Florida Department of Transportation

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GOVERNOR

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STEPHANIE C. KOPELOUSOS
SECRETARY

July 29, 2009

To: Prospective Bidders and Plan Holders

Addendum No: **5, E2N55,** 42622515201, Federal # ARRA 045 B
Operational improvements at the intersection of State Road 45 and Southwest 30th Avenue in Alachua County.

Per the Division One, Section **6-5.2 Source of Supply-Steel (Federal-Aid Contracts Only):** For Federal-aid Contracts, only use steel and iron produced in the United States, in accordance with the Buy America provisions of 23 CFR 635.410 should be attached to your contract.

Please delete the Federal Register, Part VI, 49 CFR Part 661 from your Request for Proposal and replace it with 23 CFR 635.410 Buy America, (four pages).

You must sign, date and fax a copy of this addendum back to me by close of business today to indicate receipt. A copy of this addendum must be returned with your bid.

_____
Company Name

_____
Date

_____
Signature

Thanks,

Patsy Elkins, CPPB
Contracts Coordinator
386-758-3703 Phone
386-758-3791 Fax

1. Buy America

References:

- 23 USC 313
- ISTEA Section 1041(a) and 1048(a)
- 23 CFR 635.410

Applicability:

Applicable to all Federal-aid construction projects

Background:

Federal domestic procurement requirements have been around since 1933. The original requirements, commonly referred to as the "Buy American" requirements, are found in 41 CFR 10a-10d, and apply only to direct Federal procurement activities. A direct Federal procurement occurs when a Federal government agency makes the purchase or awards a contract. Construction contracts done under the Federal Lands Highways program are examples of Federal direct procurements.

The STAA of 1978 (Pub. L. 95-599), §401 expanded domestic procurement coverage to the Federal-aid highway program by establishing "Buy America" requirements. Current Buy America policy is based on §165 of the STAA of 1982 (Pub. L. 97-424), as amended by ISTEA, and codified by SAFETEA-LU, §1903 as 23 USC 313. The requirements apply to all Federal-aid construction projects. Projects located on highways classified as local roads and rural minor collectors; transportation enhancement projects; and non-highway construction are also covered by these requirements when funded by Federal Highway Trust Fund money.

Section 165 initially covered cement, steel and manufactured products. However, in developing the implementing regulations, FHWA determined that Congress had not intended to cover all manufactured products and, therefore, FHWA's regulations cover only manufactured products containing iron and steel. Due to concerns about an inadequate domestic supply of cement, §165 was amended in 1983 to limit the coverage to steel materials and products only. Subsequently, ISTEA §1048(a) amended §165 to include iron. Further, ISTEA §1041(a) defined the action of applying a coating to a covered material and products (i.e., steel or iron) as a manufacturing process subject to Buy America requirements. In 1994, FHWA issued two nationwide waivers: the first in February covered a list of specific ferryboat parts; and the second in August, covered pig iron, scrap, raw alloy materials, and processed, pelletized or reduced iron ore. These waivers are still in effect.

In August 2005, SAFETEA-LU §1903 codified the Buy America requirements as section 313 of Title 23 but made no substantive changes to the requirements.

Guidance:

Simply stated, the current regulations require the use of domestic steel and iron in Federally funded construction projects. All foreign steel and iron materials and products are covered by Buy America regardless of the percentage they comprise in a manufactured product or the form they may take. The regulations allow bidders and the contracting agency some latitude through minimum use, waivers, and alternate bids.

All manufacturing processes must take place domestically. Manufacturing begins with the initial melting and mixing, and continues through the coating stage. Any process which modifies the chemical content, the physical size or shape, or the final finish is considered a manufacturing process. These processes include rolling, extruding, machining, bending, grinding, drilling and

coating. "Coating" includes epoxy coating, galvanizing, painting, or any other coating that protects or enhances the value of the material.

Buy America does not apply to raw materials (iron ore and alloys), scrap, pig iron or processed, pelletized, and reduced iron ore. Insufficient domestic supplies of raw materials caused FHWA to issue a nationwide waiver allowing foreign source supplies of these items. The waiver may be found in the March 24, 1995 *Federal Register*.

If domestically produced steel billets or iron ingots are shipped overseas for any manufacturing process, and then returned to the U.S., the resulting product does not conform with the Buy America requirements. Mr. Weseman's memorandum of July 6, 1989 (Appendix A-32) provides further guidance.

The manufacturing process for a steel/iron product is considered complete when the product is ready for use as an item (e.g., fencing, posts, girders, pipe, manhole cover, etc.) or could be incorporated as a component of a more complex product through a further manufacturing process (e.g., the case for a traffic signal head). The final assembly process does not need to be accomplished domestically so long as the steel/iron component is only installed and no manufacturing process is performed on the steel/iron component.

EXAMPLE: shapes produced domestically from foreign source steel billets are not acceptable under Buy America since the initial melting and mixing of alloys to create the steel occurred in a foreign country.

EXAMPLE: all welding must take place domestically since the welding rod itself is typically an iron/steel product and the welding process substantially alters the rod.

Buy America does not apply to minimal use of iron/steel materials provided that the total cost of all foreign source items used in the project, as delivered to the project site, is less than $2500 or does not exceed one-tenth-of-one-percent of the total contract amount, whichever is greater. If a supplier or fabricator wishes to use a partial fabrication process where domestic and foreign source components are assembled at a domestic location, the "as delivered cost" of the foreign components should include any transportation, assembly and testing costs required to install them in the final product.

For the Buy America requirements to apply, the steel or iron product must be permanently incorporated into the project. Buy America does not apply to temporary steel items, e.g., temporary sheet piling, temporary bridges, steel scaffolding and falsework, etc. Further, Buy America does not apply to materials which remain in place at the contractor's convenience.

The practice of making otherwise eligible items nonparticipating for the purpose of circumventing the Buy America requirements is unacceptable and should not be approved in Federal-aid projects. There is no clear-cut rule for resolving an after-the-fact discovery of an inadvertent incorporation of an excess amount of foreign materials into a project. Each situation will be resolved on a case-by-case basis.

Buy America provisions apply to all steel and iron materials that is to be permanently incorporated in a Federal-aid project, even if an item is rendered as a "donated material" in accordance with 23 U.S.C. 323 - Donations and Credits. While States and local governments may receive a credit for donated material, this material must generally comply with Buy America requirements. There have been instances where FHWA Divisions have approved Buy America waivers for the donation of material from existing stockpiles of locally owned material. The use of existing material was determined to be in the public interest; however, the procurement of new material for a donation would not generally be considered for a waiver.

Waivers. With prior concurrence from Headquarters, the FHWA Division Administrator may grant a waiver of the Buy America requirements for specific projects if it can be shown that:

- following the requirements is inconsistent with the public interest, or
- insufficient quantities of satisfactory quality domestic products are available.

Only under very limited circumstances will materials delivery delay be considered as grounds for a waiver. The cost differential between domestic and foreign products is generally not grounds for a waiver. Approval authority for waivers of Buy America requirements cannot be delegated to the STA for any FHWA-funded contract.

When domestic steel products are available, meeting the contractor's schedule should not be the basis for requesting a Buy America waiver. The contracting agency, and any design consultants, should be aware of our Buy America requirements and consider these issues in the design and specification development process. Contractors must be aware of the Buy America contract provisions and take this into account in developing their anticipated schedules and bids for a construction project.

Only the Federal Highway Administrator may grant nationwide waivers, which are done through the public rulemaking process. To date, two nationwide waivers have been approved. One dealt with the issue of raw materials and includes scrap; pig iron; processed, pelletized, and reduced iron ore; and raw alloys. The second waiver deals with specific equipment and machinery items required for ferryboats. The items included in the waiver are marine diesel engines, electrical switchboards and switchgear, electric motors, pumps, ventilation fans, boilers, electrical controls, and electronic equipment (see February 9, 1994 *Federal Register*). Items not specifically included in these waivers remain subject to the Buy America requirements.

A State may apply for a waiver of the Buy America provisions if it believes that a waiver is warranted. The STA should submit the waiver request with supporting information to the FHWA Division Administrator sufficiently in advance of need (preferably during the preliminary engineering stage, in order to allow time for proper review and action).

For Headquarters's prior concurrence review of the waiver request, the supporting information must include:

- the project number/description, project cost, waiver item, item cost, country of origin for the product and reason for the waiver, and
- an analysis of re design of the project using alternate or approved equal domestic product.

No prior concurrence from Headquarters is needed for waivers for steel or iron products totaling less than $50,000 as delivered to the project. FHWA Division Offices should correspond directly with Mr. Edwin Okonkwo, HIPA 30, Phone 202 366 1558; Fax: 202 366 3988.

NAFTA

On March 17, 1994, the Federal Highway Administrator wrote to the American Road and Transportation Builders Association to indicate that the North American Free Trade Agreement (NAFTA) does not affect the Buy America requirements for the Federal-aid highway program. Article 1001 of NAFTA expressly exempts grants, loans, cooperative agreements, and other forms of Federal financial assistance from its coverage. Unless future negotiations among the US, Canada and Mexico modifies NAFTA, or additional statutory requirements are implemented, the NAFTA does not affect Buy America requirements.

In the late 1990s, ADF Group, a steel fabricator on a Federal-aid project in Virginia, filed suit against VDOT and FHWA claiming that the FHWA's Buy America policies prevented it from using a Canadian fabrication facility, thus violating the NAFTA's investment chapter. ADF Group claimed $90 million in damages.

The litigation was eventually resolved on January 9, 2003, when an international arbitration tribunal issued an award in favor of the United States, rejecting ADF Group's claims in their entirety. The tribunal upheld the FHWA's Buy America requirements and found that the application of Buy America requirements did not violate international law or discriminate against ADF on the basis of its nationality.

Alternative Bidding Procedures. An alternative bidding procedure may be used to justify the use of foreign steel or iron. Under this procedure, the total project is bid using two alternatives: one which is based on foreign source products, and the second using domestic products. The use of foreign products may be justified if the lowest total bid based on domestic steel or iron products is 25 percent more than the lowest bid using corresponding foreign steel or iron products. The 25 percent differential applies to the total bid for the entire project, not just the bid prices for the steel or iron products.

State Restrictions. States may have "Buy America" provisions that are more restrictive than the Federal requirements, including provisions for products that are not covered by Buy America, such as crumb rubber, glass, plastic, and aluminum. However, the more restrictive provisions must be required by State law. If more restrictive requirements are imposed as a matter of State policy, directive or regulation, the FHWA requires a State legal opinion that the requirements are authorized under State law and do not conflict with the competitive bidding statutes of the State. The State law or policy may not establish an in-State materials preference.

Enforcement. The STA is responsible for enforcing the Buy America provisions. Generally, the materials certification process has been adequate for determining compliance; however, there are some products for which origin is difficult to ascertain. The contract provisions should require the contractor to provide a definitive statement about the origin of all products covered under the Buy America provisions.

Another option is to use step certification for products. Under step certification, each handler of the product (supplier, fabricator, manufacturer, processor, etc.) certifies that their step in the process was domestically performed. Both AASHTO and FHWA encourage the use of step certification. Refer to AASHTO guidance on step certifications.

Cargo Preference. The Cargo Preference Act: P.L. 83-644 (August 26, 1954), as amended, contains permanent legislation concerning the transportation of waterborne cargoes in U.S.-flag vessels. The Act requires that certain products be shipped on privately owned U.S.-registered vessels.

Mr. Farris's February 19, 1988 memorandum clarified that the Cargo Preference Act requirements are not to be imposed on any materials, supplies or equipment used on or in Federal-aid projects.