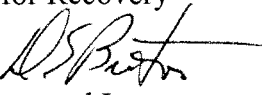


July 15, 2009

**MANAGEMENT DIRECTIVE # 6**

TO: Senior Management Team for Recovery

FROM: Dempsey Benton, Director   
Office of Economic Recovery and Investment

SUBJECT: OERI Guidance on Compliance with ARRA Provisions  
**Buy American...pp. 1-5**  
**Davis-Bacon...pp. 5-8**  
**Reporting Requirements...pp. 8-11**  
**Posting with the ESC...p. 12**  
**Posting Whistleblower Rights and Remedies...p. 12**

The American Recovery and Reinvestment Act of 2009 (ARRA) was signed into law by President Obama on February 17, 2009. Since that time, the administration and federal agencies have issued instructions for complying with many of the provisions in the ARRA. Each ARRA project is controlled by state and federal rules which will appear in every contract. You are to be guided by the terms of the contract or grant documents as to what applies for each project. Since some of these rules are new and potentially confusing, the North Carolina Office of Economic Recovery and Investment (OERI) has provided brief “How to Comply” directions set forth here.

The “How to Comply” directions below are for the “Buy American” provision, the “Davis-Bacon” provision, the reporting requirements, the posting with the Employment Security Commission requirement and the posting of whistleblower rights and remedies. Program guidance, grant award documents or contracts with the federal government may change a recipient’s obligations under any of these enumerated provisions. Please refer to your individual documents from the federal agencies to ensure complete compliance under the ARRA. If you need further instructions on any provisions in your contract or grant documents, please consult the contracting agency first. OERI is available to help and will continue to add to these directions as questions come to us.

**Buy American**

Since the ARRA includes a new and different “Buy American” provision affecting projects funded in whole or in part with ARRA funds, special attention must be paid to its terms.

### **1. To whom does it apply?**

The Buy American provision in the ARRA applies to all projects with which ARRA funds are expended on a “public building or public work.” At this point the federal Department of Energy has issued guidance that Buy American does not apply to the Weatherization program.

### **2. What items are covered?**

All iron, steel (an alloy that includes at least 50 percent iron and between .02 and 2 percent carbon, and may include other elements), and other manufactured goods used as construction material for the construction, alteration, maintenance, or repair of a public building or public work must be produced in the United States. A domestic preference for unmanufactured construction materials is included by reference to the preexisting “Buy American” provisions of 41 U.S.C. 10a-10d.

### **3. To what projects does it apply?**

“Public building or public work” means building or work, the construction, alteration, maintenance, or repair of which, as defined in this award term, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public.

### **4. What are unmanufactured construction materials?**

Raw material brought to the construction site for incorporation into the building or work that has not 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. Where the basic character, function, or kind of material processed remains the same, it is not manufactured. All unmanufactured construction materials must be one hundred percent of American origin. An exception will be granted if the material cost of the American supply exceeds the foreign costs by more than six percent.

### **5. What are manufactured construction materials?**

Any construction material that is not “unmanufactured construction material.” Manufactured good or product” means a good or product used as construction material in a project that is the result of processing materials by way of machinery and/or labor that produce a substantially different article. They have to be all manufactured in the United States. The origins of subcomponents do not need to be sourced, however the assembly of the ultimate good or product must occur in the United States.

### **6. What are the exceptions?**

Any exceptions from the requirements of the Buy American provision must be granted by the federal awarding agency.

1. The Government may exclude materials from Buy American requirements in specific terms within the bidding and contract documents. If there are no exclusions at that stage of the process then that fact will be stated in the bid specifications.

2. Construction material also includes an item brought to the site preassembled from articles, materials, or supplies. 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 and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site.

3. The federal award official may grant other exemptions if the federal government determines:

a. that the cost of domestic construction material or manufactured goods will increase the overall cost of the project by more than 25%.

b. The material is not mined, produced or manufactured in sufficient quantity or quality or the material is not reasonably available here.

c. The restrictions would be inconsistent with the public interest. (These waivers have been issued thus far by the EPA and will continue to be issued by the federal agency awarding money to the particular project).

4. The materials are supplied by the government.

The procedure for the exceptions contained in (3) above are defined in the contract documents

#### **7. Required contract inclusions:**

The following FAR clause FAR 52.225-21 is only applicable to projects funded by the ARRA.

#### **FAR 52.225-21--Required Use of American Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials**

##### **(a.) Definitions as used in this clause—**

**“Construction material”** means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. 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 and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material. **“Domestic construction material” means—**

- (1) An unmanufactured construction material mined or produced in the United States; or
- (2) A construction material manufactured in the United States

**“Foreign construction material”** means a construction material other than a domestic construction material. **“Manufactured construction material”** means any construction material that is not unmanufactured construction material. **“Steel”** means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include

other elements. “**United States**” means the 50 States, the District of Columbia, and outlying areas. “**Unmanufactured construction material**” means raw material brought to the construction site for incorporation into the building or work that has not 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

**(b.) Domestic preference**

- (1) This clause implements—
  - (i.) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111-5), by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and
  - (ii.) The Buy American Act (41 U.S.C. 10a-10d) by providing a preference for unmanufactured domestic construction material.
- (2) The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraph (b)(3) and (b)(4) of this clause.
- (3) This requirement does not apply to the construction material or components listed by the Government as follows: **NONE**
- (4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—
  - (i.) The cost of domestic construction material would be unreasonable.
    - (A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;
    - (B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;
  - (ii.) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
  - (iii.) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

**(c.) Request for determination of inapplicability of Section 1605 of the Recovery Act or the Buy American Act.**

- (1) (i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—
  - (A) A description of the foreign and domestic construction materials; (B) Unit of measure; (C) Quantity; (D) Cost; (E) Time of delivery or availability; (F) Location of the construction project;
  - (G) Name and address of the proposed supplier; and
  - (H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.
- (ii.) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii.) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv.) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material is noncompliant with section 1605 of the American Recovery and Reinvestment Act or the Buy American Act.

**(d.) Data**

To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers: Foreign and Domestic Construction Materials Cost Comparison

<b>Construction material description</b>	<b>Unit of measure</b>	<b>Quantity</b>	<b>Cost (dollars)*</b>
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Item 1: Foreign construction material Domestic construction material			
Item 2 Foreign construction material			

**Davis-Bacon**

The ARRA applies the Davis-Bacon Act to all construction, alteration or repair projects funded with recovery funds and mandates the inclusion of specific terms in those contracts.

**1. ARRA mandated inclusion in Documents:**

**§ 176.180 Procedure.**

The award official shall insert the standard award term in this Subpart in all awards funded in whole or in part with Recovery Act funds.

**§ 176.190 Award term—Wage Rate Requirements under Section 1606 of the Recovery Act.**

When issuing announcements or requesting applications for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair the agency shall use the award term described in the following paragraphs:

*(a) 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 the 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 (regardless of the amount of ARRA funding or assistance) for construction, alteration or repair (including painting and decorating). The \$2,000 threshold for Davis-Bacon to apply pertains to the amount of the prime construction contract, not the amount of individual subcontracts. If the prime construction contract exceeds \$2,000, all construction work on the project is covered and Davis-Bacon labor standards must be applied to all subcontractors.*

*(b) For additional guidance on the wage rate requirements of section 1606, contact your awarding agency. Recipients of grants, cooperative agreements and loans should direct their initial inquiries concerning the application of Davis-Bacon requirements to a particular federally assisted project to the Federal agency funding the project. The Secretary of Labor retains final coverage authority under Reorganization Plan Number 14 incorporated in any resultant covered contracts that are in excess of \$2,000 for construction, alteration or repair (including painting and decorating).*

## **2. What does it do?**

All persons receiving funding under the ARRA are required by the Secretary of Labor to “provide reasonable assurance that all laborers and mechanics employed in the performance of the project for which the assistance is provided, including those employed by contractors or subcontractors, will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of Labor in accordance with...the Davis-Bacon Act.” § 1705(c).

Under the provisions of the Act, contractors or their subcontractors are to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character.

Additionally, contractors and subcontractors on ARRA funded projects **must** pay laborers and mechanics weekly and submit weekly certified payroll records to the contracting or administering agency.

### **3. To whom does it apply?**

Davis-Bacon applies to **all** construction, alteration or repair projects when funded in whole or in Part by funding from ARRA.

### **4. What are “Prevailing Wages?”**

Prevailing wages are the minimum wage established by the Office of the United States Secretary of Labor for a particular classification of construction or maintenance work within the relevant geographic area. A job specific determination may be applied for pursuant to the act but it is anticipated that the geographic determinations will be utilized. The prevailing wages are required to be made a part of the notice, bid and contract documents and any party bidding on the project may rely upon them. Wage determinations are available at [www.wdol.gov](http://www.wdol.gov).

### **5. What is a “Certified Payroll?”**

It is the official record of wages paid with respect to employees and work covered under Davis-Bacon by the ARRA.

### **6. How to meet the certified payroll requirements?**

Davis-Bacon Certified Wage forms:

<http://www.dol.gov/esa/whd/forms/wh347.pdf>

Instructions as to their completion and use:

<http://www.dol.gov/PrinterFriendly/PrinterVersion.aspx?url=http://www.dol.gov/esa/whd/forms/wh347instr.htm>

### **7. What are the contract classifications?**

Construction projects are generally classified as either “Building,” “Heavy,” “Highway” or “Residential” for purposes of issuing wage determinations under Davis-Bacon.

### **8. What are the work/job classifications?**

These are contained in the wage determination attached to the bidding document. Bidding parties then utilize those minimum wages for the positions and work required to develop their bid. The award must then apply those minimum rates to the work performed regardless of who performs the work.

### **9. How will employees be given notice that their work is covered and what is the appropriate minimum wage?**

Employees must be given notice of the application of the act and the relevant determination of prevailing wages.

Compliance aid: Davis-Bacon posters

<http://www.dol.gov/esa/whd/regs/compliance/posters/fedprojc.pdf>

Must attach wage determinations on poster. Spanish also available

### **10. Are there exceptions? Yes**

A person may be paid an apprenticeship or training wage different than the prevailing wage if that person is:

A person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, **or**

A person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been properly certified to be eligible for probationary employment as an apprentice.

Trainees employed must be persons registered in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which have been so certified by that Administration.

For additional information on apprentices and trainees please refer to <http://www.gpo.gov/davisbacon/referencemat.html>.

### **11. How is notice given to bidding parties of the application of the act to a specific project?**

The act requires the federal agency which is letting the contract to attach a copy of the prevailing wage determination for the project to the bid solicitation.

To avoid the lack of competition that is produced by using different wage scales, any entity which receives funds to let on projects that are covered by the Davis-Bacon application of the ARRA shall attach a copy of the relevant wage determination to the bidding document.

### **12. As an entity letting a contract for bid how do I find the relevant Wage Determinations for my project and bid documents?**

Go to <http://www.access.gpo.gov/davisbacon/nc.html>. Using the four general classifications of work in the location of the project being bid, find the appropriate wage determination for your project. Those wages are to be attached to the bidding document as notice of wage minimums to prospective bidders and attached to the Davis-Bacon poster as notice to employees.

## **Reporting Requirements**

### **1. Who must report?**

Prime recipients are responsible for reporting the information in ARRA Section 1512. “Prime recipients are non-Federal entities that receive Recovery Act funding as Federal awards in the form of grants, loans, or cooperative agreements directly from the Federal government. Federal agencies are not considered prime- or sub-recipients.”

Prime recipients may delegate certain reporting requirements to sub-recipients. “Sub-recipients are non-Federal entities that expend Federal awards received from another entity to carry out a Federal program but do not include an individual who is a beneficiary of such a program.”

Reporting requirements may not be delegated to vendors. “Vendor is defined as a dealer, distributor, merchant, or other seller providing goods or services that are required for the conduct of a Federal program.”

(Citations from OMB Guidance M-09-21, dated June 22, 2009, pp. 6-8, Section 2.2).

A vendor does valuable work on a contract basis for valuable consideration. A sub-recipient receives funds under a pass-through agreement from another entity to fulfill a federal program.

## **2. When are reports due?**

Quarterly reports are due the 10<sup>th</sup> day of the month following the end of the quarter but may be amended through the 22<sup>nd</sup> day of that same month. The first official quarter end for which reports are due is September 30, 2009. The first official quarterly report is due October 10, 2009. The federal agency is required to post the results of the report on [www.grants.gov](http://www.grants.gov) by the 30<sup>th</sup> day following the end of the quarter.

To submit the reports, the reporting entity must register through the reporting tool on [www.federalreporting.gov](http://www.federalreporting.gov) which should be available by August 26, 2009. All entities with reporting responsibility must have a DUNS number and be registered with CCR.

The OMB M-09-21 guidance encourages those without a DUNS or CCR registration to “take immediate steps to prepare for registration” (OMB M-09-21, p. 17, Section 3.2) because these registrations must occur prior to registering through the reporting tool on or after August 26, 2009. If a prime recipient will delegate reporting to a sub-recipient, they must make the delegation in time for the sub-recipient to prepare for the reporting, which includes registering in the system. (OMB M-09-21, p. 9, Section 2.3)

## **3. Is there no longer a July reporting deadline?**

OMB rescinded its original plan to have a trial reporting run in July with the guidance issued June 22, 2009 (OMB-09-21). Now OMB and the Recovery Transparency and Accountability Board plan to foster a series of forums, meetings, and small-scale data collection pilots during the month of July.

If you have not been notified by the federal granting agency that you are included in a pilot, continue ensuring that your systems are ready to meet the October 10, 2009 reporting deadline (which includes having a DUNS number, registering in CCR and registering at [FederalReporting.gov](http://FederalReporting.gov) when that site becomes available in late August). If you have been included as part of a federally managed small-scale pilot, send a copy of your report to OERI.

## **4. How to get a DUNS number and Register with CCR?**

### **DUNS number**

The Data Universal Numbering System (DUNS) is a global numerical system created by Dun & Bradstreet which assigns a unique number to identify a single business entity.

To obtain a DUNS number call the toll-free DUNS number request line 1-800-705-5711. The number is staffed from 8 a.m. to 6 p.m. (local time of the caller when calling from within the continental United States). The process takes approximately 10 minutes and requires the following information:

- Legal Name
- Headquarters name and address for your organization
- Doing business as (“DBA”) or other name by which your organization is commonly known or recognized
- Physical Address, City, State and Zip Code

- Mailing Address (if separate from Headquarters and/or physical address)
- Telephone Number
- Contact Name and Title
- Number of Employees at your physical location

## **CCR**

The Central Contractor Registration (CCR) is the primary database for registering to do business with the federal government. The CCR collects data from businesses and distributes the data to facilitate the missions of federal agencies.

Visit the CCR website [www.ccr.gov](http://www.ccr.gov) and click on the Start New Registration tab. You must have your Taxpayer ID Number and online registration can take about 30 minutes depending on the complexity of your organization's structure. The CCR takes approximately 1-2 business days to process the information and complete the registration.

### **5. What must be reported?**

Prime recipients must report the data required by Section 1512 of the Recovery Act and OMB Guidance M-09-21, including the Federal Funding Accountability and Transparency Act (FFATA) data elements for the sub-recipients of the prime recipient required under 1512(c)(4).

For vendors, prime recipients must report "(1) the identity of the vendor by reporting the D-U-N-S number, (2) the amount of the payment, and (3) a description of what was obtained in exchange for the payment. If the vendor does not have a D-U-N-S number (which is not required), then the name and zip code of the vendor's headquarters will be used for identification." (OMB M-09-21, p. 9, Section 2.3)

Sub-recipients may be delegated reporting responsibility for any of the FFATA data elements. For any payments greater than \$25,000 which a sub-recipient makes to a vendor, the sub-recipient must report the vendor's identity either through the DUNS number or the name and zip code of the vendor's headquarters. (OMB M-09-21, pp. 9-10, Section 2.3)

### **6. Required Data from OMB M-09-21, pp. 10-11, Section 2.3**

#### Prime Recipient

1. Federal Funding Agency Name
2. Award identification
3. Recipient D-U-N-S
4. Parent D-U-N-S
5. Recipient CCR information
6. CFDA number, if applicable
7. Recipient account number
8. Project/grant period
9. Award type, date, description, and amount
10. Amount of Federal Recovery Act funds expended to projects/activities
11. Activity code and description
12. Project description and status
13. Job creation narrative and number
14. Infrastructure expenditures and rationale, if applicable

15. Recipient primary place of performance
16. Recipient area of benefit
17. Recipient officer names and compensation (Top 5)
18. Total number and amount of small sub-awards; less than \$25,000

Recipient Vendor

1. D-U-N-S or Name and zip code of Headquarters (HQ)
2. Expenditure amount
3. Expenditure description

Sub-Recipient\* (these are also referred to as FFATA Data Elements)

1. Sub-recipient D-U-N-S
2. Sub-recipient CCR information
3. Sub-recipient type
4. Amount received by sub-recipient
5. Amount awarded to sub-recipient
6. Sub-award date
7. Sub-award period
8. Sub-recipient place of performance
9. Sub-recipient area of benefit
10. Sub-recipient officer names and compensation (Top 5)

\*Sub-recipient may be delegated additional reporting requirements from a prime recipient.

Sub-Recipient Vendor

1. D-U-N-S or Name and zip code of HQ

**7. How do entities submit reports?**

All reporting from prime recipients and sub-recipients who are delegated reporting responsibility will be submitted through [www.federalreporting.gov](http://www.federalreporting.gov) by the quarterly deadlines. The quarterly reports will be cumulative to reflect ARRA funds expended to date. If an entity does not have web access, it should contact the federal awarding agency for guidance. (OMB M-09-21, p. 12, Section 2.5)

**8. Are there waivers for reporting requirements?**

No. The requirement for reporting the 10<sup>th</sup> day after the quarter ends is statutory and may not be waived. If an entity with reporting responsibility anticipates problems with reporting requirements, the entity should notify the prime recipient and either the prime or sub-recipient should immediately contact the federal agency awarding the funds to the particular ARRA project. (OMB M-09-21, p. 13, Section 2.7)

**9. What are the consequences for not reporting?**

The award agreement encompasses the reporting requirements; therefore the failure to report violates the agreement. The federal awarding agency may ensure compliance by “withholding funds, termination, or suspension and debarment, as appropriate.” (OMB M-09-21, p. 15, Section 2.11)

### **Posting with the Employment Security Commission (ESC)**

Contractors receiving recovery funds must post with the local ESC office all positions for which he intends to hire workers as a result of the ARRA contract. Labor and semiskilled positions must be posted for at least 48 hours before the hiring decision and all other positions must be posted for a minimum of five days before the hiring decision.

The posting of jobs funded with ARRA money and links to a host of employer services can most easily be accessed by visiting the NC ESC Homepage ([www.ncesc.com](http://www.ncesc.com)). There you go to “employer services” and then click on “Post Recovery Act Jobs”. The direct link to this page is provided here:

<https://www.ncesc1.com/business/RecoveryAct.asp>

The employer wishing to list one or more positions can go directly from there to an online form or, in the next section, download a form to fax back to the Commission. Please do not hesitate to call your local Employment Security Commission Office should you have any questions. Take a moment to look at the potential benefits to your company by listing your job opening with the Employment Security Commission. The requirement of listing only provides you access to many more job applicants. It remains the employer’s decision as to the choice of its employees. For further information on this posting requirement please see OERI Management Directive #3 available at [www.ncrecovery.gov](http://www.ncrecovery.gov).

### **Whistleblower Rights and Remedies**

Any non-federal employer receiving covered funds, including a state agency, is required by the appropriate inspector general to post notice of the rights and remedies provided under Section 1553 of the ARRA. Posting OERI Management Directive #5 on site fulfills the posting requirement. For further guidance on compliance with the whistleblower protection provision please see OERI Management Directive #5 available at [www.ncrecovery.gov](http://www.ncrecovery.gov).