

## **Buy American<sup>1</sup>**

Question: Our understanding is that to the extent that the estimated value of a grant exceeds \$7,443,000, the contractor may use in its performance either (1) "domestic" iron, steel or manufactured goods, or (2) iron, steel or manufactured goods which are manufactured in any of the "designated countries" listed in this clause. Please confirm.

Answer: We cannot confirm your understanding. The requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act only pertains to international agreements listed in 2 CFR 176.90(b). This provision only applies to grantees that are listed or included within the entities listed in the Appendix to Subpart B of 2 CFR Part 176. If the iron, steel, or manufactured goods to be used in a project receiving Recovery Act funds are from a party to an international agreement listed in 2 CFR 176.90(b), and the grantee is required under the international agreement to treat the goods and services of that party the same as domestic goods and services, then the Buy American Recovery Act provisions would not apply. Also note that pursuant to 2 CFR 176.90(a), this obligation shall only apply to projects with an estimated value of \$7,443,000 or more, and to projects that are not specifically excluded from those agreements. The general exceptions that are excluded from U.S. obligations under international agreement are listed in the Appendix to Subpart B of 2 CFR Part 176.

Question: Do items assembled in the U.S. comply with the Buy American requirements? For example, would an electronic electric meter that may include various parts that are not manufactured in the U.S. comply with the Buy American requirements if the final assembly of that meter is in the U.S.?

Answer: In the case of a manufactured good that consists in whole or in part of materials from another country, if it has been substantially transformed in the U.S. into a new and different manufactured good distinct from the materials from which it was transformed, it can be considered compliant with the Buy American requirements (2 CFR 176.160(a)). A determination of whether substantial transformation has occurred is always on a case-by-case basis. Recipients and subrecipients are responsible for making their own determinations of whether substantial transformation has occurred. Recipients and subrecipients are encouraged to consult with their own legal counsel to make determinations of substantial transformation of manufactured goods and to document their files appropriately.

Question: Do World Trade Organization Governments as listed in the Required Use Of American Iron, Steel, And Manufactured Goods (Covered Under International Agreements)--Section 1605 Of The American Recovery And Reinvestment Act Of 2009 Clause of the assistance agreement comply with the Buy American requirements?

Answer: Please consult the Appendix to Subpart B of 2 CFR Part 176. Also, see the response to the first question above for an explanation of how the requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act is interpreted by Office of

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<sup>1</sup> Note: Recipients should consult the *Department of Energy Acquisition and Financial Assistance Guide for the American Recovery and Reinvestment Act of 2009*. [http://management.energy.gov/policy\\_guidance/1672.htm](http://management.energy.gov/policy_guidance/1672.htm) for supplemental information related to their questions.

## **Questions and Answers for the Smart Grid Investment Grant Program**

Management and Budget (OMB).

Question: Do Free Trade Agreement countries as listed in the Required Use Of American Iron, Steel, And Manufactured Goods (Covered Under International Agreements)--Section 1605 Of The American Recovery And Reinvestment Act Of 2009 Clause of the assistance agreement comply with the Buy American requirements?

Answer: Please consult the Appendix to Subpart B of 2 CFR Part 176. Also, see the response to the first question above for an explanation of how the requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act is interpreted by the OMB.

Question: Do United States-European Communities with Exchange letters as listed on page 12 of the draft agreement comply with the Buy American requirements?

Answer: Please consult the Appendix to Subpart B of 2 CFR Part 176. Also, see the response to the first question above for an explanation of how the requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act is interpreted by OMB.

Question: Do North American Free Trade Agreement countries comply with the Buy American requirements?

Answer: Please consult the Appendix to Subpart B of 2 CFR Part 176. Also, see the response to the first question above for an explanation of how the requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act is interpreted by OMB.

Question: Are there any other countries, in addition to the U.S., other than those asked above, that comply with the Buy American requirements?

Answer: Please consult the Appendix to Subpart B of 2 CFR Part 176. Also, see the response to the first question above for an explanation of how the requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act is interpreted by OMB.

Regarding the Required Use Of American Iron, Steel, And Manufactured Goods -- Section 1605 Of The American Recovery And Reinvestment Act Of 2009 Clause and the Required Use Of American Iron, Steel, And Manufactured Goods (Covered Under International Agreements)--Section 1605 Of The American Recovery And Reinvestment Act Of 2009 Clause of the assistance agreement (relating to American iron, steel and manufactured goods):

Question: Are these sections only applicable to a project that involves a "public work" or a "public building?" In what circumstance would an SGIG project involve a public work or public building?

Answer: Yes, the domestic sourcing requirements are only applicable to a project that involves a public work or public building.

The definition of public building/public work is contained in the Required Use Of American Iron, Steel, And Manufactured Goods -- Section 1605 Of The American Recovery And Reinvestment Act Of 2009 Clause of the assistance agreement. It is also codified at 2 CFR 176.140 (a) (2). DOE obtained further guidance from the Office of Management and Budget (OMB) as follows:

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For instance, if the city government orders repairs to a privately-owned facility (with permission of the owner) that is used as the city's employment office, the city could consider the repair of the facility a public works project regardless of the fact that the owner of the facility receives benefit by not having to pay for the repairs.

Similarly, if the government repairs public housing units (residences), this may constitute a public works project. The determinations in the cases of privately-owned facilities will be made by the government entity ordering the work with consultation or direction from the cognizant Federal agency.

Question: Are those sections intended to be read together such that manufactured goods may be used in an SGIG project so long as they are manufactured in "designated countries" within the definition thereof in the Required Use Of American Iron, Steel, And Manufactured Goods (Covered Under International Agreements)--Section 1605 Of The American Recovery And Reinvestment Act Of 2009 Clause of the assistance agreement only if the grant recipient is a state entity listed in the Appendix to Subpart B of Part 176?

Answer: If the grant recipient is an eligible entity listed in the Appendix to Subpart B of 2 CFR Part 176, it may avail itself of the United States' obligations under the trade agreements listed there.

Question: If American-origin requirements are applicable to an SGIG project, please confirm that iron, steel and manufactured goods made in Canada, Israel or Mexico are permitted.

Answer: Only eligible recipients listed in the Appendix to Subpart B of 2 CFR Part 176 may avail themselves of the United States' obligations under the trade agreements listed there. Note: NAFTA (Canada and Mexico) does not apply to most eligible recipients.

Eligibility of recipients to avail themselves of the United States' obligations under its trade agreements and their applicability to a particular set of facts is a complicated issue. DOE is not authorized to make determinations of eligibility of recipients or applicability of trade agreements. Recipients are urged to consult their own legal counsel for determinations of eligibility for and applicability of trade agreements.

Question: The penalties for non-compliance are quite punitive. Is it possible for a recipient to obtain a waiver from DOE if necessary?

Answer: Yes. Instructions and guidance for obtaining waivers is contained in Attachment 13 to the *Department of Energy Acquisition and Financial Assistance Guide for the American Recovery and Reinvestment Act of 2009*. [http://management.energy.gov/policy\\_guidance/1672.htm](http://management.energy.gov/policy_guidance/1672.htm). Please contact Matt Grosso, [matthew.grosso@hq.doe.gov](mailto:matthew.grosso@hq.doe.gov) or 202-287-5350, for more information.