Buy America and Utilities
Federal Law and FHWA Policy

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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.”
Recent Events - Buy America
The Economy, Jobs, Public Opinion, Congress

U.S. Bridges, Roads Being Built by Chinese Firms
Cities hire Chinese instead of American workers for building projects.
02:55 | 09/23/2011

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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."
Example: application of Buy America requirements to all contracts eligible for assistance within the scope of a NEPA document’

Knik Arm Crossing, Anchorage, AK
“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. 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.**”
Successful Practices

- FHWA expects States and LPAs to enforce Buy America requirements

- States should consider Buy America requirements during preliminary engineering phase to avoid delays during construction, and explore the use of alternate domestic products.

- States should have adequate material certification procedures in their program to ensure compliance.
  - Improper documentation or lack of documentation is easy to show.
  - Showing fraud is difficult. A pattern must be established.
Certifications

- Not required by FHWA; however, a valid certification documents compliance.

- Must be certified by the manufacturer

- “Step certification” recommended by FHWA and AASHTO

- Suggested certification language:

  "All manufacturing processes for these steel and iron materials, including the application of coatings (unless granted a waiver pursuant to 23 CFR 635.410), have occurred in the United States."
Mill cert is in Russian!!
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% by weight)
  - Miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct steel components (e.g. cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, etc.)
Arguments used against Buy America

*Property Rights are in the Constitution,*

Fifth Amendment  “...nor shall private property be taken for public use, without just compensation.”

Three Major Points

1. Nothing is stated about how or when.
2. We are providing ‘Just Compensation’.
3. We don’t use the Constitution to administer the Federal-aid program.
Arguments used against Buy America

We will relocate utilities using the Uniform Act the same as we do business or home owner relocations.

Three major points

1. Utilities are not ‘Displaced Persons’ (US Supreme Court)
2. Specific Law always outweighs General Law
   (Title 23 USC 123 outweighs Title 42 USC 61)
3. Language in Title 42 USC 61.4622
   Uniform Relocation Assistance, Moving and Related Expenses
   (d) Certain utility relocation expenses, state:
   ‘(1) Except as otherwise provided by Federal law—‘
Contact Info

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- FHWA Utility Website (includes BA Q&As):
  http://www.fhwa.dot.gov/programadmin/utility.cfm

- Edwin Okonkwo, Construction Program Guide (BA)
  http://www.fhwa.dot.gov/construction/cqit/buyam.cfm