

So you want a  
piece of stimulus  
spending?

It's seller beware  
in the new age of  
transparency





### American Recovery and Reinvestment Act

Both seasoned government contractors and public sector neophytes are probably hoping they will be able to benefit from the half-trillion dollars in economic stimulus spending mandated by the American Recovery and Reinvestment Act (ARRA or "Act") of 2009. Federal, state, and local government units are expected to use the funds to acquire goods and services, providing broad business opportunities, and a hoped-for boost to the economy.

Veteran contractors may sometimes enjoy an edge over the newcomers because they may have established relationships or may know the intricacies and nuances of doing business with governmental agencies. But both first timers and companies that have been around awhile may not fully understand the scope and seriousness of the new requirements and enforcement elements in the ARRA aimed at preventing fraud, waste, and abuse.

While 80 percent of the 2,000 non-Deloitte participants in a recent Deloitte Dbriefs webcast poll believe the emphasis on transparency and accountability in government spending will translate into wider business and industry regulation, nearly 60 percent do not think it is possible to attach the level of transparency promised by the Obama administration to spending resulting from the fiscal stimulus programs.

Stimulus projects are likely to come with a thick string of transparency and accountability requirements, along with potentially severe financial penalties and, in some cases, possible prison time. These conditions may be extended not only to U.S. government contractors, but to companies undertaking federally funded projects for state and local governments.

Companies that plan to accept ARRA dollars should consider acting now to prepare for an especially demanding environment. Investing time, effort, and resources in establishing and improving risk management and compliance processes and controls today can help companies mitigate potentially catastrophic problems later.

### Many sets of eyes

The ARRA includes funding to strengthen oversight and investigations through several avenues. More than \$200 million is expected to go to the inspectors general who serve as watchdogs over federal departments and agencies. The Act requires that inspectors general review, as appropriate, any concerns raised by the public about specific investments using funds made available.

In addition, the Government Accountability Office (GAO) is also receiving ARRA funds. The GAO is hiring accountants, lawyers, economists, and policy analysts to look for fraud and abuse at various levels of government.

The Act also establishes the Recovery Act Accountability and Transparency (RAAT) Board to coordinate and conduct oversight of ARRA spending. The board is responsible for seeing that funds are awarded and distributed promptly, fairly, and reasonably. It also is charged with establishing and maintaining transparency of acquisition processes, fund recipients, and fund uses. As part of its role, the board has been asked to establish a Web site that will substantially expand the amount of contract information currently captured by a similar Web site, [USAspending.gov](http://USAspending.gov) (See What the RAAT Board wants to know).

Increased federal oversight also will "flow down," as the ARRA places compliance requirements on the shoulders of state and local officials. Section 1511 of the Act requires the governor, mayor, or other chief executive to certify that projects being funded have received full review and vetting and that the funds are an "appropriate" use of taxpayer dollars. Section 1553 of the Act also protects state and local government and contract employees from reprisal that could arise from whistle-blowing activities.

### Fraud and Abuse

Actions against companies for fraud and abuse violations related to stimulus projects can be taken principally under one of two federal statutes: the False Claims Act and U.S. Code Title 18, Section 1001, which criminalizes false statements.

## Understanding the False Claims Act

The False Claims Act (FCA or Statute) is a statute widely used to root out fraud and abuse in government contracting. However, the Statute, which dates back to the Civil War, is little understood among businesses. In fact, 80 percent of the respondents in the recent Deloitte Dbriefs webcast were not familiar with it.

The U.S. Department of Justice can pursue FCA violations for a variety of alleged acts, including:

- Fraud or misrepresentation in accepting government money
- Presenting an inflated claim for payment or approval
- Using a false record or statement in connection with a payment from the government
- Delivering less property or service than the amount indicated on the customer receipt
- Delivering a product or service that is different from what was promised

False claims fall into three categories — those that are intentionally false, those made with deliberate indifference to the truth or falsity of the claim, and those made with reckless disregard for the truth.

There are two new pieces of legislation aimed at increasing government oversight through the FCA — the Fraud Enforcement and Recovery Act (FERA) of 2009 and the False Claims Act Clarification Act (FCA Clarification Act) of 2009.

The FERA was signed into law on May 20, 2009, and addresses overpayments to contractors and requirements to repay the government. It also imposes liability on receiving federal money regardless of whether the source was a federal, state, or local entity.

The FCA Clarification Act (introduced in both the House and the Senate, but not yet passed) would tie liability to receipt of government funds. It also would allow government employees to act as whistle blowers and join other relators — such as former employees, competitors, and attorneys — in being eligible to receive qui tam payments out of penalties imposed on violators. The U.S. Department of Justice has cited this provision as potentially creating a conflict of interest for such workers.

## What the RAAT Board wants to know

In addition to information already found at the [USAspending.gov](http://USAspending.gov) Web site, the Recovery Act Accountability and Transparency Board Web site is expected to include:

- A description of how funds will be spent
- Announcements of all federal, state, and local contract and grant solicitations
- Findings from various audits
- Inspector general reviews in the Government Accountability Office.
- Information about the competitiveness of the contracting process
- Information about subcontracting opportunities and estimates of jobs created and/or retained

A significant change embodied in both acts is elimination of the “presentment” requirement to bring an FCA action. Previously, this requirement shielded some contractors whose alleged misuse of government funds involved intermediaries, such as block grantees, who, already being in possession of the grant funds, did not in turn present the false claim to the U.S. Government for subsequent reimbursement. However, with the enactment of the FERA, this change has now significantly increased the exposure of contractors under the FCA in connection with state and local contracts underwritten with stimulus funds.

The FCA mandates the awarding of treble damages and penalties of up to \$11,000 per violation. These costs can add up quickly. A \$100 overcharge spread over 1,000 invoices — 10 cents per invoice — could result in \$300 in damages and \$11 million in penalties. In addition, defendants can be required to pay plaintiff attorneys’ fees and face potential suspension and debarment from government contracting.

It should be noted that many individual states also have their own false claims statutes. Thus, stimulus fund recipients can be subject to a pincer of false claims litigation from multiple government instrumentalities.

Another major oversight mechanism was promulgated in December 2008. This involved a change to the Federal Acquisition Regulation (FAR) that prospectively directs government contractors with contracts valued above a certain threshold to self-report “credible evidence” of violations, and retroactively requires a three-year “look back” for such “credible evidence” of violations and of significant overpayments under pain of suspension and debarment. Since “credible evidence” is a standard that is far less than that needed to support a criminal conviction (“beyond a reasonable doubt”) or a civil judgment (a “preponderance of the evidence”), contractors are now required to self-report even if they believe that the evidence, objectively viewed as a whole, is insufficient to support any actual liability.

#### The consequences of false statements

Some companies that run afoul of government fraud and abuse requirements can get in trouble more quickly for what they say than for what they’ve done. Section 1001 of the U.S. Criminal Code prohibits false statements to the government. Someone is considered to have made a false statement if he/she knowingly and willfully falsifies, conceals, or covers up a material fact or makes a materially false, fictitious, or fraudulent statement or representation “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States.” This includes statements made to investigators, whether or not under oath.

The ARRA broadens the authority of government authorities to conduct interviews, and while proving a substantive violation of federal law is a multifaceted endeavor, a false statement given knowingly is itself a violation the government can prove with comparative ease.

Both the federal government and individual states can impose fines and criminal penalties for false statement violations.

#### Preparing for greater accountability

Some of the steps companies pursuing stimulus projects can take to mitigate the risk of violating these fraud and abuse edicts include:

- Understanding the requirements and sanctions outlined here, as well as the specific provisions of your particular

contracts. Read all agreements carefully.

- Conducting a detailed fraud risk assessment that identifies how fraud can occur within an organization. Determining whether there are controls and processes in place to address such threats with, where applicable, a particular focus on cost accounting. It is also important to implement effective monitoring of the effectiveness of those controls and processes.
- Developing a common definition of fraud and corruption within an organization that is documented and shared with all employees. Also, looking at how employee responsibilities for detecting fraud and corruption at all organizational levels are documented.
- Knowing the audit policies and requirements of agencies with which business is conducted, considering the potential role of internal auditors in monitoring compliance.
- Considering the disclosure requirements of ARRA and putting systems in place to collect and report timely and factual data.
- Finally, assessing whether there is a fraud response management plan and team in place that can deal with alleged fraud and corruption — knowing whom to call when, and what data needs to be collected.

It may begin with a phone call from a federal official who wants to come by your office for a visit, or an inspector general who could appear at the front door of your home in the middle of the night. You can be better prepared for either scenario, or potentially avoid problems altogether, by understanding the unique requirements of government contracting and investing in the processes, controls, and skilled people needed to address them.

**For more information, please contact:**

**Donna Epps**

**Partner**

**Deloitte Financial Advisory Services LLP**

+1 214 840 7363

depps@deloitte.com

**John Chierichella**

**Partner**

**Sheppard Mullin Richter & Hampton LLP**

+1 202 218 6878

jchierichella@sheppardmullin.com

This publication contains general information only and Deloitte is not, by means of this publication, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This publication is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor.

Deloitte, its affiliates and related entities shall not be responsible for any loss sustained by any person who relies on this publication.

Copyright © 2009 Deloitte Development LLC. All rights reserved.  
Member of Deloitte Touche Tohmatsu