American Recovery and Reinvestment Act (ARRA) Workshop

Buy American Provisions (Section 1605)

State Revolving Fund

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American Recovery and Reinvestment Act (ARRA) Workshop

BUY AMERICAN PROVISIONS (SECTION 1605)

STATE REVOLVING FUND

Note: This webcast is for informational purposes only. Any information provided does not supersede any provision of law, regulation, or grant condition.
Speakers for Today

- Tim Connor, CWSRF
- Joanne Hogan, DWSRF
- Kiri Kroner, DWSRF
Not Covered Today

• Some of the basics of the Buy American provisions (Section 1605)
• For more information on Buy American, please refer to the webcasts previously offered by EPA:
  o Buy American Waiver Process for ARRA
  o Buy American Provisions for ARRA: Additional Information
  o Buy American Provisions for ARRA: Manufactured Goods and Substantial Transformation
  o Complying with ARRA Buy American Provisions for SRF-Funded Projects
Part 1: General Topics

American Recovery & Reinvestment Act (ARRA)
Roles & Responsibilities

- **System**
  - Ultimately responsible for the project’s compliance
  - May request project-specific waiver or anticipatory oversight
  - Must maintain adequate documentation of compliance

- **Engineers & Contractors**
  - Help system ensure compliance; role should be defined by contracts
  - Collect adequate documentation and exercise due diligence

- **State & EPA**
  - Provide training, guidance, and information
  - Grant waivers (EPA only)
  - Oversee and verify project compliance
Iron and Steel

- Iron and steel must be completely U.S.-made
  - Includes all manufacturing processes
  - Exception: metallurgical processes involving refinement of steel additives do not need to happen in U.S.
  - Recycled: source of metal doesn’t matter as long as recycling takes place in U.S.
- Substantial transformation does not apply to iron and steel products
  - Rebar
  - I-beams
  - Unlined pipe
  - Fittings
Manufactured Goods

- Manufactured Good
  - Brought to the construction site for incorporation into the building or work
  - 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

- Manufacturing changes the character or use of a material and/or involves “complex and meaningful” work

- Examples
  - Pumps
  - UV disinfection equipment
  - Hydroelectric generators
  - Pipe (PVC, copper, and cement-lined)
Manufactured Goods

- Requirement is that the manufacturing occurs in the U.S.
  - No requirement with regard to the origin of components or subcomponents
  - No requirement that the company be U.S.-owned
- Some materials are excluded
Exclusions from Buy American Provisions

- Construction materials that are not permanently incorporated into the project
  - Example: material used for framing molds
- Equipment used during construction
  - Examples: backhoes and power tools
- Raw materials
  - Examples: concrete, asphalt, dirt, rock, fill, and wood lumber (but not plywood)
- Products covered by a waiver
Is your project affected by trade agreements?

- Not likely
- ARRA requires Buy American requirements to be applied consistent with U.S. obligations under international agreements
- Possible limited applicability to SRF Programs
  - 7 cities party to U.S. EC Exchange of Letters: Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville, and San Antonio
- Only impacts projects over $7.4M
What about the recent trade agreement with Canada?

- Canadian agreement would only apply to future SRF allocations or stimulus projects
  - No new stimulus
  - Buy American not part of 2010 base programs
- Latest agreement has no impact on ARRA projects
  - Disregard letters or manufacturer claims to the contrary
- For more information, see:

  http://water.epa.gov/aboutow/eparecovery/upload/US-Canada_Agreement_and_BA.pdf
Part 2: Documentation of Domestic Products

AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)
Documentation of U.S. Manufacturing

• Documentation types
  ○ Letters or certifications from manufacturers
  ○ Substantial transformation evaluation
    ▸ Both the completed checklist/matrix and supporting documentation
  ○ Secondary documentation:
    ▸ Bills of lading
    ▸ Shipping manifest & invoices
    ▸ Country-of-origin marking and labeling
    ▸ Photographs

• May need to use combination if any one form is not sufficient
Due Diligence

- Regardless of the documentation received, system (and consultant and contractor) must conduct rigorous due diligence
  - Investigate questionable statements - especially broad certifications
  - Document details of due diligence
Letters from Manufacturers

- **Look for:**
  - Product name and model number
  - Location(s) of manufacturing activities
  - Manufacturer contact information
  - Description of manufacturing process

- **Be wary of:**
  - Vague certifications
  - Claims that a product is covered by trade agreements
  - Claims that a product is covered under a waiver
  - Information on percentage of U.S.-made components
  - Any mention of assembly
Manufacturer/Supplier Documentation

- Broad statements are insufficient
  - “We comply with the Buy American requirement”
  - “All products are American”
  - “This project meets Buy American”
  - “We are certified Buy American compliant”
- There is no agency that “certifies” Buy American compliance
- Documentation should be specific about the location of the manufacturing (city and state)
Example of manufacturer certification form (Montana)
When to Dig Deeper

- When might a manufacturer’s statement warrant further investigation?
  - Product with complicated manufacturing processes
    - Pumps, SCADA, and control valves
  - Specialty products or known foreign manufacture
    - Membrane cassettes for membrane bioreactors
    - UV disinfection equipment
Next Steps for Digging Deeper

- Systems should:
  - Push manufacturer to complete substantial transformation matrix
  - Gather documentation that supports the affirmative answers in the substantial transformation matrix
Part 3: Substantial Transformation

American Recovery & Reinvestment Act (ARRA)
Substantial Transformation Definition

- A product is made in the U.S. if it “has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed.”
- Surface changes such as painting, lacquering, or cleaning are never considered substantial transformation.
Substantial Transformation

- Determined on a case-by-case basis
  - System makes the determination
  - Must obtain information about the processes used

- EPA will not make determinations, but may provide informal “anticipatory oversight” at the request of the utility

- Substantial transformation only applies to manufactured goods – not iron and steel
  - Congress differentiated between products made from iron and steel and all other products
Substantial Transformation Evaluation

When substantial transformation evaluation is required

- Checking boxes alone is not adequate
- A basic letter will not suffice
- Systems must document the process
  - Manufacturer should document “yes” responses with meaningful, informative, and specific technical descriptions of activities in the processes addressed
## Substantial Transformation Checklist

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

- A manufacturer of a generator claims that their product is substantially transformed in the U.S.
- The product includes a foreign-made engine, a U.S.-made generator, and other U.S.-made components.
- The imported engine and American components were incorporated into a containerized cogeneration system in the U.S.
- The system asks EPA for anticipatory oversight.
# Example Substantial Transformation Checklist

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1</strong></td>
<td>All components domestic</td>
<td>X</td>
</tr>
<tr>
<td><strong>2</strong></td>
<td>Change in character or use</td>
<td>X</td>
</tr>
<tr>
<td>a)</td>
<td>Physical and/or chemical properties</td>
<td>X</td>
</tr>
<tr>
<td>b)</td>
<td>Change from one use to another</td>
<td>X</td>
</tr>
<tr>
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<td>Multiple operations</td>
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</tr>
<tr>
<td>e)</td>
<td>Added value</td>
<td>X</td>
</tr>
</tbody>
</table>
Example Scenario – Question #1

- Question #1 – all components domestic?
  - No
  - The engine was manufactured in Europe
  - Other components were manufactured in the U.S.
Example Scenario – Question #2

- Question #2 – change in use?
  - No
  - The manufacturing activities in the U.S. do not change the physical/chemical properties or use of the product – the engine is still an engine
Example Scenario – Question #3

- Question #3 – complex and meaningful?
  - Manufacturer submitted documentation showing that the combining of components in the U.S. took:
    - 400+ hours
    - Significant expenditures
    - Highly skilled workers
    - Involved nine complex steps
Example Scenario – Summary

- The manufacturer answered “No” to Questions 1 and 2
- The manufacturer answered “Yes” to 4 of the 5 parts of Question 3
- This product would fulfill the requirements for substantial transformation
Examples of Manufacturing Activity Photo Documentation
Can Manufacturers Move to the U.S.?

- A foreign manufacturer can move its manufacturing operations to the U.S. to qualify for Buy American
  - Manufacturers can open new manufacturing facilities or perform manufacturing in existing facilities
  - Activities taking place in the U.S. facility must be manufacturing activities, as determined by the substantial transformation guidelines
No Substantial Transformation?

- If the answer to the “substantial transformation” question is “no” or “unknown”
  - System can switch to a domestic alternative if possible
- If no domestic alternative is available
  - Can the product fit under *de minimis*?
  - If not, system must request a project-specific waiver
Part 4: De Minimis

AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)
De Minimis National Waiver

- Two critical criteria
  - Incidental items
  - No more than 5% of total material cost
- What is the definition of “incidental” as it applies to the de minimis waiver?
  - Low cost (individually and in total)
  - Typically (though not necessarily) procured in bulk
- Should not be used for a few, expensive items
- FR notice:
Possible Incidental Items

- **Examples in waiver text**
  - Nuts, bolts, other fasteners, gaskets, tubing

- **Other possible examples**
  - **Water or sewer main projects**
    - Valve risers, meter boxes, curb stop boxes, manhole riser, some valves, and erosion control
  - **Treatment plant projects**
    - Electrical components, duct work, piping and fittings, handrails, sheetrock, insulation, anchor bolts, concrete forms, piping, fencing, and erosion control
  - **Pump station projects**
    - Conduit, electrical components, ladder, vault lid/hatch, and fencing

- Will vary by project
Using the *De Minimis* Waiver

- Total materials cost includes raw materials that are not subject to Buy American
  - Concrete, asphalt, and lumber are all included in the denominator of the calculation

- Systems should plan for the incidental percentage early on
  - Do not “use up” the 5% too soon

- If the system has documentation that an incidental product is domestic – it can be counted in domestic materials
De Minimis Waiver – Report to State

- **Waiver requirements**
  - Systems must summarize their use of *de minimis* in a report to the state:
    - Types and/or categories of items
    - Total cost of incidental components
    - Calculation by which compliance was determined, including total cost of materials used in the project
  - Systems must keep relevant documentation of these items in their project files
<table>
<thead>
<tr>
<th>Products</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ultrafiltration Membranes</td>
<td>Product-specific waiver</td>
</tr>
<tr>
<td>Pump</td>
<td>$20,000</td>
</tr>
<tr>
<td>SCADA</td>
<td>$40,000</td>
</tr>
<tr>
<td>Pre-fab Treatment Building</td>
<td>$60,000</td>
</tr>
<tr>
<td>Water Mains</td>
<td>$10,000</td>
</tr>
<tr>
<td>Control Valves</td>
<td>$15,000</td>
</tr>
<tr>
<td>Asphalt &amp; concrete</td>
<td>$12,000</td>
</tr>
<tr>
<td>U.S.-made incidental items</td>
<td>Estimate</td>
</tr>
</tbody>
</table>

**Incidental Items (not U.S. or origin unknown)**

<table>
<thead>
<tr>
<th>Incidental Items</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gaskets, nuts, bolts</td>
<td>Estimate</td>
</tr>
<tr>
<td>Fittings (15 @ $400 each)</td>
<td>Invoices</td>
</tr>
<tr>
<td>Electrical appurtenances</td>
<td>Estimate</td>
</tr>
</tbody>
</table>

**Total Materials**                                      **$371,000**

**Total Incidental**                                      **$12,000**

**% Incidental**                                          **3.09%**

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Example of a *de minimis* inventory
Part 5: Project-Specific Waivers

AMERICAN RECOVERY & REINVESTMENT ACT (ARRA)
Waiver Requests Can Still Be Submitted

- Waiver requests may still be considered “timely”, for example:
  - If product not specified in the original project specifications
  - Lack of “reasonably foreseeable circumstances”
  - Quantity waivers are likely as the construction season progresses
- Whether waiver request is considered timely or late depends on project-specific circumstances

Addressing New Waiver Requests

• Scenario #1: unforeseeable circumstances or other exceptions
  ○ Waiver requests may still be considered “timely”
  ○ EPA may review and may grant waivers
Addressing Late Waiver Requests

- Scenario #2: no unforeseeable circumstances
  - Waiver request is considered late
  - However, EPA would have granted the waiver if it had been submitted on time
  - EPA can choose how to address timeliness consistent with OMB regulations
Addressing Late Waiver Requests

- Scenario #3: no unforeseeable circumstances, and EPA cannot determine if waiver would have been approved
  - Waiver request is considered late
  - If EPA determines that the request would not have been approved, project will be non-compliant
  - Must work with EPA and state to determine how to address non-compliance
Part 6: Questions and Answers

**American Recovery & Reinvestment Act (ARRA)**
Reference Links

- EPA SRF Webcast Training Series, especially June 22 webcast by EPA on Buy American
  http://water.epa.gov/aboutow/eparecovery/ has links to all EPA documents on waivers
- October 22, 2009 Substantial Transformation EPA Guidance
- November 16, 2009 – EPA Buy American Questions and Answers – Part 2 (Substantial Transformation)
Thanks for Participating!

IF YOU HAVE FOLLOW-UP QUESTIONS REGARDING THIS WEB CAST, PLEASE CONTACT...

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