Buy American Provisions of ARRA Section 1605

QUESTIONS AND ANSWERS – Part 2
November 16, 2009

A. SUBSTANTIAL TRANSFORMATION

1. Who is responsible for substantial transformation determinations?
Substantial transformation determinations are made by the assistance recipient. Assistance recipients will make this determination for a finished good by obtaining information about the processes used and applying the questions set forth in Part A of the Buy American Q&A Part 1 (July 2, 2009) (see the link at EPA's SRF ARRA website, http://www.epa.gov/water/eparecovery/). To decide in unclear or marginal cases, recipients should ask themselves: would we be confident to use information from the analysis to document our Buy American compliance to our State or EPA in a compliance audit?

EPA does not and will not make determinations as to substantial transformation, or the U.S. or foreign origin of manufactured goods. EPA's role under §1605 is to review waiver requests when an assistance recipient believes it cannot comply by buying U.S.-made goods, and to undertake compliance oversight of determinations previously made by the assistance recipient. However, where an assistance recipient has made at least a tentative determination that substantial transformation of a specific good has occurred in the U.S., EPA may undertake informal "anticipatory" oversight, to advise the recipient as to whether the supporting information is sufficient. This informal "anticipatory" oversight is entirely at the discretion of the EPA Region and upon the direct request of an assistance recipient only.

2. What documentation should assistance recipients keep in their files when a substantial transformation determination is the means of compliance with §1605(a)?
The following information and documentation should be an assistance recipient's basis for demonstrating compliance with the Buy American requirement of §1605(a) when substantial transformation has occurred. The obligation to provide such documentation comes from the requirements of §1605 itself: without adequate documentation, compliance cannot be credibly and meaningfully demonstrated. Any alternative types of documentation must provide a level of specificity and detail as to all relevant facts, as appropriate to the case, equivalent to those described below.

(1) Appropriately detailed answers from the manufacturer to the substantial transformation questions, as set forth in Part A of the Buy American Q&A Part 1.
(2) Any additional material the assistance recipient may have from the manufacturer that provides detail supporting the answers
(3) Upon procurement of the good, documentation from the manufacturer verifying that the product originated in a U.S. plant where substantial transformation occurred as demonstrated by the answers above

3. Is a simple "yes" answer all that is needed when applying the substantial transformation questions from Part A of the Buy American Q&A Part 1?
Simple "yes" answers are insufficient to make a case that an item has been substantially transformed in the U.S. In applying these questions, "yes" answers must be documented by

meaningful, informative, and specific technical descriptions of the activities in the actual process asked about in each question. These descriptions need not be of great length, but must be sufficiently detailed and clearly written to inform assistance recipients and agency reviewers about the activities that have occurred in the process(es), enough to understand their nature and purpose. They should not simply assert a conclusion, describe an end state, or essentially repeat the words of the question as a statement.

When manufacturers send these technical descriptions to assistance recipients, they may also include any relevant material (e.g., pamphlets, brochures, diagrams, information from the manufacturer's website) that provides additional detail supporting the answers.

4. Can substantial transformation occur onsite?
The OMB Guidance definition of "manufactured good" suggests a general presumption that what occurs at the project site is construction. However, established legal interpretations of substantial transformation hold that a good is manufactured at any site where substantial transformation occurs.

Thus, manufacturing may occur on the project site, but only if the process there is both substantial transformation, and occurs under conditions ordinarily and customarily associated with manufacturing at a conventional plant. For an onsite activity to be considered "manufacturing," the company must maintain essentially full custody and control of the components of the good up to and at the project site. To do this, the company must, first, bring all components of the good to the site and must always do so in normal course of business. Second, it must do all the work onsite with its own personnel, and may use a subcontractor for this only if it does so already in the normal course of business. In addition, the onsite work must be considered substantial transformation under the questions set forth in Part A of the Buy American Q&A Part 1. The company's case will be strongest if the transformative work must be done onsite, e.g., if sophisticated adjustments, calibration, and other processes are required to be done onsite by the company to meet project performance specifications and establish warranty conditions.

5. How should a competing manufacturer submit a claim that either their product is U.S.-made, or that their competitor is *not* U.S.-made, using the substantial transformation determination?
If a competing manufacturer, bidder, or supplier states a complaint, either that its goods are U.S.-made or that another company's claim that their goods comply with §1605 is false, the assistance recipient should request that the competitor frame any concerns in the form of specific responses to the substantial transformation questions from Part A of the Buy American Q&A Part 1. As in every case, appropriately detailed answers should be provided (see Q&A #3 above). This information can equip recipients to ask further questions of their intended manufacturers, to better inform the recipient's decision, and to address the subject of potential bid protests that might otherwise complicate an ARRA project's timely contracting.

6. If U.S. manufactured pipe is insulated and jacketed in Canada and shipped back to the U.S., is this considered a U.S.-made product since the most significant portion of the product is U.S.-made?
There is no requirement for or consideration of domestic content in either §1605 of ARRA (the Buy American provision) or the OMB Guidance on that provision. Thus, the inquiry here would be whether or not insulating and jacketing, the activities that occurred outside the U.S., amount to substantial transformation for this particular good; that is, whether the final substantial

transformation occurs outside of the U.S. The analysis outlined in Part A of the Buy American Q&A Part 1 must be used, and appropriately detailed answers provided (see Q&A A.3. above) to determine whether or not the product was substantially transformed. The sub-questions outlined in Part A require focused analysis of what the function of the activities was.

7. How does the substantial transformation test compare to the laws governing product labels indicating country of manufacture (for example, the "Made in U.S.A." stamp)?
Assessing the content of other tests applied to determine the site of manufacture in other programs and under other laws is not a useful analysis for ARRA purposes at this point. EPA has developed the applicable test for making determinations for compliance with §1605(a) of ARRA based on the substantial transformation standard identified in OMB's ARRA Guidance, and further clarified the details of its application in the October 22 substantial transformation paper (see the link on EPA's ARRA website for the SRFs given in Q&A A.1. above). Assistance recipients should apply that test as stated in that paper.

B. DOCUMENTATION

1. Some State reviewers have been under the impression that receipt of signed certification indicating products are U.S.-made was sufficient to document compliance. Are States to be reviewing documentation provided by bidders to establish compliance, or is receipt of signed certification enough?
As stated in the April 28 Buy American implementation memorandum, two kinds of documentation are needed to establish compliance with the Buy American requirement where U.S.-made goods are procured: 1) the certification that all components provided in the bid are U.S.-made, 2) if the bid is accepted, "reasonable, sufficient, and timely verification to the purchaser" that each component identified in the bid as U.S-made is in fact U.S.-made. (See item 2 of the example certification provided in Appendix 5 of the April 28 memorandum, at the link on EPA's ARRA website for the SRFs, given in Q&A A.1. above.) EPA identified from the OMB Guidance and on June 11 added an element of documentation – to show substantial transformation – that should be met as early as possible, in cases where there is any basis for questioning that a good is U.S.-made Thus, depending on the content of the documentation in a particular case and whether there is any basis for questioning U.S. production, it is possible that an assistance recipient who has only the types of documentation identified in the April 28 memo may need additional documentation for full compliance.

The substantial transformation concept was not included in EPA's April 28 memorandum because OMB's April 6 Guidance on the Buy American requirement of ARRA §1605 did not clearly prescribe a standard applicable to the SRFs to determine whether goods had been manufactured in the U.S. OMB only presented the provision on substantial transformation (at §176.160) to apply in the context of international agreements, which affect few if any SRF recipients. However, in undertaking the new task of implementing the ARRA Buy American requirement, EPA subsequently found that the substantial transformation concept provides necessary guidance to determine whether goods have been manufactured in the U.S., and described it and its application in detail in several webcasts starting June 11.

The substantial transformation analysis has thus become a central part of the means by which ARRA assistance recipients should, as appropriate to the case, demonstrate compliance with the

requirements of ARRA §1605(a) when procuring a U.S.-produced manufactured good, about which there is any basis for questioning U.S. production. Specific documentation requirements, including alternatives, are described in Q&A A.2. above.

2. How do you intend a bidder to "verify" that a product is produced in the U.S.? What documentation is adequate?

The April 28 guidance includes example certification language and other contractual language to certify that a good is U.S.-made. EPA has subsequently developed an extensive webcast presentation on the concept of "substantial transformation," specified by OMB as the means under the ARRA Buy American requirement to determine whether a product has been manufactured in the U.S. This webcast was presented to States on June 11, 2009, was repeated for assistance recipients, consulting engineers, contractors, suppliers, and manufacturers in multiple webcasts in June and July, and the webcast presentations were first placed on EPA's SRF Recovery Act website in June.

In addition to or in place of a certification, documentation to establish assistance recipients' compliance with §1605(a) (where a waiver under §1605(b) or an international agreement under §1605(d) are not applicable) will include (1) appropriately detailed answers from the manufacturer to the substantial transformation questions, as described in the "*Analysis to Determine Whether Substantial Transformation Has Occurred in the U.S.*" section of the Substantial Transformation paper (at the link on EPA's ARRA website for the SRFs, given in Q&A A.1. above); (2) any additional material the recipient may have from the manufacturer that provides detail supporting the answers; and, (3) upon procurement of the good, documentation from the manufacturer verifying that the product originated in a U.S. plant where substantial transformation occurred as demonstrated by the answers above. These documentation requirements, including alternatives, are described in Q&A A.2. above.

3. How do you respond to manufacturer's vague confirmations? (Example: "Our products are expected to comply with Buy American requirements." or that they "will be manufactured in the U.S.")

Assistance recipients should not rely on vague statements such as the examples provided. As discussed in previous questions, certifications will include or be supplemented by answers to the Substantial Transformation questions. "Yes" answers must be documented by meaningful, informative, and specific technical descriptions of the activities in the actual process asked about in each question. These descriptions need not be of great length, but must be sufficiently detailed and clearly written to inform assistance recipients and agency reviewers about the activities that have occurred in the process(es), enough to understand their nature and purpose. They should not simply assert a conclusion, describe an end state, or essentially repeat the words of the question as a statement.

4. Can a bidder use a letter from the product manufacturer to verify U.S. production, or is something more objective required? For example: a tour of the factory?

A tour of the factory would not be sufficient. All that would show is that goods are finished there. It does not mean that the particular good shipped to the project site came from there. This is why verification documents like shipping invoices should be kept on file to show where the item came from.

5. What happens if an assistance recipient is confident – from their knowledge of a manufacturer – that a particular good being bought is U.S.-produced, but does not have

adequate documentation? Are there penalties to the assistance recipient if it does not have adequate supporting documentation?
By whatever means assistance recipients comply with the requirements of §1605 for any iron, steel, or manufactured goods used in an ARRA-funded project, they must have adequate, appropriate, and project-specific documentation to demonstrate compliance with the applicable means of compliance, under §1605, for that iron, steel, or manufactured goods. The requirement for such documentation comes from the requirements of §1605 itself: without such documentation, compliance cannot be credibly and meaningfully demonstrated.

Thus, any assistance recipient who lacks adequate supporting documentation must make every possible effort to assemble it as soon as possible. EPA suggested means to provide such documentation in Appendix 5 of the April 28, 2009 Buy American implementation memorandum. . EPA identified from the OMB Guidance and on June 11 added substantial transformation as an element of documentation by which ARRA assistance recipients will, as appropriate to the case, demonstrate compliance with the requirements of ARRA §1605(a) when procuring a U.S.-produced manufactured good, about which there is any basis for questioning U.S. production. In some cases, a manufacturer's primary or exclusive production in the U.S. of the goods involved may be clear and beyond question, based on e.g., information from the manufacturer (including on a manufacturer's website) that is sufficiently detailed or unequivocal about the location and nature of manufacturing that a recipient can reasonably rely on it as a manufacturer's representation. In such cases, adequate documentation could simply include such information, and verification – from e.g., detailed invoices – that the good originated in a specific domestic plant. As stated in Q&A A.2. above, any alternative types of documentation must provide a level of specificity and detail as to all relevant facts, as appropriate to the case, equivalent to those described in that Q&A.

As to penalties, the "Noncompliance" section of the OMB guidance (http://www.recovery.gov/FAQ/policy/Pages/Policy_and_Guidance.aspx, specifically §176.130 at 74 FR 18453 (April 23, 2009)) states that "in cases of apparent unauthorized use of foreign iron, steel, and/or manufactured goods," the Award Official should first "request a reply, to include proposed corrective action." In cases where an "apparent unauthorized use" is identified due in part to lack of adequate documentation of U.S. manufacture, the recipient must go back and seek documentation to verify compliance. Where sufficient documentation can subsequently be found to demonstrate compliance with §1605(a) (that is, that the particular goods are in fact U.S.-made), the "corrective action" would be to provide this sufficient documentation, correcting the appearance of unauthorized use of foreign goods. Clearly, prudent assistance recipients will not leave the search for documentation to this late stage. Particularly, if adequate documentation cannot be provided that the good is U.S.-produced, the other actions specified in that "noncompliance" section would apply.

C. THE MANUFACTURED GOODS DEFINITION APPLIED TO SPECIFIC MATERIALS

1. Is concrete considered a manufactured good? Is cement considered a manufactured good?
Neither concrete nor cement is considered a manufactured good. The explanation lies in the definition of "manufactured good" in the OMB Guidance:

"(1) *Manufactured good* means a good brought to the construction site for incorporation into the building or work that has been—

(i) Processed into a specific form and shape; or
(ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials."

Concrete is a combination of several raw materials, but that combination of materials does not have "different properties than the properties of the individual raw materials" until water is added and the combination is mixed at the project site to make concrete. Even if the concrete is mixed en route to the project construction site in a mixer truck, it does not become the "material that has different properties" at the time it is "brought to the construction site," but only once it is at the site and being poured. Therefore, it is not a manufactured good within the meaning of the OMB definition.

In the context of its use in concrete, cement is considered a raw material under the OMB definition. If it is used in simple combination with water, and that combination is mixed, it is considered in the same light as concrete. Cement mixed with water does not attain its form as a combination of materials with different properties than the individual raw materials until the addition of water and mixing occurs at the construction site.

2. Are engineered wood products, such as plywood, considered manufactured goods?
Plywood and other engineering wood products should be presumed, based on the OMB definition of "manufactured good" quoted in Q&A C.1. above, to meet at least one if not both of the descriptions of work on a good that would make it a manufactured good. Thus, if incorporated into the public building or work, such engineered wood products would be subject to the Buy American requirements of §1605.

3. Are sand and gravel considered manufactured goods?
No, sand and gravel are not considered manufactured goods.

Sand, gravel, and other similar construction materials may have been filtered, sorted, cleaned, etc., but this work does not process them "into a specific form and shape" as required under the OMB definition as quoted in the answer to Q&A C.1. above.

D. REVISED DE MINIMIS WAIVER

1. How did the revised *de minimis* waiver change the nature of "incidental" components that can be covered under the revised waiver, and how is this revised meaning of "incidental" components applied?
"Incidental" in the revised *de minimis* waiver is broad but not entirely open-ended term. The text of the revised waiver (at the link on EPA's ARRA website for the SRFs, given in Q&A A.1. above) identifies two alternative sets of principal characteristics for "incidental" components:

- "the country of manufacture and the availability of alternatives is not always readily or reasonably identifiable prior to procurement in the normal course of business"
- "the country of manufacture may be known but the [type of item is of a] miscellaneous character in conjunction with the low cost, individually and (in total) as typically procured in bulk"

The initial *de minimis* waiver was limited to the first of these characteristics. Under the revised *de minimis* waiver, components which an assistance recipient wishes to cover with the waiver must meet one of these two sets of characteristics of "incidental". Thus, a single or very small number of large item(s) costing, e.g., 3% or 4% of the total materials cost, would not be appropriate to include as incidental, because it/they would neither be of a "miscellaneous character" nor of "low cost, individually". Particularly in a large project, to include such an item as incidental would allow a type of item costing tens or hundreds of thousands of dollars to be considered "incidental" even though it had none of the characteristics in either of the two alternative means above.

But the revised waiver does provide assistance recipients with wide leeway to choose what to cover within the 5% as long as the items are low-cost, they are numerous items of a "miscellaneous character", and they are within the 5% of the total cost of materials used in and incorporated into the project as appropriately budgeted for the project.

2. What does it mean to say that projects need to budget the 5% under the revised *de minimis* waiver?

To say that "projects need to budget to stay within the 5% limit" addresses several situations. One situation is if all units of a type of item procured cost more than 5% of the total cost of materials used in and incorporated into the project, such an item could not be covered under the revised *de minimis* waiver, and a project-specific waiver would be needed for that type of item. Another situation is where a type of component comprises a substantial part of the 5% – assuming, again, that it properly fits into one of the two categories of "incidental" as identified above. In the latter situation, it is the 5% that is the limitation that likely would determine whether or not this type of component can be covered in a particular project.

To determine this, each assistance recipient needs to work out for themselves a budget for the 5% to ensure they don't exceed it, as the waiver discusses at length. That may mean they need to select from among the types of components where each was clearly incidental, each individual type totaled less than 5% alone, and thus could each be covered alone, but could not all be covered because the total would then add up to more than 5%. In such cases, recipients will need to look more extensively at U.S.-produced availability for some incidental components to see if buying American is possible. If buying American is not possible for any of the excess over 5%, and the recipient can document the lack of U.S. availability to meet justified specifications, then it can seek an individual project waiver for those components. This has been done, for example, in the Kennebec, ME waiver, at http://edocket.access.gpo.gov/2009/pdf/E9-21940.pdf.

E. MISCELLANEOUS ISSUES

1. How should assistance recipients respond to situations where only one or perhaps two companies manufacture a particular product in the U.S. but currently have a small share of the U.S. market?

Buy American provisions may properly increase demand for goods manufactured by domestic producers – even those with a relatively small share of the current U.S. market – as no waiver is required for their use. However, EPA expects that access to availability waivers will minimize potential for anti-competitive or unfair trade practices by balancing this against ARRA's clear imperative for expeditious construction. This balanced approach offers U.S. 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.

2. Will there be a protest vehicle, like the old grants program had?
The waiver process authorized in ARRA §1605 does not provide for a protest process. It would be inconsistent with ARRA's many directives for expeditious decision and construction – and particularly with SRFs' February 17, 2010 contract deadline – to provide one beyond the requirement to publish waivers granted in the Federal Register.

3. How will the Buy American requirements be enforced?
The "Noncompliance" section of the OMB guidance (see the link given in Q&A B. 5. above) defines how EPA is to review and address (as appropriate) allegations of violations of ARRA §1605. States will oversee compliance with the Buy American requirement as one of the specified conditions in all ARRA assistance agreements, with further EPA programmatic oversight.