

Government Contracts Blog

Posted at 8:04 AM on July 7, 2009 by Sheppard Mullin

The President Admits the Stimulus Is Not Working as Hoped. Well, Duh.

The Administration has conceded that the American Recovery and Reinvestment Act (“ARRA”) has not worked as planned. With unemployment numbers continuing to climb, the Administration now acknowledges it “[misread the economy](#).” But from the beginning not everyone believed ARRA would achieve the desired stimulative effect. After all, \$787 *billion* dollars cannot be disbursed without some complication.

ARRA has choked itself. Complexity, inflexibility, and draconian oversight provisions have combined to confuse and frighten contractors and state and local governments. Timely award of contracts funded by ARRA and, if the contracts are awarded, their performance, have become impracticable.

We [told you so](#).

Companies interested in pursuing stimulus funds are realizing that ARRA imposes stringent rules and regulations, whether the company is a seasoned government contractor or a strictly commercial enterprise. Companies accepting stimulus funds will pay applicable employees the prevailing wage rates that are determined by the Department of Labor. Companies whose inventories include substantial quantities of foreign-made products must keep those products on the shelves because ARRA’s “Buy American” provision incorporates strict country-of-origin requirements. Moreover, so much confusion remains in the interim guidance about the coverage of “Buy American” that some companies are adopting a wait-and-see attitude. ARRA’s promoting of such behavior is directly contrary to its stated purpose. The rules are also substantively confusing. The applicability of each rule can vary depending upon whether the federal, state, or local government funds and disburses the money for a given project. Under these circumstances, hesitation is nothing short of reasonable self-defense and preventive maintenance.

Thus it comes to pass that state and local governments are finding that they cannot spend stimulus money with the ease anticipated by the Administration and Congress. They are discovering that foreign sourcing is so common that it is impracticable to avoid foreign content for at least some percentage of components, and that “Buy American” excludes contractors who would ordinarily bid on projects but for the restrictions on foreign components. Making matters worse, not all states or state agencies are exempted from these country-of-origin requirements, which create a patchwork across states and even within some states. Inexplicably, the

Administration has fed this disorder by taking one statutory authority, ARRA, and authorizing two disjunctive regulatory regimes for it -- the FAR Councils and Office of Management and Budget (“OMB”). They have been tasked with implementing regulations for the federal government and state and local governments, respectively, and at least so far in the rulemaking process, have shown little sympathy for the lack of clarity and the imprecision that abound.

Labyrinthine rules are only one aspect of ARRA’s built-in disincentives for accepting stimulus funds. The law's reporting and auditing requirements verge on the impossible. Every quarter, companies must report to the federal government information such as the jobs “created or saved” because of the use of stimulus funds -- now there is a statistic that will most assuredly exhibit precision -- progress on the project receiving funds, and, in some cases, the salary for the five most highly-paid employees in the company. To ensure utmost compliance, companies are flowing down these requirements to subcontractors, vendors, and suppliers. All this information is subject to audit by the Government Accountability Office, the Office of Inspector General, the Recovery and Accountability Board, and state agencies. It is hardly surprising that an Administration that thinks government contracting is broken because “spending is plagued by massive cost overruns, outright fraud, and the absence of oversight and accountability” would create such a bureaucracy. But doing so amounts to a promise to hound and vilify contractors -- not an approach reasonably calculated to entice most companies to do business in the federal marketplace. Far from encouraging contractors to spend the government’s money, ARRA has made them risk-averse and discouraged efficiencies that are celebrated in the commercial world (e.g., refusing to permit, in the interim regulations, an exemption to “Buy American” for commercial items).

As we suggested before ARRA metastasized, the federal government’s own backyard needs more upkeep than it is receiving. And yet, while the federal government bemoans the absence of government contracting employees to oversee procurement adequately, it then burdens the existing corps of contracting personnel with extensive requirements for the oversight of a supposedly expedited process for the disbursement and expenditure of \$787 billion. State government officials have now also been conscripted for ARRA, but they are -- understandably - less familiar with even the pre-ARRA federal government procurement process. Add to this morass that the Administration has also famously admitted that stimulus funds are being wasted, and no one should be shocked to discover that the federal government’s scheme for stimulating the economy is clearly failing to achieve its fundamental purpose.

Authored by:

[Daniel J. Marcinak](#)

(202) 772-5391

dmarcinak@sheppardmullin.com