



Department of Energy
Washington, DC 20585

In late April and early May, 2009, a series of the Department of Energy (DOE) responses posted on the Energy Efficiency and Conservation Block Grant (EECBG) formula Funding Opportunity Announcement (FOA) FedConnect Q&A database interpreted three categories of manufactured goods (fluorescent lighting ballasts, light-emitting diode (LED) lighting, and Heating, Ventilation and Air Conditioning (HVAC) units) to be “supply items,” and thus not subject to the Buy American provisions. DOE has subsequently concluded that the use of the “supply item” analysis is not determinative of whether or not the Recovery Act Buy American provisions apply.

The concept of the “supply item” has its origins in the Buy American Act (41 U.S.C. 10a - 10d) and the Federal Acquisition Regulation (FAR), neither of which pertain to section 1605 (the Buy American provisions) of the American Recovery and Reinvestment Act of 2009 (Recovery Act; Pub. L. 111-5). Consequently, the notion of a “supply item” has no relevance in the context of section 1605 of the Recovery Act. The Buy American provisions apply to all iron, steel, and manufactured goods used for a project funded by Recovery Act appropriations for the construction, alteration, maintenance, or repair of a public building or public work. There is no requirement with regard to the origin of components or subcomponents in manufactured goods, as long as the manufacturing occurs in the United States (2 CFR 176.70).

To clarify the Buy American regulatory landscape and resolve the confusion surrounding the “supply item” interpretation, the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE) of the U.S. Department of Energy on March 19, 2010, granted a nationwide limited waiver of the Buy American requirements of the Recovery Act under the authority of section 1605(b)(1) [application of the restrictions of section 1605 would be inconsistent with the public interest] for the purchase of LED lighting (lamps, fixtures, and any supporting components) and HVAC units. This nationwide limited waiver applies to projects using EERE Recovery Act funds for the construction, alteration, maintenance and repair of a public building or public work. This limited waiver *only applies* in circumstances where the recipient of EERE Recovery Act funds (“grantee”) has taken substantial steps to commit funds for the purchase of LED lights or HVAC units between February 17, 2009, and March 31, 2010. Substantial steps to commit funds would include, but are not limited to, (1) issuing a Request for Proposals (RFP) on or before March 31, 2010 (applicable only where the grantee accepts a proposal received under that RFP); (2) in the case of a sole source selection: placing an order for the goods on or before March 31, 2010; (3) commencing a bidding process on or before March 31, 2010; (4) in circumstances where the grantee solicited quotes without an RFP: the grantee purchases the goods based on a quote dated on or before March 31, 2010 and the order for the goods is placed on or before March 31, 2010; and (5) grantee has executed a contract or purchase agreement with a supplier to acquire affected goods between February 17, 2009, and March 31, 2010.

On March 31, 2010, this nationwide limited waiver of the Recovery Act Buy American provisions will expire. After March 31, 2010, EERE grantees are required to procure LED lighting and HVAC units from domestic manufacturers in accordance with the Recovery Act Buy American provisions (with the exception of LED traffic lights, arrows, and crosswalk signals, which are covered by a nationwide categorical waiver based on domestic nonavailability issued on February 11, 2010).

On February 11, 2010, the Assistant Secretary of Energy for Energy Efficiency and Renewable Energy issued a nationwide categorical waiver of the Buy American requirements of Recovery Act section 1605 under the authority of section 1605(b)(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] for the purchase of fluorescent electronic lighting ballasts (with the exception of electronic dimming ballasts for fluorescent lamps that are capable of operating the lamps below 50 percent of their rated light output), and screw-base and pin-base compact fluorescent lamps (with the exception of plug-in CFLs longer than 10 inches). The nationwide categorical waiver for these products, along with the LED traffic lights, arrows, and crosswalk signals mentioned above, is independent from the limited public interest waiver for LED lighting and HVAC units, and does not expire on March 31, 2010.

The purpose of the Recovery Act Buy American provisions is to support economic recovery by driving investment into the domestic manufacturing sector and recycling

Recovery Act dollars within the U.S. economy. Given that the majority of Recovery Act-related procurement for EERE-funded projects has yet to occur, the Buy American provisions still have ample opportunity to fulfill their purpose and potential. The nationwide limited public interest waiver being issued for LED lighting and HVAC units is critical to resolving the confusion surrounding the “supply” analysis, clearly elucidating the requirements of section 1605 of the Recovery Act, and moving forward in a proactive manner.

Any additional questions regarding the Recovery Act Buy American provisions should be directed to the project officer for the relevant grant, and to the EERE Buy American coordinator at buyamerican@ee.doe.gov.