

# INFRASTRUCTURE

## GUIDANCE FOR GSF RECIPIENTS

### 1511 CERTIFICATIONS

#### WHAT ARE THE ARRA REQUIREMENTS FOR 1511 CERTIFICATIONS?

ARRA includes a requirement in Section 1511 of the Act which applies to infrastructure projects.

- The chief executive must certify that each project “has received the full review and vetting required by law” and is “an appropriate use of taxpayer dollars.”
- The certification must include project description and amount;
- It must be posted on a website and linked to Recovery.gov.
- Entities can’t receive infrastructure investment funding ...unless this certification is made and posted.

#### TO WHOM DOES THE 1511 CERTIFICATION REQUIREMENT APPLY?

The requirement applies to any agency using ARRA funds for an “infrastructure investment”. The Act itself does not provide a definition of infrastructure, so award recipients must depend on guidance from the awarding agency to determine if a project is considered infrastructure.

#### HOW IS INFRASTRUCTURE DEFINED FOR GSF?

from [www2.ed.gov/policy/gen/leg/recovery/sfsf-tipsheet-april2010.doc](http://www2.ed.gov/policy/gen/leg/recovery/sfsf-tipsheet-april2010.doc) - 2010-04-06

*Definition of Infrastructure – An infrastructure investment is financial support for a physical asset or structure needed for the operation of a larger enterprise. Therefore, infrastructure investments include support for tangible assets or structures such as roads, public buildings (including schools), mass transit systems, water and sewage systems, communication and utility systems and other assets or structures that provide a reliable flow of products and services essential to the defense and economic security of the United States, the smooth functioning of government at all levels, and society as a whole. However, an infrastructure investment does not include “minor remodeling” as defined in 34 C.F.R. § 77.1(c).*

from [http://edocket.access.gpo.gov/cfr\\_2009/julqtr/pdf/34cfr77.1.pdf](http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/34cfr77.1.pdf)

*34 CFR 77.1(c) Definition of “Minor Remodeling” – Minor remodeling means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include building construction, structural alterations to buildings, building maintenance, or repairs.*

#### WHAT OTHER INFORMATION IS AVAILABLE ABOUT THIS REQUIREMENT?

USDE Guidance on 1511 Certifications, with examples, is available at

<http://www2.ed.gov/programs/statestabilization/1511-certification-information-final.doc>.

## DAVIS-BACON ACT

### TO WHOM DOES THE DAVIS-BACON ACT APPLY?

The Davis-Bacon and Related Acts (DBRA) apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Many federal laws that authorize federal assistance for construction through grants, loans, loan guarantees, and insurance are Davis-Bacon “related Acts.” The “related Acts” includes the American Recovery and Reinvestment Act of 2009.

### WHAT ARE THE BASIC REQUIREMENTS?

All covered contractors and subcontractors must pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits listed in the contract’s Davis-Bacon wage determination for corresponding classes of laborers and mechanics employed on similar projects in the area.

The Davis-Bacon “prevailing wage” is the combination of the basic hourly rate and any fringe benefits listed in a Davis-Bacon wage determination. The contractor’s obligation to pay at least the prevailing wage listed in the contract wage determination can be met by paying each laborer and mechanic the applicable prevailing wage entirely as cash wages or by a combination of cash wages and employer-provided bona fide fringe benefits. Prevailing wages, including fringe benefits, must be paid on all hours worked on the site of the work.

#### **Apprentices and trainees**

Apprentices or trainees may be employed at less than the predetermined rates only when they are in an apprenticeship program registered with the Department of Labor or with a state apprenticeship agency recognized by the Department.

#### **Overtime**

Contractors and subcontractors on prime contracts in excess of \$100,000 are required, pursuant to the Contract Work Hours and Safety Standards Act, to pay employees one and one-half times their basic rates of pay for all hours over 40 worked on covered contract work in a workweek.

#### **Weekly payments**

Covered contractors and subcontractors are required to pay employees weekly.

### WHAT ARE THE REQUIREMENTS FOR RECORDKEEPING, REPORTING, NOTICES AND POSTERS?

#### **Notices and Posters**

Every employer performing work covered by the labor standards of the DBRA must post the WH-1321 [“Employee Rights Under the Davis-Bacon Act” poster](#) at the site of the work in a prominent and accessible place where it may be easily seen by employees. There is no particular size requirement. The wage determination must be similarly posted.

#### **Recordkeeping**

Under the DBRA, covered contractors must maintain payroll and basic records for all laborers and mechanics during the course of the work and for a period of three years thereafter. Records to be maintained include:

- Name, address, and Social Security number of each employee
- Each employee's work classifications

- Hourly rates of pay, including rates of contributions or costs anticipated for fringe benefits or their cash equivalents
- Daily and weekly numbers of hours worked
- Deductions made
- Actual wages paid
- If applicable, detailed information regarding various fringe benefit plans and programs, including records that show that the plan or program has been communicated in writing to the laborers and mechanics affected
- If applicable, detailed information regarding approved apprenticeship or trainee programs
- Some of the records required to be kept under the law are also required under the Fair Labor Standards Act. See Wage and Hour Division [Fact sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

### Reporting

Each covered contractor and subcontractor must, on a weekly basis, provide a copy of all payrolls providing the information listed above under “Recordkeeping” for the preceding weekly payroll period. Each payroll submitted must be accompanied by a “Statement of Compliance.” The contractor, subcontractor or the authorized officer or employee of the contractor or subcontractor who supervises the payment of wages must sign the weekly statement. Statements of Compliance are to be made on the form [WH-347 "Payroll \(For Contractors Optional Use\)"](#) or on any form with identical wording. This must be completed within seven days after the regular pay date for the pay period.

Contractors may also be asked to submit, via survey, wage data that may be used by the Wage and Hour Division to determine the locally prevailing wage rates that will apply to workers on Davis-Bacon and DBRA-covered projects. The submission of wage data is encouraged, but voluntary. Contractors and others may use the [WD-10 Form, Report of Construction Contractor’s Wage Rates](#).

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### WHAT PENALTIES APPLY? AND, WHAT APPEALS ARE AVAILABLE?

If contractors fail to adhere to the requirements they may be subject to penalties. This includes withholding contract payments in sufficient amounts to satisfy liabilities for underpayment of wages and for liquidated damages for overtime violations. In addition, violations of the Davis-Bacon contract clauses may be grounds for contract termination, contractor liability for any resulting costs to the government and debarment from future contracts for a period up to three years.

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### WHAT ARE TYPICAL PROBLEMS THAT GSF RECIPIENTS SHOULD WATCH OUT FOR?

Compliance with Davis-Bacon requirements is an imperative for contractors, but award recipients who hire contractors also share responsibility – they should provide necessary information to contractors about the requirements, ensure requirements are included in contract terms and conditions, and include assessment of Davis-Bacon compliance. Findings may be made against the recipient in external audits where contractors are non-compliant. Things that award recipients should watch out for include:

1. Misclassification of laborers and mechanics;
2. Failure to pay full prevailing wage, including fringe benefits, for all hours worked (including overtime hours);
3. Inadequate recordkeeping, such as not counting all hours worked or not recording hours worked by an individual in two or more classifications during a day;
4. Failure to maintain a copy of bona fide apprenticeship program and individual registration documents for apprentices;
5. Failure to submit certified payrolls weekly;

6. Failure to post the Davis-Bacon poster and applicable wage determination.

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## WHAT COMPLIANCE ASSISTANCE IS AVAILABLE?

The Department of Labor provides employers, workers, and others with information and assistance on how to comply with the Davis-Bacon and Related Acts, such as the [DBRA Forms page](#). Other compliance assistance related to the Act — including the [Davis-Bacon and Related Acts \(DBRA\) Web Page](#) and regulatory and interpretive materials — is available on the [Compliance Assistance "By Law"](#) Web page. Also, the [Wage Determinations OnLine](#) (WDOL) Web site provides a single location for federal contracting officers to obtain Davis-Bacon wage determinations for use in covered contracts. The WDOL Web site library provides a variety of links that relate to compliance with the prevailing wage laws that apply to federal and federally assisted contracts.

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## DEPARTMENT OF LABOR CONTACTS

[Wage and Hour Division](#)

[Contact WHD](#)

Tel: 1-866-4USWAGE (1-866-487-9243); TTY: 1-877-889-5627

## BUY AMERICAN PROVISION

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### WHAT ARE THE BASIC REQUIREMENTS OF THE BUY AMERICAN PROVISIONS

No ARRA funds may be used for a project that includes 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.

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### ARE THERE EXCEPTIONS?

The provision provides the following exceptions:

- 1) Following the provision 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.
- 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.

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### RELEVANT DEFINITIONS

**Manufactured good** means a good brought to the construction site for incorporation into the building or work that has been – (i) Processed into a specific form and shape; or (ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

A manufactured good that consists in whole or in part of materials from another country can meet Buy American requirements if it has been substantially transformed in the U.S. into a new and different manufactured good if it is distinct from the materials from which it was transformed. For example, cutting a steel pipe to a particular length would not be considered a substantial transformation; however, bending a steel pipe to a particular shape would be considered a substantial transformation.

*Public building and public work* means a public building of, and a public work of, a governmental entity. These buildings and works 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 and works.

*Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

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## WHAT ARE THE OMB REQUIREMENTS RELATED TO THE ARRA BUY AMERICAN PROVISION?

There are no specific requirements imposed by the Recovery Act or the Office of Management and Budget guidance in 2 CFR 176 concerning the type of documentation necessary to prove compliance with the Recovery Act Buy American provisions. Recipients should maintain documentation at a level they feel is appropriate to show compliance with the Recovery Act Buy American provisions, such as:

- 1) Language in contractual documents that obligates contractors to comply with the Buy American provisions;
- 2) Receipts for items produced domestically indicating such;
- 3) Documented certification from the contractor, vendor, distributor, supplier, or manufacturer verifying that the product was manufactured domestically;
- 4) Detailed and verifiable information supporting the claim that the manufactured good has undergone substantial transformation in the United States; and/or
- 5) Other reasonable documentation demonstrating compliance with the Buy American provisions.

The general contractor should keep all documentation of purchases to determine if they are U.S.-made goods. However, it is the responsibility of the GSF sub-recipient to retain adequate documentation in their project files to demonstrate Buy American compliance.

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## WHAT ABOUT SPECIAL SITUATIONS?

### **Does Buy American apply to privately owned improvements to public buildings and works?**

The question to answer is who owns the project, not who is doing the work. If a state/local government entity “owns” the building/work project, it is a public building/work that would be subject to Sec. 1605 (unless exempted). The interim rule applies Sec. 1605 to any building/work that is constructed, altered, repaired, or maintained with Recovery Act funds without regard to title.

### **Is any change to a public building or work considered construction, alteration, modification, or repair and would therefore prompt the Buy American Act Requirement? Or are minor changes that typically would not be considered a construction activity excluded?**

There is no threshold. Agencies that fully or partially fund construction, alteration, maintenance, or repair of a public works/building project with Recovery Act funds would be subject to the Buy American requirements unless an exemption applies and a waiver is granted.

### **Is computer hardware/software subject to the Buy American provision?**

The question of whether computer hardware is covered by the Buy American Recovery Act provisions turns on whether computer hardware is iron, steel or a manufactured good and whether it is used for the construction, alteration, maintenance or repair of a public building or public work. In order to determine whether computer hardware is a manufactured good, you must determine whether the computer hardware was brought to the construction site for incorporation into the building or whether it was 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. You also need to know if it was used in the construction, alteration, maintenance or repair of a public work or public building.

By contrast, file servers and networking hardware equipment are easily removable and not intended to be permanent fixtures. These products, along with personal computers and peripheral devices, are not covered by the

Recovery Act's Buy American provisions. Other examples of hardware components that are not covered by the Recovery Act's Buy American provision are: electronic data processing devices – including central processing units, routers and switches, laptops or notebook computers, personal digital assistants, hand-held computers, and wireless communication devices; peripheral input/output devices – including keyboards, printers, scanners, plotters, LCD monitors, and drives intended for removable media; related communications devices – including modems, cables, and connections; and storage media – including DVD media and USB or FireWire drives.

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#### CAN AN ENTITY REQUEST AN EXCEPTION?

There are certain cases in which a recipient may request an exception from the Buy American provisions in the Recovery Act. Before Recovery Act funds are awarded by the Federal Agency or obligated by the recipient for a project for the construction, alteration, maintenance, or repair of a public building or public work, an applicant or recipient may request from the award official a determination concerning the inapplicability of the Buy American restrictions for specifically identified items. A prospective applicant can apply for an exception to Buy American provisions in the following cases:

1. Lack of quantity or quality
2. Increase of cost of the project by more than 25 percent
3. Inconsistency with the public interest.

Exceptions must be approved by the Head of the USDE. For further information, see 2 CFR §176.80.

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#### WHAT HAPPENS IF THE CONTRACTOR IS NOT COMPLIANT?

In a case of noncompliance, the contracting officer must review any allegations of violations of section 1605 of the Recovery Act, notify the contractor of the apparent unauthorized use of foreign construction material, and request a reply including a proposed corrective action. If this review shows that a contractor has used foreign construction material without authorization, the contracting officer must take appropriate action, which may include: processing a determination of the inapplicability of the Buy American provisions, requiring the removal and replacement of the unauthorized material, determining that removal and replacement of foreign material would be impractical, or in serious cases, exercising appropriate contractual remedies, such as termination for default. For further information, see 2 CFR §176.130.