

International Trade, Government Contracts & Government Affairs

E-ALERT

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OMB Issues Guidance Applying Stimulus Package's Buy American Requirements to Sub-Federal Recipients of Funds

On April 3, 2009 the Office of Management and Budget ("OMB") released interim final guidance implementing the "Buy American" requirements in the U.S. stimulus package, the American Recovery and Reinvestment Act of 2009 ("ARRA"). The interim guidance applies to ARRA financial assistance awards, including grants, cooperative agreements, and loans, made by federal agencies to state and local governments, their various subdivisions, and other sub-federal entities ("sub-federal recipients").

ARRA's Buy American provisions require that, in any project funded by ARRA 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." Last week, an interim final rule which applied only to direct federal purchases was promulgated through amendments to the Federal Acquisition Regulation ("FAR"). A Covington & Burling LLP client alert summarizing key aspects of the interim rule is now available on our [website](#). OMB's interim guidance for sub-federal recipients, which creates a new Subpart 176 in Title 2 of the Code of Federal Regulations, contains many similarities to the interim rule but also some important distinctions.

■ APPLICATION TO CONSTRUCTION PROJECTS AND MATERIALS

Consistent with the interim final rule for federal procurement, OMB's guidance takes a narrow view of the scope of projects and materials covered by ARRA's Buy American requirement. Under the guidance, public work and public building mean a "public building of, and a public work of, a governmental entity" which includes, "without limitation, bridges, dams, plants, highways, parkways . . . power lines, pumping stations . . . railways, airports, terminals, docks" and other similar projects. All examples in the definition of public building and public work are construction projects, and it appears that only construction projects are subject to the interim guidance. (Although none of the example projects include traditional buildings, the initial mention of public buildings before the listing makes it virtually certain that OMB intends the provisions to cover traditional building construction.) In addition, the guidance states that a manufactured good is a "good brought to the construction site for incorporation into the building or work." As a result, like the interim rule in the FAR, the interim guidance does not cover items such as tools or equipment used in a public building or public work project but not incorporated into the structure.

■ DISTINCT DEFINITION OF "MANUFACTURED"

As with the rule governing direct federal procurements, the interim guidance does not require the components of manufactured goods to be produced in the United States. However, OMB's definition of "manufactured" differs slightly from the one in the FAR. Under OMB's

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guidance, a manufactured good that contains materials from another country must be “substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed.” The interim guidance adopts directly the “substantial transformation” test used to determine a product’s country of origin for trade purposes. The FAR provisions implementing ARRA for direct federal spending require only that the good be “manufactured” in the United States, apparently intending to apply the concept of “manufacture” used in the Buy American Act (“BAA”) regulations. This is for most purposes a less demanding test than the “substantial transformation” test employed under the OMB guidance.

■ REQUIREMENTS FOR IRON AND STEEL PRODUCTS

Iron and steel are treated identically for both direct federal procurement and procurement funded by federal financial assistance awards. All manufacturing processes, except metallurgical processes involving refinement of steel additives, must take place in the United States for the iron or steel to qualify as a domestic product for the purposes of ARRA funding. This requirement does not apply if the iron or steel is used as a component or subcomponent of a manufactured good.

■ UNMANUFACTURED CONSTRUCTION MATERIALS ARE NOT SUBJECT TO FEDERAL BUY AMERICAN REQUIREMENTS

Even though ARRA only applies to iron, steel, and manufactured goods, direct federal procurement of unmanufactured goods (other than iron or steel) must comply with the BAA. However, the BAA generally applies only to direct federal spending, and consistent with this scope, the OMB did not extend BAA coverage to the purchase of unmanufactured construction materials by sub-federal recipients of ARRA financial assistance funds. As a result, unmanufactured goods used in these ARRA-funded projects are not subject to any federal Buy American requirement.

■ APPLICABILITY OF TRADE AGREEMENTS ACT WAIVER

Under the OMB rules, the ARRA Buy American provisions must be applied in a manner consistent with the WTO Agreement on Government Procurement and U.S. free trade agreements. Under these agreements, the Buy American requirement does not apply to iron, steel, or manufactured goods produced in signatory countries and acquired for construction projects with a value of \$7.4 million or more. However, not all recipients of federal financial assistance are required to comply with these agreements; in general only state and local entities that have signed on to abide by the obligations in U.S. trade agreements must comply with them. At least 32 states have signed on with respect to some of their agencies, and the entities subject to U.S. obligations under these agreements are listed in the [Appendix to Subpart B, 2 C.F.R. Part 176](#). As indicated in the Appendix, certain states have also excluded specific products from coverage under international agreements, and these exclusions limit the need for such states and their agencies to comply with trade agreements with respect to these products. Where a given state or state agency is not bound by trade agreements, the ARRA Buy American provisions will apply to construction projects even above the \$7.4 million threshold.

Additionally, the Trade Agreements Act waiver, as it applies to ARRA-funded projects undertaken by states and other sub-federal entities, does not extend to either Least Developed Countries (“LDCs”) or Caribbean Basin Countries. Under the BAA, these two categories of countries enjoy the same benefits as signatories to U.S. trade agreements, but under ARRA they will not enjoy such treatment.

■ EXISTING AWARDS AND STATE BUY AMERICAN LAWS

Unlike the interim rule for procurements by federal agencies, which is intended to apply retroactively to existing ARRA-funded contracts made before the FAR revisions, the OMB's guidance does not affect existing awards to states and other entities funded through ARRA financial assistance. Additionally, the interim guidance is silent with regard to state Buy American laws. As a result, it is unlikely that the guidance preempts state laws that place more stringent requirements on their procurement practices, as long as such laws do not violate U.S. trade agreements.

■ EXCEPTIONS APPLIED CONSISTENT WITH INTERIM RULE FOR FEDERAL AGENCIES

The exceptions to ARRA's Buy American requirements for sub-federal recipients are similar to those that apply to federal agencies. OMB's guidance adopts the FAR's list of "nonavailable items" exempt from the BAA; these items are also exempt from ARRA's Buy American requirements. However, like the interim FAR rule for agencies, OMB's guidance does not include any exceptions apart from the nonavailability, unreasonable cost, and public interest exceptions.

Also similarly to the interim FAR rule for federal procurement, the "award official," or the individual in a federal agency "with the authority to enter into, administer, and/or terminate financial assistance awards" has the power to make a determination that an exception should apply to particular items in an award. However, only an award's applicant or recipient, "an entity other than an individual that receives Recovery Act funds in the form of a grant, cooperative agreement or loan directly from the Federal Government," may apply to the agency for a determination. A contractor will not be able to apply for the determination; rather the sub-federal recipient must make the request to the federal agency on the contractor's behalf.

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