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Can the Infrastructure stimulus Package Work? 5 Things to Consider

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New York, NY---Economic stimulus plan funds will soon be distributed to projects and programs across the nation, and without a doubt opinions on the matter are mixed. One definite high note is that the legislation—which includes around $48 billion in infrastructure transportation spending on everything from a high-speed rail service to highway projects to public transportation and intercity rail projects—finally recognizes that our nation's infrastructure is crumbling around us.

But according to construction attorney Barry LePatner, the government had better look before it leaps. Why? Because the legislation authorizing the distribution of this massive funding program assumes that the dollars spent on these projects will be efficiently utilized by a construction industry that is just as broken as the infrastructure it's charged with building and repairing.

"We've already seen what can happen when the government pumps money into broken industries without properly monitoring how it's used: billions of taxpayer dollars are wasted," says LePatner, coauthor of Structural & Foundation Failures (McGraw-Hill, 1982, coauthored with Sidney M. Johnson, P.E.) and author ofBroken Buildings, Busted Budgets: How to Fix America's Trillion-Dollar Construction Industry(The University of Chicago Press, October 2007, ISBN-13: 978-0-226-47267-6, ISBN-10: 0-226-47267-1, $25.00).

He speaks, of course, of the "bailout" money poured into America's financial and automotive industries—industries whose inept and inefficient ways have, to date, prevented the funds from benefitting the American people. And he insists that, sadly, the construction industry is no better. In fact, as amazing as it may seem, it could be even worse!

"When you give money to an industry that, according to recent studies, wastes upwards of $120 billion a year, and don't take the steps necessary to ensure it's used wisely, you are going to end up once again with no ROI," he warns. "That's the stark reality. And for taxpayers already saddled with a terrible economy and a crushing mountain of national debt, this is bad news indeed."

The construction industry's woes are at the center of LePatner's latest book. In it he lays out the industry's biggest problems: rampant cost overruns and missed (in some cases by several years) project deadlines. Grim as it may sound, he predicts that the construction industry will fritter away the $48 billion allotted on projects that may well get underway—but will be abandoned before they're ever finished.

"To advance billions in infrastructure funds for needed roads and bridges only to find we run out of money before they are completed is totally wasteful," says LePatner. "The amount of money being doled out for these projects is finite. Once it's gone, it's gone. Unfortunately, it's highly likely that it will be wasted, and we will end up with a nation of under-maintained highways and byways and useless, only partially completed bridges and roads. Frankly, before infrastructure repairs can be made in a cost-effective and efficient way—both crucial for the current state of the nation—the construction industry must make more than a few repairs of its own.

"The government, too, should do its part to ensure there is adequate protection against this waste in the accountability provisions of the stimulus plan," adds LePatner. "Without a true fixed-price structure for all construction projects that shifts the risk for inefficiency and waste to the construction industry, our government will be back footing the bill for an additional tens of billions of dollars within a few years."

LePatner offers a few steps he would like for the nation's governing bodies to make beforethe infrastructure money is pumped into project contracts:

Create an Infrastructure Czar position. The current stimulus legislation proposes to set up oversight by an Accountability and Transparency Board composed of a chief performance officer and six members designated by the President, including inspectors general and secretaries of the Education, Energy, HHS, Transportation, and other federal departments. But according to LePatner, it's unlikely that any of these officials have a true grasp of the inefficient way the construction industry operates or how to address them in future contracts. In order for these project negotiations to be mediated properly, he advises, the President should create an Infrastructure Czar position.

"The Czar should be a savvy construction expert who did not emanate from the construction industry but who is familiar with the low bid/change order process that consistently drives up costs on construction projects," he explains. "This individual must know how critical it is to avoid traps like the fast-track process or guaranteed maximum price traps that never truly guarantee the contract price. A construction expert of this kind will help close the information gap that will likely exist between construction contractors and the policymakers trying to negotiate government contracts."

Make fixed-price contracts mandatory.In a seemingly helpful provision, the stimulus legislation calls for contracts "to the maximum extent possible" to be awarded as fixed-price contracts through competitive procedures. Unfortunately, that appears to be the extent of what the government understands as being protective of the federal dole.

"One merely needs Google the phrase 'construction cost overruns' to begin to realize the enormous proportions of the waste our country has been dealing with for decades," says LePatner. "Fixed-price contracts on these projects are an absolute must. Without them, contractors will use change orders and delay claims to drive up the costs of these crucial infrastructure projects. In order to obtain these fixed-price contracts, the government should also require that contractors create their bids based on 100 percent complete documents from the architects and engineers. Otherwise, it will be impossible to estimate the true scope of these projects."

Invest some stimulus money in advanced technologies. Consider this fact: By the time cracks appear in the structure of one of the nation's bridges, the costs for remediation have skyrocketed. That is why some of the money being allocated for infrastructure projects should go toward purchasing new technology that can help state governments and the federal government save money down the road.

"Technology exists to anticipate bridge remediation years before rust, corrosion, and cracks appear," notes LePatner. "We need to fund states to purchase this equipment and train their inspectors to use it. Enabling bridge inspectors to ensure precision and objectivity in their evaluation process, which in turn allows us to catch problems earlier when they are easier to fix, can save our nation countless millions of dollars in unnecessary remediation costs."

Create stipulations aimed at avoiding wasted labor costs.The construction industry, now at the crossroads of so many needed projects and potential revival of our jobless situation, has a very bad (though not widely known) reputation for waste. Shockingly, some 50 percent of all labor costs of a project are lost due to late deliveries, poorly coordinated subcontractors, and other circumstances that regularly prevent employees from engaging in productive onsite work. These inefficiencies spring, in part, from the "mom and pop" nature of the businesses involved. But it is also a function of the industry's minimal use of technology, its lack of capital resources, and the fact that productivity per worker has gone down over 22 percent over the past forty years.

"In order to combat this problem, stipulations must be placed in the government contracts awarded," insists LePatner. "Contracts must require that skilled, experienced onsite construction representatives with in-depth knowledge, who can oversee not only quality but the true cost for the work, are retained for these projects."

Enact reforms to help us avoid another Big Dig. For those who don't know, the Big Dig is the most expensive highway project ever. Its original budget, set back in 1985, was just over $2 billion. It was revealed last year that the real cost of the project will reach $22 billion with a pay-off set for 2038. According to a recent Boston Globe article, the Big Dig has dealt a considerable financial blow to the state of Massachusetts. The article states, "Big Dig payments have already ****** maintenance and repair money away from deteriorating roads and bridges across the state, forcing the state to float more highway bonds and to go even deeper into the hole [...]

Massachusetts spends a higher percentage of its highway budget on debt than any other state."

"The Big Dig epitomizes everything that is wrong with the construction industry, which is rife with cost overruns and missed schedules," says LePatner. "Going forward, as infrastructure projects proceed with only limited funding, our nation cannot afford to face cost overruns of 20 percent, 30 percent, or more. There are no available funds to finish projects facing contractor overruns due to the industry's inefficiencies. The industry itself will have to be reformed before we can start making progress on repairing the nation's infrastructure."

"The government is about to embark on what is essentially bailout #3," says LePatner. "Obviously, the last two were less than successful. They'd better get this one right, or public trust will be irrevocably damaged. This stimulus plan should be handled with a lot of transparency and follow through—two characteristics the construction industry, the most inefficient industry in our nation, isn't known for.

"When you consider the huge number of projects that must be completed in order to restore America's infrastructure, it is clear that measures must be taken to ensure that money allocated for infrastructure projects is used wisely and for the betterment of the nation," he adds. "Our government must ensure that infrastructure project contracts are all undertaken with true fixed-price contracts that pass the risk for poor performance onto the contractors who fail to complete them on time and on budget. Our leaders' credibility, not to mention our nation's future safety and viability, depends on it."

About the Author:

Barry B. LePatner is the founder of the New York City-based law firm LePatner & Associates LLP. For three decades, he has been prominent as an advisor on business and legal issues affecting the real estate, design, and construction industries. He is head of the law firm that has grown to become widely recognized as one of the nation's leading advisors to corporate and institutional clients, real estate owners, and design professionals.

Mr. LePatner is widely recognized as a thought leader in the construction industry. A November 2007 Governing magazine article stated, "If there's a guru of construction industry reform, it's LePatner." In an article entitled "Building a New WPA," appearing in the November 24, 2008, issue of New York magazine, he was referred to as "a Cassandra of infrastructure." And an article on Infrastructurist.com entitled "Trillion-Dollar Barry: One Man's Quest to Keep America Solvent" states that Mr. LePatner has been hailed as "a leading expert on the construction industry."

His latest book, Broken Buildings, Busted Budgets: How to Fix America's Trillion-Dollar Construction Industry (The University of Chicago Press), which was reviewed in the Wall Street Journal, has created a national debate among owners, designers, and other key stakeholders. Mr. LePatner has been featured in BusinessWeek, the Boston Globe, the New York Times, Crain's New York Business, the Chicago Tribune, and other prestigious publications. His articles and speeches on the perilous state of our nation's infrastructure have garnered him widespread attention. He has appeared on many television and radio broadcasts, including a CNBC appearance and several National Public Radio segments.

A nationally recognized speaker, Mr. LePatner has addressed audiences on topics central to trends affecting the real estate and construction industry at events throughout the country for audiences including contractors, architects, engineers, construction technology experts, economic experts, and other construction industry thought leaders.

Mr. LePatner has written extensively and is widely quoted in the media on the subject of construction law. He previously co-authored the legal sections of the Interior Design Handbook, McGraw-Hill 2001, and Structural & Foundation Failures: A Casebook for Architects, Engineers & Lawyers, McGraw-Hill1982, with Sidney M. Johnson, P.E. Mr. LePatner is currently writing a new book that takes a look at what needs to be done to rebuild the nation's infrastructure. To be published early in 2010, it will address our decades-old failure to redress our deteriorating roads and bridges and will offer insightful recommendations on how to finance and build this critical part of our nation's backbone.

In 2007 and 2008 Mr. LePatner was selected as a Super Lawyer by the publisher of Law & Politics magazine. In 2002, Mr. LePatner received an Honorary AIA Membership. He is also currently on the Board of Trustees of the Design Industries Foundation Fighting AIDS (DIFFA). He has also served on numerous advisory committees including: the Advisory Board, Society for Marketing Professional Services; the Board of the New York Building Congress; Board of Advisors, Legal Briefs for the Construction Industry; American Institute of Architects Advisory Committee; and the National Academy of Sciences.

About the Book:

Broken Buildings, Busted Budgets: How to Fix America's Trillion-Dollar Construction Industry (The University of Chicago Press, October 2007, ISBN-13: 978-0-226-47267-6, ISBN-10: 0-226-47267-1, $25.00) is available at bookstores nationwide, from major online booksellers, and direct from the publisher at www.press.uchicago.edu.

For more information, please visit www.brokenbuildings.com.