

First Friday Fraud Facts

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Share your stories

If you have a case you would like to see shared in *First Friday Fraud Facts*, please let us know.

QUESTIONS OR COMMENTS:

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This edition will continue on the topic of the American Recovery and Reinvestment Act of 2009 (ARRA) that was covered in the last issue. More specifically, it will cover some of the provisions regarding the wide range whistleblower protections.

THE AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

In addition to extraordinary levels of transparency, there are also unprecedented whistleblower protections included in the ARRA to help combat the potential for fraud, waste, and abuse in conjunction with ARRA spending.

A whistleblower is an employee or former employee who reports alleged misconduct to someone who has the power to take action. There are many whistleblower protections and specific provisions, such as those set forth in the Sarbanes-Oxley Act enacted in 2002. The provisions provided for whistleblowers as part of the ARRA are unlike many of the previous whistleblower provisions that have been enacted with legislation over the years.

The ARRA provides that a claimant need only demonstrate a reasonable belief, they do not have to be correct. The provisions also extend to contractors, subcontractors, grantees, and recipients. This not only includes those working in these capacities directly with ARRA funds, but also those working indirectly. It appears that, when faced with the decision of whether or not an individual is covered it is likely that the decisions will air on the side of coverage.

There are also important aspects to consider regarding enforcement. When retaliation occurs against a whistleblower, the individual only needs to prove that their disclosure was a "contributing factor" in the decision to take action against them. They do not have to prove or provide a preponderance of evidence. This suggests that it does not



have to be the sole reason or even the major reason, it only has to be a contributing factor no matter how small of a factor. In addition, it is up to the employer to demonstrate by “clear and convincing” evidence that they would have taken the same action regardless of the whistleblower disclosure. Therefore the burden of proof is also on the employer.

There are several other important components of the whistleblower provisions included in the ARRA. There is no express cap on damages. There is also no waiver of rights, with the exception of collective bargaining agreements. A agreement for arbitration can only be entered into after a complaint has been filed. In addition, the whistleblower provisions of the ARRA are not exclusive, in other words a claimant can proceed simultaneously under the provisions of the ARRA as well as other state or local laws.

WHAT CAN YOU DO

Consider designating an individual to assist with any agency-based internal investigations of allegations to determine if there is sufficient credible evidence to make appropriate referrals to the Oregon Department of Justice, Oregon State Police, and the Oregon Secretary of State Audits Division. It is also important to inform program administrators and sub-grantees of the whistleblower protections offered in section 1553 (available on the State Controllers Division Website) of the ARRA.

Allegations of ARRA fraud, waste, or abuse can also be reported to the State Controllers Division Statewide Financial Internal Controls Officer. Additional tools and resources are available on the SCD webpage at:

http://www.oregon.gov/DAS/SCD/SRS/IC_ToolKit_ARRA.shtml

This webpage was created as a way to provide a central location for state agencies to find useful information, resources, tools, and links regarding the ARRA. The site is constantly changing as more information and resources become available.

ANTITRUST VIOLATIONS—BID RIGGING

Much of the spending in the ARRA will likely be done in a way that utilizes the services of contractors. As such it is a good opportunity to review some of the antitrust violations that can occur in the contracting process. One such violation is a form of collusion known as bid rigging. This is a way in which

two or more parties, seemingly competitors, come together and effectively raise their prices through what is intended to be a competitive bidding process. In this scheme competitors agree in advance who will submit the winning bid in a competitive bidding process. Bid rigging is typically found in the form of bid suppression, complementary bidding, or bid rotation. Bid suppression is when one or more competitors agree to refrain from bidding or withdraw a bid in order to allow the designated winning competitor to “win” the bid. Complementary bidding is competitor submit bids that are either significantly higher or have special condition that would enable the designated party to win the bid. Bid rotation is when competitors submit bids taking turns being the low bidder.

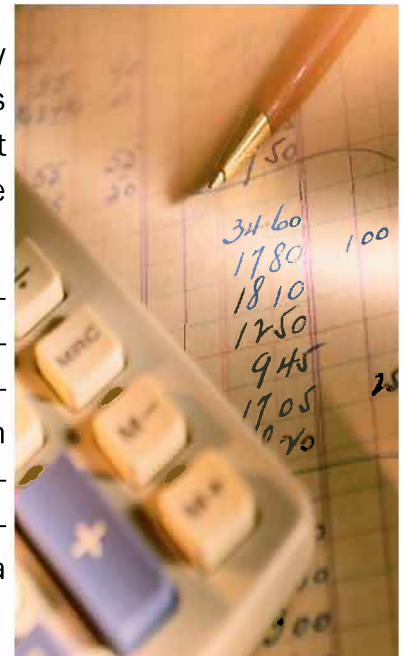
FRAUD CASE OVERVIEW

This case outlines a bid rigging scheme involving highway construction projects (NOTE: although this case does involve defrauding a government organization, it does not involve any Oregon Government entities). In this case two competing companies (and their four owner/officers) collaborated, with the help of an employee of a third company, to split up \$100 million in projects between the two competitors. The competitors discussed among themselves their prospective bid submissions and designated which would submit the low bid and high bid for each project (complementary bidding).

The scheme was discovered when an individual at a non-conspiring company began to suspect bid rigging among the competitors. Federal investigators were alerted to the scheme and the employee from the third company that was involved in the scheme cooperated with investigators to break up the operation.

Over a six year period the two conspiring organizations were able to defrauded the state highway department of an estimated \$1.7 million in overcharges. As a result three of the four conspirators were sentenced to between 12 and 17 month in prison. Over \$3.1 million in fines and restitution charges were ordered to be paid by the individuals involved and their respective companies. The collaborating employee, turned informant, was sentenced to 120 days of home confinement, one year of probation and a \$10,000 fine for his role in the scheme.

In addition, the two conspiring companies were debarred from bidding on state projects for five years.



TOOLS & RESOURCES

Oregon Internal Control Toolkit for the ARRA:

http://www.oregon.gov/DAS/SCD/SRS/IC_ToolKit_ARRA.shtml

The US Department of Justice Antitrust Division provides extensive resources to help identify fraud and collusion and report possible antitrust violations associated with ARRA funding. This information can be found on their website:

http://www.usdoj.gov/atr/public/criminal/economic_recovery.htm

State Controller's Division Fraud Webpage:

<http://www.das.state.or.us/DAS/SCD/Fraud.shtml>

Internal Controls Webpage:

http://www.oregon.gov/DAS/SCD/internal_controls.shtml

**FIRST FRIDAY FRAUD FACTS IS
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WHO CAN YOU CALL FOR HELP?

The State Controller's Division reminds state agencies that it is always available to answer internal control questions. If you have an internal control problem or an audit finding and need help in resolving it, please contact:

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Internal control tools are on the Web!

http://www.oregon.gov/DAS/SCD/internal_controls.shtml