

# PUBLICATION

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## "Buy American" Provisions In The Stimulus Bill

March 3, 2009

The American Recovery and Reinvestment Act of 2009 signed by President Obama on February 17, 2009 includes certain controversial "Buy American" provisions that remained in the bill. The House version's strong "Buy American" language was softened in the Senate and final version of the bill. The provisions that remained in the final legislation were modified by language that required stimulus funds be spent in a way that would not violate existing U.S. trade agreements.

A provision requiring the Department of Homeland Security to purchase all uniforms, for its agency personnel requiring uniforms, from U.S. manufacturers remained undiluted in the bill.

A provision requiring that "information technology" purchased by health care providers using federal health information technology funds be made in America was stricken from the final bill with no restrictions on country of origin.

### Infrastructure Spending

The large allocation of spending on the nation's infrastructure is the most impacted by the complications of the "Buy American" provisions which were initially targeted at the use of iron and steel in infrastructure projects. Most of this funding is allocated through the Federal Highway Administration (FHWA) directly or indirectly through the states. The FHWA's "Buy American" regulations have been in place for decades. Will these continue to apply; do they apply only to iron and steel products; do they comply with existing U.S. trade agreements? Will there be new regulations drafted to implement the "Buy American" provisions of the Stimulus Bill.

### "Buy American" Complexities

"Buy American" rules and regulations can vary greatly by the agency administering the program or by the particular project. Rarely does the application of "Buy American" requirements serve to preclude all materials or components of foreign origin. Usually some type of "value-added" test or substantial transformation test applies to the product or products provided. For example, does the use of foreign steel ingots, which are rolled, cut and formed into guard rails in the United States, impact the potential use under the "Buy American" provisions? Generally, each specific case must be analyzed using the rules that apply to that particular procurement or contract. Generally, a company will be required to "certify" that it meets or satisfies the applicable "Buy American" provision. The company's certification will then be subject to audit, with the attendant risks of at least monetary penalties, and possible preclusion from other business. Accordingly, effective recordkeeping and compliance management are necessary.

### What does the modification about existing U.S. trade agreements mean?

The intent of the language change in the Senate version of the bill that prevailed and became law, while sounding rather broad, was specifically intended to cover the United States' agreement with some other nations that are parties to the World Trade Organization (WTO) Agreement on Government Procurement. In addition to the United States, the nations that are parties to the WTO agreement; and, therefore likely to

receive more favorable treatment under "Buy American" rules are Canada, the 27 European Union member states, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, and Switzerland. Conspicuously absent are Australia, China, India, and Latin American countries. Obviously the rules, in this instance, are going to vary with the country of origin in some of the procurement items.

### **Action Steps**

Contractors and sub-contractors should begin identifying potential vendors, suppliers and sources of raw material in contemplation of the likely necessity of certifying "Buy American" compliance.

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Establish auditable recordkeeping and compliance measures, particularly with respect to imported products, in accordance with U.S. Customs and Border Protection regulations.

Review of contracts with legal counsel to assure compliance with "Buy American" and other legal requirements.