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American Recovery and Reinvestment Act (ARRA) Workshop



BUY AMERICAN PROVISIONS (SECTION 1605)

STATE REVOLVING FUND

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American Recovery and Reinvestment Act (ARRA) Workshop



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Note: This webcast is for informational purposes only. Any information provided does not supersede any provision of law, regulation, or grant condition.

Speakers for Today



- Tim Connor, CWSRF
- Joanne Hogan, DWSRF
- Kiri Kroner, DWSRF

Not Covered Today



- Some of the basics of the Buy American provisions (Section 1605)
- For more information on Buy American, please refer to the webcasts previously offered by EPA:
 - Buy American Waiver Process for ARRA
http://water.epa.gov/aboutow/eparecovery/upload/2009_06_17_eparecovery_Webcast_Slides_webvers.pdf
 - Buy American Provisions for ARRA: Additional Information
http://water.epa.gov/aboutow/eparecovery/upload/2009_06_17_eparecovery_Webcast_Final_webvers.pdf
 - Buy American Provisions for ARRA: Manufactured Goods and Substantial Transformation
http://water.epa.gov/aboutow/eparecovery/upload/2009_06_23_eparecovery_2009_11_06_Webcast_final_webvers.pdf
 - Complying with ARRA Buy American Provisions for SRF-Funded Projects
http://water.epa.gov/aboutow/eparecovery/upload/2009_6_22_09_Webcast_Final.pdf

Part 1: General Topics



**AMERICAN RECOVERY & REINVESTMENT ACT
(ARRA)**

Roles & Responsibilities



- **System**
 - Ultimately responsible for the project's compliance
 - May request project-specific waiver or anticipatory oversight
 - Must maintain adequate documentation of compliance
- **Engineers & Contractors**
 - Help system ensure compliance; role should be defined by contracts
 - Collect adequate documentation and exercise due diligence
- **State & EPA**
 - Provide training, guidance, and information
 - Grant waivers (EPA only)
 - Oversee and verify project compliance

Iron and Steel



- Iron and steel must be completely U.S.-made
 - Includes all manufacturing processes
 - Exception: metallurgical processes involving refinement of steel additives do not need to happen in U.S.
 - Recycled: source of metal doesn't matter as long as recycling takes place in U.S.
- Substantial transformation does not apply to iron and steel products
 - Rebar
 - I-beams
 - Unlined pipe
 - Fittings

Manufactured Goods



- **Manufactured Good**
 - Brought to the construction site for incorporation into the building or work
 - 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
- Manufacturing changes the character or use of a material and/or involves “complex and meaningful” work
- **Examples**
 - Pumps
 - UV disinfection equipment
 - Hydroelectric generators
 - Pipe (PVC, copper, and cement-lined)

Manufactured Goods



- Requirement is that the manufacturing occurs in the U.S.
 - No requirement with regard to the origin of components or subcomponents
 - No requirement that the company be U.S.-owned
- Some materials are excluded

Exclusions from Buy American Provisions



- Construction materials that are not permanently incorporated into the project
 - Example: material used for framing molds
- Equipment used during construction
 - Examples: backhoes and power tools
- Raw materials
 - Examples: concrete, asphalt, dirt, rock, fill, and wood lumber (but not plywood)
- Products covered by a waiver

Is your project affected by trade agreements?



- Not likely
- ARRA requires Buy American requirements to be applied consistent with U.S. obligations under international agreements
- Possible limited applicability to SRF Programs
 - 7 cities party to U.S. EC Exchange of Letters: Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville, and San Antonio
- Only impacts projects over \$7.4M

What about the recent trade agreement with Canada?



- Canadian agreement would only apply to future SRF allocations or stimulus projects
 - No new stimulus
 - Buy American not part of 2010 base programs
- Latest agreement has no impact on ARRA projects
 - Disregard letters or manufacturer claims to the contrary
- For more information, see:

http://water.epa.gov/aboutow/eparecovery/upload/US-Canada_Agreement_and_BA.pdf

Part 2: Documentation of Domestic Products



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Documentation of U.S. Manufacturing



- Documentation types
 - Letters or certifications from manufacturers
 - Substantial transformation evaluation
 - Both the completed checklist/matrix and supporting documentation
 - Secondary documentation:
 - Bills of lading
 - Shipping manifest & invoices
 - Country-of-origin marking and labeling
 - Photographs
- May need to use combination if any one form is not sufficient

Due Diligence



- Regardless of the documentation received, system (and consultant and contractor) must conduct rigorous due diligence
 - Investigate questionable statements - especially broad certifications
 - Document details of due diligence

Letters from Manufacturers



- **Look for:**
 - Product name and model number
 - Location(s) of manufacturing activities
 - Manufacturer contact information
 - Description of manufacturing process
- **Be wary of:**
 - Vague certifications
 - Claims that a product is covered by trade agreements
 - Claims that a product is covered under a waiver
 - Information on percentage of U.S.-made components
 - Any mention of assembly

Manufacturer/Supplier Documentation



- Broad statements are insufficient
 - “We comply with the Buy American requirement”
 - “All products are American”
 - “This project meets Buy American”
 - “We are certified Buy American compliant”
- There is no agency that “certifies” Buy American compliance
- Documentation should be specific about the location of the manufacturing (city and state)

**MANUFACTURER/SUPPLIER
CERTIFICATION OF COMPLIANCE
WITH
AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**

Project: _____ Location: _____

The manufacturer/supplier of this equipment is aware that the Owner has received Federal Funds for the Project under the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5) and said Act and published OMB Guidance (2 CFR Part 176, Appendix 9) contain the following requirements:

"None of the funds appropriated 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 (1) the public building or public work is located in the United States; and (2) All of the iron, steel, and manufactured goods used in the project are produced or manufactured in the United States. (I) Production in the United States of the iron and steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project. (II) There is no requirement with regard to the origin of the components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States."

This certification applies to the following specific equipment items to be incorporated into this project:

Manufacturer Name: _____

Equipment Description: _____

Equipment Model #: _____

Quantity: _____

Location of factory where this equipment will be manufactured: _____

The undersigned must be an officer of the company with full authority to provide this certification on behalf of the company. The undersigned hereby certifies that this equipment complies with all applicable provisions of the American Recovery and Reinvestment Act of 2009 and that the bid price supplied to the Contractor is based on full compliance with the Act.

Signature: _____

Company: _____

Name: _____

Address: _____

Title: _____

Phone: _____

Date: _____

Fax: _____

E-mail: _____

Example of manufacturer certification form (Montana)

When to Dig Deeper



- When might a manufacturer's statement warrant further investigation?
 - Product with complicated manufacturing processes
 - Pumps, SCADA, and control valves
 - Specialty products or known foreign manufacture
 - Membrane cassettes for membrane bioreactors
 - UV disinfection equipment

Next Steps for Digging Deeper



- **Systems should:**
 - Push manufacturer to complete substantial transformation matrix
 - Gather documentation that supports the affirmative answers in the substantial transformation matrix

Part 3: Substantial Transformation



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Substantial Transformation Definition



- A product is made in the U.S. if it “has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed.”
- Surface changes such as painting, lacquering, or cleaning are never considered substantial transformation

Substantial Transformation



- Determined on a case-by-case basis
 - System makes the determination
 - Must obtain information about the processes used
- EPA will not make determinations, but may provide informal “anticipatory oversight” at the request of the utility
- Substantial transformation only applies to manufactured goods – not iron and steel
 - Congress differentiated between products made from iron and steel and all other products

Substantial Transformation Evaluation



- When substantial transformation evaluation is required
 - Checking boxes alone is not adequate
 - A basic letter will not suffice
 - Systems must document the process
 - Manufacturer should document “yes” responses with meaningful, informative, and specific technical descriptions of activities in the processes addressed

Substantial Transformation Checklist



Yes No

1 All components domestic

Change in character or use

2

- a) Physical and/or chemical properties
- b) Change from one use to another
- c) Narrow range of possible uses

Complex and meaningful

3

- a) Substantial time
- b) Costly
- c) High level skill
- d) Multiple operations
- e) Added value

Substantial Transformation Example



- A manufacturer of a generator claims that their product is substantially transformed in the U.S.
- The product includes a foreign-made engine, a U.S.-made generator, and other U.S.-made components
- The imported engine and American components were incorporated into a containerized cogeneration system in the U.S.
- The system asks EPA for anticipatory oversight

Example Substantial Transformation Checklist



| | | <u>Yes</u> | <u>No</u> |
|----------|--|------------|-----------|
| 1 | All components domestic | | X |
| | Change in character or use | | |
| 2 | a) Physical and/or chemical properties | | X |
| | b) Change from one use to another | | X |
| | c) Narrow range of possible uses | | X |
| | Complex and meaningful | | |
| 3 | a) Substantial time | X | |
| | b) Costly | X | |
| | c) High level skill | X | |
| | d) Multiple operations | X | |
| | e) Added value | | X |

Example Scenario – Question #1



- Question #1 – all components domestic?
 - No
 - The engine was manufactured in Europe
 - Other components were manufactured in the U.S.

Example Scenario – Question #2



- Question #2 – change in use?
 - No
 - The manufacturing activities in the U.S. do not change the physical/chemical properties or use of the product – the engine is still an engine

Example Scenario – Question #3



- Question #3 – complex and meaningful?
 - Manufacturer submitted documentation showing that the combining of components in the U.S. took:
 - 400+ hours
 - Significant expenditures
 - Highly skilled workers
 - Involved nine complex steps

Example Scenario – Summary



- The manufacturer answered “No” to Questions 1 and 2
- The manufacturer answered “Yes” to 4 of the 5 parts of Question 3
- This product would fulfill the requirements for substantial transformation

Examples of Manufacturing Activity Photo Documentation



Can Manufacturers Move to the U.S.?



- A foreign manufacturer can move its manufacturing operations to the U.S. to qualify for Buy American
 - Manufacturers can open new manufacturing facilities or perform manufacturing in existing facilities
 - Activities taking place in the U.S. facility must be manufacturing activities, as determined by the substantial transformation guidelines

No Substantial Transformation?



- If the answer to the “substantial transformation” question is “no” or “unknown”
 - System can switch to a domestic alternative if possible
- If no domestic alternative is available
 - Can the product fit under *de minimis*?
 - If not, system must request a project-specific waiver

Part 4: *De Minimis*



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De Minimis National Waiver



- Two critical criteria
 - Incidental items
 - No more than 5% of total material cost
- What is the definition of “incidental” as it applies to the *de minimis* waiver?
 - Low cost (individually and in total)
 - Typically (though not necessarily) procured in bulk
- Should not be used for a few, expensive items
- FR notice:

http://water.epa.gov/aboutow/eparecovery/upload/2009_08_10_FR_Revised_De_Minimis.pdf

Possible Incidental Items



- Examples in waiver text
 - Nuts, bolts, other fasteners, gaskets, tubing
- Other possible examples
 - Water or sewer main projects
 - Valve risers, meter boxes, curb stop boxes, manhole riser, some valves, and erosion control
 - Treatment plant projects
 - Electrical components, duct work, piping and fittings, handrails, sheetrock, insulation, anchor bolts, concrete forms, piping, fencing, and erosion control
 - Pump station projects
 - Conduit, electrical components, ladder, vault lid/hatch, and fencing
- Will vary by project

Using the *De Minimis* Waiver



- Total materials cost includes raw materials that are not subject to Buy American
 - Concrete, asphalt, and lumber are all included in the denominator of the calculation
- Systems should plan for the incidental percentage early on
 - Do not “use up” the 5% too soon
- If the system has documentation that an incidental product is domestic – it can be counted in domestic materials

De Minimis Waiver – Report to State



- **Waiver requirements**
 - Systems must summarize their use of *de minimis* in a report to the state:
 - Types and/or categories of items
 - Total cost of incidental components
 - Calculation by which compliance was determined, including total cost of materials used in the project
 - Systems must keep relevant documentation of these items in their project files

Example of a *de minimis* inventory

| <u>Products</u> | <u>Cost</u> |
|--|-------------------------|
| Products | |
| Ultrafiltration Membranes | Product-specific waiver |
| Pump | \$200,000 |
| SCADA | \$20,000 |
| Pre-fab Treatment Building | \$40,000 |
| Water Mains | \$60,000 |
| Control Valves | \$10,000 |
| Asphalt & concrete | \$15,000 |
| U.S.-made incidental items | \$12,000 |
| | Estimate |
| | \$2,000 |
| Incidental Items (not U.S. or origin unknown) | |
| Gaskets, nuts, bolts | Estimate |
| Fittings (15 @ \$400 each) | Invoices |
| Electrical appurtenances | Estimate |
| | \$2,000 |
| | \$6,000 |
| | \$4,000 |
| Total Materials | \$371,000 |
| Total Incidental | <u>\$12,000</u> |
| % Incidental | 3.09% |

Part 5: Project-Specific Waivers



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Waiver Requests Can Still Be Submitted



- Waiver requests may still be considered “timely”, for example:
 - If product not specified in the original project specifications
 - Lack of “reasonably foreseeable circumstances”
 - Quantity waivers are likely as the construction season progresses
- Whether waiver request is considered timely or late depends on project-specific circumstances

http://water.epa.gov/aboutow/eparecovery/upload/2009_04_23_eparerecovery_OMB_Guidance_4-23-09-FR.pdf

Addressing New Waiver Requests



- Scenario #1: unforeseeable circumstances or other exceptions
 - Waiver requests may still be considered “timely”
 - EPA may review and may grant waivers

Addressing Late Waiver Requests



- Scenario #2: no unforeseeable circumstances
 - Waiver request is considered late
 - However, EPA would have granted the waiver if it had been submitted on time
 - EPA can choose how to address timeliness consistent with OMB regulations

Addressing Late Waiver Requests



- Scenario #3: no unforeseeable circumstances, and EPA cannot determine if waiver would have been approved
 - Waiver request is considered late
 - If EPA determines that the request would not have been approved, project will be non-compliant
 - Must work with EPA and state to determine how to address non-compliance

Part 6: Questions and Answers



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Reference Links



- U.S. EPA Memo: Implementation of Buy American provisions of P.L. 111-5, the “American Recovery and Reinvestment Act of 2009;” from James A. Hanlon and Cynthia Dougherty; April 28, 2009
- EPA SRF Webcast Training Series, especially June 22 webcast by EPA on Buy American
<http://water.epa.gov/aboutow/eparecovery/> has links to all EPA documents on waivers
- October 22, 2009 Substantial Transformation EPA Guidance
http://water.epa.gov/aboutow/eparecovery/upload/2009_12_13_eparecovery_10_23_09_Substantial_Transformation_memo_Final.pdf
- November 16, 2009 – EPA Buy American Questions and Answers – Part 2 (Substantial Transformation)
http://water.epa.gov/aboutow/eparecovery/upload/2009_11_20_eparecovery_2009_11_18_BA_Q-As_Part2-final.pdf

Thanks for Participating!



**IF YOU HAVE FOLLOW-UP QUESTIONS
REGARDING THIS WEB CAST, PLEASE
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