



## NEW REGULATORY GUIDANCE CLARIFIES BUY AMERICAN REQUIREMENTS FOR STIMULUS SPENDING UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

Global economic stimulus packages are rolling out as the United States and foreign governments reinvest in jump-starting the global economy. Governments around the world are earmarking trillions of dollars in a united effort to spur job growth and bring stability to fragile markets in the midst of what many financial experts agree is the worst global economic crisis since the Great Depression. As these worldwide initiatives get underway, heavy infrastructure and large-scale construction projects are taking on renewed focus in both the domestic and international community.

On the home front, the American Recovery and Reinvestment Act of 2009 aims to inject \$787 billion into the ailing U.S. economy. Nearly a third of this stimulus money—more than \$140 billion—is slated to improve our highways, bridges, airports, transit systems, and other aging and long-neglected infrastructure over the next 18 to 36 months. Half of this

infrastructure funding is targeted to be spent in the first three months following passage of the Act, with the remainder to be disbursed before the end of the third quarter next year.

The massive infrastructure spending under the Stimulus Bill is tethered to one of the most controversial provisions of the stimulus package: the Buy American provisions in Section 1605 of the Act. This federal mandate requires that no stimulus funds can be spent on “any construction, alteration, maintenance or repair of any public building or public work unless all the iron, steel and manufactured goods are produced in the United States.” The Act itself provides no real guidance on the implementation of this protectionist measure, but the Office of Management and Budget (“OMB”) issued interim regulatory guidance on April 23, 2009, in an effort to provide some directives and quell the firestorm of criticism that followed passage of the stimulus package on February 17, 2009.

## WHAT DOES “BUY AMERICAN” REALLY MEAN TO STIMULUS PACKAGE PARTICIPANTS?

Buy American is nothing new or unique to the Stimulus Bill, especially in the construction context. For decades, federal spending requirements have dictated the use of U.S.-produced iron, steel, and manufactured goods, with many states imposing similar mandates for their own locally funded projects. To be sure, even as the criteria for gauging compliance with procurement demands has varied from time to time, the notion of “Buy American” has been part of the federal procurement culture since at least the passage of the Buy American Act of 1933.

On its face, the Buy American mandate of the Stimulus Bill casts a wide net aimed at minimizing the use of foreign-produced materials as part of stimulus-funded public projects. But despite the expansive language in Section 1605 that “all iron, steel and manufactured goods” must be “produced in the United States,” “all” does not literally mean “all” for federal procurement purposes. Nor does the notion of “produced in the United States” literally mean that all components or sub-components of manufactured goods must be domestically produced. Indeed, regulatory requirements allow for the use of foreign-made materials that are domestically transformed into manufactured goods, and waivers can be obtained from procuring agencies under limited circumstances to circumvent the need for using American-made goods. Additionally, the United States’ obligations under international treaties and trade agreements provide fertile grounds for contractors and suppliers to use foreign-produced goods in completing stimulus-funded projects.

## DEFINITIONAL CLARIFICATIONS

The OMB’s April 23, 2009, interim guidance has provided some much-needed definitional clarifications to the Buy American parameters of Section 1605. While speculation has been commonplace concerning the dynamics of domestic production requirements after passage of the Stimulus Bill, the interim Federal Acquisition Regulations (“FAR”) in 2 CFR Part 176 highlight a number of clarifying criteria for implementing the federal Buy American policy on projects receiving stimulus funding.

First, “public building and public work” are defined to include only “a public building of, and a public work of, a [federal, state, or territorial] governmental entity.” These projects include obvious candidates such as government buildings, bridges, highways, airports, railways, and other infrastructure development, regardless of whether the projects are new construction, repair work, alterations, or merely a maintenance undertaking. Just what otherwise qualifies as a “public work” remains an open issue. It is unclear, for example, whether private projects that receive public funds are considered “public work” for Buy American purposes, similar to how they might be for other public funding mandates such as the payment of prevailing wages.

Second, the interim regulations clarify that “all manufacturing processes” related to iron and steel production “must take place in the United States, except metallurgical processes involving refinement of steel additives.” Importantly, these domestic production requirements are inapplicable to iron and steel “components or subcomponents of manufactured goods,” meaning foreign-made iron and steel have a role to play in processed goods that become part of federally funded projects. Similarly, foreign-made iron and steel from signatory countries under various international agreements (as described below) are exempt from the Buy American strictures in Section 1605.

Third, the only mandatory requirement concerning “manufactured goods” is that the finished goods must be physically manufactured in the United States. “Manufactured goods” are defined to encompass “a good brought to the construction site for incorporation into the work or building that has been (i) [p]rocessed into a specific form or shape; or (ii) [c]ombined with other raw material to create a material that has different properties than the properties of the individual raw materials.” Significantly, “there is no requirement with regard to the origin of the components or sub-components in manufactured goods used in the project...” Similarly, in the context of international agreements to which the United States is a signatory, manufactured goods that are “substantially transformed ... into a new and different manufactured good distinct from the materials from which it was transformed” in either the United States or another signatory country qualify for use on stimulus-funded work, regardless of where the ingredient components were made. Thus,

for example, the components of an HVAC system that are made overseas would not preclude the use of a domestically assembled air conditioning unit that incorporates those foreign components as part of the completed system installed on a federally funded project.

## REGULATORY WAIVERS

As in other Buy American contexts, the Stimulus Bill and the OMB's interim regulatory guidance provide for procuring agency waivers of the Buy American requirement under three limited circumstances:

**Nonavailability.** If the iron, steel, or manufactured goods are not made in the United States “in sufficient and reasonably available quantities of a satisfactory quality,” the head of the procuring agency can issue an exemption from the Buy American mandates. The FAR provides procedures for requesting an agency determination of “nonavailability,” and the existing lists of unavailable products disclosed in 48 CFR Part 25.104(a) apply equally to projects funded with stimulus monies.

**Unreasonable Cost.** Provided that the use of domestically produced iron, steel, or manufactured goods would increase the overall project costs “by more than 25 percent,” the procuring agency head can allow the use of foreign-made products. In order to issue this exemption, the federal agency or department involved must do a comparative analysis of the overall project costs using the foreign-made iron, steel, or manufactured goods versus the overall project costs if only domestically produced iron, steel, or manufactured goods were used.

**Inconsistent with the Public Interest.** The procuring agency head has discretion to decide whether honoring the Buy American requirements would run counter to the public interest on a particular project. This exception is rarely invoked, and challenges to agency determinations under this exception are difficult at best, given the wide latitude that agency heads enjoy in making their Buy American assessment.

Regardless of the particular exemptions that may be employed from project to project, agency officials must act with heightened transparency and accountability in assessing and deciding whether a waiver is appropriate on a particular stimulus-funded project. Not only must the specifics concerning the dollar value of the project and a description of the project being funded be disclosed, but the agency head must publish in the Federal Register a “detailed written justification as to why the restriction is being waived.”

## INTERNATIONAL AGREEMENT REQUIREMENTS

Even if no waiver of the Buy American provisions is available, recipients of stimulus funding may still be entitled to forego domestically produced iron, steel, and manufactured goods on acquisitions that are subject to certain international agreements to which the United States has agreed to be bound. Section 1605 of the Act specifies that the Buy American requirement must be “applied in a manner consistent with United States obligations under international agreements.” Thus, procuring agencies must honor the federal government's commitments to 39 global partners under the World Trade Organization Government Procurement Agreement, as well as the nondiscrimination obligations under various free trade agreements (including NAFTA) and United States-European Communities Exchange of Letters.

International agreements provide no blanket protection from discriminatory exclusions of foreign iron, steel, and manufactured goods on federally funded projects. For starters, the contract value of a project must exceed \$7,443,000 before international obligations take effect, and the United States can refuse to honor foreign commitments on projects where federal funds are either earmarked for dredging activities or funneled to the states for mass transit and highway projects. The individual states similarly have the right to dictate whether certain materials and services need to be domestically produced for locally completed work. As such, contractors and suppliers need to be cognizant of local, national, and international obligations that apply to spending requirements tied to stimulus funds.

## CONCLUSION

The controversy and uncertainty surrounding the Buy American requirements in the Stimulus Bill are likely to wane in the coming months as final guidance is issued by the OMB and product sourcing plays out with the disbursement of stimulus monies. After all, the Stimulus Bill has not radically departed from long-standing federal procurement policy with respect to preferences for U.S.-produced goods and services. The long-awaited recovery of world economies should also begin to ease any tensions stemming from the perceived protectionism inherent in the many domestic stimulus programs that both America and certain of its global partners are pursuing in the face of unprecedented economic turmoil.

## LAWYER CONTACT

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