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GAO Calls for Increased Oversight of TARP Contractors

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The Government Accountability Office (“GAO”) has called for increased oversight of contractors supporting the Troubled Asset Relief Program (“TARP”).^[1] The GAO’s call for increased oversight of contractors stems from its concerns about the types of contracts awarded by the Department of Treasury and the lack of clear mitigation plans for potential and actual conflicts of interest.

Since TARP was authorized by the Emergency Economic Stabilization Act (“EESA”), Treasury has awarded a variety of contracts for legal, investment consulting, accounting, and other services using expedited procedures under the Federal Acquisition Regulation (“FAR”). As of November 25, 2008, Treasury had awarded two indefinite delivery-indefinite quantity (“ID/IQ”) contracts using other than full and open competition and five blanket purchase agreements or orders against existing federal supply schedules maintained by the General Services Administration (“GSA”).^[2] Both arrangements provide Treasury with the flexibility to order work as needed. These contracts and agreements offer awards that range in value from \$5,000 to \$2.5 million and in length from six months to several years.

Time and Materials Contracts Seen as Problematic

For the most part, the contracts and task orders awarded thus far, including the blanket purchase agreements, are priced on a time and materials basis. Under time and materials contracts or orders, payments are made to contractors based on set hourly labor rates and the actual number of hours worked by qualified employees. Materials are reimbursed at cost. As noted by the GAO, these types of contracts are considered high risk for the government because “they provide no positive incentive to the contractor for cost control or labor efficiency.”^[3] The GAO has been critical of the use of time and materials contracts by other federal agencies, such as the Department of Defense, noting the need for close government supervision to ensure costs are contained.^[4] The GAO echoed the same concerns in connection with TARP, recommending that Treasury ensure sufficient personnel are assigned and properly trained to oversee the performance of all contractors and move toward fixed-price arrangements whenever possible.

Conflict of Interest Oversight Lacking

The GAO also found oversight to be lacking with respect to potential and actual conflicts of interest. The GAO noted that six of the eight service providers selected as of November 25, 2008 had identified potential or actual sources of conflict. Most of these were organizational conflicts of interest, although some involved personal conflicts. While the service providers proposed various approaches for mitigating conflicts of interest, the GAO found that the submitted plans provided few details on how the providers would report conflicts to Treasury that arose during contract performance. For its part, Treasury issued interim conflict of interest guidelines in October setting forth steps that should be considered in soliciting and awarding contracts (see *the Morrison & Foerster Legal Update “TARP and the Various Federal Tent Poles: Will it be Enough?”*). The GAO recommends that Treasury quickly issue final conflict of interest guidelines and review and negotiate mitigation plans to enhance specificity and compliance.

New Mandatory Disclosure and Compliance Rules

The GAO's call for increased oversight of contractors supporting TARP reflects a broader trend toward increased oversight of government contractors. Most notably, on November 12, 2008, the federal government published a new rule expanding the scope of government contractors who are required to have a code of business ethics and conduct, and an internal control system. The rule also mandates, *inter alia*, disclosure of certain violations of criminal law, violations of the civil False Claims Act, and significant overpayments. Failure to timely disclose violations was also added by the new rule as a separate basis for suspension and debarment. This new rule has generated considerable discussion among the government contractors, attorneys, regulators, and law enforcement officials, and there appears to be little consensus on the details of how the rule will or should be implemented. Nevertheless, TARP contractors will be subject to the new rule after its effective date of December 12, 2008. Further information on the new rule can be found in a prior legal update ("[New Mandatory Disclosure and Compliance Requirements Will Impact All Government Contractors](#)").

Footnotes

[1] GAO, *Troubled Relief Asset Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency*, GAO-09-161 (Washington, D.C.: Dec. 2, 2008).

[2] Treasury has also used its authority under EESA to retain a financial agent to provide custodian and cash management services.

[3] The risks are also high for contractors who do not have adequate policies, procedures, and practices in place to account for labor costs and materials and to comply with minimum labor qualifications. The consequences of submitting inaccurate invoices can be severe, ranging from penalties and damages under the civil False Claims Act to suspension and debarment.

[4] GAO, *Defense Contracting: Improved Insight and Controls Needed over DoD's Time-and-Materials*, GAO-07-273 (Washington, D.C.: Sept. 17, 2003).