



EMBASSY OF AUSTRALIA
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Brief Guide to US Government Procurement and the Australia United States Free Trade Agreement (including ‘Buy American’)

The Australia United States Free Trade Agreement (AUSFTA) came into effect on 1 January 2005 (enacted by *Public Law 108-286*).

The right of suppliers of Australian goods and services to bid for United States (US) government procurement contracts is dealt with in Chapter 15 (Government Procurement) of AUSFTA.

Broadly, in relation to US contracts Chapter 15 applies to:

- procurements over the relevant monetary thresholds:
 - US federal government construction procurements over the value threshold amount of US\$7,443,000 and goods and services procurements over US\$67,826 (effective from 1 January 2010, these threshold amounts will be US\$7,804,000 and US\$70,079 respectively); and
 - US regional government construction procurements over US\$7,443,000 and goods and services procurements over US\$528,000 (effective from 1 January 2010, these threshold amounts will be US\$7,804,000 and US\$554,000 respectively)
- procurements by most central US government entities; and
- procurements by certain regional US government entities in 31 US states.

Where Chapter 15 applies to a US government procurement, Australian goods and services are to be treated in the same manner as US goods and services. A waiver has been provided by the US to allow non-discriminatory treatment to Australia under AUSFTA with respect to the pre-existing *Buy American Act of 1933* (41 USC 10) that would otherwise apply if not for the waiver. Importantly, this means that a prime contractor on many US government procurement projects can team or subcontract with suppliers of Australian goods without breaching the prime contractor’s obligations relating to the use of non-US product.

The exemption for Australian goods from the *Buy American Act 1933* (41 USC 10) can be found in US Federal Acquisition Regulations (FAR) 25.1 and 25.4 and in the US Federal Register under *FAC 2005-07*, *FAR Case 2004-027*.

The 2009 US stimulus package, embodied in the *American Recovery and Reinvestment Act 2009* (ARRA), contained additional ‘Buy American’ provisions relating to the use of US iron, steel and manufactured goods in public building or public works projects. However, a requirement was included that such provisions are applied in a manner consistent with US international trade obligations. The US has international trade obligations to Australia pursuant to AUSFTA and therefore Australian iron, steel and manufactured goods must not receive any less favourable treatment than those from the US in covered procurements. This has been clarified in US FAR 25.603(c) and the US Code of Federal Regulations Title 2 Part 176.90.

Chapter 15 of AUSFTA does not apply to a range of US procurements, including (but not limited to):

- federally-funded mass transit and highway projects run by US regional entities;

- procurements by specified bodies such as the Transportation Security Administration and the Federal Aviation Administration;
- procurements of a small number of specified goods by the Department of Defense and the General Services Administration;
- ARRA- funded projects that do not constitute procurement eg: under grants or subsidies
- procurements targeted at US small or minority businesses; and
- specific carve-outs relating to procurement of construction services in Arkansas, Hawaii and Kansas and to procurement of construction grade steel in Delaware, Florida, Maine, Maryland, New Hampshire, New York, Oklahoma, Pennsylvania and Wyoming.

(Chapter 15 of the AUSFTA contains the full list of procurements not covered.)

In procurements such as those listed above, the exemption from *Buy American Act* requirements provided for Australian goods and services does not apply. The procuring entity must therefore consider US-origin requirements on relevant products.

NB. This document has been prepared to provide a general overview of the issues raised and does not constitute formal legal advice. Australian companies should seek independent legal advice on the application of the provisions of AUSFTA to each specific situation.