



Department of Energy
Washington, DC 20585

PROJECTS FUNDED BY THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 AND ADMINISTERED BY THE OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY NOTICE

EFFECTIVE DATE: December 17, 2009

SUBJECT: GUIDANCE ON THE BUY AMERICAN PROVISIONS AS APPLIED TO ENERGY EFFICIENCY AND RENEWABLE ENERGY PROJECTS FUNDED BY THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 AND ADMINISTERED BY THE OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY

PURPOSE: Provides guidance to financial assistance recipients regarding Buy American Recovery Act provisions under projects funded by the American Recovery and Reinvestment Act of 2009 and administered by the Office of Energy Efficiency and Renewable Energy (EERE).

As of the date of this letter the Department of Energy (DOE) has not issued any category waivers or any waivers for a particular project. If DOE issues any waivers to the Buy American Recovery Act provisions, they will be published in the *Federal Register* and otherwise made available through the DOE website and Project and Contracting Officers.

SCOPE: The provisions of this guidance apply to all recipients, sub-recipients and contractors working on projects using Recovery Act funding. The Buy American Recovery Act provisions only apply to projects funded under the Recovery Act for the construction, alteration, maintenance or repair of a public building or public work. The guidance below is designed to help applicants and recipients determine if their Recovery Act funded project is for the construction, alteration, maintenance or repair of a public building or public work¹.

GUIDANCE: The Buy American provision in the American Recovery and Reinvestment Act of 2009 (section 1605 of Title XVI), provides that, subject to three listed exceptions, none of the funds appropriated or otherwise made available by the Act may be used for a project 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

¹ For example, if Recovery Act funded projects under the State Energy Efficient Appliance Rebate Program (SEEARP) are not for the construction, alteration, maintenance or repair of a public building or public work, the Buy American Recovery Act provisions would not apply.

United States. The law also requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements.

Definitions:

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.

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.

Indian tribes are also considered governmental entities for the purpose of defining “public building or public work” and are therefore subject to the Buy American provisions of the Recovery Act.

A manufactured good is defined as a good brought to the construction site for incorporation into the public building or work that has been processed into a specific form and shape or combined with other materials to create a material that has a different property than the individual raw materials. For example, trees cut down to a 2x4 lumber used to frame a structure would be subject to the Recovery Act Buy American provisions. Similarly, copper piping used to plumb a building would be covered. Other types of manufactured goods that are attached to or fixed to real property (fixtures) are also subject to the provision. Each item must be reviewed separately by DOE to make this determination.

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 176.70(a)(2)(ii).

Determining whether the Buy American provisions under the Recovery Act apply to a particular project will depend on the specific details of an applicant/recipient's project. Once it is determined that the project is for the construction, alteration, maintenance or repair of a public building or public work, then all of the iron, steel and manufactured goods used in the project must be produced in the United States unless one of the three listed exceptions applies and DOE issues a waiver, or a recipient can legally avail itself of the U.S.'s obligations under international agreements.

RECOVERY ACT EXCEPTIONS TO SECTION 1605: The Recovery Act provides three exceptions.

1. The first exception is that applying the Buy American Recovery Act provisions would be inconsistent with the public interest.

The definition of “inconsistent with public interest” shall be interpreted by DOE on a case-by-case basis when considering waiver requests.

2. The second exception is that the iron, steel and relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality (“Nonavailability”).

The definitions of “sufficient and reasonably available quantities” and “of a satisfactory quality” shall be interpreted by DOE on a case-by-case basis when considering waiver requests. Applicants and recipients who would like to request a waiver of the Buy American requirements for their project based on its nonavailability, should prepare their request in accordance with the instructions provided in CFR 176.140(c), and summarized below.

3. The third exception is that the inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent (“Unreasonable Cost”).

The definitions of “sufficient and reasonably available quantities” and “of a satisfactory quality” shall be interpreted by DOE on a case-by-case basis when considering waiver requests.

Applicants and recipients who would like to request a waiver of the Buy American requirements for their project based on unreasonable cost, should prepare their request in accordance with the instructions provided in CFR 176.140(c) and (d) and 176.160(c) and (d), summarized below.

RECOVERY ACT BUY AMERICAN REQUIREMENTS FOR INFORMATION NEEDED FROM FINANCIAL ASSISTANCE APPLICANTS/RECIPIENTS FOR WAIVER REQUESTS BASED ON UNREASONABLE COST OR

NONAVAILABILITY: This section provides specific guidance on the unreasonable cost and nonavailability exceptions. This section does not cover requirements for the public interest exception because there are no statutory or regulatory standards for seeking or granting such a request. DOE will consider all requests for a waiver based on public interest on a case-by-case basis.

Applicants and recipients who would like to request a waiver of the Buy American requirements for their project based on unreasonable cost or nonavailability should prepare their request in accordance with the instructions below. Requests for waivers

based on unreasonable cost or nonavailability should be submitted to the DOE award official, who is the Project Officer assigned to the award in the Award Assistance Agreement. If a Project Officer has not been assigned at the time of the request submission, the request should be submitted to the Contracting Officer for the program under which the award is anticipated. In order to identify the name of the responsible Contracting Officer, applicants should contact the Point of Contact for the Department listed in the Funding Opportunity Announcement (FOA). The Project Officer or Contracting Officer will work with the Buy American coordinator at DOE Headquarters to determine whether to recommend approval of an application for a waiver to the Assistant Secretary of Energy for Energy Efficiency and Renewable Energy.

Certain items have already been determined to be domestically nonavailable on a class basis. They are listed at 48 C.F.R. 25.104(a). If a request includes such items, the applicant should indicate which items are on this list in the request.

General: This information is required for all requests for waivers of the Buy American requirements of the Recovery Act for financial assistance. [Section 1605 of the Recovery Act and 2 CFR 176.140(c) & 176.160(c)]

- Description of foreign and domestic construction materials—[See 2 CFR 176.140(c)(A) & .160(c)(A)]
- Unit of measure—[See 2 CFR 176.140(c)(B) & .160(c)(B)]
- Quantity—[See 2 CFR 176.140(c)(C) & .160(c)(C)]
- Cost—[See 2 CFR 176.140(c)(D) & .160(c)(D)]
- Price/Time of delivery or availability—[See 2 CFR 176.140(c)(E) & .160(c)(E)]
- Location of construction project—[See 2 CFR 176.140(c)(F) & .160(c)(F)]
- Name and address of proposed supplier—[See 2 CFR 176.140(c)(G) & .160(c)(G)]
- Detailed justification for the use of foreign construction materials—[See 2 CFR 176.140(c)(H) & .160(c)(H)]
- Assistance recipient made good faith effort to solicit bids for domestic construction materials/manufactured goods as demonstrated by language in requests for proposals, contracts, and communications w/prime contractor [Section 1605 of the Recovery Act]

Unreasonable Cost: This section lists categories of information required for waivers based on unreasonable cost of domestic construction materials or manufactured goods. The cost of domestic iron, steel, and/or manufactured goods used in the project is

unreasonable when the cumulative cost of such material will increase the overall cost of the project by more than 25 percent. If an applicant is requesting a waiver based on unreasonable cost of domestic construction materials or manufactured goods, the request should include the following information. [See 2 CFR 176.140(b)(3)(i) & 176.140(d)]

If an item on this list is not relevant to the request, please explain the reason for this in the request.

- Price comparison worksheet
- Relevant excerpts from the bid documents used by the contractors to complete the price comparison worksheet
- Supporting documentation indicating the contractor made a reasonable survey of the market, such as a description of the process for identifying suppliers and a list of contacted suppliers

Nonavailability: This section lists categories of information required for waivers based on nonavailability. Nonavailability means that the iron, steel, and/or manufactured good is not produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. If an applicant is requesting a waiver based on nonavailability, the following documentation is necessary to demonstrate the available quantity and or quality of the material for which the waiver is requested [See 2 C.F.R. 176.140(b)(3)(ii)]. If an item on this list is not relevant to the request, please explain the reason for this in the request.

- Supplier information or pricing information from a reputable supplier of domestic supplies indicating availability/delivery date for materials
- Documentation of assistance recipient's efforts to find available domestic sources such as a description of the process for identifying suppliers and a list of contacted suppliers
- Project schedule (timeline)
- Relevant excerpts from project plans, qualifications, and permits indicating the required quantity and quality of construction materials
- Statement from the prime contractor confirming the non-availability of domestic construction materials for which the waiver is sought

U.S. OBLIGATIONS UNDER INTERNATIONAL AGREEMENTS: If a recipient can legally avail itself of the U.S.'s obligations under international agreements, it is possible that the iron, steel or manufactured good can be treated as domestic. This

obligation only applies to projects with an estimated value of \$7.4M or more and to projects that are not specifically excluded from the application of those agreements.

If the applicant or recipient is covered by an international agreement [Appendix to Subpart B of 2 C.F.R. 176], and, under the applicable conditions of that international agreement, the iron, steel, and/or manufactured goods are treated the same as domestic products, no waiver is needed to utilize those products.

Eligible recipients, entities covered, and relevant international agreements are listed in the Appendix to Subpart B of 2 CFR 176. Recipients should consult their own legal counsel to determine compliance with the international agreements. DOE is not authorized to determine compliance with the international agreements. Recipients should document their files with evidence of compliance with the international agreements to comply with audit requirements.

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. Determining whether an international agreement applies is a complicated task. As such, recipients should consult their legal counsel for assistance in determining whether or not an international agreement applies in their particular case.

LATE REQUESTS: Late requests are defined as requests submitted after the recipient obligates the Recovery Act funds. If the recipient submits a late request for a determination regarding the inapplicability of section 1605 of the Recovery Act (Buy American) after obligating Recovery Act funds (e.g. after the signing of a construction contract), the recipient must also include an explanation of why the request was submitted at that late date. Specifically, the recipient must explain why it could not request the determination before making the obligation or why the need for such determination was not reasonably foreseeable. If the late request is based on lack of reasonably foreseeable circumstances, the recipient should provide sufficient documentation to establish the circumstance were unforeseeable.

CONCLUSION: As stated in the Terms and Conditions of award, recipients must comply with the Buy American Provisions of the American Recovery and Reinvestment Act. This guidance aims to clarify Buy American Recovery Act provisions. Buy American Recovery Act provisions only apply to funds used for a project for the construction, alteration, maintenance or repair of a public building or public work. Determining whether the Buy American provisions under the Recovery Act apply to a particular project will depend on the specific details of an applicant/recipient's project. Once it is determined that the project is for the construction, alteration, maintenance or repair of a public building or public work, then all of the iron, steel and manufactured goods used in the project must be produced in the United States unless one of the three listed exceptions applies and DOE issues a waiver, or a recipient can legally avail itself of the U.S.'s obligations under international agreements As of the date of this letter the

Department of Energy (DOE) has not issued any category waivers or any waivers for a particular project.

Applicants and recipients who have questions about the Buy American Recovery Act requirements as it applies to an award made or pending to them from a program within the DOE's Office of Energy Efficiency and Renewable Energy should submit them to this e-mail box: buyamerican@ee.doe.gov. Applicants and recipients who want to submit a request for a waiver should submit them to their Project or Contracting Officer, who will work with the Buy American coordinator at DOE Headquarters to process the waivers in a timely fashion.

Additional guidance is contained in the **Department of Energy Acquisition and Financial Assistance Guide for the American Recovery and Reinvestment Act of 2009**, located at: http://management.energy.gov/policy_guidance/1672.htm

A handwritten signature in blue ink, appearing to read 'Cathy Zoi', is positioned above the printed name.

Cathy Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy