

Applicability of Buy American Provision of Section 1605 of the Recovery Act to Projects Under the Smart Grid Investment Grant Program

A determination of whether the Buy American provision of Section 1605 of the Recovery Act to projects under the Smart Grid Investment Grant program is made on a case-by-case basis. Recipients and subrecipients are responsible for making initial determinations of whether the Buy American provision is applicable to the project at issue, based on the three-part analysis set forth below. Recipients and subrecipients should consult with their own legal counsel to make determinations as to the applicability of the Buy American provision and to document their files accordingly. Recipients should contact the Contracting Officer for guidance; (At the conclusion of this FAQ are analyses of the applicability of Section 1605 of the Recovery Act to Smart Meters and Smart Thermostats. These analyses are in response to questions raised from numerous applicants for these two technologies).

DOE is providing a three-question list for recipients in determining whether the Buy American provision of Section 1605 of the Recovery Act applies to a specific project under the Smart Grid Investment Grant program. In order for the Buy American provision of Section 1605 of the Recovery Act to apply, **ALL** three questions must be answered **YES**.

Question 1: Are the materials at issue iron, steel, or manufactured goods?

“Steel” means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements. See 2 CFR 176.140(a)(3).

“Manufactured good” means a good brought to the construction site for incorporation into the building or work that has been – (i) processed into a specific form and shape; or (ii) combined with other raw material to create a material that has different properties than the properties of the individual raw material. See 2 CFR 176.140(a)(1).

Questions that may help in the analysis as to whether an item is a manufactured good include:

- a. Is the item being brought to a construction site, i.e., a site where activities are taking place that are considered “construction?”
- b. Is the item being “incorporated into a building” or structure, i.e., is the item going to be attached to the building or structure such that it will be considered a fixture of that building or structure? For example, a smart meter owned by the utility recipient, and not the property owner, and which may be removed by the

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utility recipient, may not be incorporated into a building since it does not become a fixture of that building. However, 2X4 lumber used to frame a structure and copper piping used to plumb a building would become incorporated into the building.

Recipient Answer to Question 1: (Are the materials at issue iron, steel, or manufactured goods?)

No. The materials at issue are NOT iron, steel, or manufactured goods, then Section 1605 of the Recovery Act (Buy American) DOES NOT apply.

Yes: The materials at issue ARE iron, steel, or manufactured goods, then Section 1605 of the Recovery Act (Buy American) MAY apply – move on to Question #2.

Question 2: Does the work to be performed constitute “construction, alteration, maintenance, or repair”?

These terms are not defined in Buy American Section 1605 of the Recovery Act (Buy American). There is also no bright-line test for determining whether an activity constitutes “construction, alteration, maintenance, or repair.” In an effort to provide some guidance, please see a *generic discussion* of these phrases for use in the analysis. If the recipients are not certain about the applicability, please contact the Contracting Officer for guidance.

Alteration is associated with a limited construction project for an existing building, structure, or other real property that comprises the modification or replacement of one or a number of existing building systems or components. The term includes planning, engineering, architectural work, and other similar actions. Alteration means remodeling, improving, extending, or making other changes to a facility, exclusive of maintenance or repairs.

Repair is associated with an activity/process that fixes or replaces something that is not functioning as designed in order to put it back into a working condition.

Maintenance is associated with routine preventative activities to keep something that is working in that working state.

Construction is associated with construction projects for an existing building, structure, or other real property or the construction of a new building or structure, exclusive of alteration, maintenance or repair.

Recipient Answer to Question 2: (Does the work to be performed constitute “construction, alteration, maintenance, or repair”?)

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No. The work to be performed DOES NOT constitute “construction, alteration, maintenance, or repair,” then Section 1605 of the Recovery Act (Buy American) DOES NOT apply.

Yes. The work to be performed DOES constitute “construction, alteration, maintenance, or repair,” then Section 1605 of the Recovery Act (Buy American) MAY apply – move on to Question #3.

Question 3: Is the building or structure where the work is to be performed a “public building” or “public work”?

A “public building” or “public work” is a building or 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). Examples of “public buildings” and “public works” include, but are not limited to, 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. See 2 CFR 176.140(a)(2).

Questions that may help in the analysis include:

- a. Who owns the building or structure?
- b. How is the building or structure used (i.e., governmental or public use versus private use)?
- c. Are there other significant governmental ties to the building or structure?

In general, a government-owned building or structure would be considered a public building or public work, and a privately-owned building or structure would not. Title to the building or work is a significant factor but may not be determinative in all cases. For example, a government-owned building that is leased to a private entity, with no governmental use or other governmental ties, may not be a public building. Conversely, a privately-owned building that is used for public housing and receives government funding, or a privately-owned building that is leased by a government agency and used for a governmental function, may be a public building.

Recipient Answer to Question 3: (Is the building or structure where the work is to be performed a “public building” or “public work”?)

No. The building or structure where the work is to be performed IS NOT a “public building” or “public work” then Section 1605 of the Recovery Act (Buy American) DOES NOT apply.

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Yes. The building or structure where the work is to be performed IS NOT a “public building” or “public work” then Section 1605 of the Recovery Act (Buy American) DOES apply.

SMART METERS and SMART THERMOSTAT EXAMPLES:

Example #1: A publicly-owned (or investor-owned) utility recipient proposes to utilize Recovery Act funds for installing smart meters on multiple pre-existing privately-owned residences or commercial properties. The smart meters will be owned by the utility recipient; the amount of work to install the smart meters is minimal and is incidental to the provision of the smart meters (swapping out the meter from within the meter casing). The privately-owned residences have no significant governmental ties, i.e., they are not considered “public housing,” and the commercial properties are not used by a governmental entity (for example, a privately-owned building that is leased by a government agency).

Does the Buy American provision apply? NO.

- The smart meter is not considered a “manufactured good” under 2 CFR 176.140(a)(1) because the pre-existing privately-owned residences or commercial properties are not “construction sites” and the smart meter is not “incorporated into the building,” i.e., it is not a fixture of the building since ownership remains with the utility.
- The work at issue is not considered “construction, alteration, maintenance, or repair,” but is considered equipment installation because the amount of work to install the smart meters is minimal and is incidental to the provision of the smart meters.
- The privately-owned residences and commercial properties have no governmental use or significant governmental ties, and are therefore not considered a “public building” or “public work.”

Example #2: A publicly-owned (or investor-owned) utility recipient proposes to utilize Recovery Act funds for providing smart thermostats to residents of pre-existing privately-owned residences. The smart thermostats will be installed inside the residences and will thereafter be owned by the property owner; the amount of work to install the smart thermostats is minimal and is incidental to the provision of the smart thermostats (swapping out the thermostats). The privately-owned residences have no significant governmental ties, i.e., they are not considered “public housing.”

Does the Buy American provision apply? NO.

- The smart thermostat is not considered a “manufactured good” under 2 CFR 176.140(a)(1) because the pre-existing privately-owned residences are not “construction sites,” although the smart thermostat is “incorporated into the building,”

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i.e., it becomes a fixture of the building since ownership will transfer to the property owner.

- The work at issue is not considered “construction, alteration, maintenance, or repair,” but is considered equipment installation because the amount of work to install the smart thermometers is minimal and is incidental to the provision of the smart thermostats.
- The privately-owned residences have no significant governmental ties, and are therefore not considered a “public building” or “public work.”