

US EPA ARCHIVE DOCUMENT



Buy American Provisions for ARRA

[Additional Information and
Question & Answer Session](#)

June 4, 2009

Presenters for Today...

- Phil Metzger, Attorney-Advisor, DWSRF Team, US EPA
- Jordan Dorfman, Attorney-Advisor, CWSRF Team, US EPA

Additional Resources to Answer Questions...

Bill Anderson	-	Assoc Division Director, MSD/OWM, US EPA
Phil Zahreddine	-	Chief Municipal Technology Branch, OWM, US EPA
Bob Bastian	-	Senior Environmental Scientist, CWSRF Team, US EPA
Elizabeth Corr	-	Assoc Division Director, DWPD/OGWDW, US EPA
Peter Shanaghan	-	Team Leader, DWSRF Team, US EPA
Kiri Kroner	-	Program Analyst, DWSRF Team, US EPA



Buy American Provisions **Background**



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ARRA Includes **Buy American Requirement**

- Section 1605(a) of ARRA requires assistance recipients to use domestic iron, steel, and manufactured goods that are produced in the US. This is the expected means of compliance.
- Section 1605(b) provides for a waiver of this requirement under circumstances identified and limited in that provision
- Section 1605(d) provides that this requirement must be implemented “consistent with US obligations under international agreements”



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Waiver Determination

- Agency head may provide a waiver if finds that:
 - Applying Buy American is inconsistent with public interest (§1605(b)(1))
 - US iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
 - Inclusion of US iron, steel, and manufactured goods will increase cost of overall project by > 25% (§1605(b)(3))



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Buy American Waiver Process

- SRF assistance recipient (or State on recipient's behalf) requests waiver
- State SRF Program may participate in preparation or review of requests
- 5-Step process for reviewing individual case waivers (where approved)
 1. Once Region finds request package is complete, initial technical review by contractor/evaluation by Regional office
 2. Coordination with Cross-Agency Working Group
 3. OARM Concurrence (after RA tentative approval)
 4. Signature by Regional Administrator
 5. Publication in Federal Register



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National Waivers



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Refinancing Waiver

- Basis: Public Interest
- For projects with debt obligations incurred on or after October 1, 2008 and prior to February 17, 2009 that are refinanced by the SRF using ARRA funds
- Justified by specific ARRA provision that makes eligible projects initially financed within an “in anticipation of ARRA” window



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Refinancing Waiver, continued

- Congressionally-defined window:
 - On or after Oct. 1 = “in anticipation of ARRA”
 - Prior to Feb. 17 = in good faith and without fair notice as to the existence and statutory scope of any Buy American requirement
- To qualify, must have “debt obligations ... incurred” within the window
 - Does not include self-financing or incurring costs alone
 - Might include certain other types of funding agreements if the commitments of both parties are tantamount to a “debt obligation incurred”



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Bid Waiver

- Basis: Public Interest
- For projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009
- To have waiver cover a project, potential assistance recipients must also show verifiable basis on which they believed it was reasonable and prudent to solicit bids for these projects
- Verifiable basis must show solicitation undertaken in specific anticipation of timely funding (from ARRA or other source)



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Bid Waiver, continued

- Rationale for applying both ends of ARRA window is the same as with refinancing
 - Begins when bid solicitations can properly be considered “in anticipation of ARRA”
 - Limited to time before ARRA signing gave fair notice as to Buy American requirement
- Thus, this waiver does not apply to projects that solicited bids after ARRA signing on February 17
- Waiver is intended to recognize appropriateness of proactive steps States took to encourage SRF projects’ readiness for expeditious construction



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De Minimis Waiver

- Basis: Public Interest
- For *de minimis* incidental components of projects, where they comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project
 - 5% of total materials cost determined from research conducted by EPA



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De Minimis Waiver, continued

- Assistance recipients would determine and retain relevant documentation
- Assistance recipients would include in reports to the State:
 - Types/categories of items to which this waiver is applied
 - total cost for each type/category
 - calculations of the total cost of materials used to determine the dollar value of goods to which they have applied the waiver



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De Minimis Waiver, continued

- The waiver text identifies the following as characteristics needed for items to be covered:
 - “Country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement”
 - “Use of literally thousands of miscellaneous ...components” (different items of miscellaneous character)
 - “Generally low cost”
- “Not readily identifiable” is essential: “EPA has found that it would be inconsistent with the public interest ... to require that the national origins of these components be identified”



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Key Issue: Manufactured Good



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Definition of Manufactured Good

- “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”
- “There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States.”

~OMB Guidance



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“Processed Into A Specific Form or Shape”

Some Assembly Required

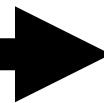


Substantial?

Substantial?

Substantial?

Heavy
Machining
and High
Value
Labor



Substantial Transformation?



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Documentation



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Be alert for attempts to game the Buy American requirements!



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Documentation

- The April 28 guidance memo suggested that assistance recipients require certification from contractors to demonstrate Buy American compliance
- Fraud and abuse will be investigated by the Office of Inspector General (OIG)
- Communicate any concerns in this regard to: www.epa.gov/oig/hotline/how2file.htm



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Role of OIG

- The OIG has a prominent role under the Act, which includes education, training, outreach, audit, evaluation and investigative activities
- Section 1515 of ARRA allows the OIG:
 - (1) To examine any records of the contractor or grantee, any of its subcontractors, or any State or local agency administering such contract, that pertain to, and involve transactions relating to, the contract, subcontract, grant, or subgrant
 - (2) To interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding such transactions



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Project Specific Waivers



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Limited US Sourcing Issues & Availability Waivers

- *How should assistance recipients respond to situations where only one or perhaps two companies manufacture a particular product in the US but currently have a small share of the US market?*
 - Buy American provisions may properly increase demand for goods manufactured by domestic monopoly producers with a relatively small share of the current US market, as no waiver is required for their use
 - However, EPA expects that access to availability waivers will minimize potential for monopolistic or unfair trade practices by balancing this against ARRA's clear imperative for expeditious construction
 - This balanced approach offers US producers a fair opportunity for a realistic, timely increase in production, while enabling assistance recipients and contractors to obtain necessary goods for construction within ARRA's expeditious time frames



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Availability Waivers

- *What if a good is produced by both US and non-US manufacturers, but the assistance recipient has reason for concern that the US-produced good may not be available in a sufficient quantity and in a timely manner as to meet the "expeditious construction" and other timing requirements of ARRA?*
- Availability waivers can be justified if assistance recipient provides adequate documentation of:
 - Good-faith efforts to seek and inability to obtain firm and satisfactory commitment by any US producer to deliver a sufficient quantity of the good in a timely manner as specified in construction documents for project
 - Firm and satisfactory commitment by a non-US producer for timely delivery of a sufficient quantity



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Availability Waivers, continued

- *Are there steps that an assistance recipient can take to protect itself against the risk that any commitment it can obtain will not be met or will not be firm and satisfactory?*
- One possible means is by including:
 - Significant financial incentives in their construction contracts with...
 - Clear, timely, and enforceable consequences for failure to deliver the promised item(s)...
 - In the promised quantity, at the promised time, and to the promised location



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Availability Waivers, continued

- A large number of manufactured goods are needed for any ARRA funded SRF project
- These goods differ greatly in the:
 - Extent to which they are US-manufactured, and
 - Presence or absence of competition as among US producers
- ARRA requirements
 - “Contract or construction” provision makes timing crucial
 - To complete construction expeditiously to create economic stimulus (Sec. 1602)
 - These requirements properly enable assistance recipients to demand timely delivery, as essential feature of “availability”



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For More Information

- www.epa.gov/recovery/
- www.epa.gov/safewater/dwsrf/
- www.epa.gov/owm/cwfinance/cwsrf/index.htm
- www.epa.gov/water/eparecovery/docs/04-29-2009_BA_waiver_process_final.pdf
- www.epa.gov/oig/hotline/how2file.htm



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