



# Arkansas Office of Recovery and Reinvestment

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## MEMORANDUM

TO: Local Education Agencies (LEAs)  
Institutions of Higher Education (IHEs)  
All other State Fiscal Stabilization Fund Recipients

FROM: Ann Purvis, Administrator *Ann Purvis*  
Erin Gildner, Program Manager *Erin Gildner*

DATE: June 18, 2010

RE: **Requirements of the American Recovery and Reinvestment Act of 2009-**  
1) Buy American Requirement under Section 1605  
2) Wage Rate Requirements under Section 1606 (Davis-Bacon and Related Acts)  
3) Department of Education Regulations Implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85 for Lower tier transactions meeting the threshold and tier requirements stated at Section 85.110.  
4) Records Retention

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The Department of Finance and Administration's Office of Intergovernmental Services (DFA-IGS) is responsible for administering the ARRA State Fiscal Stabilization Fund (SFSF) Awards for the Office of Governor Mike Beebe. It is our responsibility to assure compliance with the special conditions of the SFSF program along with providing technical assistance to the recipients of the federal funds. This Memorandum will outline four federal requirements for the SFSF funds and our comments will appear in italics. Within the next few weeks you will be notified of a series of free webinars that we will be conducting to discuss these requirements in more detail. If you have any questions or concerns, please contact our office.

- 1) Buy American Requirement Under Section 1605 of the American Recovery and Reinvestment Act of 2009 as taken from **2 CFR Part 176 located in the Federal Register; Vol. 74, No.77; Thursday, April 23, 2009; Rules and Regulations. Definitions are taken from Attachment T of the award terms provided with the State Fiscal Stabilization Fund Grant Award Notification.**

*Please note that only the head of the federal agency can grant a waiver to the Buy American requirement through a request from the state office. Moreover, there have only been a few waivers granted throughout the country.*

### Statutory Requirement

Section 1605 of the Recovery Act prohibits use of recovery funds 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. The law requires that this prohibition be applied in a manner consistent with the U.S. obligations under international agreements, and it provides for waiver under three circumstances;

- (a) Iron, steel, or relevant manufactured goods are not produced in the United States in reasonable available quantities and of a satisfactory quality;
- (b) Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent;
- (c) Applying the domestic preference would be inconsistent with the public interest.

## Policy

The public building or public work must be in the United States and all of the iron, steel, and manufactured goods used in the project must be produced or manufactured in the United States. 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.

***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.***

## Exceptions to Buy American Requirement

When one of the following exceptions applies in a case or category of cases, the award official may allow the recipient to use foreign iron, steel, and/or manufactured goods in the project without regard to the restrictions of section 1605 of the Recovery Act:

- (a) ***Nonavailability.*** The head of the Federal department or agency may determine that the iron, steel, or relevant manufactured good is not produced in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the article listed at 48 CFR 25.104 (a) and the procedures at 48 CFR 25.103(b) (1) also apply if any of those articles are manufactured goods needed in the project.
- (b) ***Unreasonable cost.*** The head of the Federal department or agency may determine that the cost of domestic iron, steel, or relevant manufactured goods will increase the cost of the overall project by more than 25 percent in accordance with how the proposal evaluation procedures listed in 2 CFR Part 176 (Federal Register/ Vol. 74, No.77/Thursday, April 23, 2009/Rules and Regulations).
- (c) ***Inconsistent with public interest.*** The head of the Federal Department or agency may determine that application of the restrictions of section 1605 of the Recovery Act would be inconsistent with public interest.
  - (1) When a determination is made for any of the reasons states in this section that certain foreign iron, steel, and/or manufactured goods may be used-
    - (i) The award official shall list the excepted materials in the award; and
    - (ii) The head of the Federal department or agency shall publish notice in the **Federal Register** within two weeks after the determination is made, unless the item has already been determined to be domestically nonavailable. A list of items that are not domestically available is at 48 CFR 25.104(a). The **Federal Register** notice or information from the notice may be posted by OMB to Recovery.gov. The notice shall include-
      - (A) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”;
      - (B) The dollar value and brief description of the project; and
      - (C) A detailed written justification as to why the restriction is being waived.

## Definitions

As used in this specific award term and condition-

- (a) ***“Construction material”*** means iron, steel, or manufactured goods brought to the construction site by the recipient, subrecipient, or a subcontractor for incorporation into the public building or public work. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when and how the individual parts or components of those systems are delivered to the construction site.
- (b) ***“Manufactured good or product”*** means an item incorporated into the physical structure of the public building or used in a public work that is the result of processing materials by way of machinery and/or labor that produce a substantially different item. Where the basic form or function of the material processed remains the same, or the processing does not add value to the item, it is not manufactured. There is no requirement with regard to the origin of components or subcomponents in manufactured goods or products, as long as the manufacture of the goods occurs in the United States.

- (c) **“Public Building” or “Public Work”** means a public building of, and a public work of, a governmental entity (The United States, the District of Columbia, commonwealths, and territories of the United States and minor outlying islands, and State and local Governments). These building may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction , alteration, maintenance, or repair of such buildings or works.

2) **Wage Requirements under Section 1606 of the Recovery Act as taken from 2 CFR Part 176 located in the Federal Register; Vol. 74, No.77; Thursday, April 23, 2009; Rules and Regulations.**

Section 1606 of the Recovery Act requires that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the Recovery Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.

Pursuant to Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. 3145, the Department of Labor has issued regulations at 29 CFR parts 1, 3, and 5 to implement the Davis-Bacon and related Acts. Regulations in 29 CFR 5.5 instruct agencies concerning application of the standard Davis-Bacon contract clauses set forth in that section. Federal agencies providing grants, cooperative agreements, and loans under the Recovery Act shall ensure that **standard Davis-Bacon contract clauses found in 29 CFR 5.5(a) are incorporated in any resultant covered contracts that are in excess of \$2,000 for construction, alteration, or repair (including painting and decorating).**

For additional information and guidance on Davis-Bacon and related acts please visit The Wage an Hour Division (WHD) Recovery Website for WHD information related to the American Recovery and Reinvestment Act of 2009: <http://www.dol.gov/whd/recovery/>. This includes presentations, helpful links such as the All Agency Memorandum No. 207 (<http://www.dol.gov/whd/recovery/AAM207.pdf>), field guides, and other information which will help you comply with Davis-Bacon and related Acts.

3) **Department of Education Regulations Implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85 for Lower tier transactions meeting the threshold and tier requirements stated at Section 85.110.**

Debarment and suspension: Federal awarding agencies and recipients shall comply with the nonprocurement debarment and suspension common rule implementing E.O.s 12549 and 12689, "Debarment and Suspension." This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

**§ 85.110 Coverage.**

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as “covered transactions.”

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency’s regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

- (A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.
- (B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$25,000) under a primary covered transaction.
- (C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(1) Principal investigators.

(2) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

- (i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;
- (ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;
- (iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);
- (iv) Federal employment;
- (v) Transactions pursuant to national or agency-recognized emergencies or disasters;
- (vi) Incidental benefits derived from ordinary governmental operations; and
- (vii) Other transactions where the application of these regulations would be prohibited by law.

**How to verify that you will not or have not participated in a transaction with an entity that has been debarred or suspended:**

You may satisfy this requirement by checking the Excluded Parties List System (EPLS) at <https://www.epls.gov/>.

- Upon accessing the site, choose the "Advanced Search" link on the upper left hand side of the page.
- Type in the name or partial name of the entity in the "Partial Name" field, along with the State in which they reside or conduct business.
- Hit the Search button.
- You may import to an Excel spreadsheet or produce a printer friendly version of your findings by choosing the blue links at the bottom of the page.
- Please retain a copy of the findings for your records.

#### 4) Records Retention

All Records must be kept for a period of three years; different definitions apply depending on the type of entity who is a recipient or subrecipient of the award. You may find records retention information for Davis-Bacon and Related Acts Provisions and Procedures in 29 CFR 5.5 (a) which is Contract Provisions and Related Matters ([http://www.dol.gov/dol/allcfr/title\\_29/part\\_5/29cfr5.5.htm](http://www.dol.gov/dol/allcfr/title_29/part_5/29cfr5.5.htm)). Specific records retention requirements are codified in the Education Department General Administrative Regulations (EDGAR), as applicable to the type of recipient or subrecipient: 34 CFR Part 74-Administration of Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations; 34 CFR Part 76—State-Administered Programs, including the construction requirements in section 75.600 through 75.617 that are incorporated by reference in section 76.600; 34 CFR Part 77—Definitions that Apply to Department Regulations; 34 CFR Part 80-Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, including procurement provisions; 34 CFR Part 91—General Education Provisions Act—Enforcement.

Important Reference Documents:

2 CFR Part 176 Requirements for Implementing Section 1512, 1605, and 1606 of the American Recovery and Reinvestment Act of 2009 for Financial Assistance Awards:

[http://www.whitehouse.gov/omb/assets/fedreg\\_2009/042309\\_recovery.pdf](http://www.whitehouse.gov/omb/assets/fedreg_2009/042309_recovery.pdf)

Davis-Bacon Related Act Provisions and Procedures; 29 CFR 5.5(a):

[http://www.dol.gov/dol/allcfr/title\\_29/part\\_5/29cfr5.5.htm](http://www.dol.gov/dol/allcfr/title_29/part_5/29cfr5.5.htm)

Education Department General Administrative Regulations (EDGAR):

<http://www2.ed.gov/policy/fund/reg/edgarReg/edgar.html>

cc: Governor's Office

Arkansas Department of Education

Arkansas Department of Higher Education