

Government Issues Interim Rules Implementing Buy American Provision of Stimulus Bill

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The Government has published regulations to implement the Buy American (“BA”) provision in § 1605 of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”). The FAR Council published an interim rule on March 31, 2009 applicable to federal procurement transactions. 74 Fed. Reg. 14623. OMB published interim final Guidance on April 3, 2009 applicable to transactions funded with other forms of federal financial assistance, such as grants to states and local governments, which are likely to account for the bulk of the Recovery Act spending.

The FAR interim rule and OMB Guidance address issues such as “production in the United States,” standards and procedures for determining applicability of the exceptions to the BA requirement, implementation of the BA provision consistent with international obligations, and consequences of non-compliance. The two regulations are substantively the same in most respects, although there are some differences in coverage, as well as editorial differences appropriate to the differences in the types of transactions covered by them.

The FAR interim rule is effective for solicitations issued and contracts awarded on or after March 31 that exceed the Simplified Acquisition Threshold, currently \$100,000. Any previously awarded contracts using Recovery Act funds will be modified to include the pertinent BA implementing FAR clauses. The OMB Guidance is effective as of April 3, 2009. Comments on the interim rule are due on June 1, 2009, and on April 17, 2009 for the OMB Guidance.

A. FAR Interim Rule

The regulations implementing § 1605 for federal procurements are contained in new FAR Subpart 25.6, American Recovery and Reinvestment Act--Buy American Act--Construction Materials, and four new FAR clauses to be included in solicitations and contracts using Recovery Act funds. Although the clauses do not mandate flow-downs, it appears that prime contractors will, as a practical matter, have to flow-down the applicable clause(s) to subcontractors.

Key Concepts and Definitions

Section § 1605(a) prohibits use of Recovery Act funds for “a project for the construction, alteration, maintenance or repair of a public building or work unless all of the iron, steel and manufactured goods used in the project are produced in the United States.” FAR 25.602, Policy, is similar, but not identical, providing that that Recovery Act funds may not be used for the construction, alteration, maintenance or repair of a public building or public work unless “[a]ll of

the iron, steel and other manufactured goods used *as construction material* in the project are produced *or manufactured* in the United States.” FAR 25.602(a)(2) (Emphasis added.)

The interim rule adopts the existing definition of “construction material” in FAR 25.003, which is “an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work;” and it “also includes an item brought to the site preassembled from articles, materials or supplies.” *See, e.g.*, FAR 52.225-23(a). The Recovery Act did not define “produced” in the United States, and the interim rule appears to equate “produced” with “manufactured,” at least for iron and steel, stating that “[p]roduction in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.” 25.602 (a)(2)(i). Beyond that, the interim rule does not specifically define “manufactured in the United States,” or explain why “manufactured in the United States” was included in the statement of Policy in FAR 25.602. The interim rule does, however, define “manufactured construction material” as “any construction material that is not unmanufactured construction material,” FAR 25.601, and in turn defines “unmanufactured construction material” as “raw material brought to the construction site for incorporation into the building or work that has not been--(1) [p]rocessed into a specific form and shape; or (2) [c]ombined with other raw material to create a material that has different properties than the properties of the individual raw materials.” *Id.* Taken together, these various definitions suggest that articles, materials, or supplies brought to a construction site for incorporation into a public building or work, or brought to the site preassembled from articles, materials or supplies, that have been “processed” or “combined” in the United States would meet the BA requirement of § 1605.

While construction material must be produced or manufactured in the United States, the interim rule clarifies that § 1605 does not extend to *components* of domestically manufactured construction material. *See* 74 Fed. Reg. at 14624. It provides that (i) iron and steel used as components of other manufactured construction material is *not* required to be produced in the United States; FAR 25.602 (a)(i); and (ii) components or subcomponents in other domestic manufactured construction materials are *not* subject to a domestic origin requirement “as long as the manufacture of the construction material occurs in the United States.” *Id.* (a)(ii). This is different from the two-part test applicable under the Buy American Act, 41 U.S.C. § 10a-10d; FAR Subpart 25. *See* FAR 25.001(c); *see also* FAR 25.003 (defining “domestic construction material” for purposes of the Buy American Act).

As noted above, § 1605 applies to projects involving the “construction, alteration, maintenance or repair of a public building or public work.” FAR 25.602 includes a cross reference to [FAR 22.401](#), regarding labor standards on construction contracts, which defines “public building or public work” as a “building or work, the construction, prosecution, completion, or repair of which . . . is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.” FAR 22.401; *see also id.* (defining “construction, alteration or repair”); FAR 2.101 (defining “construction” as “construction, alteration, or repair (including dredging, excavating and painting) of buildings, structures, or other real property” and listing examples such as, among other things, bridges, highways, airport facilities, tunnels and sewer mains, and

further providing that “construction” does not include, inter alia, the manufacture or production of “personal property,” i.e., any property other than real property). The interim rule does not, however, specifically define “maintenance,” although the language and structure of the regulation suggests that the BA requirement only reaches “maintenance” that otherwise qualifies as “construction.”

FAR 25.601 includes a number of other definitions, including, “domestic construction material,” “foreign construction material,” and “steel” (“an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements”). According to the commentary accompanying the interim rule “[t]hese definitions are drawn from existing Federal domestic-sourcing laws and the longstanding interpretations that have evolved from them.” 74 Fed. Reg. 14624. However, some of the definitions are rather cursory; for example, a “domestic construction material” is defined in part as “a construction material manufactured in the United States,” while a “foreign construction material” is defined as “a construction material other than a domestic construction material.” FAR 25.601.

Finally, although not specifically required by § 1605, the interim rule provides that the Buy American Act applies to unmanufactured construction material used in construction projects using Recovery Act funds, and includes pertinent implementing provisions, including, for example, allowing use of foreign unmanufactured construction material when the cost of the domestic material exceeds the cost of the foreign material by more than 6%. *See* FAR 25.605(a)(2); 52.225-21(b)(4)(i)(A); *see also* 74 Fed. Reg. 14624 (stating that application of the Buy American Act serves the Recovery Act’s purpose of “creating jobs and stimulating domestic demand”).

Administration of Exceptions

The interim rule also includes procedures and standards for determining if the statutory exceptions – nonavailability, unreasonable cost, or public interest, apply. (Those determinations are to be made by the head of the contracting activity, contracting officer and head of the agency, respectively.) *See* FAR 25.603. It provides for preaward determinations that the BA provision is not applicable to a particular procurement; requires offerors to submit information to the contracting officer supporting the basis for such a determination; and requires publication of such determinations in the Federal Register. *See id.* 25.604; 52.225-22; 52.225-24. It also permits post-award determinations of the inapplicability of § 1605 in limited circumstances, and subject to the contractor providing “adequate consideration.” FAR 25.606.

In determining if the unreasonable cost exception applies, “[t]he contracting officer must compare the offered price of the **contract** using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the **contract** by more than 25 percent, then the contracting officer shall determine, that the cost of the domestic manufactured construction material is unreasonable.” FAR 25.604(c)(1) (emphasis added); *see also* FAR 25.605(a)(1) (requiring application of a 25% evaluation factor, “applied to the total offered price of the contract,” to offers incorporating foreign construction materials, where the offeror has requested an exception based on the “unreasonable cost” of domestic

construction material). However, the commentary accompanying the interim rule states that “the 25 percent price adjustment factor for non-U.S. iron, steel, and other foreign manufactured construction material excepted from the section 1605 requirement on the basis of unreasonable cost is applied to the entire price of the *project*, not only to the cost of the foreign materials.” 74 Fed. Reg. at 14625 (emphasis added).

Recognition of International Obligations

The interim rule also implements the directive in § 1605(d) that the BA provision “shall be applied in a manner consistent with the United States obligations under international agreements.” It essentially sets out a regime similar to the exception to the Buy American Act under the Trade Agreements Act. *See* 74 Fed. Reg. at 14625 (stating that “if trade agreements apply to the acquisition, . . . eligible construction material from designated countries is treated in accordance with Subpart 25.4[Trade Agreements].”). In particular, construction materials from “Recovery Act designated countries” are given equal treatment with domestic construction materials in acquisitions with an estimated value of \$7,433,000 or more. *See* FAR 25.603(c). “Recovery Act designated countries” are World Trade Organization Government Procurement Agreement (“WTO GPA”) countries, Free Trade Agreement countries, and least developed countries. FAR 25.601; *see* FAR 52.225-23(a) (listing designated countries, which do not include China, Brazil and India). Caribbean Basin Countries are not considered Recovery Act designated countries. FAR 25.603(c)(2). Designated country construction materials are those which are “wholly the growth, product, or manufacture” of the countries, or have been “substantially transformed . . . into a new and different construction material distinct from the materials from which it was transformed.” FAR 52.225-23(a).

Non-compliance

Finally, the interim rule includes a process for the contracting officer to review allegations of non-compliance with § 1605 (other than allegations involving fraud). FAR 25.607. Actions that may be taken include processing a determination of inapplicability or requiring removal and replacement of the foreign construction material. *Id.*(c). (If removal or replacement is “impracticable,” the contracting officer may allow it to remain in the building or work, without prejudice to the government’s right to assert available contractual and/or administrative rights and remedies (e.g., price reductions, termination for default, or suspension or debarment)). “Sufficiently serious” non-compliances may result in termination for default, referral for suspension or debarment, or, in the case of fraud, referral to other appropriate agency officials.

B. OMB Guidance

Like the FAR interim rule, the OMB Guidance includes coverage on policy, exceptions, pre- and post-award determinations regarding the applicability of exceptions, price evaluation factors, non-compliance, and implementation of the directive in § 1605(d) that the Buy American provision is to be applied consistent with international obligations. It also includes four implementing clauses to be included in federal assistance agreements. These provisions are

included in Subpart B of a new Part 176 of 2 CFR, which also includes other Recovery Act implementing regulations.

Key Concepts and Definitions

As noted above, in most respects, the OMB Guidance tracks the coverage in the FAR interim rule. *See, e.g.*, §§ 176.80 (Exceptions); 176.120 (Determinations on late requests); and 176.130 (Noncompliance). Other provisions, while generally parallel to those in the FAR interim rule, include some variations. For example:

§ 176.70 (Policy). Like the FAR, this section states that all iron, steel and manufactured goods must be “produced or manufactured in the United States,” and excludes components from the reach of § 1605. However, unlike the FAR, the OMB Guidance is not organized around, and does not define, “construction material.” Further, it affirmatively defines “manufactured good”--a “good brought to the construction site for incorporation into the building or work that has been--(1) Processed into a specific form and shape; or (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.” *See* §176.140(a). (As discussed below, the OMB Guidance also separately defines “domestic iron, steel and/or manufactured good.”)

§ 176.100 (Timely determinations concerning the inapplicability of [§] 1605 of the Recovery Act). Unlike FAR 26.604, § 176.100(a) expressly provides for the head of a department or agency to make a determination of inapplicability in a “particular case or [to a] *category of cases.*” (Emphasis supplied.) In addition, § 176.100(e), relating to increased cost due to the use of domestic iron, steel or manufactured goods materials, expressly states that this exception applies where use of the domestic material “would increase the cost of the *overall project* by more than 25 percent.” (Emphasis supplied.) *See also* §§ 176.80(a)(2) (same); 176.110(a)(1) (same).

§ 176.110 (Evaluation of proposals of foreign iron, steel and/or manufactured goods). This provision is essentially the same as the FAR except that the OMB Guidance does not cover *unmanufactured* construction materials or provide for an evaluation (price differential) factor for such materials.

The OMB Guidance also has a somewhat different definition of “public building” and “public work.” They include “a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions).” The definition goes on to provide a long, non exclusive list of buildings and works such as “bridges, dams, plants, highways, . . . subways, tunnels, sewers, . . . power lines, pumping stations, heavy generators, railways, airports, . . . piers, wharves, . . . levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.” *Id.*

International Obligations

The OMB Guidance, like the FAR interim rule, addresses the requirement of § 1605(d) that the application of the BA provision “shall be applied in a manner consistent with U.S. obligations under international agreements.” *See* § 176.90(a). Unlike the FAR, however, the OMB guidance does not grant construction materials from “least developed countries” equal treatment with domestic construction materials. *See* § 176.90(a)(2). The OMB Guidance goes on to provide language to be used by award officials when awarding Recovery Act funds or requesting applications or proposals for Recovery Act programs for the construction, alteration, maintenance, or repair of a public building or public work. *See* §§ 176.140 – 176.170. These provisions are generally consistent with those in the FAR guidance, with some differences as noted below.

The OMB guidance at § 176.160 provides language to be used in awards to which the obligations of international agreements apply – i.e., awards with an estimated value of \$7,443,000 or more “where the iron, steel and manufactured goods... are from a Party to an international agreement that obligates the *recipient* to treat the goods and services of that Party the same as domestic goods and services.” *See* § 176.60(b)(1)(ii) (emphasis added). The recipients of the funds subject to the OMB guidance will, in most cases, be States and sub-federal entities such as certain cities and port authorities, and their obligations under international agreements are not identical to – and in some cases are quite different from – those of the U.S. Government. The OMB guidance provides a chart listing the obligations of the States and other sub-federal entities under international agreements. *See* Appendix to Subpart B of 2 CFR part 176. For example, not all states have agreed to accept obligations under international agreements. Further, those states that accepted the WTO GPA sometimes limit their obligation to certain designated state agencies, and many have *carved out* construction and/or construction grade steel from their obligations. *See* WTO GPA, App. I, Annex 2, Note 1. In addition, all of the states listed in the Appendix have carved out Canadian iron, steel and manufactured goods from their international obligations because certain Canadian provinces do not extend reciprocity to U.S. made goods. Finally, while not expressly addressed in the OMB Guidance, iron, steel and manufactured goods from designated countries used in Recovery Act funded mass transit and highway projects apparently remain subject to the BA requirement of § 1605 unless a waiver is granted. *See* WTO GPA, App. I, Annex 2, Note 5 (regarding international obligations of subfederal entities and providing that “[t]he [WTO GPA] shall not apply to restrictions attached to Federal funds for mass transit and highway projects.”).

Section § 176.160 of the OMB guidance also includes certain definitions not found in the FAR interim rule. “Designated country iron, steel and/or manufactured goods” means a manufactured good that “[i]s wholly the growth, product or manufacture of a designated country; or ... has been substantially transformed in a designated country into a new and different manufactured good distinct from the material from which it was transformed.” *See* § 176.60(a). The definition of “Domestic iron, steel and/or manufactured good” closely tracks the definition for “designated country” items; i.e., it must be wholly the growth, product or manufacture of the U.S. or substantially transformed here, and also notes that components and subcomponents of manufactured goods need not be of U.S. origin, “as long as the manufacture of the goods occurs in the United States.” *Id.*

The OMB guidance at § 176.140 also contains language to be used in awards under the Recovery Act to which the obligations of international agreements do *not* apply. For those awards, “all iron, steel, and manufactured goods used on the project are [to be] produced in the United States” unless excepted. See § 176.140(b)(1). Unlike its parallel provision in the FAR (FAR 52.225-21), this provision does not specify that its applicability is limited to “construction materials,” but it does contain a definition of “manufactured good” that incorporates a similar concept, as described above. As noted above, the clause provides that the award official may except certain materials from the domestic sourcing requirement if, among other things, it is determined that the “cumulative cost” of domestic iron, steel or manufactured goods “will increase the cost of the overall *project* by more than 25 percent.” See §176.140(b)(3)(i) (emphasis added); *see also* § 176.150(c)(same). The focus on the cost of the overall project, rather than the cost of the individual contract, is consistent with the wording of the background section of the FAR interim rule. See 74 Fed. Reg. at 14625.

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