

**Water Infrastructure
Finance Authority**

**American Recovery and
Reinvestment Act of 2009**

Buy American Requirements

**Guidance to Borrowers
and Contractors**

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Section 1: Overview

The Water Infrastructure Finance Authority of Arizona (WIFA) manages American Recovery and Reinvestment Act (Recovery Act) funding for water and wastewater projects within Arizona. Section 1605 of the Recovery Act requires that iron, steel, and manufactured goods used in water or wastewater projects funded in whole or in part by Recovery Act appropriations must be produced in the United States (“Buy American Requirements”).

Section 2: Borrower Responsibilities

For Recovery Act funded projects, a WIFA Borrower must:

1. In good faith, design the project and solicit bids for construction which will facilitate the use of American made iron, steel and manufactured goods.
2. Incorporate Buy American Requirements within solicitations and contracts. Appendix A includes sample solicitation and contract provisions.
3. Require bidders, including prime contractors and subcontractors, to certify compliance with Buy American Requirements. Appendix B includes sample certification provisions.

To facilitate compliance with these responsibilities, WIFA encourages borrowers to host pre-bid conferences with potential bidders to:

1. Identify iron, steel, and manufactured goods needed to complete the project.
2. Identify potential domestic sources.
3. Discuss procedures for seeking a waiver(s) from Buy American Requirements.

Section 3: Buy American Waivers

A Borrower may submit a waiver request for Buy American Requirements to EPA in accordance with the “Information Checklist for Waiver Requests” detailed in Appendix C. The Borrower must provide evidence of one or more of the following conditions:

1. Complying with Buy American Requirements is inconsistent with the public interest for purposes of the project for which a waiver has been requested.
2. Iron, steel, and necessary manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality.
3. Using iron, steel, and manufactured goods produced in the U.S. States increase the total project costs by more than 25%.

The borrower may seek a waiver at any point before, during, or after the bid process, but WIFA recommends that borrowers submit the waiver request prior to initiating construction.

WIFA will initially review waiver requests and will coordinate with Region 9 EPA to assist in waiver request determinations.

Section 4: EPA Buy American Guidance

For further information on Buy American Requirements, go to:

www.epa.gov/water/eparecovery/docs/04-29-2009_BA-waiver_process_final.pdf

Section 5: Definitions

For purposes of this guidance, the following definitions apply:

- ❑ **“Manufactured Goods”** – 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 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 U.S.
- ❑ **“Reasonably Available Quantity”** – The quantity of iron, steel, or the manufactured good is available or will be available at the time needed and the 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 specified in the project plans and design.
- ❑ **“Steel”** – An alloy that includes at least 50 % iron, between .02% and 2% carbon and may include other elements. To be classified as steel manufactured in the U.S., the manufacturing process must take place in the U.S. except metallurgical processes involving refinement of steel additives. This requirement does not apply to steel used as components or subcomponents of manufactured goods.

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Appendix A

Sample Solicitation and Contract Provisions

The borrower must include Buy American Requirements within Recovery Act funded project solicitations and contracts. Below are sample provisions. WIFA makes no claims regarding the legality of the provisions with respect to Arizona law or local codes and, accordingly, WIFA encourages borrowers to verify the legality and enforceability of the sample provisions

Sample Solicitation and Contract Provisions

The Contractor acknowledges to and for the benefit of the Borrower and WIFA that it understands the goods and services under this Agreement are being funded with appropriations related to the American Recovery and Reinvestment Act of 2009 (Recovery Act) and such law contains provisions that requires the iron, steel, and manufactured goods used in the project to be produced in the United States ("Buy American Requirements"). The Contractor hereby represents and warrants to and for the benefit of the Borrower and WIFA that:

1. The Contractor has reviewed and understands the Buy American Requirements.
2. 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.
3. The Contractor will provide any further verified information, certification, or assurance of compliance with this section, or information necessary to support a waiver of the Buy American Requirements, as may be requested by the borrower or WIFA.

Notwithstanding any other provisions of this Agreement, any failure to comply with this section by the Contractor may cause the Borrower or WIFA to recover as damages against the Contractor any loss, expense or cost (including without limitation attorney's fees) incurred by the Borrower or WIFA resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from WIFA or any damages owed to WIFA by the Borrower).

While the Contractor has no direct contractual relationship with WIFA, as a lender to the Borrower for the funding of its project, WIFA and the Contractor agree that WIFA is a third-party beneficiary and neither this section (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of WIFA.

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Appendix B

Sample Bidder Certification

The borrower must require contractors to certify compliance with Buy American Requirements for Recovery Act funded projects. Below is a sample certification.

Sample Bidder Certification

1. Identification of American-made Iron, Steel, and Manufactured Goods – Consistent with the terms of the Borrower’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 Borrower 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 Borrower, 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 Borrower in amending, supplementing, or further supporting such information as required by the Borrower to request and, as applicable, implement the terms of a waiver with respect to any such component or components.

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Appendix C

Information Checklist for Waiver Requests

The purpose of this checklist is to ensure that borrowers submit appropriate information to EPA for a waiver request to the Buy American Requirements for Recovery Act funded projects.

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 was submitted according to the instructions in EPA's Memorandum "ARRA 09-1" dated April 28, 2009.
- Borrower 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.

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 Borrower'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.
 - Relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials
- Waiver request includes a statement from the prime contractor confirming the non-availability of the domestic construction materials for which the waiver is sought.
- Has WIFA received other waiver requests for the materials described in this waiver request, for comparable projects?

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Appendix C

Information Checklist for Waiver Requests

Table 1: Foreign and Domestic Construction Materials Price Comparison Worksheet

Instructions

The prime contract should complete the table as follows:

Column	Input
(a)	All iron, steel, and manufactured goods required to build the project as designed.
(d)	Cost estimate for each component as supplied by domestic sources.
(e)	Cost estimate for each component for which waivers are requested, as supplied by foreign sources.

Price Comparison Worksheet

Material (a)	Unit of Measure (b)	Quantity (c)	Domestic Price * (d)	Foreign Price * (e)
Total Cost				