

Clarification on American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (the "stimulus Act") was enacted into law on February 17, 2009. A principal purpose of the Stimulus Act is to stimulate the American economy by preserving and creating American jobs, including American manufacturing jobs. As a result, Congress has included in the Stimulus Act a strong "Buy American" provision that mandates that "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." The Stimulus Act requires that the Buy American provision be applied in a manner consistent with U.S. obligations under international agreements, including free trade agreements as determined by the federal government, and provides for a government waiver under specific circumstances and upon publication of a "detailed written justification as to why the Buy American provision is being waived." As you know, The Cast Iron Soil Pipe Institute is the trade association of cast iron pipe and fittings manufacturers in the United States. Thanks to you, our members employ thousands of highly skilled workers in the United States who manufacture and market these products, and who are depending upon the Stimulus Act to help protect their jobs, livelihoods, and the wellbeing of their families in this severe economic crisis. Many of our members' competitors import competing products made in other countries such as China and India. Some of them have made broad claims that these foreign manufactured products are exempted from the Buy American provision and may be purchased using Stimulus Act funds, and they sometimes offer to "certify" that their products comply with various exceptions to the Buy American mandate. Contrary to many of these claims, competing products manufactured in China and India are subject to the Buy American provision of the Stimulus Act unless the government waives the provision based upon authorized grounds and publishes a written justification in the Federal Register within two weeks of making that determination. Competing products that are manufactured in China and India are not exempt from the Buy American provision of the Stimulus Act by a U.S. obligation under a free trade agreement. THE MARK CF QUALITY AND PERFORMANCE Do not accept the assurances of importers of foreign manufactured products at face value. The Buy American provision in the Stimulus Act is far-reaching, and whether an exception or waiver of the provision will apply in a given instance requires careful analysis. Moreover, the government must determine in writing that one of the waiver provisions in section 1605(b) of the Stimulus Act applies. A violation of the Buy American provision of the Stimulus Act by misrepresenting products as U.S. manufactured iron, steel or manufactured goods and using Stimulus Act funds to unlawfully purchase foreign iron, steel, and/or manufactured goods is a very serious matter, and could result in False Claims Act liability, contract termination for default, suspension and debarment of the contractor and, potentially, even criminal liability. Thus, it is important that you carefully scrutinize the claims of importers who solicit you to purchase foreign manufactured goods with Stimulus Act funds. For example, one manufacturer of foreign products has claimed that pursuant to an exception requiring that the Stimulus Act be enforced consistently with international trade agreements, "under NAFTA, products manufactured in Mexico, Canada and the United States must be accorded equal procurement status." This unqualified claim is incorrect. Federal law only affords equal consideration to goods and services from designated countries at or above specified threshold values; for instance, the threshold for construction contracts under the WTO Government Procurement Agreement is \$7.4 million and the threshold for NAFTA is \$8.8 million. Another potential basis for confusion is the Stimulus Act's "unreasonable cost waiver," which permits a federal agency to make a determination to allow a project to use foreign manufactured goods or foreign construction materials if the use of products manufactured in the United States will increase the cost of the "overall project "by more

than 25%. This provision is narrow and must be carefully applied. For example, the unreasonable cost waiver does not apply if the cumulative cost of the U.S. manufactured pipe for a project will be 25% greater than the cost of foreign manufactured pipe; rather the use of U.S. manufactured pipe must increase the cost of the entire project by more than 25%. Further, a determination by a federal agency to apply the unreasonable cost waiver must be published in the Federal Register along with a written justification, unless the product has already been determined to be subject to a waiver. Again, we urge you to exercise great caution in assessing the claims of foreign manufacturers about whether their foreign manufactured products are eligible for use in projects funded by the Stimulus Act. In the meantime CISPI's member companies stand ready to supply you with high quality products that are manufactured in the United States and that fully comply with the Buy American provision in the Stimulus Act. CISPI and its members have the expertise, the capacity, and the desire to meet your needs in every respect. Please contact us if we can assist you in any way.

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