

November 24, 2010

TOWN OF LEDYARD
BID NO. 2011-01; Town Hall Building Energy Efficiency and Conservation Project
ADDENDUM 1

The purpose of this addendum is to add important bid conditions relative to the Federal Recovery Act governing grant funding for this project. The following attachments include relevant guidelines and requirements and a revised bid proposal form that shall be used in lieu of the original.

Additionally, wage rates for the project, as reflected also in the bid, shall comply with the Davis Bacon Wage Requirements, including the filing of certified payroll confirming compliance.

12. Bid Form – Bid # 2011-01

Addendum 1 provisions accommodated _____ initials

a. Town Hall Energy Efficiency and Conservation Project (Base Bid)

\$ _____

written in words _____

b. Annex Building (Add Alternate Bid)

\$ _____

written in words _____

c. Information pamphlet containing

- 1) Manufacturer's warranty
- 2) Energy Star rating ("R" and "U" rating)
- 3) Pertinent information
- 4) Certifications
- 5) Specification sheets must state the following:
 - a) For Heat pumps:
American Manufacturer's Name
Energy Star Rating
Heating Capacity, Size in Tons
Seasonal Energy Efficiency Ratio (SEER)
Heating Seasonal Performance Factor (HSPF) (if available)
Energy Efficiency Ratio (EER) (if available)
Cooling capacity in KW or BTU/hr (if available)
Air Flow Rate, CFU (if available)
dB (if available)
 - b) For Thermostats:
American Manufacturer's Name
Energy Star Rating
24/7 or 5 day/ 2 day programmability
Temporary temperature change ability
Compatible with multiple zone systems
 - c) For 24 hour Timer:
American Manufacturer's Name
Energy Star Rating
Amps
Volts
Battery type
 - d) For Central Air Conditioning:
American Manufacturer's Name
Energy Star Rating
Multiple zone capability
Seasonal Energy Efficiency Ratio (SEER)
Heating Seasonal Performance Factor (HSPF) (if available)
Energy Efficiency Ratio (EER) (if available)



Department of Energy
Washington, DC 20585

**RECOVERY ACT BUY AMERICAN GUIDANCE ON IMPLEMENTING THE
AGREEMENT BETWEEN CANADA AND THE UNITED STATES OF
AMERICA ON GOVERNMENT PROCUREMENT**

EFFECTIVE DATE: May 24, 2010

**SUBJECT: IMPLICATIONS OF THE AGREEMENT BETWEEN CANADA AND
THE UNITED STATES OF AMERICA ON GOVERNMENT PROCUREMENT
FOR EERE RECOVERY ACT FINANCIAL ASSISTANCE RECIPIENTS
IMPLEMENTING THE BUY AMERICAN PROVISION**

PURPOSE: Section 1605 (the Buy American provision) of the American Reinvestment and Recovery Act of 2009 (Recovery Act) will not be applied as a condition of Recovery Act funding for EERE financial assistance recipients in the State Energy Program (SEP) and Energy Efficiency and Conservation Block Grant Programs (EECBG) with respect to Canadian iron, steel, and manufactured goods in projects for the construction, alteration, maintenance, or repair of a public building or public work at or above the \$7,804,000 value threshold for invocation of international trade agreements.

SCOPE: This guidance applies to all state, local and tribal government recipients and sub-recipients (grantees and subgrantees) of Recovery Act financial assistance from the Office of Energy Efficiency and Renewable Energy (EERE).

LEGAL AUTHORITY: Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act; Pub. L. 111-5) sets forth the Buy American provisions for recipients of Recovery Act financial assistance. The Office of Management and Budget (OMB) issued interim final guidance (2 CFR Part 176) for implementing the Buy American provision on April 23, 2009 at 74 Federal Register 18449. On November 10, 2009, the Secretary of Energy delegated the authority to make all Buy American inapplicability determinations to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act (Redelegation Order 00-002-01C, dated November 10, 2009). On March 25, 2010, OMB amended its Interim Final Guidance to address the Agreement between the Government of the United States of America and the Government of Canada on Government Procurement (75 Federal Register 14323).

DEFINITIONS: Public building or public work means a public building of, or a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; state and local governments; and multi-state, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

Federally recognized tribal governments are also considered governmental entities for the purpose of defining “public building or public work.” Therefore, projects for construction, alteration, maintenance or repair of public buildings or public works undertaken by federally recognized tribal governments are subject to the Buy American provisions of the Recovery Act.

A manufactured good is defined as a good brought to the construction site for incorporation into the public building or work that has been processed into a specific form and shape or combined with other materials to create a material that has a different property than the individual raw materials.

There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in a project, as long as the manufacturing occurs in the United States.¹

GUIDANCE: Section 1605(d) of the Recovery Act provides that the Buy American provisions shall be applied in a manner consistent with U.S. obligations under international agreements. The OMB guidance provides that the Buy American provision shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement, listed in 2 CFR 176.90(b) and the recipient is required under an international agreement, described in the Appendix to subpart B of 2 CFR 176, to treat the goods and services of that Party the same as domestic goods and services. As of January 1, 2010, this obligation only applies to projects with an estimated value of \$7,804,000 or more and projects that are not specifically excluded from the application of those agreements.

The Agreement between Canada and the United States of America on Government Procurement (U.S.—Canada Agreement) means that for the two DOE programs that are covered in it, SEP and EEBCG, state, local and tribal governments are required to treat Canadian iron, steel and manufactured goods the same as U.S. iron, steel and manufactured products in projects funded by the Recovery Act for the construction, alteration, maintenance or repair of a public building or public work valued at or above \$7,804,000. This new requirement, which went into effect on February 16, 2010, applies to any new procurements that are commenced on or after that date. This agreement does not apply to any other countries, and does not apply to any other EERE programs. This agreement is in effect until September 30, 2011, unless it is extended before then.

¹ See 2 CFR 176.70(a)(2)(ii).

In summary, if an EERE financial assistance recipient in the State Energy Program or Energy Efficiency and Conservation Block Grant Program is using Recovery Act funding for a project valued at or above \$7,804,000 for the construction, alteration, maintenance or repair of a public building or public work Canadian-sourced iron, steel and manufactured goods may be used without obtaining a waiver of the Buy American provisions of the Recovery Act.

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Cathy Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy

May 24, 2010



Department of Energy
Washington, DC 20585

International Trade Agreements and the Recovery Act Buy American Provisions:
Frequently Asked Questions

Scope: This FAQ applies to all state, local and tribal government recipients and sub-recipients (grantees and subgrantees) of Recovery Act financial assistance from the Office of Energy Efficiency and Renewable Energy (EERE).

The Buy American provision in the American Recovery and Reinvestment Act of 2009 (section 1605 of Title XVI), provides that, subject to three listed exceptions (nonavailability, unreasonable cost, and inconsistent with the public interest), none of the funds appropriated or otherwise made available by the Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used are produced in the United States, or unless the head of the Department or Agency issues a waiver based on one of the three exceptions listed above.

The law also requires that the Recovery Act Buy American provision be applied in a manner consistent with the U.S.'s obligations under its international trade agreements.¹ The Office of Management and Budget (OMB) has issued interim final guidance² directing that the Buy American provision shall not be applied where the iron, steel, or manufactured goods used in the project originate from a Party to an international agreement and the recipient of Recovery Act financial assistance is required under an international agreement to treat the goods and services of that Party the same as domestic goods and services.³ The Appendix to Subpart B of 2 CFR Part 176 contains a list of those recipients who may avail themselves of the U.S.'s obligations under its international trade agreements. Recipients who are not listed cannot avail themselves of the U.S.'s obligations under its trade agreements. Also, recipients who are eligible to invoke the U.S.'s obligations under its trade agreements can only do so for projects valued at or above \$7,804,000 or above, and only for goods that are not specifically excluded from an agreement. Exclusions from international trade agreements are also listed in the Appendix to Subpart B of 2 CFR Part 176.

¹ Recovery Act, Section 1605(d)

² 2 CFR Part 176

³ Described in the Appendix to Subpart B of 2 CFR 176; see <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>.

Implementation of U.S.-Canada Agreement

The recently concluded Agreement between the Government of the United States of America and the Government of Canada on Government Procurement (U.S.—Canada Agreement), means that for two DOE EERE programs, the Energy Efficiency and Conservation Block Grant Program (EECBG) and the State Energy Program (SEP), state and local governments are required to treat Canadian iron, steel, and manufactured goods the same as U.S. iron, steel, and manufactured goods for projects valued at or above \$7,804,000. This requirement went into effect on February 16, 2010, and it applies to any new procurements that were or are commenced on or after that date. This agreement does NOT apply to any other DOE programs, and it does NOT apply to any other countries. The requirements of this agreement will end on September 30, 2011, unless the term of the agreement is extended.

General Guidance Regarding Application of Other International Agreements

For most EERE Recovery Act grantees, international trade agreements will not be a consideration because very few recipients are eligible to invoke the U.S.'s obligations under its trade agreements. (Refer to the list in the Appendix to Subpart B of 2 CFR Part 176 explained above.) Most local government and tribal entities are not a party to any international trade agreements. Also, for all projects valued below the \$7,804,000 threshold, the Buy American provision applies, unless a waiver has been granted by DOE for the specific manufactured good in question.

Grantees are responsible for determining whether the iron, steel, or manufactured goods procured for their project are covered by an international agreement. Grantees should consult the OMB Interim Final Guidance to determine the applicability of international agreements.⁴ Please be aware that DOE cannot provide advice to grantees about whether they are eligible to invoke the U.S.'s obligations under its international trade agreements. Grantees may wish to consult their State Attorney General or their own legal counsel for such advice.

Common Questions

- 1) Question: An efficient street lighting product is manufactured in Mexico (a NAFTA signatory). Using EECBG funds, can this product be procured by a city for a \$500,000 lighting retrofit project on public property funded by the Recovery Act, and be considered compliant with the Recovery Act Buy American provisions?

Answer: No. NAFTA does not cover local government or tribal procurements. Please refer to the Appendix to Subpart B of 2 CFR Part 176. In the column entitled "Relevant International Agreements," NAFTA is listed only for Rural

⁴ The Buy American provision has been implemented in OMB's Interim Final Guidance at 2 CFR Part 176 (74 Fed. Reg. 18449 (April 23, 2009)); <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>), as amended by 75 Fed. Reg. 14323, March 25, 2010.

Utilities Services (RUS). This means that only RUS's can invoke the terms of NAFTA to permit use of non-U.S. iron, steel and manufactured goods for their projects. Also note, the hypothetical project described is well below the \$7,804,000 threshold. All projects below the \$7,804,000 threshold are subject to the Buy American requirements of the Recovery Act, unless a waiver has been granted by DOE.

- 2) Question: A State energy agency is using State Energy Program Recovery Act funds to pay for a large government building retrofit. It wants to purchase a high-efficiency HVAC system manufactured in China by a prominent U.S. company, and sold by a local distributor. Would this be compliant with the Recovery Act Buy American provisions?

Answer: No. Section 1605 of the Recovery Act clearly states that: "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 all of the iron, steel, and manufactured goods used in the project **are produced in the United States.**" Whether the company is based in the U.S. or not is immaterial; what matters is where the product is manufactured.

- 3) Question: A Japanese solar energy company opens a manufacturing plant in the United States. The components and subcomponents of the manufactured good come from all over the world. Would these PV modules be Buy American-compliant?

Answer: Yes. There is no requirement with regard to the origin of components or subcomponents in manufactured goods, so long as the final manufacturing occurs in the United States. However, the final manufacturing must be sufficient to meet the definition of manufacturing, which is generally consonant with the requirements of substantial transformation.

- 4) Question: A company contacts a grantee and insists the company is "Buy American compliant" because they import a manufactured good from abroad, repackage it at their facility in the U.S., and sell it under a U.S. brand name. Is this acceptable?

Answer: No. The iron, steel, or manufactured goods must be produced or manufactured in the United States. A simple repackaging, or a simple assembly, does not satisfy the definition of "manufacturing."

- 5) Question: How do grantees verify that a product is indeed manufactured in the United States?

Answer: Grantees should include the Buy American requirements in all solicitations, Requests for Proposals (RFPs), agreements and sub-agreements.

The language in the OMB Interim Final Guidance at 2 CFR 176.150 (for solicitations and RFPs) and 176.140 (for agreements and sub-agreements) should be helpful. Recipients should expect subrecipients and contractors to verify their compliance with the Buy American provisions.

To assess whether various activities do or do not enable recipients to consider a good as “produced in the U.S.”, OMB included in section 176.160 of the Interim Final Guidance on international agreements the concept of “substantial transformation.” This concept of “substantial transformation” is helpful in the case of a manufactured good that consists in whole or in part of materials from another country. To assist grantees in making substantial transformation determinations, EERE has issued a separate guidance document entitled “EERE Substantial Transformation Guidance,” available on the EERE website at http://www1.eere.energy.gov/recovery/buy_american_provision.html.

- 6) Question: A vendor indicated that its goods qualify under the Buy American Act of 1933 because of the WTO GPA. Is that sufficient compliance?

Answer: No. The Buy American Act of 1933 is a different law from the Recovery Act. The Buy American provisions of section 1605 of the Recovery Act are not the same as the Buy American Act of 1933.



Department of Energy
Washington, DC 20585

Computer Hardware and Software: Frequently Asked Questions

Scope: This FAQ applies to all state, local and tribal government recipients and sub-recipients (grantees and subgrantees) of Recovery Act financial assistance from the Office of Energy Efficiency and Renewable Energy (EERE).

Question: Are computer equipment (hardware), and server virtualization and energy efficiency software, subject to the Buy American requirements (section 1605) of the Recovery Act?

Background: Section 1605 of the Recovery Act requires that projects, funded by the Recovery Act, for the construction, alteration, maintenance or repair of a public building or public work use American iron, steel, and manufactured goods in the project unless one of the specified exceptions applies, and a waiver is granted by DOE.

According to the OMB Guidelines, a manufactured good is 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. For example, trees cut down to 2x4 lumber used to frame a structure or copper piping used to plumb a building and other types of manufactured goods that are permanently attached to or fixed to real property (fixtures) would be covered by the Buy American Recovery Act provisions.

Software: We do not see how computer software could be found to be a manufactured good.

Hardware: The question of whether computer hardware is covered by the Buy American Recovery Act provisions turns on whether computer hardware is iron, steel or a manufactured good and whether it is used for the construction, alteration, maintenance or repair of a public building or public work. In order to determine whether computer hardware is a manufactured good, you must determine whether the computer hardware was brought to the construction site for incorporation into the building or whether it was 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.

You also need to know if it was used in the construction, alteration, maintenance or repair of a public work or public building.

Computer hardware means the mechanical, magnetic, electronic, and electrical components of a computer system. Component is not defined in the OMB Guidance at 2 CFR Part 176. However, component is defined in the FAR at Part 25 – Foreign Acquisition. Section 25.003 states that “component means an article, material, or supply incorporated directly into an end product or construction material.” Hardware component is defined as an article, material or supply incorporated directly into an end product could be goods brought to the construction site of a public building or public work that have been processed into a specific form and shape. Therefore, hardware components could fall under the definition of manufactured good at 2 CFR 176.140(a)(1), depending on the facts of each individual case. Your everyday PC would not constitute a manufactured good, but there could be facts under which a computer was integrated into a building such that it was a manufactured good.

Cables and connections are examples of types of hardware equipment that could fall within the Buy American Recovery Act provisions because their installation makes them a permanent fixture in the building, similar to electrical wiring and outlets; Fiber optic, Cat-5, or other cabling when installed inside walls, ceilings, or flooring; conduit when inside walls, ceilings, or flooring; and RJ-45 and other connectors when affixed to a wall or floor.

By contrast, file servers and networking hardware equipment are easily removable and not intended to be permanent fixtures. These products, along with personal computers and peripheral devices, are not covered by the Recovery Act’s Buy American provisions. Other examples of hardware components that are not covered by the Recovery Act’s Buy American provision are: electronic data processing devices – including central processing units, routers and switches, laptops or notebook computers, personal digital assistants, hand-held computers, and wireless communication devices; peripheral input/output devices – including keyboards, printers, scanners, plotters, LCD monitors, and drives intended for removable media; related communications devices – including modems, cables, and connections; and storage media – including DVD media and USB or FireWire drives.

The determination of whether computer hardware is considered a manufactured good must be done by the grantee on a case-by-case basis using the analysis provided above.



Department of Energy
Washington, DC 20585

**GUIDANCE ON MANUFACTURED GOODS AND SUBSTANTIAL
TRANSFORMATION FOR FINANCIAL ASSISTANCE AWARDS**

EFFECTIVE DATE: MAY 24, 2010

**SUBJECT: GUIDANCE ON MANUFACTURED GOODS AND SUBSTANTIAL
TRANSFORMATION FOR FINANCIAL ASSISTANCE AWARDS**

SCOPE: This guidance applies to all state, local and tribal government recipients and sub-recipients (grantees and subgrantees) of Recovery Act financial assistance from the Office of Energy Efficiency and Renewable Energy (EERE).

LEGAL AUTHORITY: Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act; Pub. L. 111-5) sets forth the Buy American provisions for recipients of Recovery Act financial assistance. The Office of Management and Budget (OMB) issued interim final guidance (2 CFR Part 176) for implementing the Buy American provision on April 23, 2009 at 74 Federal Register 18449.

GUIDANCE: Section 1605 of the Recovery Act states, "None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States." The Office of Management and Budget's (OMB) guidance on implementing this section defines "manufactured good" as 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." *See* 2 C.F.R. § 176.140(a)(1).

The OMB guidelines further define 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." *See* 2 C.F.R. § 176.160(a).

We interpret, "Produced in the United States," to mean that the production or manufacturing facility is physically located in the United States or its territories. The domicile of the parent company, subsidiary, distributor, or supplier is not relevant for determining compliance with the Recovery Act Buy American provision.

Substantial transformation has long been applied in judicial and administrative customs cases on labeling, national origin, and other Federal statutory requirements as the appropriate and effective way to identify where a good was manufactured. The courts have determined what constitutes substantial transformation on a case-by-case basis. The Environmental Protection Agency (EPA) has issued guidance for its Recovery Act projects interpreting the substantial transformation test found at *Complying with ARRA Buy American Provisions for SRF-Funded Projects*, June 22, 2009 www.epa.gov/water/eparecovery . The following questions provided therein may be helpful to determine whether or not substantial transformation has occurred. It is likely that substantial transformation has occurred in the U.S. if the answer is "yes" to either (or a combination of) Question 1, 2, or 3 below:

1. Were all of the components of the manufactured good manufactured in the U.S., and were all of the components assembled into the final production in the U.S.? (If the answer is yes, then it is clearly manufactured in the U.S., and the inquiry is complete.)
2. Was there a change in character for use of the good or the components in the U.S.? (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?

If the answer is yes to any of 2a, 2b, or 2c, then the answer to Q.2 is yes.

3. Was/were the processe(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 a number of different operations?
 - d. Did the processes require particular high level skills?
 - e. Was substantial value added in the process(es)?

If the answer is yes to at least two of 3a, 3b, 3c, 3d, or 3e, then the answer to Q.3 is yes.

These questions all focus on manufacturing, processing, assembly, or integration of the components or subcomponents into a finished good. Design, planning, procurement, component production, or any other step prior to the process of physically bringing together the components into the item used in and incorporated into the Recovery Act project cannot constitute part of substantial transformation.

If the parts at issue are components (or subcomponents) of a larger manufactured good that is domestically manufactured, or substantially transformed, in the United States, then the Buy American Recovery Act requirement does not apply.

The responsibility for determining whether the parts are components of a larger manufactured good, and whether the good is manufactured in the United States rests with the Recovery Act financial assistance recipient. Recipients should consult with their own legal counsel concerning the basis for substantial transformation. Based on the requirements of the Recovery Act and OMB's guidance on the Recovery Act, DOE cannot approve or disapprove a Recovery Act recipient's determination that a manufactured good has been substantially transformed in the United States. However, DOE Contracting Officers may request additional information to support the credibility of the recipient's analysis of substantial transformation. It is the recipient's responsibility to ensure that all information and documentation that supports a substantial transformation determination is accurate and complete and is retained for audit purposes. If recipients have reasonable doubt about the substantial transformation of a given manufactured good, and they believe that one of the exceptions outlined in the Recovery Act apply (such as domestic "nonavailability"), then the recipient may apply for a waiver based on that exception.

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Cathy Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy

May 24, 2010



Department of Energy
Washington, DC 20585

**ASSISTANT SECRETARY OF ENERGY
FOR ENERGY EFFICIENCY AND RENEWABLE ENERGY**

MEMORANDUM OF DECISION

SUBJECT: Determination of inapplicability (nationwide limited waiver in the public interest) of section 1605 of the Recovery Act of 2009 (the Buy American provision) to EERE-funded projects for incidental items that comprise in total a *de minimis* amount of the total cost of the iron, steel, and manufactured goods used in a project; that is, any such incidental items up to a limit of no more than 5 percent of the total cost of the iron, steel, and manufactured goods used in and incorporated into a project.

Under the authority of the Recovery Act, section 1605(b)(1), the head of a Federal department or agency may issue a "determination of inapplicability" (a waiver of the Buy American provisions) if the application of the restrictions of section 1605 would be inconsistent with the public interest. On November 10, 2009, the Secretary of Energy delegated the authority to make all inapplicability determinations to the Assistant Secretary for Energy Efficiency and Renewable Energy, for EERE Recovery Act projects.

Pursuant to this delegation, the Assistant Secretary, EERE, has determined that application of section 1605 restrictions would be inconsistent with the public interest for incidental items that comprise in total a *de minimis* amount of the total cost of the iron, steel and manufactured goods used in the project; that is, any such incidental items up to a limit of no more than 5 percent of the total cost of the iron, steel, and manufactured goods used in and incorporated into a project.

Recovery Act projects funded by EERE typically involve the use of literally thousands of miscellaneous, generally low-cost items that are essential for, but incidental to, the construction, alteration, maintenance or repair of a public building or public work and are incorporated into the physical structure of the project, such as nuts, bolts, wires, cables, and switches. For many of these incidental items, the country of manufacture and the availability of alternatives are not always readily or reasonably identifiable in the normal course of business. More importantly, the miscellaneous character of these items, together with their low cost (both individually and when procured in bulk), characterize them as incidental to the project.

Requiring individual waivers for incidental items would be time prohibitive and overly burdensome for both applicants and for EERE. Therefore, a nationwide limited *de minimis* waiver of incidental items up to a limit of no more than 5 percent of the total

cost of the iron, steel, and manufactured goods used in and incorporated into a project is justified in the public interest.

Issuance of this nationwide limited waiver recognizes EERE's commitment to expeditious costing of Recovery Act dollars, by balancing the need for expeditious and efficient implementation of the Recovery Act while still applying the Buy American provisions for materials that are greater than a *de minimis* part of the projects.

In light of the foregoing, and under the authority of section 1605(b)(1) of the Public Law 111-5 and Redesignation Order 00-002-01C, dated November 10, 2009, with respect to Recovery Act projects funded by EERE, I hereby issue a "determination of inapplicability" (a waiver under the Recovery Act Buy American provisions) for incidental items that comprise in total a *de minimis* amount of the project; that is, any such incidental items up to a limit of no more than 5 percent of the total cost of the iron, steel, and manufactured goods used in and incorporated into a project.

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Cathy Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy

May 24, 2010



Department of Energy
Washington, DC 20585

**ASSISTANT SECRETARY OF ENERGY
FOR ENERGY EFFICIENCY AND RENEWABLE ENERGY**

MEMORANDUM OF DECISION

SUBJECT: Determination of inapplicability (waiver) of section 1605 of the American Reinvestment and Recovery Act of 2009 (Recovery Act Buy American provisions) to EERE-funded projects for non-residential programmable thermostats; commercial scale fully-automatic wood pellet boiler systems; facility and small district wood pellet and chip boiler furnaces; variable refrigerant flow zoning and inverter-driven ductless mini-split HVAC systems; electrical "smart" strips/surge protectors; gas or propane tankless water heaters up to 200,000 BTUs; and fully-enclosed continuous composting systems.

Under the authority of Recovery Act, Pub. L. 111-5, section 1605(b)(2), the head of a federal department or agency may issue a "determination of inapplicability" (a waiver of the Buy American provisions) if the iron, steel, or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality ("nonavailability"). On November 10, 2009, the Secretary of Energy delegated the authority to make all inapplicability determinations to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act. Pursuant to this delegation the Assistant Secretary, EERE, has concluded that non-residential programmable thermostats; commercial scale fully-automatic wood pellet boiler systems; facility and small district wood pellet and chip boiler furnaces; variable refrigerant flow zoning and inverter-driven ductless mini-split HVAC systems; electrical "smart" strips/surge protectors; gas or propane tankless water heaters up to 200,000 BTUs; and fully-enclosed continuous composting systems all qualify for the "nonavailability" waiver determination.

EERE has developed a process to ascertain in a systematic and expedient manner whether or not there is domestic manufacturing capacity for the items submitted for a waiver of the Recovery Act Buy American provision. This process involves a close collaboration with the National Institute of Standards and Technology (NIST) Manufacturing Extension Partnership (MEP), to disseminate the technical specifications for the manufactured goods being submitted to EERE for waiver consideration, in order to scour the manufacturing landscape in search of producers before making any nonavailability. Many of the items contained in this nonavailability waiver were submitted to EERE as a result of a Request for Information published in *Federal Register* Vol. 75, No. 23. Upon receipt of completed waiver requests in response to the RFI or independently, EERE reviewed the information provided and submitted the relevant

technical information to the National Institute of Standards and Technology Manufacturing Extension Partnership (NIST MEP). MEP has a network of 59 centers across the country that work directly with domestic manufacturers and possess extensive knowledge of their specific capabilities. The EERE—MEP collaboration draws on this extensive network centers to “scout” for domestic manufacturers for the items submitted for Buy American waiver consideration by EERE Recovery Act grantees. The MEP centers reported that their scouting process did not locate any domestic manufacturers for these items.

In addition to the MEP collaboration outlined above, the EERE Buy American Coordinator worked with labor unions, trade associations and other manufacturing stakeholders to scout for domestic manufacturing capacity or an equivalent product for each item contained in this waiver. EERE also conducted significant amounts of independent research to supplement the MEP’s scouting efforts. EERE’s efforts revealed that the goods included in this waiver are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The nonavailability determination is also informed by the communications to EERE from recipients of EERE Recovery Act funds, and from suppliers, distributors, retailers and trade associations—all stating that their individual efforts to locate domestic manufacturers have been unsuccessful. For example, EERE has received four separate individual waiver requests for the types of HVAC systems included in this nonavailability waiver.

Specific technical information for the manufactured goods included in this nonavailability determination is detailed below:

(1) Programmable Thermostats – Includes devices that permit adjustment of heating or air-conditioning operations according to a pre-set schedule. Applies only to non-residential programmable thermostat units.

(2) Commercial Scale Fully-Automatic Wood Pellet Boiler System – Includes wood pellet boilers featuring a pneumatic conveyance system to transport wood pellets to the boiler, an automatic ignition system, continuously monitored and optimized combustion, ash removal/management system and the ability to control and integrate with other existing heat systems.

(3) Facility and Small District Wood Pellet and Chip Boiler Furnaces – Includes high efficiency, ultra-low emission biomass boilers for facility and small district heating, ranging from 35,000 Btu – 15,000,000 Btu.

(4) Variable Refrigerant Flow Zoning HVAC Systems and Inverter-Driven Ductless Mini-Split HVAC Systems - Includes variable refrigerant flow (VRF) multi-split heat pump (with or without heat recovery) and air conditioning systems; and inverter-driven ductless

mini-split heat pump and air conditioner systems. This waiver includes the main condensor and heat pump units, wall and fan coil units, zone controllers, remote controls, and any other component of the larger HVAC system.

(5) Electrical "Smart" Strips/Surge Protectors – Includes power strips that detect activity in the attached equipment and cut power during periods of inactivity.

(6) Gas or Propane Tankless Water Heaters up to 200,000 BTUs – Does not apply to electric tankless water heaters, which are widely manufactured in the United States.

(7) Fully-Enclosed Continuous Composting Systems – Includes multi-zone, continuous loading, odor and moisture controlled composter with leachate recirculation and in-situ mixing capabilities.

In light of the foregoing, and under the authority of section 1605(b)(2) of Public Law 111–5 and Redesignation Order 00-002-01C, dated November 10, 2009, with respect to Recovery Act projects funded by EERE, I hereby issue a "determination of inapplicability" (a waiver under the Recovery Act Buy American provisions) for non-residential programmable thermostats; commercial scale fully-automatic wood pellet boiler systems; facility and small district wood pellet and chip boiler furnaces; variable refrigerant flow zoning and inverter-driven ductless mini-split HVAC systems; electrical "smart" strips/surge protectors; gas or propane tankless water heaters up to 200,000 BTUs; and fully-enclosed continuous composting systems.

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of her responsibility. Consequently, this waiver applies to EERE projects carried out under the Recovery Act.

Furthermore, I reserve the right to revisit and amend this determination based on new developments or changes in the domestic manufacturing capacity for these seven items.



Cathy Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy

May 24, 2010

6450-01-P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

**Nationwide Limited Public Interest Waivers under Section 1605 (Buy American) of
the American Recovery and Reinvestment Act of 2009 (Recovery Act)**

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

NOTICE: Buy American Exception under the American Recovery and Reinvestment Act of 2009

SUMMARY: The Office of Energy Efficiency and Renewable Energy (EERE) of the U.S. Department of Energy hereby provides notice that on March 19, 2010, the Assistant Secretary for EERE granted nationwide limited waivers of the Buy American requirements of the American Recovery and Reinvestment Act of 2009 (Recovery Act; Pub. L. 111-5) under the authority of section 1605(b)(1) [application of the restrictions of section 1605 would be inconsistent with the public interest] for the purchase of light-emitting diode LED lighting (lamps, fixtures, and any supporting components) and heating, ventilation and air conditioning (HVAC) units. These nationwide limited waivers apply to projects using EERE Recovery Act funds for the construction, alteration, maintenance and repair of a public building or public work. These limited waivers only apply in circumstances where the recipient of EERE Recovery Act funds (“grantee”) has taken substantial steps to commit funds for the purchase of LED lights or HVAC units between February 17, 2009 and March 31, 2010. Substantial steps to commit funds would include, but are not limited to, (1) issuing a Request for Proposals

(RFP) on or before March 31, 2010 (applicable only where the grantee accepts a proposal received under that RFP); (2) in the case of a sole source selection: placing an order for the goods on or before March 31, 2010; (3) commencing a bidding process on or before March 31, 2010; (4) in circumstances where the grantee solicited quotes without an RFP: the grantee purchases the goods based on a quote dated on or before March 31, 2010 and the order for the goods is placed on or before March 31, 2010; and (5) grantee has executed a contract or purchase agreement with a supplier to acquire affected goods between February 17, 2009 and March 31, 2010.

On March 31, 2010, these limited waivers of Buy American provisions will expire, with the exception of LED traffic lights, arrows, and crosswalk signals, which are covered by a nationwide categorical waiver based on domestic nonavailability issued on February 11, 2010. After March 31, 2010, EERE grantees are required to procure LED lighting and HVAC units from domestic manufacturers in accordance with the Recovery Act Buy American provisions.

DATES: Effective Date: March 19, 2010.

FOR FURTHER INFORMATION CONTACT: Benjamin Goldstein, Energy Technology Program Specialist, Office of Energy Efficiency and Renewable Energy (EERE), (202) 287-1553, Department of Energy, 1000 Independence Avenue SW., Mailstop EE-2K, Washington, DC 20585.

SUPPLEMENTARY INFORMATION: Section 1605 of the Recovery Act prohibits the use of recovery funds for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States, or unless a waiver is granted by the head of the Federal department or agency. A waiver may be granted if the head of the Federal department or agency determines that one of three listed exceptions applies: (1) the application of Section 1605 requirements would be inconsistent with the public interest; (2) the iron, steel, or relevant manufactured good is not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the cost of domestic iron, steel, or relevant manufactured goods will increase the cost of the overall project by more than 25 percent.

In accordance with section 1605(c) of the Recovery Act and Section 176.80 of Title 2 of the Code of Federal Regulations, DOE hereby provides notice that, pursuant to a delegation of authority by the Secretary of Energy, dated November 10, 2009, the Assistant Secretary, EERE, has granted limited nationwide waivers of the requirements of Section 1605 of the Recovery Act for LED lighting (lamps, fixtures, and any supporting components) and heating, ventilation and air conditioning (HVAC) units in circumstances where the recipient of EERE Recovery Act funds ("grantee") has taken substantial steps to commit funds for the purchase of LED lights or HVAC units between February 17, 2009 and March 31, 2010. Under the authority of section 1605(b)(1) of the Recovery Act, the Assistant Secretary, EERE, has determined that the application of section 1605 requirements in these circumstances would be inconsistent with the public

interest.

The limited waivers for these two categories of manufactured goods are intended to resolve the confusion surrounding the characterization of LED lights and HVAC units as “supply” items, and thus not subject to the Recovery Act Buy American provisions. The concept of the “supply” item has its origins in the Buy American Act (41 U.S.C. 10a - 10d) and the Federal Acquisition Regulation (FAR), neither of which applies to section 1605 of the Recovery Act. The concept of a “supply” item has no significance in the context of section 1605 (the Buy American provisions) of the Recovery Act. The Buy American provisions apply to all iron, steel, and manufactured goods used for a project funded by Recovery Act appropriations for the construction, alteration, maintenance, or repair of a public building or public work. However, 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 (2 CFR 176.70).

However, it is understandable that a general lack of familiarity with the Buy American provisions would lead Recovery Act stakeholders to reference a similar set of procurement regulations—such as those codified by the FAR and Buy American Act—for guidance in understanding and interpreting section 1605 of the Recovery Act. This confusion ultimately led some recipients of EERE Recovery Act funds to rely on the “supply” item characterization to procure some LED lighting products and HVAC units from foreign manufacturers, without first seeking and obtaining an official waiver of section 1605 of the Recovery Act.

The purpose of the Recovery Act Buy American provisions is to support economic recovery by driving investment into the domestic manufacturing sector and recycling Recovery Act dollars within the U.S. economy. Given that the majority of Recovery Act-related procurement for EERE-funded projects has yet to occur, the Buy American provisions still have ample opportunity to fulfill their purpose and potential. This nationwide limited waiver being issued for LED lighting and HVAC units is critical to resolving the existing confusion, clearly elucidating the requirements of section 1605 of the Recovery Act, and moving forward in a proactive manner.

To support this potential, facilitate the implementation of section 1605 of the Recovery Act, and ensure that Recovery Act funds are deployed expeditiously, EERE is operationalizing a robust and proactive strategy to locate domestic manufacturers for the hard-to-find products sought by grantees. This strategy is outlined in a Request for Information published in Federal Register Vol. 75, No. 23 on Thursday, February 4 (and posted on the EERE Buy American webpage http://www1.eere.energy.gov/recovery/buy_american_provision.html), and demonstrates EERE's commitment to the fulfillment of the economic and job-creation potential of the Recovery Act Buy American provisions.

Finally, the installation of LED lights and more efficient HVAC units is a proven strategy to achieve impressive energy savings, reduce energy expenditures, and to create immediate jobs in the building, construction, and electrical trades. All three of these

attributes can support near-term economic recovery and long-term sustainability in locations across the country. Hence, the installation of these products has inherently supported the goals of the Recovery Act and—as a popular use of Recovery Act funds by EERE grantees—will continue to do so in the unambiguous regulatory landscape made possible by this nationwide limited waiver.

This SUPPLEMENTARY INFORMATION constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of her responsibility. Consequently, this waiver applies to EERE projects carried out under the Recovery Act.

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

A handwritten signature in black ink, appearing to read 'CZoi', is positioned above the printed name and title.

Cathy Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy

Dated: March 19, 2010

ASSISTANT SECRETARY OF ENERGY
FOR ENERGY EFFICIENCY AND RENEWABLE ENERGY

MEMORANDUM OF DECISION

SUBJECT: Determination of inapplicability (categorical waiver) under section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) for LED traffic lights, arrows, and crosswalk signals; fluorescent electronic lighting ballasts (with the exception of electronic dimming ballasts for fluorescent lamps that are capable of operating the lamps below 50% of their rated light output); and screw-base and pin-base compact fluorescent lamps (CFLs) (with the exception of plug-in CFLs longer than 10 inches).

Under the authority of Recovery Act, section 1605(b)(2), the head of a federal department or agency may issue a “determination of inapplicability” (a waiver of the Buy American provisions) if the iron, steel, or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (“nonavailability”). On November 10, 2009, the Secretary of Energy delegated the authority to make all inapplicability determinations to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act. Pursuant to this delegation the Assistant Secretary, EERE, has concluded that LED traffic lights, arrows, and crosswalk signals; fluorescent electronic lighting ballasts (with the exception of electronic dimming ballasts for fluorescent lamps that are capable of operating the lamps below 50% of their rated light output); and screw-base and pin-base compact fluorescent lamps (with the exception of plug-in CFLs longer than 10 inches) all qualify for the “nonavailability” determination.

The determination of inapplicability under Recovery Act section 1605 for these three products is based on extensive market research and a thorough investigation of the domestic manufacturing landscape. This research revealed that these three products are manufactured almost exclusively in China and Mexico.

EERE corresponded with a wide range of lighting industry stakeholders, including the National Electrical Manufacturers Association, three major lighting companies (GE, Osram Sylvania, and Phillips), the IUE-CWA labor union, and many smaller lighting manufacturers, in establishing the domestic nonavailability determinations. The two specific exceptions to these categorical waivers (for electronic dimming ballasts and 10-inch and longer CFLs) are evidence of the very detailed research effort undertaken to support the formulation of these nonavailability determinations.

These determinations are also informed by the large number of inquiries and petitions to EERE from recipients of EERE Recovery Act funds (“grantees”), suppliers, and trade

associations—all stating that their individual efforts to locate domestic manufacturers have been unsuccessful.

EERE has also received two specific waiver requests from grantees for LED traffic lights and fluorescent electronic lighting ballasts, and has postponed granting waivers for these individual projects in favor of developing nationwide categorical waivers that would benefit all grantees implementing projects that utilize these manufactured goods.

EERE is operationalizing a strategy that involves collaborating with multiple stakeholders in the manufacturing community to disseminate technical specifications for hard-to-find products to ascertain whether or not there are any domestic manufacturers for these products. This strategy will ensure that all future determinations of nonavailability are developed via a thorough, transparent, and expedited process. However, while this larger strategy is unfolding, it is critical to move forward with the nationwide categorical waivers for these three manufactured goods, where domestic nonavailability has been ascertained and is currently impeding the progress of numerous Recovery Act projects funded by EERE.

These determinations of inapplicability (categorical waivers) apply to all projects using EERE Recovery Act funds for the construction, alteration, maintenance and repair of public buildings or public works. The Assistant Secretary, EERE, reserves the right to revisit and amend these determinations based on new developments or changes in the domestic manufacturing capacity for these three technologies.

The specific products detailed below will be *excluded* from the determinations of inapplicability (i.e. these products will remain subject to the Buy American provisions) because some domestic manufacturing capacity does exist.

- 1) Electronic dimming ballasts for fluorescent lamps

Electronic dimming ballasts for fluorescent lamps that are capable of operating the lamps below 50% of their rated light output.

- 2) Plug-in CFLs longer than 10 inches

CFLs greater than 10 inches in length have a 4-pin base and are rated from 18 to 27 watts. They are available in a range of color temperatures and are used, for example, in facilities, offices, warehouses and display cases. Lengths range from 10.5 in (266.7 mm) to 22.5 in (571.5 mm), and rated life ranges from 10,000 to 20,000 hours.

- 3) Traffic light fixtures

The nationwide categorical waiver for LED traffic lights, arrows, and crosswalk signals covers the LED lights and any adjacent wires and electronic parts necessary for the functionality of the lights themselves; but *excludes* the metal or plastic fixtures (also referred to as the “housing” or “shell”).

In light of the foregoing, and under the authority of section 1605(b)(2) of the Public Law 111-5 and Redelegation Order 00-002-01C, dated November 10, 2009, with respect to Recovery Act projects funded by EERE, I hereby issue a "determination of inapplicability" (a waiver under the Recovery Act Buy American provisions) for LED traffic lights, arrows, and crosswalk signals; fluorescent electronic lighting ballasts (with the exception of electronic dimming ballasts for fluorescent lamps that are capable of operating the lamps below 50% of their rated light output); and screw-base and pin-base compact fluorescent lamps (with the exception of plug-in CFLs longer than 10 inches). Furthermore, I reserve the right to revisit and amend these determinations based on new developments or changes in the domestic manufacturing capacity for these three technologies.

A handwritten signature in black ink, appearing to read 'CZoi', is positioned above the printed name of the signatory.

Cathy Zoi
Assistant Secretary for Energy Efficiency and Renewable Energy
U.S. Department of Energy

February 11, 2010