Transparency and Accountability under the 2009 Stimulus Act

By George D. Ruttinger

The American Recovery and Reinvestment Act of 2009, or "Stimulus Act," is pumping $787 billion into federal agencies and state and local governments to stimulate job growth and lift the nation out of the deepest recession in memory. This huge infusion of money creates opportunities for companies that are prepared to do business with the government, including infrastructure upgrades, "green" buildings, and air and rail transportation projects.

Contracting with the federal government and its grantees involves substantial risks that companies wishing to compete for Stimulus Act contracts should appreciate. [See Ruttinger, "Big Risks, Big Rewards in Government Contracts," Executive Counsel July/August 2005] The Stimulus Act exacerbates these risks by providing for an unprecedented degree of oversight to ensure "accountability and transparency." Indeed, the Act has designated $250 million for audits and investigations and almost nothing for management of stimulus funds.

Among the players in this intensified oversight regime are the Government Accountability Office (GAO), agency Inspectors General (IGs), employee "whistleblowers," and the new Recovery Accountability and Transparency (RAT) Board.

Interim regulations implementing the Stimulus Act have broadened GAO's existing investigative authority by giving it the power not only to review records of prime and subcontractors, but also to "interview any officer or employee regarding such transactions." This clause must be flowed down to all subcontractors, meaning that the GAO's broadened investigative authority applies to any subcontractors involved in performance of Stimulus Act work. The interim regulations for the first time grant similar audit and interview powers to agency IGs.

The Act and implementing regulations also provide for enhanced protection of whistleblowers — i.e., a contractor employee who "reasonably believes" that there is evidence of "gross mismanagement of the contract" or "gross waste of covered funds." The whistleblower may report his belief to the RAT Board, IG, GAO, or an agency head without fear of discharge or demotion as a reprisal.

The troublesome aspect of the interim regulations is that a whistleblower who complains of reprisal need only show that his disclosure was a "contributing factor" in the contractor's employment action, and can do so by circumstantial evidence, e.g., that "the official undertaking the reprisal knew of the disclosure." The employer can rebut the whistleblower's complaint only by "clear and convincing evidence" that it would have taken the alleged reprisal action even in the absence of the employee's disclosure. An agency head can order a range of remedies for reprisal, including reinstatement and back pay and reimbursement of the whistleblower's legal and expert fees, and his action is reviewable only for "conformance with the law." One thing the whistleblower provisions are certain to stimulate is a flood of complaints and litigation fueled by the plaintiffs' bar.

The Stimulus Act also creates new oversight entities whose jurisdictions overlap with those of the GAO and IGs. The most prominent is the RAT Board, which is charged with overseeing all funds expended under the Act, maintaining the primary "transparency" website (Recovery.gov), developing an on-line hotline for the public to log suspected fraudulent use of recovery funds, and making "flash" reports to Congress and the President on potential funding or management problems.

There are also self-appointed oversight entities, such as the National Procurement Task Force, which was created in 2006 and is composed of 58 prosecutors and 35 IGs. The Task Force announced creation of a new "Grant Fraud Committee" whose goals include training auditors, agents, and prosecutors in investigating grant fraud.

In short, the aroma of Stimulus Act funds can be intoxicating, but aspiring contractors must be aware of the risks they face in accepting such funding given the intensified oversight by federal and state agencies, the RAT Board, and whistleblowers. Given the devastating consequences of not complying with federal statutes prohibiting fraud and false claims, such as the False Claims Act and Anti-Kickback Act, contractors must apply an extra measure of diligence in ensuring that their contracting personnel comply with spirit and letter of government contracts law.

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