



“BUY AMERICA”, “BUY AMERICAN ACT” AND “BUY AMERICAN” PROVISIONS IN CONTRACTS-CLARIFYING THE CONFUSION

(Impact of American Recovery and Reinvestment Act on government projects)

With the passage of the American Recovery and Reinvestment Act (ARRA), commonly referred to as the Obama ‘Stimulus Plan’, there will be a substantial increase of federal funds distributed to federal, state and local governments in the next several months and years ahead. With the funding of these projects by the ARRA, a number of requirements will likely be imposed upon contractors and their suppliers concerning the origin and composition of the products or materials that will be utilized in connection with the construction or completion of these projects.

Two commonly referenced clauses often times utilized with government projects are know as the “Buy America” and “Buy American Act”. These clauses can be referenced or incorporated within Purchase Orders or contact documents that are issued in connection with federal, state or local projects that our customers are serving as a contractor or sub-contractor. With projects funded by the ARRA, a third clause has been created which will likely be referred to as “Buy American” or Section 1604 of AARA.

These clauses contain specific requirements relative to the final product containing a certain percentage of domestic or USA manufactured goods or components. Also, these clauses contain provisions which permit products that do not satisfy the domestic requirement, provided a ‘cost premium’ is added to or included in the price that is offered to the contractor or purchaser of item to be utilized for the covered project. The following with provide you with a general overview of the principles surrounding these provisions.

BUY AMERICAN ACT:

Application: Typically applies when the federal government is directly purchasing products or materials or a federal building or facility is being constructed (such as US highways, federal prisons, etc.)

Domestic Requirement: Requires **51%** of the components of the final product to be made in the US.

Cost-Based Waiver: Cost of domestic materials must be 6% (12% for small business) than foreign materials. A price premium of 6% will be added for pricing evaluation by the contracting officer, if the domestic requirement is not satisfied.

BUY AMERICA:

Application: Generally applicable to state and local government projects, typically when these projects are funded by the Federal Transit Authority (FTA). **Domestic Requirement:** Requires **100%** of the components of supplies or construction materials to be made in the US **Cost-Based Waiver:** Cost of domestic materials must be 25% more expensive than foreign materials. A price premium of 25% will be added for pricing evaluation by the contracting officer, if the domestic requirement is not satisfied.

BUY AMERICAN or SECTION 1604 of AARA

Application: Applies to all ARRA funded public buildings and works projects, which will includes federal, state and local projects, if these projects receive funds from ARRA. Domestic Requirement: Requires **100%** of the components of the final product to be made in the US. Cost-Based Waiver: Cost of domestic materials must be 25% more expensive than foreign materials. A price premium of 25% will be added for pricing evaluation, if the domestic requirement is not satisfied.

While the three provisions above may be applicable to a various federal or state projects or projects funded by ARRA, many states have their own 'domestic content' laws that may be even more expansive than these federal provisions provide; however, with most of the projects funded by ARRA (which will likely be federal small business or public works projects of less than \$7.4 million), these more expansive state laws should not be applicable. Nonetheless, it is important for stores and Fastenal sales representatives to be aware of these provisions and understand the relative impact these provisions have on the products we supply to customers and contractors who are purchasing products in connection with government projects funded by the ARRA.

COMPLIANCE ACTIONS:

With the funding of federal and state projects with ARRA funds, it is likely more reporting obligations will be imposed on our stores concerning the domestic content of the products we supply to our customers for covered projects. It is probable that contractors (prime or sub-contractors) may be required to 'certify' that the products they are purchasing or utilizing for covered projects comply with Buy American or Section 1604 of ARRA. Also, our customers may request or require Fastenal to 'certify' or verify that products we supply are compliant. In addition, purchase order documents and other types of contractual arrangements that are presented to stores prior to purchase and delivery of products to customers may include indemnification clauses that hold Fastenal responsible for complying with 'Buy American' clauses. In essence, many contractors and customers may be shifting this 'domestic content' responsibility to their suppliers. Therefore, it is important for stores and Fastenal sales representative to recognize these requirements and to take steps to monitor these requests and to ensure that compliant product is supplied to our customers for these covered projects.