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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



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Office of Weatherization and Intergovernmental Programs
U.S. Department of Energy
1000 Independence Ave, SW
Washington, DC 20585

Re: Office of Energy Efficiency and Renewable Energy Request for Information Concerning Section 1605 of the Recovery Act

On behalf of the Associated General Contractors of America (AGC), we appreciate the opportunity to submit the following comments on the implementation of Section 1605 of the Recovery Act, or the Buy American provision. AGC is the leading association for the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities, and other improvements to real property. Many of these firms regularly perform construction services for federal, state and local governments. Most are small and closely-held businesses. AGC also proudly represents both union and open-shop construction contractors.

AGC has maintained longstanding objections to expanded Buy American requirements. Buy American policies create delays, inefficiencies, administrative burdens, and increase project costs and liability for construction contractors. This is particularly problematic at a time when the U.S. construction industry is facing almost 24 percent unemployment nationwide, with 926,000 million jobs lost in 2009 and 1.9 million since December 2007ⁱ. Section 1605 of the Recovery Act represents a broad expansion of the traditional application to iron and steel in federal procurements and the Federal Aid Highway Program to require that all manufactured goods be "American." This creates many problems for our industry which relies on an established global supply chain and depends on thousands of inputs on the most basic construction project. Furthermore, this creates problems for meeting the expedited timeframes these projects require, particularly where many of these projects have designs that were created prior to inclusion of these requirements in the Recovery Act. AGC would recommend that the Department of Energy (DOE) look at the U.S. Environmental Protection Agency's (EPA) model which has been the most progressive and rational approach to implementing "Buy American" requirements of Section 1605.

Streamlined Waiver Process

AGC recommends that DOE establish a two week period to ensure expedited reviews for waiver requests (similar to EPA)ⁱⁱ. This will ensure lengthy delays will not further impact job creation. In the event that a sufficient number of waivers are granted for particular items, DOE should reserve the right to issue national categorical waivers similar to the Department of Agriculture's (USDA) Rural Utilities Service *de minimis* waiver for incidental components and the Department of Commerce's public interest waiver of Section 1605 requirements for its Broadband Technology Opportunities Program.

A categorical *de minimis* exception, similar to EPA's and USDA's, should be added to DOE's Guidance in order to limit the detrimental impacts of a very small-value piece (for example: fittings, sealers, gaskets, etc.) preventing a company from providing an entire system on a project. This can happen in many different types of projects and systems within construction projects, but particularly in the energy efficiency area where specific seals and fittings must be added on site and are not always manufactured domestically. A *de minimis* exception will help alleviate many of the unintended consequences AGC has seen in program implementation, ensuring that projects are completed in a timely and cost-efficient manner.

The EPA and the USDA's Rural Utilities Service have already granted this type of waiver for Buy American provisions of the Recovery Act. These nationwide waivers can be applied to materials or components which constitute five percent or less of the total cost of materials incorporated into a water infrastructure project funded by the Recovery Act through EPA's Clean Water and Safe Drinking Water State Revolving Loan (SRF) programs. This waiver was deemed to be in the public interest by the EPA in order to ensure that Recovery Act funded projects proceed within the timelines established in the legislation, while meeting the ultimate goal of the Recovery Act's infrastructure component - creating and sustaining jobs and investing in our infrastructure.

Definition of Manufactured Goods

With respect to manufactured construction material used in covered projects, OMB defines "manufactured good" in § 176.140(a)(1) as a good brought to the construction site that has been "(1) processed into a specific form and shape; or (2) combined with other raw material to create a material that has different properties than the properties of the individual raw materials."

This, however, avoids defining what actually constitutes the manufacturing process. For example, if a contractor were to purchase a door frame whose parts were made in Thailand, but those pieces were assembled into the door frame at an off-site warehouse in the U.S., would that constitute being "manufactured" in the United States? Presumably the country of origin of the pieces of that door frame would be irrelevant if it is brought to the jobsite in a completed form and installed there. However, if those pieces were delivered instead to the jobsite and assembled there, those pieces would presumably be in violation.

There are many legitimate and important reasons to install at the worksite, but the Interim Final Guidance will encourage or force some assemblies to be done offsite in order to maintain compliance. Allowing the contracting officer some level of discretion in this matter will be beneficial to ensure that projects are not held up by discrepancies in what is "manufactured" in the U.S. or limit competition by preventing or discouraging some companies from bidding. We should not create a situation where it makes more sense to assemble a product offsite, rather than forcing contractors to assemble materials onsite to ensure compliance.

International Obligations

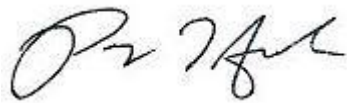
The provision in the Recovery Act providing that Section 1605 be implemented in a manner consistent with international obligations of the U.S. was created to address concerns that this provision would be contrary to U.S. agreements such as the World Trade Organization Agreement on Government Procurement and various free trade agreements in which the United States participates. However, the trade agreements exception does not apply to state and municipal governments (with a handful of exceptions, and even in these cases it is not the full list of designated countries). States and municipalities have no experience in applying such rules and their projects and contracting schedules are often more

sensitive to restrictions on the supply chain, due to the local nature of the projects. Municipal governments also have the additional challenge of budgets that are too small to absorb the added costs of project delays. The lack of a trade agreements exception at the municipal level will greatly increase the time and expense of moving projects forward, contrary to the objectives of the Recovery Act.

AGC recommends creating a single set of designated countries for the purposes of all DOE contracts funded by the Recovery Act to promote understanding and compliance by government and industry. Our suggestion is to eliminate the list of different state requirements in Appendix B of the OMB ARRA Interim Final Guidance cited in DOE's guidance with a single standard that is consistent with the provisions of the Recovery Act. This single standard is currently applicable to federal contracts funded by the Recovery Act. It would be imposed as a condition of the grants and would flow down to contractors and sub-contractors under Recovery Act funded contracts. The currently proposed regulations allow each state to apply its own law concerning international trade agreements, resulting in the numerous different requirements summarized in Appendix B. This approach is difficult for government and industry personnel to understand and enforce, and has resulted in numerous articles in the media criticizing the complexity and results of that approach.

Conclusion

AGC appreciates the opportunity to respond to the DOE's request for information. Thank you again for considering AGC's views. The association would welcome the opportunity to provide additional information or support for the rulemaking process. For further information, please contact Perry Fowler at fowlerp@agc.org or (703) 837-5321.



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ⁱ Bureau of Labor Statistics "Employment Situation January 2010" <http://www.bls.gov/news.release/pdf/empsit.pdf>

ⁱⁱ EPA Memorandum ARRA 09-1 "Implementation of Buy American provisions of P.L. 111-5, the American Recovery and Reinvestment Act of 2009" http://www.epa.gov/ogd/forms/Buy_Am.pdf