

BUY AMERICA AND UTILITIES FEDERAL LAW AND FHWA POLICY

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MAP-21

(Moving Ahead for Progress in the 21st Century Act)

- **Signed into law by President Obama on July 6, 2012**
- **Funds surface transportation programs at over \$105 billion for fiscal years (FY) 2013 and 2014**
- **First long-term highway authorization enacted since 2005**

MAP-21

(Moving Ahead for Progress in the 21st Century Act)

- **Creates a streamlined and performance-based surface transportation program**
- **Builds on many of the highway, transit, bike, and pedestrian programs and policies established in 1991(ISTEA)**

Buy America (the law in part...)

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.”

MAP-21

(Moving Ahead for Progress in the 21st Century Act)

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.

Buy America Defined

- **Federal participation in contracts or agreements for environmental studies and document preparation, right of way acquisition, preliminary engineering and other non-construction work will invoke the application of Buy America to the project under Section 1518 of MAP-21, even if no Federal funds are used in the construction.**

Buy America Defined

- **There is no limitation in the statute that the Federal funds be used only in construction contracts. If any contract or agreement for such work is executed after October 1, 2012 all construction contracts on that project will be subject to Buy America regardless of whether Federal funds are used in any of the contracts for construction.**

FHWA Letter to AASHTO

Dated 12/20/2012

- **United States DOT has determined that Buy America applies to any utility work that is accomplished as a result of a Federal-aid highway project.**
- **As a result of the MAP-21 amendment, the application of Buy America cannot be narrowed to exclude utility work, even if such utility work is not reimbursed with Federal-aid highway funds.**

FHWA Letter to AASHTO

Dated 12/20/2012

- **The only instance where Buy America would not apply to utility work is where such work is not eligible for Federal-aid because the State is legally unable to pay the utility. In these instances, such work would not constitute a contract that is eligible for assistance**

Effect on GDOT Let and Locally Administered Projects

GDOT Let Projects

- **Reimbursable Agreements – Actual Cost, Lump Sum or Unit Price are subject to the Buy America Law**
 - **Language has been added to each agreement template**
 - **Compliance Affidavit**
- **Public Interest Determination Projects – Design Build and P3 Projects**
- **Contract Item Agreement- utility relocation is placed in the Highway Contract**
 - **Compliance is a part of Prime Contractor obligations**

Effect on GDOT Let and Locally Administered Projects

Locally Administered Projects

- **Status 2:** The Utility/Railroad Owner is in conflict with the project and requires relocation by the Utility/Railroad Owner during construction requiring coordination with the contractor and the Utility/Railroad Owner. The reimbursable agreement between the Local Government and the Utility/Railroad Owner is attached.
 - Reimbursable Agreement – Actual Cost, Lump Sum or Unit Price is subject to the Buy America Law, even if the locals decide to use their own funding.

- **Status 4 :** Utility/Railroad relocation to be incorporated into the highway construction project contract.
 - Contract Item Agreement, where utility relocation is placed in the Department Contract, is subject to the Buy America Law, even if the locals decide to use their own funding.

Effect on GDOT Let and Locally Administered Projects

Buy America Provision does not apply when:

Utility adjustments are not eligible for reimbursement by State Law O.C.G.A. 32-6-170 and O.C.G.A. 32-6-171

Example:

Permitted facilities located within the Public Right-of-Way

Effect GDOT Let and Locally Administered Projects

Buy America Provision does not apply :

Locally Administered Projects

- **Status 1:** The Utility/Railroad Owner is in conflict with the project and requires relocation by the Utility/Railroad Owner during construction requiring coordination with the Contractor and the Utility/Railroad Owner. **The relocations are non-reimbursable and the Utility/Railroad Owner will be relocating at no cost to the Local Government or the Department.**
- **Status 3 :** The Utility/Railroad Owner is located within the project limits but requires no relocation work.

Expectations

➤ **States and Local Enforcement**

- **Consider Buy America requirements during preliminary engineering phase**
- **Explore the use of alternate domestic products**
- **Adequate material certification procedures in their program to ensure compliance**
- **Detect Improper documentation or lack of documentation**

➤ **Internal Audit done on 5% of let projects each year**

➤ **FHWA will review on Full-Oversight Projects and spot check Exempt projects**

GDOT Language and Certification Statement Included in Agreements

In accordance with the BUY AMERICA requirements of the Federal regulations (23 U.S.C. 313 and 23 CFR 635.410) all manufacturing processes for steel and iron products or predominantly of steel or iron (at least 90% steel or iron content) furnished for permanent incorporation into the work on this project shall occur in the United States. The only exception to this requirement is the production of pig iron and the processing, pelletizing and reduction of iron ore, which may occur in another country. Other than these exceptions, all melting, rolling, extruding, machining, bending, grinding, drilling, coating, etc. must occur in the United States.

GDOT Language and Certification Statement Included in Agreements

i) Products of steel include, but are not limited to, such products as structural steel piles, reinforcing steel, structural plate, steel culverts, guardrail, steel supports for signs, signals and luminaires, and cable wire/strand. Products of iron include, but are not limited to, such products as cast iron frames and grates and ductile iron pipe. Coatings include, but are not limited to, the applications of epoxy, galvanizing and paint. The coating material is not limited to this clause, only the application process.

GDOT Language and Certification Statement Included in Agreements (cont.)

ii) A Certificate of Compliance shall be furnished for steel and iron products as part of the backup information with the billing. The form for this certification entitled “Buy America Certificate of Compliance” is attached to this agreement as “Exhibit B.” Records to be maintained by the RAILROAD/UTILITY and the DEPARTMENT - Office of Utilities for this certification shall include a signed mill test report and a signed certification by each supplier, distributor, fabricator, and manufacturer that has handled the steel or iron product affirming that every process, including the application of a coating, performed on the steel or iron product has been carried out in the United States of America, except as allowed by this Section. The lack of these certifications will be justification for rejection of the steel and/or iron product or nonpayment of the work.

GDOT Language and Certification Statement Included in Agreements (cont.)

iii) The requirements of said law and regulations do not prevent the use of miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct the above products, manufactured products that are not predominantly steel or iron or a minimal use of foreign steel and iron materials if the cost of such materials used does not exceed one-tenth of one percent (0.1%) of the total contract price or \$2,500.00, whichever is greater.

GEORGIA
DEPARTMENT OF TRANSPORTATION
BUY AMERICA
CERTIFICATE OF COMPLIANCE

Date _____, 20____

WE, _____

(UTILITY/RAILROAD OWNER)

Address: _____

Hereby certify that we are in compliance with the “Buy America” requirements of this project.

(Insert Project P.I. No. and Description Here)

As required, we will maintain all records and documents pertinent to the Buy America requirement, at the address given above, for not less than 3 years from the date of project completion and acceptance. These files will be available for inspection and verification by the Department and/or FHWA.

We further certify that the total value of foreign steel as described in the Buy America requirements for this project does not exceed one-tenth of one percent (0.1%) of the total contract price or \$2,500.00, whichever is greater.

Signed by _____ Title _____
(Officer of Organization)

Subscribed and sworn to before me this _____ day of _____, _____.

My Commission Expires: _____

Notary Public/Justice of the Peace



Manufactured Products under Buy America Provision

- **Requirements apply to structural steel or iron components of pavements, bridges, tunnels, waterline**
- **High strength bolts, anchor bolts, cable wire/strand, pre-stressing/post-tensioning wire**
- **Steel fence material, fence posts**
- **Mast arms, poles, luminaires, etc.**
- **Steel or Iron components of precast concrete products, such as reinforcing steel, wire mesh and pre-stressing or post-tensioning strands or cable**

Manufactured Products under Buy America Provision (Exemptions)

➤ **Does not apply to manufactured products that are not:**

- **Predominantly steel or iron (90% by Weight or Cost)**
- **Miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct steel components**
- **Cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, etc.)**

Manufactured Products under Buy America Provision (Exemptions)

- **Products that contain a minimal amount of iron and/or steel – less than 90% - as a portion of the manufactured product are exempt**
- **Manufactured products that are not predominantly steel or iron or a minimal use of foreign iron and/or steel provided that the cost of such material does not exceed 0.1% or the total project or \$2500.00, whichever is greater**
 - **The threshold for utilities is the total value of the agreement**

Certification

- **Valid certification document compliance**
- **Material certification by the manufacturer**
- **“Step certification” recommended by FHWA and AASHTO**
 - **This is the process where each person handling the material certifies that is made in America, i.e., manufacture, supplier, vendor. We will require manufacture mill certs and/or certification.**

Certification

- **Documents must be kept 3 years after FHWA acceptance**
 - **This could be 10 years for the Department. We will keep records along as information is sent to the Department during the invoice stage**

- **Waivers**
 - **Waivers have to be approved by Washington FHWA. Has to be done on each project. Information at www.fhwa.dot.gov/construction/cqit/buyam.cfm**

Resolution for Non-Compliance

- **FHWA will review the following information to determine the appropriate resolution:**
 - **The state's material certification procedures for determining Buy America compliance.**
 - **Degree of diligence by the State DOT and contracting agency in ensuring Buy America compliance.**
 - **Contract provisions prescribing Buy America requirements.**
 - **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.**
 - **Issues associated with removal and replacement with domestic iron and steel products during construction/completion.**

Resolution for Non-Compliance

- **With the Federal Headquarters' concurrence, available options based on the conclusion of the reviews include the following:**
 - **Remove the excess foreign iron and steel products and replace with domestic iron and steel products.**
 - **Make the non-compliant iron and steel products Federal-aid non-participating.**
 - **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.**

Resources

FHWA Utility Website (includes Buy America Q&As):

<http://www.fhwa.dot.gov/programadmin/utility.cfm>

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

Questions

