



**An Introduction to
the American
Recovery and
Reinvestment Act of
2009:
Implications for
Construction
Contractors**

May 26, 2009

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Stimulus Act Oversight and Fraud, Waste and Abuse

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Overview

- \$787 billion in stimulus funding → unprecedented oversight
- “Experience tells us that the risk of fraud and abuse grows when billions of dollars are going out quickly, eligibility requirements are being established or changed, and new programs are being created.”

--GAO-09-453T, March 5, 2009

Overview

- “The bottom line is that to assure accountability ... the government will have ***more persons auditing and investigating the functioning of the Act, than managing its implementation.*** The Act designated more than ***\$250 million*** for the [GAO], Recovery Accountability and Transparency [RAT] Board, and office of Inspector General to audit and investigate, ***yet hardly anything to manage the expenditure of the \$787 billion.***”

--Steinhoff, *The Changing Bar for Government Accountability and Transparency*, April 29, 2009

Overview

- The Players
 - GAO
 - Agency IGs
 - RAT Board
 - National Procurement Fraud Task Force
 - Congress
 - DOJ Antitrust Division
 - State and local auditors
 - Whistleblowers
 - The Public

Overview

- Interim FAR Rules implementing ARRA provide for enhanced oversight of contracts and grants receiving stimulus funds
 - GAO powers to review records, interview employees
 - IG power to review and interview
 - Enhanced protection of whistleblowers

Interim FAR Rule

GAO Oversight

- GAO's authority under Audit and Records Clause (FAR 52.215-2) enhanced
 - Broad authority to examine “any of the Contractor's or any subcontractors' records that pertain to, or involve transactions relating to, this contract”
 - Additional authority to “**Interview** any officer or employee regarding such transactions”
- Authority applies to
 - Solicitations issued or contracts awarded after 3-31-09
 - Commercial item contracts
 - Contracts below simplified acquisition thresholds
 - COTS contracts
- Clause flows down to all subcontracts

Interim FAR Rule IG Oversight

- Interim rule provides for additional oversight by agency IGs; IGs authorized to
 - Examine pertinent records of contractors and subcontractors
 - Interview contractor personnel
- Authority applies to commercial item, COTS and simplified acquisition contracts
- Mandatory flow-down requirement, except for IG right to interview employees (*i.e.*, no authority to interview subcontractor personnel)
- Preamble: Contractors that refuse to accept modification adding clause to existing contracts for future orders “will not be eligible for receipt of Recovery Act funds.”

Interim FAR Rule Whistleblowers

- No discharge, demotion—i.e., retaliation—against contractor’s employees who report “reasonable belief” mismanagement or waste of stimulus funds
- Protects complaints to:
 - RAT Board
 - IG
 - GAO
 - State or federal agency
 - Supervisor
 - Court or grand jury
 - Agency head

Interim FAR Rule Whistleblowers

- Employee can show retaliation by showing that disclosure “**contributing factor**” in employer’s action; evidence of contributing factor:
 - Official taking action knew of disclosure
 - Reprisal occurred within time period after disclosure such that reasonable person could conclude that disclosure was a contributing factor
- Complaining employee entitled to access to IG investigative files

Interim FAR Rule Whistleblowers

- Employer can rebut retaliation claim by “***clear and convincing evidence***” that personnel action would have been taken in absence of the employee’s disclosure
- Interim rule applies to contracts for commercial items, COTS and below simplified acquisition threshold, if funded in whole or part with stimulus funds

Interim FAR Rule Whistleblowers

- Based upon IG report, agency head has authority to take range of actions to address reprisals against non-federal employees, including
 - Ordering reinstatement with back pay
 - Ordering employer to pay costs and expenses incurred by employee, including expert and attorneys' fees

Interim FAR Rule Whistleblowers

- If agency head denies reprisal claim or fails to act within 210 days of complaint, employee may bring *de novo* action in federal court, with right to jury trial
- Aggrieved employer can appeal to U.S. Court of Appeals to obtain review of order's "conformance with law"

Interim FAR Rule Whistleblowers

- Bottom line: disparity in burden of proof, remedies for contractor and employees likely to stimulate complaints and litigation

RAT Board

- Creature of ARRA
- Oversees all funds expended under Act
- Maintains primary “transparency” website, Recovery.gov
- Developing on-line hotline for public to log suspected fraudulent use of recovery funds
- Will make “flash” reports to Congress, POTUS on potential funding or management problems

RAT Board

- Membership—more involvement by IGs
 - Chairman: Earl Devaney, formerly of Secret Service, Interior IG
 - 10 federal IGs, including
 - Commerce
 - Energy
 - DHS
 - DOJ
 - Treasury

Additional Oversight by GAO

- Encouraging public to report fraud, waste and abuse to FraudNet
- 16 states (representing 65% of population) selected for bi-monthly reviews of use of recovery funds
- Conducting outreach to state and local audit authorities

Additional Oversight by GAO

- Announced principles of contract management for review of stimulus fund expenditures
 - Transparent lines of authority
 - Clear requirements
 - Competition
 - Fixed price contracts
 - High ethical standards
 - Trained surveillance personnel
 - Enforcement of ethical standards
 - Coordination with state and local officials

GAO-09-453T (March 5, 2009)

National Procurement Task Force

- Created in 2006
- Chaired by Assistant AG, Criminal Division
- Composition: 58 prosecutors, 35 IGs
- OIG Special Report, 2/09: creation of new Grant Fraud Committee
 - 2007: Grant spending \$383B—18% of federal budget
 - Committee headed by DOJ IG

National Procurement Task Force

- Goals
 - Enhance information sharing re: grant fraud
 - Coordinate training of auditors, agents, prosecutors in detecting and investigating grant fraud
 - Rigorous oversight of how grant dollars are spent and awarded
- Training initiatives include “fraud card” for grant recipients—how to spot fraud, including altered supplier invoices, lies about contract completion, and payments to influence grant awards

DOJ Antitrust Division

- DOJ Press Release, May 12, 2009
 - Initiatives to help government agencies insulate recovery funds from collusion and fraud
 - Training procurement and grant officials on “red flags of collusion”
 - Competition experts available to agencies to evaluate procurement and grant funding processes
 - Dissemination of “best practices”
 - Aid in investigations

Lesson: Beware of Fraudulent Claims

- New regime includes numerous agencies for oversight and detection of fraud, waste and abuse (GAO, OIGs, RAT Board, whistleblowers, etc.)
- Potential penalties for adjudicated fraud severe
- *Morse Diesel v. U.S.* (COFC)
 - MD found to have violated Anti-Kickback Act (by making rebates to surety bond broker), FCA (by representing bond premiums as “paid” when they were not)
 - Result: MD forfeits claims totaling \$54.3M under 28 U.S.C. § 2514

Lesson: Beware of Fraudulent Claims

- *Daewoo Eng'g & Constn. v. U.S.* (Fed. Cir. 2/20/09)
 - Daewoo found to have violated FCA by submitting grossly inflated claims as a “negotiating ploy”
 - Daewoo forfeits \$64M claim under § 2514
 - Also liable for penalty under CDA of \$50.6M and FCA penalty of \$10K