

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****[Docket No. FR-5344-N-01]****Notice of National Exceptions to Section 1605 of the Recovery Act (Buy American Requirement) Applicable to Public and Indian Housing Recovery Act Funds****AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.**ACTION:** Notice.

**SUMMARY:** In accordance with the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-05, approved February 17, 2009) (Recovery Act), and implementing guidance of the Office of Management and Budget (OMB), this notice advises that certain national exceptions to the Buy American requirement of the Recovery Act have been determined applicable for work using Capital Fund Recovery Formula and Competition (CFRFC) grant funds.

**FOR FURTHER INFORMATION CONTACT:** Dominique G. Blom, Deputy Assistant Secretary for Public Housing Investments, Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410-4000, telephone 202-402-8500 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** The Recovery Act awarded an additional \$4,000,000,000 for the "Public Housing Capital Fund." Section 1605(a) of the Recovery Act, the "Buy American" provision, states that for Recovery Act funds used for a project for the construction, alteration, maintenance, or repair of a public building or public work, all of the iron, steel, and manufactured goods used in the project must be produced in the United States.

Section 1605(b) of the Recovery Act provides certain exceptions to the Buy American requirement. Section 1605(b) provides that the Buy American requirement shall not apply in any case or category in which the head of a Federal department or agency finds that: (1) Applying the Buy American requirement would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality, or (3) inclusion of iron, steel, and manufactured goods will

increase the cost of the overall project by more than 25 percent. Section 1605(c) provides that if the head of a Federal department or agency makes a determination pursuant to section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register**.

In accordance with section 1605(c) of the Recovery Act and OMB's implementing guidance published on April 23, 2009 (74 FR 18449), this notice advises the public that the Secretary has determined that certain exceptions to the Buy American requirement are applicable to work using CFRFC grant funds based on findings made under section 1605(b). The exceptions determined applicable, without the necessity of a grantee to seek an individual exception determination, are as follows:

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 public housing agency (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, HUD's Office of Public and Indian Housing (PIH) may accept that determination and permit the PHA to apply that exception to the remainder of the CFRFC grant work in that project.

3. Where the size of the CFRFC grant is less than \$100,000 (currently the 24 CFR part 85 simplified acquisition threshold), the Buy American requirement is not applicable.

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 under way prior to acceptance of CFRFC funds, the Buy American requirement is not applicable.

In addition to these five national exceptions, there is also an existing list of nonavailable articles listed at 48 CFR 25.104(a) (FAR List). 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 CFR 25.103(b)(1). See also 2 CFR 176.80.

Additional information about these exceptions has been provided in the PIH Buy American Implementation Guidance, which can be found on HUD's Web site at: <http://www.hud.gov/offices/pih/publications/notices/>.

HUD's foremost expectation is that PHAs will use American iron, steel, and manufactured goods throughout their Recovery Act assisted projects. However, there are certain circumstances under which exceptions to the Buy American requirement will be appropriate in accordance with section 1605(b). The legislative history and Congressional intent expressed in the record for the Recovery Act make clear that the priority of Congress is to provide capital funding to projects as quickly as possible to create jobs, assist those most impacted by the recession and stabilize state and local government budgets. Further evidence of the urgency and the overarching Congressional directives in providing this assistance for CFRFC programs are the specific requirements that the funding is for: (1) Priority investments; (2) priority capital projects that can be awarded contracts based on bids within 120 days from the date the funds are made available to the PHAs (i.e., July 18, 2009, for Capital Fund Recovery Formula (CFRF) grant funds); and (3) PHA priority capital projects that are already underway or included in the 5-year capital fund plans required by the section 5A of the United States Housing Act of 1937 (1937 Act) (42 U.S.C. 1437c-1). The national exceptions to the Buy American requirement determined applicable to CFRFC grants funds are all supportive and essential to carrying out these Congressional mandates and balanced with the interests and intent of the Buy American requirement.

The Recovery Act has also imposed obligation and expenditure of funds requirements that are stricter than the 1937 Act requirements, which generally provide PHAs two years to obligate grant funds and four years to expend those funds. Specifically, the Recovery Act requires PHAs to obligate 100 percent of CFRF grant funds by March 17, 2010. All unobligated funds will be unilaterally recaptured. PHAs must expend at least 60 percent of the grant by March 17, 2011, and if less than 60 percent is expended, all unexpended funds will be unilaterally recaptured. PHAs must expend 100 percent of the grant by March 17, 2012, or all unexpended funds will be unilaterally recaptured. Extension of the obligation and expenditure deadlines are not permitted under the Recovery Act.

These strict obligation and expenditure requirements demonstrate the financial and construction expediency requirements that the PHAs must meet along with the additional requirement of Buy American and the need for transparency.

The five exception determinations listed above are based on a determination of inconsistency with public interest. The FAR List is based on insufficient and not reasonably available quantities and of a satisfactory quality. At this time, HUD is not adding to the FAR List or creating a HUD list. HUD does not need to provide any additional justification for use of items currently on the FAR List of domestically nonavailable items at 48 CFR 25.104(a). If a PHA wants to use items on the FAR List or to have items added to the FAR List or to a HUD list, the PHA must follow the PIH Buy American Implementation Guidance.

The five national exceptions determined applicable are based on public interest are necessary to: (1) Avoid delay in completion and restoration of housing for low-income families and the achievement of the Recovery Act deadlines; (2) avoid delays in the start of construction and modernization of public housing that will jeopardize jobs; (3) avoid the possibility of additional funding gaps on termination of certain contracts and price differentials cause by procurement of goods and equipment; (4) avoid loss of funding for critical projects; and (5) address current and emerging situations presented by PHAs. The national exception for PHAs where the size of the CFRFC grant is less than \$100,000 will cover 30 percent of the PHAs (often referred to as "small PHAs") and will amount to a relatively small impact (approximately \$52 million of the nearly \$4 billion in grant awards). A determination was made that an exception is also applicable to PHAs where the size of a contract funded with CFRFC grant assistance is less than \$100,000 (which is currently the 24 CFR part 85 simplified acquisition threshold fixed at 41 U.S.C. 403(11)) in part because under 24 CFR 85.36(d)(1), these are small purchase procedures that are relatively simple and informal procurement methods for securing goods. If small purchase procedures are used by a PHA, price or rate quotations are to be obtained from at least three qualified sources.

PHAs have brought to HUD's attention that every public housing development and modernization project involves the use of literally thousands of miscellaneous, generally low-cost components that are essential for but

incidental to the construction and modernization, and are incorporated into the physical structure of the project, such as nails, hinges, other hardware, electrical, plumbing and finishing components. These incidental components are subject to the Buy American requirement, but unlike major components, the country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement in the normal course of construction and modernization of public housing. Over 2,300 PHAs have less than 250 units in inventory, and many of these PHAs are located in rural areas or small towns. HUD understands that these PHAs in particular often have to search further in order to procure American-made items and find contractors familiar with the Buy American requirement. For these PHAs, it takes additional time to procure, and there are increased costs associated with bringing materials and contractors in from a great distance. Under the requirements of the Recovery Act, HUD is concerned that it could be disproportionate to the costs and time involved for the PHA or their contractor and would not be feasible for PHAs to find alternatives. In an effort to address this concern, HUD sought to identify the scope of these incidental components within the construction and modernization of public housing, consulted with PHAs and PHA trade associations and considered the number of ways and the number of sources of these components.

Recognition of the lack of availability and access to resources as well as relief from administrative burdens are critical to the success of small PHAs and consistent with Recovery Act objectives. As with any new requirement, implementation of the Buy American requirement will take analysis and resources that are not readily available to small PHAs. The need for the expeditious and efficient use of the CFRFC funds balanced with the long established recognition of decreased availability of resources available to small PHAs clearly supports exceptions 3 and 4 above.

Based on the information resulting from this process, the determination was made that these exceptions were appropriate because compliance with the Buy American requirement would be disproportionate to the cost and time involved for PHAs and delay work on critical public housing projects and the jobs associated with those projects. This public-interest justification does not reach the conclusion that the inclusion of iron, steel, and manufactured goods produced in the United States will

automatically increase the cost of the overall project by more than 25 percent. Cost is a factor in all PHA procurements and must be considered in accordance with 24 CFR part 85 and the cost principles at 2 CFR part 225. Cost is in part a factor in all of HUD's public interest national exceptions. HUD has decided that cost-based exceptions must be determined on a case-by-case basis and submitted to HUD for review under the PIH's Buy American Implementation Guidance.

For additional information see <http://www.hud.gov/offices/pih/publications/notices/>.

Dated: September 4, 2009.

**Sandra B. Henriquez,**

*Assistant Secretary for Public and Indian Housing.*

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## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

#### **Request for Comments on the Strategic Plan Framework as Input for Revision and Updating of the Departmental Strategic Plan**

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** The Department of the Interior is seeking public comment as part of its process to revise and update its current strategic plan.

**DATES:** You must submit comments on or before November 10, 2009.

**ADDRESSES:** You may submit comments by any of the following methods:

*E-mail:*

*StratPlancomments@ios.doi.gov.*

*FAX:* 202-208-2619.

*Mail:* U.S. Department of the Interior, Office of the Secretary—Planning and Performance Management, Attention: DOI Strategic Planning Coordinator, 1849 C Street, NW., Mail Stop 5258, Washington, DC 20240-0001.

#### **Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made public under certain circumstances. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.