Buy American Provisions of ARRA Section 1605
QUESTIONS AND ANSWERS – Part 1

July 2, 2009 (*Revised September 22, 2009 and May 27, 2010*)

ARRA Section 1605 sets forth the clear expectation that "all the iron, steel, and manufactured goods used in [an ARRA-funded] project will be "produced in the United States." Section 1605 also sets forth specific circumstances under which a federal agency may determine to waive this Buy American requirement. However, it is important to emphasize that, as they are identified in the OMB ARRA guidance (published in the Federal Register on April 23, 2009), waivers are "exceptions" to the Buy American expectations of Section 1605.

A. MANUFACTURED GOODS / SUBSTANTIAL TRANSFORMATION

1. **How do we determine if a good is manufactured in the United States?**
   The following questions are intended to serve as a guide for SRF assistance recipients to use to determine whether a manufactured good to be incorporated into a project being built with ARRA funds was manufactured in America. ARRA places on assistance recipients the obligation to establish whether a manufactured good was produced in the U.S. or if substantial transformation has occurred in the U.S. Note that the OMB ARRA guidance (published in the FR April 23, 2009) states "production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives" [2 CFR §176.70(a)(2)(i)].

   If the answer to Question 1 is yes, then the good is clearly manufactured in the U.S., and the inquiry is complete. If the answer is yes for any of 2a, 2b, or 2c, then answer to Question 2 is yes. If the answer is yes for at least two of 3a, 3b, 3c, 3d, or 3e, then answer to Question 3 is yes. However, if a recipient cannot answer any of the following in the affirmative, the recipient should either find an alternative U.S.-made good if possible, or seek a waiver from the Buy American provisions, if applicable.

Questions for Determining Whether Substantial Transformation Has Occurred in the U.S.		
QUESTION	**YES**	**NO**
1. Were all of the components of the manufactured good manufactured in the United States, and were all of the components assembled into the final product in the U.S.? (If the answer is yes, then this is clearly manufactured in the U.S., and the inquiry is complete)		
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)		
a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?		
b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?		
c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?		

Questions for Determining Whether Substantial Transformation Has Occurred in the U.S. - *continued*		
QUESTION	**YES**	**NO**
3. Was(/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?		
a. Did the process(es) take a substantial amount of time?		
b. Was(/were) the process(es) costly?		
c. Did the process(es) require particular high level skills?		
d. Did the process(es) require a number of different operations?		
e. Was substantial value added in the process(es)?		

2. **Where did these questions to determine whether substantial transformation occurred in the U.S. originate from?**
   2 CFR §176.140 defines "manufactured good" as "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." In order to further refine our understanding of the term, we look to 2 CFR §176.160. This particular section is not binding on the great majority of recipients in the SRF programs, only those that are subject to particular international agreements identified in the Appendix to Subpart B in 2 CFR Part 176 of the OMB Guidance (74 FR at 18457, April 23, 2009). However, the section provides important guidance, rooted in established lines of judicial and administrative interpretation, by defining a domestic manufactured good as "a manufactured good that consists in whole or in part of materials from another country, has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed. There is no requirement with regard to the origin of components or subcomponents in manufactured goods or products, as long as the manufacture of the goods occurs in the United States."

   This definition incorporates the "substantial transformation test" which has been long applied in judicial and administrative customs cases on labeling, national origin, and other Federal statutory requirements as the appropriate and effective test to identify where a good was "manufactured". While a variety of statutory and judicial criteria have been formulated to determine, always on a case-by-case basis, whether or not "substantial transformation" has occurred, the previous questions represent a distillation of the functional analyses common to the different versions of the "substantial transformation test." If a recipient cannot answer yes to Question 1, 2, or 3, the recipient should either find an alternative U.S.-made good if possible, or seek a waiver from the Buy American provisions, if applicable.

   In applying the "substantial transformation" test within the ARRA Buy American provision (Section 1605), the objective is to determine whether or not a product is U.S.-produced when the product is created by processes in more than one country and/or incorporates materials, parts, or components from more than one country. More particularly, the test is intended to identify that whether manufacturing or processing operations that took place in the U.S. amounted to "substantial transformation" which would enable the product to be properly considered as U.S.-manufactured.

In all cases, it is a question of degree; the transformation or change to imported materials brought about by manufacturing or other processing must be "substantial."

3. **Can you provide some examples of things that would not be able to answer yes to the questions to determine if substantial transformation has occurred in the U.S.?**

   One example would be cosmetic or surface changes, such as painting, cleaning, or lacquering, which do not significantly affect the physical dimensions or qualities or chemical composition of the product, are usually not considered sufficient to constitute a substantial transformation.

   In addition, simply cutting a material to length or width is generally not considered a sufficient change in use. A material that is simply cut to length or width remains suitable for multiple uses. *Rest of answer was removed since substantial transformation does not apply to iron and steel.*

4. **What about a kit, would that be considered a U.S.-made good if it is assembled in the US?**
   If all the pieces are shipped by one company with the intent of providing all components necessary to be assembled into a functional good (e.g., pump station), then this would not be considered substantial transformation and therefore not a U.S.-made good.

5. **Is concrete considered a manufactured good?**

   No, concrete is not considered a manufactured good because all of the raw materials are brought to the construction site, where they are then mixed to create concrete. Therefore, concrete mixing is considered construction. The result is the same if the raw materials are continually mixed en route to and/or at the site.

6. **Is it the primary responsibility of the general contractor to document that purchases are U.S.-made goods?**

   The general contractor should keep all documentation of purchases to determine if they are U.S.-made goods. Additionally, the contractor may be required (as in the sample certification attached to the April 28, 2009 memo) by the assistance recipient to provide verification of the U.S. manufacture of any goods. However, it is the responsibility of the assistance recipient to retain adequate documentation in their project files to demonstrate Buy American compliance.

B. CATEGORICAL (including nationwide) WAIVERS

1. **What is EPA's interpretation of "categorical" waiver?**

   ARRA Section 1605(b) authorizes the Administrator to provide waivers in any "case or category of cases" that meet the terms specified in that provision. In turn, the Administrator has delegated to the Assistant Administrator for Water the authority to consider and make determinations on categorical waivers regarding the SRF programs that have "applicability to two or more grant recipients or broad applicability for a national program." Thus, for example, the nationwide waiver published in the Federal Register for refinanced projects for which the initial debt obligation was incurred

beginning October 1, 2008 and before February 17, 2009 was for all projects that fell into the defined "category of cases."

2. What must an assistance recipient do to determine if their ARRA-funded project is covered by a categorical (including nationwide) waiver?

Assistance recipients who believe their ARRA-funded SRF project is covered by an existing categorical (including nationwide) waiver (which covers a "category of cases", per ARRA Section 1605(b)) do not need to apply for an individual waiver. Such recipients need to look closely at the text of the particular waiver as published to identify the specific information they need to have and maintain in their project files in order to document the coverage of a project by a categorical waiver. More broadly stated**, the documentation that a project is covered by a categorical waiver *must include all elements required by the waiver* for a project to be covered**. They are not required to engage with or submit anything to the State or EPA to have their project covered by the waiver, but if they have any question about whether their project meets the conditions for coverage under a categorical waiver, they may wish to consult with their State and/or EPA Regional Office (which are responsible for ensuring compliance with the Buy American provision).

2.a. Refinancing Waiver

For example, in the case of the nationwide refinancing waiver published April 7, 2009, an assistance recipient must have and maintain documentation that their project later funded by ARRA had its initial "debt obligation incurred" (the ARRA and waiver terminology) within the Oct. 1, 2008-Feb. 17, 2009 window. This is fairly straightforward and objective information, though it's possible that in a few situations there could be question whether the financing action taken within the window amounts to a "debt obligation incurred" (e.g., self-financing does not).

2.b. Bidded Projects Waiver

With regard to the bidded projects waiver, two conditions must be met for an ARRA-funded project to be covered. First, the project must have made a public bid solicitation within the Oct. 1, 2008-Feb. 17, 2009 window, and maintain documentation of this (a copy of a published advertisement, an internet posting or email distribution, etc.) in the project files. In addition, the waiver text requires that:

> "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".

The text makes clear the kinds of information required. If the recipient has documentation of a type specifically described above (note that the "other government funding source" may include budgetary allocations or commitments by the entity itself to provide self-financing), they must retain it in the project files as documentation to the State and EPA of compliance with the Buy American provision in ARRA section 1605. If the recipient is uncertain what documentation is appropriate or sufficient, it may wish to consult with their State or EPA Regional Office, including (if appropriate and mutually agreeable) some written confirmation or statement as to the sufficiency of documentation.

~~**3. Are items covered by the De Minimis waiver even if the origin is known?**~~
This answer was removed since it referred to the original De Minimis waiver which was revised on July 24, 2009.

C. INDIVIDUAL (project-specific) WAIVERS

1. Will information be made public as to which companies have received waivers?

Because the Buy American requirement of section 1605(a) applies to "projects," the responsibility to comply rests with assistance recipients. Only they directly need and can apply for individual project waivers, although requests can be submitted on recipients' behalf by States and authorized agents of recipients. All waivers will be published in the Federal Register. However, because any waivers provide only for the use of non-U.S. produced iron, steel, or manufactured goods in a specific case (project) or category of cases, such waivers will not designate or be for the use of iron, steel, or manufactured goods from specific companies or brands. A waiver may name specific companies or brands, but only as part of the detailed justification required for waivers. However, an individual waiver is based in and justified by the particular circumstances specified in the published waiver. Thus, a non-US-made product whose use is permitted under an individual waiver might not be permitted in other cases where different circumstances do not justify a waiver.

2. Will waiver documentation for successful waivers be posted on the web so that others with the similar circumstances can use the format and justification if they apply?

We will be linking all Federal Register waiver notices to our page on the EPA recovery website (http://www.epa.gov/water/eparecovery/). The "detailed written justification" for the waiver that is required to be included in the Federal Register notice will be part of each notice. However, generally it will not include the specific documents that were submitted with the waiver request. It will include sufficient identification of the relevant facts set forth in those documents that provided adequate justification to issue a waiver.

3. Is the 25% increase in cost an increase in the project cost, or the product cost as is used in the old Buy American language?

In order to apply for a project specific waiver based on cost, the increase in cost must be 25% of the overall (total) project cost, as stated in the statute. Section 1605 was written to apply to a wide variety of programs across the federal government, and is not linked to the standards and criteria that may apply in previously-enacted Buy American statutes.

Where the OMB ARRA Guidance (published in the Federal Register April 23, 2009, and can be found at 74 FR 18452) includes additional applicable definitions or terms (such as "substantial transformation"), these are incorporated into EPA's implementation of Section 1605.

4. **Does the 25% increase in cost include associated costs, such as engineering fees, or is it just the contract cost?**

   The 25% increase in total project cost is for the entire project and would include associated engineering fees.

5. **What is the total amount of time from when a waiver is requested to the time a decision is received?**

   The target is two weeks, starting once a waiver request application is deemed complete.

D. NON-AVAILABILITY WAIVERS

This information provides additional clarification of the documentation necessary to support a waiver request from an assistance recipient based on ARRA Section 1605(b)(2), that "iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality". This is defined in Memorandum ARRA 09-1, dated 04/28/2009, as: "The quantity of iron, steel, or the relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design."

1. **What if a good covered by section 1605 is produced by both U.S. and non-U.S. manufacturers, but the assistance recipient has reason for concern that the U.S.-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?**

   One potential element of the justification for a project based waiver is if the award recipient provides adequate documentation of its good-faith efforts to seek and its inability to obtain a firm and satisfactory commitment by any U.S. producer to deliver a sufficient quantity of the good in a timely manner as specified in the construction documents for the project. Justification for such a waiver would also require a firm and satisfactory commitment by a non-U.S. producer.

2. **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 by which an assistance recipient may be able to maximize the likelihood of receiving a firm and satisfactory commitment from a producer 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.