



# Buy American Provisions For ARRA: Manufactured Goods and Substantial Transformation

[BA Webcast #3](#)

June 11, 2009



Preliminary Internal Staff Level Discussion Document

1

## Presenters for Today...

- Phil Metzger, Attorney-Advisor, DWSRF Team, US EPA
- Jordan Dorfman, Attorney-Advisor, CWSRF Team, US EPA

## Additional Resources to Answer Questions...

- Elizabeth Corr – Assoc Division Director, DWPD/OGWDW, US EPA
- Peter Shanaghan – Team Leader, DWSRF Team, US EPA
- Kiri Kroner – Program Analyst, DWSRF Team, US EPA



Preliminary Internal Staff Level Discussion Document

2

## Buy American Provisions Background



Preliminary Internal Staff Level Discussion Document

3

## 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 US. 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
- Section 1605(d) provides that this requirement must be implemented “consistent with US obligations under international agreements”



Preliminary Internal Staff Level Discussion Document

4

## **Key Issue: Has a Good Been “Manufactured” in the U.S.?**



Preliminary Internal Staff Level Discussion Document

5

## **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)]<sub>6</sub>

Preliminary Internal Staff Level Discussion Document

## “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



Preliminary Internal Staff Level Discussion Document

7

## Applying “Substantial Transformation” Analysis: Assistance Recipients’ Role

- SRF assistance recipients are responsible to comply with §1605 (applies to “project”)
- Statutory expectation is that recipients will Buy American (§1605(a)) to comply – in OMB Guidance, waivers are “exceptions”
- Recipients, in conjunction with consultants, contractors, and others, are responsible to decide if products are US-made per §1605(a)



Preliminary Internal Staff Level Discussion Document

8

## Applying “Substantial Transformation” Analysis: EPA Role

- EPA does not make “substantial transformation” (ST) or US/foreign origin determinations
- EPA §1605 role is to review waiver requests when recipient believes it cannot comply by buying US-made good, and do compliance oversight



Preliminary Internal Staff Level Discussion Document

9

## Summary of State Buy American Role

- Ensure recipients have adequate documentation in project files to demonstrate all applicable means of BA compliance
  - For US-made goods: verification of US production (as stated in sample certification point 2 in EPA 4/28/09 BA memo)
  - For items covered by a categorical (e.g., nationwide) waiver: the documentation must include all elements specified in and required by the waiver for an item or project to be covered
  - For any component that has been granted a waiver: FR notice of project specific waiver, and/or
  - For items subject to an international agreement
    - Communication from applicable state or municipal party to the agreement that recipient and item(s) are covered, and
    - Verification of country of origin



Preliminary Internal Staff Level Discussion Document

10

## Substantial Transformation Concerns For States

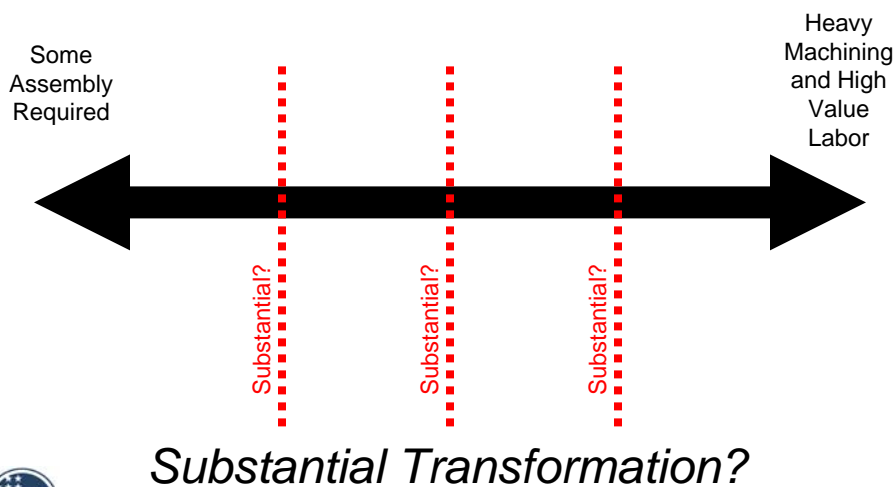
- Be cautious regarding recipient requests to consult on substantial transformation
  - States have direct responsibility to ensure BA compliance of recipients
  - Recognize tension between State role for compliance and discretionary provision of BA technical assistance
  - Don't advise unless you have sufficient information to be confident that recipient compliance is demonstrated



Preliminary Internal Staff Level Discussion Document

11

## Has “Manufacturing” Occurred in the United States?



Preliminary Internal Staff Level Discussion Document

12

## Basic Principles in “Substantial Transformation” Analysis

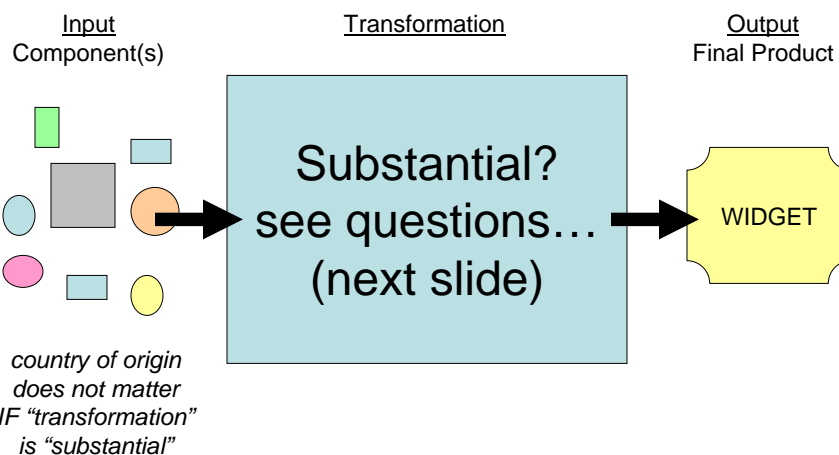
- Determination of whether “substantial transformation” has occurred is always case-by-case under questions/criteria
- No good “satisfies substantial transformation test by ... having merely undergone ‘[a] simple combining or packaging operation.’”
- “Assembly operations which are minimal or simple,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



Preliminary Internal Staff Level Discussion Document

13

## Transformative Process



Preliminary Internal Staff Level Discussion Document

14

## Questions for Determining Whether Substantial Transformation Has Occurred in the US

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 US? (If the answer is yes, then this is clearly manufactured in the US, and the inquiry is complete)		
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) <i>[Questions 2.a., 2.b., and 2.c. shown on next slide]</i>		
3. Was(/were) the process(es) performed in the US (including but not limited to assembly) complex and meaningful? <i>[Questions 3.a., 3.b., 3.c., 3.d, and 3.e. shown on later slide]</i>		



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





## To Answer Question 3, Ask the Following:

Question	Yes	No
3. Was(/were) the process(es) performed in the US (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)?		



## How to Apply the Substantial Transformation Questions

Substantial Transformation has occurred in the US if answer yes to either Question 1, 2, or 3

- If answer to any of 2a, 2b, or 2c is yes, then answer to Question 2 is yes
- If answer to at least two of 3a, 3b, 3c, 3d, or 3e is yes, then answer to Question 3 is yes



## 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)



## Can “Substantial Transformation” Occur On-site?



## Can “Substantial Transformation” Occur On-site?

- OMB “manufactured good” definition: a “good brought to the construction site” suggests that only construction occurs onsite, and test is as to origin of goods as they arrive onsite
- However, established interpretations of “substantial transformation” test provide that manufacturing occurs in the U.S. wherever the test is met in the U.S.
- Can reconcile these by maintaining the distinctions made in each test



Preliminary Internal Staff Level Discussion Document

21

## “Substantial Transformation” May Occur On-site IF...

- Manufacturer brings all components of the good to the site and always does so in normal course of business
  - Ensures that this is not an attempt to game BA 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)



Preliminary Internal Staff Level Discussion Document

22

## 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 State or EPA, that this good is US-produced?
- If have reasonable doubt, and US-made good meeting recipient's needs is not available, then should apply for waiver
- For recipients considering use of goods claimed to be US-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



Preliminary Internal Staff Level Discussion Document

23

## For More Information

- [www.epa.gov/recovery/](http://www.epa.gov/recovery/)
- [www.epa.gov/safewater/dwsrf/](http://www.epa.gov/safewater/dwsrf/)
- [www.epa.gov/owm/cwfinance/cwsrf/index.htm](http://www.epa.gov/owm/cwfinance/cwsrf/index.htm)
- [www.epa.gov/water/eparecovery/docs/04-29-2009\\_BA\\_waiver\\_process\\_final.pdf](http://www.epa.gov/water/eparecovery/docs/04-29-2009_BA_waiver_process_final.pdf)
- [www.epa.gov/oig/hotline/how2file.htm](http://www.epa.gov/oig/hotline/how2file.htm)



Preliminary Internal Staff Level Discussion Document

24