

The American Recovery and Reinvestment Act (ARRA) of 2009 Creates New, Expanded Reporting Challenges for Prime Recipients

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The American Recovery and Reinvestment Act (ARRA) of 2009, which was enacted February 17, 2009 through Public Law Number 111-5, is a major effort to jumpstart our economy, save and create millions of jobs, and put a down payment on addressing long-neglected challenges so our country can thrive in the 21st century. So far, approximately \$360 billion dollars have been obligated by the government to the ARRA effort, and most of it (\$300 billion) has been targeted for grant-type programs.

With so much at stake, ARRA provides for unprecedented levels of transparency and accountability, including the creation of a public access Web site, www.recovery.gov, to give American citizens the ability to monitor the progress of our recovery. In addition, ARRA creates specific roles and responsibilities for federal agencies and prime recipients to ensure compliance with ARRA and other federal procurement regulations, such as FAR, DFAR, CAS and others.

Prime recipients are organizations that have received ARRA funds directly from the federal government. These organizations could be states, tribes, localities, counties, non-profit organizations or federal contractors/private sector companies. Even though the ARRA creates significant opportunities for these organizations, the funds are **accompanied by additional obligations beyond what is normally required to do business with the federal government**. As such, companies must be aware that the recent ARRA regulations provide strict compliance requirements and could have a direct bearing on every aspect of their business operations.

This white paper focuses on a few of the new Federal Acquisition Regulations (FAR) and Code of Federal Regulations (CFR) interim regulations issued March 31, 2009, in the Federal Register, Volume 74, Number 60, that apply to both contracts and grants/cooperative agreements under ARRA in the following areas:

- Reporting requirements
- Whistleblower protection rights
- Expanded government audit rights
- Single audit information for non-profit organizations

ARRA Reporting Requirements

Federal Acquisition Regulation (FAR) 52.204-11 is a mandatory clause required in all ARRA procurements. This clause describes the minimum Contractor Reporting Requirements (FAR Case 2009-009), including:

- Reporting no later than the 10th day following the end of each quarter, starting with October 10, 2009, the use of ARRA funds. The filing must be done through www.recovery.gov and all information on this website is publically available;
- The following information must be reported:
 - The amount of ARRA funds invoiced for that quarter;
 - A list of significant services performed and/or goods delivered on ARRA awards;
 - An assessment of progress towards completion and expected outcomes and results of the ARRA programs;
 - Description of employment impact of the ARRA work, i.e., jobs created or jobs retained;
 - Names and total compensation of each of the five most highly compensated officers for the year in which the ARRA contract/subcontract was awarded if in the preceding fiscal year, the contractor/subcontractor received: (1) 80% or more of its annual gross revenues in federal contracts/subcontracts, loans, grants, and cooperative agreements; (2) \$25 million or more in annual gross revenues from federal contracts/subcontracts, loans, grants, and cooperative agreements; and (3) the public does not have access to information about the compensation of the senior executives through periodic reports filed under the Securities Exchange Act of 1934 or the Internal Revenue Code of 1986; and
- Similar information for subcontractor awards greater than \$25,000.

Obviously, these reporting requirements impact your entire organization and are not limited to finance and accounting but include operations, contracts, subcontracts and human resources. We have already seen that these reporting requirements are creating some burden on ARRA contractors.

Non-profit organizations have additional reporting requirements discussed in the section below, “Single Audit Information for Recipients of Recovery Act Funds.”

ARRA Whistleblower Protection Rights

Under Section 1553 of the ARRA, two new FAR clauses (FAR Case 2009-012) have been implemented protecting contractor employee rights to disclose covered information to the government regarding fraud, waste and abuse. FAR 52.205-15 requires contractors to post notices of whistleblower rights and remedies. This FAR clause also establishes procedures for filing complaints of reprisals to agency Inspector Generals (IGs) and requires agencies to request that the Department of Justice file an enforcement action if the employer is found in non-compliance of this clause. In addition, FAR 3.907 makes it explicit that non-federal employees are protected from reprisal for disclosing covered information to the government through Web sites such as “FraudNet.gov.”

Contractors receiving ARRA funds are prohibited from discharging, demoting, firing, reprimanding or otherwise discriminating against an employee as reprisal for disclosing “covered information” to the government. Covered information is defined as gross mismanagement or waste of ARRA funds; abuse of management authority when implementing ARRA projects; or any contractor/subcontractor overbillings, mischarging of costs or other types of procurement law and/or regulation violations.

This “Whistleblower” clause applies to commercial items acquisitions, awards valued at less than \$100,000 (i.e., or current Simplified Acquisition Threshold), federal contracts and grants/cooperative agreements. More importantly, the government has increased the amount, under certain instances, for recovery under “employee qui tam actions” from 20% to 30%.

As the result of the new level of oversight under ARRA and other new regulatory requirements, the Department of Justice has stated that it expects to see a significant increase in civil and criminal fraud prosecutions, including jail time.

ARRA Expanded Government Audit Rights

New FAR Alternate Audit Right clauses (FAR Case 2009-011) must be included in all ARRA awards. Basically, these clauses provide the Government Accountability Office (GAO) and the agency Inspector Generals (IGs)

with expanded audit authority and rights. The GAO has expanded audit authority to (a) examine books and records of primes and subcontractors; and (b) interview all officers and employees of primes and subcontractors. The IGs have expanded audit rights to: (a) examine books and records of primes and subcontractors; and (b) interview all officers and employees of primes only. These alternate clauses can be found at:

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

As noted from above, these expanded government audit rights apply to commercial items acquisitions, awards valued at less than \$100,000 (i.e., or current Simplified Acquisition Threshold) and federal contracts. Non-profit organizations also have some expanded audit rights addressed in the section below, “Single Audit Information for Recipients of Recovery Act Funds.”

Prime recipients who receive awards under ARRA must be prepared to be audited. Post-award compliance audits are mandatory in the ARRA. In addition, pre-award audits are required for federal contractors proposing on ARRA awards valued at \$10 million or more.

On May 20, 2009, in conjunction with the ARRA, President Obama signed the Fraud Enforcement and Recovery Act (FERA; Public Law Number 111-21), which among other things, authorizes prosecution of those who commit fraud or make false statements in connection with money or funds sought or obtained under either ARRA or Troubled Asset Relief Program (TARP). This was the first major amendment to the False Claims Act (FCA) since 1986, and it expands the grounds for liability under the FCA. Its effective date was retroactive to June 7, 2008.

FERA’s broader interpretation of the FCA includes:

- A clarification that the FCA covers false claims whether or not the person or entity specifically intended to defraud the government (i.e., burden of proof no longer on government).
- A clarification that the FCA covers false claims whether or not the claim was presented to a government employee or official (i.e., removal of the direct “payee-payor” relationship).

- A prohibition against improper retention of discovered overpayments (i.e., reverse false claim).
- A revised definition of a knowing failure to return an overpayment to the government.

Under the FERA, “knowing” is defined as “deliberate, reckless, or indifferent.” The Department of Justice (DOJ) has gone on record defining “knowing” as “if your financial systems are not adequate to spot an overpayment, then you are reckless or indifferent” and will be subject to treble damages under the FERA.

More importantly, FERA provides for increased government funding for enforcement. Over the next two years, hundreds of millions of dollars (estimated at \$155 million/year) will be spent on hiring of federal agents, prosecutors, forensic analysts and support staff.

Single Audit Information for Recipients of Recovery Act Funds

Under 2 CFR 176, Subpart D, non-profit organizations receiving ARRA funds must comply with the Single Audit Information requirements. The key requirements for the recipients are:

- They must maintain records that adequately identify source and application of ARRA funds
- If they are covered by the Single Audit Act Amendments of 1996 and OMB Circular A-133, Audits of States, Local Government, and Non-Profit Organizations, they must agree to separately identify expenditures using ARRA funds
- They must agree to identify each sub-recipient of ARRA funds and require them to separately identify their own ARRA expenses
- They are to flow down this information requirement

The ARRA provision requiring whistleblower protections also applies to grants and cooperative agreements, per Section 1553(a) of the ARRA. In addition, the expanded government audit authority and rights apply to grants and cooperative agreements, per Section 1514 and 1515 of the ARRA. The only exception to the expanded government audit and authority rights is that the **GAO only has access to contracts and not grants or cooperative agreements using ARRA funds.**

For non-profit organizations, compliance with ARRA regulations (and other applicable federal procurement regulations, such as FAR, DFAR, CAS and others) is even

more critical to avoid potential criminal and/or civil fraud indictments, but also the public perception of impropriety or greed, which could severely undermine an organization’s ability to achieve its mission through donations, volunteerism and other public and private support.

Due to the severity of the penalties associated with ARRA funds, if you are considering taking advantage of this money, you should carefully assess your organization’s ability to support this level of oversight and supervision. Before accepting any ARRA awards, we recommend that you carefully assess policies and procedures and/or established practices related to every major function in your business, including:

- Business ethics/code of conduct;
- Finance and accounting;
- Operations;
- Human resources and workforce;
- Information technology systems and controls;
- Contracting and purchasing; and
- Internal audit and risk management.

If you have any questions or would like to arrange for an assessment of your specific situation, please contact Nadine A. Massih, managing director, Government Contract Consulting Practice, at 703.624.9553 or nadine.massih@rsmi.com.

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