

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5357-N-01]

Buy American Exception Under the American Recovery and Reinvestment Act of 2009: Notice of National Exceptions of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 Applicable to Community Planning and Development Recovery Act Funds

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: In accordance with the American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (2009) (Recovery Act), and implementing guidance of the Office of Management and Budget (OMB), this notice advises that national exceptions to the Buy American requirements of the Recovery Act have been determined applicable for projects using Community Development Block Grant-Recovery (CDBG-R) funds and Neighborhood Stabilization Program 2 (NSP2) funds.

FOR FURTHER INFORMATION CONTACT: Stanley Gimont, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7286, Washington, DC 20410, telephone number 202-708-3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800-877-8339. FAX inquiries may be sent to Mr. Gimont at 202-401-2044. Except for the "800" number, these telephone numbers are not toll free.

SUPPLEMENTARY INFORMATION: The Recovery Act appropriated \$1 billion in CDBG-R funds to states and local governments to carry out eligible activities on an expedited basis. The Recovery Act also appropriated \$2 billion for the second round of NSP2, "[f]or the provision of emergency assistance for the redevelopment of abandoned and foreclosed homes." 123 Stat. 217. Section 1605(a) of the Recovery Act imposes a Buy American requirement on Recovery Act funds used for a project for the construction, alteration, maintenance, or repair of a public building or public work. The section provides that all of the iron, steel, and manufactured goods used in the project must be produced in the United States. Section 1605(b) provides that the Buy American requirement

shall not apply in any case or category of cases in which the head of a federal department or agency finds that: (1) Applying the Buy American requirement 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 satisfactory quality; or (3) inclusion of iron, steel, and manufactured goods will increase the cost of the overall project by more than 25 percent. Section 1605(c) provides that if the head of a federal department or agency makes a determination pursuant to section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register**.

In accordance with section 1605(c) of the Recovery Act and OMB's implementing guidance published on April 23, 2009 (74 FR 18449), this notice advises the public that the Secretary determined it was necessary to approve certain exceptions to the Buy American requirement based on findings under section 1605(b) with respect to work using CDBG-R or NSP2 funds. Those exceptions are as follows:

1. If another federal agency (e.g., Department of Commerce, Department of Energy, or Environmental Protection Agency) has granted a Buy American exception under section 1605(b) for a project, HUD will accept that agency's determination and permit the grantee to apply that exception for the remainder of CDBG-R or NSP2 funded work in that project.

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

3. For publicly owned housing¹ assisted with CDBG-R or NSP2 funds, when such property contains fewer than 8 units.²

¹ For purposes of this exception, "publicly owned" housing includes, but is not limited to, public housing as defined in 24 CFR 5.100; residential structures owned by other governmental entities listed in 2 CFR 176.140; and public facilities designed to provide shelter to persons with special needs and owned by governmental entities listed in 2 CFR 176.140.

² For purposes of this exception, "such property contains fewer than 8 units" is to be construed in

4. When 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.

5. When the size of a contract funded with the CDBG-R or NSP2 grant is less than the simplified acquisition threshold described in 24 CFR 85.36 (currently \$100,000), regardless of the size of the grantee.

6. Any project that is substantially under contract or under construction prior to acceptance of the CDBG-R or NSP2 funds.

The above national exceptions are based on a determination of inconsistency with the public interest. In addition to these exceptions, a list of items already determined to be domestically nonavailable can be found at 48 CFR 25.104(a) (FAR List). HUD does not need to provide an exception or any additional justification to allow grantees to use items currently on the FAR List of domestically nonavailable items at 48 CFR 25.104(a). The procedures to apply if any of those articles are manufactured goods needed in a project covered by the Buy American requirement are found at 48 CFR 25.103(b)(1). See also 2 CFR 176.80. At this time, HUD is not adding to the FAR List. If a grantee wants to use items on the FAR List or to have items added to the FAR List or to a HUD list, the grantee must follow the CPD Implementation Guidance for the Buy American requirement.

Additional information about these exceptions can be found in the CPD Implementation Guidance for the Buy American requirement. To review the Guidance, visit the CPD page on HUD's Client Information and Policy System (HUDCLIPS) at: <http://www.hud.gov/offices/adm/hudclips/notices/cpd/>.

Background

HUD generally requires that grantees use American-made iron, steel and manufactured goods throughout Recovery Act-assisted projects subject to the Buy American requirement. However, there are certain circumstances under which exceptions to the Buy American requirement will be appropriate in accordance with section 1605(b). In administering Recovery Act programs, HUD must also apply the Buy American requirement in a manner that does not undermine the broader purposes and objectives of the Act, as well as statutory provisions

a manner consistent with the Davis-Bacon exemption under section 110 of the Housing and Community Development Act of 1974. This exemption has been interpreted to include property containing 7 or fewer units. Typically, single-family properties are excluded under this exemption.

specific to CDBG–R and NSP2 funding. First and foremost, the Recovery Act was enacted to provide an immediate stimulus to the U.S. economy. As stated in section 3 of the Recovery Act:

GENERAL PRINCIPLES CONCERNING USE OF FUNDS.—The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the [specified] purpose * * * including commencing expenditures and activities as quickly as possible consistent with prudent management.

123 Stat. at 116. In addition, the Recovery Act includes quick expenditure provisions specific to CDBG–R and NSP2 grants. In particular, the statute mandates that, “in administering the [CDBG–R] funds, [HUD] shall establish requirements to expedite the use of the funds.” 123 Stat. at 217. The law also requires that “in selecting projects to be funded, recipients shall give priority to projects that can award contracts based on bids within 120 days from the date the funds are made available to the recipients.” *Id.* The NSP2 appropriation included another mandate for grantees to “expend at least 50 percent of allocated funds within 2 years of the date funds become available to the grantee for obligation, and 100 percent of such funds within 3 years of such date.” *Id.* Consistent with this intent, HUD has already established mechanisms designed to put NSP2 and CDBG–R funds to immediate use, including establishing spending/obligation deadlines in funding announcements and grant agreements, and expecting at least quarterly drawdowns from the grantee’s line of credit. In order to further expedite grantees’ timely use of Recovery Act funds, HUD is granting national exceptions that are all supportive and essential to carrying out these congressional mandates and balanced with the interests and intent of the Buy American requirements.

The following national exceptions based on the public interest are necessary to: (1) Avoid delay in completion and restoration of housing for low-income families and the achievement of Recovery Act deadlines; (2) avoid delays in the start of construction and completion of public facilities and improvements that will jeopardize jobs; (3) avoid the possibility of additional funding gaps on termination of certain contracts and price differentials caused by repurchase of goods and equipment; (4) avoid loss of funding for critical projects; and (5) address current and emerging situations presented by states and local governments.

Publicly Owned Housing Fewer Than 8 Units

To expedite grantees’ timely use of Recovery Act funds, HUD believes it is in the public interest to provide an exception to the Buy American requirement, to the extent that it applies to publicly owned housing projects developed with CDBG–R and NSP2 funds, when such property contains fewer than 8 units. This 8-unit threshold ensures that CDBG–R and NSP2 funds are employed in a prudent manner consistent with applicable program requirements.

Funding available under the Recovery Act has clear purposes—to stimulate the economy through measures that modernize the Nation’s infrastructure, improve energy efficiency, and expand educational opportunities and access to health care. Congress clearly intends that CDBG–R funds should be invested in housing, infrastructure, and other public facilities activities that will quickly spur further economic investment, increase energy efficiency, and job creation or retention. To this end, HUD has strongly urged grantees to use CDBG–R funds for hard development costs associated with infrastructure activities that provide basic services to residents or activities that promote energy efficiency and conservation through rehabilitation or retrofitting of existing buildings. However, in the CDBG program, while HUD awards financial assistance to state and local governments, the decision concerning how the financial assistance will be expended and in what combination, if any, is left to the state or local government. Grantees may use CDBG–R funds for stimulus activities that involve publicly or privately owned structures. Buy American coverage, however, is limited to public works and public buildings. The requirement does not apply to the development of privately owned housing. This distinction may have the unintended effect of grantees moving CDBG–R funds away from publicly owned housing in favor of privately owned housing. The resulting loss of federal funding could restrict affordable housing opportunities for our Nation’s most vulnerable citizens, including the elderly, disabled, or other special needs populations.

Similar unintended consequences may also affect the progress of other housing activities in the CDBG–R and NSP2 programs. NSP2 funding, in particular, is intended “to assist states, local governments, and nonprofits in the purchase and rehabilitation of foreclosed, vacant properties in order to create more affordable housing and

reduce neighborhood blight.” H.R. Conf. Rep. No. 111–16, at 472. After acquiring abandoned and foreclosed-upon residential properties, governmental entities may still hold title to the homes during the renovation process. It is anticipated that many of these homes will be single-family homes and other small residential properties with fewer than 8 units. In small renovations, it would be impractical to research the origins of every potential manufactured good under the time constraints. A typical housing renovation uses countless materials that could be construed as “manufactured goods.” Grantees have brought to HUD’s attention that every housing project involves the use of literally thousands of miscellaneous, generally low-cost components that are essential, but incidental, to the construction and modernization, and are incorporated into the physical structure of the project, such as nails, hinges, or other hardware, and electrical, plumbing, and finishing components. These components are subject to the Buy American requirement, but the country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement in the normal course of construction and modernization of publicly owned housing. Under the requirements of the Recovery Act, it would be laborious, likely unproductive to find feasible alternatives, and disproportionate to the costs and time involved for the grantee or its contractor to pursue such inquiries.

Given the magnitude of the foreclosure crisis and the unprecedented numbers of families facing homelessness, returning abandoned and foreclosed-upon residential properties to the affordable housing stock is of critical importance. As a result, HUD has looked to identify the scope of components within the construction and development of small publicly owned housing projects. HUD has considered the disproportionate cost and delay that would be imposed on small publicly owned housing projects if HUD did not issue certain exceptions to the Buy American requirement.

De Minimis Exceptions

The national exception for jurisdictions with a CDBG–R grant of less than \$100,000 will cover about 10 percent of CDBG–R grantees and will amount to a relatively small impact (approximately \$11.5 million of the nearly \$1 billion in CDBG–R grant awards). This exception also covers State CDBG–R grants for less than \$100,000 from states to units of general

local government (state grant recipients). Another reason that Recovery Act funds have been provided to state and local governments is the recognition that state and local governments are suffering from serious budgetary constraints due to simultaneous revenue shortfalls and increased demand for services. CDBG-R funding, in particular, reaches small and rural communities. HUD understands that such communities often have to search further in order to procure American-made items and to find contractors familiar with the Buy American requirement. For these communities, it takes additional time to procure and there are increased costs associated with bringing materials and contractors in from a great distance. The additional time and allocation of scarce staff resources to finding American-made materials for relatively small grants works against state and local governments' fiscal constraints, as well as the Recovery Act's expenditure deadlines. In many cases, the administrative time and cost involved in undertaking such searches would be overly burdensome given the nature of the projects. Recognition of the lack of availability and access to resources and as relief from administrative burdens are critical to the success of small grantees and is consistent with Recovery Act objectives. As with any new requirement, implementation of the Buy American requirement will take analysis and resources that are not readily available to small grantees. The need for the expeditious and efficient use of the CDBG-R funds, balanced with the long established recognition of decreased availability of resources available to small grantees, clearly supports exception 4 above. Because the NSP2 program has a minimum grant amount of \$5 million, there is no national exception for small grant size.

HUD has decided to grant an exception when a contract assisted with CDBG-R or NSP2 funds is less than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently \$100,000). This tracks the standard applied to small purchases described in 24 CFR part 85. Under 24 CFR 85.36(d)(1), small purchase procedures are relatively simple and informal methods for securing goods that do not cost more than the simplified acquisition threshold. Imposing the Buy American requirement on these small-scale projects would result in an unreasonable delay in affordable housing and infrastructure development. Therefore, HUD hereby provides notice that it is granting a

limited nationwide exception of the Buy American requirement to allow the use of nondomestic iron, steel, and manufactured goods when they occur in such *de minimis* contracts assisted with CDBG-R or NSP2 funds.

Projects That Are Substantially Under Contract or Under Construction

HUD is granting an exception to the Buy American requirement for any project substantially under contract or underway prior to acceptance of the CDBG-R or NSP2 funds. Delaying these "shovel ready" projects, by requiring grantees to restart the design and bidding process again, would pose substantial obstacles to compliance with the above obligation and expenditure deadlines. HUD finds that impeding projects already substantially under contract or underway would be inconsistent with the public interest.

In order to be substantially under contract, a project must have the following characteristics prior to the date that HUD executes the Grant Agreement:

1. The HUD 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 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 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 in 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 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 percent expended within 2 years of obligation availability and 100 percent 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.

Due to the national economic crisis, a HUD grantee may find that a project that was previously under construction has lost one or more of its funding commitment(s) and is now halted due to the loss of this funding commitment(s). In seeking additional funding sources, the HUD grantee may decide that 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 materials that do not meet the Buy American requirement. The HUD grantee may take advantage of this exception in order to complete the project. To be considered as a project under construction, a project must have the following characteristics prior to the date that HUD executes 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 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 percent expended within 2 years of obligation availability and 100 percent 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 projects) pre-award cost limitations.

In conclusion, HUD has determined that these exceptions are appropriate because compliance with the Buy American requirement would be disproportionate to the cost and time involved for grantees and contractors delaying work on critical Recovery Act projects and the jobs associated with those projects. In accordance with section 1605(c) of the Recovery Act, HUD hereby provides notice that it is granting limited nationwide exceptions of the Buy American requirement for the above categories of cases. For the above reasons, HUD has determined that applying the Buy American requirement to these categories of cases would be inconsistent with the public interest. This supplementary information constitutes the detailed written justification required by section 1605(c) for exceptions "based on a finding under subsection (b)." The exception applies only to the CDBG-R and NSP2 grant funds and not to the use of other Recovery Act funding, even if such other funds are used in conjunction with CDBG-R and NSP2 funds for a project. Any HUD grantee who wishes to use the above exceptions must maintain sufficient documentation to demonstrate the applicability of the

exception and compliance with any terms or conditions set forth in the exception.

This public-interest justification does not reach the conclusion that the inclusion of iron, steel, and manufactured goods produced in the United States will automatically increase the cost of the overall project by more than 25 percent. Cost is a factor in all procurements and must be considered in accordance with 24 CFR part 85 and the cost principles at 2 CFR part 225. Cost is a factor in all of HUD's public-interest national exceptions. HUD has decided that cost-based exceptions must be made on a case-by-case basis and submitted to HUD for review under CPD Implementation Guidance for the Buy American Requirement. For additional information, visit the CPD page on HUD's Client Information and Policy System (HUDCLIPS) at: <http://www.hud.gov/offices/adm/hudclips/notices/cpd/>. Questions may be submitted to BuyAmericanQuestions@hud.gov.

Dated: October 14, 2009.

Mercedes M. Márquez,

Assistant Secretary for Community Planning and Development.

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