



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

**BUY AMERICAN PROVISIONS
IN THE
AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA)**

A SUMMARY BASED ON INTERIM FINAL GUIDANCE ISSUED BY THE
OFFICE OF MANAGEMENT & BUDGET

Effective Date: April 3, 2009

Original Statutory Requirement Summary (ARRA Title XVI, Section 1605)

Infrastructure projects involving construction, alteration, maintenance or repair of public buildings or public works must be accomplished using iron, steel and manufactured goods produced in the United States. The Buy American provision is only applied in a manner consistent with United States obligations under international agreements. Exceptions can be made by the heads of federal departments or agencies when use of domestic products is:

- i. Inconsistent with the public interest (e.g. the EPA partial Buy American waiver [see below]);
- ii. Compromised because there are insufficient or reasonably unavailable quantities of domestic products or their quality is unsatisfactory; or
- iii. Likely to increase the cost of the overall project by 25% or more.

Definitions (2 Code of Federal Regulations [CFR], Section 176.140, 176.160)

Public buildings or public works - A building or work of a government entity

Steel - An alloy that includes 50 percent iron and between .02 and 2 percent carbon

Manufactured goods - A good brought to the construction site for incorporation into the building or work that has been (a) processed into a specific form or (b) combined with other raw material to create a qualitatively different material

Produced in the United States - A good that is either wholly produced in the United States, or, if it contains materials from another country, has been substantially transformed in the United States into a new and different manufactured good

Waivers/Exceptions (2 CFR Sections 176.70-80)

Iron and steel

In general, all iron and steel manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. However, these requirements do not extend to iron or steel used as components or subcomponents of manufactured goods used in the project.

Waivers/Exceptions *(continued)*

Components of manufactured goods

No requirement is extended 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

United States obligations under international agreements

For federal procurement, the Buy American requirement does not apply where the materials used in the project are from countries with which the U.S. has a relevant international agreement, namely including (a) signatories to the World Trade Organization Government Procurement Agreement,¹ and (b) countries with which the U.S. has Free Trade Agreements with relevant procurement provisions.²

Regarding state & local procurement, however, many states have limited their commitment to these agreements, as outlined in a chart in the guidance

(http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf, p.157). The forty states and various other sub-federal entities listed there will only be required to adhere to Buy American provisions for procurement done by any agencies not listed in the “entities covered” section and for goods from any countries not specifically listed in the “relevant international agreements” section.

Request Processing and Noncompliance (2 CFR Sections 176.100-130)

- Requests for exceptions to Buy American should come before funds are obligated; late requests will require an explanation as to why the need for an exception was not foreseeable.
- In cases of noncompliance, provisions are made for the removal and replacement of unauthorized foreign building materials, reduction and termination of funding, and investigations of fraud as necessary.

EPA Buy American Partial Waiver (Federal Register Vol. 74, Num. 65)

As of April 7, 2009, the EPA is granting a nationwide waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) (public interest waiver) for eligible projects for which debt was incurred on or after October 1, 2008 and before February 17, 2009, the date of enactment of ARRA. This action permits the use of nondomestic iron, steel, and manufactured goods in such projects funded by ARRA that may otherwise be prohibited under section 1605(a).

Information current as of April 22, 2009. For questions, contact:

Paul Snow – (202) 624-8683, paul.snow@ncsl.org

Diana Hinton Noel – diana.binton@ncsl.org; Molly Ramsdell – molly.ramsdell@ncsl.org

¹ Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom

² CAFTA signatories (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua), NAFTA signatories (Canada and Mexico), Australia, Bahrain, Chile, Israel, Morocco, Oman, Peru, and Singapore