

STATE OF NEW HAMPSHIRE  
**American Recovery  
and Reinvestment Act**



## **INFORMATION PACKET FOR July 16, 2009 ARRA MEETING**

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STATE OF NEW HAMPSHIRE  
**American Recovery  
and Reinvestment Act**



STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES

**NOTICE OF INFORMATIONAL MEETING FOR:  
CONSTRUCTION CONTRACT REQUIREMENTS UNDER  
AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA)**

**FOR THE**

**DRINKING WATER STATE REVOLVING FUND LOAN PROGRAM  
AND  
CLEAN WATER STATE REVOLVING LOAN PROGRAM**

**When: Thursday, July 16, 2009, 9 am to Noon**

**Where: DES Auditorium, 29 Hazen Drive, Concord, New Hampshire**

**Who Should Attend: Public, Private and Non-Profit entities and their  
consultants with construction projects funded by ARRA**

DES will hold an informational meeting to discuss important American Recovery and Reinvestment Act requirements for construction contracts. Topics to be discussed include Buy American, Prevailing Wage Rates, Jobs Reporting, Debarment, Whistleblower Protection, Access to Records and other ARRA provisions. DES will also discuss the steps required to achieve ARRA requirements for timely construction and the overall status of the ARRA program for the Drinking Water and Clean Water State Revolving Funds in New Hampshire.

For further information regarding this meeting, please contact Paul Heirtzler by telephone at 603-271-2001 or by email at [paul.heirtzler@des.nh.gov](mailto:paul.heirtzler@des.nh.gov) or Stephen Roberts by telephone at 603-271-2980 or by email at [Stephen.roberts@des.nh.gov](mailto:Stephen.roberts@des.nh.gov).

# **Presentation Slides**

# ARRA REPORTING and CONTRACT REQUIREMENTS

A Meeting for Municipalities and  
Engineers



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## Requirements for ARRA Funds Sub-Recipients

- › DUNS Number\*\*
- › CCR Registration
- › Jobs Created/Retained\*\*
- › Compensation of Executives and Officers
- › Allow Access to Records\*
- › Whistleblower Protection\*
- › Limitation on Use of ARRA Funds
- › Buy American\*
- › Prevailing Wage\*
- › Debarment\*
- › \* Starred Items also apply to contractors
- › \*\* Starred Items also apply to A/E's



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## DUNS Number

- › What is a DUNS Number?
  - A 9 digit unique identifier for federal funds recipients
- › Who has to get one?
  - ARRA funds recipients (SRF sub-recipients) and prime contractors
- › How do you get one?
  - <http://fedgov.dnb.com/webform>
- › Instructions in Exhibit C of Loan Agreement



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## CCR Registration

- What is a CCR?
  - Central Contractor Registration
- Who has to register?
  - ARRA funds recipients (SRF sub-recipients)
- How do you register?
  - [www.ccr.gov](http://www.ccr.gov)
- Instructions in Exhibit C of Loan Agreement



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## Jobs Created/Retained Reporting

- Who has to report?
  - First tier sub-contractors to prime contractor, prime contractor to ARRA funds recipients (SRF sub-recipients), ARRA funds recipients to State SRF program
  - Also, A/Es to Sub-Recipients (>\$25,000)
- When are jobs reports made?
  - Monthly, within 7 days of end of month



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## Jobs Created v. Retained

- A job cannot be both created and retained
- Created Job:
  - A new position created and filled
  - An existing unfilled position that is filled
  - As a result of the Recovery Act
- Retained Job:
  - An existing position that would not have continued to be filled if not for the Recovery Act



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## Calculating Jobs

- > Number of jobs should be expressed in terms of "full time equivalents" (FTEs)
- > Number of FTEs to report = Total hours worked in jobs created and retained / Number of hours in a full time schedule
- > Full time schedule assumes:
  - 2080 work hours per year
  - 520 work hours per quarter
  - Total hours reported may include paid leave



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## Reporting Compensation of Executives and Officers

- > Who must report?
  - ARRA funds recipients (SRF sub-recipients)
- > Report what?
  - Names and total compensation of five most highly compensated executives and officers
- > But, only if:
  - Recipient received 80% or more of annual gross revenue in federal awards, and
  - Recipient received \$25 million or more in annual gross revenue in federal awards, and
  - Public does not have easy access to the information



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## Access to Records

- > For any project using ARRA funds, the Comptroller General or authorized representative shall have right to:
  - examine all project records
  - interview officers or employees
- > Who does this apply to:
  - ARRA funds recipients (SRF sub-recipients)
  - Contractors
  - Subcontractors



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## Whistleblower Protection

- > ARRA Section 1553 accords certain protections and remedies for state, local and contractor employee whistleblowers
- > Each contract for ARRA projects must contain reference to this provision



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## Limitation on Use of Funds

- > No ARRA funds may be used for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool



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## Prevailing Wage (Davis Bacon) Requirement

- > What is it?
  - Wage rates established by the U.S. Department of Labor for different work functions
- > Where does it apply?
  - All ARRA funded projects
- > Where can you find them?
  - [www.wdol.gov](http://www.wdol.gov)



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## Prevailing Wage (Davis Bacon) Requirement (Continued)

- Who is responsible?
  - Sub-Recipients are responsible for including latest wage determination in contract documents for bidding
  - Contractors and subcontractors are responsible for using the prevailing wage rates in their bids and paying their employees the prevailing wage rates
  - Sub-Recipients are responsible for obtaining and checking the contractors certified payroll weekly to determine compliance with this provision. Contractor certification also required.
  - Sub-Recipients forward payrolls and certification to State SRF



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## Debarment

- The Sub-Recipient shall not knowingly award a construction contract to a contractor that has been debarred or suspended by the federal government
- How do you know if a bidder has been debarred or suspended?
  - Check the contractor's name against the "Excluded Parties List" at [www.epls.gov](http://www.epls.gov)
- Contractors must check on its subcontractors



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## Contact Information

- Paul Heitzler
- 603-271-2001
- [Paul.Heitzler@des.nh.gov](mailto:Paul.Heitzler@des.nh.gov)

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Buy American

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## Overview of ARRA Buy American Provisions

Jordan Dorfman  
US EPA

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## ARRA Includes Buy American Requirement

- Section 1605(a) of ARRA requires assistance recipients to use domestic iron, steel, and manufactured goods that are produced in the U.S. This is the expected means of compliance.
- Section 1605(b) provides for a waiver of this requirement under circumstances identified and limited in that provision
- ARRA applies to "all I/S/MG used in a project," so entire project must comply with §1605 if any ARRA funds are used

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## Complying with §1605(a): SRF Assistance Recipients Must Make Efforts to Buy American

- Must in good faith (where applicable, design the project) and solicit bids for construction with American made iron, steel, and manufactured goods (I/S/MG)
- Should include ARRA's Buy American terms in any RFPs or bid solicitations

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Assistance Agreement Recipients Comply With Buy American Requirements Through One or a Combination of 4 Pathways

1. Exclusively procure iron, steel, and manufactured goods that meet the definition of being "manufactured in the United States" (This is the presumed pathway of compliance)
2. Any non-domestically manufactured items are covered by a categorical (national) waiver
3. Project specific waiver for any non-domestically manufactured items not covered by a categorical (national) waiver
4. In very limited circumstances, an international trade agreement may apply

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Definition of Manufactured Good

- "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"
- "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."  
~OMB Guidance [§176.140, 176.70(a)(2)(ii)]
- Recipients, in conjunction with consultants, contractors, and others, are responsible to decide if products are American-made per §1605(a)

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"Substantial Transformation"

- "In the case of 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."
  - This OMB Guidance term [§176.160] for international agreements applies to few SRF recipients
  - While term is binding on few if any SRF recipients, EPA believes it provides important guidance on this issue, rooted in well-established legal interpretations

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## Basic Principles in "Substantial Transformation" Analysis

- Determination of whether "substantial transformation" has occurred is always case-by-case
- No good "satisfies substantial transformation test by ... having merely undergone '[a] simple combining or packaging operation.'"
- "Assembly operations which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation."

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## Questions for Determining Whether Substantial Transformation Has Occurred in the U.S.

Question	Yes	No
1. Were all of the components of the manufactured good manufactured in the United States, and were all of the components assembled into the final product in the U.S.? (If the answer is yes, then this is clearly manufactured in the U.S., and the inquiry is complete)	<input type="checkbox"/>	<input type="checkbox"/>
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component) [Questions 2.a., 2.b., and 2.c. shown on next slide]	<input type="checkbox"/>	<input type="checkbox"/>
3. Was(were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful? [Questions 3.a., 3.b., 3.c., 3.d., and 3.e. shown on later slide]	<input type="checkbox"/>	<input type="checkbox"/>

Substantial transformation has occurred in the U.S. if answer yes to either Question 1, 2, or 3

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## To Answer Question 2, Ask the Following:

Question	Yes	No
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)	√	<input type="checkbox"/>
a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?	<input type="checkbox"/>	<input type="checkbox"/>
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?	<input type="checkbox"/>	<input type="checkbox"/>
c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?	√	<input type="checkbox"/>

If answer yes to any of 2a, 2b, or 2c, then answer to Question 2 is yes (checked answers are for illustration only)

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**To Answer Question 3, Ask the Following:**

Question	Yes	No
3. Was(/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?	√	
a. Did the process(es) take a substantial amount of time?	√	
b. Was(/were) the process(es) costly?		
c. Did the process(es) require particular high level skills?	√	
d. Did the process(es) require a number of different operations?		
e. Was substantial value added in the process(es)?		

If answer yes to at least two of 3a, 3b, 3c, 3d, or 3e, then answer to Question 3 is yes (checked answers are for illustration only)

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**Established Interpretations Disqualify Some Actions Under Any Circumstances**

- Cosmetic or surface changes (e.g., painting, lacquering, or cleaning)
- Simply cutting a material to length or width (e.g., cutting steel pipe to particular length)
- If all pieces are shipped by one company with the intent of providing all components necessary to be assembled into a functional good (e.g., pump station)

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**Assistance Recipients: Key Occasions to Apply ST Analysis**

- To decide in unclear (marginal) cases, recipients can ask: *would we be confident to use information from the analysis to document our BA compliance to the State or EPA that this good is U.S.-produced?*
- If have reasonable doubt, and U.S.-made good meeting recipient's needs is not available, then should apply for waiver
- For recipients considering use of goods claimed to be U.S.-made
  - If a competing manufacturer, bidder or supplier protests such claim, can ask competitors to frame any concerns in the form of specific responses to these questions
  - Responses could provide a resource that recipient can consider

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### **"Substantial Transformation" May Occur On-site IF...**

- Manufacturer brings all components of the good to the site and does so in normal course of business
  - Ensures that this is not an attempt to game Buy American rules
- Manufacturer does all the work onsite
  - May use sub for this only if manufacturer does so already in the normal course of business
- Answered yes to Questions 1, 2, or 3 above (i.e., found substantial transformation occurs)
  - Case is strongest if the transformative work must be done onsite (e.g., work includes adjustments, calibration, etc required to meet performance spec)

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### **Categorical/Nationwide Waivers**

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### **Refinancing Waiver**

- Basis: Public Interest
- For projects with debt obligations incurred on or after October 1, 2008 and prior to February 17, 2009 that are refinanced by the SRF using ARRA funds
- Justified by specific ARRA provision that makes eligible projects initially financed within an "in anticipation of ARRA" window

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## Refinancing Waiver, continued

- Congressionally-defined window:
  - On or after Oct. 1 = "in anticipation of ARRA"
  - Prior to Feb. 17 = in good faith and without fair notice as to the existence and statutory scope of any Buy American requirement
- To qualify, must have "debt obligations ... incurred" within the window
  - Does not include self-financing or incurring costs alone
  - Might include certain other types of funding agreements if the commitments of both parties are tantamount to a "debt obligation incurred"

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## Bid Waiver

- Basis: Public Interest
- For projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009
- To have waiver cover a project, potential assistance recipients must also show verifiable basis on which they believed it was reasonable and prudent to solicit bids for these projects
- Verifiable basis must show solicitation undertaken in specific anticipation of timely funding (from ARRA or other source)

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## Bid Waiver, continued

- Rationale for applying both ends of ARRA window is the same as with refinancing
  - Begins when bid solicitations can properly be considered "in anticipation of ARRA"
  - Limited to time before ARRA signing gave fair notice as to Buy American requirement
- Thus, this waiver does not apply to projects that solicited bids after ARRA signing on February 17
- Waiver is intended to recognize appropriateness of proactive steps States took to encourage SRF projects' readiness for expeditious construction

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**De Minimis Waiver**

- Basis: Public Interest
- For *de minimis* incidental components of projects, where they comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project, and country of origin is unknown
  - 5% of total materials cost determined from research conducted by EPA

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**De Minimis Waiver, continued**

- Assistance recipients would determine and retain relevant documentation
- Assistance recipients would include in reports to the State:
  - Types/categories of items to which this waiver is applied
  - Total cost for each type
  - Calculations of the total cost of materials used to determine the dollar value of goods to which they have applied the waiver

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**De Minimis Waiver, continued**

- The waiver text identifies the following as characteristics needed for items to be covered:
  - "Country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement"
  - "Use of literally thousands of miscellaneous... components" (different items of miscellaneous character)
  - "Generally low cost"
- "Not readily identifiable" is essential: "EPA has found that it would be inconsistent with the public interest...to require that the national origins of these components be identified"

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**If ARRA-Funded Project Is Covered By Categorical Waiver...**

- Do not need to apply for an individual waiver
- Documentation that a project is covered by a categorical waiver *must include all elements required by the waiver*
- Maintain documents in project files

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**Project Specific Waivers**

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**ARRA Provides Three Bases on Which a Project Specific Waiver May be Granted by EPA**

- Applying Buy American is inconsistent with public interest (§1605(b)(1))
- U.S. iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
- Inclusion of U.S. iron, steel, and manufactured goods will increase cost of overall project by > 25% (§1605(b)(3))

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**EPA Anticipates That Many Waiver Applications May Be Based Upon "Availability" Considerations**

- U.S. iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
  - The Agency's April 28, 2009 memorandum defines "reasonably available quantity" as:
    - "Quantity 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."

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**Possible Basis on Which an Assistance Agreement Recipient Could Apply for an "Availability" Waiver**

- An Assistance Agreement Recipient May Apply to EPA for a Waiver from the "Buy American" Requirements on the basis of "Availability" if, based upon the responses to a bid solicitation, the Assistance Agreement Recipient has determined that:
  - Only Non-U.S. Manufactured
    - Iron
    - Steel or
    - Manufactured Good(s)
  - Meet the Project Specifications (e.g.):
    - Performance
    - Physical Characteristics
    - Timeliness of Delivery

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**SRF Assistance Recipients Should:**

- Ensure that project design specifications do not unnecessarily preclude U.S.-produced iron/steel/manufactured goods (I/S/MG)
- Include bid solicitation provisions and enforceable contract provisions for timely delivery of I/S/MG to ensure expeditious construction under ARRA
- Should make clear bidders' responsibility to document in detail any unavailability of U.S.-produced I/S/MG in response to bid solicitation

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## Implementing Buy American at the Project Level

A step-by-step overview

Daniel Gonzalez-Kreisberg  
Northbridge Environmental

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### Goals:

- Explain how assistance recipients and architecture and engineering firms should alter their standard practices to comply with Buy American
- Ensure that appropriate documentation is kept to demonstrate compliance with Buy American

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### Handout

- "Buy American Roles and Required Documentation" is designed to explain the actions and documentation that are required of assistance recipients, A/E's, and construction contractors through the process
- Follow along!

Buy American Roles and Required Documentation			
	Assistance Recipient	Architecture/Engineering Firm	Construction Contractor
1. General	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>
2. Roles	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>
3. Documentation	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>	<ul style="list-style-type: none"> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> <li>Obtain and review the Buy American Act and Executive Order 13692.</li> </ul>

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### Players:

- Note: some large utilities or municipalities will have staff that are responsible for various tasks typically performed by architecture and engineering firms or construction contractors

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### Remember:

- It is best to use a bottom up approach to Buy American compliance
  - Will need certifications all the way down to vendors, suppliers, or manufacturers for each component procured for project
- Engage players well down the supply chain as early as possible

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### Remember:

- Buy American applies ONLY to iron, steel, and manufactured goods used during construction
- Raw materials (plywood, stone, concrete mix) and machines used during construction are NOT required to comply with Buy American

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### Waivers:

- Waivers are the **exception**
- You should apply for a waiver as soon as you know you will need one. You are encouraged to apply for a waiver before bidding occurs.

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### Waivers:

- **Never** assume that you will receive a waiver
  - EPA will be evaluating each waiver application on the information presented in the application
    - You will not receive a waiver for a design choice unless the choice was made based on performance parameters
  - If your waiver application is not accepted, you will not be able to include the foreign-made component that the waiver would have covered in your project, even if you use another, non-ARRA source to pay for the component
- **Always** have a design contingency in the case that a waiver is not received

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### 1-2. Planning, Design, and Specification

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1-2. Planning, Design, and Specification

- Key actions:
  - Identification of water quality problem
  - Evaluation of possible solutions
  - Identification of the best solution
  - Development of project plans and specs

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1-2. Planning, Design, and Specification

- Key actions:
  - Identification of water quality problem
  - Evaluation of possible solutions
  - Identification of the best solution
  - **Development of project plans and specs**
- Buy American generally applies to the design portion of planning and design

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1-2. Planning, Design, and Specification

- Incorporate Buy American:
  - If there are **several equally effective solutions** to your water quality problem, investigate the availability of American-made components for each solution
  - If **several specifications for a component are equally effective**, consider investigating the availability of American-made components and specifying parameters for which American-made components are available

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## 1-2. Planning, Design, and Specification

- Incorporate Buy American:
  - Make non-performance design choices that allow for the use of American made components
  - If the designs or specs require a good that requires a waiver, start developing waiver applications – **this will be the EXCEPTION!**

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## 1-2. Planning, Design, and Specification

Project Stage	Assistance Recipient	Architecture and Engineering Firm	Construction Contractors	
1. Planning and design	Active	• Work closely with A/E to plan included in design • Include list of goods and services that may be necessary for design to be met	• Make design decisions that are consistent in location • Identify components that will be supplied by domestic suppliers • Develop list of domestic suppliers	• N/A
	Documentation	• Prepare list of goods and services that are necessary for design to be met	• Prepare list of goods and services that are necessary for design to be met	• N/A
2. Preparation for Bidding	Active	• Work closely with A/E to plan included in design	• Select components that are consistent in location • Identify components that will be supplied by domestic suppliers	• Develop list of goods and services that are necessary for design to be met • Prepare list of goods and services that are necessary for design to be met
	Documentation	• N/A	• Prepare list of goods and services that are necessary for design to be met	• Prepare list of goods and services that are necessary for design to be met

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## 1-2. Planning, Design, and Specification

- What if my project's design or specs were developed before ARRA was law?
  - Buy American compliance is required: waivers will NOT be granted to avoid redesigning or re-specing
  - Either:
    - Redesign/re-spec with Buy American in mind
    - Develop waiver applications that show that decisions to include components that are not available domestically were made due to performance parameters

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### 3. Bidding Process

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- ### 3. Bidding Process
- Key actions:
    - Issuance of request for proposals (RFP), request for bid, letters of instruction and/or specifications
    - *Development of bid packages*
    - Evaluation of bid packages
    - Selection of winning bid package

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- ### 3. Bidding Process
- Incorporate Buy American:
    - Make sure request for proposal/bid is clear:
      - Definition and application of substantial transformation
      - Types of satisfactory documentation/certification
      - Requirement to submit request for clarification if contractors are unable to determine whether a specific American-made good would satisfy a spec
      - Directions for waivers and requirements for alternatives to all potential waivers

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### 3. Bidding Process

	Assistance Recipients	Architecture and Engineering Firms	Construction Contractors
Actions	<ul style="list-style-type: none"> <li>• Develop ITT request for proposal</li> <li>• With the contractor's expertise, identify the best possible bid team</li> <li>• Set up goals for the award</li> <li>• Be aware of Buy American domestic preference</li> <li>• Do not accept information if you believe it is not complete or accurate</li> <li>• Conduct a thorough review of the full proposal to verify compliance with the ITT</li> </ul>	<ul style="list-style-type: none"> <li>• Respond to all requests for clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Develop ITT, RFP, and proposal and provide them to the project</li> <li>• Identify potential winning bid and make appropriate adjustments to the proposal based on the ITT/RFI/RFQ</li> <li>• Submit responses for clarification of requests</li> <li>• Have a bid team with access to a bid team</li> </ul>
Documentation	<ul style="list-style-type: none"> <li>• Develop proposal to respond to request for proposal</li> </ul>	<ul style="list-style-type: none"> <li>• Provide proposal, clarification and bid responses to request for proposal</li> </ul>	<ul style="list-style-type: none"> <li>• Provide proposal in response to request for proposal</li> <li>• Information that is not to be shared with the bid team</li> </ul>

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### 3. Bidding Process

- What if my project went to bid before ARRA was law?
  - If your project went to bid between October 1, 2008 and February 17, 2009, you are exempt from Buy American under a national waiver
  - If your project went to bid prior to October 1, 2008, you must comply with Buy American, either by re-bidding or by amending the contract between assistance recipient and construction contractor

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### 4. Developing Construction Contracts

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## 4. Developing Contracts

- Points to remember:
  - Correctly written contracts ensure it is the vendor/manufacture's legal burden to identify the origin of components that are procured
  - Contracts should specify that prime contractors, other contractors, subcontractors, and vendors are all legally obligated to comply with Buy American
  - Assistance recipients are ultimately responsible for compliance with Buy American, including all substantial

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## 4. Developing Contracts

- Incorporate Buy American:
  - Require contractors and subcontractors to comply with Buy American by:
    - Imposing compliance certifications and indemnification requirements into all contracts
    - Specifying that all decisions of substantial transformation must be made by the assistance recipients
    - Requiring records of all decisions made as to the origin of manufactured goods be kept by contractors and forwarded to the assistance recipient
    - Requiring contractors to assist in the development of supporting materials for necessary waiver

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## 4. Developing Contracts

	Assistance Recipients	Architecture and Engineering Firms	Construction Contractors
4. Developing construction contracts	<ul style="list-style-type: none"> <li>• Incorporate compliance certifications and indemnification requirements into all contracts</li> <li>• Specify that all decisions of substantial transformation must be made by the assistance recipients</li> <li>• Require records of all decisions made as to the origin of manufactured goods be kept by contractors and forwarded to the assistance recipient</li> <li>• Require contractors to assist in the development of supporting materials for necessary waiver</li> </ul>		<ul style="list-style-type: none"> <li>• Incorporate compliance certifications and indemnification requirements into all contracts</li> </ul>
Documentation	• Support materials for all contracts		• Support materials for all contracts

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#### 4. Developing Contracts

- What if my project was under contract before ARRA was law, and I have not begun procurement?
  - If debt was incurred between October 1, 2008 and February 17, 2009, you are exempt from Buy American under a national waiver
  - Otherwise, you must amend your construction contracts to include Buy American

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#### 5. Procurement

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#### 5. Procurement

- Key actions:
  - Documenting the country of manufacture of ALL iron, steel, and manufactured goods
    - Exception: goods that are purchased under the de minimis waiver
  - Substantial transformation decisions
    - Documenting substantial transformation decisions
  - Development of any remaining required waiver applications – **this will be the EXCEPTION!**

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## 5. Procurement

- Points to remember during procurement:
  - Assistance recipients are responsible for all substantial transformation decisions
    - If any part of a component was not manufactured in the US entirely with American-made subparts, the decisions to purchase that component involves a substantial transformation decisions
  - Assistance recipients may allow construction contractors to make this decision, but the legal burden of this determination cannot be delegated

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## 5. Procurement

- Incorporate Buy American:
  - Make substantial transformation determinations

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## Handout

- "Determining Whether Substantial Transformation Occurred in the U.S." provides a framework for substantial transformation determinations

Determining Whether Substantial Transformation Occurred in the U.S.			
Question	Options	Yes/No/NA	Yes/No/NA
1. Is the component manufactured in the United States?	Yes/No/NA		
2. If the component is not manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
3. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
4. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
5. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
6. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
7. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
8. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
9. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		
10. If the component is not manufactured in the United States and is not a substantial transformation of a component manufactured in the United States, is it a substantial transformation of a component manufactured in the United States?	Yes/No/NA		

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## 5. Procurement

- Incorporate Buy American:
  - Make substantial transformation determinations
  - Collect documentation of country of origin for all manufactured goods
    - Exception: for goods that are purchased under the de minimis waiver, collect documentation that country of origin is not possible to determine during the procurement process
  - Do not purchase foreign made goods for which you are yet to have a waiver approved

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## 5. Procurement

- Examples of documentation that could prove a good is American-made:
  - Invoices
  - Shipping manifests
  - Bills of lading
  - Photographs of country of origin markings
  - Cut sheets

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## 5. Procurement

	Assistance Recipients	Architecture and Engineering Firms	Construction Contractors
Actions	<ul style="list-style-type: none"> <li>• Make substantial transformation determinations</li> <li>• Develop and submit waiver requests</li> </ul>	<ul style="list-style-type: none"> <li>• Obtain assistance requirements regarding what technical data is to be submitted on component procurement requirements</li> </ul>	<ul style="list-style-type: none"> <li>• All workers, materials and manufacturing processes covered by the information</li> <li>• Include assistance requests in all procurement requirements processes</li> <li>• Assist assistance recipients in obtaining their requirements</li> </ul>
5 Procurement Documentation	<ul style="list-style-type: none"> <li>• Country of origin determination for all goods and services purchased</li> <li>• Certification the source of origin information is reliable for component purchase under the de minimis waiver</li> <li>• Document information for purchase request where applicable</li> <li>• Submit waiver requests for national interest specific requirements</li> </ul>	<ul style="list-style-type: none"> <li>• Support requirements for project procurement of all goods</li> </ul>	<ul style="list-style-type: none"> <li>• Country of origin information for all goods, services and materials purchased</li> <li>• Certification that source of origin information is reliable for component procurement under the de minimis waiver</li> </ul>

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## 5. Procurement

- What if procurement was begun for my project before ARRA was law?
  - If debt was incurred between October 1, 2008 and February 17, 2009, you are exempt from Buy American under a national waiver
  - If debt was incurred prior to October 1, 2008, you are not eligible for ARRA funding
  - If you have incurred no debt, you are eligible for ARRA funding if you can prove that all procured components are American-made and you amend construction contracts to include Buy American going forward

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## Preparing a Buy American Waiver Request

Sarah McFate  
Northbridge Environmental

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Preparing a Buy American Waiver Request

## WAIVER REQUEST CONTENTS

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## Recommended Contents

- Waiver request
  - Cover letter with contact information
  - General product information
  - Justification for the waiver request
- Supporting documentation

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## General Product Information

- Description of the foreign and domestic iron, steel and manufactured goods for which the waiver is requested
  - Example: "APG-Neuros NX100-C060 (100 hp) and APG-Neuros NX150-C060 (150 hp) air bearing turbo aeration blowers plus custom Main Blower Control Panel (MBCP). See following web link to company and product descriptions: [www.neuros.com/02product/product\\_01.htm](http://www.neuros.com/02product/product_01.htm)"
- Unit of measure for the iron, steel, or manufactured goods in question
- Quantity of I/S/MG for which the waiver is requested
- Cost of the I/S/MG in question
- Time of delivery or availability
  - Example: "16 weeks following order confirmation, custom fabrication, not including installation or start-up. This lead time and availability will fall within our allowable construction project schedule"
- Location of the project
- Name and address of the proposed supplier

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## Justification for the Waiver Request

- A detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods cited
- Identify the basis for the waiver (may be more than one)
  - Applying Buy American is inconsistent with public interest (§1605(b)(1))
  - U.S. iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
  - Inclusion of U.S. iron, steel, and manufactured goods will increase cost of overall project by > 25% (§1605(b)(3))

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## Supporting Details

*Written description of the justification for the waiver request, supported by details such as:*

- Technical basis for selecting the product
- Process used to identify suppliers
- Process for evaluating suppliers
- Rationale for preferring the selected supplier
- Issues related to availability or quality of the products

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## Example: Winnepesaukee River Basin

- Waiver request included detailed description of process for identifying the selected product
  - Pre-bid selection committee of operations, maintenance, and technical staff developed a weighted checklist of critical specifications and manufacturer capabilities that they deemed most important for evaluating bids for high-efficiency turbo blowers
  - RFI published in newspaper and sent directly to four known blower manufacturers

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## Winnepesaukee Waiver

- Committee identified several priority/mandatory requirements for the selection of the blower
  - Blower package must meet State Fire Marshal certification requirements
  - Manufacturer must demonstrate experience with numerous installed blowers in U.S. WWTP
- Each committee member independently evaluated manufacturers' responses to the RFI using weighted scoring criteria
- Korean manufacturer was the only one to meet mandatory criteria, and scored highest on the evaluation checklist

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# **Special Requirements for ARRA Funded Projects**

## SPECIAL REQUIREMENTS FOR ARRA FUNDED PROJECTS

**1. DUNS Number.** The Loan Recipient must obtain a Data Universal Numbering System (DUNS) number for the purpose of registering with the Central Contractor Registry (CCR) and reporting data. A DUNS number may be obtained by visiting <http://fedgov.dnb.com/webform/> and providing the following information:

- a. Legal Name
- b. Tradestyle, Doing Business As (DBA), or other name by which your organization is commonly recognized
- c. Physical Address, City, State and Zip Code
- d. Mailing Address (if separate)
- e. Telephone Number
- f. Contact Name
- g. SIC Code (Line of Business)
- h. Number of Employees at your location
- i. Headquarters name and address (if there is a reporting relationship to a parent corporate entity)
- j. Is this a home-based business?

**2. CCR Registration.** The Loan Recipient must register with the Central Contractor Registry by visiting [www.ccr.gov](http://www.ccr.gov) and providing the following information:

- a. DUNS Number
- b. U.S. Federal Tax Identification Number
- c. Point of Contact
- d. Electronic Business Point of Contact
- e. Marketing Partner ID ( A Password)

**3. Jobs Created/Retained.** During the duration of the project, the Loan Recipient must report to the state (NHDES) by the seventh day of each month, the following jobs data for the previous month:

- a. An evaluation of the completion status of the project or activity;
- b. An estimate of the number of jobs created by the project or activity;
- c. The total number of jobs retained by the project or activity;
- d. The total number of jobs created by the project or activity;
- e. Total hours of employees working on the project or activity (subtotal by new-hire and existing);
- f. Total wages for employees working on the project or activity (subtotal by new-hire and existing);
- g. Detailed information on any first tier subcontracts awarded by the prime contractor.

The following definitions are provided for the purposes of this section:

**Contract:** means a mutually binding legal relationship obligating one party to provide materials or services (including construction) and the other to pay for them.

**First-tier subcontract:** means a subcontract awarded directly by a prime contractor whose contract is funded by the Recovery Act.

**Jobs created:** means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the ARRA. This definition covers only prime contractor positions established in the United States. The number shall be expressed as "full-time equivalent" (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each month.

**Jobs retained:** means an estimate of those previously existing filled positions that are retained as a result of funding by the ARRA. This definition covers only prime contractor positions established in the United States. The number shall be expressed as "full-time equivalent" (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each month.

**4. Compensation of Loan Recipient Executives and Officers.** Loan Recipients must provide to the state (NHDES), upon approval of the ARRA CWSRF loan agreement, the names and total compensation of its five most highly compensated executives and officers if all three of the following criteria apply:

- a. The Loan Recipient received 80 percent or more of its annual gross revenues in Federal awards; and
- b. The Loan Recipient received \$25,000,000 or more in annual gross revenues from Federal awards; and
- c. The public does not have access to information about the compensation of the Loan Recipient's senior executives and officers through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986 [26 USCS § 6104].

For purposes of this requirement:

**Total compensation:** means the cash and non-cash dollar value earned by the executive or officer during the Loan Recipient's past fiscal year of the following (for more information see 17 CFR 229.402(c)(2)) and includes:

- a. Salary and bonus.
- b. Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the

fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

- c. Earnings for services under non-equity incentive plans. Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
- d. Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
- e. Above-market earnings on deferred compensation which is not tax-qualified.
- f. Other compensation. For example, severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property if the value for the executive exceeds \$10,000.

**5. Access to Records.** The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, or of the State of New Hampshire shall have access to and the right to:

- a. Examine any of the Loan Recipient's, contractor's or any subcontractor's records that pertain to and involve transactions relating to this contract or a subcontract hereunder; and
- b. Interview any officer or employee regarding such transactions.
- c. The Loan Recipient shall insert paragraphs a. and b. in its contract with the Contractor and require the Contractor to insert paragraphs a. and b. in all subcontracts under this contract.

**6. Whistleblower Protection.** ARRA Section 1553 establishes whistleblower protections that apply to the Loan Recipient, Contractor, and any sub-contractor pursuant to this agreement. The Loan Recipient shall post notice of employees rights and remedies for whistleblower protections provided under ARRA Section 1553, insert this paragraph in its contract with the Contractor, and cause the Contractor to include the substance of this paragraph in all subcontracts.

**7. Limitation on Use of Funds.** The Loan Recipient agrees that in compliance with ARRA section 1604, none of the funds appropriated or otherwise made available in this Act may be used by any Loan Recipient for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.

**8. Buy American.** The Loan Recipient agrees to comply with the Buy American requirements of ARRA Section 1605. Unless this requirement has been waived by a competent federal authority pursuant to 2 CFR 176.140, none of the funds appropriated or otherwise made available by the American Recovery and Reinvestment 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.

When using funds appropriated under the ARRA, the definition of "domestic manufactured construction material" requires manufacture in the United States but does not include a requirement with regard to the origin of the components. Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material. There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

As used in this "Buy American" term and condition:

- a. Manufactured good means a good brought to the construction site for incorporation into the building or work that has been:
  - (i) Processed into a specific form and shape; or
  - (ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.
  
- b. Public building and public work means a public building of and a public work of a governmental entity. 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.
  
- c. Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

The "Buy American Act," 41 U.S.C.A. §10A-10D, exists as separate and additional legal limitation on the use of ARRA federal funds. The Loan Recipient agrees to use only domestic un-manufactured construction material, as required by the Buy American Act.

Loan Recipient agrees to include the following provision in each construction contract using ARRA funds:

"The Contractor acknowledges to and for the benefit of the State of New Hampshire 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 State 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 funded by this agreement 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 has been approved by federal authorities, 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 State. Notwithstanding any other provision of the Agreement, any failure to comply with this paragraph by the Contractor shall permit the State to recover as damages any loss, expense or cost (including without limitation attorney's fees) incurred by the State resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the State or any damages owed to the State)."

The Loan Recipient shall require the selected Contractor to provide the following certification before awarding the bid:

1. Identification of American-made Iron, Steel, and Manufactured Goods: Consistent with the terms of the bid solicitation and the provisions of ARRA Section 1605, the Contractor certifies that the bid on which this contract is based reflects the Contractor'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 Contractor certifies that all components contained in the bid solicitation that are American-made have been so identified, and the Contractor agrees that it will provide reasonable, sufficient, and timely verification to the State of the U.S. production of each component so identified.

Upon Substantial Completion of the project, the Loan Recipient shall require the Contractor to provide, and the Loan Recipient shall acknowledge, the Buy American Certification attached to this guidance as Attachment 1.

**9. Prevailing Wage Requirement.** The Loan Recipient agrees to comply with the Wage Rate Requirements in Section 1606 of ARRA.

In accordance with 2 C.F.R. §176.190, the standard Davis-Bacon contract clause as specified by 29 CFR §5.5(a) and set forth below shall be included in the bid package:

(9)(a) Minimum wages.

9(a)(i) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3) ), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than

those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

9(a)(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

9(a)(ii)(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division,

Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

9(a)(ii)(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

9(a)(ii)(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii)(B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

9(a)(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

9(a)(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

9(b) Withholding. The Loan Recipient shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other State contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper,

employed or working on the site of the work, all or part of the wages required by the contract, the Loan Recipient may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

9(c) Payrolls and basic records.

9(c)(i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

9(c)(ii)(A). The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the Loan Recipient. The Loan Recipient shall forward the payrolls to the State. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the Loan Recipient who shall forward the employee information to the State. If so requested, the Loan Recipient shall forward the payrolls and employee information to the Wage and Hour Division of the

Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, sponsor, or owner).

9(c)(2)(ii)(B). Each payroll submitted to the State by the Loan Recipient shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

9(c)(2)(ii)(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

9(c)(2)(ii)(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code or New Hampshire Revised Statutes Annotated Chapter 641.

9(c)(2)(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the State of New Hampshire or the federal Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the government agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause

the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

9(d) Apprentices and trainees--

9(d)(i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

9(d)(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be

greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

9(d)(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

9(e) Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

9(f) Subcontracts. The contractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

9(g) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

9(h) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

9(i) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the federal Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and

the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

9(j) Certification of eligibility.

9(j)(i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

9(j)(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

9(j)(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001 and New Hampshire RSA Chapter 641.

9(k) Contract Work Hours and Safety Standards Act. For any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States and the State of New Hampshire, for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.

(3) Withholding for unpaid wages and liquidated damages. The (*write in the name of the government agency or the loan or grant recipient*) shall upon its own action or upon written request of an authorized representative of the federal Department of Labor withhold or cause to be withheld, from any moneys payable



on account of work performed by the contractor or subcontractor under any such contract or any other contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

9(l) In any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the State of New Hampshire and the federal Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

**10. Debarment.** The Loan Recipient shall not knowingly award a construction contract to a contractor which has been debarred or suspended by the federal government. The Loan Recipient or its agent shall compare the names of contractors who have bid on the project against the searchable list in the federal "Excluded Parties List System" (EPLS) database, which can be found at <https://www.epls.gov/>.

Before visiting the database, your web browser must be configured to allow secure connections using TLS 1.0. Instructions are provided below:

### **Internet Explorer**

To enable TLS in Internet Explorer, perform the following steps:

1. Click the **Tools** drop down menu and select **Internet Options** to open the **Internet Options** dialog window.
2. Click the **Advanced** tab at the top of the **Internet Options** dialog window.
3. Scroll down to the end of the list of items and locate the item labeled "Use TLS".
4. Check the box next to "Use TLS 1.0".
5. Click the **OK** button at the bottom of the dialog window to confirm the change.
6. You should now be able to access the EPLS web site at <https://www.epls.gov/>.

**ARRA in the DW and  
CW SRF: Additional  
Sources of Information**

# ARRA in the CWSRF/DWSRF: Additional Sources of Information

July 16, 2009 New Hampshire ARRA Applicant/Contractor Workshop

## General Information

National CWSRF guidance, reference, and training material:

[www.epa.gov/recovery/](http://www.epa.gov/recovery/)

[www.epa.gov/water/eparecovery](http://www.epa.gov/water/eparecovery)

Clean Water SRF Specific:

[www.cwsrftraining.net/recovery](http://www.cwsrftraining.net/recovery)

[www.epa.gov/owm/cwfinance/cwsrf](http://www.epa.gov/owm/cwfinance/cwsrf)

Drinking Water SRF Specific:

<http://www.epa.gov/safewater/dwsrf/>

## Buy American

Waiver application submissions:

[region1waiver@epa.gov](mailto:region1waiver@epa.gov)

Federal Register:

[www.gpoaccess.gov/fr](http://www.gpoaccess.gov/fr)

## Davis Bacon Fair Wages

U.S. Department of Labor:

[www.wdol.gov](http://www.wdol.gov)

[www.dol.gov/esa/whd](http://www.dol.gov/esa/whd)

[www.dol.gov/esa/whd/recovery](http://www.dol.gov/esa/whd/recovery)

## Reporting

Central Contractor Registration:

[www.ccr.gov](http://www.ccr.gov)

D-U-N-S Number Registration:

[www.dnb.com/US/duns\\_update](http://www.dnb.com/US/duns_update)

## Oversight

U.S. EPA OIG's fraud and abuse hotline:

[www.epa.gov/oig/hotline/how2file.htm](http://www.epa.gov/oig/hotline/how2file.htm)

**Buy American and Bid  
Package Pricing**

# Buy American and Bid Package Pricing

Answer questions 1-3 to determine the appropriate pricing for bid and required documentation for a component:

1. What product would you procure under normal circumstances?	2. Characteristics of standard options	3. Additional determinations to make	Appropriate pricing for bid	Required documentation
A specific American-made product	N/A	N/A	Price the American-made product	None
One of several products	At least one American-made option	N/A	Price the American-made product	None
	Only foreign-made options	Determine whether there is any other American-made good that is analogous	If there is an analogous American-made product, price that American-made product	None
			If there is not an analogous American-made good, price a foreign-made product and note the need for a waiver	Collect certification from the producers of all analogous goods indicating that each is foreign-made
A specific foreign-made product			If there is no function difference between the foreign-made product and the American-made product with a similar function, price the American-made product	None
	Foreign-made option with proprietary design	Determine whether there are functional differences between the product and American-made products with similar function	If there is a function difference between the foreign-made product and the American-made product with similar function, price the foreign-made product	Outline the functional difference between that product and American-made products with similar functions
	Foreign-made option without proprietary	Determine whether there is an American-made	If there is an American-made version of the product, price	None

	design	version of the product	that American-made product If there is not an American-made version of the product, price the foreign-made product	Collect certifications of the unavailability of an American-made version from several vendors
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**Documentation Required  
for a Buy American  
Availability Waiver**



## Documentation Needed for an Availability Waiver Submittal

Waiver Request Submittal should include:

- Short description of the overall project
- Estimated/Projected cost of the overall project
- A description of the foreign made equipment
  - Unit of measure
  - Quantity
  - Price
  - Time of delivery when needed at construction / job site
  - Name and address of the manufacturer
- Justification for the use of the foreign equipment
- Domestic alternatives and why they do not meet proposed project specifications
  - Provide written documentation that you looked for US companies to buy from and either couldn't find any or couldn't find any that would be able to meet the project specifications
  - Provide written documentation from domestic manufacturer(s) that its product cannot meet the applicant's project specifications or written documentation detailing the level of effort conducted by applicant to seek a domestic supplier
  - Provide specifications from domestic supplier(s) demonstrating exactly how it (they) do not meet project specifications
- Technical specifications and requirements involved with the foreign made equipment
- Detailed drawings
- The foreign made equipment (preferred for the project)
- The domestic alternatives (that don't work)
- If there was any pre-bid selection committee or any other type of process that came up with a list of critical specifications or criteria for the product, you should detail that in the waiver request as well
- If the waiver is being request after construction has initiated you need to include a justification as to why it is being requested now and not earlier
- Provide written documentation that the Buy American provision was included in the bid documents and if it was not an explanation as to why

**Region I Process for a  
Buy American  
Availability/Cost Waiver**

### Region 1 Process for an Availability / Cost Waiver

- Receive a waiver request in our Region 1 Waiver mailbox
- Do an initial review to make sure that we feel that the package is complete
  - If an initial review indicates package is not complete, provide applicant with detailed response via email regarding deficiencies that need to be addressed
- Email the “complete” request package to Cadmus, the national EPA contractor
- Cadmus responds whether or not they have a complete package to be able to do a technical review; we usually receive this email the same day that the request package is submitted to them
- Within 3 business days, Cadmus will email the Region a technical assessment report
  - Gives project info such as name, type, location, products
  - Provides the basis on which the waiver is being requested
    - Availability
    - Cost
  - Summarizes the waiver request including background on the product
  - Provides an evaluation of the quality of the waiver request including whether or not they can confirm the information that the applicant provided
  - Basis for the review
  - If Cadmus determines that additional information is necessary, then this is conveyed back to the applicant by the Regional office for further re-evaluation, then the process essentially starts over again
- If the technical assessment confirms the applicant’s claim then the Region puts together documentation for concurrence from the Office of Administration and Resource Management (OARM) including:
  - Memo from the manager of the Municipal Assistance Unit (Jackie Leclair) through the chief of the Grants, Tribal, Community and Municipal Assistance Unit (Lois Adams) to the Acting Regional Administrator (Ira Leighton)
  - Regional checklist which is Appendix 2 of The April 28, 2009 EPA HQ Memorandum, “Implementation of Buy American provisions of P.L. 111-5, the ‘American Recovery and Reinvestment Act of 2009’ ”
  - Draft Federal Register Notice
  - Approval Memo which will be signed by the Acting Regional Administrator after we receive concurrence from OARM
  - Concurrence Memo which is from our Regional Administrator (who signs it) to Craig Hooks, who is the Assistant Administrator of OARM
- All of this documentation along with the technical assessment report from Cadmus and any documentation that the applicant sent in their original request is then sent down to OARM for concurrence
- OARM has 3 days to concur or ask for additional information (which could increase the review time)
- Once OARM concurs, all of this documentation is again taken through the ranks at the Region and signed by the Regional Administrator
  - The date that the RA signs is the official “waiver approval” date
- After the waiver has been signed by the RA, the waiver approval is published in the Federal Register

**Buy American Roles  
and Required  
Documentation**

# Buy American Roles and Required Documentation

Project Stage	Assistance Recipients	Architecture and Engineering Firms	Construction Contractors
<p>1. Planning and design</p> <p>Actions</p> <hr/> <p>Documentation</p>	<ul style="list-style-type: none"> <li>• Work closely with A/E's so BA is included in designs</li> <li>• Include language in contract with A/E's requiring A/E to provide information that may be necessary for design waivers</li> <li>• Information that may be included in a waiver application</li> </ul>	<ul style="list-style-type: none"> <li>• Make design decisions that take into account Buy American</li> <li>• Identify components that will likely require a waiver</li> <li>• Help assistance recipients begin the development of necessary waivers</li> <li>• Information that may be included in a waiver application</li> </ul>	<p>N/A</p> <p>N/A</p>
<p>2. Preparing for bidding</p> <p>Actions</p> <hr/> <p>Documentation</p>	<ul style="list-style-type: none"> <li>• Work closely with A/E's so BA is included in specs</li> </ul> <p>N/A</p>	<ul style="list-style-type: none"> <li>• Spec component parameters that are American-made</li> <li>• Identify components that will likely require a waiver</li> <li>• Records of design decisions made due to performance parameters</li> </ul>	<ul style="list-style-type: none"> <li>• Alert primary vendors you will be bidding on a project that requires American-made goods</li> <li>• Be on the lookout for new vendors, suppliers, or manufacturers of American-made goods</li> <li>• Lists and specifications of American-made goods provided by vendors, suppliers, or manufacturers</li> </ul>
<p>3. Bid process</p> <p>Actions</p>	<ul style="list-style-type: none"> <li>• Ensure RFP requires bidders to comply with Buy American and explains how substantial transformation is defined and applied and how the waiver process works</li> <li>• Be aware of Buy American during bid evaluation</li> <li>• Ask for more information if one bidder is significantly lower than others</li> <li>• Select a winning bidder that you are confident is capable of managing Buy American</li> </ul>	<ul style="list-style-type: none"> <li>• Respond to all requests for clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Identify all iron, steel, and manufactured goods necessary for the project</li> <li>• Estimate prices assuming American-made components if possible (see "Buy American and Bid Package Pricing")</li> <li>• Identify components that will likely require a waiver</li> <li>• Submit requests for clarification if necessary</li> <li>• Have a back-up plan in case a waiver is not received</li> </ul>

Documentation	<ul style="list-style-type: none"> <li>• Clarification provided in response to request for clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Reasoning behind clarification provided in response to requests for clarification</li> </ul>	<ul style="list-style-type: none"> <li>• Clarification received in response to request for clarification</li> <li>• Information that may be included in a waiver application</li> </ul>
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## Buy American Roles and Required Documentation

Project Stage	Assistance Recipients	Architecture and Engineering Firms	Construction Contractors
4. Developing construction contracts  Actions	<ul style="list-style-type: none"> <li>• Impose compliance certifications and indemnification requirements into all contracts</li> <li>• Specify that all decisions of substantial transformation be made by you</li> <li>• Require records be kept and forwarded of all decisions made as to the origin of goods</li> <li>• Require contractor assistance in the development of waiver applications</li> </ul>	N/A	<ul style="list-style-type: none"> <li>• Impose compliance certifications and indemnification requirements into all contracts</li> </ul>
Documentation  5. Procurement  Actions	<ul style="list-style-type: none"> <li>• Signed copies of all contracts</li> <li>• Make substantial transformation determinations</li> <li>• Develop and submit waiver applications</li> </ul>	N/A	<ul style="list-style-type: none"> <li>• Signed copies of all contracts</li> <li>• Ask vendors, suppliers, and manufacturers to provide country-of-manufacture information</li> <li>• Include assistance recipients in all substantial transformation decisions</li> <li>• Assist assistance recipients in developing waiver applications</li> </ul>

Documentation

- Country of origin information for all iron, steel, and manufactured goods
- Certification that country of origin information is not available for components purchased under the de minimis waiver
- Supporting information for project specific waiver applications
- Federal register citation for national and project specific waivers used

- Supporting information for project specific waiver applications

- Country of origin information for all iron, steel, and manufactured goods
- Certification that country of origin information is not available for components purchased under the de minimis waiver

**Determining Whether  
Substantial  
Transformation  
Occurred in the U.S.  
for Buy American**



# Determining Whether Substantial Transformation Occurred in the U.S.

Substantial transformation occurred in the U.S. if you are able to answer "Yes" to any of the following 3 questions:

Questions	Criteria	Sub questions	Yes	No
1. Were all of the components of the manufactured good manufactured in the United States, and were all of the components assembled into the final product in the U.S.?	Answer "Yes" to Question 1	N/A		
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)	Answer "Yes" to any of the three sub-questions	<p>a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?</p> <p>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?</p> <p>c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?</p>		
3. Was/(were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?	Answer "Yes" to any two of five sub-questions	<p>a. Did the process(es) take a substantial amount of time?</p> <p>b. Was/(were) the process(es) costly?</p> <p>c. Did the process(es) require particular high-level skills?</p> <p>d. Did the process(es) require a number of</p>		

		different operations?		
		e. Was substantial value added in the process(es)?		

# **Davis Bacon/Prevailing Wage Rates**

## Davis-Bacon and ARRA

- Section 1606 of the ARRA legislation:

"Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, all laborers and mechanics employed by contractors and sub contractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267; 5 U.S.C.App.) and section 3145 of title 40, United States Code."

- Davis-Bacon applies to all ARRA projects

- Davis-Bacon and Related Acts

- Applies for the entire project, not just the portion funded by ARRA

## Where to Find Prevailing Wages

- The Department of Labor (DOL) establishes prevailing wages for different work functions

- Based on work function and location

- Most water/sewer workers would fall under "Heavy Construction"

- Most contractors have experience with determining which category the workers fall under

- Updated periodically

- States are surveyed every 3 years

- New annual editions in February of each year

- Some updates during the year - pending revisions noted each week on <http://www.wdol.gov>

- Prevailing wage = base hourly rate + fringe

- Current wage rates can be found on [www.wdol.gov](http://www.wdol.gov)

## If There Is No Prevailing Wage for a Type of Work

- In some cases, DOL will not have a prevailing wage:
  - For some specialized projects, there may not exist wage determinations for certain workers.
  - Some locations may not have rate determinations
- DOL guidance: The federal agency providing financing must submit Standard Form 308 to DOL requesting a wage determination.
  - The state SRF program may submit this form
- DOL will take at least 30 days to review the request
- Ideally, obtain wage determination prior to bid opening

## Bid Preparation, Evaluation and Contracts

- Pre-bid:
  - Compare work that needs to be performed based on plans & specs with the existing wage determinations
    - Will a wage determination be necessary? Submit SF-308
- Bid advertisements/specifications:
  - Include language requiring Davis-Bacon in all bids received
  - Include the wage rates for different functions that will be required
- Bids received should include:
  - The number and types of workers that will be needed to construct the project
  - Wages being paid to all workers
- Contracts with contractors and subcontractors should include language conforming to D-B
- Preconstruction conferences and letters:
  - Recommended by DOL to further ensure that the contractor is aware of the wage requirements and reporting

## Language for Bid Solicitations and Contracts


- Following language is required to be included in bid solicitations and contracts (prime and subs)
  - “The successful bidder will be required to conform to all provisions of the federal Davis-Bacon and Related Acts which requires that all laborers and mechanics employed by contractors and subcontractors performing on contracts funded in whole or in part Recovery Act appropriations in excess of \$2,000 pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits, as determined by the Secretary of Labor, for corresponding classes of laborers and mechanics employed on similar projects in the area.”

## Changes in Wage Determinations

- Federal law: Wage determinations contain no expiration date and are updated as needed
    - If the wage determination changes while a bid is still open, the original wage determination holds
      - Exception: if the construction contract has not been awarded within 90 days of bid opening
    - Wage determinations remain effective for the life of the contract
      - Exception: the contracting officer chooses to extend the life of the contract after a new wage determination has been released
  - State law: Rates are determined on the date that the contract is awarded to the general contractor
    - Wage rates are updated on July 1
- ✓ *Best practice: use the highest rate at the time*

# At The Construction Site

- Federal law: requires a poster be placed in a visible location on the work site notifying workers that they are performing work covered by the Davis-Bacon Act
- State law: also requires the placement of posters notifying workers of wage requirements
- ✓ BOTH posters must be placed on the job site!
  - In all relevant languages



## Notice to Employees

Working on State or Municipal Financed Construction Projects?

You must not be paid less than the Davis-Bacon wage rate for each trade listed on the Wage Determination schedule posted with this notice.

Overtime rate applies when working over 8 hours a day or 40 hours a week.

Apprentice rates apply only to apprentices properly registered under approved State apprenticeship programs.

If you do not receive proper pay, you may file a complaint with the RI Department of Labor and Training and your claim will be investigated by the department. You may contact the Prevailing Wage Division at (401) 462-8380 for additional information. In addition, please note that RI Law 37-13-11 also provides for a private right of action to collect wages and benefits.

Rhode Island Department of Labor and Training  
300 N. Fosters Green  
111 North Fosters Green, Providence, RI 02903  
www.dlt.rhodeisland.gov

## EMPLOYEE RIGHTS UNDER THE DAVIS-BACON ACT

### FOR LABORERS AND MECHANICS EMPLOYED ON FEDERAL OR FEDERALLY ASSISTED CONSTRUCTION PROJECTS

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

<b>PREVAILING WAGE</b>	You must be paid not less than the wage rate listed in the Davis-Bacon Wage Determination posted with this notice for the work you perform.
<b>OVERTIME</b>	You must be paid at least one and one-half times your basic rate of pay for all hours worked over 40 in a work week.
<b>ENFORCEMENT</b>	Contract employers can be held liable to ensure you are paid properly and to pay any back wages and benefits you are owed. The U.S. Department of Labor, Office of Contract Administration and Dispute Resolution, can help you file a complaint if you are not being paid properly. A contractor who fails to pay you properly may be in violation of the law and may be subject to criminal penalties, fines and other consequences.
<b>APPRENTICES</b>	Apprentice rates apply only to apprentices on approved and approved State apprenticeship programs.
<b>PROPER PAY</b>	If you do not receive proper pay, you may file a complaint with the U.S. Department of Labor Wage and Hour Division.

FOR ADDITIONAL INFORMATION:  
**1-866-4-USWAGE**  
(1-866-487-0248) TDD: 1-877-255-5242  
[WWW.WAGEHOUR.DOL.GOV](http://WWW.WAGEHOUR.DOL.GOV)

## DERECHOS DEL EMPLEADO BAJO LA LEY DAVIS-BACON

### PARA OBREROS Y MECÁNICOS EMPLEADOS EN PROYECTOS DE CONSTRUCCIÓN FEDERAL O CON ASISTENCIA FEDERAL

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

<b>PREVAILING WAGE</b>	Usted debe ser pagado no menos que la tarifa de salario publicada en el Aviso de Tarifas de Salario para el trabajo que usted realiza.
<b>EXTRA TIEMPO</b>	Usted debe ser pagado al menos una y media veces su tarifa de salario básica por todas las horas trabajadas más allá de 40 horas a la semana.
<b>ENFORCEMENT</b>	Los empleadores pueden ser responsables de asegurar que usted sea pagado correctamente y de pagar cualquier salario y beneficios que le sean adeudados. El Departamento de Trabajo de los Estados Unidos, Oficina de Administración de Contratos y Resolución de Disputas, puede ayudarle a presentar una queja si no está siendo pagado correctamente. Un contratista que no pague correctamente puede estar violando la ley y puede estar sujeto a sanciones penales, multas y otras consecuencias.
<b>APPRENTICES</b>	Las tarifas de aprendiz solo se aplican a aprendices inscritos en programas de aprendizaje aprobados y aprobados por el Estado.
<b>PAGO CORRECTO</b>	Si usted no recibe el pago correcto, puede presentar una queja con el Departamento de Trabajo de los Estados Unidos.

FOR ADDITIONAL INFORMATION:  
**1-866-4-USWAGE**  
(1-866-487-0248) TDD: 1-877-255-5242  
[WWW.WAGEHOUR.DOL.GOV](http://WWW.WAGEHOUR.DOL.GOV)

## Reporting and Recordkeeping

- The contractor must submit two types of documentation on a WEEKLY basis
  1. Payroll records for the previous week for all workers at contractor and subcontractor levels
  2. Certification of compliance with Davis-Bacon wage laws
- ✓ **Materials are kept at the assistance recipient's**

## Who Are the Materials Sent To?

- Issue is still being worked out with DOL
- DOL regulations would indicate that materials would be sent to the entity in closest to the contractor
  - For SRF projects, this is the assistance recipient
- However, OMB ARRA guidance refers to D-B contract clauses that would tie this to EPA
  - DOL guidance on Davis-Bacon says this clause can be changed to meet agencies' needs
  - EPA does not contract for construction, so a change in DOL's clauses is necessary. EPA has drafted modified contract clauses
  - DOL is currently reviewing the modified clauses
  - Expect to hear any day now



## Weekly Payroll Records

- Federal Davis-Bacon law: Form WH-347 or similar to be completed weekly by all contractors and subcontractors for their workers
- General Law provides a form for weekly payroll record submission
  - State law does not allow for use of other state or federal forms
- Assume for now that payroll records are kept at the assistance recipient level
  - DOL review will hopefully confirm this soon

## Certification of Compliance

- Statements of Compliance is required to be submitted with the weekly payroll forms
  - State and federal statements almost identical
  - Federal language is on the back of WH-347



## Oversight – Assistance Recipient, cont'd

- The assistance recipient may also check for compliance periodically by:
  - Interviewing work site employees to ensure correctness of job classification, wages and fringe benefits
  - On-site inspections to check type of work performed, number/classification of workers and fulfillment of posting requirements
  - Payroll reviews
  - Reviewing inconsistencies
    - Reviewing complaints by workers
      - Notify US Dept of Labor and RI Dept of Labor and Training of any violations
- Some assistance recipients may choose to hire a contractor to provide D-B monitoring

## Oversight - Federal

- Davis-Bacon code (29 CFR 5.7) requires that semi-annual enforcement reports be sent to DOL
- Due April 30 and October 31 each year
- Details still being worked out, but assistant recipient should be prepared to submit information
- Look to other programs that require Davis-Bacon, which may have existing forms that can be used as an example

## EPA Inspector General Reviews

- EPA's Office of Inspector General will be conducting reviews of Davis-Bacon compliance
- May conduct unannounced inspections at the project site and at the office
  - Review payroll records for compliance with D-B