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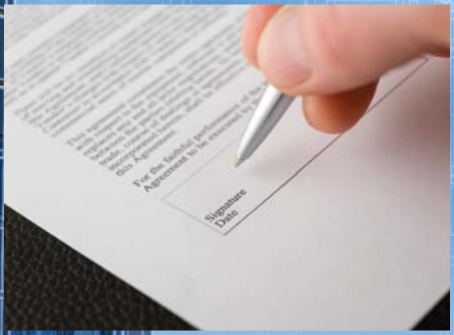
Construction Law Report

American Recovery and Reinvestment Act/ Public Private Partnerships



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Editor's note

Pro Bono Aedificatione [For the Good of the Construction Industry]

The construction industry could still use some good news. Actually, given predictions by some leading economists that non-residential construction is not likely to recover until 2011, it could use a lot of good news. In this issue, we focus on two programs that could provide benefits to many in the industry before then. First, Jeff Hummel describes the current state of the federal stimulus program. Second, Steve Kmieciak, who chaired a panel on private public partnerships (PPPs) at the December 2008 Superconference in San Francisco, explains the nature of such programs. We hope that both of these articles will provide you with some ideas and guidance in the days ahead. Naturally, you should consult knowledgeable counsel for details respecting any particular project.

Roger L. Price / Mark L. Johnson

Construction Projects Under the Federal Stimulus Plan—Key Concepts and Requirements

In February 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA). ARRA authorized $787 billion in tax cuts, expenses, benefits, and other government spending to accomplish its three main goals: (1) create and save jobs, (2) spur economic activity and invest in long-term economic growth, and (3) heighten the levels of accountability and transparency in government spending. The construction industry was intended to be a significant beneficiary of the ARRA funds, as approximately $143 billion of the total amount authorized was allocated for infrastructure and public building investments.

Numerous ARRA-funded construction projects have been awarded over the last year, with many more in the pipeline. Given the continued lack of private development projects in most areas of the country, government-funded construction projects have become much more important, and in some cases essential, to the ongoing success of many construction industry businesses.

While ARRA was intended to provide much needed business opportunities to the construction marketplace, it also imposes numerous additional requirements upon contractors who perform work on ARRA-funded contracts. Many of these requirements are in addition to, or supplement, the requirements contained in the Federal Acquisition Regulation (FAR), which traditionally has applied to federal government projects. Companies that are interested in participating in ARRA construction projects for the first time should be aware of the unique ARRA rules and requirements, several of which are discussed below. For companies already performing ARRA-funded construction work, this article should serve as a reminder of the current requirements for performing such work.

General Rules Applicable to Stimulus Projects

As an initial matter, it is important to note that FAR will generally apply to ARRA-funded contracts with a federal agency. Earlier drafts of the legislation provided that all ARRA-funded contracts were subject to FAR, even if procured through a state or local agency. However, various construction and other groups successfully lobbied against the general application of FAR to state and local contracts funded by ARRA. Thus, contracts with state and local governments are generally subject to state and local procurement laws. Nevertheless, state and local contracts funded by ARRA may be subject to certain FAR clauses, depending on the particular nature of the project. As with any procurement, the applicable contract documents should be reviewed closely, and companies should not assume that FAR and other federal rules and regulations are not applicable merely because an ARRA-funded prime contract is not administered through a federal agency.

Sources for ARRA Opportunities

The government has created a comprehensive website for information relating to the implementation of ARRA and the opportunities created by the related stimulus funds (see *www.recovery.gov*). This website provides links to contracting opportunities, as well as statistical information regarding the use of funds already expended. In addition, many states have created their own websites for projects funded in whole or in part through ARRA (e.g., *www.stimulus.virginia.gov*). The state websites are accessible through *www.recovery.gov* as well. Federal agencies are also required to post contracting opportunities and actions funded in whole or in part by ARRA at *www.fedbizopps.gov*.

Oversight of ARRA Projects

In order to achieve its goal of accountability and transparency, ARRA contains extensive provisions relating to the oversight of expended funds, and contractors should expect that all ARRA-funded contracts will be closely scrutinized. All funds expended under ARRA are subject to audit by an entity called the The Recovery Accountability and Transparency Board (RATB), which is charged with coordinating and conducting oversight of covered funds in order to prevent "fraud, waste, and abuse." RATB is comprised of Inspectors General from ten federal agencies and a chairperson appointed by the President. Among other things, RATB reviews compliance with competition requirements, audits the use of stimulus funds, and submits quarterly reports to the President and Congress. RATB may even issue subpoenas and hold public hearings regarding its oversight responsibilities.

Reporting Requirements

For projects awarded by federal agencies, prime recipients of ARRA-funds are required to complete quarterly reports identifying, among other things, (a) the total amount of ARRA funds received from that federal agency, (b) the amount of ARRA funds received that were expended or obligated to projects or activities, (c) a detailed list of all projects for which ARRA funds were expended or obligated, and (d) an estimate of the number of jobs created and retained by the project. Prime contractors are also required to provide similar information for all subcontracts exceeding $25,000.

In addition to project-specific information, certain contractors may also be required to provide information about executive compensation. ARRA requires that quarterly reports are required to include names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded, *but only if* in the preceding fiscal year the contractor received:

- 80 percent or more of its annual gross revenues from federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements;
- $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
- the public does not have access to information about the compensation of the senior executives through periodic reports filed under the Securities Exchange Act of 1934 or the Internal Revenue Code.

The quarterly reports are required to be submitted through a specially created website: *www.federalreporting.gov*. Prime contractors are required to register through the website prior to submitting their first report. The *www.federalreporting.gov* website provides detailed information regarding reporting requirements and answers to many frequently asked questions. It also provides examples of how to calculate and prepare required information, such as the number of jobs created by the particular project.

The first quarterly reports under ARRA were submitted in October 2009. In general, reporting information is required to be provided in terms of days after the end of a calendar quarter (e.g., day 10 is the tenth day following the end of the calendar quarter):

Day 1-10 – Contractors prepare their report for submission and submit it before day 10.

Day 11-21 – Contractor reports may be publicly posted. Contractors may make corrections by the end of day 21.

Day 22-29 – Federal Agencies review and, if necessary, comment upon the contractor's report. Agencies are instructed to submit comments by day 26 to permit the contractor to make any corrections by day 29. The system does not require contractors to make corrections, or otherwise require agency approval of the report.

Day 30 – The report will be finalized on day 30 regardless of whether any corrections are made. However, in order to increase the accuracy of the data submitted, beginning in January 2010, contractors will be permitted to correct mistakes on a continual basis each quarter.

Contractors should consult the *federalreporting.gov* website regularly, as the above dates may be extended with respect to any particular quarter. Contractors should make every effort to comply with the reporting requirements because failure to do so may result in the exercise of "appropriate contractual remedies," including potentially withholding of payments.

Buy American Requirements

Buy American requirements are a traditional part of government contracting. During the negotiation of ARRA, Buy American issues sparked an intense debate regarding trade and protectionism. The resulting compromise in the final legislation contains several new Buy American requirements related to ARRA-funded contracts. In general, ARRA provides that all iron, steel, and manufactured goods used in a project for construction, alteration, maintenance or repair of a public work or public building project in the United States using ARRA funds, must be produced in the United States, consistent with international agreements. These requirements are both similar to, and different from, the requirements of the Buy American Act (41 USC 10a-10d) which governs non-ARRA funded government projects. In addition, projects administered by the Federal Transportation Administration are subject to still other Buy America requirements (49 USC 5323(j)). As a result, careful attention must be paid to the nature of the particular project and the agency administering the project.

The following chart summarizes some differences between the various Buy American requirements:

Buy American Act (41 USC 10a-10d)	ARRA Section 1605	FTA Buy America 49 USC 5323(j)
Construction, alteration, or repair of public building or works out of appropriations	Construction, alteration, repair or maintenance of public building or work using ARRA funds	Highway and mass transit projects funded by FTA
Use only articles, materials or supplies mined, produced, or manufactured in US	Must be produced in US	Steel, iron, and manufactured goods must be produced in US
Content "substantially all" from articles made in US	Focus on production, not content	No content requirement (except for rolling stock)
Waiver if domestic goods "unreasonably" increase cost	Waiver if domestic goods increase cost of project by 25%	Waiver if domestic goods increase cost of project by 25%
Trade agreements – no mention in statute but they apply	Apply consistent with trade agreements	Trade Agreements do not apply to mass transit and highway

Note that the key focus of ARRA Buy American requirements is on the location of assembly or manufacture, rather than the origin of the components, which is a key requirement of the traditional Buy American Act. For example, under ARRA, when steel is used as a construction material, all manufacturing process related to the steel (except metallurgical refinement of additives) must be done in the United States. The origin of the steel itself, however, does not matter under ARRA.

ARRA also requires that its application must be consistent with international agreements. The United States is a party to several trade agreements by which it agrees to give equal treatment in federal procurements to the goods and materials of certain trading partners. Various countries have been identified as "ARRA designated countries," including World Trade Organization Countries, Free Trade Agreement countries, and various underdeveloped countries. For projects exceeding $7.443 million, ARRA provides that contractors may use iron, steel, and manufactured goods from most of these designated countries. Different contract thresholds may apply to goods from certain countries. State and local procurements using ARRA-funds may also be able to use certain foreign products on projects over $7.443 million, depending on whether the particular state has agreed to be subject to trade agreements.

ARRA provides that its Buy American requirements may be waived where (1) they are inconsistent with the public interest, (2) the iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality, or (3) when inclusion of iron, steel and manufactured goods produced in the United States will increase the cost of the *contract* by more than 25 percent. If a waiver is granted under the cost exception, in evaluating bids, a 25% markup is to be applied to the total price of a bid when foreign steel, iron, or manufactured construction material is used in the bid, and a 6% markup is to be applied to foreign un-manufactured construction material, but only to the price of the material itself.

The penalties for non-compliance with ARRA Buy American provisions can be severe, and may include the removal of the offending material, default termination, and potential suspension and debarment from federal contracting. If the violation was deemed fraudulent, the contractor may also be subject to civil and criminal false claims prosecution.

Prevailing Wage Provisions

Pursuant to the Davis-Bacon Act, contractors on federal construction are required to pay prevailing wages to construction tradespeople in accordance with rates established by the Department of Labor. The Davis-Bacon Act is applicable only to federal contracts. Contractors and subcontractors on projects funded in whole or in part by ARRA are also required to pay workers in accordance with Davis-Bacon prevailing wage rates. Thus, ARRA extends the obligation to pay prevailing wage rates to contracts with state and local governments, if those contracts are funded in whole or in part by ARRA. Obviously, contractors should be aware of these requirements prior to submitting pricing for a project, as it may have a significant impact on their labor costs.

Whistleblower Protections

Whistleblower protections have been a part of government contracting for some time. Under the federal False Claims Act and other statutes, employees of government contractors have been protected, and often rewarded, for reporting fraud or other prohibited acts to the government. In connection with its goal to reduce fraud, waste and abuse, ARRA contains new and potentially significant rules regarding the protection of whistleblowers who report fraud, mismanagement, and waste on ARRA-funded projects. The rules apply to all non-federal employers who, through grants or contracts, receive ARRA funds.

In general, the whistleblower provisions provide that employers cannot fire, demote, or otherwise discriminate against an employee as a reprisal for disclosing "covered information" to a government entity or to one's supervisor or other internal compliance personnel. "Covered information" is information that an employee reasonably believes is evidence of one of the following activities related to ARRA funds: (1) gross mismanagement, (2) gross waste of covered funds, (3) substantial and specific danger to public health or safety, (4) abuse of authority, and (5) violation of law, rule or regulation.

In order to prevail under ARRA whistleblower provisions, employees only have to show that their disclosure of covered information was a "contributing factor" to the alleged employment discrimination. The employer, in turn, is required to show by "clear and convincing evidence" that the negative action would have been taken regardless of the disclosure. Complaints are filed with the Inspector General (IG) of the agency that awarded the contract. The IG must fully investigate the allegations and either (i) dismiss the complaint as frivolous, or (ii) issue a report of findings to the employee, employer, the agency head, and RATB. The agency head then has 30 days to issue a determination. The agency head can require the contractor to take various actions, including reinstatement of the employee, payment of compensatory damages, benefits and back pay, and payment of attorney's fees. If the claim is not investigated in the required time, or is denied, the employee may file suit in federal court, which will review the case *de novo* (without regard to prior dismissals or findings). In order to ensure that employees are aware of their rights, employers performing ARRA work are required to post notices in the workplace of the procedures, rights, and remedies afforded under the whistleblower provisions.

Summary

There is little doubt that ARRA will continue to be a significant source of construction work over the next few years. Especially until new activity in the commercial construction market increases substantially, ARRA and other government-funded projects will be a primary source of revenue for many companies. ARRA projects can be successfully performed, provided that all parties are aware of the various additional requirements associated with ARRA work and the projects are planned and managed accordingly.

Public Private Partnerships

The Nature and Role of Public Private Partnerships

The American Society of Civil Engineers has estimated that the United States needs to spend hundreds of billions of dollars to repair, replace or expand our infrastructure. Government spending, however, cannot provide all the necessary funding that is needed. Public Private Partnerships (PPPs) are emerging as an alternative source of infrastructure funding.

The National Council for Public Private Partnerships defines PPP as "a contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or the facility."

Although they may take many forms, fundamentally, in a PPP private capital is used to construct and operate facilities that would normally be built and operated by the government entirely. PPPs can be used in many ways to suit many needs. These projects include toll roads, bridges and tunnels, power projects, water and sewage treatment projects, and schools.

PPPs have been used successfully in Europe and Asia to provide needed infrastructure project when government funding was not available. PPPs should be a valuable supplement to government infrastructure spending in the United States to meet this country's substantial infrastructure needs. The Administration's stimulus plan would not likely displace the role that PPPs can play in rebuilding our infrastructure. U S infrastructure needs are greater than the public funding for infrastructure that could be included in any such plan. Consequently, the availability of financing for private investors in this economy presents the greatest challenge to the viability of PPPs in the short term.

PPPs allow governments to build projects for which funding might not otherwise be available, and they allow private investors to tap potentially lucrative sources of revenue while meeting a public need. Those private investors frequently form a separate corporate entity or LLC to contract with the public agency for the right to build and operate the completed project. That long term right to operate and obtain the revenue from the project is usually referred to as a concession, and the private entity is the concessionaire. While these projects present some unique challenges, they also present opportunities for significant rewards.

Risks and Rewards

PPPs have their share of risks for all participants. Investors must identify a project and submit a proposal to an interested public agency, which must convince the agency of the value and the viability of such a project.

A PPP project can require a substantial investment to prepare and submit a proposal to a public agency. The concessionaire would typically identify a location, develop a preliminary design, forecast use and revenue, and make the preliminary arrangements for financing to determine whether the project would provide a profitable return before any proposal would be presented to a public agency. The concessionaire must project revenue over a long period, 20-40 years, and it must factor in the operating and maintenance costs into such projections. For example, predicting changes in traffic patterns and use of the project presents a significant challenge.

Once a project is identified, the viability of PPPs may be affected by political considerations and public opinion. Public opinion may impact the award of the project, and public scrutiny will certainly temper the public agency's negotiating position. The agency must deal with the possibility that the project will not be popular, or that the terms it gave the concessionaire are perceived to be too generous.

Public agencies need to know what they want, and define their needs clearly. They must also be prepared to commit appropriate resources, particularly senior personnel, to complete their responsibilities with regard to the project. Further, public agencies must take the long-term view and recognize that each concession agreement and PPP project will set a precedent for future projects.

Although a PPP may proceed from proposal to completed project faster than a government project, from the concessionaire's perspective the time and money the concessionaire spends from the presentation of a proposal to the negotiation and award of the concession contract will frequently be greater than a bidder would spend on conventional government project. There is always the risk that others will offer competing proposals. Investors must be prepared to be patient with the process.

The concessionaire takes the risk that it can build and operate the project within its cost forecast so that it will make a profit. On some projects the public agency must pay the concessionaire if the project does not generate the revenue that was expected. For example, if there is a shortfall in toll revenue because other public roads projects diverted traffic away from the PPP, the agency may be required to make up a portion of the shortfall with payments to the concessionaire.

The parties to the concession agreement should strive to provide a project that is needed and that provides a reasonable return on investment for the concessionaire. The parties must avoid terms that will result in a windfall for the concessionaire because of the significant political consequences that could result. The parties must also avoid a revenue sharing arrangement between the concessionaire and the public agency that eliminates a reasonable return, or worse a financial failure for the concessionaire.

The global economic crisis has added additional pressure on state and local governments with regard to PPPs. Government agencies are beginning to push back on PPP investors in an effort to get terms more favorable to the government than previously, in part to satisfy taxpayers and in part to obtain more revenue at the beginning of the project. The economic crisis has also limited the availability of traditional lending for PPP participants. Of course, private equity firms may form funds to invest in infrastructure projects. As interest in commercial REITs has waned, these infrastructure funds appear to be gaining favor with investors.

Contractor Opportunities

Contractors have several opportunities to participate in PPPs. First, they can play the traditional role of the constructor of the project. Usually, PPPs use design-build or turnkey contracts in an effort to place the entire design, construction, and performance responsibility in the contractor's hands. Second, the contractor may have the opportunity to participate as an investor or shareholder in the concessionaire, thus providing the contractor with the opportunity to earn a profit on the construction contract and to earn a long-term return on its investment in the concession company.

Rankings

Seyfarth's Construction Practice is currently ranked in the 2009 *Chambers USA: America's Leading Business Lawyers* nationwide.

Our Construction Practice is also ranked by *Legal 500* for Construction in Washington, D.C.

Many of our individual lawyers are listed in *The International Who's Who of Construction Lawyers* and as *Best Lawyers in America*, *Leading Lawyers* and *Super Lawyers* in their local jurisdictions.

Construction Practice Notices

On June 22, 2010, David Blake and Christa Dommers will present a session on "Contract and Leasing Strategies For Green Buildings" at the U.S. Green Building Council's RealGreen Mid-Atlantic Conference and Expo.

Roger Price and Mark Johnson will reprise their roles as featured speakers in a Lorman presentation on June 3, 2010 concerning "AIA Contracts: The Owner-General Contractor Agreement."

On Wednesday, February 17, 2010, the Environmental, Safety & Toxic Torts practice group presented a webinar "What to Expect from the Occupational Safety & Health Administration in 2010." The webinar discussed the new frontier of OSHA enforcement.

"The Implied Warranty of Habitability in Illinois: A Critical Review," authored by Roger Price and Ryan Pinkston, was published in the *Illinois Bar Journal*, February, 2010.

Michael McKeeman and Gina Ferrari recently presented a seminar titled "Understanding the American Recovery and Reinvestment Act of 2009" at the California Association of General Contractors' Legal Advisory Committee Retreat in Southern California.

Joe Barra and Jonathan Hauser recently prepared an article summarizing the report recently published by the Massachusetts Inspector General on the use of CM At-Risk in Massachusetts Public Construction.

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