



Department of Energy
Washington, DC 20585

RECOVERY ACT BUY AMERICAN GUIDANCE ON IMPLEMENTING THE AGREEMENT BETWEEN CANADA AND THE UNITED STATES OF AMERICA ON GOVERNMENT PROCUREMENT

EFFECTIVE DATE: May 24, 2010

SUBJECT: IMPLICATIONS OF THE AGREEMENT BETWEEN CANADA AND THE UNITED STATES OF AMERICA ON GOVERNMENT PROCUREMENT FOR EERE RECOVERY ACT FINANCIAL ASSISTANCE RECIPIENTS IMPLEMENTING THE BUY AMERICAN PROVISION

PURPOSE: Section 1605 (the Buy American provision) of the American Reinvestment and Recovery Act of 2009 (Recovery Act) will not be applied as a condition of Recovery Act funding for EERE financial assistance recipients in the State Energy Program (SEP) and Energy Efficiency and Conservation Block Grant Programs (EECBG) with respect to Canadian iron, steel, and manufactured goods in projects for the construction, alteration, maintenance, or repair of a public building or public work at or above the \$7,804,000 value threshold for invocation of international trade agreements.

SCOPE: This guidance applies to all state, local and tribal government recipients and sub-recipients (grantees and subgrantees) of Recovery Act financial assistance from the Office of Energy Efficiency and Renewable Energy (EERE).

LEGAL AUTHORITY: Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act; Pub. L. 111-5) sets forth the Buy American provisions for recipients of Recovery Act financial assistance. The Office of Management and Budget (OMB) issued interim final guidance (2 CFR Part 176) for implementing the Buy American provision on April 23, 2009 at 74 Federal Register 18449. On November 10, 2009, the Secretary of Energy delegated the authority to make all Buy American inapplicability determinations to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act (Redelegation Order 00-002-01C, dated November 10, 2009). On March 25, 2010, OMB amended its Interim Final Guidance to address the Agreement between the Government of the United States of America and the Government of Canada on Government Procurement (75 Federal Register 14323).

DEFINITIONS: Public building or public work means a public building of, or 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; 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.

Federally recognized tribal governments are also considered governmental entities for the purpose of defining “public building or public work.” Therefore, projects for construction, alteration, maintenance or repair of public buildings or public works undertaken by federally recognized tribal governments are subject to the Buy American provisions of the Recovery Act.

A manufactured good is defined as a good brought to the construction site for incorporation into the public building or work that has been processed into a specific form and shape or combined with other materials to create a material that has a different property than 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.¹

GUIDANCE: Section 1605(d) of the Recovery Act provides that the Buy American provisions shall be applied in a manner consistent with U.S. obligations under international agreements. The OMB guidance provides that the Buy American provision shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement, listed in 2 CFR 176.90(b) and the recipient is required under an international agreement, described in the Appendix to subpart B of 2 CFR 176, to treat the goods and services of that Party the same as domestic goods and services. As of January 1, 2010, this obligation only applies to projects with an estimated value of \$7,804,000 or more and projects that are not specifically excluded from the application of those agreements.

The Agreement between Canada and the United States of America on Government Procurement (U.S.—Canada Agreement) means that for the two DOE programs that are covered in it, SEP and EEBCG, state, local and tribal governments are required to treat Canadian iron, steel and manufactured goods the same as U.S. iron, steel and manufactured products in projects funded by the Recovery Act for the construction, alteration, maintenance or repair of a public building or public work valued at or above \$7,804,000. This new requirement, which went into effect on February 16, 2010, applies to any new procurements that are commenced on or after that date. This agreement does not apply to any other countries, and does not apply to any other EERE programs. This agreement is in effect until September 30, 2011, unless it is extended before then.

¹ See 2 CFR 176.70(a)(2)(ii).

In summary, if an EERE financial assistance recipient in the State Energy Program or Energy Efficiency and Conservation Block Grant Program is using Recovery Act funding for a project valued at or above \$7,804,000 for the construction, alteration, maintenance or repair of a public building or public work Canadian-sourced iron, steel and manufactured goods may be used without obtaining a waiver of the Buy American provisions of the Recovery Act.

A handwritten signature in blue ink, appearing to read 'CZoi', with a stylized flourish at the end.

Cathy Zoi
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U.S. Department of Energy

May 24, 2010