



# AMERICAN RECOVERY AND REINVESTMENT ACT'S BUY AMERICAN REQUIREMENT

## PRESENTED BY

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# The ARRA's Buy American Clause States:

- “None of the funds appropriated or otherwise made available by this 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.”
- Pub. L. No. 111-5 § 1605(a).

# What this means:

- No foreign iron, steel or manufactured goods are permitted;
- Whatever the source of funding for such items;
- In any “public building” or on any “public work”
- That receives ARRA funds.

# Potential for Extremely Broad Interpretation

- “Public Building” and “Public Work”
  - Definitions were removed from the Act
  - “Wiggle room” for BA proponents seeking to impose requirements on other than purely federal projects
  - States
  - Other ARRA projects

# Potential for Extremely Broad Interpretation

- “Manufactured Goods”
  - Unclear exactly what qualifies
  - BA proponents could argue that any item undergoing some processing is a manufactured good
- “...produced in the United States”
  - Not defined
  - Need to know how to qualify goods as U.S. goods
  - Does a product pass the test if merely assembled in the United States of entirely foreign components?

# Exceptions to Buy American Requirement

- Inconsistent with the public interest
- Iron, steel and relevant manufactured goods are unavailable in sufficient quantity or quality
- Inclusion of U.S. iron, steel, or manufactured goods increases the cost of the project by more than 25%
- The agency must issue in the Federal Register a detailed written justification as to why the BA requirement is being waived

# Exceptions to Buy American Requirement

- Similar to exceptions in the Buy America Act of 1933
- However, 25% differential is a significant increase over differentials currently applied in the FAR
- FAR: currently only 6% for large businesses and 12% for small business concerns

# International Agreements Exception

- Implementation of the Buy American requirement must be consistent with international agreements
- National Treatment and Non-Discrimination
- Under the WTO GPA, NAFTA and other FTAs, our trading partner's goods are considered U.S. goods for Buy America Act purposes
- DOE and its Power Marketing Administrations are among U.S. agencies procuring in accordance with WTO GPA (exceptions apply)

# International Agreements Exception

- Assumption is that the ARRA's International Agreements exception will operate as a waiver the same way the TAA operates as a waiver for current BAA requirements.
- WTO Director General Pascal Lamy: “the final compromise is that this [Buy American] provision will be implemented in a way that is consistent with U.S. WTO obligations.”

# International Agreements Exception

## ISSUES

- No FTA with China, Brazil, India, Taiwan, Malaysia
- Is your product covered? Look for exceptions in the applicable FTA
- When does iron, steel or a manufactured good qualify as a U.S. product or the product of an FTA country?
- Will the country of origin rule for U.S. products be the same as the country of origin rule for FTA country products?

# International Agreements Exception

## ISSUES

- Currently, different country of origin rules for U.S. products and FTA-country products
- FTA countries can offer items produced from components originating entirely from
  - the United States,
  - other FTA countries, or
  - even non-FTA countries, such as China, Brazil and India,

# Conclusion

- Application of the BA requirement is not entirely clear at this point
- OMB Guidance (mid-March to mid-April)
- Executive Order
- Individual Agencies may fill in blanks to the extent OMB and the White House do not clarify
- Federal Rulemaking Process may apply with opportunity to comment