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Oversight Under the American Recovery and Reinvestment Act of 2009

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- ARRA Oversight Provisions
- Benefits/Burdens of Oversight
- Inspector General (OIG) Act of 1978
- Future Oversight Trends

ARRA Oversight Provisions

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- Audit Access
- Quarterly Reporting and Data Collection
- Recovery Accountability and Transparency (RAAT) Board
- Whistleblower Protections
- Existing Oversight Tools
 - Criminal False Statements
 - Civil False Claims Act
 - Mandatory Disclosure Rules

Audit Access and Procedures

- Stimulus Act promised an unprecedented level of transparency
- Stimulus Act requires an unprecedented level of auditor access
 - Allows extensive audit access from both GAO and OIG
 - Review of records; and
 - Officer and employee interviews
 - Be aware of the criminal False Statements Act, 18 USC § 1001
 - May focus on any number of issues: technical, financial, management, etc.
- Requires creation (and retention) of documents showing how Stimulus funds are spent
 - Requires that Stimulus funds be separately called out in audit forms (as distinct from normal federal funding)
 - Also requires detailed information about subrecipients
- Requirement flows down to subcontractors

Quarterly Reporting

- Comprehensive reporting requirement for direct recipients of Stimulus funds
 - Information must be submitted on quarterly basis
 - Most recent report was due by January 2010
 - www.federalreporting.gov
 - Requires separate registration from CCR
- Numerous resources already published to help streamline process
 - Data dictionaries; other descriptions
 - Guidance available at reporting website

Quarterly Reporting (cont'd)

- Content of Reports
 - Contract number
 - Dollar amount of funds invoiced
 - Description of services performed or supplies delivered
 - Description of progress toward completion
 - Narrative description of employment impact of program
 - Estimates of “jobs created” and “jobs saved”
 - Compensation of top five most highly compensated officer, **provided:**
 - 80% of annual gross revenues come from the U.S. Government
 - \geq \$25 million in annual gross revenues
 - Information is not otherwise already available through SEC filings
 - Similar information for first-tier subcontractors
 - Must flow down requirement to first-level subcontractors

Quarterly Reporting (cont'd)

- These reports are publicly released
 - *Be careful about including any proprietary information*
- Expectation is that related supporting documentation also will be maintained
- Different rules may apply to depending on the source and type of funding (*e.g.*, OMB rules)
- Government is “Still Working Out the Kinks”
 - Difficulties with this reporting are prevalent in the media
 - Additional guidance expected

RAAT Board

- Coordinates and conducts “oversight of covered funds to prevent fraud, waste and abuse”
- Broad charter includes authority to issue:
 - Flash Reports
 - Non-Flash Reports
 - Quarterly Reports
 - Annual Reports

RAAT Board (cont'd)

- Empowered to
 - Conduct independent audits and reviews,
 - Collaborate with IG investigations,
 - Hold public hearings,
 - Issue subpoenas to compel testimony of non-Federal officers and employees, and
 - Contract-out in support of its oversight functions.
- Website lists its audit findings, as well as those of the OIG and GAO

Whistleblower Protections

- Creates broad whistleblower protections to individuals who claim to be exposing fraud, waste or abuse with Stimulus funds
- Prohibits any type of discrimination or recrimination against an employee that “reasonably believes” that stimulus funds may have been improperly used
- Includes employees whose job it is to investigate and audit company compliance

Whistleblower Protections (cont'd)

- Requires posting of a notice informing employees of their rights
- Employees may file a complaint with IG or a private cause of action
 - Burden of proof favors employees
- Protections cannot be waived and do not preempt other whistleblower rights
- Requirements will flow down to **all** subcontractors

Existing Oversight Tools

- Criminal False Statements (18 USC § 1001)
 - Attaches criminal liability to anyone who “knowingly and willfully falsifies, conceals or covers up ... a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry....”

Existing Oversight Tools (cont'd)

- Civil False Claims Act (31 U.S.C. § 3729-3731)
 - Liability for submitting a false claim to the Government
 - Includes submissions to other companies that are later passed to the Government
 - Also includes failure to repay overpayments
 - 3x damages **plus** \$11,000 per false claim
 - Government's main fraud recovery tool
 - > \$24 Billion recovered in last 20+ years
 - \$2.4 Billion in 2009 alone

Existing Oversight Tools (cont'd)

- **Mandatory Disclosure Rules**
 - FAR Part 9; FAR 52.203-13
 - Effective December 2008
 - Requires disclosure of “credible evidence” of a violation of:
 - Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - the civil False Claims Act; or
 - Significant overpayment(s) on the contract, other than overpayments resulting from contract finance payments as defined in FAR 32.001.

Benefits / Burdens of Oversight

Benefits of Oversight

- Transparency
- Ability to target any corrective action
- Accountability
- Protection of Whistleblowers
- Deterrence and detection of “fraud, waste and abuse”

Burdens of Oversight

- Significant increase in costs
 - Government and contractors
 - Another set of compliance plans
 - Gathering detailed reporting information
- Compliance with and liability under multiple, overlapping regimes
 - Existing audit requirements sufficient?
- Differing obligations at federal and state levels
- Agencies are not well prepared for new requirements
- Potential compliance costs and risk could deter participation in program

Burdens of Oversight (cont'd)

- Expansive Reach
 - Commercial Items and Commercial Off-the-Shelf items are covered
 - Actions under the simplified acquisition threshold are covered (currently \$100,000)
 - Many requirements will flow down to **all** subcontractors

Inspector General (IG) Act of 1978

IG Act of 1978

- Primary purpose
 - Promote economy, efficiency, and effectiveness in administration of programs and operations
 - Detection of fraud and abuse in such programs and operations
 - Keep agencies fully and currently informed about problems and deficiencies related to administration

IG Act of 1978 (cont'd)

- Broad grant of audit/access authority
 - Access to records, reports, audits, reviews, documents, etc.
 - Coordination of audits and investigations
 - Request assistance, as necessary
 - Use of non-federal auditors
 - Enter into contracts with public agencies and private persons
 - Subpoena power

IG Act of 1978 (cont'd)

- Protection against employee complaints
 - Non-reprisal for making a complaint or disclosing to the IG
 - IG will keep identity anonymous (if possible)
- Reports to Congress / Semi-annual reports
- Public Websites
 - Link to allow reporting
 - Reports & Audits publicly available

Future Oversight Trends

Future Oversight Trends

- Multiple, overlapping regimes
- Emphasis on transparency
 - Public Websites
 - Reporting Obligations
- Broad audit/access authority
- Expanded subpoena powers
- Whistleblowers incentives and protections

Future Oversight Trends (cont'd)

- Interplay between public and private investigations
- Voluntary/Mandatory disclosure obligations
- Creation of oversight boards (*e.g.*, RAAT and Council of the IG on Integrity & Efficiency)
- Macro & Micro oversight provisions

For more information on these topics and
other government contracts issues,
please visit our blog at

www.governmentcontractslawblog.com