

EPA SRF Webcast Training Series

Please remember to call the audio conference center so you can
listen to today's presentation:
877-593-2004 PIN: 7563

A copy of today's presentation can be downloaded from the
Encounter Collaborative meeting page:
https://e1.e2c.com/enc/enc_pc_pmtg



Buy American Provisions for ARRA

Additional Information and
Question & Answer Session

June 4, 2009

Getting to Know Live Meeting



- Having problems with the audio or Web portion of today's event: Contact Customer Care by pressing *0 on your telephone keypad
- Press "control H" on your keyboard to toggle your screen between regular view and expanded view
- Want to submit a question? Send it to us via the Question and Answer console at any time
- Handouts can be downloaded via the Encounter registration page



Just a Reminder...

- Target Audience:
 - State CW and DW SRF Staff and Managers
 - EPA Regional Staff
 - State Associations

If you are not a State, EPA Regional, or State Association staff member we ask that you please disconnect from the webcast at this time.



Please Note

We are *tentatively* planning to hold another webcast!

Date/Time: Thursday, June 11th from 2-4 PM Eastern Time

Topics: More on the Buy American Criteria
Manufactured Good/Substantial Transformation
Public Interest Waivers
Question and Answer Session

How to Sign Up:

Additional information and registration will be provided early next week



Preliminary Internal Staff Level Discussion Document

5

Polling Question

- **How many folks do you have on the line with you today?**
 - A. 1-2
 - B. 2-4
 - C. 4-6
 - D. 6-10
 - E. 10 or more



Preliminary Internal Staff Level Discussion Document

6

Presenters for Today...

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

Additional Resources to Answer Questions...

- Bill Anderson – Assoc Division Director, OWM, US EPA
- Phil Zahreddine – Chief Municipal Technology Branch, OWM, US EPA
- Bob Bastian – Senior Environmental Scientist, CWSRF Team, US EPA
- Elizabeth Corr – Assoc Division Director, OGWDW, US EPA
- Peter Shanaghan – Team Leader, DWSRF Team, US EPA
- Kiri Kroner – Program Analyst, DWSRF Team, US EPA



Buy American Provisions Background



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”



Waiver Determination

- Agency head may provide a waiver if finds that:
 - Applying Buy American is inconsistent with public interest (§1605(b)(1))
 - US iron, steel, and manufactured goods are not produced in sufficient and reasonably available quantities or of satisfactory quality (§1605(b)(2))
 - Inclusion of US iron, steel, and manufactured goods will increase cost of overall project by > 25% (§1605(b)(3))



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
 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



National Waivers



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



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”



Bid Waiver

- Basis: Public Interest
- For projects that solicited bids on or after October 1, 2008 and prior to February 17, 2009
- To apply for waiver, potential assistance recipients must 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)



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



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
 - 5% of total materials cost determined from research conducted by EPA



De Minimis Waiver, continued

- Assistance recipients would determine and retain relevant documentation
- Assistance recipients would include in reports to the State:
 - types 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



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”



Question & Answer Section

Have a question?
Submit it using the Q&A console.

(you can submit questions at any
time during the presentation)



Key Issue: Manufactured Good



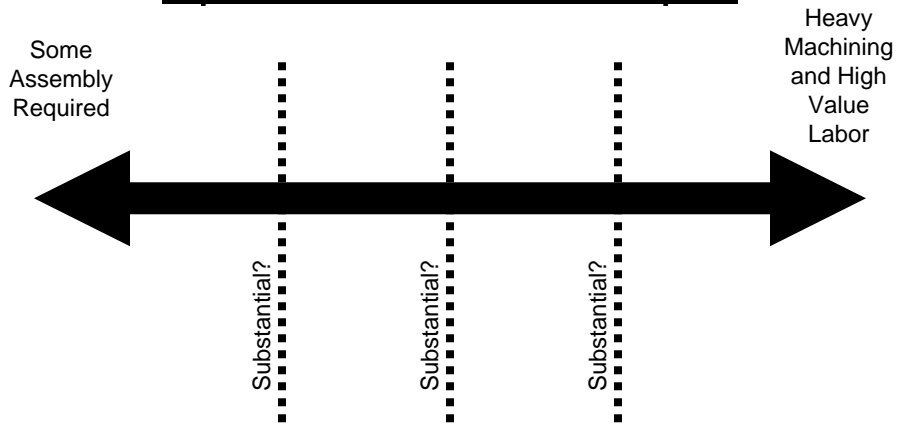
Definition of Manufactured Good

- “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



“Processed Into A Specific Form or Shape”



Substantial Transformation?



Documentation



Be alert for attempts to game the Buy American requirements!



Documentation

- The April 28 guidance memo suggested that assistance recipients require certification from contractors to demonstrate Buy American compliance
- Fraud and abuse will be investigated by the Office of Inspector General (OIG)
- Communicate any concerns in this regard to: www.epa.gov/oig/hotline/how2file.htm



Role of OIG

- The OIG has a prominent role under the Act, which includes education, training, outreach, audit, evaluation and investigative activities
- Section 1515 of ARRA allows the OIG:
 - (1) To examine any records of the contractor or grantee, any of its subcontractors, or any State or local agency administering such contract, that pertain to, and involve transactions relating to, the contract, subcontract, grant, or subgrant
 - (2) To interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding such transactions



Question & Answer Section

Have a question?
Submit it using the Q&A console.



Project Specific Waivers



Limited US Sourcing Issues & Availability Waivers

- *How should assistance recipients respond to situations where only one or perhaps two companies manufacture a particular product in the US but currently have a small share of the US market?*
 - Buy American provisions may properly increase demand for goods manufactured by domestic monopoly producers with a relatively small share of the current US market, as no waiver is required for their use
 - However, EPA expects that access to availability waivers will minimize potential for monopolistic or unfair trade practices by balancing this against ARRA's clear imperative for expeditious construction
 - This balanced approach offers US producers a fair opportunity for a realistic, timely increase in production, while enabling assistance recipients and contractors to obtain necessary goods for construction within ARRA's expeditious time frames



Availability Waivers

- *What if a good is produced by both US and non-US manufacturers, but the assistance recipient has reason for concern that the US-produced good may not be available in a sufficient quantity and in a timely manner as to meet the “expeditious construction” and other timing requirements of ARRA?*
- Availability waivers can be justified if assistance recipient provides adequate documentation of:
 - Good-faith efforts to seek and inability to obtain firm and satisfactory commitment by any US producer to deliver a sufficient quantity of the good in a timely manner as specified in construction documents for project
 - Firm and satisfactory commitment by a non-US producer for timely delivery of a sufficient quantity



31

Preliminary Internal Staff Level Discussion Document

Availability Waivers, continued

- *Are there steps that an assistance recipient can take to protect itself against the risk that any commitment it can obtain will not be met or will not be firm and satisfactory?*
- One possible means is by including:
 - Significant financial incentives in their construction contracts with...
 - Clear, timely, and enforceable consequences for failure to deliver the promised item(s)...
 - In the promised quantity, at the promised time, and to the promised location



32

Preliminary Internal Staff Level Discussion Document

Availability Waivers, continued

- A large number of manufactured goods are needed for any ARRA funded SRF project
- These goods differ greatly in the:
 - Extent to which they are US-manufactured, and
 - Presence or absence of competition as among US producers
- ARRA requirements
 - “Contract or construction” provision make timing crucial
 - To complete construction expeditiously to create economic stimulus
 - Properly enable assistance recipients to demand timely delivery of essential feature of “availability”



33

Preliminary Internal Staff Level Discussion Document

Denied Waivers

- *Will denied waiver requests be available so that other assistance recipients do not apply for the same reasons?*
 - The status of all waiver requests will be available in the database that Cadmus is maintaining
 - However, since they are project based waivers, this does not mean the waiver would be denied in your location since conditions may be different for each project



34

Preliminary Internal Staff Level Discussion Document

Question & Answer Section

Have a question?
Submit it using the Q&A console.



Thank you for attending
today's Webcast!



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
- www.epa.gov/oig/hotline/how2file.htm

