Memorandum

U.S. Department
of Transportation

Federal Highway
Administration

Subject: Application of Buy America to non FHWA-funded Utility Relocations

Date: July 11, 2013

From: Gloria M. Shepherd
Acting Associate Administrator
for Infrastructure (HIF-1)

Reply to
Attn. of: HIPA-30

To: Division Administrators
Directors of Field Services

In Section 1518 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress amended existing law to broaden the applicability of Buy America to non FHWA-funded utility relocations. For FHWA-funded projects, Buy America now applies to all contracts within the scope of a National Environmental Policy Act (NEPA) determination and eligible for assistance under title 23, United States Code, so long as one such contract is funded by FHWA. That is, if a project receives FHWA funding for any development or construction activities, including NEPA studies, right-of-way acquisition, preliminary engineering, or construction, Buy America applies to all contracts within the scope of the NEPA determination regardless of whether the contract uses FHWA funding.

The broadened application of Buy America has created implementation issues for the utility industry. Many utility companies are now revamping their supply chains to ensure that their steel and iron products comply with Buy America. Because highway construction projects are now being delayed or are threatened with delay, **for non-Federally funded utility relocations,** FHWA is providing utility companies a reasonable period of time, **through December 31, 2013,** to take the necessary steps to ensure that their steel and iron products used in relocation work as part of Federal-aid highway projects comply with Buy America. These necessary steps include, but are not limited to, making the necessary arrangements with vendors to obtain appropriate certifications with respect to Buy America compliance and taking necessary actions to review new Buy America compliant materials to ensure compatibility with company product specifications and standards. **This memorandum covers any project-specific utility agreements for non-Federally funded utility relocations executed on or before December 31, 2013**, and does not apply to master, area-wide, or state-wide utility agreements.

If you have any questions, please contact either Mr. Gerald Yakowenko at 202-366-1562 or Mr. Edwin Okonkwo at 202-366-1558.

Florida Department of Transportation

RICK SCOTT
GOVERNOR

605 Suwannee Street
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ANANTH PRASAD, P.E.
SECRETARY

January 16, 2014

Mr. James Christian, FHWA Division Administrator
Federal Highway Administration
545 John Knox Road, Suite 200
Tallahassee, Florida 32303

Re: Florida - Guidelines for the Implementation of Buy America Requirements for Utility Relocations

Dear Mr. Christian:

The Florida Department of Transportation (Department) is pleased to offer guidelines to be used by utility agency/owners (UAOs) for the purpose of clarifying and defining Buy America (BA) requirements for utility relocations or adjustments within the State of Florida. The use of these guidelines is strictly limited to relocation or adjustments of UAO facilities and will not impact or modify how the Department applies BA requirements to transportation materials.

These guidelines are applicable for all federally eligible transportation projects where the Federal Highway Administration (FHWA) is the lead federal agency; it does not take precedence over projects where the Federal Transit Administration or the Federal Railroad Administration is the lead federal agency. These guidelines are intended to supplement and to be implemented in conjunction with the Federal Highway Administration's memorandum issued Dec. 21, 2012 (the Baxter memo) and July 11, 2013, (the Shepherd memo).

The Department intends to utilize the following definitions and documented decisions to provide clarity and to assist UAOs as they strive to develop internal processes to discern and track materials that are subject to BA in the field.

It should be noted that these guidelines were reviewed by the Florida Utility Coordinating Committee's Subcommittee on "Buy America" whose members represent major Florida utility companies. These members have indicated that, without the clear guidance provided herein, the successful application of BA would be questionable. Therefore, the Florida Department of Transportation will implement BA utility relocation activities required for highway projects funded under Title 23 of the US Code as follows:

Guidance:

- The following materials, when comprised of more than 90% steel or iron, are subject to BA compliance:
  - Poles and cross arms;
  - Pipes and valves (except as stated below);
  - High-strength bolts, anchor bolts and anchor rods;
  - Girders used to comprise transmission towers and stand-alone structures;
  - Rebar and other reinforcing iron/steel for all precast and cast-in-place installations;
  - Conduit and duct work;
  - Fire hydrants; and

- Manhole covers and rims, and drop-inlet grates.

The Department will review utility relocation projects to determine that the above categories are adequate to comply with BA. These reviews may result in the addition of categories.

- All Utility Agreements (UA) executed before December 31, 2013, that will not have federal funding for utility materials or relocations are not subject to BA (even if other contracts associated with the project were reimbursed with federal funds).
- The date of the original UA will be used as the date to determine BA compliance even if the UA is amended after December 31, 2013.
- BA does not apply to items that are not 90% iron or steel (i.e. wood poles, copper wire, etc.)".
- BA does not apply to items that are not permanently incorporated into the project and are not a functional part of the project (i.e., scaffolding, sheet piles left in place after construction that are not an integral part of the finished project). This includes equipment that was placed in a temporary location to facilitate construction of the project.
- BA does not apply to existing materials that are relocated from one location to another within the project limits.
- If the UAO does not wish to subject betterment materials (as defined below) to BA provisions then the betterments must be excluded from the UA or contract that includes work eligible for federal aid.
- BA does not apply to assembly materials, attachment materials, miscellaneous electronics, or encasements, as defined below.
- BA does not apply to any associated materials (including spare materials) required for maintenance.
- BA does not apply to any materials necessary to repair equipment that was discovered or damaged during construction which required immediate action to restore to safe conditions or to minimize adverse public impacts.
- BA does not apply to associated materials necessary for a temporary utility relocation.
- Minimal use threshold exclusion: Non-domestic iron and steel material may be used provided the cost of such materials do not exceed one-tenth of one percent (0.1%) of the individual UA amount, or $2,500.00, whichever is greater using the following equation:

$$\text{Percentage of non-compliant materials} = \frac{\text{Combined cost of only those materials that are subject to BA and are non-compliant (limited to the individual UA) times 100.}}{\text{Total utility relocation costs (cited in the individual UA)}}$$

- BA does not apply if the utility relocation effort is not eligible for reimbursement with federal funds because the State is legally unable to pay the utility. However, all such work must remain separate from and cannot be accomplished under a UA or contract that includes work eligible for federal aid.
- Per 23 CFR 635.410, the work to be performed under the UA may include foreign iron and steel products if the cost of BA compliant materials will cause the cost of the work to increase by at least 25%. To determine applicability of this provision, one of the following two procedures shall be used:
  1) If the UAO will use a contractor to perform the work included in the UA, the following procedures apply: Demonstration of meeting the 25% excess costs requirement must be accomplished by receiving two separate bids each from at least two qualified contractors for the work. Requests for bids from the qualified contractors must conform to 23 CFR 635.410 (b)(3). One bid from each contractor will include a cost of performing the work described in the UA using BA compliant materials and the other bid will include a cost for

the same work assuming foreign materials. If the bid with the BA compliant materials is at least 25% greater than the bid that includes foreign materials, then the contract can be awarded to the lowest bid based on materials that are not compliant with BA.

2) If the UAO will perform work in the UA with its own forces, the following procedures apply: Demonstration of meeting the 25% excess cost requirement must be accomplished by receiving two separate bids from vendors or manufacturers listing the cost of BA compliant materials on one bid document and listing the cost of non-compliant materials on a separate bid document. The UAO will take the cost of the BA compliant materials and use it to create the total estimated cost of the work included in the UA. The UAO will do the same with the costs of the non-compliant materials. If the costs of the work included in the UA with BA compliant materials is at least 25% greater than the costs using the non-compliant materials, then the non-compliant materials may be used.

Definitions:

Anchor and High-Strength Bolts - Anchor and high-strength bolts will be distinguished in one of three methods to be selected and consistently applied by the UAO:

1) The UAO may identify anchor and high-strength bolts in the specifications or plans as necessary for the safe and functional design of the utility relocation. If a bolt is not called out as anchor or high-strength, it stands that the design did not require that level of performance and the supplied bolt is not subject to BA;
2) The UAO may identify anchor and high-strength bolts through the application of a strength rating. Any bolt possessing a yield strength of fifty-thousand pounds per square inch (50-ksi) or greater will be considered an anchor or high-strength bolt.
3) The UAO may identify anchor and high-strength bolts through the application of a weight measurement. Any bolt possessing a weight of 15 pounds or greater will be considered an anchor or high-strength bolt.

Assembly Materials (miscellaneous steel) - The collection of miscellaneous materials used to fasten, hold, attach, secure and/or assemble materials including, but not limited to, nuts, bolts, U-bolts, screws, washers, clips, fittings, sleeves, lifting hooks, mounting brackets, pole steps, clamps, brackets, mountings, straps, fasteners, hooks, pins, braces, disks, clevises, couplers, swivels, snaps, crimps, trunnions, dead-ends, compression swages, and other miscellaneous materials used to assemble.

Attachment Materials - An item or material that is not an integral part or permanently attached to the pole, pipe or valve. Cross arms are an exception to this definition and do not qualify as attachment materials. Attachment materials include, but are not limited to, cross arm bracing, insulators, avian equipment, miscellaneous hardware (defined below), fittings, racks, ladders, encasements, guy wire, strand, conductors and tubing 0.75-inch diameter or less.

Betterments - Any upgrading of the facility being relocated that is not attributable to the highway construction and is made solely for the benefit of and at the election of the UAO (23 CFR 645.105). As such, betterments are not eligible for federal aid.

Conductor - A material (specifically wires and cables) that allows the flow of energy, including electricity, heat, data, audio/video transmission, etc.

Encasements - Include cabinets, housings, boxes, vaults, covers, shelves, and other items used to protect or house equipment or miscellaneous electronics.

Fittings - Individual parts used to join, adjust or adapt a system of pipes including, but not limited to, elbows, tees, wyes, crosses, nipples, reducers, end caps, couplers, o-lets, transitions, connectors (steady state, seismic and flexible), unions, mechanical flanges (not permanently affixed to the pipe), bushings, ferrules, gaskets, O-rings, plugs or taps.

Girders - A load bearing beam or strut commonly taking the cross-sectional shape of a circle, square, rectangle, or an: I, C, L, or Z, and assembled for the purpose of creating lattice towers, stand-alone platforms or transmission towers.

Lattice Towers - A structure that is compiled of girders and is typically used in series to support conductor cables.

Maintenance - An action or application of materials necessary to keep a system functioning safely and at optimal capacity, general up-keep.

Miscellaneous Electronics - Manufactured products or assemblies consisting of many components such as electronic equipment, routers, transformers, switches, radios, processors, power supplies, batteries, antennas, splice cases, pre-connectorized hubs and terminals, and cross-boxes.

Miscellaneous Hardware - An assembly of small parts that are compiled to form a finished product that is often used independently or as an attachment material, including, but not limited to: locks, switches, cutouts, regulators, gauges, meters, barometers, strainers, filters, pilots, arrestors, insulators, ball bearings, dampeners, needle valves, braces, pipe supports, actuators, motors and pumps.

Permanent Installation - The final location and final installation of the materials as defined on the plans or in the specifications. No further adjustments or relocations are necessary to accommodate the final transportation project improvements.

Stand-Alone Platform - A structure that is compiled of girders and is used to permanently hold or support large equipment.

Temporary Utility Relocation - A temporary utility relocation is generally subject to the schedule necessary to accomplish the scope as defined by the NEPA document. A temporary utility relocation is one that is needed to allow the roadway construction to proceed, but is not required to remain in its relocation as a result of the ultimate roadway improvement. For example, if the scope requires the sequential completion of six separate construction contracts, theoretically a temporary utility relocation could remain in place prior to commencement of the first construction contract and extend beyond completion of the sixth construction contract prior to its final placement. A temporary utility relocation can also be established if the contract specification or plans require that the steel or iron material used on the project either must be removed at the end of the project or may be removed at the contractor's convenience.

Certification:

The Department desires a process that provides reasonable assurance that utility materials subject to BA requirements are compliant prior to permanent installation. The Department will accept either of the following two certification methods: 1) UAO Self Certification and 2) Vendor/Manufacturer Certification. Each provides sufficient demonstration of BA compliance for utility relocations.

1) UAO Self Certification Method:
The Department will enter into a legally binding UA with each UAO on a project by project basis. The UA will include the following provisions:
   a) The UAO will source materials that comply with BA requirements.
   b) The UAO will certify compliance via a contract provision in the UA as follows:

"[UAO] understands and acknowledges that this project is subject to the requirements of the Buy America Law (23 USC § 313) and applicable regulations, including 23 CFR 635.410 and Federal Highway Administration guidance. [UAO] hereby certifies that in the performance of this Agreement,

for products where Buy America requirements apply, it shall use only such products for which it has received a certification from its supplier, or provider of construction services that procures the product certifying Buy America compliance. This does not include products for which waivers have been granted under 23 CFR. § 635.410 or other applicable provisions or excluded materials cited in the Florida Department of Transportation's "Guidelines for the Implementation of Buy America Requirements for Utility Relocations."

The UAO will not be required to provide copies of supplier certifications or other UAO signed certifications as part of this Agreement or with the final invoice.

c) All documents obtained to demonstrate BA compliance will be held by the UAO for a period of three years from the date the final payment was received by the UAO and will be made available to the Department or FHWA upon request.

2) Vendor/Manufacturer Certification Method:

The Department will enter into a legally binding UA with each UAO on a project by project basis. The UA will include the following provisions:

a) The UAO will source materials that comply with BA requirements.

b) The UAO will demonstrate BA compliance by one of the two following methods (or a combination of both):

1. The UAO will collect written certifications from the vendor(s): The written certification will be signed by the vendor on company letterhead, or other acceptable documentation, signed by an authorized representative of the vendor and will declare that all supplied materials subject to the BA provisions are fully compliant.

2. The UAO will collect written certifications from the factory(s):

i) The Mill Test Report (MTR) issued and signed by the initial fabricator stating that the materials subject to BA were melted and manufactured in the United States.

ii) Other written statements on company letterhead, or other acceptable documentation, signed by an authorized representative, from the manufacturers providing any additional treatment to the fabricated material (such as blasting, galvanizing or painting) will state that all treatment processes occurred in the United States in accordance with FHWA guidelines.

c) All documents obtained to demonstrate BA compliance will be held by the UAO for a period of three years from the date the final payment was received by the UAO and will be made available to the Department or FHWA upon request.

d) One set of copies of all documents obtained to demonstrate BA compliance will be attached to, and submitted with, the final invoice.

e) If no materials were subject to BA, the UAO will indicate that as part of the final invoice submittal (i.e., with a separate memo, rubber stamp on the invoice or other reasonable method).

Additional Provisions Common To Both Certification Methods:

1) No certification (demonstration of BA compliance) is required for any materials or parts that are not subject to BA requirements for any reason, including, but not limited to application, material composition and the "minimal use threshold exclusion".

2) It will be up to the UAO to declare compliance with the "minimal use threshold exclusion" as defined in the guidance above.

3) The UAO will bear responsibility to ensure all materials permanently incorporated into their utility relocations are either compliant or not required to be compliant.

4) Where the UAO purchases manufactured products from a vendor for use by the UAO in its relocation activities, a certification from the vendor to the UAO that the materials meet BA requirements shall be deemed to constitute compliance by the UAO.
5) Where the UAO obtains construction services in connection with utility relocation work and the provider of those construction services is also responsible for provision of manufactured products used in connection with that project, a certification from the provider of construction services that the materials provided for that project meet BA requirements shall be deemed to constitute compliance by the UAO.

I am hopeful you will find this satisfactory and able to offer concurrence. Should you have any questions or require additional information, please do not hesitate to contact me at 850-414-5240. Thank you for your assistance in this matter.

Sincerely,

Thomas C. Byron, P.E.
Chief Engineer

Concur:

James Christian, FHWA Division Administrator

1/28/14
Date

TB/tb