



**U. S. Department of Housing and Urban Development
Office of Community Planning and Development**

Special Attention of:

NOTICE: CPD-09-05

All Secretary's Representatives
All State/Area Coordinators
All CPD Division Directors
HUD Field Offices
HUD Regional Offices

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Section 1605 of Title XVI of Pub. L. 111-5

2 CFR part 176

24 CFR parts 84, 85 and 570

Subject: CPD Implementation Guidance for the Buy American Requirement of the American Recovery and Reinvestment Act of 2009 including the Exception Process

This notice provides implementation guidance, including the exception process, for the Buy American requirement imposed by section 1605 of Title XVI of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (the Recovery Act). The notice offers initial guidance on the application of section 1605 of the Recovery Act (the Buy American requirement) to Recovery Act programs administered by the Office of Community Planning and Development (CPD Recovery Act programs). This CPD Implementation Guidance for the Buy American requirement summarizes the applicable requirements, identifies the covered CPD Recovery Act programs, and specifies the requirements for obtaining exception relief. The attached addendums include sample language for agreements and contracts, a checklist of information required for exceptions, answers to frequently asked questions and other useful information for grantees.

I. Background

The Recovery Act imposes a Buy American requirement on the funding provided thereunder. Specifically, section 1605 (the Buy American requirement) of the Recovery Act states that:

- (a) None of the funds appropriated or otherwise made available by this Act 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.
- (b) Subsection (a) shall not apply in any case or category of cases in which the head of the Federal department or agency involved finds that-
 - (1) applying subsection (a) would be inconsistent with the public interest;
 - (2) 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; or
 - (3) 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.
- (c) If the head of a Federal department or agency determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived.
- (d) This section shall be applied in a manner consistent with United States obligations under international agreements.

The Office of Community Planning and Development (CPD) incorporated section 1605 into funding announcements for CPD Recovery Act programs. *Notice of Availability: Program Requirements for Community Development Block Grant Program Funding Under the American Recovery and Reinvestment Act of 2009*, 74 Fed. Reg. 21816 (May 11, 2009); *Notice of Funding Availability (NOFA) for the Neighborhood Stabilization Program 2 Under the American Recovery and Reinvestment Act, 2009*, 74 Fed. Reg. 21377 (May 7, 2009), as amended by 74 Fed. Reg. 28715 (June 17, 2009). Specifically, the Community Development Block Grant Recovery (CDBG-R) notice described the Buy American requirement, including the exception standards set forth in section 1605, and required applicants to submit a certification of compliance. Similarly, the Neighborhood Stabilization Program 2 (NSP2) NOFA informed applicants of the Buy American requirement and the availability of an exception. The CDBG-R notice is available on the HUD Web site at: <http://www.hud.gov/recovery/cdblock.cfm>. The NSP2 NOFA is available at <http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/>. In addition, application materials in CPD Recovery Act programs include a standard certification of compliance with all applicable laws.

On April 23, 2009, the Office of Management and Budget (OMB) issued interim final guidance on the application and implementation of the Buy American requirement

and other provisions of the Recovery Act, entitled “Requirements for Implementing Sections 1512, 1605 and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards” (74 Fed. Reg. 18449) (to be codified at 2 C.F.R. part 176) (OMB Interim Guidance). Although the guidance is interim, it is binding on federal agencies and establishes the standard government-wide award terms for agencies to implement the Buy American requirement of the Recovery Act. OMB solicited public comment on the Interim Guidance until June 20, 2009. OMB final guidance is pending.

Covered Activities/Projects

Based on the OMB Interim Guidance, HUD has determined that the Buy American requirement applies to certain CPD programs funded under the Recovery Act. As noted above, the Buy American requirement only applies to projects for the construction, alteration, repair, or maintenance of public buildings or public works. The Homelessness Prevention and Rapid Re-Housing Program (HPRP) does not provide funding for such activities, and, therefore, would not trigger the Buy American requirement. Also, privately owned housing would not ordinarily be subject to the Buy American requirement. Accordingly, the Buy American requirement would not usually apply to the Tax Credit Assistance Program (TCAP), which assists low-income housing tax credit projects that are privately owned. See section II for definitions of public building and public work, privately- owned housing and publicly- owned housing. By contrast, the Buy American requirement applies to most contracts using CPD Recovery Act funds for the construction or alteration of public housing and certain mixed-finance projects. See Question 15 in Addendum 5 for further discussion.

For the CDBG-R and NSP2 programs, the Buy American requirement applies to eligible activities using CDBG-R and NSP2 funds for the construction, alteration, repair, or maintenance of public buildings and public works. This would include funding the construction and/or rehabilitation of public facilities and improvements that are owned by governmental entities. Facilities owned and operated by private entities are not considered publicly owned, and therefore not subject to the Buy American requirement. For similar reasons, the Buy American requirement would not apply when CDBG-R and NSP2 funds are used to develop privately owned housing.

II. Definitions

The following terms are critical to the interpretation and implementation of the Buy American requirement and apply to the process described in this guidance:

The terms *General Counsel*, *HUD*, *Public Housing Agency (PHA)* and *Secretary* are defined in 24 C.F.R. 5.100.

The terms *Contract*, *Grant*, *Local Government*, and *Obligation* are defined in 24 C.F.R. 85.3.

Governmental Entity: The United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions. 2

C.F.R. 176.140(a)(2) and 176.160(a). For purposes of the Buy American requirement, Indian tribes do not fall within any of the enumerated categories and, therefore, are excluded from the OMB Interim Guidance.

Maintenance: The general rule is that any expense associated with repairing or maintaining public facilities and improvements is ineligible. This includes maintenance and repair of publicly owned streets, parks, playgrounds, water and sewer facilities, neighborhood facilities, senior centers, centers for persons with disabilities, parking and other public facilities and improvements. Examples of maintenance and repair activities include the filling of pot holes in streets, repairing of cracks in sidewalks, the mowing of recreational areas, and the replacement of expended street light bulbs. As ineligible uses of CDBG-R and NSP2 funds, there are no maintenance or repair activities of public facilities and improvements that would trigger the Buy American requirement under these programs.

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. 2 C.F.R. 176.140(a)(1).

Privately owned housing: Includes, but is not limited to, housing and other residential structures owned by private individuals or private entities. See also Question 15 in Addendum 5 for discussion of public-private partnerships.

Public building and public work: A public building of, and a public work of a governmental entity (as defined above). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works. 2 C.F.R. 176.140(a)(2) and 176.160(a). For the CDBG-R and NSP2 programs, these would include public facilities and improvements owned by a governmental entity. Public facilities may include neighborhood facilities, firehouses and fire protection equipment, public schools, and libraries. Public improvements traditionally include streets, sidewalks, curbs and gutters, parks, water and sewer lines, flood and drainage improvements, parking lots, and utility lines. Public housing and certain mixed financed projects may also be considered public buildings.

Publicly owned housing: Includes, but is not limited to, public housing; a residential structure owned by a governmental entity; and public facilities designed to provide shelter to persons with special needs that are owned by a governmental entity.

Repair: See definition of Maintenance.

Reasonably Available Quantity: The quantity of iron, steel, or the relevant manufactured good is available or will be available at the time needed and place needed,

and in the proper form or specification as specified in the project plans and design.

Satisfactory Quality: The quality of iron, steel, or the relevant manufactured good as specified in the project plans and designs.

Steel: An alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements. Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project. 2 C.F.R. 176.70(a)(2) and 176.140(a)(3).

Use: The obligation of funds. HUD has adopted the definition of “obligation” as it appears in 24 C.F.R. 85.3.

III. Implementation

Applicable HUD grant agreements providing Recovery Act assistance (e.g., CDBG-R grant agreements) explicitly require compliance with OMB guidance implementing section 1605. See Addendum 1. In carrying out CPD Recovery Act activities, the HUD grantee should first assess whether the activity may involve the construction, alteration, maintenance, or repair of a public building or public work. See Section 0 and Addendum 5 for guidance.

When the Buy American requirement applies, the HUD grantee should take the following steps:

1. A provision requiring compliance with the Buy American requirement must be placed in requests for applications or proposals, subrecipient agreements, bidding documents, and contracts for the assisted activity/project. The OMB Interim Guidance noted above specifies standard contract and award terms. HUD grantees should also consider using the sample language provided in Addendum 1.
2. The Buy American requirement must be applied in a manner consistent with United States obligations under international agreements. The requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act only pertains to international agreements listed in 2 C.F.R. 176.90. The Appendix to Subpart B in the OMB Interim Guidance enumerates the entities that are subject to U.S. obligations under international agreements. Accordingly, this exception only applies to HUD grantees listed, or included within the entities listed, in the Appendix to Subpart B. If the iron, steel, or manufactured goods to be used in a project are from a Party to an international agreement listed in 2 C.F.R. 176.90, and the grantee is required under the international agreement to treat the goods and services of that Party the same as domestic goods and services, then the Buy American requirement will not apply. For example, a State grantee listed in the Appendix buys steel under an international agreement from a designated country that is also Party to the international agreement. The foreign steel is treated as if it is domestically produced for the purposes of the Buy American requirement. Also note that pursuant to 2

C.F.R. 176.90, this obligation shall only apply to projects with an estimated value of \$7,443,000 or more and projects that are not specifically excluded from the application of those agreements. For this purpose, the value of the project should be based on the total contract value of the project, not just the CPD-funded portion.

3. The HUD grantee may also request an exception to the Buy American requirement if the grantee believes that (1) applying these requirements would be inconsistent with the public interest; (2) 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; or (3) 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. The exception process is described in detail below.

IV. Step-By-Step Exception Process

The exception process begins with the HUD Grantee. In order to comply with the Buy American requirement, the HUD grantee must ensure bids solicited for the repair, maintenance, construction or alteration of public works or public buildings use American made iron, steel and manufactured goods. However, if one or more of the exception conditions in section 1605(b) are present, the HUD grantee may request an exception. Until an exception is granted by HUD, the Buy American requirement stands, except as noted above with respect to grantees covered by international agreements.

The HUD grantee may seek an exception at any point before, during, or after the bid process if one or a combination of three conditions is met:

1. Iron, steel, and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
2. 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; or
3. Applying the Buy American requirement would be inconsistent with the public interest.

The need for an exception will likely appear at three points in a project:

1. During the design process, the HUD grantee and its architects or engineers identify key materials (iron and steel) or equipment (manufactured goods) that are not produced in sufficient quantity and satisfactory quality domestically;
2. After evaluation by prospective bidders and their consultation with suppliers, the HUD grantee determines that iron, steel, or manufactured goods as required by the design are not produced in sufficient quantity and satisfactory quality domestically; or
3. Upon bid opening, the HUD grantee has solicited (and received) bids which estimate costs both with and without only American-made materials, the HUD grantee

determines that the cost of the overall project has increased by more than 25 percent.

The HUD grantee could potentially request an exception at any of the above points in the project. It is also possible to request an exception after bids are opened or after construction has been initiated. See the Late Submissions section below. It is strongly recommended, if an exception is necessary, to initiate the request as soon as practicable. It should also be noted that the HUD grantee must continue to follow all other HUD program requirements, including the procurement requirements of 24 CFR Parts 84 and 85 (as applicable). It is also strongly encouraged that HUD grantees hold pre-bid conferences with potential bidders. A pre-bid conference can help identify iron, steel, and manufactured goods needed to complete the project as described in the plans and specifications that may not be available from domestic sources and the need to seek an exception prior to bid. Pre-bid conferences may also help inform HUD grantees of compliance options.

Submission of an Exception Request

HUD grantees should submit exception requests to the CPD program office in the relevant HUD Field Office. Grantees must use the Checklist for Submission and Review of Buy American Exception Requests found in Addendum 2 to this Implementation Guide when submitting an exception request. The request package will then be reviewed by both the CPD program office in the HUD Field Office and Field Counsel for completeness. Proper and sufficient documentation must be provided by the HUD grantee. If documentation is complete, the CPD Field Office will forward the request package along with a recommendation to HUD Headquarters for consideration and approval by the Secretary, Assistant Secretary, or other HUD official with delegated authority. For CPD Recovery Act programs, the Assistant Secretary for Community Planning and Development has delegated authority to approve exceptions. CPD staff shall consult with OGC regarding current delegations of authority and orders of succession that permit other officials to approve exceptions. OGC concurrences must be obtained on all exception approvals.

Late Submissions

Consistent with 2 C.F.R. 176.120, exception requests submitted after entering into obligations or the initiation of construction shall include an explanation of why the request could not be submitted before making the obligation or why the need for an exception was not reasonably foreseeable. If HUD determines that the justification for the late request is based on grounds that the HUD grantee should have been reasonably expected to foresee, then CPD may deny the request. Before denial, CPD may consider subjecting the request to a balancing test. This balancing test may consider whether the public interest in expeditious construction under the Recovery Act outweighs the need for full, timely, and good faith compliance with the Buy American requirement as set forth in the Recovery Act and in applicable OMB guidance.

Granting an exception is a 5-step process:

- 1. Evaluation by HUD: The CPD Field Office will be responsible for screening exception requests for completeness and assessing the sufficiency of information provided by the HUD grantee.** After receiving an exception request from a HUD grantee regarding the Buy American requirement, CPD Field Office staff will use the

checklist in Addendum 2 to determine whether the request sufficiently documents and justifies the statutory basis cited for the exception. The checklist provides information with regard to an exception on the basis of public interest, unavailability, or substantial cost increases.

After finding that complete documentation and justification have been submitted, the CPD Field Office will obtain Field Counsel concurrence. Next, the CPD Field Office will prepare a written recommendation and forward the request package to CPD Headquarters for consideration and approval as described above. Upon receiving the recommendation and request package, CPD Headquarters should begin the next steps in the exception process so that the Secretary, Assistant Secretary, or other HUD official with delegated authority may approve the exception to the HUD grantee. This includes preparing the detailed written justification for publication in the Federal Register described below and obtaining OGC Headquarters concurrence.

2. **Coordination:** In accordance with the normal waiver process, CPD will coordinate with other appropriate HUD Offices (e.g. the Office of Public and Indian Housing), to the extent determined necessary and expedient, on any concerns that arise while processing the exception request. For example, if the exception request identifies other HUD Recovery Act funding in the project, CPD may contact the other HUD Program Office in order to avoid duplication of efforts. CPD shall also coordinate with OGC on any related legal concerns with the exception request.
3. **Concurrence:** CPD Headquarters and OGC concurrences must be obtained on all exception approvals.
4. **Signature of exception approval by Secretary, Assistant Secretary, or other HUD Official with delegated authority:** After the exception is signed and dated, the CPD Field Office will notify the HUD grantee as soon as practicable. The processing and approval of exceptions will be handled in an expeditious manner.
5. **Publication in the Federal Register** of a detailed written justification as to why the Buy American requirement is being excepted. Pursuant to 2 C.F.R 176.90, the notice must include the title “Buy American Exception under the American Recovery and Reinvestment Act of 2009,” the dollar value and brief description of the project, and a detailed written justification as to why the restriction is being excepted. This publication will be processed by OGC and must occur within 2 weeks after the exception approval is given. (No publication is required when the item has already been determined to be domestically nonavailable.) A list of items that are not domestically available is at 48 C.F.R. 25.104(a) and **Addendum 4**. The Federal Register notice or information from the notice may be posted by OMB to www.Recovery.gov and will be posted on www.hud.gov.

V. Special Circumstances

1. National Exceptions

Under certain special circumstances, HUD may approve a national exception of the Buy American requirement for a category of cases/projects pursuant to section 1605(b). HUD may issue a national exception on policy decisions regarding the public interest or a determination that a particular item (e.g., certain goods necessary in “green construction”) is not produced domestically in reasonably available quantities or of a sufficient quality. A determination to grant an exception of the Buy American requirement based solely on inconsistency with the public interest must consider the possible national implications of such an exception.

2. Mixed Funding/Partially-Assisted Projects

The Buy American requirement prohibits use of recovery funds 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. For the CDBG-R and NSP2 programs, HUD has defined the term “use” to mean obligation of funds as it appears in 24 C.F.R. 85.3. Thus, when a project for the construction, alteration, maintenance, or repair of a public building or public work is assisted, in whole or in part, with CDBG-R and NSP2 funds, the Buy American requirement applies. HUD discourages intentionally dividing a series of activities into separate and smaller contracts or agreements to avoid Buy American coverage on some portion of a single project, particularly where the activities are integrally and proximately related to the whole. However, there are many situations in which major development activities are clearly undertaken in phases that are distinct in purpose, time, or place, in which case, separate contracts or agreements using other funding may carry separate requirements from Recovery Act-funded projects.

For the Buy American requirement to apply, the assisted structure must be a public building or public work of a governmental entity. While there is a presumption that ownership by a governmental entity is required, there may be some instances where the Buy American requirement applies even though a governmental entity does not have complete or direct ownership of the structure. Question 15 in Addendum 5 provides guidance on mixed finance projects involving Public Housing Agencies (PHAs). For questions regarding the application of the Buy American requirement to other governmental entities or specific public-private partnerships, contact Elton Lester, Associate General Counsel for Assisted Housing and Community Development at BuyAmericanQuestions@hud.gov.

3. Exceptions Previously Granted by HUD or another Federal Agency

If a HUD grantee finds that a Buy American exception has been granted by another Federal agency or another HUD Program Office for a particular project, the grantee can elect to take advantage of the following options below:

- a. **If another Federal agency has granted a Buy American exception under section 1605(b)** for a project, HUD will accept that exception and permit the

HUD grantee to apply that exception for the remainder of HUD-assisted work in that project.

- b. **If another HUD Program Office has granted a Buy American exception under section 1605(b)** for a project, and the written determination supports its application to another request, CPD may accept that exception and permit the HUD grantee to apply that exception for the remainder of the CDBG-R or NSP2 work in that project. To use this exception, the HUD grantee must submit a written determination justifying the applicability of the previously granted exception to the CPD-funded portion of the project. CPD must concur in that determination.

If other Buy American exception requests for the project are pending, or have been granted, the HUD grantee is responsible for maintaining and providing the information and supporting documentation described in Addendum 2.

VI. Approved National Exceptions

A HUD grantee covered by the Buy American requirement may use these already approved exceptions. Grantees who wish to use these exceptions should, in consultation with their contractors, determine the items or projects to be covered by the exception. The HUD grantee must maintain sufficient documentation to demonstrate the applicability of the exception and compliance with any terms or conditions set forth in the exception.

1. HUD has granted national exceptions for the following categories:
 - a. For publicly owned housing assisted with CDBG-R funds, when such property contains less than 8 units.
 - b. For publicly owned housing assisted with NSP2 funds, when such property contains less than 8 units.
 - c. The size of the CDBG-R grant from HUD to a grantee or (in the case of State CDBG-R) from a State to a state grant recipient is less than \$100,000. This will cover approximately 10% of the CDBG-R entitlement grantees. State CDBG-R grants to small rural communities will also benefit from this exception.
 - d. The size of a contract funded with CDBG-R or NSP2 grant assistance is less than the simplified acquisition threshold described in 24 CFR 85.36 (currently \$100,000), regardless of the size of the grantee.
2. HUD has approved an exception for any project substantially under contract or under construction prior to acceptance of the CDBG-R or NSP2 funds (See Addendum 3).

Exception for Items Already Determined Domestically Nonavailable

There is an existing list of nonavailable articles at 48 C.F.R. 25.104(a). The procedures at 48 C.F.R. 25.103(b)(1) apply if any of those articles are manufactured goods needed in the project covered by the Buy American requirement. See also 2 C.F.R. 176.80. An excerpt from the current list of nonavailable articles, and applicable procedures for using such articles, are found in Addendum 4. To the extent that a HUD grantee wishes to use manufactured goods that are not on the current list, it may still seek an exception on a case-by-case basis. See instructions for submitting an exception request in section IV.

Documentation of Exceptions in Records

If the HUD grantee has received an exception or is using a national exception, documentary evidence of the exception must be included in the grantee's records for that project (which can include but not be limited to this CPD Implementation Guidance for the Buy American Requirement and documentation to support the exception). If HUD has determined that the Buy American requirement does not apply to the assisted work, the HUD grantee should have documentary evidence of that determination in its records for that project.

VII. Further Questions

Addendum 5 contains **Questions and Answers** to facilitate understanding of the Buy American requirement and the exception process.

Contact: Elton Lester, Associate General Counsel for Assisted Housing and Community Development with additional questions at BuyAmericanQuestions@hud.gov.

Addendum 1

BELOW ARE SAMPLE PROVISIONS FOR CONTRACTS SUBJECT TO SECTION 1605. HUD MAKES NO CLAIMS REGARDING THE LEGALITY OF THIS CLAUSE WITH RESPECT TO STATE OR LOCAL LAW. IT IS IMPERATIVE THAT ANY PARTY INSERTING THIS CLAUSE INTO A CONTRACT VERIFY THAT IT IS LEGAL AND ENFORCEABLE ACCORDING TO STATE AND LOCAL LAWS, REGULATIONS, AND ORDINANCES:

Sample Buy American Contract Language

The Contractor acknowledges to and for the benefit of the _____ (“HUD grantee”) that it understands the goods and services under this Agreement are being funded with monies made available by the American Reinvestment and Recovery Act of 2009 (Recovery Act) (or are being made available for a project being funded with monies made available by the Recovery Act) and section 1605 of such law contains provisions commonly known as “Buy American.” The Buy American requirement prohibits the use of Recovery Act funds 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 (“Buy American requirement”) including iron, steel, and manufactured goods provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the HUD grantee that (a) the Contractor has reviewed and understands the Buy American requirement, (b) all of the iron, steel, and manufactured goods used in the project will be and/or have been produced in the United States in a manner that complies with the Buy American requirement, unless an exception to the requirement is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support an exception to the Buy American requirement, as may be requested by the HUD grantee or HUD. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the HUD grantee to recover as damages against the Contractor any loss, expense or cost (including without limitation attorney’s fees) incurred by the HUD grantee resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part from HUD). Neither this paragraph (nor any provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the HUD grantee.

Sample Certification that HUD grantees may require from a contractor or bidder

1. Identification of American-made Iron, Steel, and Manufactured Goods: Consistent with the terms of the HUD grantee’s bid solicitation and the provisions of Section 1605 of the Recovery Act, the Bidder certifies that this bid reflects the Bidder’s best, good faith effort to identify domestic sources of iron, steel, and manufactured goods for every component contained in the bid solicitation where such American-made components are available on the schedule and consistent with the deadlines prescribed in or required by the bid solicitation.

2. **Verification of U.S. Production:** The Bidder certifies that all components contained in the bid solicitation that are American-made have been so identified, and if this bid is accepted, the Bidder agrees that it will provide reasonable, sufficient, and timely verification to the HUD grantee of the U.S. production of each component so identified.
3. **Documentation Regarding Non-American-made Iron, Steel, or Manufactured Goods:** The Bidder certifies that for any component or components that are not American-made and are so identified in this bid, the Bidder has included in or attached to this bid one or both of the following, as applicable:
 - a. Identification of and citation to a categorical exception published by HUD (or another Federal agency) in the Federal Register that is applicable to such component or components, and an analysis that supports its applicability to the component or components;
 - b. Verifiable documentation sufficient to the HUD grantee, as required in the bid solicitation or otherwise, that the Bidder has sought to secure American-made components but has determined that such components are not available on schedule and consistent with the deadlines prescribed in the bid solicitation, with assurance adequate from the Bidder under applicable conditions stated in the bid solicitation or otherwise.
4. **Information and Detailed Justification Regarding Non-American-made Iron, Steel, or Manufactured Goods:** The Bidder certifies that for any such component or components that are not so available, the Bidder has also provided in or attached to this bid information, including but not limited to the verifiable documentation and a full description of the bidder's efforts to secure any such American-made component or components, that the Bidder believes are sufficient to provide and as far as possible constitute the detailed justification required for an exception under section 1605 with respect to such component or components. The Bidder further agrees that, if this bid is accepted, it will assist the HUD grantee in amending, supplementing or further supporting such information as required by the HUD grantee to request and, as applicable, implement the terms of an exception with respect to any such component or components.

Addendum 2

REQUIREMENTS/CHECKLIST FOR SUBMISSION AND REVIEW OF BUY AMERICAN EXCEPTION REQUESTS

I. Introduction

These requirements are to be used by all HUD grantees requesting an exception to the Buy American requirement (section 1605) of the American Recovery and Reinvestment Act of 2009 (Recovery Act). Pursuant to **the CPD Implementation Guidance for the Buy American Requirement**, all requests for an exception of the Buy American requirement must be submitted in compliance with these requirements.

A. A HUD grantee may seek an exception in the following circumstances:

1. The HUD grantee may seek an exception at any point before, during, or after the bid process **if one or a combination of three conditions is met:**
 - a. Iron, steel, and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
 - b. 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; or
 - c. Applying the Buy American requirement of the Recovery Act would be inconsistent with the public interest.
2. The HUD grantee may seek an exception if one or a combination of three of the conditions above are met after the signing of the construction contract or after an obligation has been entered into if it does not meet the requirements in **Section I.B** below.

B. A HUD grantee does not need to seek an exception if:

1. The HUD grantee's project meets the criteria for the national exceptions as described in **Section VI of the CPD Implementation Guidance for the Buy American Requirement**;
2. The procurement meets the criteria for a project substantially under contract or under construction prior to acceptance of CDBG-R or NSP2 funds as described in **Addendum 3 to the CPD Implementation Guidance for the Buy American Requirement**; or
3. The exception request is for an item or items included in the list of nonavailable articles at 48 C.F.R. 25.104(a), and the HUD grantee has met the requirements related to using the **FAR List**. See also 2 C.F.R. 176.80 and **Addendum 4 to the CPD Implementation Guidance for the Buy American Requirement**.

C. If a HUD grantee has other Buy American exception requests that have been granted and

would like that exception to be applicable to the HUD or CPD funded portion of the project pursuant to section V.3 of the CPD Implementation Guidance for the Buy American Requirement, any information and supporting documentation related to the granted exception must be maintained in the HUD grantee's files. The supporting documentation should contain:

1. A copy of any other Buy American exception requests for the materials that have been submitted to another HUD Program Office or another Federal agency for the project;
2. Identification of and citation to any other Buy American exception published by HUD or another Federal agency in the Federal Register that the HUD grantee believes is applicable to such component or components, and a written determination that supports its applicability to the component or components; and
3. Identification of the other Recovery Act funds assisting the project, and applicable contact information for the other HUD Program Office or Federal agency.

If another HUD Program Office has granted a Buy American exception under section 1605(b) for a project, the HUD grantee must submit the above documentation to the CPD Field Office, along with a written determination justifying the applicability of the previously granted exception to the CPD-funded portion of the project. CPD must concur in that determination.

If the HUD grantee has other Buy American exception requests that are pending, the HUD grantee should coordinate with the other entity before proceeding with an exception request from CPD and maintain copies of items 1-3 above (as applicable).

II. General Requirements

A HUD grantee that decides it is necessary to request an exception should submit an exception request package to its respective CPD Field Office for review for completeness and processing in accordance with the **CPD Implementation Guidance for the Buy American Requirement**. The submission cannot be submitted electronically but must be sent via regular mail with original signatures (express or certified mail can also be used) to the responsible CPD Field Office. **HUD grantees may also hand deliver request packages**. An exception request package must contain all items/documentation required. All exception requests must include **Section II. General Requirements A - C**, and depending on the exception requested may require additional information as stated below in **Section III**. If the CPD Field Office finds the submission deficient, it shall return the incomplete exception request to the HUD grantee noting the deficiency.

A. Letter from the HUD grantee, which must provide all of the following information (check each one):

1. The project/development and specific activities for which the exception request is being submitted;
2. The point in time when the request is being submitted, which would be **one of the following (check one):**

- ___ i. During the planning and design/pre-bid phase of the project;
- ___ ii. After evaluation by prospective bidders and their consultation with suppliers;
- ___ iii. After acquiring two cost estimates with bids: one with only American-made materials and the other with any materials;
- ___ iv. No later than start of the work; or
- ___ v. After Recovery Act funds have been obligated for a project. The HUD grantee must explain why it could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the HUD grantee does not submit a satisfactory explanation, CPD need not make a determination and may deny the request.¹

___ 3. How the exception will facilitate the purpose of the project including but not limited to **(check each one)**:

- ___ i. An explanation of how the exception will assist the goals of the Recovery Act;
- ___ ii. Identification of the areas (e.g. housing, infrastructure, job creation or retention, improve energy efficiency, expand educational opportunities and access to health care); and
- ___ iii. An explanation of how the lack of an exception would slow the implementation of the project and/or undermine Recovery Act initiatives.

B. The HUD grantee must also include the following information in the request package:

FOREIGN AND DOMESTIC ITEMS COST COMPARISON				
a. Description of Item	b. Unit of Measure*	c. Quantity	d. Cost (dollars)**	e. Time of Delivery/Avail.
Foreign steel, iron, or manufactured good				
Domestic steel, iron, or manufactured good				
f. Location of the project (please list all locations)				
g. Name/Address of proposed supplier				
h. Detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods				

* Unit of measure includes but is not limited to pounds, ounces, gallons, liters, yards and meters.

**The cost of iron, steel, and/or manufactured goods shall include all delivery costs to the construction site

¹Note: Before denial, CPD may consider subjecting the request to a balancing test. This balancing test may consider whether the public interest in expeditious construction under the Recovery Act outweighs the need for full, timely, and good faith compliance with the Buy American requirement as set forth in the Recovery Act and in applicable OMB guidance.

and any applicable duty.

C. The HUD grantee must provide documentation/support to show that it has made a good faith effort to solicit bids for domestic construction materials/manufactured goods, as demonstrated by at least one of the following (check at least one):

- 1. Language in request for bids/proposals;
- 2. Language in contracts; and
- 3. Communications with contractor.

III. Requirements Applicable In Certain Circumstances

In addition to the General Requirements in Section II above, if a HUD grantee is submitting an exception based on cost because 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 **or based on unavailability** because iron, steel, and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, **the information in Section III.A or B below must also be included** in the exception request submission package, as applicable.

A. Exception Request Based on Cost: If the HUD grantee’s request is based on a belief that inclusion of iron, steel and manufactured goods will result in an increase in cost of the overall project by more than 25 percent, in addition to the General Requirements above, the request **must include all** of the following (check each one). **It is important to note that a cost comparison must be completed for each item that the HUD grantee believes will cumulatively increase the overall cost of the project. The HUD grantee must provide a separate cost comparison table (Table 1 below) for each item and then complete the cumulative total table (Table 2 below) which should illustrate that the overall cost is more than 25% due to the inclusion of iron, steel, and manufactured goods produced in the United States:**

1. Cost Comparison Table (Table 1)

FOREIGN AND DOMESTIC ITEMS COST COMPARISON			
Description of Item	Unit of Measure	Quantity	Cost (dollars)*
Item 1/Foreign Supplier Foreign steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for foreign supplier			
Item 1/Domestic Supplier 1: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 1			
Item 1/Domestic Supplier 2 (if available): Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 2			

Item 1/Domestic Supplier 3 (if available): Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 3			

*Include all delivery costs to the construction site. Enter the cost estimate for each component as supplied by domestic sources and enter the cost estimate for each component for which exceptions are requested, as supplied by foreign sources.

2. Cumulative Cost Table (Table 2)

	Domestic Source Cost (dollars)	Foreign Source Cost (dollars)
Item #1:		
Item #2:		
Item #3:		
TOTAL Overall Estimated Project Cost		
Cost differential in dollars: sum of domestic-source costs minus sum of foreign-source costs		

NOTE: If the total domestic project cost in the Price Comparison Table does not exceed the total project cost (including foreign items) indicated by more than 25%, HUD will not continue to process the exception based on cost. For example, if the total project cost estimate (including foreign items) is \$1,000,000, the threshold for the total domestic project cost would be \$1,250,000 [Total evaluated cost = project cost estimate + (.25 x project cost estimate)]

3. The HUD grantee **must also submit the following supporting documentation (check each one)**:
- i. Relevant excerpts from the bid documents used by the contractors to complete the Price Comparison Table; and
 - ii. 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. Attach responses of surveyed suppliers. This could include a summary if the survey was oral. Grantees may wish to refer to their state/local procurement policies in determining what constitutes a “reasonable survey” of the market.

B. Exception Request based on Availability: If the HUD grantee’s request is based on a belief that inclusion of iron, steel and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, **in addition to the General Requirements above in Section II, the request must include all of the following (check each one):**

___ 1. The HUD grantee provided the following supporting documentation (necessary to demonstrate the availability, quantity, and quality of the materials for which the exception is requested). Please note that the HUD grantee must address all three of these conditions in order to be considered for this exception:

Quantity/Availability Comparison Table (Table 1)

FOREIGN AND DOMESTIC ITEMS QUANTITY/AVAILABILITY COMPARISON			
Description of Item	Unit of Measure	Quantity	Time of Delivery/Avail
Item 1/Foreign Supplier Foreign steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for foreign supplier			
Item 1/Domestic Supplier 1: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 1			
Item 1/Domestic Supplier 2 (if available): Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 2			
Item 1/Domestic Supplier 3 (if available): Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 3			
Project Description*:			

*Including project schedule and relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials.

- ___ 2. The HUD grantee must certify that it has made efforts to find available domestic sources.
- ___ 3 The HUD grantee must maintain documentation of its process for identifying suppliers, and a list of contacted suppliers.
- ___ 4. The HUD grantee must attach a statement from the contractor confirming the non-availability of the domestic construction materials for which the exception is sought.

Addendum 3

National Exception for any Project Substantially Under Contract or Under Construction Prior to Acceptance of CDBG-R or NSP2 funds.

This exception is applicable to CDBG-R and NSP2 funded projects subject to the Buy American requirement. Any HUD grantee who wishes to use this exception must maintain sufficient documentation to demonstrate the applicability of the exception and compliance with any terms or conditions set forth in the exception.

I. For Projects That Have Not Begun Construction but are Substantially Under Contract² Prior to Acceptance of CDBG-R or NSP2 Funds

- A. In order to be substantially under contract, a project must have the following characteristics prior to the date of HUD's execution of the Grant Agreement:
1. The Grantee has secured financial commitments for the project;
 2. The HUD grantee has solicited bids for the project's construction and selected a general contractor. The general contractor has provided a price or estimate, which does not include the use of all American-made products. The HUD grantee must maintain documentation of the bid solicitation process and bid in its files;
 3. The project is in the HUD grantee's consolidated plan/annual action plan, amended consolidated plan/annual action plan, or NSP2 application (including any amendments thereto);
 4. The project is ready to begin construction and will have all required zoning, building and other necessary permits to start construction;
 5. The HUD grantee can show that it is in the public interest to move ahead with the project and not rebid the construction work to ensure that all products are American-made. To support its public interest determination, the HUD grantee must maintain documentation demonstrating that rebidding will result in one or more of the following:
 - a. a substantial delay of the construction and completion of the project;
 - b. a substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;

² "Contract" relates to portions not originally designated to receive CDBG-R or NSP2 funding.

- c. one or more lenders or funding partners or the construction contractor rescinding their commitment to the project resulting in the project being significantly delayed or rendering it infeasible;
 - d. a HUD grantee missing the obligation and expenditure deadlines specified in the Recovery Act (CDBG-R funds must be expended by September 30, 2012 and for NSP2 funds, 50% expended within 2 years of obligation availability and 100% within 3 years of obligation availability);
 - e. jobs not being created or retained;
 - f. negative economic consequences to a neighborhood or locality if a project is delayed or cannot be built; or
 - g. other compelling negative hardships related to the above; and
6. The costs and activities comply with all applicable program requirements, including environmental, labor standards and (where applicable for CDBG-R activities) pre-award cost limitations.

II. For Projects Already Under Construction Prior to Acceptance of CDBG-R or NSP2 Funds

Due to the national financial crisis, a HUD grantee may find that a project that was previously under construction has lost one or more of its funding commitments and is now halted due to the loss of this funding commitment(s). In seeking additional funding sources, the HUD grantee may decide the commitment of CDBG-R or NSP2 Recovery Act funds to the project is the best way to get the project back on track and to resume construction. The project's existing construction contract may include the use of steel, iron, or manufactured goods that do not meet the Buy American requirement. The HUD grantee may take advantage of this exception, however, in order to complete the project. In such cases, the construction work must have been carried out in compliance with all applicable CDBG or NSP2 requirements, such as the National Environmental Policy Act (NEPA) and Davis-Bacon. Therefore, in selecting projects, a relevant consideration would be whether the project has already received other federal financial assistance.

To be a project under construction, a **project must have the following characteristics prior to** the date of HUD's execution of the Grant Agreement:

1. The HUD grantee has secured the remaining financial commitments for the project and these sources are currently available to the project;
2. The HUD grantee has an existing construction contract and general contractor. The general contractor contract does not include the use of all American-made

products. The HUD grantee has documentation of the bid solicitation process and the bid in its files;

3. The project is in the HUD grantee's consolidated plan/annual action plan, amended consolidated plan/annual action plan, or NSP2 application (including any amendments thereto);
4. The project is ready to resume construction and has received the required zoning, building and other necessary permits to start construction;
5. The HUD grantee can show that it is in the public interest to resume construction and not rebid the construction work to ensure that all products are American-made. To support its public interest determination, the HUD grantee must maintain documentation demonstrating that rebidding will result in one or more of the following:
 - a. a substantial delay of the construction and completion of the project;
 - b. a substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;
 - c. one or more lenders or granters or the construction contractor rescinding their commitment to the project resulting in the project being significantly delayed or rendering it infeasible;
 - d. a HUD grantee missing the obligation and expenditure deadlines specified in the Recovery Act (CDBG-R funds must be expended by September 30, 2012 and for NSP2 funds, 50% expended within 2 years of obligation availability and 100% within 3 years of obligation availability);
 - e. jobs not being created or retained;
 - f. negative economic consequences to a neighborhood or locality if a project is delayed or cannot be built; or
 - g. other compelling negative hardships related to the above; and
6. The costs and activities, including the initial construction, comply with all applicable program requirements, including environmental, labor standards, and (where applicable for CDBG-R activities) pre-award cost limitations.

Addendum 4

This is an excerpt from the current list of nonavailable articles listed at 48 CFR 25.104(a). For the complete list of nonavailable articles, please see 48 CFR 25.104(a). See also 2 C.F.R. 176.80. The procedures at 48 C.F.R. 25.103(b)(1) apply if any of those articles are manufactured goods needed in the project covered by the Buy American requirement. HUD grantees covered by the Buy American requirement may use these already approved exceptions as described below. HUD may learn of other manufactured goods that are not available in sufficient and reasonably available quantities and of a satisfactory quality, and could make such a finding to except those items or HUD could apply to have them included on the list at 48 CFR 25.104(a)

The following articles have been determined to be nonavailable in accordance with 48 CFR 25.103(b)(1)(i):

Acetylene, black.	Emetine, bulk.
Agar, bulk.	Ergot, crude.
Anise.	Erythrityl tetranitrate.
Antimony, as metal or oxide.	Fair linen, altar.
Asbestos, amosite, chrysotile, and crocidolite.	Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.
Bauxite.	Goat hair canvas.
Bephenium hydroxynapthoate.	Graphite, natural, crystalline, crucible grade.
Bismuth.	Hand file sets (Swiss pattern).
Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.	Hemp yarn.
Chicle.	Hog bristles for brushes.
Chrome ore or chromite.	Hyoscine, bulk.
Cinchona bark.	Ipecac, root.
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.	Iodine, crude.
Coffee, raw or green bean.	Kaurigum.
Colchicine alkaloid, raw.	Lac.
Copra.	Leather, sheepskin, hair type.
Cork, wood or bark and waste.	Manganese.
Cover glass, microscope slide.	Menthol, natural bulk.
Calcium cyanamide.	Mica.
Castor beans and castor oil.	Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property).
Chalk, English.	Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.
Cadmium, ores and flue dust.	Modacrylic fur ruff.
Crane rail (85-pound per foot).	Nitroguanidine (also known as picrite).
Cryolite, natural.	
Dammar gum.	
Diamonds, industrial, stones and abrasives.	

Nux vomica, crude.
Oiticica oil.
Petroleum, crude oil, unfinished oils, and finished products.
Pine needle oil.
Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
Pyrethrum flowers.
Quartz crystals.
Quebracho.
Quinidine.
Quinine.
Radium salts, source and special nuclear materials.
Rosettes.
Rubber, crude and latex.
Rutile.
Santonin, crude.
Secretin.
Shellac.
Thread, metallic (gold).

Silk, raw and unmanufactured.
Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
Sugars, raw.
Talc, block, steatite.
Tantalum.
Tapioca flour and cassava.
Tartar, crude; tartaric acid and cream of tartar in bulk.
Tin in bars, blocks, and pigs.
Triprolidine hydrochloride.
Tungsten.
Wax, carnauba.
Wire glass.
Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
Yarn, 50 Denier rayon.

TITLE 48--FEDERAL ACQUISITION REGULATIONS SYSTEM

CHAPTER 1--FEDERAL ACQUISITION REGULATION

Sec. 25.103 Exceptions.

When one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American Act:

* * * * *

(b) Nonavailability. The Buy American Act does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(1) Class determinations. (i) A nonavailability determination has been made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as--

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. * * * *

* * * *

(e) Information technology that is a commercial item. The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item, when using fiscal year 2004 or subsequent fiscal year funds (Section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

[64 FR 72419, Dec. 27, 1999, as amended at 70 FR 11742, Mar. 9, 2005; 71 FR 224, Jan. 3, 2006]

Addendum 5

Questions and Answers

- Q1: How does a HUD grantee determine 1) whether a product or contract is likely to include iron, steel and/or manufactured goods subject to the restriction, and 2) whether such materials qualify as “produced in the United States” in accordance with the Buy American requirement?
- A1: Product labels and descriptions shall be relied on. If in doubt, contact the manufacturer. In the event that the country of origin is unascertainable, HUD grantees should document the means used in their attempts to verify the country of origin (e.g., informal consultations with manufacturers, suppliers, construction contractors, etc.). Also refer to the Office of Management and Budget (OMB) Interim Guidance entitled *Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards*, 74 Fed. Reg. 18449 (April 23, 2009) (to be codified at 2 CFR Part 176) (as now in effect and as may be amended from time to time) available at <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>. HUD grantees should also consider using the sample language provided in Addendum 1.
- Q2: Will the Buy American steel and iron requirement apply to manufactured items such as appliances, heat pumps, and generators. If so, what is the process to determine if they meet the standards and what documentation will be required?
- A2: Yes. As stated above, product labels and descriptions shall be relied on. If in doubt, contact the manufacturer and maintain supporting records.
- Q3: What information does a HUD grantee need to include in their contracts and agreements regarding the Buy American requirement?
- A3: The OMB Interim Guidance noted above specifies standard contract and award terms. HUD grantees should also consider using the sample language provided in Addendum 1.
- Q4: Does the Buy American requirement extend to heating and cooling units?
- A4: Yes. Manufactured goods must be manufactured in the United States, but there is no requirement with regard to the origin of components or subcomponents used in manufactured goods. See 2 C.F.R. 176.70(a)(2)(ii).
- Q5: The HUD grantee is interested in purchasing water heaters that are assembled in the U.S. and all parts are manufactured in the U.S. except for the relief valve. Does this meet the Buy American requirement?

- A5: Yes. The requirement does not apply to iron or steel used as components or subcomponents of manufactured goods used in the project. See 2 C.F.R. 176.70(a)(2)(ii).
- Q6: What if a HUD grantee wants to purchase manufactured goods from a U.S. company, but the product is manufactured outside the U.S.? What if the manufactured goods are sold by a foreign-owned company, but manufactured in the U.S.?
- A6: According to the OMB Interim Guidance at 2 C.F.R. 176.70(a)(2), all of the iron, steel and manufactured goods used must be produced or manufactured in the United States. Production in the U.S. of the iron or steel used in the manufactured goods requires that all manufacturing processes must take place in the U.S. except metallurgical processes involving refinement of steel additives. The requirement does not apply to iron or steel used as components or subcomponents of manufactured goods. There is no requirement with regard to the origin of components or subcomponents in manufactured goods, as long as the manufacturing occurs in the U.S. (Whether the company is domestically or foreign-owned is irrelevant.) Also note that there is non-application to acquisitions covered under an international agreement, but the HUD grantee would have to be Party to a covered agreement. 2 C.F.R. 176.70; 176.90; 176.160; 176.170 and Appendix to Subpart B of 2 CFR part 176.
- Q7: What if the contractor is buying a “kit” that is assembled on site? Is that considered manufactured in the U.S.?
- A7: The kit would meet the definition of an acceptable manufactured good as it would be brought to the construction site for incorporation into the building or work and 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. See 2 C.F.R. 176.140(a)(1).
- Q8: If a HUD grantee wants to purchase iron fencing and they have thoroughly researched the availability of American-manufactured iron fencing, and could not find any iron fencing made or manufactured in the U.S., could they document their attempts and proceed with purchasing the product from a foreign producer? Is a fence covered by the Buy American requirement?
- A8: Iron fencing used in the construction or alteration of a public work or public building with Recovery Act funds is covered by the Buy American requirement. If the HUD grantee finds a product, such as iron fencing, is not available, they should submit an exception request to HUD. In addition, there is an existing list of nonavailable articles at 48 CFR 25.104(a). The procedures at 48 CFR 25.103(b)(1) apply if any of those articles are manufactured goods needed in the project. See also 2 C.F.R. 176.80.
- Q9: Does a HUD grantee need an exception to the Buy American requirement if the CDBG-R or NSP2 funds are used only for land acquisition (not part of the construction or rehabilitation financing)?

- A9: No. The Buy American requirement applies when Recovery Act funds are used for a project for the construction, alteration, maintenance, or repair of a public building or public work. Using CDBG-R or NSP2 funding solely for land acquisition is not considered construction, alteration, maintenance, or repair of a public building or public work.
- Q10: Does the Buy America requirement affect the purchase of materials from the time the funds are introduced into the project, or is it retroactive to the start of the project? For example, the contractor may have already purchased the materials that are affected by the requirement.
- A10: Buy American would not apply to work already performed and funded with non-Recovery Act funds.
- Q11: A HUD grantee has a public works project already under construction using non-HUD (and non-Recovery Act) funds. CDBG-R funds will be used to fund an additional increment of construction work (e.g. 4 additional blocks of sewer lines); that work was initially included in the construction bids, but was excluded from the construction contract because the bids came in over budget. Will the Buy American requirement apply only to the CDBG-R funded portion of the project, or will the requirement retroactively apply to the entire project?
- A11: When a project for the construction of a public building or public work is assisted, in whole or in part, with CDBG-R funds, the Buy American requirement applies prospectively to all construction work performed from the time CDBG-R funds are introduced into the project. This would include both CDBG-R and non-Recovery Act funded activities that are part of a single project. The Buy American requirements would not apply retroactively to work already performed and funded with non-Recovery Act funds. HUD has granted an exception for public works projects already under construction prior to acceptance of CDBG-R funds. See Addendum 3.
- Q12: What are the consequences for noncompliance with the Buy American requirement?
- A12: HUD must follow the requirements in 2 C.F.R. 176.130. In addition to other lawful remedies, HUD reserves the right to disallow costs or to take other corrective or remedial actions deemed appropriate.
- Q13: Where can I find additional information on the Buy American requirement?
- A13: Additional information may be found in OMB Interim Guidance entitled *Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards*, 74 Fed. Reg. 18449 (April 23, 2009) (to be codified at 2 CFR Part 176) (as now in effect and as may be amended from time to time) available at <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>.
- Q14: Does the Buy American requirement apply when a structure will be owned by a private, nonprofit entity but is classified in the CDBG regulations as a public facility?

A14: No. Structures owned by nongovernmental, nonprofit entities are generally not considered public buildings.

Q15: Does the Buy American requirement apply in cases where a Public Housing Agency (PHA) develops housing in a mixed-finance project?

A15: OGC has opined on the applicability of the Buy American requirement to mixed finance projects. Where the PHA procures a private developer for the project and merely serves as a lender of funds having no ownership interest in the project, the Buy American requirement does not apply. Where a PHA or an instrumentality thereof has a marginal ownership interest in the project (for example, as a .01% general partner of a limited partnership), but otherwise the scenario is the same as the preceding, the Buy American requirement does not apply. When the PHA or PHA instrumentality exercises significant functions within the owner entity with respect to the management of the project, and in cases where the PHA or a PHA instrumentality serves as the general partner of the owner entity and has a significant management role as determined by HUD, the Buy American requirement will apply. Finally, if the PHA or PHA instrumentality serves as the developer of a mixed finance development, the Buy American requirement also applies. A parallel situation may exist with other types of governmental entities, or for certain types of mixed-use projects involving both public- and private ownership. For questions regarding the application of the Buy American requirement to public-private partnerships with other governmental entities, contact Elton Lester, Associate General Counsel for Assisted Housing and Community Development at BuyAmericanQuestions@hud.gov.

Q16: If a HUD grantee, that is an entity covered by an International Agreement pursuant to the Appendix to Subpart B of the OMB Interim Guidance, contracts with a developer to construct a public building or public work and in turn, the developer subcontracts some of the work to a subcontractor, are the contractor and subcontractor subject to the International Agreement?

A16: The International Agreement “nonapplication of the Buy American requirement” (2 C.F.R. 176.90) applies to the iron, steel and manufactured goods used in the project and the “recipients” are to follow the terms of the International Agreement. Direct procurement is not required by the OMB Interim Guidance. Accordingly, any project contract or subcontract with the covered recipient (HUD grantee) subject to an International Agreement would not be subject to the Buy American requirement as long as the project has an estimated value of \$7,443,000 or more and the project is not specifically excluded from the application of those agreements (2 C.F.R. 176.90(a)).

Q17: Is there a small purchases threshold (e.g., exemption for contracts or purchases under \$100,000) or de minimus amount of non-American iron, steel or manufactured goods that may be contracted for or purchased with Recovery Act funds?

A17: The Buy American requirement provides neither a small purchases threshold nor a de minimus exception. However, HUD has granted an exception for purchases below the simplified acquisition threshold (currently \$100,000).

Q18: An NSP2 application is submitted by a consortium that includes local government and private nonprofit organizations.

- (a) If funded, will all activities of the consortium be subject to the Buy American provisions?
- (b) Does it matter whether the lead member of the consortium is a local government versus a private nonprofit organization?
- (c) If a nonprofit consortium member purchases residential properties from a local government consortium member, does Buy American apply?
- (d) If a nonprofit consortium member purchases foreclosed residential properties directly from the lender, using local government funds for acquisition, rehabilitation, or new construction, does Buy American apply?

A18: The Buy American requirement applies to projects (“public buildings and public works”), rather than entities. If the consortium or consortium member intends to use NSP2 funds for the construction, alteration, repair or maintenance of a public building or public work, then the Buy American requirement applies. Generally speaking, a structure or improvement owned by a governmental entity is considered a public building and public work. A structure owned by a private entity is not usually considered publicly owned, and therefore not subject to the Buy American requirement. See sections I. and V.2. of the CPD Implementation Guide as well as Q&A 15. Also, the Buy American does not apply when NSP2 funds are used solely for land acquisition, as this is not considered construction, alteration, maintenance, or repair of a public building or public work. See Q&A 9.

Q19: If a governmental entity has a long-term lease interest in a privately- owned building, does that make it public?

A19: In the CDBG program, a long-term lease (a lease in excess of 15 years) of a privately- owned building by a governmental entity is treated as an acquisition. Accordingly, the building would be considered to be owned by the governmental entity and, therefore, a public building.