



## FACT SHEET Broadband Technology Opportunities Program Buy American Requirement

This document is intended to provide a general understanding of the Buy American requirement applicable to Federal financial assistance awards under the National Telecommunications and Information Administration's (NTIA) Broadband Technology Opportunities Program (BTOP). This guidance is not a substitute for the terms and conditions of specific BTOP awards, including the Buy American requirement set forth in the Department of Commerce (DOC) American Recovery and Reinvestment Act of 2009 (ARRA) Standard Award Terms and Conditions and in 2 C.F.R. part 176, Subpart B. Should this document and BTOP award terms differ, the terms and conditions of the BTOP award govern.

### Overview

BTOP recipients and subrecipients are subject to Section 1605 (the Buy American requirement). ARRA Section 1605(a) states:

None of the funds appropriated or otherwise made available by this Act [ARRA] 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.

Details about the Buy American requirement are available at 2 C.F.R. part 176, Subpart B and in the Department of Commerce (DOC) ARRA Standard Award Terms and Conditions incorporated into each BTOP award. Please note that all the recipients are encouraged, to the greatest extent possible, to purchase American made equipment and products under their BTOP awards. See DOC ARRA Standard Award Terms and Conditions ¶ M.03.

### Scope of the Buy American Requirement

This section provides guidance and important definitions that delineate the scope of the Buy American requirement.

#### Projects Funded by ARRA

The Buy American requirement applies only to projects funded with BTOP or other ARRA funds, but recipients may not segregate matching funds from ARRA funds to avoid application of the Buy American requirement. Matching funds used with ARRA funds in a project are subject to the Buy American requirement. Non-ARRA, non-matching funds can be leveraged in addition to ARRA funds without becoming subject to the Buy American requirement, if these funds are used for activities undertaken as distinct, segregable actions using separate financial assistance agreements or contracts and are not commingled with ARRA funds to fund any part of the same activity.

#### Construction, Alteration, Maintenance, or Repair of a Public Building or Public Work

The Buy American requirement applies to projects for the construction, alteration, maintenance, or repair of a public building or public work. Virtually any change made to a public building or public work is considered construction, alteration, maintenance, or repair that triggers the Buy American requirement.

A "public building" or "public work" is a public building or public work of a governmental entity. Governmental entities include the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; tribes; and multi-State, regional, or interstate entities that have governmental functions. Public buildings and public works can include, but are not limited to, fiber plant, radio towers, and buildings that house public computer centers. See 2 C.F.R. § 176.140(a)(2).





The crucial question is whether the project is for a public building or public work, not whether the entity performing the work is a private or governmental entity. Generally speaking, if a governmental entity owns or leases the building or work, it is a public building or work that would be subject to the Buy American requirement. However, title is not the only factor (*i.e.*, it is not dispositive). For example, when the governmental entity exercises significant functions with respect to the management or ownership of the building or work (*e.g.*, a public-private partnership), the Buy American requirement will generally apply. Determinations of what is a public building or public work must be made on a case-by-case basis by the recipient, in consultation with the recipient's BTOP Federal Program Officer as necessary.

### Iron, Steel, and Manufactured Goods

The Buy American requirement applies only to iron, steel, and manufactured goods brought to the construction site for incorporation into a public building or public work. Products other than iron and steel that do not fit the definition of manufactured goods are not covered. Similarly, services are not covered.

A manufactured good is a good brought to the construction site for incorporation into the building or work (*e.g.*, to become a permanent fixture of real property) that has been processed into a specific form and shape, or combined with another raw material to create a material that has different properties than the properties of the individual raw materials. See 2 C.F.R. § 176.140(a)(1). There is no requirement with regard to the origin of components or subcomponents of manufactured goods used in a project, as long as the manufacturing occurs in the United States. See 2 C.F.R. § 176.70(a)(2)(ii).

Examples:

- A crane used to lift items on a construction site would not be considered a manufactured good covered by the Buy American requirement because the crane is not incorporated into the building or public work.
- Personal computers, file servers, and networking hardware equipment are typically easily removable and not intended to be permanent fixtures. As a result, these items are not considered manufactured goods covered by the Buy American requirement. However, computer equipment that is built into a building, such as computer systems that are wired into the HVAC system or used to create a "smart building" could fall within the Buy American requirement.
- Cables and connections likely fall within the Buy American requirement because their installation makes them a permanent fixture in the building, similar to electrical wiring and outlets.
- Buried or aerial fiber included in a state-owned network is incorporated into a public work and, therefore, subject to the Buy American requirement.
- A radio antenna brought to the construction site for attachment to a governmental entity's tower would be subject to the Buy American requirement and must be produced in the United States (unless an exception to the Buy American requirement applies). The individual parts that go into that antenna, however, would be considered components or subcomponents and would not be subject to the Buy American requirement.

### Produced in the United States

All iron, steel, or manufactured goods used in an ARRA-funded project for the construction, alteration, maintenance, or repair of a public building or public work must be produced in the United States. NTIA interprets "produced in the United States" to mean that the production or manufacturing facility is physically located in the United States or its territories. The domicile of the parent company, subsidiary, distributor, or supplier is not relevant for determining compliance with the Buy American requirement.





Production in the United States of iron or steel requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. See 2 CFR § 176.70(a)(2)(i).

Production in the United States of a manufactured good containing foreign components requires that the good undergoes a substantial transformation in the United States. See 2 CFR § 176.160. Substantial transformation occurs when, as a result of manufacturing processes, a new and different article emerges, having a distinctive description, character, or use, which is different from that originally possessed by the article or material before being subject to the manufacturing process. The mere finishing or modification of a partially or nearly complete foreign product in the United States will not result in the substantial transformation of such product and it retains its character as a product of a foreign country. Design, planning, procurement, component production, or any other step prior to the process of physically bringing together the components into the final manufactured good used in (and incorporated into) the ARRA project is not part of the substantial transformation determination. 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. See 2 CFR § 176.70(a)(2)(ii).

The responsibility for determining whether parts are components of a larger manufactured good, and whether the good is produced in the United States, rests with the BTOP recipient. Recipients should ensure that all information and documentation that supports a substantial transformation determination is accurate and complete and is retained in the recipient's grant file for audit purposes or for review by BTOP (upon request).

### Subrecipients and Contractors

Recipients are required to include the Buy American requirement in all bid solicitations for construction, alteration, maintenance, or repair of a public building or public work projects using ARRA funds. All bid specifications, contracts, purchase orders, and other procurement documents must also include a Buy American provision that requires contractors and subcontractors to certify their compliance with the Buy American requirement and to provide information pertaining to the origin of iron, steel, and manufactured goods to BTOP upon request. Sample Buy American language for bid solicitations and contracts may be found in Appendix A of this document. If a BTOP recipient or subrecipient has already completed a bidding process, it is nonetheless responsible for ensuring that all contractors and subcontractors performing work on the project understand and comply with the Buy American requirement.

The Buy American requirement applies (i.e., "flows down") to purchases made by subrecipients and contractors in the same manner that it applies to purchases made by recipients. Therefore, contractors and subrecipients must include a Buy American provision in all solicitations, requests for proposals, subcontracts, and lower-tier subaward agreements. BTOP recipients are ultimately responsible for their subrecipients' and vendors' compliance with the Buy American requirement and should take whatever measures they deem necessary to ensure that their respective subrecipients and contractors comply with the Buy American requirement.

### Exceptions to the Buy American Requirement

In some cases, a recipient may believe that it is necessary to purchase iron, steel, or manufactured goods for use in its BTOP project that are not produced in the United States. Before considering whether any exceptions apply or whether to submit a waiver request, the recipient should carefully review the scope of the Buy American requirement, as discussed above.

### Limited Waiver Applicable to BTOP Broadband Equipment

The DOC has granted a limited waiver of the Buy American requirement with respect to certain broadband equipment used in projects funded by BTOP. See 74 Fed. Reg. 31,410 (July 1, 2009).





The waiver covers the following components of a modern broadband infrastructure network:

- *Broadband Switching Equipment:* Equipment necessary to establish a broadband communications path between two points.
- *Broadband Routing Equipment:* Equipment that routes data packets throughout a broadband network.
- *Broadband Transport Equipment:* Equipment for providing interconnection within the broadband provider's network.
- *Broadband Access Equipment:* Equipment facilitating the last mile connection to a broadband subscriber.
- *Broadband Customer Premises Equipment and End-User Devices:* End-user equipment that connects to a broadband network.
- *Billing/Operations Systems:* Equipment that is used to manage and operate a broadband network or offer a broadband service.

Please note that this list does NOT include fiber optic cables, coaxial cables, cell towers, and other facilities that are produced in the United States in sufficient quantities to be reasonably available as end products.

#### International Treaty Obligations

The Buy American requirement shall be applied in a manner consistent with the United States' obligations under international agreements. See ARRA § 1605(d). This means that the Buy American requirement does not apply where:

- The iron, steel, or manufactured goods used in the project are from a party to an applicable international agreement listed in Appendix B to 2 CFR part 176, Subpart B (e.g., the World Trade Organization Government Procurement Agreement);
- The recipient is required under an international agreement to treat the goods and services of that party the same as domestic goods and services; and
- The project has an estimated value of \$7,804,000 or more and is not specifically excluded from the application of the international agreement.

See 2 CFR §176.90(a). Note that it is not enough for the source of the goods to be a party to a relevant international agreement; the recipient must also be a party to the agreement.

See Appendix B of this document for a guide to the application of an International Treaty Obligation.

#### Case-by-Case Waiver Requests

For items covered by the Buy American requirement and not included in the above exceptions, recipients may seek waivers on a case-by-case basis. Waivers may be granted in the following situations:

- Inconsistent with Public Interest: The Secretary of Commerce determines that application of the Buy American requirement would be inconsistent with the public interest;
- Nonavailability: Iron, steel, or the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or





- **Unreasonable Cost:** Inclusion of United States iron, steel, and manufactured goods would increase the cost of the overall project (not just the cost of a specific item) by more than 25 percent.

See ARRA §1605(b)-(c) and 2 CFR § 176.80(a). The DOC ARRA Standard Award Terms and Conditions list the information that must be included in a waiver request based upon public interest, nonavailability, or unreasonable cost. See also 2 CFR §§ 176.110, 176.140(c)-(d), 176.160(c)-(d). If a recipient requests a waiver after obligating the associated funds, the recipient must explain why it could not request the waiver before making the obligation or why the need for the waiver otherwise was not reasonably foreseeable. See 2 CFR § 176.120(a). Waiver requests should be submitted as an Award Action Request (AAR). Approval of any waiver of the Buy American requirement, if granted, will be made in writing by the BTOP Grants Officer. In cases of approved waivers, BTOP will also publish a notice in the *Federal Register* consistent with the requirements set forth in 2 C.F.R. § 176.80(b).

## Frequently Asked Questions

### **A BTOP recipient is not sure if a product was produced in the United States. What should the recipient do to verify the manufacturing origins of the product?**

The recipient should contact the product's manufacturer, distributors, and suppliers to determine the country of origin. In addition, trade associations may be a good source of information. The recipient should also ensure that all information and documentation that supports its Buy American determination is accurate and complete, and is retained in the recipient's grant file for audit purposes or for review by BTOP upon request.

Note that the Buy American designations on the General Services Administration (GSA) procurement website do NOT apply to BTOP recipients because different regulations implement the Buy American requirement for Federal agencies' procurement.

### **A foreign broadband equipment manufacturer opens a manufacturing plant in the United States. The components and subcomponents of the manufactured good come from all over the world. Is the equipment compliant with the Buy American requirement?**

Possibly. There is no requirement with regard to the origin of components or subcomponents in manufactured goods, so long as the final manufacturing occurs in the United States. However, the work performed in the United States must constitute substantial transformation.

### **A company imports a manufactured good from abroad, repackages it at its facility in the United States, and sells it under a U.S. brand name. Is the product compliant with the Buy American requirement?**

No. For purposes of the Buy American requirement, the manufactured good must be produced in the United States. A repackaging or a simple assembly in the United States does not constitute a substantial transformation for purposes of characterizing the good as being manufactured in the United States.

### **What is the consequence of not complying with the Buy American requirement?**

Noncompliance with the Buy American requirement constitutes a violation of the terms and conditions of the BTOP recipient's award agreement. NTIA will review allegations of non-compliance brought against BTOP recipients, including subrecipients and contractors. If it finds evidence of non-compliance, NTIA may take one or more of the enforcement actions set forth in 2 C.F.R. § 176.130, which include, but are not limited to, requiring the recipient to remove and replace the foreign-sourced iron, steel, or manufactured goods at its own expense; reducing the amount of the award; withholding future award payments; or termination of the entire BTOP award. In cases of fraud, it can even lead to criminal investigation and prosecution.





### **How can a recipient document compliance with the Buy American requirement?**

Recipients are responsible for compliance with the Buy American requirement and for maintaining sufficient documentation supporting its determinations and actions under the BTOP award. Examples of documentation include: (1) language in documents that obligates subrecipients and/or contractors to comply with the Buy American provisions; (2) receipts for items produced domestically indicating such; (3) a documented certification from the vendor, distributor, supplier, or manufacturer verifying that the product was manufactured domestically; (4) detailed and verifiable information supporting the claim that the manufactured good has undergone substantial transformation in the United States; and/or (5) other reasonable documentation per the discretion of the recipient demonstrating compliance with the Buy American requirement. If there is any question whether items are compliant, a detailed letter from the manufacturer, including the manufacturing processes and location of manufacturing, should be obtained.

### **Additional Resources**

For additional guidance, please refer to the following resources:

- BTOP Limited Waiver of the Buy American Requirement, 74 Fed. Reg. 31410 (July 9, 2009), <http://www2.ntia.doc.gov/files/BroadbandBuyAmericaNotice7-1-09.pdf>.
- DOC ARRA Standard Terms and Conditions, [http://www2.ntia.doc.gov/files/award\\_docs/ARRA-DOC-Award-Terms-Final-5-20-09PDF.doc.pdf](http://www2.ntia.doc.gov/files/award_docs/ARRA-DOC-Award-Terms-Final-5-20-09PDF.doc.pdf).
- Office of Management and Budget Interim Final Guidance on Requirements for Implementing Sections 1512, 1605, and 1606 of ARRA for Financial Assistance Awards, 2 CFR Part 176 Subpart B, <http://www.gpo.gov/fdsys/pkg/CFR-2011-title2-vol1/pdf/CFR-2011-title2-vol1-part176-subpartB.pdf>.





## Appendix A: Sample Buy American Provision for Bid Solicitations and Contracts

BELOW IS A SAMPLE BUY AMERICAN PROVISION THAT COULD BE USED IN BID SOLICITATIONS AND CONTRACTS USING ARRA FUNDS. NTIA MAKES NO CLAIMS OR REPRESENTATIONS REGARDING THE ENFORCABILITY OF THIS PROVISION UNDER STATE OR LOCAL LAW. PARTIES WISHING TO USE THIS PROVISION SHOULD VERIFY ITS ENFORCEABILITY PRIOR TO USE.

The Contractor is required to comply with the "Buy American Provision" found in section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) and in the regulations promulgated thereunder at 2 C.F.R. part 176, Subpart B. The Recovery Act includes strict domestic source requirements for iron, steel, and manufactured goods used in construction, alteration, maintenance, or repair of public building or public work projects receiving Recovery Act funds.

*Definitions.* As used in this specification:

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

In accordance with section 1605 of the Recovery Act, all of the iron, steel, and manufactured goods used in the Project must be produced in the United States and the Contractor shall include this requirement in all bid specifications, contracts, purchase orders, and other procurement documents for goods and materials used in the Project.

A waiver of this requirement may be sought from the Commerce Department if at least one of the following conditions applies:

- Applying this subsection would be inconsistent with the public interest.
- 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.
- Inclusion of iron, steel, and manufactured goods produced in the United States will increase the overall project cost by more than 25 percent.

Specific procedures and documentation are required for each category of waiver. If the Secretary of Commerce determines that it is necessary to waive this provision, NTIA shall publish in the *Federal Register* a detailed written justification as to why the provision is being waived. In addition, the Secretary has already granted a limited waiver with respect to certain broadband equipment that will be used in BTOP projects.<sup>1</sup>

This section of the law shall be applied in a manner consistent with United States obligations under international agreements.

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<sup>1</sup> See 74 Fed. Reg. 31410 (July 1, 2009).





# BROADBANDUSA

CONNECTING AMERICA'S COMMUNITIES

The Contractor shall include the following Buy American Contract Clause in all bid specifications, contracts, purchase orders, and other procurement documents for goods and materials used for the Project to require: (i) all iron, steel, and manufactured goods being purchased for the Project be produced in the United States, and (ii) all suppliers providing iron, steel, or manufactured goods for the Project provide information related to the origin of these items to BTOP upon request.

Buy American Contract Clause:

In accordance with section 1605 of the American Recovery and Reinvestment Act, all of the iron, steel, and manufactured goods used in the Project must be produced in the United States. [[[Insert name of supplier or service provider]]] certifies that any of the iron, steel, and manufactured goods provided for use on the Project is produced in the United States. [[[Insert name of supplier or service provider]]] will provide information related to the origin of any such material to BTOP upon request.







**Appendix B: Guide to Identifying Exemptions Under International Agreement**

