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Recovery Act Requirements Take Shape

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by Richard J. Vacura, Keric Chin

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The Federal Acquisition Regulation ("FAR") Councils have promulgated a number of important interim rules amending the FAR and implementing contract-related requirements of the American Recovery and Reinvestment Act (the "Recovery Act"). These include: (1) Buy American requirements for construction materials; (2) whistleblower protections; (3) requirements for publicizing contract actions; (4) reporting requirements; and (5) Government Accountability Office/Inspector General access to records and employees. The new rules were published in the Federal Register on March 31, 2009 and became effective on that date.[1] They apply to all contracts and subcontracts funded in whole or in part by Recovery Act funds, including contracts for the purchase of commercial items and those under simplified acquisition threshold. They represent additional requirements above and beyond the norm. Each rule is described more fully below.

Buy American Requirements[2]

Section 1605 of the Recovery Act prohibits, *inter alia*, the use of recovery funds for any 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.[3] When first proposed, this provision drew the ire of many critics both at home and abroad, who argued that protectionist measures such as this would trigger trade wars and impede economic recovery. In response, the Senate amended the bill to clarify that the "Buy American" provision of the Recovery Act would be applied in a manner that is consistent with U.S. obligations under international agreements.[4]

The new rule is structured along the same lines as the more familiar Buy American Act provisions of the FAR. Like the Buy American Act, the Recovery Act's prohibition against the use of foreign construction materials is not absolute. There are several important exceptions to the prohibition under both. The contracting officer may allow the contractor to incorporate foreign construction material into a project if: (1) domestic construction materials are not reasonably available in sufficient quantities and satisfactory quality; (2) the cost of such materials is unreasonable; or (3) application of the prohibition on the use of foreign construction materials would be inconsistent with public interest.

There are also important differences between the Recovery Act and Buy American Act provisions. Most notably, the price evaluation adjustment under the Recovery Act that the government is obligated to apply is 25 percent for any offer incorporating foreign iron, steel, or "manufactured construction materials." Moreover, the adjustment is applied to the *total offered price of the contract*. By contrast, the price evaluation adjustment under the Buy American Act is only 6 percent and it is only applied to the price of the foreign materials incorporated into the offer. Under the new rule, both price evaluation adjustments are used, with the former covering the purchase of iron, steel, and "manufactured construction materials" and the latter covering the purchase of "unmanufactured construction materials."

Contracting officers use the price evaluation adjustments to compare offers incorporating foreign construction materials to those that do not. Application of the two price evaluation adjustments is relatively straightforward. In evaluating an offer, the contracting officer will first increase the total price of the offer by 25 percent if the offer incorporates any foreign iron, steel, or manufactured construction material. The contracting officer will then apply the Buy American Act's 6 percent price evaluation adjustment to the price of the foreign unmanufactured construction material, if any, incorporated into the offer. The total evaluated price for the offer is the sum of these two price adjustments.[5]

The new rule clearly favors use of domestic construction materials and may, as a practical matter, preclude the use of foreign construction materials, especially iron, steel, and manufactured construction material. In this regard, the difference between foreign "manufactured" and "unmanufactured" construction material is important because the former triggers the 25 percent upward price evaluation adjustment. The new rule defines "manufactured construction material" to mean any construction material other than "unmanufactured construction material" and it defines "unmanufactured construction material" to mean raw material brought to the construction site for incorporation into the building or public work that has not been processed into a specific form or shape, or combined with other raw materials to create a material that has different properties than its constituent parts. Given the narrow definition of "unmanufactured construction material," the definition of "manufactured construction material" is necessarily broad.

Another important difference between new rule and the Buy American Act provisions is the definition of "domestic construction material." Under the new rule, the term includes construction material mined, produced, or manufactured in the United States. There are no restrictions with respect to the origin of the components comprising the manufactured construction materials. As a result, all or some of the components comprising the construction material can be foreign so long as the end product is manufactured in the United States. This contrasts significantly with the Buy American Act provisions, which define domestic construction material as unmanufactured construction material mined or produced in the United States or "construction material manufactured in the United States, if the costs of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components." In other words, to qualify as a domestic end product under the Buy American Act, the product must be manufactured in the United States *and* the cost of its domestic components must cost more than half of the total cost of all components. To qualify under the Recovery Act, the product need only be manufactured in the United States.

Consistent with U.S. obligations under various trade agreements, offers incorporating domestic and designated country construction material are evaluated on an equal footing for contracts with an estimated value of $7,443,000 or more. Under the Recovery Act, designated countries include the WTO GPA countries, FTA countries, and least developed countries. They do not include Caribbean Basin countries, in contrast to the other Trade Agreements Act provisions. [6] The "substantial transformation" test is applied to determine the country of origin of eligible construction materials.[7] Contractors are required to use domestic or Recovery Act designated country construction materials unless an exception is provided.

Whistleblower Protections[8]

Section 1553 of the Recovery Act extends whistleblower protections to the employees of contractors and subcontractors that are awarded contracts funded, in whole or in part, with Recovery Act funds. Section 1553 and the new implementing rule prohibit non-Federal employers from discharging, demoting, or discriminating against employees as a reprisal for disclosing "covered information" to certain governmental entities or persons within the employee's chain of supervision. "Covered information" includes information that the employee reasonably believes is evidence of:

- Gross mismanagement of an agency contract or subcontract relating to recovery funds;
- Gross waste of recovery funds;
- A substantial danger to public health or safety related to the use of recovery funds;
- An abuse of authority related to the implementation or use of recovery funds; or
- A violation of law, rule or regulation related to an agency contract, including the competition for or negotiation of a contract, related to recovery funds.

The new rule protects employees against acts of reprisal for disclosing such covered information to any of the following entities or their representatives:

- The Recovery Act Transparency and Accountability Board;
- An Inspector General;
- The Comptroller General;
- A member of Congress;
- A state or federal regulatory or law enforcement;
- A person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover or terminate misconduct;
- A court or grand jury; or
- The head of a federal agency.

The inspector general for the agency that awarded the contract is charged with investigating complaints of reprisal and is required to do so unless the inspector general determines that the complaint is frivolous, does not relate to covered funds, or another federal or state judicial or administrative proceeding has previously been invoked to resolve such complaint. The inspector general may also decline to investigate the complaint after providing a written explanation for doing so to the complainant and the non-federal employer. Section 1553 and the new implementing rule impose strict timelines on the inspector general's investigation and the agency's actions in response to the investigative report. Ultimately, a complainant who is not satisfied with the relief, if any, granted by the agency or who has otherwise exhausted his or her administrative remedies may bring a civil action against the employer in federal court and either party may demand a jury trial. The whistleblower protections, including burdens of proof and timelines, are discussed in greater detail in our February 2009 Legal Update, "Sweeping New Whistleblower Law May Cover All Employers Who Receive Stimulus Funds," by Daniel P. Westman and Vanessa R. Waldref.

Publicizing Contract Actions[9]

The FAR Councils also issued a new rule implementing OMB guidance relative to publicizing pre-award and post-award contract actions. Among other things, the new rule directs agencies to identify proposed contract actions funded in whole or in part with recovery funds, to post pre-award notices for task and delivery orders of $25,000 or more for "informational purposes only," and to include a narrative of the products and services (including construction) that is clear and unambiguous to the public. In terms of post-award contract actions, the new rule requires publication of any contract action exceeding $500,000 and any contract action, regardless of value, that is not both fixed price and competitively awarded.

Reporting Requirements[10]

In keeping with the Obama Administration's commitment to an "unprecedented level of transparency and accountability," contractors that are awarded contracts funded in whole or in part with Recovery Act funds will be subject to extensive reporting requirements. Beginning on July 10, 2009, and thereafter on the 10th day after the end of each calendar quarter, such contractors must report the following information using the reporting tool at http://www.FederalReporting.gov (which is still being developed):

- The government contract and order number, as applicable.
- The amount of Recovery Act funds invoiced by the contractor for the reporting period.
- A list of significant services performed or supplies delivered for which the contractor has invoiced.
- A description of the overall purpose and expected outcomes or results of the contract.

- An assessment of the contractor's progress toward completion of the overall purpose and expected outcomes or results of the project.
- A narrative description of the employment impact of work funded by the Recovery Act, including the types and estimated numbers of jobs created and retained in the United States and outlying areas.
- Names and total compensation for each of the five most highly compensated officers of the contractor, if the contractor received: (1) 80 percent or more of the its annual gross revenues from federal contracts, funding agreements or loans; (2) $25 million or more in annual gross revenue from those sources; and (3) the public does not have access to the information through other means.
- Information about first-tier subcontractors, including, if applicable, the names and total compensation for each of the five most highly compensated officers of the contractor.

Most of the reporting requirements under the new rule were specified in the Recovery Act and initial OMB guidance. However, the requirement to report the total compensation for the five most highly compensated was not, and may come as a surprise to some companies. In discussing this requirement, the FAR Council states that the companies to which it applies should already be aware of the requirement and have prepared for it because the requirement was introduced by the Federal Funding Accountability and Transparency Act ("FFATA"), which became law on December 26, 2007. This is only partially correct. While FFATA became law on the specified date, the requirement to disclose executive compensation was added to FFATA on June 30, 2008 by a provision in the Supplemental Appropriations Act of 2008 (Pub. L. No. 110-252).

Government Accountability Office/Inspector General Access[11]

Several sections of the Recovery Act provide for increased access by the Comptroller General and inspector generals to the records and employees of contractors and subcontractors that receive contracts funded with Recovery Act funds. More specifically, Section 902 of the Recovery Act provides the Comptroller General and his or her representatives with authority to examine the records of the contractor and any of its subcontractors and to interview any officer or employees of the same. Section 1515 similarly authorizes agency inspectors general to examine the records of the contractor and any of its subcontractors. However, it only authorizes them to interview the officers and employees of the contractor, and not its subcontractors. The new rule amends the FAR to provide the Comptroller General and inspectors general with these authorities to the extent those authorities did not already exist in the FAR.

* * *

It is important to note that the requirements discussed in this article are in addition to those already applicable to contractors and subcontractors under the FAR. Companies who have received contracts or subcontracts that are funded in whole or in part by Recovery Act funds would be well advised to review and update their internal policies and procedures to ensure compliance with these new requirements, particularly in light of the Administration commitment to unprecedented levels of transparency and accountability. It should also be noted that many of these requirements also apply, in some form or fashion, to recipients and subrecipients of grants and cooperative agreements funded with Recovery Act funds. Appendix 9 of the OMB's updated implementing guidance, dated April 3, 2009, provides further detail on the application of these requirements to grants and cooperative agreements.

Footnotes

[1] *See also*, Office of Management and Budget Memorandum, *Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009*, M-09-15 (Apr. 3, 2009).

[2] *See* American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material, 74 Fed. Reg. 14,623 (Mar. 31, 2009) (interim rule).

[3] Pub. L. No. 111-5, § 1605.

[4] *E.g.*, World Trade Organization Government Procurement Agreement ("WTO GPA") and Free Trade Agreements.

[5] Total evaluated price = offered price + (.25)(offered price, if offer incorporates foreign manufactured construction materials) + (.06)(cost of foreign unmanufactured material, if any).

[6] *See* Federal Acquisition Regulation ("FAR") Subpart 25.4.

[7] Under the Trade Agreements Act, the following country of origin rule applies:

An article is a product of a country or instrumentality only if (i)it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii)in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been *substantially transformed* into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

19 U.S.C. § 2518(4)(B) (emphasis added). Notably, in July 2008, the U.S. Customs and Border Protection proposed extending the "tariff shift" test and related rules set forth in 19 C.F.R. Part 102 to the Trade Agreements Act and other customs laws that use the "substantial transformation" test. This would add substantial complexity to country-of-origin determinations, as described in our October 2008 Legal Update, "Proposed Changes to Compliance Standards for the Trade Agreements Act May Add Complexity," by Richard J. Vacura and Keric B. Chin.

[8] *See* American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections, 74 Fed. Reg. 14,633 (Mar. 31, 2009) (interim rule).

[9] *See* American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions, 74 Fed. Reg. 14,636 (Mar. 31, 2009) (interim rule).

[10] *See* American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements, 74 Fed. Reg. 14,639 (Mar. 31, 2009) (interim rule).

[11] *See* American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access, 74 Fed. Reg. 14,646 (Mar. 31, 2009) (interim rule).