**Buy America Question and Answer**

**BUY AMERICA – GENERAL QUESTIONS**

**Q# 1: Do the Buy America requirements apply to utility work using Federal-aid highway (FAHP) funding?**

**A# 1:** Yes, any contract or agreement involving utility work that uses any amount of FAHP funding must comply with the Buy America requirements.

**Q# 2: For Federal-aid Highway (FAHP) funded projects, do Buy America requirements apply to utility work accomplished using no FAHP funds?**

A# 2: Yes. Per section 1518 of MAP-21, if the project (NEPA corridor) has at least one FAHP funded construction contract authorized after October 1, 2012 or at least one FAHP funded Preliminary Engineering contract authorized after January 1, 2013, all federally eligible utility work must meet Buy America requirements regardless of funding source.

**Q# 3: Why do we have to comply with Buy America (BA)?**

A# 3: MAP-21 changed the way a project is defined based on a NEPA document. If any project is within the boundary of that NEPA document is funded with federal funding then ALL contracts in that boundary are subject to BA and this includes utility contracts.

**Q# 4: Where can I find FHWA's Buy America policies?**

A# 4: The FHWA Buy America statutory provisions are in [23 U.S.C.313](http://www.fhwa.dot.gov/programadmin/contracts/bas182.cfm) and the regulatory provisions are in [23 CFR 635.410](http://www.gpo.gov/fdsys/pkg/CFR-2013-title23-vol1/xml/CFR-2013-title23-vol1-sec635-410.xml).

**Q# 5: When did this requirement go into effect?**

A# 5: Oct 1, 2012 and an extension was granted to Dec 31, 2013?

**Q# 6: Do the two Federal Policies listed above take precedence over the CFR for utilities (23 CFR 645)?**

A# 6: Yes

**Q# 7: What Buy America and utility issues should be considered when developing agreements to relocate utilities on FAHP funded projects?**

A# 7: The utility contract or agreement must include the requirements for the utility company to meet the Buy America requirements (as specified in MAP-21 section 1518 and 23 U.S.C. 313). The contract or agreement shall require the contractor to provide a definitive statement about the origin of all products, permanently incorporated into the project, covered under the Buy America requirements.

**Q# 8: Why do we have to amend our existing MRUA’s?**

A# 8: Section (2) COMPLY WITH FEDERAL POLICY GUIDE (FAPG) within the MRUA specifically mentions FAPG 23 CFR 645A and any amendments. Buy America did not amend 23 CFR 645A but the new BA policies take precedence over the utility CFR and this language needs to be in the MRUA’s according to FHWA.

**Q# 9: Are we going to amend our template contracts found on CCO’s intranet/sharepoint site?**

A# 9: Yes. All necessary contract templates will be amended with the new Buy America language.

**Q# 10: Will non-reimbursable relocations be required to comply with Buy America?**

A# 10: No.

**Q# 11: Can the utility relocation costs be listed as non-participating costs within the project to avoid Buy America requirements?**

A# 11: No. All permanent iron and steel products (that are predominately iron/steel 90% or greater) must be Buy America compliant.

**Q# 12: Does Buy America apply if a State DOT makes the cost of eligible iron and steel products Federal-aid non-participating in construction of a Federal-aid project?**

A# 12: Yes. Buy America applies to all steel and iron products supplied and permanently incorporated into a Federal-aid project regardless of the funding source actually used to purchase the product.

**Q# 13: Does Buy America apply if the steel or iron for a Federal-aid funded project is procured by the State through a separate contract?**

A# 13: Yes. Buy America applies to all iron and steel products permanently incorporated into Federal-aid funded project, regardless of how they were procured.

**Q# 14: What is the FHWA's minimum threshold for Buy America to apply?**

A# 14: Per regulation, the FHWA's minimum threshold for Buy America to apply is $2,500 (the total amount of iron and steel products as delivered to the project) or 0.1% of the total contract amount, whichever is greater.

**Q# 15: In emergency situations, does FHWA offer any type of relief to Buy America policy?**

A# 15: The Buy America requirements apply during emergency situations. However, when the responsible agency demonstrates that the application of Buy America requirements would be inconsistent with the public interest, or that the necessary steel or iron is not available domestically, the FHWA may grant a waiver.

**BUY AMERICA – PRODUCT APPLICABILITY**

**Q# 16: Does Buy America apply to recycled steel?**

A# 16: No. Although raw materials used in the steel manufacturing process may be imported, all manufacturing processes to produce steel products must occur domestically, including the addition of additives and the application of coatings. However, raw materials such as iron ore, limestone and waste products are not covered. FHWA defines waste products to include scrap as steel that is no longer useful in its present form (e.g. steel from old automobiles, machinery, pipe, railroad tracks, etc.).

**Q# 17: Do Buy America requirements apply to all manufacturing processes of steel/iron products?**

A# 17: Yes. All manufacturing processes must take place domestically. Manufacturing is any process that modifies the chemical content; physical shape or size; or final finish of a product. Manufacturing begins with the initial melting and mixing, and continues through the bending and coating stages. If a domestic product is taken out of the US for any process, it becomes foreign source material.

**Q# 18: When a domestic steel product leaves the country for non-domestic fabrication, how should I calculate the value of non-domestic content?**

A# 18: Fabrication is a manufacturing process that must take place in the United States. If a domestic steel product leaves the country for non-domestic fabrication, the entire steel product becomes foreign steel.

**Q# 19: Does Buy America apply to domestic iron/steel products purchased by contractor and shipped overseas for use in physical assembly (i.e. reinforcement bars for formation of concrete pipes, and shapes)?**

A# 19: No. Buy America does not apply to iron/steel products shipped overseas strictly for physical assembly. Note that if any of the manufacturing process (bending, extruding, drilling, coating etc.) occurs on the domestic iron/steel product while overseas, the resulting product becomes foreign and does not conform with Buy America requirements.

**Q# 20: Do Buy America requirements apply to coating materials and the process of applying a coating?**

A# 20: Yes. The manufacturing process for the application of a coating for iron or steel is subject to Buy America, however, the material being applied as a coating is not covered under Buy America. A coating means any process that protects or enhances the value of a material or product to which it is applied, such as epoxy coatings, galvanizing or painting.

**Q# 21: Do Buy America requirements apply to any manufactured product?**

A# 21: No. The FHWA's Buy America regulations waive the application of Buy America to manufactured products that do not include steel and iron components. However, Buy America requirements apply to any steel or iron component of a manufactured product regardless of the overall composition of the manufactured product (e.g. Buy America applies to the steel wire mesh or steel reinforcing components of a precast reinforced concrete pipe).

**Q# 22: Does Buy America apply to aluminum products (like aluminum light poles)?**

A# 22: No. Buy America applies only to **iron and steel products**.

**Q# 23: Can a State DOT apply the Buy America requirements on an incremental basis by allowing a very small amount of foreign steel to be used as the work progresses?**

A# 23: No. State DOTs cannot apply Buy America requirements on an incremental basis. A State DOT must track the amount of incorporated foreign steel and iron as the work proceeds to ensure that the minimal use threshold amount is not exceeded at any point in the contract (0.1% of the total contract amount or $2,500 whichever is greater).

**Q# 24: Does Buy America apply to iron and steel (sheet piling, scaffolding, etc) products used on a temporary basis for construction of a Federal-aid project.**

A# 24: No. Buy America applies only to iron and steel products required to be permanently incorporated into a Federal-aid construction project. Temporary use means that the contract specifications provide that the iron and steel products used on the project either must be removed at the end of the project or may be removed at the contractor's convenience. Also, where a contracting agency is able to document that phased construction is imminent and the steel or iron product will be removed in subsequent near term stages, then the iron or steel product may be considered temporary and not subject to Buy America. However, if the iron or steel product is required to remain in place at the end of the contract (per contract documents) and where phased construction is not imminent, then the product is deemed permanent and Buy America applies.

**Q# 25: Do Buy America apply to iron and steel products that were competitively procured in one project, for construction of a Federal-aid project?**

A# 25: Yes. With accompanying certification showing that the products were manufactured domestically, if they are for permanent installation and a public interest finding as required by 23 CFR 635.407 for the use of state-furnished material.

**Q# 26: Does Buy America apply to iron and steel products donated by State DOT, Public Local Agency, or Contractor for construction of Federal-aid projects?**

A# 26: Yes. Buy America applies to all donated iron and steel products.

**BUY AMERICA - WAIVERS**

**Q# 27: Can a waiver be granted for the Buy America requirements?**

A# 27: Yes. Under 23 CFR 635.410 (c)(1)(i), a waiver of Buy America requirements may be granted on a “project-by-project” basis if: (a.) The application of Buy America provisions would be inconsistent with the public interest, or (b.) Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality. Also, FHWA regulations also waive the applicability of Buy America when alternate bidding procedures are used and lowest overall total bid based on using domestic steel is 25% more than the lowest overall total bid based on using foreign steel.

**Q# 28: Who may request a Buy America waiver?**

A# 28: The (Local Public Agency (LPA)/State DOT) administering the Federal-aid project may request a project specific waiver.

**Q# 29: May the FHWA issue a standing national or regional waiver?**

A# 29: Yes. FHWA may issue a standing national or regional waiver if it is warranted.

**Q# 30: On what basis may a nationwide waiver be granted?**

A# 30: A nationwide waiver of a specific iron or steel product may be granted by the Secretary of Transportation if the product is not manufactured in the United States and the public rulemaking process demonstrates that non-domestic availability of the product would adversely impact the Federal-aid program in multiple states, specific region and/or nationwide.

**Q# 31: Has FHWA granted any nationwide waivers?**

A# 31: Yes. FHWA has granted two nationwide waivers, 1) on February 9, 1994 for ferryboat equipment and machinery parts, and 2) on March 24, 1995 for pig iron and processed, pelletized, and reduced iron ore

**Q# 32: Who may request a nationwide waiver?**

A# 32: The LPAs/State DOTs may request a nationwide waiver.

**Q# 33: How often does FHWA approve waivers based on public interest?**

A# 33: Not very often. An example of when a public interest waiver may be considered could be during an emergency situation. Another example may be where a certain steel or iron product is to be evaluated on an experimental basis.

**Q# 34: What does the FHWA need in order to consider a project waiver request?**

A# 34: The agency administering Federal-aid project submits the waiver request with supporting information to the FHWA Division Office. Relevant supporting information includes project information, item information, reasons for waiver request. Also included must be the description of the efforts made by the State to locate a domestically manufactured product, and an analysis of re-design of the project using alternate or approved equal domestic product.

**Q# 35: Has FHWA denied any waiver request?**

A# 35: Yes. If FHWA discovers a domestic product during the review of waiver request, the request will be denied.

See <http://www.fhwa.dot.gov/construction/contracts/waivers.cfm> for Buy America waiver requests denied.

**Q# 36: How often does FHWA receive and approve waivers based on non-availability?**

A# 36: FHWA frequently receives Buy America waiver requests and conducts preliminary reviews on each to ensure that waiver request is warranted before they are formally processed. FHWA actually approves most waiver requests that are formally processed because they are usually thoroughly vetted before being submitted for approval.

**Q# 37: What is the process for submitting a waiver request?**

A# 37: The agency (State DOT/LPA) administering the Federal-aid project is responsible for submitting a waiver request to the FHWA Division Office for preliminary reviews and recommendations. The Division Office will then forward the request to the FHWA'sOffice of Program Administrationfor formal in-depth review and for a final decision.

**Q# 38: Is a waiver necessary for an item that would otherwise be non-participating?**

A# 38: Yes. A Buy America waiver request is necessary for all foreign iron and steel products permanently incorporated into a Federal-aid project even if there is no Federal funding involved in the purchase of the iron and steel products.

**Q# 39: Can a State DOT transfer a Buy America waiver granted for an item from one Federal-aid project to another Federal-aid project (i.e. utilize an approved waiver on multiple projects)?.**

A# 39: No. Buy America waivers are approved on a **project-by-project basis** and they are not transferable. Therefore a waiver that is approved for one particular project cannot be used on another project. Only a nationwide waiver can be used for multiple projects.

**COUNTING THE VALUE OF DOMESTIC/FOREIGN STEEL**

**Q# 40: What are the costs associated with the value of iron and steel as delivered to the project?**

A# 40: The total cost of iron and steel includes the cost of the material plus the cost of transportation to the project site, as evidenced by delivery receipt, but does not include labor costs involved in final assembly.

**Q# 41: If a U.S supplier purchases foreign steel, performs domestic fabrication on the foreign steel and then supplies the fabricated product to a contractor on a Federal-aid construction project, should the cost of domestic fabrication be included as part of cost of foreign steel as delivered to the project?**

A# 41: No. Since the regulation requires that all manufacturing process on iron and steel products must take place domestically, the cost of domestic manufacturing processes performed on the foreign iron or steel products should not be included in the value of materials as delivered to the project. However, the cost of domestic manufacturing processes must be clearly documented.

**BUY AMERICA – OTHER APPLICABILITIES**

**Q# 42: What Buy America requirements apply to projects funded with ARRA TIGER I funding?**

A# 42: ARRA-funded highway projects are administered in accordance with the requirements of Title 23, US Code, including the provisions of Buy America at 23 USC 313.

**Q# 43: What Buy America requirements apply to projects funded with TIGER II funds?**

A# 43: FHWA projects funded with any TIGER II funds are administered in accordance with the requirements of Title 23, US Code, including the provisions of Buy America at 23 USC 313.

**Q# 44: Are there differences between Buy America requirements of 23 U.S.C. 313 and Buy American requirements of 41 U.S.C. 10a - 10d?**

A# 44: Yes. Buy America requirements apply to Federal-aid projects, while the Buy American requirements apply to direct Federal procurement contracts.

**Q# 45: Can you apply Buy American provisions to Federal-aid projects?**

A# 45: No. Buy American provisions do not apply to Federal-aid projects. It applies to direct Federal procurement contracts using Federal Acquisition Regulations. However, if a Federal agency is acting as the direct contracting entity for a project involving Federal-aid funding, such as an arrangement between a State DOT and a FHWA Federal Lands Division Office, the project will be procured pursuant to the FAR and Buy American will apply.

**Q# 46: Do Buy America provisions apply to Federal-aid construction projects that are not considered to be highway construction?**

A# 46: Yes. All iron or steel products that are permanently incorporated in a Title 23-funded project are covered by Buy America requirements. The coverage for Title 23 eligible projects includes projects that may not have been historically considered to be highway construction (e.g. harbor cranes, bicycle racks, railroad stations, trains, motor vehicles, etc).

**Q# 47: When a project is jointly funded by FHWA and FTA, which Buy America provisions should be used by the contracting agency?**

A# 47: When a project combines funding from both the FTA and the FHWA programs, an agency should transfer the project funds to whichever agency is serving as the lead agency. When FHWA funds are transferred to FTA for a transit project, then FTA Buy America requirements apply, and when FTA funds are transferred to the FHWA for a highway project, FHWA Buy America requirements apply. For joint funded projects involving other Federal agencies where there is no established lead agency, 23 USC 313 continues to apply to the FHWA funding and other agencies' requirements apply as well.

**Q# 48: What is "green rod" and is it subject to Buy America coverage?**

A# 48: Green rod is basically mild steel that is hot drawn and rolled with scale. It is used by welding rod manufacturers to produce welding rod. Since the green rod is typically an iron/steel product, it is covered by Buy America requirements.

**Q# 49: Is the welding process covered by Buy America requirements?**

A# 49: Yes. All welding process must take place domestically since the welding rod itself is typically an iron/steel product and the welding process substantially alters the rod.

**Q# 50: Does Buy America apply to work constructed by a railroad under a contract or agreement?**

A# 50: Yes. MAP-21 Section 1518 requires the application of Buy America to all contracts eligible for assistance under the scope of NEPA project if Federal-aid funds were obligated after October 1, 2012 for any project (by contract or agreement) under the approved NEPA document. In that case, Buy America requirements will apply to railroad agreement/contract regardless of the funding source. The only exception is if the railroad work is ineligible for Federal-aid Highway Program funding.

**Q# 51: Do Buy America requirements apply to an eligible utility contract/agreement being completed by the utility company under a State/Utility company relocation contract/agreement?**

A# 51: Yes. MAP-21 Section 1518 requires the application of Buy America to all contracts eligible for assistance under the scope of NEPA project if Federal-aid funds were obligated after October 1, 2012 for any project (by contract or agreement) under the approved NEPA document. In that case, Buy America requirements will apply to utility agreement/contract regardless of the funding source.

**Q# 52: In using the alternate bid procedure mentioned in 23 CFR 635.410(b)(3), is the comparison for the 25% differential based on the value of the total iron/steel products in each bid?**

A# 52: No. The comparison must be between the total lowest bid using domestic iron/steel product and the total lowest bid using foreign iron/steel product. Note that if the state elects to use alternate bid provisions, all bidders must be required to submit a bid based on furnishing domestic iron/steel. The contract must be awarded to bidder who submits the lowest total bid based on furnishing domestic steel, unless this bid is more than 25% higher than the total bid based on foreign steel or iron products.

**BUY AMERICA - CERTIFICATION**

**Q# 53: What are the MoDOT certification requirements?**

A# 53: The utility company will choose between “Utility Owner Self-Certification Method” or “Vendor/Manufacturer Certification Method”. With the utility owner self-certification, the utility will agree to be compliant with Buy America requirements by a retention of documents clause in the utility agreement and will not provide documents to MoDOT. With the vendor/manufacturer certification, the utility will agree to be compliant with Buy America requirements by a retention of documents clause in the utility agreement and will supply all vendor/manufacturer/factory certification documents with the final invoice.

**BUY AMERICA – NON-COMPLIANCE**

**Q# 54: How does FHWA resolve an after-the-fact discovery of an inadvertent incorporation of foreign iron and steel products into a Federal-aid project?**

A# 54: For resolving an after-the-fact discovery of incorporated foreign iron and steel products exceeding the minimal use amount (the greater amount of $2,500 or 0.1% of the contract value), FHWA will review the following information to determine the appropriate resolution:

1. The state's material certification procedures for determining Buy America compliance.
2. Degree of diligence by the State DOT and contracting agency in ensuring Buy America compliance.
3. Contract provisions prescribing Buy America requirements.
4. Availability of domestic iron and steel products or its equivalent at the time when excess foreign iron and steel products were incorporated into the project.
5. Issues associated with removal and replacement with domestic iron and steel products during construction/completion.

With the Headquarters' concurrence, available options based on the conclusion of the reviews include the following:

1. Remove the excess foreign iron and steel products and replace with domestic iron and steel products.
2. Make the non-compliant iron and steel products Federal-aid non-participating.
3. In instances where there is evidence of carelessness, negligence, incompetence, or understaffing on the part of the contracting agency, the Division Office may determine that all project costs are ineligible.