AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

June 1, 2009

FAR Secretariat (VPR)
1800 F Street, NW
Room 4041
Attn: Hada Flowers
Washington, DC 20405

Re: FAR Case 2009–008, American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Buy American Requirements for Construction Material

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the Interim Rule that the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (hereinafter the "Councils") issued on March 31, 2009. In short, that Interim Rule would: (1) implement section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which implements the Recovery Act with respect to the unique Buy American provision; (2) implement section 1605 of the Recovery Act by adding a new Subpart 25.6, entitled ''American Recovery and Reinvestment Act—Buy American Act—Construction Materials;'' and (3) add new provisions and clauses at Part 52, with conforming changes to Subparts 1.1, 5.2, 25.0, 25.2, and 25.11.

AGC is among the oldest and largest of the nationwide trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly work for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration and other Federal departments and agencies. Most are small and closely-held businesses.

Overall Perceptions of the Proposed Rule

The American Recovery and Reinvestment Act of 2009 (hereinafter referred to as the "Recovery Act"), contains Buy American provisions requiring that, in any project funded by the Act involving a "public building" or "public work," "all of the iron, steel, and manufactured goods used in the project" must be "produced in the United States." The Interim Final Rule, which adds a new FAR subpart at 25.6 and several new contract clauses in Part 52, creates a new regulatory

framework for acquisitions funded by the Recovery Act, and marries long-standing Buy American provisions from the 1964 Buy America law and the provisions outlined in Section 1605 of the Recovery Act.

AGC is sensitive to the limitations the Councils are bound by due to statutory language, and we are aware that the intent of that statutory language was to make sure that Recovery Act dollars help U.S. producers and manufacturers. However, Congress' well-meaning intentions, like all protectionist measures, could inadvertently hurt the downstream U.S. users of those products. AGC believes that greater flexibility in application would help to minimize that impact by limiting the damage and difficulty with complying.

The Interim Rule clarified many ambiguities in the statutory language. AGC still remains concerned, however, that there remains a significant amount of confusion among the construction industry. AGC believes Section 1605 can be implemented in a manner that is consistent with the law without interfering with the start and completion of critical infrastructure projects in a manner that is cost effective and will deliver the promise of helping the U.S. economic recovery. We strongly urge the Councils to approach the regulatory process in a manner that is consistent with the goals of the Recovery Act.

We also believe that there is a high degree of confusion among the government contracting workforce concerning what is required under the statutory language and the Interim Rule. We have already seen evidence that this confusion is causing the government and construction companies to be overly cautious in implementing the Interim Rule and not take into account certain potential exemptions afforded to them due to misperceptions that certain products are covered that are in actuality not covered under the Interim Rule. This is worsening an already difficult and confusing situation. It also has the effect of causing many of our international trading partners tremendous consternation.

The construction industry and its government partners are keenly aware of the additional oversight and scrutiny that Recovery Act projects will garner. We strongly believe that thorough and appropriate oversight is vital on these projects, but the extraordinarily high level of complexity in the statue and in the rulemaking is creating an environment that only serves to incentivize an atmosphere of confusion about the ambiguities in the Interim Rule and the intent of the original legislation. It is imperative that clear and concise guidance be provided as soon as possible to ensure that all parties to Federal contracts fully understand what is and is not covered.

AGC has numerous concerns and questions about the Interim Rule and offers its comments for consideration by the Councils on a variety of matters including:

- New Requirements for Iron and Steel Products
- Consequences for U.S. Trade Agreements and Domestic Construction Costs
- Manufactured & Unmanufactured Goods
- Waivers
- Projects with Recovery Act and Non-Recovery Act Funds

New Requirements for Iron and Steel Products

As to iron and steel procured by Federal contractors for use as construction material in covered projects, the Councils chose to create a new Subpart governing Recovery Act projects. Subpart 25.6 requires, consistent with the Recovery Act, that all manufacturing processes take place in the United States except metallurgical processes related to refining steel additives. This would include melting, pouring, rolling and the like. Subpart 25.6 makes clear, however, that this does not apply to iron and steel used as components or subcomponents of other manufactured construction materials, which markedly limits the impact of the 100 percent domestic iron and steel manufacturing requirement to iron and steel brought to the construction site in those forms, such as rebar and girders.

100 Percent Versus 51 Percent Domestic Content

The Recovery Act's Buy American provision, enacted as Section 1605, goes beyond the original Buy American Act of 1933 (hereinafter "BAA") in that while the BAA requires that only 51 percent of the iron and steel used in a project be domestically manufactured, Section 1605 actually mirrors the Buy America statute used by the U.S. Department of Transportation (DOT) for the highway and transit program. This mandates that 100 percent of the iron and steel used in a project be domestically manufactured. In like manner, under Buy America, the cost of domestic materials must be 25 percent more expensive than foreign materials for a cost-based waiver, while under the BAA the cost differential is just six percent.

As to the standard for cost-based waivers, the Recovery Act mandates a 25 percent test, also similar to the DOT's Buy America approach. This means that offers that do not qualify for domestic status will have a 25 percent price premium added for purposes of pricing evaluation *to the whole contract price, not just the material price*, and thus only domestic offers will prevail -- except on the rare occasion when their pricing is more than 25 percent higher than each foreign offer.

Section 1605 of the Recovery Act combines the coverage of both the BAA and the Buy America law. It is clear from the conference report language that it was the intent of Congress to ensure that Section 1605 complied with all international agreements and did not impede the initiation of projects. The broader domestic preference framework has been in effect for decades, and has developed since the BAA was signed into law and evolved as other agency specific or sector specific domestic preference laws have been passed. Current supply chains have developed over time to be in compliance with these current requirements, and any change in such requirements will limit competition and cause delays and increases in costs. AGC urges the Councils to tailor the requirements for Section 1605 into the similar framework of current domestic preference regulations in the Federal Acquisition Regulations (FAR) insofar as returning to the 51 percent determination for what constitutes iron and steel products manufactured in the U.S. This will ensure compliance with our international agreements, assist in getting projects started, limit delays, and ensure competition.

Consequences for U.S. Trade Agreements and Domestic Construction Costs

The provision in the Recovery Act providing that Section 1605 be implemented in a manner consistent with international obligations of the United States was created to address concerns that this provision would be contrary to U.S. agreements such as the World Trade Organization Agreement on Government Procurement and various free trade agreements in which the United States participates.

The enactment of this provision and the Interim Rule is creating great consternation with our international trading partners and could lead them to retaliate with their own protectionist measures. For example, the United States exported approximately nine million tons of steel in 2007. The risk to American steel exports is potentially equal to or greater than the gains that may be realized from the Buy American provision in the Recovery Act. Conceivably, other nations might extend their focus to manufactured goods, now that the U.S. is doing so.

In response to the Buy American measures, other countries would likely choose to echo U.S. legislation by further restricting the ability of foreign firms to bid on public contracts. Such action—applied to lucrative new projects covered by their own stimulus programs—would raise additional barriers to U.S. manufactured exports.

AGC is also greatly concerned about the negative impact the Buy American provision might have on job creation. It is very likely that prices for iron, steel and other manufactured goods that are compliant under the Recovery Act rule will be significantly higher -- although not high enough to trigger the 25 percent total contract cost waiver under the Interim Rule. These increases in construction material costs would mean that fewer projects could be built with the same amount of Recovery Act dollars, which translates to fewer jobs created or retained per dollar invested, limiting economic impact of the Recovery Act on job creation.

AGC is cognizant that these arguments are more general in nature; however, we believe they apply uniquely to these new provisions because of the expedited job creation goals of the Recovery Act, the high profile nature of the Recovery Act, and this particular provision.

Manufactured & Unmanufactured Goods

Construction materials used for projects funded under the Recovery Act must be "produced in the United States." The Councils found that, unlike the BAA, the Recovery Act does not specifically require the components of construction material to be produced in the United States. As a result, under the new rule, an item is a "domestic construction material" and eligible for use in a Recovery Act-funded project if it is manufactured in the United States, regardless of the origin of its components. Although the regulations do not define the term "manufactured," the regulations suggest that the test will be similar to the requirement of U.S. manufacture applied under the BAA. This may in some cases be a less demanding test than the "substantial transformation" test, which examines whether an article is transformed into a new and different article of commerce, having a new name, character, or use.

With respect to manufactured construction material used in covered projects, the Councils define manufactured construction material as all construction material "that is not **un**manufactured" construction material. This effectively means that all construction materials will be deemed "manufactured" when the result of processing into a specific form and shape or combining of raw material into a property different from the individual raw materials.

Defining "Manufactured Goods"

AGC agrees with the Interim Rule approach of not including a requirement relating to the origin of components, but still believes there is a significant benefit to providing clarification on what constitutes a component. An expansive and practical definition for "manufactured good" is needed to allow the contractor leeway in getting the project done on time and not over budget.

As stated above, Subpart 25.6 avoids defining precisely what is required for manufactured construction material to be considered "produced" or "manufactured" in the United States. But given Subpart 25.6's definition of "manufacturing," by implication construction material will be considered "produced/manufactured" in the United States when it results from processing into a specific form and shape or combining of raw material into a property different from the individual raw materials, and that processing/combining occurs in the United States.

For example, if a contractor were to purchase a door frame whose parts were made in Thailand, but those pieces were assembled into the door frame at an off-site warehouse in the U.S., would that constitute being "manufactured" in the United States? Presumably the country of origin of the pieces of that door frame would be irrelevant if it is brought to the jobsite in a completed form and installed there. However if those pieces were delivered instead to the jobsite and assembled there, those pieces would presumably be in violation.

There are many legitimate and important reasons to install at the worksite, but the Interim Rule will encourage or force some assemblies to be done offsite in order to maintain compliance. Allowing the contracting officer some level of discretion in this matter will be beneficial to ensure that projects are not held up by discrepancies in what is a component or competition limited by preventing some companies from bidding. We should not create a situation where it makes more sense to assemble a product onsite, but where the contractor feels obligated to ensure compliance to assemble offsite.

AGC asks that the term "manufactured" be more thoroughly defined. We believe that both the substantial transformation concept and the Buy American Act content model should both be accepted when determining the origin under the Recovery Act. This would only impact contracts under the trade agreements thresholds ($7.433 million under World Trade Agreement Government Procurement Agreement), because then the requirements defined under those pre-existing regulations would apply. Allowing both models to determine when a product has been manufactured in the United States ensures the greatest flexibility in compliance and therefore the greatest number of companies being willing and able to participate.

Unmanufactured Goods

The Recovery Act's Buy American provision only mentions iron, steel, and manufactured goods; it does not address unmanufactured construction material (i.e., sand). However, the Councils went beyond the statue and found that the purpose of the provision is best served by applying the BAA restrictions to unmanufactured construction materials (other than iron or steel) procured for Recovery Act projects. Unmanufactured construction material is defined as raw material that has not been: "(1) Processed into a specific form and shape; or (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials."

AGC believes that statutory authority does not exist to extend the provisions required by Section 1605 to unmanufactured goods and asks that this be struck from the Final Rule. Not only does this serve to severely complicate matters for contractors who perform work for the Federal government as well as state governments (because this provision is absent from the OMB guidance), but it also creates further complications and delays for the contractor. These complications and delays would be passed on to the Federal government in the form of increased costs and delays.

Waivers

Waivers are explicitly allowed under three circumstances: (1) iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; (2) inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent; and (3) applying the domestic preference would be inconsistent with the public interest. If a waiver is taken, the head of the agency has to publish a notice in the *Federal Register* within two weeks after the determination is made, including a detailed justification as to why the restriction is being waived.

The use of these waivers should be encouraged and simplified in appropriate circumstances. The specific two-week timeline for publication in the Federal Register should be removed and replaced with language requiring publication in the fastest practical manner. The use of waivers under any of the three exceptions should be utilized by agencies whenever needed in order to ensure that projects are not needlessly held up, which is in the public interest. There may be instances where blanket waivers or broad temporary waivers may be appropriate. If the Councils were able to broadly define these instances, it could make it more likely that waivers would be utilized. We believe there is hesitancy on the part of both the government and the contractor to apply for these waivers. Many times these broad, temporary waivers will indeed be in the public interest, particularly given the goals of the Recovery Act.

Applicability to Existing Contracts

In addition to contracts awarded on or after March 31, 2009, contracting officers must modify existing contracts to include the Interim Rule's requirements for all future orders under such

contracts. Although the modifications must be made on a bilateral basis, a refusal to accept a modification will make a contractor ineligible to receive Recovery Act funds. The Interim Rule does not give guidance to agencies regarding the implementation of this provision. For example, it does not indicate whether "future orders" include orders under which delivery has not yet occurred.

AGC concludes that such contract modifications should not have been required in the Interim Rule stage. Due to the confusion and massive push to move projects, we ask that the Councils amend the final rule to state that such contract modifications for existing contracts be required 30 days after the final rule is promulgated. The complex nature of the Interim Rule and its potential interactions with existing statues and U.S. trade obligations necessitate deliberative action.

EPA Precedent

The U.S. Environmental Protection Agency (EPA) has taken the prudent approach of using the "public interest" exception to issue a nationwide waiver of the Recovery Act Buy American requirement for State Revolving Loan Fund projects for which debt was incurred between October 1, 2008 and February 17, 2009. This smart approach will permit the flow of Recovery Act funds to state and local clean water and wastewater revolving fund projects that are "shovel-ready," or nearly so, while the agency gets in place the regulatory regime for later projects. Hopefully, more agencies will follow the EPA's lead so that stimulus funds can be deployed now, when most needed, rather than await publication and implementation of Buy American regulations.

De Minimis Exception

Utilizing a similar situation and logic as described above in the Defining "Manufactured" section, a *de minimis* exception should be added to the Interim Rule in order to limit the detrimental impacts of a very small value piece preventing a company from providing an entire system on a project. This can happen in many different types of projects and systems within construction projects, but particularly in the piping area where specific gaskets and fittings must be added on site and are not always manufactured domestically. A *de minimis* exception will help alleviate many of the unintended consequences that are starting to arise during implementation that have no material impact on any company's revenue stream.

Task Orders Under Existing Contracts

The Interim Rule requires contracting officers to modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the Recovery Act Buy American requirements for future orders. In addition, if a contractor refuses to accept such a modification, the contractor will not be eligible for, nor receive, Recovery Act funds. Task orders under Government-wide Acquisition Contracts (GWACs) and Multiple Award Contracts (MACs) are directly impacted by this, which may require pricing adjustments or companies having to forgo the opportunity to provide their products on Recovery Act projects. The Councils should look at limiting the

impact on these types of contracting vehicles. The use of task orders is being encouraged and should be encouraged in order to expedite projects being initiated and funds being spent from the Recovery Act.

Commercial Off-the-Shelf Items

On February 17, 2009, a new Final FAR Rule took effect to partially waive the Buy American Act as it applies to commercially-available off-the-shelf (COTS) items (FAR Case 2005-305, Commercially-Available Off-the-Shelf (COTS) Items, 74 Fed. Reg. 2713 (Jan. 15, 2009)). The rules waive the Buy American Act's "component test" (41 U.S.C. §§ 10a and 10b) for COTS items, which means that a COTS item can be treated as a "domestic end product" so long as the item is "manufactured" in the United States, without the need to track the origin and cost of the item's individual components. In issuing this rule, the Councils observed that compliance with the component test can be especially burdensome in today's global marketplace, and noted that this change "reduces significantly the administrative burden on contractors and the associated costs to the Government."

We believe that commercial items as a "category" should be exempt from coverage under Section 1605 under a public interest waiver, and believe it is consistent with Congressional intent. This will ensure projects can move forward more quickly, increase competition, reduce costs, as well as diminish the level of confusion and apprehension on determining what is and is not covered under the law. Any domestic sourcing requirements that would normally apply to the commercial item would continue to apply, such as the BAA. Commercial item supply chains are well established and modifications to them for Recovery Act projects will be difficult or nearly impossible to implement. Companies will be put in the unenviable position of deciding not to bid on Recovery Act projects due to the difficulty and costs associated with Buy American requirements.

Projects with Recovery Act and Non-Recovery Act Funds

One area that the Interim Rule does not address is projects that are partially funded by both the Recovery Act and regular appropriations. It was noted above how these regulations are markedly different from the currently existing Buy American requirements. Given this, AGC is very concerned that significant confusion could arise regarding when and how the Recovery Act Buy American requirement would cover construction material for these projects. Many times the funds will be combined, so there will be no way to discern between when Recovery Act funds are paying for a particular construction material and when non-Recovery Act funds are paying for it.

If Recovery Act funds are merely supplementing projects funded with non-Recovery Act funds, we urge the Councils to exempt those projects from coverage. The Councils could develop criteria to determine if a project is classified as a Recovery Act funded project. Depending on the nature of those criteria, if a project is determined as meeting those requirements, then the Councils should clarify that the Recovery Act rules apply. AGC recommends that there should

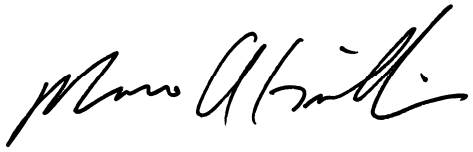
be a preference that mixed-fund projects be treated as non-Recovery Act funded projects to ensure clear application of the regulations to both contractors and contracting officers.

Conclusion

AGC appreciates the opportunity to comment on the rule that the Councils proposed on March 31, 2009. AGC finds that the Interim Rule would change far more than the Councils have acknowledged and that its approach will create complications greater than Congress or even the Councils may have contemplated.

Thank you again for considering AGC's views. The association would welcome the opportunity to provide additional information or support for the rulemaking process.

Sincerely,



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