

## Stimulus Contracts Not Business As Usual

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By Tymon Berger

### Fine Print in New Stimulus Act Leaves More Questions than Answers

As government agencies and private businesses scramble for opportunities funded by the American Recovery and Reinvestment Act (known to many as simply "the stimulus"), there has been surprisingly little discussion of how the ARRA will transform numbers on a spreadsheet into construction jobs and demand for U.S. goods. As the Washington State Department of Transportation and other state, local, and even federal agencies roll out bid documents to capture their share of ARRA funds, government agencies and bidders should understand that this is not business as usual.

Public officials should be aware that two major provisions must be attached to ARRA-funded contracts. First, each contract must allow the General Accountability Office to examine any contractor's records and interview any contractor's officers or employees. Second, the contract must comply with the ARRA's "Buy American" provision. The first requirement, though significant, leaves little question regarding what a contractor must be willing to provide. The second requirement, by contrast, leaves it largely unclear what it means to buy American—let alone what provisions federal, state, and local agencies must include in their construction contracts.

### Buying American pre-ARRA

Our current buy-domestic program began with the Buy American Act of 1933, which applies to "[e]very contract for the construction, alteration, or repair of any public building or public work." Under the Act, "public building" and "public work" are generally only those contracts made directly with federal agencies and departments. And although amended over the years, the 1933 Act continues to require construction contractors to build these projects using at least 51% domestically-produced construction materials.

While the 1933 Act applies to contracts directly with the federal government, a separate set of laws and rules impose domestic purchase requirements on non-federal transportation contracts. Starting in 1978 and then again in 1982, Congress implemented a buy-domestic program for state and local governments using federal funds to pay for both highway and transit work. In contrast to the comparatively less demanding 51% requirement found in the 1933 Act, the 1982 "Buy America" statute required all iron, steel, and manufactured goods to be produced in the United States.

Not long after the statute was passed, however, the Federal Highway Administration's enforcement of the statute on highway work began to diverge from the Federal Transit Administration's more stringent interpretation for transit work. The FHWA developed rules that effectively dropped any requirement for non-steel "manufactured goods," and by 1995, even iron had been waived from the statute's requirements. By comparison, the FTA continued to require 100% domestic production of iron, steel, and manufactured goods.



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Prior to the ARRA, then, buy-domestic requirements for construction projects roughly divided into three groups of contracts: direct purchases by federal agencies, federally-funded state and local highway construction contracts, and federally-funded state and local transit construction contracts. For direct purchases, the 1933 Act and the Federal Acquisition Regulation governs, imposing a 51% buy-domestic requirement and a 6% markup on bids that do not comply with the requirement. For state and local highway projects, 100% of the contractor's steel must be American-made, otherwise the bidder suffers a 25% markup on its total bid. For state and local transit projects, this same buy-domestic requirement (and penalty) also applies, and further extends the 100% requirement to all manufactured goods, too.

### Building in the ARRA Era

The trouble with the ARRA's Buy American provision is that it is a sweepingly broad statute dropped amidst a fairly intricate set of existing buy-domestic laws and rules. For example, according to the ARRA's Buy American provision, none of its

appropriations may be used on 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." But the provision does not define "public building" or "public work," even though existing statutes have. Further, the provision broadly governs large amounts of federal contract dollars that, historically, have never had 100% buy-American requirements. And based on its broad language, the provision applies to highway, bridge, and tunnel contracts that never previously included a "manufactured goods" category in their respective buy-domestic clauses.

Interestingly, the House version of this provision was limited to iron and steel—it did not include buy-domestic restrictions on manufactured goods. Furthermore, the House version provided definitions for "public building" and "public work," imputing the 1933 Act's definitions and expressly adding roads, bridges, and transit. Given the 1933 Act's limited application to direct federal contracts, the House's Buy American provision implies that it would have been similarly limited and therefore not applicable to state and local projects. So in the case of ARRA-funded highway projects, for example, the House's Buy American provision would only apply to the federal land highways that traverse Indian reservations and national parks.

Ultimately it did not matter what the House version implied: by the time the ARRA made it to the President's desk, the House's definitions had been deleted, and the broad "manufactured goods" category had been added to the list of iron and steel. It is likely, then, that the signed ARRA contemplates a broad application of the Buy American provision. If so, state transportation agencies like WSDOT will have to overhaul bid documents currently set to the FHWA standard, as this standard does not include a provision for all manufactured goods.

The overhaul is not limited to state transportation agencies, either. Because



The Berry Amendment, originally applicable only to the Department of Defense, requires textile goods such as uniforms to be produced in the United States.

### Stay Tuned

Many anticipate that in the coming days, the Whitehouse's Office of Management and Budget will provide clarification regarding its interpretation of the ARRA's Buy American provision. But as an assistant office to the President, the OMB will likely only focus on a few executive-branch questions, such as what it means to apply the Buy American provision in a manner consistent with international trade agreements. The OMB will not likely endeavor to square the ARRA's Buy American provision with the statutes and agency rules that govern either the FTA or FHWA's Buy America rules.

Modern public works contracts have always contained various buy-American requirements—but none so potentially sweeping as the ARRA's recent update. The ARRA is a broad departure from business as usual for federal, state, and local agencies. And in many ways, the law is still being written. Public officials around the state should therefore be taking a closer look at the ARRA and asking their federal counterparts for guidance. No one will benefit if the ARRA has to be enforced through terminations for convenience. So until government agencies do the tuck-pointing around the ARRA's "Buy American" provision, every contractor and policymaker must remain mindful of the fine print that will certainly change the way business is done. <<

the ARRA uses such broad language, it corners the market on all projects receiving ARRA funds, including direct contracts with federal agencies and departments. Unless an amendment or agency rulemaking narrows the ARRA's current reach, the ARRA overrides considerably more lenient Federal Acquisition Regulation provisions that follow the 1933 Buy American standard—provisions that are regularly used by sizeable construction consumers like the U.S. Army Corps of Engineers.

The ARRA also threatens to nullify specific FAR provisions, like the recently adopted exception of commercially available off-the-shelf items from the FAR's Buy American requirement. And the ARRA even imposes buy-domestic requirements outside of its Buy American provision, expanding the so-called Berry Amendment to Department of Homeland Security agencies such as the TSA, Customs and Border Patrol, FEMA, and the U.S. Coast Guard.