



**U. S. Department of Housing and Urban Development  
Office of Public and Indian Housing**

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Special Attention of:

NOTICE **PIH-2011-12 (HA)**

Public Housing Directors;  
Public Housing Agencies;  
Mixed Finance Project Managers  
HUD Field Offices  
HUD Regional Offices

Issued: February 17, 2011

Expires: February 28, 2012

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Cross Reference:  
Notice 2009-31,  
Section 1605 of Title XVI of Pub. L. 111-5  
2 CFR part 176  
24 CFR parts 85, 905, 941 and 968

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Subject: Reissuance of PIH Notice 2009-31 - PIH Implementation Guidance for the Buy American Requirement of the American Recovery and Reinvestment Act of 2009 including Process for Applying Exceptions

This notice reissues Notice 2009-31, which provides implementation guidance, including the process for applying exceptions, for the Buy American requirement imposed by section 1605 of Title XVI of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (the Recovery Act) for the Public Housing Capital Fund Recovery Formula and Competition (CFRFC) Grant Programs within the Office of Public and Indian Housing (PIH). This notice is referred to as PIH Implementation Guidance for the Buy American Requirement.

**I. Background**

The Recovery Act imposes a Buy American requirement on Recovery Act funding. Specifically, section 1605 (the “Buy American requirement”) of the Recovery Act states that:

- (a) None of the funds appropriated or otherwise made available by this Act may be used for a project for 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.

- (b) Subsection (a) shall not apply in any case or category of cases in which the head of the Federal department or agency involved finds that-
  - (1) applying subsection (a) 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.
- (c) If the head of a Federal department or agency determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived.
- (d) This section shall be applied in a manner consistent with United States obligations under international agreements.

## **II. Implementation**

As initial implementation of the Buy American requirement, PIH incorporated the requirement of section 1605 of the Recovery Act into the following documents: Annual Contributions Contract Amendment for the Capital Fund Formula Recovery Act funds (“ACC Amendment”); Public Housing Notice 2009-12, issued March 18, 2009 (Reissued January 21, 2011 in Public Housing Notice 2011-04); and the Recovery Act Capital Fund Competitive NOFA, issued May 7, 2009 and amended June 9, 2009. See Office of Capital Improvements Recovery Act Information at <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>.

On April 23, 2009, the Office of Management and Budget (OMB) issued interim final guidance on the application and implementation of the Buy American requirement and other provisions of the Recovery Act at 2 C.F.R. part 176 (74 Fed. Reg. 18449) entitled “Requirements for Implementing Sections 1512, 1605 and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards” (OMB Interim Guidance). Although the OMB Interim Guidance is interim, it is binding on federal agencies and establishes standard government-wide award terms for agencies to implement the Buy American requirement of the Recovery Act. OMB solicited public comment on the interim guidance until June 20, 2009. OMB final guidance is pending.

Based on the OMB Interim Guidance, HUD has determined that the Buy American requirement applies to the majority of contracts using Public Housing CFRFC grant funds for construction including alteration, development, modernization and nonroutine maintenance of public housing (as defined below). Maintenance or operational work performed under the Operating Fund Program in accordance with section 9(e) or under section 9(g) of the United States Housing Act of 1937 (1937 Act) is not an eligible use of funds under the CFRFC Programs, and therefore, there are no routine maintenance activities which involve the Buy American requirement.

With respect to mixed finance projects, the Buy American requirement does not apply to a Public Housing Agency (PHA) that procures a private developer for the project and merely serves as a lender of funds having no ownership interest in the project. Similarly, the Buy American requirement does not apply to a PHA or an instrumentality thereof that has a marginal ownership

interest in the project (for example, as a .01% general partner of a limited partnership), but otherwise the scenario is the same as the preceding. However, the Buy American requirement does apply when a PHA or PHA instrumentality exercises significant functions within the owner entity with respect to the management of the project, and in cases where a PHA or a PHA instrumentality serves as the general partner of the owner entity and has a significant management role as determined by HUD. The Buy American requirement also applies if a PHA or PHA instrumentality serves as the developer of a mixed finance development.

For questions regarding application of the Buy American requirement to specific mixed finance projects, contact Althea M. Forrester, Associate General Counsel for Assisted Housing and Community Development at [Althea.M.Forrester@hud.gov](mailto:Althea.M.Forrester@hud.gov).

As discussed below, the Secretary has determined that certain exceptions to the Buy American requirement apply to CFRFC grant funds, without the need for a PHA to seek an individual exception. PHAs, however, may also seek exceptions to the Buy American requirement beyond the exceptions pre-determined to apply to CFRFC grant funds.

An exception to the Buy American requirement may be provided if HUD determines that (1) applying the requirement 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. The exception process is described in detail in this notice.

The requirement to adhere to U.S. obligations under international agreements found in section 1605(d) of the Recovery Act only pertains to international agreements listed in 2 C.F.R. 176.90. Accordingly, this exception does not apply to HUD program grantees such as PHAs unless they are listed or included within the entities listed in the Appendix to Subpart B in the OMB Interim Guidance. If the iron, steel, or manufactured goods to be used in a project receiving Recovery Act funds are from a Party to an international agreement listed in 2 C.F.R. 176.90, and the grantee is required under the international agreement to treat the goods and services of that Party the same as domestic goods and services, then the Buy American requirement will not apply. Also note that pursuant to 2 C.F.R. 176.90, this obligation shall only apply to projects with an estimated value of \$7,443,000 or more and projects that are not specifically excluded from the application of those agreements.

Where the Buy American requirement applies, PHAs should implement the Buy American requirement by placing a provision requiring compliance with the Buy American requirement in all applicable contracts using Public Housing CFRFC grant assistance, unless the international agreement exception of section 1605(d) of the Recovery Act applies. See **Addendum 1** of this PIH Implementation Guidance for sample Buy American contract language and a sample certification that PHAs may require from a contractor or bidder.

### **III. Definitions**

The following terms are important to the appropriate interpretation and implementation of

the Buy American requirement of the Recovery Act and apply to the process described in this PIH Implementation Guidance for the Buy American Requirement:

**2 C.F.R. part 176:** OMB issued interim final guidance on the application and implementation of the Buy American requirements and other provisions of the Recovery Act.

**1937 Act:** The United States Housing Act of 1937, as amended (42 U.S.C. 1437 et seq.).

**Alteration:** Same as definition of modernization.

**Annual contributions contract (ACC):** A contract under the 1937 Act between HUD and the PHA containing the terms and conditions under which the Department assists the PHA in providing decent, safe, and sanitary housing for low-income families. The ACC must be in a form prescribed by HUD under which HUD agrees to provide assistance in the development, modernization, and/or operation of a low-income housing project under the 1937 Act, and the PHA agrees to develop, modernize and operate the project in compliance with all provisions of the ACC, and the 1937 Act, and all HUD regulations and implementing requirements and procedures. This term includes Mixed Finance ACC Amendment and other ACC amendments. 24 C.F.R. 968.105 and part 941.

**Contract:** A procurement contract under a grant. 24 C.F.R. 85.3.

**Construction:** Includes the definitions of development, modernization and nonroutine maintenance.

**Development:** The term development has the same meaning as that provided for a low-income housing project, as that term is defined in section 3(c)(1) of the 1937 Act. 24 C.F.R. part 941.

**Grant:** An award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. 24 C.F.R. 85.3.

**HUD program grantee:** Entity entering into a grant agreement (e.g., ACC Amendment) between HUD and a PHA.

**HUD Program Office:** The HUD Headquarters Office of Public Housing.

**Manufactured good:** A good brought to the construction site for incorporation into the building or work that has been processed into a specific form and shape; or combined with the other raw material to create a material that has different properties than the properties of the individual raw materials. 2 C.F.R. 176.140(a)(1). 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. 2 C.F.R. 176.70(a)(2)(ii).

**Modernization:** The improvement of one or more existing public housing developments. For each modernization project, HUD and the PHA shall enter into an ACC amendment, requiring low-income use of the housing for not less than 20 years from the date of the ACC amendment. 24 C.F.R. 968.106.

**Non-routine maintenance:** Work items that ordinarily would be performed on a regular basis in the course of upkeep of property, but have become substantial in scope because they have been put off, and involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does qualify, but reconstruction, substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify. 24 C.F.R. 968.105.

**Project:** Public Housing CFRFC Program work including the alteration, construction, development, modernization or non-routine maintenance of public housing.

**Obligations:** The amounts of orders placed, contracts awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period. 24 C.F.R. 85.3.

**Public building and public work:** 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 which have governmental functions. 2 C.F.R. 176.140(a)(2).

**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.

**Repair:** Same as definitions of non-routine maintenance and modernization.

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

**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. 2 C.F.R. 176.70(a)(2) and 176.140(a)(3).

**Use:** The obligation of funds. HUD has adopted the definition of “obligation” as it appears

in 24 C.F.R 85.3 and 24 C.F.R. part 905 and includes the relevant obligation time period requirements of the Recovery Act.

#### **IV. Special Circumstances**

##### **1. National Exceptions**

Under certain circumstances, HUD may approve an exception to the Buy American requirement under the authority to waive such requirement if application of such provision would be inconsistent with the public interest. A determination to grant an exception of the Buy American requirement based solely on inconsistency with the public interest as authorized under section 1605(b)(1) must consider the possible national and regional implications of such an exception. HUD has the authority to issue a national “public interest” exception, for a project or on a category of cases/projects basis pursuant to section 1605(b) determined by HUD to be eligible for application of the exception. HUD may also issue a national or regional exception on policy decisions regarding the public’s interest or a determination that a particular item (e.g., certain goods necessary in “green construction”) is not produced domestically in reasonably available quantities or of a sufficient quality.

##### **2. Comprehensive Application and No Intentional Splitting of Contracts**

Section 1605 requires that American iron, steel, and manufactured goods be used in any project receiving Recovery Act funding. Accordingly, HUD has concluded that any project of a HUD program grantee that is funded in whole or in part with Recovery Act funds, must comply with the Buy American requirement.

A Public Housing CFRFC project consists of all work including the alteration, construction, development, modernization or non-routine maintenance of public housing regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place. This precludes the intentional division of Recovery Act projects into separate and smaller contracts 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 separate phases that are distinct in purpose, time, or place, in which case, separate contracts for Recovery Act funds would carry separate requirements.

##### **3. Documentation of Exceptions in PHA Procurement Records**

If the PHA has received an exception or is using a national exception (see discussion in Section V. below), documentary evidence of the exception must be included in the PHA’s procurement records for that project and contract (which can include but not be limited to this PIH Implementation Guidance for the Buy American Requirement and documentation to support the exception). If HUD has determined that Section 1605 does not apply to the assisted work, the PHA must have documentary evidence of that determination in the PHA’s procurement records for that project.

## V. National (Categorical) Exceptions Granted

HUD has determined that the following national exceptions apply. A more detailed justification of the determination on which these exceptions are based will be published in the Federal Register in accordance with section 1605(c) of the Recovery Act, as implemented by 2 C.F.R. 176.80.

1. **If another Federal agency (e.g., Department of Commerce, Department of Energy or Environmental Protection Agency) has determined that an exception to the Buy American requirement is applicable under section 1605(b)**, for a project including public housing, HUD will accept that agency's determination and permit the PHA (HUD program grantee) to apply that exception for the remainder of HUD-assisted work in that project.
2. **If another HUD Program Office (e.g., Office of Community Planning and Development) has determined that an exception to the Buy American requirement is applicable under section 1605(b)** for a project, and an analysis supports its application to another request, PIH may accept that determination and permit the HUD program grantee (PHA) to apply that exception to the remainder of the CFRFC grant work in that project.
3. Where **the size of the Public Housing CFRFC grant is less than \$100,000** (currently the 24 C.F.R. part 85 simplified acquisition threshold) the Buy American requirement is not applicable. This exception covers 30% of the PHAs (often referred to as "small PHAs") and will account for approximately \$52 million of the nearly \$4 billion in grant awards.
4. Where **the size of a contract funded with CFRFC grant assistance is less than \$100,000**, regardless of the size of the PHA, the Buy American requirement is not applicable.
5. **For any project substantially under contract or underway prior to acceptance of Public Housing CFRFC grant funds, the Buy American requirement is not applicable.** A summary of this exception is found in **Addendum 4** to this PIH Implementation Guidance for the Buy American Requirement.

In addition to these five national exceptions, there is also an **existing list of nonavailable articles** listed at 48 C.F.R. 25.104(a) (**FAR List**) and the procedures to apply, if any of those articles are manufactured goods needed in the project covered by the Buy American requirement, are found at 48 C.F.R. 25.103(b)(1). See also 2 C.F.R. 176.80. The current list of nonavailable articles is found in **Addendum 3** to this PIH Implementation Guidance for the Buy American Requirement.

## VI. Step-By-Step Exception Process

**The exception process begins with the HUD program grantee.** If a PHA needs to request an exception that is not covered by a national exception, a PHA must follow the process described in this notice. In order to fulfill the requirements of the Recovery Act, the HUD program grantee must in good faith design the project (where applicable) and solicit bids for construction with American-made iron, steel and manufactured goods. However, if one or more of the

exceptions specified in section 1605(b) are present, the HUD program grantee may request a determination that the exception applies to the grantee. Until an exception has been determined applicable by HUD, the Buy American requirement stands.

**The HUD program grantee may seek an exception 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 requirement of the Recovery Act would be inconsistent with the public interest.

**The applicability of an exception will likely appear at two points in a project:** 1) during the design process, where the HUD program grantee and its architects or engineers identify key materials (iron and steel) or equipment (manufactured goods) that are not produced in sufficient quantities domestically, or, 2) after evaluation by prospective bidders and their consultation with suppliers, the HUD program grantee determines that iron, steel, or manufactured goods as required by the design are not produced in sufficient quantities domestically. The HUD program grantee could potentially seek a determination of an exception at either or both points in the project. It is also possible to seek an exception determination after bids are opened or after construction has initiated or the obligation is entered into.

It is strongly recommended, if an exception is considered necessary, to initiate the request before construction starts or the obligation is entered into. It should also be noted that the HUD program grantee must continue to follow all other HUD program requirements including, for example the administrative requirements for grants and cooperative agreements for Public Housing Capital Funds, 24 C.F.R. part 85, especially the procurement requirements, as well as Recovery Act requirements.

It is also strongly encouraged that HUD program grantees hold pre-bid conferences with potential bidders. A pre-bid conference can help 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 an exception prior to bid and can help inform the HUD program grantee on compliance options.

### **Submission of a Request for an Exception Determination**

A request for an exception determination should be submitted by HUD program grantees to PIH program offices in the HUD Field Offices. PHAs shall use the **Requirement/Checklist for Submission and Review of Buy American Exception Requests found at Addendum 2** to this PIH Implementation Guidance for the Buy American Requirement when submitting an exception request. The request package will then be reviewed by both the PIH program office in the HUD



Field Office and Field Counsel for completeness. Proper and sufficient documentation is necessary for processing an exception determination. If adequate documentation and justification have not been submitted by the PHA, the HUD Field Office will return the request package to the PHA noting the deficiencies. If documentation is complete, the PIH Field Office will forward the request package along with a recommendation to HUD Headquarters for consideration and approval by the HUD Secretary or those with delegated authority. For Buy American exceptions under the Public Housing CFRFC Programs, the Assistant Secretary for Public and Indian Housing has delegated authority to approve exceptions.

### **Late submissions**

Consistent with 2 C.F.R. 176.120, and where the national exception for any project substantially under contract or underway prior to acceptance of Public Housing CFRFC grant funds does not apply, HUD will consider exception requests submitted after the signing of the construction contract or after an obligation has been entered into. These exception requests must include an explanation of why the PHA could not request the determination before making the obligation or why the need for such determination otherwise was not reasonably foreseeable. 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. If HUD concludes that the program grantee should have made the request before making obligations, HUD may deny the request. Late requests that are based on grounds that the HUD program grantee would be reasonably expected to foresee will, before consideration of the underlying exception request, be subject to a balancing of interests. This balancing of interests will consider whether the public interest in expeditious construction under the Recovery Act does or does not outweigh the need for full, timely, and good faith compliance with the Buy American requirement as set forth in the Recovery Act, the OMB Interim Guidance, PIH Notices and web information and this PIH Implementation Guidance for the Buy American Requirement.

### **Granting an exception is a 5-step process:**

1. **Evaluation by HUD:** After receiving an exception request for the Buy American requirement from a HUD program grantee, the PIH Field Office and Field Counsel will use the checklist in **Addendum 2** of this PIH Implementation Guidance for the Buy American Requirement to determine whether the request properly and adequately documents and justifies the statutory basis cited for the exception, i.e., that it is quantitatively and qualitatively sufficient. The checklist provides information with regard to an exception on the basis of public interest, the unavailability of a product or material, or of substantial cost increases.

If the PIH Field Office with Field Counsel concurrence finds that adequate documentation and justification have been submitted, a recommendation will be prepared and the request package will be forwarded to HUD Headquarters for consideration and approval as described above.

2. **Coordination:** To the extent determined necessary and expedient, the PIH Field Office shall

coordinate with appropriate PIH Regional Offices and other HUD Program Offices (e.g., HUD Community Planning and Development Program Offices) administering funds involved in the project. The HUD Program Office shall also coordinate with Office of General Counsel (OGC) on any related legal concerns with the exception request.

3. **Concurrence:** PIH Headquarters Office and OGC Headquarters Office concurrences must be obtained on all exception approvals.
4. **Signature of exception approval by HUD Secretary, Assistant Secretary or HUD Official with delegated authority:** As soon as the exception is signed and dated, PIH must notify the HUD program grantee. The processing and approval of exceptions will be handled in an expeditious manner.
5. **Publication in the Federal Register** of a detailed written justification as to why the Buy American requirement is being excepted. See section 1605(c) and 2 C.F.R. 176.80. Pursuant to 2 C.F.R 176.90, the notice must include the title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”; the dollar value and brief description of the project, and a detailed written justification as to why the restriction is being excepted. This publication will be processed by OGC and must occur within 2 weeks after the exception approval is given, unless the item has already been determined to be domestically nonavailable. A list of items that are not domestically available is at 48 C.F.R 25.104(a) and provided in **Addendum 3** to this PIH Implementation Guidance for the Buy American Requirement. The **Federal Register** notice or information from the notice may be posted by OMB to [www.Recovery.gov](http://www.Recovery.gov) and should be posted on [www.hud.gov](http://www.hud.gov).

## VII. Further Questions

**Addendum 5** to this PIH Implementation Guidance for the Buy American Requirement contains **Questions and Answers** to facilitate understanding of the Buy American requirement and the process for applying exceptions.

**Contact:** Althea M. Forrester, Associate General Counsel for Assisted Housing and Community Development with additional questions at [Althea.M.Forrester@hud.gov](mailto:Althea.M.Forrester@hud.gov).

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Sandra B. Henriquez, Assistant Secretary for  
Public and Indian Housing

## **Addendum 1**

### **Sample Buy American Contract Language**

**BELOW ARE SAMPLE PROVISIONS FOR CONTRACTS SUBJECT TO SECTION 1605. HUD MAKES NO CLAIMS REGARDING THE LEGALITY OF THIS CLAUSE WITH RESPECT TO STATE OR LOCAL LAW. IT IS IMPERATIVE THAT ANY PARTY INSERTING THIS CLAUSE INTO A CONTRACT VERIFY THAT IT IS LEGAL AND ENFORCEABLE ACCORDING TO STATE AND LOCAL LAWS, REGULATIONS, AND ORDINANCES:**

The Contractor acknowledges to and for the benefit of the \_\_\_\_\_ (“Public Housing Agency”) and HUD that it understands the goods and services under this Agreement are being funded with monies made available by the American Reinvestment and Recovery Act of 2009 (Recovery Act) (or are being made available for a project being funded with monies made available by the Recovery Act) and section 1605 of such law contains provisions commonly known as “Buy American.” The Buy American requirement prohibits the use of Recovery Act funds on any project for the construction, alteration, maintenance, or repair of a public building or work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States (“Buy American Requirement”) including iron, steel, and manufactured goods provided by the Contractor pursuant to this Agreement.

The Contractor hereby represents and warrants to and for the benefit of the PHA and HUD that (a) the Contractor has reviewed and understands the Buy American Requirement, (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 Requirement, unless an exception of the requirement 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 an exception of the Buy American Requirement, as may be requested by the PHA or HUD.

Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the PHA to recover as damages against the Contractor any loss, expense or cost (including without limitation attorney’s fees) incurred by the PHA resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part from HUD). Neither this paragraph (nor any provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of HUD.

### **Sample Certification that PHAs may require from a contractor or bidder**

1. Identification of American-made Iron, Steel, and Manufactured Goods: Consistent with the terms of the PHA’s bid solicitation and the provisions of Section 1605 of the Recovery Act, 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 PHA 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 national (categorical) exception published by HUD (or another Federal 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 PHA, 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 schedule and consistent with the deadlines prescribed in the bid solicitation, with assurance adequate from the Bidder under 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 an exception under section 1605 with respect to such component or components. The Bidder further agrees that, if this bid accepted, it will assist the PHA in amending, supplementing or further supporting such information as required by the PHA to request and, as applicable, implement the terms of an exception with respect to any such component or components.

## Addendum 2

### **REQUIREMENTS/CHECKLIST FOR SUBMISSION AND REVIEW OF BUY AMERICAN EXCEPTION REQUESTS**

#### **I. Introduction**

These requirements are to be used by all Public Housing Agencies (PHAs) that feel it is necessary to seek an exception of the Buy American requirement (section 1605) of the American Recovery and Reinvestment Act of 2009 (Recovery Act). Pursuant to **PIH Implementation Guidance for the Buy American Requirement**, all requests for an exception of the Buy American requirement must be submitted in compliance with these requirements.

#### **A. A PHA may seek an exception in the following circumstances:**

1. The PHA may seek an exception at any point before, during, or after the bid process **if one or a combination of three conditions is met:**
  - a. Iron, steel, and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
  - b. 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,
  - c. Applying the Buy American requirement of the Recovery Act would be inconsistent with the public interest.
2. The PHA may seek an exception if one or a combination of three of the conditions above are met after the signing of the construction contract or after an obligation has been entered into if it does not meet the requirements in **Section I.B** below.

#### **B. A PHA does not need to seek an exception if:**

1. The PHA's procurement meets the criteria for the national exceptions as provided in the **Section V. of the PIH Implementation Guidance for the Buy American Requirement**;
2. The procurement was completed prior to publication of the PIH Implementation Guidance for the Buy American Requirement, that is it meets the criteria for project substantially under contract or underway prior to acceptance of Public Housing Capital Fund Recovery Formula or Competition Grants (CFRFC) as described in **Addendum 4 to the PIH Implementation Guidance for the Buy American Requirement**; or
3. The exception request is for an item or items also included in the list of nonavailable articles at 48 C.F.R. 25.104(a), and the PHA has meet the requirements related to using the **FAR List**. See also 2 C.F.R. 176.80 and **Addendum 3 to the PIH Implementation Guidance for the Buy American Requirement**.

**C. If a PHA has other Buy American Exception Requests that are pending or that have been granted, the information and supporting documentation must be provided (as applicable). Further, the**

**PHA should coordinate with the other approving entity before proceeding with this request and keep the following items (as applicable) until the exception request is ready for HUD Field Office consideration:**

1. A copy of any other section 1605 exception requests for the materials described in this exception request that have been submitted to another HUD Program Office or another Federal agency for the project;
2. Identification of and citation to any other section 1605 exception published by HUD or another Federal agency in the Federal Register that the PHA believes is applicable to such component or components, and an analysis that supports its applicability to the component or components; and
3. Identification of the other Recovery Act funds assisting the project, and applicable contact information for the other HUD Program Office or Federal agency.

## **II. General Requirements**

A PHA that decides it is necessary to request an exception should submit an exception request package to their respective PIH Field Office for review for completeness and processing in accordance with the **PIH Implementation Guidance for the Buy American Requirement**. The submission cannot be submitted electronically but must be sent via regular mail with original signatures (express or certified mail can also be used) to the responsible PIH Field Office. PHAs may also hand deliver request packages. An exception request package must contain all items/documentation required. All exception requests must include **Section II. General Requirements A - C**, and depending on the exception requested may require additional information as stated below in **Section III**. If the PIH Field Office finds the submission deficient, it shall return the incomplete exception request to the PHA noting the deficiency.

### **A. Letter from Executive Director which must provide all of the following information (check each one):**

1. The project/development and specific activities for which the exception request is being submitted;
2. The point in time when the request is being submitted, which would be **one of the following (check one):**
  - i. During the planning and design/pre-bid phase of the project;
  - ii. After evaluation by prospective bidders and their consultation with suppliers;
  - iii. No later than start of the work; or
  - iv. After Recovery Act funds have been obligated for a project, and if so, the PHA must explain why it could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the PHA does not submit a satisfactory explanation, HUD need not make a determination.
3. How the exception will facilitate the purpose of the project including but not limited to **(check each one):**
  - i. An explanation of how the exception will assist the goals of the Recovery Act;

- \_\_\_ ii. Identification of the areas (e.g. housing, infrastructure, job creation or retention, improve energy efficiency, expand educational opportunities and access to health care); and
- \_\_\_ iii. Explain how the lack of an exception would slow the implementation of the project and/or undermine Recovery Act initiatives.

**B. PHA must also include the following information in the exception request package:**

FOREIGN AND DOMESTIC ITEMS COST COMPARISON				
a. Description of Item	b. Unit of Measure*	c. Quantity	d. Cost (dollars)**	e. Time of Delivery/Avail.
Foreign steel, iron, or manufactured good				
Domestic steel, iron, or manufactured good				
f. Location of the Work (please list all locations)				
g. Name/Address of proposed supplier				
h. Detailed justification of the reason for use				

\* Unit of measure includes but is not limited to pounds, ounces, gallons, liters, yards and meters.

\*\*The cost of iron, steel, and/or manufactured goods shall include all delivery costs to the construction site and any applicable duty.

**B. The PHA must provide documentation/support to show that it has made a good faith effort to solicit bids for domestic construction materials/manufactured goods, as demonstrated by at least one of the following (check at least one):**

- \_\_\_ 1. Language in request for bids/proposals;
- \_\_\_ 2. Language in contracts; and
- \_\_\_ 3. Communications with contractor.

**III. Requirements Applicable In Certain Circumstances**

In addition to the General Requirements in Section II above, if a PHA is submitting an exception based on cost because the 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 based on unavailability because iron, steel, and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, the information in Section III.A or B below must also be included in the exception request submission package, as applicable.

**A. Exception Request Based on Cost:** If the PHA’s request is based on a belief that inclusion of iron, steel and manufactured goods will result in an increase in cost of the overall project

by more than 25 percent, in addition to the General Requirements above, the request **must include all** of the following (check each one). It is important to note that a cost comparison must be completed for each item that the PHA believes will cumulatively increase the overall cost of the project. The PHA must provide a separate cost comparison table (Table 1 below) for each item and then complete the cumulative total table (Table 2 below) which should illustrate that the overall cost is more than 25% due to the inclusion of iron, steel, and manufactured goods produced in the United States:

**1. Cost Comparison Table (Table 1)**

FOREIGN AND DOMESTIC ITEMS COST COMPARISON			
Description of Item	Unit of Measure	Quantity	Cost (dollars)*
Item 1/Foreign Supplier Foreign steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for foreign supplier			
Item 1/Domestic Supplier 1: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 1			
Item 1/Domestic Supplier 2: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 2			
Item 1/Domestic Supplier 3: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 3			

\*Include all delivery costs to the construction site. Enter the cost estimate for each component as supplied by domestic sources and enter the cost estimate for each component for which exceptions are requested, as supplied by foreign sources.

**NOTE: If the total domestic project cost in the Price Comparison Table does not exceed the total foreign project cost indicated by more than 25%, HUD will not continue to process the exception based on cost.**



**2. Cumulative Cost Table (Table 2)**

FOREIGN AND DOMESTIC ITEMS COST COMPARISON SUMMARY			
	Cost (dollars)	Cost increase (dollars)	Percentage of increase
Item #1:			
Item #2:			
Item #3:			
TOTAL (Increase cost in overall project)			

3. The PHA **must also submit the following supporting documentation (check each one)**:

- \_\_\_ i. Relevant excerpts from the bid documents used by the contractors to complete the Price Comparison Table; and
- \_\_\_ ii. 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. This could include a summary if the survey was oral.

**B. Exception Request based on Availability:** If the PHA’s request is based on a belief that inclusion of iron, steel and manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, **in addition to the General Requirements above in Section I, the request must include all of the following (check each one)**:

- \_\_\_ 1. The PHA provided the following supporting documentation (necessary to demonstrate the availability, quantity, and quality of the materials for which the exception is requested). Please note that the PHA must illustrate all three components of this provision of the Recovery Act exist in order to be considered for this exception:

Cumulative Cost Table (Table 2)

FOREIGN AND DOMESTIC ITEMS COST COMPARISON			
Description of Item	Unit of Measure	Quantity	Time of Delivery/Avail
Item 1/Foreign Supplier Foreign steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for foreign supplier			
Item 1/Domestic Supplier 1: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 1			
Item 1/Domestic Supplier 2: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 2			
Item 1/Domestic Supplier 3: Domestic steel, iron, or manufactured good			
List name, address, telephone number, email address, and contact for Supplier 3			
Project Description*:			

\*Including project schedule and relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials.

**2. Cumulative Cost Table (Table 2)**

FOREIGN AND DOMESTIC ITEMS COST COMPARISON SUMMARY			
	Availability	Quantity	Quality
Item #1:			
Item #2:			
Item #3:			
TOTAL (Insufficient quantity, not readily available and not of a satisfactory quality)			

- \_\_\_\_ 2. The PHA has certified that it has made efforts to find available domestic sources, and is maintain documentation of its process for identifying suppliers, and a list of contacted suppliers.
- \_\_\_\_ 3. The PHA has attached a statement from the contractor confirming the non-availability of the domestic construction materials for which the exception is sought.

### **Addendum 3 - FAR List**

This is the current list of nonavailable articles listed at 48 C.F.R 25.104(a) and the procedures at 48 C.F.R 25.103(b)(1) to apply if any of those articles are manufactured goods needed in the project covered by the Buy American requirements. See also 2 C.F.R 176.80. HUD and HUD program grantees covered by the Buy American requirements may use these already approved exceptions as described below. HUD may learn of other manufactured goods that are not available in sufficient and reasonably available quantities and of a satisfactory quality, upon such a finding and HUD could except those manufactured goods in a national exception or HUD could apply to have them included on the list at 48 C.F.R 25.104(a).

[Code of Federal Regulations]

[Title 48, Volume 1]

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[CITE: 48 CFR 25.104]

#### **TITLE 48--FEDERAL ACQUISITION REGULATIONS SYSTEM**

#### **CHAPTER 1--FEDERAL ACQUISITION REGULATION**

Sec. 25.104 Nonavailable articles.

(a) The following articles have been determined to be nonavailable in accordance with 25.103(b)(1)(i):

Acetylene, black.

Agar, bulk.

Anise.

Antimony, as metal or oxide.

Asbestos, amosite, chrysotile, and crocidolite.

Bamboo shoots.

Bananas.

Bauxite.

Beef, corned, canned.

Beef extract.

Bephenium hydroxynapthoate.

Bismuth.

Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.

Brazil nuts, unroasted.

Cadmium, ores and flue dust.

Calcium cyanamide.

Capers.

Cashew nuts.

Castor beans and castor oil.

Chalk, English.  
Chestnuts.  
Chicle.  
Chrome ore or chromite.  
Cinchona bark.  
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.  
Cocoa beans.  
Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.  
Coffee, raw or green bean.  
Colchicine alkaloid, raw.  
Copra.  
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.  
Emetine, bulk.  
Ergot, crude.  
Erythrityl tetranitrate.  
Fair linen, altar.  
Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.  
Goat hair canvas.  
Goat and kidskins.  
Grapefruit sections, canned.  
Graphite, natural, crystalline, crucible grade.  
Hand file sets (Swiss pattern).  
Handsewing needles.  
Hemp yarn.  
Hog bristles for brushes.  
Hyoscine, bulk.  
Ipecac, root.  
Iodine, crude.  
Kaurigum.  
Lac.  
Leather, sheepskin, hair type.  
Lavender oil.  
Manganese.  
Menthol, natural bulk.  
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.  
Modacrylic fiber.  
Nitroguanidine (also known as picrite).  
Nux vomica, crude.

Oiticica oil.  
Olive oil.  
Olives (green), pitted or unpitted, or stuffed, in bulk.  
Opium, crude.  
Oranges, mandarin, canned.  
Petroleum, crude oil, unfinished oils, and finished products.  
Pine needle oil.  
Pineapple, canned  
Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.  
Pyrethrum flowers.  
Quartz crystals.  
Quebracho.  
Quinidine.  
Quinine.  
Rabbit fur felt.  
Radium salts, source and special nuclear materials.  
Rosettes.  
Rubber, crude and latex.  
Rutile.  
Santonin, crude.  
Secretin.  
Shellac.  
Silk, raw and unmanufactured.  
Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.  
Spices and herbs, in bulk.  
Sugars, raw.  
Swords and scabbards.  
Talc, block, steatite.  
Tantalum.  
Tapioca flour and cassava.  
Tartar, crude; tartaric acid and cream of tartar in bulk.  
Tea in bulk.  
Thread, metallic (gold).  
Thyme oil.  
Tin in bars, blocks, and pigs.  
Triprolidine hydrochloride.  
Tungsten.  
Vanilla beans.  
Venom, cobra.  
Water chestnuts.  
Wax, carnauba.  
Wire glass.  
Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.  
Yarn, 50 Denier rayon.

Yeast, active dry and instant active dry.

(b) This list will be published in the Federal Register for public comment no less frequently than once every five years. Unsolicited recommendations for deletions from this list may be submitted at any time and should provide sufficient data and rationale to permit evaluation (see 1.502).

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 34241, June 18, 2004;  
70 FR 11743, Mar. 9, 2005]

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## TITLE 48--FEDERAL ACQUISITION REGULATIONS SYSTEM

### CHAPTER 1--FEDERAL ACQUISITION REGULATION

#### Sec. 25.103 Exceptions.

When one of the following exceptions applies, the contracting officer [of the PHA] may acquire a foreign end product without regard to the restrictions of the Buy American Act:

\* \* \* \* \*

(b) Nonavailability. The Buy American Act does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(1) Class determinations. (i) A nonavailability determination has been made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency [PHA] is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as--

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer [of the PHA] learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. \*

\* \* \* \* \*

(e) Information technology that is a commercial item. The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item, when using fiscal year 2004 or subsequent fiscal year funds (Section 535(a) of Division F, Title V,

Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts)  
[explanation added].

[64 FR 72419, Dec. 27, 1999, as amended at 70 FR 11742, Mar. 9, 2005; 71 FR 224, Jan. 3, 2006]



## Addendum 4

### **National Exception for any Project Substantially Under Contract or Underway Prior to Acceptance of Public Housing Capital Fund Recovery Formula or Competitive Grants**

This exception is applicable to HUD Recovery Act projects subject to the Buy American requirement, and covers public housing development, including conventional development (24 C.F.R. 941.102(a)(1)) and mixed-finance development (24 C.F.R. 941.102(a)(4)) where the PHA is both developer and general partner and where the PHA has a significant role and the PHA would be subject to 24 C.F.R part 85. This exception does not apply to turnkey or acquisition methods of public housing development (24 C.F.R. 941.102(a)(2) or (3)). This exception is also applicable to modernization projects. Development and Modernization requirements are discussed separately below:

#### **I. For Projects That Have Not Begun Construction but are Substantially Under Contract**

##### **A. Public Housing Development**

In order to be substantially under contract, a **project must have all of the following characteristics prior to the date that the PIH Implementation Guide for the Buy American Requirement is issued:**

1. The PHA is the project's developer (only for mixed finance development);
2. The PHA has secured financial commitments (tax credits, investor for credits, or other funding sources) for the project (only for mixed finance development);
3. The PHA has bid out the project's construction and selected a general contractor. The general contractor has provided a price or estimates, which do not include the use of all American-made products. The PHA must ensure that the documentation of the bid and the bid process is in its files;
4. The PHA has submitted a rental term sheet to HUD (only for mixed finance development);
5. The project is in the PHA's 5-Year Plan and Annual Plan;
6. The project is ready to begin construction once HUD provides its approval and will have all required, building and other necessary permits to start construction; and
7. The PHA can show that it is in the public interest to move ahead with the project and not rebid the construction work to ensure that all products are American-made. Rebidding **will result in one or more** of the following:
  - a. A substantial delay of the construction and completion of public housing;

- b. A substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;
- c. One or more lenders or granters or the construction contractor rescinding their commitment to the project resulting in the project being significantly delayed or rendering it infeasible;
- d. PHA missing the obligation and expenditure deadlines specified in the Recovery Act (obligate 100% of the funds within one year of the effective date of the CFRF or CFRC Annual Contributions Contract (ACC) Amendment; expend 60% within two years of the effective date of the ACC Amendment; and expend 100% within three years of the effective date of the ACC Amendment);
- e. Jobs not being recreated or retained;
- f. Negative economic consequences to a neighborhood or locality if a project is delayed or cannot be built; or
- g. Other compelling negative hardships related to the above.

## **B. Public Housing Modernization**

In order to be substantially under contract, a modernization project (24 C.F.R. parts 905 and 968, including non-routine maintenance, and as described in the PIH Implementation Guidance for the Buy American Requirement) must have all of the following characteristics prior to the date that the PIH Implementation Guidance for the Buy American Requirement is issued:

1. The PHA is modernizing the project;
2. The PHA has bid out the project's modernization work and selected a contractor. The contractor has provided a price or estimates, which do not include the use of all American-made products. The PHA must ensure that the documentation of the bid and the bid process is in its files;
3. The project is in the PHA's 5-Year Plan and Annual Plan;
4. The project is ready to begin modernization once HUD provides its approval and will have all required building and other necessary permits to start construction; and
5. The PHA can show that it is in the public interest to move ahead with the project and not rebid the work to ensure that all products are American-made. Rebidding **will result in one or more** of the following:
  - a. A substantial delay of the modernization and completion of the public

housing work;

- b. A substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;
- c. One or more contractors rescinding their commitment to the project resulting in the project being significantly delayed or rendering it infeasible;
- d. PHA missing the obligation and expenditure deadlines specified in the Recovery Act (obligate 100% of funds within one year of the effective date of the CFRF or CFRC Annual Contributions Contract (ACC) Amendment; expend 60% within two years of the effective date of the ACC Amendment; and, expend 100% within three years of the effective date of the ACC Amendment);
- e. Jobs not being recreated or retained;
- f. Negative economic consequences to a neighborhood or locality if a project is delayed; or
- g. Other compelling negative hardships related to the above.

**While no submission to HUD will be required to justify the I.A. or I.B. exception, the PHA must retain information justifying the above factors in its procurement records for the project, which must be available for review by HUD or Office of Inspector General.**

## **II. For Projects Already Underway**

### **A. Public Housing Development**

Due to the national financial crisis, a PHA may find that a public housing development (conventional or mixed-finance project) that has already received HUD approval and was under construction has lost one or more of its funding commitments and is now halted due to the loss of this funding commitment(s). In seeking out additional funding sources, the PHA may decide that the commitment of Capital Fund Recovery Formula or Competitive funds to the project is the best way to get the project back on track and to resume construction. Under the project's existing construction contract, such a contract may include the use of manufactured goods that do not meet the Buy American requirement. However, in order to be considered as a project underway, **the PHA must meet the following:**

1. The PHA is the project's developer;
2. The PHA has secured the remaining financial commitments (tax credits, investor

for credits, or other funding sources) for the project and these sources are currently available to the project (only for mixed finance development);

3. The PHA has an existing construction contract and/or general contractor. The contractor contract does not include the use of all American-made products. The PHA has documentation of the bid and the bid process is in its files;
4. The PHA had submitted a rental term sheet to HUD prior to the start of construction and had received HUD approval for the project (for mixed finance development). In the case of other public housing development, the PHA has an approved development plan and has started construction;
5. The project is in the PHA's 5-Year Plan and Annual Plan;
6. The project is ready to resume construction and has received the required building and other necessary permits to start construction; and
7. The PHA can show that it is in the public interest to resume construction and not rebid the construction work to ensure that all products are American-made.  
**Rebidding will result in one or more of the following:**
  - a. A substantial delay of the construction and completion of public housing;
  - b. A substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;
  - c. One or more lenders or granters or the construction contractor rescinding their commitment to the project resulting in the project being significantly delayed or rendering it infeasible;
  - d. PHA missing the obligation and expenditure deadlines specified in the Recovery Act (obligate 100% of funds within one year of the effective date of the CFRF or CFRC Annual Contributions Contract (ACC) Amendment; expend 60% within two years of the effective date of the ACC Amendment; and, expend 100% within three years of the effective date of the ACC Amendment;
  - e. Jobs not being recreated or retained;
  - f. Negative economic consequences to a neighborhood or locality if a project is delayed or cannot be built; or
  - g. Other compelling negative hardships related to the above.

## **B. Public Housing Modernization**

Due to the national financial crisis, a PHA may find that a public housing modernization project (**24 C.F.R. parts 905 and 968, including non-routine maintenance, and as described in the PIH Implementation Guidance for the Buy American Requirement**) that has already received HUD approval and was underway is now halted due to the need for additional funding. In seeking out additional funding sources, the PHA may decide that the commitment of Capital Fund Recovery Formula or Competitive funds to the project is the best way to get the project back on track and to resume modernization. Under the project's existing construction contract (to the extent that it is not a significant modification for purposes of 24 C.F.R. part 85), such a contract may include the use of manufactured goods that do not meet the Buy American requirement. However, in order to be considered as a project underway, **the PHA must meet the following:**

1. The PHA is modernizing the project;
2. The PHA has an existing modernization contract and/or general contractor. The contract does not include the use of all American-made products. The PHA has documentation of the bid and the bid process is in its files;
3. The project is in the PHA's 5-Year Plan and Annual Plan;
4. The project is ready to resume modernization and has received the required building and other necessary permits to start modernization; and
5. The PHA can show that it is in the public interest to resume modernization and not rebid the modernization work to ensure that all products are American-made. **Rebidding will result in one or more of the following:**
  - a. A substantial delay of the modernization;
  - b. A substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;
  - c. One or more contractor(s) rescinding their commitment to the project resulting in the project being significantly delayed or rendering it infeasible;
  - d. PHA missing the obligation and expenditure deadlines specified in the Recovery Act (obligate 100% of funds within one year of the effective date of the CFRF or CFRC Annual Contributions Contract (ACC) Amendment; expend 60% within two years of the effective date of the ACC Amendment; and expend 100% within three years of the effective date of the ACC Amendment;
  - e. Jobs not being recreated or retained;

- f. Negative economic consequences to a neighborhood or locality if a project is delayed or cannot be modernized; or
- g. Other compelling negative hardships related to the above.

**While no submission to HUD will be required to justify the II. A or B. exception, the PHA must retain information justifying the above factors in its procurement records, which must be available for review by HUD or the Office of Inspector General.**

## Addendum 5

### Questions and Answers

- Q1: Section VI, Procurement, item 7 of PIH Notice 2009-12 states that the “Buy America” provisions of the Recovery Act apply to Recovery Act Capital Funds. How does a PHA determine 1) whether a product or contract is likely to include iron, steel and/or manufactured goods subject to the restriction, and 2) whether such materials qualify as “produced in the United States” in accordance with this requirement?
- A1: Product labels and descriptions shall be relied on. If in doubt, contact the manufacturer. In the event that the country of origin is unascertainable, PHAs should document the means used in their attempts to verify the country of origin (*e.g.*, informal consultations with manufactures, suppliers, construction contractors, etc.). Also refer to the Office of Management and Budget (OMB) Interim Guidance entitled *Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards*, 74 Fed. Reg. 18449 (April 23, 2009) (to be codified at 2 C.F.R Part 176) (as now in effect and as may be amended from time to time) available at <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>. PHAs should also consider using the sample language provided in **Addendum 1** to the PIH Implementation Guidance for the Buy American Requirement.
- Q2: Will the Buy American steel and iron requirements apply to manufactured items such as appliances, heat pumps, and generators. If so, what is the process to determine if they meet the standards and what documentation will be required?
- A2: Yes. As stated above, and product labels and descriptions shall be relied on. If in doubt, contact the manufacturer and maintain supporting records. Component or subcomponent parts may be from other countries as long the components and subcomponents are assembled into manufactured goods in the United States.
- Q3: What information does a PHA need to include in their contracts and agreements regarding the Buy American requirements?
- A3: PHA’s contracts shall state that the Buy American requirements of section 1605 of the Recovery Act apply to work funded with Public Housing Capital Fund Recovery Formula or Competition assistance unless HUD has determined that Section 1605 does not apply to the assisted work or the PHA has received an exception of section 1605 or a national exception applies. PHAs should consider using HUD’s **Sample Buy American Contract Language (Addendum 1 to the PIH Implementation Guidance for the Buy American Requirement)**. **If the PHA has received or is using a national exception, documentary evidence of the exception must be included in the PHA’s procurement records for that project and contract. If HUD has determined that Section 1605 does not apply to the assisted work, the PHA must have documentary evidence of that determination in the PHA’s procurement records for that project. See the PIH Implementation Guidance for the Buy American Requirement for information on exceptions.** Also, the OMB Interim Guidance noted above specifies standard contract and award terms.
- Q4: Do the Buy American requirements (section 1605 of the Recovery Act) apply to equipment expended from Capital Fund account 1410 (Administration)?
- A4: Yes. Section 1605 applies to account 1410 equipment expenditures whether funded with Public

Housing Capital Fund Recovery Formula or Competitive assistance.

- Q5: Does the Buy American requirement extend to heating and cooling units?
- A5: Yes. Manufactured goods must be manufactured in the United States, but there is no requirement with regard to the origin of components or subcomponents used in manufactured goods. **See 2 C.F.R 176.70(a)(2)(ii).**
- Q6: The PHA is interested in purchasing water heaters that are assembled in the U.S. and all parts are manufactured in the U.S. except for the relief valve. Does this meet the Buy American requirement?
- A6: Yes. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project. **See 2 C.F.R 176.70(a)(2)(ii).**
- Q7: What if a PHA wants to purchase manufactured product from a U.S. company, but the product is manufactured outside the U.S.? What if the product is from a non-U.S. company, but is manufactured in the U.S.?
- A7: According to OMB regulations at 2 C.F.R 176.70(a)(2), all of the iron, steel and manufactured goods used must be **produced or manufactured in the United States**. Production in the U.S. of the iron or steel used in the product requires all manufacturing processes **must take place in the U.S. 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. There is no requirement with regard to the origin of components or subcomponents in manufactured goods, **as long as the manufacturing occurs in the U.S. Therefore, the purchase of products manufactured in the U.S., regardless of the country of the owner of the company, would be in compliance with section 1605. Also note that there is non-application to acquisitions covered under international agreements, but the PHA would have to be Party to a covered agreement. 2 C.F.R 176.70; 176.90; 176.160; 176.170 and Appendix to Subpart B of 2 C.F.R part 176.**
- Q8: What if the contractor is buying a “kit” that is assembled on site? Is that considered manufactured in the U.S.?
- A8: The kit would meet the definition of an acceptable manufactured good as it would be brought to the construction site for incorporation into the building or work and has been processed into a specific form and shape or combined with other raw material to create a material that has different properties than the properties of the individual raw materials. **See 2 C.F.R. 176.140(a)(1).**
- Q9: If a PHA wants to purchase iron fencing and they have thoroughly researched the availability of American-manufactured iron fencing, and could not find any iron fencing made or manufactured in the U.S., could they document their attempts and proceed with purchasing the product from a foreign producer? Is a fence covered by the Buy American requirements?
- A 9: Iron fencing used in the construction (including development, modernization and nonroutine maintenance) or alteration of public housing with Recovery Act funds is covered by the Buy American requirement. If the PHA finds a product, such as iron fencing, is not available, they should submit an exception request to HUD. **In addition, there is an existing list of nonavailable articles listed at 48 C.F.R 25.104(a) (FAR List). The procedures at 48 C.F.R 25.103(b)(1) to**



**apply if any of those articles are manufactured goods needed in the project. See also 2 C.F.R. 176.80. See also Addendum 3 of the PIH Implementation Guidance for the Buy American Requirement.**

Q10: Does a PHA need an exception to the Buy American requirement if the funds are used only as a construction source (not part of the permanent financing)?

A10: Yes. The Buy American requirement applies to construction, but not to permanent financing. Use of Recovery Act funds on covered HUD programs for construction would likely involve use of manufactured goods, steel or iron as defined in the OMB Interim Guidance on Buy American at 2 C.F.R part 176 (74 Federal Register 18449, April 23, 2009).

Q11: Do the Buy America requirements affect the purchase of materials from the time the funds are introduced into the project, or is it retroactive to the start of the project? For example, the contractor may have already purchased the materials that are affected by the provision.

A11: The Buy American requirement applies to the use of the Recovery Act funds. If Recovery Act funds are used for purchase of manufactured goods, then the Buy American requirement would apply unless HUD has determined that Section 1605 does not apply to the assisted work or the PHA has received an exception to section 1605 or a national exception applies. The Buy American requirement would not apply to work already performed and funded with non-Recovery Act funds. Similarly, the Buy American requirement would not apply to future work on a portion of the project not funded with Recovery Act funds. See also answer to Q. 3 above.

Q12: Is there a small purchases threshold (e.g., exemption for contracts or purchases under \$100,000) or de minimus amount of non-American iron, steel or manufactured goods that may be contracted for or purchased with Recovery Act Capital Funds?

A12: Section 1605 provides neither a small purchases threshold nor a de minimus exception. However, HUD has granted a national exception for purchases below the simple acquisition threshold. See PIH Implementation Guidance for the Buy American Requirement.

Q13: What are the consequences for noncompliance with the Buy American requirement?

A 13: HUD must follow the requirements in 2 C.F.R 176.130. In addition to other lawful remedies, HUD reserves the right to disallow costs or to take corrective or remedial actions deemed appropriate.

Q14: Where can I find additional information on the Buy American requirement?

A14: Additional information may be found in OMB Interim Guidance entitled *Requirements for Implementing Sections 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards*, 74 Fed. Reg. 18449 (April 23, 2009) (to be codified at 2 C.F.R Part 176) (as now in effect and as may be amended from time to time) available at <http://edocket.access.gpo.gov/2009/pdf/E9-9073.pdf>.