



Department of Energy
Washington, DC 20585

**ASSISTANT SECRETARY OF ENERGY
FOR ENERGY EFFICIENCY AND RENEWABLE ENERGY**

MEMORANDUM OF DECISION

SUBJECT: Determination of inapplicability (nationwide limited waiver in the public interest) of section 1605 of the Recovery Act of 2009 (the Buy American provision) for donated manufactured goods (provided at zero cost) utilized in EERE-funded projects. This waiver expires May 1, 2012.

Under the authority of the Recovery Act, section 1605(b)(1), the head of a Federal department or agency may issue a “determination of inapplicability” (a waiver of the Buy American provisions) if the application of section 1605 would be inconsistent with the public interest. On April 25, 2011, the Secretary of Energy delegated the authority to make all inapplicability determinations to the Assistant Secretary for Energy Efficiency and Renewable Energy, for EERE Recovery Act projects.

Pursuant to this delegation, I, as the Acting Assistant Secretary, have determined that application of section 1605 restrictions would be inconsistent with the public interest for items donated (provided at zero cost) to EERE-funded Recovery Act projects.

This determination waives the Buy American requirements in EERE-funded Recovery Act projects for donated manufactured goods.

Definitions – *Donated* means manufactured goods provided to the project at zero cost. These goods must not hold a caveat, expectation, or quid-pro-quo of any sort, nor may their donation bind the grant recipient in any way. The recipient, for example, may not agree to pay more for one item, so as to have another item donated, nor may they promise more business in the future in exchange for a donated item. The Project Officer or the Contracting Officer will be consulted to determine whether the goods qualify as donated; this will serve to prevent abuse of this waiver. This waiver applies only to the donated manufactured goods themselves. All funds used in the project are still subject to the Buy American requirements and other contract requirements.

The Buy American provision “prohibits use of recovery funds 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.” 2 CFR § 176. However, in a number of cases, grant recipients and sub recipients have been able to secure offers of donation, for items already installed that are non-compliant with the Buy American provision of the Recovery Act. Offers of donation may free up the need to spend federal dollars that otherwise would have been spent on those donated items and that may also count towards the recipient’s cost share (10 C.F.R. § 600.224) for grants that require cost sharing. When donated items are used in a project, freeing up allocated Recovery Act funds, grantees will work with their Project Officers to allocate funds to other projects, or to broaden the existing project. The “freed-up” Recovery Act funds may not be used on the purchase of non-compliant manufactured goods in accordance with applicable laws.

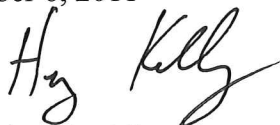
For the reasons outlined above, I find that it is in the public interest to issue a waiver of the Recovery Act Buy American provisions that allows grantees to use donated manufactured goods in EERE funded projects. This waiver should not be used as a means to circumvent the Recovery Act Buy American provisions through encouraging recipients to knowingly accept non-compliant goods that would be used on a Recovery Act project to further leverage Recovery Act funds.

Issuance of this nationwide public interest waiver recognizes EERE’s commitment to expeditious costing of Recovery Act dollars by enabling grantees and vendors to easily ascertain whether a project complies with the Buy American provision. Issuance of this waiver removes any need for EERE to issue a Recovery Act Buy American non-compliance finding and negates economic waste that would result by having a recipient uninstall or remove a donated good that is otherwise compliant with the Recovery Act Buy American provisions.

In light of the foregoing, and under the authority of section 1605(b)(1) of Public Law 111–5 and the Redelegation Order of April 25, 2011, with respect to Recovery Act projects funded by EERE, I hereby issue a new “determination of inapplicability” (a waiver under the Recovery Act Buy American provisions) for donated manufactured goods. This waiver expires May 1, 2012.

I reserve the right to revisit and amend this determination based on new information or new developments.

December 6, 2011

A handwritten signature in black ink, appearing to read "Hy Kelly". The signature is fluid and cursive, with the first name "Hy" and the last name "Kelly" clearly distinguishable.

Acting Assistant Secretary
Energy Efficiency and Renewable Energy
U.S. Department of Energy