

SPENDING STIMULUS DOLLARS WHILE REDUCING THE RISK OF RECOVERY ACT FRAUD AND ABUSE

EXERCISING THE RIGHT TYPE OF
MANAGEMENT AND OVERSIGHT OF
STIMULUS PROGRAMS IS KEY.

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John W. Snow
Secretary of the Treasury.



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HUNDRED DOLLARS

BY KATHERINE NG AND STELLA TSAI



WITHOUT A DOUBT, THE RAPID DISTRIBUTION OF BILLIONS OF DOLLARS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA) NOT ONLY PRESENTS MASSIVE ECONOMIC OPPORTUNITIES, BUT ALSO THE POTENTIAL FOR MASSIVE FRAUD.¹ THE ARRA SEEKS TO ADDRESS THIS UNFORTUNATE FACT OF LIFE BY MAKING, AMONG OTHER THINGS, SPECIFIC DEMANDS THAT STATE AND LOCAL GOVERNMENT TAKE EXPLICIT RESPONSIBILITY FOR MANAGEMENT OF THE STIMULUS PROGRAMS.²

Some states and local governments have responded to these mandates by appointing compliance “czars” and commissions to help achieve effective oversight.³ More tangible investment returns will be realized, however, if local and state governments allocate sufficient resources and time to planning and evaluation *before* the dollars are spent or committed to programs, rather than after the fact when tracking (i.e., auditing) routinely gets done. These agencies should promptly set and communicate clear standards and expectations that must be met as a prerequisite for the release of these funds. This would ensure that funds are used for the most direct, judicious, and relevant expenditures and eliminate the need for micromanagement as the project or program runs its course.

Even in situations where the perceived need for speed may curtail the planning phase, exercising the right type of management or oversight can lead to very positive programmatic results. From our experience and that of colleagues who have endured the rigors of government contracting, we have identified a list of best practices and processes for reducing the risk of ARRA fraud and abuse.

1. USE “MERIT-BASED” PROCESSES FOR AWARDING CONTRACTS.

The Request for Proposals (RFP) Process

The RFP process allows for merit-based proposals brimming with creative and cost-effective solutions. By creating a benchmark of minimum qualifications, the RFP process ensures that bidders have proven experience and the potential to provide a quality solution to the owner. With sustainable building a key focus of the ARRA dollars, it would behoove government agencies to require some track record of sustainable projects, or at a minimum sustainability education to ensure that projects are executed by knowledgeable designers and contractors. Having such requirements would also promote an upward trend for people to educate themselves in order to prepare for future

projects. Further, the RFP process should include a risk assessment of the potential contractor or vendor to ensure that contract requirements can be met, reduce the risk of litigation, and avoid harm to reputation, which public officials should value.

The Pre-Qualification or Request for Qualifications (RFQ) Process

The pre-qualification process allows government agencies to screen potential bidders by looking at key indicators of potentially successful performance, including past experience, financial strength, and personnel credentials. By limiting the pool of respondents to those who meet a minimum benchmark of technical qualifications, the government benefits in numerous ways. These benefits include reducing risk to the government for poor performance and the associated costs of time delays and claims—saving the government reviewers valuable time and money by only entertaining qualified bids, and encouraging competitive pricing from applicants who feel they are bidding on a level playing field with other qualified bidders. Eligibility for bidding is typically good for a specific period of time. State and local agencies should make sure that the pool of pre-qualified companies is as inclusive as possible; otherwise, the process favors companies with established relationships and may exclude “qualified” minority and women-owned business enterprises (MWBE), a number of which await MWBE certification from the local or state government.

2. ENFORCE AN ETHICAL CODE OF CONDUCT.

The agency should clearly communicate and enforce its expectations that any contractor, provider, or consultant who intends to accept ARRA dollars will conduct its business in an ethical manner and promote an ethical culture within its organization. Such a culture encourages ethical conduct and compliance with the law. This is not legal or moral mumbo jumbo, but rather a serious factor that federal prosecutors consider when determining whether to charge orga-

nizations with crimes⁴ and federal judges may consider under the 2004 Sentencing Guidelines. The Sentencing Commission made its recommendation to include this factor based on data showing that companies with strong ethical cultures are less likely to have management or employees who commit misconduct.⁵

3. USE SIMPLE, CLEAR CONTRACT LANGUAGE.

Even if the decisions to award Recovery Act funds are merit-based, no ARRA dollars should be released to the private sector without clearly written contracts. In a study of construction litigation involving government agencies from 1980–2004, the primary causes of litigation for the U.S. General Services Administration, Naval Facilities Engineering Command, and the U.S. Army Corps of Engineers were contract modifications and the interpretation of contracts.⁶ These results support the need for strict expectations to be detailed at the inception of a contract in order to avoid the open room for interpretation among owners, contractors, and consultants. Such ambiguity easily leads to loss of time, bureaucratic handling, and wasted overhead for all parties—all avenues of wasteful spending of taxpayer dollars. The standards for project documents must be raised to a higher level so that owners are not left in a quagmire when architects and contractors both do not take responsibility for the hiccup.

4. EXECUTE EFFECTIVE CONTRACT MANAGEMENT.

Taxpayer dollars may be saved if contracts are more effectively managed throughout their course. According to recent research by the Construction Management Association of America, construction clients have found that the majority of design efforts finish behind schedule and that the quality of design documents has decreased over the past 10 years.⁷ If designers were held to a higher standard of accountability for the quality of their design documents, costly consequences resulting from delays, open interpretation, and conflicts could be prevented. The role of construction managers should also be better understood. As such managers usually do not do any actual construction,⁸ the value added from their oversight of projects should be scrutinized compared to the services already brought forth by the designers, contractors, and consultants on a project. Taxpayers would benefit greatly if contract administrators were adequately educated on the legal and technical ramifications of construction contracts such that confusion and double-handling are kept to a minimum in the execution of these projects.

5. STREAMLINE OVERSIGHT.

Trust that the providers will comply, but verify compliance with spot investigations and follow-through. If you put someone in charge of everything, then you don't double

handle—use clear policies to govern all projects and put the contractor on notice that noncompliance will not be tolerated.

6. MAKE-WORK IS NOT REAL WORK.

Create jobs that teach transferable skills based on merit, not nepotism. Not everyone may be able to stay ahead of the curve, and even fewer people may be visionaries, but it is surely possible for all people to want to improve themselves. Stimulus dollars should influence the general public to both achieve efficiencies in the short term as well as set the stage for generational learning by fostering new skills that are relevant to the evolving technology and social impetus behind sustainable growth. In the past, the weatherization workforce development programs—which were offered to ex-offenders and people living in impoverished urban communities—amounted to nothing more than rudimentary instruction on caulking and insulation installation. ARRA dollars should not be spent letting people continue to do what they already know how to do—otherwise, we wouldn't be in this mess in the first place.

7. KEEP LOOKING FORWARD.

The current economic times should be a wake-up call to society that the feelings of national superiority in the past will no longer be viable in the national and international markets. We need to remember that having the freedom to grow is a blessing and not a birthright—it takes monumental effort to continue making the most of this opportunity. We should view the stimulus dollars as an opportunity to start an ongoing effort to learn, train, and think out of the box when it comes to how we can revitalize our country with skills that will allow our growth to compound upon itself and maintain leadership in the global economy.





8. STIMULATE LIFELONG LEARNING.

We need to instill the passion for continual learning and public service from an early age. Resources for green education are quickly being developed into lesson plans and hands-on exercises to infuse the qualities of sustainable living into everyday learning.⁹ If our youth are taught the content of the green movement alongside the concept that continual, adaptable learning is key to long-term sustainability, then we will be setting the stage for our young people to prosper and not fall into complacency.

Complacency of standards and the feeling of entitlement for a certain quality of life without the practical skills to support that idea are just some of the reasons for our deteriorated economic state, as somewhere along the way individuals shifted their focus to reaping rewards without the work ethic. We now know those rewards don't grow on trees, and our youngsters need to develop a real world mentality to fight in the trenches for what they want.

CONCLUSION

Transparency and accountability are not the stuff of rocket science or complex metrics, but rather simple measures designed to reward the American work ethic. Agencies and organizations that foster and sustain an ethical culture within their workplace are more apt to comply with the law. There are many skeptics and cynics, but despite the headaches, we welcome these measures because it is understood by most Americans that the ailing U.S. economy can ill afford to squander these critical investments. **CM**

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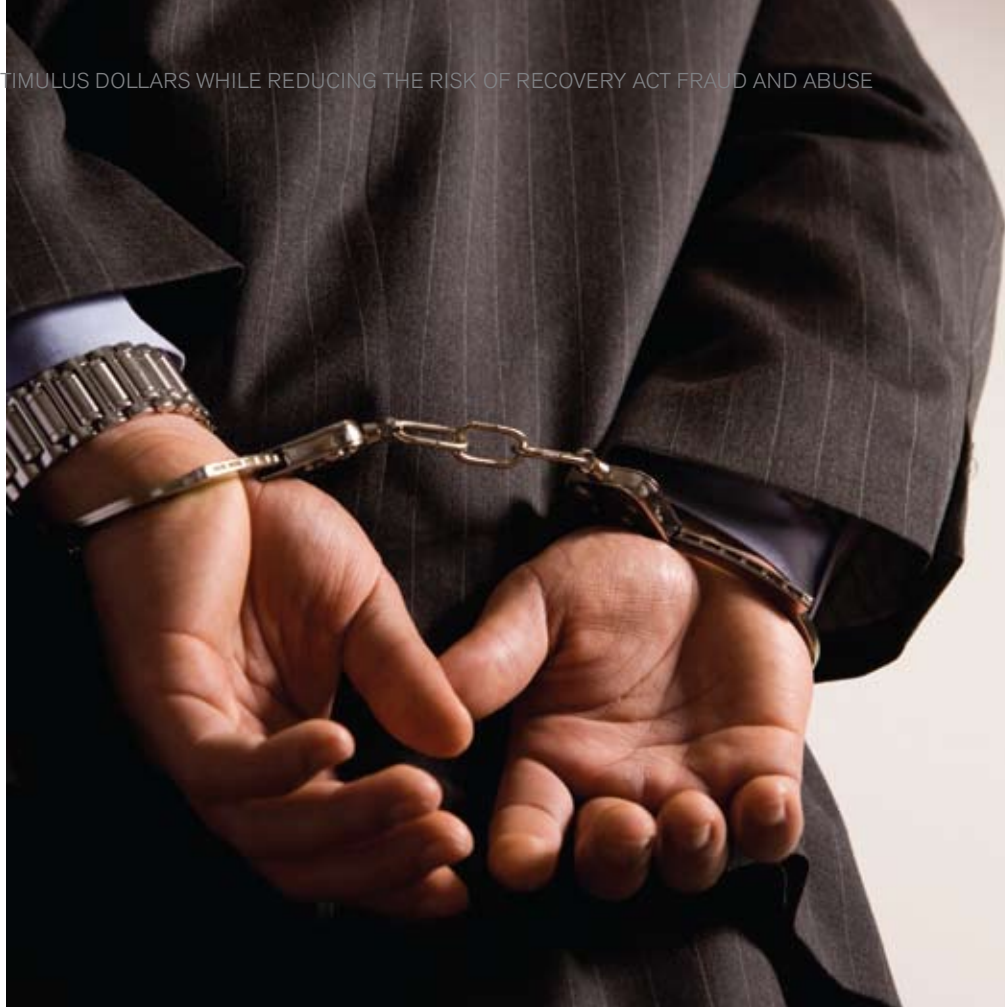
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ENDNOTES

1. The Fifth Circuit acknowledged in recent *qui tam* (or "whistleblower") case, *Rigby v. Branch Consultants*: "The potential for fraud exists in any government program and, certainly, in the situation presented by Hurricane Katrina where mass amounts of federal funds were expended in emergency and less-controlled conditions." *Rigby*, No. 07-31191, 2009 U.S. App. at *22-3 (5th Cir. 2009).
2. *Pub. L.* 111-5. Also, the Federal Recovery Act Transparency and Accountability Board will conduct oversight, program review, and audits. State and local governments must provide access to contract and grant information to the board and the public. The Government Accountability Office has issued hundreds of pages of guidance and is urging private citizens, government workers, contractors, and others to report waste, fraud, abuse, or mismanagement of those funds to a tipline called Fraud-Net at fraudnet@gsa.gov or 800-424-5210 (toll-free) or 202-501-1780 (in the Washington, DC metropolitan area).
3. The City of Philadelphia is hiring a Recovery Act manager to track the whereabouts of every stimulus dollar and develop benchmarks to ensure these dollars yield results. In Delaware, the lieutenant governor has oversight of the Recovery Act and is implementing a pre-approval process for any expenditure of stimulus money. In New Jersey, Governor Corzine created an Accountability Task Force that ensures public access to information about grants, monitors the expenditures, and offers their collective expertise on best practices on merit-based project selection and contract management. In Pennsylvania, Governor Ren-

dell created a Stimulus Oversight Commission to review the Commonwealth agencies' performance in allocating the funds and make any recommendations for improvement, if necessary. The agencies are directed to cooperate with the commission chair.

4. *United States Attorneys' Manual*, "Principles of Federal Prosecution of Business Organizations," §9-28.800 (2008).
5. Public Hearing Testimony, March 17, 2004, "Testimony of the Department of Justice, Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania."
6. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* (ASCE February 2009).
7. "A New Approach to Contracting Design Professionals," *Building a Sustainable Future*, Proceedings of the 2009 Construction Research Congress, April 5-7, 2009, Seattle, Washington.
8. Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2008-2009 Edition.
9. Accessed at www.edutopia.org.



RECOMMENDED READING



Harvard Business Review on Managing Your Career

by Harvard Business School Press

Building a Career in Compliance and Ethics

by Joseph E. Murphy and Joshua H. Leet

Federal Contracting Made Easy, 3rd Edition

by Scott A. Stanberry

To order these great titles, visit NCMA's Web site, www.ncmahq.org/publications/bookstore.

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