Gannoe (Paul.Gannoe@ky.gov) and Jennifer Linton (Jennifer.Linton@ky.gov).

USE OF SMALL PURCHASE AUTHORITY

Agencies should be judicious in using small purchase authority to make purchases with ARRA funds. The ARRA requirements outlined in this document apply to all projects/purchases using ARRA funds, regardless of dollar amount. The single quote delegation will not apply as all ARRA procurements must be competitively bid. Accordingly, the significant level of effort required by both an agency and a vendor to comply with these requirements may not be commensurate with the benefit received from using ARRA funds for a small purchase.

If an agency still chooses to proceed with a purchase using ARRA funds, the following rules must be observed:

(1) All the ARRA requirements outlined in this document, including reporting and "Buy American" must be complied with.
(2) In order to comply with the requirement for fair and open competition for the use of ARRA funds, agencies who wish to use ARRA funds to make purchases under small purchase authority, must request a minimum of three (3) quotes (regardless of whether a single purchase quote would normally suffice). In the alternative, agencies may post a solicitation on the e-procurement website to satisfy this requirement.
(3) Agencies shall include the "STANDARD TERMS AND CONDITIONS FOR CONTRACT AND GRANTS" outlined later on in this memorandum in any small purchase contracts created.

REPORTING

Section 1512 of the ARRA establishes fairly detailed reporting requirements. Please review the Standard Terms and Conditions referenced further on in this memorandum for more information. *See also*, Federal Register, Volume 77, Rules and Regulations, (April 23, 2009, pages 18449-18451) http://www.naspo.org/documents/standard_awardsconditions_E99073.pdf. Each state agency receiving ARRA funds is also responsible for complying with any additional requirements established by individual federal granting agencies.

REGISTRATION REQUIREMENT FOR GRANTS

In accordance with ARRA, Section 1512(h), recipients (i.e. state agencies) of grants and **first-tier recipients** of such funds (i.e. grantees) are specifically required to maintain current registrations in the Central Contractor Registration (CCR) Database: http://ww.ccr.gov/.

Please note that a Dun and Bradstreet Data Universal Numbering System (DUNS) Number is required for such registration. In order to obtain a DUNS number, an entity may contact Dun & Bradstreet at (866) 705-5711 or go to: http://fedgov.dnb.com/webform/displayHomePage.do.

SEGREGATION OF COSTS

Obligations and expenditures of ARRA funds must be segregated from other funding. No part of ARRA funds may be comingled with any other funds or used for a purpose other than that of making payments for costs allowable under the ARRA.

In order to ensure that the Commonwealth can readily comply with this requirement the Office of the State Budget Director and the Office of the Controller have established the following rules for ARRA fund expenditures:

Accounting Rules:

- New Federal Fund "12FS" has been created for all state agencies, except Transportation Cabinet, which will use "12TS".
- SAS-14 must be completed to establish Fund/Department relationship and any necessary Fund/Department requirements.
- New Program code must be created to account for the funds received through the ARRA.
- Associate the new program code to *Program Category* "ARRA" on the program table.
- Do not establish a *Priority 99*.
- Code fund "12FS" in both the *Expense* and *Revenue* section of the *Funding Line*.
- Capital Projects funded with Stimulus funds – *SAS-14* must be completed to establish the capital project and associate the project with Fund Group "ARRA" on the bottom of the *SAS-14*.

All procurement documents (requisitions and awards) which involve the use of federal stimulus funds:

- Shall note "Federal Stimulus" in the *Document Name* field.
- Shall note the project name in the *Document Description* field.
- Shall indicate 12FS (12TS for Transportation) as the *Fund* under the fund accounting section.

FEDERAL COMPTROLLER/INSPECTOR GENERAL ACCESS

The ARRA and interim federal regulations allow for the federal Comptroller General to have access to and audit contracts and subcontracts and to interview contractors and subcontractors under contracts using ARRA funds. Federal Agency inspector generals receive the same authorities, with the exception of interviewing subcontractor employees.

JOB POSTING REQUIREMENTS

Section 1512 of the ARRA requires states receiving stimulus funds to report on jobs created and retained as a result of the stimulus funds. Additionally, the United States Department of Labor, through its Training and Employment Guidance Letter 14-08 (TEGL 14-08) issued on March 18, 2009, strongly encourages Governors to use their state job banks to collect and report this information. Accordingly, Contractors/Grantees who receive ARRA funded contracts are required to post jobs created and retained as a result of stimulus funds on the state job bank, https://e3.ky.gov/

NATIONAL ENVIRONMENTAL POLICY ACT

In accordance with ARRA, Section 1609, recipients, grantees and sub-grantees must comply with any applicable environmental impact requirements of the National Environmental Act of 1970 ("NEPA").

WHISTLEBLOWER PROTECTION

All state agencies must post notice of the rights and remedies available to employees under Section 1553 of the ARRA.

WAGE REQUIREMENTS

Pursuant to Section 1606 of the ARRA, all laborers and mechanics employed by contractors and subcontractors on projects funded in whole or in part with funds available under the ARRA shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality, as determined by the United States Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40 of the United States Code. The Secretary of Labor's determination regarding the prevailing wages applicable in the Commonwealth of Kentucky are located at: http://www.gpo.gov/davisbacon/ky.html.

As a practical matter, under the Davis-Bacon Act (See 29 CFR 5.5(a)), this means that federal wage requirements apply to any contracts in excess of *$2,000* for construction, alteration or repair (including painting and decorating).

BUY AMERICAN REQUIREMENT

The Buy American provision in Section 1605 of Division A, Title XVI of the ARRA requires that all "iron, steel and manufactured goods used in the construction, alteration, maintenance or repair of a "public building or public work funded in whole or in part by funds made available under the ARRA be "produced in the United States," unless this requirement is waived by the appropriate federal agency.

Iron and steel are "produced in the United States" if all of the manufacturing processes, except metallurgic processes involving refinement of steel additives, take place in the United States. Iron or steel used as components or subcomponents of manufactured goods used in an ARRA-funded project; however, do not have to be "produced in the United States." Manufactured goods are "produced in the United States" if the manufacturing occurs in the United States (there is no requirement about the origin of the components or subcomponents of the manufactured goods).

The ARRA also provides that the Buy American requirement in Section 1605 "shall be applied in a manner consistent with United States obligations under international agreements." As a practical matter, this means that, for procurement under state construction contracts valued at $7,443,000 or more, iron, steel, and manufactured goods may be purchased if they are produced in the United States or produced in any of the following countries: Aruba, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, United Kingdom, Australia, Chile, Morocco, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.

The "exception" to the Buy American requirement for obligations under international agreements does not apply to dredging, the restrictions attached to federal funds to states for mass transit and highway projects, or the purchase of construction grade steel, motor vehicles or coal. Consequently, if using ARRA funds in connection with these activities or for construction grade steel, motor vehicles or coal, only items produced in the United States may be procured.

The Buy American requirement may be waived by Federal agencies in one of the following circumstances only: (1) application of the Buy American requirement would be inconsistent with the public interest; (2) iron, steel and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; (3) or inclusion of iron, steel or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent. Requests for waivers must be submitted before funds are awarded by a federal agency or obligated by the state.

The process for requesting a waiver of the Buy American requirements, including information that must be provided to federal agencies in support of a request for a waiver, is further described in Federal Register, Volume 77, Rules and Regulations, (April 23, 2009, pages 18450-18463). http://www.naspo.org/documents/standard_awardsconditions_E99073.pdf

As used in this Section, "steel" means any alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

"Manufactured good" means a good brought to the construction site for incorporation into the building or work that has been -- (1) processed into a specific form and shape; or (2) combined with other raw material that has different properties than the properties of individual raw materials. "Public building or public work" means a public building of, and a public work of, the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State regional or interstate entities which have governmental functions).

PLEASE NOTE: Agencies are encouraged to coordinate with the FAC Division of Engineering and Contracting Administration, prior to making a decision on whether to use ARRA funds for any construction-related projects (whether under small purchase or competitive procurement).