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International Trade | Government Contracts & Disputes | June 16, 2009

Continuing Controversy Over Buy American Provisions of Recovery Act

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Section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) ("Recovery Act") provides that funds made available under the Act may not be used on projects for construction, alteration, maintenance, or repair of a "public building or public work," unless all of the "iron, steel or other manufactured goods" used in the project are produced in the United States, subject to certain exceptions. As a practical matter, the Recovery Act mandates that U.S. origin products be given a 25% price preference over foreign products.

The Act nonetheless also requires that the Buy American provisions be implemented consistently with the international obligations of the United States, including the WTO Government Procurement Agreement and U.S. free trade agreements such as the NAFTA and the Central America Free Trade Agreement.[1] Those agreements require the United States to accord non-discriminatory treatment to the procurement of products and services of countries that are members of those agreements.[2]

Expenditures under the Recovery Act can be made in one of two basic ways: the federal government may use the funds for its own purchases of goods and services, or the federal government may make an "award" to a state government that the state may use to procure goods and services. Separate implementing regulations have been published to implement the Buy American restrictions under each of these scenarios.

On March 31, an "interim rule" incorporating the Buy American provisions of the Recovery Act into the Federal Acquisition Regulation (FAR) that governs federal government procurements was published in the Federal Register by the FAR Council.[3] The notice solicited public comments to be submitted for

[1] For procurements covered by the Government Procurement Agreement, the United States also extends its obligations of non-discriminatory treatment to a group of least developed countries.

[2] Note that the WTO Government Procurement Agreement is a "plurilateral" agreement to which only a small subset of the WTO member countries have acceded. The United States has no government procurement-related obligations to many countries, including China and India.

[3] The FAR Council is comprised of the Office of Management and Budget, the General Services Administration, the Defense Department, and the National Aeronautics and Space Administration.

consideration prior to implementation of the final rule, which were due on June 1.[4] In response to the request for comments, a wide range of interests put forth their concerns and suggestions.[5]

The commenters included the European Commission, the governments of Canada, Japan, and Korea, the Chinese Ministry of Commerce, the AFL-CIO, the U.S. Chamber of Commerce, the EPA's Office of Inspector General, and various other industry and trade associations. Some U.S. domestic interests pressed for clarifications that would make the restrictions more extensive than they are currently. Many of the comments expressed concerns that the regulations contain confusing terms that are difficult to apply and may be leading to an overly restrictive application of the program, and others complained that the measure is protectionist.

For example, some foreign governments complained that the Buy American provisions of the Recovery Act conflict with the global recovery plan adopted by the G-20 at its April 2, 2009 meeting, which committed the member states to refrain from raising new barriers to investment or trade in goods. Other comments noted that the regulations exclude application of the restrictions where international obligations apply – that is, where the value of the procurements is above the threshold acquisition levels for application of the applicable international agreements – but that the regulations impose new restrictions on contracts below those threshold levels.[6]

Commenters for and against the restrictions agreed that the regulations should be amended to clarify their coverage. For example, the European Commission requested that the final rule "provide detailed and transparent implementation instructions to the relevant contracting agencies so that any economic operator wishing to use [Recovery Act] funds and potentially subject to its Buy American requirements will be treated fairly." Some of the specific areas of concern regarded the definitions of "manufactured materials," "unmanufactured construction material," "materials to be incorporated in the construction," and "component," among others. These definitions all relate to the issue of how much U.S. content and U.S. processing will be required for materials and goods to be considered "produced" in the United States.

Commenters reported problems with procuring government agencies adopting their own theories of how the Buy American restrictions should work, without regard to the actual language of the statute and regulations. This type of problem can arise when agencies demand certifications or other types of written commitments from suppliers using terms they have created on their own.

Other requests were made for (i) clarification of the application of the restrictions to procurements only partially funded by Recovery Act funds, (ii) creation of a *de minimis* exception for minor foreign content, and (iii) a formal encouragement to agencies to issue waivers of the restriction as provided for in the Recovery Act when certain conditions are met.

Because of the close similarities between the interim rules implementing the changes to the FAR and those issued at 2 C.F.R. Part 176 applying the Buy American provisions to procurements by states using

[4] 74 Fed. Reg. 14623, March 31, 2009.

[5] The Office of Management and Budget published a separate interim rule creating 2 C.F.R. Part 176 ("Award Terms for Assistance Agreements That Include Funds Under the American Recovery and Reinvestment Act of 2009, Public Law 111-5"), 74 Fed. Reg. 18449, April 23, 2009. That set of regulations applies to procurements by the states using Recovery Act funds. That notice also contained a request for comments, which are due on June 22, 2009.

[6] For example, the WTO Government Procurement Agreement only applies to construction contracts that have a value of $7,443,000 or more. For contracts with a lower value, the United States does not have any obligations under international agreements. With regard to procurements by states (which are covered by the separate regulations issued by the Office of Management and Budget), international agreements do not comprehensively cover all U.S. states or all procurements by the states that agreed to be subject to those agreements.

Recovery Act funds, several commenters suggested that efforts be made to ensure close alignment of the two sets of rules to reduce the potential for confusion.

The U.S. government has not announced when the regulations will be issued in final form, but those regulations may incorporate changes based on the comments or on further analysis by the involved government agencies. Because the Buy American restrictions are having an important impact on many of the new projects funded by the Recovery Act, it is advisable for companies seeking to participate in those projects to monitor the progress of the new regulations.

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