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"Buy American" Provision in Stimulus Legislation Poses Serious Compliance Challenges for Public Works Contractors and DHS Suppliers

Despite widespread opposition by the U.S. business community and U.S. foreign trade partners, the final version of the financial stimulus legislation (American Recovery and Reinvestment Act, or ARRA) passed by Congress late last week contains a strong "Buy American" provision mandating that all iron, steel, and manufactured products used in ARRA-funded public building and works projects be produced in the United States. The ARRA also imposes a sweeping prohibition on the Department of Homeland Security (DHS) that precludes DHS from using any appropriated funds to acquire clothing, individual equipment, and textile products made outside the United States.

Both of these provisions provide authority for limited waivers by federal agencies and, fortunately, the legislation also includes Senate language that these provisions be applied in a manner consistent with U.S. obligations under international agreements. Nonetheless, the ARRA, which funds tens of billions of dollars worth of infrastructure improvements, represents the most sweeping U.S. domestic content legislation enacted in decades. The law's domestic content rules present new and serious compliance challenges for public building and works contractors and suppliers at the federal, state, and local levels that hope to work on ARRA-funded projects, and for all DHS suppliers.

100 Percent Versus 51 Percent Domestic Content

The ARRA's Buy American provision, enacted as Section 1605, actually overlays and combines aspects of two existing, oft-confused, and quite different U.S. domestic content laws — the "Buy American Act" and the "Buy America" statute. The first statute, the Buy American Act, enacted in 1933 and since amended, applies only to U.S. government procurements and construction projects — that is, when the federal government directly buys products or itself builds public buildings or works via a procurement covered by the Federal Acquisition Regulation. The second statute, the Buy America law, first enacted in 1964 and amended on numerous occasions since, applies principally to Federal Transit Administration (FTA) grants provided to states and localities.

While both the Buy American Act and the Buy America law require that final products delivered to the government be made domestically, the 1964 Buy America law is much more demanding than the Buy American Act in keys respects — for example, the treatment of manufactured goods and construction materials components, which generally are parts and supplies incorporated directly into the final manufactured product or construction material. Buy America mandates that 100 percent of the components be made in the United States for the final manufactured good or construction material to qualify as U.S.-made. By contrast, the Buy American Act requires only 51 percent of the components of supplies and construction materials be made domestically for the final product to qualify as U.S.-made. In like manner, under Buy America, the cost of domestic materials must be 25 percent more expensive than foreign materials for a cost-based waiver, while under the Buy American Act the cost differential is just six percent (12 percent for a small business.)

ARRA Section 1605 combines the coverage of both the Buy American Act and the Buy America law. Because Section 1605 applies to both federal ARRA-funded public building and works projects, and all state and local ARRA grant-funded public buildings and works projects, and because Section 1605 tracks the statutory language of the Buy America law, it will likely apply that law's more exacting requirements. Thus, federal, state, and local public buildings and works procurements using ARRA funds will likely require a 100-percent U.S. component test, rather than the 51-percent component test, for end products to qualify for U.S.-made status.

Indeed, because Section 1605 uses the term "all" with respect to "manufactured products," Section 1605 could be interpreted as applying to manufacturing tiers **below** the component level. That would require subcomponents, and even sub-subcomponents, be manufactured in the United States, requiring that prime contractors trace the manufacturing origin of materials and supplies well down into the supply chain. This is not merely a theoretical possibility: that very type of origin-tracing is already necessary for domestic iron and steel under the Buy America law.

As to the standard for cost-based waivers, the ARRA mandates a 25-percent test, also similar to the Buy America approach. This means that offers that do not qualify for domestic status will have a 25-percent price premium added for purposes of pricing evaluation, and thus only domestic offers will prevail except on the rare occasion when their pricing is more than 25 percent higher than each foreign offer. This all but dictates that offerors must meet the ARRA's U.S. domestic content requirements to be competitive for contract awards on ARRA-funded projects.

Nor will the Senate amendment providing that Section 1605 be implemented in a manner consistent with international obligations of the United States be of much benefit. That amendment, responding to vociferous criticism from home and abroad that Section 1605 would be contrary to those international obligations, is designed to indicate explicitly that the president may exempt certain ARRA-funded projects consistent with international agreements such as the World Trade Organization Agreement on Government Procurement and various free trade agreements in which the United States participates. In reality, however, the scope of this amendment is quite limited, as those international agreements do not apply to federal grant funds for states and localities. Therefore, ARRA grant-funded public works projects at the state and local levels, which are likely to constitute the lion's share of the ARRA's infrastructure spending, will have to comport in full with Section 1605. Indeed, many states have their own domestic content laws that are even more expansive than federal law. Moreover, those agreements generally do not apply to federal small business procurements or to public works procurements less than $7.4 million, and they have only limited application to federal defense procurements.

More Compliance Necessary

For federal, state, and local contractors working on ARRA-funded projects, perhaps the greatest matter of concern is that compliance with Section 1605 will likely be enforced via written certification requirements with heavy penalties for violations. Both the Buy American Act and the Buy America law impose stringent compliance certification requirements on contractors. Given the ARRA's language, it is a virtual certainty that ARRA-funded projects will have similar requirements.

With Buy American/Buy America certifications, prime contractors must certify that their bids comply with the domestic content requirement, and a failure to provide the required certification can render a bid ineligible for contract award. To assure the accuracy of their certificates and prevent violations during contract performance, prime contractors typically impose compliance certifications — and even indemnification requirements — well down the subcontract and construction material supply chain. Those actions serve to share, if not shift, the risk of violations to the lower contract tiers.

A violation of these U.S. domestic content requirements and their respective certifications can result in False Claims Act liability, contract termination for default, suspension and debarment of the contractor, and potentially, even criminal liability. Consequently, prime and subcontractors contemplating working on ARRA-funded projects will have to take aggressive steps to implement compliance.

DHS Suppliers

Besides its Buy American provision, the ARRA also creates an entirely new domestic content requirement for DHS acquisitions by prohibiting DHS from using any appropriated funds (not just ARRA funds) to acquire clothing, individual equipment, and a host of textile products unless they are made in the United States. This provision, similar to a law applicable to the U.S. Department of Defense called the "Berry Amendment," will have a significant fiscal impact, as it will govern acquisitions by large federal agencies such as the U.S. Coast Guard, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement. Even acquisitions for stockpiling emergency supplies by the Federal Emergency Management Agency will be covered.

While the law provides a limited number of exceptions, experience with the Berry Amendment at the Defense Department suggests this ARRA provision will likely bar foreign suppliers of these products from the DHS market. The ARRA provision, which expressly applies to commercial items, also will impose significant compliance obligations on domestic DHS suppliers to assure that their products comply with the law, possibly including Buy American/Buy America-type certifications. To underscore the congressional interest in full compliance, the statute also mandates the training of DHS acquisition personnel on the new law and its implementing regulations.

Conclusion

Businesses interested in working on ARRA-funded projects, and those that are DHS suppliers, need to take immediate steps to prepare for the ARRA's domestic content requirements. Even firms with experience on projects covered by the existing Buy American/Buy America requirements will need to review their compliance programs to determine that the more stringent ARRA domestic content requirements will be met.

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Authors/Contacts

David T. Ralston, Jr.
Partner, General Commercial Litigation — Government Contracts
Washington, D.C.
202.295.4097
dralston@foley.com

Jeffrey R. Blease
Chair, Construction Practice
San Diego, California
619.685.4612
jblease@foley.com

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