

# International Trade, Government Contracts & Government Affairs

## E-ALERT

April 1, 2009

### Interim Final Rule Implements the Stimulus Package's Buy American Requirements

On March 31, 2009, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the "Councils") issued an interim final rule amending the Federal Acquisition Regulation ("FAR") to implement the U.S. stimulus package's "Buy American" requirements. This client alert summarizes the key aspects of the interim final rule and its implications for government contractors and suppliers.

The stimulus bill, entitled the American Recovery and Reinvestment Act of 2009 ("ARRA"), contains Buy American provisions requiring that, in any project funded by the Act involving a "public building" or "public work," "all of the iron, steel, and manufactured goods used in the project" must be "produced in the United States." The interim final rule, which adds a new FAR subpart at 25.6 and several new contract clauses in Part 52, only addresses procurements made directly by the federal government. The Office of Management and Budget will issue separate regulations governing purchases made by states or localities with ARRA funds. Although the interim rule is effective immediately, there is a 60-day comment period, after which the Councils will review any comments and issue a final rule.

The interim rule applies a unique regulatory framework to acquisitions funded through ARRA, although it borrows from long-standing Buy American provisions (such as those found in the 1933 Buy American Act). Key aspects of the interim final rule include the following:

#### ■ "PUBLIC WORK" LIMITED TO CONSTRUCTION PROJECTS AND CONSTRUCTION MATERIALS

Under the statute, ARRA's Buy American provision covers items purchased for use in any "public work" project. The interim rule narrows the definition of "public work" so that it only "applies to construction projects" using ARRA funds. Additionally, although items "used for a project" could be expansively interpreted to include any item used by a contractor in furtherance of a project, the interim rule only applies to "construction material," defined as an article, material, or supply brought to the construction site by a contractor to be incorporated into the building or work. As a result, items such as pieces of equipment or tools which are not incorporated into the building or work are not covered by the interim rule.

#### ■ "PRODUCED IN THE UNITED STATES" BROADLY DEFINED

Construction materials used for projects funded under ARRA must be "produced in the United States." The Councils found that, unlike the Buy American Act ("BAA"), ARRA does not specifically require the components of construction material to be produced in the United States. As a result, under the new rule, an item is a "domestic construction material" and eligible for use in an ARRA-funded project if it is manufactured in the

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United States, regardless of the origin of its components. Although the regulations do not define the term “manufactured,” the regulations suggest that the test will be similar to the requirement of U.S. manufacture applied under the BAA. This may in some cases be a less demanding test than the “substantial transformation” test, which examines whether an article is transformed into a new and different article of commerce, having a new name, character, or use.

#### ■ **REQUIREMENTS FOR IRON AND STEEL PRODUCTS**

In order for iron and steel to qualify for ARRA funding, all manufacturing processes, except metallurgical processes involving refinement of steel additives, must take place in the United States. However, this requirement does not apply to steel or iron when it is a component or subcomponent of another manufactured construction material. In such a case, the item is a “domestic construction material” if it is manufactured in the United States; the steel and iron components are not required to be of U.S. origin.

#### ■ **BAA APPLIES TO UNMANUFACTURED CONSTRUCTION MATERIALS**

ARRA’s Buy American provision only mentioned iron, steel, and manufactured goods. However, the Councils found that the purpose of the provision is best served by applying the BAA restrictions to unmanufactured construction materials (other than iron or steel) procured for ARRA projects. Unmanufactured construction material is defined as raw material that has not been “(1) Processed into a specific form and shape; or (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.”

Because the BAA applies to unmanufactured goods, contracting officers must apply the BAA’s regulations to determine the reasonableness of the cost of using domestic unmanufactured materials. Under the BAA, foreign material may be exempt from the restrictions of the Act if the cost of the material is more than 6% less than domestic material. In contrast, the ARRA Buy American provisions, which apply to iron, steel, and manufactured goods, are inapplicable only if the inclusion of domestic products increases the cost of the entire project by more than 25%.

#### ■ **EFFECT ON EXISTING CONTRACTS**

In addition to contracts awarded on or after March 31, 2009, contracting officers must modify existing contracts to include the interim rule’s requirements for all future orders under such contracts. Although the modifications must be made on a bilateral basis, a refusal to accept a modification will make a contractor ineligible to receive ARRA funds. The interim rule does not give guidance to agencies regarding the implementation of this provision. For example, it does not indicate whether “future orders” include orders under which delivery has not yet occurred.

#### ■ **APPLICABILITY OF THE TRADE AGREEMENTS ACT WAIVER**

The rule requires that the Buy American provisions be applied in conformance with U.S. free trade agreements and obligations under the WTO’s Agreement on Government Procurement. Pursuant to the Trade Agreements Act’s waiver provision, eligible foreign construction materials will “receive equal consideration with domestic offers” for construction contracts valued at \$7.4 million or higher. Although the BAA is also waived under the Trade Agreements Act for products of certain Caribbean Basin countries under the Caribbean Basin Trade Initiative, ARRA’s Buy American provision is not waived for these countries.

#### ■ **CARRY-OVER OF BAA EXCEPTION FOR NONAVAILABLE ARTICLES BUT NOT FOR INFORMATION TECHNOLOGY**

The FAR contains a list of “nonavailable articles” which are exempt from the BAA.

These are items that agencies have determined are not available in the United States in sufficient quality or quantities for government contracting purposes. ARRA's interim rule adopts this list for the purpose of determining nonavailability for ARRA acquisitions. The BAA regulations also currently include an exception for "information technology that is a commercial item." This exception was not adopted by ARRA's interim rule.

■ **DETERMINATION OF INAPPLICABILITY OF ARRA OR THE BAA**

An offeror may request from the contracting officer a determination that either ARRA or the BAA, in the case of unmanufactured materials, does not apply to specific items because of nonavailability, unreasonable cost, or inconsistency with the public interest. The agency must publish a notice in the Federal Register within two weeks after the determination is made and include a detailed justification as to why the restriction is waived. A contractor may also request a determination after contract award, if the request could not have been made prior to the award. The contracting officer may grant a post-award exception but must negotiate adequate consideration in return.

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