

## Questions or Assistance?

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## Stimulus: “Proceed With Caution”

Now that the initial flurry of activity associated with the various federal stimulus bills has subsided, and more thoughtful review and analysis has followed, parties have begun to assess more accurately both the opportunities presented by this legislation and its limitations and pitfalls. Clearly, the stimulus bills provide incentives for investment in certain types of products and projects. However, the axiom that “there is no such thing as a free lunch” remains true, and those incentives generally place certain obligations and limitations on their beneficiaries. When navigating through the stimulus package, and when contracting for services related to its incentives, it’s important to keep an eye not only on the availability of funding, but also on the conditions that come with it, as well as on issues specific to each particular sector. The three sectors highlighted below -- energy, construction and technology -- illustrate both the opportunities and the complexities that the stimulus bills present.

### ***Energy***

The American Recovery and Reinvestment Act of 2009 (“ARRA”) has created numerous opportunities to implement energy efficiency and distributed generation projects through incentives, grants and bond programs. Several bond programs offer low or essentially no interest borrowing; these include Qualified Zone Academy Bonds (QZABs), Qualified Renewable Energy Bonds (CREBs) and Qualified Energy Conservation Bonds (QECBs). In many instances, these programs involve the preparation of detailed grant applications, competitive bidding and subsequent contracting issues that require careful consideration and planning to avoid pitfalls that include missing filing deadlines or the identification of program prerequisites or goals. Some programs are awarded on a competitive basis, so careful adherence to program requirements and attention to the stated program goals and purpose can be the difference between an award and a denial.

When negotiating and preparing vendor contracts for the energy-related services, you must consider the strict deadlines and performance thresholds that may be imposed by grant or bond issuing entities that have approved your project for funding. Indeed, even where funding is not conditioned on project deadlines or performance criteria, the financial benefits of a project may go unrealized if project vendor contracts do not require the vendor to meet the performance goals or timelines. Vendor contracts should be carefully negotiated and prepared to fully describe all relevant program requirements and timelines and hold vendors accountable for any loss of funding or grant money or failure to meet the projects energy goals.

### ***Construction***

The wide availability of form contracts for design and construction has caused many sophisticated stakeholders to be uncharacteristically complacent about aspects of the design and construction process. This tendency can be especially harmful when a project receives public funds, because public funds, it’s no surprise, often come with strings that affect design and construction. These conditions and restrictions need to be considered well before that ever-ready shovel breaks ground, when compliance can still be eased with appropriate project delivery systems, thoughtful apportionment of costs between funding sources, and deliberately drafted contracts.

The conditions and restrictions of the ARRA are no exception. There are two broad categories of strings attached to the ARRA. First are those conditions and restrictions that are part of the ARRA itself. A few of these, like the “buy American” and “prevailing wage” provisions, made headlines and have obvious effects on design and construction. Others, like the many reporting requirements, may only indirectly impact design and construction,



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but can, when not incorporated into the process, send a project schedule or budget off-course. Then there are the conditions and restrictions imposed by the countless federal, state, and local bodies and grant programs through which the ARRA channels stimulus money. Some such conditions and restrictions may be apparent to recipients at the outset, but others may be buried in the Grant Award or in authorizing statutes, regulations, or policies, only to see the light of day when an oversight body comes knocking at the door to conduct an audit.

## ***Technology***

ARRA has also created opportunities for education and healthcare clients to implement supportive technology systems. For education clients, ARRA provides approximately \$100 billion for education investment nationwide, including \$650 million in education technology state grants and other funding, such as State Fiscal Stabilization funds, which may be spent on educational technology. Schools, school districts and higher education institutions will have access to such funding. Connecticut schools will have access to \$4.7 million in stimulus funding specifically earmarked for education technology funding. In addition, Connecticut school districts may use any portion of their share of the \$542 million in State Fiscal Stabilization funding on education technology. The U.S. Department of Education has recommended that school districts spend such funding on education technology upgrades, including data systems and software, because one-time investments in technology enhance the capacity of schools to improve teaching and learning and will require little continued investment when stimulus funding stops flowing in two years. Education clients should thus consider this an opportune time to invest in technology.

For healthcare clients, the Health Information Technology for Economic and Clinical Health (HITECH) Act of ARRA provides for new HIPAA requirements with technology implications; for example, new breach notification requirements for unauthorized release of patient health information (PHI); new accountability requirements for Business

Associates; proper disposal of records containing PHI requirements; access for patients to electronic PHI; and expanded enforcement and increased penalties for non-compliance. In addition, the HITECH Act includes funding opportunities related to electronic Health Records (EHR) implementation with up to \$2 billion in funding and assistance to states and healthcare providers to facilitate widespread adoption of certified EHR technology and \$17.2 billion for incentive payments to eligible healthcare professionals who are meaningful EHR users. These EHR funding opportunities are time limited with significant incentives to implement meaningful use of EHR systems as soon as possible to maximize incentive payments or, at a minimum, to avoid reduced payments.

For both education and healthcare technology clients, in addition to requirements related to the source of funds, when preparing and negotiating technology contracts, the client must consider a number of technology specific issues including licensing requirements and restrictions, representations and warranties, service level commitments related to installation and performance of the technology system, intellectual property ownership issues including ownership of client data, indemnification provisions, liability limitations, confidentiality provisions, and appropriate protection of client data. To that end, technology contracts should be carefully prepared and negotiated to adequately protect the interest of education and healthcare licensees and users of technology systems.

Shipman & Goodwin stands ready to assist its clients navigate through the maze of complexities involved in accessing and achieving maximum benefit from stimulus dollars. Our experience with both the potential uses of stimulus monies, as well as the “strings” that come along with them, will help assure you take full advantage of the incentives the federal government is providing.

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