

US EPA ARCHIVE DOCUMENT

encouraging potential assistance recipients to begin the planning and design phase of project construction, and in some cases, actually solicit bids on the plans and designs. Projects that have solicited bids are in most cases considered to be in a ready-to-proceed category as among projects listed on State IUPs. Under the exceptional emphasis on expeditious construction of ARRA's SRF language quoted above, States will generally give the highest priority for ARRA SRF funding to eligible projects that clearly qualify to be in a ready-to-proceed category. This statutory language also confirms the appropriateness of proactive steps States had taken to encourage SRF projects' readiness for expeditious construction. Moreover, the ARRA SRF language cited in EPA's nationwide waiver for refinanced projects specified October 1, 2008 as the opening of the window within which initiation of relevant action can properly be considered done "in anticipation of ARRA" (74 FR 15722).

To be included under this waiver, potential assistance recipients must show a verifiable basis on which they believed it was reasonable and prudent to solicit bids for these projects prior to concluding an assistance agreement with the State SRF. Such verification will show some objective basis under which these actions were reasonably and prudently undertaken in specific anticipation of ARRA funding, or any other source of timely funding. Such action may include an affirmative communication from a funding source, such as a binding commitment, high placement on a priority list, or other indicative and verifiable communication from an SRF or other government funding source, or regarding any affirmative steps taken to secure private bond financing from an appropriate industry entity. Any such objective verification would show that bid solicitations were undertaken reasonably and prudently, in order to fulfill Congress' intent in passing ARRA and in particular to create jobs and spur economic recovery "by commencing activities and expenditures as expeditiously as possible" (See ARRA Section 3(b)).

The imposition of ARRA's Buy American requirements on projects eligible for SRF assistance whose assistance applicants had solicited bids on or after October 1, 2008 and prior to February 17, 2009, the date when those requirements were imposed, would require the time-consuming rebidding of those projects and potentially a redesign. Specifically, those projects that can show a reasonable and prudent

basis to solicit bids prior to the passage of the ARRA would be harmed by the imposition of these requirements post bid solicitation. This imposition would particularly conflict with the intentions and objectives of the bases on which those projects reasonably and prudently solicited bids for project construction prior to the passage of the ARRA: based on an affirmative communication by a State SRF program, or in order to meet requirements set forth or identified by a financing agency or source of funds in order to ensure receipt of financing for the project. This would clearly frustrate Congress' expressed intent for expeditious construction of projects supported by the State Revolving Funds or that had otherwise made themselves ready to proceed, and may imperil portions of States' ARRA funding if it renders them unable to meet ARRA's stringent time requirements for the entirety of their SRF appropriations. These projects are most likely to proceed to construction in a relatively short period of time, thereby creating jobs and stimulating the economy.

ARRA Section 1605(b)(1) authorized the Administrator to waive the requirements of Section 1605(a) in any case or category of cases in which she finds that applying subsection (a) would be inconsistent with the public interest. Therefore, for the foregoing reasons, applying Buy America requirements to projects that reasonably and prudently solicited bids prior to the passage of ARRA in specific anticipation of ARRA funding, or any other source of timely funding, would be inconsistent with the public interest.

Authority: Public Law 111-5, section 1605.

Dated: May 22, 2009.

Michael Shapiro,

Acting Assistant Administrator for Water.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-8911-8]

Notice of Nationwide Waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) for *de minimis* Incidental Components of Projects Financed Through the Clean or Drinking Water State Revolving Funds Using Assistance Provided Under ARRA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a nationwide waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) (public interest waiver) for *de minimis* incidental components of eligible water infrastructure projects funded by ARRA. This action permits the use of non-domestic iron, steel, and manufactured goods when they occur in *de minimis* incidental components of such projects funded by ARRA that may otherwise be prohibited under section 1605(a).

DATES: *Effective Date:* May 22, 2009.

FOR FURTHER INFORMATION CONTACT:

Jordan Dorfman, Attorney-Advisor, Office of Wastewater Management, (202) 564-0614, or Philip Metzger, Attorney-Advisor, Office of Ground Water and Drinking Water, (202) 564-3776, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a nationwide waiver of the requirements of section 1605(a) of Public Law 111-5, Buy American requirements, allowing the use of non-domestic iron, steel, and manufactured goods when they occur in *de minimis* incidental components of eligible projects for which a Clean or Drinking Water State Revolving Fund (SRF) has concluded or will conclude an assistance agreement using ARRA funds, where such components comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project.

Among the General Provisions of the American Recovery and Reinvestment Act of 2009 (ARRA), Section 1605(a) requires that "all of the iron, steel, and manufactured goods used in" a public works project built with ARRA funds must be produced in the United States, unless the head of the respective Federal department or agency determines it necessary to waive this requirement based on findings set forth in Section 1605(b). In addition, expeditious construction of SRF projects is made a high priority by a provision in the ARRA Title VII appropriations heading for the SRFs, which states "[t]hat the Administrator shall reallocate funds * * * where projects are not under contract or construction within 12 months of" ARRA enactment (February 17, 2010). The finding relevant to this waiver is that "applying [ARRA's Buy American requirement] would be inconsistent with the public interest" (1605(b)(1)).

In implementing ARRA section 1605, EPA must ensure that the section's requirements are applied consistent with congressional intent in adopting this section and in the broader context of the purposes, objectives, and other provisions of ARRA applicable to projects funded under the Clean and Drinking Water State Revolving Funds (SRF), particularly considering the SRFs' 12 month "contract or construction" requirement.

Further, also in the context of ARRA's SRF "contract or construction" deadline, Congress' overarching directive to

[t]he President and the heads of Federal departments and agencies [is that they] shall manage and expend the funds made available in this Act so as to achieve the purposes [of this Act], including commencing expenditures and activities as quickly as possible consistent with prudent management. [ARRA Section 3(b)]

Water infrastructure projects typically contain a relatively small number of high-cost components incorporated into the project that are iron, steel, and manufactured goods, such as pipe, tanks, pumps, motors, instrumentation and control equipment, treatment process equipment, and relevant materials to build structures for such facilities as treatment plants, pumping stations, pipe networks, etc. In bid solicitations for a project, these high-cost components are generally clearly described via project specific technical specifications. For these major components, utility owners and their contractors are generally familiar with the conditions of availability, the approximate cost, and the country of manufacture of available components.

Every water infrastructure project also involves the use of literally thousands of miscellaneous, generally low-cost components that are essential for but incidental to the construction, and are incorporated into the physical structure of the project, such as nuts, bolts, other fasteners, tubing, gaskets, etc. These incidental components are subject to the Buy American requirement of ARRA Section 1605(a), as stated above.

In contrast with the situation applicable to major components with regard to country of manufacture, availability, and procurement process, the situation applicable to these incidental components is one where the country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement in the normal course of business. Particular under the time constraints outlined above, it would be laborious, likely unproductive as to feasible alternatives, and

disproportionate to the costs and time involved for an owner or their contractor to pursue such inquiries.

EPA undertook multiple inquiries to identify the approximate scope of these *de minimis* incidental components within water infrastructure projects. EPA consulted informally with many major associations representing equipment manufacturers and suppliers, construction contractors, consulting engineers, and water and wastewater utilities, and a contractor performed targeted interviews with several well-established water infrastructure contractors and firms who work in a variety of project sizes, and regional and demographic settings. The contractor asked the following questions:

- What percentage of total project costs were consumables or incidental costs?
- What percentage of materials costs were consumables or incidental costs?
- Did these percentages vary by type of project (drinking water vs. wastewater; treatment plant vs. pipe)?

The responses were consistent across the variety of settings and project types, and indicated that the percentage of total costs for drinking water or wastewater infrastructure projects comprised by these incidental components is generally not in excess of 5 percent of the total cost of the materials used in and incorporated into a project. In drafting this waiver, EPA has considered the *de minimis* proportion of project costs generally represented by each individual type of these incidental components within the hundreds or thousands of types of such components comprising those percentages, the fact that these types of incidental components are obtained by contractors in many different ways from many different sources, and the disproportionate cost and delay that would be imposed on projects if EPA did not issue this waiver.

Under such specific circumstances associated with these particular types of incidental components, EPA has found that it would be inconsistent with the public interest—and particularly with ARRA's directives to ensure expeditious SRF construction consistent with prudent management, as cited above—to require that the national origins of these components be identified in compliance with Section 1605(a). Accordingly, EPA is hereby issuing a national waiver from the requirements of ARRA Section 1605(a) for the incidental components described above as a *de minimis* factor in the project, where such components comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project.

Assistance recipients who wish to use this waiver should in consultation with their contractors determine the items to be covered by this waiver, must retain relevant documentation as to those items in their project files, and must summarize in reports to the State the types and/or categories of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project.

Therefore, for the foregoing reasons, imposing ARRA's Buy American requirements for the category of *de minimis* incidental components described herein is not in the public interest. This supplementary information constitutes the "detailed written justification" required by Section 1605(c) for waivers "based on a finding under subsection (b)."

Authority: Pub. L. 111-5, section 1605.

Dated: May 22, 2009.

Michael H. Shapiro,

Acting Assistant Administrator for Water.

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FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

May 26, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance