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Mayer Brown LLP Post-Inauguration Webinar Series

Infrastructure Provisions of the Stimulus Legislation

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Stimulus Legislation and Next Steps



Overview

- American Recovery and Reinvestment Act
 - Surface transportation
 - Airports, ports, rail, and mass transit
 - Tax changes to support infrastructure financing
- Procurement and oversight
- Next steps after stimulus legislation
 - National infrastructure strategy
 - Surface transportation legislation
 - National infrastructure bank
 - Highway trust fund scoring

Surface Transportation

Federal Highway Administration



- \$27.5 billion for surface, rail, and port projects
- Funds apportioned among states on March 2, 2009 by formula
- Shovel ready
 - 50% of funds must be obligated within 120 days
 - 100% of funds must be obligated within 1 year
 - Certain funds for urban areas are not subject to the 120-day rule
- Challenges for state and local governments
 - Prompt expenditures and
 - Satisfying stimulus regulations

Surface Transportation



Secretary's Discretionary Grants

- The Secretary of Transportation may award up to \$1.5 billion for projects of national or regional significance
- Awarded to states, local governments, and transit agencies
- Grants will be \$20 million - \$300 million each
- No more than 20% may be awarded to a single state
- Up to \$200 million may be used to pay the subsidy and administrative costs under the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA)
- Possible use for PPP projects

Airports, Ports, Rail, and Mass Transit



High-Speed Rail and Transit

- \$8 billion for high-speed and inter-city rail
 - Discretionary grants available to states
 - Budget authority through September 2012
 - FY 2010 Budget: additional \$5 billion



- \$8.4 billion for transit
 - Formula grants, apportioned mostly (80%) to urban areas
 - 50% of funds must be obligated within 180 days
 - 100% of funds must be obligated within 1 year

Airports, Ports, Rail, and Mass Transit



Airports, Amtrak, and Ports

- \$1.1 billion for airports
 - Discretionary grants available to airports
 - 50% of funds must be obligated within 120 days
 - 100% of funds must be obligated within 1 year
 - Next critical step: FAA reauthorization legislation
- \$1.3 billion for Amtrak capital investment
- \$100 million for qualified shipyards
 - Funds should be obligated within 180 days

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Municipal Finance

Changes to Support Infrastructure Financing



Build America Bonds

- Prior to January 1, 2011, state and local governments may issue Build America Bonds that pay taxable interest to bondholders. Such bonds must otherwise qualify as tax-exempt governmental bonds under the Internal Revenue Code.
- There are two options for issuers of Build America Bonds
 - Tax credit option
 - Bondholder gets a 35% tax credit on the interest paid on such bonds
 - Direct payment option
 - Issuer elects to receive a 35% rebate of interest paid on such bonds from the federal government
 - If the direct payment option is chosen, the proceeds of such bonds can only be used for capital expenditures, debt service reserve funds and costs of issuance

Municipal Finance

Changes to Support Infrastructure Financing



Recovery Zone Bonds

- Definition of “recovery zone”
- Must be issued prior to January 1, 2011
- Two categories of Recovery Zone Bonds
 - Recovery Zone Economic Development Bonds
 - Recovery Zone Facility Bonds
- Allocation to states based on 2008 job losses
- States sub-allocate to counties and municipalities

Procurement & Oversight



Expanded Procurement and Oversight

- New and expanded procurement, transparency and oversight requirements apply to contractors, subcontractors, grantees, and contractors under grants
- Provisions impose substantial risks and burdens on entities that accept Recovery Act funds
- Contractors and grantees must be knowledgeable and prepared to comply

Procurement & Oversight



Competitive Fixed-Price Contracts

- To the maximum extent possible, contracts funded under the Recovery Act must be awarded as fixed-price contracts through the use of competitive procedures
- Exceptions must be posted on Recovery.gov
- March 4, 2009 Presidential Memorandum emphasizes competition and fixed-price contracts

Procurement & Oversight



Fixed-Price Contracts

- Fixed-price contracts impose substantial risks on contractors for overruns where requirements are not carefully defined in advance
- Recovery Act includes a preference for quick start activities, and contractors should be careful about projects they pursue

Procurement & Oversight



Domestic Preference

- Act includes two sets of domestic preference requirements
 - DHS generally can procure certain items only if they are grown, reprocessed, reused, or produced in the US
 - Section 1605: With certain exceptions, public buildings or public works projects must use US iron, steel, and manufactured goods, consistent with international agreements
- Section 1605 requirements may vary from project to project, and companies seeking construction projects funded by the Act will need to be knowledgeable of specific Buy America requirements for each project and take steps to comply with those requirements

Procurement & Oversight



Labor Requirements

- Davis-Bacon Act wage rates apply for laborers and mechanics employed by contractors and subcontractors on all projects funded by the Recovery Act
- Four new Executive Orders apply to contractors
 - Use of Project Labor Agreements for Federal Construction Projects (EO 13502)
 - Notification of Employee Rights Under Federal Labor Law (EO 13496)
 - Economy in Government Contracting (EO 13494)
 - Nondisplacement of Qualified Workers Under Service Contracts (EO 13495)

Procurement & Oversight



Transparency and Oversight

- The Recovery Act establishes a website, Recovery.gov, to foster greater accountability and transparency. The website must provide, among other things
 - Detailed data on federal contracts and grants, including information about the competitiveness of the contracting process, and a summary of contracts over \$500,000
 - A link to information about announcements of grant competitions and solicitations for contracts
 - Plans from federal agencies for using funds made available under the Act
- Contractors, grantees must report quarterly regarding expenditures, subcontracts, etc.

Procurement & Oversight



More and More Oversight

- Proposed federal contractors will be closely scrutinized for “responsibility,” e.g., financial resources to perform, ability to meet schedule, past performance, and ethics
- Multiple (overlapping, uncoordinated, and burdensome) investigatory authorities
 - IGs authorized not only to examine documents, but to interview company employees
 - GAO authorized to examine documents and interview company employees
 - Recovery Accountability & Transparency Board created and authorized to audit, hold hearings, and subpoena testimony

Procurement & Oversight



More and More Oversight (cont'd)

- New and expanded protections for non-federal whistleblowers (contractor, state and local government employees)
 - Includes right to bring a civil action for damages
- FAR Mandatory Disclosure Rule applies to federal contracts; OMB Guidance applies similar requirement to grants and loan guarantees under the Recovery Act
- Pending Amendments to civil False Claims Act
 - Includes ability to bring actions against recipients of federal funds at lower tiers

Next Steps After Stimulus Legislation



National Infrastructure Strategy

- Stimulus does not solve infrastructure challenges, but highlights them
- Key elements of national strategy
 - Preservation and enhancement of interstate highway system
 - Congestion relief in major metropolitan areas
 - Future funding: gas tax v. vehicle mileage driven charges v. other options
 - National freight transportation system
 - High speed rail network
 - National infrastructure bank
 - Role of public-private partnerships

Next Steps After Stimulus Legislation



Surface Transportation Legislation

- Legislative calendar and timing considerations
- Perspectives of key congressional and industry stakeholders
- Impact of stimulus legislation
- “\$500 billion question”: funding of surface transportation

Next Steps After Stimulus Legislation



National Infrastructure Bank

- Model for NIB: Dodd-Hagel, Rohatyn Proposal, and others
- Will direct federal infrastructure investment
- Will foster coordination of “state, municipal, and private co-investment”
- Requested appropriations: \$25 billion over 5 years
- Relationship to the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA)

Next Steps After Stimulus Legislation



Proposed FY 2010 Budget

- Highway Trust Fund Scoring

- Highway Trust Fund spending is currently considered “mandatory,” and therefore is not scored against the annual budget
- OMB proposed defining the Trust Fund’s authority as “discretionary,” to be scored against the annual budget
- Congressional leaders and state transportation departments have strongly opposed this scoring change

Congress of the United States
Washington, DC 20515

February 27, 2009

The Honorable Kent Conrad
Chairman
Committee on the Budget
United States Senate
624 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Judd Gregg
Ranking Member
Committee on the Budget
United States Senate
624 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable John M. Spratt, Jr.
Chairman
Committee on the Budget
U.S. House of Representatives
207 Cannon House Office Building
Washington, D.C. 20515

Dear Sirs:

The President’s Budget released on February 27, 2009, proposes that certain authority are treated for budget scoring purposes as discretionary, including certain airport grant programs. Currently, these programs are funded by trust funds, derived from the Highway Trust Fund (“Aviation Trust Fund”). OMB proposes to treat these programs as discretionary authority, but rather to score the obligation in annual appropriations acts as discretionary.

We strongly oppose this proposed budget process reform that fails to recognize the unique nature of Trust-Funded programs.

Such a rule would essentially convert the trust funds, which currently fund our highway, transit, and airport grant programs to a simple authorization of appropriations for budget scoring purposes.

While proponents of such a scorekeeping rule change argue that it would increase Trust Fund transparency, it would in fact do the opposite, by further merging Trust-Funded programs with non-Trust-Funded programs in the budget process. If any budget process reforms are to be made, they should serve to increase the separation of Trust-Funded programs from non-Trust-Funded programs.

We have a longstanding commitment to ensuring that the user fees deposited into the Highway and Aviation Trust Funds are in fact used for their intended purposes to

“We strongly oppose this proposed scorekeeping rule change and any other budget process reform that fails to recognize the unique nature of Trust-Funded programs.”

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