

# American Recovery and Reinvestment Act (ARRA) Workshop



## **BUY AMERICAN**

### **STATE REVOLVING FUND**

## Agenda



- **Buy American Section of ARRA**
- **Documenting Compliance**
  - Domestic Purchase of Goods
    - ✦ Substantial Transformation
  - Waivers
- **Roles and Responsibilities**
- **Common Questions**

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# Buy American: Overview



## AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

# ARRA Purpose



“Making supplemental appropriations for

- ✦ job preservation and creation,
- ✦ infrastructure investment,
- ✦ energy efficiency and science,
- ✦ assistance to the unemployed, and
- ✦ State and local fiscal stabilization,

for the fiscal year ending September 30, 2009, and for other purposes.”

## Buy American Requirement of ARRA



- (a) “No funds appropriated ... by this Act may be used for a project unless all of the iron, steel, and manufactured goods used in the project are produced in the United States”
- (b) Allows section (a) to be waived under certain conditions
- (c) Waiver must be published in *Federal Register* with a detailed written justification

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## Responsibility for BA Compliance



- Who is ultimately responsible for the project’s compliance with BA?
  - EPA
  - State
  - Water/Wastewater System (Funding Recipient)
  - Consulting Engineer
  - Contractor



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**LOAN RECIPIENT COMPLIANCE ASSURANCE WITH RESPECT TO ARRA BUY AMERICAN REQUIREMENTS**  
(Must be submitted with each loan disbursement request)

# BA Compliance Certification

KPWSLF OR KWPCRLF PROJECT # \_\_\_\_\_

DISBURSEMENT REQUEST # \_\_\_\_\_

To assure compliance with ARRA Buy American requirements found in Exhibit C of loan agreement for the project referenced above, the Loan Recipient indicated below, hereby certifies that the manufacturers' certification of all iron, steel, and manufactured goods used in the project referenced above, have been reviewed and as of the date of the construction contract pay request submitted as part of the above referenced KDHE SRF disbursement request, all such iron, steel, and manufactured goods have been produced in the United States except for any items specifically waived by EPA's De Minimis waiver effective May 22, 2009 (Federal Register Vol. 74 No. 104), which was later revised with an effective date of July 24, 2009 (Federal Register Vol. 74 No. 152). The Loan Recipient further certifies that if the De Minimis waiver is used, that the total cost of the items covered do not exceed 5% of the total materials cost of the project.

Authorized Representative of Loan Recipient \_\_\_\_\_

Title of Authorized Representative \_\_\_\_\_

Signature of Authorized Representative \_\_\_\_\_

Legal Name of Loan Recipient \_\_\_\_\_

Date \_\_\_\_\_

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# How Do I Comply with Buy American?



## AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

## Compliance with Buy American



- Purchase goods manufactured in U.S.
- Utilize national *de minimis* waiver
- Utilize/obtain project-specific waiver
- Utilize refinance or bid waiver

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## Documentation



- Items to document
  - Purchase of domestic goods
  - Waivers
- Forms and documents
  - Required
  - Suggested
- Required content

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# Documenting Purchase of Domestic Goods



## AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

# Documentation - Domestic Goods



- **Contractor**
  - Provisions in contract documents
  - Certification of compliance with bid documents
  
- **Supplier/manufacturer certifications**
  - All manufacture is in U.S.
  - Specific items and specific location
  - May need to address question of “substantial transformation”
  
- **Keep documentation in project file**

# KDHE BA Certification for Bidders

## ARRA BUY AMERICAN CERTIFICATION

1. Identification of American-made Iron, Steel, and Manufactured Goods: Consistent with the terms of the Purchaser's bid solicitation and the provisions of ARRA Section 1605, the Bidder certifies that this bid reflects the Bidder's best, good faith effort to identify domestic sources of iron, steel, and manufactured goods for every component contained in the bid solicitation where such American-made components are available on the schedule and consistent with the deadlines prescribed in or required by the bid solicitation.
2. Verification of U.S. Production: The Bidder certifies that all components contained in the bid solicitation that are American-made have been so identified, and if this bid is accepted, the Bidder agrees that it will provide reasonable, sufficient, and timely verification to the Purchaser of the U.S. production of each component so identified.
3. Documentation Regarding Non-American-made Iron, Steel, or Manufactured Goods: The Bidder certifies that for any component or components that are not American-made and are so identified in this bid, the Bidder has included in or attached to this bid one or both of the following, as applicable:
  - a. Identification of and citation to a categorical waiver published by the U.S. Environmental Protection Agency in the Federal Register that is applicable to such component or components, and an analysis that supports its applicability to the component or components;
  - b. Verifiable documentation sufficient to the Purchaser, as required in the bid solicitation or otherwise, that the Bidder has sought to secure American-made components but has determined that such components are not available on the schedule and consistent with the deadlines prescribed in the bid solicitation, with assurance adequate for the Bidder under the applicable conditions stated in the bid solicitation or otherwise.
4. Information and Detailed Justification Regarding Non-American-made Iron, Steel, or Manufactured Goods: The Bidder certifies that for any such component or components that are not so available, the Bidder has also provided in or attached to this bid information, including but not limited to the verifiable documentation and a full description of the bidder's efforts to secure any such American-made component or components, that the Bidder believes are sufficient to provide and as far as possible constitute the detailed justification required for a waiver under section 1605 with respect to such component or components. The Bidder further agrees that, if this bid is accepted, it will assist the Purchaser in amending, supplementing, or further supporting such information as required by the Purchaser to request and, as applicable, implement the terms of a waiver with respect to any such component or components.

Signature \_\_\_\_\_ Name and Title of Signer (Please Print) \_\_\_\_\_  
Date \_\_\_\_\_

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# BA Contract Provisions for Kansas

## ARRA Buy American Contract Provisions

The Contractor Acknowledges to and for the benefit of the Owner and the State of Kansas, that it understands the goods and services under this agreement are being funded with monies made available by the federal American Recovery and Reinvestment Act of 2009 (ARRA) and such law contains provisions commonly known as "Buy American" that requires all of the iron, steel, and manufactured goods used in the project be produced in the United States ("Buy American Requirements") including iron, steel, and manufactured goods provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner and the State of Kansas that (a) the Contractor has reviewed and understands the Buy American Requirements, (b) all of the iron, steel, and manufactured goods used in the project will be and/or have been produced in the United States in a manner that complies with the Buy American Requirements, unless a waiver of the requirements is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the Buy American Requirements, as may be requested by the Owner or the State of Kansas. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner or State of Kansas to recover as damages against the Contractor any loss, expense or cost (including without limitation attorney's fees) incurred by the Owner or State of Kansas resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the State of Kansas or any damages owed to the State of Kansas by the Owner). While the Contractor has no direct contractual privity with the State of Kansas, as a lender to the Owner for the funding of this project, the Owner and the Contractor agree that the State of Kansas is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the State of Kansas.

A waiver to this requirement may be provided if (1) applying these requirements would be inconsistent with the public interest; (2) 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; or (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent. If a Contractor believes a waiver is appropriate, a request for waiver must be made to the Owner in a format required by the Owner. The Owner will then make a request to EPA for the waiver. Bids that are made with the assumption of a waiver that is not granted could be considered unresponsive.

EPA has granted a nationwide waiver effective May 22, 2009, that permits the use of non-domestic iron, steel, and manufactured goods when they occur in *de minimis* incidental components of projects funded by ARRA, where such components comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project. These incidental components would include non-major components that are essential for construction such as nuts, bolts, other fasteners, tubing, gaskets, etc. If the contractor wishes to use this waiver, the contractor must determine the items to be covered by this waiver, must retain relevant documentation as to those items in their project files, and must summarize in reports to KDHE the types and/or categories of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type of category, and the calculations by which they determined the total cost of materials used in and incorporated into the project.

The following definitions apply to this provision.

**Steel.** An alloy that includes at least 50 percent iron, between .02 and 2 percent carbon and may include other elements. Production in the United State of the iron or 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 good used in the project.

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## Manufacturer/Supplier Documentation



- **Broad statements are insufficient**
  - “We comply with the Buy American requirement”
  - “All products are American”
  - “This project meets Buy American”
  - “This product was produced in the United States”

## Manufacturer/Supplier Documentation



- **Letters or certifications from manufacturers**
  - All manufacturing is in U.S.
  - Specific product and specific location
- **Other documentation types**
  - Bills of Lading, shipping manifest, invoices,
  - Country-of-origin marking and labeling
  - Photographs

**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: \_\_\_\_\_

Date: \_\_\_\_\_ Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_ Fax: \_\_\_\_\_

## Examples of Letters and Certifications



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

**Example  
Certification**

To Whom It May Concern:

We certify that our products meet the  
Buy America Program.

Feel free to contact the nearest Big Sky  
Water Inc. office for more  
information.

Sincerely  
Big Sky Water, Inc.

**Example  
Certification**

Pipe and Pumps Inc.

To Whom This May Concern:

Thank you for your interest in Pipe and  
Pumps, Inc., We are certified “Buy  
American” compliant.

If you have any questions, please  
contact our corporate office at 555-  
345-6789.



**Example  
Certification**

Big-Time Bolts Inc.  
Detroit, MI

Dear Dan,

All material supplied on this project will be domestic. Please be sure to specify “Domestic” on all Purchase Orders.

Thank you for your support and if you have any questions or concerns please call me.

Sincerely  
Jack B. Quick  
Big Time Bolts, Inc.



**Example  
Certification**

Buy American Certification

To Whom This May Concern:

Products supplied by Pumps and Motors, Inc. comply with Buy American. All products we manufacture are comprised of 85% American components.

Thank you for your use of our products, and if you have any questions, please contact our corporate office at 555-345-6789.



**Action Electric - Invoice**

**Invoiced to:**

Town of  
Whitehall  
368 Main Street  
Whitehall, USA

**Remit to:**

Action Electric  
924 South Street  
San Francisco, CA

**Order**

<u>No</u>	<u>Catalog Number</u>	<u>UPC</u>	<u>Quantity</u>	<u>Shipment Origin</u>
273	LHX 996 LPI	943758393209478	5	Salem, OR
273	IND 456 LPI	297586749893933	1	Salem, OR
273	CRT 491 HHS	948578695484930	2	San Francisco, CA



**Example  
Certification**

**Certificate of Compliance  
to Standards**

DIP Inc. certifies that all Fabricated Ductile Iron Pipe it supplies, is in full compliance with the Buy American Provision of the American Recovery and Reinvestment Act of 2009.

All pipe supplied by DIP Inc. is  
manufactured at our only foundry in  
Savannah, Georgia, USA.



## Example Certification



To Whom It May Concern:

This letter serves to certify the origin of the electrical wire products purchased by WIRE Inc. These electrical wire products are wholly manufactured in the United States at one or more of our four plants listed below. These products qualify for NAFTA, the Buy American Act of 1933 as well as the American Recovery and Reinvestment Act of 2009. Feel free to contact me should you have any further questions or requests.

### Manufacture Plants for Aforementioned Products:

WIRE Inc.-Building Wire  
5730 Alpine Drive  
Carrollton, GA 30119

WIRE North- Bare Copper  
111 Lions Dr.  
Detroit, MN 30677

WIRE South- MC Cable  
3017 Wallabee Way  
Mobile, AL 32993

WIRE West-Mineral Wells  
2630 Swartenager Ln  
Long Beach, CA, 90234



### Example Certification

Dear Jim:

The pump you purchased on June 25, 2010, Model Number XJ6 99TR for the Main Street Pump Station project was manufactured at our plant in Newark, NJ.

Thank you for your business  
Pumps R Us



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## When to Dig Deeper



- **When might a manufacturer's statement, even if specific, seem inadequate?**
  - Lack of detail
  - Product with complicated manufacturing processes
    - ✦ Pumps, SCADA, control valves
  - Specialty products
  - Known foreign manufacture
    - ✦ Membrane cassettes

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## Due Diligence



- **Regardless of the documentation received:**
  - The recipient (and their consultant and contractor) must conduct rigorous due diligence
    - ✦ Investigate questionable statements - especially broad certifications
    - ✦ Document file showing details of due diligence
- **Unclear documentation**
  - Require completion of substantial transformation matrix
  - Accompanying documentation

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# What Is Substantial Transformation?



## AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

## Substantial Transformation



- In response to questions on defining “manufactured good,” EPA issued guidance
  - Introduced the concept of substantial transformation
- Manufacture versus Assembly
  - Minimal or simple assembly operations are not considered to be substantial transformation
    - ✦ Combining, repacking, resurfacing

## Substantial Transformation



- **Determined on case-by-case basis**
  - System makes the determination
    - ✦ Obtain information about the processes used
  - EPA will not make determinations, but may undertake informal “anticipatory” oversight

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## Evaluation Matrix/Questions



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?**
  - Finished good, not each individual component
3. **Was(were) the process(es) performed in the U.S. complex and meaningful?**

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## ST Question #2



- **Change in character or use**
  - Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?
  - Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?
  - Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?

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## ST Question #3



- **Complex and meaningful processes**
  - Did the process(es) take a substantial amount of time?
  - Was(were) the process(es) costly?
  - Did the process(es) require particular high level skills?
  - Did the process(es) require a number of different operations?
  - Was substantial value added in the process(es)?

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## Substantial Transformation Evaluation



- Evaluation is not always necessary
  - Question of manufacture is often straight-forward
- When evaluation is required
  - Checking boxes alone is not adequate
  - Discussion of specific processes
  - Documentation of processes

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## Substantial Transformation Example



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

## Substantial Transformation Example



- A manufacturer of a SCADA system states that their product, while undergoing many of its manufacturing processes in Mexico, undergoes substantial transformation at their facility in Big City, TX.
- The system is designed in Big City, and some of the critical parts (approximately 40% of the components) are made in Small Town, TX.
- Much of the manufacture takes place at a facility in Mexico, and the product is shipped to Big City for final manufacture, assembly and testing.

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## Example Substantial Transformation Checklist



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

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## Example ST Background Doc.



- Question #1 – all components domestic?
  - No
  - 40% of the components used in our SCADA system are manufactured in the U.S.

## Example ST Background Doc.



- Question #2 – change in use?
  - Yes response to one of three
  - The product shipped from the facility in Mexico is generic in nature and unready for use
    - ✦ Although the structure is complete, the processors must be installed and the unit must be customized for the installation
    - ✦ Processes in Big City narrow the range of uses to the specific site (in this case a water system pump station)

## Example ST Background Doc.



- **Question #3 – complex and meaningful?**
  - Yes response to 4 of 5
  - Processes that take place in Big City account for approximately 45% of the total cost of the system.
  - Employees at this facility are highly skilled and required to install the computer processors, assemble the unit, and program for its ultimate use.
  - These processes more than double the value of the unit compared to its value coming from the Mexico facility
  - This facility currently employs 25 full time staff for design, final manufacture, assembly, programming and testing of SCADA systems.

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Photos of  
Manufacturing  
Facility in Big City,  
Texas



## No Substantial Transformation



- If the answer to the “substantial transformation” question is “no” or “unknown”
  - Switch to a domestic alternative
  - First line of compliance
- If no domestic alternative is available
  - Request a waiver

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## Waivers



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

## Buy American Waivers



- ARRA allows Buy American requirement to be waived for any of three reasons
  - Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, or
  - Inclusion of goods produced in the U.S. will increase the cost of the overall project by more than 25 percent, or
  - Its application would be inconsistent with the public interest

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## Waivers



- **Applicability**
  - National
    - ✦ Issued by EPA HQ
    - ✦ Affecting projects on a nation-wide level
  - Project-specific
    - ✦ Issued by EPA Regional offices
    - ✦ For specific projects
- **Types**
  - Availability
    - ✦ Quantity
    - ✦ Quality
  - Cost
  - Public interest

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## National Waivers



- EPA has issued three national waivers
  - All were based on public interest
  - *De minimis*
    - ✦ Incidental components
    - ✦ No more than five percent of the total cost of materials used in a project
  - Refinanced projects and projects with solicited bids
    - ✦ Projects in anticipation of ARRA (shovel-ready)
    - ✦ After October 1, 2008 and before February 17, 2009

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## Incidental



- What is the definition of “incidental” as it applies to the *de minimis* waiver?
  - Miscellaneous character
  - Low cost (individually and in total)
  - Typically procured in bulk
  - *De minimis* should not be used for a single or very small number of large items that are 3-4% of the total project cost because these cannot be considered “incidental”

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## Possible Incidental Items



- **Examples in waiver text**
  - Nuts, bolts, other fasteners, gaskets, tubing
- **Other possible examples** (*items will vary project to project*)
  - **Water or Sewer Main**
    - ✦ Valve risers, meter boxes, curb stop boxes, manhole riser, some valves, and erosion control
  - **Treatment Plant**
    - ✦ Electrical components, duct work, piping and fittings, handrails, sheetrock, insulation, anchor bolts, concrete forms, piping, fencing, and erosion control
  - **Pump Station**
    - ✦ Conduit, electrical components, ladder, vault lid/hatch, and fencing

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## Making Use of the De Minimus Waiver



- **Almost every project likely to make use of waiver**
- **Decision making**
  - System's decision – work with contractor and engineer
- **Retain documentation**
  - Types and/or categories of items
  - Total cost of incidental components
  - Total cost of all materials
  - Calculation by which compliance was determined
- **Summarize in report to State**

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## Project-specific Waivers



- **Availability Waivers**
  - Quality
    - ✦ No domestic manufacturer can meet project design and/or specification requirements
  - Quantity
    - ✦ Made in U.S., but not available when or in the quantity needed
- **Cost waivers**
  - Increase total project cost >25%
  - None issued to date
- **Public interest waivers**
  - Very few issued

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## Waiver Submittals



- **Assistance recipient requests waiver**
  - Send request and documentation to EPA Region
  - E-mail: [region7waiver@epa.gov](mailto:region7waiver@epa.gov)
- **EPA Region reviews and approves or denies**
  - Published in Federal Register
- **Waivers can still be submitted**
  - Quantity waivers are likely as the construction season progresses

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# How Do I Document Use of a Waiver?



## AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

### *De Minimis* Waiver - Documentation



- **Two critical criteria**
  - Incidental items
  - No more than 5% of total goods
  
- **Keep documentation in project file**
  - List items claimed under waiver
    - ✦ Confirm incidental
  - Cost information
    - ✦ Total of goods purchased for project
    - ✦ Total of *de minimis* items

## Project-Specific Waivers – Documentation



- **Keep documentation of waiver in project file**
  - Federal Register notice
  - Background information submitted in support of the waiver
  - Any relevant communications

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## Buy American Binder



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

## Buy American Binder



- Section 1 – Contracts and Forms
  - ✦ Bidder certification
  - ✦ Contractor certification
  - ✦ Contract – BA section
- Section 2 – Waivers
  - ✦ Federal Register Notice
  - ✦ Background Documentation
- Section 3 – American Goods
  - ✦ Letters & Certifications
  - ✦ ST evaluations
- Section 4 – De Minimus
  - ✦ Estimates
  - ✦ Invoices
- Section 5 – Summary
  - ✦ Table of costs
  - ✦ *De minimus* calculation

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BUY AMERICAN BINDER

	<u>Documentation</u>	<u>Cost</u>
<u>Foreign Products</u>		
Ultrafiltration Membranes	FR Notice	\$200,000
<u>Domestic Products</u>		
Pump	Manufacturer Letter	\$20,000
SCADA	STE & Supporting Doc.	\$40,000
Pre-fab Treatment Building	Supplier Information	\$60,000
Water Mains	Manufacturer Letter	\$10,000
Control Valves	Shipping statement	\$15,000
<u>Incidental Items</u>		
Gaskets, nuts, bolts	Estimate	\$2,000
Fittings and piping	Invoices	\$6,000
Electrical appurtenances	Estimate	\$4,000
<b>Total Manufactured Goods</b>		<b>\$357,000</b>
<b>Total Incidental</b>		<b><u>\$12,000</u></b>
<b>% Incidental</b>		<b>3.36%</b>

# Roles and Responsibilities



## AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

### Engineers and Contractors Role



- **Help system ensure compliance**
  - Role should be defined by contracts
    - ✦ Contracts may need to be amended
  - Collect documentation from manufacturers regarding products used in design and construction
  - Exercise due diligence to ensure that Buy American requirements are met

## System's Role



- **Primary authority and responsibility for implementing Buy American**
  - Request waiver if necessary
  - Require documentation
    - ✦ In bid documents and contracts
    - ✦ Contractors' evidence of manufacture in the U.S.
  - Perform due diligence to verify documentary evidence
  - Maintain files of the documentation

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## State and EPA Role



- **Effectively manage ARRA funds**
- **Provide training and guidance to systems**
- **Help systems get necessary information and answers to questions**
- **Oversee and verify system compliance with Buy American**

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## Audits and Site Inspections



- System, State, and EPA may schedule random checks of materials at job site (ensure no substitution)
- Audits (by EPA OIG, GAO) may uncover fraudulent statements by engineering firms, construction contractors, or manufacturers

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## On-Site Inspections



- Inspection of records
- Visual inspection of a selection of products
- Check materials at job site and documentation of origin
- Note any BA compliance issues/concerns (and corresponding resolutions, if applicable)

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# Common Questions



## AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)

# Which “Buy American”



- The manufacturer states that he’s compliant with the Buy American Act. Is that adequate documentation?
  - Buy American requirement of ARRA versus Buy American Act
    - ✦ ARRA requirement
      - Manufactured in U.S.
      - Components can be foreign
    - ✦ Buy American Act
      - Focused on % American components



## Trade Agreements



- **Is my project impacted by Trade Agreements?**
  - Not likely
    - ✦ ARRA requires Buy American requirements to be applied consistent with U.S. obligations under international agreements
    - ✦ Limited applicability to SRF Programs
    - ✦ Cities party to U.S. EC Exchange of Letters
      - Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville, San Antonio
    - ✦ Only impacts projects over \$7.4M



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## Canadian Trade Agreement



- **I understand that there was a recent decision regarding a Canadian trade agreement – will that decision apply to my project?**
  - Not this project, but possibly future projects
  - If there is another stimulus bill passed by Congress, it's possible that any Buy American requirements in this bill will be affected by this trade agreement
  - It would impact projects larger than \$7.4M



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## Foreign “Assembly”



- If a product is comprised of all U.S. produced materials, but those materials are assembled in Canada or Mexico, does that product comply with Buy American?
  - It depends on the nature of the work in the U.S. and the work in Canada
  - If it was manufactured in the U.S. and assembled outside the U.S., it is considered a domestic product
  - Where did “substantial transformation” take place?



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## Recordkeeping



- What records must the system keep regarding Buy American compliance, and how long must these records be retained?
  - Systems should retain bid documents, contracts, Buy American certification, and records of due diligence
  - Required period for record-keeping is not specified



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## Split Funding



- My project is only partly funded through ARRA; if I need a foreign product, can I fund it through my other sources?
  - The Buy American requirement applies to the “project” as a whole
  - If there are ARRA funds contributing to a project, the entire project must comply



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## Waivers After the Fact



- What if I realize after a product has been installed that I am unsure of its origin?
  - Request substantial transformation evaluation from manufacturer
  - If in doubt – request waiver
  - Corrective action decided on a case-by-case basis



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## OIG Audits



- What if an OIG audit finds that equipment used in the project does not comply with Buy American?
  - Does the contractor's or manufacturer's certification absolve the system from blame? No
  - Does the state bear any responsibility? No
  - What will the penalty be?
    - ✦ Variety of possible outcomes
    - ✦ OMB guidance
    - ✦ Intent is part of consideration regarding fraud



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## Additional Resources



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

## 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://www.epa.gov/water/eparecovery/index.html#NationalWaivers> has links to all EPA documents on waivers
- October 22, 2009 Substantial Transformation EPA Guidance (New Link)
  - [http://www.epa.gov/water/eparecovery/docs/10\\_23\\_09\\_Substantial\\_Transformation\\_memo\\_Final.pdf](http://www.epa.gov/water/eparecovery/docs/10_23_09_Substantial_Transformation_memo_Final.pdf)
- November 16, 2009 – EPA Buy American Questions and Answers – Part 2 (Substantial Transformation) (New Link)
  - [http://www.epa.gov/water/eparecovery/docs/2009\\_11\\_18\\_BA\\_Q-As\\_Part2-final.pdf](http://www.epa.gov/water/eparecovery/docs/2009_11_18_BA_Q-As_Part2-final.pdf)

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## Questions?



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## Definitions



- **Manufactured Good:** a good brought to the construction site for incorporation into the building or work that has been...
  - × 1. Processed into a specific form and shape; or
  - × 2. Combined with other raw material to create a material that has different properties than the properties of the individual raw materials
- Note: There is no requirement with regard to the origin of components or subcomponents in manufactured goods, as long as the manufacture of the goods occurs in the U.S.

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## Definitions



- **Reasonably Available Quantity:** 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.
- **Satisfactory Quality:** The quality of iron, steel, or the relevant manufactured good as specified in the project plans and designs.

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