

**AMERICAN RECOVERY AND REINVESTMENT
ACT
SPECIAL CONDITIONS
AND INFORMATION**

**GEORGIA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION**

***SPECIAL CONDITIONS AND INFORMATION FOR
CONSTRUCTION CONTRACTS FUNDED UNDER
THE AMERICAN RECOVERY AND REINVESTMENT ACT
THROUGH THE FEDERALLY ASSISTED
STATE REVOLVING LOAN FUNDS IN THE STATE OF GEORGIA***

May 27, 2009

Following is the standard language that must be incorporated into construction contract documents and in all solicitations for offers and bids for all construction contracts or subcontracts to be funded by the American Recovery and Reinvestment Act through the Federally-assisted State Revolving Fund in the State of Georgia and information regarding these Special Conditions.

The requirements in these Special Conditions shall not relieve the participants in this project of responsibility to meet any requirements of other portions of the construction contract or of other agencies, whether these other requirements are more or less stringent. The requirements in these Special Conditions must be satisfied in order for work to be funded through the American Recovery and Reinvestment Act.

ARRA Special Conditions and Information

TABLE OF CONTENTS

Instructions & General Requirements..... 3

Contractor Acknowledgement of Buy American Requirements..... 5

Bid Certification.....6

Information Checklist for Waiver Request to US EPA.....7

Table 1: Foreign and Domestic Construction Materials Price Comparison Worksheet.....8

Definitions.....9

Implementation of Buy American requirements.....10

Step-by-Step Waiver process.....11

INSTRUCTIONS & GENERAL REQUIREMENTS

These Special Conditions are based on detailed, specific guidance provided by the United States Environmental Protection Agency (US EPA). Public Law 111-5, the “American Recovery and Reinvestment Act” (ARRA), includes requirements in addition to those normally required for the regular State Revolving Fund (SRF) programs, which are found in the SRF Supplemental General Conditions. The Special Conditions include additional payroll reporting requirements and “Buy American” provisions, which require recipients of ARRA funds to use iron, steel, and manufactured goods that are produced in the United States of America. In a project that is only partially funded through the ARRA, the ARRA requirements will apply to all parts of the project. Failure to comply with these requirements will prevent the disbursement of ARRA funds to the Owner.

Payroll Reports:

The prime contractor must submit electronic copies of certified weekly payrolls for the prime contractor and for all subcontractors. These must be submitted by e-mail in a pdf format to the Owner’s representative and then forwarded to the Georgia Environmental Protection Division’s (GA EPD’s) Construction Management Unit project engineer. These must be submitted each month for the period covered by the prime contractor’s current payment request, and are required for funds to be endorsed for this period. The payroll records must include all information required by the SRF Supplemental General Conditions. The Owner must also maintain complete payroll records and make these available for inspection and audit.

Registration:

The contractor shall register with the Central Contractor Registration database or complete other registration requirements as determined by the Director of the Office of Management and Budget.

Access of Offices of Inspector General to Certain Records and Employees:

Any representative of an appropriate inspector general appointed under Section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.) is authorized:

- (1) to examine any records of the contractor or any of its subcontractors that pertain to, and involve transactions relating to, the construction contract or subcontract; and
- (2) to interview any officer or employee of the contractor regarding such transactions.

Wage Rate Requirements:

All laborers and mechanics employed by contractors and subcontractors on the project shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with Subchapter IV of Chapter 31 of Title 40, United States Code.

Buy American Requirements:

- (1) The prime contractor is required to comply with the Buy American provisions in these special conditions. The Owner is required to verify compliance as a condition of funding through the ARRA. Failure on the part of an apparent successful bidder to submit required information to the Owner may be considered by the Owner in evaluating whether the bidder is responsive to bid requirements.

ARRA Special Conditions and Information

- (2) The prime contractor or apparent low bidder is required to submit signed copies of the Contractor Acknowledgement of Buy American Requirements (page 5) and of the Bid Certification (page 6) to the Owner's representative for verification. Prior to the initial disbursement of ARRA funds for this contract, the Owner will be required to submit signed copies of these to GA EPD's Construction Management Unit.
- (3) If the prime contractor proposes to use iron, steel, or manufactured goods that are not produced in the United States of America, then it must submit to the Owner:
 - (a) Documentation required by the Information Checklist for Waiver Request to US EPA, found on page 7;
 - (b) Table 1: Foreign and Domestic Construction Materials Price Comparison Worksheet, found on page 8.
- (4) Non-domestic goods may not be incorporated into the work until the Owner obtains a formal waiver from the US EPA to allow these goods to be used in this project. In order to apply for a project waiver, the Owner must email the request in the form of a Word document (.doc) to the US EPA Region 4 waiver email address: region4waiver@epa.gov . It must include all of the information as shown in the checklist on page 7 of these documents. The Regional office will send a copy to the State contact.
- (5) If a waiver is necessary, US EPA strongly recommends initiating the request before construction has initiated. Consistent with the direction of the federal Office of Management and Budget Guidance, US EPA will expect requests submitted after the signing of the construction contract to include an explanation of why the request was submitted at that late date.
- (6) Definitions and detailed explanation of Buy American provisions and the waiver process are included in these Special Conditions, starting on page 9.

Contractor Acknowledgement of Buy American Requirements

The Contractor acknowledges to and for the benefit of the Owner, the State of Georgia, and the United States Environmental Protection Agency that it understands that the goods and services under this Agreement are being funded with monies made available by the federal American Recovery and Reinvestment Act of 2009 (ARRA) or are being made available for a project being funded with monies made available by the federal ARRA and that such law contains provisions commonly known as “Buy American;” that requires all of the iron, steel, and manufactured goods used in the project be produced in the United States (“Buy American Requirements”) including iron, steel, and manufactured goods provided by the Contractor pursuant to the construction contract. The Contractor hereby represents and warrants to and for the benefit of the Owner, the State, and the United States that:

- (a) the Contractor has reviewed and understands the Buy American Requirements;
- (b) all of the iron, steel, and manufactured goods used in the project will be and/or have been produced in the United States in a manner that complies with the Buy American Requirements, unless a waiver of the requirements is approved; and
- (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the Buy American Requirements, as may be requested by the Owner, the State, or the United States Environmental Protection Agency.

Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner or the State to recover as damages against the Contractor any loss, expense or cost (including without limitation attorney’s fees) incurred by the Owner or the State resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the State or any damages owed to the State by the Owner). While the Contractor has no direct contractual privity with the State, as a lender to the Owner for the funding of its project, the Owner and the Contractor agree that the State is a third-party beneficiary and neither this paragraph (nor any other provision of the construction contract necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the State.

PRINTED NAME & TITLE OF AUTHORIZED REPRESENTATIVE OF CONTRACTOR OR SUBCONTRACTOR

SIGNATURE OF AUTHORIZED REPRESENTATIVE

DATE

Bid Certification

1. Identification of American-made Iron, Steel, and Manufactured Goods: Consistent with the terms of the Owner’s bid solicitation and the provisions of ARRA Section 1605, the Bidder certifies that this bid reflects the Bidder's best, good faith effort to identify domestic sources of iron, steel, and manufactured goods for every component contained in the bid solicitation where such American-made components are available on the schedule and consistent with the deadlines prescribed in or required by the bid solicitation.
2. Verification of U.S. Production: The Bidder certifies that all components contained in the bid solicitation that are American-made have been so identified, and if this bid is accepted, the Bidder agrees that it will provide reasonable, sufficient, and timely verification to the Owner of the U.S. production of each component so identified.
3. Documentation Regarding Non- American-made Iron, Steel, or Manufactured Goods: The Bidder certifies that for any component or components that are not American-made and are so identified in this bid, the Bidder has included in or attached to this bid one or both of the following, as applicable:
 - a. Identification of and citation to a categorical waiver published by the U.S. Environmental Protection Agency in the Federal Register that is applicable to such component or components, and an analysis that supports its applicability to the component or components;
 - b. Verifiable documentation sufficient to the Owner, as required in the bid solicitation or otherwise, that the Bidder has sought to secure American-made components but has determined that such components are not available on the schedule and consistent with the deadlines prescribed in the bid solicitation, with assurance adequate for the Bidder under the applicable conditions stated in the bid solicitation or otherwise.
4. Information and Detailed Justification Regarding Non- American-made Iron, Steel, or Manufactured Goods: The Bidder certifies that for any such component or components that are not so available, the Bidder has also provided in or attached to this bid information, including but not limited to the verifiable documentation and a full description of the bidder's efforts to secure any such American-made component or components, that the Bidder believes are sufficient to provide and as far as possible constitute the detailed justification required for a waiver under section 1605 with respect to such component or components. The Bidder further agrees that, if this bid is accepted, it will assist the Owner in amending, supplementing, or further supporting such information as required by the Owner to request and, as applicable, implement the terms of a waiver with respect to any such component or components.

PRINTED NAME & TITLE OF AUTHORIZED REPRESENTATIVE OF BIDDER OR CONTRACTOR

SIGNATURE OF AUTHORIZED REPRESENTATIVE

DATE

Information Checklist for Waiver Request to EPA

The purpose of this checklist is to ensure that all appropriate and necessary information is submitted to US EPA. Please review this checklist carefully and provide all required information. This checklist is for informational purposes only and does not need to be included as part of a waiver application. This may be helpful to include, however, as US EPA will review based on a similar checklist.

General

- Waiver request includes the following information:
 - Description of the foreign and domestic construction materials
 - Unit of measure
 - Quantity
 - Price
 - Time of delivery or availability
 - Location of the construction project
 - Name and address of the proposed supplier
 - A detailed justification for the use of foreign construction materials
 - ___ Waiver request is submitted according to the instructions in this contract
 - ___ Assistance recipient made a good faith effort to solicit bids for domestic construction materials/manufactured goods, as demonstrated by language in requests for proposals, contracts, and communications with the prime contractor

Cost

- Waiver request includes the following information:
 - Price Comparison Worksheet shown in Table 1
 - Relevant excerpts from the bid documents used by the contractors to complete the Price Comparison Worksheet
 - Supporting documentation indicating that the contractor made a reasonable survey of the market, such as a description of the process for identifying suppliers and a list of contacted suppliers
 - ___ Does the Total Domestic Project Cost indicated in column (d) of the Price Comparison Worksheet exceed the Total Foreign Project Cost indicated in column (e) by more than 25% of the value in column (e)?

Availability

- Waiver request includes the following supporting documentation necessary to demonstrate the availability, quantity, and/or quality of the materials for which the waiver is requested:
 - Supplier information or pricing information from a reasonable number of domestic suppliers indicating availability/delivery date for construction materials
 - Documentation of the assistance recipient's efforts to find available domestic sources, such as a description of the process for identifying suppliers and a list of contacted suppliers.
 - Project schedule
 - ___ By item, list schedule date and domestic delivery quote date or other relevant information. Based on materials delivery/availability date indicated in supporting documentation, will the materials be unavailable when they are needed according to the project schedule?
 - Relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials
 - ___ Waiver request includes a written statement from the prime contractor confirming the non-availability of the domestic construction materials for which the waiver is sought
 - ___ If available, information about other waiver requests for the materials described in this waiver request for comparable projects

Table 1: Foreign and Domestic Construction Materials Price Comparison Worksheet

Instructions: To be completed by the prime contractor. In column a), enter all iron, steel, and manufactured goods required to build the project as designed. In column b) enter the cost estimate for each component as supplied by domestic sources. In column c) enter the cost estimate for each component for which waivers are requested, as supplied by foreign sources.

(a) Material	Unit of Measure	Quantity	(b) Price – Domestic Material (include all delivery costs to the construction site)	(c) Price – Foreign Material (including all delivery costs to the construction site)
			(d) Total Domestic Project Cost: \$	(e) Total Foreign Project Cost: \$

Definitions

The following terms are critical to the interpretation and implementation of the Buy American provisions of the ARRA and apply to the process described in these documents:

Steel: An alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements. Production in the United States of the iron or steel used in the project 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 iron or steel used as components or subcomponents of manufactured goods used in the project. (This and the following definition were drawn from the OMB Guidance of April 3, 2009, at 176.70(a)(2)(ii) and 176.140(a).)

Manufactured Good: “Manufactured good” means a good 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.

There is no requirement with regard to the origin of components or subcomponents in manufactured goods, as long as the manufacture of the goods occurs in the United States.

Reasonably Available Quantity: The quantity of iron, steel, or the relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.

Satisfactory Quality: The quality of iron, steel, or the relevant manufactured good as specified in the project plans and designs.

Assistance Recipient: The Owner - a borrower or recipient that receives funding from a State CWSRF or DWSRF program.

Implementation

P.L. 111-5, the "American Recovery and Reinvestment Act of 2009" (ARRA), provides significant levels of funding for States to finance high priority infrastructure projects needed to ensure clean water and safe drinking water. The Act also includes "Buy American" provisions in section 1605 that require Clean Water State Revolving Loan Fund (CWSRF) and Drinking Water State Revolving Loan Fund (DWSRF) assistance recipients of these ARRA funds to use domestic iron, steel and manufactured goods that are produced in the United States.

US EPA's foremost expectation is that assistance recipients will use American iron, steel and manufactured goods throughout their ARRA-funded projects. Section 1605 also, however, sets forth certain circumstances under which a federal agency may determine to waive Buy American requirements. In addition, Section 1605 requires the Buy American requirements to be applied consistent with U.S. obligations under international agreements. With regard to these international agreements, however, based on discussions with OMB officials and OMB's "Updated Implementation Guidance," this provision only applies to direct procurement by the entities listed in the appendix of OMB's Interim Final Guidance or the Federal government, and does not apply to procurement initiated by local entities (SRF assistance recipients) in Georgia.

US EPA's intention in developing the approach described here is to effectively and efficiently implement this full range of ARRA requirements. A waiver may be provided if US EPA determines that:

- (1) Applying these requirements 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.

This requirement has been included as a grant condition in all US EPA capitalization grants, and will be a condition in all loan and grant agreements provided by States to local recipients. On April 23, 2009, the Office of Management and Budget (OMB) issued Interim Final Guidance for several aspects of ARRA, including the Buy American Requirement under Section 1605. The full text of this Guidance is at <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>. Definitions herein have incorporated the relevant text from the OMB Guidance, and the term and condition specified in the OMB Guidance at 176.140 (page 18454) will be incorporated as an award term of ARRA grants from US EPA.

In order to implement the Buy American provisions of the ARRA, US EPA has developed an approach to allow for effective and efficient implementation to allow projects to proceed in a timely manner. The framework described below will allow assistance recipients to apply for waivers directly to US EPA. Pursuant to the ARRA, US EPA has the responsibility to make findings and determinations as to the issuance of waivers to the Buy American provisions.

Step-By-Step Waiver Process

Application by Assistance Recipient

Each local entity that receives ARRA water infrastructure financial assistance is required by section 1605 of the ARRA to use American made iron, steel, and manufactured goods in the construction of its project. However, if it is one of the entities listed in the appendix to Appendix 9 of the OMB Updated Implementing Guidance (none of which are in Georgia), it must allow for the use of iron, steel, or manufactured goods from a country covered by a relevant international agreement. If that is not possible, or if the recipient falls under one of the categories below, the recipient may request a waiver. Until a waiver is granted by US EPA, the Buy American requirements stand, except as noted above with respect to countries covered by international agreements.

The waiver process begins with the SRF assistance recipient. In order to fulfill the requirements of the ARRA, the assistance recipient must in good faith design the project (where applicable) and solicit bids for construction with American made iron, steel, and manufactured goods. It is essential that the assistance recipient include the ARRA's Buy American terms in any request for proposals or solicitations for bids, and in all contracts (see page 5 for sample contract language). The assistance recipient may seek a waiver at any point before, during, or after the bid process if one or a combination of three conditions is met:

- (1) Iron, steel, and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
- (2) 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; or
- (3) Applying the Buy American requirements of ARRA would be inconsistent with the public interest.

US EPA believes that most waivers will likely come forward at two points in a project: first, based on the design where the assistance recipient identifies key materials (iron and steel) or equipment (manufactured goods) that are not produced in sufficient quantities domestically, or, second, after evaluation by prospective bidders and their consultation with suppliers determines that iron, steel, or manufactured goods as required by the design are not produced in sufficient quantities domestically. An assistance recipient could potentially request waivers at either or both points in the project. It is also possible to request a waiver after bids are opened or after construction has initiated. US EPA strongly recommends, if a waiver is necessary, initiating the request before construction has initiated.

Consistent with the direction of the OMB Guidance at §176.120, US EPA will expect that requests submitted after the signing of the construction contract will include an explanation of why the request was submitted at that late date. Late submissions that are based on the grounds of lack of reasonably foreseeable circumstances that led to the request, where sufficiently documented, will be considered as if timely submitted. Late requests that are based on grounds that the assistance recipient would be reasonably expected to foresee will, before consideration of the underlying waiver request, be subject to a balancing. This balancing will consider whether the public interest in expeditious construction under ARRA does or does not outweigh the need for full, timely, and good faith compliance with the Buy American provision according to the grounds set forth in ARRA and in applicable federal guidance and information.

Proper and sufficient documentation must be provided by the assistance recipient. A checklist detailing the types of information required for a waiver to be processed is included on page 7.

Additionally, it is strongly encouraged that assistance recipients hold pre-bid conferences with potential bidders. A pre-bid conference can help to identify iron, steel, and manufactured goods needed to complete the project as described in the plans and specifications that may not be available from domestic sources and the need to seek a waiver prior to bid, and can help inform the recipient on compliance options. In order to apply for a project waiver, the assistance recipient should email the request in the form of a Word document (.doc) to the Region 4 waiver email address: region4waiver@epa.gov. Please include all of the information as shown in the checklist on page 7. The Regional office will send a copy to the State contact.

ARRA Special Conditions and Information

Evaluation by US EPA Regional Offices

After receiving an application for waiver of the Buy American provisions, the Regional office will use the checklist on page 7 to determine whether the application properly and adequately documents and justifies the statutory basis cited for the waiver - that it is quantitatively and qualitatively sufficient - and to determine whether or not to grant the waiver. The checklist provides information to the Region with regard to a waiver on the basis of unavailability of a product or material, or of substantial cost increases.

In the event that the Regional office in consultation with the Office of Regional Counsel (ORC) finds that adequate documentation and justification has been submitted, the Regional Administrator may grant a waiver to the assistance recipient. In any event, the Region should notify the assistance recipient that a waiver request has been approved or denied no later than 2 weeks from the date of receipt of a complete waiver request. Granting such a waiver is a 5-step process:

- (1) Evaluation - After receiving an application for waiver of the Buy American provisions, the Regional office must use a checklist similar to that found on page 7 to determine whether the application properly and adequately documents and justifies the statutory basis cited for the waiver - that it is quantitatively and qualitatively sufficient - and to determine whether or not to grant the waiver.
- (2) Coordination - No later than 3 days prior to the submission of a notification of a proposed waiver approval to the Assistant Administrator for the Office of Administration and Resources Management (OARM) for concurrence, the Region must notify the Cross-Agency Coordination Working Group described below that a waiver review is complete, along with a copy of the proposed notification.
- (3) Concurrence - Prior to approving a project waiver, the Regional Administrator must obtain the concurrence of the Assistant Administrator for OARM, as required by the Administrator's March 31, 2009 delegation of approval authority for exceptions (waivers) to the requirements of ARRA section 1605(a).
- (4) Signature of waiver approval by the Regional Administrator - As soon as the waiver is signed and dated, the Region must notify the State and assistance recipient. This should take place no later than 2 weeks after the receipt of a complete waiver request from an assistance recipient.
- (5) Publication by Regional office of notification of issuance of waiver in the Federal Register.

When notification of the issuance of a waiver is published in the Federal Register, the Regional office should send appropriate information to Headquarters for a link to the Federal Register notice to be posted on EPA's Recovery.gov website.

Cross-Agency Coordination Working Group

US EPA will establish a national coordination working group composed of representatives from its Offices in the two SRF programs, and from the Regions. This group will have two principal functions:

- (1) To provide oversight of the national waiver process through consultation, quality control, and direction as necessary to clarify and resolve policy issues raised on waiver requests.
- (2) To identify the potential for appropriate national or (U.S. geographical) regional, categorical waivers to be issued based on similar circumstances identified in the detailed justifications for a waiver or waivers. Such categorical waivers may be based on one or a combination of the grounds for a waiver specified in ARRA section 1605(b), as may be appropriate to the detailed justifications available or developed.

Special Circumstances

Under certain special circumstances, US EPA may grant a waiver of the Buy American provisions under the authority to waive such provisions if application of such provisions would be inconsistent with the public interest. A determination to grant a waiver of the Buy American provisions based solely on inconsistency with the public interest (as authorized under ARRA section 1605(b)(1)) must be made with US EPA Office of Water consultation due to the possible national implications of such a waiver, except in any particular categories of “public interest” cases for which US EPA has defined in national information, policy, or guidance the applicable conditions and the specific elements of the individual justification that must be provided. For the Regional office to consider these types of waiver requests, it must find that the conditions defined in the national information, policy, or guidance, and that the elements, in scope and detail, of the information provided to justify the request, are both present as required. If these are both present, the Regional office can then determine whether the justification offered is sufficient, within the terms set forth in the applicable information, policy, or guidance, to grant the waiver. This application will be sent to the same email address as mentioned above, however the requester should indicate in the subject line that the request is for a public interest waiver.

National Waivers

US EPA reserves the right to issue national waivers that may apply to particular classes of assistance recipients, particular classes of projects, or particular categories of iron, steel, or manufactured goods. As stated in the discussion of the “Cross-Agency Coordination Working Group,” above, US EPA may develop national or (U.S. geographic) regional categorical waivers through the identification by that Working Group of similar circumstances in the detailed justifications presented to one or more Regions in a waiver request or requests. US EPA may issue a national waiver based on policy decisions regarding the public’s interest or a determination that a particular item is not produced domestically in reasonably available quantities or of a sufficient quality. In such cases, US EPA may determine it is necessary to issue a national waiver. All national waivers will be issued by US EPA Headquarters.

Split Funding

Based on their intended use plans many States intend to fund projects with “split” funding, from ARRA and the base SRF program. Based on the ARRA language in section 1605, which requires that American iron, steel, and manufactured goods be used in any project receiving ARRA funding, US EPA has concluded that any project that is funded in whole or in part with ARRA funds, must comply with the Buy American provisions. A “project” consists of all construction necessary to complete the building or work regardless of the number of contracts or assistance agreements involved so long as all contracts and assistance agreements awarded are closely related in purpose, time and place. This precludes the intentional splitting of ARRA projects into separate and smaller contracts or assistance agreements to avoid Buy American coverage on some portion of a larger project, particularly where the activities are integrally and proximately related to the whole. However, there are many situations in which major construction activities are clearly undertaken in segregable phases that are distinct in purpose, time, or place, in which case, separate contracts or assistance agreement for ARRA and base funding would carry separate requirements.