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Iraq Reconstruction: Frequently Asked Questions Concerning the Application of Federal Procurement Statutes

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Summary

The announcement and award of contracts for the postwar reconstruction of Iraq have engendered several questions concerning the application of Federal procurement laws and regulations. This report addresses several of these questions.

Does the Buy American Act apply to contracts for the reconstruction of Iraq?

What is a “Little Buy American Act” and could one be used to require use of American products in the reconstruction of Iraq?

May contracts for the reconstruction of Iraq be limited to American owned companies?

Are contracts for the reconstruction of Iraq subject to full and open competition?

If a contract is “sole-sourced,” what information must be made available?

Does the Buy American Act Apply to Contracts for the Reconstruction of Iraq?

The Buy American Act,¹ the major domestic preference statute governing procurement by the federal government, is quite broad in scope, applying to all Federal procurements that do not come under one of the five exceptions.² Enacted in 1933,³ the Act attempts to protect domestic labor by providing a preference for American goods in government purchases. In determining what are American goods, the place of mining,

¹ 41 U.S.C. §§ 10a through 10d.

² 41 U.S.C. §§ 10a & 10b. The Act applies to leases as well as purchases. National Office Equipment Co., B-191003, 78-1 CPD ¶ 413 (1978).

³ Ch. 212, 47 Stat. 1520, 72nd Congress, 2nd Session. (1933).

production, or manufacture is controlling. The nationality of the contractor is not considered in determining whether a product is of domestic origin.⁴

There are five primary exceptions to the Buy American Act. The Act excepts procurements: (1) to which application would be inconsistent with the public interest; (2) for which compliance would require unreasonable cost;⁵ (3) of products or services for use outside the United States; (4) of products not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality;⁶ or (5) for under \$2,500.⁷

The third exception, exempting articles or services purchased "for use outside of the United States,"⁸ would apply to most contracts for the reconstruction of Iraq. This exception is not limited to only the country of use, but to products of any origin.⁹ For example, the exemption has applied to Canadian steel towers for use in West German communications system procured by the military¹⁰ and military bases leased from foreign governments.¹¹

What is a "Little Buy American Act" and Could One Be Used to Require Use of American Products in the Reconstruction of Iraq?

A "Little Buy American Act" is a domestic preference enacted to govern a specific type of procurement that for some reason is exempt from the Buy American Act. This is usually necessitated because a procurement is for articles for use outside of the United States. Targeted domestic preference provisions have often been attached to the appropriations acts for the agencies making the procurement in question and are of the form—"Notwithstanding any other law, no funds may be used to purchase....not made in America." The most well known of these Acts is commonly referred to as the "Berry Amendment" and requires domestic origin under a long list of certain procurements of the Department of Defense.¹²

The United States Agency for International Development (USAID) has a key role in providing government aid for the reconstruction of Iraq. A "Little Buy American"-like

⁴ See, E-Systems, Inc., 61 Comp. Gen. 431 (1982); and Patterson Pump Co., B-200165, 80-2 CPD ¶ 453 (1980).

⁵ 41 U.S.C. § 10a.

⁶ Id.

⁷ Pub. L. No. 103-355, 108 Stat. 3346-7, 103rd Cong., 2nd Sess. (1994) codified at 41 U.S.C. 10a.

⁸ 41 U.S.C. § 10a.

⁹ B-166137, 49 Comp. Gen. 176 (1969).

¹⁰ Id.

¹¹ B-122519, 34 Comp. Gen. 448 (1955); see also B-221211, 85-2 Comp. Gen. Proc. Dec. P653 (1985).

¹² For more information on this Act, see CRS Report RL31236, *The Berry Amendment: Requiring Defense Procurement To Come From Domestic Sources*, by Valerie Grasso.

provision in the Foreign Assistance Act of 1961 authorizes special rules for the source and nationality of commodities and services financed by USAID.¹³ These special rules are set out at 22 C.F.R. part 228 and apply to goods and services financed directly with program funds under the Act.¹⁴ Detailed rules restrict contracts and subcontracts by categories of countries classified according to certain foreign policy considerations.¹⁵ Also, special rules require U.S. procurement of agricultural commodities (with some exception), motor vehicles designed for normal road speeds, and pharmaceutical products.¹⁶ Other rules set forth U.S.-flag requirements for transporting procured goods,¹⁷ and yet other provisions set forth preference requirements for placing marine insurance.¹⁸

The existence of the USAID provision does not preclude the enactment of a “Little Buy American Act” aimed specifically at Iraqi reconstruction funds. Such provisions have in the past been attached to an appropriation placing a Buy American restriction on the use of the funds.

May Contracts for the Reconstruction of Iraq be Limited to American-Owned Companies?

There is no general limitation on the nationality of ownership of a company contracting with the Federal government. However, Congress has placed this type of limitation under certain programs, the most pertinent being the special rules limiting the nationality of suppliers of commodities and/or services financed by USAID, discussed above.¹⁹ Under these rules lists of countries are excluded from certain covered contracts.²⁰ These limits are on the nationality of the ownership of the company.

Are Contracts for the Reconstruction of Iraq Subject to Full and Open Competition?

Under the Competition in Contracting Act, Federal procurement generally requires full and open competition.²¹ Unlike the Buy American Act, the Competition in Contracting Act does apply to contracts for good or services to be used outside the United

¹³ Pub. L. No. 87-195, § 621, 75 Stat. 445, 494, 87th Cong., 1st Sess. (1961), codified at 22 U.S.C. § 2381.

¹⁴ 22 C.F.R. § 228.02.

¹⁵ 22 C.F.R. § 228.03.

¹⁶ 22 C.F.R. § 228.13.

¹⁷ 22 C.F.R. §§ 228.21, 228.22.

¹⁸ 22 C.F.R. § 228.23.

¹⁹ Pub. L. No. 87-195, § 621, 75 Stat. 445, 494, 87th Cong., 1st Sess. (1961), codified at 22 U.S.C. § 2381.

²⁰ 22 C.F.R. §§ 228.03 and 228.13.

²¹ 10 U.S.C. § 2304 which applies to the Department of Defense and NASA and 40 U.S.C. § 253 which applies to all other executive agencies. *See*, also, 48 C.F.R. part 6.

States. The Act does contain seven exceptions to the general rule. Other than full and open competition is permitted under the following circumstances:

- (1) Only one responsible source is available, and no other supplies or services will satisfy agency requirements.²²
- (2) The agency's need is of such unusual and compelling urgency that the Government would be seriously injured.²³
- (3) The Government needs to ensure suppliers are maintained in case of national emergency or to achieve industrial mobilization; establish or maintain an engineering, research, or development capability; or obtain expert services for litigation.²⁴
- (4) Such competition is precluded by international agreement.²⁵
- (5) A statute specifically authorizes or requires that the acquisition be made through an other agency or from a specified source.²⁶
- (6) Disclosure of the agency's need would compromise national security.²⁷
- (7) The public interest would be better served by other than full and open competition.²⁸

One can at least envision situations where exemptions (2) or (6) could be applied to contracts for reconstruction of Iraq.

Apart from the Competition in Contracting Act, USAID need not use full and open competition when it would impair or otherwise have an adverse effect on programs conducted for the purposes of foreign aid, relief and rehabilitation.²⁹ This authority may be used for award of personal service contracts under section 636(a)(3) of the Foreign Assistance Act of 1961; award of \$250,000 or less by an overseas contracting activity; individual awards with respect to which an assistant administrator of USAID has found that use of full and open competition would impair foreign assistance objectives, and would be inconsistent with fulfillment of the foreign assistance program; awards for particular countries, regions, or projects, or programs, where the administrator of USAID has found that compliance with full and open competition would impair foreign

²² 10 U.S.C. § 2304(c)(1), 40 U.S.C. § 253(c)(1), and 48 C.F.R. § 6.302.1.

²³ 10 U.S.C. § 2304(c)(2), 40 U.S.C. § 253(c)(2), and 48 C.F.R. § 6.302.2.

²⁴ 10 U.S.C. § 2304(c)(3), 40 U.S.C. § 253(c)(3), and 48 C.F.R. § 6.302.3.

²⁵ 10 U.S.C. § 2304(c)(4), 40 U.S.C. § 253(c)(4), and 48 C.F.R. § 6.302.4.

²⁶ 10 U.S.C. § 2304(c)(5), 40 U.S.C. § 253(c)(5), and 48 C.F.R. § 6.302.5.

²⁷ 10 U.S.C. § 2304(c)(6), 40 U.S.C. § 253(c)(6), and 48 C.F.R. § 6.302.6.

²⁸ 10 U.S.C. § 2304(c)(7), 40 U.S.C. § 253(c)(7), and 48 C.F.R. § 6.302.7.

²⁹ 40 U.S.C. § 474 and 48 C.F.R. §706.302-70.

assistance objectives, and would be inconsistent with fulfillment of the foreign assistance program; or awards when open competition would result in substantial additional costs or would result in unacceptable delay.³⁰

If a Contract is “Sole-Sourced,” What Information Must be Made Available?

The Federal Acquisition Regulations require a written, certified justification before any of the exceptions to full and open competition is used.³¹ The regulations specifically require each justification to contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification must include the following information:

- (1) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for other than full and open competition."
- (2) Nature and/or description of the action being approved.
- (3) A description of the supplies or services required to meet the agency's needs (including the estimated value).
- (4) An identification of the statutory authority permitting other than full and open competition.
- (5) A demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited.
- (6) A description of efforts made to ensure that offers are solicited from as many potential sources as is practicable, including whether a notice was or will be publicized and, if not, which exception applies.
- (7) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.
- (8) A description of the market research conducted (see part 10) and the results or a statement of the reason market research was not conducted.
- (9) Any other facts supporting the use of other than full and open competition, such as:
 - (i) Explanation of why technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition have not been developed or are not available.

³⁰ 48 C.F.R. §706.302-70(b).

³¹ 48 C.F.R. § 6.303-1.

(ii) When 6.302-1 is cited for follow-on acquisitions as described in 6.302-1(a)(2)(ii), an estimate of the cost to the Government that would be duplicated and how the estimate was derived.

(iii) When 6.302-2 is cited, data, estimated cost, or other rationale as to the extent and nature of the harm to the Government.

(10) A listing of the sources, if any, that expressed, in writing, an interest in the acquisition.

(11) A statement of the actions, if any, the agency may take to remove or overcome any barriers to competition before any subsequent acquisition for the supplies or services required.

(12) Contracting officer certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

Each justification shall include evidence that any supporting data that are the responsibility of technical or requirements personnel (e.g., verifying the Government's minimum needs or schedule requirements or other rationale for other than full and open competition) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.³²

These justifications must be approved in writing by the agency official designated. The designated official varies according to the size of the contract.³³ Written justifications and related materials are to be available to the public, consistent with the Freedom of Information Act (5 U.S.C. § 552).³⁴

³² 48 C.F.R. § 6.303-2.

³³ 48 C.F.R. § 6.304.

³⁴ 41 U.S.C. § 253(f)(4) and 48 C.F.R. § 6.305.