



TOPIC

*Buy America Procedures For Federally
Funded Projects*

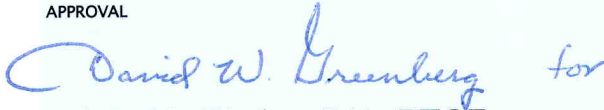
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SUPERSEDES OR RESCINDS

New

APPROVAL

*Edward L. Fischer, P.E., PTOE
State Roadway Engineer*

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Topic

In 2008 FHWA rescinded the delegation of approval authority for Buy America waivers by the local Division offices and required all waivers to go to FHWA Headquarters. The process also added some steps to provide notice in the Federal Register, which increases the time necessary for processing. This Advisory outlines the process and provides some guidelines for processing time.

*Advisory Information*General Provisions and Applicability

Current Federal regulations (23 CFR 635.410) 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.

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,

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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.

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. Except for material salvaged from a project for re-use on the same project, all used materials that are to be permanently incorporated must also meet the same Buy America requirements as new materials. Old certifications and records for the used material must be available.

Past Buy America waivers requested by ODOT have involved movable bridge electrical control equipment, motors, generators, pumps, HVAC equipment, fans,

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weigh scale and sensor frames, bridge fall protection systems, industrial hydraulic Rexroth cylinders, fibers for concrete bridge deck overlays, sheet pile for bridge foundations, and hollow core anchors for retaining walls. Previously approved waivers for all states are listed by FHWA at the following web site:

<http://www.fhwa.dot.gov/construction/cqit/buywaiver.cfm>.

Procedures

During project development, ODOT designers and project leaders, as well as design consultants, need to be aware of these Buy America requirements and specify iron or steel products that are available from domestic sources. It is important to investigate the availability of domestically produced iron and steel products in order to know if a waiver will be needed. As soon as it is apparent that a Buy America waiver will be needed the project leader should contact the Federal Highway Administration (FHWA) and begin working on developing the waiver request. At this time the point of contact at FHWA is Jeff Graham and he can be reached by telephone at (503) 587-4727 or by email at jeffrey.graham@fhwa.dot.gov.

On March 13, 2008 FHWA revised the approval procedures for Buy America waiver requests and all waiver requests must now be reviewed and approved by the FHWA Headquarters office in Washington, DC. In addition, all waiver requests are subject to a 15 day public notice and comment period where potential suppliers may comment on domestic product availability prior to FHWA granting any waiver. In addition, waivers to be issued are also now published in the Federal Register. Since this new procedure has been in place waiver requests now take between 2 and 3 months to process. So, project leaders need to be aware of this potential delay to the project schedule.

With prior approval 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 ODOT or local agency for any FHWA-funded contract.

ODOT may apply for a waiver of the Buy America provisions if it believes that a waiver

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is warranted. The project leader 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 FHWA's review of the waiver request, the supporting information must include:

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

With the implementation of the new Buy America waiver procedures it is even more important that ODOT, consultants, and local agencies assess the availability of domestic iron and steel products during the design phase of a project in order to avoid delays during construction since each after-the-fact discovery of an inadvertent use of foreign iron or steel products on a project is resolved on a case-by-case basis. If these procedures are not able to be done in a timely way, the project may need to be state funded.

Target Audience

This Advisory is intended for Area Managers, Project Team Leaders, Discipline Leadership Teams, and others who need to process FHWA Buy America Waivers for Federally funded projects.

Contact Information

CONTACT: Unit Manager, Office of Pre-Letting
PHONE: (503)986-3796
E-MAIL: Eryca.S.MCCARTIN@odot.state.or.us

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