Recovery Act
Buy American Act Regulations

On March 31, 2009, the FAR Council published an Interim Rule (with request for comment) implementing the Buy American provision contained in Section 1605 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 ("Recovery Act"). This interim rule applies to any construction contract using Recovery Act funds in connection with public building or public work as defined in FAR § 22.401 and creates a new and complex process for determining whether foreign construction material may be used on the project and the cost evaluation penalty to be applied to offers that include excepted foreign construction material. Some key aspects of this new rule bear emphasis:

- *Only applies to federal construction contracts.* The interim FAR rule is inapplicable to federal grants and assistance provided to state and local entities for federally funded projects. Implementation of the Recovery Act restrictions for such projects will be subject to OMB guidance that has been promised shortly.

- *The Buy American requirement applies only at the "construction material" level and does not limit use of foreign components.* In some good news for potential suppliers with global supply chains, the FAR Council has declined to adopt a component based test for determining whether an item qualifies as "domestic construction material." Accordingly, for a manufactured item delivered to the site (or certain emergency life safety systems assembled at the site), use of foreign components or material is irrelevant.

- *The interim FAR rule layers the Recovery Act Buy American provision on top of the general Buy American Act.* Because the Recovery Act prohibition applies only to iron, steel and manufactured products, the interim FAR rule has adopted a new concept – unmanufactured construction material. This latter category of construction material must meet the traditional Buy American Act criteria.

- *The interim FAR rule includes a convoluted two-part test for permitting use of foreign construction material.* Unlike the traditional approach under the Buy American Act and Trade Agreements Act where cost unreasonableness is determined by use of additional cost factors applied in the cost evaluation itself, the interim FAR rule appears to require that the contracting officer first make a waiver determination and then apply the same cost factors again in the evaluation of competing offers. Specifically, for

any offer containing foreign construction material, the CO must first determine whether substitution of domestic manufactured construction material would increase the *total* contract price by more than 25%. Separately, the CO must then evaluate "domestic unmanufactured construction material" by determining that the price of such domestic unmanufactured construction material exceeds the proposed foreign unmanufactured construction material by more than 6%.

- *A similar formula is again applied in comparing offers.* Having determined that the Recovery Act prohibition on foreign construction material may be waived because the cost of domestic material is unreasonable, the interim FAR rule then applies the same factors in evaluating competing offers. The total evaluated price of each offer containing permitted foreign construction material is equal to the offered price plus 25% of the offered price (if the offer includes foreign manufactured construction material) plus an additional 6% of the cost of any foreign unmanufactured construction material included in the offer.

- *The interim FAR rule's exception for construction contracts subject to the trade agreements is ambiguous.* The interim FAR rule states that for construction contracts exceeding the current Trade Agreements Act threshold ($7,443,000), "eligible products . . . shall receive equal treatment with domestic offers." What is unsaid is how this will work in practice as the approach to evaluating offers under the interim FAR rule is substantially different from the approach used for construction contracts subject to the TAA. A better approach might be to simply say that for Recovery Act contracts exceeding the TAA threshold, construction material (whether manufactured or unmanufactured) from a Recovery Act designated country (which does not include Caribbean Basin countries) will be treated as domestic.

- *Iron and Steel.* Under the interim FAR rule, to qualify as domestic, all manufacturing processes, except metallurgical processes involving refinement of steel additives, must occur in the United States. The prohibition only applies to iron or steel delivered to the site; it does not apply to iron or steel used as components or subcomponents of other manufactured construction material.

- *Waiver.* The interim FAR rule acknowledges the statutory bases for waiver of the Buy American restriction and implements the requirement for publication in the Federal Register of the detailed justification of the waiver, unless the construction material has

already been determined to be domestically nonavailable and listed in the FAR.

- *Non-compliance*. The interim FAR rule underscores the serious consequences for noncompliance. Even in the case of inadvertent non-compliance, the rule authorizes the contracting officer to take a number of actions, including requiring removal and replacement of the unauthorized foreign construction material, reducing the contract price, terminating the contract for convenience, and suspending or debarring the contractor. Where noncompliance is sufficiently serious, termination for default should be considered and the rule directs referral for criminal investigation where the noncompliance appears fraudulent.

For more information, contact Alan W. H. Gourley at agourley@crowell.com or Adelicia R. Cliffe at acliffe@crowell.com.