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



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Office of Federal Financial Management
Office of Management and Budget
Room 6025, New Executive Office Building
Washington, DC 20503

Re: Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the Interim Final Guidance (2 CFR 176) that the Office of Management and Budget (hereinafter "OMB") issued on April 23, 2009 with regard to Pub. L. 111-5. In short, that Interim Final Guidance would: (1) implement the unique reporting requirements that are outlined in section 1512 of Division A of the American Recovery and Reinvestment Act of 2009 (2) implement section 1605 of the Recovery Act by adding new Buy American requirements; and (3) implement section 1606, which applies the prevailing wage requirements of the Davis-Bacon Act to all Recovery Act projects.

AGC is among the oldest and largest of the nationwide trade associations in the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC represents more than 32,000 member companies in nearly 100 chapters throughout the United States including 7,000 of the nation's leading general contractors, 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. AGC members build a wide array of projects including, but not limited to: highways, hospitals, schools, commercial buildings, bridges, tunnels, airports, drinking water and waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, factories, and industrial facilities. Many of these firms regularly work for state Department's of Transportation, municipal governments, water authorities, public and private utilities and Tribal entities that receive funding from federally assisted programs administered by the U.S. Department of Transportation, the U.S. Environmental Protection Agency, the U.S. Department of Agriculture and other federal and state agencies. AGC members also regularly build projects for federal agencies such as the U.S. Army Corps of Engineers, Naval Facilities Engineering Command, the General Services Administration, and other Federal departments and agencies. Our membership consists of open shop as well as union companies; many are family- and employee-owned small and closely-held businesses.

AGC and its members are glad to be a part of the nation's economic recovery and to be working on contracts funded by Recovery Act dollars. We laud the government's goal of creating and retaining jobs – and where Recovery Act contracts have gone out, we have seen jobs created and saved. However, AGC feels that perhaps the increased regulatory burden placed on these

contracts could be holding the Recovery Act back from achieving its true employment potential. AGC remains concerned that these burdens are confusing, and place an inordinate amount of extra risk on the contractor, such that they act both as a barrier to entry to the Recovery Act market, as well as a restriction on potential employment. These concerns are distinguished by rising unemployment in the construction industry in particular, which has reached 19.2 percent, more than double the national average.

For expediency's sake, AGC has divided its comments into two sections, the first dealing with all issues concerning the implementation of Section 1512 (reporting requirements), and the second addressing AGC's concerns with the implementation of Section 1605 (Buy American provisions).

Reporting Requirements

Overall Perceptions of the Guidance

AGC commends the government's goal of transparency and we are pleased to have the opportunity to offer comments on OMB's Interim Final Guidance. AGC understands that OMB is bound to issue regulatory guidance based on statutory language, and we are aware that the intent of that statutory language was to make sure that Recovery Act dollars are thoroughly tracked. However, AGC is concerned that the government may not have reasonably considered the massive amount of information to be collected and its effect on industry. These new costly and time-consuming requirements represent significant changes which have the potential for long-lasting changes to Federally-assisted procurement policies in a manner not fully contemplated by the Congress or the Administration. They could potentially narrow the field of contractors who have the resources for providing this information, leading to decreased competition. This increased burden on contractors and assistance recipients may have the further unintended consequences of exposing contractors to applicable fraud and false-claims statutes and disrupting regulatory predictability which may cause project delays and increase costs to the government, contrary to the goals of the Recovery Act.

AGC believes that the Guidance will have a significant negative economic impact on a substantial number of small businesses, and particularly on the small suppliers and subcontractors that represent the majority of the construction industry. Many of these firms do not, themselves, hold government contracts. AGC fears that many small businesses will find that the costs and complications of complying with the Interim Final Guidance will exceed the benefits of pursuing Recovery Act work and may discourage entrance into the Recovery Act market.

Lack of Working Website

AGC is concerned that the online reporting tool is not yet operable. In OMB's Memorandum for the Heads of Departments and Agencies titled "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009" dated April 3, 2009, section 2.11 states that

“detailed reporting instructions will be made available at www.federalreporting.gov within no less than 45 days before the October 10, 2009 reporting deadline.” OMB also states that it “will work with agencies to determine the most appropriate method for collecting information from the recipients for the July 10th reporting.” Since the tool is not expected to be ready before the July 10 reporting deadline, it is very likely different agencies will implement the reporting requirements in a manner that is confusing and/or inconsistent, further magnifying the burden on the contractor.

Another point to consider is that contractors with direct-Federal contracts are required in FAR 52.204-11 (c) and (d) (FAR Case 2009-009, American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Reporting Requirements) to submit their July 10th reports to the www.federalreporting.gov website. Given that, at this point in the progression, one can presume that it is being developed under a rushed process. Thus, it remains to be seen how well the tool will function, and how clearly it will instruct contractors in how the reports should be completed. This will limit the public’s ability to fully provide thoughtful comments on implementation of the Interim Final Guidance. AGC is concerned that if the tool is not operational, it is very likely different contracting entities will implement the reporting requirements in a manner that is confusing and/or inconsistent.

Since section 1512(f) of the Recovery Act establishes 180 days after enactment (October 10, 2009) as the initial statutory reporting deadline, AGC requests that the July 10 deadline be eliminated and suggests that OMB instead utilize a cumulative report on October 10 as the first official reporting date. AGC is concerned that significant variance in reporting procedures at the first reporting deadline would only serve to compound and already complex and unclear process.

Unpredictable Application of the FFATA

OMB has justified inclusion of the reporting requirements due to the invocation of the Federal Funding Accountability and Transparency Act of 2006 (FFATA) (Pub. L. 109-282) and, in the case of the salary disclosure requirements an amendment (Pub. L. 110-252) to the FFATA, in the statutory language of the Recovery Act. AGC is sensitive to the limitations OMB is bound by due to statutory language, and we are aware that the intent of that statutory language was to ensure that Recovery Act dollars are thoroughly tracked. However, the FFATA was not intended to be applied to federally-assisted contracts. Consequently, contractors who perform work for state and local entities were not anticipating application of these regulations.

AGC is extremely concerned that OMB may have misapplied these FFATA requirements outside of Congressional intent. The FFATA, as written, only applies to direct-Federal spending, and the conference report on its passage discusses only its application to direct-Federal procurements. Disrupting regulatory predictability will likely cause project slowdowns and increase costs to the government, contrary to the goals of the Recovery Act. AGC believes greater flexibility in application would help to minimize that impact by limiting the difficulty with complying.

This concern is further compounded by the fact that the federal regulations concerning the FFATA have not yet gone through the normal rulemaking processes. The FAR Councils have not yet released a Notice of Proposed Rulemaking for the two pending FAR Cases (FAR Cases 2008–039 (FFATA flow-down) and 2008–037 (Financial Disclosure)), yet the FAR Councils and OMB have presumptively advanced to the Interim Final Rule and Interim Final Guidance stages a similar regulation that has not yet been finalized of its own accord, which addresses the policy issues contained in the two pending cases.

AGC is justifiably concerned that the normal deliberative rulemaking process has been trumped by the implementation of the Recovery Act. The passage of the Recovery Act was designed to stimulate our economy, not serve as a back door vehicle for applying Federal regulations beyond their intended scope.

Clarify the Use and Definition of “Recipient” and “Subrecipient”

AGC has noticed inconsistencies in the way OMB defines “Recipient” and the way it uses the term. OMB defines “recipient” as “any entity other than an individual that receives Recovery Act funds in the form of a grant, cooperative agreement or loan *directly* from the Federal Government” – examples of such recipients would be a state or municipal government, a state Department of Transportation (DOT), or a municipal water authority. But both within the Background section and the statutory language, OMB seems to use the term “recipient” to mean the prime contractor, who would normally be considered a “subrecipient” because they do not receive funds directly from the Federal government but from a pass-through entity.

For example, the Background section 5(iv) says “...(Pub. L. 110-252) added a requirement to collect compensation information on certain chief executive officers (CEOs) of the recipient and subrecipient entity” – why would the government be requesting compensation disclosure from the recipient entity, when presumably the recipient is a public entity? A further example in § 176.50(c) states “Recipients and their first-tier recipients must maintain current registrations in the Central Contractor Registration (<http://www.ccr.gov>) at all times during which they have active federal awards funded with Recovery Act funds” – this again seems to indicate that an entity like the state DOT would have to maintain an entry in the Central Contractor Registration database.

These instances of usage seem to imply that OMB is using the term “recipient” to refer to the prime contractor, rather than the entity who *directly* receives the funding, as per OMB’s own definition. AGC is concerned that this inconsistency is at best unclear, and at worst a drastic change in congressional intent concerning what gets reported and to whom the reporting is done. We ask that OMB clarify that the responsibility of the prime contractor is to report to the entity that is directly receiving the Recovery Act funds, and that this entity is responsible for reporting that information to the federal government.

Salary Disclosure Requirements

Part 176 Subpart A of the Interim Final Guidance as well as the “Standard Data Elements for Reports under Section 1512 of the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (hereinafter “Standard Data Elements chart”)” requires each prime contractor and all first-tier subcontractors to disclose the names and total compensation of each of their five most highly compensated officers if they meet the following criteria:

- (1) 80 percent or more of annual gross revenues in Federal awards the previous fiscal year; and
- (2) contractors received \$25M or more in annual gross revenue from Federal awards the previous fiscal year; and
- (3) the public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

This requirement presents several problems. The impact of the public disclosure of total compensation could have long-lasting negative effects on the construction industry. We are also concerned about applying these requirements to existing contracts (particularly given the unpredictability of the application of the FFATA discussed above). Finally, we also have serious reservations about the requirement for prime contractors to obtain salary information from its first-tier subcontractors. For this and other reasons discussed in more detail to follow, AGC recommends that prime contractors not be expected to directly obtain and report salary information for their first-tier subcontractors, but that the subcontractors report this information directly to the government website.

Concerns with the Public Disclosure of Total Compensation

AGC has serious reservations about the release of this critical private information to the public. This information will be available for all to see including competitors, and will no doubt cause privacy and morale issues for owners of construction firms nationwide. The ability of private enterprises to become successful and maintain their level of success is due in part to their right to operate “privately.” American owners of private companies, particularly small businesses, are fiercely independent, hard working risk takers who strongly value their privacy.

In a competitively-bid environment, contractors assume the financial risk of completing a project and receive no guarantee from the project owner of profitability. Contractors competitively bidding on publicly funded construction projects, including those funded by the Recovery Act, enter into construction contracts and provide the necessary bonds as required by statute to protect the financial interests the government and taxpayers, and bear the majority of the risk for completing the project on schedule and within the project budget.

Construction contracting firms, like any other businesses, must be allowed to maintain the business model that works best for each individual company. A privately-held company should not be punished for organizing itself in a manner that best suits its needs, nor should it be punished for having a successful business model. AGC agrees that American taxpayers should be able to review how their money is spent; however, this requirement does not provide the

government or the public with any valuable information that can be used to determine whether a contractor successfully competes for and completes a contract as required by the government. Past performance, experience and the ability to receive bonding should be the basis upon which contractors are judged, not the compensation of their executives. The collection of this information raises several questions. For example, what is the burden on the government to collect executive compensation information? How will this information be used? It is clear that this requirement will be a burden to contractors, yet AGC sees no clear benefit for taxpayers or the Federal government.

Impact on Existing Contracts

In addition to contracts awarded on or after April 23, 2009, contracting officers must modify existing contracts to include the Interim Final Guidance'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 Final Guidance 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.

This is particularly troubling given the unpredictability of the application of the FFATA to contracts that are not directly promulgated by the Federal government, as discussed above. AGC concludes that such contract modifications should not be required in the Interim Final Guidance stage. Due to the confusion and massive push to move projects, we ask that OMB 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 Final Guidance and its potential interactions with existing statutes, as well as the extremely sensitive nature of the information requested, necessitate deliberative action.

Concerns Over Prime Contractors Obtaining Salary Information from Subcontractors

AGC members have indicated that they fully believe that it would be extraordinarily difficult to obtain the required salary disclosure terms from their subcontractor partners. It is very likely that such requests will be met with great resistance. For contracts that have yet to be awarded, there is no guarantee that they will be able to successfully obtain this information from potential first-tier subcontractors, which creates a barrier to entry. For contracts that have already been awarded, this modification to the original contract would create a whole separate set of difficulties in that subcontractors would be faced with the decision to either accept the contract modification or refuse, which could force the prime contractor to either terminate the contract or lead both parties down the uncertain road of litigation. Any refusals to submit to these requirements will, in turn, force a financial hardship on prime contractors by obtaining subcontract help elsewhere at a possibly higher cost. Such a result would limit competition for subcontracts due to a limited pool of subcontractors that would be willing to bid on Recovery Act work. Either of these options would undoubtedly lead to delayed completion of the contract and would be costly to both the prime contractor and the government.

AGC Recommendations

AGC recommends that salary disclosures be visible only to government officials. The public receives no benefit from this information, and the potential harm for contractors is substantial. Prime contractors should not be expected to obtain directly and report to the government salary information for their first-tier subcontractors. Prime contractors and subcontractors should each separately file this information directly to the government website. The prime contractor's responsibility would be to flow-down this requirement to the subcontractor. Accordingly, if a subcontractor were to fail to report this information, it should not reflect negatively on the prime contractor's performance evaluation. If OMB insists on keeping this requirement as is, AGC strongly recommends the inclusion of a safe harbor and affirmative defense for prime contractors for violations committed by any subcontracting entity.

AGC would also like OMB to consider amending the Interim Final Guidance to clarify one key consideration concerning the timing of the reporting elements required by the Interim Final Guidance. We have heard from our members that over the past several weeks, that several Federal contracting officers have recently demanded compliance with the salary disclosure requirement during the Request For Proposals (RFP) phase. When the affected contractors asked the contracting officers why they must submit this information, they were told it was required in order to be considered to receive the contract award, and if they did not include this information, their bids would be rejected as non-responsive. We have seen no evidence that the original legislation, the Recovery Act, or the Interim Final Guidance imposes such a requirement. We respectfully request that OMB issue guidance clearly stating that this information is only required post-award during the applicable reporting periods required by the Recovery Act.

Buy American Requirements

Section 1605 of the Recovery Act contains Buy American provisions which require “public building” or “public works,” projects funded by the Act to use “iron, steel, and manufactured goods” which are “produced in the United States.” The Interim Final Guidance, creates a new regulatory framework for acquisitions funded by the Recovery Act, and expands the application of long-standing Buy American provisions from the 1964 Buy America law, which applies to the surface transportation program

AGC is sensitive to the limitations OMB is 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, and expose contractors to unnecessary increased civil and criminal penalties. AGC believes that greater flexibility in application would help to minimize that impact by limiting the damage and difficulty with complying. Several federal agencies and a limited number of municipalities currently have ‘Buy American’ requirements, but this expansion to programs which have not been traditionally subject to these types of requirements (like the EPA’s federally-assisted State Revolving Loan assistance programs for drinking and wastewater) has led to confusion and there is evidence that despite waiver processes, this provision has slowed down the ability to fund and start “shovel ready” top-priority projects.

The Interim Final Guidance clarified many ambiguities in the statutory language, but AGC remains concerned that there is still a significant amount of confusion among the construction industry, owners, manufacturers and suppliers. 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 OMB to approach the regulatory process in a manner that is consistent with the goals of the Recovery Act, which are to rapidly stimulate employment in the construction industry and provide valuable infrastructure investments.

There is a high degree of confusion among the state and local government contracting workforce concerning what is required under the statutory language and the Interim Final Guidance. We have already seen evidence that this confusion is causing states and localities and their construction companies to be overly cautious in implementing the Interim Final Guidance 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 Final Guidance. This is worsening an already difficult and confusing situation. It also has the effect of causing many of our international trade partners tremendous consternation and is setting the scene for potential retaliation by foreign governments, provinces, and municipalities.

The construction industry and its state and local 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 statute and in the rulemaking is creating an environment that only serves to incentivize an atmosphere of confusion about the ambiguities in the Interim Final Guidance 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 these contracts fully understand what is and is not covered.

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

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

Domestic Construction Costs

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 Final Guidance. 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 as well as the high profile nature of the Recovery Act and this particular provision.

New Requirements for Iron and Steel Products

Subpart B, § 176.70(a) 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 B, § 176.70(a)(2)(i) 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 OMB to tailor the requirements for Section 1605 into the similar framework of current domestic preference regulations 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.

Manufactured Goods

Construction materials used for projects funded under the Recovery Act must be "produced in the United States." OMB determined 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 Guidance, an item is a "manufactured good" 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. AGC agrees with the Interim Final Guidance 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 "manufacturing"

Clarifying the Definition "Manufactured Good"

With respect to manufactured construction material used in covered projects, OMB defines "manufactured good" in § 176.140(a)(1) as a good brought to the construction site that has 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."

This however avoids defining what actually constitutes the manufacturing process. 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 Final Guidance 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 good” 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.

Projects with Recovery Act and Non-Recovery Act Funds

One area that the Interim Final Guidance 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 OMB to exempt those projects from coverage. OMB 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 OMB 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.

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. AGC believes that given the circumstances and goals of the Recovery Act, the use of waivers under any of the three exceptions, particularly the “public interest” exception, 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 OMB 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.

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

A *de minimis* exception should be added to the Interim Final Guidance 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.

The EPA has already granted this type of waiver for Buy American provisions of the Recovery Act. This nationwide waiver can be applied to materials or components which constitute five percent or less of the total cost of materials incorporated into a water infrastructure project funded by the Recovery Act through EPA's Clean Water and Drinking Water State Revolving Loan (SRF) programs. This waiver was deemed to be in the public interest by the EPA in order to ensure that Recovery Act-funded projects proceed within the timelines established in the legislation while meeting the ultimate goal of the Recovery Act's infrastructure component - creating and sustaining jobs and investing in our infrastructure.

Applicability to Existing Contracts

In addition to contracts awarded on or after April 23, 2009, contracting officers must modify existing contracts to include the Interim Final Guidance'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 Final Guidance 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 Final Guidance stage. Due to the confusion and massive push to move projects, we ask that OMB 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 Final Guidance and its potential interactions with existing statutes and U.S. trade obligations necessitate deliberative action.

Consequences for U.S. Trade Agreements

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 in the Interim Final Guidance 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.

These problems are further compounded because the trade agreements exception does not apply to municipal governments (with a handful of exceptions, and even in these cases it is not the full list of designated countries). Municipalities have no experience in applying such rules and their projects and contracting schedules are often more sensitive to restrictions on the supply chain, due to the local nature of the projects. The lack of a trade agreements exception at the municipal level will greatly increase the time and expense of moving projects forward, contrary to the objectives of the Recovery Act.

AGC recommends creating a single set of designated countries for the purposes of all contracts under funded by the Recovery Act - Federal, state and municipal - to promote understanding and compliance by Government and industry. Our suggestion is to eliminate the list of different state requirements in Appendix B with a single standard consistent with the provisions of the Recovery Act. This single standard, the same as that currently applicable to Federal contracts funded by the Recovery Act, would be imposed as a condition of the grants and flowed-down to contractors under Recovery Act-funded contracts.

The currently-proposed regulations allow each state to apply its own law concerning international trade agreements, resulting in the numerous different requirements summarized in Appendix B. This approach is difficult for government and industry personnel to understand and enforce, and has resulted in numerous articles in the media criticizing the complexity of that approach.

We suggest a different, simpler approach that is fully consistent with the Recovery Act: The regulations should impose on grantees the same Recovery Act Buy American requirements applicable to Federal contracts under FAR clause 52.225-23, " Required Use of American Iron, Steel, and Other Manufactured Goods-Buy American Act-Construction Materials Under Trade Agreements (Mar 2009)," published as an interim regulation in the Federal Register of March 31, 2009 (74 Fed. Reg. 14623). That clause defines "Recovery Act designated countries," to include WTO GPA countries, Free Trade Agreement countries and least developed countries. It requires domestic construction materials for contracts under the \$7.443 threshold that triggers international trade agreements (\$8,817,449 for Mexico, Bahrain and Oman). For contracts over those dollar amount thresholds, the FAR clause allows use of construction materials from Recovery Act designated countries.

This approach would simply add this requirement to other Federal requirements imposed on grantees. It would not otherwise interfere with these state and municipal contracts and is fully-consistent with the Recovery Act's Buy American provisions. The contracts would remain state and municipal contracts; they simply would have one additional contract clause - like the current FAR clause - that establishes one standard with which government and industry personnel can comply.

The benefits of our suggested approach would be increased understanding and compliance by state, municipal and industry personnel. It would also create a single standard with which industry would comply, resulting in increased efficiency in production of construction materials.

Conclusion

AGC appreciates the opportunity to comment on the rule that OMB issued on April 23, 2009. AGC finds that the Interim Final Guidance would change far more than OMB have acknowledged and that its approach will create complications greater than Congress or even OMB 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,

A handwritten signature in black ink, appearing to read "Stephen E. Sandherr". The signature is fluid and cursive, with a long horizontal stroke at the end.

Stephen E. Sandherr
Chief Executive Officer

SS/SB/PF/BD/MG