

FAC 2005-32 / FAR Case 2009-008: American Recovery and Reinvestment Act of 2009 (the Recovery Act) - Buy American Requirements for Construction Material
OCPO Regulatory Advisory 09-16

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Item I -American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material (Interim) (FAR Case 2009-008)

This interim rule implements the Buy American provision, section 1605, of the American Recovery and Reinvestment Act of 2009. It prohibits the use of funds appropriated for the Recovery Act 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. However, section 1605 requires that the Buy American requirement be applied in a manner consistent with U.S. obligations under international agreements. Moreover, because Congress intended that least developed countries be excepted from section 1605, least developed countries can continue to be treated as designated countries. Section 1605 also provides for waivers under certain limited circumstances.

Purpose and Description – FAR Case 2009-008, Interim Rule

- Implements the Buy American provision, section 1605, of the Recovery Act.
- Prohibits, with certain exceptions, the use of funds appropriated for the Recovery Act 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.

FAR Parts Affected: Part 1, 5, 25 and 52

- In order to segregate the unique Buy-American provisions of the Recovery Act from the requirements of the Buy American and Trade Agreements Acts, a new Subpart 25.6 has been created entitled “American Recovery and Reinvestment Act—Buy American Act—Construction Materials.”
- Prescriptions for the use of four new solicitation provisions and contract clauses applicable to FAR Part 25 are included in a single subpart, 25.11.

Applicability

- Solicitations issued and contracts awarded on or after March 31, 2009 using Recovery Act funds for iron, steel, and manufactured goods used in projects for construction, alteration, maintenance, or repair of a public building or public work located in the U.S.
- Applies to contracts and subcontracts both above and below the simplified acquisition threshold. It is not applicable to acquisition of commercial items under Part 12 because construction cannot be acquired under Part 12.
- Unmanufactured construction materials remain covered by the provisions of the Buy American Act.
- For construction contracts with an estimated acquisition value of \$7,443,000 or more, eligible products from trade agreement countries receive equal consideration with U.S. products per FAR 25.4.
- Under three limited circumstances, a waiver from the requirements of section 1605 may be granted: non-availability, unreasonable cost, and inconsistency with the public interest.

Contractor Requirements

- Prohibits contractors with certain exceptions from using funds appropriated by the Recovery Act for U.S. construction projects to purchase iron, steel, or other manufactured goods that were not produced in the U.S.
- As applicable, request a pre-award waiver from the Contracting Officer of section 1605 or Buy American Act for specifically identified construction materials in accordance with the applicable clause.
- Postaward requests for waiver of section 1605 or Buy American Act must be accompanied by an explanation of why the need for a waiver was not reasonably foreseeable.

Contracting Officer Responsibilities

- The Contracting Officer may allow incorporation of foreign construction materials on the basis of three exceptions.
 - Iron, steel, or manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality. The head of the contracting activity must make this determination.
 - Inclusion of U.S. iron, steel, and manufactured goods will increase the cost of the project by more than 25%: or
 - Applying the domestic preference would be inconsistent with the public interest. The head of the agency must make this determination.
- When a waiver is granted:
 - The contract must include a list of the excepted materials; and
 - A notice must be published in the Federal Register within two weeks of the date of the waiver unless the construction material is listed at FAR 25.104 as being already domestically unavailable. (See FAR 25.603(b)(2) for the content of the notice.)
- Sections 25.604 and 25.605 address situation where the Contracting Officer must evaluate an offer to determine if an exception for unreasonable cost of domestic construction material applies. The Contracting Officer must evaluate the offer by adding to the offered price—
 - 25 percent of the offered price of the project, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and
 - 6 percent of the value of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.
- Contracting Officers must bilaterally modify existing contracts to include the appropriate FAR clause for future orders or new line items if Recovery Act funds will be used. The contractor is not eligible for receipt of Recovery Act funds if it refuses to accept a modification.
- If the solicitation includes either FAR clause 52.225-11 or 52.225-23 the Contracting Officer must insert the following notice in the synopsis:

“One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.”
- FAR 25.607 provides actions the Contracting Officer must take if there are allegations of non-compliance.
- When using Recovery Act funds, Contracting Officers must insert the appropriate provision and/or clause —

- 52.225-21, Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials, *instead* of 52.225-9, Buy American Act—Construction Materials;
- 52.225-22, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials, *instead* of 52.225-10, Notice of Buy American Act Requirement—Construction Materials;
- 52.225-23, Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials Under Trade Agreements, *instead* of 52.225-11, Buy American Act—Construction Materials under Trade Agreements; and
- 52.225-24, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials under Trade Agreements, *instead* of 52.225-12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements.

Definitions and Key Concepts

- The interim rule includes definitions drawn from existing Federal domestic-sourcing laws and their interpretation.
- The definition of domestic construction material under this rule does not include a requirement relating to the origin of the components of domestic manufactured construction material; therefore, the iron and steel used as components or subcomponents are not required to be domestic as long as the manufacture of the construction material occurs in the U.S.
- For Recovery Act-funded construction projects, the 25 percent price adjustment factor for non-U.S. iron, steel, and other foreign manufactured construction material is unique because the adjustment is applied to the entire price of the project, not only to the cost of the foreign materials.
- The 6 percent adjustment for the Buy American Act is retained and applied to the cost of foreign unmanufactured goods to determine unreasonable cost.
- If trade agreements apply to the acquisition, the use of the provision and clause 52.225-23 and 52.225-24, respectively, ensures that eligible construction material from designated countries is treated on a par with domestic construction material at the appropriate threshold; therefore, no evaluation factor is applied to offers on the basis of using eligible construction material.
- Least developed countries are excepted from section 1605 and therefore retain their status as designated countries. However, Caribbean Basin countries are not included as designated countries with respect to the Recovery Act.

Impact on DHS Acquisition Policy

No changes to the HSAR or HSAM are anticipated.

For More Information

- To access FAC 2005-32's interim rule on Buy American Requirements for Construction Material, type **FAC 2005-32** in the "Search Documents" section of Regulations.gov at <http://www.regulations.gov/search/index.jsp>
- For questions on FAR Case 2009-008, contact Jerry Olson at 202-447-5197 or Jerry.Olson@dhs.gov.