International Government Contractor

WEST®

News and Analysis on International Public Procurement and Export Controls

Vol. 6, No. 1 January 2009

Analysis

¶ 1

With A Massive Economic Stimulus Package On The Horizon, Battle Looms Over 'Buy America' Steel Provisions—Stimulus Package And Other Bills Would Significantly Expand Steel Source Restrictions

A major element of the stimulus package pending in Congress, which may total $825 billion or more, is federal funding for infrastructure projects (e.g., highways, public works construction and public transportation). The House Appropriations Committee has added a provision sought by domestic steel producers that would require that only U.S.-made steel be used in projects funded by the stimulus package. Another bill would make a permanent change in Buy America law to require U.S. steel in any building or public works projects funded by the departments of Defense, Homeland Security or Transportation. Arguably, these expansions could violate U.S. international obligations under the World Trade Organization agreements and bilateral and regional trade agreements, and potentially signal a retreat by the U.S. from open trade principles. The Obama administration has not taken a position on this important issue.

H.R. 595, titled the "American Steel First Act of 2009," was introduced by Rep. Pete Visclosky (D-Ind.) on January 15. The bill would require that most federally funded public works projects, defense installations and some other new federal buildings use only steel produced in the U.S., regardless of whether the funding is provided through the stimulus package or other appropriations. In addition, the House stimulus bill would require U.S.-produced steel for school construction by local school districts. On January 21, the House Appropriations Committee added a section to mandate exclusive use of U.S. iron and steel across the board in building and public works funded by the package.

Key Buy America Provisions in H.R. 595 and the Stimulus Bill—The Buy America scheme in the stimulus bill and H.R. 595 is very similar to the current Buy America Act for federally funded highway projects, 23 USCA § 313, mass transit construction projects, 49 USCA § 5323(j) and airport projects, 49 USCA § 50101. The Buy America standard for steel requires exclusive use of steel "produced" in the U.S. Under applicable regulations, "produced" means that all essential steelmaking operations must have occurred in the U.S., including melting and pouring of molten steel and all other essential processing, including rolling and coating. See, e.g., 49 CFR pt. 661.

Current law allows a waiver of these requirements on three possible grounds. The first ground, vague but rarely invoked, is that the public interest requires it. The second ground applies if U.S. steel is not timely available in sufficient quantities for the project. The third ground, price differential, may be invoked if using domestic steel instead of a less expensive foreign alternative would increase the total cost of the project by at least 25 percent. This is seldom the case, even if the bid using domestic steel is substantially higher than the competition. For example, if steel at the world market price represents 10 percent of project cost, the domestic steel price would have to be two and a half times the price of competing foreign steel to permit a waiver.

The American Steel First bill would apply these Buy America standards to major new categories of spending. For example, the bill would cover any project for the construction, alteration, or repair of buildings or public works funded by appropriations to DOD, DHS and DOT. The stimulus bill would reach stimulus funding through *any* federal agency. "Public works" is defined broadly to include virtually any construction project, including dams, water works, pipelines, harbors, piers, airports, roads, bridges and rail systems. Major areas not covered under current law include:

- Dams, canals, levees, harbor and water works projects, most of which are conducted by the U.S. Army Corps of Engineers.
- Buildings, piers and other facilities constructed or funded by DOD, with no exception provided for overseas construction.

- Homeland security infrastructure, such as border fences and crossing stations, which could include any such infrastructure outside the U.S.
- New buildings or facilities for DHS or DOT funded by appropriations to those departments. Such projects could be covered even if the construction were conducted by another agency, such as the General Services Administration, if the funding is provided through appropriations to any of the three covered departments. For example, DHS' new headquarters is estimated to cost $3.4 billion, and will be the largest construction project in the Washington area since the building of the Pentagon in 1941. GSA plans to finance the project through a combination of increased discretionary appropriations and money collected in rent from federal agencies. If any of the funding comes from appropriations to DHS, the headquarters project could be covered by the new restrictions.
- Coast Guard pier or base projects.
- Any other state or local infrastructure projects that might be included in a federal stimulus program, if falling under the definition of "public works." This would include public works projects funded by the Federal Emergency Management Agency grants after emergencies.

The bill would make another significant change to Buy America requirements by mandating new procedural requirements for granting waivers to the Buy America rules on steel in covered projects. First, whenever a waiver is considered under any of the three grounds for waiver outlined above, the agency concerned would be required to publish a "detailed written justification" in the *Federal Register* and allow a "reasonable time" for public comment. These procedural requirements could make final approval of waivers more difficult and time-consuming. The notice-and-comment requirements would apply not only to the projects newly covered under H.R. 595, but to already-covered highway and mass transit projects. In addition, federal agencies would have to report annually to Congress on any instances of non-application of the domestic steel requirement because of waivers or the application of international agreements or other provisions of law.

Potential Buy America Restrictions Beyond Steel—Last month, the Congressional Steel Caucus sent a letter to House leadership urging that "manufactured products" purchased with stimulus funds, as well as steel, be subject to Buy America restrictions. A request was made to the Rules Committee to allow an amendment to the stimulus bill to be offered on the House floor to make that change. Another proposed amendment would impose a domestic preference on all goods, similar to the Buy American Act, 41 USCA § 10a-d. That Act requires both domestic manufacture and domestic component content of at least 51 percent by cost. The Rules Committee refused to allow either of those amendments, but the Senate Appropriations Committee amended the Buy America section of the Senate stimulus bill to cover manufactured products as well as steel. However, neither H.R. 595 nor any of the current stimulus-related proposals would change current law for "specialty metals" such as titanium. Specialty metals used in supplies sold to DOD are restricted under what used to be known as the Berry Amendment, now 10 USCA § 2533b.

Key Issues—Arguably, the Buy America provisions of the stimulus bill and H.R. 595 violate the WTO Government Procurement Agreement (GPA) and some free trade agreements to which the U.S. is a party. The GPA includes the U.S. and 39 other WTO members, including the 27 members of the EU. The North American Free Trade Agreement covers Canada and Mexico, and the U.S. has bilateral and regional free trade agreements with 18 other countries. These agreements typically require the U.S. and other participants to give reciprocal access to the products of the other participants in procurements funded by those governments, with limited exceptions. The GPA, for example, applies to almost all federal procuring entities, including DOD, DHS (except the Transportation Security Administration) and DOT. It applies generally to construction of buildings and public works under Annex 5, as well as to construction materials acquired directly rather than as incorporated in completed construction projects under Annex 1. However, when entering the GPA, the U.S. trade representative negotiated a carve-out for federal highway and transit projects, to accommodate the existing Buy America statutes.

The GPA does not generally apply to federal non-procurement spending, such as grants and cooperative agreements to universities, state and local governments, and nonprofit organizations. However, 37 U.S. states have joined in the GPA during or since the Uruguay Round, and their procurements are mostly covered under the GPA, although state GPA annexes must be examined to determine the degree of coverage. Thus, many state and local infrastructure projects that receive federal support through the stimulus program could be subject to GPA requirements.

Thus, while current Buy America coverage is essentially consistent with U.S. international obligations, the expanded coverage of the Buy America provisions in the stimulus bill expand coverage to areas not excepted from the GPA. WTO members could file dispute settlement cases and seek the authority to retaliate against U.S. exports. Consistent with the GPA, however, expanded Buy America requirements could be applied in the following areas:

- to projects costing less than the $7.44 million GPA threshold for construction projects, which is rarely the case;
- to exclude steel from country sources that are not covered by the GPA or other FTAs, such as China; and
- to infrastructure grants to states and local authorities that are not covered by the GPA at all, or that exclude steel or the particular type of project from coverage.

Neither the stimulus bill nor H.R. 595 as currently written includes an explicit exception for instances that would breach international agreements, although the annual reporting provision reflects a recognition that the bill may be inconsistent with international obligations in some cases and that a waiver on those grounds may be necessary.

The bill does not contain factual findings on the net economic effects of additional restrictions on U.S. industry. The stimulus package is intended first and foremost to foster U.S. employment and to stimulate U.S.-based business, but expanded application of Buy America restrictions could protect jobs in some U.S. sectors at the expense of others.

✦

This article was written for* INTERNATIONAL GOVERNMENT CONTRACTOR *by* David W. Burgett, Lewis E. Leibowitz *and* Andrew C. Ertley. *Mr. Burgett is a partner and Mr. Ertley is an associate in the Government Contracts Group of Hogan & Hartson LLP, resident in Washington. Mr. Leibowitz is a partner in the firm's International Trade Group. They can be reached at DWBurgett@hhlaw.com, LELeibowitz@hhlaw.com and ACErtley@hhlaw.com.