

[Alerts and Updates]

FAR Rules for Stimulus Funded Contracts: Alert 4 - GAO and Inspector General Oversight

May 15, 2009

Our earlier Alerts noted the recent issuance of five FAR Counsel Interim Rules. In our [May 5, 2009 Alert](#), we discussed in greater detail the rule that involved incorporation of existing and modified requirements of adherence to Buy American requirements, as required by the American Recovery and Reinvestment Act of 2009 ("ARRA" or the "Stimulus Package"). Our [May 6, 2009 Alert](#) analyzed the new enhanced whistleblower protections provided by ARRA. Our [May 14, 2009 Alert](#) discussed the requirements for contractors' quarterly reporting.

In this fourth Alert, we will discuss the ARRA's provisions granting the U.S. Government Accountability Office ("GAO") and federal agencies' Inspectors General ("IG") offices increased authority to review and examine government contracts impacted by ARRA financing.

GAO and Inspector General Oversight (FAR Case 2009-011)

FAR Case 2009-011 implements a new set of alternative FAR clauses, which are likely to significantly enhance the investigative authority of both the GAO and agency IGs regarding ARRA-funded projects. Some of this new authority corresponds to similar authority granted under the National Defense Authorization Act for Fiscal Year 2009, relating to non-ARRA-funded contracts. The new set of alternative FAR clauses includes:

- FAR 52.212-5, relating to "Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items"
- FAR 52.214-26, relating to "Audit and Records—Sealed Bidding"
- FAR 52.215-2, relating to "Audits and Records—Negotiation"

Alternative clauses will be applicable to all ARRA-funded contracts, such as commercial, off-the-shelf and those below the simplified acquisition threshold.

These clauses will:

- Allow GAO access to and the right to examine prime contractor and subcontractor records of ARRA-funded contracts.
- Permit GAO to interview any current officer and employee regarding affected transactions.
- Give IGs this authority as well, but only at the prime-contractor level.

Observations and Practice Pointers

- These new requirements are likely to place an increased burden on the already limited resources of the GAO and the federal agencies' IGs' offices.
- Contractors may want to create and enforce document-retention policies in light of potentially increased scrutiny of these agencies.

- The broadening of the whistleblower protections discussed in our second Alert indicates the significance of maintaining proper documentation and careful adherence to FAR rules and Government Accountability standards.
- Contractors, particularly small-firm contractors who may be subject to the FAR rules, may want to ensure that their consultants—such as accountants, and scheduling and claims consultants, as well as their attorneys—are familiar with the multiple requirements of the federal laws and regulations that apply to these contracts.
- As a result of the recent requirements of self-reporting, contractors should be aware of irregularities in their contract performance. Bringing these issues to the attention of the federal government before they are discovered by the GAO and the IG may be a way to mitigate difficult situations. It may be too late once these irregularities are discovered by the GAO or IG.
- The rights of the GAO and the IG to interview officers and employees may involve issues with the Fifth Amendment to the U.S. Constitution. Contractors should be mindful that, when engaging legal counsel in connection with GAO or IG investigations, legal counsel should be aware that it is representing the contractor and not necessarily the officer or employee, since their interests may be in conflict.
- One of the potential impacts of increased GAO and IG surveillance is that it may elicit more whistleblower complaints.

For Further Information

If you have any questions regarding this Alert or would like more information, please contact [Robert A. Prentice](#), [Richard P. Dyer](#), [Kenneth H. Lazaruk](#), [Daniel E. Toomey](#), any [member](#) of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.