

Recovery Act Buy American Overview

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Buy American Support

American Recovery and Reinvestment Act: Buy American Provision - Windows Internet Explorer

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

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Buy American Provision

This Web page contains guidance for financial assistance recipients regarding Buy American Recovery Act provisions under projects funded by the American Recovery and Reinvestment Act of 2009 and administered by the Office of Energy Efficiency and Renewable Energy (EERE).

The Buy American provision in the American Recovery and Reinvestment Act of 2009 (section 1605 of Title XVI), provides that, unless one of three listed exceptions applies (nonavailability, unreasonable cost, and inconsistent with the public interest), and a waiver is granted, 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 the iron, steel, and manufactured goods used are produced in the United States.


Please check this page regularly, as the Office of Energy Efficiency and Renewable Energy will provide updates as further guidance is released.

Guidance Documents

The following documents are available as Adobe Acrobat PDFs. [Download Adobe Reader](#).

- Guidance on the Term "Project" Under the Recovery Act Buy American Provisions (PDF 52 KB)

EERE Domestic Nonavailability Waiver Request Form



A fillable form for EERE grantees to submit requests for waivers of the Buy American provisions on the basis of domestic nonavailability.

- Read the Waiver Request Form (PDF 92 KB)

Buy American Provision Webinar (PDF 448 KB)

EERE Buy American Project Leader Benjamin Goldstein presented this Webinar on June 9, 2010, to State Energy Program (SEP) and Energy Efficiency and Conservation Block Grant (EECBG) recipients.

- Section 1605 of the American Recovery and Reinvestment Act (Recovery Act)
- 2 CFR 176 (Government-wide guidance): “Requirements for Implementing...Section 1605”
- “None of the funds appropriated for 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 or manufactured in the United States.” (2 CFR 176.70)

- There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in a project, as long as the manufacturing occurs in the United States. (See 2 CFR 176.70(a)(2)(ii).
- So what constitutes “manufacturing?”
- Production or manufacturing facility is physically located in the United States or its territories. The domicile of the parent company, subsidiary, distributor, or supplier is not relevant for determining compliance with the Recovery Act Buy American provision.

- **Manufactured Good:** “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.” See 2 C.F.R. § 176.140(a)(1).
- Only manufactured goods that **are permanently attached to or fixed to real property** are covered by the Buy American Recovery Act provisions.

- *Guidance on Manufactured Goods and Substantial Transformation*
- “The responsibility for determining whether the parts are components of a larger manufactured good, and whether the good is manufactured in the United States rests with the Recovery Act financial assistance recipient.”
- We have given you the tools you need
- DOE Buy American Coordinator and HQ procurement lawyers not empowered to make “substantial transformation” determinations

Can only be determined by the Assistant Secretary for Energy Efficiency and Renewable Energy

- 1. Nonavailability** (not produced or manufactured in sufficient and reasonably available quantities of a satisfactory quality)
- 2. Unreasonable cost** (will increase cost of the *overall project* by more than 25%)
- 3. Inconsistent with the public interest**

Nonavailability/Unreasonable Cost Waiver Request
Form,

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

Technical information is sent to Manufacturing Extension Partnership for “supplier scouting” and to industry trade associations, unions, etc to search for domestic manufacturers.

- What records are needed to document compliance with the Buy American provisions?
- Grantees are required to flow down the Buy American requirements to subrecipients, and in any subawards or subcontracts.
- Contractors and vendors should be held responsible for complying with the Buy American provisions.
- Grantees, sub-recipients and subawardees may ask contractors and vendors for letters of certification.

- *Guidance on Documenting Compliance with the Recovery Act Buy American Provisions*
- 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.
- Recipients should maintain documentation at a level they feel is appropriate to show compliance with the Recovery Act Buy American provisions.

- A list of recommended documentation is outlined in the Guidance.
- Includes: “other reasonable documentation per the discretion of the state, local, or tribal government financial assistance recipient demonstrating compliance with the Buy American provisions.”

International Agreements

- Obligation only applies to projects valued at or above \$7,804,000.
- Many States and Sub-Federal Entities have specific exclusions from certain Agreements
- See Appendix Subpart B of 2 CFR 176
<http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>
- February 16: U.S.—Canada agreement effective date. This gives Canada access to EECSBG and SEP projects above \$7.804 million.

- For cities, municipalities, counties, and tribes Canada is the *only country* with access to EECBG projects (above \$7.8 million) under the Buy American provisions.
- No other international trade agreements (including NAFTA, CAFTA, etc) cover local government procurement.
- States can see Appendix Subpart B of 2 CFR 176 <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>
- DOE HQ will not help interpret obligations under international trade agreements for sub-federal entities.

- Do not see how computer software could be a manufactured good.
- Software is not processed into a specific form and shape nor combined with other raw material to create a material that has different properties than the properties of the individual raw materials.
- Server virtualization software and energy efficiency software are therefore not subject to the Recovery Act Buy American requirements.

- Computer hardware: The question of whether computer hardware is covered by the Recovery Act Buy American provisions turns on whether computer hardware meets the Recovery Act definition of a *manufactured good*.
- Yes it is processed into a specific form and shape.
- But, is the the computer hardware “brought to the construction site for incorporation into the building.”
- Is it permanently attached to or fixed to real property?
- Determination must be made by the grantee.

‘Blanket’ waivers that are both retrospective and prospective. Cover all procurement past, present, and future.

Grantees who have the need for a product already covered in a waiver need to document compliance, but do not need to apply for a waiver.

17 total items as of August 11, 2010

March 19, 2010

- Nationwide limited public interest waivers for purchases of LED lighting and HVAC units before March 31, 2010.
- The limited waivers for these two categories of manufactured goods are intended to resolve the confusion surrounding the characterization of LED lights and HVAC units as “supply” items, and thus not subject to the Recovery Act Buy American provisions.
- The concept of a “supply” item has no significance in the context of section 1605 (the Buy American provisions) of the Recovery Act.

August 9, 2010

Clarifies the Buy American requirements for solar installations

- 1) Domestically-manufactured modules containing foreign-manufactured cells,
- 2) Foreign-manufactured modules, when comprised of 100 percent domestically-manufactured cells, and
- 3) Any ancillary items and equipment (including, but not limited to, charge controllers, breakers and fuses, racks, trackers, cables and all otherwise incidental equipment with the exception of inverters and batteries) when utilized in a solar installation involving a U.S. manufactured PV module, or a module manufactured abroad but comprised exclusively of domestically-manufactured cells.

This waiver expires six months from the day it takes effect.

- **A balancing or percentage of content test-** it depends upon the location of final manufacturing (“substantial transformation”)
- **Subject to NAFTA for projects under 7.8 million dollars**
- **The “Buy American Clause” of the FAR-** watch out for manufacturers using the terms “Buy American Clause”, “Buy American Act” or “Buy American Content” compliant- this is not the standard, and the product may not be compliant with section 1608 of the Recovery Act.

- The concept of the “supply item” has its origins in the Buy American Act (41 U.S.C. 10a - 10d) and the Federal Acquisition Regulation (FAR), *neither of which applies to section 1605* (the Buy American provisions) of the American Recovery and Reinvestment Act of 2009 (Recovery Act; Pub. L. 111-5).
- *To be absolutely clear: the concept of a “supply item” has no relevance in the context of section 1605 of the Recovery Act.*

May 24, 2010

- “De Minimus” waiver for incidental items up to a limit of no more than 5 percent of the total cost of the iron, steel, and manufactured goods used in and incorporated into a project.

Guidance and FAQs

- Guidance on Documenting Compliance with the Recovery Act Buy American Provisions
- Guidance on Manufactured Goods and Substantial Transformation for Financial Assistance Awards
- Recovery Act Buy American Guidance on Implementing the Agreement Between Canada and the United States of America on Government Procurement
- International Trade Agreements and the Recovery Act Buy American Provisions: Frequently Asked Questions
- Computer Hardware and Software: Frequently Asked Questions
- Guidance on the Buy American Provisions as Applied to EERE Projects funded by ARRA (oldie but goodie)

EERE Buy American Waivers

- *Nationwide Nonavailability Waivers (3 for a total of 17 items)*
- *De Minimis Public Interest Waiver*
- *Solar Public Interest Waiver*
- *Nationwide Limited Public Interest Waiver for LED Lighting and HVAC Units*
- *Nationwide Categorical Waivers for Electronic Ballasts, LED Traffic Lights, and CFLs*

- Q: Are LED streetlights a “supply item”, and thus exempt from “Buy American” requirements?
- A: No. The concept of a “supply item” has no relevance in the context of section 1605 of the Recovery Act. There are U.S. manufacturers of LED streetlights and area lights.
- Q: How do we find products that comply with the “Buy American” requirement?
- A: DOE is compiling a list of manufacturing trade associations. We cannot provide a list of specific manufacturers.

- Q: If the ARRA funds are mixed with non-ARRA funds into one contract for the same “project,” do the Buy American provisions apply to the entire pool of funds?
- A: If the funds are combined for the same “project,” then yes. There are strategies to ensure funds remain separate, segregated, etc. EERE has issued guidance on the definition of “project.”
- We want to leverage non-ARRA capital.

- Q: A project receives ARRA funding after having been through the budgeting and contracting phase. Is the entire project now required to comply with the Buy American requirements, even retroactively?
- A: Yes, but good candidate for a “public interest” waiver.
- **FAQ resources exist; EECBG searchable FAQ database; HTML FAQs on Buy American webpage**
- http://www1.eere.energy.gov/recovery/buy_american_faq.html

Thank You

- Additional questions can be submitted to:
buyamerican@ee.doe.gov
- Website:
http://www1.eere.energy.gov/recovery/buy_american_provision.html