[Alerts and Updates]

FAR Rules for Stimulus Funded Contracts: Alert 3 - Enhanced Contractors' Internet-Quarterly-Reporting Requirements

May 14, 2009

In our two previous Alerts, we noted the recent issuance of five interim rules by the Federal Acquisition Regulation ("FAR") Counsels. In our May 5, 2009 Alert, we discussed in more 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 discussed the new enhanced whistleblower protections provided by ARRA.

In this third Alert in a series of five, we will discuss the ARRA contractors' quarterly reporting requirements.

Contractors' Quarterly Reports (FAR Case 2009-009)

In a stated effort to increase "transparency" in connection with Stimulus Package projects, ARRA requires a considerable amount of additional paperwork and reporting by not only prime contractors but also, in many instances, subcontractors and suppliers of prime contractors. Going forward, all prime contractors will have to submit detailed quarterly public reports to the federal government on the services they provide and the jobs they create using ARRA funds.

The new FAR rules establish FAR Clause, 52.204-11, applicable to, and included in, all fully or partially ARRA-funded contracts. This clause requires that contractors:

- Report quarterly and publicly, using the online reporting tool at www.federalreporting.gov, the amount of ARRA funds invoiced per quarter, including the significant services and supplies delivered;
- Describe the overall purpose and expected outcome of the contract, and assess the progress toward completing the purpose;
- Describe the "employment impact" of the ARRA-funded work, with a description of the types of jobs created and retained, as well as an estimate of the number of jobs created and jobs retained by the prime contractors;
- Disclose, if a prime or first-tier subcontractor, the names and total compensation of the five highest-compensated officers during the calendar year in which the contract is awarded, if their companies derive 80 percent or more of their annual revenue and more than $25 million in annual gross revenue from federal contracts or grants, unless this information is already available publicly via U.S. Securities and Exchange Commission filings; and
- Require that several of these requirements extend to subcontractors receiving more than $25,000 in ARRA funds.

The reporting requirements are effective as of March 31, 2009, and apply to solicitations issued and contracts awarded on or after that date. In addition, existing contracts will be modified to include the reporting requirements, if ARRA funds will be used. The first reports are due by July 10, 2009. This new level of information gathering and reporting is likely to have a significant impact on both the direct and indirect cost of performance.

Observations and Practice Pointers

- All reports submitted should be carefully reviewed for accuracy and completeness by the contractors, and contractors may want to ensure that their compliance programs/efforts are thorough and effective. Contracting officers will not be validating content.

- While the FAR Counsels provide estimates of the probable final costs to the government, contractors and subcontractors for compiling these reports, these estimates may be somewhat optimistic.

- In addition, while the government's goal—transparency—appears to be a worthy one, the amount of information to be gathered is likely to be enormous and may result in information overload.

- This increased burden on contractors may have an unintended effect of narrowing the scope of contractors who have the capability of providing this information.

- The possibility exists that contractors' monthly pay requests will be conditioned upon timely filing of quarterly reports.

- ARRA requires a substantial amount of participation from disadvantaged business enterprises (DBEs). Many of these DBEs will be prime subcontractors, to which this reporting requirement is likely to be an additional responsibility. If DBEs struggle to comply, they may need the assistance of prime contractors to meet these requirements.

- Failure to comply with the reporting requirements will result in the exercise of "appropriate contractual remedies."

- All of these reporting requirements are likely to be subject to applicable fraud and false-claims statutes, which may increase potential risks to contractors and subcontractors.

- The information reported regarding progress toward completing the "purpose" might be used against contractors as "admissions" in subsequent proceedings by or against them for delay, interference, etc.

- The online reporting tool is not yet operable, and it may be presumed that it is being developed rapidly. Thus, it remains to be seen how well the tool will function, and how clearly it will instruct contractors in how the reports should be completed.

- Government agencies may not be prepared to handle and analyze this data. At a recent conference on the Stimulus Package, representatives of both the General Services Administration and the U.S. Army Corps of Engineers noted the "challenge" that these requirements are likely to create for their agencies, which will have their own reporting requirements (discussed in an upcoming Alert). Both agencies indicated they would require assistance from contractors to meet the requirements.

- These reports may enable competitors to develop material for challenging current contractors in subsequent requests for proposals, yet they may also allow competitors unprecedented access to information regarding ongoing contracts.

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.