



Do I Really Want Stimulus?

(Especially from Someone Who Claims to Be my Uncle Sam?)

As you know, something called the American Recovery and Reinvestment Act, (a/k/a “ARRA” and “Stimulus Bill”), was enacted in 2009. The supposed goals of Stimulus are to (1) foster job preservation and growth, (2) encourage greater economic activity / investment in long-term growth, and (3) enhance accountability and transparency.

Stimulus funding to federal, state, and local agencies gives contractors the ability to find valuable work in an otherwise stagnant market. As you might expect, there is “baggage” that comes with Stimulus funds. Contractors should recognize the baggage before bidding on projects funded with Stimulus money. These include (1) new reporting requirements, (2) coverage under the Davis Bacon Act’s prevailing wage requirements, and (3) potential liability under a souped-up False Claims Act.

Reporting Requirements

There are various reporting requirements for “prime recipients” of stimulus money. “Prime recipients” are nonfederal entities that receive stimulus money directly from Uncle Sam. With construction projects, states are the most frequent prime recipient of stimulus money on projects that are not managed directly by Uncle Sam. Please be aware that while “prime recipients” are responsible for complying with the reporting requirements, these obligations may be (and quite often will be) delegated to a “sub-recipient,” which is a nonfederal entity that is awarded stimulus money via contract or grant from a prime recipient. The information must be reported on a quarterly basis and is posted for public review on the ARRA web site, www.recovery.gov.

Some of the information that may be required to be reported includes the compensation of the contractor’s five most highly compensated officers. The reporting requirements apply to prime contractors (whose gross revenue was at least \$300,000 in the previous tax year) and first tier subs (if the subcontract, including options, is \$25,000 or more) who meet all of the following three criteria:

1) Received 80% or more of its annual gross revenues from federal awards during the preceding year;

2) Received \$25M or more in annual gross revenues from federal awards in the preceding year; and

3) Senior executive compensation information is not publicly available, such as on a public agency website or through SEC or IRS reports.

Reporting is required to take place within ten days after the close of each quarter. The reporting instructions are contained at <http://www.recovery.gov/FAQ/Pages/RecipientReporting.aspx>. On July 8, 2010, the Federal government issued an Interim Rule concerning the reporting requirements. While the executive compensation reporting is effective July 8, 2010, subcontract reporting from July 8 to September 30, 2010 only applies to prime contracts of \$20 million or more. After October 1, 2010, this rule will apply to prime contracts of \$550,000 or more, and after March 1, 2010, \$25,000 or more.

There is a long list of data that must be reported. For example, prime recipients must describe the types of jobs created and retained as a result of the stimulus money as well as the estimated numbers of jobs created/ retained. Contractors will most likely be required – by prime recipients – to report data on the impact of ARRA funded contracts on the contractor’s work force.

The reporting requirements delegated to contractors will likely vary depending on the federal agency overseeing the stimulus spending, as well as the prime recipient of those funds. In Georgia, the GADOT-related Stimulus program is described in detail at: <http://www.dot.ga.gov/informationcenter/gastimulus/Pages/default.aspx>. And the transparency and reporting guidelines are referenced at: <http://www.dot.ga.gov/informationcenter/gastimulus/Pages/Reporting.aspx>.

Expanded Coverage under the Davis Bacon Act

The Davis-Bacon Act requires contractors to pay “locally prevailing” wages and fringe benefits on all federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair of public buildings or public works. The Stimulus Bill expands the applicability of the Davis-Bacon Act to nearly all construction projects that are funded at least in part by stimulus money. A contractor, therefore, will be required to pay prevailing wages on ARRA funded projects, regardless of whether the contract is with a government agency (federal, state, or local) or a private party. For more information on the Davis Bacon Act as it relates to stimulus funding, check out the Department of Labor, Wage and Hour Division’s ARRA website at <http://www.dol.gov/whd/recovery/index.htm>.

The Davis Bacon Act requires prime contractors and subs to submit weekly certified payroll reports certifying that each employee has been paid the full weekly wages earned at not less than the applicable wage rates and fringe benefits for the classification of work performed. The contractor is responsible for obtaining the completed payroll certifications from its subcontractors. If the certified payrolls are not received on a timely basis, the owner may

withhold contract funds. Failure to comply with the prevailing wage requirements can further subject a contractor to severe penalties. Moreover, a contractor can also be held strictly liable for a subcontractor's failure to pay its employees at the applicable prevailing wage rate.

The Department of Labor has promised to significantly increase its efforts to enforce the Davis Bacon Act in light of the ARRA's significant expansion of the number of projects to which it will apply. The Department of Labor's Wage and Hour Division expects the number of complaint-driven investigations to increase dramatically in the future. In essence, contractors can expect additional scrutiny for compliance with the Davis Bacon Act on ARRA funded projects.

Souped-Up False Claims Act

The federal False Claims Act applies to contractors who are working on ARRA funded projects. A souped-up False Claims Act imposes severe penalties on a contractor who (among other things) makes a false statement in association with a payment request or any other type of claim for payment on a project. A contractor who violates the False Claims Act is potentially liable for treble damages plus additional monetary penalties.

The False Claims Act also contains whistle blower provisions that encourage citizens (most likely employees) with evidence of fraud against the government to sue, on behalf of the government, to recover stolen funds. Under the False Claims Act, the whistle blower may be able to recover an amount between 15 and 30 percent of the funds that are recovered.

On May 20, 2009, President Obama signed the Fraud Enforcement and Recovery Act (FERA) into law. This new law changed the False Claims Act by removing the requirement of intent to defraud the Government. Under the new law, a request for payment made to another contractor can constitute a "claim" and a contractor can be liable if it "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."

Under the new law, a contractor would violate the False Claims Act if it retains money inadvertently overpaid by the government, even if the contractor does not make a false statement, even if there is no intent to defraud. Keeping money wrongfully paid by the government could create liability for the contractor.

Other Requirements

After December 31, 2008, certain contractors must now also have an ethics code, perform training, investigate themselves and report violations. These requirements are contained in all federal contracts and subcontracts over \$5 million and 120 days performance time.

The Code of Ethical Conduct must cover bribes, kickbacks, conflicts of interest, detection, reporting and cooperation requirements, among other things. A copy of this code must be promptly furnished to each employee working on that contract.

An Internal Control Program is also required to facilitate ethics awareness/compliance/detection of ethical departures. An Ethics Compliance Officer must be designated, and there must be periodic reviews to detect, report, and self-correct any wrongdoings, including provision for things like internal hotlines and disciplinary actions of those who do not comply.

Once a violation is detected, the contractor is obligated to report to a government-hired Inspector General any evidence of fraud, bribery, etc. The contractor must then fully cooperate with the government. If a project manager or superintendent fails to disclose the evidence of fraud/overpayments/etc., then the Government may suspend or debar the contractor from future federal work. Note that this provision applies to overpayments made by the government – not just fraud committed by the business.

On April 6, 2010, President Obama issued a memorandum entitled “Combating Noncompliance with Recovery Act Reporting Requirements.” In it, the President has directed Federal agencies to “intensify their efforts to improve reporting requirements by prime recipients” of stimulus money by: terminating awards; pursuing suspensions/debarments; reclaiming funds; and initiating punitive actions.

There is also a network of complex “Buy American” requirements as to federal contracts. These pertain to iron, steel and manufactured goods. So, beware of bidding a contract premised upon the acquisition of cheaper goods, especially if they are from Brazil, India, Russia or China. While there are certain exceptions to the “Buy American” goal, they must be carefully documented.

Conclusion

In summary, the Federal Stimulus Bill offers a life line to the construction industry through a dramatic increase in the amount of federal funding available for projects. However, contractors must be aware of the multitude of requirements attached to the stimulus funds. Some of these requirements, such as the reporting obligations, may significantly increase administrative costs associated with project management. Others, like the expansion of the Davis Bacon Act requirements, may greatly increase labor costs associated with performing the work. Further, contractors must closely scrutinize payment applications, change order requests, and any claims submitted to the owner on federally funded projects to avoid the potentially severe penalties imposed under the re-engineered False Claims Act.

It is important to obtain as much information as possible prior to bidding on projects that include stimulus revenues. While Stimulus from Uncle Sam may present new opportunities, there is baggage that comes with that Uncle. Before jumping in completely, make sure you test the water and know what you are jumping into!

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