

Decoding the "Buy American" Provision

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Midwest Real Estate News

July 9, 2009

The American Recovery and Reinvestment Act of 2009 was signed into law on February 17th of this year. One of the stated goals of the Act is to stimulate job creation and economic development activity related to the construction of public works and other infrastructure projects. The Act therefore represents a range of potential opportunities for developers, contractors and materials suppliers in the construction trades.

However, the Act imposes restrictions upon the use of the funding made available by the Act. One such restriction, which generated significant public debate, is the "Buy American" provision of the Act. This provision requires that, with certain exceptions, the so-called stimulus funds appropriated or made available by the Act may not be used 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." At first blush, this provision seems to exclude from participation in construction projects receiving stimulus funding any provider of raw materials or component parts to be incorporated into a building or structure unless those materials and components are entirely "made in the USA."

Regulations that have been enacted by federal agencies to implement the Act, however, make clear that the Buy American provision should not be read so narrowly. For example, the regulations provide that, in contrast to "structural" steel or iron, the Buy American restrictions do not apply to the steel or iron that may be used as components of manufactured construction material that will be incorporated into the project. "Manufactured construction material" means any raw material brought to the construction site for incorporation into the building or work that has been processed into a specific form and shape, or combined with other raw material to create a material that has different properties from those of the individual raw materials.

In other words, processed building materials and components that themselves contain steel or iron may be used in a project receiving stimulus funding even if that steel or iron is not domestically produced. In addition, manufactured construction materials containing components other than steel or iron may be used regardless of the nation of origin of those components, as long as the manufacture of the finished construction material occurs in the United States.

The Act authorizes the Federal agency awarding stimulus funds for a given project to impose penalties upon discovering a violation of the Buy American provisions of the Act. Those penalties can include the removal and replacement of unauthorized materials and the reduction, suspension or termination of the grant of stimulus funding for the project. Project managers should therefore be vigilant in ensuring that all materials and components to be incorporated into the building or structure are in compliance with the Act. Vendors and materials suppliers should be required to demonstrate their compliance. The regulations do allow an applicant for stimulus funding to request a determination in advance by the agency involved concerning the applicability of the Buy American requirements for specifically identified items.

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