

Buy America Issues to Consider for Utility Work on Projects

The following guidance addresses the applicability of the Buy America requirements to utility work accomplished as part of a larger Federal-aid highway program (FAHP) funded project, as defined by the National Environmental Protection Act (NEPA):

1. Do the Buy America requirements apply to utility work using FAHP funding?

Yes, any contract or agreement involving utility work that uses any amount of FAHP funding must comply with the Buy America requirements (23 U.S.C. 313).

For example, if the utility work is accomplished through a standalone contract or agreement and uses FAHP funding the Buy America requirements apply.

Additional policy and guidance information is available in the FHWA Construction Program Guide at: <http://www.fhwa.dot.gov/construction/cqit/buyam.cfm>

2. For FAHP funded projects, do Buy America requirements apply to utility work accomplished using no FAHP funds?

Yes. Per section 1518 of MAP-21, if the project, as defined by NEPA, 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.

3. For FAHP funded projects, do Buy America requirements apply to utility work where State law does not allow the State DOT to reimburse the utility for relocation costs?

No. When State law prohibits State DOTs from reimbursing utilities, the utility work is not eligible for federal reimbursement (23 USC 123(a)). Federally ineligible work is not subject to Buy America requirements.

4. Can foreign steel be allowed in an FAHP funded project if the foreign items are made non-participating?

No. All materials permanently incorporated into an FAHP funded project, as defined by NEPA, must meet the Buy America requirements (as specified in MAP-21 section 1518 and 23 U.S.C. 313). For example, it is not acceptable to allow foreign steel as a permanent component of an FAHP project by using State or local funds for the non-conforming items. It is generally not acceptable for non-conforming materials to be donated to an FAHP funded project. Additional information on Buy America requirements is available in the FHWA Construction Program Guide at: <http://www.fhwa.dot.gov/construction/cqit/buyam.cfm>

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5. Do the Buy America requirements take precedence over the 23 CFR 645 requirements pertaining to the relocation or accommodation of utility facilities?

Yes, based on the Buy America requirements being codified in Federal law (23 U.S.C. 313), these requirements take precedence over regulations pertaining to the accommodation or relocation of utility facilities on projects involving FAHP funding.

For example, the Buy America requirements take precedence over the regulations which allow utilities to furnish materials from company stock (as specified in 23 CFR 645.117(e)). This provision allows the utility owner to furnish materials from company stock only in the case where the supplied materials meet the Buy America requirements. Company stock materials that do not meet Buy America requirements may not be permanently incorporated into an FAHP funded project.

Another example where the Buy America requirements take precedence over utility requirements is the statement 'The utility shall not be required to change its existing standards for materials used in permanent changes to its facilities' (as specified in 23 CFR 645.117(e)). Once again, Buy America requirements take precedence over this utility regulation. Therefore, a utility is not required to change its existing standards for materials as long as the Buy America requirements are met.

6. What Buy America and utility issues should be considered when developing agreements to relocate utilities on FAHP funded projects?

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. Additional information on the Buy America requirements to include in utility contracts and agreements is available in the FHWA Construction Program Guide at: <http://www.fhwa.dot.gov/construction/cqit/buyam.cfm>, and in the FHWA Contract Administration Core Curriculum Participant's Manual and Reference Guide 2006 at: <http://www.fhwa.dot.gov/programadmin/contracts/core02.cfm#s2B01>.

7. Can a waiver be granted for the Buy America requirements?

Yes, waivers of the Buy America requirements may be granted on a project-by-project basis. Additional information on the requirements and conditions around which FHWA will consider waivers is available in the FHWA Construction Program Guide at: <http://www.fhwa.dot.gov/construction/cqit/buyam.cfm>