

PUBLICATION

ARRA: Are you Ready to Receive some Attention?

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The American Recovery and Reinvestment Act of 2009 (ARRA) was signed into law by President Obama on February 17, 2009 and authorizes up to \$787 billion in federal spending through September 30, 2010. Potential federal spending includes funding for construction projects in all 50 states, the District of Columbia, and U.S. territories, as well as the procurement of supplies and services.

Interim Federal Acquisition Regulation (FAR) rules were then issued that apply only to federal procurement contracts funded with ARRA money. The primary thrust of the rules is to increase transparency and accountability in the spending of ARRA funds. Companies contemplating getting into the federal contracting arena should understand that ARRA dollars come with reporting obligations and other requirements that must be understood and properly implemented.

For example, ARRA recipients must file quarterly reports documenting their use of stimulus funds. This is accomplished through the government's website. In addition, all contracts receiving stimulus funds require a FAR-mandated contract clause which requires the prime contractor and first-tier subcontractors to report certain information, including the amount of stimulus funds invoiced by the contractor for the reporting period, an assessment of the contractor's progress on the contract, the employment impact (jobs created and retained) of the contract, and, under certain circumstances, the names and compensation of the five most highly paid officers of the contractor.

Aside from these reporting requirements, current and potential contractors must be aware of the whistleblower protection provided by FAR rules, which prohibit a contractor receiving ARRA funds from retaliating against an employee for disclosing what the employee reasonably believes to be evidence of gross mismanagement, misuse or waste of ARRA funds. Contractors receiving ARRA funds must post a notice concerning employees' whistleblower protections and include this whistleblower clause in all ARRA-funded contracts and subcontracts.

In addition to the separate ARRA reporting requirements, another agency is particularly interested in scrutinizing the recipients of ARRA money. Although existing federal contractors are (or should be) well-acquainted with the Office of Federal Contract Compliance Programs (OFCCP) regulations and requirements, existing and new federal contractors should be aware that the granting of a contract using ARRA funds will undoubtedly subject the contractor to increased OFCCP scrutiny. Again, to increase transparency and accountability of ARRA spending, OFCCP is obligated to track its ARRA-related and non-ARRA-related enforcement activities separately. Accordingly, OFCCP has established separate scheduling procedures to provide for compliance evaluations of ARRA funded contractors.

Under "normal" circumstances, OFCCP uses what is referred to as Active Case Management (ACM) procedures for conducting supply & service (non-construction) compliance evaluations. Under ACM procedures, in most cases OFCCP conducts only an abbreviated desk audit unless it suspects systemic discrimination. The abbreviated desk audit entails the submission of the contractor's Affirmative Action Plan and employment support data for an off-site review by the OFCCP. Provided that the information submitted does not raise potential systemic discrimination indicators, OFCCP will normally close the audit at that stage or enter into a conciliation agreement with reporting requirements if minor violations are found. ACM procedures

will not be used in reviews of ARRA funded contractors. Rather, ARRA procedures will require OFCCP to conduct a full compliance review, including a full desk audit and on-site review, of every ARRA-funded contractor scheduled for an evaluation, even in the absence of systemic discrimination indicators.

Non-construction contractors will receive the established OFCCP non-construction scheduling letter identifying the contractor establishment selected for review, as well as an ARRA notification letter notifying them that their establishment was scheduled using the ARRA scheduling procedures, and will offer compliance assistance. Construction contractors will also receive a scheduling letter that includes notification that their compliance evaluation was scheduled using the ARRA scheduling procedures. The major focus of a construction compliance review will be the contractor's trade workforce in the geographical area(s) where the contract work is being performed, and its good faith efforts to achieve equal employment opportunity. This review may also consider the contractor's total onsite construction workforce in the area, including those employees working on other construction projects, whether or not those other projects are federally funded or federally assisted.

Finally, even though it is foreseeable that ARRA money may attract many newcomers to the federal contracting arena, the government has not reduced its expectations that those who do business with the federal government understand and closely follow the law. Companies looking to take advantage of this possible new source of revenue should make sure that they have individuals within their organization that understand the regulatory requirements and the importance of seeking outside assistance when necessary.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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