

# **BUY AMERICAN EXPLAINED NBG (6-5-09)**

## **Purpose of this memo:**

This memo will provide guidance for business application of “Buy American or Buy America” requirements:

(1) specifically as related to the 2009 American Recovery and Reinvestment Act (ARRA)

And

(2) Generally as related to the two (2) previous “Buy American or Buy America” acts.

Additionally, this memo will act as a supporting document to the NBG Buy American Letter of Certification (three versions)

Only Federal procurement rules have been implemented and clarified via an “interim rule effective March 31, 2009.

As of this date no specific guidelines (interim rule clarifications) have been developed specifically addressing State and Local project procurements utilizing Stimulus Funds.

## **The Three “Buy Americas”**

- **1933 Buy American**
- **1982 Buy America**
- **2009 ARRA / Stimulus Act Buy American**

We will summarize and explain all three (3) related acts that are commonly referenced as “Buy American or Buy America”.

## **Summary: 1933 Buy American vs. 1982 Buy America vs. 2009 ARRA**

### **Buy American 1933**

- Direct procurement and construction contracts by the federal government.
- **WAIVERS**: Unavailability, cost (6-12%), public interest.
- **EXEMPTIONS**: Generally GPA, Free Trade, and Least Developed Countries.

### **1982 Buy America**

- Applies to federal grants distributed by FHWA and FTA for federal highway and mass transit related projects.
- **WAIVERS**: Unavailability, cost (25%), public interest.
- **EXEMPTIONS**: NONE (GPA, Free Trade, and Least Developed countries ***NOT EXEMPT***).
- **NOTE**: Highway and transit projects **funded by the 2009 ARRA** through the FHWA or FTA are given 1982 Buy America preference (no exemptions for other countries).

### **2009 American Recovery and Reinvestment Act (ARRA) “Buy American”**

- Applies to projects funded by ARRA.
- **WAIVERS**: Unavailability, cost (25%), public interest.
- **EXEMPTIONS**: Generally GPA, Free Trade, and Least Developed countries.
  - **Countries Exempt from 2009 ARRA Requirements**
    - Exemptions are based on whether the procurement is federal, state, or local Government procurement.
    - Defining procurement as federal, state, or local depends on who does the procurement (who spends the money), not where the money comes from.

**Details for these three (3) acts are provided on the following pages**

## **The Buy American Act (1933):**

(BAA — 41 U.S.C. § 10a–10d) passed in 1933 by Congress and signed by President Hoover, required the United States government to prefer U.S.-made products in its purchases. Other pieces of Federal legislation extend similar requirement to third-party purchases that utilize Federal funds, such as highway and transit programs.

In certain government procurements, the requirement to purchase “American” may be waived if purchasing the material domestically would burden the government with an unreasonable cost (the price differential between the domestic product and an identical foreign-sourced product exceeds a certain percentage of the price offered by the foreign supplier), if the product is not available domestically in sufficient quantity or quality, or if doing so is in the public interest.

### **Requirements**

- Applies to **direct procurement** by the federal government, and **construction contracts** awarded by the federal government.
- Requires the purchase of:
  - U.S.-mined or produced unmanufactured goods, supplies and material
  - Manufactured goods produced substantially from U.S. materials (“when the cost of the domestic components exceeds 50% of the cost of all of its components”)
  - **Examples:** New building in a national park, construction of a federal courthouse

### **EXEMPTIONS:**

Some foreign nations are exempted (no preference is given for U.S. goods over goods from those nations). Certain products and services are exempted from countries that are:

- **GPA Signatories:** WTO Government Procurement Agreement (GPA)
- **Free Trade Agreement (FTA)**
- **“Least Developed” countries**

These 3 categories of foreign nations will be named later in this paper.

### **WAIVERS AVAILABLE FOR:**

- **Unavailability:** The iron, steel and manufactured goods are not available in reasonable quantity and quality.
- **Cost:** If the cost of U.S.-produced goods exceeds the cost of foreign goods by more than 6-12%.
- **Public Interest:** Conflicts with the public interest.

## **Section 165 of the Surface Transportation Assistance Act of 1982:**

Specifically, section 165 of the Surface Transportation Assistance Act of 1982 (as amended), and known as the Buy America Act provides:

Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated by this Act or by any Act amended by this Act or, after the date of enactment of this Act, any funds authorized to be appropriated to carry out this Act, title 23, United States Code, the Urban Mass Transportation Act of 1964, or the Surface Transportation Assistance Act of 1978 and administered by the Department of Transportation, unless steel and manufactured products used in such project are produced in the United States.

The (1982) Buy America statute is specifically tailored to the project obligation requirements of the Federal-aid highway program

### **Requirements**

- Applies to **federal grants** distributed by Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) for **federal highway and transit related projects**.
- Prohibits the use of federal grants ***UNLESS*** the iron, steel and manufactured goods in funded projects are produced in the U.S.
- **Example:** Federally funded state highway project

**EXEMPTIONS:** No exemptions are given to other countries.

### **WAIVERS AVAILABLE FOR:**

- **Unavailability:** The iron, steel and manufactured goods are not available in reasonable quantity and quality.
- **Cost:** If the U.S.-produced goods increase the cost of a project by more than 25%.
- **Public Interest:** Conflicts with the public interest.

## **2009 American Recovery and Reinvestment Act (ARRA)**

### **BUY AMERICAN PROVISIONS:**

#### Section 1605—Use of American Iron, Steel, and Manufactured Goods

(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.

© 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.

**Continued next page.**

## ARRA (cont'd)

### Requirements

#### Preferences in Stimulus Bill (ARRA)

- No stimulus funds may be used for “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 ARRA requires that projects funded by the Act use iron, steel, and manufactured goods produced in the U.S.
  - **KEY POINT:** EXPANDS EXISTING DOMESTIC PREFERENCES BEYOND FEDERAL HIGHWAY AND MASS TRANSIT PROJECTS TO ALL STIMULUS-FUNDED PROJECTS
- These requirements must be “applied in a manner consistent with United States obligations under international agreements.”

### EXEMPTIONS:

Some foreign nations are generally exempted (no preference is given for U.S. goods over goods from those nations). Certain products and services are exempted from countries that are:

- **GPA Signatories:** WTO Government Procurement Agreement (GPA)
- **Free Trade Agreement** partners (e.g. NAFTA)
- **Least Developed countries**
- **HOWEVER**, highway and mass transit projects get 1982 Buy America protections, meaning **NO OTHER COUNTRIES** are exempted

### WAIVERS AVAILABLE FOR:

- **Unavailability:** The iron, steel and manufactured goods are not available in reasonable quantity and quality.
- **Cost:** If the U.S.-produced goods increase the cost of a project by more than 25% (for manufactured construction materials).
- **Public Interest:** Conflicts with the public interest.

**WARNING:** Regulations took effect immediately but are still subject to change.

## **INTERIM RULE CLARIFICATIONS – FEDERAL PROCUREMENT ONLY**

- **On March 31, 2009, an interim rule was issued to implement portions of the ARRA Buy American provision. See the following page for excerpts from the Federal Register.**
- The interim rule is narrow in scope and applies only to federal government procurement of construction materials for projects funded pursuant to the ARRA.
- A separate rulemaking with guidance for state and local government procurement under the ARRA will be issued by the Office of Management and Budget at a later date.
- **Most importantly, the interim rule clarifies that:**
  - ARRA Buy American requirements are limited to projects located in the U.S.
  - All of the iron, steel and other manufactured goods used as construction material in the project must be produced or manufactured in the United States
    - “Production in the United States” requires that all manufacturing processes take place in the United States, except metallurgical processes involving refinement of steel additives
    - But this requirement does not apply to iron or steel used as components or subcomponents of other manufactured construction material
  - All construction materials, including manufactured construction materials and unmanufactured construction materials (e.g., sand) are covered
  - The cost of domestic manufactured construction material is unreasonable when the cost of all such domestic material increases the entire price of the project by more than 25%.
  - The cost of unmanufactured construction material is unreasonable when the cost of such domestic material exceeds the cost of the same foreign material by more than 6%.
- **NOTE: REMEMBER THAT THE INTERIM RULE APPLIES TO FEDERAL PROCUREMENT ONLY. SPECIFIC STATE RULES ARE EXPECTED SOON.**
- **The interim rule also defines the following terms:**
  - Public building or public work
  - Construction material
  - Domestic construction material
  - Foreign construction material
  - Manufactured construction material
  - Unmanufactured construction material
  - Steel

## **FROM THE March 31, 2009 Federal Register:**

### **25.601 Definitions.**

As used in this subpart—

**Domestic construction material** means—

- (1) An unmanufactured construction material mined or produced in the United States;  
Or
- (2) A construction material manufactured in the United States.

**Foreign construction material** means a construction material other than a domestic construction material.

**Manufactured construction material** means any construction material that is not unmanufactured construction material.

**Recovery Act designated country** means—

- (1) a World Trade Organization Government Procurement Agreement country
- (2) a Free Trade Agreement country
- (3) , or a least developed country.

**Steel** means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

**Unmanufactured construction material** means raw material brought to the construction site for incorporation into the building or work that has not been—

- (1) Processed into a specific form and shape;  
Or
- (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

### **25.602 Policy.**

Except as provided in 25.603—

None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (as defined at 22.401) unless—

- (1) The public building or public work is located in the United States;  
and
- (2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used as construction material 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 steel or iron used as components or subcomponents of other manufactured construction material.

(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

## **FROM THE March 31, 2009 Federal Register (Cont'd):**

### **Discussion:**

Because section 1605 does not specify a requirement that significantly all the components of construction material must also be domestic, as does the Buy American Act, the definition of domestic construction material under this interim rule does not include a requirement relating to the origin of the components of domestic manufactured construction material.

Given the applicability of the Recovery Act to iron, steel, and manufactured goods, the definition of "component" is unnecessary in these clauses, because the definition of domestic construction material no longer includes a requirement relating to the origin of components.

### **NBG Interpretation:**

***Manufactured construction material*** means any construction material that is brought to the construction site for incorporation into the building or work that has been:

- (1) Processed into a specific form and shape;  
Or
- (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

Based on the "Discussion" above, there is not a requirement relating to the origin of the components of domestic manufactured construction materials.

This allows for the NBG purchase of coils that were imported into the United States and subsequently are sold to NBG for processing / manufacturing of construction materials (i.e. panels, purlin, light gage shapes, etc.). In most cases, this will involve a supplier importing a "hotband" that the supplier will process in a U.S. facility through coating, painting, and slitting operations prior to selling to NBG. The country of origin for the "hotband" would have to meet WTO GPA, Free Trade, or Least Developed exemption status.

## **Federal Procurement under 2009 ARRA**

- **Exempt countries under the 2009 ARRA Buy American requirements**
- **Federal Procurement**: According to the ARRA Buy American Interim Rule, eligible “Recovery Act designated countries” generally qualify for bidding on federal procurement projects, equal to U.S. suppliers.
- Recovery Act designated countries include:
  - GPA Countries
  - Free Trade Agreement countries
  - Least Developed countries
- ***Generally Exempt from Buy America for Federal Procurement***
  - **Free Trade Agreement countries**
    - **Australia**, Bahrain, **Canada**, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, **Mexico**, Morocco, Nicaragua, Oman, Peru, Singapore
  - **GPA countries**
    - United States, **Canada**, Liechtenstein, Iceland, Norway, Switzerland, Israel, **Japan**, **South Korea**, Singapore, Hong Kong, China, Aruba (with respect to the Netherlands),
    - **European Community**:
      - Belgium, Bulgaria, Czech Republic, Denmark, Germany, Greece, Estonia, Spain, France, Ireland, Italy, Cyprus, Latvia, Lithuania, Luxemburg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden, UK
  - **Least Developed countries**
    - Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, Zambia

## State Procurement

**WARNING: State rules subject to change!!**

### Exempt countries under the 2009 ARRA Buy American requirements

**State Procurement:** Varies by state, and **state procurement rules have not yet been issued.**

- Canada and Mexico **DO NOT** receive equal treatment to U.S. suppliers. Canada exempted its provinces in NAFTA, and Mexico did not sign the GPA.
- Based on the interim rule, it is expected that GPA countries, non-NAFTA Free Trade countries, and Least Developed countries will have access to procurement in approximately\* 37 states, though 12 of these states make specific exemptions for “construction-grade steel.”
- 13 States did not accept the GPA, and are not required to give equal access to any foreign products.

\*FTA state coverage varies. For example, the U.S.-Australia FTA only covers 31 states

**GPA countries, non-NAFTA Free Trade countries, and Least Developed countries generally exempt from Buy American for state procurement**

#### 37 States that accept the GPA

Arizona	Arkansas	California	Colorado	Connecticut	*Delaware
*Florida	Hawaii	Idaho	*Illinois	*Iowa	Kansas
Kentucky	Louisiana	*Maine	*Maryland	Massachusetts	*Michigan
Minnesota	Mississippi	Missouri	Montana	*New York	Nebraska
*New Hampshire	*Oklahoma	Oregon	*Pennsylvania	Rhode Island	South Dakota
Tennessee	Texas	Utah	Vermont	Washington	Wisconsin
*Wyoming					

#### \*GPA States Excluding “Construction Grade Steel” from Exemptions:

Delaware	Florida	Illinois	Iowa	Maine	Maryland
Michigan	New York	New Hampshire	Oklahoma	Pennsylvania	
Wyoming					

## **State Procurement (Cont'd)**

### **13 non-GPA States**

Alabama	Alaska	Georgia	Indiana	Nevada	New Jersey
New Mexico	North Carolina	North Dakota	Ohio	South Carolina	Virginia
West Virginia					

**Note:** Some states only apply GPA exemptions under certain state agencies.

### **WARNING: State rules subject to change!!**

A separate rulemaking with guidance for state and local government procurement under the ARRA will be issued by the Office of Management and Budget (OMB) at a later date.

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## **Local Procurement**

### **No exempt countries under the 2009 ARRA Buy American requirements**

**Local Procurement:** ***NO EXEMPT COUNTRIES*** for local procurement under the 2009 ARRA Buy American requirements.

- Local Procurement: Cities, school districts, etc.
- Local procurement is ***not covered*** by the GPA or our free trade agreements.
- No other countries will receive equal treatment on bids.

A separate rulemaking with guidance for state and local government procurement under the ARRA will be issued by the Office of Management and Budget (OMB) at a later date.

## **2009 ARRA Summary:**

**Under the guidelines provided by the Interim Rule published March 31, 2009 and the information provided by Pat McFadden (NUCOR), NBG has come to the following conclusions regarding compliance with the 2009 ARRA:**

ALL major manufactured items (essentially all steel parts) that we ship to a construction site are and will be "compliant".

This includes:

- Primary framing
- Mill shapes
- Purlin
- Sheeting and trim

The definition of "Manufactured Construction Material" allows for the NBG purchase of coils that were imported into the United States and subsequently are sold to NBG for processing / manufacturing of construction materials (i.e. panels, purlin, light gage shapes, etc.). In most cases, this will involve a supplier importing a "hotband" that the supplier will process in a U.S. facility through coating, painting, and slitting operations prior to selling to NBG. The country of origin for the "hotband" would have to meet WTO GPA, Free Trade, or Least Developed exemption status.

Some "Standard Stock" minor items (specific warehouse items) may be considered "non-compliant".

This includes:

- Bolts, Nuts, & Washers
- Fasteners (roof, wall, & trim)
- Dektites
- Cable
- Etc.

Therefore these items must be purchased as a "Special" from a "domestic" manufacturer / supplier to be "compliant" with 2009 ARRA.

Currently we believe that this will provide "compliance" for all Federal, State, and Local projects funded by 2009 ARRA Stimulus Funds. This assumes that Federal Rules apply to State and Local procurements that use ARRA funding / grants (the common understanding by several Washington law firms that specialize in federal trade and procurement law).