



Tribal Tip Sheet:

Economic Stimulus Information for the Construction Industry

Information Provided by the Construction in Indian Country Conference (CIIC) Executive Committee

The information in this document should not be construed or relied upon as legal advice and in all instances Tribal personnel should refer questions to the appropriate officials of their Tribe, organization or Federal government agency.



The Secret to Stimulus Success – Observe Good Business Practices

The Nacirema Tribe was well on its way to what it thought was long overdue housing rehabilitation on 29 units in one of the most remote Tribal areas in the lower 48 States. The general contractor had been hired, the materials had been ordered and federal funds combined with Tribal funds had started flowing. The community had been able to get this part of the process completed even though the Finance Director retired three years earlier. Moreover, and due to the remote location, the Tribal Housing Director worked on a part time basis and commuted twice a month from a neighboring community to the Tribe's reservation. There was only one problem – the procurement and contracting policies that the Tribal Council approved prior to the Finance Director's retirement were not followed. Had the Tribal Council required the due diligence called for, the Tribe would have discovered that the GC failed to renew his surety bond and that the State Registrar of Contractors suspended his license as a result. In the end, the GC abandoned the project. The work that the GC partially completed did not meet basic safety standards nor did it meet the Uniform Building Codes that the Tribe adopted years earlier. Although this specific story is fictitious, many similar experiences faced by American (that's Nacirema spelled backwards) Tribes could have been and can be avoided.

With economic recovery deadlines fast approaching, Tribes are expected to act quickly to issue solicitation documents and prepare contracts in order to obligate or expend Stimulus funds as quickly as possible. If Tribes do not meet the federal compliance standards on time, Tribes risk recapture of these Stimulus funds. In order to avoid such consequences, the CIIC Executive Committee prepared this informational document to alerts Tribes to the new Stimulus reporting requirements as well as provides suggestions to help Tribes avoid project management pitfalls.



Practices for Effective Project Management

The fast approaching Stimulus deadlines and new reporting requirements combined with high Tribal staff turnover rates and the eagerness of consultants and contractors to secure tribal Stimulus funds may combine to form a perfect storm that could negatively affect your Tribal project.

To facilitate successful projects, Tribes should focus on adopting strategies that minimize the risks at each stage of the contracting process (i.e. planning, developing and managing). It is essential that all parties (tribal and non tribal) involved with the contract understand their role and what is expected of them.

- (1) Make it a priority to identify responsible contractors and hold them accountable.
 - Conduct appropriate background checks for contractor personnel/principals responsible for contracts. Check for outstanding tax payments, outstanding judgments or liens, past criminal conduct by the company or its principals, administrative sanctions such as OSHA or Environmental Control Board violations.
 - Check the corporate standing of organizations. Check for compliance with all required corporate filings and licensing rules, and any history of debarments or for cause terminations.
 - Request and call business references. Check to see if the contractor/firm has a good track record of working in Indian Country and has a good track record for providing the specific service you require.

- (2) Follow standard procurement practices.
 - Request for Qualifications (RFQs) should properly request information about the contractor's/firm's project experience and any other unique qualifications that would be reason to select them for the project. As a qualification, rural Tribes should require that contractors/firms have adequate rural project experience. Check project history to determine if a contractor/firm has previous project experience working in remote locations. Contractors/firms should be adept at relocating to and living in remote/rural areas for the duration of a construction project.
 - Request for Proposals (RFPs) should properly define the scope of work and the nature of the project. In their proposals, contractors/firms should make the case for why they are best qualified, based on their experience and their capabilities, and specify what they will do, what the project will be, what their delivery schedule will be, and what the cost of their contract will be.
 - RFPs that fail to identify the contractor's/firm's responsibilities may lead to costly litigation down the road if a Tribe and a contractor/firm do not agree about what each party's expectations and obligations are under the contract.
 - Determine if contractors/firms have adopted codes of business ethics and conduct for their employees and subcontractors. FAR now requires government contractors to prepare a Code of Business Ethics and Conduct if the contractor receives awards in excess of \$5 million where the

period of performance is 120 days or more. Tribes should consider incorporating an ethics clause into all solicitations regardless of the contract amount.

- (3) Once a contract has been awarded and finalized, Tribes need to monitor the actual spending and quality of work.
 - If a Tribe fails to monitor a contractor's compliance with the contract requirements, Tribes may end up paying large amounts of money to contractors only to later learn that the hired contractor performed sub par work.
 - It is important for Tribes to understand that changes to a contract that are too drastic in the post award phase can be extremely detrimental to a project's success. Tribes should take important steps to minimize projects changes, particularly changes to the contract objectives and work statement.
- (4) Stay in contact with your federal program officer.
 - Under the new ARRA quarterly requirements, Tribes who fail to submit quarterly reports on time risk the termination of their stimulus awards. General contractors and subcontractors will be responsible for submitting critical project data (i.e. number of jobs created) to the Tribe to be included in the quarterly reports. Keep your federal program officer informed on the status of all tribal stimulus projects.
- (5) The Antitrust Division of the Department of Justice launched the "Recovery Initiative" aimed at training government officials and contractors to recognize and report efforts by parties to unlawfully profit from the stimulus projects.
 - Training may be scheduled by sending an email to antitrust.recovery@usdoj.gov.
 - Visit the website for more information:
http://www.usdoj.gov/atr/public/criminal/economic_recovery.htm
- (6) The Government Accountability Office (GAO) launched "Fraud Net" which is a website that permits any one from the public (this includes tribal members) to report allegations of fraud, waste, abuse, or mismanagement of federal funds. GAO will then refer those allegations to the Inspector General (IG) of the relevant federal agency
 - Recovery.gov is currently working to provide an on line complaint and hotline service to log suspected fraudulent or abusive use of the recovery money
 - Visit the website for more information: <http://www.gao.gov/fraudnet/fraudnet.htm>

We encourage Tribes to support and invest in American Indian and Tribally Owned Companies and Firms by developing and promoting tribal policies that demonstrate support and commitment to awarding contracts and subcontracts to these business entities.



New Federal Acquisition Regulation (FAR) Interim Rules

Federal Register Page 14646 / Vol. 74, No. 60 / Tuesday, March 31, 2009
http://edocket.access.gpo.gov/2009/pdf/E9_7027.pdf

On March 31, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the "FAR Councils") published five Federal Acquisition Regulation (FAR) Interim Rules in the *Federal Register* implementing several of the contracting provisions included in the American Recovery and Reinvestment Act (ARRA). Below are highlights of the Interim Rules. We strongly encourage you to review these rules and the accompanying OMB guidelines as the summaries provided below are not comprehensive.

The Interim FAR Rules only apply to federal procurement contracts funded with stimulus money. The FAR rules do not apply to grants, cooperative agreements, or federal financial assistance provided by the federal government to fund stimulus projects.

Although each of the Interim Rules became effective as of March 31, the FAR Council and OMB are accepting public comments by June 1, 2009, in formulating the final rules.

- (1) Quarterly Reporting Requirements. This section requires Federal Government contractors receiving ARRA funds to submit quarterly online reports at www.federalreporting.gov.
 - Consult the Interim Rules and the OMB guidance memoranda for detailed instructions about the information that should be included in the quarterly reports.
 - It is critical that Tribes meet all reporting requirements on time. Any Tribe that is late in submitting its quarterly reports may be prohibited from drawing down any remaining funds and/or may have their contract(s) terminated. General contractors and subcontractors will be responsible for submitting critical project data (i.e. number of jobs created) to the Tribe to be included in the quarterly reports.

- (2) Publicizing Contract Actions. The section imposes various requirements including posting of pre solicitation and award notices on FedBizOpps (FBO). Any stimulus related prospects must be specially formatted to differentiate them from regular projects. For any contracts or orders over \$500,000, the agencies must summarize the contract or order, provide a description of the particular goods or services required, and then post that information to the recovery.gov website, making it available to the public. Agencies are also urged to use fixed price contracts wherever possible and appropriate.
 - Consult the Interim Rules and agency websites for additional and forthcoming details on the procedures and instructions that must be followed.

- (3) "Buy American" Requirement. This section prohibits the use of funds appropriated or otherwise made available by the Act for any project for the construction, alteration, maintenance, or repair of a public

building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

- Consult Interim Rules and OMB guidance memoranda for information about how Tribes may waive this requirement.

- (4) GAO and IG Access to Records and Contractor Employees. This section grants greater authority to the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office (GAO) to examine any records of the contractor and interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding ARRA transactions.
- The GAO has authority to audit both contracts and subcontracts that receive ARRA funds, and to interview contractor and subcontractor employees. IGs are granted the same rights, except IGs do not have the ability to interview subcontractor workers.
- (5) Whistleblower Protections. This section requires protections against reprisal for employees of private contractors who disclose to Federal officials information reasonably believed to be evidence of gross mismanagement, gross waste, or violations of law related to contracts using ARRA funds.

Obama Administration's Policies on Transparency and Open Government

Presidential Memorandum of January 21, 2009, "Transparency and Open Government"
Federal Register Page 4685 / Vol. 74, No. 15/ Monday, January 26, 2009
http://edocket.access.gpo.gov/2009/pdf/E9_6754.pdf

On January 21, 2009, President Obama published a Presidential Memorandum instructing executive departments and agencies to take specific actions to improve government transparency and accountability. Executive department and agency officials must take specific actions to implement the following principles:

- (1) Ensuring Merit Based Decision making for Grants and Other Forms of Federal Financial Assistance Under the Recovery Act. The President calls on all executive departments and agencies to develop transparent, merit based selection criteria that will guide their available discretion in committing, obligating or expending funds under the Recovery Act for grants and other forms of federal financial assistance.
- (2) Avoiding Funding of Imprudent Projects. The President makes it clear that funds under the Recovery Act shall not be committed, obligated or expended by any executive department or agency, and shall not be used by any state or local governmental or private grantee or awardee for the construction of "any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool."
- (3) Ensuring Transparency of Registered Lobbyist Communications. The President ordered that an executive department or agency official shall not consider the view of a registered lobbyist concerning particular projects, applications or applicants for funding under the Recovery Act. Such communications by Federal lobbyists must be submitted in writing and must be posted publicly on the agency's recovery website within 3 days. Registered lobbyists are permitted to communicate with executive department or agency officials concerning general policy questions about the logistics of Recovery Act funding or implementation.



Economic Recovery Resources

- (1) National Congress of American Indians (NCAI) Indian Country Works
<http://www.indiancountryworks.org/>
- (2) New Mexico Integrated Recovery Guide: Indian Country Investments
http://bingaman.senate.gov/policy/stimulus_guide_indiancountryinvestments.cfm
- (3) National Center for American Indian Economic Development (NCAIED)
<http://www.ncaied.org/>
- (4) Native American Contractors Association (NACA)
<http://www.nativecontractors.org/>
- (3) American Recovery and Reinvestment Act of 2009
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf
<http://www.indiancountryworks.org/generalprovisions.cfm>
- (5) The White House
<http://www.whitehouse.gov/>
http://www.whitehouse.gov/omb/assets/fy2010_new_era/Jumpstarting_The_Economy.pdf
- (6) Stimulus Watch
<http://www.stimuluswatch.org/>
- (7) Economic Investments by State
http://www.recovery.gov/?q=content/investments_state
- (8) Federal Business Opportunities:
<https://www.fbo.gov/index?cck=1&au=&ck>
- (9) Grants.gov
<http://grants.gov/>
- (10) Federal Agency Websites:
 - (a) Department of Agriculture
 - Food Distribution Program for Indian Reservations:
<http://www.fns.usda.gov/fdd/programs/fdpi/default.htm>

- (b) Department of Energy
- Tribal Energy Program:
http://apps1.eere.energy.gov/tribalenergy/government_grants.cfm#Tribal
- (c) Department of Health and Human Services
- Administration for Children & Families:
<http://www.acf.hhs.gov/programs/ocs/csbq/guidance/im110.html>
- (d) Department of Housing and Urban Development
- The Indian Community Development Block Grant (ICDBG):
<http://www.hud.gov/recovery/icdblockh.cfm>
 - Native American Housing Block Grant Stimulus Program (Competitive):
<http://www.hud.gov/recovery/nahblockh.cfm>
- (e) Department of Interior
- Bureau of Indian Affairs:
<http://www.doi.gov/bia/>
<http://enan.bia.edu/home.aspx>
 - Bureau of Reclamation:
<http://www.usbr.gov/native/>
- (f) Department of Justice
- Correctional Facilities on Tribal Lands Program (Competitive):
<http://www.ojp.usdoj.gov/BJA/recovery/RecoveryTribalCorr.pdf>
 - Grants to Indian Tribal Governments Program:
http://www.ovw.usdoj.gov/indian_tribal_gov_grant.htm
 - Tribal Domestic Violence and Sexual Assault Coalitions Grant Program:
<http://www.ovw.usdoj.gov/TribalCol.htm>
- (g) Department of Transportation
- Public Transportation on Indian Reservations Program:
<http://flh.fhwa.dot.gov/programs/irr/>
http://edocket.access.gpo.gov/2009/pdf/E9_6271.pdf
- (h) Department of the Treasury
- Native American CDFI Assistance (NACA) Program
http://www.cdfifund.gov/what_we_do/programs_id.asp?programID=3
<http://www.cdfifund.gov/recovery/implementationplan.pdf>

Q: What happens if our project isn't "shovel ready" but will be ready soon?

A: NCAI encourages tribes to contact the relevant agency with questions about specific tribal projects. In general, the Stimulus is intended to address projects that are considered "shovel ready first;" however, there will likely be opportunities for projects that are pending or almost ready. First, the Stimulus will have the effect of clearing the backlog for many projects, making room for others to move up the list for the regular appropriations process. Second, there are "use it or lose it" provisions in the Stimulus. This means that if funds go unused for a particular period of time (that varies by program area), they will be redistributed to various other projects that have been moved up the priority list.

Q: Does the Stimulus take the place of usual annual appropriation process?

A: No, the Stimulus is over and above the usual appropriations process. Projects pending or considered "shovel ready" will be funded by the Stimulus, leaving usual funding and appropriations open for new projects.

Q: What should we do as a tribe to get ready?

Grant cycles are shorter, so you can begin to prepare background information for grant proposals, such as tribal demographics and history, now. Your tribal council should also begin drafting any resolutions that may be needed and preparing budget documents. If you have projects pending in any of the direct funding categories, you should begin lining up contractors as soon as possible. There will be a great deal of money flowing into states and tribes, and competition for skilled contractors will be high. You will not be competing with other tribes for contractors, but with the states who will be receiving the bulk of the funds, and will be held to the same "use it or lose it" provision.

Q: Where can I find more information about NCAI's Wednesday Webinars and other resources?

Stimulus related information such as NCAI's [Wednesday Webinars](#) and other resources including the [Office of Management and Budget Recovery Guidance \(.pdf\)](#) and [N.M. Congressional Delegation Recovery Package Resource Guide](#) can be found in the [Resources](#) section of the website.



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