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News

“Buy American” Provision in Economic Stimulus Legislation Poses Compliance Hurdles for Public Works Contractors and Suppliers

Despite significant opposition from certain U.S. businesses and U.S. foreign trade partners, the American Recovery and Reinvestment Act (“ARRA”), also known as the economic stimulus legislation signed by President Obama on February 13, 2009 includes a strong “Buy American” provision. This provision prohibits funds from being used for a project for the construction, alteration, maintenance or repair of a “public building or public work”¹ unless all of the iron, steel and manufactured goods used in the project is produced in the United States, with limited exceptions. This provision has proven controversial as many U.S. companies fear that their trading partners abroad will retaliate with similar “buy domestic” provisions, prohibiting them from competing for stimulus spending in Europe and Asia. As a result, the final version of the legislation includes language requiring that the Buy American provision be applied in a manner consistent with U.S. international trade obligations to avoid such retaliation abroad.

The Buy American provision included in the ARRA, enacted as Section 1605, is a combination of two existing and different U.S. domestic content laws – the Buy American Act and the Buy America statute. The Buy American Act, enacted in 1933 and since amended, applies only to U.S. government procurements and construction projects (i.e., when the U.S. government purchases products or builds public buildings or public works via a procurement covered by the Federal Acquisition Regulations). The second statute, the Buy America law, first enacted in 1964 and since amended, applies principally to Federal Transit Administration (FTA) grants provided to states and localities.

Section 1605 of the ARRA combines the coverage of both the Buy American Act and the Buy America law. Specifically, the Buy American provision in the economic stimulus package applies to both federal ARRA-funded public building and works projects, and all state and local ARRA grant-funded public buildings and works projects. While it has yet to be determined what percentage of domestic content will be required to satisfy Section 1605, sources have speculated that the government will likely apply the more exacting content provisions of the Buy America statute. The Buy America statute mandates that 100 percent of the components used in a project be made in the United States for

¹ Section 1605(d) provides “the terms ‘public building’ and public work’ have the meanings given such terms in section 1 of the Buy American Act (41 U.S.C. 10c) and include airports, bridges, canals, dams, dikes, pipelines, railroads, multiline transit systems, roads, tunnels, harbors and piers.”

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the final manufactured good or construction material to qualify as U.S.-made. While, the Buy American Act has a less rigid standard requiring that only 51 percent of the components of supplies and construction materials be made domestically for the final product to qualify as U.S.-made.

Note, the absolute nature of the Buy American provision in the ARRA may be limited if certain exceptions are met. These exceptions allow for the restriction to be waived in cases where it is in the public interest to do so, when domestic iron, steel or manufactured goods are not available in the sufficient quantities and of a satisfactory quality; or if using U.S. iron, steel or manufactured goods would increase the cost of the overall project by more than 25 percent. The “public interest” exception though vaguely worded may be the most significant loophole for trade policy. This provision could allow the Obama administration a means of assuring selected trading partners that their rights will not be violated by implementation of the ARRA. The degree to which these exceptions will be used is still to be determined and will depend on the regulations issued and government agencies tasked with administering them.

For federal, state and local contractors working on ARRA-funded projects, the matter of greatest concern is likely to be compliance with Section 1605. Sources have indicated that compliance with the Buy American provision in the ARRA will likely be enforced by written certification requirements with heavy

penalties for violations. Both the Buy American Act and Buy America statute impose stringent compliance certification requirements on contractors. It follows that prime and subcontractors contemplating working on ARRA-funded projects should take aggressive steps to remain informed of the domestic content and certification requirements as they are issued by the Obama administration and to ensure compliance with the necessary requirements.

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