



The Buy American Waiver Process for ARRA

Additional Information on the EPA April 28, 2009
Buy American Provisions Guidance

May 19, 2009



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Presenters for Today...

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Additional Resources to Answer Questions...

- | | | |
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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.
- Section 1605(b) provides for a waiver of this requirement under circumstances identified and limited in that provision
- Section 1605(d) provides that this requirement must be implemented “consistent with U.S. obligations under international agreements”



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Waiver Determination

- Agency head may provide a waiver if finds that:
 - 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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Buy American Waiver Process

- SRF assistance recipient (or State on recipient's behalf) requests waiver
- State SRF Program may participate in preparation or review of requests
- 5-Step process for reviewing individual case waivers (where approved):
 1. Once Region finds request package is complete, initial technical review by contractor/evaluation by Regional office
 2. Coordination with Cross-Agency Working Group
 3. OARM Concurrence (after RA tentative approval)
 4. Signature by Regional Administrator
 5. Publication in Federal Register



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Assistance Recipient Requests Waiver



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SRF Assistance Recipients Should Seek First to Comply with §1605(a)

- 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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SRF Assistance Recipients Should If Necessary Address Waiver Potential Under §1605(b)

- Should be prepared to make case for a waiver that justifies any specification requiring non-US-produced iron/steel/manufactured goods (I/S/MG)
- Should make timely delivery to ensure expeditious construction a key (and optimally, an enforced) provision of bid solicitation and contract
- Should make clear bidders' responsibility to document in detail any unavailability of US-produced I/S/MG in response to bid solicitation



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SRF Assistance Recipients...

- To ensure compliance via §1605(a) or (b), should if needed plan to apply for a waiver
 - Prior to or after preparation of bid solicitation, if key I/S/MG are identified as not produced in sufficient quantities or adequate quality domestically
 - After bids are received and contractors or suppliers document that I/S/MG are not produced in sufficient quantities or adequate quality domestically
- Requests submitted after construction contract is signed must explain why request could not be timely submitted (OMB Guidance at §176.120)



Where to Submit

- Waiver applicants should submit requests accompanied by all necessary documentation to their Regional EPA Office
- Via:
 - Email at regionXwaiver@epa.gov
(X represents the region such as 1, 2, 3, etc)
- Region may ask for additional information if necessary; formal review period starts once Regional office finds request package is complete



State Participation

- §1605 applies ARRA-wide, and places authority for waivers solely with Federal agencies
- Thus State role is by definition optional
- States may work with assistance recipients to assist in preparation of requests and may submit requests on behalf of recipients, OR
- States may provide initial screening of waiver requests to assess sufficiency of information
 - Checklist provided in Appendix 1 of guidance
- Any State screening must be done consistent with timing of Regional waiver review process; consult with Regional office to maximize complementary effectiveness



Appendix 1: Information Checklist for Waiver Request

The purpose of this checklist is to ensure that all appropriate and necessary information is submitted to EPA. Please review this checklist carefully and provide all required information to EPA. This checklist is for informational purposes only and does not need to be included as part of a waiver application.

Items	✓	Notes
General <ul style="list-style-type: none"> • Waiver request includes the following information: <ul style="list-style-type: none"> – Description of the foreign and domestic construction materials – Unit of measure – Quantity – Price – Time of delivery or availability – Location of the construction project – Name and address of the proposed supplier – A detailed justification for the use of foreign construction materials • Waiver request was submitted according to the instructions in the memorandum • Assistance recipient made a good faith effort to solicit bids for domestic construction materials/manufactured goods, as demonstrated by language in requests for proposals, contracts, and communications with the prime contractor 		
Cost <ul style="list-style-type: none"> • Waiver request includes the following information: <ul style="list-style-type: none"> – Price Comparison Worksheet shown in Table 1 – Relevant excerpts from the bid documents used by the contractors to complete the Price Comparison Worksheet – Supporting documentation indicating that the contractor made a reasonable survey of the market, such as a description of the process for identifying suppliers and a list of contacted suppliers 		
Availability <ul style="list-style-type: none"> • Waiver request includes the following supporting documentation necessary to demonstrate the availability, quantity, and/or quality of the materials for which the waiver is requested: <ul style="list-style-type: none"> – Supplier information or pricing information from a reasonable number of domestic suppliers indicating availability/delivery date for construction materials – Documentation of the assistance recipient's efforts to find available domestic sources, such as a description of the process for identifying suppliers and a list of contacted suppliers. – Project schedule – Relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials • Waiver request includes a statement from the prime contractor confirming the non-availability of the domestic construction materials for which the waiver is sought • Has the State received other waiver requests for the materials described in this waiver request, for comparable projects? 		



5-Step Process for Reviewing Waivers



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5-Step Regional Process For Reviewing Individual Case Waivers (where approved)

1. Once Region finds request package is complete, initial technical review by contractor/evaluation by Regional office
2. Coordination with Cross-Agency Working Group
3. OARM Concurrence (after RA tentative approval)
4. Signature by Regional Administrator
5. Publication in Federal Register



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Step 1: Evaluation

- On receipt of waiver, Region determines if information in application, *if accurate*, would be sufficiently complete to properly and adequately document and justify basis for waiver
 - (See checklist in Appendix 2 of April 28 memo)
- If Region deems it necessary, may formally request additional information



Appendix 2: Regional Review Checklist for Waiver Request

Instructions: To be completed by the EPA Regional Office. Review all waiver requests using the questions in the checklist, and mark the appropriate box as Yes, No or N/A. Marks that fall inside the shaded boxes may be grounds for denying the waiver. If none of your review markings fall into a shaded box, the waiver is eligible for approval if it indicates that one or more of the following conditions applies to the domestic construction material for which the waiver is sought:

1. The iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.
2. The inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

Review Items	Yes	No	N/A	Comments
Cost				
• Does the waiver request include the following information?				
– Price Comparison Worksheet shown in Table 1				
– Relevant excerpts from the bid documents from foreign and domestic sources used to complete the Price Comparison Worksheet				
– A sufficient number of bid documents or pricing information from domestic sources to constitute a reasonable survey of the market				
• Does the Total Domestic Project Cost indicated in column (d) of the Price Comparison Worksheet exceed the Total Foreign Project Cost indicated in column (e) by more than 25% of the value in column (e)?				
Availability				
• Does the waiver request include supporting documentation sufficient to show the availability, quantity, and/or quality of the iron, steel, and manufactured goods for which the waiver is requested?				
– Supplier information or other documentation indicating availability/delivery date for construction materials				
– Project schedule				
– Relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials				
• Does supporting documentation provide sufficient evidence that the contractors made a reasonable effort to locate domestic suppliers of materials, such as a description of the process for identifying suppliers and a list of contacted suppliers?				
• Based on the materials delivery/availability date indicated in the supporting documentation, will the materials be unavailable when they are needed according to the project schedule? (By item, list schedule date and domestic delivery quote date or other relevant information)				
• Is the Region aware of any other evidence indicating the non-availability of the materials for which the waiver is requested?				
Examples include:				
– Multiple waiver requests for the materials described in this waiver request, for comparable projects in the same State				
– Multiple waiver requests for the materials described in this waiver request, for comparable projects in other States				
– Correspondence with construction trade associations indicating the non-availability of the construction materials				
• Are the available domestic construction materials indicated in the bid documents of inadequate quality compared those required by the project plans, specifications, and/or permits?				



Step 1: Evaluation, continued

- Once Region determines waiver request package is complete
 - 2 week target timeline for final action on waiver begins
 - Notifies and send package to Cadmus for technical review:
 - waivers@cadmusgroup.com
 - Cadmus will conduct consistent technical reviews of all waivers, in a timely manner
 - Notifies Cross-Agency Coordination Working Group for consultation
- Region processes analyses from both sources and develops staff determination on waiver for consideration by Regional Administrator



Step 1: Evaluation, continued: Cross-Agency Working Group

- Shall be notified of all waiver applications for consultation and coordination
- Members of working group from HQ and Regional Office SRF programs
- Functions:
 - Identify similar cases previously resolved or under current consideration in other Regions
 - Provide collaborative resolution of policy issues
 - Identify potential for national or other categorical waivers (for sectors, US geographic regions)



Step 3: Concurrence

- All waivers must obtain concurrence from AA/OARM before RA signature
- RA must give tentative approval or “concurrence” before sending to OARM
- Send waiver packages for concurrence to:
oarmwaivers@epa.gov
- 3 business days are given for OARM review



Step 3: Concurrence, continued

- OARM will route applications through:
 - Office of General Council
 - Office of International Affairs
 - To confirm no international agreements are involved in the request
 - Office of Grants and Debarment (OGD)/ Office of Administration and Resources Management (OARM)
 - For concurrence by AA/OARM



Step 4: Approval

- Once waiver is signed and dated by Regional Administrator, notify the State and the assistance recipient and then send copy of approval to both
- This should occur no later than 2 week target after receipt of complete waiver application
- Waiver is effective on the date signed by Regional Administrator



Step 5: Publication

- Publish notification of issuance of waiver in Federal Register
- Draft Federal Register notice provided in guidance
- Inform HQ so link to Federal Register notice can be posted on www.recovery.gov



Special Circumstances



Public Interest Waivers

- Where public interest waiver request is “case of first impression,” must consult with OW in review
 - Ensure national consistency, including through Cross-Agency Coordination Working Group
 - Ensure key factors identified in national discussions are incorporated into decision conditions
- Where conditions for a specific type of public interest waiver has been defined in national information, policy, or guidance
 - These conditions must be met
 - Elements of information, in scope and detail, must justify the request



Example: Refinancing Waiver

- Public interest waiver signed April 1, 2009
- National waiver which allows projects that incurred debt on or after October 1, 2009 and before February 17, 2009 to refinance using ARRA funds
- Questions regarding application of this waiver to certain situations must be addressed in consultation with OW (e.g., for certain States' binding commitments)



International Trade Agreements

- An international agreement may apply under §1605(d), as indicated by the table (at 77 FR 18457-18463) in OMB Guidance Appendix to Subpart B (April 23, 2009)
- Table includes (relevant to SRFs) only certain listed agencies of State governments and seven specific US cities, for specified international agreements
- For direct procurement by a listed entity using SRF ARRA funds, may procure iron, steel, or manufactured goods from country which is a party to the international agreement to which listed entity is also a party
- Compliance via §1605(d) appears to be available (i.e., to apply) only to projects of \$7,443,000 or more estimated value - OMB Guidance §176.160(b)(1)(ii)



International Trade Agreements, cont'd

- §1605(d) may apply to a particular, multiple, or all components of project – depends on entity, items procured, and specific international agreements to which that listed entity is a party
- To determine if they are covered, recipients must consult legal counsel for listed entity, as to whether the recipient is included, and whether the scope of the listed agreement applies to procurement of a particular item or items
- Covered recipients may use it to demonstrate compliance with §1605 to the State, and, as necessary, EPA, for the covered item(s).
- Not a waiver – is compliance via §1605(d)



Split Funding



Using ARRA and non-ARRA Funding in a Project

- ARRA applies to “all I/S/MG used in a project,” so entire project must comply with §1605 if any ARRA funds used
- What is a “project”?
 - Analysis used by DOL since 1978 for Davis-Bacon
 - “All construction necessary to complete work so long as all contracts and assistance agreements are closely related in purpose, time, and place”
- Precludes intentional splitting of ARRA projects to avoid § 1605 coverage on part of a project
 - Allows major activities to be separate projects if clearly undertaken in distinct, segregable phases with separate contracts or assistance agreements



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For More Information

- www.epa.gov/recovery/
- www.epa.gov/safewater/dwsrf/
- www.epa.gov/owm/cwfinance/cwsrf/index.htm
- www.epa.gov/water/eparecovery/docs/04-29-2009_BA_waiver_process_final.pdf



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