

BUY AMERICA POLICY FOR UTILITY RELOCATIONS

Guidelines for Utility conformance with Buy America provisions

Approved:

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1.0 Introduction

Implementation of MAP-21 has broadened how Buy America (BA) is applied to federally funded transportation projects. MAP-21 requires that all aspects of a highway construction project (as defined by the project's NEPA decision document) comply with BA if any federal highway funds are obligated to the project on or after October 1, 2012.

The Nebraska Department of Roads (NDOR), in cooperation with the Federal Highway Administration (FHWA), Nebraska Division, has developed guidelines for the implementation of and conformance to the BA provisions, as established in 23 USC § 313 and applicable regulations, including 23 CFR § 635.410 and FHWA guidance. These guidelines are to be used by utilities for the purpose of clarifying and defining BA requirements for utility relocation within the State of Nebraska. The use of these guidelines is strictly limited to utilities and will not affect or modify how NDOR and Local Public Agencies (LPA) apply BA requirements to transportation materials.

The guidelines set forth in this document are applicable and relevant to all federally funded transportation projects when the FHWA is determined to be the lead federal agency. Further, all contracts that are required to implement the federally funded transportation project must comply with BA. "Contract" shall be defined as a utility agreement (UA) necessary to implement a project that is eligible for federal highway funds.

These guidelines are intended to supplement and be implemented with the guidance issued by the U.S. Department of Transportation, through the Federal Highway Administration, Nebraska Division, on December 20, 2012 (<http://www.fhwa.dot.gov/construction/contracts/121220.cfm>), December 21, 2012 (<http://www.fhwa.dot.gov/construction/contracts/121221.cfm>), and July 12, 2013 (<http://www.fhwa.dot.gov/construction/contracts/130711.cfm>).

2.0 When Do Buy America Requirements Apply?

The NDOR will implement BA requirements for utility relocation activities required by transportation projects funded under Title 23 of the US Code as described in this section.

2.1 Execution Date of Utility Agreements

FHWA has established that all UAs executed before December 31, 2013, that do 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 to determine BA compliance, even in the case that the UA is amended after December 31, 2013.

2.2 Materials

For utilities, the following materials, when comprised of more than 90% steel or iron, are subject to BA:

- Raw steel and iron products
- Mast arms, poles and cross arms, standards, trusses, or supporting structural members for signs, luminaries, or traffic control systems
- Steel transmission or distribution pole structures and lattice towers, including girders used to comprise transmission towers and stand-alone platforms
- Pipe, grates, and valves
- High-strength bolts, anchor bolts, and anchor rods
- Rebar and other reinforcing iron/steel for all cast-in-place installations
- Conduit and ducting
- Fire hydrants
- Manhole covers, risers, and rims
- Rebar and other reinforcing iron/steel used in concrete transmission or distribution pole structures, or any prefabricated concrete vaults or similar concrete structures,

The NDOR intends to utilize these definitions and documented decisions to provide clarity and to assist utility service providers as they strive to develop internal processes to discern and track materials that are subject to BA as well as the practical application of BA in the field.

The NDOR will periodically review Bills of Materials for utility projects and determine whether the categories described above adequately result in certification of compliance with BA. These periodic reviews may result in the addition of categories that are not currently listed in Section 2.2.

The following definitions of materials that are permanently incorporated into the relocation and are subject to BA apply to utilities:

- Anchor Rods, Anchor & High-Strength Bolts – Anchor and high-strength bolts will be distinguished in one of three methods to be selected, and consistently applied, by the utility owner:
 1. The utility owner may specifically 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 identified as anchor or high-strength, it will be concluded that the design did not require that level of performance, and the supplied bolt is therefore not subject to BA.
 2. The utility owner 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 utility owner may identify anchor and high-strength bolts through the application of a weight measurement. Any bolt possessing a weight of fifteen pounds or greater will be considered an anchor or high-strength bolt.

- 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 section, 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.
- Stand-Along Platforms – A structure that is compiled of girders and is used to permanently hold or support large equipment.
- 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.

When utility relocation is partially reimbursable, all materials that are not otherwise excluded in Section 3 and are included within the UA for the reimbursable utility relocation will be subject to BA.

All betterment materials, as defined below, are subject to BA requirements if the work is included with the UA and performed under the same contract that includes work eligible for Federal-aid. Betterments are defined to be 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 utility (23 CFR § 645.105). As such, betterment is not eligible for Federal-aid.

2.3 Acceptable Use of Non-domestic Materials

The FHWA and NDOR recognize that there are instances in which the minimum use of non-domestic materials should be permissible.

Non-domestic iron and steel materials may be used if 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. The equation to be used is the following:

$$\frac{\text{Combined Cost of Materials that are not BA compliant}}{\text{Total Utility Relocation Cost}}$$

The costs of materials subject to BA that are non-compliant are limited to the individual UA. Further, the total utility relocation cost must be that cited in the individual UA.

In addition to the aforementioned exclusion, 23 CFR § 635.410 allows inclusion of foreign iron and steel products if the cost of the BA compliant materials will cause the cost of the work to increase by at least 25%. There are two acceptable procedures to document this determination.

1. If the utility owner will use a contractor to perform the work included in the UA, demonstration of meeting the 25% excess cost 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(b3). One bid from each contractor must include a cost of performing the work described in the UA using BA compliant materials and the other bid must include a cost for the same work, assuming foreign materials.

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

2. If the utility owner will perform work in the UA with its own resources, demonstration of meeting the 25% excess cost requirement must be accomplished by receiving two separate bids from vendors or manufacturers listing the cost of the BA compliant materials on one bid document and listing the cost of non-compliant materials on a separate bid document.

The utility owner 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 utility owner will do the same with the cost of the non-compliant materials.

If the cost of the work included in the UA with BA compliant materials is at least 25% greater than the cost of using materials that are not compliant with BA, then the non-compliant materials may be used.

3.0 When Are Buy America Requirements Not Applicable?

BA provisions shall not be applied to utility relocations necessitated by a Federal-aid transportation project where the utility relocation is not eligible for reimbursement. UAs will not be executed for non-reimbursable utility relocations.

While BA must still be incorporated into all federally eligible transportation projects, the FHWA and NDOR recognize that certain materials may be excluded from BA provisions.

3.1 Materials

For utilities, the following materials are not subject to BA:

- Assembly materials
- Attachment materials
- Miscellaneous electronics and hardware
- Encasements
- Fittings
- Associated materials, including spare materials, required for maintenance
- Materials associated with temporary utility relocation
- Materials necessary to repair equipment that was discovered or damaged during construction and requires immediate action to restore to safe condition or to minimize adverse public impact
- Existing utility materials that are relocated from one location to another ***within project limits***

The following definitions of materials that are not subject to BA apply to utilities:

- 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. 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. Cross arms are an exception to this rule and do not qualify as attachment materials.
- Conductor – A material (specifically wires and cables) that allows the flow of energy including electricity, heat, data, audio/video transmissions, 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.
- 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, 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, transformers, locks, switches, cutouts, regulators, gauges, meters, barometers, strainers, filters, pilots, arrestors, insulators, ball bearings, dampeners, needle valves, braces, pipe supports, actuators, motors, and pumps.

In addition to these materials, BA does not apply to temporary utility relocations. 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 until 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.

3.2 Betterment

BA does not apply if the utility relocation effort is not eligible for reimbursement with federal funds. Utility owners are typically required to pay for 100% of the entire relocation effort associated with betterment, except under very specific circumstances. If a Utility owner intends to include betterment but does not wish to subject betterment materials to BA provisions, then all betterments must be excluded from the UA or contract that includes work that is eligible for Federal-aid.

4.0 Buy America Certification Process

FHWA and NDOR desire a process that provides reasonable assurance that utility materials subject to BA requirements are compliant prior to permanent installation. It is not, however, the intent of either agency to stipulate an overly cumbersome process to demonstrate this. The utility owner will bear the responsibility to document that the appropriate materials meet the BA provisions detailed above. The utility owner must further ensure that all materials permanently incorporated into a project and are installed under the same contract that includes work eligible for Federal-aid meet BA provisions.

NDOR or Local Agency will enter into a legally binding UA with each utility owner on a project-by-project basis in this process. The UA will include the following provisions:

- Utility owner will source materials that comply with BA requirements
- Utility owner will certify compliance via a contract provision in the UA
- Utility owner will be required to provide copies of supplier certifications or other utility owner-signed certifications with all invoices submitted for payment. This documentation shall be retained by the utility owner until payment has been made.