Beware of Strings Attached to Stimulus Projects

BY STEVEN M. HENDERSON AND RONALD STAY

These federal funding packages require significant reporting.

THERE WAS MUCH ANTICIPATION IN THE construction industry when President Obama signed the American Recovery and Reinvestment Act (ARRA) in February 2009. For the most part, ARRA delivers on that promise by presenting significant opportunities for contractors to find work in an otherwise stagnant private construction market. There are, however, significant strings attached to ARRA funds and contractors must be aware of these issues before bidding on ARRA funded projects. But these strings make perfect sense when you consider the full intent of the ARRA, which is to: create new jobs and save existing ones; spur economic activity and invest in long-term growth; and foster new levels of accountability and transparency in government spending.

It's the last point—fostering new levels of accountability and transparency in government spending—that is the focus of this discussion. In that regard, some of the more important ARRA requirements that contractors need to be familiar with include: (1) the ARRA's reporting requirements; (2) expanded application of the Davis-Bacon Act's prevailing wage requirements; and (3) potential liability under the False Claims Act.

ARRA Reporting Requirements

Section 1512 of the ARRA contains detailed reporting requirements for "prime recipients" of ARRA funds. "Prime recipients" are nonfederal entities that receive ARRA funding in the form of grants, loans, or cooperative agreements directly from the federal government. States are the most likely prime recipient of ARRA funds for construction projects that are not administered directly by a federal agency. Although "prime recipients" are responsible for complying with the reporting requirements, these obligations can be, and most likely will be, delegated to a "sub-recipient," which is a nonfederal entity that is awarded ARRA funding from a grant or contract from a prime recipient. The most likely sub-recipient to whom this responsibility would be delegated is the contractor building a state project. Consequently, any contractor bidding on state ARRA projects should become familiar with these reporting requirements, as the contractor will in all likelihood be responsible for meeting them. The information must be reported on a quarterly basis and is posted for public review on the ARRA web site, www.recovery.gov. This heightened level of public disclosure is one of the most distinctive features of ARRA and one that presents both opportunity and challenge.

Section 1512 contains a long list of data that must be reported. Among other things, prime recipients must include a brief description of both the types and number of jobs created and retained in the United States due to ARRA funding. In addition, contractors will most likely be required by prime recipients to submit information concerning 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 expenditure of the ARRA funds, as well as the prime recipient of those funds. Each federal entity expending ARRA funds, such as the Department of Education, Department of Defense, Federal Transit Administration, and so on, will have its own ARRA implementation requirements and disclosure guidelines. Additionally, each state that administers ARRA funded projects may have its own disclosure and reporting guidelines. With such an interlocking web of new disclosure requirements, contractors must be sure to research which set of guidelines will apply on a project-by-project basis.

Expansion of the Davis-Bacon Act

The Davis-Bacon Act (40 U.S.C §§3141 et. seq.) typically 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. Section 1606 of the ARRA significantly expands the applicability of the Davis-Bacon Act to all construction projects that are funded, in whole or in part, using ARRA funds (with some minor exceptions). A contractor, therefore, will be required to pay

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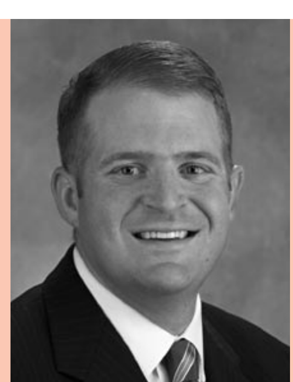

prevailing wages on ARRA funded projects, regardless of whether the contract is with a government agency (federal, state, or local) or a private party.

The Davis-Bacon Act also requires prime contractors and subcontractors to submit weekly certified payroll reports to the owner 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. Such reporting can be time and resource intensive and contractors are well advised to account for the additional overhead in their bid estimates. 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 subject a contractor to severe penalties. Further, 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 double over the course of the next two years, and also expects to increase the number of agency-directed investigations from 90 per year to approximately 250 per year. In short, contractors can expect to be subject to additional scrutiny for compliance with the Davis-Bacon Act on ARRA funded projects.

False Claims Act Violations

The federal False Claims Act (31 U.S.C. §§ 3729 et. seq.) also applies to contractors who are working on ARRA funded projects and was recently amended to expand its scope and reach even more. The 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. This may include such issues as verification of workers' immigration status under the applicable federal e-Verify regulations. A contractor who violates the False Claims Act is potentially liable for three times the government's damages plus civil penalties of $5,500 to $11,000 per violation, so the financial risks are great.

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% of the funds that are recovered.

Conclusion

The ARRA extends a life line to the construction industry through an unprecedented increase in the amount of federal funding available for projects. However, contractors must be aware of the many requirements attached to ARRA 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 ARRA funded projects to avoid the potentially severe penalties imposed under the False Claims Act.

As the saying goes, the best defense is a good offense and contractors must educate themselves about the ARRA before bidding on these projects. In these difficult economic times, the ARRA may present new opportunities for your company to expand the markets in which you are currently working. Before doing so, learn about the many laws applicable to ARRA funded projects, which go far beyond those mentioned in this article, and develop a comprehensive compliance plan to ensure that your company is prepared to address the obligations that accompany ARRA funds and the potential risks associated with non-compliance. MSC