



---

## American Recovery and Reinvestment Act (ARRA) Supplemental Buy American Guidance for NIST Construction Grants

---

### Table of Contents

I.	Background.....	3
II.	Applicability.....	4
III.	Policy .....	4
IV.	Definitions.....	4
A.	“Steel”:	4
B.	“Iron or Steel Produced in The United States”:	4
C.	“Manufactured Good”: Is defined as a good brought to the construction site <i>for incorporation into</i> the building or work that has been:	5
D.	“Overall Project Cost”:	5
E.	“Public Building and Public Work”:	5
V.	Manufactured Goods & “Substantial Transformation” .....	6
A.	Manufactured Goods and Substantial Transformation .....	6
B.	Applying Substantial Transformation Analysis – Roles and Responsibilities .....	7
C.	Substantial Transformation Examples .....	9
VI.	Overview: Exceptions and Exemptions to the ARRA Buy American Requirements.....	10
A.	Exceptions (Waivers):.....	10
1)	Non-Availability:.....	10
2)	Unreasonable Cost:.....	10
3)	Public Interest:.....	10
B.	Exemption for Certain Acquisitions Covered Under International Agreements: .....	10
VII.	Requesting a Waiver from the ARRA Buy American Requirements .....	12
A.	Non-availability waiver: .....	12



B. Unreasonable cost waiver: .....	13
1) Justification Memo.....	13
2) Cost Comparison (See Appendix E for submission format). .....	13
3) Bids from a minimum of three U.S. and/or three foreign suppliers to support the comparison (See Appendix E for submission format). .....	13
C. Public interest waiver:.....	13
a) A justification memo that explains the reason(s) for the request; and.....	13
b) Any additional, independent supporting documents that may strengthen the claim that the use of domestic iron, steel, and/or manufactured goods is inconsistent with the public interest. ....	14
D. Waiver Authority and Waiver Determinations .....	14
VIII. Compliance.....	15
IX. Noncompliance.....	16
Appendix A: Cross-Reference to Applicable ARRA Buy American Regulatory Provision .....	18
Appendix B: Exemption Coverage Table for Construction Grants.....	19
Appendix C: NIST-1104 .....	22
Appendix D: Pre-Approved Non-Available Items .....	23
Appendix E: Foreign and Domestic Items Cost Comparison.....	25
Appendix F: Determining Substantial Transformation .....	26
Appendix G: Required Buy American Language for Recipients' Contracts and Purchase Documents.....	28

---

---



## I. Background

---

1. The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009) (Recovery Act or ARRA), was enacted to generate domestic economic activity. In keeping with this goal, Congress included strict domestic source requirements for iron, steel, and manufactured goods used in public works projects receiving Recovery Act funds.

This Supplemental Guidance is intended to provide a general understanding of the Buy American requirements as they apply to NIST Recovery Act construction grants. This document references the ARRA Buy American requirements, which are incorporated into the terms and conditions of NIST Recovery Act construction grants. This Supplemental Guidance is not a substitute for the ARRA statutory and regulatory requirements or for the terms and conditions of a specific NIST grant. Should this document and such ARRA authorities or award terms differ, the ARRA statutory and regulatory requirements, and the terms and conditions of the NIST construction award, shall govern.

2. Governmental entities receiving NIST Recovery Act construction grants for projects that involve construction, alteration, maintenance or repair of a public building or public work must comply with the “Buy American” requirements of the Recovery Act. However, *if the facility* being constructed, altered or repaired under the NIST construction grant *is or will be privately-owned*, it is not considered to be a public building or a public work and the *Buy American requirements do not apply*.<sup>1</sup>
3. For recipients of NIST Recovery Act construction grants, the Buy American requirements, if applicable, apply to the entire NIST project. Therefore, eligible project costs allocable to both the federal and non-federal cost shares under a NIST construction grant, including recipient and third-party in-kind contributions, must comply with the ARRA Buy American requirements.
4. Recipients of NIST Recovery Act construction grants should keep in mind that the terms and conditions of the award flow down and are applicable to sub-recipients and to contractors/subcontractors.

---

<sup>1</sup> See *Frequently Asked Questions – American Recovery and Reinvestment Act of 2009*, “General Recovery Act FAQ #7,” accessible at: [http://www.whitehouse.gov/omb/recovery\\_faqs/#g7](http://www.whitehouse.gov/omb/recovery_faqs/#g7).



## II. Applicability

---

The Buy American Requirements discussed herein apply only to NIST Recovery Act construction grants. For NIST Recovery Act construction grants, the ARRA Buy American implementing regulations are set forth in 2 C.F.R. part 176, Subpart B. See Appendix A for a table providing cross-references between the ARRA Buy American requirements and the applicable provisions of the implementing regulations.

## III. Policy

---

Pursuant to Section 1605 of the Recovery Act, Recovery Act funds may not be used to fund the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.<sup>2</sup> There are three exceptions to the Buy American requirements of the Recovery Act, which require written determinations (waivers) from the Secretary of Commerce or from a delegated Department of Commerce Official. In addition, certain acquisitions covered under international agreements are exempt from the Buy American requirements. The three exceptions and one exemption to the Buy American requirements are summarized below in Section V. of this Supplemental Guidance.

## IV. Definitions<sup>3</sup>

---

- A. "Steel":  
means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.
  
- B. "Iron or Steel Produced in The United States":  
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 minor components or subcomponents of manufactured goods used in the project.

---

<sup>2</sup> See 2 C.F.R. §§ 176.60 and 176.70 (2010).

<sup>3</sup> See 2 C.F.R. §§ 176.70, 176.140, 176.160 (2010).



C. “Manufactured Good”: Is defined as 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 used in the project, as long as the manufacturing occurs in the United States.* Please note that this definition of domestic origin is different from the origin requirement for iron and steel.

D. “Overall Project Cost”:

The total amount of the project, including Architect’s and/or Engineer’s fees and land acquisition costs.

E. “Public Building and Public Work”:

means a public building of, and 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 that 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.



## V. Manufactured Goods & “Substantial Transformation”<sup>4</sup>

---

ARRA Section 1605 sets forth the clear expectation that all of the iron, steel, and manufactured goods used in project receiving Recovery Act funds will be produced in the United States.

ARRA places *on grant recipients* the obligation to establish whether a manufactured good was produced in the U.S. For this purpose, manufactured goods that consist, in whole or in part, of materials from another country may be considered as U.S.-manufactured where the good has been substantially transformed in the United States to a new and different manufactured good distinct from the materials from it which was transformed.

### A. Manufactured Goods and Substantial Transformation

For purposes of the ARRA Buy American requirements, a “manufactured good” is defined as 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 materials to create a material that has different properties than the properties of the individual raw materials.”<sup>5</sup> Additional guidance pertaining to the definition of “manufactured good” is found in 2 C.F.R. § 176.160,<sup>6</sup> which defines a domestic manufactured good as “a manufactured good that consists in whole or in part of materials from another country, has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed. There is no requirement with regard to the origin of components or subcomponents in manufactured goods or products, as long as the manufacture of the goods occurs in the United States.”

This definition incorporates the “substantial transformation test,” which has been long applied in judicial and administrative customs cases on labeling, national origin, and

---

<sup>4</sup> The below “substantial transformation” discussion and the tool provided in Appendix G are modeled from ARRA Buy American guidance issued by the U.S. Environmental Protection Agency (EPA), which is accessible at: <http://water.epa.gov/aboutow/eparecovery/index.cfm>.

<sup>5</sup> 2 C.F.R. § 176.140(a) (1) (2010).

<sup>6</sup> Although 2 C.F.R. § 176.160 addresses acquisitions covered under international agreements and is not expected to apply to recipients of NIST construction grants, it nonetheless provides useful guidance on the definition of a domestic manufactured good.



other Federal statutory requirements as an appropriate and effective test to identify where a good was "manufactured." A variety of statutory and judicial criteria have been formulated to determine, always on a case-by-case basis, whether or not "substantial transformation" has occurred.

In applying the "substantial transformation" test to the ARRA Buy American requirements, the objective is to determine whether or not a product is U.S. - produced when the product is created by processes in more than one country and/or incorporates materials, parts, or components from more than one country. More particularly, the test is intended to identify whether manufacturing or processing operations that took place in the U.S. amounted to "substantial transformation," which would enable the product to be properly considered as a U.S.-manufactured good.

In all cases, it is a question of degree; the transformation or change to foreign materials brought about by manufacturing or other processing in the United States must be "substantial."

## B. Applying Substantial Transformation Analysis – Roles and Responsibilities

### Grant Recipient's Role:

Grant recipients bear the direct responsibility to comply with the Buy American requirements of §1605. The statutory expectation is that recipients will comply by using U.S.-produced iron, steel, and manufactured goods.

NIST grant recipients, assisted by the engineering community and others, should use their best professional judgment in making determinations as to substantial transformation, which must be supported by appropriately detailed information from manufacturers describing the specific operations in their manufacturing process that warrant a determination that substantial transformation has occurred in the U.S.

Upon applying a substantial transformation analysis, NIST grant recipients may determine that a manufactured good to be used in their project was produced in the United States or substantial transformation of the good occurred in the United States. Recipients and contractors relying on the "substantial transformation test" should properly document their files with the following information:

- 1) Appropriately detailed answers from the manufacturer to the substantial transformation questions, as set forth in Appendix F;



- These questions represent a distillation of the functional analyses common to different versions of the "substantial transformation test" and are intended to serve as a guide for recipients of NIST construction grants to help determine whether a manufactured good to be incorporated into a project being built with ARRA funds was manufactured in the United States.
- 2) Any additional material the recipient may have from the manufacturer that provides detail supporting the answers;
  - 3) Upon procurement of the good, documentation from the manufacturer verifying that the product originated in a U.S. plant where substantial transformation occurred as demonstrated by the answers above; and
  - 4) Any other information and documentation that provides a level of specificity and detail supporting the grant recipient's or contractor's position that substantial transformation of a particular manufactured good occurred in the United States.

This information and documentation will be the basis for demonstrating compliance with the Buy American requirements of ARRA Section 1605(a).

After reviewing information to answer the substantial transformation questions as to an intended manufacturer's product, a grant recipient or contractor may have continuing, reasonable doubt as to the adequacy of the answers to establish the U.S. origins of that product. For recipients considering use of goods claimed to be U.S.-produced, if a competing manufacturer, bidder or supplier protests such claim, you can ask such competitors to frame any concerns in the form of specific responses to these questions, both as to their product and that of another competing company.

By requesting and analyzing substantial transformation information, a recipient or contractor will also be better equipped to understand other potential options. This analysis may provide a basis to see whether a competing manufacturer's U.S.-made product does meet, or can be timely adapted to meet the recipient's justified specifications. If the U.S.-made product does not meet those specifications, and other U.S.-made goods that do meet them are not available, then the recipient may have sufficient information to apply for a waiver from NIST.

#### NIST Role:

NIST will not make determinations as to substantial transformation or of the U.S. or foreign origin of manufactured goods. NIST's role under Section 1605 of the Recovery





Act is to review waiver requests when a grant recipient believes it cannot comply by buying U.S.-made goods, and to undertake compliance oversight.

NIST does recognize that these issues may be as novel, complex and demanding for grant recipients as they are for NIST. Thus, at the discretion of NIST and upon the direct request of a NIST grant recipient, NIST may undertake an informal "anticipatory" oversight review.

In this respect, where an grant recipient has made at least a tentative determination that substantial transformation of a specific good has occurred in the United States, NIST may review detailed information about substantial transformation that the grant recipient believes is or may be sufficient to support its determination, and may in such cases, as a matter of "anticipatory" oversight, advise the recipient as to whether in NIST's judgment the supporting information is sufficient. NIST will only review information provided by the NIST grant recipient, or on its behalf by another party (e.g., a manufacturer or consulting engineer) with the grant recipient's express consent. This will ensure that any NIST review of a substantial transformation determination and supporting information is undertaken because the NIST grant recipient considers it to be genuinely in its own interest, and is not primarily for the benefit or convenience of any other party.

### C. Substantial Transformation Examples

- Cosmetic or surface changes, such as painting, cleaning, or lacquering, which do not significantly affect the physical dimensions or qualities or chemical composition of the product, are usually not considered sufficient to constitute a substantial transformation.
- Simply cutting a material to length or width is generally not considered a sufficient change in use. A material that is simply cut to length or width remains suitable for multiple uses.
- A kit is not considered a U.S.-made good if it is assembled in the U.S.
  - If all the pieces are shipped by one company with the intent of providing all components necessary to be assembled into a functional good (e.g., pump station), then this would not be considered substantial transformation and therefore not a U.S.-made good.



- Concrete is not considered a manufactured good because all of the raw materials are brought to the construction site, where they are then mixed to create concrete. Therefore, concrete mixing is considered construction. The result is the same if the raw materials are continually mixed en route to and/or at the site.

## VI. Overview: Exceptions and Exemptions to the ARRA Buy American Requirements

---

There are three exceptions and one exemption to the ARRA Buy American requirements, each of which is summarized below:

### A. Exceptions (Waivers):<sup>7</sup>

Each of the below exceptions require a written determination from the Secretary of Commerce, or from a delegated Department of Commerce official, in order to waive the ARRA Buy American requirement.

#### 1) Non-Availability:

If iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

#### 2) Unreasonable Cost:

If the use of domestically produced iron, steel, or manufactured goods would increase the overall *project cost* by more than 25%.

#### 3) Public Interest:

If the application of the domestic preference provision of the Recovery Act would be inconsistent with the public interest.

### B. Exemption for Certain Acquisitions Covered Under International Agreements:<sup>8</sup>

The United States is a signatory to several international agreements that obligate the government to treat goods and services from certain other foreign countries the same as domestic goods and services in some situations. In keeping with these obligations,

---

<sup>7</sup> See 2 C.F.R. § 176.80 (2010).

<sup>8</sup> See 2 C.F.R. § 176.90 (2010).



recipients of NIST Recovery Act construction grants need not apply the Buy American provision for iron, steel, or manufactured goods from designated countries provided that all of the following conditions are met:

1. The estimated project value is \$7,804,000 or more;<sup>9</sup>
2. The recipient is bound by an international agreement. Appendix B contains a useful guide for public entity recipients of NIST Recovery Act construction grants to determine whether they are subject to U.S. obligations under international agreements;
3. The project activity or product to be used in the project is not specifically excluded from the international agreement. Appendix B also contains a list of exclusions as they apply to the portfolio of public entities receiving NIST Recovery Act construction grants; and
4. The recipient provides NIST with written documentation justifying its exemption to the ARRA Buy American requirements with respect to some or all of the iron, steel or manufactured goods to be used in the project and NIST provides the recipient with written confirmation of the exemption. In such case, NIST will amend the terms and conditions of the grant award consistent with the exemption.

Based on a review of the portfolio of NIST Recovery Act construction grant awards, it does not appear as if any public entity recipient will meet the criteria for an exemption to Buy American requirements based on an international agreement. Recipients should, however, consult Appendix B to this Supplemental Guidance to confirm whether it may be exempt from the ARRA Buy American requirements based on its coverage under an international agreement.

---

<sup>9</sup> Prior to January 1, 2010, the Buy American threshold for international agreements was \$7,443,000. Effective as of January 1, 2010, this threshold was increased to \$7,804,000 based on a determination by the United States Trade Representative. See 75 Fed. Reg. 14323 (March 25, 2010).



## VII. Requesting a Waiver from the ARRA Buy American Requirements

---

### Waiver Timing

Whenever possible, waiver requests must be submitted to NIST before the grant recipient or contractor obligates award funds for the construction or alteration of a public work or public building. Waiver requests submitted after award funds are obligated must include a justification as to why the grant recipient or contractor could not request the waiver before making the obligation or why the need for the waiver was not reasonably foreseeable.<sup>10</sup>

### *Waiver Process*<sup>11</sup>

#### A. Non-availability waiver:

In order to request a waiver because of non-availability, the recipient must submit a NIST Form 1104 to the NIST Construction Grants Federal Program Officer. This form provides the information that is necessary to justify the reason(s) for the requested waiver and for NIST to evaluate the request. This Form is provided as Appendix C or may be downloaded at [http://www.nist.gov/recovery/construction\\_program.cfm](http://www.nist.gov/recovery/construction_program.cfm).

If the item(s) in question appears on the list of government approved non-available items (see Appendix D – Approved Non-Available Items) it should be noted on the form. In such case, the recipient does not need to provide additional supporting documentation.

If the item does not appear on the list in Appendix D, the recipient must submit proof of non-availability via the details requested in the NIST-1104 form (Appendix C).

NIST has no objection to considering legitimate requests for non-availability waivers.

- Note that cost is not a factor in the request for a non-availability waiver.
- Requests that are not complete or do not adequately show due diligence will be returned without consideration.

---

<sup>10</sup> See 2 C.F.R. §§ 176.100 and 176.120 (2010).

<sup>11</sup> See generally 2 C.F.R. §§ 176.100, 176.110, and 176.140(c) and (d) (2010).



NIST construction grant projects have necessary design considerations and resultant specifications. If a U.S.-made product does not meet those specifications, and other U.S.-made goods that do meet them are not available, then there may exist sufficient justification to apply to NIST for a non-availability waiver.

Without an approved non-availability waiver from NIST, all material submittals shall only contain iron, steel and manufactured goods produced in the United States.

**B. Unreasonable cost waiver:**

In order to request a waiver because of unreasonable cost, the recipient must submit the following to their NIST Construction Grants Federal Program Officer:

1) Justification Memo.

This must explain the reason(s) for the request. To receive a waiver, the recipient must establish that the use of domestic iron, steel, or manufactured goods will increase the overall project cost by more than 25%. The justification memo should include a statement describing the percentage increase in costs that would be caused by the use of domestic products.

2) Cost Comparison (See Appendix E for submission format).

This must include the material, quantity needed, and unit price from three foreign and three domestic sources for each item. NIST strongly encourages recipients to use the Foreign and Domestic Items Cost Comparison template provided in Appendix E.

3) Bids from a minimum of three U.S. and/or three foreign suppliers to support the comparison (See Appendix E for submission format).

**C. Public interest waiver:**

1) In order to request a public interest waiver, the recipient must submit the following to their NIST Construction Grants Federal Program Officer:

a) A justification memo that explains the reason(s) for the request; and



b) Any additional, independent supporting documents that may strengthen the claim that the use of domestic iron, steel, and/or manufactured goods is inconsistent with the public interest.

2) Waivers on the grounds of inconsistency with the public interest will only be made in extraordinary circumstances.

#### D. Waiver Authority and Waiver Determinations<sup>12</sup>

The authority to grant waivers to the Buy American requirement of the Recovery Act rests with the Secretary of Commerce or his delegate.

- Absent written approval of the waiver from the Department of Commerce, through NIST, any use of foreign iron, steel, or manufactured goods will be considered non-compliant and is at the recipient's own risk.

The Office of Management and Budget requires NIST to publish a notice in the *Federal Register* of all Buy American waivers issued to its grant recipients, unless the waiver is for a material that has already been determined to be domestically non-available (see Appendix D).<sup>13</sup>

The notice shall be published within two weeks of the waiver's approval and shall include:

1. The title "Buy American Exception under the American Recovery and Reinvestment Act of 2009";
2. The dollar value and a brief description of the project; and
3. A detailed written justification for the waiver.

---

<sup>12</sup> See generally 2 C.F.R. §§ 176.80 and 176.100 (2010).

<sup>13</sup> See 2 C.F.R. § 176.80(b) (2010).



## VIII. Compliance

---

Recipients of NIST Recovery Act construction grants are required to comply with the Buy American requirements set forth in Section 1605 of the Recovery Act. The Recovery Act includes strict domestic source requirements for iron, steel and manufactured goods used in projects receiving Recovery Act funds. NIST will actively monitor recipients' compliance with the Buy American provision of the Recovery Act.

Recipients are required to flow down to its contractors the Buy American requirements in all bid documents for construction grant projects funded with Recovery Act funds, including those for consultants, designers, constructors, subcontractors, and material purchases. All bid specifications, contracts, purchase orders, and other procurement documents must include a Buy American Contract Clause, and require suppliers to provide information related to the origin of iron, steel, and manufactured goods to NIST upon request.

NIST approved language can be found in Appendix G of this document.

If the recipient has already completed procurement, they are still responsible for promptly amending their contract or purchase language ensuring that all contractors performing work on the project understand and will comply with Buy American requirements. It is the responsibility of the NIST grant recipient to retain (or to require its contractors to retain) adequate documentation in their project files to demonstrate compliance with the ARRA Buy American requirements.

Product data submittals will be monitored by NIST for compliance with the Buy American requirements. The grant recipient or NIST prime contractor is required to maintain records documenting compliance, which will be provided to NIST in a timely manner upon request.

In addition, construction materials will be randomly monitored by NIST as they arrive or are at the jobsite. NIST will perform random spot checks of materials on site, including but not limited to documentation checks and physical inspections. Items known to represent a high dollar value used repeatedly in large amounts, or that have unique or salient characteristics may receive enhanced monitoring. However any construction material may be randomly audited for compliance by NIST at any time.



Please contact the NIST Construction Grants Federal Program Officer with any questions regarding compliance with the ARRA Buy American requirement.

## IX. Noncompliance<sup>14</sup>

---

The use of iron, steel, or manufactured goods produced outside of the United States is considered a violation of the award terms if the recipient: (i) has not been verified by NIST as exempt from the Buy American requirements because of coverage under an international agreement, or (ii) has not received a waiver from NIST of the Buy American requirements and subsequent amendment to the award terms. Any use of foreign iron, steel, or manufactured goods without an NIST waiver, or without verification by NIST of an exemption based on an international agreement, is at the recipient's own risk.

In addition, NIST will investigate complaints of non-compliance brought against recipients of Recovery Act construction grants from third-parties, as well as suspected cases of non-compliance raised by NIST staff. If NIST finds evidence of non-compliance, it may take one or more of the following actions:

1. Allow the recipient to submit a request for a waiver as described in Section VII. Waivers are granted at the discretion of the Secretary of Commerce or his delegate and submitting a request will not guarantee that a waiver will be approved.
2. Require the removal of the unauthorized foreign iron, steel, and/or manufactured goods and replacement with domestically produced items. NIST will only reimburse the recipient for costs related to the purchase and installation of domestically produced iron, steel, and/or manufactured goods. Costs related to the purchase, installation, or removal of foreign iron, steel, and/or manufactured goods will be disallowed.
3. Make a determination that removing the foreign iron, steel, and/or manufactured goods would be detrimental to the interests of the Federal Government. This decision does not constitute a waiver to the Buy American requirements under Section 1605 of the Recovery Act, and NIST will disallow all costs associated

---

<sup>14</sup> See 2 C.F.R. § 176.130 (2010).





with the purchase and installation of the foreign iron, steel, or manufactured goods.

4. Depending on the severity of the noncompliance, NIST may take other enforcement action up to and including termination of the grant award or contract (as the case may be). NIST may also initiate a debarment proceeding in accordance with 2 C.F.R. part 180 and will report apparent fraudulent actions to the Department of Commerce Office of the Inspector General for criminal investigation.



## Appendix A: Cross-Reference to Applicable ARRA Buy American Regulatory Provision

<b>Topic</b>	<b>Cross-Reference to Applicable ARRA Buy American Regulatory Provision(s)<sup>15</sup></b>
<b>Requirements/Policy</b>	
	2 C.F.R. § 176.60 2 C.F.R. § 176.70
<b>Definitions</b>	
• Public Building or Public Work	2 C.F.R. § 176.140(a)(2)
• Steel	2 C.F.R. § 176.140(a)(3)
• Manufactured Good	2 C.F.R. §176.140(a)(1)
• Manufactured Construction Material	See definition of "Manufactured Good"
• Unmanufactured Construction Material	Not defined in 2 C.F.R. part 176
<b>Exceptions (Waivers)</b>	
• Timing of Waiver Requests	2 C.F.R. §§ 176.100 and 176.120
• Nonavailability	2 C.F.R. § 176.80(a)(1) 2 C.F.R. § 176.140(c) <i>See also</i> 48 C.F.R. §§ 25.103(b)(1) and 25.104(a)
• Unreasonable Cost	2 C.F.R. § 176.80(a)(2) 2 C.F.R. § 176.110 2 C.F.R. § 176.140(c), (d)
• Public Interest	2 C.F.R. § 176.80(a)(3) 2 C.F.R. § 176.140(c)
<b>Exemption for Acquisitions Covered Under International Agreements</b>	
• Covered International Agreements	2 C.F.R. § 176.90(a), (b)
• Exemptions Based on Obligations under Covered International Agreements	2 C.F.R. part 176, Appendix to Subpart B
<b>Noncompliance</b>	
	2 C.F.R. § 176.130

<sup>15</sup> 2 C.F.R. part 176, Subpart B at: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=5ac7bd0ddba2d0911fd70f6dbd4e29ea&rqn=div5&view=text&node=2:1.1.1.7.11&idno=2#2:1.1.1.7.11.2>.



**Appendix B: Exemption Coverage Table for Construction Grants<sup>16</sup>.**

<i>Subset of States with Public Entity NIST ARRA Construction Grants. For full listing, refer to the footnote.</i>			
<b>State</b>	<b>Entities Covered</b>	<b>Exclusions</b>	<b>Relevant Agreement</b>
KY	Division of Purchases, Finance and Administration Cabinet	Construction projects	<ul style="list-style-type: none"> <li>• WTO GPA</li> <li>• US-Chile FTA</li> <li>• US Singapore FTA</li> <li>• DR-CAFTA</li> <li>• US-Australia FTA</li> <li>• US-Morocco FTA</li> </ul>
ME	<ul style="list-style-type: none"> <li>• Department of Administrative and Financial Services</li> <li>• Bureau of General services (covering State government agencies and school construction)</li> <li>• Department of Transportation</li> </ul>	Construction-grade steel (including requirements on subcontracts); motor vehicles; coal	<ul style="list-style-type: none"> <li>• WTO GPA</li> <li>• US-Chile FTA</li> <li>• US Singapore FTA</li> <li>• US-Australia FTA</li> </ul>
MD	<ul style="list-style-type: none"> <li>• Office of the Treasury</li> <li>• Department of the Environment</li> <li>• Department of General Services</li> <li>• Department of Housing and Community Development</li> <li>• Department of Human Resources</li> <li>• Department of Licensing and Regulation</li> <li>• Department of Natural Resources</li> </ul>	Construction-grade steel (including requirements on subcontracts); motor vehicles; coal	<ul style="list-style-type: none"> <li>• WTO GPA</li> <li>• US-Chile FTA</li> <li>• US Singapore FTA</li> <li>• DR-CAFTA</li> <li>• US-Australia FTA</li> <li>• US-Morocco FTA</li> </ul>

<sup>16</sup> See Appendix to Subpart B of 2 C.F.R. part 176 – U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements (as of February 16, 2010).



	<ul style="list-style-type: none"> <li>• Department of Public Safety and Correctional Services</li> <li>• Department Personnel</li> <li>• Department of Transportation</li> </ul>		
NC	<i>State Not Listed – Buy American Required. This Table is NOT applicable.</i>		
NE	Central Procurement Agency	None	<ul style="list-style-type: none"> <li>• WTO GPA</li> <li>• US-Chile FTA</li> <li>• US Singapore FTA</li> <li>• DR-CAFTA</li> <li>• US-Australia FTA</li> <li>• US-Morocco FTA</li> </ul>
PA	Executive branch agencies (for complete list see Appendix to Subpart B of 2 C.F.R. part 176)	Construction-grade steel (including requirements on subcontracts); motor vehicles; coal	<ul style="list-style-type: none"> <li>• WTO GPA</li> <li>• US-Chile FTA</li> <li>• US Singapore FTA</li> <li>• US-Australia FTA</li> </ul>

Explanatory Example:

For example, assume NIST makes a \$3.25 million Recovery Act grant to a Delaware State university to build a business incubator with an estimated project value of \$10 million. The estimated project value is over \$7,804,000, so the Delaware State University must check the Coverage Table in Appendix to subpart B of 2 C.F.R. part 176.

Section of Coverage Table-

State	Entities Covered	Exclusions	Relevant Agreement
DE	<ul style="list-style-type: none"> <li>• Administrative Services (Central Procurement Agency)</li> <li>• State Universities</li> <li>• State Colleges</li> </ul>	Construction-grade steel (including requirements on subcontracts); motor vehicles; coal	<ul style="list-style-type: none"> <li>• WTO GPA</li> <li>• US-Chile FTA</li> <li>• US Singapore FTA</li> <li>• DR-CAFTA (except Honduras)</li> <li>• US-Australia FTA</li> <li>• US-Morocco FTA</li> </ul>



- By reviewing the table, the recipient will find that the State of Delaware, including State universities, is bound by several international agreements, which means that subsection (d) of the Buy American provision must be read consistently with the international obligations undertaken by the State of Delaware. Next the recipient must determine if the project or material is excluded from the relevant international agreements. Since construction-grade steel is excluded from the international agreements by which the Delaware State University is bound, the recipient must acquire steel for the project from domestic sources.
- However, iron and most manufactured goods are not excluded, so the recipient may obtain iron or manufactured goods, such as a furnace, from countries that have signed on to the relative agreements.
- In this case, the relevant agreements in the Coverage Table are: the WTO Government Procurement Agreement, the US-Chile Free Trade Agreement (FTA), the US-Singapore FTA, DR-CAFTA (excluding Honduras), the US-Australia FTA, and the US-Morocco FTA.
- Therefore, the University of Delaware may, but is not required to, buy iron and manufactured goods for the incubator from any of the following countries: Aruba, Australia, Austria, Belgium, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Morocco, Netherlands, Nicaragua, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, and the United Kingdom.



## Appendix C: NIST-1104

---

Request Form for Waiver of the Recovery Act Buy American Provision Using the  
Nonavailability Exception for:  
- ARRA NIST Construction Grants

(See document following Appendix G)



## Appendix D: Pre-Approved<sup>17</sup> Non-Available Items

---

The following items have been determined to be unavailable by the Federal Government:

- Acetylene, black
- Antimony, as metal or oxide
- Asbestos, amosite, chrysotile, and crocidolite
- Bauxite
- Bismuth
- Cadmium, ores and flue dust
- Calcium cyanamide
- Chalk, English
- Chrome ore or chromite
- Cobalt, in cathodes, rondelles, or other primary ore and metal forms.
- Cork, wood or bark and waste.
- Cover glass, microscope slide.
- Crane rail (85-pound per foot).
- Cryolite, natural.
- Dammar gum.
- Diamonds, industrial, stones and abrasives
- Graphite, natural, crystalline, crucible grade
- Hand file sets (Swiss pattern)
- Iodine, crude.
- Kaurigum
- Mica
- Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property)
- Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts
- Nitroguanidine (also known as picrite)
- Oiticica oil
- Petroleum, crude oil, unfinished oils, and finished products
- Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
- Quartz crystals
- Quebracho

---

<sup>17</sup> This is a partial list of items which are most relevant for NIST Recovery Act construction grant projects. For the sake of clarity, NIST has omitted items that are unlikely to be used for construction, such as food and medical products. The complete list, as set forth in 48 C.F.R. § 25.104(a), is available at:

<http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=a70a35cea699b5cf86b5c0303c745b78&rqn=div5&view=text&node=48:1.0.1.4.24&idno=48#48:1.0.1.4.24.1.1.5>



- Radium salts, source and special nuclear materials.
- Rosettes
- Rubber, crude and latex
- Rutile
- Secretin
- Shellac
- Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available
- Talc, block, steatite.
- Tantalum
- Tin in bars, blocks, and pigs
- Tungsten
- Wire glass
- Woods, logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak





## Appendix E: Foreign and Domestic Items Cost Comparison

---

Please attach bids to this form. Bids must include the firm's name, address, telephone number, email address, and the name of a point of contact. Include any other relevant supporting information.

The recipient must receive bids from a minimum of three domestic and three foreign suppliers for each item for a complete cost comparison.

Description	Unit of Measure*	Quantity	Price (Dollars)**
Item _____:			
Foreign bids			
Supplier A:	_____	_____	_____
Supplier B:	_____	_____	_____
Supplier C:	_____	_____	_____
Domestic bids			
Supplier A:	_____	_____	_____
Supplier B:	_____	_____	_____
Supplier C:	_____	_____	_____

*\*The Unit of Measure must be such that domestic and foreign bids can be easily compared. If domestic bids are given in pounds, while foreign bids are given in kilograms, the recipient must convert the foreign bids into the same unit of measurement as the domestic bids and note the conversion formula used to do so.*

*\*\*Include all delivery costs to the construction site in the total price. Include the exchange rate used to convert the bid into dollars, if the original submission was in another currency.*



## Appendix F: Determining Substantial Transformation

Questions for Determining Whether Substantial Transformation Has Occurred In the U.S.:

Question	Yes	No
1. Were all of the components of the manufactured good manufactured in the United States, and were all of the components assembled into the final product in the U.S.? (If the answer is yes, then this is clearly manufactured in the U.S., and the inquiry is complete)		
2. Was there a change in character or use of the good or the components in America? (These questions are asked about the finished good as a whole, not about each individual component)		
a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?		
b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?		
c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?		
3. Was (/were) the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?		
a. Did the process(es) take a substantial amount of time?		
b. Was (/were) the process(es) costly?		
c. Did the process(es) require particular high level skills?		
d. Did the process(es) require a number of different operations?		
e. Was substantial value added in the process(es)?		

- If the answer to Question 1 is yes, then the item is clearly manufactured in the U.S., and the inquiry is complete.
- If the answer is yes for any of 2a, 2b, or 2c, then answer to Question 2 is yes.
- If the answer is yes for at least two of 3a, 3b, 3c, 3d, or 3e, then the answer to Question 3 is yes.

If the answer is “yes” to any of Questions 1, 2 or 3, then “substantial transformation” occurred in the United States.



In applying these questions to individual cases, “yes” answers must in all cases be documented by meaningful, informative, and specific technical descriptions of the activities in the actual process asked about in each question. These descriptions need not be of great length, but must be sufficiently detailed and clearly written to inform assistance recipients and agency reviewers about the activities that have occurred in the process(es), enough to understand their nature and purpose. They should not simply assert a conclusion, describe an end state, or essentially repeat the words of the question as a statement.

If a contractor cannot answer any of the following in the affirmative, the recipient should either find an alternative U.S. - made good if possible, or seek a waiver from the Buy American provisions, if applicable.



## Appendix G: Required Buy American Language for Recipients' Contracts and Purchase Documents

---

The Contractor is required to comply with the “Buy American Provision” found in Section 1605 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009) (Recovery Act). This provision of the Recovery Act includes strict domestic source requirements for iron, steel and manufactured goods used in construction, alteration, maintenance or repair of public building or public work projects receiving Recovery Act funds. The Recovery Act’s Buy American requirements shall flow down and apply to all Subcontractors.

*Definitions.* As used in this specification:

1. *Manufactured good* means a good brought to the construction site for incorporation into the building or work that has been—
  - a. Processed into a specific form and shape; or
  - b. Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.
2. *Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.
3. *Public Building and Public Work* means a public building of, and 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 that 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.

In accordance with Section 1605 of the Recovery Act, all of the iron, steel, and manufactured goods used in the Project must be produced in the United States and the Contractor shall include this requirement in all bid specifications, contracts, purchase orders, and other procurement documents for goods and materials used in the Project.



The Department of Commerce may grant waivers of this requirement if it finds that at least one of the following conditions applies:

- Applying this subsection would be inconsistent with the public interest.
- 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.
- Inclusion of iron, steel, and manufactured goods produced in the United States will increase the overall project cost by more than 25 %.

Specific procedures and documentation are required for each category of waiver. If the Department of Commerce determines that it is necessary to waive this provision, NIST shall publish in the *Federal Register* a detailed written justification as to why the provision is being waived.

In addition, the Buy American requirement in Section 1605 of the Recovery Act shall be applied in a manner consistent with United States obligations under international agreements.

The Contractor shall include the following Buy American Contract Clause in all bid specifications, contracts, purchase orders, and other procurement documents for goods and materials used for the Project to require (i) all iron, steel and manufactured goods being purchased for the Project be produced in the United States, and (ii) all suppliers providing iron, steel, or manufactured goods for the Project provide information related to the origin of these items to NIST upon request:

In accordance with Section 1605 of the American Recovery and Reinvestment Act, all of the iron, steel, and manufactured goods used in the Project must be produced in the United States. **[Insert name of supplier or service provider]** certifies that any of the iron, steel, and manufactured goods provided for use on the Project is produced in the United States. **[Insert name of supplier or service provider]** will provide information related to the origin of any such material to NIST upon request.