

**ATTACHMENT: FAR Cases**

**FAR Case 2009-008, Buy American Requirements for Construction Material**

- Implements the Recovery Act with respect to the unique Buy American provision, section 1605, by adding a new Subpart 25.6 entitled “Buy American Act – Construction Materials” and adding new provisions and clauses to Part 52 with conforming changes to certain Subparts
- Section 1605, “Buy American,” prohibits the use of funds appropriated or otherwise made available by the Act for any 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
- The law requires that this prohibition be applied in a manner consistent with US obligations under international agreements, and it provides for waiver under 3 circumstances:
  - Iron, steel, or manufactured goods are not produced in the US in sufficient and reasonably available quantities and of a satisfactory quality;
  - Inclusion of iron, steel, or manufactured goods produced in the US will increase the cost of the contract by more than 25%; or
  - Applying the domestic preference would be inconsistent with the public interest.
- Section 1605 is expected to stimulate the economy by increasing and maintaining jobs in the US in the steel, iron, and manufactured construction materials industries and providing new opportunities to construction firms to win contracts for construction and public works projects
- The FAR Council has determined that this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at FAR 2.101
- This rule will not have a significant economic impact on a substantial number of small entities as it only applies to offerors that want to use non-US iron, steel, and other manufactured goods in a construction project in the US
- Does not cover procurements funded with Federal financial assistance such as Federal grants
- Applies to solicitations issued and contracts awarded on or after March 31, 2009

Clause Number	Clause Name
52.225 – 21	Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials
52.225 – 22	Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials
52.225 – 23	Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials under Trade Agreements
52.225 – 24	Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials under Trade Agreements

**FAR Case 2009-009, Reporting Requirements**

- Implements section 1512, the “Jobs Accountability Act,” which requires contractors to report on their use of Recovery Act funds
- Contractors that receive awards (or modifications to existing awards) funded, in whole or in part, by the Recovery Act are required to report quarterly on the use of the funds
- Contracting officers must include the new clause, 52.204-11, in solicitations and contracts funded with Recovery Act funds, except classified solicitations and contracts
- An online reporting tool will be available by July 10, 2009
- Reports from contractors for all work funded by the Recovery Act for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports should be submitted no later than the 10<sup>th</sup> day after the end of each calendar quarter
- Reporting is limited to first-tier subcontractors that meet the applicability requirements
- The FAR Council has determined this rule applies to contracts or subcontracts at or below the simplified acquisition threshold, as well as to commercial items both at the prime and subcontract levels, as defined at 2.101
- The provision of law will also apply to Commercially Available Off-The-Shelf (COTS) item contracts and subcontracts
- This rule may have a significant economic impact on a substantial number of small entities because it requires contractors to report on their use of Recovery Act funds
- Applies to solicitations issued and contracts awarded on or after March 31, 2009

Clause Number	Clause Name
52.204-11	American Recovery and Reinvestment Act—Reporting Requirements
52.212-5	Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items

**FAR Case 2009-010, Publicizing Contract Actions**

- Implements the Office of Management and Budget (OMB) Guidance M-09-10, dated February 18, 2009, entitled, “Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009”, with respect to publicizing contract actions
- The OMB guidance requires that the FAR be amended to reflect unique requirements for:
  - Posting of pre-solicitation notices
  - Announcing contract awards
  - Entering awards into the FPDS
  - Actions that are not fixed-price or competitive

- Requires the CO to enter data in FPDS on any action funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L.111-5), in accordance with the instructions at <https://www.fpds.gov>
- Directs COs to use the Government-wide Point of Entry FedBizOpps (FBO) at <https://www.fedbizopps.gov> to:
  - Identify the action as funded by the Recovery Act;
  - Post pre-award notices for orders exceeding \$25,000 for "informational purposes only;"
  - Describe supplies and services (including construction) in a narrative that is clear and unambiguous to the general public; and
  - Provide a rationale for awarding any action, including modifications and orders, that is not both fixed-price and competitive, and include the rationale for using other than a fixed-price and/or competitive approach.

**FAR Case 2009-011, GAO/IG Access (Sections 902, 1514, and 1515 of Division A)**

- Implements the Recovery Act with respect to Sections 902, 1514 and 1515, by adding *alternate clauses* (see table below). Further, FAR 12.504 (a) (7) is *amended* for contracts using Recovery Act funds to apply 41 U.S.C. 254d (c) and 10 U.S.C. 2313 (c), Examination of Records of Contractor
- Section 1514 provides for agency inspector general review of concerns raised by the public regarding investments of funds under the Recovery Act
- Sections 902 and 1515 provide for respectively, Comptroller General and agency inspector general reviews of any records of the contractor or subcontractor regarding transactions using Recovery Act funds, and the interview of contractor officers or employees concerning such transactions
- Section 902 also provides for the Comptroller General to interview subcontractor employees, while nowhere in the Recovery Act is corresponding authority provided to the agency inspector generals
- Specifically, for contracts using Recovery Act funds, this rule provides the following authorities to the Comptroller General:
  - For Part 12 contracts (Acquisition of Commercial Items), the authority to audit subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold;
  - For Part 15 contracts (Audit and Records), the authority to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold;
  - For Part 14 contracts (Sealed Bidding), the authority to audit both contracts and subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.

- The FAR Council has determined this rule applies to contracts or subcontracts at or below the simplified acquisition threshold, as well as to commercial items both at the prime and subcontract levels, as defined at 2.101
- The provision of law will also apply to Commercially Available Off-The-Shelf (COTS) item contracts and subcontracts
- Contractors are not obligated to create additional records to be in compliance with this rule. They are only expected to make available existing records of transaction covered by the Act
- Applies to solicitations issued and contracts awarded on or after March 31, 2009

Clause Number	Clause Name
52.212 – 5	Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items
52.214 – 26	Audit and Records-Sealed Bidding
52.215-2	Audit and Records – Negotiation

#### **FAR Case 2009-012, Whistleblower Protections**

- Protects state and local government and contractor whistleblowers, and prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information
- The FAR Council has determined this rule applies to contracts or subcontracts at or below the simplified acquisition threshold, as well as to commercial items both at the prime and subcontract levels, as defined at 2.101
- The Administrator, Office of the Federal Procurement Policy, has determined that the rule should apply to COTS item contractors, as defined at FAR 2.101
- The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act
- Applies to solicitations issued and contracts awarded on or after March 31, 2009

Clause Number	Clause Name
52.203-15	Whistleblower Protections
52.212-4	Contract Terms and Conditions—Commercial Items
52.212-5	Contract Terms and Conditions Required to Implement Statutes of Executive Orders—Commercial Items
52.213-4	Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items)
52.244-6	Subcontracts for Commercial Items