

**BUY AMERICAN ISSUES IN THE RECOVERY ACT
FOR FINANCIAL ASSISTANCE AGREEMENTS**

The Office of Management and Budget (OMB) issued interim guidance for financial assistance actions funded by the Recovery Act in March 2009. Public comments on the interim guidance have been received and are currently being analyzed by OMB. The following questions and answers address many issues that are expected to be clarified in OMB's final guidance, and will be updated as needed.

1. What are the Buy American restrictions in the Recovery Act?

The Buy American provision in the Recovery Act (section 1605 of Title XI), directs that, subject to certain exceptions, no funds appropriated or otherwise made available for a project may be used for the construction, alteration, or repair of a public building or public work unless all the iron, steel, and manufactured goods used are produced in the United States.

2. Does the Buy American provision apply to all projects funded by the Recovery Act?

No. The law covers Recovery-Act-funded federal contracts and Recovery-Act-funded state and local public works projects. For recipients of Federal contract awards directly from the Federal government, guidance is provided at FAR Subpart 25.6, as published in the interim rule in 74 Federal Register 14623 on March 31, 2009.

3. How do financial assistance applicants know if the Buy American requirements apply to their project?

Applicants should first read the information regarding Buy American requirements contained in OMB guidance located in Title 2 of the Code of Federal Regulations Part 176 (2 CFR 176) at <http://www.gpoaccess.gov/CFR/>. Then, for further clarification, applicants should consult with the Contracting Officer in the DOE office that is issuing the specific project announcement.

4. What is a public works project?

Public building or public work means a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks,

piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

5. What is a “manufactured good”?

A manufactured good is a good brought to the construction site for incorporation into the building or work that has been processed into a specific form and shape; or combined with another raw material to create a material that has different properties than the properties of the individual raw materials. (See 2 CFR 176.140(a)(1)). There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in a project, as long as the manufacturing occurs in the United States. (See 2 CFR 85.3).

The interim final guidance at 2 CFR part 176 requires that the manufactured good be incorporated into the project. A crane used to lift items to and from the construction site would not be a covered manufactured good while an energy meter that is brought to the site for incorporation into a building would be covered. The parts that go into a meter brought to the construction site for incorporation into the building would be considered components and, therefore, would not be covered.

6. What is an “alteration”?

An alteration is defined as a limited construction project for an existing building that comprises the modification or replacement of one or a number of existing building systems or components. Alteration means remodeling, improving, extending, or making other changes to a facility, exclusive of maintenance repairs that are preventive in nature. The term includes planning, engineering, architectural work, and other similar actions.

7. Does Buy American apply to privately owned improvements to public buildings and works?

The question to answer is who owns the project, not who is doing the work. If a state/local government entity “owns” the building/work project, it is a public building/work that would be subject to Sec. 1605 (unless exempted). The interim rule applies Sec. 1605 to any building/work that is constructed, altered, repaired, or maintained with Recovery Act funds without regard to title.

8. Is it true that non-manufactured construction materials are not Buy American Act covered?

Correct, they are not covered under Section 1605 of ARRA.

9. Is any change to a public building or work considered construction, alteration, modification, or repair and would therefore prompt the Buy American Act Requirement? Or are minor changes that typically would not be considered a construction activity excluded? If the latter, what is the threshold?

There is no threshold. Agencies that fully or partially fund construction, alteration, maintenance, or repair of a public works/building project with Recovery Act funds would be subject to the Buy American requirements unless an exemption applies and a waiver is granted. In response to several comments, OMB is looking at the possibility of having a de minimus provision in the final rule, but no final decision has been made yet.

10. When are alternate proposals allowed?

When a project proposal includes foreign iron, steel, and/or manufactured goods, other than designated country iron, steel, and/or manufactured goods, that are not listed by the Federal Government at 2 CFR 176.140(b)(2), the applicant may also submit an alternate proposal based on use of equivalent domestic iron, steel, and/or manufactured goods.

If an alternate proposal is submitted, the applicant shall submit a separate cost comparison table prepared in accordance with 2 CFR 176.140(c) and (d) for the proposal that is based on the use of any foreign iron, steel, and or manufactured goods for which the Federal Government has not yet determined an exception applies.

11. Are there exceptions to the Buy American restrictions?

Yes, there are three exceptions where:

- Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality;
- Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the project by more than 25 percent;
- Applying the Buy American restriction is inconsistent with the public interest.

Also, the Buy American restriction is not applicable if it is inconsistent with U.S. obligations under international agreements.

12. How are exceptions processed?

Before Recovery Act funds are awarded by the Federal agency or obligated by the recipient for a project for the construction, alteration, maintenance, or repair of a public building or public work, an applicant or recipient may request from the award official a determination concerning the inapplicability of the Buy American restrictions for specifically identified items. The Recovery Act refers to this determination as a waiver of the Buy American provisions.

A prospective applicant requesting a determination regarding the inapplicability of the Buy American restrictions for lack of quantity or quality, increase of cost of the project by more than 25 percent, or inconsistency with the public interest, should submit the request to the award official in time to allow a determination before submission of applications or proposals. The prospective applicant shall include the information and applicable supporting data required by 2 CFR 176.140(c) and (d) in the request. If an applicant has not requested a determination regarding the inapplicability of the Buy American restrictions before submitting its application or proposal, or has not received a response to a previous request, the applicant shall include the information and supporting data in the application or proposal. Exceptions must be approved by the Head of the agency, and published in the Federal Register.

13. What about a category exception?

If the head of the agency makes a determination of inapplicability for a category of cases, it will be published in the Federal Register and posted on the DOE Recovery Act webpage. To date, DOE has issued no categorical waivers for the Buy American requirements.

14. What if a project falls under U.S. obligations under international agreements?

The Buy American restrictions shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement, and the recipient is required under an international agreement to treat the goods and services of that Party the same as domestic goods and services. This obligation only applies with an estimated value of \$7.4M or more and to projects that are not specifically excluded from the application of those agreements.

The international agreements that obligate recipients that are covered under an international agreement to treat the goods and services of a Party the same as domestic goods and services and the respective Parties to the agreements are listed in the regulations at 2 CFR 176.90(b). Recipients are required to treat the goods and services of that Party the same as domestic goods and services are listed in Appendix B to 2 CFR part 176.

It is important to note, as the Appendix indicates, many states have exceptions to the trade agreements depending upon the items to be purchased or the state sub-entity making the purchase. In particular, NAFTA (Canada and Mexico) does not apply to most states and entities listed in the Appendix.