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Recovery Act and Updates to "Buy American"

By David S. Gallacher

On March 25, 2010, the Office of Management and Budget ("OMB") offered three small, yet significant, amendments to the rules implementing the "Buy American" requirement of the American Recovery and Reinvestment Act of 2009 (Section 1605 of the "Recovery Act" or "ARRA"). *See* 75 Fed. Reg. 14323. The new rules *do* liberalize the requirement – at least a little bit – allowing increased flexibility in delivering products from Canada and Taiwan under State or local construction projects funded by the Recovery Act. But be aware that these new amendments are prospective – if you already have a contract funded by the Recovery Act, you will more than likely need to modify your contract to take advantage of these new revisions (assuming you are able). If you are pursuing future business opportunities funded by the Recovery Act, then you may be able to take advantage of the new rules. Easy, right? Not exactly. If you have to deal with these issues in real life, your head is probably already spinning. Let's sit down and talk for a minute.

We have already written at length on this blog about Buy American requirements generally and about Buy American requirements under the Recovery Act, specifically. (Click here). To be clear – *they are not necessarily the same thing*; they involve different statutes, promulgated at different times, for different reasons, imposing slightly different requirements, and having slightly different impacts. While one might think it logical to have a single regime and a one-size-fits-all solution for all Buy American requirements, that is simply not the case. This is, after all, the U.S. Government we are talking about – nothing is ever that easy. Instead we get to wade through and figure out the intricacies and vagaries of "domestic content" and "foreign trade agreements," often on a project-by-project, delivery-by-delivery basis. It's complicated. But, for better or for worse, these new amended rules may make the process at least a tiny bit easier. Maybe.

The new March 25, 2010 amendments implement three recent developments that relate to international trade agreements:

1. Taiwan (Chinese Taipei) is added to the list of approved Recovery Act countries. As previously discussed here and here, Taiwan finalized its process of entering into a free

trade agreement with the U.S. back in July 2009. That means that for certain procurements over the applicable dollar thresholds, products "Made in Taiwan" are considered the same as products "Made in America." While it did take the OMB nearly nine months to make this change, we nonetheless welcome it as long overdue.

2. The applicable dollar threshold for ARRA-funded construction projects is raised to $7,804,000 from $7,443,000. As previously discussed here, the U.S. Trade Representative raised the applicable free trade agreement dollar thresholds on January 1, 2010. This means that for Recovery Act-funded construction projects valued over $7.8 million, a free trade agreement exception could apply. For construction projects valued at less than $7.8 million, domestic construction materials will normally be required, unless another statutory exception is available.

3. The list of State and local entities covered by free trade agreements is amended to allow greater access for Canadian companies and Canadian-origin products for Recovery Act procurements. As previously discussed here and here, the U.S. signed a new trade agreement with Canada on February 12, 2010, allowing improved access to State and local authorities by Canadian companies and for Canadian-origin products. The new trade agreement allows Canadians greater access to procurements conducted by certain State or local authorities, including:

   o Executive agencies of approximately 40 different States; and

   o Recipients of certain funds from the U.S. Department of Agriculture, Department of Energy, Department of Housing and Urban Development, and Environmental Protection Agency, when the projects relate to water and waste disposal, community facilities, energy efficiency and conservation, community development, public housing, and drinking water preservation.

   Notably, the new agreement does not extend to all local entities – most local Port Authorities and cities listed under the free trade agreements do not recognize this new exception for Canadian-origin products. The complete list of State and local authorities covered by the new U.S.-Canada agreement are located at 2 C.F.R. Part 176, Appendix to Subpart B. What this means is that, while over the last year many Canadian-origin products have been frozen out of State and local markets spending Recovery Act funds – which is where the bulk of the Recovery Act procurements are being conducted – those markets should now be more open to Canadian-origin products.

Overall, these are welcome changes. Do they complicate things? Yes, at least a little. But that may be okay because the amendments avoid addressing some of the bigger gaps that have existed in the rules since being promulgated in Spring of 2009. At the very least, these three changes are generally steps forward. You cannot always say that about regulatory updates.

We want to emphasize one final point because it seems to be an issue of common confusion. With regard to the Buy American requirement under the Recovery Act, there are two separate yet similar sets of implementing rules – rules that apply under *direct contracts* with the U.S. Government (promulgated at FAR Subpart 25.6) and rules that apply under *grants* issued by the U.S. Government, which typically includes contracts with State and local governments that receive Recovery Act grants from the Government (with the rules promulgated by the OMB at 2 C.F.R. Part 176, Subpart B). These new amendments apply only to the latter set of regulations – the OMB/grant-based regulations. Most of these new changes were either unneeded or already implemented in the FAR rules, so a new amendment to those FAR rules is probably not coming any time soon. Still, it is worth emphasizing that there are two sets of rules, each of which can, and do, have slightly different requirements depending on your contract.

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