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The Office of Federal Contract Compliance Programs (OFCCP) has announced new aggressive procedures for auditing recipients of federal stimulus funds. Under the new procedures, any company receiving ARRA funds will face more rigorous audits and certain existing rules limiting the number and frequency of audits will no longer apply. In addition, construction projects, which have not been subject to significant audit activity for a number of years, are now going to be a primary focus of the agency's activities. Procurement personnel who are seeking ARRA funds will need to coordinate with HR in order to ensure that the company is prepared to comply fully with OFCCP's regulations before submitting its contract bid.

Companies Seeking Stimulus Funds Should Expect a More Aggressive OFCCP

By David J. Goldstein and Alissa A. Horvitz

As part of the Obama administration's commitment to accountability in spending under the American Recovery and Reinvestment Act (ARRA), the federal Office of Federal Contract Compliance Programs (OFCCP) will be tracking its ARRA-related and non-ARRA-related enforcement activities separately and aggressively auditing recipients of ARRA funds.

On July 7, 2009, OFCCP released a new directive that explains the different procedures that will apply in scheduling and conducting compliance evaluations for ARRA-funded contractors versus other federal contractors.

Under the new procedures, there will be an increased focus on construction contractors. In addition, supply and service contractors receiving ARRA funds will be subjected to full desk audits and onsite reviews. Existing 24-month moratoriums on audits for companies on the pre-award registry will not apply, and the current audit ceiling of no more than 25 audits per company will not apply to companies receiving ARRA funds.

In short, if a company wants ARRA funds, compliance with equal employment opportunity and affirmative action needs to be reviewed before the ARRA application is submitted.

ARRA Compliance Evaluations of Supply and Service Contractors (Non-Construction Contractors)

When evaluating an ARRA-funded contractor, OFCCP always intends to proceed with a full desk audit and an on-site review, even in the absence of systemic discrimination indicators. This represents a significant change from existing procedures under which the agency sometimes limits its auditing activities to just verification of the contractor's recordkeeping and that usually does not involve an on-site inspection absent signs of systemic discrimination or other specific problems.

Changes in Scheduling Procedures

OFCCP’s national office will compile and provide to the regional OFCCP offices every 45 days a list of ARRA federal contractors. This list will be used by the regional offices to schedule ARRA audits and will be separate from the Federal Contractor Selection System (FCSS) list now used to select contractors for audits.

For contractors with multiple establishments, the FCSS limits the number of compliance evaluations scheduled to 25 new evaluations during a scheduling cycle. This limit will not apply to ARRA compliance evaluations.

In addition, under the existing process, an establishment that has been reviewed by OFCCP is excepted from further review for a 24-month period. This exception will not apply to ARRA-funded contractors. Instead, an establishment that underwent a standard review will be excepted from an ARRA review for only six months from the date on which the prior review closed. On the other hand, an establishment that undergoes an ARRA compliance evaluation will not be subject to another and will be excepted from scheduling for a standard OFCCP compliance evaluation for 24 months.

Finally, companies seeking large federal contracts (over \$10 million) are subject to a pre-award clearance evaluation. OFCCP has also adopted new rules for conducting these pre-award evaluations when they are in connection with ARRA-funded projects.

The new procedures for scheduling and conducting pre-award evaluations and compliance evaluations vary with the size of the contract and are different for companies that are existing government contractors (and, therefore expected to already be in compliance with OFCCP’s rules and regulations) versus companies that are new to the government contracting world. The variations are summarized in the chart below.

Contract and Contractor Status			Pre-Award Clearance Evaluation?	ARRA Compliance Evaluation
Contract Amount	Existing federal contractor?	Contractor already on Pre-Award Registry?		
>\$10 Million	Yes	No	Yes, even if the contractor has been audited and cleared within the last 24 months.	Yes, upon confirmation that contractor establishment has received the funds.
>\$10 Million	Yes	Yes	No.	Yes, upon confirmation that contractor establishment has received the funds.
>\$10 Million	No	No	Yes, OFCCP is expected to complete the pre-award review and notify the contracting agency within 20 days of receipt of the pre-award request Because new ARRA contractors do not have existing contracts within OFCCP’s jurisdiction, and do not have AAPs or support data to be evaluated, a key component of the pre-award evaluation will include on-site compliance assistance. ¹	

<p>Less than \$10 Million but more than \$50,000</p>	<p>Yes</p>	<p>N/A</p>	<p>No.</p>	<p>If the contractor happens to be already scheduled for a non-ARRA audit, but that audit has not yet begun, OFCCP will remove the establishment from the FCSS list and audit it in the order in which it appears on the ARRA list.</p> <p>If the contractor is in the middle of a non-ARRA audit, that audit will continue under existing Active Case Management procedures (focusing on systemic discrimination indicators).</p> <p>If the ARRA contractor is not in the middle of an existing audit, the new auditing procedures will apply: full compliance review, including a full desk audit and on-site review, even in the absence of systemic discrimination indicators.</p>
<p>Less than \$10 Million but more than \$50,000</p>	<p>No</p>	<p>No</p>	<p>No.</p>	<p>OFCCP will conduct a full desk audit evaluation and an on-site review.</p> <p>If the ARRA compliance evaluation indicates that there is no systemic discrimination or other apparent non-compliance with the laws that OFCCP enforces, OFCCP will issue the appropriate closure notices.</p> <p>If violations are found, compliance officers will follow established procedures, meaning, OFCCP will identify the violations in a Predetermination notice or Notice of Violations, attempt to conciliate with the contractor, and if conciliation efforts fail, refer the case to the Solicitor's Office for enforcement.</p> <p>Absent indicators of possible discrimination, each full compliance evaluation should be completed within 60 days.</p>

ARRA Compliance Evaluations of Construction Contractors

Construction projects will be selected for review from lists developed by OFCCP's national office and provided in "batches" to the regional or district OFCCP office where the projects are located. The lists of projects will apparently be compiled from information provided by federal contracting officers, applicants for and recipients of federal financial assistance, and current contractors (all of whom are required to provide such notice under existing federal regulations).

Once a local office has selected a project for evaluation, it will identify and then contact the prime contractor for the project. If the prime contractor confirms that construction on the project has begun, OFCCP will then: (1) seek additional information from the prime

contractor about the project and all of its construction subcontractors; (2) schedule an on-site date; and (3) identify those subcontractors working on the current phase of the project as of the date of the on-site.

For each selected construction project, OFCCP will identify three contractors for review. Every prime or subcontractor working on the current phase of the project on the date of OFCCP's scheduled on-site will be subject to review if:

- it has a minimum of 10 trade employees and laborers assigned to the project;
- it has a contract of \$10,000 or more;
- it has not previously undergone an ARRA construction evaluation within the same geographical area; and
- OFCCP has not reviewed the contractor, within the same geographic area, within the past 6 months.

Construction compliance reviews will focus on the contractor's trade workforce in the geographic area(s) where the contract work is performed. OFCCP will consider the contractor's total on-site workforce, including those employees working on other construction projects in the relevant geographic area, *regardless of whether or not those projects are federally funded or federally assisted, ARRA funded or non-ARRA funded.*

Mega Projects

OFCCP has also defined certain covered construction projects as "Mega Projects." These are projects that have a contract value of \$50 million or more, have a significant economic and/or employment impact on a community, and are expected to last more than one year.

In order to promote equal employment opportunity in the skilled trades and to enhance relations among governmental entities, community groups, labor organizations, sponsors, and contractors, OFCCP intends to act proactively in connection with Mega Projects to coordinate preliminary meetings with the contracting agency, provide pre-construction technical assistance to the prime and major subcontractors, coordinate establishment of an oversight committee to monitor the project, facilitate introductions between contractors and community and labor groups, and conduct compliance evaluations of the prime contractor and its subcontractors as the project progresses.

Employer Considerations

Many construction contractors have become used to a low level of scrutiny from OFCCP. Clearly, that is going to change. Construction contractors working on ARRA-funded projects, in particular, should expect to be hearing from OFCCP sometime in the near future. This means that companies that are not willing to accept the obligations and the scrutiny that come with work on a federal or federally assisted construction project should not undertake such projects.

The situation is similar for service and supply contractors. Companies that have never before been audited face a greater likelihood of audit now if they are receiving ARRA funds. Recipients of ARRA funds also need to keep in mind -even if an establishment has been previously audited and normally would not be subject to another audit for some time- that may no longer be the case. Recipients of ARRA funds also need to remember that if selected for evaluation, they can now count on the process including a full desk audit and on-site review. This means that contractors should be acting now to make sure that their affirmative action programs are compliant and effective, that they are creating and properly retaining records, and that their underlying HR practices are fair and nondiscriminatory.

With greater budgetary resources, additional staff, and an articulated commitment to increased auditing, OFCCP is going to be very active for the next few years. Proactive steps to comply with OFCCP's regulations will ensure that the benefits of participation in an ARRA-funded project or contract are not later lost to the costs of an unnecessarily difficult audit or an OFCCP imposed remedy.

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¹ In particular, OFCCP will:

- review the contractor's equal employment opportunity requirements and obligations under Executive Order 11246, Section 503 of the Rehabilitation Act and VEVRAA;
- explain how to develop an AAP and maintain required records;
- review its enforcement role and procedures and ensure that the contractor has a copy of the "Equal Employment Opportunity is the Law" poster; and
- determine whether the bidder will be able to comply with all the EEO obligations of a federal contractor