

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

May 26, 2009

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Reporting Requirements and Audit Risks

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Reporting Requirements: General Provisions

- Applicable to primes and first-tier subs using on-line reporting tool
- Applicable to commercial and COTS items
- Implementing clauses to be included in new contracts and added to old contracts using ARRA funds
- Mitigate commingling of non-ARRA funds to allow for separate tracking
- “Exercise appropriate contractual remedies” for failures to report
- Forecast costs for implementation seem substantially understated

“One-time” Reporting Requirements for Primes

- Prime contract number and “award number” for each first-tier sub
- Program or project title
- Description of purpose and expected results of the prime and each first-tier sub
- Names, amounts, and dates of first-tier subs
- NAIC code for prime contract
- Funding agency

“One-time” Compensation Reporting Requirement

- Applies to prime and first tier subs
- “The Contractor shall report”
 - “The Contractor” undefined
 - Unincorporated divisions?
 - Wholly-owned subsidiaries?
 - JVs?
- “Five most highly compensated officers”
 - Employees who are not “officers”
 - For the calendar year in which the contract is awarded
 - Report “total compensation” for the prior year
- Exemptions
 - Disclosure already required for top five officers (SEC or IRS)
 - Less than 80% of annual gross revenue from federal contracts and subcontracts, loans, grants, subgrants, and cooperative agreements
 - Less than \$25M in gross annual revenue from those sources

“One-time” Reporting Requirements for Subs

- DUNS number for sub and its parent
- Physical address, nine-digit ZIP code and Congressional district (guess why?)
- Subcontract performance location, including Congressional district

Quarterly Reporting Requirements for Primes

- To be filed within 10 days of the end of each quarter, starting July 10, 2009
- Cumulative ARRA funds from the beginning of the contract
- Significant services or supplies delivered, including construction
- Progress to completion
- Narrative description of employment impact: types and number of jobs created and retained
- Detailed information about first-tier subs, including top-five compensation

Audit Risks for Construction Contractors

- For competitively awarded FFP contracts, very little risk for the basic contract
- For contracts with a cost-reimbursement component or non-competitively awarded, risk of CAS coverage and TINA certification
- For modifications, FAR cost allowability rules and TINA apply (over \$650K)
- Risk areas
 - Commercial labor charging practices for exempt employees
 - Insurance costs
 - Proposal preparation costs and marketing/PR costs
 - Corporate home office allocations
 - Transactions with affiliates, including real property and equipment rental



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

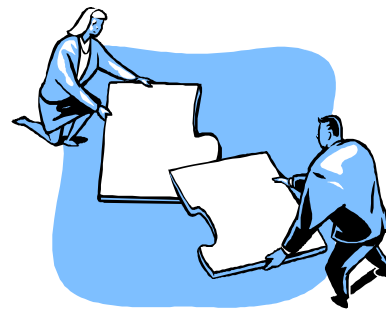
Waiver based on “unreasonable cost”



- 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