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Bidding Adieu To The "Summer of Recovery": Changes To ARRA Buy American And Reporting Requirements

By David S. Gallacher

While Vice President Biden was busy touting Summer 2010 as the "Summer of Recovery" and the economic effects of the February 2009 Stimulus Act (a.k.a. the American Recovery and Reinvestment Act, the Recovery Act, ARRA, the Stimulus Act, etc.), the gears of the regulatory process ground steadily onward. Throughout the summer, the White House Office of Management and Budget ("OMB") issued updated policy guidance implementing the ARRA requirements, and the rule-makers in the FAR Councils remained hard at work updating and (hopefully) finalizing the regulations implementing the finer details of the Recovery Act. Despite the fact that the ARRA funding officially expired on September 30, 2010 (meaning that any unobligated ARRA funds will now revert to the federal treasury to be saved or spent another day), the Government spent its summer fine-tuning the regulations. As the sun begins to set on the Recovery Act, and as the Summer of Recovery fades into the past, we summarize here some of the key features of the final Recovery Act rules promulgated over the last few months.

Changed "Buy American" Requirements

Subject to certain exceptions, Section 1605 of the Recovery Act prohibits use of iron, steel, or manufactured goods in Recovery Act-funded projects when those products were not "produced" in the United States. In Spring 2009, the FAR Councils and the OMB published regulations applying the Section 1605 restrictions to ARRA-funded construction projects. (Discussed previously here and here). While there were a few minor updates to these provisions over the last several months, the most significant revisions were finally published on August 30, 2010, with an effective date of October 1, 2010. *See* 75 Fed. Reg. 53153.

These new final rules update the provisions at FAR Subpart 25.6 and the contract clauses at FAR 52.225-21 through 52.225-24 (which remain separate from, and slightly different than, the requirements promulgated by the OMB). We have previously discussed the interim rules published in Spring 2009. However, in issuing the final rules there are a number of notable changes. Following is a discussion of three key issues that we think deserve special attention.

1. **"Supplies" Purchased Directly By the U.S. Government Are Now Within the Scope Of The Section 1605 Recovery Act Restrictions.** The interim rule included the longstanding definition of "construction material" at FAR 25.003, which states that "materials purchased directly by the Government are supplies, not construction material." This was an important distinction because the FAR has long recognized different regulatory regimes for the separate (albeit similar) statute, the Buy American Act, for "construction materials" and "supplies." *See* FAR Subparts 25.1 and 25.2. Many companies interpreted the interim definition as meaning that direct purchases of products by the Federal Government, regardless of whether those products were eventually used on or in a Recovery Act-funded construction project, were not covered by the Section 1605 restriction. Apparently, they were right – at the time. Because the newly published final rule deletes the phrase in question from the definition (only with regard to the ARRA clauses) and also adds a separate section to clarify that "manufactured materials purchased directly by the Government and delivered to the [construction] site for incorporation into the project shall meet the same domestic source requirements as specified for [other] manufactured construction material…." FAR

25.602-1(b) (emphasis added).

2. **Clarification Of Legal Standards – "Manufactured" Vs. "Substantially Transformed."** The final rules also clarified a point that has been commonly misunderstood over the past eighteen months by industry and Government alike – the legal standard required to determine if a product has been "produced" in the United States. Following the promulgation of the original rules in Spring 2009, many agencies (including the OMB) issued guidance indicating that products "produced" in the U.S. should include those that are "*substantially transformed*" in the U.S. or an approved country, which is the legal standard for determining the country of origin of products under the Trade Agreements Act, 19 U.S.C. §§ 2501-2581, and which is the more commonly used legal standard for larger federal procurements. However, since Recovery Act Section 1605 much more closely mirrors the different (albeit similar) Buy American Act, 41 U.S.C. §§ 10a-10d, the FAR Councils chose to use the Buy American Act-type concept of "*manufactured in the U.S.*" in implementing Section 1605, which imposes a distinct and different legal requirement. *See* FAR 25.001(c). Nonetheless, given the fact that few people seemed to understand completely the intricacies of and interplay between the various country of origin statutes, and given the immediate urgency to begin stimulus spending on U.S.-origin products, it was probably inevitable that confusion crept into how Section 1605 was interpreted and applied. The final rules have clarified that products must be "manufactured" in the United States (not "substantially transformed") in order to satisfy Section 1605. To the extent the construction project is over $7,804,000 (the dollar threshold at which foreign free trade agreements begin to apply), however, products that are "substantially transformed" in an ARRA-approved country could also satisfy Section 1605. While it will require a bilateral contract modification to implement the new clauses, contractors are nonetheless warned that the prior interpretations of the ARRA Buy American requirements by a Contracting Officer may not have been legally correct. Welcome to the shifting sands of government contracts.

3. **The FAR Councils Declined To Make Other Reasonable Accommodations That Would Ease The Burden On Industry.** Despite the fact that the FAR Councils *could* have waived the requirements of Section 1605 for COTS or commercial items, they chose not to do so. Similarly, while they could have exempted purchases beneath the simplified acquisition threshold (now $150,000), they also chose to ignore that option. Their reasoning is essentially that the Recovery Act is too important, and Section 1605 too critical in fostering American jobs, to create such broad exemptions. But where we are talking about purely commercial products and lower dollar threshold purchases, one is hard pressed to consider how or why a commercial vendor would actually want to participate in "stimulus" activities if it means the need to adopt major changes in where the product is "produced."

Changed Reporting Requirements

Section 1512 of the Recovery Act required companies receiving Recovery Act funds to provide detailed reporting information about themselves (and, to a lesser extent, about their subcontractors), including executive compensation. These requirements were implemented by the FAR Councils in March 2009 in FAR Subpart 14.5 and FAR 52.204-11 (discussed here). However, on July 2, 2010, the FAR Councils issued a new interim rule that expanded the scope of the requirements with regard to collecting jobs-related data from first-tier subcontractors. *See* 75 Fed. Reg. 38684. In particular, the change requires Recovery Act prime contractors to report information relating to the number of jobs created and jobs retained by first-tier subcontractors with awards of $25,000 or more, where the prior version of the rule applied this requirement only to prime contractors. Two points are worth noting about these new changes.

1. **Industry Not Pleased With Vague And Changing Rules.** Industry has not received this new interim rule warmly. In addition to questioning the new first-tier subcontractor reporting requirement, the Council of Defense and Space Industry Associations ("CODSIA") also criticized changes that referred to an OMB website for definitions. Specifically, CODSIA pointed out that it was fundamentally unfair for the Government to incorporate definitions in FAR 52.204-11 by references to the OMB website, especially where that website could be updated and changed without prior notice and without input from industry. Again, welcome to the shifting sands of government contracts.

2. **Increased Demands For Transparency And Updated Guidance.** The demand for increased transparency, especially with regard to the reporting requirements, appears to be driven by the White House. Despite issuing stern reminders through 2009, many companies have simply not been submitting the required reports. In April 2010, President Obama issued a strongly worded memorandum regarding reporting requirements. *See* 75 Fed. Reg. 18045. The OMB followed this memorandum by updating its own guidance, directing agencies to take specific steps to improve reporting compliance – including termination of the contract, suspension or debarment, and other appropriate punitive actions. And then on September 24, 2010, OMB issued comprehensive new guidance, implementing both the April 2010 Presidential memorandum, as well as the July 2010 updates to the FAR. Perhaps all of these sternly worded memos and regulatory updates are having an effect – OMB announced just last month that for the latest reporting period ending September 30, 2010, the Government has received the required reports from approximately 99.5% of contractors.

Other New Requirements

Other final ARRA rules that were issued during the Summer of Recovery include:

- **Audit and Government Access**. Rules relating to the audit and access of ARRA-funded contracts by Governmental authorities. *See* 75 Fed. Reg. 34279 (June 16, 2010). Only minor changes were made from the prior rule (discussed previously here, here, here, and here). The FAR Councils declined to recognize any exceptions for COTS or commercial item contracts.

- **Whistleblowers**. Protections for whistleblowers under ARRA-funded projects. *See* 75 Fed. Reg. 34258 (June 16, 2010). Only minor changes were made from the prior rule (previously discussed here and here).

- **Publicizing Contract Actions**. Requirements relating to publicizing ARRA-related contract actions pre-award, at award, and post-award. *See* 75 Fed. Reg. 34271 (June 16, 2010). Only minor changes were made from the prior rule.

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