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Six Questions To Ask In Figuring Out Whether The Recovery Act Buy American Requirement Applies To You

Nearly one year ago on February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5), more commonly known as the Stimulus Act, the Recovery Act, or ARRA. One of the key features of the Act included a "Buy American" requirement, requiring domestically manufactured "iron, steel, or manufactured goods" to be used in Recovery Act funded projects (located at Section 1605 of the Act). This requirement has proven to be a collossal headache for vendors supporting Recovery Act projects and has also proven to be immensely complicated for the good men and women in Government (including those at the State and local levels), who are faced with the task of figuring out how, where, and when the Recovery Act Buy American requirement applies.

There are two sets of ARRA Buy American regulations: (1) regulations at FAR Subpart 25.6, relating to contracts directly with the U.S. Government and its agencies (such as the General Services Administration); and (2) regulations issued by the Office of Management and Budget (OMB) at 2 C.F.R. Part 176, Subpart B, relating to grants from the U.S. Government, as well as contracts with State and local governments that receive stimulus funds from the U.S. Government via grants. While these two sets of regulations are not identical, the structure and language in the regulations do identify at least six basic questions that should help you answer the threshold question of "Does the Recovery Act Buy American requirement apply to me?" The answer may surprise you. Unfortunately, it is not an easy question to answer.

- **Question 1: Are ARRA funds being used to purchase your products?**

    - o If "yes," then Section 1605 *may* apply to your purchase. Typically, the person placing the order (whether a Government or prime contractor employee) should know whether an order is funded by the Stimulus Act. Moreover, the question of whether ARRA funds are being used may be painfully obvious if you are being asked to agree to the boiler-plate ARRA terms and conditions – particularly those relating to ARRA whistleblower rights, ARRA audit rights, and ARRA reporting requirements (discussed previously here and here). Or, if you think that your would-be buyer is being overly cautious in its use of ARRA clauses because it is not sure of the source of funding, there is always the ARRA web site

(www.recovery.gov), which can help identify the funding source. (Just click on the tab "Where is the Money Going").

- o If "no," then Section 1605 will *not* apply, because the ARRA Buy American requirement applies only to funds appropriated under the Recovery Act. However, be aware that other country of origin requirements may still apply if federally appropriated funds are being spent, because other statutes like the Buy American Act, the Trade Agreements Act, or the Buy America Act (applicable to Department of Transportation construction projects) could still apply. (The interplay of these various statutes is discussed here).

- **Question 2: Is the main project for which goods are being procured a "construction project?"**

  - o If "yes," then Section 1605 *may* apply to your purchase. FAR Part 25 distinguishes between purchases of "supplies" and purchases of "construction materials" (with both "construction" and "supplies" defined at FAR 2.101). In implementing Section 1605 through the FAR rules, the U.S. Government has embraced this "supply" vs. "construction materials" distinction, indicating that the ARRA Buy American requirement applies only to construction projects. While the OMB regulations do not necessarily enshrine this same rubric of "supply" vs. "construction material" that is contained in the FAR, all of the guidance issued to date by the U.S. Government seems to recognize that whether the core project is a "construction project" is a key threshold question.

  - o If "no," then Section 1605 will *not* apply. While there may be some who argue that the language of Section 1605 broadly applies to "construction, alteration, maintenance and repair" – not merely to "construction projects" – the Government has (thus far) consistently applied Section 1605 only to construction projects. Moreover, most authorities seem to be applying Section 1605 co-extensively with Section 1606, which imposes a "minimum wage"-style requirement for construction contracts under the Davis-Bacon Act. Since the Davis-Bacon Act applies exclusively to construction projects, this seems to further support the conclusion that the ARRA Buy American requirement does not extend to the mere purchase of "supplies," when those "supplies" are not "construction materials" under the regulations.

- **Question 3: Is the project for a "public building and public work?"**

  - o If "yes," then Section 1605 *may* apply.

  - o If "no," then Section 1605 should *not* apply. Note that the two sets of regulations include two different definitions of "public building and public work." FAR

22.401 defines this term broadly to include virtually any project funded with federal money. It does not require ownership by the U.S. Government as a precedent. If your project is covered by the FAR, then answering Question 3 is easy – if federal funds are involved, it is a public work. However, the OMB regulations (2 C.F.R. 176.140(a)) define "public building and public work" more narrowly, recursively referring to "a public building of, and a public work of, a government entity." At least with regard to public buildings, this different definition seems to indicate that it needs to be "***of***" a governmental entity and government ownership may be required.

- **Question 4: What is being delivered to the construction site?**

  - The FAR rules define the ARRA Buy American restriction in terms of the "construction materials" (both manufactured and unmanfactured) that are brought to the construction site. *See* FAR 25.003 and 25.601. The product that is actually delivered to the construction site is, under the definitions in the regulations, the "construction material" covered by the Buy American restriction. Materials purchased directly by the Government and delivered as such to the work site are "supplies," not "construction materials." *See* FAR 25.003. Ostensibly, where component parts are delivered off-site and manufactured into a product that is subsequently delivered to the construction site, it is the later-manufactured module that should qualify as the delivered "construction material" subject to the ARRA restrictions.

  - While the OMB rules also consider what is being delivered to the construction site, they do not use the exact same terminology as in the FAR rules. The OMB rules define the Buy American restriction in terms of "manufactured goods," not "construction materials," which could arguably mean that the OMB rules impose a broader obligation on contractors. While we hope that the two requriements would be applied consistently across all Recovery Act projects, we would not be surprised to find contracting officers applying the OMB regulations slightly differently based on the different language.

  - An additional point worth emphasizing is that the ARRA Buy American requirement looks only at the country of origin of the "construction material" or "manufactured good" delivered to the construction site. ARRA does not concern itself with the country of origin of the various components of the end-product delivered to the construction site – only the final construction material or manufactured good.

- **Question 5: What is the dollar value for the main construction project?**

  - If the prime-level project is valued at $7.443 million or more, then the ARRA-funded contract may recognize an exception for iron, steel, or manfuactured

goods manufactured either in the U.S. or in a free trade agreement (FTA) country. (The interplay of FTA exception was previously discussed here). Under the regulations, if the FTA exception is satisfied, then products from a FTA country are considered the same as U.S.-origin alternatives.

- o If the prime-level project is valued at less than $7.443 million, then domestic manufactured goods must be supplied for the project, absent an exception. The three exceptions to this rule are: (1) that requiring domestic goods would not be in the public interest (as determined solely by the U.S. Government); (2) that a domestic alternative to the foreign-made project is not available (through Domestic Nonavailability Determinations or DNADs); or (3) that the inclusion of exclusively domestic-made products increases the cost of the overall procurement by at least 25%. The regulations outline complicated waiver requirements that must be satisfied if any of these exceptions are invoked.

- **Question 6: Who is the ultimate customer?**

  - o If the ultimate customer is a State or local government, then the FTA exception discussed above with Question 5 may not be available. Typically, FTAs apply only at the federal level, with limited applicability at the State or local level (as we previously discussed here). (A complete list of covered State and local governments is available at 2 C.F.R. Part 176, Appendix to Subpart B).

  - o Consequently, even if a project is over $7.443 million, if a State or local government is not covered under the FTA, then the FTA exception will probably not apply – even if the State or local government would love nothing more than to have the FTA exception available. The other three exceptions discussed above, may still be available to allow use of certain foreign-made products, but these exceptions are narrow and difficult to satisfy.

Applying the ARRA Buy American requirement in actual practice is complicated and difficult. Many in Congress and in the U.S. Chamber of Commerce have criticized the requirement as counterintuitive, disruptive and unnecessary. A recent report from the Government Accountability Office indicated that the difficulties in applying the Buy American requirement have complicated and delayed some of the critical stimulus projects for at least five federal agencies. Moreover, the requirement also quite nearly sparked off a trade war between the U.S. and Canada, one that only recently seems to be nearing a point of resolution as the U.S. and Canada negotiate revisions to their FTAs, allowing both Canadian and U.S. companies access to State, Provincial and local government procurements.

Still, regardless of whether the Buy American requirement is "workable," "bad policy," or even just plain "wrong," the fact remains that the domestic preference requirement is a fact of life for anyone performing work on a Stimulus project. Before you agree to perform on a contract including the ARRA Buy American requirement, you should be fully aware of what obligations

you will be required to meet, including whether any of the statutory exceptions may also be available.

For additional discussion in this blog about the ARRA Buy American requirement, click here, here and here.For discussion of ARRA generally, click here.

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