

A Desk Guide to the Buy American Provisions of the American Recovery and Reinvestment Act of 2009:

Public Guidance on Implementation,
Documentation, Non-compliance and
Enforcement

March 2011



The US Department of Energy (DOE) Office of Energy Efficiency and Renewable Energy (EERE) Buy American team has prepared this desk guide for Award Recipients of EERE Recovery Act Awards to assist them in applying the Buy American provisions¹ of the American Recovery and Reinvestment Act of 2009 (Recovery Act) to EERE awards management as required. This guide seeks to assist Award Recipients in: 1) understanding the Buy American provisions and their application; 2) determining compliance of recipients and sub-recipients with the Buy American provisions; and 3) understanding how the DOE addresses non-compliance through enforcement and resolution measures where appropriate.

For further assistance with any of the topics covered in this desk guide, please contact:

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Office of Energy Efficiency and Renewable Energy
buyamerican@ee.doe.gov
202-586-7691

Additional guidance, information, FAQs, and a list of issued waivers are available at:

http://www1.eere.energy.gov/recovery/buy_american_provision.html

¹ The terms “Buy American provisions” and “Buy American provisions of the Recovery Act” used in this document all reference the Buy American provisions of the American Recovery and Reinvestment Act of 2009. This document does not address the Buy American Act, 41 U.S.C. § 10a et seq. (implemented by the FAR) or the language included in appropriations statutes whereby Congress provides, “It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this award should be American-made.”

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Introduction

After obligating \$11.3 billion in Recovery Act funds to over 2300 state, local, and Tribal award recipients, EERE is moving into a new phase of awards management focused on monitoring and compliance. This Desk Guide is intended to provide a clear understanding of the various roles and responsibilities associated with implementing, monitoring and enforcing the Buy American provisions of the Recovery Act.

Largely, EERE Recovery Act award recipients have successfully implemented the Buy American provisions (and other Special Terms and Conditions) in accordance with the obligations set forth by the Recovery Act. However, EERE has identified some cases (and there are likely to be more) where the award recipient has failed to comply with the Buy American requirements stated in the Terms and Conditions of their Recovery Act award agreements.

EERE is responsible for applying and enforcing the Recovery Act Buy American provisions in a clear and consistent manner in accordance with the authorizing statute (Section 1605 of Pub. L. 111-5); EERE Program Guidance; the OMB government-wide requirements (2 CFR part 176); and DOE Financial Assistance Regulations (10 CFR part 600). Close coordination between the Program Office (Program staff and the Buy American team), EERE Project Officers, General Counsel, Field Counsel, the Field Offices, and the Office of Procurement Policy (Headquarters and Contracting Officers) is critical to ensuring the consistency of all actions taken in response to potential or verified cases of non-compliance with the Buy American provisions.

In order to ensure consistency and transparency in the EERE response, this Desk Guide outlines the various roles and responsibilities of the different DOE staff, as well as specific sets of procedures to follow in cases of suspected or verified non-compliance. Observance of these roles and responsibilities and adherence to a pre-established set of procedures is also critical to establishing a clearly delineated and streamlined approach to enforcement of the Buy American provisions, and maintaining a well-documented file that can be accessed in cases where EERE actions are questioned or contested.

Roles and Responsibilities

EERE Buy American team

- Develop EERE strategy for, and facilitate implementation of, the Recovery Act Buy American provisions; seek policy guidance from EERE leadership when necessary
- Draft guidance documents, maintain website and FAQs
- Assist EERE award recipients and DOE staff with Buy American-related questions and maintain a record of guidance given to recipients and sub-recipients
- Process and log all waiver requests and waivers awarded
- Prepare action memos, decision memos, and Federal Register notices related to the waivers for General Counsel concurrence and signature by the Assistant Secretary
- Coordinate between DOE staff and EERE award recipients in cases of suspected or actual noncompliance and enforcement
- Maintain a detailed record of each case of potential or proven non-compliance and resulting enforcement actions (Concerns and Formal Findings)

EERE Project Officers

- Serve as the day-to-day point of contact for EERE Recovery Act award recipients
- Assist award recipients in the proper implementation of their Recovery Act award(s)
- Help the states/prime recipients design protocols to oversee sub-recipients
- Facilitate the submission of waiver requests, and inform Contracting Officers when awardees are utilizing items covered by a waiver in their project
- Facilitate coordination between responsible parties as appropriate
- Act as the monitors of, and first responders to potential compliance issues
- Prevent and mitigate compliance issues; provide guidance and recommendations to award recipients to avoid non-compliance
- Verify remedial actions were taken when recommended or required by Contracting Officer

DOE Contracting Officers

- Serve as the DOE entity legally empowered to execute and amend award agreements
- Manage EERE response to cases of potential or proven non-compliance with the Buy American provisions, including administering remedies as appropriate
- Coordinate closely with EERE Project Officers and the Buy American team in cases of non-compliance
- Propose and apply remedies in cases of non-compliance, incorporating the recommendations of the Buy American team and with the assistance of Field Counsel
- Inform Buy American team of all corrective actions and enforcement issues and decisions (for Concerns and Formal Findings), so the Buy American team can maintain appropriate records

Program Manager

- Concur on findings of non-compliance, and enforcement and remedial actions resulting there from

- Provide programmatic guidance regarding implementation and enforcement of Buy American provisions

DOE Field Counsel

- Serve as the primary resource for EERE Project and Contracting Officers with legal questions
- Serve as the primary legal support for Project and Contracting Officers regarding cases of noncompliance
- Refer Buy American questions in need of additional research or clarification back to the EERE Buy American team and/or General Counsel for resolution
- Support Contracting Officers in proposing and applying remedies in cases of noncompliance, by reviewing determinations for legal sufficiency

DOE General Counsel

- GC-61 (Procurement and Financial Assistance): provide all final legal analysis and interpretation pertaining to the Recovery Act Buy American provisions
 - All complex ownership questions will be referred to General Counsel
 - All proposed waivers (in the form of action and decision documents, prepared for the assistant Secretary's signature by the Buy American team), will be obtain concurrence from General Counsel, before being submitted for signature
 - Implementation of serious remedies must be formally concurred upon by General Counsel
 - Field Counsel and the Buy American team will refer questions and issues to General Counsel when additional interpretation or support is needed
- GC-31 (Enforcement): is empowered to send letters to contractors, vendors, suppliers or manufacturers suspected of violating the Buy American provisions²

Assistant Secretary for Energy Efficiency and Renewable Energy

- Sets the policy direction for EERE
- Has been delegated the authority to grant waivers of the Buy American provisions in EERE Recovery Act-funded projects

Recipients of EERE Recovery Act Funds

- Responsible for direct oversight of sub-awardees
- Responsible for properly implementing Buy American provisions (with guidance from EERE staff as needed)
- Maintain documentation of compliance with Buy American provisions
- Look to Project Officer for support with Buy American issues, Project Officer will refer them to Buy American team and Contracting Officers as needed

² DOE does not have privity of contract with recipients' contractors, vendors or suppliers, however, DOE will make a concerted effort to contact these parties in the best interest of our recipients.

Implementation

Introduction³

Section 1605 of the American Recovery and Reinvestment Act states, “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**” (emphasis added).

The U.S. Office of Management and Budget (OMB) has issued guidance to assist in implementing the Recovery Act at 2 CFR Part 176. The OMB guidance defines “manufactured good” as 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 other raw material to create a material that has different properties than the properties of the individual raw materials.” 2 CFR § 176.140(a) (1) (emphasis added).

Incorporation into a Public Building or Public Work

Public Buildings/Public Works

The Buy American provisions only apply to projects involving public buildings or public works.

“**Public building or public work** means a public building of, or 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).” 2 CFR § 176.140(a)(2).

These buildings and works may include: government office buildings, schools, university buildings, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, parking-lots, ways, lighthouses, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

Indian Tribe, Tribal Nations, Native Villages as well as their sub-parts, including bands, chapters and subsidiaries are also considered governmental entities for the purpose of determining if a project involved a “public building or public work”, subject to the Recovery Act Buy American provisions.

Courthouses, jails, or highways are almost always going to be subject to the Buy American provisions. Likewise, privately owned homes are almost never going to be subject to the Buy American provisions. Buildings owned by public entities, but leased to non-profit or other private entities are subject to the Buy American provisions.

³ See Appendix A for Award Language

More complicated issues arise when ownership is in question, or the building or work shares financing between public and private entities, or where the government is the lessor or lessee of a property. In these cases, the question should be referred to the EERE Buy American team, who will help the Contracting or Project Officer couch the question for legal analysis by General Counsel⁴. The general principles below may serve as guidance.

Where the government agency or an instrumentality thereof merely serves as a provider of financial assistance, having no ownership interest in the building/work, the Buy American requirement generally will not apply. Similarly, when a government agency or an instrumentality thereof has a marginal ownership interest in the building/work (for example, 5% of a limited partnership), the Buy American requirement will not apply.

By contrast, when the government agency or an instrumentality thereof exercises significant functions within the owner entity [i.e., a public-private partnership] with respect to the management or ownership of the building/work, or in cases where the agency serves as the general partner of the owner entity and has a significant management role, the Buy American requirement will apply.

Finally, if the government agency or an instrumentality thereof serves as the original developer of a mixed-finance development now receiving Recovery Act funds for one or all of the involved buildings/works, the Buy American requirement will apply.

“Incorporation Into”

The OMB Interim Final Guidance states that the manufactured good must be **incorporated** into the project to be subject to the Buy American provisions. *See* 2 CFR § 176.140(a)(1)(emphasis added).

This is generally interpreted as a good that becomes a **fixture** of the building, or permanent part of the property.

Equipment that is used for construction but ultimately not incorporated into the project **is not** subject to the Buy American provisions. For example, a crane used to lift items on a construction site would not be considered a manufactured good covered by the Buy American provisions because the crane is not incorporated into the building or public work. Similarly, manufactured goods that are not physically incorporated into the public building or public work are not covered by the Buy American provisions. A recycling bin, computer monitor, or high efficiency portable desk fan does not become a permanent fixture of the building or work, and therefore is not "incorporated into" the building or work. As a result, the item does not fit the definition of a "manufactured good" and is not covered by the Buy American provisions.

By contrast, a "smart" thermostat that is brought to the site for incorporation into a building would be covered by the Buy American provisions, as would a light-bulb or an HVAC system.

⁴ The best way to contact the EERE Buy American team is to send or cc: correspondence to the Buy American inbox buyamerican@ee.doe.gov

Lamps and luminaries (light bulbs) are permanent fixtures. The purpose of a light bulb is to be permanently attached to the light fixture, and to illuminate until its usefulness is expended, then disposed of, thus it is a permanent fixture for the purposes of the Buy American provisions of the Recovery Act.

Computer Hardware and Software

Depending on the particular hardware and the individual project circumstances, computer/information technology equipment could be brought to the construction site for incorporation into the building. This determination depends on whether the computer hardware is permanently attached to or fixed to real property (permanent fixtures). If so, the computer hardware would be covered by the Buy American Recovery Act provisions.

Server virtualization software and energy efficiency software are not manufactured goods; and thus not subject to the Buy American provisions.

Cables and connections are examples of types of hardware equipment that could fall within the Buy American Recovery Act provisions because their installation makes them a permanent fixture in the building, similar to electrical wiring and outlets. Specific examples include fiber optic, Cat-5, or other cabling when installed inside walls, ceilings, or flooring; conduit when installed inside walls, ceilings, or flooring; and RJ-45 and other connectors when affixed to a wall or floor. Computer equipment that is built into the building, such as computer systems that are wired into the HVAC system or used to create a “smart building” could fall within the Buy American provisions under the same theory.

By contrast, personal computers, file servers, and networking hardware equipment are typically easily removable and not intended to be permanent fixtures. As such, these products are not covered by the Recovery Act Buy American provisions. Other examples of hardware components that likely are not covered are- laptops or notebook computers, personal digital assistants, hand-held computers, and wireless communication devices; peripheral input/output devices – including keyboards, printers, etc-0

What is a Project?

Example A

A city plans to construct a \$3 million wing to an existing police station, funded by non-Recovery Act funds, and the construction of the wing is not used as cost share for the DOE funded project. The city also receives Recovery Act funds for solar lights on the parking structure of the main police station building. The city bids the construction of the wing and the installation of the solar panels on the parking lot to the main building separately and uses separate instruments for the work. Under this circumstance, the projects are funded by separate funds and are distinct activities, even though they are both upgrading the police station. The construction of the wing using non-Recovery Act funds would not be governed by the Buy American provisions.

A “project” is a distinct eligible program activity.

If any of the funding for these eligible program activities is provided by the Recovery Act, then the “project” is covered by the Recovery Act Buy American provisions. Projects that are not funded by the Recovery Act are not covered by the Recovery Act Buy American provisions⁵.

Private, philanthropic, state, local, tribal or other non-Recovery Act funds may be leveraged alongside or in addition to Recovery Act funds without becoming subject to the Recovery Act Buy American provisions, if these funds are used for activities undertaken as **distinct, segregable actions** using separate financial assistance agreements, contracts or subcontracts, and are not commingled with Recovery Act dollars to fund any part of the same program activity and eligible activity. Separate project plans, Requests for Proposals (RFPs), administrators and “piles” (separate accounts or units) of funding are signs of separate projects.

Please note that award recipient cost-share dollars used with Recovery Act dollars for a given project are subject to the same regulations of Recovery Act funds, including the Buy American provisions.

Recipients must not alter or manipulate financial assistance agreements to separate program activities that would logically be grouped together just to avoid application of the Recovery Act Buy American provisions. In addition, recipients cannot segregate cost share funds from Recovery Act funds to avoid application of the Recovery Act Buy American provisions.

The determination of what constitutes a project is very fact specific. The examples on this page are provided for general guidance only. When a determination is made that there are separate projects, some of which do not implicate the Recovery Act regulations, that determination should be well documented by the grantee in a memo to their file.

Example B

A state energy office provides funding to ten different cities within the state to conduct energy efficiency retrofits. The individual cities then went to bid and signed individual contracts to perform the work. Each retrofit would be considered a separate project because they are occurring in different locations (areas) under separate contracts.

Example C

A city has plans to renovate an existing police station. This planned renovation is funded by non-Recovery Act funds. The city then receives Recovery Act funds and decides to purchase energy efficient windows and lights for the police station. The city bids the renovation work and the purchase of the windows and lights separately and uses separate instruments for the work. Under this circumstance, the activities are distinct and separate because the new windows and lights were not part of the original plan for the renovation and would be separate and additional work to the original renovation. Therefore, the broader renovation of the existing police station using non-Recovery Act funds would not be governed by the Buy American provisions, whereas the purchase of the windows and lights would be.

⁵ Activities that are not funded by the Recovery Act may be subject to other domestic preference requirements of the states or Congress.

International Agreements

In order for a award recipient to use manufactured goods from a nation other than the United States under an international agreement, **both** must be true: 1) the project has a total value of \$7,804,000 or greater and 2) the recipient or sub-recipient is a party to an international agreement.

Total Project Value:

The determination of total project value is made by the award recipient⁶. The total value of the project includes the Recovery Act funds as well as recipient cost share (as applicable).

Party to an International Agreement:

The OMB has published a list in the Appendix to Subpart B of Part 176, of title 2 of the Code of Federal Regulations, entitled “U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements.” If a recipient or sub-recipient is not on that list, they are not party to an international agreement. Even if the project has a total value of \$7.8 million or above, they must comply with the Buy American provisions, and no foreign-made iron, steel or manufactured goods are permitted.

If however, both of the above requirements are met, they may purchase items from the nation/nations with which they are parties to an agreement, subject to the terms of that agreement.

The Project Officer is not responsible for making this determination. The award recipient is advised to retain a trade attorney to guide them through this process and ensure compliance. EERE cannot provide any type of legal advice regarding trade compliance.

NAFTA: a common issue seen with award recipients is a belief that NAFTA applies to their project. As you can see by the OMB list, NAFTA almost **never** applies. NAFTA goods **are not** US “manufactured goods” for the purposes of the Recovery Act Buy American provisions, unless 1) and 2) above apply.

Canada:

On March 25, 2010, OMB amended its Interim Final Guidance to address the Agreement between the Government of the United States of America and the Government of Canada on Government Procurement (75 Federal Register 14323).

If any EERE financial assistance recipient in the State Energy Program or Energy Efficiency and Conservation Block Award Program is using Recovery Act funding for a project valued at or above \$7,804,000 for the construction, alteration, maintenance or repair of a public building or public work, Canadian-sourced iron, steel and manufactured goods may be used without obtaining a waiver of the Buy American provisions of the Recovery Act.

⁶ The value of the project is negotiated with the award recipient early in the award process. The Contracting Officer may be able to provide the Project Officer with this information if the award recipient does not know the precise value.

Waivers

The Recovery Act allows the head of a Federal department or agency to award a waiver⁷ of the Buy American provisions in certain circumstances. For EERE, this authority has been delegated to the Assistant Secretary for EERE. A waiver of the Buy American provision of the Recovery Act may be awarded in three circumstances: 1) when the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality (“Nonavailability”), 2) when the inclusion of those goods will increase the cost of the overall project by more than 25 percent (“Unreasonable Cost”), or 3) when applying the Buy American provision would be “inconsistent with public interest.”

Most waivers are categorical and cover all Recovery Act procurement past, present and future. **If the award recipient or sub-recipient procures a product covered by a categorical waiver, they do not have to apply for a separate waiver.** Award recipients must maintain documentation at a level they feel is appropriate to show compliance with the Recovery Act Buy American provisions, including, when applicable, that a purchased good is covered by a waiver.

Award recipients must inform Project Officers when they are using an item covered by a waiver. The Project Officer must inform the Contracting Officer any time a categorical waiver is being used by a award recipient. Contracting Officers must know if a recipient is applying a categorical waiver to its project so it can be incorporated into the Terms and Conditions of the award as appropriate.

The Contracting Officer may request supporting documentation from the Project Officer, who will request that information from the award recipient. That documentation may include receipts and letters from vendors verifying that the items used in the project are compliant with the issued waiver.

When and How to Apply for a Waiver

An award recipient who wishes to apply for a waiver may obtain a form from the EERE Buy American website at http://www1.eere.energy.gov/recovery/pdfs/eere_buy_american_nonavailability_template.pdf

If a Project Officer receives a waiver request from an award recipient, he or she will forward it to the Buy American team immediately so that processing can begin (and CC: the Contracting Officer).

EERE has instituted a formal “scouting” process to independently verify whether the manufactured goods listed in a waiver request are produced in the United States.

There are three types of waivers available:

1. Nonavailability

Manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality

2. Unreasonable Cost

Inclusion of domestic goods will increase the cost of the overall project by more than 25 percent

3. Public Interest

Applying the Buy American provision would be “inconsistent with public interest.”

⁷ A waiver and an ‘exemption’ are different things. The term exemption should never be used when discussing the Buy American provisions. The terminology used by OMB in 2 CFR part 176 is either ‘exception’ or ‘waiver’.

First, a member of the Buy American team logs the waiver and verifies that a waiver has not already been issued for the given manufactured good or goods in the waiver request.

If the request came in from a private contractor or vendor, the request is deferred and the contractor is notified that the request will be accepted only when submitted by an award recipient. If the request comes in from a sub-award recipient, the Buy American team notifies the award recipient that a request has been received and asks if they will award permission for the sub-recipient to request a waiver (but while waiting for a response, begins the scouting process). In all cases the Buy American team notifies the Project Officer that a waiver request has been received.

Following the logging process, the Buy American team will access technical expertise within and outside of the Department of Energy and other Federal agencies to confirm the nonavailability or unreasonable cost justification. EERE has partnered with the National Institute of Standards and Technology's Manufacturing Extension Partnership Program (MEP). MEP has 60 regional centers with substantial knowledge of and connections with domestic manufacturing industries. MEP uses their regional centers to scout for manufacturers and potential manufacturers of the product(s) listed in a waiver request. Generally speaking, it takes MEP two weeks to adequately scout each product. MEP will send their results to EERE, indicating whether any partial or exact matches were found for the product being scouted.

De Minimis- 5% of the total cost of iron, steel, & manufactured goods may be non-U.S.

Often, the resources of EERE and MEP are able to find high-quality American goods that can be used in the project in place of foreign goods. In other instances, the technical experts within the DOE are able to assist award recipients in modifying the project plan to utilize equivalent goods produced in the United States.

However, in some instances, American manufacturers do not produce a given manufactured good, and no reasonable alternative is available. In these instances, a waiver is appropriate, and the Buy American team will draft a waiver and circulate it within EERE and the Office of the General Counsel for concurrence and approval. If there are no objections to issuing the waiver, the Assistant Secretary for EERE will review and sign the waiver. The waiver will be in effect as soon as it is signed, until the date of expiration defined in the waiver, until modified or for the duration of the Recovery Act period.

As soon as the waiver is issued, the Buy American team will notify the award recipient, and the Project Officers that the waiver has been awarded. As explained above, the Project Officer will inform the Contracting Officer any time a categorical waiver is being used by an award recipient.

Issued Waivers

De Minimis

EERE has issued a waiver for incidental items that comprise in total a *de minimis* amount of the total cost of the iron, steel, and manufactured goods used in a project; that is, any such incidental items up to a limit of no more than 5% of the total cost of the iron, steel, and manufactured goods used in and incorporated into a project.

This means that recipients do not need to substantiate a domestic origin for 5% (based on cost) of incidental manufactured goods in each project. This is not 5% of the total project cost and does not include labor, *de minimis* is 5% of only the total cost of the iron, steel, and manufactured goods incorporated into a project.

The *de minimis* waiver allows award recipients to focus their compliance efforts on the major goods in their projects. (Award recipients may mention the *de minimis* standard in RFPs, as it may encourage more bids). When planning projects, award recipients must take into account the 5% ceiling and plan accordingly.

Solar Technologies⁸

EERE has issued a Solar Public Interest waiver that covers the following:

- 1) Foreign manufactured cells, when incorporated into domestically manufactured modules/panels.

This means that when the panel/module is domestically manufactured, the cells may be manufactured abroad, so long as they are imported and assembled into that module/panel in the United States.⁹

- 2) Foreign manufactured modules, when completely composed of domestically manufactured cells.

This means that if all of the cells are manufactured in the United States (the origin of the components and subcomponents used to create the panel is immaterial), the module/panel may be domestically manufactured or assembled abroad.

- 3) Any ancillary items and equipment (including, but not limited to, charge controllers, combiners and disconnect boxes, breakers and fuses, racks, trackers, lugs, wires, cables and all otherwise incidental equipment, except inverters or batteries) when utilized in a solar installation involving a U.S. manufactured PV module, or a module manufactured abroad but composed exclusively of domestically manufactured cells.

Inverters and batteries are not included, thus domestically manufactured inverters and batteries must be used. An incidental item is a miscellaneous, generally low-cost item that is essential for, but incidental to, the solar installation. The rules of (1) and (2) above are not affected by this part.

Solar- Allows solar panels where cells or the module is domestic. Allows foreign ancillary items except inverters and batteries

	Domestic Manufacturing/ Domestic Module	Foreign Manufacturing/ Assembly/ Foreign Module
Domestic Cell	compliant	compliant
Foreign Cell	compliant	non-compliant

⁸ A Project Officer must inform the Contracting Officer when a award recipient is utilizing the Solar Public Interest Waiver, so the appropriate modification can be made to the Terms and Conditions.

⁹ A Photovoltaic System containing domestically manufactured cells and domestically manufactured modules, which is assembled domestically, is always Buy American provision compliant and will continue to be so, even after the expiration of this waiver.

NonAvailability¹⁰

Categorical Non-Availability waivers have been issued to date. A full list is available at:

http://www1.eere.energy.gov/recovery/ba_waivers.html

Expired/Withdrawn Waivers

The Public Interest waiver issued for LEDs and HVAC systems expired March 31st, 2010. The Solar public interest waiver expires August 6th, 2011. The waiver for LED traffic signals was withdrawn December 1, 2010. When a waiver expires or is withdrawn, an award recipient must have made substantial steps to commit funds for the purchase of the covered manufactured goods by the date of expiration of the waiver, to be covered by that waiver.

Substantial steps to commit funds would include, but are not limited to, (1) issuing a Request for Proposals (RFP) on or before expiration of the waiver (applicable only where the award recipient accepts a proposal received under that RFP); (2) in the case of a sole source selection: placing an order for the goods on or before expiration of the waiver; (3) commencing a bidding process on or before expiration of the waiver; (4) in circumstances where the award recipient solicited quotes without an RFP: the award recipient purchases the goods based on a quote dated on or before expiration of the waiver, and the order for the goods is placed on or before expiration of the waiver; or (5) award recipient has executed a contract or purchase agreement with a supplier to acquire affected goods on or before expiration of the waiver.

¹⁰ Recall that an award recipient must notify the Project Officer if they are using an item covered by a waiver. A Project Officer must then inform the Contracting Officer, so the appropriate modification can be made to the Terms and Conditions.

Documentation

Requirements

State and local governments and tribes must follow their own procurement policies and procedures, per 10 CFR 600.236, “Procurement”, and are expected to maintain maximum oversight over their project and procurement activities with regards to Buy American compliance.

Many prime award recipients are producing documents for their sub-recipients to fill out. This approach is recommended for consistency, but not required. See Appendix E for sample documents.

The EERE guidance on documenting compliance can be found at:

http://www1.eere.energy.gov/recovery/pdfs/eere_buy_american_documentation_guidance.pdf

The EERE guidance on documenting compliance with the Buy American provisions states:

“recipients should maintain documentation at a level they feel is appropriate to show compliance with the Recovery Act Buy American provisions”. Although the burden of ‘appropriate to show compliance’ is on the award recipient- the examples below provide some guidance as to what *could* demonstrate compliance.

Examples of documentation include: (1) language in documents that obligates sub-recipients and/or contractors to comply with the Buy American provisions; (2) receipts for items produced domestically indicating such; (3) a documented certification (“letter of compliance”) from the contractor, vendor, distributor, supplier, or manufacturer verifying that the product was manufactured domestically; (4) detailed and verifiable information supporting the claim that the manufactured goods has undergone substantial transformation in the United States; and/or (5) other reasonable documentation per the discretion of the state, local, or tribal government financial assistance recipient demonstrating compliance with the Buy American provisions.

Look for:

- Product name and model number
- Location(s) of manufacturing activities
- Manufacturer contact information
- Description of manufacturing process

Be wary of:

- Vague certifications
- Claims that a product is covered by trade agreements
- Claims that a product is covered under a waiver
- Information on percentage of U.S.-made components(or Supply Item, FAR reference)
- Any mention of assembly

Broad statements are insufficient:

- “We comply with the Buy American requirement”
- “All products are American”
- “This project meets Buy American”
- “We are certified Buy American compliant”

There is no agency that “certifies” Buy American compliance

Documentation should be specific about the location of the manufacturing (city and state)

What is a “Manufactured Good”?

According to the OMB Guidance, 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 other raw material to create a material that has different properties than the properties of the individual raw materials. 2 CFR § 176.160(a).

Manufactured good-
-Incorporated/fixed to building
-Changed from the individual
raw materials

Only goods incorporated into a public building or public work are subject to the Buy American provisions. 2 CFR Part 176

When is a “Manufactured Good” “Produced in the United States”?

The OMB guidance defines a “domestic manufactured good” as “a manufactured good that... has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed.” There is no requirement with regard to the origin of components or subcomponents in manufactured goods or products, as long as the manufacture of the goods occurs in the United States.” See 2 CFR § 176.160(a).

“Produced in the United States,” has been interpreted to mean that the production or manufacturing facility is **physically located in the United States or its territories**. A domestically manufactured good for the purposes of the Buy American provision of the Recovery Act is one that has undergone “substantial transformation” in the United States or its territories.

The domicile (location), or national origin of the parent company, subsidiary, distributor, or supplier **is not relevant** for determining compliance with the Recovery Act Buy American provision. The only factor is where the final manufactured good is produced.

“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.” 2 CFR § 176.160(a).

What is Substantial Transformation?

Substantial transformation occurs when, as a result of manufacturing processes, a new and different article emerges, having a distinctive description, character, or use, which is different from that originally possessed by the article or material before being subject to the manufacturing process. The mere finishing or modification of a partially or nearly complete foreign product in the United States will not result in the substantial transformation of such product and it remains the product of a foreign country.¹¹

The following questions may help determine if a product meets the threshold. These questions all focus on processing work on and manufacturing/ integration of components into a final, finished good.

¹¹ This general definition of substantial definition is drawn from that traditionally used in trade agreements, and is not specifically defined in the regulation itself or the implementing guidance from the OMB. It is utilized here for the purposes of helping the reader understand the term in its common use.

Design, research and development, planning, procurement, component production, or any other step prior to the process of physically working on and bringing together the components into the final item used in and incorporated into the project cannot constitute or be a part of the substantial transformation analysis.

Who determines if Substantial Transformation has occurred?

It is the responsibility of the award recipient to determine if the manufactured goods they are using in their project have undergone substantial transformation in the United States. The determination must be supported by documentation, including, where appropriate, answers to the questions below. DOE will neither approve nor disapprove a substantial transformation determination.

Substantial Transformation Analysis Questions

The questions below are designed to assist award recipients in determining if substantial transformation has occurred. Simple yes/no answers, especially to the more subjective queries in Question 3, are not sufficient, rather, the answers should be elaborated with an explanation of why the answer is 'yes'.

Question 1

1. Were all of the components of the manufactured good manufactured in the United States, **and** were all of the components assembled into the final product in the U.S.? (If the answer is yes, and includes a detailed supporting explanation, then this is clearly manufactured in the U.S., and the inquiry is complete)

Question 2

Because each of the sub-questions of 2 call for relatively significant and demanding steps, the answer to question 2 is "yes" if answer to any of 2a, 2b, or 2c is "yes" and is supported with appropriate detail/analysis.

2. Was there a change in character or use of the good in the United States? (These questions are asked about the finished good as a whole, not about each individual component)
 - a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?
 - b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?
 - c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?

Question 3

If the answer to at least two of 3a, 3b, 3c, 3d, or 3e is "yes", then the answer to Question 3 is "yes". Manufacturers who wish to establish beyond a doubt that their product has been substantially transformed in the U.S. via answers to Question 3 will want to provide descriptions of their process(es) that support affirmative answers to as many of the sub-questions as are applicable, to increase the likelihood that the answers to at least two of the questions are sufficient.

3. Was (/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?
 - a. Did the process(es) take a substantial amount of time?
 - b. Was (/were) the process(es) costly?
 - c. Did the process(es) require particular high-level skills?
 - d. Did the process(es) require a number of different operations?
 - e. Was substantial value added in the process(es)?

Some Actions Are Not Substantial Transformation Under Any Circumstances

Work that makes simply cosmetic or surface changes only in a component, e.g., painting, lacquering, or cleaning, cannot amount or contribute to a finding of substantial transformation.

Similarly, simply cutting a material to length or width, e.g., cutting steel pipe to particular length, is considered a minor change that is not, and does not advance the case for, substantial transformation.

Finally, simple **assembly** of component pieces, all of which are imported from abroad, should be scrutinized closely.

Documenting Substantial Transformation

The award recipient is responsible for determining if Substantial Transformation has occurred in the United States. If the Project Officer in the course of monitoring has a question as to the quality of the documentation, they will submit the question to the Buy American team (a checklist with the things to look for in documentation is available in Appendix C). The Buy American team will review the documentation, and assist the Project Officer in determining whether it is sufficient to document compliance with the Buy American provisions.

The most common documentation EERE staff have been encountering are “letters of compliance” issued by manufacturers. See Appendix E for examples of sufficient and insufficient letters.

Some Common Examples of Insufficient Documentation:

Letters do not provide enough information

Some letters provide little more than a statement that “our widgets are Buy American compliant.” This is not a sufficient level of detail to document compliance with the Buy American provisions for significant manufactured goods used in the project. If there is any question whether items are compliant, a detailed letter from the manufacturer, including the manufacturing processes and location of manufacturing, is required.¹²

Letters are misleading or confusing

There are a number of red flags in compliance letters: “Buy American Act,” “component content,” “supply item,” the Federal Acquisition Regulations (FAR), or NAFTA references often signify a problem, as does any reference to International Agreements that is not consistent with the guidance on page 12.

In the case of letters with insufficient information, misleading letters or confusing letters; Project Officers should contact the Buy American team to determine if additional contact has been made with these manufacturers in the past to remedy the issues, and to assist the award recipients in moving forward.

However, if the documentation demonstrates use of foreign iron/steel or manufactured goods or raises suspicion of **fraud**, the issue needs to be escalated as described in the section on fraud, and remedies as appropriate shall be pursued.

¹² See Substantial Transformation Guidance Questions on page 18.

Documentation for Waivers

Award recipients must inform Project Officers when they are using an item covered by a waiver. The Project Officer must inform the Contracting Officer any time a categorical waiver is being used by a award recipient. Contracting Officers must know if a recipient is applying a categorical waiver to its project so it can be incorporated into the Terms and Conditions of the award as appropriate.

Incomplete documentation that cannot be remedied by enlisting the assistance of the Buy American team, becomes a Suspicion of Non-compliance and will be reported to the Contracting Officer and the Buy American team. Once an issue reaches this level of seriousness, the Contracting Officer becomes the responsible party, and the Buy American team and Project Officer will assist the Contracting Officer in their response.

Non-compliance and Enforcement

Each issue of non-compliance will be addressed individually, because each has fact-specific considerations that must be addressed. However, broad guidelines have been developed to ensure consistency.

The Contracting Officer is the lead party in cases of non-compliance, and the Buy American team and Project Officer are responsible to provide the Contracting Officer with requested materials, data, and assistance¹³.

Enforcement actions are taken against prime award recipients, not sub-recipients. If a sub-recipient is in non-compliance, all correspondence must address the prime recipient, as the prime recipient is responsible for ensuring the compliance of its sub-recipients.

The award recipient must report all incidents of non-compliance to the Project Officer. The Project Officer will provide feedback, and assist in escalating the issue as needed, after conferring with the Buy American team.

Non-compliance

There are three broad categories of non-compliance, each of which will be treated in a specific manner. Categorizing incidents of non-compliance in terms of these broad categories allows DOE staff to design a consistent approach to enforcement and remediation:

1. **Improper Implementation:** The award recipient or sub-recipient attempted to comply with the Buy American provisions but did so in an improper manner. Often occurs as a result of process problems, oversight problems, confusion or lack of resources.
2. **Mislead by Contractor, Vendor, or Manufacturer:** The award recipient or sub-recipient has been misled by a contractor, vendor or manufacturer.
3. **Award Recipient Misconduct:** The award recipient or sub-recipient made no genuine attempt to comply with the Buy American provisions.

¹³ the Project Officer, Contracting Officer, Field Counsel and the EERE Buy American team should be copied on all relevant correspondence, in order to ensure that all parties have the most accurate and up-to-date information.

Buy American Team Responsibilities- Suspicion of Non-Compliance

If any member of EERE staff suspects that foreign iron, steel or a manufactured good[s] have been used in violation of the Buy American provisions of the Recovery Act, the EERE Buy American team will be contacted immediately, as ultimately they are responsible for:

- 1.) Confirming that the Buy American provisions apply to the project and item(s) in question.
- 2.) Verifying that a waiver has not already been issued that would cover the non-compliant item (Public Interest, De Minimis, Unreasonable Cost, or Non-Availability).
- 3.) Opening a file to track and maintain all correspondence and documentation relevant to the incident of non-compliance (in cases where the suspicion rises to a Concern or a Formal Finding is issued)

Once it is determined that the Buy American requirement applies, and that a waiver has not been issued for the manufactured good, the Contracting Officer will notify the recipient in writing of the suspected non-compliance and give the award recipient the opportunity to respond and provide additional documentation. [2 CFR § 176.130(b)].

Available Remedies

Remedies are categorized into remedies applicable to all violations and remedies applicable to serious violations.

The OMB guidance in CFR 176 section 130 does not require that a remedy must be taken in all circumstances of non-compliance, or in response to all violations. The contracting Officer is empowered to make a finding of noncompliance without pursuing a remedy. The Contracting Officer Checklist in Appendix D details how to determine if a remedy is appropriate, and which remedy to pursue in various situations.

Remedies 1 through 5 below are the more general remedies, and 6-10 are intended for more serious violations. These options are further explained below.

1. Late Waiver
2. Cancellation of the purchase for unauthorized materials
3. Removal of the unauthorized materials
4. Absorption of the cost of unauthorized materials by the award recipient
5. Reduction of award by cost of unauthorized materials
6. Withholding payments pending correction
7. Suspending award
8. Terminating award
9. Withholding further awards
10. Debarment

1) Late (retroactive) waiver

The award recipient may be eligible for a late waiver. As discussed previously, there are three types of waivers, Public Interest, “Non-availability” and “Unreasonable Cost” waivers.

If the award recipient contends that the item(s) in question are not available from domestic manufacturers, the Project Officer may advise the award recipient to submit a non-availability waiver request utilizing

the form on the EERE-Recovery Act website. Similarly, if the award recipient contends that the cost of domestic items would increase the total project cost more than 25%, the Project Officer may advise the award recipient to submit an unreasonable cost waiver, utilizing the same form.

If the award recipient contends there is a compelling case for a Public Interest waiver, then the Project Officer may direct the award recipient to submit their justification to the Buy American team for consideration.

The Buy American team will respond in the same manner they would any other waiver request and will inform the Project and Contracting Officers as to the status of the waiver request and when a determination is made. If a waiver is awarded, the Buy American team will notify the award recipient and Project and Contracting Officers, and publish the waiver. If the waiver is denied, the Buy American team will notify all parties and work with the Project and Contracting Officers on how to proceed. *While the waiver is being processed, noncompliant items that have been purchased, but not installed, should not be installed.*

2) Cancellation of purchase

If materials that are noncompliant have been procured, but not installed into the project, those items should not be used. The Contracting Officer will inform the award recipient that those items may not be paid for with Recovery Act funds, [unless they fall below the De minimis standard and if the award recipient has not already reached their De Minimis threshold]. The Project Officer will direct the award recipient to pursue all possible avenues to cancel the purchase and return the foreign goods. Where the award recipient was misinformed by a manufacturer or distributor; and thus believed the goods were compliant, the Buy American team will, at the request of the Project Officer, attempt to intervene and encourage the vendor/distributor/manufacturer to accept a return of the goods if they are hesitant to do so.

3) Removal of the noncompliant materials

If the noncompliant materials have been integrated into the project already, the Contracting Officer may contact the award recipient in writing, and request that they be removed. The written notice must be prepared in accordance with 10 CFR § 600.24, “Noncompliance”, section (b). It must include:

- (1) The factual and legal bases for the determination of noncompliance;
- (2) The corrective actions and the date (not less than 30 days after the date of the notice) by which they must be taken.
- (3) Which of the actions authorized under [...10 CFR §600.243(a)...], [and 2 CFR §176.130] ...DOE may take if the recipient does not achieve compliance within the time specified in the notice, or does not provide satisfactory assurances that actions have been initiated which will achieve compliance in a timely manner.

4) Absorption of the cost of noncompliant materials by award recipient

In some cases, removal of the noncompliant materials would be:

- Impracticable
- Cause undue delay
- Otherwise be detrimental to the interests of the Federal Government

In these cases, the Contracting Officer, after discussion with the Buy American team and concurrence from Field Counsel, can make the decision to allow the award recipient to retain the materials in the installation but require the recipient to assume the cost of the noncompliant item(s). If a decision is made to retain the items in an installation, **a determination must be prepared in writing** that a) the items, specifically listed, need not be removed or replaced. That determination **must** also contain the following text “this determination does not affect the Federal Government’s right to reduce the amount of the award by the cost of the steel, iron, or manufactured goods that are used in the project or to take enforcement or termination action in accordance with the Agency’s awards management regulations 2 CFR Part 176.130(3).”

The award recipient would work with the Project Officer and Contracting Officer to allocate the funds to another eligible activity. The award recipient must utilize other funding (not cost-share or leveraged funds already in the project, which are subject to the Buy American requirements) to cover the procurement cost of the noncompliant items.

5) Reduction of award value by procurement cost of the noncompliant materials

In some cases, removal of the noncompliant materials would be:

- Impracticable
- Cause undue delay
- Otherwise be detrimental to the interests of the Federal Government

In these cases, the Contracting Officer, after discussion with the Buy American team and concurrence from Field Counsel, can make the decision to allow the award recipient to retain the materials in the installation and reduce the award value by the cost of the noncompliant materials. If a decision is made to retain the items in an installation, **a determination must be prepared in writing** that a) the items, specifically listed, need not be removed or replaced. That determination **must** also contain the following text “this determination does not affect the Federal Government’s right to reduce the amount of the award by the cost of the steel, iron, or manufactured goods that are used in the project or to take enforcement or termination action in accordance with the Agency’s awards management regulations 2 CFR Part 176.130(3).”

The award will be reduced by the cost of the noncompliant goods only, not the cost of installation labor. Accordingly, the cost of the noncompliant goods must be determined. The Project Officer will work with the award recipient to determine the cost of the noncompliant goods (and if appropriate, whether the De Minimis waiver applies to any portion of those goods), typically utilizing sales receipts or other purchase documentation to determine materials costs.

The award recipient must utilize other funding (not cost-share or leveraged funds already in the project, which are subject to the Buy American requirements) to support the procurement cost of the noncompliant items.

The Contracting Officer will proceed with the amendment of the award or other action as appropriate to implement this reduction. The Project Officer and Buy American team will provide support as requested by the Contracting Officer.

Recovery Act funds that are de-obligated from the award will be re-allocated in accordance with DOE Financial Assistance regulations (10 CFR Part 600).

Serious remedies are designed for only the most egregious of cases.

Serious Remedies are concurred upon by General Counsel before institution.

6) Serious Remedy: Withholding payment

Upon consultation with the EERE Headquarters Buy American team and Field Counsel, with formal concurrence by General Counsel, the Contracting Officer may withhold further payments to the award recipient, pending remedial action by the award recipient or sub-award recipient. For instance, the Contracting Officer could withhold payments until a noncompliant wind turbine was removed and a new procurement action for an American-manufactured wind turbine was prepared.

7) Serious Remedy: Suspending award

Upon consultation with the EERE Headquarters Buy American team and Field Counsel, with formal concurrence by General Counsel, the Contracting Officer could suspend the entire award, pending remedial action by the award recipient or sub-award recipient.

However, when exercising this remedy, specific notification requirements apply; see 10 CFR Part 600.25, “Suspension and termination”, section (b) “Notification requirements”.

Except as provided in §600.24, §600.162(a), §600.243(a), or §600.352(a); before suspending or terminating an award for cause, DOE shall mail to the award recipient (by certified mail, return receipt requested) a separate written notice in addition to that required by §600.24(a) at least ten days prior to the effective date of the suspension or termination. Such notice shall include, as appropriate:

- (1) The factual and legal bases for the suspension or termination;
- (2) The effective date or dates of the DOE action;
- (3) If the action does not apply to the entire award, a description of the activities affected by the action;
- (4) Instructions concerning which costs shall be allowable during the period of suspension, or instructions concerning allowable termination costs, including in either case, instructions concerning any sub-awards or contracts;
- (5) Instructions concerning required final reports and other closeout actions for terminated awards (see §§600.170 through 600.173, §§600.250 through 600.252 and §§600.350 through 600.353;
- (6) A statement of the award recipient's right to appeal a termination for cause pursuant to §600.22; and
- (7) The dated signature of a DOE Contracting Officer.

8) Serious Remedy: Terminating award [10 CFR 600.25]

Upon consultation with the EERE Headquarters Buy American team and Field Counsel, and formal concurrence by General Counsel, the Contracting Officer could terminate the entire award for serious/egregious noncompliance and failure to remedy that compliance. The same notification requirements utilized for suspending the award would apply (see above). If the award is terminated, DOE shall allow full credit to the award recipient for the DOE share of non-cancellable obligations properly incurred by the award recipient prior to the effective date of the termination. This means, that if funds have been properly spent, or obligations to spend those funds have been undertaken that cannot be cancelled, DOE must give full faith and credit to those obligations, and must allow the award recipient to retain the funds necessary to fulfill those obligations.

9) Serious Remedy: Withholding or restricting future awards

Future awards could be restricted or withheld from the award recipient if the organization is selected for funding under future competitive opportunities or through non-competitive means. DOE may consider the organization's past performance record and may, at its discretion, impose controls or mitigation measures on any resulting award or determine the organization's application to be ineligible for funding altogether based on previous noncompliance with Buy American provisions.

10) Serious Remedy: Debarment

The award recipient could be debarred. This would cause the entity to be placed on the Excluded Parties List System and would render the entity ineligible to receive Federal contracts, certain subcontracts, and certain Federal assistance (such as grants) and benefits. 2 CFR 180.130 does not allow any entity excluded by any Federal agency to (1) "Be a participant in a Federal agency transaction that is a covered transaction; or (2) Act as a principal of an entity participating in one of those covered transactions." This regulation specifically excludes the entity from receiving any future federal financial assistance and prohibits them from participating in federal procurement. Furthermore, other Federal award recipients would not be able to use the debarred entity as either a sub-recipient or vendor under DOE awards, or in some cases all future federal funding, and may be placed on a public or internal list including this information. This is an extreme remedy. Please contact the Buy American team and, consult with General Counsel and DOE's debarment/suspension official before applying this remedy. See 2 CFR Part 180 for more guidance on the debarment and suspension procedures.

Application of Remedies

Deciding if a remedy is appropriate under the circumstances, and where a remedy is needed, which remedy should be pursued, requires close collaboration between the Project Officer, Contracting Officer, Field Counsel and the EERE Headquarters Buy American team. However, Contracting Officers are the only individuals with the legal authority to amend the award or enforce remedies for noncompliance by a DOE award recipient. General Counsel must concur formally on the institution of Serious Remedies (6-10) as defined above.

Before any remedy can be pursued, the Contracting Officer must send a letter or email to the award recipient documenting:

- That the award recipient has been found noncompliant with the Buy American provision of the Recovery Act
- The specific iron/steel or manufactured goods that are noncompliant/unauthorized
- 10 CFR Part 600 and 2 CFR Part 176.130¹⁴ should be referenced/provided, and the statement "[t]he DOE reserves the right to pursue any and all remedies under that authority" must be included

As mentioned in the section on Compliance, there are three major types of Noncompliance:

- a. Improper Implementation:** The award recipient or sub-recipient attempted to comply with the Buy American provisions but did so in an improper manner. Often as a result of process problems, lack of oversight, confusion or lack of resources.

¹⁴ See Authorities in Appendix B for complete language of guidance

- The award recipient misunderstood the requirements of Buy American
 - Failed to request proper documentation
 - Believed documentation was sufficient when it was not
- The award recipient failed to properly implement the Buy American provisions and set up appropriate procedures
- The award recipient failed to implement the Buy American provisions at all due to oversight
- The award recipient failed to implement the Buy American provisions at all due to lack of resources

b. Mislead by Contractor, Vendor, or Manufacturer: The award recipient or sub-recipient has been misled by a contractor, vendor or manufacturer.

- The vendor intentionally misled the award recipient (fraud)
- The vendor provided documentation that was unclear /confusing

c. Award Recipient Misconduct: The award recipient or sub-recipient willfully ignored the Buy American provisions.

The appropriate remedy is contingent on the type and severity of noncompliance. In addition to the remedies The Contracting Officer, Project Officer, Field Counsel and Buy American team will consult on which remedy to pursue.

Application of Alternative Remedial Actions

In some cases, there is a case of non-compliance, however, the remedies listed above are too severe in light of the circumstances.

In those cases, the Contracting Officer may allow the non-compliant materials to remain in the installation, and accommodate the project as it stands, taking no further action and allowing the award recipient to retain the manufactured goods and the full sum of the DOE award.

In order to maintain consistency, EERE has developed the following considerations.

In cases where all of the following are met:

- 1) The value of the affected items is below a certain threshold or compelling exceptional circumstances exist; and
- 2) Reasonable effort was made by the award recipient (and sub-recipient where applicable) to comply with the Buy American provisions, but despite these efforts, a mistake was made (or the award recipient, sub-recipient were misled by a contractor, manufacturer, distributor or vendor); and
- 3) Reasonable effort was made by any contractor to whom the Buy American provisions were 'flowed down' to comply with the Buy American provisions; and
- 4) The cost of removal and replacement of the items is unreasonable in respect to the cost of the items involved; and

- 5) The award recipient and/or sub-recipient did not willfully disregard any communications or recommendations from Project Officers, Contract Officers, or the Buy American team in regards to compliance with the Buy American provisions; and
- 6) The award recipient or sub-recipient has received no similar prior accommodation for this DOE award;

The Contracting Officer, in consultation with the Buy American team and Field Counsel; **may** choose to issue a determination that no further action will be taken regarding the non-compliance and the award recipient may retain the non-compliant manufactured good as installed, without forfeiting any amount of the DOE award funds. **Meeting the above considerations does not prohibit the Contracting Officer from pursuing another remedy.**

Fraud

Fraud is a representation about a material point that is false and **intentional**, and which is acted upon to the detriment of the DOE, financially or otherwise.

As can be seen from the program notice attached in Appendix F of this document, allegations of fraud have been made already concerning the energy efficient lighting industry. It is possible that allegations will continue with regard to this and other technologies.

Most cases of fraud will arise when 1) a vendor/manufacturer knowingly certifies falsely that their product is Buy American Compliant, or 2) an award recipient/sub-recipient states that they are using compliant goods, when they knowingly are not.

There are very specific and complex remedies for dealing with the documentation and redress of fraud or allegations thereof, as laid out in 10 CFR Parts 1013 and 600. Please contact the Buy American team and the Contracting Officer in instances of suspected fraud, so they can immediately escalate the matter to the Inspector General and proceed in accordance with the established IG protocol.

Appendices

Appendices

A: Award Language

B: Compliance, Applicable Authorities

C: Project Officer Checklist: Buy American

D: RESERVED

E: Sample Compliance Documentation

Examples of State Energy Office Forms for “Letters of Compliance”

Georgia Environmental Finance Authority Example

West Virginia Division of Energy Example

Examples of “Letters of Compliance”

Sufficient Letters

Insufficient Letters

Example De Minimis Worksheet

EERE Program Notice: Recovery Act Buy American Provisions and Potentially Misleading Manufacturer Claims

F: Definitions

Appendix A: Award Language

Award Language¹⁵

2 CFR § 176.140 Award term—Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.

When awarding Recovery Act funds for construction, alteration, maintenance, or repair of a public building or public work that does not involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the award term described in the following paragraphs:

(a) Definitions. As used in this award term and condition—

(1)Manufactured good means a good brought to the construction site for incorporation into the building or work that has been—

(i)Processed into a specific form and shape; or

(ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

(2)Public building and 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.

(3)Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

(b) Domestic preference.

(1) This award term and condition implements Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5), by requiring that all iron, steel, and

¹⁵ Awards made through the Golden and Oak Ridge Field Offices include the following clause, which is applicable, regardless if the project involves a public building or public work: "It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this award should be American-made." Pursuant to this clause, recipients are obligated to take steps to purchase American-made goods to greatest extent practicable.

manufactured goods used in the project are produced in the United States except as provided in paragraph (b)(3) and (b)(4) of this section and condition.

(2) This requirement does not apply to the material listed by the Federal Government as follows:
[Award official to list applicable excepted materials or indicate “none”]

(3) The award official may add other iron, steel, and/or manufactured goods to the list in paragraph (b)(2) of this section and condition if the Federal Government determines that—

(i) The cost of the domestic iron, steel, and/or manufactured goods would be unreasonable. The cost of domestic iron, steel, or manufactured goods used in the project is unreasonable when the cumulative cost of such material will increase the cost of the overall project by more than 25 percent;

(ii) The iron, steel, and/or manufactured good is not produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act would be inconsistent with the public interest.

(c) Request for determination of inapplicability of Section 1605 of the Recovery Act.

(1)

(i) Any recipient request to use foreign iron, steel, and/or manufactured goods in accordance with paragraph (b)(3) of this section shall include adequate information for Federal Government evaluation of the request, including—(A) A description of the foreign and domestic iron, steel, and/or manufactured goods; (B) Unit of measure; (C) Quantity; (D) Cost; (E) Time of delivery or availability; (F) Location of the project; (G) Name and address of the proposed supplier; and (H) A detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods cited in accordance with paragraph (b)(3) of this section.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this section.

(iii) The cost of iron, steel, and/or manufactured goods material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any recipient request for a determination submitted after Recovery Act funds have been obligated for a project for construction, alteration, maintenance, or repair shall explain why the recipient could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the recipient does not submit a satisfactory explanation, the award official need not make a determination.

(2) If the Federal Government determines after funds have been obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official will amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is the unreasonable cost of the domestic iron, steel, or manufactured goods, the award official shall adjust the award amount or redistribute budgeted funds by at least the differential established in 2 CFR 176.110(a).

(3) Unless the Federal Government determines that an exception to section 1605 of the Recovery Act applies, use of foreign iron, steel, and/or manufactured goods is noncompliant with section 1605 of the American Recovery and Reinvestment Act.

(d) Data. To permit evaluation of requests under paragraph (b) of this section based on unreasonable cost, the Recipient shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Items Cost Comparison

Description	Unit of measure	Quantity	Cost (dollars)*
Item 1:			
Foreign steel, iron, or manufactured good	-----	-----	-----
Domestic steel, iron, or manufactured good	-----	-----	-----
Item 2:			
Foreign steel, iron, or manufactured good	-----	-----	-----
Domestic steel, iron, or manufactured good	-----	-----	-----

Appendix B: Compliance, Applicable Authorities

Applicable Authorities

10 CFR Part 600: (addresses non compliance generally)

10 CFR§600.24(all recipients); (when states/municipalities are award recipients) – 10 CFR §600.243 or 10 CFR §600.162 (when colleges/non-profits are award recipients) and 10 CFR § 600.352 (when for-profit organizations are award recipients)

Example: The DOE has authority under 10 CFR 600.243 to take action when **“a [recipient] materially fails to comply with the terms and conditions of an award.”**

(a) Remedies for noncompliance. If an [award recipient or sub-award recipient] materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

- (1) Temporarily withhold cash payments pending correction of the deficiency by the award recipient or sub-award recipient or more severe enforcement action by the awarding agency,
- (2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,
- (3) Wholly or partly suspend or terminate the current award for the award recipient’s or sub-award recipient’s program,
- (4) Withhold further awards for the program, or
- (5) Take other remedies that may be legally available.

2 CFR §176.130 Office of Management and Budget (OMB) Requirements for Implementing Section 1605 of the Recovery Act (Buy American Provision)

The Office of Management and Budget (OMB) has issued government-wide guidance that supplements DOE’s authority in implementing section 1605 of the Recovery Act (the Buy American provisions).

In accordance with 2 CFR §176.130, the award official must—

- (a) Review allegations of violations of section 1605 of the Recovery Act;

(b) Unless fraud is suspected, notify the recipient of the apparent unauthorized use of foreign iron, steel, and/or manufactured goods and request a reply, to include proposed corrective action; and

(c) If the review reveals that a recipient or sub-recipient has used foreign iron, steel, and/or manufactured goods without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act in accordance with § 176.120.

(2) Consider requiring the removal and replacement of the unauthorized foreign iron, steel, and/or manufactured goods.

(3) If removal and replacement of foreign iron, steel, and/or manufactured goods used in a public building or a public work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Federal Government, the award official may determine in writing that the foreign iron, steel, and/or manufactured goods need not be removed and replaced. A determination to retain foreign iron, steel, and/or manufactured goods does not constitute a determination that an exception to section 1605 of the Recovery Act applies, and this should be stated in the determination. Further, a determination to retain foreign iron, steel, and/or manufactured goods does not affect the Federal Government's right to reduce the amount of the award by the cost of the steel, iron, or manufactured goods that are used in the project or to take enforcement or termination action in accordance with the agency's awards management regulations.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate remedies, such as withholding cash payments pending correction of the deficiency, suspending or terminating the award, and withholding further awards for the project. Also consider preparing and forwarding a report to the agency suspending or debarment official in accordance with the agency's debarment rule implementing 2 CFR part 180. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

Appendix C: Project Officer Checklist: Buy American

BUY AMERICAN PROVISIONS: Project Officer Checklist



Project Information: Grantee: _____
 Date: _____ Sub-recipient: _____
 Project Officer: _____ Location: _____

A. Does Buy American(BA) Apply?	Yes	No
1. Does the project ¹ involve a Public Work or Public Building ² ? (If Yes, move to Question 2. If No, analysis is complete- BA does not apply)		
2. Does the project have a total value ³ of \$7,804,000 or more? (If Yes, move to 2(a). If No, move to question 2(b)) 2a. The project may use Canadian or U.S.-sourced iron, steel, or manufactured goods. The grantee or subgrantee may also be subject to an international agreement ⁴ , and able to purchase goods from countries with whom they have entered into that agreement. Contact Buy American Team before continuing with compliance analysis. After contacting Buy American team, and determining which countries the grantee may purchase goods from, move on to Section B. 2b. If the product does not have a value of \$7,804,000- all goods must be manufactured (substantially transformed) in the US or its territories, move on to Section B.		
B. Compliance Generally	Yes	No
1. Does the award recipient/sub-award recipient have sufficient policies/procedures in place to ensure compliance with Buy American? (Yes, move on to 2. No, Corrective Action Plan(CAP) may be necessary)		(CAP- Yes/No)
2. Is the award recipient/sub-award recipient familiar with the resources available to them through the Buy American Team and web-site? (Yes, move on to 3. No, Corrective Action Plan(CAP) may be necessary)		(CAP- Yes/No)
3a. Contracts-Has the recipient/sub-recipient "flowed down" the Recovery Act special terms and conditions (including the Buy American provisions) in all contract and sub-awards? (Yes, move on to 3b. No, Corrective Action Plan(CAP) may be necessary; note issue and continue to 3b)		(CAP- Yes/No)
3b. Contracts- Has the award recipient or sub-recipient used clear definitions, distinguishing the rules of the Buy American provisions of the Recovery Act from any FAR regulations, such as the Buy American Act? (Yes, move on to 4. No, Corrective Action Plan(CAP) may be necessary; note issue and continue to 4)		(CAP- Yes/No)
4. RFPs- Do the "Requests for Proposals" or other project bidding documents contain clear requirements that contractors or vendors provide iron, steel and manufactured goods that must be compliant with the Buy American Provisions? (Yes, move on to Section C. No, Corrective Action Plan(CAP) may be necessary; note issue and continue to Section C.)		(CAP- Yes/No)

¹ http://www1.eere.energy.gov/recovery/pdfs/eere_buy_american_guidance_on_project.pdf

² <http://management.energy.gov/documents/ARRAGuideAttachment10v1.pdf>, See p. 1, Q. 4.

³ This is not the amount total of ARRA funds awarded, but the total value of the project.

⁴ The OMB has published a list in Appendix to Subpart B of 176 (2 CFR Part 176, PDF pp. 9 -14, FR pp. 18457-18462) "U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements." If a grantee or subgrantee is not on that list, they are not party to an international agreement.

BUY AMERICAN PROVISIONS:**Project Officer Checklist**

C.Manufactured Goods	Yes	No
1. Are the iron, steel, or manufactured goods permanently installed project fixtures ⁵ ? (For goods permanently installed, move to question 2. For goods that are not permanently installed, analysis is complete - BA does not apply)		
2. Does the project use iron, steel, or manufactured goods ⁶ produced outside U.S. states or territories? (if Yes, immediately contact BA team for assistance)		
3a. Look at the boxes items come in—do they say ‘made in China,’ etc.? (Yes, go to 3c.)(No, go to 3b.)		
3b. Look at the goods themselves—do they have a stamp declaring their origin? (Yes, go to 3c.)(No, go to 4.)		
3c. If the items are labeled in a manner that leads you to question their origin, escalate the issue, loop in the contracting officer and ask the award recipient/sub-award recipient for documentation demonstrating that the products they are using are compliant.		
4. Certification Documents: Do certification documents (letters/receipts etc.) exist for all significant manufactured goods? (If Yes, move to 4b. If No, request certification from grantee, loop in BA team to assist if grantee is unsuccessful, and design CAP to design protocol for future collection of documentation if needed)		
Be wary of: <ul style="list-style-type: none"> •Vague certifications •Claims that a product is covered by trade agreements(NAFTA, WTO, etc) •Claims that a product is covered under a waiver •Information on percentage of U.S.-made components (or Supply Item, FAR reference, COTs) •Any mention of ‘assembly’ Broad statements are insufficient: <ul style="list-style-type: none"> •“We comply with the Buy American requirement” •“All products are American” •“This project meets Buy American” •“We are certified Buy American compliant”- there is no agency that “certifies” compliance 	4b. Are these present in the documentation?	
	If yes, send the documents to the Buy American Team and move to 4d. which the BA team will assist you in answering.	
<ul style="list-style-type: none"> • Product name and model number • Location(s) of manufacturing activities in United States • Manufacturer contact information • Description of manufacturing process (or Supply Item, FAR reference, COTs) 	4c. Are these present in the documentation?	
	If yes, documentation is sufficient. Check Yes in box 4d.	
Is the compliance documentation sufficient? (If yes, inquiry is complete. If no, refer to the BA Team, as this becomes a “Concern” that <u>may</u> lead to a “formal finding” and enforcement action. The BA team will help facilitate moving forward)		

⁵ e.g. HVAC systems, lighting fixtures & bulbs are permanently installed; recycling bins, cars, window a/c units, scaffolding and flash drives are not.

⁶ <http://management.energy.gov/documents/ARRAGuideAttachment10v1.pdf>, See p. 2, Q. 5.

Appendix D: RESERVED

Appendix E: Sample Compliance Documentation

Examples of State Energy Office Forms for “Letters of Compliance”

Georgia Environmental Finance Authority Example

West Virginia Division of Energy Example

Examples of “Letters of Compliance”

Sufficient Letters

Insufficient Letters

De Minimis Worksheet Example

EERE Program Notice: Recovery Act Buy American Provisions and Potentially Misleading Manufacturer Claims



Sonny Perdue
Governor

GEORGIA ENVIRONMENTAL FINANCE AUTHORITY

Kevin Clark
Executive Director

CERTIFICATION OF COMPLIANCE WITH BUY AMERICAN

GEFA subrecipient:
GEFA subrecipient contract:
Vendor Name:

Manufactured good(s) being used for project (please list)

Type of Good	Make & Model	Manufacturing Location	Waiver received? (y/n)

Waiver attached

Vendor should include a copy of applicable product waiver(s) when sending the 'Certification of Compliance with Buy American' to subrecipient (if applicable). Waivers can be downloaded here:

http://www1.eere.energy.gov/recovery/ba_waivers.html

1. Will a waiver(s) be included with this document when sent to subrecipient?
☐ Yes ☐ No ☐ N/A

If using a good that has not received a waiver, please answer questions below.

1. Were all of the components of the manufactured good(s) manufactured in the U.S., and were all of the components assembled into the final production in the U.S.? ☐ Yes ☐ No

If the answer to the above question is 'no,' please answer question two and three below.

2. Was there a change in character for use of the good or the components in the U.S.? (These questions are asked about the finished good as a whole, not about each individual component. Vendor must answer yes to at least one question to qualify for Buy American compliance.)

a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good? ☐ Yes ☐ No

i. If yes, describe:

b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use? ☐ Yes ☐ No

i. If yes, describe:

c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product? ☐ Yes ☐ No.

i. If yes: describe:

3. Was/were the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful? (Vendor must answer yes to at least two questions to qualify for Buy American compliance.

a. Did the process(es) take a substantial amount of time? ☐ Yes ☐ No

i. If yes, describe:

b. Was/were the process(es) costly? ☐ Yes ☐ No

i. If yes, describe:

c. Did the process(es) require a number of different operations? ☐ Yes ☐ No

i. If yes, describe:

d. Did the processes require particular high level skills? ☐ Yes ☐ No

i. If yes, describe:

e. Was substantial value added in the process(es)? ☐ Yes ☐ No

i. If yes, describe:

Manufacturing performed in countries outside of the U.S.

☐ I understand that equipment manufactured in Mexico, Canada or any other countries with whom the U.S. has trade agreements will not count as Buy American compliant.

Certification

Certification by vendor

☐ I certify that this information is true and accurate to the best of my knowledge.

Signature: _____

Date: _____

Name:

Title:

Organization:

☐ **Received & reviewed by subrecipient**

Signature: _____

Date: _____

Name:

Title:

Organization:

West Virginia EECBG Buy American Certification



This certification is to be utilized by West Virginia EECBG Local Government Grant Program grantees to obtain a certification from each of their vendors (including contractors, subcontractors, suppliers and distributors) that they are in compliance with the Buy American provisions of the American Recovery and Reinvestment Act of 2009 (ARRA). Grantees should make copies of this certification form and have each vendor complete and sign the form. Vendors must also attach receipts and/or other documentation with this form showing evidence of Buy-American compliance. The original form should be kept by the grantee for their records and a copy submitted with their payment request to their regional planning and development council for submission to the West Virginia Division of Energy.

____ I hereby certify that all of the iron, steel and manufactured goods supplied or provided by me or my company for use on this project for the construction, alteration, maintenance or repair of a public building or public work was produced in the United States of America, unless a United States Department of Energy exception or waiver applies

____ I am relying on the following Buy American exceptions and/or waivers (check all that apply):

____ Iron, steel and manufactured goods supplied/provided by me equal no more than 5 percent of the total cost of the iron, steel and manufactured goods used in and incorporated into this project.

____ I am supplying or providing a good(s) deemed by the United States Department of Energy to be not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (provide name and description of item(s) below and provide additional documentation as available)

Vendor Name

Vendor Representative Printed Name/telephone number

Vendor Representative Signature

Date



Good Letter of Compliance



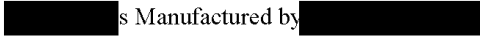
Manufacture's certificate of compliance

Date:

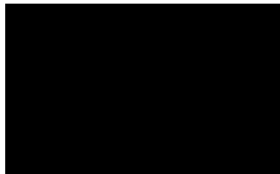


Re: American Recovery Act. Compliance per Section 1605 of arra-09

Products: Manufactured by



hereby certifies we manufacture at our facility located at 2 Avenue in S H, California, United States of America, comply with section 1605 of ARRA-09 requirements with regards to determining whether substantial transformation has occurred in the U.S.A.



Questions for Determining Whether Substantial Transformation Has Occurred in the U.S.

Questions	Yes	No
1. Were all of the components of the manufactured good manufactured in the United States, and were all of the components assembled into the final product in the U.S.? (If the answer is yes, then this is clearly manufactured in the U.S., and the inquiry is complete)		X
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)	X	
a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?	X	
b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?	X	
c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?	X	
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)	X	
3. Was/(were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?	X	
a. Did the process(es) take a substantial amount of time?	X	
b. Was/(were) the process(es) costly?		X
c. Did the process(es) require particular high level skills?	X	
d. Did the process(es) require a number of different operations?	X	
e. Was substantial value added in the process(es)?	X	



**Commercial HVAC
Sales, Service & Parts**

Sufficient Letter of
Compliance

To: [REDACTED]

Date: September 28, 2010

Re: Made in America Qualifications for [REDACTED]

Mr. [REDACTED],

As you are aware [REDACTED] is an authorized sales agent for [REDACTED]
[REDACTED] in the [REDACTED] market.

To confirm our conversation of this morning, the commercial products offered by
[REDACTED] are made in the following locations:

Air Handling Units – [REDACTED] Pennsylvania

Commercial Condensing Units – [REDACTED] Oklahoma

[REDACTED] Boxes – [REDACTED] Florida

Please be advised that the [REDACTED] products fabricated at the following USA location listed
above are in full compliance with the “Buy American” provision as required under the
American Recovery and Reinvestment Act (ARRA) of 2009.

If you have any questions or need any more information please feel free to call.

Regards,

[REDACTED]

[REDACTED]
Vice President

[REDACTED]

Really Really Bad Letter of
Compliance

May 24, 2010

Dear [REDACTED] Partners and Customers:

We are presently working on a number of American Recovery and Reinvestment Act (ARRA) projects. As [REDACTED] and many other [REDACTED] manufacturers are completing more of these projects, we are receiving more questions to clarify the Buy American Act. This letter is an effort to clearly communicate both our understanding of the intentions of the Buy American Act as it surrounds ARRA projects, and our stance in regards to both the [REDACTED] systems.

The Buy American Act: ← wrong regulation

- Creates price preferences that favor “domestic end products” from American firms on U.S. federal government contracts. For manufactured products specifically, the preference is on products manufactured in the U.S., or in which the cost of its U.S. components exceeds 50% of the cost of all components of the item.
- Serves as the legal authority for other U.S. domestic preference programs in procurement.
- Allows exceptions if certain conditions are met:
 1. The items are for use outside of the U.S.A.
 2. Domestically produced items of satisfactory quality are unavailable in reasonable quantities at a reasonable cost.
 3. The cost of a domestic alternative increases the cost of the entire project by more than 25%.
 4. The selection of a non-domestic alternative is in the best interest of the public good.
 5. The total project cost exceeds \$7,433,000, in which case products manufactured in countries with existing trade agreements may be used.
 6. The products are components of a larger product or assembly that is “manufactured” in the US. In this case, only the final assembly must meet the domestic manufacturing requirement.

Our organization is part of [REDACTED] a U.S.-based company with global coverage and a global manufacturing organization. Our business channel goes to market with both [REDACTED]. [REDACTED] is manufactured almost entirely in the United Kingdom (a top 6 U.S. trade partner), with a handful of devices manufactured in Mexico (a NAFTA partner) at the same facility where [REDACTED] devices are manufactured. We have experienced very little resistance to the allowance of both our brand names in

improper reference
to international
agreements

ARRA projects to date, as our partner manufacturing facilities are with very friendly trade partners, and one of the above exceptions is usually met. We address the listed Exceptions as follows:

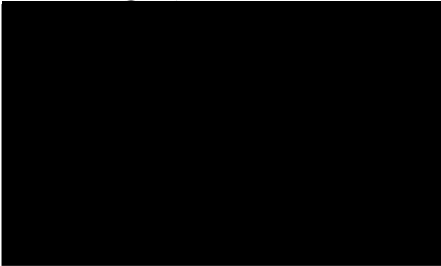
- Exception numbers 2, 3, and 5 are easily addressed by quantifying dollars and/or percentages, given the size of a project or our pricing as compared to a competing bid.
- Exception number 4 is commonly accepted with an extension of an existing [REDACTED]. It is much more practical, less costly, and preserves the technical capabilities of an entire system when it can be extended. It's in the best interest of the end user customer to have one cohesive system versus two separate systems.
- Exception number 6 can be accepted in all situations with the provision of a [REDACTED] solution. Every [REDACTED] is an engineered system. The actual electronic components of the engineered system normally account for about 15-20% of the total price. The bulk of the total solution is designed, installed and completed by our local [REDACTED] arguably the final assembly of a system/solution.

These exceptions don't apply. Exceptions/Waivers can only be granted by the assistant secretary

component content is irrelevant

Please let me know if you have any specific [REDACTED] or any particular product within each product line. Each project is unique, and each system configuration is a unique combination of electronics, software, end devices, programming and customization. We're confident that our offerings will compare favorably in regards to ARRA and Buy American requirements.

Best Regards,



Sample De Minimis Worksheet

Sample De Minimis Worksheet		
Compliant Products		
<i>Products</i>	<i>Notes</i>	<i>Cost</i>
4 Gas tankless water heaters	Covered by blanket waiver	5600
8 Circulator Pumps	US Made (Pittsburgh, PA)	3000
U.S.-made connectors	Estimate	1000
Incidental Items (not U.S. or origin unknown)		
<i>Products</i>	<i>Notes</i>	<i>Cost</i>
Gaskets, nuts, bolts	Estimate	50
Fittings (16 @ \$18.75 each)	Invoices	300
Electrical appurtenances	Estimate	150
Totals		
Total Materials (includes US and non-US)		10100
Total Incidental		500
% Incidental		0.0495

EERE Program Notice: Recovery Act Buy American Provisions and Potentially Misleading Manufacturer Claims

EERE is issuing this Program Notice as an informational bulletin to financial assistance recipients (“award recipients”) to aid their compliance with the Recovery Act Buy American provisions. Please note that EERE has recently issued guidance to assist award recipients in documenting compliance and to determine where a product is manufactured; these documents are available on the EERE Buy American Website, at:

http://www1.eere.energy.gov/recovery/buy_american_provision.html.

EERE has received a series of complaints from domestic manufacturers alleging that foreign competitors are fraudulently marketing their products as compliant with the Recovery Act Buy American provision. EERE reminds award recipients that it is their responsibility to ensure that, for Recovery Act-funded projects, all iron, steel, and manufactured goods incorporated into a public building or public work are manufactured or produced in the United States.

The allegations of fraudulent claims have been predominantly in the high-efficiency lighting sector, particularly induction and LED products. As a result, award recipients pursuing lighting retrofit projects should be vigilant in their interactions with lighting product suppliers, distributors, and manufacturers. EERE and DOE General Counsel are taking measures to increase vigilance on our end, and will make a reporting hotline available on the EERE Buy American website to enable award recipients or domestic manufacturers to report concerns about improper identification as domestically manufactured goods.

The award recipient will need to verify that the products in question are actually manufactured or produced in the United States. Award recipients are responsible for ensuring that the products they purchase fully comply with the Buy American requirements, and must be able to sufficiently document that compliance for purposes of post-award monitoring and audits, as outlined in the Guidance on Documenting Compliance with the Recovery Act Buy American provisions

(http://www1.eere.energy.gov/recovery/pdfs/eere_buy_american_documentation_guidance.pdf).

In addition to allegations of fraud, EERE research has discovered several company websites promoting their products’ compliance with the Buy American requirements, apparently on the basis of being manufactured in a “Trade Agreement” country. This can be confusing, because not all award recipients can treat “Trade Agreement” country goods as U.S. goods and are only eligible to invoke the U.S.’s obligations under its trade agreements for projects valued at or above \$7,804,000. For additional information, please see the EERE FAQ entitled “International Trade Agreements and the Recovery Act Buy American provisions”

(http://www1.eere.energy.gov/recovery/pdfs/faq_international_trade_agreements_and_buy_american_provisions.pdf).

EERE would also like to use this Program Notice to publicize an effort by the National Electrical Manufacturers Association (“NEMA”) to identify domestic induction, LED lighting manufacturers, and compile a list of domestic producers for lighting items in high demand by EERE award recipients. EERE hopes that this information will be available from NEMA within the next two weeks. Once it is available, a link to this information will be posted on the Buy American website (http://www1.eere.energy.gov/recovery/buy_american_provision.html).

Appendix F: Definitions

Buy American Provisions: The Buy American Provisions are found in the American Recovery and Reinvestment Act of 2009. The Buy American provisions direct that, subject to certain exceptions, no Recovery Act funds 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 or manufactured in the United States.

Buy American Act of 1933: a different law from the Recovery Act. The Buy American provisions of section 1605 of the Recovery Act are not the same as the Buy American Act of 1933.

Concern: A minor concern to correct for the future; or a problem that could jeopardize the program. In this case, a Corrective Action Plan (CAP) may be requested from the State.

Corrective Action Plan (CAP): step-by-step plan of action and schedule for correcting a process or a quality issue.

Federal Acquisition Regulation (FAR): The body of regulations that is the primary source of authority governing the federal government procurement process. It applies when the federal government is the part making a purchase, and does not apply to projects using ARRA funds unless they are projects involving federal buildings or works. The FAR is published as Chapter 1 of Title 48 of the Code of Federal Regulations.

Formal Finding: A formal finding is non-compliance with a federal regulation or guidance; or a repeated or previously identified non-addressed correction or action item. To resolve a finding, a CAP is required from the State.

Manufactured good: a good brought to the construction site for incorporation into the building or work that has been—(i)Processed into a specific form and shape; or(ii)Combined with other raw material to create a material that has different properties than the properties of the individual raw materials. 2 CFR 176

Project: see definition here:

http://www1.eere.energy.gov/recovery/pdfs/eere_buy_american_guidance_on_project.pdf

Public building and public work: 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, office buildings, schools, parking lots, 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.

Recommendations: Suggestions made to the State to assist with compliance of program requirements, improve merits of the program, suggest a best practice, or to identify technical assistance available.

Recovery Act: The American Recovery and Reinvestment Act of 2009

Substantial Transformation: Substantial transformation occurs when, as a result of manufacturing processes, a new and different article emerges, having a distinctive name, character, or use, which is different from that originally possessed by the article or material before being subject to the manufacturing process. The mere finishing or modification of a partially or nearly complete foreign product in the United States will not result in the substantial transformation of such product and it remains the product of a foreign country

Substantial transformation is a term used in the definition of a "domestic manufactured good" in the OMB Interim Final Guidance published at 2 CFR 176. In order for a good to be considered produced or manufactured in the United States, it must undergo a substantial transformation in this country. EERE has recently published guidance to assist grantees in making these substantial transformation determinations.

The factors involved in determining whether substantial transformation has occurred focus on manufacturing, processing, assembly, or integration of the components or subcomponents into a finished good. Design, planning, procurement, component production, or any other step prior to the process of physically bringing together the components into the final manufactured good used in (and incorporated into) the Recovery Act project cannot constitute part of the substantial transformation determination.

Steel: an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

Waiver: In certain circumstances, a project will qualify for an exception to the Buy American provisions. Only the Secretary of Energy or those to whom he has delegated authority, including the Assistant Secretary for EERE may grant waivers. There are three types of waivers:

Nonavailability: Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available (commercial?) quantities and of satisfactory quality;

Unreasonable Cost: Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25%;

Public Interest: Applying the Buy American provision is inconsistent with the public interest.



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