

BUY AMERICAN PROCEDURES
FOR LATE WAIVER REQUESTS AND NONCOMPLIANCE

May 11, 2011

As ARRA-funded State Revolving Fund (SRF) projects continue and are moving further into the construction process, waiver requests are still being made and waivers are being issued, when appropriate, consistent with the Office of Management and Budget (OMB) guidance. The waiver application and review process is still the same as is stated in the EPA's April 28, 2009, memorandum.

Late Waiver Requests (2 CFR §176.120)

In prior information provided by the Office of Water (EPA's April 28, 2009, memorandum), February 17, 2010 was specified as the expected cut-off date for waiver requests because until that date States had the option of withdrawing ARRA money from projects with potentially complex Buy American issues. After February 17, 2010, it was expected that in typical circumstances a State would not be able to change funding decisions and all contracts for projects would have been executed. For availability waivers, a pre-February 17, 2010, EPA finding of potential domestic availability required assistance recipients to consider using US-made components, but for requests filed after that date the presumption of the expeditious pace of ARRA construction under a contract greatly reduces the practicality of changing specified components. Nonetheless, the Agency has received many waiver requests after the February 17, 2010, deadline and is therefore further elaborating on how it plans to process these requests.

OMB guidance at 2 CFR § 176.20 contemplates that there may be circumstances wherein a waiver request is made after the date that one enters into a construction contract. Consistent with the direction of the OMB Guidance at 2 CFR §176.120, EPA expects that waiver requests submitted after the signing of the construction contract will include an explanation of why the request was submitted at that date. These waiver requests now fall into two general categories based on the reason for being submitted after the contract was signed: unforeseeable and foreseeable.

Unforeseeable Waiver Requests

Consistent with the direction of the OMB Guidance at 2 C.F.R. §176.120, on some occasions waiver requests, although made after the contract date, can be evaluated as timely because the need for a waiver was not reasonably foreseeable. EPA will generally regard waiver requests with respect to components that were not specified in the bid solicitation or were not included in a general/primary construction contract as late but unforeseeable. In addition, emergencies are another situation where the need for a waiver may have been unforeseeable. Other types of unforeseeable waiver requests may include a circumstance where a domestic alternative was expected to be available, but is not.

Foreseeable Waiver Requests

If the need for a waiver is reasonably foreseeable, EPA could still apply discretion in these cases as per the OMB Guidance, which says "the award official may deny the request" and not that it is required to deny all late requests just because they were not timely made. For waiver requests submitted after the contract signing and lacking a reasonable explanation for their lateness, EPA

may still consider granting a waiver if conditions are met. Specifically, EPA may still consider granting waivers for reasonably foreseeable late requests for which the waiver basis is valid (for example, there are no domestic manufacturers for the product) and there is no apparent gain by the ARRA assistance recipient or loss to the government.

Noncompliance (2 CFR §176.130)

Waiver requests for items that are already “used” in an ARRA funded project, or non-domestic iron, steel, and/or manufactured goods discovered in a project during oversight by the State or EPA must be addressed as noncompliance under 2 CFR §176.130. EPA is defining “used” in a project as being those components already installed. Projects can also be found to be in noncompliance if EPA or the State disagrees with a decision the assistance recipient has made, such as whether substantial transformation occurred or which components can be included under the national de minimis waiver.

Once the potentially noncompliant item(s) is identified, the assistance recipient should be notified either by the State or EPA of the apparent unauthorized use of the non-domestic component, including a proposed corrective action (2 CFR §176.130(b)), and should be given the opportunity to reply as stated in the regulations. If unauthorized use is confirmed, EPA, where appropriate, or the State, should take one or more of the actions provided in 2 CFR §176.130(c), which includes the possibility of issuing a waiver, allowing use of the non-domestic item, requiring the removal of the non-domestic item, or withholding payments for all or part of the project. The corrective actions that are available to EPA in cases of noncompliance differ from those available to States. Only EPA can issue waivers to authorize the use of a non-domestic item. EPA can also withhold assistance funds from the State. In most cases, excluding sub-grants, only the States can withhold money from the assistance recipient. Once a noncompliance letter is issued by either EPA or the State, the other may choose but does not need to issue a noncompliance letter as well. EPA should address all noncompliance letters to the State and copy the assistance recipient.

So that SRF programs can better understand how EPA intends to apply its discretion within the noncompliance authority, EPA has identified relevant mitigating conditions that may include, but are not limited to, the following:

- EPA *would have granted a waiver* to the assistance recipient under the circumstances had one been applied for prior to noncompliance;
- In cases where EPA would have granted a waiver per the preceding factor, it would be *wasteful, and against the ARRA objective of expeditious construction, not to allow the use* of the non-domestic component because the assistance recipient has already procured or irrevocably committed themselves to that component; or
- There appear to be *no financial gains or procedural advantage* (by the assistance recipient) *or financial losses or procedural disadvantage* (by the Federal government) by the assistance recipient's failure to make a timely request for the waiver. The assistance recipient should therefore properly receive reimbursement for the non-domestic component.

Where these conditions, or others that EPA may identify as relevant, apply, then EPA believes that it is appropriate to use our discretion under 2 CFR §176.130(c)(3) to allow the assistance

recipient to use the non-domestic component in the project and for the State to be reimbursed for it.

If there appear to be any gains made by the assistance recipient, or losses by the Federal government, EPA has the authority under 2 CFR §176.130(c)(4) to withhold funding for all or part of the project from the State. The State in most cases has the authority to withhold funding from the project or to suspend/terminate its agreement with the sub-recipient. In addition, another option is that the State or EPA can require that the non-domestic good(s) be removed and replaced with a domestic product.

It is recommended that the State work collaboratively with EPA to determine the appropriate corrective action, especially in cases where the State is the one who identifies the item in noncompliance or there is a disagreement with the assistance recipient. If there is a disagreement between the State and EPA, where EPA believes that a project is non-compliant, then EPA, consistent with grant regulations, may invoke a range of remedies with respect to the State, including issuing a noncompliance letter. If EPA's remedy includes the withholding of funds, it will be up to the State, consistent with State law, to decide what remedies to apply to the assistance recipient.

If fraudulent activities are suspected, the OIG should be contacted immediately. The OIG can be reached at 1-888-546-8740 or OIG_Hotline@epa.gov. More information can be found at this website: <http://www.epa.gov/oig/hotline.htm>.