



Feature Article



Being Ready for an Audit -- A Must for ARRA Project Subcontractors

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FIRST QUARTER 2011

REPRINT



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While the projects created for government contractors and subcontractors by the American Recovery and Reinvestment Act are a welcome oasis in a desert of construction opportunity, those projects come with some tight strings attached. The ARRA included a significant amount of money dedicated to compliance and enforcement, in alignment with President Obama's pledge for transparency and accountability for taxpayer dollars spent as part of the \$787-billion economic stimulus package.

The U.S. Department of Labor recently stated that future enforcement efforts would focus on subcontractor compliance, so it's crucial that subcontractors at any tier of a project understand the laws that apply to projects funded by taxpayer dollars. Given this focus — and the fact that prime contractors are ultimately responsible for



whether subs are in compliance — primes will no doubt be scrutinizing their subs more closely than ever. The DOL more than tripled the number of investigations conducted for compliance with the Davis-Bacon Act in 2010 as compared to 2009. This means it's almost certain every contractor and subcontractor working on ARRA-funded projects will be audited at some point.

'Sweep Audits'

Kevin Frankovich of CGR Associates says an issue garnering attention among government contractors is "sweep audits." Before signing onto a project, subcontractors

should establish whether the work they are performing is subject to provisions of the Davis-Bacon and related laws. If the project is funded in part or in whole with ARRA funds, subs should keep impeccable records and check with the general contractor to ensure that all subcontractor employees are being reported and being paid the appropriate prevailing wage for their job classification.

"Teams of 3-5 investigators are visiting worksites and examining everyone on the project," Frankovich explains. "Prime contractors are ultimately responsible for whether their subcontractors — and any subs their subcontractors are using — are in compliance with applicable laws such as the Davis-Bacon Act. However, noncompliance can also lead to fines against subcontractors as well."

IN THIS ARTICLE . . .

- *DOL is ramping up Davis-Bacon enforcement.*
- *Audits likely for ARRA-project subs.*
- *Keeping complete and accurate records is imperative.*

Frankovich says it's entirely possible that, for instance, a fourth-tier subcontractor brought in to install cabinets may not even be aware that it is covered by the Davis-Bacon Act while working on an ARRA-funded project. Violations by subcontractors can result in the prime contractor being debarred from working on future government contracts, so it's likely subcontractors will see contract language giving primes the right to review all subcontractor records, to review all records and schedules, and even to conduct their own audits to ensure compliance.

Federal False Claims Act Used to Enforce Davis-Bacon

While not strictly related to audits, a recent ruling that a contractor in Kentucky pay the government triple damages totaling over \$1.6 million has focused attention on prime contractors and the subs they use on projects funded by taxpayer dollars. In this case, the contractor was found to have falsely certified that the company and all its subcontractors were paying all employees appropriate prevailing wages. While the company did file certified payroll for its own employees and other subcontractors, it did not submit them for one electrical subcontractor. The judge found that both the prime's original payroll certifications and its later payroll certifications contained false entries because they omitted the electrical subcontractor and falsely stated that all workers on the project were paid the prevailing wages.

In its lawsuit, the government stated that the Davis-Bacon Act requires contractors working for the government to pay workers the prevailing wages, without deduction and without exception. The prime contractor and subcontractor must also certify to the government that they are providing correct and complete payroll information that

Get Answers About Worker Classification in ASA's Feb. 15 Webinar

Do you know the rules the IRS uses to classify workers? Incorrectly classifying your workers as independent contractors can result in a huge bill — including penalties and unpaid taxes.

In ASA's February webinar, "Employee or Independent Contractor? Getting Worker Classification Right," presenter Michael Schrier, Esq., Jackson, Kelly, PLLC, Washington, D.C., will review the factors that the IRS commonly uses for determining worker status and explain why and how public officials are increasing enforcement.

Project the webinar on a screen or wall and listen to it on a speakerphone for a group training event at your office. The registration fee for the webinar is \$99 for ASA members and \$179 for nonmembers, and allows access with one Internet connection and one telephone line. After the program, participants will receive a multimedia CD-ROM with an audio-visual recording of the presentation, and a link to a printable ASA Certificate of Completion. The 90-minute webinar is scheduled for Feb. 15 at 12:00 p.m. EST.

To register, visit "Register for a Meeting" at www.asaonline.com, or call (703) 684-3450, Ext. 1304.



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identifies all laborers at the contract worksite, and that all laborers are paid the requisite prevailing wages (payroll certifications). The falsifications of any of these certifications can subject the contractor and subcontractor to civil prosecution under the False Claims Act.

Independent Contractor vs. Employee

Particular attention has been paid in the past 18 months to the issue of workers being misclassified as independent contractors when, in fact, they are employees. In March of 2010, the DOL announced a joint DOL-IRS "Misclassification Initiative" designed to improve enforcement of workplace laws, with particular emphasis on employers that wrongly classify employees as independent contractors in an effort to avoid payment of employment taxes, benefits and overtime.

Furthermore, the DOL's Wage and Hour Division received an additional \$12 million and 90 new investigators to expand its enforcement efforts. The DOL will reward states that are successful at detecting and prosecuting employers that fail to pay the proper taxes — this pilot program received \$10.9 million in funding. The DOL budget also includes \$1.6 million for the Office of the Solicitor to enhance enforcement strategies and to promote legislative

changes aimed at rectifying the misclassification of employees as independent contractors.

The misclassification issue received further attention with the April 22, 2010, introduction of the Employee Misclassification Prevention Act, which would amend the Fair Labor Standards Act to "require persons to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for persons who misclassify employees as non-employees."

In addition to these federal initiatives, many states have also begun their own efforts to identify misclassified workers. Last year Delaware enacted a law specifically targeting the construction industry. Other states cracking down on misclassification include Colorado, Illinois, Indiana, Maryland, Minnesota, New Hampshire, New Jersey, Rhode Island and Washington. As a result, employers need to be extremely careful that workers who are classified as independent contractors meet qualifying criteria. Information to help employers determine whether workers are independent contractors or employees can be found at www.irs.gov.

Documentation Is Crucial

Since audits are random and unannounced, government contractors and subcontractors must keep complete and accurate records at all times. One of the problem areas recently identified by the DOL is "inadequate recordkeeping" and therefore documentation is crucial. With this in mind, business owners and managers should pay particular attention to these areas:

■ Using the correct job categories for workers.

Sometimes, in an effort to save money, contractors will classify a worker as a laborer when he or she is a carpenter and must be paid carpenter's wages. In cases where a worker performs several job duties on a project, hours must be broken

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out according to which function and job classification is being performed, and correct wages must be paid for each. In the False Claims Act case previously mentioned, suspicions were raised when only one worker on a project was classified as an electrician, and the others were all classified as laborers.

■ Frequency of contributions to bona fide benefit plans.

While the Davis-Bacon Act requires that fringe benefit contributions made on behalf of hourly workers be made at least quarterly, consider making contributions monthly. It makes documentation and recordkeeping easier for the contractor, and with monthly contributions, it's easier to catch and correct errors in a timely fashion.

■ Recordkeeping.

Know that auditors are looking

for inadequate recordkeeping and contractors that are ignoring health and welfare requirements. Documents that may be requested by the auditors include:

- Plan documents/Adoption agreement(s)/Summary plan descriptions/Summary annual reports.
- Schedule A forms.
- Form 5500s.
- Fidelity bond information.
- Distribution forms/Form 1099s.
- Schedule of contributions received.
- Nondiscrimination testing results.

The Cost of Non-Compliance

For many contractors, the opportunities presented by the ARRA are exciting. However, penalties for failure to comply with the various laws associated with ARRA-funded projects can be steep, and may even include debarment from work on public works projects. To make navigating the maze of regulations easier, consider partnering with a company that has both expertise and experience assisting clients with compliance and the audit process. When choosing a partner, contractors should investigate how long the bona fide benefits plan provider has worked with government contractors, and ascertain the scope of assistance that will be provided, including whether compliance assistance is provided in-house or outsourced at an additional cost. An experienced company that understands the laws and regulations that apply to public works can help contractors bid on these projects with increased confidence.

Adam Bonsky is executive vice president of government markets for Fringe Benefit Group, which has been serving the construction industry on prevailing wage jobs since 1983. He can be reached at abonsky@fibi.com. For more information on prevailing wage benefit plans and bidding on government jobs, visit <http://asa.contractorsplan.com>. ◆