



## **Purchasing Directive: Buy American Provision; Debarred and Suspended Contractors**

<b><u>Purchasing Directive Reference:</u></b> Additional Resources for Buy American Provision; Debarred and Suspended Contractors	<b><u>Issue Date and Version:</u></b> 07/17/2009 – v1
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### **I. Purpose:**

The purpose of this Purchasing Directive is to alert state entities to additional resources regarding application of the Buy American Provision of the American Recovery and Reinvestment Act of 2009 (ARRA) and to identify a resource for determining whether a contractor has been debarred or suspended.

### **II. Applicability:**

This Purchasing Directive applies to all State of Georgia governmental entities of the executive branch subject to DOAS' procurement authority pursuant to the State Purchasing Act, including but not limited to certain state offices, agencies, departments, boards, bureaus, commissions, institutions and universities & colleges. This Purchasing Directive may also be used as a general guide for other governmental entities such as state authorities, local governmental entities and other organizations as appropriate.

### **III. Additional Resources for Buy American Provision:**

The following online resources may provide assistance in understanding the Buy American provision:

- OMB "Buy American" guidance can be found here:  
<http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>
- Buy American Requirements for Construction Material:  
<http://edocket.access.gpo.gov/2009/pdf/E9-7031.pdf>
- See Also Attachments 1 and 2 to this directive.

#### **IV. Debarred and Suspended Suppliers**

As a general rule, the federal suspension and debarment checking requirement applies to any contract in excess of \$25,000 when federal funds are involved. Additional information regarding this requirement is available at [www.epls.gov](http://www.epls.gov).

#### **V. Contact Information:**

The State Purchasing Division is prepared to provide you assistance in accomplishing the procurement activity. Contact can be made directly to Tim Gibney at [tim.gibney@doas.ga.gov](mailto:tim.gibney@doas.ga.gov) or at 404.656.0934.

## **ATTACHMENT 1: ARRA Buy American Overview**

**General Rule:** Section 1605 of the Recovery Act 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. The law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements (e.g., the government procurement provisions of the nation's trade agreements). This is a significant expansion of prior Buy American requirements for many states.

**Rule May Be Waived Where:** (1) The required iron, steel, or relevant 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, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent; or (3) Applying the domestic preference would be inconsistent with the public interest.

**OMB Implementation Guidance:** Issued Thursday, April 23, 2009, Federal Register Vol. 74, No. 77, pages 18449 – 18463, available electronically at <http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=57370128578+2+2+0&WAIAction=retrieve>. OMB is accepting comments on this guidance until June 22, 2009.

**Rule Applies To All States:** For all procurement awards valued at less than \$7,443,000.

**Rule Does Not Apply:** To procurements, valued at \$7,443,000 or more, where states are covered under international agreements, unless the particular procurement has been excluded from the agreement's coverage. Forty states, Puerto Rico, and certain cities and port authorities, have acceded to the government procurement provisions of one or more international agreement and will have to take these international commitments into account when awarding ARRA-related procurement contracts.

**Example:** Many states are covered by the WTO Agreement on Government Procurement ("WTO GPA"). Procurement officials in these states are, regardless of the ARRA, required to treat the goods of other parties to the WTO GPA no less favorably than U.S. goods when making contract awards (National Treatment requirement). Procurement officials in these states must also generally extend equal treatment during the award process to the same or similar goods from other WTO GPA signatories (Most Favored Nation requirement).

**Determining The Scope Of The ARRA's Buy American Requirements For Your State:** To ensure the ARRA's Buy America requirements are properly applied, states procurement officials should, as an initial matter:

1. Determine whether your state has committed to abide by the procurement provisions of any international agreement (a list of states that have made such commitments appears in the Guidance starting at Fed. Reg. 18457), and determine which other nations are also a party to those agreements.

AND

2. Determine—assuming your state is covered by one or more of these agreements—the exact scope of the state’s commitment under these agreements, including the state agencies listed in the agreement and the extent of any reservations or exclusions that the state may have taken from these commitments. For example, certain states specifically excluded procurements involving construction-grade steel, coal, or motor vehicles from the coverage of the WTO GPA.

Given this, procurement officials in states that are covered by the WTO GPA would, for example, generally be required to treat a bid offering to supply steel from Japan (Japan is a member of the WTO GPA) no less favorably than they treat bids offering to supply U.S. steel. Those states that specifically excluded construction grade steel from the Agreement’s coverage, however, would be required to apply the ARRA’s Buy America requirement when evaluating covered bids offering to supply steel from Japan (or any other country).

**ARRA Applicability To States That Have Not Acceded To Any International Agreement:**

If a state has not acceded to the government procurement provisions of any international agreement, all procurements funded by the Recovery Act are subject to the Recovery Act’s Buy American rules.

**ARRA Applicability To States That Have Acceded To An International Agreement:** If a state has acceded to the government procurement provisions of one or more international agreements, the state must apply the Recovery Act’s Buy American rules UNLESS:

1. The contract is worth \$7,443,000 or more, AND
2. The international agreement at issue requires the state to treat the particular goods at issue of a particular foreign nation the same as U.S. goods when awarding an ARRA-related contract. (i.e., If these two requirements are met, the procuring agency must generally treat the foreign goods the same as the agency treats U.S. products.)

**Only Products From Certain Countries May Be Entitled To National Treatment/MFN Treatment When Awarding State-Administered ARRA Contracts:** These countries include the following signatories to the WTO Agreement on Government Procurement:

Aruba, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom,<sup>1</sup>

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<sup>1</sup> Taiwan will become a party to the WTO GPA as soon as it completes its domestic approval and submits the necessary documents to accede to the WTO GPA. It is likely that this will occur by July or August of this year.

and the following nations that have concluded separate free trade agreements with the U.S.:

Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Australia, Chile, Singapore, Morocco, Peru.

**Certain ARRA-Related Procurements Are Not Entitled To The Benefits Of The WTO GPA Or Other Agreements:** The benefits contained in the WTO Agreement on Government Procurement and other U.S. trade agreements do not apply to federal mass transit and highway project-related procurements, or to dredging-related procurements. Covered state procurements involving these subjects are therefore subject to the ARRA's Buy American requirements.

## ATTACHMENT 2:

TO: Governors' Recovery Leads, Washington Representatives and State-Federal Contacts  
RE: Follow-Up Questions and Answers from Buy American Call

### BUY AMERICAN CALL QUESTIONS

- 1) **Question:** My question concerns the interpretation of manufactured goods as it applies to these structural steel components. By way of example, a structural steel column is fabricated or manufactured from steel plates, H-beams, angles, etc... and is subsequently painted as per specifications for the particular job. Based on the information in paragraph 196.70, would the fabricator have to ascertain the steel being used was made in the U.S., or would this be interpreted as goods manufactured in the U.S. and subsequently not restricted to domestic steel?

**Response:**

**Paul Piquado:**

This is a good question, which I think hinges on confusion surrounding the OMB's definition of what constitutes a "manufactured good," and the fact that rule only requires an examination of the source of the final product where manufactured goods are involved, not every component therein.

The OMB Guidance defines the term "manufactured good", at 176.140, to mean "a good brought to the construction site for incorporation into the building or work that has been--(i) Processed into a specific form and shape; or (ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials."

The question which naturally arises based on this definition is: Does the ARRA's "Buy American" requirement apply to foreign steel that has been received in one shape (e.g., steel slab, plate, coil, etc.) but then is subsequently "processed" in the U.S. into another form (e.g., by being extruded into steel pipe or, in this case, a steel column)? Does this type of "processing" turn it into a U.S.-manufactured good?

The answer, I believe, is no, especially given the intent of the law. Simply taking foreign steel, changing its shape, and painting it does not turn the steel into a U.S.-manufactured product which can be bought with ARRA funds. As such, the local fabricator will have to find another use for his steel than public building projects funded with ARRA money.

**Jean Grier:**

I agree with Paul's conclusion. However, I would refer to section 176.70(a)(2)(i) of the OMB Guidance that sets out the requirement for production in the U.S. of iron and steel as follows: "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) **Question: Which federal agency would have the authority to issue a waiver of the ARRA “Buy American” requirement where more than one federal agency is involved in providing ARRA funding for a particular project?**

**Response:**

**Jean Grier**

According to OMB, in such a case, the federal agencies involved in funding the project would have to work together to decide which agency would issue the waiver.

- 3) **Questions: I was on the call today and just after that handled a question from an aluminum handrail manufacturer in my state. They buy all their fittings and aluminum from companies in the US. In talking with other companies, they are hearing that one company is buying the fittings and the aluminum from China and doing the manufacturing in the US. I believe that would still meet the buy American provision. Is that correct?**

**Response:**

**Jean Grier**

Yes, it complies. Except for iron and steel, there is no requirement with regard to components, as long as final manufacture occurs in the United States.

- 4) **Question: Will the ARRA Buy American provisions apply to the weatherization of state-owned public housing?**

**Response:**

**Jean Grier**

To respond to this question, we will need more information on the program and the context for the question (e.g., Which agency is awarding the funds? What type of entity is the recipient? Are the funds being awarded through a direct federal assistance award (e.g., grant), contract, or other form?

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