[Alerts and Updates]

FAR Rules for Stimulus Funded Contracts: Alert 2 - Enhanced Whistleblower Protections

May 6, 2009

In our May 5, 2009, Alert, we addressed the recent issuance of five Federal Acquisition Regulation ("FAR") Counsel interim rules[1] that are required by the American Recovery and Reinvestment Act of 2009 ("ARRA" or "Stimulus Package"),[2] and discussed in more detail the interim rule incorporating existing and modified Buy American requirements.

In this second Alert in a series of five, we discuss the enhanced whistleblower protections.

Enhanced Whistleblower Protections (FAR Case 2009-012)

Whistleblower protections are not new to government contractors. Since 1863, the federal False Claims Act (initially targeting corrupt contractors fleecing the government over Union Army supplies) has protected, and in fact rewarded, employees who report fraud or other prohibited acts ("whistleblowers") with its *qui tam* provisions, which permit ordinary individuals to sue "for the King, as for himself."[3] More recently, the Sarbanes-Oxley Act of 2002 extended protection to employees of publicly-traded companies (including many government contractors) who report corporate-fraud securities violations.[4] For years, the Occupational Health and Safety Administration and the U.S. Department of Labor have administered other whistleblower protection programs to promote disclosure of environmental or health and safety-related violations.[5] Several states have enacted their own whistleblower laws, such as New Jersey's Conscientious Employee Protection Act and New York's private sector whistleblower's law, which typically protect private employees who report illegal acts, fraud or threats to public health, safety or the environment.[6]

The FAR interim whistleblower rule, however, is likely to substantially increase the caseload for federal agencies that handle investigation and determination of such claims, and—for all contractors and subcontractors receiving stimulus funds—promotes and protects an unprecedented range of reported offenses: not only fraud but also abuse, mismanagement and waste.[7]

- The interim rule applies to all "Non-Federal employers" who, through grants or contracts, receive federal stimulus-funds ("Employers"), including state and local governments, and public or private contractors and their subcontractors.[8]
- Employers cannot fire, demote or otherwise discriminate against an employee "as a reprisal for disclosing covered information" to a long list of governmental entities (an Inspector General ("IG"), a member of Congress, a court, grand jury and others) *or*, in a marked departure from previous whistleblower statutes, to one's supervisor or Employer's internal compliance personnel.[9]
- "Covered information" is information that an employee "reasonably believes" is evidence of any of five offenses (one expanded, four new) relating to use of stimulus funds, including: "gross mismanagement," "gross waste of covered funds," "a substantial and specific danger to public health or safety," "an abuse of authority," or "violation of law, rule, or regulation."[10] The previous FAR whistleblower rule, in stark contrast, protected only the reporting of "*substantial* violations of law," and did not expressly offer employees the benefit of the broader, more-subjective "reasonable belief" standard.[11]
- Employees have a relatively easy burden of proof and can prove a prohibited reprisal occurred by showing that their disclosure of covered information was a "contributing factor" to the alleged employment discrimination.[12] This can be

proven by "circumstantial evidence," including if the retaliating official knew of the employee's disclosure, or if a reasonable person would find retaliation because the employment discrimination followed soon after the disclosure.[13]

- Employer faces a relatively high burden to rebut the employee's claim, and must prove by "clear and convincing evidence" that, notwithstanding the disclosure, it would have taken the negative action against the employee anyway.[14]
- Complaints are filed with the IG of the agency that awarded the contract, and must be dismissed or fully investigated within 180 days (as extended by the parties, or extended to 360 days by the IG).[15] Within that time, the IG must (i) dismiss the complaint as frivolous, unrelated to stimulus funds or subject to a separately pending administrative or judicial proceeding, or (ii) issue a report of findings to the employee, Employer, the agency head and the recently formed Recovery Accountability and Transparency Board.[16]
- Based on an IG report, the agency head has 30 days to issue a determination. The agency head can require Employer to (a) "abate" the reprisal; (b) reinstate employee; (c) pay compensatory damages (not previously provided), benefits *and* back pay; and (d) pay attorneys' fees and costs.[17]
- If Employer does not comply, an enforcement action can be filed in federal court for injunctive relief, compensatory and exemplary damages, and costs.[18]
- If the claim is not investigated, not decided in time, or is denied, the employee may sue in federal district court *de novo* (that is, the court will not review or consider the prior dismissal, IG's findings or agency head's determination).[19]
- Employee is provided access to the IG's file; Employer is not, except for a limited right of access if the employee sues.[20]
- Employer, employee or any other person adversely affected by the agency head's order can appeal to a federal court of appeals; however, appeal is not *de novo*, and is limited to whether the order conformed with the law and FAR section 3.907.[21]
- These rights cannot be waived by agreement or condition of employment, including pre-dispute arbitration agreements; except if included in a collective bargaining agreement.[22]
- These federal rights do not preempt state law. An employee may proceed simultaneously in different forums if other legal grounds exist, for example, state whistleblower statutes.[23]
- Finally, Employers must post notices in the workplace of these procedures, rights and remedies.[24]

Observations and Practice Pointers

- The federal government has likely benefited from information provided by whistleblowers. These new, enhanced provisions may empower certain employees to disclose illegal acts, fraud and, now, abuse, mismanagement and waste.
- However, especially in these difficult times, some employees may be tempted to misuse these provisions for such reasons as to avoid being fired.
- The unprecedented new scope of "covered information," including "gross mismanagement" and "gross misuse," is likely to make claims difficult for agencies to evaluate and determine, and for Employers to defend against.
- This expanded scope is also likely to increase the volume of reporting and claims.
- The increase in volume, combined with strict and short time requirements, may cause problems. Recent hearings before the U.S. Senate Subcommittee on Homeland Security called into question whether the GAO or the various Inspector Generals' offices have sufficient personnel to review new claims, much less handle their existing backlog.

In light of that backlog, will delayed investigations or rushed dismissals remove claims from the administrative process, placing them into federal court litigation?

- Meantime, Employers may encounter difficulties taking adverse actions unrelated to the disclosure, particularly since employees have to show only that the Employer's action was a "contributing factor."
- Increased remedies, now including compensatory damages, in addition to back pay, benefits, and attorneys' fees and costs, may make this an expensive proposition for contractors.
- Contractors may mitigate their risks by:
    - educating supervisors with respect to the impact of this unprecedented law;
    - implementing programs to closely monitor internal administration and management of all stimulus-funded contracts (particularly with respect to mismanagement, misuse, abuse, public health and safety and legal violations); and
    - providing clear procedures for immediate corrective measures.

For Further Information

If you have any questions regarding this Alert or would like more information, please contact Robert A. Prentice, Richard P. Dyer, Kenneth H. Lazaruk, Daniel E. Toomey, any member of the Construction Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. ARRA FAR Interim Rules, 74 Federal Register 14,622 (Mar. 31, 2009).
2. American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009).
3. Federal False Claims Act, 31 U.S.C. §§ 3729-3733 (2000).
4. Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A (2002).
5. Whistleblower protection programs based on several federal statutes, such as the Clean Air Act, 42 U.S.C. § 7622 (2000); Pipeline Safety Improvement Act, 49 U.S.C. § 60129 (2002).
6. N.J. Stat. Ann., § 34:19-3 *et seq*. (West 2009), and N.Y. Lab. Law § 740 (Consol. 2009).
7. The interim whistleblower rule implements section 553 of ARRA, also known as the McCaskill Amendment, by adding a new section 3.907, and making the previous, much-narrower FAR whistleblower procedure (sections 3.901–3.906), inapplicable to stimulus-funded contracts.
8. FAR 3.907-1.
9. FAR 3.907-2.
10. FAR 3.907-1.
11. FAR 3.901-3.906.
12. FAR 3.907-6(a)(1)(i).
13. FAR 3.907-6(a)(1)(ii).
14. FAR 3.907-6(a)(2).
15. FAR 3.907-3(a) & 3.907-4.
16. ARRA § 1553.
17. FAR 3.907-6(b).
18. FAR 3.907-6(d).
19. FAR 3.907-6(c).
20. FAR 3.907-5(a).
21. FAR 3.907-6(e).

22. ARRA § 1553(f)(2).
23. ARRA § 1553(d).
24. FAR § 52.203-15 (new clause).