

The Recovery Act of 2009: What Does It Mean for Your Business?



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Overview

- What Are The New Business Opportunities?
 - Federal and California
- Recovery Act Requirements
 - Federal and California
- Other Compliance Requirements
 - Federal and California
- Lessons Learned from Other Emergency Spending

WHAT ARE THE NEW BUSINESS OPPORTUNITIES?

New Business Opportunities: Commercial Opportunities

- Funding Opportunities
 - Contracts
 - Grants
 - Cooperative agreements
- Opportunities
 - Federal
 - State
 - Local

New Business Opportunities: Major Federal Funding Initiatives

- Department of Defense (DOD)
 - US\$4.26B: Facilities sustainment, restoration, and modernization
 - US\$1.3B: Defense-wide hospital construction (US\$2.18B: New construction)
 - US\$555M: Service member home assistance for homes whose value decreased due to base closures
- Department of Homeland Security (DHS)
 - US\$1.0B: Transportation Security Administration (TSA) baggage detection systems
 - US\$420M: Customs and border protection land ports of entry

Major Federal Funding Initiatives (continued)

- Department of the Interior (DOI)
 - US\$1.0B: Bureau of Reclamation water and related resource programs
 - US\$589M: National Park Service (NPS) facilities modernization and construction
- Department of Transportation (DOT)
 - US\$8.0B: High-speed rail
 - US\$1.3B: Amtrak
 - US\$750M: Grants for fixed guideway transit systems
 - US\$750M: Capital investment grants

Major Federal Funding Initiatives (continued)

- Department of Energy (DOE)
 - US\$5.0B: Home weatherization
 - US\$4.4B: Modernize power grid
 - US\$2.0B: Advanced vehicle battery research program
 - US\$1.6B: Science research programs
 - US\$1.5B: Carbon capture technologies
 - US\$800M: Clean coal power
 - US\$500M: Renewable energy and electric power transmission loan guarantees

Major Federal Funding Initiatives (continued)

- Department of Agriculture (USDA)
 - US\$11.7B: Rural housing loans
 - US\$3.9B: Rural utilities loans and grants
 - US\$650M: Forest service facilities
 - US\$500M: Forest service wild land fire management

Major Federal Funding Initiatives (continued)

- Department of Health and Human Services (HHS)
 - US\$8.2B: National Institutes of Health (NIH) scientific research
 - US\$2.0B: Health information technology
 - US\$1.5B: Public health centers
 - US\$1.3B: NIH National Center for Research Resources
 - US\$1.1B: Healthcare clinical research
 - US\$1.0B: Community services block grant
 - US\$1.0B: Prevention and wellness activities
 - US\$500M: Health center grants
 - US\$500M: Health professional scholarships
 - US\$500M: NIH construction and renovation

Major Federal Funding Initiatives (continued)

- General Services Administration (GSA)
 - US\$4.5B: Green building renovations
- Department of Commerce (DOC)
 - US\$4.7B: Broadband expansion
 - US\$1.0B: Census Bureau programs*
 - US\$650M: Digital TV conversion
- National Aeronautics and Space Administration (NASA)
 - US\$800M: Space and exploration programs
- National Science Foundation (NSF)
 - US\$2.5B: Scientific research and related activities

New Business Opportunities: Specific Plans

- DOE
 - Recovery Act Funding: US\$38.7B:
 - US\$25B: Distributed through grants
 - US\$13B: Competitive
 - US\$12B: Noncompetitive (formula grants)
 - US\$7.9B: Procurement Contracts
 - US\$7.3B: New procurements or to already competitively awarded contracts
 - US\$620M: Noncompetitive
 - US\$5.8B: Undecided

Specific Plans (continued)

- GSA
 - Recovery Act Funding: US\$5.87B
 - 99% of funds will be awarded competitively
 - Maximize use of existing, competitively awarded contracts (FSS)
 - New Blanket Purchase Agreements (BPAs) under GSA Federal Supply Services (FSS)
 - Pre-solicitations posted on FedBizOpps to notify all vendors of Recovery Act opportunities
 - 1% noncompetitive—mainly 8(a) or HUBZone Sole Source

Specific Plans (continued)

■ HHS

- Recovery Act Funding—US\$167B
 - 98% competitive awards
- 67% Federal Financial Participation (FFP)
- Plans are preliminary (84% approved or in process)
- Examples
 - Research Projects
- US\$1.9B: Noncompetitive
- Competing \$2.9B
 - No decision on new vs. renewal
- IT: US\$140M—awarded under Federal Acquisition Regulation (FAR) based procurements

Specific Plans (continued)

■ DOD

- Recovery Act Funding: US\$7.4B
 - 80% competitive
- 90-95% FFP
- Significant amount being awarded under current MACs
- Examples
 - RM 09-0842 Repair NOSC Reserve Training Building, Portland, Oregon (only those holding a contract under N44255-08-R-3003 are eligible)
 - Fabricate 20 hoist chain assemblies for 10 spillway gates at Barkley Dam at Kuttawa, KY (only those holding a contract under W912P5-09-R-0014 are eligible)
- There are some open competitions
 - FY09 Maintenance Dredging, Saginaw River, Michigan (open to competition)

Specific Plans (continued)

■ DOT

- Recovery Act Funding: US\$48.1B
 - US\$38.6 through existing programs
- Grant funding will “dwarf” contract funding opportunities
- 82% competitively awarded
- FAA
 - US\$112M under existing contract vehicles
 - US\$88M new navigation and landing systems, airport towers
 - 75% FP
- FRA—two contract awards
 - 100% of their activity
 - 100% FP
- FHWA will concentrate on small businesses existing or new awards
 - 77% FP

Specific Plans (continued)

- NASA
 - Recovery Act Funding: Nearly US\$1B
 - States existing contracts will be used and new will be awarded when “to best suit NASA’s business and provide most effective delivery of key spacecraft hardware and scientific products.”
 - New awards will be grants and contracts
 - Use FP to maximum extent possible
 - However due to nature of difficulty in estimating costs, other mechanisms may be used

Specific Plans (continued)

- USDA
 - Recovery Act Funding: US\$ 28B
 - 97% of funds will NOT be delivered through contracts
 - Rather formula grants and other grants, loans, and cooperative agreements
 - For contracts, 94% will be competitive
 - 93% of those will be FP
 - No statement on new vs. existing contract vehicles

Specific Plans (continued)

■ DHS

- Recovery Act Funding: Nearly US\$3.5B
 - 70% awarded competitively (preliminary)
 - 67% will be FP
 - Many awards will be made using the existing DHS FirstSource IDIQ contract, GSA FSS, or other
- Examples (8 Opps on FedBiz as of 6/21/09)
 - Motorola Rapid Response Kits
 - Golf carts for land survey (US\$167,000)
 - Tactical communication HUB upgrade (US\$1.7M)
- One is sources sought (may be open competition if RFP issued)
 - Low energy mobile imaging system

CALIFORNIA RECOVERY ACT OPPORTUNITIES

California ARRA Opportunities: California Funding Initiatives

- US\$85B to benefit California (US\$50B Spending and US\$35B Tax Benefits)
 - Health and Human Services: US\$19.5B
 - Health IT infrastructure for electronic health information exchange and prevention and wellness opportunities, food stamp benefits, elderly nutrition services, and other ongoing programs
 - Education: US\$11.8B
 - Improve performance in struggling schools, development of data bases to manage and analyze student data and improve teacher preparation and recruitment, protect ongoing programs
 - Labor: US\$5.2B
 - Expand job search assistance and training opportunities, create summer employment opportunities for youth, upgrade computer systems, and develop automated options for unemployed to start and manage their unemployment insurance claims

California Funding Initiatives (continued)

- Transportation: US\$4.7B
 - Rebuild and repair highways, local streets and roads as well as transit projects, such as high speed intercity rail, surface transportation projects, aviation, Amtrak, ferries, and other transportation programs
- Energy: US\$3.0B
 - Modernize the state's electric grid (Smart Grid), reduce total energy use, make buildings more energy efficient, weatherize, and support renewable energy projects and climate change-related programs.

California Funding Initiatives (continued)

- **Water and Environment: US\$2.5B**
 - Complete flood control projects in the Central Valley, improve water supply reliability and habitat in the Sacramento-San Joaquin Delta, restore fisheries, reclamation of abandoned mines, earthquake science, and work to complete important forest fuels reduction and trail maintenance work
- **Science Technology: US\$2.4B**
 - Broadband infrastructure, improve health information technology, construct, modernize, and repair research facilities, update research equipment, and further research and related activities

California Funding Initiatives (continued)

- Housing: US\$2.1B
 - Homeless prevention and rapid re-housing, build and rehabilitate low-income housing using green technologies, and potential funds for the state to purchase abandoned and foreclosed homes
- Public: US\$0.7B
 - Support hiring to combat violence against women, fight internet crimes against children, assist crime victims, and support youth mentoring
- Other: US\$3B

California ARRA Opportunities: Drilling Down into Opportunities

- Transportation (example)
 - US\$4B: Projected to California
 - Highway Infrastructure Investment:
 - US\$2.57B total
 - » US\$1.606B: Local government projects
 - » US\$964M: State highway projects

US\$1B obligated by California as of May 4, 2009 to over 80 transportation infrastructure projects.

Drilling Down into Opportunities (continued)

- Funds sent to the state*
 - Spends some funds through contracts managed by state agencies
 - Allocates other funds to local governments and municipalities
- Funds sent directly to local governments**
 - Will mostly spend through contracts

* The State of California has awareness of these funds, is responsible for reporting to federal agencies on their use, and performs oversight of sub-recipients

** The state has no direct awareness of these funds, has no reporting requirements, and currently performs limited, if any, oversight of recipients' use of funds.

California ARRA Opportunities: Where to Find Opportunities—State and Local

- California state contracts register
- Small or large businesses should register on the new eProcurement system
- California small businesses (SB) and disabled veteran business enterprises (DVBES) should also get certified to do business with the state
- Local governments and municipalities

Where to Find Opportunities—Key Agency for State Procurement

- California's Department of General Services, Procurement Division (CGS-PD)
- Either contracts for other agencies, or provides agencies delegated authority to contract
- Also certifies small/disabled veteran businesses and manages multiple contracting vehicles

California ARRA Opportunities: State Contracting

- California provides a hierarchy of using the funds
 - Promotes rapid deployment of funds
 - Ranks how to get money into the economy
 - **Good:** Department of General Services (DGS) expedited procurement (direct contracting on department's behalf)
 - **Better:** Utilize Department's delegation (direct contracting by department)
 - **Best:** Use SB/DVBE (bypasses normal procurement requirements)
 - Encourages use of California Multiple Awards Schedules (CMAS) and masters contracts (contracts already in place)

California ARRA Opportunities: State Contracting Approach

- **The Approach:** Use existing contract vehicles and methods wherever possible
 - Use expedited procurement through DGS
 - Increase delegated purchasing authority to agencies
 - Use SB/DVBE to bypass extended competitive bidding processes
 - Fund existing programs rather than create new ones, if possible

California ARRA Opportunities: Other Resources to Identify Opportunities

■ Federal

— Recovery.gov

- Makes recovery funds transparent and provides information to taxpayers
- Lists opportunities for contractors and grant opportunities
 - Provides access to agency websites to identify opportunities
 - Provides access to state websites to identify opportunities
 - » State sites are different

— FedBizOpps: Lists all solicitations, awards, and subcontracting opportunities

Other Resources to Identify Opportunities (continued)

- California
 - DGS (California) (dgs.ca.gov)
 - Management Memo 09-03 requires usage of term “Recovery Act Funded” in solicitations using ARRA funds
 - However, use of Recovery Act and ARRA provided additional opportunities
- California Department Procurement Websites
 - CalTrans
 - Department of Social Services

California ARRA Opportunities: Benefits to Companies using ARRA funds

- Organizational growth
 - Revenues
 - Jobs
- Cash flow enhanced
 - Offset to company planned or ongoing financed activities (i.e., Smart Grid)
 - Research and development funding
- Tax incentives and benefits

California ARRA Opportunities: Summary

- Opportunities exist at federal, state, and local levels
 - Contracts, grants, and cooperative agreements
- Leveraging current contracts (e.g., GSA FSS) presents a significant opportunity
- Monitoring solicitations to identify new opportunities is important
- Navigating federal, state, and local websites is complex and requires dedicated time
- **The key:** ensuring resources are properly dedicated to this initiative and/or that outside resources are leveraged to identify and marry the opportunities with your products, services, and current contracts

NEW COMPLIANCE REQUIREMENTS ON RECOVERY ACT “STIMULUS” FUNDING

ARRA Compliance Requirements: Overview

- Enhanced Oversight and Accountability
- New Registration and Reporting Requirements
- Other Restrictions on Funds

ARRA Compliance Requirements: Enhanced Oversight and Accountability

- Inspectors General (IGs) and Government Accountability Office (GAO) have expanded authorities
 - IGs and the GAO can examine *any records pertaining* to the contract or grant, and interview any officer or employee
 - Generally applies to subcontractors, subgrantees, and state or local agencies

Enhanced Oversight and Accountability (continued)

- IGs have expanded authority and funding
 - ARRA includes over US\$250M in appropriations for IGs to use in oversight activities
 - Inspector General Reform Act of 2008 had already increased authorities and capabilities of IGs, and established a council of IGs

Enhanced Oversight and Accountability (continued)

- IGs are already active
 - Reviewing project proposals and conducting pre-award audits
 - Coordinating efforts with other IGs, GAO, and states
 - Prioritizing audits based on existing program risks and amount of funding
 - Adjusting in-process audits to monitor new funding

Enhanced Oversight and Accountability (continued)

- GAO is active:
 - issuing reports
 - conducting bimonthly reviews of selected state and localities
 - commenting on the estimates of the number of jobs
 - reviewing areas such as trade adjustment assistance, new education incentive grants, and efforts to increase small business lending
 - Meeting with state and local IGs, treasurers, and audit staff
 - Reviewing state single audits (e.g., in California) to identify targets for further investigation
 - Meeting with Recovery Board and agency IGs
 - Managing a fraud hotline

Enhanced Oversight and Accountability (continued)

- Recovery & Accountability Board:
 - Members are IGs, and the Board coordinates and conducts oversight of covered funds
 - Makes reports to President and Congress which are made public
 - Conducts its own audits, reviews, and public or private hearings
 - The Board can issue subpoenas to compel testimony at hearings

Enhanced Oversight and Accountability (continued)

- Recovery & Accountability Board reviews:
 - whether reporting on contracts and grants meets standards and performance measures
 - whether agencies satisfied competition requirements
 - whether audits are sufficient
 - whether agencies have qualified staff to oversee contracts and grants
 - whether agencies can collaborate in efforts to oversee funds

Enhanced Oversight and Accountability (continued)

- Whistleblower Protections:
 - Employees get *new independent whistleblower protections* and a cause of action to go to court
 - An employee who “***reasonably believes***” there has been gross mismanagement of the contract or grant, a gross waste of funds, a substantial and specific danger to public health or safety, an abuse of authority implementing funds, or a violation of law, rule, or regulation relating to a contract or grant involving ARRA funds
 - Can disclose to: Recovery Board; an IG; GAO; a member of Congress; law enforcement; a supervisor with authority to investigate; a court; or the head of an agency (or their representatives)

Enhanced Oversight and Accountability (continued)

- Whistleblower Protections (continued):
 - No discharging, demoting or discriminating for disclosing gross mismanagement of contracts or grants, gross waste of funds, dangers to public health or safety, abuse of authority, or violations of laws, rules, or regulations relating to contracts or grants
 - Businesses have to post notices of these protections in the workplace

Enhanced Oversight and Accountability (continued)

- Publication of Contract Information
 - Pre- and post- award contract actions must now publicly provide:
 - A rationale for using anything other than fixed-price or competitive approaches in award notices
 - A description of supplies and services in plain language
 - Pre-award notice of *any* contract action above US\$25,000;
Post-award notice of *any* contract action above US\$500,000

ARRA Compliance Requirements: Registration and Reporting

- All fund recipients:
 - Get or update your Dun and Bradstreet Universal Numbering System (DUNS)
 - Register at Central Contractor Registration (CCR)
- Grant applicants also must register on Grants.gov

ARRA Compliance Requirements: Recipient Reporting

- **Who:** Any entity receiving funds directly from the Federal Government other than individuals. Includes prime and first-tier subcontractors
- **When:** One-time reports by July 10, 2009; quarterly reports starting October 10, 2009
- **To:** Agencies, who compile information and submit to Office of Management and Budget (OMB)
- **How:** Agency-unique, but common data elements
- **What:** Quarterly reports
 - funds received, expended and obligated
 - description and status of projects
 - estimate of jobs created and retained by project
 - detailed information on subcontracts or subgrants made by the recipient
 - purpose, total cost, rationale, and a point of contact for the project (for state and local government infrastructure projects)

Recipient Reporting (continued)

Contractor	Initial	Quarterly
Prime	Award number (including first-tier subs); project title, description including milestones and deliverables; names, amounts and dates of first-tier sub awards; NAICS code and funding agency.	Cumulative amount of recovery funds invoiced to contract; all significant services performed or supplies delivered supporting invoices; assessment of progress towards overall completion and expected outcomes; and narrative description of employment impact.
First-Tier Sub	Subcontractor's DUNS Number; address; and place of primary performance, including congressional district.	
Both	<i>Public disclosure of names and total compensation of prime's five highest compensated officers for calendar year of award.*</i>	

Recipient Reporting (continued)

What?	When?
Major Communications	Immediate/Ongoing
Funding Notification Report (previously Formula Block Grant Allocation Report)	Immediate/Ongoing
Weekly Financial and Activity Report	Weekly/Ongoing
Award-Level Reporting (as required for USAspending.gov)	Immediate/Ongoing
Agency-Wide Recovery Plans	Draft May 1; Final May 15
Program-Specific Recovery Act Plans	Draft May 1; Final May 15

Other Restrictions on Funds: General

- Funds must be *obligated* before September 30, 2010
- No casinos, gambling establishments, aquariums, zoos, golf courses, or swimming pools
- Laborers and mechanics cannot be paid below prevailing rates as determined by the Secretary of Labor

Other Restrictions on Funds: Buy American

- No stimulus funds can be used for construction, alteration, maintenance, or repair of *public* buildings or *public* works unless “all of the iron, steel, and manufactured goods used in the project are produced in the United States”
- Agencies can waive, based on exceptions:
 - “inconsistent with the public interest”;
 - there aren’t “sufficient and reasonably available quantities and of a satisfactory quality” of the iron, steel, or goods produced in the US;
 - or use of US materials would increase overall project cost by 25% or more

Buy American (continued)

- Buy American Iron, Steel & Manufactured Goods (Section 1605) is applied in a “manner consistent with United States obligations under international agreements”
 - “Least Developed Countries” exempt (but not Caribbean Basin nations)
 - NAFTA exempt
 - WTO GPA exempt
 - Acquisitions under trade agreements above US\$7.443M threshold excepted

Buy American (continued)

- Applies to all Stimulus funds (contracts and grants), but differences in implementing regulations
 - Contracts: FAR 25.6, 52.225-21 – 52.225-24
 - Grants: 2 CFR 176.60-176.170
- Complements existing Buy American Act (41 U.S.C. § 10a–10d) requirements

Buy American: Contracts

- Existing contracts will be modified bilaterally, but if contractor does not agree, no stimulus funds
- FAR 25.6 added for “ARRA Buy American Act—Construction materials”
 - All iron or steel used as **construction material** requires all manufacturing processes take place in US, except refinement of additives. Does not apply to iron or steel used as **components** of other **manufactured construction** material
 - No limitation on use of foreign components or subcomponents in manufactured construction material, as long as the manufacture of the material occurs in US
 - If cost of domestic construction material is unreasonable, +25% price adjustment to overall project cost AND +6% adjustment to cost of foreign materials

Buy American: Grants

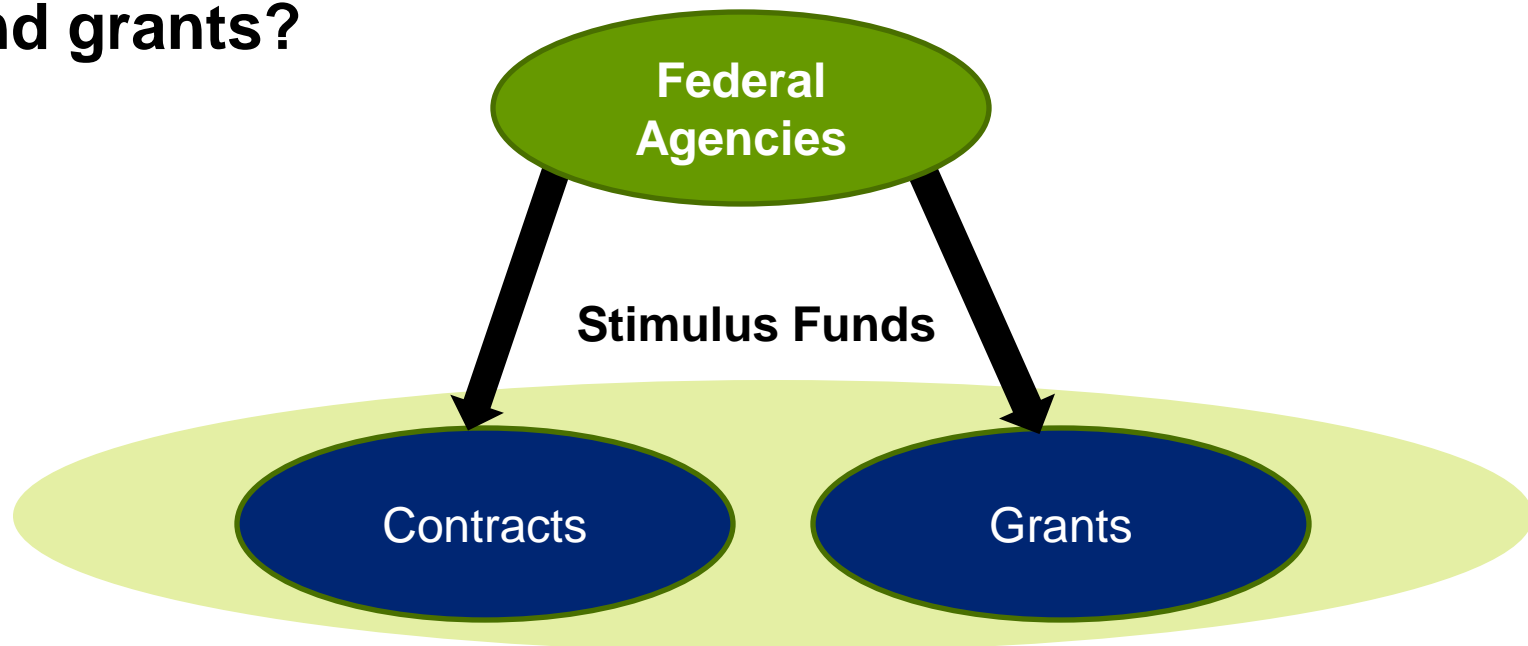
- 2 CFR 176.60-176.170
- Price adjustment limited to only +25% project cost (no +6% adjustment to cost of foreign materials)
- Same US\$7.443M threshold for procurements under trade agreements being excepted, but products only qualify for equivalent treatment if those products are subject to trade agreement concessions. Not all products are subject to agreements with all states or local entities

Other Restrictions on Funds: No Lobbying for Projects

- Presidential Memo, March 20, 2009: Officials shall disregard the views of **registered lobbyists** on particular projects unless those views are in writing and all communications must be disclosed
- OMB Guidance Memo, April 7, 2009: Clarifies there are no restrictions on communications on general, or procedure questions, but nothing project-specific. Covered communications must be disclosed on agency websites
- Signal from White House in blog entry May 29, 2009 rules will be updated:
 - Everyone barred from contact (not just registered lobbyists)
 - Narrows timeframe—communications after grant submission and before award are barred, but otherwise okay

ARRA Compliance Requirements: Compliance Review

Are compliance requirements the same for contracts and grants?



Generally yes, but GAO access to examine records or interview employees is not provided for grant recipients

CALIFORNIA ARRA COMPLIANCE

California ARRA Compliance

- Players and organizations
- Focus
- Activities
- More help?

Oversight: Challenges

- Limited numbers of oversight staff including inspectors and auditors
- The speed and scope of Recovery Act funding
- New federal oversight requirements for Recovery Act funding
- Many funds do not go through the state, but flow directly from federal agencies to local governments

Oversight: Players and Organization

- California State Auditor
- California Recovery Task Force
- California Recovery Inspector General
- Other California agencies:
 - Department of Finance
 - State Controller's Office
 - Attorney General
- Local government audit boards and inspectors general
- California Assembly Stimulus, Economic Recovery, and Jobs (SERJ) Task Force

Oversight: Focus

- Extensive coordination with federal agencies
- Use previous state single audits to prioritize efforts
- Pre-audit agencies that will manage contracts
- Seek additional resources

Oversight: Coordinate with Feds

- GAO conducts bi-monthly reviews of California's spending and oversight activities
- State Officials Testify at Congressional Oversight Hearings
- California State Auditor works **regularly** with GAO, Council of Federal IGs (Stimulus Working Group) and OMB on oversight

Oversight: Start with Previous Audits

- State Auditors:
 - Already planning to expand single audits conducted in 2008, to cover all recipients of federal funds administered by the state
 - Identified numerous findings from previous years, single audits to prioritize investigations
- State agencies, programs, or contractors with a history of problems will be the first targeted by the state, and probably GAO

Oversight: Pre-Audit Agencies

- State Auditor just completed internal control and state and federal compliance audit report (single audit) and released report May 27, 2009
- Department of Finance: Readiness review of agencies' abilities to manage and conduct oversight of Recovery Act funds.
 - Four of six departments reviewed “have adequate oversight and accountability controls in place related to ARRA funding”
 - Recommends continued “coordination efforts with state and federal authorities”
 - Endorses additional training and monitoring

Oversight: Create Task Forces and Recovery IG

- Legislative:
 - SERJ Task Force
 - SERJ draft strategy calls for creation of a California Economic Recovery Accountability and Transparency Board (CA Economic Recovery Board)
- Executive:
 - Federal Economic Stimulus Task Force
 - Governor Schwarzenegger appointed a new state IG for Recovery Act.

Oversight: Pass Laws Controlling Funds

■ Legislative:

- Six bills specifically addressing the use of ARRA funds have passed
 - Apportioning highway infrastructure funds within state and local programs
 - Setting grant ceilings and exempting “clean water” funds from conditions on other existing urban water management plans and projects

Oversight: Seek Resources

- State Auditor in 2008 audited 43 programs, receiving 78 percent of federal funds (US\$59 out of US\$76B)
- ARRA oversight will require 14 new program audits, and expansions to 14 more
- This does not include oversight of any funds sent directly to local governments that do not go through the state

Oversight: Resources on the Way?

- OMB or Congress may loosen restrictions and let states spend more overhead on Oversight
- House Committee on Oversight and Government Reform has proposed legislation to provide additional funds to state auditors to assist in meeting the demands imposed by ARRA
- The “Enhanced Oversight of State and Local Economic Recovery Act” (H.R. 2182) would allow state and local governments to set aside up to 0.5 % of recovery funds on top of any other administrative expenses deducted, to conduct planning and oversight

FEDERAL GOVERNMENT CONTRACTING COMPLIANCE

Federal Government Contracting Compliance

- The Statutory Framework
- Enforcement Provisions
- “Dos and Don’ts” in Government Procurement
- Recent Changes

The Statutory Framework

- The overall procurement system
 - Federal Property and Administrative Services Act
 - Competition in Contracting Act (CICA)
 - “Procurement Reform” Statutes
 - Expansion of Federal Supply Schedule contracting
 - Commercial item contracts
- “Integrity” of the system
 - Procurement Integrity Act
 - False Claims Act

Enforcement Provisions that Apply to Government Contractors

- Criminal penalties
 - False statements
 - False claims
- Civil false claims
 - Treble damages
 - Civil penalties for each false claim: US\$5,500/US\$11,000
- Suspension/debarment/exclusion
- Termination of contracts
- Past performance evaluations
- Corporate liability
 - “Respondeat Superior”
 - The “collective knowledge” doctrine

“Dos and Don’ts” in Government Procurement: Unacceptable Activities

- Offering business courtesies, gifts, entertainment, recreation, discounts, meals, or **any** “thing of value” to government procurement or requirements personnel
- Discussing present or future employment opportunities
- Requesting any contractor bid or proposal information or source selection information in violation of procurement integrity regulations
- Agreeing with actual or potential competitors to limit competition
- Byrd Amendment

“Dos and Don’ts” In Government Procurement: Procurement Integrity Act (FAR 3.104)

- Restricts disclosing and obtaining procurement information during the conduct of a federal agency procurement
- Identifies actions procurement officers must take when contacted by a bidder or offeror regarding non-federal employment
- Prohibits a former government official’s acceptance of compensation from a contractor if the former officials either served in an identified position or made certain contract decisions involving more than US\$10M per contract action to that contractor

“Dos and Don’ts” in Government Procurement: “Revolving Door” Restrictions

- Numerous limits on discussing employment with government officials
 - Senior agency officials
 - Procurement officials
- Recent scandals
 - Boeing/Druyun
 - Criminal sanctions
 - Company suspension

Recent Changes in FAR Rules

- The New FAR Rules
 - Covered contracts
 - Hotline posters
 - Compliance program
 - Mandatory disclosure
 - Full cooperation
 - Suspension/debarment

New Compliance Requirements

Type Of Requirements	Clauses/Coverage	Scope of Requirements
"Should have" requirements (non-mandatory)	FAR 3.1002 <ul style="list-style-type: none"> applies to all federal contractors 	<ul style="list-style-type: none"> code of conduct compliance program internal control systems (suitable to size, facilitate discovery and disclosure)
Contract based mandatory compliance and disclosure requirements	FAR 52.203-13 <ul style="list-style-type: none"> in solicitations and contracts expected to exceed US\$5M and 120 days and issued after the effective date (12/12/08), prior version possible in earlier 2008 solicitations and contracts FAR 52.203-14 <ul style="list-style-type: none"> to be included in contracts other than for commercial items or to be performed entirely outside US 	<ul style="list-style-type: none"> code of conduct to contract employees mandatory disclosure compliance program (unless small or commercial item) to include training internal control system (not applicable to commercial item contracts) flow down to subcontracts which exceed US\$5M and 120 days display of agency hotline poster as identified
Contractor qualification requirements (responsibility, suspension, debarment, past performance, etc.)	FAR 9.104-1, 9.406-2, 9.407-2, 42.1501 <ul style="list-style-type: none"> applies to all federal contractors 	<ul style="list-style-type: none"> new cause of debarment for knowing failure by principal to timely disclose (based on credible evidence) certain criminal violations, false claims, or significant overpayments related to a contract consideration of record of ethics as part of responsibility and past performance evaluations consideration of contractor compliance efforts as mitigation

Applicability: FAR Covered Contracts

- Requirements will apply:
 - Traditional FAR contracts
 - FSS contracts
 - Blanket purchase agreements
- Requirements will not apply:
 - Grant agreements
 - Cooperative research and development agreements
 - Other transactions agreements
 - Contracts not using appropriated funds
 - e.g., Federal Deposit Insurance Corporation (FDIC), United States Postal Service (USPS), Army & Air Force Exchange Service (AAFES)
- Disclosure requirement effective when FAR 52.203-13 incorporated into contracts (subject to dollar amount and duration provisions)
- Suspension/debarment provisions effective on December 12, 2008

Display of Hotline Posters: FAR 52.203-14

- Effective December 24, 2007, contractors are required to display government fraud hotline posters **unless** the contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster.
- If the contractor does not have a business ethics and conduct awareness program, the hotline poster must be displayed:
 - During contract performance in the US, with display in common work areas, within business segments performing work under the contract ,and at contract work sites
 - On the contractor's website, if the contractor maintains a company website as a method of providing information to employees
- Does not apply if the contract is for a commercial item or is to be performed entirely outside the United States
- Contractor must flow-down the requirement in all subcontracts that exceed US\$5M, except those for commercial items or that will be performed entirely outside the US

New provisions in FAR 52.203-13

- Business ethics awareness and compliance program (FAR 52.203-13(c)(1))
- Internal control system (FAR 52.203-13(c)(2))
- Covered contracts
 - These requirements do **NOT** apply to contracts for commercial items or those in which the contractor has represented itself to be a small business concern

Mandatory Disclosure Obligation: FAR 52.203-13

- Contractors must **timely** disclose, in writing, (agency Office of Inspector General (OIG), copy to CO), “whenever, in connection with the award, performance, or closeout of this [prime] contract or any subcontract thereunder, the Contractor has **credible evidence**” that a **principal, employee, agent, or subcontractor** of the Contractor has committed: (a) a violation of **federal criminal law** involving fraud, conflict of interest, bribery, or gratuity violations; or (b) a violation of the **civil False Claims Act**

Mandatory Disclosure Obligation: The False Claims Act

- Under 31 U.S.C. § 3729(a), a person can be liable for violating any of seven different provisions:
 1. Knowingly presenting a false claim for payment;
 2. Knowingly making or using a false record or statement material to a claim;
 3. Knowingly delivers less money or property than is due to the Government
 4. Certifying receipt of property without knowing that the information is true;
 5. Knowingly buying government property from an unauthorized officer of the government;
 6. Knowingly making or using a false record to avoid payment, or pay less to the government
 7. **Conspiring to commit any of the above**

The False Claims Act (continued)

- The term “knowingly” is defined to include:
 - Actual knowledge;
 - Deliberate ignorance; or
 - Reckless disregard of the truth or falsity of information subject to the Act
- Thus, the government does not have to prove that the person or firm actually deliberately attempted to defraud the government
- The “reckless disregard” standard is a much easier to meet standard than criminal standards for conviction
- Actions of individuals or employees are imputed to the company

Mandatory Disclosure Obligation: Applicable Contracts

- The mandatory disclosure requirements apply to federal contracts with a performance period of 120 days or more and a value of more than US\$5M, **including Federal Supply Schedule (FSS) Contracts with an anticipated overall value of more than that amount.**
 - This applies to all government contracts, including those for commercial items and those performed exclusively overseas.

Mandatory Disclosure Obligation: Subcontractors

- The Rule mandates flow-down of the disclosure requirements contained in FAR 52.203-13 for subcontracts with a value in excess of US\$5M and a performance period of more than 120 days. FAR 52.203-13(d)

Mandatory Disclosure Obligation: Full Cooperation

- A contractor's internal control system must provide for "full cooperation with any government agencies responsible for audit, investigation, or corrective action." FAR 52.203-13(c)(2)(ii)(G)
- "Full cooperation" means/includes:
 - Disclosure of information sufficient for law enforcement to identify
 1. nature and extent of offense, and
 2. individuals responsible for the conduct
 - Providing timely and complete response to government auditors' and investigators' request for documents and access to employees with information. FAR 52.203-13(a)(1)

Mandatory Disclosure Obligation: Suspension and Debarment

- The Rule added as a cause for suspension and debarment:

“Knowing failure by a principal, until three years after final payment on any government contract awarded to the contractor, to timely disclose to the government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, 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;
- B. Violation of the civil False Claims Act; or
- C. Significant overpayment(s) on the contract. . . .”

Suspension and Debarment: Applicable Contracts

- New causes for suspension and debarment apply to all government contracts, regardless of whether they include the newly revised version of FAR 52.203-13
 - Unlike contracts subject to mandatory disclosure, no dollar value threshold applies
 - Applies to overseas contracts, small business contracts, and commercial item contracts
 - Applies to contracts that pre-date the Final Rule where contractors have credible evidence of a past violation related to a contract that was not closed out before December 12, 2005, even though the contractor is not subject to the new mandatory disclosure provisions, which are prospective only

Increased Risk of Whistleblower (*Qui Tam*) Suits

- ARRA will see lots of quick spending and new contracts done in a hurry often with “less than precise” requirements
- ARRA’s increased oversight and whistleblower protections will cause more problems (real or magnified) to be found
- Expect aggressive government enforcement

CALIFORNIA GOVERNMENT CONTRACTING COMPLIANCE

California Government Contracting Overview

- California's Procurement System
 - Patchwork of statutes and regulations developed over decades
 - Multitude of studies and recommendations for improving the system
- DGS (Department of General Services) enters into contracts for California agencies, and also delegates authority to contract to many agencies

How the State Finds and Responds to Problems

- OMB Circular A-133 & single audits for programs using federal funds
- California State Auditor audits and reports
- Whistleblower protections
- Dealing with infractions:
 - Cartwright Act (Antitrust) & Unfair Competition Law
 - California's False Claims Act

Finding Problems: Single Audits

- Required by Federal Single Audit Act
- Details in OMB Circular A-133 (audits of states, local governments, and nonprofit organizations)
- Identifies:
 - Reporting requirements
 - Sub-recipient monitoring
 - Matching level of effort
 - Cash management

Finding Problems: State Audits and Reports

- California's System for Administering Federal Recovery Act Funds (April 22, 2009)
- California Prison Healthcare Services: Improper contracting decisions and poor internal controls (January 22, 2009)
- California Highway Patrol: It followed state contracting requirements inconsistently, exhibited weaknesses in its conflict-of-interest guidelines, and used a state resource imprudently (January 22, 2008)

Finding Problems: Whistleblower Protection

- State employees:
 - California Whistleblower Protection Act
 - State Auditor Hotline
- Contractors and private citizens:
 - California False Claims Act (Gov't Code § 12653)
 - Employers may not act to prevent employees from disclosing information
 - Employers may not retaliate against employees that do
 - Employees may contact government or law enforcement agencies—includes local law enforcement

Dealing with Problems: Cartwright Act (Antitrust)

- Active state enforcement
- State Attorney General can bring criminal and civil
- Treble damages (greater of US\$1M per violation or twice gain or loss from conspiracy)
- Violations also are *per se* violations of Unfair Competition Law
- Last looks resulting in lowered bids, raised bids, declined last looks, and courtesy bids may be alleged in prosecutions

Dealing with Problems: Antitrust Case Studies

- **Paxil:** California receives US\$2M out of multistate settlement as compensation for government acquisitions at prices allegedly inflated by anticompetitive conduct.
- **Zurich American:** California shares in a nine-state settlement for US\$152M over allegations ZA participated in price fixing and bid-rigging schemes.

Dealing with Problems: California False Claims Act (CFCA)

- Similar to Federal False Claims Act, but with important differences
 - Local officials may enforce (not just the Attorney General)
 - A claim need not actually have been false, just ‘underpinned by fraud’
 - Third-party beneficiaries can be liable
 - *Qui tam* relators have greater financial incentive to file
 - Less government discretion to dismiss suits

Dealing with Problems: CFCA Case Studies

■ Citibank

- Allegation: Citibank swept credit balances from credit card accounts to general fund
- Citibank apparently filed reports with State Controller that omitted practice of swept funds
- Settled in 2008 for US\$3.5M in damages and penalties, plus refunds to customers

■ Hanson

- Allegation: Hanson underrepresented amount of sand dredged under contract for state lands in 2003
- AG sues for US\$200M and eventually settles for US\$42.2M

LESSONS LEARNED FROM GOVERNMENT EMERGENCY SPENDING

Lessons Learned: The more things change....

- Government spending large sums of money in a short period of time increases risk of fraud, waste, and abuse, and taxes already limited acquisition personnel and tools
- Agencies *will seek* shortcuts to quickly fund projects.
- Contractors should *anticipate* audits and investigations, including the questioning of costs
- Noncompliance with requirements can lead to protracted and costly disputes with agencies to defend performance and costs
- *Severe penalties*, including fines, suspension and debarment and prison terms, are imposed after-the-fact for violations that could be avoided

Lessons Learned: Post 9-11 Contracts

■ Background

- In aftermath of 9-11 terrorist attacks, the federal government created the Transportation Security Administration (TSA) and federalized airport security screening
- Urgent need to hire airport screeners and provide infrastructure to support TSA employees at airports across the US
- In awarding initial contracts, TSA had a small staff responsible for numerous high dollar procurements

Lessons Learned: Post 9-11 Contracts

- TSA used a “letter contract” to quickly award \$US200+M to bridge air passenger screening at airports until TSA could assume that role
 - The “letter contract” was supposed to be followed by negotiations finalizing labor rates
 - Follow on negotiations never happened, and after performance the government tried to unilaterally lower rates
 - The dispute took over three years, and extensive litigation, to settle

Lessons Learned: Post 9-11 Contracts

- TSA awarded US\$104M contract to test and hire airport screeners
 - In less than one year, the contract cost increased to US\$741M
 - Defense Contract Audit Agency (DCAA) auditors questioned nearly US\$300M of the contractor's costs
 - Contractor engaged in extended legal battle with agency to defend costs
 - Contractor charged with False Claims Act violation for attempts to defraud government
 - Contractor paid US\$5.6M fine as settlement of False Claims Act charges

Lessons Learned: Post 9-11 Contracts

- TSA awarded a US\$1B contract to establish information technology and telecommunication infrastructure
 - Less than halfway through contract performance TSA had spent 83% of contract ceiling, without receiving many critical contract deliverables
 - US\$1B estimated cost was simply “a number out of the air”
 - DCAA report charged contractor with overbilling the government for up to 171,000 hours worth of labor and billing 24,982 hours of overtime that may have been inappropriate under the contract
 - Contractor subject to investigation for False Claims Act violation

Lessons Learned: Post Katrina: FEMA

■ Background

- FEMA not well prepared to provide acquisition support required for catastrophic disaster
- Inadequate planning led to hastily purchased supplies, commodities, and equipment
- The government often failed to pay reasonable prices because of limited competition
- Government's contract oversight was inadequate, leading to payment of questionable costs

Lessons Learned: Post Katrina: FEMA

■ Results

- House Committee report noted that 19 Katrina contracts collectively worth US\$8.75B were plagued by fraud, waste, abuse, or mismanagement
- House Committee report noted nearly 1,400 cases of reported criminal activity, including procurement fraud and abuse, that were under investigation
- At least 34 individuals have been sentenced to prison for FEMA fraud convictions

■ Temporary Housing Contract

- Experienced contractor providing temporary housing had over US\$50M of US\$154M in costs questioned by DCAA
- Questioned costs resulted from mischarging by subcontractor for maintenance which contractor acknowledged would have cost taxpayers US\$48M during the 19-month period of the contract

Lessons Learned: Post Katrina: FEMA

- Short Term Lodging Program
- Hotel owner and others investigated for overbilling the government for more than US\$250,000 under Katrina Short Term Lodging Program
- Submitted bills to FEMA for hotel rooms that Hurricane Katrina evacuees never occupied
- Hotel owner sentenced to 30 months in prison and a US\$30,000 fine for filing a false claim under the Short Term Lodging Program. The hotel owner also paid US\$232,000 in restitution to the US

Lessons Learned: Iraq Reconstruction

■ Overview

- As a result of problems with fraud, waste, and abuse in the reconstruction of Iraq, government established a Special Inspector General for Iraq Reconstruction (SIGIR)
- SIGIR has conducted numerous investigations including approximately 100 audits of contracting activities
- 300 criminal and civil investigations leading to arrests and convictions
- Numerous cases currently under prosecution at the Department of Justice

Lessons Learned: Iraq Reconstruction

- Contract for Interrogation Services
 - In 1998, a contractor was awarded an IT services contract by GSA
 - The Army placed an order for interrogation services at Abu Ghraib prison in Iraq under the IT services contract
 - Interrogation services were not a part of the IT services contract (order was “out-of-scope”)
 - The out-of-scope order was part of a larger problem and prompted DOD and GSA to establish a "Get it Right" program to ensure that future orders under such contracts were within the scope of the contract's terms

Lessons Learned: Iraq Reconstruction

- Bribery and Corruption in Iraq
 - US contractor based in Bucharest, Romania involved in a bribery and corruption scheme to defraud the US government
 - Scheme also involved Comptroller and Funding Officer for the Coalition Provisional Authority—South Central Region (CPA-SC)
 - Conspired to rig bids on contracts being awarded by the CPA-SC so that contracts were awarded to the contractor
 - Contractor provided public officials with over US\$1M in cash, SUVs, sports cars, a motorcycle, jewelry, computers, business class airline tickets, liquor, future employment, and other items of value

Lessons Learned: Iraq Reconstruction

- Bribery and Corruption in Iraq (continued)
 - Contractor pleaded guilty to bribery, money laundering, and conspiracy in connection with the scheme to defraud the CPA in al-Hillah, Iraq. Sentenced to 46 months in prison and ordered to forfeit US\$3.6M
 - Comptroller sentenced to nine years in prison and ordered to forfeit US\$3.6M for his role in the bribery and fraud scheme.
 - Other officials from the US Army were also convicted of participating in the bribery and corruption scheme and also faced penalties, including fines, and prison terms

Emergency Spending: Contractor Best Practices

- Do not be afraid to slow the agency down and help the agency clarify what they need and what you can do to help
- Improve internal compliance training and perform self-audits and reviews

**Transparency, communication,
and documentation**

Questions or Comments?

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