



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240



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Department of the Interior Acquisition Policy Release (DIAPR) ARRA 2009-08

Subject: American Recovery and Reinvestment Act (ARRA) (the Recovery Act) of 2009 – Buy American Act - Construction Materials

Reference: Federal Acquisition Circular (FAC) 2005-32, Federal Acquisition Regulation (FAR) Case 2009-008, the Recovery Act of 2009 - Buy American Requirements for Construction Material

FAR Parts 1, 5, 25, and 52

Department of the Interior Acquisition Regulations (DIAR) Parts 1402 and 1425

1. **Purpose:** This DIAPR establishes Departmental policy for the Buy American Act (BAA) for construction material for an acquisition (contract) funded by the Recovery Act. It implements the Buy American provision, section 1605, of the Recovery Act.
2. **Effective Date:** Effective immediately upon issuance. FAC 2005-32 was effective March 31, 2009.
3. **Expiration Date:** This DIAPR will remain in effect until cancelled or superseded.
4. **Background and Explanation:** An interim rule implementing Buy American provisions in the Recovery Act was published by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council on March 31, 2009. The interim rule, which was included in FAC 2005-32, and was effective March 31, 2009, amends the FAR to incorporate Buy American provisions included in the Recovery Act.

The FAR councils issued the interim rule without providing the public an opportunity to comment because contracts for projects using economic stimulus funds are presently ready for award.

Specifically, the rule requires that all iron, steel, and manufactured goods used for construction projects (new construction, alteration, maintenance, or repair of a public building or public work) funded by the Recovery Act be produced in the United States (US). Section 1605 also provides waivers under three limited circumstances.

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 to the FAR was created, entitled “American Recovery and Reinvestment Act – Buy American Act – Construction Materials.” Four new provisions and clauses (with

appropriate alternates) are specified. They apply to contracts and subcontracts, above and below the simplified acquisition threshold. They do not apply to commercial item acquisitions.

The BAA Recovery Act requirements must be applied in a manner consistent with US obligations under international trade. The interim rule contains a definition of “Recovery Act Designated Country” that includes countries that are part of the World Trade Organization’s Government Procurement Agreement, have a free trade agreement with the US, or are considered a least developed country, excluding the Caribbean Basin countries. The BAA restrictions do not apply to Recovery Act designated country construction material. Trade Agreement countries offering eligible products receive equal consideration with US products per FAR Part 25.4.

Subject to a number of qualifications, foreign construction materials can be used if the contracting officer determines the cost of the project would be greater if US construction materials are used. Contractors are required to supply information on foreign construction material used.

FAR Part 25.607 addresses the actions a contracting officer (CO) must take if there are allegations of non-compliance with the unique BAA requirements related to Recovery Act projects.

5. Actions Required for BAA Recovery Act Compliance:

COs must:

- Insert applicable FAR Part 25 clause(s) below as prescribed in all solicitations issued and contracts awarded on or after March 31, 2009 using Recovery Act appropriated funds for construction projects, as follows:
 - FAR 52.225-21, Required Use of American Iron, Steel, and Manufactured Goods-Buy American Act-Construction Materials
 - FAR 52.225-22, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials
 - FAR 52.225-23, Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act – Construction Materials Under Trade Agreements
 - FAR 52.225-24, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act – Construction Materials under Trade Agreements
- Modify existing contracts bilaterally to incorporate the appropriate FAR Part 25 BAA clause for new line items added with Recovery Act funds. The contractor must accept the modification in order to use Recovery Act funds.

- Evaluate an offer to determine if an exception for unreasonable cost of domestic construction material applies (FAR 25.604 and 25.605). The CO must apply evaluation factors to the offer incorporating the use of foreign construction material as follows (see below waiver exception bullet on “unreasonable cost”):
 - 25% of the offered price of the entire 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% of the value of the foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.
- Obtain waivers, as appropriate, to allow use of foreign construction materials. The three waiver exceptions are:
 - **Non-availability** – Iron, steel, or manufactured goods are not produced in the US in sufficient and reasonably available quantities and of a satisfactory quality. The *head of the contracting activity** must make this determination.

**Assistant or Associate Administrative Head of each Bureau, may be redelegated to the Bureau Procurement Chief*
 - **Unreasonable cost** – If the inclusion of US iron, steel, and manufactured goods will increase the cost of the project by more than 25%, the *CO may* determine that the cost of domestic construction material is unreasonable.
 - **Inconsistency with the public interest** - The *head of the agency** must determine if applying the domestic preference would be inconsistent with the public interest.

**Assistant Secretary – Policy, Management and Budget*
- Publish a notice in the *Federal Register* within two weeks of the date of the waiver unless the construction material is listed at FAR 25.104 as already being domestically unavailable. Bureaus will publish a notice in the *Federal Register* in accordance with local policy for waiver approvals granted at the Bureau level (unreasonable cost or non-availability). An Office of Acquisition and Property Management representative will coordinate a notice in the *Register* for an approval granted by the Head of the Agency for an “inconsistency with the public interest” waiver.
- Insert the following notice in the synopsis if the solicitation includes either FAR clause 52.225-11 or 52.225-23:

“One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.”

6. **Additional Information:** Please disseminate this guidance within your Bureau. It will also be available on the web at <http://www.doi.gov/pam/diapr.html>. You may contact Brigitte Meffert on (202) 208-3348 or Brigitte_Meffert@ios.doi.gov with questions regarding this policy.



Debra E. Sonderman, Director

Office of Acquisition and Property Management

QUICK REFERENCE (ACQUISITION)

Major Highlights –

- FAR Case 2009-008 (interim rule) implements the Buy American provision, section 1605, of the Recovery Act
- Rule requires all iron, steel, and manufactured goods used in construction projects (new construction, alteration, maintenance, or repair of a public building or public work) using Recovery Act funds be produced in the US
- Definition of domestic construction material does not include a requirement relating to the origin of the components of domestic manufactured construction material; therefore, components or subcomponents of iron or steel are not required to be domestic as long as the manufacture of the construction material occurs in the US
- Unreasonable cost waiver from the requirements of the BAA Recovery Act funded construction projects calls for a 25 % adjustment factor for non-US iron, steel, and other foreign **manufactured construction material**; 25 % factor is applied to the total price of the project
- 6% adjustment for the Buy American Act is retained and applied to the cost of foreign **unmanufactured goods** to determine unreasonable cost.
- Use of the provision and clause 52.225-23 and 52.225-24 when prescribed, ensures that eligible construction material from designated countries is treated on par with domestic construction material.
- Least developed countries retain their status as designated countries, with the exception of the Caribbean Basin countries

Evaluating Offers of Foreign Construction Material

Total evaluated price = offered price + (.25 x offered price, if FAR Subpart 25.605 (a) (1) applies) + (.06 x cost of foreign unmanufactured construction material, if 25.605 (a) (2) applies)

Four New Provisions and Clauses

<i>If construction project value is:</i>	<i>then insert:</i>
Less than \$7,443,000	52.225-21 and 52.225-22
Greater than \$7,443,000	52.225-23 and 52.225-24

Exceptions to Incorporate Foreign Construction Materials

<i>Exception</i>	<i>Approval Authority</i>
Non-availability	Head of the Contracting Activity
Unreasonable cost	Contracting Officer
Inconsistent with public interest	Head of the Agency