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Danielle M. Conway  
dzc5647@psu.edu

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# Emerging Trends in International, Federal, and State and Local Government Procurement in an Era of Global Economic Stimulus Funding

Danielle M. Conway\*

## I. INTRODUCTION

The American Recovery and Reinvestment Act of 2009<sup>1</sup> (“ARRA”) is enormous in volume and scope, touching everything from executive compensation paid by past and future recipients of funds under the Troubled Assets Relief Program<sup>2</sup> (“TARP”) and nationwide broadband services development<sup>3</sup> to the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) Continuation Health Coverage,<sup>4</sup> and the New Construction, Substantial Rehabilitation, and Loan Management Programs<sup>5</sup> administered by the U.S. Department of Housing and Urban Development (“HUD”). The ARRA has followed the trend of predecessor spending bills that have sought to pump lifeblood into the American economy during times of instability and financial crisis by force-feeding the government contracts machine.<sup>6</sup>

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\* Professor of Law & Director, University of Hawai‘i Procurement Institute. I am grateful to The John Marshall Law School for inviting me to present an early draft of this article during the 2009-2010 Faculty Scholarship Roundtable Series. I am especially grateful to Professor Kim David Chanbonpin for personally extending the JMLS invitation. Finally, I wish to thank Kelly Higa and Jennifer Allen for their superior research assistance.

<sup>1</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>2</sup> *Id.* Div. B, Tit. VII, § 7001, 123 Stat. at 516-20. TARP was authorized by the Emergency Economic Stabilization Act (“EESA”) of 2008, which Congress passed on October 3, 2008. Under TARP, the United States Treasury used funds to make direct equity investments in financial institutions. Section 7001 amended and restated in their entirety the EESA provisions regarding executive compensation.

<sup>3</sup> *Id.* Div. B, Tit. VI, § 6001, 123 Stat. at 512-16. Section 6001 established “a national broadband service development and expansion program in conjunction with the technology opportunities program,” referred to as the Broadband Technology Opportunities Program. *Id.*

<sup>4</sup> *Id.* Div. B, Tit. III, § 3001, 123 Stat. at 455-66.

<sup>5</sup> *Id.* Div. A, Tit. XII, 123 Stat. at 225-26; Patton Boggs, LLP., No Small Change: The Stimulus Package and its Impact, 81-87 (Apr. 21, 2009), [http://www.pattonboggs.com/](http://www.pattonboggs.com/follow%20Patton%20Boggs%20Economic%20Stimulus%20Analysis%20The%20American%20Recovery%20and%20Reinvestment%20Act%20of%202009) (follow “Patton Boggs Economic Stimulus Analysis The American Recovery and Reinvestment Act of 2009” hyperlink) [hereinafter Boggs].

<sup>6</sup> See Div. A, 123 Stat. at 116-305. See generally Boggs, *supra* note 5.

As with previous economic downturns, the federal government is looking to contractors to stave off the tide of recession. Economists note that, in the end, government spending is meant to entice other economic agents to start spending.<sup>7</sup> One segment of this broad group of economic agents is private sector contractors, which include construction and engineering companies.<sup>8</sup> As such, the ARRA has been described as “good news for government contractors.”<sup>9</sup> This article considers the ARRA’s impact on contractors operating in international, federal, and state and local procurement sectors while attempting to identify the emerging trends in compliance and reporting requirements, competition requirements, domestic preference regulatory requirements, and heightened transparency and oversight requirements.

Section two of this paper provides a basic summary of the ARRA in the context of government contracting. Section three offers examples of the scope of contracting opportunities from select industries. Section four examines the federal government’s competition policy. Section five explores the murky arena of domestic preferences and their impact on America’s precarious foreign trade relations. Section six examines the federal government’s enhanced oversight and investigatory authority. Section seven focuses on the intersection between the oversight and reporting requirements and potential liability under the False Claims Act. And finally, the article concludes by forecasting the long-term impacts of the ARRA on parties who accept or administer economic stimulus funds over the next two years.

## II. SUMMARY OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The ARRA was enacted on February 17, 2009, amending myriad scattered sections of the United States Code.<sup>10</sup> By all accounts it is considered one of the most significant pieces of tax relief and government spending legislation since the Great Depression.<sup>11</sup> The ARRA is officially described as “[a]n Act

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<sup>7</sup> N. Gregory Mankiw, *Is Government Spending Too Easy an Answer?*, N.Y. TIMES, Jan. 10, 2009, at BU6.

<sup>8</sup> Francisco J. Gonzalez et al., *The American Recovery and Reinvestment Act of 2009: An Immediate Look at the Legal, Governmental, and Economic Ramifications of President Obama’s Stimulus Package*, 2009 ASPATORE SPECIAL REP. 8 (2009).

<sup>9</sup> See Boggs, *supra* note 5, at 114.

<sup>10</sup> See 123 Stat. 115.

<sup>11</sup> See Boggs, *supra* note 5, at 11. In comparing today’s economic stimulus package with the Great Depression and President Franklin Roosevelt’s New Deal Legislation, it is important to contrast the relative severity of the latter to the former. The Gross Domestic Product (“GDP”) in 1929, adjusted for today’s dollars, is considered miniscule. In addition, by 1933 the stock market lost 90% of its 1929 value; the 2008 stock market decline was severe, but its 2008 value loss was only 30%. The figures for unemployment between then and now are also quite

[m]aking supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes.”<sup>12</sup> The ARRA authorized the commitment of approximately \$800 billion of federal funds to jumpstart an American economy crippled by the jaw dropping financial crisis of 2008.<sup>13</sup>

The ARRA dedicates federal funding to a laundry list of new programs, existing programs, and expanded or newly established competitive grants. These programs and grants are administered by federal, state, and local entities and they impact innumerable private sector industries. The individual components of the ARRA fall into six broad categories: individual income tax cuts; a two-year patch to the alternative minimum tax; investment incentives; aid to people directly hurt by the recession; state fiscal relief, and direct government investment spending.<sup>14</sup> In the scope of this article, the last two categories—state fiscal relief and direct government investment spending—are of major import.

In the context of state fiscal relief, the ARRA provides for state legislative authority to appropriate funds included in the ARRA. There are six types of ARRA funded programs: current programs with no requirement for state matching funds; current programs that require the state to match funding, thereby requiring the state to accept any, some, or all of federal funds; current programs where the Brown Amendment applies, dealing specifically with the Temporary Assistance for Needy Families block grant (“TANF”), and the child care block grant; competitive grants, such as grants for high-speed rail; new federal-state programs; and, finally, support for the State Fiscal Stabilization Fund.<sup>15</sup>

In the context of direct government investment spending, the ARRA authorizes federal agency expenditure of funds pursuant to contract actions and competitive grant awards encompassing virtually every aspect of government contracting.<sup>16</sup> Federal agencies will spend on highway and transportation projects; renewable energy and broadband infrastructure development; construction, repair, and maintenance projects; and research, development, and

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disparate, 25% unemployment during the Great Depression compared to 7-10% today. Boggs, *supra* note 5, at 11.

<sup>12</sup> 123 Stat. at 115.

<sup>13</sup> COUNCIL OF ECONOMIC ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, ESTIMATES OF JOB CREATION FROM THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 2 (May 2009), [http://www.whitehouse.gov/assets/documents/Job-Years\\_Revised5-8.pdf](http://www.whitehouse.gov/assets/documents/Job-Years_Revised5-8.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE APPROPRIATIONS AUTHORITY AND THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 1-2 (Feb. 25, 2009), <http://www.ncsl.org/print/statefed/ARRA-LegislativeAuthority.pdf>.

<sup>16</sup> See generally Div. A., 123 Stat. 115.

testing. Accompanying spending authority granted by the ARRA, the act hoists upon government contractors and other recipients of stimulus funds unprecedented requirements for reporting, accountability, and compliance to guarantee a uniquely high level of transparency and oversight to the American taxpayer. To this end, the ARRA adds an additional layer of oversight to a procurement system that has existing checks and balances to curb fraud, waste, and abuse. The new oversight mechanisms established by the ARRA to scrutinize expenditures of stimulus funds include, but are not limited to: mandates for review by the United States Government Accountability Office and the Congressional Budget Office; the formation of the new Recovery Accountability and Transparency Board; and review by "any inspector general of a Federal department or executive agency."<sup>17</sup>

The General Provisions of the ARRA dictate various up front requirements.<sup>18</sup> For example, the ARRA funds remain available for obligation until September 30, 2010.<sup>19</sup> For infrastructure investments, a project must be "shovel-ready," meaning that preference is given to projects that can be started and completed expeditiously.<sup>20</sup> The ARRA also excludes certain enumerated projects, for example, funds cannot be used "for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool."<sup>21</sup> In addition, the ARRA has significant new domestic preference requirements implicated by the Buy American Act.<sup>22</sup> The ARRA requires contractors to pay laborers and mechanics prevailing wage rates,<sup>23</sup> and requires governors to certify their intent to use funds.<sup>24</sup> Finally, the ARRA restricts the hiring of non-immigrants.<sup>25</sup>

### III. GOVERNMENT CONTRACTING OPPORTUNITIES UNDER ARRA

One visit to the Recovery Act website<sup>26</sup> and the American taxpayer receives a detailed snapshot of how twenty-eight federal agencies are spending the ARRA funds through contracts and grants to states and contractors. The world-

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<sup>17</sup> *Id.* Tit. XV, 123 Stat. at 286-89.

<sup>18</sup> *Id.* Tit. XVI, 123 Stat. at 302-05.

<sup>19</sup> Key Deadlines, Staterecovery.org, <http://www.staterecovery.org/key-deadlines> (last visited Dec. 18, 2009).

<sup>20</sup> U.S. GOV. ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, RECOVERY ACT: AS INITIAL IMPLEMENTATION UNFOLDS IN STATES AND LOCALITIES, CONTINUED ATTENTION TO ACCOUNTABILITY ISSUES IS ESSENTIAL, GAO-09-580, 21 (Apr. 2009), <http://www.gao.gov/new.items/d09580.pdf> [hereinafter GAO REPORT].

<sup>21</sup> Div. A, Tit. XVI, § 1604, 123 Stat. at 303.

<sup>22</sup> *Id.* § 1605, 123 Stat. at 303.

<sup>23</sup> *Id.* § 1606, 123 Stat. at 303.

<sup>24</sup> *Id.* § 1607(a), 123 Stat. at 303.

<sup>25</sup> *Id.* § 1611(b), 123 Stat. at 305.

<sup>26</sup> Recovery.gov, <http://www.recovery.gov> (last visited Dec. 18, 2009).

wide-web is abuzz with lists of contracting opportunities for contracting veterans and newcomers. The opportunities appear endless—but for the temporary availability of the ARRA funds.

The Government Accountability Office (“GAO”) reports that “[n]early half of the approximately \$580 billion associated with Recovery Act spending programs will flow to states and localities,” with “three of the largest streams of funds flowing to” (1) temporary increases in Medicaid Federal Medical Assistance Percentage awards amounting to “approximately \$87 billion in assistance; (2) the State Fiscal Stabilization Fund, which will provide nearly \$54 billion to help state and local governments avoid debilitating budget cuts; and (3) highway infrastructure investment funds of approximately \$27 billion.”<sup>27</sup> These figures do not include the allocations to the twenty-eight federal agencies to engage in direct spending.

In the arena of direct federal agency expenditures, the Department of Energy received \$36.7 billion in ARRA funding for various initiatives, including promoting energy efficiency, deploying renewable energy, and scientific research.<sup>28</sup> The General Services Administration received \$5.55 billion in ARRA funding for United States courthouses, federal buildings, border stations, and for converting federal buildings to high-performance green buildings.<sup>29</sup> The Department of Defense plans to use approximately \$2 billion of ARRA funding for “construction and facility repair projects . . . in 49 states, plus Guam and the District of Columbia.”<sup>30</sup> The projects are reported to be primarily new facility construction, repair, or replacement of hospitals and military medical facilities.<sup>31</sup>

Considering the Department of Transportation’s authority to award grants and contracts for highway infrastructure and the authority of the remaining twenty-seven federal agencies to engage in direct investment spending, there is no argument that the amount of money the government is investing in the economy is unprecedented, staggering, and a bit intoxicating to those in the government contract community. But along with the wealth of opportunity comes the burden of obligation to the government and ultimately to the taxpayer. The current embarrassment of riches to federal agencies, states and localities, and contractors only begs the question about the commensurate obligations that must be met. More incisively, it also begs the question of

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<sup>27</sup> GAO REPORT, *supra* note 20, at 3.

<sup>28</sup> See Div. A, Tit. IV, 123 Stat. 115, 138; see also U.S. Dep’t of Energy, <http://www.energy.gov/recovery/> (last visited Dec. 18, 2009).

<sup>29</sup> Div. A, Tit. V, 123 Stat. at 149.

<sup>30</sup> U.S. Dep’t of Defense, Department of Defense Information Related to the American Recovery and Reinvestment Act of 2009 (Recovery Act), <http://www.defenselink.mil/recovery/> (last visited Dec. 18, 2009) [hereinafter Department of Defense].

<sup>31</sup> *Id.*

whether heightened burdens and obligations will persist and become the norm even after the ARRA funding commitments are exhausted.

#### IV. COMPETITION POLICY, RISK MANAGEMENT, AND THE ARRA

Each Administration's approach to procurement policy generally results in a shift in competition policy and a change in the strategic outlook on acquisition planning to achieve that policy. The Obama Administration has identified that the U.S. procurement system is broken.<sup>32</sup> Paradoxically, the Obama Administration also admits that the U.S. procurement system is an integral component in the plan to prompt economic recovery through implementation of the ARRA.<sup>33</sup> To respond to this paradox and to accomplish the goals established in the ARRA, the Administration has concentrated its rhetoric and spending power on the time-honored principle of full and open competition.<sup>34</sup> Contemporaneously, the Administration is targeting methods to reduce and manage risk through an express preference for agency use of fixed-price contract types in ARRA-funded procurements, along with a reinvestment in the U.S. acquisition workforce.<sup>35</sup>

The rhetoric of competition is nothing new to those intimately involved with or who are assailed by the news of the latest spending scandal. It seems that each fiscal year a report of some fraud, waste, or abuse has rocked the procurement world.<sup>36</sup> In most cases, improper contract awards were made on sole source bases. Reports by agency Inspectors General and the GAO repeatedly show that noncompetitively awarded contracts have resulted in waste, mismanagement, poor contractor performance, and/or inadequate accountability.<sup>37</sup> Yet, stating a strong policy for agencies to use full and open

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<sup>32</sup> See Office of the Press Secretary, The White House, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Government Contracting* (2009), [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/) [hereinafter *Government Contracting*].

<sup>33</sup> See *id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Warren Hoge, *U.N. Looking at Charges of Fraud in Procurement*, N.Y. TIMES, Jan. 24, 2006, at A6.

<sup>37</sup> See GAO Report to Congressional Committees, *As Initial Implementation Unfolds in States and Localities, Continued Attention to Accountability Issues is Essential*, GAO 09-580, 9 (Apr. 2009); see also GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (Washington, D.C. July 30, 2004); *Interagency Contracting: Problems with DOD's & Interior's Orders to Support Military Operations*, GAO-05-201 (Washington, D.C. April 29, 2005); *Rebuilding Iraq: FY2003 Contract Award Procedures and Management Challenges*, GAO-04-605 (Washington, D.C. June 1, 2004).

competition to the maximum extent practicable does not make it true, nor does it address procurement realism.

In terms of procurement realism, the Obama Administration acknowledges that government contract spending has more than doubled since 2001 and, “[d]uring this same period, there has been a significant increase in the dollars awarded without full and open competition.”<sup>38</sup> The reality is that increases in noncompetitively awarded contracts have escalated due in large part to increases in spending, the complexity of agency needs, and the cannibalism of the ranks of the acquisition workforce. These factors have come together in a perfect storm to produce an environment where oversight of contractors is nonexistent at worst and poor at best during the administration of procurement contracts. Now add to this reality the ARRA’s unprecedented levels of agency spending within a concentrated timeframe and the concoction is a brew of potential over-reliance on noncompetitively awarded contracts.

In addition, while the language of the ARRA promotes competition, the condensed timeframe for spending ARRA funds and the speed at which procurement professionals must obligate funds and award contracts mean that shortcuts will be exploited to feign competition. For example, members of the acquisition corps pressed to meet the ARRA’s timelines may actually circumvent competition by relying on the issuance of task and delivery orders against multiple award contracts (“MACs”) or modifications to preexisting contracts. In the former example, task and delivery orders against MACs would thwart competition because orders against MACs do not enhance competition; rather, they only redistribute orders among a preselected group of contractors. In the latter example, modifications to preexisting contracts would not enhance competition because no new contractors would have the opportunity to bid or propose on the work as modified. Accordingly, the ARRA has the potential to stymie the competition policy that the Obama Administration intends to protect.

The Obama Administration also focuses heavily on risk management as a key feature of its plan for economic recovery.<sup>39</sup> In the procurement arena, managing risk requires sound acquisition planning. Sound acquisition planning in turn relies on a well-trained, well-supported, and well-paid acquisition workforce. In managing risk, procurement professionals evaluate several factors including, but not limited to: market conditions, market research, the agency’s minimum needs, cost estimates and incentives, and contract types.<sup>40</sup>

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<sup>38</sup> *Government Contracting*, *supra* note 32.

<sup>39</sup> See Executive Office of the President, Office of Management and Budget, Memorandum for the Heads of Departments and Agencies, Subject: Improving Government Acquisition, [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m-09-25.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-25.pdf) [hereinafter Improving Government Acquisition].

<sup>40</sup> See *id.*; see also GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (“FAR”)



The federal government has targeted contract types as a primary mechanism to manage and contain risks associated with the increased spending mandated by the ARRA.<sup>41</sup>

The contract type selected defines the expectations, obligations, incentives, and rewards for both the government and the contractor during the life of an acquisition.<sup>42</sup> Generally, there are two basic contract types: fixed-price contracts and cost-reimbursement contracts.<sup>43</sup> In a firm-fixed-price contract, the contractor must complete the work to receive payment.<sup>44</sup> Under this type of contract, the risk of performance is allocated to the contractor. The contractor may receive contract financing from the government, but the payments are subject to finance costs.<sup>45</sup> A firm-fixed-price contract is required in sealed bid procurements.<sup>46</sup> This contract "utilizes the basic profit motive of business enterprise" by placing the risk on the contractor to perform at a specified price.<sup>47</sup>

The government's purpose is to place the risk of performance on the contractor without unduly subjecting him to unreasonable, uncontrollable, or unpredictable risks.<sup>48</sup> Under a firm-fixed-price contract, there is no compensation for unforeseen contingencies.<sup>49</sup> The government must be cautious about this type of contract because both parties are at risk. The contractor's risk stems from a possible failure to perform when the cost of performance exceeds the price quoted in the bid or offer. The government loses when the contractor is financially unable or unwilling to complete the work required under the contract.

When using a firm-fixed-price contract, the contracting officer should ensure that specifications are detailed and definitive, and prices can be established fairly and reasonably—as when the following occurs:

- (a) [t]here is adequate price competition; (b) [t]here are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data; (c) [a]vailable cost or pricing information permits realistic estimates of the

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7.102 and FAR pt. 10.

<sup>41</sup> *Id.*

<sup>42</sup> See generally JOHN CIBINIC, JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS, 245-377 (4th ed. 2006).

<sup>43</sup> Selecting Contract Types: General, 48 C.F.R. § 16.101(b) (2009).

<sup>44</sup> Federal Acquisition Regulation (FAR) 16.202-1. The Federal Acquisition Regulation is the primary source of regulatory authority governing the procurement process. The FAR appears in Title 48 of the Code of Federal Regulations.

<sup>45</sup> FAR 32.005.

<sup>46</sup> 48 C.F.R. § 16.102(a).

<sup>47</sup> *Id.* § 16.103(b).

<sup>48</sup> FAR 16.104.

<sup>49</sup> FAR 16.202-1.

probable costs of performance; or (d) [p]erformance uncertainties can be identified and reasonable estimates of their cost impact can be made.<sup>50</sup>

A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract.<sup>51</sup> This type of contract is "suitable for acquiring commercial items[,] . . . other supplies or services on the basis of reasonably definite functional or detailed specifications . . . when the contracting officer can establish fair and reasonable prices at the outset."<sup>52</sup>

In contrast to fixed-price contracts, cost-reimbursement contracts "provide for payment of allowable incurred costs[] to the extent prescribed in the contract."<sup>53</sup> "These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer."<sup>54</sup> Cost-reimbursement contracts "may be used only when—(1) [t]he contractor's accounting system is adequate for determining costs applicable to the contract; and (2) [a]ppropriate [g]overnment surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used."<sup>55</sup>

The cost-reimbursement contract contains a standard "Limitation of Cost" clause.<sup>56</sup> This clause provides that the contractor is under no further obligation to continue performance or incur costs if all of the funds contemplated by the contract have been fully expended.<sup>57</sup> If the government provides additional funds, then the contractor must continue performance as long as funds are available or until completion of the specified work.<sup>58</sup> The government will pay the contractor's costs during contract performance up to a certain dollar amount.<sup>59</sup> The government pays the contractor's allowable costs plus a fee as prescribed in the contract.<sup>60</sup> To be allowable, a cost must be reasonable, allocable, follow standards and contract terms, and not specifically disallowed.<sup>61</sup>

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<sup>50</sup> 48 C.F.R. § 16.202-2.

<sup>51</sup> *Id.* § 16.202-1.

<sup>52</sup> *Id.* § 16.202-2.

<sup>53</sup> *Id.* § 16.301-1.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 16.301-3(a)(1)-(2).

<sup>56</sup> *Id.* § 32.705-2(a).

<sup>57</sup> *Id.* § 52.232-20(d)(2)(i).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* §§ 32.702, 52.232-20.

<sup>60</sup> *Id.* § 32.703-1(a).

<sup>61</sup> *Id.* § 31.201-2(a).

The two most common types of cost-reimbursement contracts are the cost contract and the cost-plus-fixed-fee contract ("CPFF").<sup>62</sup> A cost contract is a cost-reimbursement contract in which the contractor receives no fee.<sup>63</sup> "A cost contract may be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations."<sup>64</sup>

In CPFF contracts, the parties separately negotiate the estimated cost of performance and the pre-established fee resulting from performance.<sup>65</sup> The fixed fee is stated as a set amount of dollars that will vary only if the contractor is required to perform additional work not included in the original contract.<sup>66</sup> The estimated cost will ideally reflect the best estimate of the amount that will be spent in accomplishing the work called for by the contract. Estimated cost, however, might be underestimated for two reasons: (1) to fall within the government's available funding and (2) to increase or enhance competition.

In an attempt to manage risk, notwithstanding the benefits of cost-type contracts, the Obama Administration has expressly stated a preference for use of fixed-price contracts for spending under the ARRA.<sup>67</sup> In support of this position, the Obama Administration identifies that cost-reimbursement contracts "provide limited incentive to control costs."<sup>68</sup> The Obama Administration also recognizes that development, negotiation, and management of cost-reimbursement contracts generally demand more in depth programmatic knowledge and experience, and a higher level and broader range of skills than for competitively awarded fixed-price contracts.<sup>69</sup>

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<sup>62</sup> *Id.* § 16.306(a). Other types of cost-reimbursement contracts are the cost-plus-incentive-fee contract, the cost-plus-award-fee contract, and the cost-sharing contract. "A cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for an initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs." *Id.* § 16.304. "A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (a) a base amount (which may be zero) fixed at inception of the contract and (b) an award amount, based upon a judgmental evaluation by the Government, sufficient to provide motivation for excellence in contract performance." *Id.* § 16.305. "A cost-sharing contract is a cost-reimbursement contract in which the contractor receives no fee and is reimbursed only for an agreed-upon portion of its allowable costs." *Id.* § 16.303(a). "A cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits." *Id.* § 16.303(b).

<sup>63</sup> *Id.* § 16.302(a).

<sup>64</sup> *Id.* § 16.302(b).

<sup>65</sup> *Id.* § 16.306(a).

<sup>66</sup> *Id.*

<sup>67</sup> *Government Contracting*, *supra* note 32.

<sup>68</sup> PETER R. ORSZAG, DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES: IMPROVING GOVERNMENT ACQUISITIONS 5 (July 29, 2009), [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m-09-25.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-25.pdf).

<sup>69</sup> *See id.*

In the last two decades, procurement professionals have relied on cost-reimbursement contracts because of the lack of available and capable professionals to conduct the procurement planning necessary to meet the upfront requirements that would otherwise facilitate the use of fixed-price contracts.<sup>70</sup> Because of this lack of professional capability, the desire to ameliorate the risks associated with overspending are not remedied by simply stating a preference for fixed-price contracts when cost-type contracts are made part of the acquisition plan. This procurement reality is evident in the obligation of ARRA funds. For example, more than one-half of the ARRA contracts that federal agencies have awarded are cost-reimbursement contracts.<sup>71</sup> As of August 2009, “agencies had obligated \$10.18 billion in stimulus contracts.”<sup>72</sup> Only \$4.38 billion—43 percent—are firm-fixed-price agreements. Comparatively, data shows agencies have spent \$5.44 billion—53 percent—on cost-type contracts.<sup>73</sup>

The impact of the ARRA spending mandate is to place members of the acquisition workforce in the unenviable position of having to implement the preference for fixed-price contract types even though “shovel-ready” projects may not have undergone sufficient acquisition planning to allow use of these contract types. This potential insufficiency creates its own risks. The risk of failed performance by a contractor that cannot underwrite potential funding shortfalls only means that contracts will have to be terminated for convenience or default, agency needs will have to be re-procured, and in that event a re-procured contract might only motivate contractors to compete if the agency decides to shift to cost-type contracts to address risk to the contractor. To manage risk in the spending of ARRA funding, agencies will have to weigh the preference for the fixed-price contract type against the mandate to quickly obligate funds, award contracts, and have contractors begin performance.

While the Obama Administration articulates its goals to achieve full and open competition through a preference of contract awards based on fixed-price contract types, it is likely that there will be a trend upward in the use of cost-type contracts for undefined and complex agency acquisition needs. In a time of unprecedented government investment in the economy, policymakers need to show courage in distinguishing between the rhetoric of a preference for fixed-price contracts and the reality of the two-decade trend of using cost-type contracts to satisfy agency needs with an understaffed and inadequately trained acquisition workforce.

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<sup>70</sup> See Improving Government Acquisition, *supra* note 39.

<sup>71</sup> Robert Brodsky, Many Recovery Act Contracts Fall into High-Risk Category (Aug. 31, 2009), [http://www.govexec.com/story\\_page.cfm?filepath=/dailyfed/0809/083109rb1.htm&oref=search](http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0809/083109rb1.htm&oref=search).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

## V. THE BUY AMERICAN ACT, INTERNATIONAL TRADE POLICY, AND THE ARRA

The Buy American provision in the ARRA forbids the use of ARRA funding “for the construction, alteration, maintenance, or repair of a public building or public work project unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.”<sup>74</sup> To temper the harsh impact that the ARRA Buy American provision will have on foreign contractors, the ARRA requires that the Buy American provision comply “with United States obligations under international agreements.”<sup>75</sup> The provision “ensures that parties to the World Trade Organization government procurement agreement and other free trade deals can bid on government contracts.”<sup>76</sup>

Although the ARRA’s Buy American provision borrows its framework from the Buy American Act of 1933 (“BAA”)<sup>77</sup> and the Federal Acquisition Regulation,<sup>78</sup> it is noticeably distinct in its unique regulatory agenda and application. In contrast to the ARRA’s Buy American provision ban on foreign products, the BAA regulates “acquisition of foreign supplies, services, and construction materials.”<sup>79</sup> With limited exceptions, the BAA, unlike the ARRA’s Buy American provision, does *not* prohibit foreign firms from competing in federal acquisitions nor does the BAA prohibit the agencies from purchasing foreign-made goods.<sup>80</sup> With respect to construction materials, the BAA requires, with some exceptions, the use of only domestic construction materials in contracts for construction in the United States.<sup>81</sup> One of the exceptions to the BAA is the removal of discriminatory treatment for those countries having trade agreements with the United States.<sup>82</sup> Accordingly, the BAA is not applicable to acquisitions subject to certain trade agreements. In acquisitions so governed, construction materials from certain countries receive nondiscriminatory treatment in evaluations alongside domestic offers.

While the BAA provides for nondiscriminatory treatment of construction materials bid on or proposed by contractors in countries where the United States has a government trade agreement, the ARRA language narrows

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<sup>74</sup> Div. A, Tit. XVI, § 1605, 123 Stat. at 303.

<sup>75</sup> *Id.*

<sup>76</sup> Roberta Rampton, *Update 2—Canada Has Few Rights in “Buy American” Flap—USTR*, REUTERS, June 10, 2009, <http://www.reuters.com/article/marketsNews/idUSN1045052420090610>.

<sup>77</sup> 41 U.S.C. §10(a)-(d) (2006). The Buy American Act of 1933 is a Depression-era protectionist statute.

<sup>78</sup> 48 C.F.R. § 25.000 (2009).

<sup>79</sup> *Id.* § 25.202.

<sup>80</sup> *Id.* § 25.103.

<sup>81</sup> *Id.* § 25.101.

<sup>82</sup> *Id.* § 25.402.

opportunities for foreign contractors by instituting a default rule for use of ARRA funding involving a “public building or public work” by requiring that “all of the iron, steel, and manufactured goods” be “produced in the United States.”<sup>83</sup> The ARRA arguably does not specifically require the components of construction materials to be produced in the United States. Thus, an item is a domestic construction material and eligible for use in an ARRA-funded project if it is manufactured in the United States, regardless of the origin of the components.<sup>84</sup> Viewed by current and potential foreign trading partners, the ARRA’s Buy American provision can be seen as a large step toward inward protectionism, at least in terms of construction project work involving iron, steel, and manufactured goods.

Despite the protectionist stance that can be interpreted into the ARRA, the provision can be read to confirm that the United States intends to honor its trade agreements and will continue to commit to allowing least developed nations special access to the “walled garden” of U.S. procurement.<sup>85</sup> Specifically, the Federal Acquisition Regulation provides that listed “least developed countr[ies]” are also included as exceptions to the Buy American Act even though they are not parties to U.S. free trade agreements or explicitly protected by the legislative language.<sup>86</sup>

While virtually all contractors performing federal stimulus projects and various federally funded state stimulus projects can choose from a variety of country sources so long as they meet the U.S. produced “iron, steel, and manufactured goods” requirement,<sup>87</sup> except for bright-line ineligible countries

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<sup>83</sup> Div. A, Tit. XVI, § 1605, 123 Stat. at 303.

<sup>84</sup> 48 C.F.R. § 52.225-9.

<sup>85</sup> See Div. A, Tit. XVI, § 1605(d), 123 Stat. at 303.

<sup>86</sup> 48 C.F.R. § 25.404.

<sup>87</sup> See Matthew C. Hoyer, *Country-of-Origin Requirements Facing Federal Construction Contractors*, 6 No. 8 INT’L GOV’T CONTRACTOR ¶ 62 (2009) (explaining that the fears associated with the more restrictive ARRA have not come to fruition because of the regulatory implementation that lessened the impact on foreign contractors working on construction projects exceeding \$7.4 million). According to Hoyer, the ARRA applies the BAA, but places additional domestic-preference restrictions for iron and steel on contracts below the \$7.4 million TAA threshold. *Id.* The TAA exception still applies to those contracts with an estimated value of \$7.4 million or more. *Id.* According to Hoyer, Congress did not explicitly include the TAA exception in the ARRA. *Id.* Instead, the ARRA states that the domestic-preference provisions “shall be applied in a manner consistent with United States obligations under international agreements.” *Id.* (citing Div. A, Tit. XVI, § 1605, 123 Stat. at 303). As such, the implementing regulations had to incorporate the TAA exceptions so that the U.S. would not violate various trade agreement obligations. The implementing regulations alleviate the concern about the impact of the ARRA’s domestic preference for federal contracts. The concern remains, however, for ARRA-funded grants for state and local procurements because those regulations include no TAA exception (and may never), as does the FAR. In the final analysis, the ARRA impacts only iron and steel below the \$7.4 million TAA threshold in the following manner: iron

such as China, Brazil, and India,<sup>88</sup> the ARRA can potentially undermine global and American economic recovery goals. Critics of ARRA's Buy American provision argue that the United States is endangering the following goals: preserving trade relations among nations in a time of economic downturn; creating more jobs in the United States; and developing confidence in the global economy.<sup>89</sup>

Leaders from around the world continue to press for open markets, especially in a time of economic downturn. The leadership of the United Kingdom and Canada promote global procurement opportunities as the correct response to the economic downturn.<sup>90</sup> They convey that the United States will exacerbate the economic downturn by embracing protectionist legislation.<sup>91</sup> To them, the ARRA's provisions can be seen as the beginning of a "downward spiral" of national protectionist policies and practices, which forgo collective action to remedy the global economic downturn.<sup>92</sup>

America's trade partners warn that the ARRA's Buy American provision will have an unintended and deleterious effect on job creation within the United States.<sup>93</sup> American stakeholders are also echoing this concern. A study completed by the U.S. Chamber of Commerce estimates that "to lose just 1 percent of potential foreign stimulus procurement opportunities" could equal a loss of 176,800 jobs.<sup>94</sup> The ARRA's Buy American provision has already sparked backlash from current and potential United States trade partners. For example, the ARRA prompted "the Chinese [to] put in place an explicit 'Buy China' provision in their own stimulus package."<sup>95</sup>

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and steel must still meet the BAA 51-percent test, but they must also meet the additional requirement that all manufacturing processes take place in the U.S. In other words, practically speaking, the ARRA requires all steel and iron components, as well as the final construction material, to be manufactured in the U.S. To bring this new rule under the familiar rubric of the 51-percent rule, steel and iron must consist of 100-percent domestic components. *Id.*

<sup>88</sup> W. Noel Keyes, *The Trade Agreements Act of 1979 and NAFTA*, GCFAR § 25.3(a) (West 2009).

<sup>89</sup> See, e.g., Gary Clyde Hufbauer & Jeffrey J. Schott, "Buy American: Bad for Jobs, Worse for Reputation," PIIE Policy Brief 09-02 (Feb. 2009), available at [www.petersoninstitute.org/publications/pb/pb09-2.pdf](http://www.petersoninstitute.org/publications/pb/pb09-2.pdf). See generally Nelson D. Schwartz, *World Leaders Wary of U.S. Economic Measures*, N.Y. TIMES, Feb. 2, 2009, at B6.

<sup>90</sup> Steven L. Schooner & Christopher Yukins, *Tempering "Buy American" in the Recovery Act—Steering Clear of a Trade War*, 51 NO. 10 GOV'T CONTRACTOR ¶ 78 (Mar. 11, 2009).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> LAURA M. BAUGHMAN & JOSEPH F. FRANCOIS, U.S. CHAMBER OF COMMERCE, TRADE ACTION—OR INACTION: THE COST FOR AMERICAN WORKERS AND COMPANIES 4 (2009), [http://www.uschamber.com/assets/international/uscc\\_trade\\_action\\_inaction\\_study.pdf](http://www.uschamber.com/assets/international/uscc_trade_action_inaction_study.pdf).

<sup>95</sup> Eswar Prasad, Opinion Asia, *A Dangerous Game of Trade "Chicken": The U.S. China Spat Could Have Global Consequences*, WALL ST. J., Sept. 14, 2009,

Recently, the ARRA Buy American provision prompted Canadian Prime Minister, Stephen Harper, to visit the Capitol to request an exemption from the provision for Canadian businesses after noticeable strain on Canadian-American trade relations.<sup>96</sup> For example, the town of Peru, Indiana rejected “sewage pumps made outside of Toronto.”<sup>97</sup> At another project in Camp Pendleton in California, Canadian pipe fittings were removed and replaced with American-made fittings.<sup>98</sup> Subsequently, Ontario towns retaliated against being shut out of the American market by “barring U.S. companies from [Canadian] municipal contracts.”<sup>99</sup>

The backlash to the ARRA’s Buy American provision negatively impacts the American economy because reciprocal exclusions harm U.S. companies that own Canadian firms.<sup>100</sup> One of these companies is Trojan Technologies, a wholly owned subsidiary of Washington D.C.-based Danaher Corp., which makes water-treatment products in London, Ontario.<sup>101</sup> In order to comply with the ARRA’s Buy American provision, Trojan Technologies moved its production from Ontario, Canada to Valencia, California.<sup>102</sup> The move that allows Trojan Technologies’ products to be used in ARRA-funded projects has come with the disadvantages of delays and increased costs to consumers.<sup>103</sup> Not all companies, however, are able to handle the increased costs associated with moving and, therefore, are inevitably shut out of some competition.<sup>104</sup>

While some foreign companies are seeing orders decline because of the ARRA’s Buy American provision, others are threatened by total corporate demise. For example, “Duferco Farrell Corp., a Swiss-Russian partnership,” is on the verge of shutting down operations because the coils it manufactures “do not fit the current definition of made in the USA.”<sup>105</sup> Because Duferco does not meet the requirement, “its largest client—a steel pipemaker located one

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<http://online.wsj.com/article/SB10001424052970203917304574411883297685844.html>.

<sup>96</sup> Sheldon Alberts, *Harper Asks Congress to Fight Buy American*, VANCOUVER SUN, Sept. 17, 2009, available at <http://www.vancouversun.com/business/fp/Harper+asks+Congress+fight+American/2004525/story.html>. Although Canada is subject to the NAFTA and the WTO trade agreements, Canada “chose to exclude its provinces and towns from procurement rules that would have put them beyond the reach of the new provision.” Peter Fritsch & Corey Boles, *How “Buy American” Can Hurt U.S. Firms*, WALL. ST. J., Sept. 17, 2009, at A5.

<sup>97</sup> Anthony Faiola & Lori Montgomery, *Trade Wars Brewing in Economic Malaise*, WASH. POST, May 15, 2009, at A1.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Annys Shin, *“Buying American” Puts a Strain on U.S. Trade with Canada*, WASH. POST, Aug. 11, 2009, at A9.

<sup>101</sup> *Id.*

<sup>102</sup> Fritsch & Boles, *supra* note 96.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Faiola & Montgomery, *supra* note 97.



mile down the road" from the manufacturing plant—notified Duferco that it would no longer be purchasing from the company because it was being forced to buy from companies meeting the requirements of the Buy American provision.<sup>106</sup> As a result of the decreased demand, Duferco has had to furlough eighty percent of its workforce.<sup>107</sup>

#### VI. OVERSIGHT, TRANSPARENCY, AND ACCOUNTABILITY UNDER THE ARRA

The Obama "[A]dministration has stipulated that every taxpayer dollar spent on economic recovery must be subject to unprecedented levels of transparency and accountability."<sup>108</sup> To ensure a high level of accountability to American taxpayers, the Office of Management and Budget ("OMB") issued detailed guidance to federal departments and agencies for implementing and administering the ARRA expenditures.<sup>109</sup> OMB Recovery Act Guidance was drafted to help federal agencies implement the ARRA.

Division A, Title XV of the ARRA covers accountability and transparency.<sup>110</sup> The ARRA presents a list of deadlines that must be met and reports that must be filed to cement a culture of transparency and accountability at the federal and state levels.<sup>111</sup> One of the public availability measures that the ARRA prescribes is that all reports prepared and submitted by the Inspectors General of the various agencies "shall be made publicly available and posted on the website established by section 1526."<sup>112</sup> The website is a "portal or gateway to key information" regarding the ARRA, and provides links to other government websites with other important information.<sup>113</sup> The Recovery Accountability and Transparency Board's website includes information about how the ARRA funds are allocated by agencies and their corresponding reports.<sup>114</sup> These reports must "include a link to estimates of the jobs sustained or created by the Act."<sup>115</sup> The reports prepared and submitted by

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> GAO REPORT, *supra* note 20, at 8.

<sup>109</sup> ORSZAG, *supra* note 68.

<sup>110</sup> Div. A, Tit. XV, 123 Stat. at 286.

<sup>111</sup> *See, e.g., id.* § 1512(c)-(d), 123 Stat. at 287-88.

<sup>112</sup> *Id.* § 1523(b)(4)(A), 123 Stat. at 291.

<sup>113</sup> *Id.* § 1526(b) & (c)(10), 123 Stat. at 293; *see* Recovery.gov, <http://www.recovery.gov> (last visited Dec. 20, 2009).

<sup>114</sup> The Recovery Accountability and Transparency Board maintains the recovery website. The Board, Recovery.gov, <http://www.recovery.gov/About/board/Pages/TheBoard.aspx> (last visited Dec. 20, 2009).

<sup>115</sup> Div. A, Tit. XV, § 1526(c)(8), 123 Stat. at 293.

Inspectors General consist of worksheets of data addressing the allocation of funds and major completed and planned activities.<sup>116</sup>

In addition, the ARRA requires that governors or other appropriate chief executives “certify that the infrastructure investment[s] ha[ve] received the full review and vetting required by law.”<sup>117</sup> This certification process includes a description of the investment, the estimated total cost, and the amount of covered funds to be used.<sup>118</sup> This information is also to be posted on a website and linked to [www.recovery.gov](http://www.recovery.gov) pursuant to the requirements of section 1526 of Title XV, Division A.<sup>119</sup>

At the state level, governors have moved quickly to certify projects to receive ARRA funding.<sup>120</sup> Additional oversight from the states can be found in some state constitutional requirements that “all expenditure[s], regardless of the source, [are] to be made through legislative appropriation.”<sup>121</sup> In addition to these constitutional provisions, thirty-four states and the Virgin Islands have proposed legislation related to the ARRA.<sup>122</sup> For example, Washington State proposed a bill “relating to the economic stimulus capital budget intending to stimulate Washington’s economy and to reduce the state’s unemployment rate by creating jobs with infrastructure projects funded by ARRA.”<sup>123</sup> Fifteen states and American Samoa have executive orders relating to the ARRA.<sup>124</sup> For example, in anticipation of the ARRA, Oregon established the *Oregon Way Advisory Group* “to advise and assist those seeking competitive federal stimulus grants.”<sup>125</sup>

Many states have established their own recovery websites to allow the public to see what they are doing.<sup>126</sup> For example, the state of Washington’s website provides a county-by-county overview of how the ARRA funds are being

<sup>116</sup> Recovery.gov, <http://www.recovery.gov> (follow “Accountability” hyperlink, then choose department and follow “Status Report” hyperlink) (last visited Dec. 20, 2009).

<sup>117</sup> Div. A, Tit. XV, Subtit. A, § 1511, 123 Stat. at 287.

<sup>118</sup> See *id.* § 1511, 123 Stat. at 287 (Section 1511 certification).

<sup>119</sup> *Id.* § 1526(c)(10), 123 Stat. at 293-94.

<sup>120</sup> State Recovery, <http://www.staterecovery.org/state-responses> (last visited Dec. 20, 2009).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> State Recovery, State Responses, <http://www.staterecovery.org/state-responses> (follow “Washington” State Legislation Related to ARRA link) (last visited Dec. 20, 2009). Some of the proposed projects in Washington include improving higher education campuses, cleaning up the Puget Sound, replacing aging local infrastructure, and creating green jobs. H.R. 1425, 61st Leg., Reg. Sess. (Wash. 2009).

<sup>124</sup> State Recovery, *supra* note 123.

<sup>125</sup> Oregon Office of the Governor, Exec. Order No. 09-06, 2 (2009), available at [http://governor.oregon.gov/Gov/docs/executive\\_orders/eo0906r.pdf](http://governor.oregon.gov/Gov/docs/executive_orders/eo0906r.pdf).

<sup>126</sup> See, e.g., Recovery.wa.gov Homepage, <http://www.recovery.wa.gov/> (last visited Dec. 20, 2009).

used.<sup>127</sup> It also provides a list of all the projects that were allocated funding, the funding amount obligated, the amount actually awarded, and the amount expended to date.<sup>128</sup>

The Counsel of State Governments has also created a website, [www.staterecovery.org](http://www.staterecovery.org), permitting states to “rapidly decipher potential funding opportunities” and “share best practices by tracking how the executive, legislative, and judicial branches of state government are responding to and impacted by” the ARRA.<sup>129</sup> The website has compiled lists of states that have executive orders and legislation related to the ARRA.<sup>130</sup> In July of 2009, Good Jobs First ranked the state of Washington’s ARRA highway reporting website as second in the nation and its main ARRA website as third in the nation<sup>131</sup> based on the effectiveness of “conveying information about the categories of stimulus spending; the distribution of that spending in different parts of the state; and specific projects being carried out by private contractors, including their employment impact.”<sup>132</sup>

The study found that most states’ main ARRA site and their respective highway projects sites (because they are a high-profile aspect of stimulus spending), did not score very high.<sup>133</sup> The scoring for the main ARRA pages, based on “ten factors relating to quality and quantity of the information presented,”<sup>134</sup> range from zero (Illinois and Utah) to 80 (Maryland).<sup>135</sup> The scoring for the highway project sites range from zero (Illinois and Kentucky) to 75 (Maryland).<sup>136</sup> Hawaii’s main ARRA website scored 20 points and ranked 28th, and its highway project site scored 15 points and was ranked 46th.<sup>137</sup> The average score was 28.2 and the median score was 25 for the main ARRA

<sup>127</sup> County Reports, <http://www.recovery.wa.gov/map/county.asp> (last visited Dec. 20, 2009).

<sup>128</sup> American Recovery Grant Awards and Spending (2009), <http://www.recovery.wa.gov/documents/EstimatedAwardedSpent.pdf>. The Washington website reports that \$4.8 billion has been committed to Washington, \$2.4 billion has been awarded, and \$1.2 billion has been paid. Recovery.wa.gov Home Page, <http://www.recovery.wa.gov/default.asp> (last visited Nov. 6, 2009).

<sup>129</sup> Staterecovery.org Homepage, <http://www.staterecovery.org/> (last visited Dec. 20, 2009).

<sup>130</sup> Staterecovery.org State Responses, <http://www.staterecovery.org/state-responses> (last visited Dec. 20, 2009).

<sup>131</sup> Phillip Mattera et al., Show Us the Stimulus: An Evaluation of State Government Recovery Act Websites 3 (2009), <http://www.goodjobsfirst.org/pdf/ARRAwebreport.pdf>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 7.

websites and the average score was 37.8 and the median score was 38 for the highway project site categories.<sup>138</sup>

The report also gives an idea of how states are reporting their information. For example, the report identifies those states “us[ing] interactive maps to display county breakdowns” of stimulus spending (such as Oregon, Washington, and Tennessee), and notes that 37 states provide detailed information on ARRA spending on specific programs.<sup>139</sup> The study indicates that one of the best ARRA websites was actually a city and not a state website—New York City’s stimulus tracker is cited as an excellent example of disclosure and effective presentation.<sup>140</sup>

This guidance also emphasizes the ARRA’s requirements for timely and accurate reporting to achieve a high level of transparency and accountability. The OMB expects to provide “unprecedented transparency into how and where Federal funds are spent.”<sup>141</sup> The OMB also mandates that Recovery Act reporting be separate from all other reporting of results.<sup>142</sup> To further ensure reporting compliance, OMB requires that all federal agency guidance must be immediately posted on the agency’s Recovery Act webpage.<sup>143</sup> In addition, agencies are to provide weekly funding reports to the OMB. States, however, are supposed to be given flexibility in collecting and transmitting required information.<sup>144</sup>

Recipients are responsible for reporting funds used by themselves and by any sub-awardees, with the “initial statutory reporting deadline of October 10, 2009.”<sup>145</sup> Recipients must also report on “an estimate of the number of jobs

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<sup>138</sup> *Id.* at 3.

<sup>139</sup> *Id.* at 4.

<sup>140</sup> *Id.* at 14.

<sup>141</sup> PETER ORSZAG, MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES: UPDATED IMPLEMENTING GUIDANCE FOR THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 24 (2009), [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-15.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf).

<sup>142</sup> *Id.* at 13-16.

<sup>143</sup> *Id.* at 13.

<sup>144</sup> *Id.* at 26-27.

<sup>145</sup> *Id.* at 25. Information posted on Recovery.gov includes information about how contracts are awarded, how prime contractors are using funds, and how subcontracts are awarded by primes. Information about how the grants are made, how the prime recipients are using the funds, and any sub-awards that are made are available for review at <http://www.recovery.gov/Transparency/RecipientReportedData/Pages/RecipientLanding.aspx>. On this page, taxpayers will be able to view all data, charts, reports and summaries submitted by recipients. The reports are prepared by recipients of federal contracts, grants, and loans who reported by the October 10, 2009 deadline. This reporting event is historical, as it is the first time recipients of awards have been required to make reports available directly to the taxpayer. The first statutory reporting requirement covered the period from February 17, 2009 to September 30, 2009. The reports were submitted to FederalReporting.gov—the government website created to collect all the recipient data. The second statutory reporting deadline is circa

created or retained by [each] project or contract,” including information that describes the types of jobs created or retained in the United States.<sup>146</sup>

The ARRA also establishes the Recovery Accountability and Transparency Board (“RATB”), which is responsible for the oversight of all funds under the Recovery Act and provides the public a direct link to [www.recovery.gov](http://www.recovery.gov).<sup>147</sup> To aid in this process, the Antitrust Division of the United States Department of Justice has launched a Recovery Initiative “aimed at preparing government officials and contractors to recognize and report efforts by parties to unlawfully profit from the stimulus projects.”<sup>148</sup>

In addition to the reporting required in the ARRA itself, the Federal Acquisition Regulation was amended to include provisions for ARRA reporting.<sup>149</sup> The Regulation requires contractors receiving funding from the ARRA to do the following:

report information including, but not limited to—(a) [t]he dollar amount of contractor invoices; (b) [t]he supplies delivered and services performed; (c) [a]n assessment of the completion status of the work; (d) [a]n estimate of the number of jobs created and retained as a result of the Recovery Act funds; (e) [n]ames and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and (f) [s]pecific information on first-tier subcontractors.<sup>150</sup>

## VII. COMPLIANCE AND REPORTING REQUIREMENTS AND FALSE CLAIMS ACT EXPOSURE UNDER THE ARRA

“The False Claims Act, also known as the ‘Lincoln Law,’ was enacted during the Civil War to combat the fraud perpetrated by companies that sold supplies to the Union Army.”<sup>151</sup> At the time “[w]ar profiteers were shipping boxes of sawdust instead of guns . . . and swindling the Union Army into purchasing the same cavalry horses several times.”<sup>152</sup> One profiteer boasted he “made millions unloading moth-eaten blankets to the military.”<sup>153</sup>

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January 10, 2010 and covers the period from September 30, 2009 to December 31, 2009.

<sup>146</sup> *Id.* at 26.

<sup>147</sup> Div. A, Tit. XV, Subtit. B, § 1523(b)(4)(a), 123 Stat. at 291.

<sup>148</sup> DEP’T OF JUSTICE, ANTITRUST DIVISION ANNOUNCES INITIATIVE TO HELP PROTECT RECOVERY FUNDS FROM FRAUD, WASTE, AND ABUSE 1 (2009), [http://www.justice.gov/atr/public/press\\_releases/2009/245776.pdf](http://www.justice.gov/atr/public/press_releases/2009/245776.pdf).

<sup>149</sup> See 48 C.F.R. § 4.1500(a)–(f) (2009).

<sup>150</sup> *Id.*

<sup>151</sup> The False Claims Act: History of the Law, [http://www.allaboutquitam.org/fca\\_history.shtml](http://www.allaboutquitam.org/fca_history.shtml) (last visited Dec. 20, 2009).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

### The False Claims Act:

contained “*qui tam*” provisions that allowed private citizens to sue, on the government’s behalf, companies and individuals that were defrauding the government. “*Qui tam*” is short for a Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which roughly means “he who brings an action for the king as well as for himself.”<sup>154</sup>

“The original False Claims Act assessed wrongdoers double damages and a \$2,000 civil fine for each false claim submitted. Those who filed lawsuits, known as ‘relators,’ were entitled to receive 50 percent of the amount the government recovered as a result of their cases.”<sup>155</sup>

In 1943, Congress emasculated the False Claims Act, leaving it fallow until the mid-1980s.<sup>156</sup> Spurred by reports of widespread fraud and abuse during the Cold War build up, Congress re-examined the law.<sup>157</sup> “Congress decided to revise the False Claims Act to encourage more whistleblowers to come forward and to create incentives for private attorneys to use their own resources to investigate fraud.”<sup>158</sup> “Congress sought to create a partnership between public institutions and private citizens” to generate a market response to ensure the checks and balances necessary to deter fraud, waste, and abuse.<sup>159</sup>

The Civil False Claims Act is the primary weapon for combating fraud in government procurements.<sup>160</sup> In general, the Civil False Claims Act imposes liability for civil penalties and treble damages on “any person who knowingly—(A) presents, or causes to be presented, a false or fraudulent claim

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* “The statute remained virtually unchanged until 1943 when Congress radically altered the *qui tam* provisions. The changes included a drastic cut in the relator’s reward, so there was less of an incentive for people to report fraud.” *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* The public read about outrageous billing practices, such as the Navy paying \$435 for an ordinary claw hammer and \$640 for a toilet seat. In 1985, the Department of Defense reported that 45 of the largest 100 defense contractors—including nine of the top 10—were under investigation for multiple fraud offenses.

Government enforcement agencies, meanwhile, complained that their efforts to investigate and stop fraud were hamstrung by insufficient resources, a lack of adequate legal tools and the difficulty of getting individuals with knowledge of fraud to speak up for fear they would lose their jobs.

*Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> The False Claims Act Legal Center, What is the False Claims Act & Why is it Important?, <http://www.taf.org/whyfca.htm> (last visited Dec. 20, 2009).

for payment or approval; (B) makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”<sup>161</sup>

The Civil False Claims Act authorizes an individual, in his or her private capacity, to bring suit in the name of the United States.<sup>162</sup> As an inducement to be a whistleblower, the statute provides such person percentages of any judgments or settlements against the defendants.<sup>163</sup> Twenty-five states now “have their own versions of the False Claims Act with *qui tam* provisions,”<sup>164</sup> and the value of recoveries obtained under these laws has steadily increased in recent years.<sup>165</sup>

Because of the spending contemplated by the ARRA and the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel. Sanders*,<sup>166</sup> Congress amended the False Claims Act by passing the Fraud Enforcement and Recovery Act (“FERA”) of 2009.<sup>167</sup> The FERA expands the jurisdiction of the False Claims Act to cover not only claims made to the federal government but also claims submitted to a contractor, grantee, or other recipient so long as the money to pay a claim comes from or will be reimbursed by the government.<sup>168</sup> Thus, the FERA expands the scope of liability under the False Claims Act to subcontractors and subgrantees.<sup>169</sup> This change will impact all recipients of ARRA funds, including those performing infrastructure investment projects where invoices are submitted for payment to state and local governments. The FERA also legislatively overrules the Supreme Court’s decision that liability for False Claims Act violations must be premised upon a showing of intent.<sup>170</sup> Specifically, the FERA states that the “knowing” and “knowingly” prongs of a cause of action under the False Claims Act does not require “proof of specific intent to defraud” the government.<sup>171</sup>

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<sup>161</sup> 31 U.S.C.A. § 3729(a)(1) (2009).

<sup>162</sup> *Id.* § 3730(b).

<sup>163</sup> *Id.* § 3730(d).

<sup>164</sup> The False Claims Act Legal Center, State False Claims Acts, <http://www.taf.org/statefca.htm> (last visited Dec. 20, 2009).

<sup>165</sup> See generally TAF Publications, The False Claims Act Legal Center, <http://www.taf.org/publications.htm> (last visited Dec. 20, 2009).

<sup>166</sup> \_\_\_ U.S. \_\_\_, 128 S. Ct. 2123 (2008) (rejecting the interpretation that liability would attach because a false statement resulted in the use of government funds to pay or approve a false claim).

<sup>167</sup> Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

<sup>168</sup> See 31 U.S.C.A. § 3729(a)(1) (2009) (expanding liability by foregoing the requirement that a claim be submitted to a federal official; instead liability hinges upon whether money to pay a claim comes from or will be reimbursed by the government).

<sup>169</sup> See *id.*

<sup>170</sup> See *Allison Engine*, \_\_\_ U.S. at \_\_\_, 128 S. Ct. at 2128.

<sup>171</sup> 31 U.S.C.A. § 3729(b)(1)(B) (2009).

In addition to the Civil False Claims Act, the Criminal False Claims Act<sup>172</sup> covers procurement fraud. Criminal liability results from the submission of “any claim upon or against the United States . . . knowing such claim to be false, fictitious, or fraudulent.”<sup>173</sup> The Criminal False Claims Act is generic because it applies to any type of false claim submitted to the government.<sup>174</sup> For example, it applies to Medicare and state health plans just as easily as it applies to construction.<sup>175</sup>

Furthermore, the Criminal False Statements Act attaches criminal liability to anyone who “knowingly and *willfully*—(1) *falsifies*, conceals or covers up . . . a material fact; (2) makes any intentionally false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.”<sup>176</sup> Section 1001 is frequently employed to prosecute individuals or entities that make misleading or false statements to, or conceal facts from, federal investigators during audits and investigations.<sup>177</sup> In this regard, it is notable that the statute reaches concealment or falsification of a material fact and affirmatively making false or fraudulent statements.<sup>178</sup> The state of mind requirement, however, is somewhat stringent because the government must prove that the defendant acted “*willfully*.”<sup>179</sup>

The ARRA has strengthened whistleblower protections, broadened the application of the False Claims Act, and created the Recovery Accountability and Transparency Board.<sup>180</sup> In addition, the acceptance of ARRA funds by a contractor authorizes the government to conduct on-site audits and permits greater transparency of contractor books and records than under ordinary federal contracts.<sup>181</sup> The unprecedented levels of oversight and enforcement in the legislative and regulatory agendas in an era of economic stimulus funding are intended to ensure that recipients of federal funds are held accountable to the government. The enhanced whistleblower protections alone will guarantee that *qui tam* relators and their attorneys will make use of the False Claims Act to police federal and state project fraud on behalf of the government and

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<sup>172</sup> 18 U.S.C.A. § 287 (2009).

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See generally* Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 591-92 (1996) (explaining that Medicare and Medicaid fraud are primarily prosecuted under mail fraud, false statements, and conspiracy statutes).

<sup>176</sup> 18 U.S.C.A. § 1001 (2009) (emphases added).

<sup>177</sup> *See id.*

<sup>178</sup> *See id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See supra* notes 147, 161-71.

<sup>181</sup> *See* Pub. L. No. 111-5, §§ 901-02, 1514-15, 1521, 1523, 1526, 123 Stat. at 191, 289, 290, 293.



taxpayers. The 2009 amendments to the False Claims Act and the enhanced whistleblower protections signal Congress's intent that the government also have the tools to respond to fraud, waste, and abuse.

The congressional message is clear that recipients of federal stimulus funds are to be held to the task of establishing compliance and reporting programs that will ensure candor in government contract negotiations, submission of justifiable and accurate claims to all recipients of federal stimulus funds, and access to documentation to prove the legitimacy of claims for payment and the absence of false certifications. The expanded scope of the False Claims Act on the heels of the ARRA signals a definite trend toward the establishment of an enforcement framework that likely will become the new model in policing against fraud, waste, and abuse long after the sunset of President Obama's federal economic stimulus legislation of 2009.

### VIII. CONCLUSION

There are certain statutory and policy measures in the ARRA that will have long term continuing impacts on international, federal, and state and local government procurement beyond the two year life of funds anticipated by the ARRA. The trend of increased oversight and transparency will endure long after the last dollar of the ARRA funds have been spent. Now that Congress and the Executive Branch have started down the road of transparency in reporting expenditures to the taxpayer, there would likely be a backlash if these reporting and transparency tools were recalled. The trend will be to continue reporting and requiring transparency for all areas, specifically in the procurement arena where the taxpayer has come to expect access to information regarding how taxpayer dollars are spent.

Another trend that will likely continue beyond the ARRA spending is the use of the False Claims Act to police the private sector in their reporting of information, statements, and claims made to the government. The reach of the False Claims Act has broadened as a result of the passage of the FERA. The taxpayer can expect to see False Claims Act litigation spike with the auditing of ARRA expenditures and then taper off to a steady increase beyond the life of ARRA funding.