

Recovery Act Accountability and Transparency Provisions

The Not-So-Hidden Requirements Behind ARRA Funding

By Chad Jacobs, LOC General Counsel

On February 17, President Barack Obama signed into law the \$787 billion American Recovery and Reinvestment Act (ARRA). Also known as the federal stimulus package, the ARRA presents cities with numerous opportunities to jump start local economies; finance new or unfunded projects; and hire or retain existing employees.



Before applying for funding, cities need to be aware that Congress and President Obama have called for an unprecedented level of responsibility and accountability for the use of ARRA funds. As a result, the law imposes several restrictions on the use of ARRA dollars as well as several reporting and transparency requirements. Cities that receive ARRA dollars should expect to encounter these new accountability

and transparency provisions even when receiving ARRA funding through a program from which they have received non-ARRA funds in the past.

Cities that are considering applying for ARRA funding need to be familiar with the law's accountability and transparency provisions for several reasons. First, cities need to understand these provisions in order to be able to determine whether the ARRA is the most appropriate funding source for their projects. It might be more appropriate for a city to apply for non-ARRA funding because of the law's restrictions or because of the additional costs related to some of the requirements. Cities also need to determine whether they are willing and have the resources available to adhere to the law's compliance and reporting requirements. Finally, cities need to be aware that the federal government is taking these requirements very seriously and that there are considerable costs associated with violating these provisions.

“What I need from all of you is unprecedented responsibility and accountability...the American people are watching.”

*President Obama
February 20, 2009*

Is the ARRA the right funding source for our project?

There are several preliminary issues cities should keep in mind when considering whether to apply for ARRA funding for a particular project. First, there are some prohibitions in the law that preclude the use of ARRA funds for certain projects. Specifically, no ARRA funds may be used for zoos, aquariums, golf courses, swimming pools, or casinos. Cities interested in receiving assistance for such projects must look to funding

sources other than the ARRA. Second, ARRA funding is temporary. It is intended to preserve and create jobs; make investments in infrastructure; invest in energy and science technology; provide unemployment assistance; and stabilize state and local budgets. Projects that do not fit these goals might not receive funding. Third, ARRA spending is to be accomplished quickly. The law requires federal agencies to “give preference” to projects that can be started and completed “expeditiously,” with a goal of using at least 50 percent of



the funds on projects that can be started within 120 days of enactment of the law. In several cases, the ARRA requires funding to be spent by September 30, 2010. Projects that are unable to spend the funds quickly—i.e., that are not “shovel ready”—will likely fail to receive funding.

In addition to these preliminary issues, cities need to consider several other requirements that apply to the use of ARRA funds. Specifically, there are strong “buy America” provisions in the law; the law requires compliance with the National Environmental Policy Act; recipients must apply the federal prevailing wage rate to all ARRA projects; and ARRA funds must be used to supplement not supplant existing funds. Each of these requirements is discussed in greater detail below.



Buy America Provisions

Any contract, grant, or other expenditure made using ARRA money for the construction, alteration, maintenance, or repair

of a public building or public work must use iron, steel, or manufactured goods produced in the United States. This requirement is far reaching. As used, the term “public works”

If anyone builds a swimming pool, “I’ll show up in your city and say this is a stupid idea.”

Vice President Biden
March 18, 2009

could include a wide variety of projects, including, among others, new roads and weatherization projects. Furthermore, the phrase “manufactured goods” potentially covers all goods and supplies used in a project. This requirement can be waived when the head of the federal department or agency involved finds that:

- Applying (the Buy America requirement) would be inconsistent with the public interest;
- Iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- Inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

Cities need to keep this requirement in mind when composing a project budget to determine if the use of ARRA funds is cost effective.

Compliance with the National Environmental Policy Act

The ARRA requires that all projects comply with the National Environmental Policy Act (NEPA). The ARRA further dictates that environmental reviews required by the law must be made on an expeditious basis and that the shortest existing applicable process under NEPA must be utilized. As such, cities must keep in mind their ability to complete all applicable environmental reviews required by NEPA in order to get their projects into a “shovel ready” status.

Federal Prevailing Wage Rates Apply

The ARRA requires that prevailing wages, including benefits, as mandated by the Davis-Bacon Act, be paid to all laborers and mechanics employed by contractors and subcontractors on projects funded or assisted by funds provided under the ARRA. These provisions apply to construction projects funded using ARRA money in excess of \$2,000. The U.S. Department of Labor determines the prevailing wage for a variety of labor categories. The prevailing wage

is typically based on the wage paid to the majority of a class of employees in an area. Cities need to keep this requirement in mind when composing project budgets to determine if the use of ARRA funds is cost effective.

Cannot Supplant Existing Funds

Grantees must use federal funds to supplement existing state and local funds for program activities and must not replace (supplant) state or local funds that they have appropriated or allocated for the same purpose. Potential supplanting will be the subject of

monitoring and audit. Violations may result in a range of penalties, including suspension of current and future funds under this program, suspension or debarment from federal grants, recoupment of monies provided under a grant, and civil and/or criminal penalties.

Analyzing a particular project in light of these restrictions and requirements will assist cities in determining whether the ARRA is the best funding source for a particular project. In doing this analysis, cities should keep in mind that in order to spend ARRA funds quickly, the federal government is utilizing existing programs to distribute these funds.

Utilizing this distribution method might result in federal agencies having additional non-ARRA funds available under existing funding programs. Accordingly, cities should look to these programs for non-ARRA funding opportunities as well.

Do we have the resources to comply with the ARRA’s reporting requirements?

To achieve a high level of transparency and accountability, the ARRA imposes several reporting requirements on funding recipients. First, governors, mayors or others making funding decisions must certify that investments have been fully vetted and are appropriate uses of taxpayer dollars. Second, grantees must submit quarterly reports detailing the use of funds. The reports must include information regarding the purpose, cost, and rationale for the project, a contact for concerns, and detailed information on subcontracts. This information will be posted on the Internet at: www.recovery.gov.

Third, grantees must register with the Central Contractor Registration (CCR) database and complete other reporting requirements as determined by the Office of Management and Budget. Fourth, grantees will be required to apply for most funds online using resources such as www.FedConnect.net and www.grants.gov. Using these resources will often require cities to pre-register and use a DUNS number. Finally, many grantees will be subject to mandatory audits regarding the use of ARRA funds. Completed audits will also be posted on the Internet.



These transparency requirements are unprecedented and will require cities to dedicate staff time and resources to comply with the law. Accordingly, cities need to determine if they are willing and have the resources available to adhere to the law’s compli-

ance and reporting requirements before applying for and accepting ARRA funding.

How will the federal government oversee accountability and transparency provisions?

The federal government is taking the ARRA's accountability and transparency requirements very seriously. To that end, there are considerable costs associated with violating these provisions.



The ARRA establishes a Recovery Transparency and Accountability Board, which will be chaired by Earl Devaney, former inspector general of the Interior Department, who was in large part responsible for ferreting out misconduct involving former lobbyist Jack Abramoff. The board will maintain the official ARRA Web site, www.recovery.gov, where it will post an unparalleled amount of information regarding the use of ARRA funds including the certifications, quarterly reports, and audit reports discussed above.

The board will have broad authority to investigate the use of ARRA funds, including subpoena power to compel the production of documents and to require testimony from officials of entities receiving funds. It is expected that if misconduct is discovered, the board will make referrals to appropriate federal law enforcement agencies, including the Department of Justice. Similarly, the board audit reports will be provided to Congress, which may result in Congressional investigation and oversight hearings.

In addition to oversight by the Recovery Transparency and Accountability Board, the ARRA grants authority to the inspector general of each agency that distributes ARRA funds to review projects and investigate misuse of funds. Every agency that distributes ARRA funds is also required to maintain a dedicated ARRA web page, which must contain a place where members of the public can report concerns about investments made using ARRA funds. Inspectors general will also likely refer found misconduct to appropriate federal agencies for enforcement.

“My vision here is that every reporter in America will wake up and click on this site and be looking for problems,” Devaney told 130 city and county officials at a stimulus conference in Washington. “They’ve already started, by the way.”

Earl Devaney
March 18, 2009

In addition to this oversight, reports and certifications made to the federal government under the ARRA are subject to

the False Claims Act. Under this law, an entity that submits, or causes to be submitted, a false or fraudulent claim or statement in support of a claim for money to the federal government is liable for up to treble (triple) the damages caused by the false claim or statement, in addition to other penalties for each false claim or statement, and the government's costs of bringing suit.

Finally, to encourage the reporting of misconduct, the ARRA protects whistleblowers. Employees of non-federal employers may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing information the employee reasonably believes is evidence of gross mismanagement of a contract involving ARRA funds; gross waste of ARRA funds; substantial and specific danger to public health or safety related to implementation or use of ARRA funds; abuse of authority related to ARRA funds; or violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) related to ARRA funds.

Although the accountability and transparency provisions of the ARRA are unprecedented, the opportunities that the ARRA provides to cities are equally unprecedented. The ARRA provides cities with amazing possibilities to fund projects that have gone unfunded for too long, to save jobs that might otherwise have been lost, and to help stimulate local economies during these turbulent times. Cities are encouraged to pursue these opportunities and should not be intimidated by the accountability and transparency requirements of the law because in the end, these requirements only provide information that is likely otherwise already available.

On the Web: Cities interested in receiving ARRA funding should be sure to consult the League's Web site, which includes a wealth of information regarding various funding opportunities. Some application deadlines have already passed, and others are approaching quickly. The League's ARRA Web page can be found at: www.orcities.org/AZIndex/FederalEconomicStimulusPackage/tabid/5786/language/en-US/Default.aspx. ■

Editor's Note: Because of the complexities of these requirements, this article is necessarily general and is not intended to provide legal advice. This article should not serve as a substitute for competent legal counsel. Please consult with your legal counsel to ensure that your city fully understands the accountability and transparency requirements of the ARRA.