

[Alerts and Updates]

FAR Rules for Stimulus Funded Contracts: Alert 1 - Buy-American Provisions

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New Rules, More Headaches?

The old adage, "There is no such thing as a free lunch," applies to the recently passed American Recovery and Reinvestment Act of 2009 ("ARRA") or the "Stimulus Package."¹ This gargantuan document encourages transparency and provides for numerous "safeguards" against fraud, waste and abuse, and gross mismanagement of ARRA funds. Now, the administrative bodies charged with the responsibility of implementing this legislation into the regulatory framework of the Federal Acquisition Regulation ("FAR"), the FAR Councils, have published five FAR rules that are effective, via interim rulemaking, as of March 31, 2009. By "interim," the FAR acknowledges that these rules have been enacted without the normal procedures of rulemaking, such as public comment, because of "urgent and compelling reasons exist[ing] to promulgate."² Comments will be required to be provided on or before June 1, 2009. Strong opposition and requests for changes to the interim rules are anticipated. The full text of these interim rules and related commentary can be found in volume 74 of the *Federal Register* on pages 14,622–14,652 (March 31, 2009).

The new interim rules apply to government contracts that are either fully funded or partially funded with Stimulus Package appropriations. Moreover, the interim rules do not apply only to government contracts entered into on or after March 31: federal agencies will also have to *modify certain existing contracts* to incorporate the provisions of the interim rules.

The five interim rules implicate the following areas of Stimulus-funded projects:

- Enhanced whistleblower protection for nonfederal employees;
- Buy American requirements for the use of construction materials consistent, however, with American trade agreements;
- Enhanced contractor Internet-quarterly-reporting requirements as to how funds are being utilized;
- Requirement that federal agencies post proposed contracting actions online in clear and unambiguous language; and
- Increased Government Accountability Office ("GAO") and Inspector General ("IG") oversight, including right of GAO to interview witnesses during performance of contracts.

Contractors are likely to welcome the availability of a substantial new funding stream for government contracts. However, the new interim rules may place considerable new burdens on performance, potentially increasing related challenges, as well as increasing direct and indirect costs to support these additional new and modified requirements.

In this first of a series of five Alerts, we will discuss the new Buy American provisions and will follow with Alerts on the other four interim FAR rules.

Buy American Requirements (FAR Case 2009-008)

Buy American requirements are a traditional part of government contracting. These restrictions sparked an intense debate concerning trade and protectionism in the U.S. Congress during the drafting and negotiation of ARRA, but they made it into the final version of the bill. As such, ARRA's section 1605 applies the Buy American Act's existing provisions to Stimulus-funded construction projects, consistent with current trade agreements. The new Buy American obligations:

- Apply to any recipient of ARRA funds, including state and local governments and their contractors.
- Prohibit use of ARRA funds for "construction, alteration, maintenance, or repair" of public buildings or works unless (a) the public building or work is in the United States³; (b) all steel, iron and "manufactured goods" used in the project are produced or manufactured in the United States⁴; (c) the manufacturing processes in the production of iron and steel occur in the United States⁵; and (d) all unmanufactured construction materials are of domestic origin.⁶
- Do not require, however, that the source of components or subcomponents of manufactured construction material be limited to the United States,⁷ and may permit all of the components to be procured outside of the United States. (Current Buy American provisions require that at least 50 percent of the components of manufactured construction material be domestic).⁸
- Require contracting officers ("COs"), when evaluating bids seeking to utilize foreign-made products, to (a) mark up *the total bid price by 25 percent* and not merely the price of the foreign iron, steel or manufactured construction materials, which may enhance the disadvantage of using foreign components; and (b) add a 6-percent markup to unmanufactured construction materials, but limited only to the price of those materials.⁹
- Require application consistent with U.S. obligations under international agreements,¹⁰ and provide for waiver under three circumstances: (a) when iron, steel or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality¹¹; (b) when inclusion of iron, steel or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent¹²; and (c) when applying the domestic preference would be inconsistent with the public interest.¹³

Differences Between New and Existing Buy American Requirements

The Buy American provisions of ARRA differ from the existing requirements of the Buy American Act in two main respects:

- Existing Buy American provisions require that at least 50 percent of the components of manufactured construction material be domestic.¹⁴ However, the Buy American provisions of ARRA do not specify a requirement concerning the source of components or subcomponents of manufactured construction material.
- Existing Buy American provisions require that the CO add a differential of 6 percent (12 percent for small businesses) to the price of nondomestic offers in determining reasonableness of cost.¹⁵ Under the Buy American provisions of ARRA, a 25-percent markup is to be applied to the total price of a bid when foreign steel, iron or manufactured construction material is utilized in the bid, and a 6-percent markup is to be applied to foreign unmanufactured construction material, but only to the price of the material itself.¹⁶

Observations and Practice Pointers

- In the event that a contractor wishes to use non-Buy American iron, steel or construction materials, it is critical that the contractor make the request before offers are submitted, because not doing so will result in the contractor's having to justify its reasons for not doing so or not anticipating a problem. COs have the discretion to reject the requests and deem the proposal nonresponsive. In addition, COs will have the right to negotiate concessions in price in connection with acceptance of non-Buy American materials after the fact.¹⁷
- The FAR rules permit contractors to provide alternative proposals, one with and one without Buy American materials. If this is done, rejection for nonresponsiveness can be avoided.¹⁸
- The penalties for failure to comply with the Buy American provisions may be stiff, and include the removal of the offending material, default termination, potential suspension and debarment and worse, if there is a determination that

the inclusion of such materials was fraudulent.¹⁹ If fraud is involved, this may implicate the newly expanded whistleblower and False Claims Act provisions, which will be discussed in more detail in our next Alert.

- As contractors are aware, it was not too long ago that U.S. contractors faced a crisis in not only the availability of steel but also the enormous price escalation from which they sought, unsuccessfully, relief by way of change-order. It remains to be seen whether American manufacturers of iron and steel and other construction materials will be able to meet the demand.
- Assuming a CO permits the inclusion of non-Buy American materials in bids, the FAR does not explain how the add-ons will be carried out.
- Regarding all of the interim rules, the FAR Councils will be accepting comments until June 1, 2009. It is anticipated that most of the construction industry groups will provide comments seeking to modify these rules.

In our next Alert, we will discuss the new whistleblower protections, followed by Alerts on ARRA contractor quarterly-reporting requirements, increased GAO/IG oversight and federal-agency-required posting of contracting actions online.

For Further Information

If you have any questions regarding this Alert or would like more information, please contact [Robert A. Prentice](#), [Richard P. Dyer](#), [Kenneth H. Lazaruk](#), [Daniel E. Toomey](#), any [member](#) of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. ARRA FAR Interim Rules, 74 Federal Register 14,622 (Mar. 31, 2009).
2. Buy American Requirements for Construction Material, 74 Fed. Reg. 14,623, 14,625 (Mar. 31, 2009).
3. FAR 25.602(a)(1).
4. FAR 25.602(a)(2).
5. FAR 25.602(a)(2)(i).
6. FAR 25.602(b).
7. FAR 25.602(a)(2)(ii).
8. FAR 25.003.
9. FAR 25.605(a).
10. FAR 25.603(c).
11. FAR 25.603(a)(1).
12. FAR 25.603(a)(2).
13. FAR 25.603 (a)(3).
14. FAR 25.003.
15. FAR 25.105.
16. FAR 25.605(a).
17. FAR 25.606.
18. FAR 25.605(c).
19. FAR 25.607.