

*Advisory prepared for the Ministry of Industry, Trade and Labor
of the Government of Israel
June 2009*

Participation of Israeli Companies In Tenders Under the Recovery Act

On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 (available on www.recovery.gov). The law is more commonly known as the “Recovery Act.” The \$787 billion act is intended to provide a stimulus to the U.S. economy in the wake of the current economic downturn.

Recovery Act’s “Buy American” Provision Respects Existing International Agreements

As part of the Recovery Act, state and federal agencies will be purchasing goods and services for various projects. Included in the Recovery Act is a “Buy American” provision which generally requires steel, iron and manufactured goods used in public works projects funded by the act to be produced in the United States. However, the “Buy American” provision unequivocally states that this domestic preference must be “applied in a manner consistent with United States obligations under international agreements.”

For Israeli companies, the relevant international agreements guaranteeing access to the U.S. procurement market are the Israel - U.S. Free Trade Agreement (FTA), and the World Trade Organization’s Government Procurement Agreement (GPA), which Israel and the United States have joined. Because of these international agreements, Israeli companies are to be treated like U.S. companies when competing on certain federal and state government procurement contracts.

Federal Government Guidance on Implementing the Recovery Act

To clarify how the “Buy American” provision in the Recovery Act will be implemented, the federal government issued two implementation documents: a binding rule and guidance to assist state government agencies.

On March 31, 2009 a rule was issued to implement the “Buy American” restrictions for public works contracts awarded by federal agencies using stimulus funds. Among other things, the rule defines the term “manufactured goods” and provides country-of-origin rules.

Under the rule, the Act’s preference for U.S.-made “manufactured goods” is narrowly applied, to extend only to construction materials which will be used “for construction, alteration, maintenance, or repair of a public building or public work.” Thus, products used outside of construction, such as computer software and telecommunications equipment, typically will not be covered by the Recovery Act’s “Buy American” provision. And even if such items *are* used on construction projects funded by the Recovery Act, under the rule generally those items need not be U.S.-made if those items are merely *components* of materials provided under the contract.

For those construction materials that *are* covered by the “Buy American” provision, to determine country of origin (*i.e.*, whether the materials are “Made in America” or in a designated country), the “substantial transformation” test will be applied. Goods that have been “substantially transformed” in a designated country -- such as Israel -- may be purchased (subject to the conditions described below). For a foreign “manufactured good” to qualify as Israeli and benefit from the GPA’s protections, Israel must have been the last country where the “manufactured good” was substantially transformed. This is the same test applied under the Israel - U.S. FTA, and it does not create a new burden for Israeli manufacturers.

Guidance for States: Honor U.S. Commitments to Free Trade in Procurement

On April 23, 2009, guidance was issued by the federal government to ensure that state agencies award contracts funded by the Act consistently with the Recovery Act’s “Buy American” provision. Under the guidance, as with the rule that applies to federal agencies, the “substantial transformation” test will be applied in order to determine the country of origin of Israeli “manufactured goods.”

Given the trade protections of the Act and its implementing regulations (and subject to the conditions described below), local, state, and federal officials undertaking projects under the Recovery Act may look to Israeli companies for goods and services. Although some state and local officials have tried to exclude foreign vendors from Recovery Act procurements, that is not the law: under U.S. law, and agreements that the federal government and the great majority of states have signed, procurement markets in the United States should be open and non-discriminatory.

Those open markets apply, *first*, when the federal agency in question is covered by the GPA. For a list of those agencies, see Annex 1 to this document, which also can be found at http://www.wto.org/english/tratop_e/gproc_e/usa1.doc

Second, these free trade commitments apply when the government procurement is above the minimum dollar threshold in the GPA. Under the GPA, the dollar threshold is currently set at \$194,000 for goods and services, and \$7.4 million for construction. (For federal government procurements of supplies between \$50,000 and \$194,000, special protections for Israeli companies under the Israel - U.S. FTA may apply.)

Third, Israeli (and certain other foreign) companies may also be protected in state procurements, at least in the 37 states that have agreed to join the GPA (not including local governments). To see a list of the states covered by the GPA, see Annex 2 to this memorandum, which also can be found at http://www.wto.org/english/tratop_e/gproc_e/usa2.doc. Note that states that have not agreed to be bound by the GPA need not comply with the federal government’s guidance on nondiscrimination, though even then an Israeli exporter facing possible discrimination may be able to seek a waiver of the Buy American requirements (discussed below).

Fourth, even if the state is covered by the GPA, the relevant state agency or procurement may not be covered. To see which state agencies and procurements are covered by the GPA, see

Annex 2, which also can be found at http://www.wto.org/english/tratop_e/gproc_e/usa2.doc, and the implementing guidance available at 74 Federal Register 18449, 18457 (Apr. 23, 2009) (<http://www.gpoaccess.gov/fr/>). The free trade requirements also extend to certain special entities, such as the Tennessee Valley Authority, listed in Annex 3 to the GPA, attached to this memorandum and available at http://www.wto.org/english/tratop_e/gproc_e/usa3.doc

A final note, if none of the existing international agreements protect an Israeli exporter: as the discussion above reflects, the free trade protections under the Recovery Act are broad, but not without gaps. An Israeli company bidding on a contract covered by the Recovery Act may request a waiver of the “Buy American” provision. A waiver may be granted on three grounds: unreasonable cost, general unavailability of the item in the United States, or the public interest. For more on the waiver process, see the guidance available on www.recovery.gov, and the Buy American provisions included in the solicitation documents. Again, however, we should emphasize that the Recovery Act already recognizes agencies’ right to buy foreign goods and services, including goods and services from Israel, under standing international free trade agreement. A waiver will be necessary, therefore, only in those cases where the general rule of open procurement markets does not apply.

This advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.

*For further information, please feel free to contact Lawrence Schneider at Arnold & Porter LLP, 555 Twelfth Street, N.W., Washington, D.C. 20004
lawrence.schneider@aporter.com tel. +1 202 942 5694*

Annex 1

*U.S. Central Government Entities Which Procure in Accordance
With the Provisions of the Government Procurement Agreement*

UNITED STATES

(Authentic in the English language only)

ANNEX 1

*Central Government Entities which Procure in Accordance
With the Provisions of this Agreement*

Threshold: 130,000 SDRs for supplies and services
5 million SDRs for construction

List of Entities:

1. Department of Agriculture (not including procurement of agricultural products made in furtherance of agricultural support programmes or human feeding programmes)
2. Department of Commerce (not including shipbuilding activities of NOAA, as excluded in Annex 4)
3. Department of Education
4. Department of Health and Human Services
5. Department of Housing and Urban Development
6. Department of the Interior (including the Bureau of Reclamation)
7. Department of Justice
8. Department of Labor
9. Department of State
10. United States Agency for International Development (not including procurement for the direct purpose of providing foreign assistance)
11. Department of the Treasury
12. Department of Transportation (not including procurement by the Federal Aviation Administration, and pursuant to Article XXIII)
13. Department of Energy (pursuant to Article XXIII, national security exceptions include procurements made in support of safeguarding nuclear materials or technology and entered into under the authority of the Atomic Energy Act, and oil purchases related to the Strategic Petroleum Reserve)
14. General Services Administration (except Federal Supply Groups 51 and 52 and Federal Supply Class 7340)
15. National Aeronautics and Space Administration
16. The Department of Veterans Affairs
17. Environmental Protection Agency
18. National Science Foundation
19. Executive Office of the President
20. Farm Credit Administration
21. National Credit Union Administration

22. Merit Systems Protection Board
23. The Corporation for National and Community Service
24. Office of Thrift Supervision
25. Federal Housing Finance Board
26. National Labor Relations Board
27. National Mediation Board
28. Railroad Retirement Board
29. American Battle Monuments Commission
30. Federal Communications Commission
31. Federal Trade Commission
32. Securities and Exchange Commission
33. Office of Personnel Management
34. United States International Trade Commission
35. Export-Import Bank of the United States
36. Federal Mediation and Conciliation Service
37. Selective Service System
38. Smithsonian Institution
39. Federal Deposit Insurance Corporation
40. Consumer Product Safety Commission
41. Equal Employment Opportunity Commission
42. Federal Maritime Commission
43. National Transportation Safety Board
44. Nuclear Regulatory Commission
45. Overseas Private Investment Corporation
46. Broadcasting Board of Governors
47. Commission on Civil Rights
48. Commodity Futures Trading Commission
49. Peace Corps
50. National Archives and Records Administration
51. Advisory Commission on Intergovernmental Relations
52. African Development Foundation
53. Alaska Natural Gas Transportation System
54. Appalachian Regional Commission
55. Commission of Fine Arts
56. Delaware River Basin Commission
57. Federal Election Commission
58. Department of Homeland Security (except procurement by the Transportation Security Administration, and the national security considerations applicable to the Department of Defense are equally applicable to the U.S. Coast Guard)
59. Federal Home Loan Mortgage Corporation
60. Federal Mine Safety and Health Review Commission
61. Federal Reserve System
62. Federal Retirement Thrift Investment Board
63. Holocaust Memorial Council
64. Inter-American Foundation
65. National Capital Planning Commission
66. National Commission on Libraries and Information Science
67. National Council on Disability

68. National Foundation on the Arts and the Humanities
69. Occupational Safety and Health Review Commission
70. Office of Government Ethics
71. Office of the Nuclear Waste Negotiator
72. Office of Special Counsel
73. Small Business Administration
74. Susquehanna River Basin Commission
75. Federal Crop Insurance Corporation
76. Federal Prison Industries, Inc.
77. Government National Mortgage Association
78. Uranium Enrichment Corporation
79. Department of Defense, including the Corps of Army Engineers

This Agreement will not apply to the following purchases of the Department of Defense:

- (a) Federal Supply Classification (FSC) 83 - all elements of this classification other than pins, needles, sewing kits, flagstuffs, flagpoles, and flagstaff trucks;
- (b) FSC 84 - all elements other than sub-class 8460 (luggage);
- (c) FSC 89 - all elements other than sub-class 8975 (tobacco products);
- (d) FSC 2310 - (buses only);
- (e) Speciality metals, defined as steels melted in steel manufacturing facilities located in the United States or its possessions, where the maximum alloy content exceeds one or more of the following limits, must be used in products purchased by DOD: (1) manganese, 1.65 per cent; silicon, 0.60 per cent; or copper, 0.06 per cent; or which contains more than 0.25 per cent of any of the following elements: aluminium, chromium, cobalt, columbium, olybdenum, nickel, titanium, tungsten, or vanadium; (2) metal alloys consisting of nickel, iron-nickel and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 per cent; (3) titanium and titanium alloys; or (4) zirconium base alloys;
- (f) FSC 19 and 20 - that part of these classifications defined as naval vessels or major components of the hull or superstructure thereof;
- (g) FSC 51 and 52;
- (h) Following FSC categories are not generally covered due to application of Article XXIII, paragraph 1: 10, 12, 13, 14, 15, 16, 17, 19, 20, 28, 31, 58, 59, 95.

This Agreement will generally apply to purchases of the following FSC categories subject to United States Government determinations under the provisions of Article XXIII, paragraph 1.

FSC	22	Railway Equipment
	23	Motor Vehicles, Trailers, and Cycles (except buses in 2310)
	24	Tractors
	25	Vehicular Equipment Components
	26	Tyres and Tubes
	29	Engine Accessories
	30	Mechanical Power Transmission Equipment
	32	Woodworking Machinery and Equipment
	34	Metalworking Machinery
	35	Service and Trade Equipment
	36	Special Industry Machinery
	37	Agricultural Machinery and Equipment
	38	Construction, Mining, Excavating, and Highway Maintenance Equipment
	39	Materials Handling Equipment
	40	Rope, Cable, Chain and Fittings
	41	Refrigeration and Air Conditioning Equipment
	42	Fire Fighting, Rescue and Safety Equipment
	43	Pumps and Compressors
	44	Furnace, Steam Plant, Drying Equipment and Nuclear Reactors
	45	Plumbing, Heating and Sanitation Equipment
	46	Water Purification and Sewage Treatment Equipment
	47	Pipe, Tubing, Hose and Fittings
	48	Valves
	49	Maintenance and Repair Shop Equipment
	53	Hardware and Abrasives
	54	Prefabricated Structures and Scaffolding
	55	Lumber, Millwork, Plywood and Veneer
	56	Construction and Building Materials
	61	Electric Wire, and Power and Distribution Equipment
	62	Lighting Fixtures and Lamps
	63	Alarm and Signal Systems
	65	Medical, Dental, and Veterinary Equipment and Supplies
	66	Instruments and Laboratory Equipment
	67	Photographic Equipment
	68	Chemicals and Chemical Products
	69	Training Aids and Devices
	70	General Purpose ADPE, Software, Supplies and Support Equipment
	71	Furniture
	72	Household and Commercial Furnishings and Appliances
	73	Food Preparation and Serving Equipment
	74	Office Machines, Visible Record Equipment and ADP Equipment
	75	Office Supplies and Devices
	76	Books, Maps and Other Publications
	77	Musical Instruments, Phonographs, and Home Type Radios

78	Recreational and Athletic Equipment
79	Cleaning Equipment and Supplies
80	Brushes, Paints, Sealers and Adhesives
81	Containers, Packaging and Packing Supplies
85	Toiletries
87	Agricultural Supplies
88	Live Animals
91	Fuels, Lubricants, Oils and Waxes
93	Non-metallic Fabricated Materials
94	Non-metallic Crude Materials
96	Ores, Minerals and their Primary Products
99	Miscellaneous

Note to Annex 1

The conditions specified in the General Notes apply to this Annex.

Annex 2

*U.S. Sub-Central Government Entities Which Procure in Accordance
With the Provisions of the Government Procurement Agreement*

ANNEX 2

*Sub-Central Government Entities which Procure in Accordance
With the Provisions of this Agreement*

Threshold: 355,000 SDRs for supplies and services
5 million SDRs for construction

List of Entities:

Arizona

Executive branch agencies

Arkansas

Executive branch agencies, including universities but excluding the Office of Fish and Game and construction services

California

Executive branch agencies

Colorado

Executive branch agencies

Connecticut

Department of Administrative Services
Connecticut Department of Transportation
Connecticut Department of Public Works
Constituent Units of Higher Education

Delaware*

Administrative Services (Central Procurement Agency)
State Universities
State Colleges

Florida*

Executive branch agencies

Hawaii

Department of Accounting and General Services (with the exception of procurements of software developed in the state and construction)

Idaho

Central Procurement Agency (including all colleges and universities subject to central purchasing oversight)

Illinois*

Department of Central Management Services

Iowa*

Department of General Services

Department of Transportation

Board of Regents' Institutions (universities)

Kansas

Executive branch agencies, excluding construction services, automobiles and aircraft

Kentucky

Division of Purchases, Finance and Administration Cabinet, excluding construction projects

Louisiana

Executive branch agencies

Maine*

Department of Administrative and Financial Services

Bureau of General Services (covering state government agencies
and school construction)

Maine Department of Transportation

Maryland*

Office of the Treasury

Department of the Environment

Department of General Services

Department of Housing and Community Development

Department of Human Resources

Department of Licensing and Regulation

Department of Natural Resources

Department of Public Safety and Correctional Services

Department of Personnel

Department of Transportation

Massachusetts

Executive Office for Administration and Finance
Executive Office of Communities and Development
Executive Office of Consumer Affairs
Executive Office of Economic Affairs
Executive Office of Education
Executive Office of Elder Affairs
Executive Office of Environmental Affairs
Executive Office of Health and Human Service
Executive Office of Labor
Executive Office of Public Safety
Executive Office of Transportation and Construction

Michigan*

Department of Management and Budget

Minnesota

Executive branch agencies

Mississippi

Department of Finance and Administration (does not include services)

Missouri

Office of Administration
Division of Purchasing and Materials Management

Montana

Executive branch agencies (only for services and construction)

New York*

State agencies
State university system
Public authorities and public benefit corporations, with the exception of those entities with multi-state mandates

In addition to the exceptions noted at the end of this annex, transit cars, buses and related equipment are not covered.

Nebraska

Central Procurement Agency

New Hampshire*

Central Procurement Agency

Oklahoma*

Department of Central Services and all state agencies and departments subject to the Oklahoma Central Purchasing Act, excluding construction services.

Oregon

Department of Administrative Services

Pennsylvania*

Executive branch agencies, including:

Governor's Office
Department of the Auditor General
Treasury Department
Department of Agriculture
Department of Banking
Pennsylvania Securities Commission
Department of Health
Department of Transportation
Insurance Department
Department of Aging
Department of Correction
Department of Labor and Industry
Department of Military Affairs
Office of Attorney General
Department of General Services
Department of Education
Public Utility Commission
Department of Revenue
Department of State
Pennsylvania State Police
Department of Public Welfare
Fish Commission
Game Commission
Department of Commerce
Board of Probation and Parole
Liquor Control Board
Milk Marketing Board
Lieutenant Governor's Office
Department of Community Affairs
Pennsylvania Historical and Museum Commission
Pennsylvania Emergency Management Agency
State Civil Service Commission

Pennsylvania Public Television Network
Department of Environmental Resources
State Tax Equalization Board
Department of Public Welfare
State Employees' Retirement System
Pennsylvania Municipal Retirement Board
Public School Employees' Retirement System
Pennsylvania Crime Commission
Executive Offices

Rhode Island

Executive branch agencies, excluding boats, automobiles, buses and related equipment

South Dakota

Central Procuring Agency (including universities and penal institutions)

In addition to the exceptions noted at the end of this annex, procurements of beef are not covered.

Tennessee

Executive branch agencies (excluding services and construction)

Texas

Texas Building and Procurement Commission

Utah

Executive branch agencies

Vermont

Executive branch agencies

Washington

Washington State executive branch agencies, including:

General Administration
Department of Transportation
State Universities

In addition to the exceptions noted at the end of this annex, procurements of fuel, paper products, boats, ships and vessels are not covered.

Wisconsin

Executive branch agencies, including

Department of Administration
State Correctional Institutions
Department of Development
Educational Communications Board
Department of Employment Relations
State Historical Society
Department of Health and Social Services
Insurance Commissioner
Department of Justice
Lottery Board
Department of Natural Resources
Administration for Public Instruction
Racing Board
Department of Revenue
State Fair Park Board
Department of Transportation
State University System

Wyoming*

Procurement Services Division
Wyoming Department of Transportation
University of Wyoming

Notes to Annex 2

In addition to the conditions specified in the General Notes, the following conditions apply:

1. For those states marked by an asterisk with pre-existing restrictions, the Agreement does not apply to procurement of construction-grade steel (including requirements on subcontracts), motor vehicles and coal.
2. The Agreement shall not apply to preferences or restrictions associated with programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women.
3. Nothing in this annex shall be construed to prevent any state entity from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade.
4. The Agreement shall not apply to any procurement made by a covered entity on behalf of non-covered entities at a different level of government.
5. The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects.

ANNEX 3

*All Other Entities Which Procure in Accordance
With the Provisions of the Government Procurement Agreement*

ANNEX 3

*All Other Entities which Procure in Accordance
With the Provisions of this Agreement*

Threshold: 400,000 SDRs for supplies and services (except as specified below)
5 million SDRs for construction

List of Entities:

The following entities at the SDR equivalent of \$250,000 for supplies and services:

Tennessee Valley Authority

Power Marketing Administrations of the Department of Energy

- Bonneville Power Administration
- Western Area Power Administration
- Southeastern Power Administration
- Southwestern Power Administration
- St. Lawrence Seaway Development Corporation

The following entities are 400,000 SDRs for supplies and services:

The Port Authority of New York and New Jersey with the following exceptions:

- Maintenance, repair and operating materials and supplies (e.g., hardware, tools, lamps/lighting, plumbing);
- In exceptional cases, individual procurements may require certain regional production of goods if authorized by the Board of Directors;
- Procurements pursuant to multi-jurisdictional agreement (i.e., for contracts which have initially been awarded by other jurisdictions).

The Port of Baltimore (subject to the conditions specified for the state of New York in Annex 2)

The New York Power Authority (subject to the conditions specified for the state of New York in Annex 2)

Rural Utilities Service Financing:

- (1) waiver of Buy American restriction on financing for all power generation projects (restrictions on financing for telecommunication projects are excluded from the Agreement);

(2) application of Code-equivalent procurement procedures and national treatment to funded projects exceeding the thresholds specified above.

Notes to Annex 3

1. With respect to these entities, the Agreement shall not apply to restrictions attached to Federal funds for airport projects.
2. The conditions specified in the General Notes apply to this Annex.