

The Economic Stimulus Plan and the Construction Industry

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On February 17, 2009, the President signed the \$787 billion economic stimulus package into law. The American Recovery and Reinvestment Act of 2009 presents a welcome opportunity for a construction industry and public sector reeling from the effects of the on-going financial crisis and recession. Of the \$575 billion in federal spending reflected in the new law, approximately \$135 billion is designated for construction, repair, and maintenance of federal buildings, transportation infrastructure, and other public works projects. Highlights of the Recovery Act include:

Transportation - \$49.3 billion, including \$27.5 billion for highways and \$8 billion for high-speed rail.

DoD and VA - \$7.8 billion, with \$5.5 billion to restore and modernize facilities and \$2.3 billion for the construction of new facilities, including military housing, hospitals, child-care centers, and various "quality of life" projects to support the military.

Energy Projects - \$30.6 billion, including \$11 billion for electrical grid and smart-grid projects.

Non-DoD Federal Buildings - \$13.4 billion, including \$4.5 billion for energy efficiency upgrades to existing federal buildings.

Water and Environment Projects - \$20.1 billion, including \$6 billion for DoE cleanup, \$6 billion for EPA waste-water and drinking water projects, \$1.2 billion for Superfund cleanup, and \$4.6 billion for Army Corps of Engineers civil works projects.

The following articles focus on the who, what, where, when, and how much for the construction component of the Recovery Act. It addresses how the funds will be allocated to the federal agencies, and state and local governments, and how projects will be selected for funding. It identifies some of the procurement and oversight issues created by the new law, including the Buy American provisions, the implications of www.recovery.gov, and the audit powers of the new Recovery Act Accountability and Transparency Board.

Shovels at the Ready: A Contractor's Guide to the Stimulus Package

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“The challenge for contractors is to identify which projects... will translate into actual contract opportunities.”

The billions of dollars worth of “shovel-ready” projects that could be built if money were available was a subject of great debate in connection with the discussions about how best to stimulate the economy. But now that the Recovery Act has become law, the challenge for contractors is to identify which projects are “shovel-ready” and how the “stimulus package” will translate into actual contract opportunities. Contractors are properly interested in knowing which projects will be funded and how they will be awarded. What rules and regulations will apply to contracts funded by the stimulus and what oversight will be imposed?

How the Funds are Distributed

President Obama signed the stimulus package into law on February 17, 2009. The law is in two parts—a spending package of \$318 billion and a tax package that is even larger. It is the former number that is intended to be the short-term job creation engine for the construction industry, with roughly two-thirds of the appropriations designated for infrastructure and for repair, renovation, and maintenance of public buildings.

To achieve its goal of channeling the money to projects that will put people to work, the Act sets an aggressive timetable of planning and obligation for the officials allocating the funds. It is this timetable, rather than an explicit requirement for ‘shovel-readiness,’ that favors some projects and indirectly serves to exclude others. Even if a project is included on a list of planned expenditures, it must meet a short timetable for “obligation” of the funds. A project that is not sufficiently developed to allow the preparation of a contract for its construction cannot be funded by the Act.

The time limits in the Recovery Act are unusual for an appropriations law. Typically, once the federal government appropriates money to its various agencies, that is the amount of money the agency has to spend in that fiscal year. Perhaps recognizing the logistical difficulty in obligating hundreds of billions of dollars in new spending in this fiscal year (which is almost half over), the Act provides that stimulus funds will remain available for obligation until September 30, 2010 (although shorter and longer periods are imposed on specific appropriations).

The Act's funding can generally be split into two categories: first, funds controlled by the various federal agencies, and second, grants controlled by the states. The law specifies different processes for committing the funds for these two groups. There are also different reporting requirements.

For federal agencies, programs, and departments, the Act requires a periodic report to Congress setting forth progress in obligating the stimulus funds. Agencies within the Department of the Interior, for example, have 30 days to submit a "general plan" for allocating Interior's appropriations and 90 days to submit "detailed project level information associated with the general plan." The Secretary of the Army has 45 days to detail the "allocation, obligation, and expenditures" of the \$4.6 billion slated for the Corps of Engineers. The Administrator of the General Services Administration must "submit a detailed plan, by project" regarding the use of his \$5.5 billion appropriation. The Secretary of Defense has even less time to submit his "expenditure plan." His report on \$2.3 billion of spending for military construction in the United States will be due in mid-March. Of these varied time limits in the Act, the 90 days for a detailed report to Congress is the most typical. In addition, the agency is typically required to submit quarterly reports thereafter detailing its progress in obligating its funds.

The Act allocates specific amounts of money to the various agencies, but the agencies themselves will make the decisions as to precisely how the money is spent. Of the \$4.6 billion allocated to the Army Corps of Engineers, \$2

billion is specified for "construction," and \$2 billion is specified for "operation and maintenance." Within the general guidelines of the statute and with the requirement to report back to Congress, the Secretary of the Army has broad discretion to allocate his stimulus funds to specific projects as he sees fit. Of GSA's \$5.5 billion for construction, the stimulus law requires "not less than" \$4.5 billion to be spent on "measures necessary to convert GSA facilities to High-Performance Green Buildings." Other than the obligation to keep Congress informed of the expenditures, GSA has broad discretion to select particular projects for funding. Of the \$2 billion in construction funds appropriated to the Department of Defense, \$1.33 billion is dedicated to hospitals. As with the other appropriations, DoD has broad discretion to select the projects that will be funded.

The regime for awarding grants similarly allows the states discretion to select specific projects. Of the \$49 billion allocated to construction spending by the states, \$27 billion is designated for highway construction. Highway construction funds will be allocated to the states according to an existing formula that gives the most credits to states that already have the most federal-aid highways. California, Texas, Florida, and New York, for example, will receive the largest portion of highway construction funds. As with the federal construction spending, selecting specific projects is up to the individual states, but states must report what projects have been allocated funding, what projects have been bid, and what projects have started.

There is at least one important difference in the state allocation scheme. The

Act adds a use-it-or-lose-it provision that will force states to make quick choices among candidate projects. Once the allocation to the states has been completed, the states have 120 days to obligate or "suballocate" their apportioned funds. If a state does not act to obligate or suballocate its funds, the Secretary of Transportation must take back half of the uncommitted funds for distribution to states that were able to obligate them. After a year, the Secretary will reclaim whatever funds were not obligated. This scheme may make it difficult, if not impossible, for a state to complete any feasibility studies, environmental impact studies, or land acquisition for a given project, favoring the funding of projects where these initial steps are complete, or a least well underway.

A notable exception to this use-it-or-lose-it provision is the process for committing the \$8 billion appropriated for high-speed rail. In an acknowledgment of the complexity of such projects, the states will apply for grants according to a criteria that will be established by the Secretary of Transportation. Recognizing

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the additional time that will be required for these projects, funds for high-speed rail remain available until September 30, 2012.

The reporting requirement that individual projects be identified is undoubtedly designed to force federal and state actors to identify and to commit to projects quickly. Although the words “shovel-ready” do not appear in the Act itself, the projects that it makes possible are those that are furthest along in their planning or those that may even already be underway. An ideal candidate would be a project being performed in phases, where funding would allow accelerated performance. The Act does not mandate funding of these kinds of projects, but its stated purpose, time limits, and reporting requirements make those projects very easy ones to include in any allocation plan. At the same time, the fact that obligation of funds does not need to occur for over a year, in most cases, leaves open the opportunity to accelerate the planning and design of a project that could theoretically be funded within the deadline. Of course, this assumes that there will be money left at that time.

Identifying Contract Opportunities

Identifying specific opportunities created by the stimulus law will require some diligence. The stimulus law itself requires the creation of several internet resources that will include a great deal of information about contract and grant opportunities. One website, www.recovery.gov, is already online. This website will include the plans required of each federal agency describing how they intend to use the stimulus funds, as well as information about how the money has been allocated to the states. The stimulus law also requires this website to include “a link to information about announcements of grant competitions and solicitations for contracts to be awarded.” Some project-specific information is already online. Many federal agencies and several states have established stimulus information sites that are accessible through www.recovery.gov. Virginia’s site at www.stimulus.virginia.gov even allows the submission of unsolicited proposals for the use of stimulus funds.

Monitoring FedBizOpps.gov for opportunities and announcements will continue to be an important source of information about federal contract opportunities. The Recovery Act affirmatively requires federal agencies to seek competition to the “maximum extent possible.” On March 4, 2009, President Obama issued a policy memorandum reminding heads of all federal agencies of the requirement for competition. “It is the policy of the Federal Government that executive agencies shall not engage in noncompetitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards have been put in place to protect the taxpayer.” Even when they are awarded without competition, stimulus-funded contracts will be announced on FedBizOpps. In addition to the publication requirements already in place, a February 18, 2009 policy memorandum issued by the Office of Management and Budget requires agencies to publish “pre-solicitation and award notices of orders under task and delivery order contracts.” Stimulus-funded opportunities are already appearing on FedBizOpps. The Naval Facilities Engineering Command, for example, has posted a solicitation for a large multiple award construction contract allowing it to complete “various large dollar

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maximum extent
possible.”

construction projects” in Metropolitan Washington, DC.

Another important source of information about contracting opportunities are the project priority lists created by federal agencies and by state and local governments independent of their reports to Congress. The Naval Facilities Engineering Command, for example, publishes a MILCON Solicitation/Award Forecast identifying specific projects, the amount programmed for the work, and the projected date of award. State and local governments also publish lists of prospective construction projects. The Washington Metropolitan Transit Authority has already published a list of projects for which it anticipates using stimulus funds. The United States Conference of Mayors recently issued a report identifying \$150 billion in projects that may be candidates for stimulus funds.

Contractors should be aware that federal agencies will also likely seek to accomplish much of their stimulus-funded construction spending through task orders issued under indefinite-quantity (IDIQ) contract vehicles that are already in place. Multiple award schedule (MAS) contracts have been used with increasing frequency in recent years, and there are a number of such contracts in place for the procurement of construction services. The Air Force, for example, has 20 IDIQ contracts in place with the largest construction contractors in the United States through its Heavy Engineering Repair & Construction (“HERC”) program. Through 2011, the HERC contracts allow the Air Force to spend up to \$15 billion. The General Services Administration has already negotiated MAS contracts with

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suppliers of solar and alternative energy systems, which will no doubt be utilized in connection with the \$4.5 billion planned for improving the efficiency of federal buildings.

Until last year, one of the most controversial aspects of MAS contracts was a provision in the 1994 Federal Acquisition Streamlining Act, which exempted most MAS task and delivery orders from bid protests. This bid protest exemption was partly lifted by language in the 2008 Defense Authorization Act. Contractors may now protest the award of a task order that exceeds \$10 million to the Government Accountability Office. Given the magnitude of the additional spending and the desire to spend the stimulus funds quickly, there will almost certainly be errors in the procurement process. The availability of a GAO bid protest will serve as an inducement to agencies to play fair in soliciting proposals from the private sector. GAO has proven to be an effective forum for resolving contract award controversies.

Rules, Regulations, and Oversight

Contractors that actually receive a stimulus-funded contract will be subject to all of the typical rules and regulations that accompany

public contracts. Federal construction contracts, for example, will be subject to the Federal Acquisition Regulation, the Contract Disputes Act, the Miller Act, the Davis-Bacon Act, the False Claims Act, and the Buy American Act. The Buy American provisions were the subject of intense debate in Congress before the stimulus law was finalized, but they are included in the final version of the law. Although there are many important exceptions to the Buy American requirement, the Recovery Act affirmatively requires all iron, steel, and manufactured goods used in the construction, alteration, maintenance, or repair of a public building or public work to be produced in the United States.

The stimulus law also includes important oversight provisions that will be of interest to many contractors. It creates an entity called the “Recovery Act Accountability and Transparency Board,” comprised of the Inspectors General from ten civilian agencies and a chairperson appointed by the President. In addition to providing marginal additional funding for the inspectors general themselves, the Recovery Act authorizes \$84 million for the Board’s operation, and directs it to conduct various oversight functions relating to the use of the stimulus funds. Among other things, the Board is expressly authorized to review compliance with competition requirements, and to audit the use of stimulus funds. In addition to “collaborating” with the agency inspectors general, the Board has its own independent power to issue subpoenas compelling the appearance of witnesses and to hold public hearings.

Contractors will also be interested in the requirement for public reporting of the activities and conclusions of the

Accountability and Transparency Board. The Board is required to make quarterly reports to the President and Congress summarizing “the findings of the Board and the findings of the inspectors general of agencies.” Except to the extent information is exempt from public disclosure under the Freedom of Information Act, the Board’s reports are to be publicly available and reported on a website that the Act requires the Board to create. The website must also include “accountability information, including findings from audits, inspectors general, and the Government Accountability Office,” and must connect to other government websites with information relating to the Act. With the prospect of a routine audit or investigation report being published on the internet, contractors will need to exercise additional vigilance in protecting their trade secrets and proprietary information from the eyes of the public and their competitors.

“Buying American” to Rebuild America: Will Section 1605 Stimulate or Stifle?

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What’s so bad about buying American? Why are free trade advocates up in arms about the required use of American-made materials in public construction projects funded with stimulus dollars? The controversy has been fueled by accusations that the Buy American requirements included in the Recovery Act will create a global trade war which, in turn, will further damage the economy. Some have even gone so far as to compare the Recovery Act’s Buy American provisions to the imposition of the Smoot-Hawley Tariff in 1930, which

is said to have deepened the severity of the Great Depression.

Notwithstanding the disagreement in the press, the requirements of the Buy American Act are familiar components of public construction projects. Under subpart 25.2 of the Federal Acquisition Regulation, the Buy American Act applies to all “contracts for the construction, alteration, or repair of any public building or public work in the United States.” FAR 25.200.

What the Recovery Act Requires

Section 1605 of the Recovery Act, entitled “Use of American Iron, Steel, and Manufactured Goods,” mirrors certain provisions of the Buy American Act

with respect to construction materials. It applies to any project involving “the construction, alteration, maintenance, or repair of a public building or public work” funded with stimulus dollars. Specifically, § 1605 requires such projects to utilize “iron, steel, and manufactured goods... produced in the United States.”

Despite the requirement to use American-produced goods, the stimulus package also adopts several well-recognized exceptions. Buy American requirements do not apply if the head of a Federal department or agency makes any one of the following determinations:

- application of the Buy American restriction “would be inconsistent with the public interest”;

- “iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality”; or
- use of American-made iron, steel and manufactured goods would “increase the cost of the overall project by more than 25 percent.” 1605(b)(1)–(3).

Following heated discourse in the press and opposition by Senate Republicans, the language signed into law also includes a requirement that the Buy American provisions be “applied in a manner consistent with United States obligations under international agreements.” 1605(d).

What the “Buy American” Restrictions Mean for Contractors & Suppliers

While portions of 1605 track the requirements of FAR subpart 25.2, the distinctions are significant enough to create some confusion as to their true meaning. On the one hand, it is clear that the restrictions will apply only to public construction projects. The Recovery Act is slightly more far-reaching than FAR 25.200 in terms of scope, as it also applies to “maintenance” projects. This new requirement may be the source of controversy, since a significant portion of the stimulus dollars are allocated to maintenance rather than repair and improvement.

Another question is presented by the absence of a definition for the terms “public building” and “public works.” It makes sense that these terms would

be defined in accordance with the definitions reflected in the existing FAR Buy American Act provisions, and the House version of the stimulus package expressly adopted those definitions. But the final version of the law eliminated this clarification.

Furthermore, the Recovery Act does not define the meaning of the phrase “produced in the United States.” Under FAR Part 25, “domestic construction material” means an “unmanufactured construction material mined or produced in the United States” or a “construction material manufactured in the United States”, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components” or “(ii) [t]he end product is a [commercially available off-the-shelf] item.” FAR 25.003. The Recovery Act does not use the term “domestic construction material” and does not adopt the existing FAR definitions. The lack of precision on this issue may be a source of disputes on stimulus-funded construction projects.

Another source of controversy will be found in the Recovery Act’s requirement that the Buy American restrictions be “applied in a manner consistent with United States obligations under international agreements.” FAR Subpart 25.2 recognizes that the dollar value of an acquisition governs whether or not certain trade agreements apply. Specifically, FAR 25.202 refers to the application of subpart 25.4 (Trade Agreements) in construction contracts valued at \$7,407,000 or more. FAR 25.202(c). Although it is likely that

“Although the debate over the inclusion of the Buy American requirements has ended, controversy over their scope and implementation will likely continue.”

the intent of the Recovery Act was to adopt similar restrictions, they were not expressly adopted. As such, agency and department heads may be required to independently review and interpret the requirements of various “international agreements.”

Conclusion

Although the debate over the inclusion of the Buy American requirements in the stimulus package has ended, controversy over their scope and implementation will likely continue. Due to the lack of specificity in the language within the Recovery Act, there is some uncertainty as to the meaning of some of the new requirements. In practice, the Buy American requirements in the Recovery Act will affect every step of the contracting process—from bid preparation to substantial completion. Only time will tell whether the restrictions provide a much-needed economic boom or perpetuate the bust.

Appropriations for Military Construction Under The Recovery Act

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According to an estimate by the Associated General Contractors included in the conference report on the Recovery Act, each billion dollars in non-residential construction spending creates or sustains 28,500 jobs. The conferees thus estimated that the \$3.8 billion in the Recovery Act for military construction will produce 97,200 jobs.

The military construction supplemental appropriations are set out in Title X of the Recovery Act. They are presented in outline form below for clarity. While the military construction programs in the final bill were reduced by over \$3 billion from those passed by the House, the final amounts remain impressive.

Types of Projects Authorized

The Recovery Act provides funds directed primarily towards projects in the United States for medical facilities, housing, child development centers, and energy savings.

Medical Facilities - \$2.5 billion. The Recovery Act gives about \$2.5 billion for defense-related medical facilities - \$100 million for Army warrior transition centers; \$1.3 billion for DOD hospitals; \$1 billion for Veterans Health Administration medical facilities and \$150 million for State nursing homes.

Housing - \$890 million. The Recovery Act gives over \$890 million for defense-related housing. The Navy and Air Force each get \$100 million for troop housing. Family Housing construction and maintenance is also funded at about \$136 million - the Army receives about \$38 million and the Air Force about \$96 million. An additional \$555 million is given for the DOD Homeowner Assistance Fund, which allows DOD to buy and maintain housing near military installations.

Child Development Centers - \$240 million. The Recovery Act provides \$240 million for construction of child development centers on military installations. The Army, Navy, and Air Force are each allotted \$80 million.

Energy Saving Projects - \$220 million. The Recovery Act contains \$220 million for energy saving or alternative energy projects. The Navy receives \$100 million for energy projects and DOD an additional \$120 million.

The Recovery Act merely provides money for these types of projects and leaves it to DoD and VA to decide upon the specific projects to be funded. The money

“The conferees estimate that the \$3.8 billion in the Recovery Act for military construction will produce 97,200 jobs.”

is made available immediately and may be used to fund planning, design and construction. Most provisions require the Secretaries of Defense and Veterans Affairs to file a report to the House and Senate Appropriations committees within thirty days describing how the money will be spent. Most of the appropriations remain available through fiscal year 2013, ending September 30, 2013. But significant amounts must be spent in the next eighteen months by the end of fiscal 2010.

Breakdown of Military Construction Provisions

Department of Defense

Military Construction - Army. The Recovery Act appropriates \$180 million to the Army for military construction available through the end of fiscal year 2013:

- \$80 million for child development centers
- \$100 million for warrior transition centers, medical treatment facilities for wounded soldiers.

Military Construction - Navy and Marine Corps. The Recovery Act appropriates \$280 million to the Navy and Marine Corps for military construction available through the end of fiscal year 2013:

- \$100 million for troop housing
- \$80 million for child development centers
- \$100 million for energy conservation and alternative energy projects

Military Construction – Air Force. The Recovery Act appropriates \$180 million

available through September 30, 2013:

- \$100 million for troop housing
- \$80 million for child development centers

Military Construction - Defense-Wide.

The Recovery Act appropriates \$1.5 billion available through September 30, 2013:

- \$1.330 billion for hospitals
- \$120 million for energy conservation programs

Military Construction – Army National Guard.

The Recovery Act appropriates \$50 million available through September 30, 2013. It does not specify the purposes for the spending.

Military Construction – Air National Guard.

The Recovery Act appropriates \$50 million available through September 30, 2013. It does not specify the purposes for the spending.

Family Housing Construction – Army.

The Recovery Act appropriates \$34,507,000 available through September 30, 2013.

Family Housing Operation and Maintenance – Army.

The Recovery Act appropriates \$3.932 million. It does not specify the purposes for the spending.

Family Housing Construction – Air Force.

The Recovery Act appropriates \$80.1 million available through September 30, 2013.

Family Housing Operation and Maintenance – Air Force.

The Act appropriates \$16.461 million. It does not specify the purposes for the spending.

Homeowners Assistance Fund.

The Recovery Act appropriates \$555 million,

available until it is expended, for the DOD’s Homeowner’s Assistance Fund that allows the DOD to buy and manage housing near military installations. The program allows DOD to “acquire title to, hold, manage, and dispose of, or, in lieu thereof, to reimburse for certain losses upon private sale of, or foreclosure against, any property improved with a one- or two-family dwelling which is situated at or near a military base” 42 U.S.C. § 3374.

Department of Veteran Affairs

Veterans Health Administration – Medical Facilities.

The Recovery Act provides the VA with \$1 billion, available until September 30, 2010, for these medical facilities. Since this money must be spent in the next 18 months, these projects may be among the first to get underway.

National Cemetery Administration.

The Recovery Act contains \$50 million for monument repairs and energy projects, available until September 30, 2010.

Grants to State for Construction and Renovation of State Nursing Homes.

The Recovery Act allocates \$150 million, available until September 30, 2010 for grants to help States construct state nursing home and domiciliary facilities and to remodel existing hospital, nursing home, domiciliary facilities in State homes. The State Homes furnish care to veterans, pursuant to 38 U.S.C. §§ 8131 – 8137.

Homeland Security Appropriations Under The Recovery Act

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“The Recovery Act appropriates more than \$2.6 billion to be spent on construction, equipment, and services relating to homeland security.”

The Recovery Act appropriates more than \$2.6 billion to be spent on construction, equipment, and services relating to homeland security. The funds include:

\$200 million for a new Department of Homeland Security Headquarters. This funding covers the planning, design, construction, site security, IT infrastructure, fixtures, and other costs. DHS has been planning for several years to consolidate all of its operations into one facility rather than having offices spread out throughout Washington and the surrounding area. Over the past few years, there has been a debate in Congress over the location of this new facility. In January, the District of Columbia National Capital Planning Commission approved plans for DHS to relocate at the site of the former St. Elizabeth’s mental hospital in Southeast DC. According to reports, the construction will involve the renovation of several historic buildings for use by DHS.

\$1 billion for the purchase and installation of “checked baggage explosive detection systems and checkpoint explosives detection equipment” at airports across the nation based on a priority system to be developed by the Transportation Security Administration.

\$80 million to spend on tactical communications equipment and radios for use by US Customs and Border Protection and US Immigration and Customs Enforcement.

\$100 million for procurement of non-intrusive inspection systems by the US Customs and Border Protection.

\$100 million for “expedited development and deployment of border security technology” on the Southwest border of the United States.

\$420 million for construction at government-owned land border ports of entry.

\$98 million use by the Coast Guard for the construction of improvements at “shore facilities and aids to navigable facilities.”

\$142 million for use the Coast Guard to alter or remove “obstructive bridges.”

\$150 million in state and local grants to implement the recommendations of the 9/11 Commission.

\$150 million in grants to states and localities for use in improving port security.

\$210 million to modify, upgrade, or construct “non-Federal fire stations.”

The grant money will be issued competitively and no grant under the program can exceed \$15,000,000.

Despite the additional \$2.6 billion appropriated to the Department of Homeland Security, the Recovery Act appropriates only \$5 million for audit and oversight functions conducted by the DHS Inspector General. No additional money was provided for additional procurement staff, to improve DHS contracting operations, or to provide more training for acquisition officials.

A “Berry Amendment” for DHS

Another significant element of the Homeland Security appropriations is the imposition of Buy American requirements to the purchase of textile products. The requirements are similar to those imposed on DoD under the “Berry Amendment,” but with a few twists. The Berry Amendment is a limitation on DoD purchases of foreign textiles, food, and specialty metals dating back to 1941.

The items covered by the new restriction include a variety of textile products that are “directly related to the national security interests of the United States.” The following products are identified in section 604 of the Recovery Act:

- clothing and the materials and components thereof, other than

sensors, electronics, or other items added to, and not normally associated with clothing (and the materials and components thereof);

- tents, tarpaulins, covers, textile belts, bags, protective equipment (including but not limited to body armor), sleep systems, load carrying equipment (including but not limited to fieldpacks), textile marine equipment, parachutes, or bandages;

- cotton and other natural fiber products, woven silk, or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wood (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or

- any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.

This list is similar to the list that the Berry Amendment imposes on DoD, with a few additional elements. The DHS list includes “protective equipment,” which allows DoD to procure certain protective clothing used for chemical warfare from countries with which the United States has trade agreements or programs. See 10 U.S.C. § 2533a(e). The Recovery Act calls for the Buy American restrictions to be “consistent with United States obligations under international agreements,” but it does not include the specific exception for chemical protective clothing available to DoD.

The Recovery Act also allows the purchase of foreign-made textiles if

the Secretary of DHS determines that compliant items “cannot be procured as and when needed at United States market prices.” 604(c). It does not apply to procurements under the simplified acquisition threshold. 604(f). But, it does apply to the purchase of commercial items. 604(g). These exceptions are similar to the operation of the Berry Amendment.

The Recovery Act also provides an exception if non-compliant fibers make up less than 10 percent of the total value of the “total purchase price” in the end item. 604(d). This provision mimics the DoD regulation at DFARS 252.225-7012(c)(2).

One exception that may need clarification is the language stating that restrictions on foreign textiles do not apply to “emergency procurements.” 604(e). This exception is listed under the heading “Exception for Certain Procurements Outside the United States,” but language used in the statute does not specifically apply to foreign procurements. Indeed, in this regard, the exception differs from the DoD statute, which states that it does not apply to “emergency procurements . . . by, or for, an establishment located outside the United States for the personnel attached to such establishment.” 10 U.S.C. § 2533a(d) (3). There is similarly no language in the Recovery Act that addresses whether the restrictions on foreign textiles apply to procurements conducted under other than competitive procedures relating to “unusual and compelling urgency of need,” which is set forth in the DoD statute.

Stimulating Optimism for High-Speed Rail Development

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“According to Secretary LaHood, high-speed rail is ‘the transformational issue for this Administration when it comes to transportation.’”

High-speed rail and more efficient intercity passenger rail service has been a dream of transportation planners for decades. Indeed, it is a passenger rail option that has been successfully demonstrated on a modest scale at moderate speeds by Amtrak’s northeast corridor Acela Express service. Acela’s success is the product of substantial public funding for a variety of critical rail infrastructure improvements that were required to support the enhanced speed of the electric trains. Regrettably, with an average speed of 86 miles per hour, Acela has yet to achieve truly high speed operation to rival Japanese and European systems. Speed requires more than sleek and powerful locomotives and rail cars. To match speeds delivered by systems like France’s TGV trains, substantial improvements must be made to rail beds, curves, bridges, crossings, electric traction equipment and the challenges of sharing tracks with freight carriers. The Recovery Act may provide the stimulus to launch the design and eventual construction of improvements needed to achieve real high speed operation of 150 miles per hour or more in the United States.

Transportation agencies and advocacy groups are promoting the creation of service in each of the ten corridor designations. In addition to the existing Acela service, other high-speed initiatives are underway. California created a High Speed Rail Authority in 1996. Supported by a \$9 billion bond issue approved in 2008, the Authority is proceeding with planning for service in the San Francisco/Sacramento/Los Angeles/San Diego corridor. Other initiatives have had a more tormented history. In 2000, Florida passed a constitutional amendment requiring a high-speed rail system. The amendment was subsequently repealed in 2004 due to concerns about the expense. Florida is, nevertheless, moving forward with other intercity passenger rail options. Currently in the procurement phase of a “design/build” initiative for a commuter rail train through central Florida, FDOT continues to advance its SunRail program. Unfortunately, funding continues to be a challenge. February 2009 bids on the project substantially exceeded FDOT estimates. State and local transportation agencies are optimistic that Federal dollars under the Recovery Act will bridge their funding gaps.

Rail and transit programs throughout the country will benefit directly and indirectly from the \$135 billion in infrastructure investment provided by the Recovery Act. \$8 billion is designated as capital assistance for high-speed rail corridors and intercity passenger rail service. According to the Government website devoted to the Act (www.recovery.gov), the investment represents the “largest increase in funding of our nation’s roads, bridges, and mass transit systems since the creation

of the national highway system in the 1950s.” Realistically, \$8 billion is a small down payment for an ambitious high-speed rail program. Nevertheless, it provides a healthy source of funds for the planning and engineering needed to make improvements to support the service. Aside from one paragraph of text concerning capital assistance for high-speed rail, the Recovery Act assigns responsibility for prioritizing the deployment of funds to Transportation Secretary Ray LaHood. The Act provides that within 60 days of enactment, the Secretary shall submit a strategic plan describing how the funds will be used

to improve and develop high speed rail systems. Within 120 days of enactment, the Secretary is directed to issue interim guidance to applicants concerning grant terms, conditions, and procedures. The Recovery Act specifically announces that federal grant funding, at the option of the recipient, may be up to 100 percent. Additionally, the Act expressly waives any requirement that funded projects be in an existing state rail plan. The high-speed rail funding under the Recovery Act expires in September 2012.

The future success of the Recovery Act and its influence on passenger rail

service hinges on the strategic plan to be submitted by the Secretary, and more importantly, a commitment by Congress to continue funding more than just the current \$8 billion “down payment.” Fortunately, it appears that passenger rail will be significant priority for the Obama administration. Secretary LaHood has described high-speed rail as “the transformational issue for this administration when it comes to transportation.” We will continue to provide updates on the developing initiative for capital assistance for high-speed rail and its implications for grant recipients.

GSA Funding for Green Building Under the Recovery Act

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Congress and the President have taken a substantial step toward assisting GSA in meeting energy efficiency goals by allocating \$4.5 billion dollars under the Recovery Act to GSA’s Federal Building Fund to convert existing GSA facilities to High-Performance Green Buildings. The Energy Independence and Security Act of 2007 requires GSA to reduce its energy consumption by 30% by 2015, to reduce fossil fuel consumption and to “green” a substantial portion of the agencies facilities. GSA has one of the largest real estate holdings in the world, with over 8,600 assets with nearly 354 million square feet of rentable space spread across all 50 states, 6 territories and the District of Columbia.

The Recovery Act requires GSA to provide the House and Senate Appropriations Committees with a detailed plan, including a list of projects and specifics on how these funds are going to be used, by April 3, 2009, forty-five days after the law was enacted. The majority of this funding must be allocated by GSA by September 30, 2010, with the remainder obligated by September 30, 2011.

According to Paul Prouty, Acting Administrator of GSA, in his testimony before the House Committee on Transportation and Infrastructure, Subcommittee on Economic

Development, Public Buildings and Management, on February 11, 2009, the agency has over 500 projects that it considers ready to go and eligible for this funding. The agency is going to focus its spending to get the biggest return on its investment, looking for projects with both high energy efficiency and high job creation. GSA believes that this will stimulate the economy by getting thousands of unemployed construction workers back to work. Some of the smaller projects that GSA believes have high value and can get started almost immediately include adding thicker insulation, installing variable frequency drives on mechanical equipment, converting lighting to LED, and retrofitting or replacing windows. Larger projects that GSA has identified include

improvements such as installing intelligent lighting systems, replacing flat roofs with ENERGY STAR membranes, photovoltaic panels or planted roofs and the installation of advanced meter systems.

GSA expects that its administrative resources will be challenged in this ambitious effort and is implementing systems to assist in speeding up project execution. One of the main methods is by standardizing scopes of work, business practices, policy and guidance so that all of its offices will be able to efficiently manage these projects. GSA is expected to use Blanket Purchase Agreements, Federal Supply Schedule and other IDIQ contracts to speed and streamline the procurement process. It is also exploring

the use of more design-build contracts.

In order to remain accountable to the taxpayers paying for these upgrades, GSA is working on developing the means to measure energy performance in all of the buildings that will be improved through the use of stimulus funds and will be commissioning these buildings to ensure that the technology used performs to the standards that they were intended to meet. While the funds that have been made available to GSA are not likely to get the agency over hurdle of a 30% reduction, it will surely reduce energy spending on these buildings and will go a long way to improving the federal government's existing building stock and increasing the value of its assets.

School Renovation and Modernization Under The Recovery Act

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Although earlier versions of the Recovery Act included up to \$14 billion specifically for school renovation, the final language of the Act forces states to prioritize school renovation and modernization projects against other education needs in allocating stimulus funds. Although renovation and modernization projects may not see the influx of money schools originally anticipated, there is still ample opportunity for schools and contractors to benefit.

Funds for school renovation and modernization are provided in Title XIV of the Recovery Act entitled, State Fiscal Stabilization Fund. The Act provides \$53.6 billion for necessary expenses to be administered by the Department of Education. Section 14002(b) provides that state Governors allocate 18.2%, or approximately \$8.8 billion

for public safety and “other government services” These other services include modernization, renovation or repair of public school facilities and higher education facilities. Higher education buildings that are eligible for stimulus funds include those facilities “that are primarily used for instruction, research, or student housing.” The language of the Recovery Act indicates a preference for modernization and repair efforts that are “consistent with a recognized green building rating system.”

Because the Act does not provide funds specifically for school renovation and modernization, it is unclear whether the funds allocated to schools will be used for renovation and modernization and if so, how much. There are however, some restrictions that local educational agencies and contractors should be aware of before undergoing renovation or modernization efforts financed by stimulus funds:

Time Requirements: Section 14001(f) of the Recovery Act requires that state Governors return any funds received that the Governor fails to “award as subgrants or otherwise commit within two years of receiving such funds.” The Secretary of Education is then empowered to reallocate those funds to other states.

Maintenance Costs: Funds received may not be used by local education agencies for payment of maintenance costs.

Restrictions On Facilities: Funds received may not be used for renovation or modernization of “stadiums or other facilities primarily used for

athletic contests or exhibitions or other events for which admission is charged to the general public.” Funds are likewise prohibited for renovation or modernization projects on “stand alone facilities whose purpose is not the education of children.” Such facilities include central office administration, operation, or logistical support facilities.

No Vehicles: Funds received may not be used to purchase or upgrade vehicles.

Restrictions on Higher Education

Facilities: Funds received by higher education institutions may not use such funds for facilities “used for sectarian instruction or religious worship,” or facilities in which a “substantial portion of the functions of the facilities are subsumed in a religious mission.”

In addition to funds made available through the State Fiscal Stabilization Fund, money for school renovation and modernization is available in Title VIII of the Act, which provides additional funds in the form of “Impact Aid” to the Department of Education. The funds may be used in a variety of ways, including construction projects. One percent of funds may be withheld for management and oversight and 60% of those funds not withheld will be made available to eligible local education agencies through competitive grants to carry out “emergency repairs of school facilities.” Impact Aid grants may also be awarded to local education agencies for modernization projects. In awarding Impact Aid grants to eligible education agencies, the Secretary of Education will consider several criteria:

Safety: The Secretary will look to whether a facility poses a health

“Although renovation and modernization projects may not see the influx of money schools originally anticipated, there is still ample opportunity for schools and contractors to benefit.”

or safety risk to students or school personnel. Such risks include non-compliance with building codes or inaccessibility for persons with disabilities.

Green Building: The Secretary will also consider the extent to which the new construction utilizes energy efficient and recyclable materials.

Efficiency: A contractors’ ability utilize non-traditional or alternative building methods to expedite construction and project completion to maximize cost efficiency and whether the project can be completed within 24 months will also be considered in awarding grants.

Other Sources of Funds: The availability of other resources to complete the project will also be considered in making grant awards.

Finally, under the Recovery Act, state and local governments may issue up to \$22 billion in qualified school construction bonds in 2009 and 2010. Instead

“Under the Recovery Act, state and local governments may issue up to \$22 billion in qualified school construction bonds in 2009 and 2010.”

of interest, bondholders receive tax credits and school districts are only required to pay back the principal. The bonds are intended to make investment in school construction more attractive to investors and more affordable for schools. Proceeds from the bonds may be used for construction, renovation or repair of a public school facility, or to acquire land upon which a facility is to be constructed.

To determine how to allocate stimulus funds, local education agencies must decide whether the funds are best spent on school renovation and modernization efforts or elsewhere. If the agencies move forward with renovation and modernization projects, it is important for contractors and design professionals to demonstrate the knowledge and ability to apply green building design methods and materials to create a lasting impact for school facilities. Although contractors have no control over how many school renovation and modernization projects are funded, it is clear that the opportunity to capitalize on these projects depends heavily on a contractor's ability to design and build high performing green schools in an economical and efficient manner.

Stimulating the Use of Public-Private Partnerships Under the Recovery Act

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The Recovery Act presents states and local governments with an unique opportunity to leverage federal funding on public projects through the use of Public-Private Partnerships (“PPP”). The Recovery Act specifically identifies the States and local government's ability to distribute funds to PPPs:

“After adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of governments, public entities, and public-private entities within the State either by formula or at the State's discretion.”

Moreover, the Recovery Act has set aside approximately \$98 billion on infrastructure and transportation projects an area where PPPs have successfully been utilized by many jurisdictions across the United States. A significant portion of these funds will be going towards state and local coffers. It is highly likely given Congress's

recognition of public-private entities as a recipient of funds and legislative support for widespread infrastructure and transportation improvement projects that the construction industry is set to see the growth of PPP relationships across the country.

The PPP concept was born from the need to repair, upgrade, or replace the United States' aging infrastructure coupled with systemic reductions in available local, state, and federal budgets for these purposes. The PPP delivery approach was developed in order to address this problem, and to bring private capital and

“The use of a PPP is thought to promote timely, efficient, and less costly construction for both the public and private partners.”

know-how to public projects. In general, a PPP is a contractual agreement between a public agency (federal, state, or local) and a private sector entity. Through the PPP agreement, the assets, skills, and resources of both the public and private entity, are shared in order to deliver a service or facility for the general public's use. With this sharing of resources also comes the sharing of the inherent risks and rewards in the delivery of the service or facility. State or local governments, and private entities unfamiliar with PPP agreements, should be aware that this area of the PPP agreement is often one of the most negotiated areas and should be carefully developed by the project participants in order to adequately address these risk/reward nuances.

The use of a PPP is thought to promote timely, efficient, and less costly construction for both the public and private partners. PPPs allow projects to move more quickly because the project can avoid some of the governmental funding issues that can slow down a traditional government construction project. PPPs additionally encourage the participating private entity to invest in the State or local jurisdiction where the project is located. Another important advantage of using a PPP is that the public benefits from the use of new, cutting-edge technology that normally a governmental entity may deem too risky for public procurement.

Virginia is an example of a State who has successfully used PPPs for large-scale construction projects, and who continues today to tackle sophisticated construction projects, like the High Occupancy Toll (“HOT”) Lanes Project currently being built in Northern Virginia, by PPP means. The Virginia Public-Private Transportation Act is the legislative framework enabling the Commonwealth to enter into agreements with private entities to construct, improve, maintain, and operate transportation facilities. PPPs have been used on several transportation infrastructure projects throughout Virginia. For example, Route 895 Pocahontas Parkway—a 8.8-mile long freeway that crosses the James River—was funded 90% through private funds. In addition, in Powhatan and Goochland Counties, Western Route 288's largest section was delivered through a PPP and the Dulles Greenway, a 14-mile freeway, was built 100% by private funding.

PPPs have been successful not only in Virginia, but on a multitude of projects throughout the United States, including transportation, water/wastewater management, urban development, school university, and utility projects all of which are likely to be targeted for improvements by State and local jurisdictions using funds from the Recovery Act. PPPs have even been utilized to fight climate change and address environmental sustainability issues. These sorts of PPP relationships have been used by several European Union countries for years, but just recently have been deployed in the United States. For example, in late 2008 California partnered with SunEdison, a solar energy services provider, to provide solar power at fifteen California State University campuses and executive offices. With the national focus on climate change and sustainability, coupled with the Recovery Act's broad “green” agenda, we may see a number of “green” PPPs developed utilizing Recovery Act funds a well.

Proposed Budget For 2010

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On February 26, President Obama released his proposed budget for the 2010, the next fiscal year. Obama adds \$2 billion onto last year's budget for transportation. This is in addition to the over \$48 billion provided under the Recovery Act. It also begins to signal Obama's positions on transportation policy in advance of Congress reauthorizing the federal aviation programs and federal highway & transit programs later this year.

Rail – The President continues his push for high-speed rail by proposing another \$5 billion in funds on top of the \$8 billion in ARRA.

Innovative Finance – Obama also fulfills a campaign promise by providing the first \$2 billion in seed money for a new program to support expanded use of innovative financing in transportation and infrastructure development. This new program will be in addition the existing "state infrastructure banks" and TIFIA programs.

Aviation – Obama provides increased funds for the long-planned modernization of the US air traffic control system, and also proposes to replace \$7.2 billion in existing aviation excise taxes and replace them with an undefined "direct user charge." Past proposals to reduce or replace excise taxes on fuel and tickets with other forms of user fees have been highly contentious within the aviation industry and with the public.

"The 2010 budget proposals signal Obama's positions on transportation policy."

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