

Government Contracts Blog

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ARRA Risks -- Traps for the Unaware

While the promise of the \$787 billion federal stimulus package is no doubt alluring to many companies, receiving Stimulus funds does not come without strings attached, posing risks for the unwary recipient.

For example:

- **Rules and Restrictions Apply to All Purchases Using Stimulus Funds.** While many commercial companies may not think that they are "government contractors," any company receiving any Stimulus Act funds -- including vendors and subcontractors ultimately providing goods or services for a Stimulus Act project -- are subject to the rules and restrictions inherent in the statute. Two of the stated hallmarks of the Stimulus Act are "oversight and accountability," and the statute extends these responsibilities to anyone receiving these federal funds, whether performing a federal contract underwritten with Stimulus funds or a State or local project that relies on stimulus funding. Moreover, despite the fact that the Act does not expressly apply to small purchases or to purchases of commercial products, regulatory authorities are thus far resisting any exceptions for small, common, or commercial purchases. What this means is that even though a company may simply provide a standard commercial product for a Stimulus-funded project, the strings are still attached. Like it or not, everyone who receives Stimulus money is considered a "government contractor."
- **Different Rules May Apply Depending on Whether the Stimulus Funds Are Distributed by the Federal Government or by a State or Local Government.** Unfortunately, the regulators on Capitol Hill have not seen fit to implement a single set of regulations governing the restrictions on Stimulus Act funds. Companies may find that they are subject to different sets of rules depending on the source through which the Stimulus funds are flowing.
- **Untrained Contracting Personnel.** The federal government is experiencing a shortage of trained contracting personnel, which means that many companies seeking Stimulus funds face administrative "slow downs" and personnel who may simply not know "what to do." This is further aggravated by the fact that many of the Stimulus funds are spent at the State or local level, where trained personnel who are familiar with the intricacies of federal law are -- quite simply -- not to be found. Unfortunately, this means that many companies are finding that the onus is on them to act as the "guide" as they navigate the difficult regulatory waters.

- **Quarterly Reporting Requirement.** Direct recipients of the Stimulus funds, such as prime contractors, are required to submit quarterly reports to the Government detailing a number of things – including the progress being made on the project, the amount of money spent to date, and (under certain circumstances) the salary amounts for the top five highest-paid employees. Perhaps one of the most difficult reporting requirements is that companies are also required to estimate the numbers of jobs created **or preserved** using the Stimulus funds. The guidance issued to date from the White House is vague and unclear as to how exactly these metrics should be measured, forcing companies to go through the time and effort of reaching reasoned estimates. Many companies are transferring the reporting requirements to all their suppliers and vendors to ensure that the reporting companies have the maximum amount of information available when ultimately reporting to the Government.
- **Buy American.** The Buy American requirements for construction projects under the Stimulus Act are incredibly complicated, even more so at the State or local level. Even companies that may be used to satisfying "country of origin" requirements under normal sales to the U.S. Government are finding that the Stimulus Act imposes different rules. The Buy American requirements have been addressed on our Blog [here](#), [here](#), and [here](#).
- **Prevailing Wage Rates.** The Stimulus Act requires contractors performing certain labor functions to be paid based on a prevailing wage determination made by the U.S. Department of Labor. Normally, the prevailing wage requirements apply only to federal construction projects, but with the Stimulus Act, they reach much further.
- **Whistleblowers.** Federal law already presents a host of protections for people who blow the whistle on companies who allegedly steal money from the U.S. Government. But the Stimulus Act includes several additional and onerous requirements, including the requirement that the whistleblower provisions flow down to subcontractors and that public notice be posted alerting employees of their whistleblower rights under the Act. The whistleblower protections under the Act are very broad and even extend to company audit personnel who may claim "reprisal" for routine investigations into potential fraud (even when investigating potential fraud is part of their regular responsibilities). This puts employers in an almost untenable position when it comes to disciplining audit personnel in the normal course of business.
- **Audit Rights.** Government audit rights under the Stimulus Act are extensive, especially at the State level, where a contractor may be subject to audit by the State, an agency Inspector General, the Government Accountability Office, and/or the Recovery Accountability and Transparency Board. The audit rights include the right to review documents, as well as the right to interview employees. We addressed this issue [here](#) and [here](#).
- **Modifying the Regulations Moving Forward.** As if the risks are not substantial enough, complying with the regulatory requirements presents a bit of a moving target because the regulations are expected to change by summer's end. The public comment periods for the implementing regulations have closed, and it is expected that the Government will issue new, revised (and hopefully improved) regulations as soon as practicable. But exactly how those new regulations will differ from those currently in place is unknown.

While the Stimulus Act no doubt presents some attractive business prospects, we caution companies to enter the process with their eyes wide open, fully aware of the associated risks.

Additional discussion of the Stimulus-related issues can be reviewed on our Blog at
<http://www.governmentcontractslawblog.com/articles/stimulus/>.

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