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Title 7 – Agriculture

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Chapter XVII – Rural Utilities Service, Department of Agriculture

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Appendix A to Part 1787

Product Procurement

PART 1787—THE “BUY AMERICAN” REQUIREMENT

Authority: 7 U.S.C. 903.

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§ 1787.1 General.

- (a) The “Buy American” provision of the Rural Electrification Act of 1936 (RE Act) requires, to the extent practicable and the cost of which is not unreasonable, that RUS Borrowers use loan funds only for such manufactured articles, materials, and supplies as have been manufactured in the United States or in any eligible country, substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States or any eligible country.
- (b) Each RUS Borrower is responsible for assuring that its use of loan funds complies with this requirement, and that the contracts it enters into for construction, materials and equipment, and purchases with vendors contain the Buy American requirement, along with certification as to compliance, made through RUS Form 213.

§ 1787.2 Definitions.

For purpose of this part, the following terms have the following meanings:

Administrator. The Administrator of the RUS, or his/her designee.

Buy American. A provision of the RE Act requiring that loan funds only be used to purchase products made in the U.S. or an eligible country.

Component. Any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

Domestic product. A product or like product which both:

- (1) Is manufactured in the United States or in any eligible country; and
- (2) Contains components manufactured in the United States or in any eligible country consisting of more than 50 percent of the total cost of all components used in the product.

Eligible country. Any country that the United States Trade Representative determines as having corporations located therein, as eligible to enter into contract with an RUS Borrower, under which loan funds will be provided for unmanufactured and manufactured goods.

Loan funds. Funds provided under an RUS direct or guaranteed loan.

Manufactured. The application of processes to alter the form or function of materials or of elements of the product such that value is added or the materials or elements are transformed into a new end product functionally different from that which would result from mere assembly of the materials or elements.

Nondomestic bid. An offer to sell a nondomestic product to an RUS borrower.

Nondomestic product. Any product other than a domestic product or product from an eligible country.

Product. An item of manufactured material or assembled components, which is complete and capable of performing an intended practical purpose.

RE Act. Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*).

RUS. The Rural Utilities Service.

RUS Borrower. Any organization that has an outstanding RUS loan made or guaranteed by RUS pursuant to the RE Act.

Telecommunications. Any communication service for the transmission or reception of voice, data, sounds, signals, pictures, writings, or signs of all kinds, by wire, fiber, radio, light, or other visual or electromagnetic means, including all telephone lines, facilities, or systems used in the rendition of such service; but shall not be deemed to mean message telegram service or community antenna television system services or broadcasting facilities other than those intended exclusively for educational purposes, or radio broadcasting services or facilities within the meaning of section 3(o) of the Communications Act of 1934, as amended.

Unmanufactured. With respect to articles, materials, or supplies, refers to such goods that have not been manufactured.

§ 1787.3 Products constituting a portion of a purchase order or contract.

Where a supplier or contractor offers or furnishes several products under a purchase order or contract, the provisions of this part apply to each product individually.

§ 1787.4 Unmanufactured articles, materials, and supplies.

The Buy American requirement also applies to unmanufactured articles, materials, and supplies to be financed with RUS loan funds, and will be considered domestic if mined or produced in the United States or in an eligible country.

§ 1787.5 Eligible countries.

The United State Trade Representative (USTR) determines what countries are eligible countries with respect to purchases made by electric borrowers or telecommunications borrowers. A particular country may be determined to be an eligible country for purchases made by telecommunications borrowers, for electric borrowers, or both. RUS maintains the latest FEDERAL REGISTER notice on its website which sets out the list of Eligible Countries for each RUS program at https://www.rd.usda.gov/files/UEP_Engineering_EligibleCountries.pdf.

§ 1787.6 Nondomestic products.

A product is considered to be nondomestic for the purpose of compliance with the “Buy American” requirement if:

- (a) The product is manufactured outside the United States or any eligible country; or
- (b) The product is manufactured in the United States or in any eligible country, but the cost of nondomestic components used therein constitutes 50 percent or more of the cost of all components. The cost of components shall be determined on a comparable basis, so that only the cost of domestic and nondomestic components, up to the point where they are combined and manufactured into a complete product shall be considered.
 - (1) The determination of the cost of the nondomestic components of a product shall include:
 - (i) The price paid to the nondomestic source;
 - (ii) The cost of shipment to the port of entry into the United States;
 - (iii) Applicable tariffs or duties;
 - (iv) The cost of transportation from the port of entry to the distributor's plant or warehouse; and
 - (v) Profit, overhead, and commissions of domestic and nondomestic suppliers and subcontractors of the components.
 - (2) The following items shall not be considered in determining the cost of components, although they are proper elements in the determination of the final selling price of the product:
 - (i) Fabrication or processing costs, if any, of nondomestic or domestic components at the assembly plant, or any other place of fabrication in the United States or any eligible country;
 - (ii) Testing costs at the assembly plant or at the installation site;
 - (iii) Direct profit, overhead, and commissions of the domestic distributor; and
 - (iv) Cost of transportation from the domestic assembly point to the installation site.

§ 1787.7 Components.

Where a component is manufactured only determines whether the component is classified as domestic or nondomestic even if all the materials and subcomponents comprising the component are manufactured in ineligible countries. A component manufactured in the United States or in an eligible country shall be considered domestic when determining whether a product is classified as domestic or nondomestic. A component manufactured in an ineligible country shall be considered nondomestic.

§ 1787.8 Purchase of nondomestic products.

An RUS Borrower may only use loan funds to purchase a nondomestic product if a waiver pursuant to § 1787.10 has been received by the Administrator before entering into a contract with the vendor. Should the Administrator deny the waiver request, the RUS Borrower must use its own funds for the expenditure.

§ 1787.9 Waivers.

Under limited circumstances the Administrator may waive the Buy American requirement with respect to a specific contract entered into between an RUS Borrower and a third party which will be paid for with loan funds, subject to §§ 1787.10 through 1787.14.

§ 1787.10 Applications for specific waivers.

RUS borrowers may request a specific waiver of the Buy American requirement through a written, detailed explanation showing that:

- (a) The cost between the nondomestic product and domestic product is unreasonable;
- (b) There is a non-availability of domestic products; or
- (c) It is not in the public interest or impractical for the RUS Borrower to purchase a domestic product.

§ 1787.11 Cost differential.

By application pursuant to § 1787.10, the Administrator may waive the Buy American requirement if the cost of the domestic product is unreasonable. Given that RUS loans terms normally range from 20 to 35 years, and that additional costs will be magnified with interest over these terms, the Administrator has determined that if the lowest bid or offered price is a nondomestic bid that is at least 6percent lower than the next lowest bid or offered price, the RUS Borrower may request a cost differential waiver. With respect to contracts that are not required to be bid, prices of market-available, domestic products must be used for comparison in a request for waiver.

§ 1787.12 Non-availability or shortages.

By application pursuant to § 1787.10, the Administrator may waive the Buy American requirement upon a showing that there is no domestic product available in the market in sufficient and reasonable quantities and of satisfactory quality, and that such shortage of suitable domestic alternatives jeopardizes the project being completed on budget and/or according to scheduled planning. A lack of responsive and responsible bids to a well-publicized request for bids will be presumed to meet the conditions of a non-availability waiver. With respect to contracts that are not required to be bid, sufficient evidence must be presented to the Administrator in order to make a determination.

§ 1787.13 Public interest or impracticality.

- (a) By application pursuant to § 1787.10, the Administrator may waive the Buy American requirement upon a showing that application of the requirement would be inconsistent with the public interest or impractical for the RUS Borrower. With respect to impracticality, an RUS Borrower may request a waiver upon a showing that the domestic product is incompatible or impractical to integrate with existing, significant capital infrastructure or existing, critical software already in use. Notwithstanding, the burden shall rest with the RUS Borrower to present how the use of the domestic product would create a hardship or negatively impact its project.
- (b) With respect to contracts that were approved by RUS based on a bidder or offer that originally certified compliance with the Buy America requirements, but which can no longer comply with such certification, the Administrator may grant an impracticality waiver based on a showing that the original certification was made in good faith and that the product cannot now be obtained domestically due to commercial impossibility or impracticability, or without undue hardship or a negative impact to the project.
- (c) In determining whether to issue any public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general waiver has already been issued by the Administrator with respect to the product.

§ 1787.14 General waivers.

- (a) The Administrator may issue a general waiver for all RUS Borrowers for a determinate period, if the Administrator finds that such manufactured or unmanufactured goods are in shortage regionally or nationally, so as to avoid the administrative burden of issuing individual, specific waivers.
- (b) The Administrator has determined that it is in the best interest of RUS to issue a permanent general public interest waiver from the Buy America requirements for “small purchases,” which shall be published in the FEDERAL REGISTER for each program under the RE Act and amended as needed from time to time. In carrying out this exception, however, the Administrator shall ensure that contracts are not artificially fragmented.

Appendix A to Part 1787—Product Procurement

This appendix shows an example of how the 6 percent differential is applied to determine award of a bid. In response to a request for bids for a digital central office a borrower receives four responsive bids to the specification, three domestic bids and one nondomestic bid. The nondomestic bid is the apparent low bid. We will consider in our analysis the nondomestic bid and the lowest domestic bid as shown in the following table.

	Nondomestic bid	Domestic bid
Total materials	\$895,000	\$920,000
Installation	155,000	177,000
Freight	+1,000	+1,500

	Nondomestic bid	Domestic bid
Total bid	\$1,051,000	\$1,098,500

Please note that once the product has been determined as nondomestic, the 6 percent cost differential shall be applied to all the material content in the nondomestic bid, even if the nondomestic product includes domestic components.

In this example, 6 percent of the total material content in the nondomestic bid (\$895,000) equals \$53,700. This cost differential is added to the total nondomestic bid as shown in the following table.

Total of the nondomestic bid	\$1,051,000
6% of the all material cost	+53,000
Total evaluated bid	\$1,104,700

This total evaluated bid, (that is the nondomestic bid plus the 6% of the cost of its material content), is compared with all the domestic bids for award of the bid. In our example the domestic bid (\$1,098,500) is lower than the nondomestic evaluated bid (\$1,104,700).

The domestic bid becomes the low bid and the domestic bidder gets award of the bid. This product is classified as domestic since the cost of the domestic components used in the product constitutes more than 50 percent of the cost of all the components used.

