

Vendor Reporting Compliance Under the American Recovery and Reinvestment Act

I. Introduction

This whitepaper examines what reporting obligations, if any, a seller of finished goods and/or services has when a buyer purchases the seller's goods or services using funds awarded the buyer under the American Recovery and Reinvestment Act ("ARRA").

What is the ARRA?

ARRA is the economic stimulus package enacted by Congress and signed into law by President Obama on February 17, 2009. The primary goal of ARRA is to stimulate the economy and create jobs through spending and tax incentives.¹ Due to its reporting requirements, ARRA also promotes "unprecedented levels of accountability and transparency in government funding."²

What reporting requirements does a provider of goods or services have under ARRA?

A provider's reporting requirements under ARRA is dependent upon its classification as a "Vendor," "Recipient" or "Sub-recipient" of ARRA funds.

II. Analysis

What is a "Recipient," "Sub-recipient," and "Vendor" under ARRA?

a. Recipient

"Recipients" are defined as entities that receive ARRA funds directly from the Federal Government by grant, loan or contract. Examples of Recipients include states, corporations and sole proprietorships. However, Federal agencies and individuals do not qualify as Recipients.³ Recipients of ARRA funds are subject to ARRA reporting requirements.⁴

b. Sub-recipient

"Sub-recipients" are defined as entities that receive ARRA funds from a Recipient whose goods or services are intended to carry out the federal program or project, in whole or in part, subject to the funds.⁵ Under ARRA, both the Recipient and Sub-recipient have reporting requirements. Sub-recipients may receive the entire ARRA award, or only a portion of the award. As the ARRA funds are paid to the Recipient and then pass-through to the Sub-recipient, the Recipient may delegate some of the ARRA reporting requirements to a Sub-recipient.⁶

¹ The Act (visited Mar. 15, 2010) http://www.recovery.gov/about/pages/the_act.aspx.

² *Id.*

³ See Office of Management and Budget Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations* (June 30, 1997, Revised 2003) [hereinafter OMB Cir. A-133] at § 100.

⁴ American Recovery and Reinvestment Act (2009), Pub. L. No. 111-5 [hereinafter ARRA], 123 Stat. 287 §1512(b)(1).

⁵ Office of Management and Budget Memorandum M-09-21, *Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009* (Jun. 22, 2009) [hereinafter OMB Guidance M-09-21] at § 2.2 pages 6-7.

⁶ ARRA, *supra* at 123 Stat. 288 §1512(c)(4).

As an example of the difference between Recipients and Sub-recipients, if University A is awarded a \$1 million grant of ARRA funds, and University A sub-awards \$500,000 to University B to conduct a part of the research funded by the grant, University A is the Recipient of the ARRA funds, and University B is the Sub-recipient of the ARRA awards.

c. Vendor

“Vendors” are defined as any dealer, distributor, merchant or seller providing goods or services to a Recipient or Sub-recipient that are purchased by Recipients or Sub-recipients.⁷ There can be a question as to whether an entity is a Sub-recipient or a Vendor as defined under ARRA, however Vendors are distinguishable from Sub-recipients in that Vendors: (i) provide goods and/or services in the normal course of business; (ii) sell similar goods and/or services to many different purchasers; (iii) operate in a competitive market; and (iv) provide goods and/or services that are ancillary to the operation of the ARRA funded program.⁸

Reporting Requirements

Recipient and Sub-recipient Reporting

Recipients and Sub-recipients have extensive reporting requirements under ARRA.⁹ These requirements include the specifics regarding the amount, type, nature of ARRA award, amount of ARRA funds expended or obligated, project description and status, job creation narrative and number of jobs created, infrastructure expenditures and rationale, Recipient area of benefit, Recipient officer names and compensation, and total number and amount of small sub-awards. The reporting under ARRA is cumulative. That is, the reporting obligation commences as of the date of the ARRA award and continues through the life of the applicable contract under which the ARRA funds are applied.¹⁰

Reports must be filed on the 10th day following the end of each calendar quarter (*i.e.*, January 10th, April 10th, July 10th and October 10th).¹¹

Vendor Reporting and Support of Reporting

Although Vendors have no direct reporting obligations under ARRA, Recipients and Sub-recipients are required to provide certain basic information on Vendors who provide goods or services that are paid for with ARRA funds.¹² Vendors should be prepared to provide basic corporate or transaction information to help Recipient or Sub-recipient customers with their ongoing reporting obligations. In addition, Recipients and Sub-recipients of ARRA funds must report the number of jobs created or retained with ARRA funds.¹³ A job is considered funded by ARRA if the wages or salaries are either paid for or will be reimbursed with ARRA funding.¹⁴ As directed by the Office of Management and

⁷ OMB Circular No. A-133, *supra* at § 100.

⁸ OMB Guidance M-09-21, *supra* at §2.2, pages 7-8. For further clarification on the definition of a “Vendor” for the purposes of ARRA reporting, refer to OMB Cir. A-133 at § 210(c)(5).

⁹ See ARRA, *supra* 123 Stat. 287-8 at §1512(c) and OMB Guidance, *supra* at §2.3, pages 8 -11.

¹⁰ Reporting requirements must still be met even if subsequent to the award of ARRA funds, no funds have been expended or obligated by the Recipient or Sub-recipient. OMB Guidance M-09-21, *supra* at § 2.5, page 12.

¹¹ ARRA, *supra* 123 Stat. 287-8 at § 1512(c) and 2 CFR §176.50(b).

¹² OMB Guidance M-09-21, *supra* at §2.3, pages 8-11.

¹³ Office of Management and Budget Memorandum M-10-08, *Updated Guidance on the American Recovery and Reinvestment Act* (Dec. 18, 2009) [herein after OMB Guidance M-10-08] § 5.2.2, page 11.

¹⁴ OMB Guidance M-10-08, *supra* at §5.9, page 21.

Budget, Recipients should not attempt to report jobs created for sellers of goods or services unless they are critical to the ARRA funded program.¹⁵

To better support Recipient and Sub-recipient customers, Vendors can be prepared to provide basic corporate and transaction information to ARRA funded customers, and if applicable, the number of jobs created which are critical to the ARRA funded program, with adequate time for Recipients or Sub-recipients to properly report quarterly.

Penalties for Failure to Report

Although not set forth in the ARRA reporting requirements, failure by a Recipient or Sub-recipient to comply with its reporting obligations may be deemed a breach of the contract for the ARRA award.¹⁶ In the event of a breach by Recipient or Sub-recipient of the contract, the awarding federal agency may terminate the contract or award, or take other customary remedial actions necessary to ensure compliance with contract.¹⁷

III. Conclusion

In order to determine your reporting obligations, you need to establish whether your business is considered a Recipient, Sub-recipient or Vendor under ARRA. Determining the proper classification of your business is important so that you can clearly understand your ARRA reporting obligations and evaluate whether you need to obtain information from others to fulfill your reporting obligations. As discussed above, the failure to properly report could result in the termination of your contract awarding ARRA funds. For these reasons, it is important to have an understanding of ARRA and its reporting requirements.

Although Vendors have no direct reporting requirements under ARRA, there are other requirements that Vendors must fulfill to receive ARRA funds. These requirements range from “Buy American” provisions on iron, steel and manufactured goods for construction projects to wage standards for laborers and mechanics to compliance with whistleblower protections.¹⁸ These requirements are important to understand and fulfill, but Vendors are not obligated to report on these requirements. As such, these requirements are beyond the scope of this paper and have not been fully detailed herein. If you need help determining your obligations and reporting requirements or have other questions regarding ARRA, please contact ZentLaw for assistance.

¹⁵ OMB Guidance M-10-08, *supra* §5.2.7 page 12

¹⁶ ARRA, *supra* 123 Stat. 287-8 at §1512; 2 CFR §176.50

¹⁷ OMB Guidance M-09-21, *supra* §2.10, page 15

¹⁸ ARRA, *supra* 123 Stat. 303 at §1605; 123 Stat. 297 at §1553 ; and 123 Stat. 303 §1606.