

# The American Recovery and Reinvestment Act: Helping Virginia Contractors Bridge the Recession Gap with Public Works Construction Opportunities

BY CHANDRA D. LANTZ and JASON T. JACOBY

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act ("ARRA" or "Stimulus Act"), a \$787 billion economic stimulus package, with the goal of slowing the economic downturn<sup>1</sup>. A significant portion of the package is devoted to tax cuts and state and local fiscal relief, but, approximately \$111 billion is earmarked for infrastructure projects, including construction of schools, maintenance of federal buildings, repair of bridges and rebuilding of roads<sup>2</sup>. By increasing the volume and speed of government spending on public works, the Administration hopes to significantly impact the construction industry and, in turn, the economy. But the new law brings with it a complex regulatory scheme that will present new challenges for contractors.

To achieve the goals of job creation and infrastructure investment, the ARRA promises to funnel money into projects that are "shovel-ready," meaning that preference will be given to projects that can be started and completed quickly. In addition, the ARRA includes a "use it or lose it" provision requiring states to assign the stimulus funds to specific projects within 120 days from apportionment<sup>3</sup>. Failure to allocate apportioned funds means the money will be redistributed to other states that can more readily make use of the funding. Virginia has already established processes focusing on project solicitation, prioritization, and implementation.

## How the ARRA works

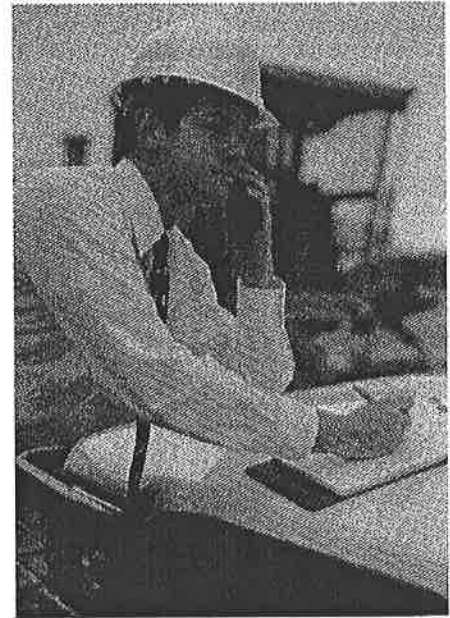
The ARRA provides both funds administered by federal agencies and grants controlled by the states. Federal agencies may determine how to spend their funding, but

must abide by the ARRA's reporting requirements, including periodic submission of reports to Congress detailing progress in obligating the funds. States also may select the projects on which to spend the ARRA funding, however, the state grants are subject to the "use it or lose it" provision. Consequently, states must commit to projects that are further along in the planning stages to more easily meet the ARRA's strict time limits, forcing states to make quick decisions among potential projects.

To identify opportunities created by the Stimulus Act and to maintain transparency, the ARRA requires the creation of online resources that provide information regarding contract and grant opportunities. Detailed information as to how the recovery dollars are allocated to each state and federal agency may be found at [www.recovery.gov](http://www.recovery.gov)<sup>4</sup>. Virginia's website, [www.stimulus.virginia.gov](http://www.stimulus.virginia.gov), seeks to ensure that "Virginia citizens are kept informed about how state government leaders plan to implement the [ARRA]" and allows users to submit proposals for the use of AARA funds<sup>5</sup>. Potential projects are organized into a report format, including a description, status, locality name, and approximate start and end dates<sup>6</sup>.

## What has Virginia done to administer ARRA funds?

Virginia has already taken action toward allowing appropriating and spending of ARRA dollars across the next three years. Governor Kaine created a Stimulus Act Working Group to evaluate the ARRA requirements and select project proposals<sup>7</sup>. Over \$3 billion of Virginia ARRA funding will be



distributed to local projects, targeting localities with high rates of unemployment and poor labor market conditions. After reviewing the project proposals submitted by Virginia citizens and evaluating the submissions to ensure compliance with the applicable federal guidelines, the Cabinet Secretaries will recommend to Governor Kaine the projects that they believe merit funding<sup>8</sup>.

Already, Virginia has secured ARRA funding for a wide variety of projects—from child care assistance to clean water. Of the over 9,000 submitted projects, approximately twenty percent are transportation projects, including the construction of passenger and maintenance facilities in the Greater Richmond, Hampton Roads and Potomac and Rappahannock areas<sup>9</sup>. The Virginia Department of Housing and Community Development will also receive \$5.2 million in Community Development Block Grant Recovery ("CDBG-R") funds to carry out eligible projects aimed at maximizing economic development and job creation. CDBG-R funds will finance a variety of construction projects, including additions to medical facilities, streetscape improvements (e.g. sidewalks, lighting), and improve-

ments to downtown buildings<sup>10</sup>. Virginia will continue to allocate more ARRA funds as the Commonwealth Transportation Board, Metropolitan Planning Organizations, local governments, and specialized industry groups continue to collaborate and prioritize projects<sup>11</sup>.

As of September 2009, it was announced that Virginia would receive \$5,098,083,000 in ARRA funding. Of this amount, \$3,215,333,000 has been made available for projects, and a total of \$970,683,000 has actually been paid<sup>12</sup>. The Department of Health and Human Services, the Department of Education and the Department of Agriculture have paid the bulk of these initial dollars<sup>13</sup>. The amount of ARRA dollars announced, made available, and paid out in Virginia is comparable to other states in the region, but much less than states with larger metropolitan areas, such as New York, Illinois and California.

### Effects of the ARRA and the increase in public works projects

The increase in public works projects will bring with it contractors with little or no experience working on government projects.<sup>16</sup> Because of the economic downturn, private contractors that previously specialized in non-government markets are now taking advantage of the ARRA public-works projects. The flood of bidders has made for a very competitive market and thin profit margins.<sup>16</sup> State agencies and taxpayers should benefit as stimulus dollars are leveraged to get more work done at a lower cost, but it has also been suggested that quality of work may be lowered as contractors struggle to keep costs down, perhaps ultimately increasing total project expense.<sup>16</sup>

### Increased Regulation

Contractors receiving stimulus-funded contracts will be subject to all of the federal laws, rules and regulations relating to public works contracts. States, agencies, contractors and owners will be held to higher standards of accountability and transparency.<sup>17</sup>

Section 1605 of the ARRA

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requires, subject to certain exceptions, the use of American-made materials in stimulus-funded public works projects involving the "construction, alteration, maintenance, or repair of a public building or public work."<sup>18</sup> Portions of Section 1605 are similar to the Buy American Act, subpart 25.2 of the Federal Acquisition Regulations ("FAR"), but, in some instances, without clarifying its own terms, the ARRA does not expressly adopt the existing definitions in FAR subpart 25.2.<sup>19</sup> This may cause problems because Buy American restrictions apply only to public construction projects, but their scope in the ARRA is broader than the Buy American Act as the ARRA applies to maintenance projects in addition to construction, alteration and repair projects.

In addition, ARRA funded contracts will be carefully scrutinized by auditors for fraud, waste and abuse. Many federal contracts funded by the ARRA are subject to the terms of the FAR, which require contractors to formulate a written code of business ethics, develop compliance programs and disclose ethics violations to the Office of the Inspector General.<sup>20</sup> Contractors performing state and local contracts may also have to comply with the provisions of FAR, depending on the terms of the contract. But state and local contractors should understand that even if the FAR does not directly apply to a certain project, they may still be subject to the federal False Claims Act,<sup>21</sup> as well as state and local ethics laws. In fact, the ARRA extends the reach of the False Claims Act, expanding the potential liability of contractors who receive federal funds.<sup>22</sup> One goal of the Stimulus Act is to enhance ethics enforcement, so contractors at all levels of government will undoubtedly face greater scrutiny.

Employees themselves can exercise an oversight function by acting as whistleblowers against employers who grossly mismanage ARRA funding. The ARRA gives whistleblowers a private right of action against employers who retaliate against them for reporting inappropriate spending of funds or a violation of law.<sup>23</sup> Contractors who receive stimulus funds must provide notice to their employees of the whistleblower protections.

The ARRA also creates the "Recovery Act Accountability and Transparency Board," whose purpose is to oversee the use of the stimulus funds to prevent fraud, waste and abuse. The Inspectors General Board members review compliance with ARRA requirements and audit the use of the ARRA funds. Each quarter, the Board is required to submit a report to the President and Congress summarizing its findings. These publicly accessible reports will include information regarding the audit results, so contractors should be careful to protect their trade secrets and proprietary information during the audit process while still meeting oversight demands of the Board.<sup>24</sup>

In addition to the goals of increased transparency and accountability in contracting, the ultimate purpose of the ARRA is to create and save jobs. Critics have argued that by only pouring money into projects that are "shovel ready," the Stimulus Act is simply funding existing work rather than creating new jobs for the unemployed. With an increasing unemployment rate both nationally and in Virginia, there may be merit to this criticism.<sup>25</sup> However, the Obama administration has emphasized patience, and [www.recovery.gov](http://www.recovery.gov) predicts that

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# Calendar of VBA Events

October 2-3, 2009

39th Annual Conference on  
Labor Relations & Employment Law  
Hilton, Virginia Beach

October 9-11, 2009

YLD Fall Executive Committee/  
Council Meeting  
Stonewall Jackson Hotel, Staunton

October 16-17, 2009

Board of Governors Meeting  
Wintergreen

October 20, 2009

11th Annual Corporate Counsel  
Fall Forum  
The Hilton Garden Inn, Richmond

October 23-24

Boyd-Graves Conference  
Richmond Marriott West

October 27, 2009

Virginia Family Law Coalition  
Troutman Sanders LLP, Richmond

October 30, 2009

20th Annual Tax Practitioners'  
Roundtable  
Farmington Country Club,  
Charlottesville

November 4, 2009

5th Annual Health Care  
Practitioners' Roundtable  
SunTrust Building, Richmond

November 10, 2009

15th Annual Administrative Law  
Conference  
The Omni Richmond Hotel

November 19-20, 2009

17th Annual Capital Defense  
Workshop  
Richmond Marriott Downtown

January 21-24, 2010

120th VBA Annual Meeting  
Williamsburg Lodge and  
Conference Center

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the most up-to-date  
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the ARRA will create or save approximately 93,000 jobs in Virginia in the next two years.<sup>26</sup>

### Conclusion

The ARRA places heavy accountability and transparency obligations on contractors, and these contractors must strengthen their due diligence procedures if they hope to compete in this evolving environment. Additional regulations apply to projects funded with ARRA money, but for companies that already have established compliance programs, these new regulations should not negatively impact their business. Alternatively, companies that are new to the federal marketplace will face greater challenges and will most certainly be prudent in seeking the assistance of legal counsel. Specifically, companies competing in this new regulatory environment will need to establish effective compliance and accounting systems so they can quickly identify and report possible violations. Not only will businesses need to work on developing internal checks and balances, but they should also consult legal counsel in order to effectively manage the intricacies of the federal laws, rules, and regulations. Provided that ARRA dollars keep flowing into Virginia, owners, contractors, employees, and taxpayers alike should see some benefit from increased public works construction opportunities; however, the ultimate effect of the ARRA has yet to be seen.

### Notes

- 1) American Recovery and Reinvestment Act of 2009, P.L. 111-5, Feb. 17, 2009, 123 Stat 115, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1enr.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf). [hereinafter Recovery Act].
- 2) See <http://www.recovery.gov/?q=content/rebuilding-infrastructure>.
- 3) *Id.*
- 4) See Memorandum from Wayne M. Turnage, Chief of Staff to the Heads of Executive Branch Agencies (Feb. 19, 2009) (on file with author).
- 5) <http://www.stimulus.virginia.gov/about/>.
- 6) See [http://bi.cao.virginia.gov/Va\\_StimulusPublicReports/rdPage.aspx?rdReport=rpt\\_Stimulus\\_Main\\_AG&rdAgReset=True&rdNoShowWait=True&rdWaitCaption>Loading&rdDataCache=332462268&rdLinkDataLayers=rpt\\_Stimulus\\_Category\\_Bar&rdRequestForwarding=Form](http://bi.cao.virginia.gov/Va_StimulusPublicReports/rdPage.aspx?rdReport=rpt_Stimulus_Main_AG&rdAgReset=True&rdNoShowWait=True&rdWaitCaption>Loading&rdDataCache=332462268&rdLinkDataLayers=rpt_Stimulus_Category_Bar&rdRequestForwarding=Form).
- 7) See <http://www.stimulus.virginia.gov/approach/>.
- 8) See *id.*
- 9) See <http://www.stimulus.virginia.gov/news/>.
- 10) See [http://www.dhcd.virginia.gov/pdfs/CDBG-R\\_Substantial\\_Amendment\\_Draft.pdf](http://www.dhcd.virginia.gov/pdfs/CDBG-R_Substantial_Amendment_Draft.pdf).
- 11) See [http://www.stimulus.virginia.gov/docs/transpo\\_projects.pdf](http://www.stimulus.virginia.gov/docs/transpo_projects.pdf).
- 12) See <http://www.recovery.gov/?q=content/investments-state>.
- 13) See <http://www.recovery.gov/?q=content/available-amount-program&state=VA>.
- 14) William W. Thompson & Mary R. Berry, *The New Stimulus Act: Does It "Federalize" State and Local Contracts? Does It Change the Risk Calculus for Contractors Performing Public Contracts?* CONSTRUCTION LAW AND PUBLIC CONTRACTS NEWS (Virginia State Bar), Spring 2009, at 1.
- 15) See Andrew G. Wright, *Razor-Thin Margin As Contractors Fight for Stimulus Projects*, ENR, June 29, 2009.
- 16) See *id.* at 18.
- 17) See <http://www.recovery.gov/?q=content/accountability-and-transparency>.
- 18) Recovery Act § 1605.
- 19) See Sarah M. Graves, "Buying American" to Rebuild America: Will Section 1605 Stimulate or Stifle?, THE ECONOMIC STIMULUS PLAN AND THE CONSTRUCTION INDUSTRY, Akerman Senterfitt, (March 2009).
- 20) The purpose of FAR is to ensure integrity and honesty in public contracting. See FAR 3.1002(a)(b).
- 21) See 31 U.S.C. § 3729. The False Claims Act imposes civil liability on any person who makes a false statement in order to get a fraudulent claim paid or approved by the government.
- 22) See Marcia Coyle, *Fears Rise Over New Fraud Law*, THE NATIONAL LAW JOURNAL, May 25, 2009, at 4.
- 23) See *American Recovery and Reinvestment Act of 2009—Whistleblower Protections*, 74 Fed. Reg. 14,633 (Mar. 31, 2009).
- 24) Recovery Act § 1526.
- 25) See Michael D. Shear, *Obama Responds to Growing Criticism of Recovery Act*, WASHINGTON POST, available at [http://voices.washingtonpost.com/44/2009/07/11/obama\\_responds\\_to\\_criticism\\_on.html?wprss=44](http://voices.washingtonpost.com/44/2009/07/11/obama_responds_to_criticism_on.html?wprss=44); <http://www.vec.virginia.gov/vecportal/press.cfm>.
- 26) See <http://www.recovery.gov/?q=content/impact>.