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To: Charlie Hageman  
FIA Members

From: Laurin Baker  
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Date: April 2, 2009

RE: Federal Acquisition Regulations on the Buy American Requirements for Construction Material in American Recovery and Reinvestment Act (ARRA) Projects

On March 31, 2009, the Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) issued an Interim Rule with Request for Comments to implement the Buy American requirements found in the stimulus package signed by the President on February 17, 2009. (The Federal Register Notice is being provided under separate cover.) The Rule was effective immediately, but public comments may be submitted until June 1, 2009 prior to the issuance of a Final Rule. Please note: the rule does NOT cover procurements funded with Federal financial assistance such as Federal grants. That guidance is expected to be issued separately by the Office of Management and Budget (OMB).

The ARRA *“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 projects are produced in the United States.”* We believe that forgings qualify as a “manufactured good”.

The Interim Rule states that all iron or steel used as construction material must be manufactured in the US, but that *“these requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.”* It goes on to state that *“There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.”*

Thus, our initial interpretation of the Interim Rule is that forgings made in the US will be compliant with this rule. We will continue to consult with other individuals and associations following these issues and will update the membership with any new information.

The remainder of this memorandum highlights key issues of note regarding the Interim Rule.

*This memo should not be relied on as legal advice. It represents only a regulatory interpretation by FIA’s Washington Representatives. Companies should rely on their own legal counsel for final implementation decisions.*

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- The Interim Rule applies to all solicitations and contracts issued on or after March 31, 2009.
  - Existing contracts that will use ARRA funds will be modified to reflect these provisions.
  - You should expect prime contractors and subcontractors to begin flowing down the Buy American requirements for construction materials on ARRA-funded projects very soon.
- You will likely be asked to certify for each shipment under such a contract that the “manufactured good” was made in the US.
- For ARRA projects in excess of \$7,443,000, the Interim Rule lists “designated countries” in the 3<sup>rd</sup> column of p. 14630 of the Federal Register Notice.
  - These are countries that the US has some kind of international agreement with and as such, iron, steel, or manufactured goods that are made in these countries, or “substantially transformed” in one of these countries, will be treated as “domestic” for purposes of ARRA projects.
  - We believe this puts US forgers on the same footing as forgers in these countries in this process.
  - Countries NOT listed in the Rule (notably China and Taiwan) cannot supply iron, steel or manufactured goods for ARRA projects in the US.
- Prime contractors may seek a waiver for US iron, steel or manufactured goods if 1) the iron, steel, or manufactured goods are not produced in the US in sufficient and reasonably available quantities and of a satisfactory quality; 2) if the inclusion of these US materials would increase the cost of the contract by more than 25%; or 3) if applying the domestic preference would be inconsistent with the public good.
  - Waivers will be issued pre-award when possible.
  - If a waiver is needed post-award, there will likely be severe contractor considerations required, which will be passed along to subcontractors.

Please let us know if you have any questions.