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TO: University of Colorado
FROM: B&D Consulting
DATE: April 24, 2009
RE: Potential Impact of the "Buy American" Clause in the *American Recovery and Reinvestment Act*

Introduction

This memo provides a preliminary review of the impact of current and emerging requirements related to the "Buy American" clause included in Public Law 111-5, the *American Recovery and Reinvestment Act* (ARRA), on the University of Colorado's (CU) applications for funding to support construction and high-end instrumentation acquisition projects. Obviously, we offer this counsel in a consulting capacity and not as a legal opinion.

We conclude that when any grant funds traceable to ARRA are used by CU, regardless of whether directly granted from Federal agencies or passed through State entities, CU as a public institution must abide by Buy American requirements on building construction, repair and renovation. Buy American does not, however, cover furnishing a building with equipment or supplies that are not essential to the operational functioning of the structure.

In terms of enforcement, there are significant potential consequences for non-compliance. The Buy American requirements "flow down" from the Federal agency to bind the entity (CU) doing the contracting. The best protection is for CU to similarly "flow down" the requirements to its architecture and engineering consultants, and require that certification of compliance with Buy American be part of all prime construction contracts awarded with ARRA funds. Our understanding is that sophisticated construction contractors are gearing up for stimulus work and are anticipating the assumption of these 'pass through' responsibilities.

1. "Buy American" in the ARRA

Section 1605 of the ARRA is the "Buy American" clause, which requires that public construction projects that use stimulus funds to use U.S.-produced iron, steel, and manufactured goods:

BUY AMERICAN

SEC. 1605. USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS.

(a) None of the funds appropriated or otherwise made available by this Act may be used for a **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. (emphasis added)

(b) Subsection (a) shall not apply in any case or category of cases in which the head of the Federal department or agency involved finds that—

(1) applying subsection (a) would be inconsistent with the public interest;

(2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

(c) If the head of a Federal department or agency determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived.

(d) This section shall be applied in a manner consistent with United States obligations under international agreements.

Iron, Steel and Manufactured Goods

For the most part, case law to date has clarified that, when the Buy American clause pertains, this means that 100% American goods are required in the construction, renovation, maintenance and repair context. That is, anything used in the actual physical structure of a public building or public work would be subject to the requirement, whereas fixtures would not. For example, an HVAC unit or windows would probably be subject to the requirement, whereas a diagnostic imaging machine or computer software would probably not be covered.

Public Buildings and Public Works

Although the definition of a "public building or public work" is not otherwise defined in the ARRA, some general conclusions are possible. An NIH building on the Bethesda campus is clearly a public building, and so would be subject to the Buy American requirements under ARRA. Moreover, building projects on public university campuses (such as University Colorado), as entities of state

governments, are certain to be deemed public buildings and therefore subject to the Buy American requirements under ARRA.

2. Actions to Clarify Impact of Section 1605

On March 31, 2009, the FAR Council released 4 proposed interim final rules regarding ARRA issues to OMB/OIRA for clearance:

- Whistleblower Protections;
- GAO/IG Access;
- Reporting Requirements; and
- Buy American Requirements for Construction Material.

The Office of Management and Budget followed up on April 4, 2009, with "Interim final guidance to agencies" to include in grant and cooperative agreement awards standard terms applying the Buy American section of ARRA. OMB is accepting comments on this interim (but currently effective) final guidance. The guidance does not answer every question regarding Buy American and its application to ARRA projects. But it is clear that the general intent of OMB is to apply Buy American broadly, and to allow a clear and transparent waiver process for certain narrowly defined circumstances.

The guidance states:

“Public building” and "public work" means a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

3. Potential Impact on CU Projects, and Recommendations for Compliance

Public Building

We interpret the guidance definition to cover CU buildings and, absent clear guidance to the contrary from NIH, recommend that CU proceed as if building projects awarded funding through the Extramural Research Facilities Improvement Program (RFA-RR-09-008) or Core Facility Renovation, Repair and Improvement (RFA-RR-09-007) mechanisms would be required to comply with Section 1605.

High End and Shared Instrumentation

We believe that section 1605 will not apply to CU projects selected for funding under the High-End Instrumentation (PAR-09-118) or Shared Instrumentation (PAR-09-028) grant mechanisms. Buy America/Buy American requirements have historically only applied to goods used in the construction (to include also renovation, expansion, modernization and repair) of facilities.

Buy America/Buy American does not prohibit CU from buying research or diagnostic equipment that is not made in the US (e.g., a small animal MRI of a caliber that is only produced by a foreign company).

4. Remedies: What Happens if there is a Violation?

Federal officials clearly have significant powers to "unwind" a project that ignores Buy American requirements. These provisions flow down to the States. The award official for the State agency will be responsible for ensuring that the ARRA is complied with. Violations of the ARRA should be reported to the award official, who will review the allegations. (See new section 2 CFR 176.130 from OMB.) If unauthorized steel or iron is used, the award official can:

1. Determine that section 1605 does not apply.
2. Require the removal and replacement of the unauthorized material.
3. Retain the unauthorized material and reduce the amount of the award by the cost of the unauthorized material.
4. Withhold cash payments pending correction, suspend or terminate the entity, bar the violating entity from further awards or contracts, and refer the matter to the appropriate officer for a criminal investigation .