

MEMORANDUM

TO: New Jersey Local Government Units

FROM: The New Jersey Recovery Accountability Task Force

DATE: August 10, 2009

RE: American Recovery and Reinvestment Act

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act (“ARRA” or “Recovery Act”), which authorizes the expenditure of billions of dollars in an effort to revive the nation’s economy. New Jersey will receive ARRA funds through a number of different funding streams that will flow through various departments of state government as well as directly to units of local government.

Governor Corzine created the New Jersey Recovery Accountability Task Force (“Task Force”) to monitor the distribution of Recovery Act funds in New Jersey and provide for transparency and accountability in Recovery Act expenditures. The Mission Statement of the Task Force is attached. This memorandum from the Task Force seeks to provide guidance to ensure that government units properly distribute and account for ARRA funds. The intention of this document is to provide assistance to New Jersey government units and promote transparency and best practices under this complicated federal statute.

Please note that the guidance reflected in this memorandum is aimed at Recovery Act programs generally, rather than particular funding streams. It is designed to have relevance for all types of government units and agencies. As issues arise as to particular programs and government entities, government units are encouraged to contact the appropriate state or federal agency, or call on the other resources identified in this memorandum. Moreover, this guidance is not intended to supersede or serve as a substitute for guidance or instructions issued by the federal Office of Management and Budget (“federal OMB”) or other federal agencies. All government units should remain fully familiar with such ongoing federal guidance and instructions.

Transparency and Accountability

The unprecedented level of funding provided under the Recovery Act also brings with it unprecedented requirements for transparency and accountability. It is essential that Recovery Act resources be used effectively and efficiently and that the public have confidence in the propriety of these expenditures. The use of these funds is being reviewed and evaluated by a variety of State and federal entities.

On the federal level, for example, Congress has directed the Government Accountability Office (“GAO”) to evaluate whether Recovery Act funds are being used by states for their intended purpose and whether they are achieving the purposes of the Recovery Act. GAO is evaluating use of Recovery Act funds with an eye toward specifically determining whether the funds are: 1) preserving and creating jobs and promoting economic recovery; 2) assisting those most impacted by the recession; 3) being invested in transportation, environmental protection and other infrastructure with long-term benefits; and 4) stabilizing state and local government budgets in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases. New Jersey is one of 16 states that have been selected for detailed GAO review, and will be the subject of bimonthly GAO reporting to Congress for at least the next two years.

Project Selection Criteria

A key step in ensuring that Recovery Act funds are utilized in a way that maximizes their positive impact in New Jersey is to ensure that they are distributed based upon clear, transparent, and appropriate merit-based criteria. President Obama and Governor Corzine both have expressed their commitment to the use of such criteria for selection of ARRA projects and funding recipients. It is important that the criteria to be used and the process by which funding decisions are made advance the purposes of the ARRA and are easily understood by the public.

Guidance in developing transparent, merit-based selection criteria can be found in a memorandum sent by President Obama to federal agencies on March 20, 2009. In that document, the President instructs that merit-based selection criteria should be designed to support projects that have, to the greatest extent, a demonstrated or potential ability to:

- Deliver programmatic results;
- Achieve economic stimulus by optimizing economic activity and the number of jobs created or saved in relation to the federal dollars obligated;
- Achieve long-term public benefits by, for example, investing in technological advances in science and health to increase economic efficiency and improve quality of life; investing in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; fostering energy independence; or improving educational quality; and
- Satisfy the Recovery Act’s transparency and accountability objectives.

(Memorandum from President Obama dated March 20, 2009).

In addition, when drafting criteria and considering projects to be funded, there are certain prohibitions in the Recovery Act of which your government unit should be aware and which should be communicated to any subgrantees. Specifically, the Recovery Act explicitly prohibits the use of Recovery Act funds by any state or local government (or private entity) for “any casino

or other gaming establishment, aquarium, zoo, golf course or swimming pool.” (Recovery Act § 1604). President Obama’s March 2009 memorandum explicitly noted this prohibition and further directs federal agencies not to fund any projects “similar” to those described above. Accordingly, your government unit should take steps to ensure that ARRA funds are not utilized for the type of projects specifically delineated or for projects that are similar in nature.

In addition, it is important that each government unit keep a clear record of how all discretionary funding streams are considered, reviewed and distributed. It is similarly important to ensure that any related guidance or instruction you receive from any federal agency is appropriately memorialized, whether in an e-mail, a confirming letter to the agency, or a memo to your own files.

Federal Contracting and Other Requirements

The Recovery Act specifically requires that every effort be made for contracts funded under the ARRA to be awarded through the use of competitive contracting procedures. (Recovery Act §1554).¹ Indeed, the ARRA requires that a summary of any ARRA-related contract that is not awarded using competitive procedures be posted on the federal Recovery Act website. The Recovery Act similarly requires that to the maximum extent possible, all contracts funded under the ARRA are to be structured as fixed-price contracts. The ARRA also contains provisions concerning “Buy American” obligations and Davis-Bacon wage rate requirements. (Recovery Act §§ 1605, 1606).

Additional federal laws and regulations may apply to your expenditure of these federal funds. These federal sources of law may impose requirements beyond or different than those imposed by State law or typical local practice. Some government units may not typically receive federal funds and therefore may not be familiar with these requirements. Your government unit should review the particular provisions of the Recovery Act and federal law generally regarding these requirements, in consultation with counsel.

Effective Management of Contracts and Grants

Federal OMB has advised agencies to “structure [grants and contract awards] to result in meaningful and measurable outcomes that . . . promote the goals of the Recovery Act. The evaluation criteria for award should include those that bear on the measurement and likelihood of achieving these outcomes.” (Federal OMB April 3, 2009 Implementation Guidance at 47, 53).

Contract Management

¹ The New Jersey Department of Education is seeking further guidance from the U.S. Department of Education and federal OMB concerning the scope of this provision as it applies to local education authorities (school districts).

In the area of contract management specifically, the GAO has developed a series of “basic principles” to prevent some of the problems that have affected contract spending in other contexts. We strongly recommend that your government unit follow these best practices in overseeing ARRA-related contracts (as well as other contracts that your agency manages) absent compelling reason to do otherwise:

- 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;
- 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;
- Enforce penalties for companies and individuals that commit severe ethics violations or fail to demonstrate acceptable performance, and refer suspected fraud to the appropriate agency promptly; and
- Coordinate with state and local program officials and auditors in the planning and execution of contracts, agreements, and audits and other reviews.

Grant Management

Similarly, a group of federal and state audit organizations chaired by the U.S. Comptroller General has highlighted what it called “promising practices” for improving grants accountability. Some specific examples of these best practices include:

- Assessing applicant capability to account for funds;
- Including clear terms and conditions in grant award documents;

- Providing grant-management training to staff and grantees;
- Consolidating information systems to assist in managing grants;
- Coordinating programs with similar goals and purposes;
- Linking activities with program goals and working with grantees to develop performance measures; and
- Monitoring the financial status of grants and monitoring subrecipients.

General Areas of Concern

Other areas of concern highlighted by the accountability community have included:

- Segregation of and separate accounting for Recovery Act funds;
- Active monitoring and measurement of contracts and grants to ensure that performance and schedule goals are being met;
- Qualification and number of contract and grant management staff;
- Timeliness of awards;
- Validation of data used in decision making against other government or third party sources;
- Inspection whenever possible to confirm information prior to payment;
- Conducting system edit checks to identify problems before payments are made;
- Training staff on fraud awareness;
- Increased information-sharing concerning potential fraud;
- Rigorous oversight of how dollars are spent after they are awarded; and

- Appropriate documentation and document retention.

(See generally GAO, *American Recovery and Reinvestment Act, GAO's Role in Helping to Ensure Accountability and Transparency*, Statement of Gene L. Dodaro, Acting Comptroller General of the United States, GAO-09-453T (March 5, 2009)).

Recipients of Recovery Act funds should assess current policies, procedures, and internal controls, assign appropriate staff, and enhance existing internal controls if necessary in the above-mentioned areas. The Office of the State Inspector General is providing training concerning such internal control and related issues. That office will be contacting government units in the State to arrange for such training. Further information concerning such training sessions can be obtained by calling the Inspector General's office at 609-292-8183.

Preparing for and ensuring that the proper internal controls, policies and procedures are in place and utilized at the earliest stages of projects using Recovery Act Funds will ensure that New Jersey meets the unique challenge of implementing the Recovery Act.

Reporting Requirements

The Recovery Act contains specific requirements concerning information that is to be reported to the federal government regarding the use of Recovery Act funds. Any entity that receives ARRA funds from the federal government (through a grant, loan, or contract) is to report the required information no later than 10 days after the end of each calendar quarter. Pursuant to the terms of the Recovery Act, the first set of these reports is due to the federal government by October 10, 2009. Federal OMB has posted detailed guidance on these reporting requirements, which can be found at www.recovery.gov/sites/default/files/m09-15.pdf (April 3, 2009) and www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21.pdf (June 22, 2009).

Please note that these reporting requirements supplement and do not supplant existing obligations under New Jersey State law to report all contracts exceeding \$2 million to the Office of the State Comptroller and to obtain preclearance from that office for the procurement process for contracts exceeding \$10 million. (See N.J.S.A. § 52:15C-10).

Document Preservation and Retention

Retaining relevant documents for each project funded by the Recovery Act is essential to a successful ARRA accountability program. ARRA funding recipients should implement, if not already in place, policies and procedures requiring the preservation and retention of all relevant Recovery Act documentation. In addition, recipients of Recovery Act funds should be aware that there are federal regulations concerning document retention that may be applicable to Recovery Act funds.

Also, the federal government is requiring separate tracking of and accounting for Recovery Act funds. Please ensure that your government unit has mechanisms in place from an accounting perspective to comply with this federal mandate.

Reporting Waste, Fraud or Abuse

The ability of the general public or persons connected to a given project to report potential fraud, waste or abuse is vital to a successful accountability program. The State of New Jersey, Office of the State Comptroller, is using the hotline number of 1-866-547-1121 to receive reports of waste, fraud or abuse in connection with ARRA funding in New Jersey. Please disseminate this information in a conspicuous manner in connection with any Recovery Act project.

Thank You

Thank you for your close attention to the guidance provided in this memorandum. We are confident that our collective efforts will ensure that Recovery Act funds are spent appropriately and with proper accountability so that we can achieve the greatest benefits possible for the people of the State of New Jersey.

The New Jersey Recovery Accountability Task Force

Governor's Chief of Staff Edward J. McBride (co-chair)
State Comptroller A. Matthew Boxer (co-chair)
NJ Medicaid Inspector General Mark Anderson
NJ Inspector General Mary Jane Cooper
NJ Chief Technology Officer Adel Ebeid
Former NJ State Auditor Richard Fair
NJ OMB Director Charlene Holzbauer
Former NJ OMB Director Richard Keevey
Governor's Deputy Chief of Staff Diane Legreide
Former U.S. OMB Official David Sandahl

NEW JERSEY RECOVERY ACCOUNTABILITY TASK FORCE

Mission Statement

The mission of the New Jersey Recovery Accountability Task Force is to provide for transparency and accountability in the use of American Recovery and Reinvestment Act (ARRA) resources in our State. Created by Governor Corzine, the Task Force will monitor the distribution of ARRA funds in New Jersey and promote the effective and efficient use of those funds.

Specifically, the Task Force will work in partnership with federal and state agencies to:

- Ensure public access to information concerning use of ARRA funds, including programmatic, financial, project, and vendor-related information, as well as criteria for project selection;
- Provide guidance to agencies receiving ARRA funds on merit-based project selection, internal controls, accounting practices, and best practices in contract management and grant administration;
- Review project-selection criteria and processes used by New Jersey government agencies receiving ARRA funds to ensure clarity and compliance with applicable standards;
- Perform a coordination role concerning ARRA-related efforts being carried out by state and local government agencies as well as relevant oversight bodies;
- Provide a means to receive and address concerns from New Jersey residents about uses of Recovery Act funds; and
- Ensure ongoing assessments of results, through agency self-analysis or reviews by State oversight entities.

The Task Force will not be involved in selecting or recommending particular projects for funding as project selection is the responsibility of the government agency implementing the particular program. The Task Force instead will provide guidance and review concerning agency use of merit-based project selection criteria to ensure clarity and compliance with applicable standards.

The Task Force is comprised of professionals with extensive backgrounds in government and government oversight. Its efforts are directed at creating a framework under which ARRA funds in New Jersey are spent transparently and effectively.