ALI ABA

American Law Institute | American Bar Association

Continuing Leadership in Professional Education

TSPA06

Government Contracting: Practical Tips After ARRA 2009

May 6, 2009 | Telephone Seminar/Audio Webcast

800-CLE-NEWS | www.ali-aba.org

Study Materials

This is ALI-ABA

www.ali-aba.org

A nonprofit endeavor providing continuing professional education for lawyers since 1947.

How It All Started

In 1947 the American Bar Association (ABA) asked the American Law Institute (ALI) to collaborate in organizing a national program of continuing education of the bar. ALI, founded in 1923 in part "to promote the clarification and simplification of the law," was engaged in restating the law and drafting codes and model laws. ALI agreed to take on the task. The first of a series of Memoranda of Understanding between the parent organizations placed primary responsibility with ALI and provided for a joint committee to oversee ALI-ABA activities. An initial Carnegie grant carried the operation for about eight years when the program became—as it remains—self-sustaining.

What It Does Today

ALI-ABA's multimedia approach to continuing legal education comprises a comprehensive range of educational materials and services described below.

ALI-ABA Online

ALI-ABA makes its programs and publications available *directly to the office, laptop, and portable devices* from www.ali-aba.org—with the added conveniences of licensing, browsability, sampling, and downloadable forms. Subscriptions to libraries are available, organized by areas of practice.

Live Courses and Programs by Webcast and Telephone

ALI-ABA's more than 200 courses of study and programs via live webcast are attended each year by tens of thousands of lawyers and others in related professions. The faculties for these courses consist primarily of practicing lawyers who volunteer their time and expertise and, in many cases, forgo reimbursement of their out-of-pocket expenses to lecture and prepare written materials for the benefit of their professional colleagues. Although concentrated in the areas of business and commercial law, securities, taxation and estate planning, real estate, and government regulation, ALI-ABA's course curriculum includes a broad range of practice-oriented subjects, from skills courses to trial evidence and civil practice, to criminal law and legal issues in subjects of current public interest. ALI-ABA also offers courses via the telephone and online. Education in professional responsibility and ethics is a concern in each course and of special programs. Approximately 10% of the courses are new each year, the others being updates of core curriculum subjects. Week-long summer courses, some on university campuses, offer an academic retreat for study of a subject in depth.

Many ALI-ABA programs are cosponsored with law schools, sections of the ABA, the Federal Bar Association, the Environmental Law Institute, state and local CLE organizations, and other legal entities, as well as The Smithsonian Institution, the American Association of Museums, and others.

Electronic and Print Publications

ALI-ABA publishes seven traditional periodicals, four electronic periodicals, and a variety of books in both traditional and electronic formats. **Practice Texts** provide comprehensive coverage of a subject and are published as hardbound books of several hundred pages. **Formbooks** are published in a looseleaf binder format. Formbooks also are available on CD-ROMs to enable lawyers to download and adapt forms to their clients' needs. **Practice Checklist Manuals** are paperbound compilations of helpful articles on individual subjects selected from the pages of **The Practical Lawyer**® and other ALI-ABA magazines. **CD-ROMs** of selected ALI-ABA texts are also produced.

Additionally, study materials prepared for ALI-ABA Courses of Study are offered as a resource for further research.

Among ALI-ABA's periodicals are **The Practical Lawyer**®, which features concise, how-to-do-it articles for general practitioners; **The Practical Real Estate Lawyer**®, which treats similarly materials concerned with real property (forms and checklists from this magazine are available in a separate floppy disk subscription service); **The Practical Tax Lawyer**®, published with the

cooperation of the Section of Taxation of the ABA; and **The Practical Litigator**®.

All of ALI-ABA's periodicals and selected course materials are available online at www.ali-aba.org. Lawyers can subscribe to an entire year's worth of online issues, or purchase and access just the online issue, single article, or course paper that they need.

To advise lawyers of its wealth of CLE products, ALI-ABA issues a quarterly booklet, the **ALI-ABA CLE Review Catalog.** The **ALI-ABA Business Law Course Materials Journal** selects and republishes the best of the business law outlines and forms originally prepared for ALI-ABA Courses of Study, while the **ALI-ABA Estate Planning Course Materials Journal** does the same with materials from ALI-ABA estate planning courses.

Audio and Video Recordings

ALI-ABA offers recordings of virtually all of its live presentations in a growing number of convenient formats. The library of more than 2,000 programs includes courses of study, **ALI-ABA Video Law Review**® webcasts, telephone seminars, specially prepared lectures, and webcasts produced in ALI-ABA's studio. Also available are DVDs, audio mp3 CD-ROMs, and online programs.

ALI-ABA In-House

ALI-ABA In-House offers personal consulting and training assistance to law firms, corporate law departments, and government agencies for their in-house professional development programs. ALI-ABA's in-house training programs cover a wide range of skills areas, as well as areas of substantive law upon request. In addition, the almost 300 members of ALI-ABA In-House receive a quarterly newsletter, access to e-mail information and discussion forums, discounts on ALI-ABA programs, products, and services, and regular mailings of related information. ALI-ABA In-House also develops materials for lawyer training and regularly presents conferences on professional development topics.

Advancement of the Profession

ALI-ABA subsidizes a variety of activities to advance the quality and content of post-admission legal education and to enhance professional competence and professional responsibility. Among them are sponsorship of national conferences and studies of adult education and its unique characteristics, of mandatory CLE, of law practice quality evaluation methodologies, of bridge-the-gap transition training for the newly admitted lawyer, and of the quality of continuing legal education and the methods of measuring it. Most recently, ALI-ABA has published a guide for applying adult education techniques to continuing legal education and, as a public service effort, is developing new training materials to encourage and train lawyers to represent immigrants in asylum cases.

In addition, ALI-ABA has developed training materials for lawyers in the areas of negotiation skills, real estate transactions, and corporate transactions.

A CLE Resource

One of ALI-ABA's primary functions, from its very beginning, has been to serve as a resource for national, state, and local agencies involved in continuing legal education. ALI-ABA was a founding member of ACLEA, which, through the interchange of knowledge and techniques, advances the proficiency of continuing legal education professionals.

ALI-ABA's course materials and programs are available to all who plan and conduct post-admission legal education activities, and senior staff members, whose average tenure is in excess of 15 years, are always ready to work with and assist others.

Governance and Staffing

ALI-ABA operates under a Memorandum of Understanding between the American Law Institute and the American Bar Association and is governed by a Board of Directors composed of 13 persons, including 12 regular members and the President. In addition, the ALI Director, the ABA Executive Director, and the ALI Treasurer are non-voting ex officio members of the Board.

The ALI-ABA staff consists of 80 employees, including 19 lawyers.

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American Law Institute
American Bar Association
Continuing Professional Education

As of December 2008

ALI ABA

American Law Institute | American Bar Association

Continuing Leadership in Professional Education

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ALI-ABA Audio Seminar

Government Contracting:
Practical Tips After ARRA 2009

May 6, 2009
Telephone Seminar/Audio Webcast

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PROGRAM SCHEDULE
Telephone Seminar/Audio Webcast
Government Contracting: Practical Tips after ARRA 2009— TSPA06
for May 6, 2009

Program Schedule	Eastern	Central	Mountain	Pacific & Arizona	Alaska	Hawaii
Program Begins	12:30 p.m.	11:30 a.m.	10:30 a.m.	9:30 a.m.	8:30 a.m.	6:30 a.m.
Adjournment	2:00 p.m.	1:00 p.m.	12:00 p.m.	11:00 a.m.	10:00 a.m.	8:00 a.m.

Program (*All Times Eastern Daylight)*

12:30 p.m. Program Begins.

Faculty will discuss how recent legislation and rule-making has changed the landscape of procurement policy, including:

- Contractor challenges from the Stimulus Bill (ARRA 2009)
- New FAR rules requiring mandatory disclosure of fraud and significant overpayments
- The Defense Authorization Act(s), including the new database of contractor activity

2:00 p.m. Program Ends.

Scope and Purpose:

The American Recovery and Reinvestment Act of 2009 provides new opportunities for businesses to contract with the federal government. However, this legislation, the Defense Authorization Acts (of 2008 and 2009), and changes to mandatory reporting rules for contractors also institute sweeping federal procurement reform.

Transparency in the awarding of contracts, the new Recovery Board's oversight, and the focus on contractor accountability, as outlined in President Obama's March 4th memo on procurement reform, herald a new era in federal contracting. Therefore, current and potential federal contractors need guidance to implement newly mandatory requirements.

Robert A. Burton, former Deputy Administrator of the Office of Federal Procurement Policy, now a partner with Venable LLP, Washington, D.C.; **Paul A. Debolt**, a Venable partner with extensive federal contract law experience, Washington, D.C.; and **David S. Williams**, CEO of Deloitte Financial Advisory Services LLP, New York City, will offer practical advice on how to navigate the complex and rule-driven procurement process.

Suggested Prerequisite: Limited experience in practice area
Educational Objectives: Information designed to keep practitioners current in the practice area; training designed to maintain practitioners' competence.
Level of Instruction: Intermediate
Total 60-minute hours of instruction: 1.5. **Total 50-minute hours:** 1.8.

ALI-ABA Audio Seminar

Government Contracting: Practical Tips After ARRA 2009
May 6, 2009
Telephone Seminar/Audio Webcast

PLANNER & FACULTY:

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FACULTY BIOGRAPHIES

Government Contracting: Practical Tips after ARRA 2009
Telephone Seminar/Audio Webcast – Wednesday, May 6, 2009 (TSPA06)

PLANNER & FACULTY:

Robert A. Burton is a nationally-recognized federal procurement expert, who focuses his practice on assisting government contractors navigate the complex and rule-driven procurement process. He represents companies that conduct business across the entire spectrum of the federal government, from the largest defense contractors and systems integrators to small businesses that provide products and services to the government.

A thirty-year veteran of procurement law and policy development, Mr. Burton served in the Executive Office of the President as Deputy Administrator of the Office of Federal Procurement Policy (OFPP), the nation's top career federal procurement official. He also served as Acting Administrator for a total of two years during his seven-year tenure at OFPP. Prior to joining OFPP, Mr. Burton served as a senior acquisition attorney in the Department of Defense (DoD), supporting the acquisition and management of large weapon systems contracts. Throughout his career, he has displayed an ability to work effectively with industry, the military services, the civilian agencies, and Congress.

As a result of his extensive background in procurement law and policy, Mr. Burton is uniquely positioned to assist clients in resolving contract problems and policy issues with the federal agencies and Congress. He is also especially well-suited to assist clients with suspension and debarment proceedings, contract cost disputes, internal corporate investigations, and corporate compliance and ethics programs.

As Deputy Administrator of OFPP, Mr. Burton was responsible for the government's acquisition policy and procurement guidance to all Executive Branch agencies. His office was charged with developing policy affecting more than $400 billion in annual federal spending - a figure that doubled during Mr. Burton's time in office as a result of the Iraq War and other major events.

At OFPP, Mr. Burton was instrumental on a number of fronts, including preparing the Administration's policy positions and testimony on proposed acquisition legislation; working with House and Senate committees on the development of acquisition reform proposals; and serving as a principal spokesperson for government-wide acquisition initiatives. He also served as the Executive Director of the Chief Acquisition Officers (CAO) Council. The CAO Council is comprised of the Chief Acquisition Officers from each federal agency. Mr. Burton also managed the activities of the Federal Acquisition Regulatory (FAR) Council, which has statutory authority to promulgate the government's procurement regulations.

Prior to joining OFPP in 2001, he spent over twenty years as a senior acquisition attorney with the Department of Defense. At the Defense Contract Management Agency, he negotiated the resolution of high-profile contract disputes with major defense contractors and provided advice on cost allowability issues. He served as general counsel for DoD's Defense Energy Support

Center as well as associate general counsel for the Defense Logistics Agency (DLA), the DoD component responsible for purchasing most of the general supplies and services used by the military services. At DLA, Mr. Burton served as counsel to the agency's suspension and debarment official and managed the agency's fraud remedies program, working with the Department of Justice and the criminal investigative agencies to coordinate appropriate remedies in major procurement fraud cases.

FACULTY:

Paul A. Debolt is a partner at the Washington, D.C. office of Venable, LLP. He assists companies and individuals on all issues that arise from doing business with the federal government, including civil fraud. He is experienced in the competitive source selection process, defending or prosecuting bid protests, issuing advice concerning compliance with government regulations and laws during the performance of a contract, and helping to resolve disputes and claims during contract performance or as a result of contract termination. Mr. Debolt also has significant experience with due diligence in connection with the merger and acquisition of government contractors, as well as post-transaction matters such as novations. He counsels clients on the Service Contract Act, the Civil False Claims Act, joint ventures and teaming agreements, prime-subcontractor disputes and internal investigations.

Mr. Debolt has extensive government contracts law experience and applies a team approach which ensures that clients receive the benefit of firm-wide strength in all related areas. Mr. Debolt supports Venable's large and small government contracts clients including major systems manufacturers, providers of information technology and other service providers. He also regularly participates in the firm's *pro bono* activities.

Recently, Mr. Debolt has conducted a number of internal investigations of both large and small companies involving questioned contract certifications and cost charging. Mr. Debolt has also represented a number of clients with claims and intellectual property disputes before the Court of Federal Claims, the Armed Services Board of Contract Appeals and various federal district courts. Other representative matters include:

- For a small business, Mr. Debolt made a successful presentation to AUSA's office that resulted in a decision by government not to pursue a civil false claim with an estimated value of over $400,000.
- On behalf of a large defense contractor, Mr. Debolt negotiated a multi-million dollar settlement for claims arising from charges to a contract with the United States Postal Service for coding services.
- On behalf of a service company, he negotiated a multi-million settlement of a claim arising from an undefinitized letter contract.
- Mr. Debolt conducted an internal investigation for a non-profit into alleged mischarging to numerous government contracts and grants, and successfully negotiated a favorable settlement with an AUSA.

David S. Williams is the Chief Executive Officer of Deloitte Financial Advisory Services LLP (Deloitte FAS) in New York City. He has more than 25 years of experience providing advice and counsel to clients engaged in business transactions or facing critical business events.

During his tenure with Deloitte FAS, Mr. Williams has served in various leadership roles spanning Deloitte FAS' two major business arms—Forensic & Dispute Services and Advisory Services. Most recently, he was the national leader of Deloitte FAS' Advisory Services practice. Earlier, he was the national leader of Deloitte FAS' Valuation Services practice and a principal in the organization's Forensic & Dispute Services practice. Since 2004, Mr. Williams has been a member of the executive committee of Deloitte FAS and the boards of both Deloitte FAS and Deloitte LLP.

He has testified as an expert in litigation, arbitration, mediation and other alternative dispute resolution (ADR) matters; served as an arbitrator/mediator; and consulted with management, executives and boards of directors.

Mr. Williams has experience in the calculation of damages in commercial disputes involving breach of contract, financial and securities fraud, wrongful termination, adjustment of purchase price, regulatory noncompliance and other causes of action. He has provided consulting services to various industries on business and financial issues, including strategic planning and analysis, new business development and pricing, manufacturing and service delivery, cost measurement and control, performance measurement, financial accounting and reporting and the associated compliance requirements.

Mr. Williams earned his undergraduate degree in Economics from the University of Pennsylvania and his M.B.A. in Finance from the Wharton School of the University of Pennsylvania. He is a member of the American Bar Association. In addition, he serves on the board of Teach for America New York.

ALI-ABA Audio Seminar

Government Contracting: Practical Tips After ARRA 2009

May 6, 2009
Telephone Seminar/Audio Webcast

Government Contracting: Practical Tips After ARRA 2009
PowerPoint Presentation

By

Robert A. Burton
Paul A. Debolt
Venable LLP
Washington, D.C.

VENABLE LLP

Government Contracting: Practical Tips After ARRA 2009

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The Current Environment

- Federal procurement spending has increased from approximately $200 billion to over $500 billion during this decade
- ARRA contains $787 Billion
- Congress and the Obama Administration has issued numerous laws, regulations and Executive Orders that impact the Federal acquisition system
- Enormous challenges face the acquisition workforce and government contractors

VENABLE LLP

Reform Highlights

- 2008 and 2009 Defense Authorization Act procurement reform provisions
- New mandatory disclosure requirements
- New ethics program requirements
- Personal and Organization Conflict of Interest Rules
- EOs relating to employee rights to unionize
- ARRA specific requirements
- President Obama's Procurement Memorandum (March 4, 2009)

Impact of New Contracting Environment

- Increased transparency
- Increased accountability
- Increased competition
- Increased oversight and reporting requirements
- Preference for firm-fixed-price contracts
- Prohibition against sole-source procurements absent justification and adequate oversight
- Increased scrutiny by Congress/IGs/DCAA
- Increased risk of suspension and debarment

VENABLE LLP

The American Recovery and Reinvestment Act of 2009

Deloitte.

Government Contracting: Practical Tips after ARRA 2009

Points of View on Transparency and the False Claims Act

David S. Williams
Deloitte Financial Advisory Services LLP
May 2009

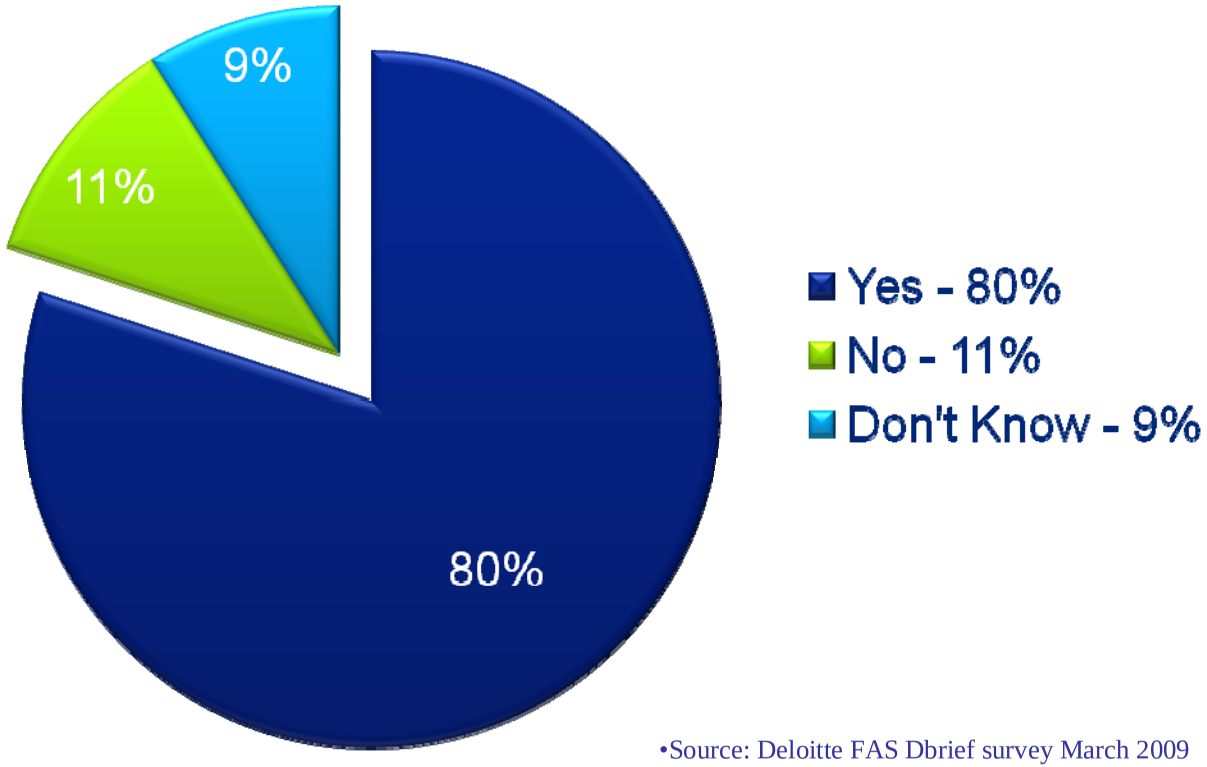
Background

- Conducted polling during the Deloitte Dbriefs webcast, "Oversight of the Fiscal Stimulus Bill: Transparency in a New Age" – March 23, 2009.
- Discussed concept of fiscal stimulus in economic terms, overview of the ARRA, the False Claims Act and tips for avoiding fraud, waste and abuse.
- Audience:
  - Financial and other business executives
  - Mixture of Deloitte clients and non-clients
  - Both large and not-so-large organizations
  - Generally not government contractors

More Regulation?

Q1

Do you think the emphasis on transparency and accountability in Government spending will translate into wider regulations for all industries/businesses? (n=1546)

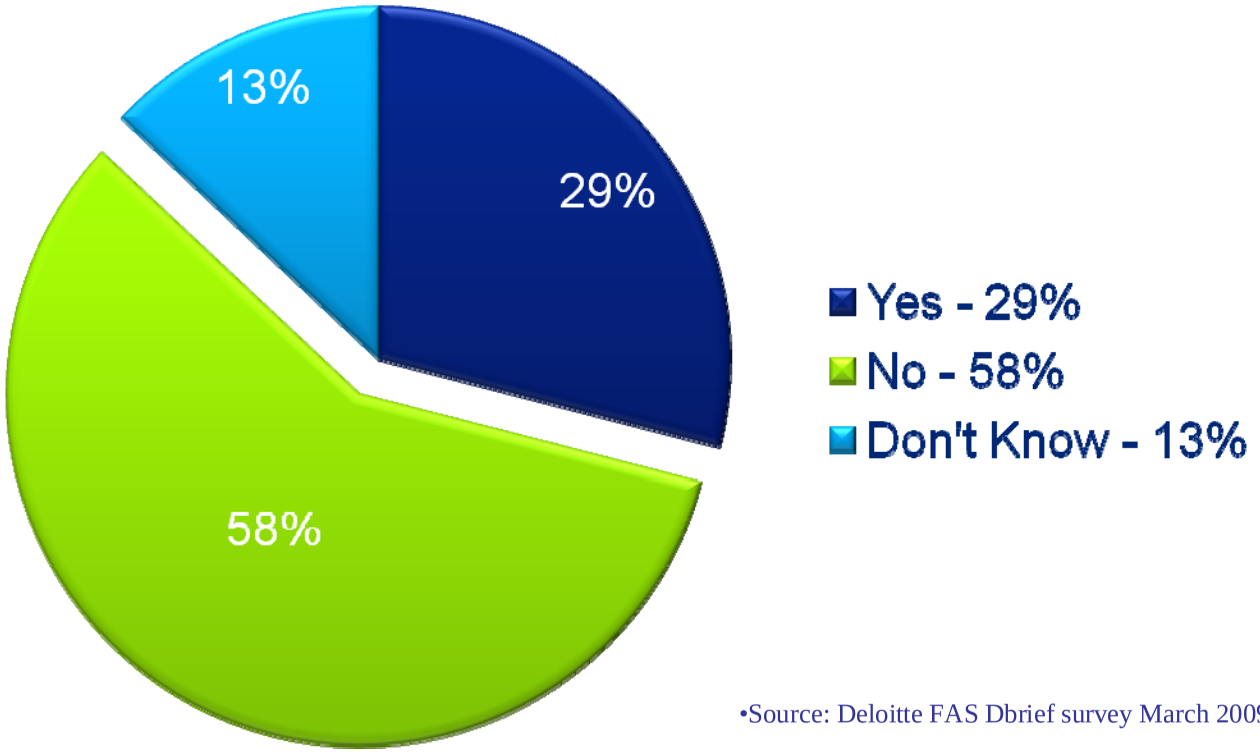


•Source: Deloitte FAS Dbrief survey March 2009

Level of Transparency?

Q2

Do you think it's possible to attach the level of transparency promised by the Obama administration to spending resulting from the fiscal stimulus? (n=1713)

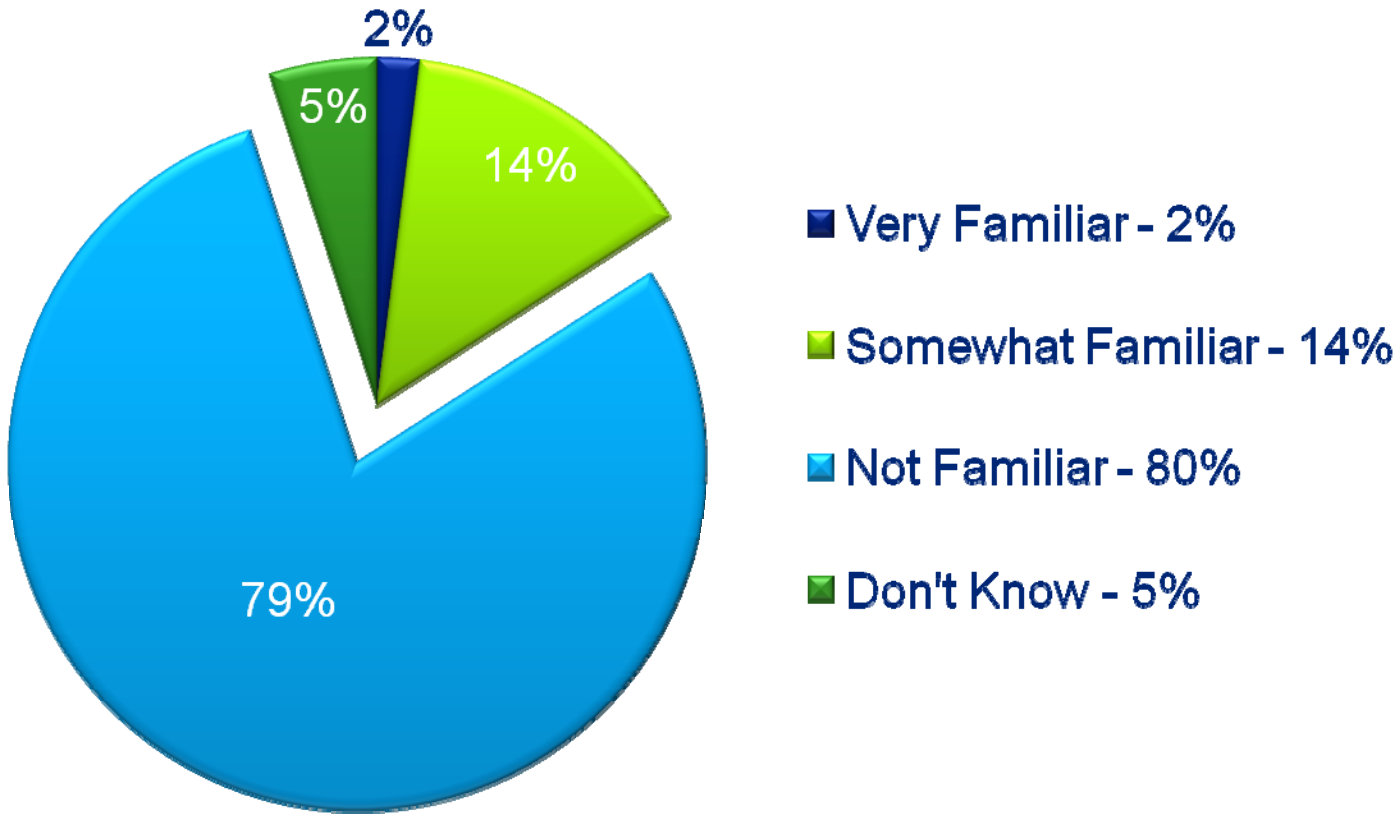


•Source: Deloitte FAS Dbrief survey March 2009

False Claims Act?

Q3

How familiar are you with the False Claims Act? (n=1,725)

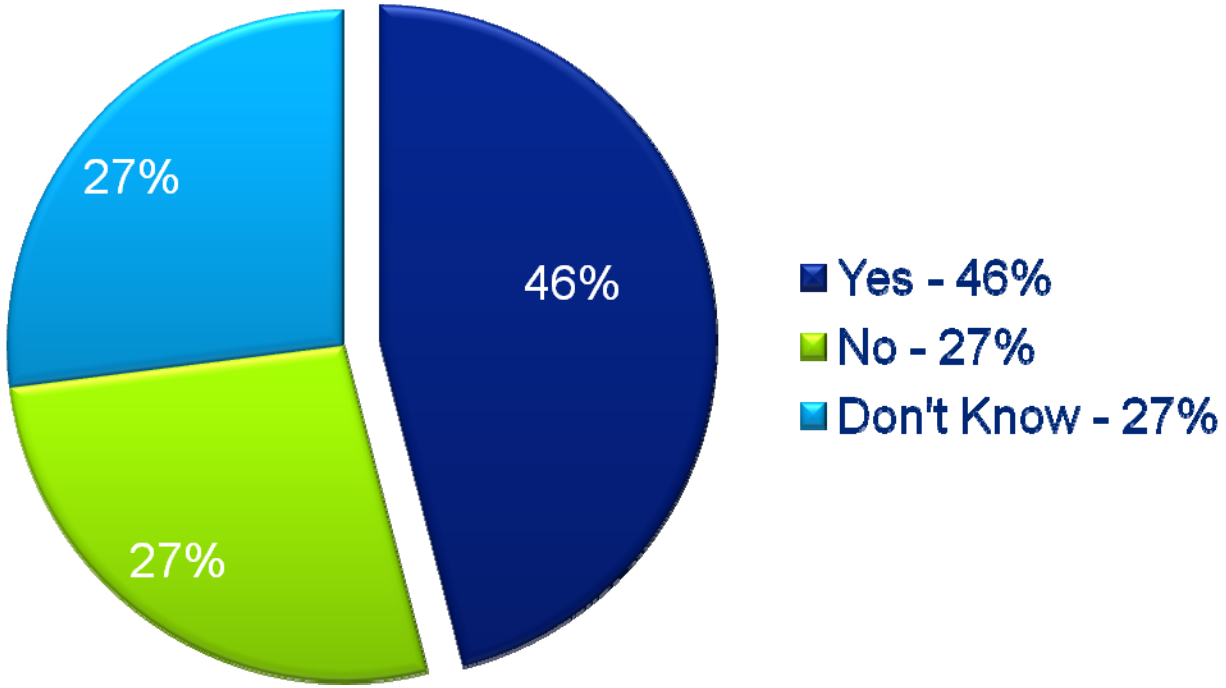


•Source: Deloitte FAS Dbrief survey March 2009

Stronger FCA?

Q4

Do you believe that the False Claims Act needs to be strengthened? (n=1,653)

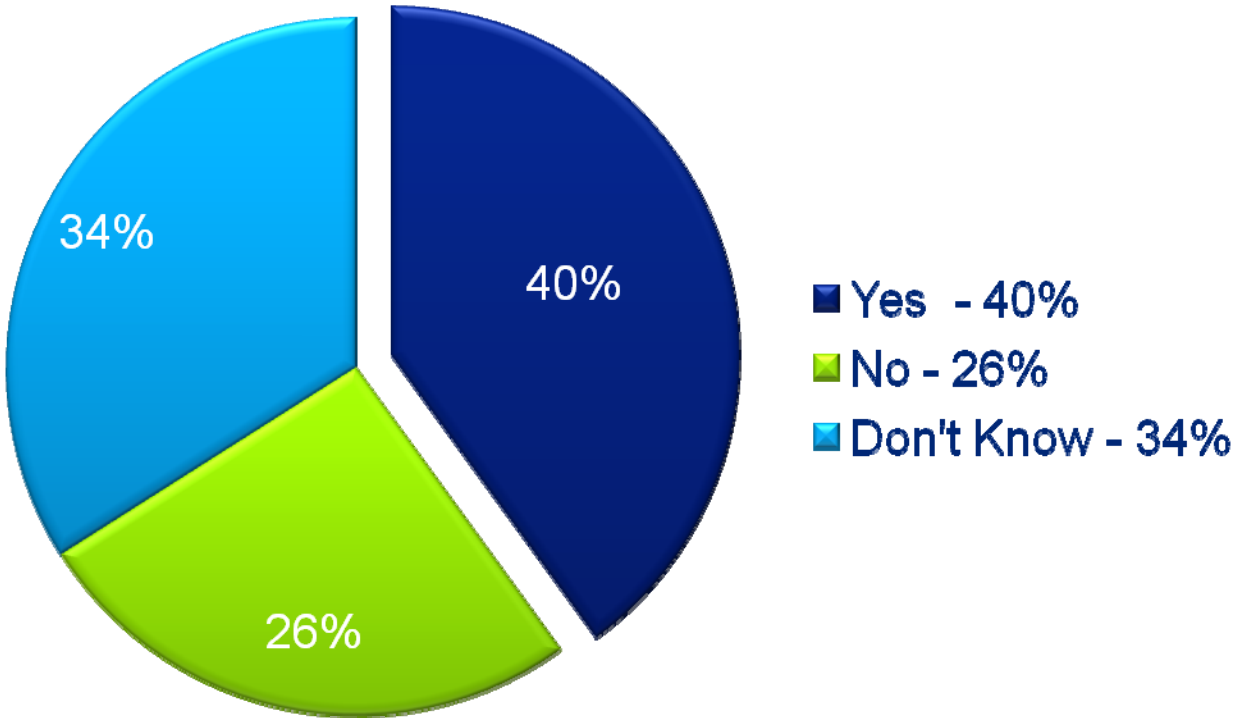


•Source: Deloitte FAS Dbrief survey March 2009

Impact on Anti-fraud programs and Controls?

Q5

Even if your company will not directly benefit from the stimulus, is the emphasis on transparency and ethics leading your company to address its anti-fraud programs and controls? (n=1,541)



•Source: Deloitte FAS Dbrief survey March 2009

About Deloitte

•"As used in this document, "Deloitte" means Deloitte LLP and its subsidiaries. Please see *www.deloitte.com/us/about* for a detailed description of the legal structure of Deloitte LLP and its subsidiaries."

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Practical Tips for Navigating the Current Regulatory Environment

VENABLE LLP

ARRA

- ARRA did not fundamentally change the way the Government conducts business
- Continue to look for business opportunities
- Continue to market to the government
- Analyze the contracts or other procurement vehicles that company has in place

VENABLE LLP

ARRA

- ARRA money is not free
- Additional regulations apply to money funded with ARRA money
- Set up procedures to capture and report required data

VENABLE LLP

"Brave New World of Government Contracting"

- Impact will depend on current operations
- Less impact for companies that have a robust compliance program and that frequently report issues to contracting officer
- Greater impact on companies whose compliance programs have been dormant or are new to Federal marketplace

Practical Tips

- Establish robust compliance program
- Educate your employees
- Flow-down requirements to subcontractors
- Coordinate disclosures to Agency IG's with suspension and debarment officials
- Ensure accounting system captures costs and that records are readily available to DCAA

VENABLE LLP

Practical Tips

- Coordinate disclosures to Agency IGs with suspension and debarment officials
- Ensure accounting system captures costs and that records are readily available to DCAA

VENABLE LLP

Questions

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President Obama and Congress Take Drastic Steps to Increase Oversight of Government Contracts

By

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VENABLE LLP

government contracts update
A PUBLICATION OF VENABLE'S GOVERNMENT CONTRACTS GROUP

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President Obama and Congress Take Dramatic Steps to Increase Oversight of Government Contracts

President Obama and the 111th Congress, now just weeks in office, are taking an aggressive approach with federal contractors and increasing oversight of government contracting. During the past few weeks, the President signed several executive orders mandating new employment policies for government contractors. From an oversight perspective, the Senate created an ad hoc subcommittee with the sole purpose of overseeing federal contracting and the recent American Recovery and Reinvestment Act of 2009 ("ARRA") includes a requirement for the creation of a Recovery Act Accountability and Transparency Board.

ARRA includes several provisions of significance for government contractors, including a further delay to the proposed withholding tax for government contractors and a "Buy American" provision.

President Obama Issues Four Employment-Related Executive Orders

On January 30, 2009, President Obama signed three executive orders relating to: 1) the displacement of workers under service contracts; 2) the notification of employees' rights under federal labor law; and 3) the unallowability of costs for certain activities related to the prevention of unionization; which significantly change the employment landscape for federal contractors. For a detailed analysis of each of these executive orders, please see Venable's Labor & Employment News E-lert at http://www.venable.com/docs/pubs/2086.pdf.

More recently, on February 6, 2009, President Obama signed Executive Order 13502 that encourages executive agencies to consider requiring the use of "project labor agreements" in the awarding of construction projects that will cost the federal government $25 million or more. Under this Order, a project labor agreement is "a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project…." Any project labor agreement pursuant to this Order shall:

(a) bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(b) allow all contractors and subcontractors to compete for contracts and subcontractors without regard to whether they are otherwise parties to collective

bargaining agreements;

(c) contain guarantees against strikes, lockouts, and similar job disruptions;

(d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(e) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(f) fully conform to all statutes, regulations, and Executive Orders.

The FAR Council shall issue any necessary implementing regulations within 120 days of the date of the Order, and the Director of Office of Management and Budget is expected to provide the President, within 180 days of the date of the Order, with recommendations about whether broader use of labor agreements will promote economical, efficient, and timely completion of such projects.

Senate Forms Subcommittee to Oversee Federal Contracting

On January 29, 2009, Senator Joseph Lieberman (I-Conn.) announced that he was creating an ad hoc subcommittee within the Homeland Security and Government Affairs Committee, the committee he chairs. This subcommittee will be chaired by Senator Claire McCaskill (D-Mo.).

In a statement regarding the new subcommittee, Senator Lieberman referred to government contracting as a high-risk area for waste, fraud, abuse, mismanagement, and in need of reform. He also added that he was "certain that [Senator McCaskill] will approach her new responsibilities with unmatched vigor to improve the value of all the taxpayer dollars devoted to federal contracting."

Senator McCaskill is a former prosecutor and state auditor and has sponsored bills to strengthen the power of federal agencies' Inspectors General. Senator McCaskill's web site states that she "believes that one way to reduce government spending is to target government contractors." Senator McCaskill, in accepting the new position, stated "we all know that outrageous contracting abuses occur in every facet of government. I can't wait to get to work…" Undoubtedly, government contractors will face increased scrutiny from the 111th Congress.

Notable ARRA Provisions

"Recovery Act Accountability and Transparency Board"

ARRA includes the creation of a Recovery Act Accountability and Transparency Board ("Board") that will "coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse." This Board will be composed of a chairperson, and the Inspectors General of the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Justice, Transportation, Treasury, and the Treasury Inspector General for Tax Administration, as well as any other Inspector General designated by the President from an agency that obligates ARRA funds.

Generally, "[t]he Board shall conduct audits and reviews of spending of covered funds and coordinate on such activities with the inspectors general of the relevant agency to avoid duplication and overlap of work." However, the ability of the Board to "request[] that an inspector general conduct or *refrain from conducting* an

audit or investigation" (emphasis added) has raised some concern for the Board's detractors that believe it restricts the independence of inspectors general. On the other hand, proponents argue that the Board is composed of at least 10 Inspectors General, which assures the autonomy of inspectors general from the Board.

Regardless of the concerns relating to independence of Inspectors General on the Board, contractors accepting stimulus funds should remain mindful that such contracts and funds will come with significant strings and oversight.

Postponement of Implementation of the Government Contractor 3% Tax Withholding Requirement

The final version of the ARRA, which President Obama signed on February 17, delays by one year the implementation of the 3% tax withholding requirement applicable to payments made to government contractors. The new effective date of the withholding requirement will begin on January 1, 2012. The final version of the "stimulus bill" negotiated in conference last week comes as a disappointment to industry because Section 1541 of the original House bill, H.R. 1, included language repealing the 3% tax withholding requirement in its entirety. Instead, Congress adopted the Senate version, which only delays implementation by another year.

Under current law, Federal, State, and local governments "making any payment to any person providing any property or services . . . shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment." 26 U.S.C. § 3402(t). The automatic withholding could prove to be a considerable burden on government contractors, especially those that operate on very low-margins and rely on prompt and complete government payments to meet their short-term cash needs. A House bill in the 110th Congress sought to repeal the 3% withholding law, but did not gain much traction. On December 5, 2008, the Internal Revenue Service issued a proposed rule to implement the withholding requirement, with comments due by March 5, 2009. *See* 73 FR 74082. Although not the repeal hoped for by contractors, the one-year delay suggests Congress may be willing to reconsider the withholding requirement before it is implemented.

Controversial "Buy American" Provision

The ARRA includes a "Buy American" provision that despite being watered down from an earlier Senate version is proving controversial and angering numerous U.S. trading partners.

This provision provides that any "iron, steel, and manufactured goods used" in any project with funds appropriated by ARRA shall be produced in the U.S. Department heads may waive the application of the provision if it is: a) "inconsistent with the public interest;" b) the iron, steel and manufactured goods at issue are not "in sufficient and reasonably available quantities and of a satisfactory quality;" or c) the use of domestically produced iron, steel or manufactured goods "will increase the cost of the overall project by more than 25 percent."

Interestingly, however, the provision includes a requirement that it "shall be applied in a manner consistent with United States obligations under international agreements." Therefore, although the provision alarms many U.S. trading partners, it is unclear whether it will be implemented in a manner so as to allow the procurement of iron, steel and manufactured goods from some or all U.S. trading partners.

E-Verify Update

On January 30, 2009, President Obama postponed the implementation of the E-Verify Rule until May of this year. This rule requires federal contractors to check if newly-hired employees are not undocumented immigrants. For more information on this rule, please visit: http://www.venable.com/docs/pubs/2071.pdf

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May 6, 2009
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President Obama Issues Memorandum to Heads of Executive Departments Concerning Government Contracting

By

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government contracts special update
A PUBLICATION OF VENABLE'S GOVERNMENT CONTRACTS TEAM

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President Obama Issues Memorandum to the Heads of Executive Departments and Agencies Concerning Government Contracting

On March 4, 2009, President Obama issued a policy Memorandum for the Heads of Executive Departments and Agencies regarding Government Contracting. The memorandum contains a number of broad policy pronouncements and sets forth timetables by which the Government must complete a review of federal contracting procedures as well as for issuing "tough new guidelines" on how the Government does business. In his remarks accompanying the signing of the memorandum, the President described the procurement system as "broken" and stated that the Federal government had failed to keep the public trust. In particular, some of the concerns and failures highlighted by the President were: fraud; massive cost overruns; contractors overseeing other contractors; and, a lack of oversight and accountability.

HIGHLIGHTS

- Preference for firm-fixed price contracts
- Prohibition against non-competitive contracts absent justification and adequate oversight
- Limited use of cost-reimbursement contracts
- Ensure inherently governmental functions performed by Government

Background to President's Obama's Policy Memorandum

Between 2001 and 2008, federal spending on Government contracts almost doubled to $500 billion. In addition, during this same period, the Government significantly increased the number of dollars awarded to contractors without full and open competition as well as the number of dollars obligated through cost-reimbursement contracts. More significantly, reviews by various Inspectors General and the Government Accountability Office ("GAO") have shown that "noncompetitive and cost-reimbursement contracts have been misused, resulting in wasted taxpayer resources, poor contractor performance, and inadequate accountability for results." Similarly, a GAO study in 2008 found cost overruns of 26 percent on 95 major defense acquisitions.

In these difficult times, the President stated that these problems cannot continue. Rather, as American families continue to face difficult financial challenges every day, the American people must be assured that the Federal procurement system functions efficiently and effectively such that it provides value for the taxpayers. No longer should the Government buy things that it does not need or pay more for items than it needs to pay.

President Obama's Procurement Policy and Associated Agency Requirements

To achieve these objectives, the President issued the following broad policy objectives for Federal procurements:

- a preference for firm-fixed-price contracts;
- a prohibition against noncompetitive contracts ***except*** where their use can be ***fully justified*** and their performance monitored to protect the taxpayer;
- a limit on the use of cost-reimbursement contracts, except in the circumstances where an agency cannot sufficiently allow for a fixed-price contract;
- sufficient Government capacity to manage the contracting process from start to finish; and,
- ensure that functions that are inherently governmental in nature are performed by Government employees rather than outsourced.

In addition, the President directed the Director of the Office of Management and Budget ("OMB"), in collaboration with the heads of other executive agencies, to develop and issue by July 1, 2009 guidance for the identification and review of contracts that "are wasteful, inefficient, or not otherwise likely to meet the agency's needs" as well as the appropriate corrective action. Further, the President directed these individuals to issue guidance by September 30, 2009 to (1) maximize the use of competition and establish the appropriate use and oversight of non-competitive procurements; (2) govern the use and oversight of all contract types; (3) "assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately"; and (4) clarify the situations where the government may outsource for services. It is unclear whether the "guidance" will be in the form of changes to the Federal Acquisition Regulation.

Implications for Government Contractors

Some would argue that the President's policy simply reinforces the policies and regulations that already exist. The Federal Acquisition Regulation sets forth regulations regarding the use of sole-source procurements and cost-reimbursement contracts. Likewise, there are procedures in place to determine when outsourcing is permitted. Thus, the problem is not with a lack of rules or policies, but rather the lack of sufficient personnel to perform the functions needed for the Federal procurement system to function effectively and efficiently.

Indeed, for years commentators have bemoaned the fact that the size and quality of the Federal acquisition workforce has not kept pace with the level of Government spending. Consequently, the current problems have arisen, in many cases, simply from a lack of adequate and experienced personnel. These policies arguably do little to change this short-fall and, in some instances, could exacerbate the problem by focusing the Government's resources on monitoring, reporting and enforcement, rather than on recruiting and retaining a high-quality workforce to award and administer contracts.

Those that take this view, however, do not appreciate the impact that the new administration will have on Federal procurements. Already, the President has

PRACTITIONER TIPS

- Establish effective compliance programs
- Review and strengthen program controls, including the establish-ment of internal reporting procedures
- Implement frequent training regarding rules and regulations issued by Government

issued four Executive Orders containing policies relating to labor and unions and has established an oversight board to monitor the stimulus money awarded through contracts and granting. This increase in oversight will invariably lead to more allegations of fraud and increased investigations of companies, whether or not such allegations are well-founded and without regard to the ongoing systematic causes of any noncompliances. Likewise, these changes may inhibit government contracting personnel from implementing creative solutions to problems for fear of being second-guessed, or force more cases to be resolved through claims simply because a government official does not want to be viewed as being supportive of a contractor.

To protect themselves in this new environment, contractors must have an established and effective compliance program. In fact, most contractors are now required by the FAR to have compliance programs and internal control systems in place. The FAR even outlines certain features that the programs must include. Likewise, contractors will have to ensure that their workforce receives frequent training to ensure that they maintain awareness of the evolving regulatory framework in which they work. Finally, contractors must ensure that they have adequate reporting procedures in place, so they can identify problems as quickly as possible and bring possible violations to the attention of their Government counterparts. Failure to have adequate compliance programs and controls in place can be a recipe for disaster in this new oversight and accountability environment.

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FAR Councils Issue Five Interim Rules Implementing Key Provisions of the American Recovery and Reinvestment Act of 2009

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FAR Councils Issue Five Interim Rules Implementing Key Provisions of the American Recovery and Reinvestment Act of 2009

On March 31, 2009, the FAR Councils issued five interim rules implementing important provisions of the American Recovery and Reinvestment Act of 2009 ("Recovery Act" or "the Act"), Pub. L. 111-5, affecting government contracts funded or partially funded by Recovery Act appropriations. To further the Act's goal of maintaining transparency over the use of such funds, these rules, among other things: create affirmative (and potentially burdensome) reporting obligations on the part of contractors; require certain contracting actions to be published online; and allow government officials to interview contractor and subcontractor employees during audits. Perhaps most significantly, one of the new rules prohibits government contractors from retaliating against employees that report on the alleged misuse of Recovery Act funds and creates a new source of liability, including a civil cause of action, for government contractors that retaliate against such employees.

These rules apply to solicitations and contracts awarded on or after March 31, 2009, including those for the purchase of commercial items and acquisitions below the simplified acquisition threshold. Additionally, contracting officers are required to modify existing contracts, on a bilateral basis, to include the new implementing clauses if future orders will use Recovery Act funds.

Whistleblower Protections (FAR Case 2009-012)

This interim rule implements Section 1553 of the Recovery Act, which establishes protections for whistleblowers of employers that receive funds under the Act. Specifically, a new FAR 3.907 prohibits non-federal employees from "discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information" to the government. The rules define covered information as information that the employee reasonably believes is evidence of gross mismanagement or gross waste of Recovery Act funds, or a violation of law or regulation related to an agency contract funded by Recovery Act funds. A new FAR Clause 52.203-15 requires contractors to post notices of rights and remedies for whistleblowers under the Act.

This rule also establishes procedures for filing complaints of reprisal to agency inspector generals. If an employee affirmatively establishes that his or her disclosure of covered information was a contributing factor for the reprisal, and the employer is unable to show by clear and convincing evidence that it would have taken action in the absence of the disclosure, agencies are authorized to provide relief. Such relief includes: ordering the employer to take affirmative action to abate the reprisal; reinstatement of the employee

along with the payment of compensatory damages, benefits, and back pay; and payment of attorneys' fees related to the filing of the reprisal complaint. The rule also creates a de novo civil cause of action in federal district court if the agency denies relief or fails to investigate the complaint. Moreover, the rule requires agencies to request the Department of Justice to file an enforcement action in district court if an employer fails to comply with an order from the agency.

Publicizing Contract Actions (FAR Case 2009-010)

Pursuant to FAR Subpart 5.7, agencies are required to post proposed contracting actions online (at https://www.fedbizopps.gov), explaining in clear and unambiguous language the products or services to be acquired. This rule implements the Recovery Act requirements that: (1) contracting actions exceeding $25,000 funded or partially funded by the Act be posted online in order to enhance public transparency; and (2) award notices, including modifications and orders under task order contracts, exceeding $500,000 be posted online. The notices required under this rule do not replace existing publication requirements for government contracting opportunities.

The most significant aspect of this rule may be that it mandates that notices for any contract action (regardless of value) that is not fixed-price or competitively awarded must include the agency's rationale for using other than fixed-price and/or a competitive approach. See FAR 5.705(b) (as amended). As a result, contractors receiving cost-type contracts funded by the Recovery Act may anticipate greater scrutiny not only from the public, but from competitors and disappointed offerors that may be considering potential grounds for a bid protest.

Contractor Reporting Requirements (FAR Case 2009-009)

This rule implements the Recovery Act's requirements that contractors report quarterly on their use of Recovery Act funds. Reports under this rule will be posted online and available to the public for review. The rule creates a new FAR Clause 52.204-11 which will be incorporated into contracts funded or partially funded by Recovery Act appropriations, including contracts for commercial-off-the-shelf items and contracts below the simplified acquisition threshold.

Under the new clause, contractors must report, among other things, the amount of Recovery Act funds invoiced during the reporting period, all significant services or supplies delivered, a description of the overall purposes and expected outcome or results of the contract, and an assessment of the contractor's progress toward the completion of the overall purpose. Contractors must also describe the employment impact of the work funded by the Act, which includes providing an estimate of the number of jobs created or retained by the prime contractors.

Large contractors receiving Recovery Act funds must also report the names and total compensation of each of the five most highly compensated officers for the year in which the contract was awarded. This information is only required, however, if the contractor receives $25 million or more in annual gross revenue from federal contracts, 80% or more of its annual gross revenue is from federal contracts, and the information is not already available to the public under Securities Exchange disclosure laws. Many of these requirements flow-down to certain subcontractors receiving more than $25,000 in Recovery Act funds.

Government Accountability Office/Inspector General Access (FAR Case 2009-011)

This interim rule creates alternate clauses for FAR 52.214-26, Audit and Records—Sealed Bidding, FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and FAR 52.215-2, Audit and Records—Negotiation. The alternative clauses are to be used in any contract receiving Recovery Act funds, including commercial contracts, contracts for commercial-off-the-shelf items, and contracts below the simplified acquisition threshold.

The alternate clauses grant the Government Accountability Office ("GAO") access to examine any of the contractor's or subcontractor's records that relate to transactions under the contracts and to allow them to interview any officer or employees regarding such transactions. The alternates also grant agency inspector generals the same authority, but only at the prime contractor level (i.e., inspector generals may not interview subcontractor employees).

The issuance of this rule coincides with a similar interim rule implementing a provision in the National Defense Authorization Act of 2009, which amends these same FAR clauses to allow the GAO to interview current employees relating to transactions under their contracts, except under commercial item contracts. See FAR Case 2008-026. Thus, GAO now has similar authority to interview contractor employees when conducting audits, even under contracts not funded by the Recovery Act.

Buy American Act Requirements for Construction Material (FAR Case 2009-008)

Section 1605 of the Recovery Act applies the Buy American Act's domestic source restrictions to construction projects funded by the Act, to the extent such restrictions are not inconsistent with trade agreements. These restrictions apply to any recipient of Recovery Act funds, including state and local governments and their contractors. Specifically, the implementing rule prohibits the use of Recovery Act funds or appropriations made available under the Act for construction, alteration, maintenance, or repair of a public building or public work unless: (1) the public building/work is in the United States; and (2) all of the steel, iron, and "manufactured goods" used in the project are produced or manufactured in the United States. FAR 25.602(a) (as amended). The rule also requires that manufacturing processes in the production of iron and steel take place in the United States, and that any unmanufactured construction material be of domestic origin.

Notably, there is no express restriction on the source of components or subcomponents of manufactured construction material under the Recovery Act's Buy American provision. In this regard, the new regulation appears to differ from existing Buy American regulations, which require at least 50% of the components of a manufactured end product to be domestic. See FAR 25.003. Thus, as long as construction material is manufactured in the United States, material containing entirely foreign components and subcomponents will apparently not be prohibited by the Recovery Act's restrictions.

Additionally, the new Recovery Act restrictions utilize a different evaluation preference scheme for construction material than the existing preference under the broader existing Buy American rules. Under the new rule, a 25% mark-up will be applied to the total price of an offer when foreign steel, iron, and other manufactured goods that are part of the construction material are included in an offer. This mark-up is particularly significant because it applies to the entire offer rather than only to the cost of the foreign material. Further, a 6% mark-up will be

applied to foreign unmanufactured construction material, but only to the price of the material (i.e., not the entire offer).

Finally, for acquisitions subject to U.S. trade agreements, the source restrictions for manufactured and unmanufactured construction material purchased using Recovery Act funds apply to "eligible" construction material from the numerous designated countries. Designated countries include members of the World Trade Organization Government Procurement Agreement, the North American Free Trade Agreement (and other free trade agreements), and least-developed countries. However, unlike the existing Trade Agreements Act regulations, countries from the Caribbean Basin are not designated countries for purposes of Recovery Act funds.

Practitioner's Tips:

- The goal of these rules is to increase public transparency over the use of Recovery Act funds and to ensure that the funds are properly spent and managed. If any of your contracts will be funded or partially funded by Recovery Act appropriations, you should anticipate significantly more oversight than may be customary and be prepared to track the use of these funds in greater detail.

- Increased oversight begins with your own employees. Unlike civil false claims whistleblower suits, in which an employee must allege fraud, the Recovery Act whistleblower rule allows your employees to report what they believe to be gross mismanagement or waste of Recovery Act funds to trigger a government investigation—a much broader and perhaps more subjective threshold. While the employees may not allege fraud or false claims, an ensuing investigation by the agency may open the door to government allegations of fraud or other wrongdoing, and may even lead to a suspension and debarment action. Therefore, it is especially important that any recipient of Recovery Act funds exercise an even greater degree of care in performing and managing its contracts. In addition, contractors should review their internal compliance and reporting procedures to ensure that employees report any problems to management as soon as possible.

- Contractors must be mindful of the interplay between the Recovery Act reporting requirements and the mandatory disclosure provisions that went into effect in December 2008. Pursuant to the mandatory disclosure provisions, contractors must disclose, in writing, whenever they have credible evidence that a principal, employee, agent, or subcontractor has committed (1) a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuities or (2) a violation of the civil False Claims Act.

- The Recovery Act rules require contracting officers to modify existing contracts, on a bilateral basis, to include the implementing clauses if future orders will be funded by appropriations under the Act. Contractors should carefully determine the extent of increased costs associated with the new requirements (e.g., quarterly reporting requirements) when negotiating an adjustment to the contract price.

- The public and your competitors will likely track and scrutinize your performance based on your quarterly reports. Performance problems, such as delays or cost overruns, will likely attract increased public attention and affect the agency's approach toward resolving such problems. Thus, contractors must ensure that they have adequate controls in place to identify potential performance problems in a timely manner.

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Early Presidential Directives Indicate that President Obama Will Be a Friend of Labor in the Government Contracting Arena

By

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Early Presidential Directives Indicate that President Obama Will be a Friend of Labor in the Government Contracting Arena

By Paul A. Debolt, Maurice Baskin, David R. Warner and James Edward Fagan, III, Venable LLP

Since the election in early November, commentators have been speculating and offering their opinions on the impact of the Obama Administration upon federal procurement. With the signing of the American Recovery and Reinvestment Act of 2009, it is clear that the government is going to be spending money for the foreseeable future – a lot of money. It also appears, however, that the Obama Administration will use the federal government's market power to support the interests of labor and its unions.

In what some commentators have referred to as the President "paying his union dues," and less than three weeks after his inauguration, President Obama issued four executive orders ("E.O.s") relating to labor policy and Government contracting. These orders followed the President's signing of the Lilly Ledbetter Fair Pay Act. Due to the timelines for implementation contained in each of the E.O.s, and the penalties for violating the E.O.s, the Government contract community will begin to feel the impact of the E.O.s by early this summer. Contractors need to monitor the development of these regulations to ensure that they do not find themselves precluded from pursuing future Government work.

Summary of E.O.s

NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS	**Requires employers to post signs informing workers of their right to engage in collective bargaining under the National Labor Relations Act ("NLRA") and revokes an executive order signed by President Bush that had required employers to post signs informing workers of their rights to limit financial support of unions.**
NON DISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS	**Requires government contractors to offer jobs to the qualified employees of the predecessor contractor when a government contract changes hands.**
ECONOMY IN GOVERNMENT CONTRACTING	**Prohibits government contractors from being reimbursed for expenses incurred when seeking to inform or influence workers regarding whether to form unions or engage in collective bargaining.**
USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS	**Directs that federal agencies may require the use of union-only project labor agreements on "large-scale construction projects" ($25 million and above), revoking another Bush Executive Order that had expressly prohibited such union-only requirements.**

NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Executive Order No. 13,496, which reverses an executive order issued by the Bush Administration, requires that "all Government contracting departments and agencies" include a provision in every Government contract, other than purchases under the simplified acquisition threshold and other exempted contracts, requiring contractors to post a notice, in a form yet to be determined, that informs workers of their rights under Federal labor laws. If a contractor fails to comply with this requirement, in addition to having the ability to cancel, terminate or suspend the contract, the Government can declare the contractor ineligible for additional Government contracts.

The scope of the E.O. is very broad as it also applies to subcontractors. Specifically, the E.O. requires contractors to include its requirements in every subcontract entered into relating to the covered contract. Further, the E.O. gives the Secretary of Labor ("the Secretary") the right to direct a prime contractor to takes the steps necessary to enforce the E.O.'s requirement against subcontractors, including sanctions. If the contractor becomes embroiled in litigation, or is threatened with such involvement due to the enforcement of the E.O.'s requirements, the E.O. permits the contractor to ask the Government to enter into the litigation to protect the United States' interest.

The E.O. gives the Secretary the right to investigate whether the contractual provisions relating to the notice have been violated, as well as complaints by employees. Likewise, the E.O. gives the Secretary the power to hold hearings and to sanction a prime contractor or subcontractor for their failure to follow the regulations. The sanctions available to the Secretary if a contractor or subcontractor violates the E.O. include: suspension; cancellation or termination of the contract or any portions thereof; condition continuing performance upon future compliance; or debarment.

Notably, the Secretary does not have unfettered discretion with regard to the government's imposing these remedies. The E.O. prohibits the Secretary from canceling, terminating or suspending a contract – as well as debarring a contractor from further Government contracts or identifying the contractor as a noncompliant contractor – without providing the contractor an opportunity for a hearing. Further, the Secretary cannot impose these sanctions without first providing the head of the contracting department or agency the opportunity to offer written objections to the issuance of the sanctions. Finally, the Secretary cannot issue any such "directive" so long as the head of the agency objects to the issuance of the proposed sanctions.

HIGHLIGHTS

- **E.O. effective immediately**
- **Requires display of notice informing workers of their right to join the union**
- **Failure to comply may result in cancellation or suspension of contract or suspension/debarment of contractor**
- **Requirements must be flowed-down to subcontracts**
- **Secretary of Labor can require contractor of above requirements against subcontractor**
- **Provision will be included in all solicitations after completion of required rulemaking**

The Secretary is responsible for administering and enforcing the order. Currently, the Secretary must initiate a rulemaking to establish the size and content of the notice by June 1, 2009. Similarly, the E.O. directs the Federal Acquisition Regulatory Council ("the FAR Council") to "take whatever action is required" to incorporate these provisions into the Federal Acquisition Regulations. The E.O. became effective January 30, 2009 and will apply to solicitations issued after the Secretary issues the required rules relating to the size and content of the notice.

NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

E.O. No. 13,495 implements a requirement for a contract clause that affords a "right of first refusal" to employees under a predecessor service contract whose employment will be terminated as a result of the award of a successor contract "in positions for which they are qualified." In fact, the E.O. provides that "[t]here shall be no employment openings under the contract until such right of first refusal has been provided." Like the notice requirement discussed above, this clause must be flowed-down to

subcontractors. While the E.O. contains a number of exemptions, *e.g.*, contracts under the simplified acquisition threshold, contracts awarded pursuant to the Randolph-Sheppard Act, etc., and permits the heads of contracting agencies to exempt its department from all or part of the provisions, the E.O. will still apply to a significant number of service contracts.

In accordance with the required contract clause, contractors and their subcontractors "shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified." With regard to the incumbent employees, the E.O. requires the contractor to make an express offer of employment that the employee must accept within a defined time period of not less than ten days. Further, the E.O. requires these provisions to be included in all contracts along with a requirement that subcontractors provide information about their incumbent employees.

HIGHLIGHTS

- E.O. effective immediately
- Contractors may staff with fewer employees than predecessor contractor
- Except in limited circumstances, contractor must offer a right of first refusal to incumbent employees
- Failure to comply with rules and regulations could result in a three-year debarment
- Requirements must be flowed-down to subcontractors
- Regulations scheduled to be issued late July 2009 and will apply to all subsequent solicitations

Fortunately for contractors, the E.O. recognizes that contractors and their subcontractors may elect to employ fewer employees than the predecessor contractor. As a result, the contractor and subcontractor have the ability to staff the project in the manner they deem most efficient. Moreover, notwithstanding the requirement to offer employment to the incumbent contractors, the E.O. also provides that contractors and subcontractors:

- may employ employees who have been with the company for at least 3 months immediately preceding this contract and who would otherwise be laid-off;
- are not required to offer a right of first refusal to predecessor contractor employees who are not service employees under the Service Contract Act; and,
- are not required to offer a right of first refusal to any predecessor employee whom the contractor or subcontract reasonably believes has failed to perform suitably on the job.

Ultimately, the Secretary has responsibility for investigating and obtaining compliance with the order. Further, disputes relating to this provision shall be resolved pursuant to regulations issued by the Secretary. Moreover, contractors are required to follow the directions of the Secretary with regard to the enforcement of the requirements, including the imposition of sanctions. Contractors may also request the United States to enter into the litigation to protect the rights of the United States should a dispute arise from the Secretary's direction to enforce these provisions against a subcontractor.

The penalties for failing to follow the order or any resulting regulations are very serious. "[W]here a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest shall be ineligible to be awarded any contract of the United States for a period of up to 3 years." Contractors and subcontractors proposed for debarment or listing the contractor or subcontractor on a published list of non-complying contractors have the right to a hearing. Regulations relating to this order are slated to come out by July 29, 2009.

ECONOMY IN GOVERNMENT CONTRACTING

As most contracting personnel know, to be charged to a government contract, a cost must be reasonable, allowable and allocable. Pursuant to E.O. No. 13,494, the costs of any activities to persuade employees – whether employees of the recipient of the Federal disbursements or of any other entity – to exercise, not

to exercise or the manner of exercising the right to organize as well as collectively bargain with their employer are, per se, unallowable. As such, contractors must exclude these costs from any billing, claim or proposal or disbursement applicable to their government contracts.

Specific examples of unallowable costs undertaken to persuade employees regarding their rights to organize and collectively bargain include:

- the preparation and distribution of materials;
- hiring or consulting with legal counsel or consultants;
- holding meetings; and
- planning or conducting activities by managers, supervisors, or union representatives during work hours.

While this E.O. is effective immediately, the implementing regulations are not scheduled to go into effect until June 29, 2009. The regulations will apply to solicitations issued on or after that date.

USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS

The last order, E.O. No. 13,502, issued on February 6, 2009, relates to large-scale construction projects. In particular, the order "encouraged" executive agencies to consider requiring the use of project labor agreements on large-scale construction projects. For the purposes of the E.O., a "project labor agreement" means "a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project …."

The order provides that the government may require the use of a project labor agreement if the agreement will:

- "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations, government safety and health, equal employment opportunity, labor and employment standards, and other matters," and,
- "be consistent with the law."

If the executive agency determines that the use of a project labor agreement meets this criteria, the Government can require every contractor or subcontractor on the project to become a party to the agreement with one or more labor organizations. Project labor agreements are not mandatory on every construction project. In addition, the E.O. does not require contractors and subcontractors to enter into a project labor agreement with any particular labor organization.

HIGHLIGHTS

- E.O. effective immediately
- Requires use of project labor agreements on large-scale construction projects
- Labor agreements binding on all contractors
- Contains guarantees against any job disruptions
- Sets forth procedures for resolving disputes

If the government requires a project labor agreement, the scope of the agreement is very broad. Some of the key terms of the project labor agreement include that:

- it is binding on all contractors and subcontractors on the Construction project;
- it contains guarantees against strikes, lockouts, and other job disruptions; and
- it sets forth procedures for resolving labor disputes arising during the project labor agreement.

The provisions of this E.O. went into effect immediately and will be incorporated in solicitations issued on the effective date of the FAR Council.

QUESTIONS REMAIN ABOUT THE SCOPE AND IMPACT OF THE E.O.S

Due to the fact that the regulations implementing the E.O.s have not been issued, the ultimate impact of the E.O. cannot be fully determined. Due to the Government's ability to suspend and debar contractors for failing to follow the E.O.s, Government prime contractors and subcontractors must continue to monitor this issue and be prepared to follow the regulation once issued.

Having said this, the E.O.s leave open a number of vexing questions. For example, what happens if a contractor asks the United States to enter into litigation and the Government decides not to intervene? What happens if the contractor loses a lawsuit resulting from a decision to follow the Secretary's order with regard to enforcing an E.O. against a subcontractor? Will the Government reimburse the Contractor for these costs? To the extent a hearing occurs with the Secretary regarding an alleged violation, what will be the standard of proof used by a Secretary to determine that a violation occurred? Will the Government reimburse the contractor for these costs? Obviously, the list can go on and on.

CONCLUSION

As indicated by the E.O.s, the regulatory framework under which service contractors operate will change dramatically under the new administration. Due to the sanctions associated with the E.O.'s, contractors must insure that they monitor these issues and keep their training up-to-date. Likewise, contractors must have strong compliance programs in place, as well as mechanisms to report any issues under these contracts. Failure to take these prudent steps may ultimately come back to haunt a company's bottom line.