



LEGAL ALERT

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Contractors – Get Ready for a Money Tsunami

It appears that President Obama's stimulus package is on the fast track to being signed into law. Based on the Senate passing its stimulus bill yesterday and the House of Representatives passing its version two weeks ago, those associated with the construction industry should expect to see a significant increase in work opportunities. There are differences between the bills, but there are more similarities than differences. In fact, this afternoon it was announced that a consensus bill has been reached, but the details are still sparse. Critically, both bills and presumably the consensus bill will set forth strict schedules on how and when the funds must be spent. Therefore, in order to take advantage of the expected opportunities, companies should be ready and qualified to prepare bids and begin working on the public projects to be funded. This article provides a brief summary, based on the draft bills and the anticipated consensus bill, of the estimated amounts of funding and types of projects that should result from the new law and what you can do to be ready.

What is Being Funded in the Construction Industry?

The stimulus package allocates approximately \$550 billion to "promote economic activity" and to create or sustain jobs. Included within this fund are billions of dollars to be allocated for new or existing highways, roads, bridges, public transportation, railways, waterworks, and energy-efficiency programs throughout the country. According to the National Conference of State Legislatures, the stimulus package is anticipated (subject to final negotiations between the House and Senate) to fund the following areas:



Department, Agency, or Account	Amount Funded
Highways	\$27-30 billion
Surface Transportation	\$0-5 billion
Public Transportation	\$7.5-8.2 billion
Rail	\$1.1-3.2 billion
Airport Improvements	\$1.1-3.0 billion
Schools	\$6-9 billion
Weatherization Assistance Program	\$2.9-6.2 billion
Military Construction (all branches)	\$1.9-2.9 billion
Corp of Engineers	\$4.5-4.6 billion

Each state and/or agency will receive funding based on various formulas. For example, the highway funds will be divided among the states based upon the existing federal highway apportionment formula. Other funding will flow through federal agencies – i.e., surface transportation will be funded through the Secretary of Transportation; the Department of Energy will receive significant funding for various energy efficiency projects. Additionally, Amtrak will receive a significant portion (\$800-850 million) of the funds allocated for railway projects.

Each state with a Snell & Wilmer L.L.P. law office will receive the following estimated amounts for construction projects projected from the bill passed by the House of Representatives (in millions):

State	Highways	School Construction	Water Projects	Energy	Total
Arizona	\$586	\$277	\$114	\$106	\$1,083
California	\$2,797	\$1,721	\$598	\$447	\$5,563
Colorado	\$412	\$226	\$70	\$83	\$791
Nevada	\$217	\$81	\$52	\$61	\$411
Utah	\$221	\$60	\$67	\$81	\$429

Highways/Infrastructure

The stimulus package requires that funds allocated directly to the states for highways be further divided between the state and local municipalities. Each state Department of Transportation (“DOT”) would receive between 55-60% of the highway funds with the remainder going to local governments. Currently, there is no requirement that the governmental entity receiving highway funds match or provide any additional funding.

Importantly, the stimulus package does not allocate the funds. The allocations are left to the state DOTs and local governments. The funds to be allocated to local governments are the most flexible and can be used for public transit, storm water runoff, rail, and other types of projects. Consequently, small-scale projects (such



as community parks/pools) are expected to receive funding from local governments looking for projects ready to move forward. However, the Senate's bill requires 5% of highway funds be used on congestion mitigation and air quality improvement programs. Also, funds must be more heavily allocated in population centers rather than rural parts of the state.

Homebuilders

Although the majority of the stimulus package focuses on funding public works projects, the bills do provide some relief for home buyers and for homebuilders. Both bills provide a home-buyer tax credit. The consensus bill is anticipated to include the smaller \$7,500 tax credit from the House bill. With the inclusion of a home-buyer tax credit, it is likely that the number of people buying and building homes will increase, providing a much needed boost to residential general contractors, subcontractors, and suppliers.

Alternative Energy

Renewable energy and energy efficiency programs also receive significant funding from the stimulus package. The plan includes approximately \$3 billion for a program to help weatherize low and moderate income homes, \$4.5 billion for improvements to the electricity grid, \$14 billion for government energy efficiency and renewable energy programs and extensions of renewable energy tax credits.

Use It or Lose It

In addition to providing billions of dollars for the various construction projects, the stimulus package also requires that a large portion of the funds be spent on "shovel ready projects." Congress wants this money paid out as soon as possible. Thus, the stimulus package requires the funds to be apportioned to the states within seven days of the bill becoming law. This bill is expected to become law next week. States and local governments

are then required to award contracts for up to half of their apportioned funds within 90-180 days (this will be a topic of negotiation prior to passing the bill). If funds are not used as required, they will be reappropriated to other states.

Such a time table will push government agencies to their limits. Arizona's DOT ("ADOT") prepared a potential 90-day timeline that illustrates how fast projects will have to move.

Assuming the bill is signed into law February 13, 2009:

- ADOT's board would prioritize projects by the week of February 16, 2009
- Projects will be advertised the week of February 23, 2009
- Bids will be due March 16 (less than three weeks)
- Bids will be reviewed by ADOT through April 6, 2009 (three weeks)
- Bids will be awarded by April 20, 2009
- Work commences by May 13, 2009 (90 days from date of law)

How to Prepare

It is critical that contractors are prepared to meet the demanding time constraints of the stimulus package. In order to prepare, we recommend the following:

1. Ensure you are properly licensed and/or pre-qualified to work on public projects with the relevant agencies.
2. Be aware of your state and/or municipalities' bid procurement procedures.
3. Prioritize which projects you are best suited for and are most likely to obtain.



4. Prepare your estimators for the flood of upcoming projects on tight deadlines.
5. Ensure you understand the applicable laws (i.e., federal wage requirements, use of American made products, etc.).
6. Line up any necessary subcontractors and/or material suppliers before hand.

Without adequate preparation, contractors will not be ready to compete. In addition, such contractors also risk over- or under-bidding these upcoming projects, either of which can be disastrous. It is anticipated that there will be an increased likelihood of bid protests and numerous addendums to bid

packages, as architects and engineers dust off old projects and place them on the fast track.

If you have any questions concerning this article or the 2009 American Recovery and Reinvestment Act, please contact Marc Erpenbeck, Ron Messerly, or Jim Sienicki

Stay tuned for more details on the stimulus package and details on an upcoming seminar (that will probably take place in the next two or three weeks) on the topic.



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