

FUNDING OPPORTUNITIES 

# Frequently Asked Questions about the Buy American Provisions

## Funding Opportunities

[Funding Opportunities](#) » Frequently Asked Questions about the Buy American Provisions

Here you'll find definitions of the terms and acronyms used in the Buy American Provision, as well as answers to frequently asked questions about the Provision.

You can find answers to the following questions:

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**American provisions? Or, are minor changes that typically would not be considered a construction activity excluded? If the latter is the case, what is the threshold?**

- **How do you determine what constitutes a "project"?**
- **What is a substantial transformation?**
- **My organization received financial assistance from DOE's Office of Energy Efficiency and Renewable Energy, and I have Buy American questions related to the projects this assistance is funding. Who can I talk to?**

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## Tips for Determining Buy American

- **A grantee is not sure if a product was made in America. What should the grantee do to verify the manufacturing origins?**
- **Do I need to track the country of origin of every screw, bolt, wire, switch and other small piece of construction equipment used in our project?**
- **A Japanese solar energy company opens a manufacturing plant in the United States. The components and subcomponents of the manufactured good come from all over the world. Would these PV modules be Buy American compliant?**

- A company imports a manufactured good from abroad, repackages it at their facility in the U.S., and sells it under a U.S. brand name. Is this product compliant with the Buy American provisions?
- A State Energy Office is using SEP Recovery Act funds to pay for a large government building retrofit. It wants to purchase certain equipment manufactured abroad by a prominent U.S. company, and sold by a local distributor. Would this be compliant with the Recovery Act Buy American provisions?
- If domestically-available manufactured goods are substantially less energy-efficient than foreign goods (such as solar panels) could a subrecipient seek a nonavailability waiver based on the substandard quality of the U.S. made good?

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- Who is responsible for determining whether a product is subject to the Buy American provisions?
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- What is the consequence of not complying with the Buy American provisions?
- How do grantees verify that a product is indeed manufactured in the United States?
- A vendor indicated that its goods qualify under the Buy American Act of 1933. Is that sufficient compliance?
- The General Services Administration (GSA) procurement Web site indicates that a product made in a foreign (e.g., WTO member) country is Recovery Act compliant. Is that sufficient to comply with the Buy American provisions?
- Has DOE issued guidance on how it will handle issues of non-compliance with the Buy American Recovery Act provisions where a recipient relied on a manufacturer's misrepresentation that its product complied with the Buy American Recovery Act provisions?

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- **What is the significance of the \$7,804,000 threshold for applying international agreements to the Buy American provisions' requirements?**
- **Is an SEP or EECBG grantee required to treat Canadian manufacturers the same as U.S. manufacturers if the project is valued at \$7,804,000 or more?**
- **An efficient street lighting product is manufactured in Mexico (a NAFTA signatory). Using EECBG funds, can this product be procured by a city for a \$500,000 lighting retrofit project on public property funded by the Recovery Act, and be considered compliant with the Recovery Act Buy American provisions?**
- **How do other international agreements apply to EERE grantees?**

## **GLOSSARY OF TERMS AND ACRONYMS**

### **Recovery Act**

The American Recovery and Reinvestment Act of 2009, also known as "ARRA" or the "stimulus bill."

### **Buy American Provisions**

Section 1605 of the Recovery Act (Pub.L. 111-5), also referred to as "Buy American" in this document. The Buy American provisions should not be confused with the Buy American Act of 1933 (41 U.S.C. 10a-10d), which is a separate law that predates the Recovery Act.

### **EERE**

Office of Energy Efficiency and Renewable Energy, the Department of Energy office responsible for this document.

### **FAR**

Federal Acquisition Regulation. The FAR applies to the Federal government's procurement of goods and services, *not* to financial assistance awards (grants). If the FAR clauses flow down from the contract with the Federal government, those clauses will apply to subrecipients and subcontractors as well.

## **CFR**

Code of Federal Regulations. The government-wide regulations for implementing the Buy American provisions are located at 2 CFR Part 176, Subpart B. These sections are also known as the Office of Management and Budget (OMB) Interim Final Guidance, and can be found on the EERE Buy American Web site.

## **EECBG**

Energy Efficiency and Conservation Block Grant program, one of EERE's Recovery Act funded programs.

## **SEP**

State Energy Program, one of EERE's Recovery Act funded programs.

## **Financial Assistance Recipients**

Also known as grantees. Entities (states, counties, cities, and tribes) that receive funds through financial assistance awards under programs such as SEP and EECBG are financial assistance recipients.

## **Subgrantee and Subrecipient**

A non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency.

## **Subcontractor and or Vendor**

Means a dealer, distributor, merchant, or other seller providing goods or services procured for the conduct of a Federal program. These goods or services may be procured directly by the federal government or by a financial assistance recipient expending federal dollars to execute a federal program.

## **FREQUENTLY ASKED QUESTIONS**

Q: What are the Recovery Act Buy American provisions?

A: The Buy American provisions direct that, subject to certain exceptions, no Recovery Act funds 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 or manufactured in the United States.

Q: Do the Buy American provisions apply to all projects funded by the Recovery Act?

A: No. The provisions only apply to projects for the construction, alteration, maintenance or repair of public buildings or public works funded by the Recovery Act. This FAQ addresses common questions by EERE financial assistance recipients (grantees), whose awards are governed by the OMB Interim Final Guidance at 2 CFR Part 176, Subpart B. For contractors performing Recovery Act funded work under contract with the Federal government, FAR Subpart 25.6 applies.

Q: Do the Buy American provisions apply to all goods? Services too?

A: No. The Buy American provisions only apply to iron, steel, and manufactured goods brought to the construction site for incorporation into a public building or public work. Products that do not fit the definition of manufactured goods are not covered. Similarly, services are not covered. While EERE strongly recommends employing domestic service providers when possible, there is no legal requirement to do so.

Q: What is a public building or public work?

A: According to the regulations published by OMB, this means a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; tribes; and multi-State, regional, or interstate entities which have governmental functions). 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, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

Q: What is a "manufactured good?"

A: According to the regulations published by OMB in 2 CFR 176, a manufactured good is 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 another 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 a project, as long as the manufacturing occurs in the United States. The OMB Interim Final Guidance requires that the manufactured good be physically incorporated as into the project.

For example, a crane used to lift items on a construction site would not be considered a manufactured good covered by the Buy American provisions because the crane is not incorporated into the building or public work. Similarly, an energy efficient desktop computer monitor does not become a permanent fixture of the building, and therefore is not "incorporated into" the building. As a result, the monitor does not fit the definition of a "manufactured good" and is not covered by the Buy American provisions.

By contrast, a "smart" thermostat that is brought to the site for incorporation into a building would be covered by the Buy American provisions. The individual parts that go into that meter, however, would be considered components or subcomponents and would not be subject to the Buy American provisions.

Q: Does Buy American apply to private projects, or private contractors on public projects?

A: No, and yes, respectively. The Buy American requirements apply to all Recovery Act funds used for a project for the construction, alteration, maintenance, or repair of a public building or public work. The question, therefore, is whether the project is for a public building or public work, not who is performing the work. Generally speaking, if a government entity owns or leases the building or work, it is a public building or work that would be subject to the Buy American provision. However, title is not the only factor (it is not dispositive). Determinations of what is a public building or public work must be made on a case-by-case basis by the grantee and the Recovery Act award official (the Contracting Officer).

Q: How should a grantee determine if Buy American applies to a multifamily residence?

A: In general, ownership will be the determinative factor when considering whether a building qualifies as a public building. If a state or local government entity owns the building, then it is a public building and the project will be subject to the Buy American provisions. Conversely, if a building is privately owned, for the most part the project will not be subject to the Buy American provisions.

There may be some instances, such as mixed-finance project, where the Buy American requirement applies even though a governmental entity does not have complete or direct ownership of the building. Where the government agency or an instrumentality thereof merely serves as a provider of financial assistance, having no ownership interest in the building, the Buy American requirement will not apply. Similarly, when a government agency or an instrumentality thereof has a marginal ownership interest in the building (for example, as a 5% general partner of a limited partnership), the Buy American requirement will not apply. By contrast, when the government agency or an instrumentality thereof exercises significant functions within the owner entity (i.e., a public-private partnership) with respect to the management or ownership of the building, or in cases where the agency serves as the general partner of the owner entity and has a significant management role, the Buy American requirement will apply.

Finally, if the government agency or an instrumentality serves as the original developer of a mixed-finance development now receiving Recovery Act funds for one or all of the involved buildings, the Buy American requirement will apply.

Because WAP primarily performs weatherization work on private residences, most of its Recovery Act-funded projects are not subject to the Buy American provisions. The exceptions are for buildings that fall under the categories outlined above, where the ownership or management structure does qualify them as public buildings, and therefore subject to the Buy American provisions.

Award recipients who are concerned about a project's compliance should work with their Project Officer, who can assist in rectifying any misinterpretations of the provisions in a cooperative way, and help institute measures to ensure compliance moving forward.

Q: Is any change to a public building or work considered construction, alteration, maintenance, or repair and would it therefore trigger the Buy American provisions?



Or, are minor changes that typically would not be considered a construction activity excluded? If the latter is the case, what is the threshold?

A: There is no threshold. Any construction, alteration, maintenance, or repair of a public building or public work with Recovery Act funds is subject to the Buy American requirements unless an exemption applies and a waiver is granted.

Q: How do you determine what constitutes a "project"?

A: EERE has recently published guidance on the definition of a project for the purposes of [Buy American](#).

Q: What is a substantial transformation?

A: Substantial transformation is a term used in the definition of a "domestic manufactured good" in the OMB Interim Final Guidance published at 2 CFR 176. In order for a good to be considered produced or manufactured in the United States, it must undergo a substantial transformation in this country. EERE has recently published guidance to assist grantees in making these substantial transformation determinations. Read the [complete guidance](#).

The factors involved in determining whether substantial transformation has occurred focus on manufacturing, processing, assembly, or integration of the components or subcomponents into a finished good. Design, planning, procurement, component production, or any other step prior to the process of physically bringing together the components into the final manufactured good used in (and incorporated into) the Recovery Act project cannot constitute part of the substantial transformation determination.

Q: My organization received financial assistance from DOE's Office of Energy Efficiency and Renewable Energy, and I have Buy American questions related to the projects this assistance is funding. Who can I talk to?

A: You can send questions to [BuyAmerican@ee.doe.gov](mailto:BuyAmerican@ee.doe.gov) or contact your Project Officer.

## EXCEPTIONS AND WAIVERS

Q: What are the exceptions to the Buy American restrictions?

A: In certain circumstances a project will qualify for an exception to the Buy American provisions. There are three exceptions:

- i. **Nonavailability:** Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available (commercial?) quantities and of satisfactory quality;
- ii. **Unreasonable Cost:** Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25%;
- iii. **Public Interest:** Applying the Buy American provision is inconsistent with the public interest.

In addition, the Buy American provision must be applied in a manner consistent with U.S. obligations under international agreements. EERE has published guidance and FAQ's specific to questions related to international agreements. Read the [full guidance](#).

Q: We need to procure a manufactured good for an EERE Recovery Act-funded project but cannot find a domestic manufacturer. What should we do?

A: The EERE financial assistance recipient may apply for a waiver, based on domestic nonavailability.

Q: How do we apply for a waiver based on domestic nonavailability?

A: EERE has published a "Nonavailability Waiver Request Template" on the Buy American webpage. Please fill out the required information in a thorough and complete manner. All waiver requests should be coordinated with your project officer, and submitted as an email attachment to [BuyAmerican@ee.doe.gov](mailto:BuyAmerican@ee.doe.gov).

Q: What is the process for issuing domestic nonavailability waivers?

A: Once a waiver request is submitted, the EERE Buy American team initiates a formal consultation process with the National Institute of Standards and Technology's Manufacturing Extension Partnership (MEP). MEP has 59 affiliated centers nationwide with substantial knowledge of American domestic manufacturing capabilities. MEP uses its network of centers to "scout" for manufacturers and potential manufacturers of the product identified in the waiver

request. EERE also contacts manufacturing trade associations and conducts independent research to determine whether a product is manufactured in the United States. EERE aims to complete this scouting process and issue a waiver determination approximately 4 weeks after receiving a waiver request.

Q: Has EERE already issued any nonavailability waivers?

A: Yes. The waivers are published in the Federal Register. [A complete list is available.](#)

Q: We believe that a product should be excluded on the basis of unreasonable cost or because applying the Buy American provision would not be in the public interest.

How do we apply for a waiver?

A: There is no specific format for public interest waivers. You should include as much information as you believe is necessary to allow EERE to make the proper determination. For waivers based on unreasonable cost, DOE has published [guidance](#). All waiver requests should be coordinated with the Project Officer and submitted by email to [BuyAmerican@ee.doe.gov](mailto:BuyAmerican@ee.doe.gov).

Q: For a waiver of the Buy American provisions on the basis of unreasonable cost, is the cost increase threshold 25% of the specific product in question or of the entire project?

A: Under Buy American, using domestic products must increase the cost of the *total project* by 25% to be eligible for a waiver. DOE has also published [guidance on submitting unreasonable cost waivers](#).

## TIPS FOR DETERMINING BUY AMERICAN

Q: A grantee is not sure if a product was made in America. What should the grantee do to verify the manufacturing origins?

A: Grantees should contact the product's manufacturer, distributors, and suppliers to determine the country of origin. In addition, trade associations may be a good source of information. EERE has published [guidance on documenting compliance with the Recovery Act Buy American provisions](#).

Q: Do I need to track the country of origin of every screw, bolt, wire, switch and other small piece of construction equipment used in our project?

A: No. EERE has issued a waiver for incidental items that comprise in total a *de minimis* amount of the total cost of the iron, steel, and manufactured goods used in a project; that is, any such incidental items up to a limit of no more than 5% of the total cost of the iron, steel, and manufactured goods used in and incorporated into a project.

This means that recipients do not need to substantiate a domestic origin for the bottom 5% (based on cost) of incidental manufactured goods in each project.

Q: A Japanese solar energy company opens a manufacturing plant in the United States. The components and subcomponents of the manufactured good come from all over the world. Would these PV modules be Buy American compliant?

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

Q: A company imports a manufactured good from abroad, repackages it at their facility in the U.S., and sells it under a U.S. brand name. Is this product compliant with the Buy American provisions?

A: No. The iron, steel, or manufactured goods must be produced or manufactured in the United States. A simple repackaging, or a simple assembly, does not pass the test of substantial transformation and satisfy the definition of "manufacturing."

Q: A State Energy Office is using SEP Recovery Act funds to pay for a large government building retrofit. It wants to purchase certain equipment manufactured abroad by a prominent U.S. company, and sold by a local distributor. Would this be compliant with the Recovery Act Buy American provisions?

A: No. The products must be manufactured in the United States.

Q: If domestically-available manufactured goods are substantially less energy-efficient than foreign goods (such as solar panels) could a subrecipient seek a nonavailability waiver based on the substandard quality of the U.S. made good?

A: A waiver may be granted for a manufactured good that is not available in sufficient and reasonably available commercial quantities of a satisfactory quality. If you believe that a domestically-available manufactured good is not of a satisfactory quality, you may decide to file a nonavailability waiver request.

## COMPLIANCE

Q: Who is responsible for determining whether a product is subject to the Buy American provisions?

A: Grantees are responsible. To assist grantees in making these determinations, EERE has issued a [guidance document](#).

Q: How do grantees document compliance with Buy American?

A: EERE has issued [guidance for grantees to help with determining and documenting compliance with the Buy American provisions](#).

Q: How do grantees ensure that their subrecipients or subcontracts/vendors comply with the Buy American provisions?

A: The Special Terms and Conditions applicable to Recovery Act funded projects require that the financial assistance recipient flow down the Recovery Act special terms and conditions in any subaward or subcontract.

Based on the fact that the Special Terms and Conditions flow down to all subawards and sub-contracts, and the fact that a vendor is not a subawardee, sub-recipient, or subcontractor, the Recovery Act financial assistance recipient and sub-recipients are not required to flow down the Recovery Act's Special Terms and Conditions to vendors. However, financial assistance recipients, sub-recipients and subawardees are ultimately responsible for complying with the Special Terms and Conditions, and should take whatever measures they deem necessary to ensure that the Buy American requirements of the Recovery Act are adhered to by their respective vendors.

Q: What is the consequence of not complying with the Buy American provisions?

A: Noncompliance with the Buy American provisions constitutes a violation of the Terms and Conditions of your Financial Assistance Agreement. Corrective action can

include removing and replacing the improperly purchased foreign-manufactured goods, reducing the amount of the award, or even withholding future funds. In cases of fraud, it can even lead to criminal investigation and prosecution.

Q: How do grantees verify that a product is indeed manufactured in the United States?

A: Grantees should include the Buy American requirements in all solicitations, Requests for Proposals (RFPs), agreements and sub-agreements. Recipients should expect contractors and vendors to verify their compliance with the Buy American provisions.

To assist grantees in making substantial transformation determinations and documenting compliance with the Buy American provisions, EERE has issued [guidance documents on manufactured goods and substantial transformation for financial assistance awards](#) and [compliance with the Recovery Act Buy American provisions](#).

Q: A vendor indicated that its goods qualify under the Buy American Act of 1933. Is that sufficient compliance?

A: No. The Buy American Act of 1933 is a different law from the Recovery Act. The Buy American provisions of section 1605 of the Recovery Act are not the same as the Buy American Act of 1933.

Q: The General Services Administration (GSA) procurement Web site indicates that a product made in a foreign (e.g., WTO member) country is Recovery Act compliant. Is that sufficient to comply with the Buy American provisions?

A: No. The GSA Web site designations are not applicable to financial assistance recipients. Federal procurement, the process by which agencies acquire goods and services, has its own regulations for implementing the Buy American provision.

Q: Has DOE issued guidance on how it will handle issues of non-compliance with the Buy American Recovery Act provisions where a recipient relied on a manufacturer's misrepresentation that its product complied with the Buy American Recovery Act provisions?

A: Regarding issues of non-compliance, resulting from a grantee relying on the misrepresentations of a third party, such as a vendor or manufacturer, DOE has not issued specific guidance. However, **[A Desk Guide to the Buy American Provisions of the Recovery and Reinvestment Act of 2009: Public Guidance on Implementation, Documentation, Compliance and Enforcement](#)** (DOE publication no. EE-0393) addresses the question of how these matters are addressed by EERE.

As stated in the Desk Guide, "Each issue of non-compliance will be addressed individually, because each has fact-specific considerations that must be addressed. However, broad guidelines have been developed to ensure consistency."(Desk Guide, 22)

These broad guidelines include the consideration that at times, a grantee may have been "Misled by Contractor, Vendor, or Manufacturer: The award recipient or sub-recipient has been misled by a contractor, vendor or manufacturer." (Desk Guide, 22)

The OMB Interim Final Guidance for the American Recovery and Reinvestment Act (2 C.F.R. Part 176) permits a number of remedies in cases of non-compliance.

Pursuant to that guidance, the Desk Guide states, "...the Contracting Officer may allow the non-compliant materials to remain in the installation, and accommodate the project as it stands, taking no further action and allowing the award recipient to retain the manufactured goods and the full sum of the DOE award." (Desk Guide, 28-29)

"In cases where all of the following are met:

1. The value of the affected items is below a certain threshold or compelling exceptional circumstances exist; and
2. Reasonable effort was made by the award recipient (and sub-recipient where applicable) to comply with the Buy American provisions, but despite these efforts, a mistake was made (or the award recipient, sub-recipient were misled by a contractor, manufacturer, distributor or vendor); and
3. Reasonable effort was made by any contractor to whom the Buy American provisions were 'flowed down' to comply with the Buy American provisions; and

4. The cost of removal and replacement of the items is unreasonable in respect to the cost of the items involved; and
5. The award recipient and/or sub-recipient did not willfully disregard any communications or recommendations from Project Officers, Contract Officers, or the Buy American team in regards to compliance with the Buy American provisions; and
6. The award recipient or sub-recipient has received no similar prior accommodation for this DOE award;

The Contracting Officer, in consultation with the Buy American team and Field Counsel; **may** choose to issue a determination that no further action will be taken regarding the non-compliance and the award recipient may retain the non-compliant manufactured good as installed, without forfeiting any amount of the DOE award funds." (Desk Guide, 28-29) (Emphasis in original.)

Because these cases are so fact-specific, DOE is unable to determine whether a case is appropriate for resolution in this manner without a full review of the facts and circumstances. However, the Contracting Officer will strongly consider that the grantee has been misled by a vendor or manufacturer and relied upon the representations of that vendor or manufacturer to their detriment.

## **INTERNATIONAL AGREEMENTS**

Q: What do grantees need to know about international agreements? Why is this important?

A: The Buy American provisions require implementation that is consistent with U.S. obligations under international agreements. Under various agreements, the Federal government treats foreign-manufactured goods the same as domestic goods. State, local, and tribal governments are not automatically bound by these agreements, but in some cases have chosen to participate. The OMB Interim Final Guidance includes an appendix that lists the various international agreements and participants.

Q: What is the significance of the \$7,804,000 threshold for applying international agreements to the Buy American provisions' requirements?



A: For projects below that threshold, international agreements do not come into effect. At or above that amount, however, there may be circumstances where grantees can use manufactured goods from certain foreign countries without seeking a waiver. The circumstances and countries involved will depend on the individual grantee and the specific international agreement in question.

Q: Is an SEP or EECBG grantee required to treat Canadian manufacturers the same as U.S. manufacturers if the project is valued at \$7,804,000 or more.

A: Yes; SEP and EECBG grantees are required to treat Canadian manufacturers the same as a U.S. manufacturer for projects valued at \$7,804,000 or more. This is a result of a recent agreement between the Canadian and U.S. governments. The Agreement applies to new procurements on or after February 16, 2010 for SEP and EECBG grantees. It does not extend beyond these two programs or apply to projects below that dollar threshold.

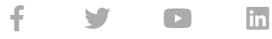
Q: An efficient street lighting product is manufactured in Mexico (a NAFTA signatory). Using EECBG funds, can this product be procured by a city for a \$500,000 lighting retrofit project on public property funded by the Recovery Act, and be considered compliant with the Recovery Act Buy American provisions?

A: No. Local government and tribal procurements under EERE Recovery Act programs are not subject to NAFTA. In addition, the hypothetical project described is well below the \$7,804,000 threshold. All projects below the \$7,804,000 threshold are subject to the Buy American requirements of the Recovery Act, unless a waiver has been granted by DOE.

Q: How do other international agreements apply to EERE grantees?

A: EERE has recently published [guidance](#) in this area.

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