

**An Introduction to
the American
Recovery and
Reinvestment Act of
2009:
Implications for
Construction
Contractors**

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Buy American Provisions

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Controversial Provisions: the Buy American Restrictions

- Stimulus Act includes Buy American Restrictions:
 - No funds appropriated or made available under the Stimulus Act can be used for “a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.” Section 1605(a).

Public Outcry

- Washington Post Article: “Trade Wars Brewing in Economic Malaise,” May 15, 2009, is an example of reaction to the Buy American provisions:
 - “Is this what the first trade war of the global economic crisis looks like?”
 - “...what is emerging as the biggest threat to open commerce during the economic crisis.”



Global Sourcing

- Stimulus Act Buy American restrictions are similar to existing restrictions
 - These restrictions should be familiar to contractors working on domestic infrastructure projects funded with federal grants, or federally-funded construction projects
- Nevertheless, implementation of an additional Buy American regime increases the difficulty of supplying the best products the global economy has to offer



Section 1605(a) - Applicability

- Restriction applies to all construction projects (including alteration, maintenance or repair) of public buildings or public works funded by the appropriations made available under the Act



Section 1605(a) - Waivers



- Requirements can be waived where head of agency determines:
 - (1) the Buy American requirements would be inconsistent with the public interest;
 - (2) the iron, steel, or relevant manufactured goods are not produced in “sufficient and reasonably available quantities and of a satisfactory quality”; or
 - (3) the Buy American requirements will increase the cost of the overall project greater than 25 percent

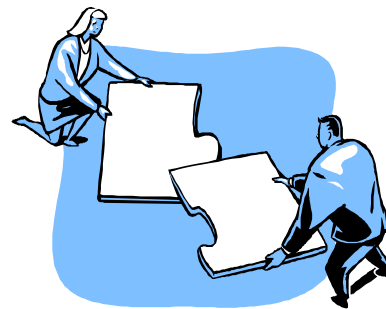
Waiver based on “unreasonable cost”



- Determination not based on cost of the foreign-origin item itself (as in usual Buy American analysis)
- Determination based on overall cost of the project
 - Even where only a small amount of foreign construction material is prepared, the contractor must show that substitution of domestic construction material or manufactured good would increase the overall project cost by more than 25%

Waiver of “Component Test”

- The Buy American requirement applies only at the “construction material” or “manufactured good” level, and does not limit the use of foreign components



Two Different Regimes Under Stimulus Act

- Federal Procurement

- Restrictions implemented by new “interim” FAR provisions. 74 Fed. Reg. 14623 (March 31, 2009)



- Grants

- Restrictions implemented by OMB guidance, issued April 3, 2009. 2 CFR part 176



Two Regimes: International Treaty Obligations

■ Federal Procurement

- Where federal prime contract exceeds the TAA threshold (\$7,443,000), products from “designated countries” “shall receive equal consideration with domestic offers.” FAR 25.603(c)

■ Grants

- More complicated on grant side because not subject to WTO GPA restriction
- Waiver will apply where
 - Project has estimated value > \$7,443,000;
 - Project funds not subject to other statutory Buy American restriction;
 - Recipient is state or other entity that has committed under GPA or free trade agreement to waive Buy American restrictions



Serious Consequences for Non-Compliance



- Even where inadvertent, rule authorizes:
 - Removal and replacement of unauthorized foreign construction material;
 - Reduction of contract price
 - Termination for convenience
 - Suspension or debarment of contractor
 - fraudulent
- Fraudulent non-compliance:
 - Directs referral for criminal investigation