Oversight: Accountability in the American Recovery and Reinvestment Act
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A Thesis submitted to

The Faculty of
The George Washington University Law School
In partial satisfaction of the requirements
For the degree of Master of Laws
August 31, 2011

Thesis directed by
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ACKNOWLEDGEMENTS

The author wishes to thank Professor Christopher Yukins for his support and assistance with the completion of this paper.
ABSTRACT

Oversight: Accountability in the American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act (ARRA) was enacted to stimulate the economy during a significant economic downturn. ARRA contained new accountability mechanisms were enacted to reduce fraud and wasteful spending. These new mechanisms were touted as creating an unprecedented level of oversight and transparency. While the Government has taken a step in the right direction, much of these new oversight mechanisms such as Recovery.gov and the Recovery Act Accountability Board have not lived up to expectations. While the ARRA posed significant challenges, the accountability mechanisms that Congress put in place seemed, on balance, to work well. In fact, the House of Representatives has legislation before it that would employ the ARRA accountability mechanisms permanently, across the Government.
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I. Introduction

The American Recovery and Reinvestment Act (ARRA) was passed by Congress in 2009 to jumpstart the American economy, which was in a severe recession. According to Recovery.gov, the Government’s website, the ARRA has “three immediate goals:

1. Create new jobs and save existing ones
2. Spur economic activity and invest in long-term growth
3. Foster unprecedented levels of accountability and transparency in government spending.

The bill to the American taxpayers for the ARRA exceeds $787 billion of borrowed money. The plan was to infuse money quickly into the economy in order to create jobs. The ARRA made $275 billion available for government contracts, grants and loans for quick-start projects that have time constraint provisions.\(^1\) The Office of Management and Budget (OMB) has defined the “crucial accountability objectives” of the act as including: timely awarding of Recovery Act funds; reporting on the use and public benefit of those funds; and ensuring that those funds are used for authorized purposes while mitigating the potential for fraud, waste, error, and abuse.\(^2\)

In attempts to control waste, fraud and abuse endemic to large scale Government contracting, the ARRA included, in addition to the existing measures of oversight, new measures to improve government contracting were implemented within the act: Title IX of the ARRA addresses the Government Accountability Office’s (GAO) oversight rule and provides appropriations for that role; Title XV provides appropriation for the

\(^1\) Recovery.gov
\(^2\) GAO-10-809, Recovery Act: Contracting Approaches and Oversight Used by Selected Federal Agencies and States at 4, July 2010
Accountability and Transparency Board and other mechanisms to insure full and open competition and transparency in the contracting process of ARRA funds.

This thesis will investigate the “unprecedented levels of accountability and transparency in government spending” in the ARRA. These oversight measures are considered to be extraordinary. There is a preference for quick start and ready to go projects. The ARRA has dates certain for infrastructure projects that require 50 percent of the appropriation to be completed not later than 120 days after the enactment of the ARRA and all funds appropriated will be available until September 30, 2010. ³ It was expected that this accelerated time-table would place a burden on the new oversight mechanisms, as the oversight will begin, especially in quick start projects, after the money is disbursed. Quick-start implies that at least the contracting process has been completed. There are concerns that the emergency designation of the ARRA and speed of implementation will mirror the contingency contract failures of the Iraq War reconstruction and Hurricane Katrina disaster relief efforts that resulted in waste, fraud and abuse of government money.

II. Background

A. The Recession of 2008

The economic downturn of 2008 technically began in December of 2007 and ended in June of 2009. ⁴ In 2008, approximately 1.1 million bankruptcy petitions by individuals

were filed, which was an increase of 32 percent over the corresponding year of 2007.\(^5\)

Home foreclosures were up 81 percent from 2007 and 225 percent from 2006.\(^6\)

Foreclosures were principally in the subprime market, but delinquencies were accelerating in the Adjustable rate mortgage sector as the mortgage rates began to increase.\(^7\) In 2007 unemployment was 7.7 million and the unemployment rate was 5.0.\(^8\)

In December of 2008 unemployment increased by 632,000 to 11.1 million and the unemployment rate rose to 7.2 percent.\(^9\)

The recession and its severity were unanticipated by the financial sectors and the government oversight sectors. Financial author, Forbes columnist, and portfolio manager Ken Fisher wrote on January 28, 2008 that he was bullish on his investments portfolio because the U.S. is “too linked to the vibrant global economy to suffer in 2008.”\(^10\) In a hearing before the Senate Banking Committee on February 14, 2008, Henry Paulson, Secretary of the Treasury, and Ben Bernanke, Chairman of The Federal Reserve,

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\(^6\) Stephanie Armour, USA Today, 2008 Foreclosure Filings Set Record (January 14, 2009)

\(^7\) Senate Committee on Banking, Housing, and Urban Affairs, Subprime Mortgage Market Turmoil: Examining the Role of Securitization, One Hundred Tenth Congress, April 17, 2007, Opening Statement of Chairman Jack Reed.


concurred that a recession would be avoided. Mr. Bernanke stated that banks would not fail because they had amassed enough capital to weather the downturn and had the capability of raising additional funds. Also, that the Federal Reserve could control the economy with additional interest cuts. Mr. Paulson affirmed the strength of the economy, and he added that the downturn was a necessary housing correction. 11

On September 23, 2008 Secretary Paulson and Chairman Bernanke testified before the Senate Banking Committee, completely reversing their views expressed seven months earlier. Secretary Paulson affirmed that the week before “our credit markets froze” and that ordinary businesses could not finance normal business loans. He called this a threat to the entire economy. The” root cause” he maintained was the sub-prime mortgage purchases of Fannie Mae and Freddie Mac, the Government Sponsored Enterprises (GSE) and their huge financial involvement in secondary mortgage market and the mounting foreclosures which caused the housing correction. Consequently, this process resulted in illiquid mortgage-related assets that choked off the flow of credit upon which an economy functions. Secretary Paulson spoke of the need for legislation to remove these troubled assets by purchasing them from institutions holding them as the single most efficacious approach to “help homeowners, the American people and stimulate our economy.” 12 The Troubled Assets Relief Program (TARP), Title 1 of the Emergency Economic Stabilization Bill, was enacted on October 3, 2008. 13 Chairman Bernanke at the same hearing stated that the Federal Housing Finance Agency placed the

12 Senate Committee on Banking, Housing, and Urban Affairs, “Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Bank And Other financial Institutions”, 110 Congress, September 23, 2008
13 110 P.L. 343, 122 Stat. 3765
GSEs into conservatorships, and essentially began an ongoing bail out. Also, the Chairman endorsed Secretary Paulson’s proposal to buy “illiquid assets from financial institutions.” The week of October 6, 2008, the stock market lost 1,874 points. The worse post World War 2 recession was in full swing.

B. The ARRA Legislation

The ARRA was signed into law on February 17, 2009, just four months before the official end of the recession. ARRA’s mission was to preserve and create jobs, and to advance the economic recovery of the United States by investing in technology, infrastructure, science, health, transportation, environmental protections, green technology, and to stabilize State and local government budgets, and help the millions of unemployed workers. ARRA made these funds available for obligation until September 30, 2010.15

The theory behind the ARRA is that Government spending can stabilize the economy and promote financial recovery. One of the strengths and justifications for government spending during a recession is the concept of the multiplier, which is delineated in the Congressional Budget Office (CBO) report of May 2010.16 The CBO is tasked by the ARRA in Section 1512(e) to determine how many jobs are created or retained by ARRA funds. The multiplier models are one approach the CBO uses to analyze new and retained jobs. The multiplier represents what one dollar of government

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14 Senate Committee on Banking, Housing, and Urban Affairs, “Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Bank And Other financial Institutions”, 110 Congress, September 23, 2008
15 111 P.L. 5; 123 Stat. 115, Sec. 1603 (2009)
money does in the economy. The CBO example is a dollar given to someone who spends 80 cents, saving 20 cents to use for other expenditures. Production increases over time to meet the additional demand generated by that spending, and the direct impact on output is 80 cents. The remaining 20 cents can be used for another project. The CBO estimates that a one-time increase of $1 in federal purchase of goods and services in one calendar quarter last year would raise gross domestic product (GDP) above what it would have been by a total of $1 to $2.50 over several quarters. The effect of $2.50 over successive quarters increases GDP approximately $1.45 in the quarter the money is spent, about 60 cents in the following quarter, and about 45 cents in later quarters. When the government purchases goods and services, it initiates economic activity that would not happen without the purchase. The CBO measures the multipliers in assessing jobs created and retained because of ARRA funds.\(^\text{17}\)

The CBO derived its “estimated” multipliers from “models and historical relationships for each of several categories of spending and tax provisions in ARRA.”\(^\text{18}\) Each multiplier “represents the estimated direct and indirect effects on the nation’s output of a dollar’s worth of a given policy.” Essentially, the multiplier is an estimate and its effect on the economy is an estimate. The estimates of ARRA’s effect on output were used to determine estimates of the effects on the unemployment rate, and total employment. The Department of Labor does not measure jobs retained, but the CBO can use its estimated multipliers to determine this metric.\(^\text{19}\)

There is a question as to whether this construct challenges the concept of waste in the procurement process. As an example, controller Wendy Gruel in Los Angeles

\(^{17}\) Id at page 4

\(^{18}\) Id

\(^{19}\) Id
audited the Public Works Department and discovered that $71 million of ARRA funds designated to create or retain 238 jobs for infrastructure, at approximately $300,000 per job had, in fact, only shielded 37 public employee jobs and created eight public or private jobs at this point in time. Ms. Gruel claimed that it took eight months to assemble bid packages, review the bids and award the contracts. The question is the whether the $300,000 price per job constitutes waste. The CBO multiplier in tracking the $71 million effect on the economy over time might conclude that this was not wasteful spending.20

III. CONTINGENCY CONTRACTS AND THE ARRA

The ARRA stipulates under “General Principles Concerning Use of Funds” that beneficiaries of ARRA funds begin spending “as quickly as possible consistent with prudent management,”21 and that all funds that are to be disbursed are to be construed as an “emergency requirement and necessary to meet emergency needs.” 22 But, the ARRA mandated dates certain by which funds must be spent. The Recovery Board was granted $84 million to carry out the provisions of Title XV, which was to remain available only until September 30, 2011.23 The General Services Administration (GSA) offered an “implementation challenge” protesting the ARRA deadlines in August 2009 because $5 billion of ARRA funds had to be obligated by September 30, 2010 and the remainder by September 30, 2011.24 The funds expired after 5 years after this obligation and could no longer be used. In a typical construction project, the funds are obligated for the life of the

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20 Two L.A. agencies get $111 million in stimulus jobs funds but have created only 55 jobs, September 17, 2010, Los Angeles Times, latimes.com (last visited March 19, 2011)  
21 11 P.L. 5; 123 Stat. 115, Sec. 3 ¶ 5(b)  
22 11 P.L. 5; 123 Stat. 115, Sec. 5 (a) and (b)  
23 11 P.L. 5; 123 Stat. 115, H.R. 1-36  
24 Oversight of the American Recovery and Reinvestment Act of 2009, GSA’s Implementation Challenges, August 6, 2009
project. The GSA wanted more time to comply with the rigors of the procurement process, but the ARRA wanted money spent as soon as possible. If “prudent management” were more important than speed, the dates certain would not have been placed in the legislation. The GSA protest underscores the dynamic of speed versus oversight that has plagued large scale contingency operations.

This is not to suggest that the ARRA comports with the definition of a contingency operation. Contingency operations are governed by 10 USC 101 ((a)(13) and are military operations that (A) are designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) are designated by the President or Congress results in the or call to order to, retention on, active duty of members of the uniformed services during a war or during a national emergency. Contingency operations include large and small military conflicts; military operations other than war such as counter–drug operations; domestic disaster and emergency relief such as hurricane relief within the U.S., if designated; and humanitarian or peacekeeping operations in conjunction with the United Nations.25

Contingency contracts are negotiated to obtain goods and services from commercial sources during these missions. Contingency contracting is not routine in the military, and even in contingency operations, if urgency is not key, then the standard contracting regulations and standards are followed. When urgency is a factor, then the

25 10 U.S.C. § 101
rules of a declared contingency allow for regulatory exceptions and flexibilities. This must be a high-pressure environment for the contingency contracting officer in balancing regulations, emergency conditions and integrity of the contracting process. The government contracting process is a complicated series of steps governed by laws and regulations. Applicable provisions of the FAR, DFAR, and myriad Department of Defense regulations govern the military. The key aspects of the procurement process are time consuming: the pre-award phase includes requirements development, acquisition planning, and solicitation; the award phase requires source selection and award through full and open competition; contract administration requires contract monitoring, acceptance of supplies or services, and payments; and finally, contract closeout in which it is deemed that the contractor has fulfilled his contractual obligations. Large scale contracting is complicated and simple errors can have catastrophic consequences.

An unknown amount of ARRA contracts funded on the state and local levels were written, if not signed, without the usual oversight regulations of government contracting. A project cannot be considered quick-start if there is no degree of prior preparation and is not ready to go. An example is the aforementioned public works department in Los Angeles which exceeded the dates certain by eight months because of the lengthy procurement process to the detriment of job creation. It follows that much of ARRA oversight commenced after the quick-start contracts had been formulated, possibly without fair and open competition. It appears from the GSA implementation protest that

26 FAR 18.2
28 Two L.A. agencies get $111 million in stimulus jobs funds but have created only 55 jobs, September 17, 2010, Los Angeles Times, latimes.com (last visited March 19, 2011)
the usual construction projects have not been granted regulatory exceptions and flexibilities as FAR grants contingency operations. They have just been accelerated.

Congress created the Commission on Wartime contracting in Iraq and Afghanistan (Commission) in 2008 to examine waste, fraud, and abuse in the contingency contracting process and to make recommendations to Congress to improve the contingency contracting process. The Commission’s conservative estimate on costs of these missions since October 2001-February 1011 is that at least $177 billion has been spent on contracts and grants to support contingency operations. There is no central federal source that can provide definitive expenditures. The Commission estimates that money lost to fraud is approximately 7 percent or $12 billion. This amount does not include contract waste. The percentage of fraud and waste in ARRA contracts is yet to be known. The new oversight measures, which are touted to be extraordinary, have a high burden.

An example is found in the July 27, 2010 report of the Special Inspector General for Iraq Reconstruction (SIGIR) which documented that $8.7 billion of the $9.1 billion in funds allocated for reconstruction programs in Iraq are missing. The SIGIR discovered in its audit that the Department of Defense (DOD) did not establish the required Department of the Treasury accounts and no DOD personnel were tasked with managing the use of these funds. The controls in place for protecting these funds were not followed.

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29 FA 18.2
31 Development Fund For Iraq: Department of Defense Needs to Improve Financial and Management Controls; SIGIR; July 2010; SIGIR.Mil (last visited March 7, 2011)
Congress has deemed the ARRA emergency legislation thereby imposing urgency to procurement process. Although Sec. 1610 requires adherence to existing laws governing the procurement process in all funds appropriated, the emergency appropriations language suggests that the ARRA may repeat the failures of the egregious contingency contracts of Hurricane Katrina reconstruction and the Iraq War contracts. Therefore, a discussion of the past mistakes of these two notorious contracts may help to determine whether the same errors will be made during the life of the ARRA, or if improvements in accountability have been made that can potentially reduce fraud and wasteful spending.

A. Audits of Katrina Contracts

Audits of Katrina contracts have revealed fraud and wasteful spending because the Government lacked effective controls or lacked adequate preparation. On April 10, 2006, the Government Accountability Office (GAO) issued a report regarding Hurricane Katrina contracts.\(^{32}\) The report stated that there was inadequate planning and preparation in anticipating requirements for needed goods and services. The GAO identifies strong planning as one of the central themes. It was found that the Government did not always have adequate plans for contracting in a major contingency situation. Because of inadequate planning, the Army Corps of Engineers purchased portable classrooms through the 8(a) program. However, this item was available on the GSA schedule at a lower price.\(^{33}\) The GAO also found that the process for executing contracts was hindered by poor communication. The disaster recovery process often involved a network of federal agencies with one agency awarding the contract and another agency managing

\(^{32}\) GAO-06-622T, Hurricane Katrina, Planning for an Management of Federal Disaster Recovery Contracts, April 10, 2006

\(^{33}\) GAO-06-622T at 3
the contract. At times, the awarding agency did not know who in the managing agency would be responsible for oversight of the contract.\textsuperscript{34} The GAO also reported that agencies had insufficient numbers of personnel to provide for effective contractor oversight. This created a risk of not only late delivery or poor contractor performance, but the payment of contractors for more than the value of services performed.\textsuperscript{35}

Another GAO report issued on November 2007 detailed $30 million in wasteful and potentially fraudulent payments to contractors.\textsuperscript{36} This happened because FEMA did not issue task orders to contractors with the lowest prices. Other examples include: the approval of invoices that were either improper or fraudulent; payment for work where there was no evidence of its completion; payment for repairs on housing units that did not exist in FEMA inventory. This happened because FEMA did not have effective controls to track invoices.\textsuperscript{37} The GAO issued several recommendations while they were directed at disaster contracting; they are highly relevant to contracting in general, especially large dollar contracting such as the ARRA. The GAO recommended that in future contracts FEMA should place a greater emphasis on issuing task orders to the companies with the capability to perform the most work at the lowest cost. Furthermore, the GAO recommended that FEMA design and implement internal control procedures to enforce the existing payment and invoice review process to provide reasonable assurance that payments are being made for work actually performed.\textsuperscript{38} Ultimately, the report

\textsuperscript{34} GAO-06-622T at 5
\textsuperscript{35} GAO-06-622T at 6
\textsuperscript{36} GAO-08-106, Hurricane Katrina, Ineffective FEMA Oversight of Housing Maintenance Contracts in Mississippi Resulted in Millions of Dollars of Waste and Potential Fraud, November 2007
\textsuperscript{37} I GAO-08-106 at 38
\textsuperscript{38} GAO-08-106 at 39
concluded that without effective planning, management processes, and sufficient numbers of capable people, poor acquisition outcomes resulted. 39

The U.S. House of Representatives authored a report that investigated the preparation and response to Katrina. The committee found that the $63 billion appropriated for the disaster relief provided a significant opportunity for fraud and mismanagement. A lack of planning was primarily to blame. However, one criticism was that the extensive federal oversight and threats of audits caused local Governments to hesitate to take the federal money. 40 Other criticisms of the Katrina response include the lack of a centralized process for intake and referral of disaster fraud reports. 41

B. Iraq War Contracts

The Iraq War contracts have also been subject to heavy criticism because of fraudulent and wasteful spending. These criticisms include poor oversight and lack of personnel to supervise contracts, poor planning, and the failure to follow internal procedures. This amount of detail might seem repetitive. However, this demonstrates the problems that have been faced in large scale contingency contracting. This detailed information concerning past mistakes helps to determine whether the same errors will be made during the life of the ARRA, or if improvements have been made that can potentially reduce fraud and wasteful spending.

39 GAO-08-106 at 7
41 U.S. Department of Justice, Hurricane Katrina Fraud Task Force, Fifth Anniversary Report to the Attorney General, September 2010 at 37.
On April 23, 2007, the GAO issued a report that was highly critical of the Department of Defense’s (DOD) management of the contracts in Iraq.\textsuperscript{42} The GAO leveled several criticisms at the DOD’s management of the contracts finding:

1. DOD officials did not have visibility over contractors, which prevented them from knowing the extent to which they were relying on contractors

The lack of visibility caused increased costs. For example, the Army Material Command lost $43 million each year on free meals provided to contractor employees at deployed locations who also received a per diem food allowance.\textsuperscript{43}

2. DOD lacked clear and comprehensive guidance and leadership for managing and overseeing contractors

The report stated that the GAO has been repeatedly urging the DOD to develop clear and comprehensive guidance for managing and overseeing the use of contractors that support deployed forces. As of the time that the report was issued, DOD guidance had not addressed a number of problems that the GAO has raised such as the need to provide adequate contract oversight.\textsuperscript{44} Also found was that at times DOD components did not comply with departmental guidance on the use of contracts.\textsuperscript{45}

3. Contracting issues such as unclear requirements and not reaching agreement on key terms and conditions in a timely manner prevented the DOD from achieving successful acquisition outcomes

The GAO found that the DOD needed to address two key factors to promote successful acquisition outcomes: 1) clearly defined requirements; and 2) timely agreement on a contract’s key terms and conditions, such as the scope and cost. It is

\textsuperscript{42} GAO-07-525T, Stabilizing and Rebuilding Iraq, Conditions in Iraq are Conducive to Fraud, Waste, and Abuse, April 23, 2007
\textsuperscript{43} GAO-07-525T at 11
\textsuperscript{44} GAO-07-525T at 12
\textsuperscript{45} GAO-07-525T at 13
believed that the absence of well-defined requirements and clearly understood objectives complicates efforts to hold DOD personnel and contractors accountable for poor acquisition outcomes. An example given was cost-reimbursement contracts that lacked adequate oversight or had vague requirements, which led to an increased risk on the Government.\(^\text{46}\) In another example, the GAO found that the DOD frequently entered into contracts without first defining key terms and conditions such as the work to be performed and projected costs that were fully defined. As of March 2004, about $1.8 billion was obligated on reconstruction contracts without DOD and the contractors reaching an agreement on the final scope and cost of the work.\(^\text{47}\)

4. The DOD did not have an adequate number of oversight personnel to ensure that the contracts that were in place were carried out efficiently and according to the contract requirements; and e. contract oversight personnel were not sufficiently trained in the management of contracts and contractors.\(^\text{48}\)

The GAO has documented early contract administration challenges that were caused, in part, by the lack of personnel.\(^\text{49}\) The DOD had no guidelines on the appropriate number of personnel needed to oversee their contracts at deployed locations. It was also surmised that an adequate number of personnel to oversee contracts could have allowed the Army to reduce its use of the Logistics Civil Augmentation Program.
(LOGCAP). Adequate staffing could have caused savings on the LOGCAP contract through more effective reviews of new requirements.\textsuperscript{50}

Poorly trained contracting personnel can result in an increased cost to the Government. An example is when oversight personnel have attempted to direct contractors to perform work that is outside of the contract’s scope.\textsuperscript{51}

IV. ACCOUNTABILITY: OVERSIGHT MECHANISMS IN THE ARRA

A. Purpose

Accountability serves to assure federal workers, the private sector, and the taxpayers that the sourcing process is efficient and effective. Accountability also protects the Government’s interest by ensuring that agencies receive what they are promised, in terms of both quality and cost, whether the work is performed by federal employees or by contractors. Accountability requires defined objectives, processes and controls for achieving those objectives, methods to track success or deviation from objectives, feedback to affected parties, and enforcement mechanisms to align desired objectives with actual performance.\textsuperscript{52}

Accountability mechanisms can be divided into three categories. First, oversight mechanisms such as audits are designed to shame government agencies or contractors for failing to follow the applicable regulations. An audit is published not only to shame the agency, but also to encourage the agency to correct its behavior. Second, oversight

\textsuperscript{50} GAO-07-525T at 17
\textsuperscript{51} GAO-07-525T at 19
mechanisms are in place to prevent fraud and wasteful spending. This includes having an adequate acquisition workforce and a preference for fixed-priced contracts. Third, oversight mechanisms have been put in place to pursue those who engage in fraudulent conduct. Included in this regime is the False Claims Act, which has been amended giving the federal government greater enforcement ability.

The three traditional pillars of the federal procurement system are competition, transparency, and integrity. Commentators maintain that if a government's procurement system reflects all three elements, the system is much more likely to achieve best value in procurement and to maintain political legitimacy. However, this thesis will not address the traditional pillars. Instead, the focus will be on the new rules designed to ensure accountability, which is one of the central focuses of the ARRA. While accountability has not been identified as one of the traditional pillars of the federal procurement system, the ARRA has attempted to ensure the accountability of government employees through an extraordinary oversight regime.

B. Stated ARRA Objectives of Oversight

The 787 billion dollars of taxpayer money being spent in such a short period of time raises a grave concern about the accountability of Government officials. Additionally, concerns about Government contract fraud are raised. The accountability section of the ARRA identifies five crucial objectives for federal agencies (five objectives):

• Recovery funds are awarded and distributed in a prompt, fair, and reasonable manner;

• The recipients and uses of all recovery funds are transparent to the public, and that the public benefits of these funds are reported clearly, accurately, and in a timely manner;
• Recovery funds are used for authorized purposes and every step is taken to prevent instances of fraud, waste, error, and abuse;
• Projects funded under the recovery legislation avoid unnecessary delays and cost overruns; and,
• Programs meet specific goals and targets, and contribute to improved performance on broad economic indicators. 54

In order to meet these five objectives, the ARRA has included an increased role of oversight by the GAO, the new ARRA Board, working in conjunction with the agency inspector generals. Furthermore, there is an expansion of the False Claims Act and Whistleblower protection. There has also been a drive to increase size and quality of the acquisition workforce. Last, there is a preference for full and open competition and fixed-priced contracts.

The GAO in an audit during an early stage of the ARRA established recommendations to prevent some of the wasteful spending that was found in previous high-dollar Government contract spending, including the Iraq war and Hurricane Katrina Recovery operations:

- Have transparent lines of procurement responsibility, authority, and oversight defined and in place;
- Ensure contracts are well structured by establishing clear requirements prior to award;
- Award contracts competitively;
- Use fixed-price contracts to the maximum extent possible;
- Ensure adherence to high ethical standards, including appropriately limiting state and local officials’ employment by firms they supervised as government employees;
- Appoint contract surveillance personnel as early on as possible-preferably prior to or as soon as contracts are awarded-and ensure that these personnel have clear guidance and training as to their role and responsibilities and that there is clear responsibility for approving payments;

54 http://www.recovery.gov/?q=content/accountability-and-transparency
In discussing the new oversight mechanisms promulgated in the ARRA and the recommendations of the GAO, it is important to acknowledge that the presiding authority of all government acquisition regulations is the FAR. New and existing oversight mechanisms must be compatible with the regulations of the FAR. For example, Subpart 5.7–Publicizing Requirements under the American Recovery and Reinvestment Act of 2009 was implemented for projects funded in whole or part by the ARRA to “enhance transparency to the public.” The ARRA, as is all federal acquisition, subject to the vision and guiding principles of the FAR.  

C. Enhanced Oversight on ARRA Contracts

1. Overview of Enhanced Oversight

The level of oversight in ARRA contracts has been described as unprecedented. There is always a risk when one does business with the Government. However, contractors have been urged to apply an extra measure of due diligence because of the high degree of oversight and the consequences for the failure to comply. This includes joint oversight by the GAO, ARRA Board, and agency Inspector Generals. An essential aspect of this oversight is data collection and analysis.

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55 American Recovery and Reinvestment Act, GAO’s Role in Helping to Ensure Accountability and Transparency, GAO-09-453T, March 5, 2009, at 9
56 FAR 5.7
57 George B. Rittinger, Transparency and Accountability under the 2009 Stimulus Act, Executive Counsel, July/August 2009
In addition to the statutorily prescribed oversight regime, some agencies designed their own oversight mechanisms. Some federal agencies created internal committees to coordinate their Recovery Act work. For example, a Department of Defense committee had regular meetings to discuss the status of Recovery Act obligations, projects in progress, and Inspector General findings. The Department of Health and Human Services established a subgroup to coordinate specific aspects of implementation and oversight. This was called the Recovery Act Coordinators. This group was tasked to hold weekly meetings of key personnel from the various agency-operating divisions. The purpose was to allow the centralized collection and distribution of management information. Most agencies surveyed by the GAO reported that they identified a single individual to take managerial responsibility for implementation and oversight of Recovery Act programs. The surveyed agencies increased the amount of internal reporting of Recovery Act activities increasing the amount of data provided directly to agency leadership on contract awards, as well as the frequency at which these data are updated.

2. GAO Oversight

During the life of the ARRA, the GAO is charged with conducting bimonthly reviews of various States and local jurisdictions’ use of ARRA funds. Inspectors Generals (Its) from the various federal agencies are charged with auditing their ARRA activities on both an individual and collective basis. Many of the agencies are members of the ARRA Board, which oversees the review of contracts and grants. The ARRA

58 GAO-10-809, Recovery Act: Contracting Approaches and Oversight Used by Selected Federal Agencies and States at 13, July 2010
59 GAO-10-809 at 14
60 American Recovery and Reinvestment Act, GAO’s Role in Helping to Ensure Accountability and Transparency, GAO-09-453T, March 5, 2009
has given the GAO authority to audit both prime contracts and subcontracts. This includes the ability to interview prime contractor and subcontractor personnel.\(^\text{61}\) The FAR had not previously given the GAO the ability to interview subcontractor personnel.\(^\text{62}\)

The GAO has directed a great deal attention to certain agencies that are considered to be at a high risk for fraud such as the Department of Energy (DOE). There have been several audits directed at the DOE. “In 1990, GAO designated DOE’s contract management, including both contract administration and project management, at high risk for fraud, waste, abuse, and mismanagement. In the following two decades, continued ineffective oversight and poor contract management led to substantial cost overruns and lengthy delays on many projects overseen by DOE, in particular, the Office of Environmental Management. DOE has faced difficulties in developing realistic cost and schedule targets and then achieving them, in part because of challenges addressing complex technical issues, negotiating contracts, complying with regulatory issues, and ensuring safety.”\(^\text{63}\)

The GAO has suggested a risk-based approach for targeting attention on specific programs and funding structures early on based on known strengths, vulnerabilities, and weaknesses, such as a track record of improper payments or contracting problems. These are called “best practices” and related guides which cover fraud prevention, contract management, and grants accountability.\(^\text{64}\)

\(\text{\textsuperscript{61}}\) 11 P.L. 5; 123 Stat. 115, sec. 902 (2009)
\(\text{\textsuperscript{62}}\) Reporting and Compliance Requirements Imposed by the Recovery Act; The Procurement Lawyer, Volume 45, number 2, Winter 2010, Penny Pittman Cobey
\(\text{\textsuperscript{63}}\) GAO-10-784; Most DOE Cleanup Projects Appear to Be Meeting Cost and Schedule Targets, but Assessing Impact of Spending Remains a Challenge; July 2010 at 5
\(\text{\textsuperscript{64}}\) GAO-09-453T
For fraud prevention, the GAO describes an effective fraud prevention program as one that can minimize waste and abuse, and which consists of preventive controls, detection and monitoring, and investigations and prosecutions. The GAO states that building internal controls up front is of the most utmost importance. The GAO also states that fraud prevention is the most efficient and effective way to minimize fraud, waste, and abuse. As the Government is likely to recover only a small portion of fraudulently disbursed dollars, appropriate controls would prevent ineligible or questionable firms from gaining access to Government funds.  

Previous GAO audits have shown that agencies do not always focus on preventive controls.  

For contract management, the GAO has as the expectation of the minimization of fraud, waste, and abuse. What GAO audits show are that best practices include developing knowledge of contract capabilities before they are needed, establishing scalable operations plans that can adjust to the level of capacity required to effectively respond to the need, and having an adequate staff to meet mission requirements.

A study of the ARRA and agency reports will help determine to what extent the ARRA implements the GAO suggestions and to what extent the Government has learned from past mistakes. Some of these suggestions by the GAO have been implemented in the ARRA. Some of these suggestions have been implemented by other statutes. There is a preference for fixed-priced contracts, and as will be discussed extensively, there is a preference for competitively awarded contracts.  

There has also been an increase in the Government’s fraud enforcement authority.

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65 GAO-09-453T at 6
66 GAO-09-453T at 7
Even after ARRA funding expired, the GAO continued oversight of ARRA awarded contracts. The ARRA provided the Departments of Agriculture and Commerce with $7.2 billion to expand broadband services. The agencies oversight of this process was subject to GAO scrutiny during the life of the ARRA. These reports raised concerns with the agencies post ARRA oversight regime. The post-ARRA report found that the agencies did address many of the GAO’s concerns. However, the GAO concluded that the agencies had failed to implement all of their conclusions.

3. Recovery Act Accountability and Transparency Board

The ARRA establishes an Accountability and Transparency board (Board). The stated purpose for this Board is to conduct oversight of covered funds and to prevent fraud, waste, and abuse. The functions of the Board are: (1) reviewing whether the reporting of contracts and grants using covered funds they meet applicable standards and specifies the purpose of the contract or grant and measures of performance; (2) reviewing whether competition requirements have been satisfied; (3) auditing or reviewing covered funds to determine whether wasteful spending, poor contract or grant management, or other abuses are occurring and referring such matters to the appropriate inspector general; (4) reviewing whether there are sufficient qualified acquisition and grant personnel overseeing covered funds; (5) reviewing whether personnel whose duties involve acquisitions or grants made with covered funds receive adequate training; and (6)

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70 Id
reviewing whether there are appropriate mechanisms for interagency collaboration relating to covered funds.

The Chairperson of the Board is appointed by the President. The Board consists of an additional ten members who were from designated Agency Inspector Generals. The ARRA also gives the President the authority to add other Inspector Generals from an agency that expends or obligates ARRA funds. 72 The Independent Advisory Panel (Panel) was created which consists of four members to advise the Board on reducing fraud, waste and abuse. 73

The Board is required to submit “flash reports” to both the President and Congress upon the discovery of potential mismanagement or funding requirements that require immediate action. 74 The Board is also required to issue quarterly and annual reports, which must be made publically available. 75 Additionally, the Board is required to conduct audits on the spending of ARRA funds. 76 The ARRA requires the Board to run Recovery.gov. 77 The Board has been given the authority to conduct audits and reviews of ARRA funds. This can be done on an independent basis or in conjunction with an Agency Inspector General. 78

The GAO reported on the activities of the Board. A report was issued which provides the GAO’s observations on the extent to which the Board is monitoring federal...
agency contract spending on ARRA contracts. The report found that the Board has acted quickly to bring a number of resources and initiatives to bear on oversight of ARRA funds, including contract spending. The initiatives include reviewing federal contracts and grants to ensure that they meet applicable standard, follow OMB guidance, satisfy applicable competition requirements, and identifying risk areas for fraud, waste, and abuse. The Board is also assessing the capacity of federal agency acquisition workforces to determine if they have sufficient personnel to manage the ARRA workload. The report stated that as the Board’s initiatives are in their early stages, and it is too soon to evaluate their success or shortcomings.

The GAO report highlighted four of the Board’s contract monitoring approaches. Each of the Board’s staff manually reviewed contract solicitations and awards posted daily on the Fedbizopps web site. This review entailed ensuring that ARRA related FAR are followed. Examples of this review are ensuring that relevant information is synopsized when a contract is awarded noncompetitively or on a non-fixed-price basis and identifying contractors that might be on the excluded parties’ list system. ARRA Board staff reviews ARRA contracts to identify reasons for noncompeted awards. The examples of the types of reviews that were performed by the Board are whether there was compliance with rules regarding cost-reimbursement contracts. The Board discovered that the DOE, which was the leader in ARRA spending at the time, issued modifications to a number of existing cost-reimbursement contracts that accounted for over 50 percent

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80 FBO.gov
81 GAO-10-216-R at 3
of the dollars obligated. The Board discussed this with the DOE’s Inspector General who stated that they were monitoring the situation. Thus, the Recovery Board has a supervisory role over Agency IGs.

Other initiatives include the Recovery Board Fraud Hotline. As of October 31, 2009, the Board received 245 complaints. If the complaints contain actionable information, the Board refers to the appropriate Inspector General. Only 29 of those complaints were referred to an Inspector General. According to Recovery.gov, the Board reported receiving 1,771 complaints as of January 31, 2010. The Board states that 147 have triggered active investigations and 43 cases have resulted in a prosecutor's office opening a file. As of July 31, 2010, the amount of complaints increased to 3,806. There were a total of 424 active investigations, and 141 cases were closed without action.

In October 2009, the Board established a Recovery Operations Center, which provides predictive and in-depth risk analysis. The center will screen recipients and funds associated with contracts, grants, and loans. The results of the predictive analysis and in-depth risk analysis are to provide input for the Inspector Generals in two ways: 1) providing information for investigations or audits of federal programs and recipients of ARRA funds, and 2) providing information to expand or help focus oversight resources.

Other initiatives include the coordinating oversight activities with Inspector General and federal agencies senior procurement executives; the operation of a fraud hotline; development of a high-risk list for each agency of programs that are vulnerable to fraud, waste, abuse, and mismanagement; development and posting of Inspector

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82 GAO-10-216 at 4
83 GAO-10-216 at 5
84 GAO-10-216 at 10
85 GAO-10-216 at 11
General work plans; the review and analysis of records that are later changed by recipients. 86

Individual Inspector Generals are reporting monthly to the Board on the number and status of ARRA related audits and investigations. As of September 30, 2009, there were 77 investigations and 391 audits in process. 87

4. Inspector General Oversight

A. Background on Inspectors General

Congress passed the Inspector General Act of 1978 to monitor economic waste and fraud in the executive agencies by creating an independent and objective inspector general (IG) who would audit and investigate executive agencies, and provide leadership and guidance in promoting “economy, efficiency, and effectiveness” which would lead to both finding and reducing waste and fraud; these findings were to be communicated directly to Congress and the agency head. 88 The IG’s mission is not only to find waste and fraud in an audit, but also to analyze existing and proposed legislation relating to oversight of the agency in semiannual reports. 89 The IG was to be appointed by the President and confirmed by the Senate without regard to his political party, and based only on his integrity and demonstrated abilities in appropriate skill areas. Congress empowered the independence of IG by affirming that he reported to and was under the general supervision of the head of the agency or the officer next in command only, and that neither of these individuals could prevent the IG from inaugurating, carrying out, or completing an investigation which included subpoena power. Hence their control over

86 GAO-10-216R at 12
87 GAO-10-216R at 6
89 Id at § 4
the IG was nominal. The IG could be removed by the President, who was required to inform in writing both houses of Congress as to why the IG was removed.  

The Inspector General Act of 1978 was amended in 2008 in order to increase the independence of the IG and to create the Council of the Inspectors General on Integrity and Efficiency (CIGIE). The 2008 Act amended certain sections of the 1978 Act but did not displace it. The ARRA in delineating the powers of the Recovery Accountability Board in Section 1524 (c)(1) states that the authority of the Board to conduct audits, reviews, and to issue subpoenas emanates from section 6 of the Inspector General Act of 1978.

The independence of the IG was enhanced in the 2008 by amending Section 3(b) of the Inspector General Act of 1978 to Section 3 (a) which required the President to notify Congress in writing 30 days before the removal of an IG rather than after the removal. This amendment strengthens the independence of the IG by requiring reasons for removal before the removal takes place thereby allowing time for protest of removal. The independency of the IG was further enhanced in section 4 by equitably establishing the rate of pay of the IG and in section 6 by providing the IG with a separate counsel that reports directly to the IG or another IG, as opposed to a counsel representing the agency. The Act provided in paragraph (4) (d) that CIGIE establish an Integrity Committee to investigate allegations of wrong doing which is relevant to arbitrary removals. The independence of the IG was further enhanced in section 6 by providing an IG with legal advice by a counsel at no charge.

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90 Id at § 3
The 2008 Act further enhances the independence of the IG in section 11¶ (B) by tasking CIGIE to develop initiatives that promote economy and efficiency in Federal programs which transcend individual agencies into coordinated Government-wide audits, investigations, inspections and evaluation programs regarding waste and fraud; in paragraph (C) by tasking CIGIE to develop programs to continually educate IG personnel; in ¶ (E) to maintain academies for training of auditors, investigators, inspectors, evaluators, and other personnel of the offices of the IG; in paragraph (F) by making recommendations to the appointing authority for any appointment to the office of Inspector General; and (B) (iv) by granting a budget to CIGIE to carry out its defined missions.

The mission of CIGIE is (A) to address integrity, economy, and effectiveness issues from within the individual agency to a government wide scope by assessing areas of “weakness and vulnerability” to address waste, fraud and abuse, and (B) promote the education and enhancement of skills of the IG workforce. (84) GIGIE’s membership is composed of IGs established under section 2or section 8G of the Inspector General Act of 1978 and respected others stipulated in Section 11 subsection (b).

B. Special Inspector Generals

Congress responded to the waste, fraud and abuse in large scale contingency contracting by creating a new category of IGs, the Special Inspector General (SIG). The first SIG was Stuart Bowen in Iraq Reconstruction, and he became SIGIR to provide oversight to the Iraq reconstruction contingency contracting.\textsuperscript{91} He was tasked, as are all

IGs, not only with finding and reducing fraud, but also to effect structural changes to improve oversight. His recommendation was to target ten reforms to improve contracting in Iraq and proposed a new “structural solution to that could more comprehensively remedy existing weaknesses,” the U.S. Office for Contingency Operations (USOCO) that will unify all the inter-agency programs, the civilian-military contracting groups and international organizations, to correct weaknesses that have plagued Iraq Reconstruction.  

92 The success of SIGIR’s oversight record resulted in the creation of the Special Inspector General of Afghanistan Reconstruction (SIGAR) and the Special Inspector General of the Troubled Assets Relief Program (SIGTARP), Neil Barofsky. 93 Unlike all other IGs, SIGTARP does not report to the agency head at all, the Secretary of the Treasury, but directly to Congress. Also, “SIGTARP will have complete discretion in pursuing audits, investigations, and in issuing subpoenas” which is stronger language than other SIGIGs, perhaps, as the author speculates, to strengthen the SIGTARP in the case the executive branch would raise a constitutional objection to the direct reporting requirement of the SIGTARP. 94 In his quarterly report, SIGTARP led an investigation against Lee Bentley Farkas, the chairman of Taylor, Bean & Whitaker, one of the largest private mortgage lending institutions in the United States, which was approved for $553 million in TARP funds; the investigation revealed fraud and

SIGTARP advised Treasury to refuse payment. Consequently, Mr. Farkas has been charged with a 16-count indictment. \(^9^5\) Mr. Barofsky also faulted the Treasury with misleading accounting methods in ascertaining AIG’s debt repayment to TARP Funds. The original $45 billion projection loss to the American taxpayers on TARP funds became $5 billion. Mr. Barofsky brought this change in accounting methods to the attention of Congress and the Treasury Department suggesting that Treasury use the older accounting methods. \(^9^6\)

C. Authority of the ARRA IGs

The ARRA expands the parameters of the IGs from the executive branch agencies to the States and local agencies or any agency receiving ARRA funds to examine records and interview contractors, subcontractors, grantees or subgrantees in their investigations. \(^9^7\) The Inspector General Act of 1978, its amendments in 2008, and the creation of the SIGs, indicate the success of IG oversight. However, there are provisions in the ARRA legislation which weaken the authority of the IGs.

First, Section 1527 \(\|$\) (a) stipulates that the independent authority of the IG to conduct an audit or investigation is not compromised, presumably by what follows. But, Section 1527 paragraph (b) appears to refute that assertion by stipulating that the Board has the power to “request” that an IG “refrain” from conducting an audit or investigation; the IG can reject this request by submitting a report stating his reasons for rejecting the request within 30 days to the Board, the head of the agency in question, and designated

\(^9^5\) Statement of Neil Barofsky, Special Inspector General for the Troubled Asset Relief Program, July 21, 2010  
\(^9^6\) Statement of Neil Barofsky, Special Inspector General for the Troubled Asset Relief Program, October 26, 2010  
\(^9^7\) 111 P.L. 5; 123 Stat. 115, sec. 1515 (a) (2009)
committees of Congress. Although the IG’s decision is stipulated to be final, a bureaucratic obstacle that potentially could have a chilling effect on the independence of the IG has been enshrined in the ARRA. Further, whereas Section 1524 ¶ (c) grants authority to the Board to conduct audits and reviews and to issue subpoenas provided under section 6 of the IG Act of 1978, no authority is given for the insertion of section 1527 (b) which appears to conflict with the authority granted to the IG in the same Act.

Second, section 1522(b) stipulates that a minimum of ten IGs from designated agencies serve on the Board. The mandate for these IGs emanate from the IG Act of 1978. But, they are not operating under this mandate as members of the Board. Section 1523 (a) (2) defines the functioning of the Board members in (A) –(F). Every one of these functions involves “reviewing.” The only call to action is (C) in which after reviewing whether there is wasteful spending or contract administration abuses, the abuse will be referred to the IG from the appropriate agency. Contrasting these functions to the duties and responsibilities of each IG under the IG Act of 1978 section 4(a) (1)-(5) indicates the independence and high level functioning of the IG as compared to the IGs who a members of the Board. The following quotation from the IG Act of 1978 illustrates the heightened responsibility of the IG in his job to reduce waste, fraud and abuse. It is noted that the word “review” is mentioned only once in (2), but after reviewing, there is a call to action:

Review existing and proposed legislation and regulations relating to programs and operations of such establishments and to make recommendations in semiannual reports required by section 5 (a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations.
administered or financed by such establishment or the prevention and
detection of fraud and abuse in such programs and operations.98

Each IG has the responsibility to conduct, supervise, and coordinate audits and
investigate programs in the agency, and to provide policy direction as stipulated in
paragraph (1). The IGs under the 1978 IG Act are independent professionals looking to
diagnose and remEDIATE waste, fraud and abuse in their agencies. The IGs on the Board
are required to review. Ten IGs have, by ARRA law, been placed on the Board and
consequently have to function not as the IGs of 1978 and 2008 IG Acts, but as members
of the Board with diminished functions.

Third, the members of the Independent Advisory Panel (Panel), as specified in
section 1542 of the ARRA, have taken over the leadership role of IGs in making
recommendations to the Board on actions the Board could take to prevent fraud, waste
and abuse. Ironically, members of the Panel have less statutory power to expose fraud,
waste and abuse than the IGs operating under the 1978 and 2008 IG Acts. Section 1543
grants the Panel the right to conduct hearings in which testimony and evidence is taken,
and, further, to ask any agency for information. However, the Panel cannot subpoena
witnesses, initiate investigations or conduct audits.

The Panel and the Board have replaced CIGIE, which was created in the 2008 IG
Act and which has evolved from two Presidential councils, the President’s Council on
Integrity and Efficiency and the Executive Council on Integrity and Efficiency
established in 1992. CIGIE is composed of all existing IGs and the remainder of the
designated membership includes the Deputy Director of Management of the Office of

98 Pub. L. 95-452, 92 Stat. 1101, sections 4(a)(2)
Management and Budget, Director of the Office of Government Ethics, Director of the Office of Personnel Management, Government Accountability Office, and esteemed others.

CIGIE has not been given an active role in ARRA oversight. Section 1523(F) enjoins the Board to coordinate and collaborate with CIGIE “to the extent practicable” on interagency collaboration. The IGs have a subordinated role in ARRA oversight. This represents a significant paradigm shift. The departmentalization of oversight structure is contrary to the strategy of SIGIR which is recommending unity of command approach in USOCO to oversight rather than the departmentalization of oversight structure which has contributed to waste and fraud.\(^9^9\) ARRA could have had a SIGARRA and/or CIGIE, but instead installed the Board and the Panel.

That is what a reading of the ARRA concludes. Section 1521 states the Board is established to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse. But, on Recovery.gov, which is the Board’s mandated website, under “Oversight Actions,” there are two statements that do not follow ARRA law, at least on the face of it:

1. In Section 1523 (a)(E) the Board is tasked with the responsibility of ensuring that personnel whose “duties involve acquisition or grants made with covered funds” are given proper training. But, the website states that the training is implemented by the IGs.

The 2008 IG Act in section 11 (c) gives CIGIE the responsibility of maintaining

academies for training of personnel, not IGs, and not the Board. The Board’s IGs are not granted authority to train personnel under ARRA or the 2008 IG Act. According to the website, the IG training program (OIG.DOC.gov/Recovery) has conducted more than 100 video training sessions related to reducing fraud, waste and abuse and mis-management of ARRA funds. Private contractors have created and presented training in construction cost estimating and suspension and debarments. The 2008 IG Act specifies that CIGIE trains personnel, not private contractors.

2. The Board states on its website that “CIGIE conducts oversight of federal agencies’ implementation of the Recovery Act” and provides a 2009 Department of Agriculture IG report written on behalf of CICIE discussing website compliance of federal agencies. Oversight in the ARRA is designated in section 1521 only to the Board, not to CIGIE. It is logical that CIGIE would have been granted oversight powers in the ARRA, but it was not granted statutory authority to do so. The Board was given that mandate in the ARRA.

The construct of the Board as defined in the ARRA appears to morph into the IGs and CIGIE with the Chairman of the Board being an unknown quantity. The website indicates the blurry lines between the Board, the ARRA IGs, the non-ARRA IGs, and CIGIE. On the website there are many IG activities that are outside the parameters of ARRA. For example, on the Commerce Department ‘s Recovery website, there is a letter dated February 18, 2011 from the IG of Commerce to Senator James M. Inhofe concerning correspondence between the Climatic Research Unit of the University of East Anglia and the National Oceanic and Atmospheric Administration. This letter is obviously unrelated to the ARRA Commerce IG, but pertinent to the Commerce IG.
Possibly in practice, the separation of the two IGs is artificial and cumbersome. There is a disparity between the ARRA and website in delineating functions.

D. Agency IGs

The IGs from the various agencies receiving ARRA funds have been conducting investigations and reviews, and posting these reports on Recovery.gov. Examples of topics covered by these reviews are agency data collection and reporting capabilities, acquisition planning, and adequacy of the acquisition workforce.

Beyond the need to increase their acquisition workforce, the GSA has stated that their goal is to plan thoroughly for the projects and acquisitions; maintain complete documentation to ensure accountability on the projects; implement effective alternative project delivery methodologies; establish training guidance for new contract vehicles; develop an alternative funding stream; effectively implement new office and information systems; handle additional leasing operations; determine funding for customer costs; and demonstrate that projects meet green buildings criteria. The GSA IG’s Recovery Act web site highlighted audits of various contract awards, including an award that the IG felt raised concerns regarding the procurement process. Another

101 GSA at 4
102 GSA at 5
103 GSA at 6
104 Audit Memorandum: Procurement of Renovations for the Roman Hruska Courthouse (Omaha, Nebraska)-a PBS Limited Scope Construction Project Funded by the American Recovery and Reinvestment Act (ARRA) of 2009, August 19, 2010
audit was posted by the GSA IG, which concluded that the procurement did not represent an effective economic use of taxpayer funds.¹⁰⁵

The DOE IG has engaged in extensive oversight, issuing several reports. Updated reports have been issued as further information has become available. In March 2009, the DOE issued a report, which concluded that the size of the acquisitions workforce has not kept pace with the demand for their services.¹⁰⁶ A December 2009 DOE audit found risks: that there was an inability to award and distribute funds in a timely manner to achieve the goals of the Recovery Act; and that there was a concern about the sufficiency of monitoring procedures and resources to, among other things, prevent and detect fraud, waste and abuse throughout the performance period of financial assistance awards and contracts. The DOE noted that there were a number of strategies that were designed to mitigate these and other risks. However, challenges to the effective implementation of these strategies were identified. This includes a lack of trained oversight staff; performance measures for achieving ARRA goals such as distributing funds in an expeditious manner had not always been established and included in performance plans; and, in financial assistance and contract documents, programs had not consistently demonstrated that previously reported deficiencies, identified through audits, inspections,

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investigations and other oversight activities, had been considered in designing mitigation strategies for the Recovery Act related risks.\textsuperscript{107}

The Department of Homeland Security (DHS) found that the department was limited by insufficient numbers of trained acquisition and grants management personnel. The DHS’s IG also found that the department does not have reliable financial systems to track and report on Recovery Act obligations and expenditures.\textsuperscript{108} Subsequent reports painted a better picture of the Department’s ability to implement the required oversight regime.\textsuperscript{109}

Other issues addressed by IG reports are contract compliance review\textsuperscript{110} and sampling of improper payments to grant recipients by the Department of Transportation\textsuperscript{111}.

In addition to conducting reviews, various IGs conducted training with a focus on preventing fraud and wasteful spending. Recovery.gov listed the focus of the IG training as:

• Recovery Act requirements in relation to fraud, waste, and abuse;

\textsuperscript{107} Selected Department of Energy Program Efforts to Implement the American Recovery and Reinvestment Act of 2009, OAS-RA-10-03, December 2009
\textsuperscript{110} Contract Compliance Review – Apache-Sitgreaves National Forest, Arizona (Hoyer Campground Facility Reconstruction Project); U.S. Department of Agriculture Office of Inspector General; November 24, 2009
\textsuperscript{111} ARRA Advisory –Sampling of Improper Payments in Major DOT Grants Programs. Department of Transportation Advisory No. AA-2009-002, Department of Transportation Inspector General, June 22, 2009
• Requirements for specific Recovery programs;
• What is fraud and how to prevent it;
• When and how to report fraud;
• How to manage grant and contract programs to meet legal and administrative requirements

In addition to independent Inspector General reviews, the Council of the Inspectors General on Integrity and Efficiency (CIGIE) conducted oversight of federal agencies implementation of the Recovery Act. Limited reviews were posted on Recovery.gov. CIGIE is an independent entity within the Executive Branch, which was created by statute. It is comprised of all Inspectors General whose offices are established under section 2 or section 8G of the Inspector General Act of 1978 (5 U.S.C. App.). CIGIE seems to have played only a limited role in Recovery Act oversight.

5. Data Reporting

Data reporting is a method of oversight, which places compliance responsibilities on both the agencies and the contractors. Recipients of ARRA funded grants, contracts, and loans are required to submit reports with information on each project including the amount and use of funds. The purpose of this requirement is to measure the jobs created by the ARRA. 112 The ARRA requires that recipients report the total amount of Recovery Act funds received, associated obligations and expenditures, and a detailed list of those projects or activities. Recipients are also required to report descriptions of the awards, projects and activities funded, funding amounts, numbers of jobs created or retained, compensation for certain executives, and awards to subrecipients. 113 According to the

113 GAO-10-581, Increasing the Public’s Understanding of What Funds are Being Spent on and What Outcomes are Expected, May 2010 at 10
GAO, “Congress built into the act numerous provisions to increase transparency and accountability over spending that require recipients of Recovery Act funding to report quarterly on a number of measures, as contained in section 1512 of the act.” Thus, data reporting has a dual role of increasing accountability and transparency in the use of ARRA funds. The OMB issued a memorandum on implementation for the use of reports. This memorandum directed the development of a nationwide data collection system at www.federalreporting.gov. “The Recovery Board’s goals for this web site is to promote accountability by providing a platform to analyze Recovery Act data and serving as a means of tracking fraud, waste, and abuse allegations by providing the public with accurate, user-friendly information.” There has been significant criticism of the reports on how many jobs were created or saved by the ARRA. As will be seen below, there has been much criticism directed towards the agencies implementation of data reporting.

According to section 1512 of the ARRA, Agencies are required to report on the use of the funds cumulatively each calendar quarter:

(c) RECIPIENT REPORTS. —Not later than 10 days after the end of each calendar quarter, each recipient that received recovery funds from a Federal agency shall submit a report to that agency that contains—

114 GAO-10-581 at 1
115 GAO-10-581, Recovery Act: Increasing the Public’s understanding of what funds are being spent on and what outcomes are expected, May 2010
117 GAO-10-581 at 7
118 Reporting and Compliance Requirements Imposed by the Recovery Act; The Procurement Lawyer, Volume 45, number 2, Winter 2010, Penny Pittman Cobey
(1) The total amount of recovery funds received from that agency; (2) the amount of recovery funds received that were expended or obligated to projects or activities; and (3) a detailed list of all projects or activities for which recovery funds were expended or obligated, including—(A) the name of the project or activity; (B) a description of the project or activity; (C) an evaluation of the completion status of the project or activity;

This subsection also requires the reporting of subcontracts:

(4) Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109–282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

This section also requires disclosure requirements by agencies in order to increase transparency.

(d) AGENCY REPORTS.—Not later than 30 days after the end of each calendar quarter, each agency that made recovery funds available to any recipient shall make the information in reports submitted under subsection (c) publicly available by posting the information on a website.119

The data reporting requirement is implemented by FAR 4.15.120

120 FAR 4.15 states:
Contractors that receive awards (or modifications to existing awards) funded, in whole or in part by the Recovery Act, must report information including, but not limited to—

(a) The dollar amount of contractor invoices;
(b) The supplies delivered and services performed;
(c) An assessment of the completion status of the work;
(d) An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds;
(e) Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and
(f) Specific information on first-tier subcontractors
Also mandated by this regulation is a requirement that every contract made under the ARRA must indicate that it is an ARRA contract. The regulation also states that the purpose of this is to maximize transparency of ARRA funds and to allow for separate tracking of ARRA funds. If a contractor fails to comply with these reporting requirements, the contracting officer is required to make this failure part of the contractor’s performance information under FAR 42.15.121

An important issue for the Inspector Generals, the GAO, and the ARRA Board was whether the agencies had an adequate data review process of recipient-reported information. An adequate data review system is essential for the prevention of fraud and wasteful spending. 122

On November 19, 2009, the GAO conducted a review of the recipient reporting data process.123 This review found that there were erroneous or questionable data entries. According to the GAO, many entries merited further attention due to an unexpected or atypical data value or relationship between data. 124 In May 2010, the GAO conducted another review. In this review, the GAO reviewed the 11 energy and infrastructure programs. 125 The GAO issued several recommendations to the OMB which included a suggestion to revise OMB’s recipient reporting guidance, including the Recipient Reporting Data Model and to provide recipients with clearer general instructions and

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121 FAR 4.1501
122 OAS-RA-09-04 at 1
123 Recipient Reported Jobs Data Provide Some Insight into Use of Recovery Act Funding, but Data Quality and Reporting Issues Need Attention, November 19, 2009, GAO-10-224T
124 GAO-10-224T at 6
125 GAO-10-581, Increasing the Public’s Understanding of What Funds are Being Spent on and What Outcomes are Expected, May 2010 at 8
examples for narrative fields aimed at fostering more complete information on the uses of funds and expected outcomes. It was also suggested that the OMB work with executive departments and agencies to determine whether supplemental guidance is needed to meet, in a reasonable and cost-effective way, the intent of the Recovery Act for reporting on projects and activities. 126

The Recovery Board has tracked the progress since the first round of recipient reporting. According to the Board, the data was riddled with inaccuracies. “Some recipients were overwhelmed by the process and confused by the guidance—and their reports reflected that dilemma.”127 For the second round of reporting, the Board detailed changes in guidance and enhancements to FederalReporting.gov and Recovery.gov, which led to better data quality. The exact improvements were not detailed, but the Board noted that not all recipients have submitted reports as required by the ARRA, and suggested that non-reporters should face enforcement penalties.128 A subsequent review by the Recovery Board concluded that there were early problems with the data reporting system because recipients were not accustomed to providing detailed information to the government on contracts, grants and loans, and, as a result, there were many errors. As a result, the Board simplified the reporting process and put in place edit checks in FederalReporting.gov. The Board claimed that these actions resulted in a marked improvement in recipient reporting. This lead the Board to post information on their

126 GAO-10-581, Increasing the Public’s Understanding of What Funds are Being Spent on and What Outcomes are Expected, May 2010 at 25-26
127 Recovery Accountability and Transparency Board, Quarterly Report to the President and Congress, March 2010 at 4
128 Recovery Accountability and Transparency Board, Quarterly Report to the President and Congress, March 2010 at 5-6
website that provided a better understanding of the reporting calendar, the categories of recipients, and the data recipients must report. The Board concluded that reporting went much more smoothly in the second period as recipients filed 179,440 reports. The breakdown: recipients submitted reports for 154,152 grants, 24,363 federal contracts, and 925 loans. In all, there were 70,644 prime recipient reports and 108,796 sub-recipient reports. Additionally, recipients reported more than 681,000 jobs for the quarter. The number of recipients that did not report this cycle decreased by 27.1%.  

In reviewing the data quality reviews process, the DOD IG found that the DOD did not have a well-defined process to perform limited data quality reviews intended to identify material omissions and/or significant reporting errors and to notify the recipients of the need to make appropriate and timely changes. Nor did DOD have specific policies or procedures to perform the data quality reviews. A recommendation for remediation was made. The purpose of this review is to determine compliance and notify recipients of the need to make appropriate changes. This review was conducted prior to the receipt of data. Therefore, the effectiveness of the processes was not tested. On November 25, 2009 at the request of the ARRA Board, 29 IGs of agencies that receive ARRA funds evaluated whether the agencies had processes in place to perform limited data-quality reviews. Issued was a summary of 21 IG reports regarding the process for collection of

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129 Recovery Accountability and Transparency Board, Quarterly Report to the President and Congress, July 2010 at 5
data and the ability to notify recipients of the need to make changes.\textsuperscript{131} Seventeen of the twenty-one IG reports indicated that the agencies did have a system in place. Five of the seventeen reports provided suggestions for refining or improving these processes.\textsuperscript{132} Twelve of the reports contained no findings or suggestions for improvements, and four contained findings related to deficiencies in the processes.\textsuperscript{133}

The DOE’s data reporting system has been subject to significant scrutiny by its Inspector General. These reviews have uncovered significant issues. The DOE released an audit during September 2009, which detailed concerns about meeting the accountability requirements of the ARRA. The overall conclusion of the audit was those DOE’s efforts to develop, refine, and apply the control structure needed to ensure accurate, timely, and reliable reporting to be positive.\textsuperscript{134} Potential difficulties pointed out by the audit were: 1) the lack of knowledge as to whether their information systems were capable of the increased workloads that the ARRA might bring about, and system modification made to performance management systems to accommodate ARRA performance measures were not fully tested; 2) the ability of prime and sub-recipients to properly segregate and report accounting and performance information had not been determined; 3) there was a lack of coordination between headquarters organizations related to aspects of ARRA reporting; and 4) a significant portion of the performance

\textsuperscript{131} Department of Health and Human Services, Office of Inspector General, Summary of Inspectors General Reports on Federal Agencies’ Data-Quality Review Process, A-09-10-01002, November 2009 at 3
\textsuperscript{132} A-09-10-01002 at 4
\textsuperscript{133} A-09-10-01002 at 5
\textsuperscript{134} Department of Energy’s Efforts to Meet Accountability and Performance Reporting Objectives of the American Recovery and Reinvestment Act, OAS-RE-09-04, September 2009
measures developed for ARRA activities were not quantifiable. The DOE also expressed a concern over whether they will have enough time and resources to conduct the scheduled quarterly reviews of information reported to OMB by recipients.  

A subsequent review in April 2010 found that there were potential anomalies with information reported by 55% of recipients. Also found was:

- The Department did not always utilize the correct basis when evaluating the accuracy of "funds provided" data submitted by grant recipients. For example, in its analysis process, the Department used data reflecting, "funds obligated" rather than the correct amount of "total grant awards". This generated a number of potential false positives.

- Duplicate reports by certain recipients, resulting in overstatements of as much as $137 million of the more than $18 billion obligated, were not corrected.

The audit noted some improvement. For example, the Department had taken action to ensure its prime facility management contractors could properly report Recovery Act information. Additionally, the contractors included in the review modified their accounting systems to ensure accurate tracking and reporting on Recovery Act activities. Their systems were restructured so that they: (i) could separate Recovery Act and non-Recovery Act funds; and, (ii) had adequate processing capacity to handle the projected increase in transactions.

Some ARRA recipients fail to comply with the reporting requirements. The Recovery Board maintained a “Non-Complier” list on Recovery.gov. The OMB provided the list and the non-complying recipients were certified by the awarding agencies. In this

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135 OAS-RA-09-04 at 8
136 Accounting and Reporting for the American Recovery and Reinvestment Act by the Department of Energy’s Funding Recipients, OAS-RA-10-06, April 2010
137 OAS-RA-10-06 at 2
case, contractors are being shamed for their non-compliance. A stronger means of enforcement have been suggested. On April 6, 2010, the President issued a memorandum, which directed federal agencies to use every means available to identify prime recipients that have failed to file a report on FederalReporting.gov. The directive required agencies, when appropriate, to terminate awards, reclaim misused funds, and pursue suspension and debarment proceedings against non-reporters.\textsuperscript{138}

If conducted properly, data reporting could be a useful accountability measure. This technique can shame agencies for failing to follow controlling regulations and encourage them to alter their behavior. However these audits indicate that the data reporting process applicable to the ARRA suffered from severe flaws. There were improvements, but they came at a slow pace towards the end of the ARRA’s life. As the Recovery Board stated:

As we are learning, transparent reporting is a challenging endeavor. The first reporting period was plagued with a multitude of mistakes and missteps by recipients entering the data and government agencies responsible for providing guidance and oversight. The Recovery Board responded to the first period reporting issues by making significant improvements to both FederalReporting.gov and Recovery.gov. The Office of Management and Budget (OMB) also issued new guidance to simplify the reporting process and agencies responded by working closely with their recipients to help them adhere to the new policies. This revised guidance coupled with the technological changes to FederalReporting.gov resulted in noticeable improvements, but we have not yet reached the goal of accurate and timely reporting by all recipients.\textsuperscript{139}

6. Recovery.gov

\textsuperscript{138} Recovery Accountability and Transparency Board, Quarterly Report to the President and Congress, July 2010 at 5

\textsuperscript{139} Recovery Accountability and Transparency Board, Quarterly Report to the President and Congress, March 2010 at 2
Section 1526 (a) of the ARRA required the establishment of “a website on the Internet to be named Recovery.gov, to foster greater accountability and transparency in the use of funds made available in this Act.” The Recovery Board has stated that the goal for Recovery.gov is to promote accountability by providing a platform to analyze Recovery Act data and serving as a means of tracking fraud, waste, and abuse allegations by providing the public with accurate, user-friendly information.\footnote{GAO-10-581; Recovery Act: Increasing the Public’s Understanding of What Funds are Being Spent and What Outcomes are Expected at 8; May 2010}

Among other required content, section 1526 (c) requires the Recovery.gov to include accountability information, including findings from audits, inspectors general, and the Government Accountability Office; data on relevant economic, financial, grant, and contract information in user-friendly visual presentations to enhance public awareness of the use of covered funds; detailed data on contracts awarded by the Federal Government that expend covered funds, including information about the competitiveness of the contracting process, information about the process that was used for the award of contracts, and for contracts over $500,000 a summary of the contract.

Under FAR 5.705, the Government is required to post a description of any contract action, regardless of dollar value, including task orders and delivery orders that is not awarded as a fixed price contract or is not awarded with competition and a rationale as to why it was not a fixed price contract or not competitively awarded. This has not been done. There is no rationale posted as to why a contract was awarded as a contract type other than fixed-priced. No matter how carefully crafted the Government’s rules are, they will not be effective if not actually implemented.
D. Steps Taken to Prevent Fraud and Wasteful Spending

1. Preference for Fixed-Priced Contracts

The ARRA requires that contracts be awarded under the fixed-price designation to the maximum extent possible. If a contract is awarded under ARRA funds and not designated as fixed-price, a summary of this activity must be posted on Recovery.gov.\textsuperscript{141}

A fixed-price contract provides for a firm price. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable adjustment.\textsuperscript{142}

A cost-reimbursement provides for payment of allowable incurred costs to the extent prescribed in the contract. An estimate of total costs for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed is established. The contractor can exceed this ceiling only with the permission of the contracting officer.\textsuperscript{143} This is known as a cost overrun. A cost-reimbursement contract and fixed-price contract are generally distinguishable on this basis. This translates into maximum risk being placed on the contractor in a fixed-price contract. A cost-reimbursement contract does not place the maximum risk on the contractor. Instead, the risk is placed on the Government.\textsuperscript{144}

A cost-reimbursement contract is only appropriate when the uncertainties involved in

\textsuperscript{141} 111 P.L. 5; 123 Stat. 115, sec. 1554 (2009)
\textsuperscript{142} FAR 16.201
\textsuperscript{143} FAR 16.301-1
contract performance do not permit costs to be estimated with sufficient accuracy for use of a fixed-price contract.\textsuperscript{145}

Cost-Reimbursement Contracts are not without criticism. They have been described as difficult for both the contractor and Government to administer, particularly when contracts are subject to Cost Accounting Standards or certified cost or pricing data is required.\textsuperscript{146}

The use of cost-reimbursement contracts does place added burdens on contracting officers. They are not to be used unless the contractor’s accounting system is adequate for determining costs applicable to the contract. This helps to assure that the contractor has systems in place to accurately and consistently record accumulated costs and bill for allowable costs. An inadequate accounting system can cause problems when costs are accumulated during contract performance.\textsuperscript{147} The determination that an accounting system is adequate is part of a pre-award survey, which includes a determination of whether that system is in accordance with generally accepted accounting principles and whether it provides for:

\begin{itemize}
\item A proper segregation of direct costs from indirect costs;
\item An identification and accumulation of direct costs by contract;
\item A logical and consistent method for the allocation of indirect cost to intermediate and final cost objectives;
\item An accumulation of costs under general ledger control;
\item A timekeeping system that identifies employees’ labor by intermediate or final cost objectives;
\end{itemize}

\textsuperscript{145} FAR 16.301-2
\textsuperscript{147} Contract Management, Extent of Federal Spending under Cost-Reimbursement Contracts Unclear and Key Controls Not Always Used, GAO-09-921 at 22, September 2009
A labor distribution system that charges direct and indirect labor to the appropriate cost objectives;
· An interim (at least monthly) determination of costs charged to a contract through routine posting of books of account.  

Regular accounting system reviews are needed to help ensure that changes to the contractor’s accounting practices are considered by the Government and evaluated for compliance with Government contract cost principles. This is because the contractor’s cost structure or accounting procedures can change during the contract period. If the Government does not take these changes into account, there is a risk that unallowable costs can be paid.

In this study, the GAO determined that out of 92 contracts, in only 52 of these contracts was there any evidence that the contractor’s accounting systems were deemed adequate in a current time frame before contract award. A current time frame was within four years or less prior to contract award.  

In thirteen of the contracts, the accounting systems were determined adequate after contract award. In seven of the contracts, accounting systems were determined adequate outside of the current time frame prior to award.  

In twenty of the contracts reviewed, there was no evidence of either pre-award or post-award determinations that the contractor’s accounting systems were adequate.  

Most of the contracting officials could not explain why this happened or were not aware of their responsibilities for ensuring the adequacy of the accounting systems.  

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148 GAO-09-921 at 23; Standard Form 1408
149 GAO-09-921 at 24
150 GAO-09-921 at 25
151 GAO-09-921 at 26
152 GAO-09-921 at 26
Another concern is inadequate cost surveillance procedures, which can lead to improper payments or overpayment to the contractor. The purpose of cost surveillance procedures are to ensure that the Government only pays for allowable, allocable, and reasonable costs that are applicable to the contract. Civilian agencies and defense agencies have different cost surveillance procedures.

At the time of this report (September 2009), civilian agencies would generally call contracting officer’s representatives (COR) to examine contractor invoices. The purpose of this review is to ensure that goods and services that are being billed were actually received, the amounts billed are allowable, and the Government is not incurring claimed costs that are inadequately supported. The steps in the cost surveillance process are:

· The program office directs work to be done, consistent with the contract’s statement of work;
· How the work is done, together with the time and cost required to do the work, is proposed by the contractor and, upon approval by the program office, becomes a work request. Work requests describe the work to be done, the labor categories needed, and the hours required by each labor category to complete the work;
· As invoices are submitted, the CORs are supposed to reconcile the invoices to the work requests to ensure that the Government only pays for the completed work authorized by the work requests. 153

The efficiency of the review depends on the agency’s policies and the workload of the Contracting Officer Representative (COR) responsible for the review. For example, after a GAO audit, the DOE was found to have inadequately reviewed invoices for a multibillion-dollar cost-reimbursement contract. The DOE relied primarily on the Defense Contract and Audit Agency’s (DCAA) review and approval of the contractor’s financial systems, and on the contractor’s review and approval of subcontractor charges.

153 GAO-09-921 at 28
As a result of this audit, the Department changed their procedure and held contracting officers responsible for invoice review. ¹⁵⁴

The DOD utilizes a tool called Earned Value Management (EVM), which is a monthly review of contractor’s costs. ¹⁵⁵ It relies on contractor-provided data to measure the value of work accomplished in a given period compared to the planned value of work scheduled and the actual cost of work accomplished. This is supplemented with audits for the purpose of testing whether invoiced costs are allowable. This program is under the oversight of the DCAA. ¹⁵⁶ The EVM does not provide surveillance of specific contract costs. It is intended to alert program managers to potential problems with cost or schedule overruns sooner than a review of contract expenditures alone would. The EVM data’s level of detail at the contract and order level can be much less than that of an invoice where the specifics in terms of labor categories, travel, and equipment would be reflected. According to the GAO, analysis of EVM data alone does not satisfy FAR requirements for cost surveillance under cost-reimbursement contracts. The EVM data must be supplemented with audits for the purpose of testing whether invoiced costs are allowable. ¹⁵⁷

As recently as September 2009, the GAO raised concerns as to the adequacy of these procedures. According to the GAO, the DOD did not document the population of invoices, prepare sampling plans, and test a random statistical sample. Auditors generally used a nonrepresentative selection of invoices in deciding the number of invoices that would be reviewed and the extent of testing that would be performed in order to support

¹⁵⁴ GAO-09-921 at 29
¹⁵⁵ GAO-09-921 at 28
¹⁵⁶ GAO-09-921 at 29
¹⁵⁷ GAO-09-921 at 30
the conclusions in their work. An example that raised concerns with the GAO is a contractor that generated $1.1 billion in annual billings to the Government; the DCAA auditor only reviewed three invoices totaling $88,000 out of 222 invoices submitted for payment. The DCAA submitted a memorandum, which approved the contractor’s procedures and stated that the contractor met the criteria for continued participation in the direct billing program. Another example is an audit that was improperly influenced in scope by DOD contracting officials. The GAO came to this conclusion that working papers did not support reported opinions. DCAA supervisors dropped findings and changed audit opinions without adequate evidence for their changes, and sufficient audit work was not performed to support audit opinions and conclusions. The GAO listed additional examples of contracts over a billion dollars where the contractors did not have adequate cost surveillance procedures in place. Included are situations where contractors were billing over the negotiated ceiling limitations. In another example, procurements were not properly approved, but the contractor’s internal audit management permitted the contractor to provide approvals three years after the fact. Questioned costs were omitted from audit reports.

This demonstrates the risks of cost-reimbursement contracts. Cost-reimbursement contracts place a burden on the agencies and require close supervision. There are accountability concerns where Government officials have failed to follow proper procedures. The failure to follow these burdensome procedures creates a risk of wasteful spending. This establishes that the more cost-reimbursement contracts that are awarded,

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158 GAO-09-921 at 31-32
159 GAO-09-921 at 32-33
the greater the risk of wasteful spending. Wasteful spending is a serious concern for the taxpayers considering the amount of money that is being spent under the ARRA. For this reason, firm-fixed price contracts that place the risk on the contractor are preferable unless there is a legitimate reason to place the risk on the Government.

The practicality of this preference for firm-fixed price contracts is another question. This preference does conflict with the standard operating procedure for some agencies. In the GSA’s implementation plan for ARRA contracts, they stated that it is not uncommon for their construction efforts to be subject to schedule delays and cost escalations in excess of approved funding. GSA established a program management office to monitor the construction and ensure adherence to the project budget and schedule. This seems to be a difficult task as funding for many of the anticipated ARRA projects were not yet incorporated into GSA customer budgets.\footnote{Oversight of the American Recovery and Reinvestment Act of 2009, GSA’s Implementation Challenges, August 6, 2009 at 5} Recovery.gov does list several contracts that were awarded as other than fixed-firm price. However, an exact number is not stated. Only future audits will be able to indicate the number of cost-reimbursement contracts awarded, the amount of cost overruns, the Government’s adherence to proper procedure, and the amount of wasteful spending.

2. Full and Open Competition

As mentioned above, full and open competition is a category in of itself within the three traditional pillars of government contract law. The GAO has also stated that full and open competition saves taxpayer money; helps improve contractor performance, and
promotes accountability for results.\textsuperscript{161} According to a GAO report issued on November 30, 2009, ninety-two percent of 27,774 contracts were issued competitively.\textsuperscript{162} The ARRA states that: “to the maximum extent possible, contracts funded under this Act shall be awarded as fixed-price contracts through the use of competitive procedures.”\textsuperscript{163} If a contract is awarded under ARRA funds and is not competitively awarded, a summary of this activity must be posted on Recovery.gov.\textsuperscript{164} Federal agencies seem to be observing the preference for full and open competition as According to a GAO report issued on November 30, 2009, ninety-two percent of 27,774 contracts were issued competitively.\textsuperscript{165}

3. Increasing the Acquisition Workforce

There has been significant writing on the inadequacy of the Government’s acquisition workforce. The lack of an adequate acquisition workforce has been said to contribute to fraud and wasteful spending. “Without a fully capable acquisition workforce, the Government will not be able to adequately protect against fraud throughout the procurement system. In reviewing contractor claims, Officers are responsible for referring suspected fraud to the appropriate agency investigator. As such, Contracting Officers must be able to identify potential fraud.”\textsuperscript{166} Federal agencies spend

\begin{footnotesize}
\textsuperscript{161} GAO-10-809, Recovery Act: Contracting Approaches and Oversight Used by Selected Federal Agencies and States at 4, July 2010
\textsuperscript{162} GAO-10-216R at 3
\textsuperscript{163} 111 P.L. 5; 123 Stat. 115, section 1554 (2009)
\textsuperscript{164} 111 P.L. 5; 123 Stat. 115, sec. 1554 (2009); The specific web address for this posting is http://www.recovery.gov/?q=content/non-competitive-category.
\textsuperscript{165} GAO-10-216R Recovery Act at 3
\end{footnotesize}
billions of dollars each year on contracts for goods and services to carry out their missions and support their operations. Effective acquisition administration, management, and oversight are essential to ensuring requirements are met with high-quality goods and services at fair and reasonable prices in a timely fashion. This result can not be achieved without a sufficient number of talented and trained acquisition professionals, whose skills and competencies are vital to the very accomplishment of agency strategic goals and missions.\textsuperscript{167} The reason attributed to the Government’s inadequate acquisitions workforce is that “agency officials geared aggressive reform initiatives to streamlining Government procurement by increasing efficiency, speed, and freedom for contracting officials and commercializing Government procurement. Not waiting to see if these reforms made for a more efficient and productive workforce, agencies slashed the number of acquisition personnel.” It is further argued that these cuts were too severe. In light of the increase in Government contracts since the 1990s, the acquisition workforce has faced more work than it is capable of doing.\textsuperscript{168} These criticisms are obviously correct in light of the above-mentioned GAO reports. During the early stages of the ARRA, there was a concern about the adequacy of the acquisition workforce in light of the complexity and demands of the ARRA. As stated by the DOE IG:

We are also concerned that the work funded by the Recovery Act through Department contracts and financial assistance will place additional pressures on other segments of the acquisition workforce, particularly Federal Project Directors and Contracting Officers Representatives. Procurement officials expect that actions associated with the Recovery Act will be complex, requiring more rigor and oversight, resulting in increased


\textsuperscript{168} Id at 173
demands on contract specialists as well as Federal Project Directors and Contracting Officers Representatives. While it is clearly management's responsibility to determine the precise staff size needed as the Department moves forward, the current staffing level appears inadequate relative to current and anticipated future needs as the Department's mission responsibilities expand. 169

This report recommended that the DOE continue its staffing efforts. 170 Thus, an inadequate workforce during the life of the ARRA could have only resulted in fraud and wasteful spending that was avoidable. In fact, reviews have concluded that the acquisition workforces of some agencies have been challenged by the increased demands of the ARRA:

The additional oversight processes and increased volume of funding under the Recovery Act have put added demands on agency contracting staff, which agency officials said was having some impact on their ability to carry out their missions. The Recovery Accountability and Transparency Board coordinated a survey administered by IGs of contracting and grant officials at 29 agencies regarding the adequacy of contracting and grant staffing levels. Some survey respondents said that staffing was inadequate, while about half of respondents said that staffing was adequate to meet Recovery Act needs but affected non-Recovery Act work. Contracting officials at several agencies whom we met with in our site reviews also reported that there had been an impact on their staff. Officials said that staff had put in extra hours to meet Recovery Act demands, and in one case said that attention to Recovery Act contracts had led to delays on non-Recovery Act contract awards. 171

There is an ongoing effort to increase the acquisitions workforce. The National Defense Authorization Act for Fiscal Year 2009 (NDAA 2009) mandated the development of a plan to increase the acquisitions workforce. 172

170 IG-RA-09-02 at 5
171 Recovery Act: Contracting Approaches and Oversight Used by Selected Federal Agencies and States, GAO-10-809, July 2010 at 14
172 110 P.L. 417; 122 Stat. 4356 Section 869 provides in relevant part:
On October 27, 2009, the Office of the Management and Budget (OMB) released a memorandum regarding the increase of the acquisitions workforce. \textsuperscript{173} This is the plan that OMB was required to develop by the NDAA 2009. This memorandum describes a plan that establishes: 1) the need for workforce growth; 2) a comprehensive annual workforce planning process to be managed by the Office of Federal Procurement Policy, in consultation with OPM, through 2014; 3) a blueprint for increasing the use of intern programs and other training and development initiatives; 4) and a five-year action plan to improve workforce development efforts and the workforce management infrastructure. This memorandum calls for each civilian agency covered by the Chief Financial Officers Act (CFO) to develop a plan that identifies specific strategies and goals for increasing both the capacity and capability of the workforce for the period ending FY 2014. This plan is required to be submitted by March 31, 2010, and annually thereafter. This will reflect hiring and training needs for FY 2011 and serve as a component of the agency’s budget preparation and serve as a component of the agencies budget preparation beginning with the FY 2012 budget cycle. Agencies that are not covered by the CFO are encouraged to use the OMB report in their planning process. \textsuperscript{174}

The purpose of this section is to authorize the preparation and completion of a plan (to be known as the "Acquisition Workforce Development Strategic Plan") for Federal agencies other than the Department of Defense to develop a specific and actionable 5-year plan to increase the size of the acquisition workforce, and to operate a government-wide acquisition intern program, for such Federal agencies.

\textsuperscript{173} Acquisition Workforce Development Strategic Plan for Civilian Agencies – FY 2010-2014, Memorandum for Chief Acquisition Officers, Executive Office of the President, Office of Management and Budget, October 27, 2009
\textsuperscript{174} OMB memo 1-2
Attached to this memorandum is the actual strategic plan. The goal would at least a five percent increase in the acquisition workforce. The strategic plan makes it clear that this will be a long and difficult process. It was not until November 2, 2009 that agencies were required to submit plans for strengthening their acquisition workforce. This will be considered as part of the 2011 FY budget process. Agencies are also required to submit an Acquisition Human Capital Plan (AHCP) to the OFPP by March 31, 2010, and annually thereafter. This will reflect hiring and training needs and serve as a component of the agency’s budget preparation beginning with the 2012 FY budget cycle.

What is obvious is that this hiring will not be complete during the life of the ARRA. An adequately sized workforce is only one aspect. This workforce needs adequate training. There is little chance that there will be an adequate acquisition workforce with proper training in order to avoid the same problems that were caused during the Iraq contracts and Katrina recovery contracts. It is likely that there will be future audits, which show incidents of wasteful spending that could have been avoided if there was an adequate acquisition workforce.

There has been an admission by the GSA that their pre-ARRA acquisitions workforce is inadequate. The GSA has stated that they must increase their staff for the purpose of

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175 Acquisition Workforce Development Strategic Plan Fiscal Years 2010-2014, A Framework for Enhancing the Capacity and Capability of the Civilian Agency Acquisition Workforce, October 2009
176 Strategic plan at 5
177 Strategic plan at 6
the ARRA especially contracting officers. This can be done by either hiring new employees or contracting out. 178

E. Increased Government Enforcement Abilities

1. Amended False Claims Act

The Government has enacted legislation to increase contract fraud enforcement authority. This includes the passage of the Fraud Enforcement and Recovery Act of 2009 (FERA). 179 FERA states its purpose is to “To improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes.” It has been suggested that FERA increases the potential for fraud prosecutions and civil actions related to the ARRA or the False Claims Act (FCA) by amending the major fraud statute making it applicable to the ARRA. 180 Due to the FERA amendment, the major fraud statute now provides:

Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

(1) to defraud the United States; or
(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,

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178 Oversight of the American Recovery and Reinvestment Act of 2009, GSA’s Implementation Challenges at 3, August 6, 2009
179 111 P.L. 21, *; 123 Stat. 1617
in any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance, including through the Troubled Asset Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government's purchase of any troubled asset as defined in the Emergency Economic Stabilization Act of 2008, or in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of such grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance, or any constituent part thereof, is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.\(^{181}\)

Prior to the passage of FERA, the FCA was interpreted to require proof that a defendant "intend[ed] that the Government itself pay the claim" for liability to attach under FCA. See *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2128 (2008). FERA has amended the FCA and causes liability to attach whenever one: "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."\(^{182}\)

As a result of FERA, the FCA redefines the term material is now defined as having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.\(^{183}\)

Previously, FCA liability was limited to a situation when a claim was presented to an officer or employee of the Government. See *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). The FCA could not reach a claim for payment of funds over which the United States has neither title nor control. *United States

\(^{181}\) 18 U.S.C. § 1031

\(^{182}\) 31 U.S.C. § 3729 (a)(1)(b); Daniel P. Graham and Julie A. Dunne, supra

\(^{183}\) 31 U.S.C. § 3729 (b)(1)(4)
It has been suggested that contractors will have to make substantial revisions to their compliance programs due to the broadened reach of the FCA.\(^{184}\)

FERA gives the Government some additional enforcement tools. The Attorney General is no longer required to sign civil investigative demands (“CIDs”), but may delegate that power to others in Department of Justice. It has been predicted that this will increase the use of CIDs. CIDs enable the Government to engage in unilateral discovery prior to the defendant being served with the complaint. CIDs can be issued after a qui tam complaint has already been filed but before it is served. It has been predicted that this form of discovery could deprive defendants of many of the protections afforded by the Federal Rules of Civil Procedure.\(^{185}\)

FERA also allows the Department of Justice to share the fruits of that discovery with the qui tam relator. Additionally, when the Government intervenes in a qui tam action and adds its own claims, the new law permits the Government’s amended complaint to relate back, for purposes of calculating the statute of limitations, to the date the qui tam action was filed.\(^{186}\)


\(^{185}\) Mark Troy, New Federal Fraud Law Implements Key Changes to False Claims Act, Washington Legal Foundation, Counsel’s Advisory, Vol. 17 No. 5, June 5, 2009

\(^{186}\) Id
What effect this increased enforcement authority will have on deterrence remains to be seen. Due to the large amount of taxpayer dollars being expended, it is hoped that the Department of Justice will aggressively prosecute contractors who have defrauded the Government. It is also hoped that this expanded authority will allow for a greater recovery of taxpayer funds. In light of the unprecedented regulations and oversight, it should be safe to assume that the Government will aggressively pursue fraud once uncovered. It is noteworthy that on September 10, 2009, the ARRA Board chair testified before the Senate and stated that the recently amended Civil False Claims should serve as useful tools in deterring willful or reckless noncompliance with ARRA reporting requirements. 187

It is worth noting that the Department of Justice Antitrust Division has allocated resources to the ARRA fraud prevention effort, referring to this as the ARRA initiative. The stated purpose of this initiative is to prevent and deter violations of criminal antitrust laws by providing, preparing and distributing publications. The Division will develop and distribute materials for fund recipients on fraud and collusion detection, prevention, and reporting. Background information on the initiative is posted on the Department of Justice web site. 188

2. Whistleblower Protection

The ARRA contains its own unique whistleblower protection. Existing FAR whistleblower procedures at FAR 3.901 through 3.906 will not apply to transactions

187 Testimony of the Honorable Earl E. Devaney Chairman, Recovery Accountability and Transparency Board Before the Committee on Homeland Security and Governmental Affairs, United States Senate, September 10, 2009
funded under the ARRA. FAR 3.907, will govern newly awarded contracts, as well as existing contracts if future orders will use ARRA funds. FAR 3.907-2 provides that Prime contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee who reports:

1) Gross mismanagement of funds; 2) gross waste of funds; 3) a substantial and specific danger to the public health and safety; 4) an abuse of authority; 5) a violation of law, rule or regulation.

In what has been described as a drastic change of course, Section 1553 of the ARRA allowed statements that employees make as part of their jobs to qualify as protected disclosures. In contrast to prior whistleblower statutes and to the Supreme Court’s decision in Garcetti v. Ceballos, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), the ARRA states that disclosures “made in the ordinary course of an employee’s duties” are protected disclosures. This change has also been referred to as extremely pro-employee as it provides nearly blanket protection as auditors investigate fraud. A commentator has alleged that an employee who investigates fraud as part of their job is protected from any adverse employment actions if they make any statement that fits within the broad definition of a protected disclosure under the Act. 189

V. CONCLUSION

A primary goal of the ARRA is to “foster unprecedented levels of accountability and transparency in government spending.” This thesis has investigated Title XV, the

accountability and transparency sections, to determine if this goal can be achieved, on the face of it. The ultimate test of this goal will be the IG investigations and audits that will provide statistics to measure the efficacy of the oversight measures in place, especially after September 30, 2010 when all ARRA funds must be spent and September 30, 2013 when the Board terminates. At that point, the ARRA IGs will revert to their normal functions. The percentages of waste and fraud will provide the judgment on ARRA oversight. The issue presently under consideration is whether the ARRA legislation provides a framework for successful oversight.

A problem is that the quick-start requirement in that ARRA did not necessarily translate into quick-start oversight. The ARRA was passed very quickly. The projects were accelerated, but it is unknown if the IGs were ready to go in their new capacities. The Commission on Wartime Contracting in Iraq and Afghanistan concluded that resources must be in place during contract formation and execution of contracts; that if the “federal government committed adequate resources to contract-management and oversight functions, it would not need to spend as much now on special inspectors general to determine what went wrong in the acquisition process.”

Noteworthy is the totality of responsibilities mandated to the IGs in the ARRA. In addition to their oversight of covered funds in the federal agencies, state and local governments, and their activities on the Board, the IGs are mandated in section 1514 to review and investigate allegations from the public about specific investments with

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covered funds, and in section 1553 to review and investigate complaints by whistleblowers who have suffered employer reprisals.

The ARRA has a potent oversight mechanism in this section. The whistleblower’s provision used in conjunction with the amended False Claims Act qui tam encourages the whistleblower to divulge alleged fraud, initially in private. Discovery is commenced without the possible defendant ‘s knowledge. If the alleged fraud is not actionable, the investigation ceases. The whistleblower has complete privacy and suffers no adverse consequences. If the case proceeds, the whistleblowers receives a percentage of what the Government recovers. In reality, financial harm is a deterrent to an employee who wishes to reveal fraud to the Government. Reputations travel and can preclude employment elsewhere. But, IG needs the time and experience to go forward with the whistleblower process. It follows that the expanded duties of the IGs required an expanded workforce to accommodate to these new responsibilities. An explosion of new IGs and IG personnel could threaten their mission. Overburdening the IG workforce could undermine oversight.

The creation of the Board is perplexing. The conflict in IG function as delineated in the 1978 and 2008 IG Acts and that of the Board is impossible to reconcile. The argument can be made that the Recovery Accountability and Transparency Board with its symbolic name and its Advisory Panel was designed to be the centerpiece of ARRA oversight. Its name comports with the oversight goal of “unprecedented accountability and transparency.” Perhaps it can be inferred that the Board was created to incur the blame for potentially high fraud and waste costs, thus absolving Congress from political
fall out. But, whatever the motivation, the Board is an imperfect and convoluted construct. The danger is that there is an act of Congress that weakens, on the face of it, the independence of the Inspectors General, and that this is in conflict with existing laws.

The oversight mechanisms of the ARRA may work well by reducing waste, fraud and abuse. Hopefully, lessons have been learned from the egregious contingency contracts of Iraq reconstruction and Hurricane Katrina disaster relief. The difficulty lies in the fact that the ARRA itself is unprecedented.

On June 2011, Representative Darrell Issa introduced the Digital Accountability and Transparency Act (DATA). DATA would require agencies to collect and submit all data on government spending directly to an independent database that will be accessible by the public. DATA would establish an independent body which would track federal spending on contracts and grants which would be modeled after the Recovery Accountability and Transparency Board. The new board would be designated as the Federal Accountability and Spending Transparency Board (FAST Board).191 Thus, there is a move to employ the ARRA accountability mechanisms permanently, across the Government.

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