

Construction Industry Ethics & Compliance Initiative

Second Annual Best Practices Forum

Implementing Federal Social & Economic
Mandates

Gunjan Talati
Associate
Crowell & Moring LLP

Overview

- American Recovery & Reinvestment Act
 - Current spending
 - Reporting
 - Buy American
 - Prohibitions
 - Wage requirements

- E-Verify
 - What is it?
 - When are you required to use it?
 - How to use it

American Recovery & Reinvestment Act



- Also known as the “Stimulus Act”
- Allocates substantial amounts to construction related projects including:
 - The design and construction of child development centers for multiple DoD agencies
 - The design and construction of warrior transition complexes for multiple DoD agencies
 - Military hospitals
 - General construction

Current Spending

- As of September 30, 2009, the agencies that have paid out the most money are:
 - Department of Health & Human Services \$32.5M
 - Department of Labor \$26.3M
 - Department of Education \$19.5M
 - Social Security Administration \$13.2M
 - Department of Agriculture \$4.9M
 - Department of Transportation \$3.1M
 - Department of Housing & Urban Development \$1.1M
 - Department of the Treasury \$1.2M
 - Department of Justice \$1.1M
 - Department of Energy \$0.72M

Source: Recovery.gov

Stimulus Act Compliance Requirements



- Reporting
 - Quarterly reports regarding the use of Stimulus Funds
 - FAR 52.204-11 requires contractors & first-tier subcontractors to report:
 - Contract number
 - Amount of stimulus funds invoiced for the relevant period
 - What was delivered or performed during that period
 - Assessment regarding the progress
 - Impact on jobs
 - Compensation of the 5 highest paid officers
 - Information on first-tier subcontractors

Buy American Requirements for Construction

- Contractors are subject to Buy American requirements for federal buildings and public works that use Stimulus Act funds
- Contractors cannot use Stimulus Act funds for the construction, alteration, maintenance, or repair of a public building or work unless the following items are produced in the United States:
 - Iron
 - Steel
 - Manufactured Goods

Other Mandates

- Prohibitions—funds cannot be used for:
 - Casinos
 - Aquariums
 - Zoos
 - Golf courses
 - Swimming pools

- Compliance with the National Environmental Policy Act is required

- Wage Rate Requirements
 - Must pay prevailing wage requirements of the Davis-Bacon Act to all laborers and mechanics
 - Applies to subcontractors

Other Mandates

- Central Contractor Registration
- Whistleblower Protection
 - Contractors cannot retaliate against employees who disclose mismanagement, abuse or waste of funds, or the violation of a law on a contract using Stimulus Act funds
 - Protection required to be flowed down to subcontractors
- Government access to employees
 - The Government Accountability Office and agency Inspector Generals can interview company employees

E-Verify



- Only eligible individuals are allowed to work in the United States
- One program to verify employment eligibility is the Basic Pilot/Employment Eligibility Verification Program
- Better known as E-Verify
- DHS administers the E-Verify program

Using E-Verify



- Contractors agree to a MOU with the DHS
- Employee information is then checked against databases
- If employee information cannot be verified the employee must take steps to remedy the situation
- FAR Clause 52.222-54 titled “Employment Eligibility Verification”
 - Inserted into contracts valued above the simplified acquisition threshold (\$100,000)
 - Not inserted if a valid exception applies

E-Verify & Government Contracts



- Impact on new contract awards
 - Required to enroll in E-Verify within 30 days
 - Within 90 days of enrolling, contractors must start using E-Verify to confirm the eligibility of all new hires within three days of their hiring
 - Also, contractors will have to verify the eligibility of employees “assigned to the contract” within 90 days of enrolling in E-Verify or 30 days after the employee is assigned to the contract, whichever is later

E-Verify & Government Contracts



- Impact on existing contracts
 - Existing ID/IQ contracts shall be amended on a bilateral basis to include the E-Verify clause for future orders
- Subcontracts
 - Mandatory flow down clause for subcontracts greater than \$3,000 unless an exception applies

Final Thoughts

- Check the text of FAR clauses
 - Many clauses have been added or modified and you should know what you are agreeing to
- Remember certifications should not be taken lightly, regardless of form
 - Always exercise due diligence before making a certification to the Government
 - Failing to do so could open you up to False Claims Act liability

Questions?

Gunjan Talati

- E-mail:
 - gtalati@crowell.com
- Phone:
 - 202-624-2661