Department of Energy
Washington, DC 20585

International Trade Agreements and the Recovery Act Buy American Provisions: Frequently Asked Questions

Scope: This FAQ applies to all state, local and tribal government recipients and sub-recipients (grantees and subgrantees) of Recovery Act financial assistance from the Office of Energy Efficiency and Renewable Energy (EERE).

The Buy American provision in the American Recovery and Reinvestment Act of 2009 (section 1605 of Title XVI), provides that, subject to three listed exceptions (nonavailability, unreasonable cost, and inconsistent with the public interest), none of the funds appropriated or otherwise made available by the 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 are produced in the United States, or unless the head of the Department or Agency issues a waiver based on one of the three exceptions listed above.

The law also requires that the Recovery Act Buy American provision be applied in a manner consistent with the U.S.'s obligations under its international trade agreements.[1] The Office of Management and Budget (OMB) has issued interim final guidance[2] directing that the Buy American provision shall not be applied where the iron, steel, or manufactured goods used in the project originate from a Party to an international agreement and the recipient of Recovery Act financial assistance is required under an international agreement to treat the goods and services of that Party the same as domestic goods and services. [3] The Appendix to Subpart B of 2 CFR Part 176 contains a list of those recipients who may avail themselves of the U.S.'s obligations under its international trade agreements. Recipients who are not listed cannot avail themselves of the U.S.'s obligations under its trade agreements. Also, recipients who are eligible to invoke the U.S.'s obligations under its trade agreements can only do so for projects valued at or above $7,804,000 or above, and only for goods that are not specifically excluded from an agreement. Exclusions from international trade agreements are also listed in the Appendix to Subpart B of 2 CFR Part 176.

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[1] Recovery Act, Section 1605(d)
[2] 2 CFR Part 176
[3] Described in the Appendix to Subpart B of 2 CFR 176; see http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf.

Implementation of U.S.-Canada Agreement

The recently concluded Agreement between the Government of the United States of America and the Government of Canada on Government Procurement (U.S.—Canada Agreement), means that for two DOE EERE programs, the Energy Efficiency and Conservation Block Grant Program (EECBG) and the State Energy Program (SEP), state and local governments are required to treat Canadian iron, steel, and manufactured goods the same as U.S. iron, steel, and manufactured goods for projects valued at or above $7,804,000. This requirement went into effect on February 16, 2010, and it applies to any new procurements that were or are commenced on or after that date. This agreement does NOT apply to any other DOE programs, and it does NOT apply to any other countries. The requirements of this agreement will end on September 30, 2011, unless the term of the agreement is extended.

General Guidance Regarding Application of Other International Agreements

For most EERE Recovery Act grantees, international trade agreements will not be a consideration because very few recipients are eligible to invoke the U.S.'s obligations under its trade agreements. (Refer to the list in the Appendix to Subpart B of 2 CFR Part 176 explained above.) Most local government and tribal entities are not a party to any international trade agreements. Also, for all projects valued below the $7,804,000 threshold, the Buy American provision applies, unless a waiver has been granted by DOE for the specific manufactured good in question.

Grantees are responsible for determining whether the iron, steel, or manufactured goods procured for their project are covered by an international agreement. Grantees should consult the OMB Interim Final Guidance to determine the applicability of international agreements.[4] Please be aware that DOE cannot provide advice to grantees about whether they are eligible to invoke the U.S.'s obligations under its international trade agreements. Grantees may wish to consult their State Attorney General or their own legal counsel for such advice.

Common Questions

1) Question: An efficient street lighting product is manufactured in Mexico (a NAFTA signatory). Using EECBG funds, can this product be procured by a city for a $500,000 lighting retrofit project on public property funded by the Recovery Act, and be considered compliant with the Recovery Act Buy American provisions?

   Answer: No. NAFTA does not cover local government or tribal procurements. Please refer to the Appendix to Subpart B of 2 CFR Part 176. In the column entitled "Relevant International Agreements," NAFTA is listed only for Rural

[4] The Buy American provision has been implemented in OMB's Interim Final Guidance at 2 CFR Part 176 (74 Fed. Reg. 18449 (April 23, 2009)); http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf), as amended by 75 Fed. Reg. 14323, March 25, 2010.

Utilities Services (RUS). This means that only RUS's can invoke the terms of NAFTA to permit use of non-U.S. iron, steel and manufactured goods for their projects. Also note, the hypothetical project described is well below the $7,804,000 threshold. All projects below the $7, 804,000 threshold are subject to the Buy American requirements of the Recovery Act, unless a waiver has been granted by DOE.

2) Question: A State energy agency is using State Energy Program Recovery Act funds to pay for a large government building retrofit. It wants to purchase a high-efficiency HVAC system manufactured in China by a prominent U.S. company, and sold by a local distributor. Would this be compliant with the Recovery Act Buy American provisions?

   Answer: No. Section 1605 of the Recovery Act clearly states that: "None of the funds appropriated or otherwise made available by the Recovery 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."** Whether the company is based in the U.S. or not is immaterial; what matters is where the product is manufactured.

3) Question: A Japanese solar energy company opens a manufacturing plant in the United States. The components and subcomponents of the manufactured goodcome from all over the world. Would these PV modules be Buy American-compliant?

   Answer: Yes. There is no requirement with regard to the origin of components or subcomponents in manufactured goods, so long as the final manufacturing occurs in the United States. However, the final manufacturing must be sufficient to meet the definition of manufacturing, which is generally consonant with the requirements of substantial transformation.

4) Question: A company contacts a grantee and insists the company is "Buy American compliant" because they import a manufactured good from abroad, repackage it at their facility in the U.S., and sell it under a U.S. brand name. Is this acceptable?

   Answer: No. The iron, steel, or manufactured goods must be produced or manufactured in the United States. A simple repackaging, or a simple assembly, does not satisfy the definition of "manufacturing."

5) Question: How do grantees verify that a product is indeed manufactured in the United States?

   Answer: Grantees should include the Buy American requirements in all solicitations, Requests for Proposals (RFPs), agreements and sub-agreements.

The language in the OMB Interim Final Guidance at 2 CFR 176.150 (for solicitations and RFPs) and 176.140 (for agreements and sub-agreements) should be helpful. Recipients should expect subrecipients and contractors to verify their compliance with the Buy American provisions.

To assess whether various activities do or do not enable recipients to consider a good as "produced in the U.S.", OMB included in section 176.160 of the Interim Final Guidance on international agreements the concept of "substantial transformation." This concept of "substantial transformation" is helpful in the case of a manufactured good that consists in whole or in part of materials from another country. To assist grantees in making substantial transformation determinations, EERE has issued a separate guidance document entitled "EERE Substantial Transformation Guidance," available on the EERE website at http://www1.eere.energy.gov/recovery/buy_american_provision.html.

6) Question: A vendor indicated that its goods qualify under the Buy American Act of 1933 because of the WTO GPA. Is that sufficient compliance?

Answer: No. The Buy American Act of 1933 is 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.