



September 1, 2010

**Final Rule Clarifies
*Buy American Provision of The Recovery Act***

On August 30, 2010, the Federal Acquisition Councils, in order to further implement Section 1605 (“the *Buy American Provision*”) of the American Recovery and Reinvestment Act of 2009 (the Recovery Act), issued a Final Rule amending the Federal Acquisition Regulations (FAR). The Final Rule is effective October 1, 2010 and applies to solicitations issued and contracts awarded on or after October 1, 2010.

The *Buy American Provision* of the Recovery Act, which was signed into law on February 17, 2009, states that

[n]one of the funds appropriated or otherwise made available by [the Recovery] Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

The Recovery Act also provides for limited waivers of the *Buy American Provision* if (1) its application would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent. In addition, the Recovery Act provides that the *Buy American Provision* “shall be applied in a manner consistent with United States obligations under international agreements.”

The Final Rule, available at 75 Federal Register 53,153 (August 30, 2010), amends and adds subparts of the FAR that address construction materials procured with appropriated Recovery Act funds. The new FAR provisions are intended to implement U.S. obligations under trade agreements in the same way as they are currently implemented in non-Recovery Act construction contracts. The Federal Acquisition Councils responses’ to comments that were solicited when the Interim Rule was issued (74 Fed, Reg, 14623

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March 31, 2009) also offer guidance regarding implementation of the FAR amendments.

Key aspects of the Final Rule are summarized below:

- The Buy American Provision “supersedes the Buy American Act with regard to the acquisition of manufactured construction materials used on a project funded with Recovery Act funds. Therefore, the component test does not apply to construction material used in projects funded by the [Recovery] Act.”
- Because the Recovery Act does not address unmanufactured construction material, the Buy American Act continues to govern the use of unmanufactured construction material in construction contracts.
- The Final Rule clarifies that “[i]f the Government directly purchases manufactured goods and delivers them to the site for incorporation into the project, such material must comply with the [Buy American Provision], even though it is not construction material as defined in the FAR.”
- The Final Rule clarifies “the restriction on the production of iron and steel and ha[s] revised the definitions of ‘domestic construction material’ in [the FAR]... specifying that all of the iron or steel in manufactured construction material that consists wholly or predominantly of iron or steel shall be produced in the United States, but the origin of the raw materials of the iron or steel is not restricted.”
- The Final Rule explains that “iron and steel components are only exempt from the [Buy American Provision] if the construction material does not consist wholly or predominantly of iron or steel” and amends the FAR to provide that “[i]ron or steel components of construction material consisting wholly or predominantly of iron or steel must be produced in the United States. This does not restrict the origin of the elements of the iron or steel but requires that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives.”

The Final Rule only applies to contracts governed by the FAR. Separate final guidance will be published by the Office of Management and Budget for contracts funded by Recovery Act grants.

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