



# Buy America Utilities Outreach Webinar

**Utility Industry Session**

**December 11, 2013  
2:00 – 4:00pm Eastern**





# Agenda



## **FHWA Welcome:**

Butch Waidelich, Associate Administrator, Office of Infrastructure

## **Overview of Buy America Requirements:**

Jerry Yakowenko, Contract Administration

## **Reply to Identified Questions and Issues:**

Ken Leuderalbert, VE and Utilities Program Manager

Edwin Okonkwo, Buy America Program Manager

Michael Harkins, Office of Chief Counsel

Jerry Yakowenko, Team Leader, Contract Administration

## **State Perspectives: Buy America/Utilities Challenges:**

Caltrans: Gary, Gutierrez, Project Manager, Buy America Task Force

New Mexico DOT: Shawn Chafins, Utility Manager

## **Question and Answer Session**





# *Housekeeping*



- **Webinar session is being recorded.**
- **Participant phone lines will be muted during presentation.**
- **Please also mute computer speakers.**
- **Questions may be posted in chat pod at any time.**
- **Time allotted for questions at end of webinar.**






# **Buy America**

***(An excerpt from FHWA's Statutory Requirements -  
originally from Section 165 of the Transportation  
Assistance Act of 1982)***

## **23 USC 313(a):**

***“Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.”***





# ***FHWA's Buy America Regulatory Requirements***

- **IRON & STEEL only**
  - all manufacturing processes must take place domestically
  - includes the application of a coating on these materials
- **Minimal use, the greater of, 0.1% of the contract value or \$2,500**
- **Waivers may be requested if:**
  - Applying requirements would be inconsistent with the public interest; or
  - Domestically produced steel and iron are not produced in sufficient and reasonably available quantities which are of a satisfactory quality



# FHWA Buy America Waiver Process

- State DOT identifies need for a waiver
- FHWA Division Office Review
- FHWA-HQ Review
- Posting of potential waiver notice on website
- Publication in Federal Register

## Request

Action: Notice, request for comments.

Web posting date: 07/25/2011

Federal Register Notice of Finding Publication Date: 02/07/12

Effective Date of Federal Register: 02/08/12

Close of public comment period: 02/23/12

**Summary:** The Federal Highway Administration (FHWA) is seeking comments on whether a waiver of the Buy America requirements of 23 CFR 635.410 should be granted to permit the use of non-domestic 8'-0" high oxidized stainless steel cable net in the state of New York City DDC.

FHWA will only consider a Buy America waiver when the conditions of 23 CFR 635.410( c) have been met: (1) when the application of the provision would be inconsistent with the public interest; or (2) when steel and iron products are not produced in the United States in sufficient and reasonably available quantities, which are of a satisfactory quality.

The FHWA will consider all comments received in the initial 15-day comment period during our evaluation of the waiver request. Comments received after this period, but before notice of our finding is published in the Federal Register, will be considered to the extent practical. Follow-up coordination on the comments received may result in a delay in the publication of our waiver finding in the Federal Register. Comments received during the 15-day comment period after notice of our finding is published in the Federal Register will be reviewed, but the finding will continue to remain valid. Comments received during the comment period after the effective date of the finding will be reviewed, and may influence the FHWA's decision to terminate or modify a finding.

New York City DDC Contact: Ali Mallick, [MallickA@ddc.nyc.gov](mailto:MallickA@ddc.nyc.gov), (718)-391-1463

## Comments

[Mouhamad A. Naboulsi](#) 07/25/2011

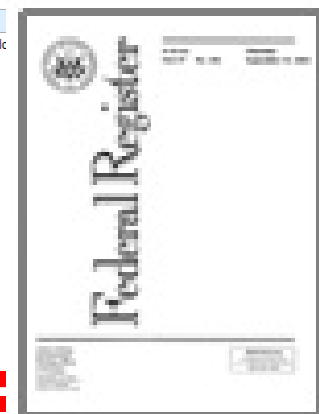
I prefer that we buy only American and preferably, not from a multinational company. The steel industry have suffered enough and need to maintain a viable working industry for emergencies. Even if it cost more.

This is nothing against other countries or their products. It is about us taking care of us first.

Best regards.

[Dennis Dalton](#) 07/25/2011

I also prefer to use solely USA sources for the HSR. The intent is to stimulate dc



# FHWA's Buy America Regulatory Requirements

23 CFR 635.410 (November 25, 1983)

**All manufacturing processes for steel and iron materials must take place in the US**



**Expansion of the Federal-aid program . . .  
1991, 1998, 2012**

**Transportation Enhancements**

**CMAQ**

**Transportation Alternatives**






# **MAP-21 S. 1518**

## **SEC. 1518. BUY AMERICA PROVISIONS.**

**Section 313 of title 23, United States Code, is amended by adding at the end the following:**


**“(g) Application to Highway Programs.--The requirements under this section shall apply to all contracts eligible for assistance under this chapter for a project carried out within the scope of the applicable finding, determination, or decision under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this title.”**







## ***Section 1518 – A Closer Look***


- **“shall apply to all contracts eligible for assistance”**
    - Coverage includes construction contracts, utility and railroad contracts.
    - “eligible” includes Federally funded and non-federally funded;
  - **“if at least 1 contract for the project” is Title 23-funded**
    - Federalization occurs with the obligation of funds for any purpose (preliminary engineering, utility relocation, right-of-way acquisition, construction, etc.)
- 

***Example: Application of Buy America requirements to all contracts eligible for assistance within the scope of a NEPA document'***





## ***S. 1518 Guidance***


- **12/20/2012 letter to AASHTO**
  - **MAP-21 S. 1518 Q&As**
  - **Utility / BA Q&As**
  - **July 11, 2013 memo Extension of the MAP-21 S. 1518 requirements for non-Federally funded utility relocations**
- 




## ***7/11/2013 memo: “Application of Buy America to Non FHWA-funded Utility Relocations”***

- Buy America applies to all contracts within the scope of the NEPA determination regardless of whether the contract uses FHWA funding.
- FHWA provided utilities through December 31, 2013 to meet the requirements.
- All work covered by utility agreements executed after 12/31/2013 will comply with the Buy America requirements.





## **12/21/2012 memo: “Clarification of Manufactured Products under Buy America”**

- **Requirements apply to structural steel or iron components of pavements, bridges, tunnels, etc.**
  
  - **Does not apply to manufactured products that are:**
    - **Not predominantly steel or iron (90% steel /iron content)**
    - **Miscellaneous steel or iron components:**
      - » *“The miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct the above components (or manufactured products that are not predominantly steel or iron) are not subject to Buy America coverage. Examples include, but are not limited to, cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, etc.”*
- 



# ***July 10, 2013 Federal Register Notice and Request for Comments***

***Request for Comments issued to gain a better understanding of implementation issues regarding:***

- ***February 9, 1994 nationwide waiver for selected ferry boat equipment;***
- ***March 24, 1995 nationwide waiver for pig iron, processed, pelletized and reduced iron ore;***
- ***November 25, 1983 general waiver for manufactured products;***
- ***Continuing need for the minimal use threshold***
- ***Standard to be applied to the acquisition of vehicles.***

***To view comments, visit:***


***<http://www.regulations.gov/#!docketDetail;D=FHWA-2013-0041>***.





# **Comparison of FHWA & FTA Buy America regulations**

	<b>FHWA</b>	<b>FTA</b>	<b>FRA</b>
<b>Source Law</b>	<b>23 USC 313 ISTEA, § 1041(a)</b>	<b>49 USC 5323(j)</b>	<b>49 U.S.C. § 24405(a); 49 U.S.C. § 24305(f) 41 U.S.C. § 8302</b>
<b>Regulation</b>	<b>23 CFR 635.410</b>	<b>49 CFR 661</b>	<b>-</b>
<b>Applicability</b>	<b>All Federal-aid projects</b>	<b>All FTA grantee purchases &gt; \$100,000</b>	<b>Applicable Programs</b>
<b>Coverage</b>	<b>Steel or iron materials permanently incorporated; all manufacturing</b>	<b>Steel, iron &amp; manufactured products and rolling stock (60% of cost of all components made in US)</b>	<b>Steel, iron, and manufactured goods</b>
<b>Applicability of MAP-21 Section 1518</b>	<b>Yes</b>	<b>No</b>	<b>No</b>



Construction Program Guide

Buy America

The FHWA's policy for Buy A

- a domestic manufacturing
- alternate bid provisions
- minimal usage criteria fo
- a waiver process based o

On Tuesday, February 12, 20 specific programs for coverag grants, which are subject to s

Authority/Legal Basis

1. Laws

- The [FHWA's statute](#)

2. Regulations

- [Title 23 C.F.R. 635.41](#) [stewardship, oversight](#) Manual for current FH

3. Rule Makings / Federal

- [November 25, 1983 F](#) policy.
- [July 21, 1993 Final R](#) a coating for steel or
- [February 9, 1994 Not](#) nation-wide waiver.
- [March 24, 1995 Notice](#) requirements for this nation-wide waiver.

4. Orders

- None

5. Policy

- The [FHWA Contract Administration Core Curriculum Manual](#) summarizes the FHWA's policies and provides general guidance for Buy America provisions.
- **Policy Memoranda**
  - [Headquarters memorandum dated December 21, 2012 provides a clarification of FHWA's position regarding the application of Buy America requirements to man products.](#) **NEW!**

Buy America Construction Program Guide Web Page

<http://www.fhwa.dot.gov/construction/cqit/buyam.cfm>

FHWA's Buy America Coordinator Edwin Okonkwo (202-366-1558)








# ***Buy America Definitions***

## **Project:**

The NEPA defined limits also referred to as logical termini. A project may be made up of several construction contracts or segments of a project. The project also includes all phases of work, environmental, Right of Way, Design, Utilities and construction.

## **Contract:**

A binding agreement between two or more persons or parties. For transportation purposes this includes an individual environmental, design, right of way, utility or construction agreement.






# ***Buy America Issue***

## **Question:**

How can I find out if a particular manufactured product must meet Buy America requirements?

## **Answer:**

State DOTs and FHWA Divisions must develop and follow a process for making and documenting Buy America decisions.





# *Buy America Issue*

## **Question:**

How will consistency in applying this law be handled?

## **Answer:**

MAP-21 defines 'what' must be done. State DOTs with Division approval determine 'how' they will meet the law.






# ***Buy America Issue***

## **Question:**

For FAHP funded projects, do Buy America requirements apply to utility work where State or Federal law does not allow the use of Title 23 funds to reimburse the utility for relocation costs?

## **Answer:**

No. When State or Federal law prohibits the use of Title 23 funds for utility relocation reimbursements, the utility work is federally ineligible (23 USC 123(a) and 23 USC 313(g)). Federally ineligible work is not subject to Buy America requirements.





# ***Buy America Issue***

## **Question:**

What if State Law allows for the payment of utility relocations, however, it is State Policy to not reimburse utility relocations. Does Buy America requirements apply?

## **Answer:**

Yes, Buy America requirements apply even in the case where it is State Policy to not pay for utility relocations.






# ***Buy America Issue***

## **Question:**

Our Local Agency wants to upgrade their utility line at the same time as a Federally funded project. Their utility does not have to be relocated as a result of the transportation improvement project. Do Buy America requirements apply if the local utility relocates or upgrades their utilities solely for their benefit?

## **Answer:**

No. Title 23 U.S.C. 123(a) allows Federal reimbursement to utilities only in the case where the relocation of the utility facility is required as a result of a transportation improvement. Therefore, if 'all' of the utility work is not required as a result of the project, the utility work is Federally ineligible and Buy America requirements do not apply.





# ***Buy America Issue***

## **Question:**

If a determination is made that the utility work is Federally ineligible does Buy America apply if the utility work is incorporated into a federally funded contract?

## **Answer:**

Yes. Buy America requirements apply to all materials within a Federally funded contract regardless of the funding source of individual pay items.





# *Buy America Issue*

## **Question:**

The July 11th letter has a 'reasonable period of time' date of December 31, 2013, after which BA applies to all projects regardless of funding. What date is used for this determination, Project Authorization or execution of agreement?

## **Answer:**

Execution of agreement







# ***Buy America Issue***

## **Question:**

What legal language needs to be added to utility agreements to address the new Buy America requirements? Is there sample or “model” language?

## **Answer:**

Use State standard Buy America specification language which states, contractor/utility is required to meet BA requirements and must retain records as proof.

FYI - Recommended language for certifications is in a non-regulatory supplement to 23 CFR 635.410

<http://www.fhwa.dot.gov/construction/contracts/0635dsup.cfm>






# *Buy America Issue*

## **Question:**

What are the expectations of the States with regard to inspection and oversight of the utilities to ensure that Buy America is met?

## **Answer:**

It is the State DOT's responsibility to ensure all contracts comply with Buy America requirements if any contract ( within the project) has or is planned to be funded with Federal funds. How the State DOT ensures compliance with Buy America is up to the State DOT.






# ***Buy America Issue***

## **Question:**

Does FHWA have a specific requirement for Buy America certifications?

## **Answer:**

FHWA's laws and regulations do not specifically require the use of a certification. FHWA expects the State DOTs to implement the appropriate material testing, documentation and acceptance procedures.





# *Buy America Issue*

## **Question:**

Does FHWA require a step-certification process?

## **Answer:**

The FHWA's non-regulatory guidance recommends, but does not require, the use of a step-certification process.

Each manufacturer provides a statement of Buy America compliance on each mill test report or material test report involved in the manufacturing process (from melting to fabrication), thereby generating "a chain of custody" documentation trail.






# *Buy America Issue*

## **Question:**

Will there be an allowance for materials with significantly long lead-times for acquisition?

## **Answer:**

Given the extension provided with the 7/11/2013 memo, it is expected that all work done under a utility agreement executed after 12/31/2013 will comply with the Buy America requirements.





# ***Buy America Issue***

## **Question:**

If a waiver is granted for a project in one State because a product was not available domestically, is that a blanket waiver for all States?

## **Answer:**

No. Buy America waivers are project specific.





# *Buy America Issue*


## **Question:**

What happens if an installation is found to be in non-compliance; will Federal funding be revoked, or will installations need to be replaced?

## **Answer:**

For participating projects, use existing procedures.

For non-participating projects, until further guidance is developed, State DOT and Division Offices should develop procedures to ensure compliance.





# *Buy America Issue*

## **Question:**

23 USC 313(b)(3) waives the requirements where the use of domestic materials “. . . will increase the cost of the overall project contract by more than 25 percent.” Can this be used for utilities?

## **Answer:**

Until FHWA issues further guidance on this subject, utilities are required to document their estimated total project costs with and without compliant material for each project.







# ***Buy America Issue***

## **Question:**

The December 21, 2012 memo states that a manufactured product is predominantly steel or iron if the product consists of at least 90% steel or iron content when it is delivered to the job site for installation. How is the 90% measured?

## **Answer:**

The 90% should be measured by weight.





# ***Buy America Issue***

## **Question:**

The second to the last paragraph of the December 21, 2012 memo provides examples of miscellaneous steel or iron components, subcomponents and hardware. Will FHWA be providing a more detailed list of examples for utilities?

## **Answer:**

No. State DOTs and FHWA Division Offices should interpret this paragraph.





# Questions?

## **Buy America Contacts:**

Jerry Yakowenko, [gerald.yakowenko@dot.gov](mailto:gerald.yakowenko@dot.gov)

Edwin Okonkwo, [edwin.okonkwo@dot.gov](mailto:edwin.okonkwo@dot.gov)

*Buy America Web Site:*

<http://www.fhwa.dot.gov/construction/cqit/buyam.cfm>

## **Utilities Contact:**

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