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**Interim Rule Implements The *Buy American Provisions Of The Stimulus Act***

On March 31, 2009, in order to further implement Section 1605 (“the *Buy American Provision*”) of the American Recovery and Reinvestment Act of 2009 (the “Stimulus Act”), the Federal Acquisition Council issued an Interim Rule amending the Federal Acquisition Regulation (“FAR”). The Interim Rule is effective immediately and applies to solicitations issued and contracts awarded on or after March 31, 2009.

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

[n]one of the funds appropriated or otherwise made available by [the Stimulus] 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 Stimulus Act also provided 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 Stimulus Act provided that the *Buy American Provision* “shall be applied in a manner consistent with United States obligations under international agreements.”

The Interim Rule, available at 74 Federal Register 14,623 (March 31, 2009), implements the *Buy American Provision* of the Stimulus Act by adding a new subpart to the FAR that addresses construction materials procured with appropriated stimulus funds. Key aspects of the Interim Rule are summarized below.

- The Interim Rule cross references the pre-existing FAR definition of “public building or public work,” which is



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defined 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 . . .”

- New definitions are provided for “steel,” “manufactured construction material,” “unmanufactured construction material,” “domestic construction material,” and “foreign construction material.”
- The Interim Rule recognizes that the *Buy American Provision* “does not specify a requirement that significantly all the components of construction material must also be domestic.” Thus, for purposes of the *Buy American Provision*, the definition of “domestic construction material” does not address the origin of components.
- The policy provisions of the amended FAR state: “Production 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. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.”
- The Interim Rule describes the process for applying the exceptions to the *Buy American Provision* and includes the calculations for evaluating the use of foreign construction materials.
- The Interim Rule states that foreign construction materials may receive equal consideration with domestic construction materials, so long as the foreign construction materials are imported from a country with which the United States has a qualifying trade agreement and the construction contract exceeds an acquisition threshold.
- New solicitation provisions and contract clauses for use by government contracting officers also are provided.

The Office of Management and Budget (“OMB”) is expected to provide additional guidance on the *Buy American Provision* in the near future.

Interested parties who would like to file comments on the Interim Rule must do so on or before June 1, 2009, in order for the comments to be considered in the formulation of the final rule.

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