

# Subpart 25.6 - American Recovery and Reinvestment Act-Buy American statute-Construction Materials

Parent topic: [Part 25 - Foreign Acquisition](#)

## 25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) with regard to *manufactured construction material* and the [41 U.S.C. chapter 83](#), Buy American (referred to in this subpart as the Buy American statute) with regard to *unmanufactured construction material*. It applies to *construction* projects that use funds appropriated or otherwise provided by the Recovery Act.

## 25.601 Definitions.

As used in this subpart-

*Domestic construction material* means the following:

(1) An *unmanufactured construction material* mined or produced in the *United States*. (The Buy American statute applies.)

(2) A *manufactured construction material* that is manufactured in the *United States* and, if the *construction material* consists wholly or predominantly of iron or *steel*, the iron or *steel* was produced in the *United States*. (Section 1605 of the Recovery Act applies.)

*Foreign construction material* means a *construction material* other than a *domestic construction material*.

*Manufactured construction material* means any *construction material* that is not *unmanufactured construction material*.

*Public building or public work* means a *building or work*, the *construction*, prosecution, completion, or repair of which is carried on directly or indirectly by authority of, or with funds of, a *Federal agency* to serve the interest of the general public regardless of whether title thereof is in a *Federal agency* (see [22.401](#)). 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.

*Recovery Act designated country* means a World Trade Organization Government Procurement Agreement country, a *Free Trade Agreement country*, or a *least developed country*.

*Unmanufactured construction material* means raw material brought to the *construction* site for incorporation into the *building or work* that has not 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.

## **25.602 Policy.**

### **25.602-1 Section 1605 of the Recovery Act.**

Except as provided in 25.603-

(a) None of the funds appropriated or otherwise made available by the Recovery Act *may* be used for a project for the *construction*, alteration, maintenance, or repair of a *public building or public work* unless the *public building or public work* is located in the *United States* and-

(1) All of the iron, *steel*, and manufactured goods used as *construction material* in the project are produced or manufactured in the *United States*.

(i) All *manufactured construction material* must be manufactured in the *United States*.

(ii) *Iron or steel components*.

(A) *Iron or steel components of construction material* consisting wholly or predominantly of iron or *steel* must be produced in the *United States*. This does not restrict the origin of the elements of the iron or *steel*, but requires that all manufacturing processes of the iron or *steel* must take place in the *United States*, except metallurgical processes involving refinement of *steel* additives.

(B) The requirement in paragraph (a)(1)(ii)(A) of this section does not apply to iron or *steel components* or subcomponents in *construction material* that does not consist wholly or predominantly of iron or *steel*.

(iii) *All other components*. There is no restriction on the origin or place of production or manufacture of *components* or subcomponents that do not consist of iron or *steel*.

(iv) *Examples*.

(A) If a *steel* guardrail consists predominantly of *steel*, even though coated with aluminum, then the *steel* would be subject to the section 1605 restriction requiring that all stages of production of the *steel* occur in the *United States*, in addition to the requirement to manufacture the guardrail in the *United States*. There would be no restrictions on the other *components* of the guardrail.

(B) If a wooden window frame is delivered to the site as a single *construction material*, there is no restriction on any of the *components*, including the *steel* lock on the window frame; or

(2) If trade agreements apply, the *manufactured construction material* shall either comply with the requirements of paragraph (a)(1) of this subsection, or be wholly the product of or be substantially

transformed in a *Recovery Act designated country*;

(b) Manufactured materials purchased directly by the Government and delivered to the site for incorporation into the project *shall* meet the same domestic source requirements as specified for *manufactured construction material* in paragraphs (a)(1) and (a)(2) of this section; and

(c) A project *may* include several contracts, a single contract, or one or more *line items* on a contract.

## **25.602-2 Buy American statute**

Except as provided in 25.603, use only *unmanufactured construction material* mined or produced in the *United States*, as required by the Buy American statute or, if trade agreements apply, *unmanufactured construction material* mined or produced in a *designated country* may also be used.

## **25.603 Exceptions.**

(a)

(1) When one of the following exceptions applies, the *contracting officer* may allow the contractor to incorporate foreign *manufactured construction materials* without regard to the restrictions of section 1605 of the Recovery Act or foreign *unmanufactured construction material* without regard to the restrictions of the Buy American statute:

(i) *Nonavailability*. The *head of the contracting activity* may determine that a particular *construction material* is not mined, produced, or manufactured in the *United States* in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as *construction materials*.

(ii) *Unreasonable cost*. The *contracting officer* concludes that the cost of *domestic construction material* is unreasonable in accordance with 25.605.

(iii) *Inconsistent with public interest*. The *head of the agency* may determine that application of the restrictions of section 1605 of the Recovery Act to a particular *manufactured construction material*, or the restrictions of the Buy American statute to a particular *unmanufactured construction material* would be inconsistent with the public interest.

(2) In addition, the *head of the agency* may determine that application of the Buy American statute to a particular *unmanufactured construction material* would be impracticable.

(b) *Determinations*. When a determination is made, for any of the reasons stated in this section, that certain *foreign construction materials* may be used-

(1) The *contracting officer* shall list the excepted materials in the contract; and

(2) For determinations with regard to the inapplicability of section 1605 of the Recovery Act, unless the *construction material* has already been determined to be domestically nonavailable (see list at

25.104), the *head of the agency shall* provide a notice to the Federal Register within three business days after the determination is made, with a copy to the Administrator for Federal *Procurement* Policy and to the Recovery Accountability and Transparency Board. The notice *shall* include-

(i) The title "Buy American Exception under the American Recovery and Reinvestment Act of 2009";

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) *Acquisitions under trade agreements.*

(1) For *construction* contracts with an estimated *acquisition* value of \$6,708,000 or more, also see subpart 25.4. *Offers* proposing the use of *construction material* from a *designated country* shall receive equal consideration with *offers* proposing the use of *domestic construction material*.

(2) For purposes of applying section 1605 of the Recovery Act to evaluation of *manufactured construction material*, *designated countries* do not include the *Caribbean Basin Countries*.

## **25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American statute.**

(a) For any *acquisition*, an *offeror* may request from the *contracting officer* a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American statute for specifically identified *construction materials*. The time for submitting the request is specified in the *solicitation* in paragraph (b) of either 52.225-22 or 52.225-24, whichever applies. The information and supporting data that *must* be included in the request are also specified in the *solicitation* in paragraphs (c) and (d) of either 52.225-21 or 52.225-23, whichever applies.

(b) Before award, the *contracting officer* must evaluate all requests based on the information provided and *may* supplement this information with other readily available information.

(c) Determination based on unreasonable cost of *domestic construction material*.

(1) *Manufactured construction material*. The *contracting officer* must compare the offered price of the contract using foreign *manufactured construction material* (i.e., any *construction material* not manufactured in the *United States*, or *construction material* consisting predominantly of iron or *steel* and the iron or *steel* is not produced in the *United States*) to the estimated price if all domestic *manufactured construction material* were used. If use of domestic *manufactured construction material* would increase the overall offered price of the contract by more than 25 percent, then the *contracting officer* shall determine that the cost of the domestic *manufactured construction material* is unreasonable

(2) *Unmanufactured construction material*. The *contracting officer* must compare the cost of each foreign *unmanufactured construction material* to the cost of domestic *unmanufactured construction material*. If the cost of the domestic *unmanufactured construction material* exceeds the cost of the foreign *unmanufactured construction material* by more than 20 percent, then the *contracting officer* shall determine that the cost of the domestic *unmanufactured construction material* is unreasonable.

## **25.605 Evaluating offers of foreign construction material.**

(a) If the *contracting officer* has determined that an exception applies because the cost of certain *domestic construction material* is unreasonable, in accordance with section 25.604, then the *contracting officer shall* apply evaluation factors to the *offer* incorporating the use of such *foreign construction material* as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign *manufactured construction material* is incorporated in the *offer* based on an exception for unreasonable cost of comparable *domestic construction material* requested by the *offeror*.

(2) In addition, use an evaluation factor of 20 percent applied to the cost of foreign *unmanufactured construction material* incorporated in the *offer* based on an exception for unreasonable cost of comparable domestic *unmanufactured construction material* requested by the *offeror*.

(3) Total evaluated price = offered price + (.25 x offered price, if (a)(1) applies) + (.20 x cost of foreign *unmanufactured construction material*, if (a)(2) applies).

(b) If the *solicitation* specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in paragraph (a) of this section and use the evaluated price in determining the *offer* that represents the *best value* to the Government

(c) Unless paragraph (b) applies, if two or more *offers* are equal in price, the *contracting officer must* give preference to an *offer* that does not include *foreign construction material* excepted at the request of the *offeror* on the basis of unreasonable cost.

(d) *Offerors* also may submit *alternate offers* based on use of equivalent *domestic construction material* to avoid possible rejection of the entire *offer* if the Government determines that an exception permitting use of a particular *foreign construction material* does not apply.

(e) If the *contracting officer* awards a contract to an *offeror* that proposed *foreign construction material* not listed in the applicable clause in the *solicitation* (paragraph (b)(3) of 52.225-21, or paragraph (b)(3) of 52.225-23), the *contracting officer must* add the excepted materials to the list in the *contract clause*.

## **25.606 Postaward determinations.**

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American statute after contract award, the contractor *must* explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the *contracting officer* concludes that the contractor *should* have made the request before contract award, the *contracting officer may* deny the request.

(b) The *contracting officer must* base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American statute made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-21 or 52.225-23 and/or other readily available information.

(c) If a determination, under 25.603(a), is made after contract award that an exception to section

1605 of the Recovery Act or to the Buy American statute applies, the *contracting officer must* negotiate adequate consideration and modify the contract to allow use of the *foreign construction material*. When the basis for the exception is the unreasonable cost of a *domestic construction material*, adequate consideration is at least the differential established in 25.605(a).

## **25.607 Noncompliance.**

The *contracting officer must*-

- (a) Review allegations of violations of section 1605 of the Recovery Act or Buy American statute;
- (b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of *foreign construction material* and request a reply, to include proposed corrective action; and
- (c) If the review reveals that a contractor or subcontractor has used *foreign construction material* without authorization, take appropriate action, including one or more of the following:
  - (1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American statute in accordance with 25.606.
  - (2) Consider requiring the removal and replacement of the unauthorized *foreign construction material*.
  - (3) If removal and replacement of *foreign construction material* incorporated in a *building or work* would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the *contracting officer may* determine *in writing* that the *foreign construction material* need not be removed and replaced. A determination to retain *foreign construction material* does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American statute applies, and this *should* be stated in the determination. Further, a determination to retain *foreign construction material* does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American statute, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.
  - (4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debaring official in accordance with subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the agency's inspector general or the officer responsible for criminal investigation.