

**BONNEVILLE PURCHASING INSTRUCTIONS  
TEMPORARY INSTRUCTION**

Temporary Instruction Number 09-2 Revision 1

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Date Issued October 2, 2009

Valid until Canceled

Approved by:  Damian J. Kelly, HCA  
Supply Chain Policy and Governance

**SUBJECT:** This Revision to Temporary Instruction 09-2 updates reporting requirements and clause usage prescriptions of the American Reinvestment and Recovery Act of 2009 (Recovery Act or ARRA), and other minor edits/corrections.

Initial Instruction

Effective Date: July 31, 2009

Effective Until: Revised

Revision 1

Effective Date: October 5, 2009

Effective Until: Revised or Cancelled

## **BACKGROUND**

The American Recovery and Reinvestment Act of 2009 (Recovery Act, or ARRA) was enacted to preserve and create jobs and promote economic recovery, assist those most impacted by the recession, provide investments needed to increase economic efficiency by spurring technological advances in science and health, invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits, stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive State and local tax increases.

The Recovery Act appropriated over \$38 billion dollars to the Department of Energy (DOE) to fund purchase contracts and financial assistance awards for energy related projects that meet its requirements. BPA expects to receive Recovery Act funds and issue award instruments using those funds.

Revision 1 to the Temporary Instruction is the result of more definitive interpretation of the law and updated implementation guidance received from Office of Management and Budget and Department of Energy Headquarters.

All text changes for this Revision 1 are noted with a strong vertical bar in the left margin.

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## **BPI CHANGES FOR THE RECOVERY ACT**

### **1. BPI TI 09-2 – AMERICAN REINVESTMENT AND RECOVERY ACT (RECOVERY ACT)**

***INFORMATION:***

(a) In its normal business operations, BPA funds its activities through self-generated revenues, and does not utilize appropriated funding sources. However, BPA does expect to obtain such funds under the Recovery Act. Awards made with appropriated funds will require additional requirements generally not applicable to BPA procurements.

(b) BPA's awards may be either (1) attributed to the Recovery Act by allocating increased borrowing authority funds to a program or project; or (2) direct funded with Recovery Act appropriations.

(c) BPA has determined that all contract provisions imposed by the Recovery Act shall apply when awards are made with appropriated funds, and limited provisions of the Recovery Act shall apply when awards are attributed to the Recovery Act through allocation of increased borrowing authority.

(d) This Temporary Instruction provides all necessary information and detailed instructions to issue solicitations or execute awards and contract modifications that are attributed to, or appropriated by, in whole or in part, the Recovery Act. BPI Policy, information, procedure, new and existing clauses, and related clause usage prescriptions are revised in several Parts of the BPI as follows:

- (1) PART 3      STANDARDS OF CONDUCT AND BUSINESS PRACTICES
- (2) PART 4      ADMINISTRATIVE MATTERS
- (3) PART 9      CONTRACTING WITH FOREIGN BUSINESSES
- (4) PART 12     SOURCE SELECTION AND AWARD
- (5) PART 14     GENERAL CONTRACT ADMINISTRATION POLICIES

***POLICY:*** BPA will follow the applicable procurement requirements as specified in the Recovery Act. Awards may not be made without clear delineation of the funding source(s) and appropriate contract content.

***PROCEDURE:*** Requisitioning offices shall communicate to Supply Chain Services the sources of funding, either attributed or appropriated, for all Recovery Act purchases.

### **2. TABLE OF CONTENTS**

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### **3. PART 3 – STANDARDS OF CONDUCT AND BUSINESS PRACTICES**

- Instructions to COs: The Recovery Act reinforces protections for whistleblowers who report improper behaviors associated with Recovery Act projects and expenditures. A new subpart 3.9 is added to the BPI, with information, policy, clause usage prescription and a new clause. The clause 3-49 is to be inserted into all new solicitations and awards that are funded by Recovery Act appropriated funds. The clause must be added to existing contracts that are changed to add work funded with Recovery Act appropriations, when the contract is modified to add the work.

**ADD** this new subpart to BPI Part 3:

#### **3.9 WHISTLEBLOWER PROTECTIONS UNDER AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**

**3.9.1 INFORMATION:** This section implements Section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), and applies to all contracts that are funded, in whole or in part, by Recovery Act appropriations.

**3.9.2 POLICY:** BPA will ensure compliance with the Whistleblower requirements imposed by the Recovery Act of 2009.

#### **3.9.3 REMEDIES**

##### **3.9.3.1 DEFINITIONS:**

As used in this section—

“Board” means the Recovery Accountability and Transparency Board established by Section 1521 of the

Recovery Act.

“Covered funds” means funds appropriated by or otherwise made available by the Recovery Act.

“Covered information” means information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds.

“Inspector General” means an Inspector General appointed under the Inspector General Act of 1978. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

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“Non-Federal employer,” as used in this section, means any employer that receives Recovery Act funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

**3.9.3.2 POLICY:**

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities or their representatives:

- (1) The Board.
- (2) An Inspector General.
- (3) The Comptroller General.
- (4) A member of Congress.
- (5) A State or Federal regulatory or law enforcement agency.
- (6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.
- (7) A court or grand jury.
- (8) The head of a Federal agency.

**3.9.3.3 PROCEDURES FOR FILING COMPLAINTS**

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.9.3.2, may submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The covered information giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act; and
- (5) The specific nature and date of the reprisal.

(c) A contracting officer who receives a complaint of reprisal of the type described in 3.9.3.2 shall forward it to the Office of the Inspector General, agency legal counsel or to the appropriate official in accordance with agency procedures.

**3.9.3.4 PROCEDURES FOR INVESTIGATING COMPLAINTS**

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

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**3.9.3.5 ACCESS TO INVESTIGATIVE FILE OF INSPECTOR GENERAL**

(a) The employee alleging reprisal under this section shall have access to the investigation file of the Inspector General, in accordance with the Privacy Act, 5 U.S.C. 552a. The investigation of the Inspector General shall be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the non-Federal employer shall have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(c) The Inspector General may exclude from disclosures made under 3.9.3.5(a) or (b)—

(1) Information protected from disclosure by a provision of law; and

(2) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the Inspector General determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An Inspector General investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

**3.9.3.6 REMEDIES AND ENFORCEMENT AUTHORITY**

(a) Burden of Proof.

(1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.9.3.2 was a contributing factor in the reprisal.

(ii) A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) Opportunity for rebuttal. The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.9.3.6(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

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(b) No later than 30 days after receiving an Inspector General report in accordance with section 1553 of the Recovery Act, the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.9.3.2 and shall either issue an order denying relief in whole or in part or shall take one or more of the following actions:

(1) Order the employer to take affirmative action to abate the reprisal.

(2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)

(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which shall have jurisdiction over such an action without regard to the amount in controversy if

(i) The head of an agency—

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order issued under this section, the head of the agency shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys' fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection may obtain review of the order's conformance with the law, and this section, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have

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occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency.

### **3.9.3.7 CLAUSE USAGE PRESCRIPTION**

The CO shall insert clause 3-49 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 in all solicitations and contracts funded in whole or in part with Recovery Act appropriated funds.

**ADD** the following clause title to the list of clauses in 3.50:

3-49 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009

#### **Clause 3-49 WHISTLEBLOWER PROTECTIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (Aug 09) (BPI 3.9.3)**

(a) The Contractor shall post notice of employees rights and remedies for whistleblower protections provided under section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

(b) The Contractor shall include the substance of this clause including this paragraph (b) in all subcontracts.

(End of clause)

## **4. Part 4 – ADMINISTRATIVE MATTERS**

- Instructions to COs: A new subpart 4.1.3 is added to the BPI, with information, policy, clause usage prescription and a new clause. The clause 4-49 shall be inserted into all new solicitations and awards that are funded in whole or in part with Recovery Act appropriated funds. Existing contracts, if changed to add work that will be funded with Recovery Act appropriated funds, shall include this clause when the contract is modified.

**ADD** this new subpart to BPI Part 4:

### **4.1.3 AMERICAN RECOVERY AND REINVESTMENT ACT REPORTING REQUIREMENTS**

**4.1.3.1 INFORMATION:** This section implements section 1512(c) of Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act), which requires as a condition of receipt of funds, quarterly reporting on the use of funds.

(a) Contractors that receive awards made with funds attributed to agency increased borrowing authority will report limited information to BPA, as defined in the contract terms.

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(b) Contractors that receive awards (or modifications to existing awards) funded, in whole or in part, by Recovery Act appropriated funds, must report information including, but not limited to—

- (1) The dollar amount of contractor invoices;
- (2) The supplies delivered and services performed;
- (3) An assessment of the completion status of the work;
- (4) An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds;
- (5) Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and
- (6) Specific information on first-tier subcontractors.

**4.1.3.2 POLICY:** BPA will ensure compliance with the reporting requirements imposed by the American Recovery and Reinvestment Act of 2009.

**4.1.3.3 PROCEDURES:**

(a) In any contract action funded in whole or in part by the Recovery Act, the CO shall indicate that the contract action is being made under the Recovery Act, and indicate which products or services are funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the contract instrument.

(b) To maximize transparency of Recovery Act funds that must be reported by the contractor, the CO shall structure contract awards to allow for separately tracking Recovery Act funds. For example, the CO may consider awarding dedicated separate contracts when using Recovery Act funds or establishing contract line item number structures to mitigate commingling of Recovery funds with other funds.

(c) COs shall ensure that the contractor complies with the reporting requirements of the Recovery Act. Clauses are prescribed for awards funded with appropriations, or awards funded with increased borrowing authority attributed to ARRA.

(d) If the contractor fails to comply with the reporting requirements, the CO shall exercise appropriate contractual remedies. The CO shall also document the contractor's failure to comply with the reporting requirements in the contractor's performance measures (see BPI 14.16).

**4.1.3.4 CLAUSE USAGE PRESCRIPTIONS**

(a) The CO shall insert clause 4-48 American Recovery and Reinvestment Act – Reporting Requirements – Projects Using Increased Borrowing Authority Attributed to ARRA.

(b) The CO shall insert clause 4-49 American Recovery and Reinvestment Act - Reporting Requirements in all solicitations and contracts funded, in whole or in part, with Recovery Act appropriated funds.

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**ADD** the following clause title to the list of clauses in 4.50:

- 4-48 American Recovery and Reinvestment Act– Reporting Requirements–Projects Using Increased Borrowing Authority Attributed to ARRA.
- 4-49 American Recovery and Reinvestment Act Reporting Requirements– Appropriated Funds

**Clause 4-48 AMERICAN RECOVERY AND REINVESTMENT ACT—REPORTING REQUIREMENTS—PROJECTS USING INCREASED BORROWING AUTHORITY ATTRIBUTED TO ARRA (Oct 09)(BPI 4.1.3)**

(a) Definitions. As used in this clause—

“First-tier subcontract” means a subcontract awarded directly by a Federal Government prime contractor whose contract is attributed to the Recovery Act.

“Jobs” means an estimate of those positions created and filled, or previously existing filled positions, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers prime contractor, and as noted in (d)(3) below first tier subcontractor, positions established in the United States. The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule (173 hours per month). For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each month.

(b) This contract requires the contractor providing products and/or services that are attributed to the American Recovery and Reinvestment Act of 2009 (Recovery Act) to report certain information. These reports will be made available to the public.

(c) Reports shall be submitted no later than 5 calendar days after the end of each calendar month.

(d) The Contractor shall report the following information by email to [ARRAjobs@bpa.gov](mailto:ARRAjobs@bpa.gov).

(1) The Government contract number, and the order/release number if applicable;

(2) A description of the employment impact of work attributed to the Recovery Act. This narrative should be cumulative for each calendar quarter and only address the impact on the contractor’s workforce. The contractor shall provide—

(i) A description in broad labor categories (construction, engineering services, etc.)

(ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States.

(3) For any first-tier subcontract attributed in whole or in part under the Recovery Act, the prime contractor shall provide detailed information on these first-tier subcontracts as follows:

(i) Name of the subcontractor.

(ii) A description in broad labor categories (construction, professional services, other services etc.)

(iii) An estimate of the number of jobs created and/or jobs retained by the prime contractor, in the United States

The report shall be in the following format:

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Contractor (or sub contractor) Name	BPA Contract No. include release no. if applicable	Project Name	Labor Category	No. of Hours	No. of Jobs (FTE)	Zip code where work is being performed (first two digits only)
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**Clause 4-49 AMERICAN RECOVERY AND REINVESTMENT ACT—REPORTING REQUIREMENTS—APPROPRIATED FUNDS (Aug 09)(BPI 4.1.3)**

(a) Definitions. As used in this clause—

“Contract,” means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see BPI Part 7.

“First-tier subcontract” means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act.

“Jobs created” means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas. The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

“Jobs retained” means an estimate of those previously existing filled positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas. The number shall be expressed as “full-time equivalent” (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

“Total compensation” means the cash and noncash dollar value earned by the executive during the contractor’s past fiscal year of the following (for more information see 17 CFR 229.402(c)(2)):

(1) Salary and bonus.

(2) Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

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(3) Earnings for services under non-equity incentive plans. Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

(4) Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.

(5) Above-market earnings on deferred compensation which is not tax-qualified.

(6) Other compensation. For example, severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property if the value for the executive exceeds \$10,000.

(b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.

(c) Reports shall be submitted no later than the 10th day after the end of each calendar quarter.

(d) The Contractor shall report the following information, using the online reporting tool available at <http://www.FederalReporting.gov>.

(1) The Government contract and order number, as applicable.

(2) The amount of Recovery Act funds invoiced by the contractor for the reporting period. A cumulative amount from all the reports submitted for this action will be maintained by the government's on-line reporting tool.

(3) A list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in this calendar quarter.

(4) Program or project title, if any.

(5) A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and, if appropriate, associated units of measure.

(6) An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (i.e., not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act.

(7) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and only address the impact on the contractor's workforce. At a minimum, the contractor shall provide—

(i) A brief description of the types of jobs created and jobs retained in the United States and outlying areas. "Outlying areas" means—

- (1) *Commonwealths.*
  - (i) Puerto Rico.

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- (ii) The Northern Mariana Islands;
- (2) *Territories.*
  - (i) American Samoa.
  - (ii) Guam.
  - (iii) U.S. Virgin Islands; and
- (3) *Minor outlying islands.*
  - (i) Baker Island.
  - (ii) Howland Island.
  - (iii) Jarvis Island.
  - (iv) Johnston Atoll.
  - (v) Kingman Reef.
  - (vi) Midway Islands.
  - (vii) Navassa Island.
  - (viii) Palmyra Atoll.
  - (ix) Wake Atoll.

This description may rely on job titles, broader labor categories, or the contractor's existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and

(ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States and outlying areas. A job cannot be reported as both created and retained.

(8) Names and total compensation of each of the five most highly compensated officers of the Contractor for the calendar year in which the contract is awarded if—

(i) In the Contractor's preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(B) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(9) For subcontracts valued at less than \$25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under \$300,000, the Contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount.

(10) For any first-tier subcontract funded in whole or in part under the Recovery Act, that is over \$25,000 and not subject to reporting under paragraph 9, the contractor shall require the subcontractor to provide the information described in (i), (ix), (x), and (xi) below to the contractor for the purposes of the quarterly report. The contractor shall

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advise the subcontractor that the information will be made available to the public as required by section 1512 of the Recovery Act. The contractor shall provide detailed information on these first-tier subcontracts as follows:

(i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.

(iii) Amount of the subcontract award.

(iv) Date of the subcontract award.

(v) The applicable North American Industry Classification System (NAICS) code.

(vi) Funding agency.

(vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.

(viii) Subcontract number (the contract number assigned by the prime contractor).

(ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.

(x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.

(xi) Names and total compensation of each of the subcontractor's five most highly compensated officers, for the calendar year in which the subcontract is awarded if—

(A) In the subcontractor's preceding fiscal year, the subcontractor received—

(1) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

(2) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

(B) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15

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U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(End of clause)

## **5. Part 9 – CONTRACTING WITH FOREIGN BUSINESSES**

### Instructions to COs:

- Additional Information relating to the Recovery Act is added to subpart 9.2 BUY AMERICAN ACT – CONSTRUCTION MATERIALS. Paragraph (d) is added to BPI 9.2.4 Clause Usage Prescriptions, directing COs to follow new content at BPI 9.2.5.
- A new subpart 9.2.5 AMERICAN RECOVERY AND REINVESTMENT ACT REQUIREMENTS FOR BUY AMERICAN ACT – CONSTRUCTION MATERIALS, is added to the BPI. It contains information, policy, clause usage prescriptions and text of four new clauses specific to construction awards. The new clauses shall be inserted into all new solicitations and awards that are funded, in whole or in part with Recovery Act funds, according to the clause usage prescription. Existing contracts, if changed to add work using funds attributed to the Recovery Act, shall include the appropriate clauses when the contract is modified.

**ADD** the following sentence to the end of the **INFORMATION** paragraph at 9.2 BUY AMERICAN ACT – CONSTRUCTION MATERIALS.

For construction projects, attributed in whole or in part, to Recovery Act funds, refer to BPI 9.2.5.

**ADD** this new paragraph (d) to subpart **9.2.4 CLAUSE USAGE PRESCRIPTIONS**

(d) For construction projects, attributed in whole or in part, to Recovery Act funds, the CO shall exclude the clauses 9-5, 9-6, and 9-7, as named in this in this subpart and insert clauses as prescribed at 9.2.5.10.

**ADD** this new subpart to BPI Part 9.

### **9.2.5 AMERICAN RECOVERY AND REINVESTMENT ACT REQUIREMENTS FOR BUY AMERICAN ACT – CONSTRUCTION MATERIALS**

**9.2.5.1 INFORMATION:** This section implements the requirements for application of the Buy American Act when project funding is attributed to, in whole or in part, the American Reinvestment and Recovery Act of 2009 (Pub. L. 111-5).

**9.2.5.2 POLICY:** BPA shall comply with the unique requirements for Buy American Act as imposed by the American Reinvestment and Recovery Act of 2009.

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**9.2.5.3 DEFINITIONS:**

As used in this subpart—

“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.

“Public building or public work” means building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

“Recovery Act designated country” means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

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

“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.

**9.2.5.4 POLICY:**

Except as provided in 9.2.5.5—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work, as defined in 9.2.5.3, unless—

- (1) The public building or public work is located in the United States; and
- (2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.
  - (i) Production in the United States of the iron or steel used as construction material 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 steel or iron used as components or subcomponents of other manufactured construction material.

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(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

#### **9.2.5.5 EXCEPTIONS**

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the Recovery Act or the Buy American Act:

(1) Nonavailability. The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(2) Unreasonable cost. The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 9.2.5.7.

(3) Inconsistent with public interest. The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(b) Determinations. When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) The head of the agency shall publish a notice in the Federal Register within two weeks after the determination is made, unless the construction material has already been determined to be domestically nonavailable. See BPI 9.2.5.5. The notice shall include—

(i) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”;

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) Acquisitions under trade agreements.

(1) For construction contracts with an estimated acquisition value of \$7,443,000 or more, also see BPI 9.4. Offers of products determined to be eligible products per BPI 9.4 shall receive equal consideration with domestic offers per BPI 9.4.

(2) For purposes of the Recovery Act, designated countries do not include the Caribbean Basin Countries.

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(3) Canada is identified by the US federal government as a trade agreement country. However, for BPA as a Power Marketing Agency of the Department of Energy, Canada is currently excluded as to the trade agreement exemption from the Buy American Act.

**9.2.5.6 PREAWARD DETERMINATION CONCERNING THE INAPPLICABILITY OF SECTION 1605 OF THE RECOVERY ACT OR THE BUY AMERICAN ACT**

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either Clause 9-47 or 9-49, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either Clause 9-46 or Clause 9-48, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(c) Determination based on unreasonable cost of domestic construction material.

(1) Iron, steel, and other manufactured construction material. The contracting officer must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

(2) Unmanufactured construction material. The contracting officer must compare the cost of each foreign unmanufactured construction material to the cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the contracting officer shall determine that the cost of the unmanufactured construction material is unreasonable.

**9.2.5.7 PROCEDURE FOR EVALUATING OFFERS OF FOREIGN CONSTRUCTION MATERIAL**

(a) To ensure receipt of all information necessary to perform evaluation of offers, the contracting officer must inform the offerors to complete and submit the information as requested in contract clauses 9-46 or 9-48, whichever applies, of the draft contract as sent to offerors during solicitation phase.

(b) If the contracting officer has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with section 9.2.5.6, then the contracting officer shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.

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(3) Total evaluated price = offered price + (.25 x offered price, if (a)(1) applies) + (.06 x cost of foreign unmanufactured construction material, if (a)(2) applies).

(c) If two or more offers are equal in price, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(e) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of Clause 9-46, or paragraph (b)(3) of Clause 9-48, the contracting officer must add the excepted materials to the list in the contract clause.

#### **9.2.5.8 POSTAWARD DETERMINATIONS**

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 9-46 or 9-48 and/or other readily available information.

(c) If a determination, under 9.2.2.5(a) is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is at least the differential established in 9.2.5.7(a).

#### **9.2.5.9 NONCOMPLIANCE**

The contracting officer must—

(a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act in accordance with 9.2.5.8.

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(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspension or debarment official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

#### **9.2.5.10 CLAUSE USAGE PRESCRIPTIONS**

When using funds attributed to the Recovery Act for construction, the CO shall insert the following clauses into construction contracts.

(a) The CO shall insert clause 9-46, Required Use of American Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials, in solicitations and contracts for construction that is performed in the United States, and valued at less than \$7,443,000.

(1) List in paragraph (b)(3) of the basic clause all foreign construction material excepted from the requirements of the Buy American Act.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(b) The CO shall insert clause 9-47, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials, in solicitations for construction that include the clause 9-46.

(1) COs shall use Alternate I to replace paragraph (b) if insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers.

(c) The CO shall insert clause 9-48, Required Use of American Iron, Steel, and Other Manufactured Good—Buy American Act—Construction Materials Under Trade Agreements in solicitations and contracts for construction that is performed in the United States and valued at more than \$7,443,000.

(1) In the basic clause, the CO shall list in paragraph (b)(3) all foreign construction materials excepted from the Buy American Act or section 1605 of the Recovery Act, other than Recovery Act designated country construction material.

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(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(3) The CO shall use Alternate I of the clause when the acquisition is valued between at \$7,443,000 and \$8,817,449. List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American Act or section 1605 of the Recovery Act, unless the excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.

(d) The CO shall insert clause 9-49, Notice of Required Use of American Iron, Steel, and Other Manufactured Good—Buy American Act—Construction Materials Under Trade Agreements, in solicitations for construction that include Clause 9-48.

(1) The CO shall use Alternate I to replace paragraph (b) if insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers.

(2) The CO shall use Alternate II to replace paragraph (d) Alternate Offers, if the acquisition is valued between \$7,443,000 and \$8,817,449.

(3) If the conditions of Alternate I and II both exist, the CO shall use Alternate III to replace basic clause paragraphs with Alternate I paragraph (b) and Alternate II paragraph (d).

**ADD** the following clause titles to the list of clauses in 9.50:

- 9-46 Required Use Of American Iron, Steel, And Other Manufactured Goods--Buy American Act--Construction Materials
- 9-47 Notice Of Required Use Of American Iron, Steel, And Other Manufactured Goods--Buy American Act--Construction Materials
- 9-48 Required Use Of American Iron, Steel, And Other Manufactured Goods--Buy American Act--Construction Materials Under Trade Agreements
- 9-49 Notice Of Required Use Of American Iron, Steel, And Other Manufactured Goods--Buy American Act--Construction Materials Under Trade Agreements

**Clause 9-46 REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS (Aug 09) (BPI 9.2.5.3)**

(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—

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- (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:

(fill in)

*[Contracting Officer to list applicable excepted materials or indicate “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.

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(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

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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**

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

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.] [Include other applicable supporting information.]

\*Include all delivery costs to the construction site.

(End of clause)

**Clause 9-47 NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS (Aug 09) (BPI 9.2.5.3)**

(a) Definitions. "Construction material," "domestic construction material," "foreign construction material," "manufactured construction material," "steel," and "unmanufactured construction material," as used in this clause, are defined in the clause of this solicitation entitled "Required Use of Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials" (BPI clause 9-46).

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(b) Requests for determinations of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of BPI clause 9-46 in the request. If an offeror has not requested a determination regarding the inapplicability of 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) Evaluation of offers.

(1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) Alternate offers.

(1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at BPI clause 9-46, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of the clause at BPI clause 9-46 if the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at BPA clause 9-46 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of clause)

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**Alternate I (Aug 09)**

(b) Requests for determinations of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at BPI clause 9-46.

**Clause 9-48 REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (Aug 09)(BPI 9.2.5.3)**

(a) Definitions. As used in this clause—

*“Construction material”* means an article, material, or supply brought to the construction site by the Contractor or 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.

*“Free trade agreement (FTA) country construction material”* means a construction material that—

- (1) Is wholly the growth, product, or manufacture of an FTA country; or
- (2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different construction material distinct from the materials from which it was transformed.

*“Least developed country construction material”* means a construction material that—

- (1) Is wholly the growth, product, or manufacture of a least developed country; or
- (2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

*“Manufactured construction material”* means any construction material that is not unmanufactured construction material.

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*“Recovery Act designated country”* means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), or United Kingdom).

(2) A Free Trade Agreement country (FTA)(Australia, Bahrain, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore); or

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia).

*“Recovery Act designated country construction material”* means a construction material that is a WTO GPA country construction material, an FTA country construction material, or a least developed country 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.

*“WTO GPA country construction material”* means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials.

(1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) and the Buy American Act (41 U.S.C. 10a-10d) do not apply

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to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

- (i) Section 1605 of the Recovery Act 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 by providing a preference for unmanufactured domestic construction material.
- (2) The Contractor shall use only domestic or Recovery Act designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

(Fill in)

*[Contracting Officer to list applicable excepted materials or indicate "none".]*

(4) The Contracting Officer may add other 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 overall 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 commercial quantities 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;

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(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 the section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than that covered by trade agreements is noncompliant with the applicable 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**

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

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Foreign construction material			
Domestic construction material			

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.][Include other applicable supporting information.]

[\* Include all delivery costs to the construction site.]

(End of clause)

**Alternate I (Aug 09)**

*“Bahrainian, Mexican, or Omani construction material”* means a construction material that—

- (1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; or
- (2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials.

(1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) and the Buy American Act do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

- (i) Section 1605 of the Recovery Act, 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 providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

**Clause 9-49 NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (Aug 09)(BPI 9.2.5.3)**

(a) Definitions. “Construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction material,” “Recovery Act designated country construction material,” “steel,” and “unmanufactured construction material,” as used in this clause, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials Under Trade Agreements” (BPI clause 9-48).

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(b) Requests for determination of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of BPI clause 9-48 in the request. If an offeror has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) Evaluation of offers.

(1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) Alternate offers.

(1) When an offer includes foreign construction material, other than Recovery Act designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of BPI clause 9-48, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI Clause 9-48 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of BPI clause 9-48 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material, and the offeror shall be required to furnish such domestic or Recovery Act designated country construction material. An offer based on use of the foreign construction material for which an exception was requested may be accepted if revised during negotiations.

(End of clause)

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**Alternate I (Aug 09)**

(b) Requests for determination of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of BPI clause 9-48.

**Alternate II (Aug 09)**

(d) Alternate offers.

(1) When an offer includes foreign construction material, except foreign construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of BPI clause 9-48, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI clause 9-48 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of BPI clause 9-48 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested may be accepted if revised during negotiations.

(End of clause)

**Alternate III (Oct 09)**

There is no new text for Alternate III. Replace paragraphs (b) and (d) of the basic clause with the text of paragraph (b) at Alternate I and paragraph (d) at Alternate II.

**6. PART 12 - SOURCE SELECTION AND AWARD**

Instructions to COs: The Recovery Act imposes additional transparency and accountability requirements on contractors and the government, including a right of the Comptroller General or its duly authorized representatives to interview any of the contractors' officers or employees regarding Recovery Act awards. A new paragraph (b) is added to subpart 12.8.8.1, which instructs the CO to modify the Examination of Records clause. The clause with its Alternate I is to be inserted into all new solicitations and awards that are funded, in whole or in part, with funds either attributed to or appropriated under the Recovery Act. Existing contracts, if changed to add work using Recovery Act funding, shall include this clause with alternate language when the contract is modified.

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**12.8.8.1 Clause Usage Prescriptions.**

***PROCEDURE:***

(a) The CO shall include Clause 12-3, Examination of Records, in all cost reimbursement or time & materials contracts over \$100,000 or in modifications over \$100,000 for any type of contract where cost analysis is required to determine the reasonableness of the amount of the modification.

(b) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, use the clause with its Alternate I in all solicitations and contracts regardless of award amount. Alternate I adds paragraph (d) to the basic clause.

**Clause 12-3 EXAMINATION OF RECORDS - ALTERNATE I (Aug 09) (12.8.8.1)**

(d) The Comptroller General has the right to interview any officer or employee of the prime contractor regarding Recovery Act funded work under this contract.

**7. Part 14 GENERAL CONTRACT ADMINISTRATION POLICIES**

- Instructions to COs: A new subpart 14.20 is added to the BPI, including information, policy, clause usage prescription and new clause 14-49. This subpart acknowledges the new requirements of the Recovery Act, and the associated clause provides additional background information to the Contractor and alerts the Contractor to new administrative requirements and flow-down requirements to subcontractors. Insert the new clause 14-49 in all new solicitations and awards that are funded under the Recovery Act. Existing contracts that are changed to add work funded with Recovery Act appropriated funds shall include this clause when the contract is modified.

**ADD** the following new subpart to BPI Part 14:

**14.20 Special Provisions for the American Reinvestment and Recovery Act of 2009.**

**14.20.1 Information:** The Recovery Act imposes significant new requirements on both government agencies and contractors who receive awards funded by the Recovery Act. Implementation of the Recovery Act continues to evolve, including reporting requirements, sub-contractor flow-down provisions, and other administrative matters.

**14.20.2 Policy:** In concert with BPA's policy to follow all pertinent elements of the Recovery Act, COs shall incorporate new provisions to contracts and provide timely updates of information and guidance, as it is received, to contractors for all awards using Recovery Act funding and related provisions.

**14.20.3 Clause Usage Prescription**

The CO shall insert clause 14-49 Recovery Act Special Terms and Conditions, in all solicitations and contracts which include funds attributed to or appropriated under the Recovery Act.

**ADD** the following clause title to the list of clauses in 14.50:

14-49 Recovery Act Special Terms and Conditions

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**Clause 14-49 RECOVERY ACT SPECIAL TERMS AND CONDITIONS (Aug 09)(BPI 14.20)**

(a) Preamble:

Work performed under this contract will be funded, in whole or in part, with funds appropriated by the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, (Recovery Act or Act). The Recovery Act's purposes are to stimulate the economy and to create and retain jobs. Contractors should begin planning activities for their first tier subcontractors, including obtaining a DUNS number (or updating the existing DUNS record), and registering with the Central Contractor Registration (CCR).

(b) Be advised that Recovery Act funds can be used in conjunction with other funding as necessary to complete projects, but tracking and reporting shall be separate to meet the reporting requirements of the Recovery Act and related guidance from BPA. For projects funded by sources other than the Recovery Act, Contractors should plan to keep separate records for Recovery Act funds and to ensure those records comply with the requirements of the Act.

(c) The Government continues to refine the implementing instructions of the Recovery Act, particularly with regard to the reporting requirements. The Contractor shall comply with all requirements of the Act, as advised by the CO. If the Contractor believes inconsistencies exist between Recovery Act requirements and other contract requirements, the issues will be referred to the Contracting Officer for reconciliation.

(d) Be advised that special clauses may apply to projects funded by the Act relating to:

- (1) Reporting, tracking and segregation of incurred costs;
- (2) Reporting on job creation and preservation;
- (3) Publication of information on the Internet;
- (4) Protecting whistleblowers; and
- (5) Requiring prompt referral of evidence of a false claim to the Inspector General.

(e) Definitions:

For purposes of this clause, "Covered Funds" means funds attributed to or appropriated under the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5. Covered Funds will have special accounting codes and will be identified as Recovery Act funds in the contract and/or modification using Recovery Act funds. Covered Funds must be reimbursed by September 30, 2015.

"Non-Federal employer" means any employer with respect to Covered Funds – the contractor or subcontractor, as the case may be, if the contractor or subcontractor is an employer; and any professional membership organization, certification of other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving Covered Funds; or with respect to Covered Funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor receiving the funds and any contractor or subcontractor of the State or local government; and does not mean any department, agency, or other entity of the federal government.

(f) Flow Down Clause

This clause shall be included in every first-tier subcontract.

- (1) Segregation and Payment of Costs

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The Contractor shall segregate the obligations and expenditures related to funding under the Recovery Act. Financial and accounting systems should be revised as necessary to segregate, track and maintain these funds apart and separate from other revenue streams. No part of the funds from the Recovery Act shall be commingled with any other funds or used for a purpose other than that of making payments for costs allowable for Recovery Act projects. Where Recovery Act funds are authorized to be used in conjunction with other funding to complete projects, tracking and reporting shall be separate from the original funding source to meet the reporting requirements of the Recovery Act and OMB Guidance.

- (2) Invoices shall clearly indicate the portion of the requested payment that is for work funded by the Recovery Act.
- (3) **Prohibition on Use of Funds**  
None of the funds provided under this agreement derived from the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, may be used for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.
- (4) **Wage Rates**  
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 American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 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. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan numbered 14 of 1950 (64 Stat. 1267, 5 U.S.C. App.) and section 3145 of title 40 United States Code. See April 2, 2009 Attachment 4 <http://www.dol.gov/esa/whd/contracts/dbra.htm>.
- (5) **Publication**  
Information about this agreement will be published on the Internet and linked to the website [www.recovery.gov](http://www.recovery.gov), maintained by the Accountability and Transparency Board (the Board). The Board may exclude posting contractual or other information on the website on a case-by-case basis when necessary to protect national security or to protect information that is not subject to disclosure under sections 552 and 552a of title 5, United States Code.
- (6) **Registration requirements**  
Contractor shall ensure that all first-tier subcontractors have a DUNS number and are registered in the Central Contractor Registration (CCR) no later than the date the first report is due.
- (7) **Utilization of Small Business**  
Contractor shall to the maximum extent practicable give a preference to small business in the award of subcontracts for projects funded by Recovery Act dollars.

(End of clause)

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## **8. Part 25 INTERGOVERNMENTAL CONTRACTS**

- Instructions to COs: When IGCs are awarded to other governmental entities with appropriated funds, incorporate the Recovery Act clauses, as appropriate. Include the clauses at time of award, or for existing awards, insert the clauses when the award is modified to add appropriated funds.

**ADD** this paragraph to the clause listing in BPI subpart 25.1.1(b).

(10) Awards made to State and local governments, and Tribes, under the American Reinvestment and Recovery Act Recovery Act (ARRA), shall include the following clauses as appropriate:

- (a) If the award is funded with agency increased borrowing authority attributed to ARRA, insert Clause 4-48, American Recovery and Reinvestment Act–Reporting Requirements–Projects Using Increased Borrowing Authority Attributed to ARRA.
- (b) If the award is funded with ARRA appropriations, insert Clause 4-49, American Recovery and Reinvestment Act Reporting Requirements–Appropriated Funds.
- (c) If the award is funded with ARRA appropriations, insert Clause 14-49, Recovery Act Special Terms and Conditions.