

Doing Business with the Government in 2009: New Opportunities for Energy Efficiency and Renewable Energy Contracting

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The American Recovery and Reinvestment Act (ARRA),¹ signed into law on February 17, 2009, aims to aggressively expand the use of energy-efficient technologies throughout the U.S. and to double renewable energy production within three years.² To accomplish this and other energy-efficiency goals, ARRA makes an unprecedented investment in renewable energy infrastructure and related research and development. Through this investment, and by seeking to direct the resources of the federal government toward energy-efficient technology, the Administration hopes to spur both job growth and technological innovation. In so doing, the government has become a crucial player in the field of energy efficiency.

Because so much of the government's work is done with the help of private contractors, ARRA presents companies in the renewable energy industry with the opportunity to start doing business with the federal government or increase their volume of government business. Without question, participation in the federal marketplace can be rewarding. In 2008, the federal government awarded approximately \$518 billion in contracts.³ At the same time, contractors must be aware of unique risks and regulatory hurdles that come part and parcel with doing business with the government. While the government's role in driving the U.S. toward greater energy efficiency will provide opportunities for contractors offering a broad spectrum of products and services, it will also require strict compliance with government regulations.

New Business Opportunities

ARRA directs large sums of money to several agencies that have been charged with contracting for green construction, renovation and rehabilitation projects and funding research and development of alternative energy and enhanced electric and battery technologies, among other renewable energy initiatives.

General Services Administration

On March 31, 2009, the United States General Services Administration (GSA) submitted to Congress a list of proposed construction and renovation projects it plans to undertake pursuant to ARRA.⁴ Of the \$5.55 billion in projects proposed by the GSA, it proposes to dedicate \$4.5 billion to the conversion of federal buildings to high-performance green buildings.⁵ High-performance green buildings are buildings that, on a life-cycle basis,

- reduce energy, water and material resource use;
- improve indoor environmental quality, including reducing indoor pollution, improving thermal comfort, and improving lighting and acoustic environments that affect occupant health and productivity;
- reduce negative impacts on the environment throughout the life-cycle of the building, including air and water pollution and waste generation;
- increase the use of environmentally preferable products, including bio-based, recycled content, and nontoxic products with lower life-cycle impacts;
- increase reuse and recycling opportunities;
- integrate systems in the building;

- reduce the environmental and energy impacts of transportation through building location and site design that support a full range of transportation choices for users of the building; and
- consider indoor and outdoor effects of the building on human health and the environment, including improvements in worker productivity and the life-cycle impacts of building materials and operations.⁶

Certain federal buildings will undergo full or partial modernization, with the emphasis on energy conservation and renewable energy generation.⁷ Other federal buildings are slated for “limited scope” projects, which the GSA expects will include installing advanced meters for electricity, water and, if appropriate, steam, as well as replacing deteriorating roofs with materials that will improve the building’s energy efficiency, including photovoltaic membranes and green roofs.⁸ The GSA states that its proposal involves building projects in all 50 states, and it anticipates awarding all contracts within the next two years.⁹ While it is likely that many of the large construction projects on the GSA’s list are largely already under contract due to the way the Public Buildings Service operates, it is quite possible that the prime contractors will be seeking new subcontractors to assist in meeting the requirements specific to converting to a high-performance green building.

Department of Defense

ARRA includes substantial funding for energy efficiency initiatives within the Department of Defense (DOD). This funding includes approximately \$4.2 billion for investment in and renovation of DOD facilities, \$300 million to develop near-term energy efficient technologies, and \$120 million for the Energy Conservation Investment Program.¹⁰ The DOD released its Expenditure Plan on March 20, 2009, which sets forth in much detail the way the DOD plans to apply its ARRA funding.¹¹ For example, the Expenditure Plan identifies each DOD facility that will be renovated, briefly describes the planned renovation, and categorizes the renovation into one of several categories, including energy-related.¹²

The DOD’s intention to invest in near-term energy-efficient technologies includes funding for research and development, testing, and evaluation. The funding will be targeted to improve energy generation and efficiency, transmission, regulation and storage, including research and development of energy from fuel cells, wind, solar, biomass energy and biofuels, as well as other renewable energy sources.¹³ The Expenditure Plan also details 45 planned Energy Conservation Investment Program projects, which include installation of photovoltaic systems, wind turbine systems, wind generators, energy conservation upgrades, and high efficiency lighting.¹⁴

Even before ARRA, certain components of the DOD had started investing in renewable energy. For example, the Air Force in 2008 installed the largest solar panel array in the U.S. at Nellis Base in Nevada, and is planning other large-scale solar projects at several bases in the southwestern U.S.¹⁵ Because the DOD is the largest single energy consumer in the U.S., its shift toward energy efficiency should bring a large influx of work for companies in the renewable energy industry as the DOD’s demand for electrical generators, solar panels, fuel cells, insulation and other energy-efficient products significantly increases.¹⁶

Department of Energy

The Department of Energy (DOE) has received \$32.7 billion in ARRA funding and is disbursing this money largely through grants, rather than contracts, with a large portion of its federal money going to states and American Indian tribes.¹⁷ Grant recipients will, in turn, be in position to award grants or contracts to companies. The DOE’s plan for this funding includes \$16.8 billion to its Energy Efficiency and Renewable Energy (EERE) program, to be divided among a number of sub-programs.¹⁸ The DOE’s Energy Efficiency and Conservation Block Grants will disperse \$3.2 billion to cities and counties, states and territories, and American Indian tribes to reduce energy

use and fossil fuel emissions, and for improvements in energy efficiency.¹⁹ As of March 26, 2009, the DOE released the Funding Opportunity Announcement (FOA) for approximately \$2.7 billion of the \$3.2 billion.²⁰

Another EERE sub-program, the Weatherization Assistance Program, has received \$5 billion to assist in reducing energy costs for low-income families through weatherization renovations.²¹ This funding will be applied to activities including renovation and replacement of insulation, air filtration systems, and heating and cooling units.²²

ARRA also includes \$3.1 billion for EERE's State Energy Program (SEP).²³ Under the SEP, the DOE awards funds to states to promote innovative energy efficiency programs, including renovation programs for existing buildings and industrial facilities, with a minimum goal of reducing the states' 1990 per capita energy use by 25 percent by the year 2012.²⁴

Other EERE sub-programs receiving ARRA funding include \$2.5 billion for Applied Research, Development, Demonstration and Deployment for its Biomass program, Geothermal Technologies program, and to spur the growth of fuel cell markets, as well as \$2 billion for the Advanced Battery Manufacturing Grants program.²⁵ ARRA funding for Advanced Battery Manufacturing Grants will support hybrid electric vehicles by awarding grants to U.S. manufacturers to produce high-efficiency batteries and their components, as well as other components (such as electric motors) needed for electric vehicles. This program will also include grants for research, development and evaluation of plug-in hybrids and related projects.²⁶

U.S. Environmental Protection Agency

ARRA includes \$7.22 billion for programs and projects administered by the U.S. Environmental Protection Agency (EPA). Of this amount, \$300 million is dedicated to the National Clean Diesel Campaign, which funds grants and loans to help regional, state and local governments, tribal agencies, and non-profit organizations with projects that reduce diesel emissions.²⁷ This \$300 million in funding will be allocated as follows:

- \$156 million for the National Clean Diesel Funding Assistance Program, which promotes the deployment of EPA-verified and certified technologies;
- \$20 million in competitive grant money for the National Clean Diesel Emerging Technologies Program, intended to promote the deployment of innovative technologies;
- \$30 million in competitive grant money for the Smart Way Clean Diesel Finance Program, under which the EPA issues grants to establish national low-cost revolving loans and/or financing programs to provide funding to fleets to reduce diesel emissions; and finally
- \$88 million for the State Clean Diesel Grant Program, which provides funds to states interested in establishing diesel emissions reduction programs.²⁸

Similar to the DOE, the business opportunities for companies in the renewable energy field with respect to ARRA funding for the EPA will largely be at the state and local level of government, and through tribal agencies and non-profits, rather than directly with the federal government.

Risks of Doing Business with the Government

Significant risks can accompany the rewards of contracting with the federal government. Such risks include government audits, inspections and investigations; whistleblower suits filed by current or former employees; and challenges by competitors to contract awards. Due to the demand for transparency in the use of ARRA funds and the high stakes associated with the

economic and social goals of ARRA, these risks are potentially escalated for ARRA-related contracts. Therefore, it is critical to understand the fundamental rules and regulations applicable to doing business with the government so that companies looking to participate in ARRA funding opportunities can minimize their risks and maximize their benefits.²⁹

Companies new to government contracting are often surprised to learn that certain fundamental aspects of the process differ significantly from commercial contracting. These differences become apparent from the outset: When the government awards a contract, a competing contractor may protest that award on the basis that the government's evaluation of proposals was somehow flawed and the award was made to the wrong company.³⁰ Defending against a protest generally involves litigation, and while the agency that awarded the contract will be a party to the litigation to defend the award, most awardees intervene in the action to ensure the best defense possible of the award, and thus incur sizeable legal fees and costs.

Unique Clauses in Government Contracts

Government contracts contain a number of unique clauses and provisions of which contractors need to be aware. For example, government contracts allow the government to unilaterally insist on changes in the scope of work (unless the contract is for a "commercial item," in which case agreement by both parties to the change is required). In exchange for the government's right to make changes, the contractor will be entitled to an equitable adjustment to the contract price and/or schedule if the change will increase or decrease the price or affect the schedule of contract deliveries or completion. But the contractor is obligated to continue performing under the changed contract, even before it receives price or schedule relief from the government, or it will risk being terminated for default.

Also, cost-reimbursement contracts will incorporate certain strict rules governing how the contractor treats its costs. The cost rules bar certain costs regularly incurred in the course of doing business from being charged to the government. For example, entertainment costs and lobbying costs are considered "unallowable" and may not be charged to the government, as are certain consultant, insurance, and advertising costs.³¹ Generally, for a cost to be "allowable," it must be reasonable, allocable to the government contract, consistent with generally accepted accounting principles and the terms of the particular contract, and not be in violation of any law or regulation.³² Also, contractors are required to carefully distinguish between direct and indirect costs and have an accounting system in place that consistently distinguishes between the two.³³ Charging unallowable costs to the government can result in a government claim for repayment of disallowed costs (plus interest), as well as possible fraud charges.

When contracting with the government, it is critical to understand the intellectual property (IP) rights clauses in the agreement. The government will often seek to obtain the contractor's technical data—including blueprints, designs, and processes—for the technology or process to be delivered under the contract, and may also seek rights in these data. Certain IP clauses provide "unlimited rights" to the government that will allow it to do anything it pleases with the data—including providing it to one of the contractor's competitors.³⁴ Companies in emerging technology industries should pay close attention to the IP clauses in a government contract to protect against the unintentional loss of control over prized IP assets.

The government can terminate the contract at any time for its convenience—for any reason.³⁵ When a contract is terminated for convenience, the contractor is entitled to recover costs incurred plus a reasonable profit on its performance to date, but is not entitled to lost profits on uncompleted work. In addition, profit on performance to date may be reduced or eliminated if the contractor was in a loss position at the time of termination.³⁶

Federal Law Affecting Government Contractors

In addition to the unique clauses in a government contract, companies need to be aware of certain statutes applicable to government contractors that carry risks of both civil and *criminal* penalties if violated. The Anti-Kickback Act makes it a criminal offense for a subcontractor to provide anything of value to a contractor or higher-tier subcontractor to influence the award of the subcontract.³⁷ A “kickback” can include cash, gifts, entertainment, or even employment of a friend.³⁸ The statute requires prime contractors to establish and enforce measures to prevent kickbacks in its dealings with subcontractors.³⁹ In addition to jail time, stiff monetary penalties are assessable for violations of this statute.⁴⁰

The False Claims Act (FCA) provides for both civil and criminal penalties for the knowing submission of false claims for payment or for improperly and intentionally substituting specific products or services without the government’s prior knowledge or consent.⁴¹ The FCA contains whistleblower provisions, which allow private citizens (often employees or former employees) to file an action against a contractor.⁴² To date, the government has recovered hundreds of millions of dollars from contractors in FCA actions. Also, revisions to the FCA have been proposed by Congress which, if enacted into law, will make it even easier to bring a whistleblower case and will broaden the scope of the statute.⁴³

The False Statements Act criminalizes false statements made to the government.⁴⁴ Contractors are presented with numerous opportunities to make “statements” to the government, including with proposals, certifications, invoices, and other submittals. Each submittal runs the risk of being found to be false.

The Sherman Antitrust Act provides for civil and criminal penalties for bid rigging and collusive pricing.⁴⁵ Government contractors are required to ensure that their agents and employees avoid contacts with competitor personnel that could be perceived as collusion on marketing, pricing, or bidding.⁴⁶

ARRA Regulatory Compliance

Companies must be aware of recent regulations issued pursuant to ARRA that will affect contractors receiving ARRA funding. These regulations are designed to achieve greater transparency into contractors’ use of ARRA funds and to minimize fraud.

First, contractors will have certain reporting requirements related to their use of ARRA funds.⁴⁷ On a quarterly basis, companies receiving contracts funded in whole or in part by ARRA monies will be required to report:

- (1) the amount of ARRA funds invoiced for the reporting period;
- (2) a list of all significant services performed or supplies delivered for which the contractor invoiced in the quarter;
- (3) an assessment of the contractor’s progress towards completion and expected outcomes or results;
- (4) a description of the employment impact of the work (i.e., jobs created and jobs retained);
- (5) information about subcontracts over a certain dollar threshold awarded under the contract; and
- (6), in certain circumstances, the names and total compensation of each of the five most highly compensated officers of the contractor.⁴⁸

These reporting requirements will most likely be a significant burden for ARRA contractors.

Second, contractors receiving ARRA funds will be prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing certain information, such as gross mismanagement of an ARRA-funded contract or grant, gross waste of ARRA funds, or an abuse of authority related to the implementation or use of ARRA funds, to the government.⁴⁹ Contractors will be required to post notices in the workplace of the rights and remedies for whistleblower protections, and to flow down the requirement to all subcontracts.⁵⁰ This rule clearly enhances whistleblower protections and will require contractors to handle whistleblower situations very carefully.

Third, for ARRA-funded contracts, the Government Accountability Office (GAO) and its agents will have expanded audit authority, which includes the authority to conduct interviews of contractor and subcontractor personnel and to audit commercial item contracts and contracts under the simplified acquisition threshold (two categories of contract not normally audited by the GAO).⁵¹

Along with these regulations, the GAO is actively urging the public, government workers and contractors to report evidence of waste, fraud and abuse of ARRA funds to "FraudNet," a government hotline established in 1979 to process reports of misuse of federal funds.⁵²

Conclusion

ARRA presents an exciting opportunity for companies in the renewable energy industry to assist the government in implementing an array of renewable energy technologies. Before entering into a contract with the government, though, companies should be aware of the risks and requirements of performing a government contract and take steps to ensure compliance with applicable contractual and legal obligations.

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¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

² The White House, *Remarks by the President and Vice President at Signing of the American Recovery and Reinvestment Act*, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-and-Vice-President-at-Signing-of-the-American-Recovery-and-Reinvestment-Act/ (last visited April 22, 2009).

³ See USASpending.Gov, Chart: *Contracts and Assistance Spending in Billions of Dollars*, <http://www.usaspending.gov/index.php> (last visited April 22, 2009).

⁴ U.S. General Services Administration (GSA), News Release, *GSA Submits Economic Recovery Plans to Congress* (March 31, 2009) (hereinafter *GSA Submits Plans to Congress*), http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=26000 (last visited April 22, 2009).

⁵ GSA, US General Services Administration – Public Buildings Service, Federal Buildings Fund, American Recovery & Reinvestment Act Spending Plan (March 31, 2009) (hereinafter *GSA Spending Plan*), available at http://www.gsa.gov/graphics/pbs/American_Recovery_and_Reinvestment_Act_2009.pdf.

⁶ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 401(13).

⁷ *GSA Spending Plan*, *supra* note 5, at 3-5.

⁸ *Id.* at 5-11.

⁹ See *GSA Submits Plans to Congress*, *supra* note 4.

¹⁰ U.S. Department of Defense (DOD), News Release, *Department of Defense Moves Swiftly to Implement Recovery Act*, <http://www.defenselink.mil/recovery/> (last visited April 22, 2009).

¹¹ DOD, *American Recovery and Reinvestment Act of 2009: Department of Defense Expenditure Plans* (March 20, 2009), available at

http://www.defenselink.mil/recovery/plans_reports/2009/march/Final_ARRA_Report_to_Congress-24_Mar_09ver2.pdf.

¹² *Id.* at Encl. 1, 21–153.

¹³ *Id.* at Encl. 1, 154–161.

¹⁴ *Id.* at Encl. 4.

¹⁵ See Katherine McIntire Peters, *Air Force Pushes the Envelope on Renewable Energy*, GovernmentExecutive.com, Aug. 13, 2008, http://www.govexec.com/story_page.cfm?articleid=40717&dcn=todaysnews (last visited April 22, 2009).

¹⁶ Rebekah Kebede, *U.S. Military is Big Target for Green Energy Sector*, March 10, 2009, <http://www.reuters.com/article/GCA-GreenBusiness/idUSTRE5295OP20090310?pageNumber=1&virtualBrandChannel=0> (last visited April 22, 2009).

¹⁷ See U.S. Department of Energy (DOE), Recovery and Reinvestment, Overview of the American Recovery and Reinvestment Act of 2009, <http://www.energy.gov/recovery/index.htm> (last visited April 22, 2009).

¹⁸ See *id.*; see also DOE, EERE News, *Economic Stimulus Act Provides \$16.8 Billion for EERE Programs* (Feb. 18, 2009), <http://apps1.eere.energy.gov/news/archive.cfm/pubDate=%7Bd%20'2009-02-18'%7D?printfull> (last visited April 22, 2009).

¹⁹ See DOE, Energy Efficiency and Renewable Energy, Weatherization & Intergovernmental Program, Program Areas, *Energy Efficiency and Conservation Block Grants*, http://apps1.eere.energy.gov/wip/block_grants.cfm (last visited April 22, 2009).

²⁰ DOE, Press Release, Update on Energy Efficiency and Conservation Block Grant Program Allocations (April 10, 2009), <http://www.energy.gov/news2009/7254.htm> (last visited April 22, 2009).

²¹ See DOE, Energy Efficiency and Renewable Energy, Weatherization Assistance Program, *2009 Recovery Act – Frequently Asked Questions about Weatherization*, http://apps1.eere.energy.gov/weatherization/recovery_act_faqs.cfm (last visited April 22, 2009).

²² *Id.*

²³ See DOE, Energy Efficiency and Renewable Energy, State Energy Program, *2009 Recovery Act – Frequently Asked Questions about State Funding*, http://apps1.eere.energy.gov/state_energy_program/recovery_act_faqs.cfm (last visited April 22, 2009).

²⁴ *Id.*

²⁵ See DOE, Energy Efficiency and Renewable Energy, American Recovery & Reinvestment Act, *Overview of the American Recovery and Reinvestment Act of 2009*, http://apps1.eere.energy.gov/wip/block_grants.cfm (last visited April 22, 2009).

²⁶ See DOE, Energy Efficiency and Renewable Energy, Vehicle Technologies Program, *Recovery Act Funding Opportunities*, <http://www1.eere.energy.gov/vehiclesandfuels/financial/recovery.html> (last visited April 22, 2009).

²⁷ See U.S. Environmental Protection Agency (EPA), National Clean Diesel Campaign, Grants & Funding, <http://www.epa.gov/otaq/diesel/grantfund.htm> (last visited April 22, 2009); EPA, Recovery Act Funding for the National Clean Diesel Campaign, <http://www.epa.gov/otaq/eparecovery/index.htm> (last visited April 22, 2009).

²⁸ *Id.*

²⁹ In many ways, the risks of participating in federal grant programs are similar to those faced by government contractors, although federal grants generally do not place as many requirements on grantees as government contracts place on contractors. On the other hand, grants carry with them certain requirements and challenges absent from government contracts. Nevertheless, a discussion dedicated to federal grant rules and regulations merits its own space, and thus the remainder of this article will focus on the risks associated with government contracting.

³⁰ See 48 C.F.R., pt. 33.

³¹ See 48 C.F.R. §§ 31.205-1, 31.205-14, 31.205-19, 31.205-22, 31.205-33.

³² See *id.* § 31.201-2.

³³ See *id.* §§ 31.201-1, 31.202, 31.203.

³⁴ See 48 C.F.R. §§ 27.404, 27.404-1.

³⁵ See 48 C.F.R., pt. 49.

³⁶ See 48 C.F.R. §§ 52.249-2, 52.249-6.

³⁷ See 41 U.S.C. §§ 51-58.

³⁸ See *id.* § 52(2); 48 C.F.R. § 3.502-1.

³⁹ See 41 U.S.C. § 52(2); 48 C.F.R. § 3.502-2.

⁴⁰ See *id.* § 54.

⁴¹ See 31 U.S.C. §§ 3729-33.

⁴² See *id.*

⁴³ False Claims Act Clarification Act of 2009, H.R. 1788; 111th Cong. (2009); Fraud Enforcement and Recovery Act (FERA) of 2009, S. 386, 111th Cong., § 4 (2009).

⁴⁴ See 18 U.S.C. § 1001.

⁴⁵ See 15 U.S.C. §§ 1-7.

⁴⁶ See 48 C.F.R. § 52.203-2.

⁴⁷ See DOD et al., Interim Rule with Request for Comments, American Recovery and Reinvestment Act of 2009 – Reporting Requirements, 74 Fed. Reg. 14639 (March 31, 2009) (to be codified at 48 C.F.R., pts. 4, 52).

⁴⁸ See *id.*

⁴⁹ See DOD et al., Interim Rule with Request for Comments, American Recovery and Reinvestment Act of 2009 – Whistleblower Protections, 74 Fed. Reg. 14633 (March 31, 2009) (to be codified at 48 C.F.R., pts. 3, 52).

⁵⁰ See *id.*

⁵¹ See DOD et al., Interim Rule with Request for Comments, American Recovery and Reinvestment Act of 2009 – GAO/IG Access, 74 Fed. Reg. 14646 (March 31, 2009) (to be codified at 48 C.F.R., pts. 14, 15, 52).

⁵² See, e.g., BNA, Federal Contracts Report, *GAO Highlights Fraud Hotline for Tracking Federal Stimulus Funds Abuse* (April 7, 2009); see also GAO, *FraudNet/Reporting Fraud*, <http://www.gao.gov/fraudnet/fraudnet.htm> (last visited April 22, 2009).