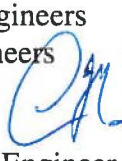




January 8, 2016

TO: Region Documentation Engineers
Region Construction Engineers

FROM: Craig McDaniel,
Deputy State Construction Engineer
360-705-7823



SUBJECT: **Rescinding the FHWA December 21, 2012 memorandum on Buy America and related memorandums from WSDOT.**

Interpretation of the Buy America requirements is facilitated by guidance and general information provided by FHWA. On December 21, 2012 FHWA issued a memorandum for use by states and local public agencies in administering Federal-aid projects titled ***Clarification of Manufactured Products under Buy America***. This memorandum excluded select miscellaneous steel and iron components from the Buy America requirements and added a threshold that a product consists of at least 90% steel or iron. We have been administering contracts in accordance with this guidance since the memorandum was issued.

On December 22, 2015 the U.S. District Court for the District of Columbia issued a decision vacating this memorandum. As a result of that decision, FHWA has withdrawn the FHWA December 21, 2012 memorandum.

The withdrawal by FHWA of their memorandum requires HQ Construction and HQ Materials Laboratory to in turn withdraw their January 15, 2013 memorandum titled, ***Clarification of Manufactured Products under Buy America***, and their January 24, 2013 memorandum titled ***Revision to Material Documentation Requirements for Buy America*** (see attached copies of memorandums).

Withdrawal of the memorandums does not affect the specification language of Section 1-06 Buy America, however Construction Manual Section 9-1.2E has been revised to reflect this decision (see attached).

Current FHWA guidance on Buy America can be viewed at [FHWA's Construction Program Guide for Buy America](#).

Documentation and Construction Engineers
January 6, 2016
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As a result of the withdrawal of the memorandum, all contracts advertised on or after January 11, 2016 will no longer be able to use the guidance provided in the aforementioned three memorandums with regard to exemptions to Buy America and shall use the revised guidance shown in the attached Construction Manual Section 9-1.2E. Contracts advertised prior to January 11, 2016 will continue to use the guidance in the memorandums.

If you have any questions, contact Dan Gasche (360)-705-6970 or Mike Grigware (360) 705-7831.

Please give this information wide distribution as appropriate.

Attachments

CM/mjg

cc: Jay Alexander CPD&M, MS 47325
Nicole McIntosh, TB 32
Ahmer Nizam-Utilities, MS 47329
Jeff Cook – Facilities, MS 47328
Kurt Williams HQ Materials, MS 47365
Susan Wimberly, FHWA
Jeff Carpenter–Design MS 47329




U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: **ACTION:** Clarification of
Manufactured Products under Buy
America

Date: **DEC 21 2012**

From: Mr. John R. Baxter 
Associate Administrator for
Infrastructure

In Reply Refer To:
HIPA-30

To: Division Administrators
Directors of Field Services

This memo clarifies the Federal Highway Administration's (FHWA) position regarding application of Buy America requirements to manufactured products. Our current Buy America policy is based upon the statutory provisions in the Surface Transportation Assistance Act of 1982, as implemented with a November 25, 1983, final rule.

In the preamble to the [1983 final rule](#) (48 FR 53099), after soliciting and considering public comments, the FHWA found that it was in the public interest to waive application of Buy America to manufactured products other than steel and iron manufactured products. As the Federal-aid Highway Program evolved and technology improved, the FHWA clarified the applicability of the standing waiver for manufactured products in a [December 12, 1997, memo](#). In this 1997 memo, the FHWA clarified that, while Buy America does not apply to manufactured products, Buy America does apply to components of "predominately steel products."

With enactment of the American Recovery and Reinvestment Act (ARRA), the FHWA formed National Review Teams (NRT) (now known as Project Management Improvement Teams) to conduct reviews and make recommendations on how to improve the delivery of ARRA funded projects. One NRT review recommended that a State's Buy America certification be clarified to ensure that all covered steel and iron meets FHWA Buy America requirements. In working to address this finding, questions have arisen regarding the scope of the application of the 1983 public interest waiver for manufactured products. For example, it has been suggested that nuts, bolts, washers, and other miscellaneous steel or iron parts used in common off-the-shelf products such as toilets and the filaments in light bulbs must be Buy America compliant. Given these questions, the FHWA is concerned that such a reading of Buy America is inconsistent with the previous 1983 waiver decision and is not cost-effective to administer. Accordingly, it has become necessary to clarify the applicability of the waiver for manufactured products.

The FHWA continues to support the Buy America waiver for manufactured products in the 1983 final rule, as clarified by the 1997 memo. In particular, the waiver was intended to apply to all manufactured products except for steel and iron manufactured products. For example, the 1983 rule specified that traffic controllers are covered by the waiver since these products have many different components that are difficult to trace. Over time, however, some States have subjected signal heads and other traffic control equipment to Buy America and have sought project specific waivers. In reexamining the extent of the 1983 waiver in light of the NRT finding, we believe that the scope of the waiver was intended to encompass miscellaneous steel or iron components and subcomponents that are commonly available as off-the-shelf products such as faucets, door hardware, and light bulbs.

Thus, in order for a manufactured product to be considered subject to Buy America, the product must be manufactured predominantly of steel or iron. The FHWA deems a product to be manufactured predominantly of steel or iron if the product consists of at least 90% steel or iron content when it is delivered to the job site for installation. For purposes of applying Buy America and determining whether a product is a steel or iron manufactured product, the job site includes the sites where any precast concrete products are manufactured.

Examples of products that are subject to Buy America coverage include, but are not limited to, the following:

- steel or iron products used in pavements, bridges, tunnels or other structures, which include, but are not limited to, the following: fabricated structural steel, reinforcing steel, piling, high strength bolts, anchor bolts, dowel bars, permanently incorporated sheet piling, bridge bearings, cable wire/strand, prestressing / post-tensioning wire, motor/machinery brakes and other equipment for moveable structures;
- guardrail, guardrail posts, end sections, terminals, cable guardrail;
- steel fencing material, fence posts;
- steel or iron pipe, conduit, grates, manhole covers, risers;
- mast arms, poles, standards, trusses, or supporting structural members for signs, luminaires, or traffic control systems; and
- steel or iron components of precast concrete products, such as reinforcing steel, wire mesh and pre-stressing or post-tensioning strands or cables.

The miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct the above components (or manufactured products that are not predominantly steel or iron) are not subject to Buy America coverage. Examples include, but are not limited to, cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, etc.

If you have any questions, please contact either Mr. Gerald Yakowenko at 202-366-1562 or Mr. Edwin Okonkwo at 202-366-1558.



January 15, 2013

TO: Region Plans Engineers
Region Documentation Engineers
Region Construction Engineers
Region Project Development Engineers

THRU: Pasco Bakotich *PB*

FROM: Jeff Carpenter *JC*
360-705-78

SUBJECT: **Clarification of Manufactured Products under Buy America**

On December 21, 2012 the FHWA sent out a memo to clarify their position with regard to application of Buy America requirements to manufactured products.

The FHWA memo reads in part as stated in italics below, clarifying statements are added in bold:

The FHWA deems a product to be manufactured predominantly of steel and iron if the product consists of at least 90% steel or iron content when it is delivered to the job site for installation. To clarify; the 90% is a percentage of the total monetary value of the manufactured product. To determine the 90% value, divide the raw steel or iron cost by the total manufactured product cost (without taxes, shipping, handling or other fees applied), and if the percentage is equal to or greater than 90% of the final manufactured product cost then Buy America applies.

For purposes of applying Buy America and determining whether a product is a steel or iron manufactured product, the job site includes the sites where any precast concrete products are manufactured. To clarify; in the specific case of "precast concrete products" the casting yard is considered part of the "job site" for Buy America purposes, and therefore the iron or steel materials delivered to precast yard are subject to Buy America. (rebar, grates, etcetera)

The second page of the memo lists several typical "*miscellaneous steel or iron components*," that are exempted from Buy America. The list is not intended to be all-encompassing, but rather reinforces a concept that the myriad minor iron and steel subcomponents used to assemble products are not subject to Buy America. This exemption applies to manufactured items as well as on site fabrication.

The miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct the above components (or manufactured products that

are not predominantly steel or iron) are not subject to Buy America coverage. Examples include, but are not limited to, cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts (this does not mean high strength bolts), nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, and etcetera.

Typical examples;

- Steel electrical conduit installed at the site,
 - 90% rule applies
 - BA criteria applies
- VMS sign
 - 90% rule applies
 - BA would typically not apply
- VMS steel supporting structure
 - Specifically called out in the bulleted list (12/21/12 Memorandum #HIPA-30)
 - BA criteria applies
- Electrical cabinets,
 - Exempted as “*miscellaneous steel or iron components*,”
 - BA typically would not apply
- Off the shelf or special order catch basins,
 - This qualifies as “*precast concrete products*,”
 - “*the job site includes the sites where any precast concrete products are manufactured*,”
 - Materials are subject to BA criteria
- Standard nuts, bolts, fasteners for mounting signs
 - Exempted as “*miscellaneous steel or iron components*,”
 - BA typically would not apply
- High strength bolts/anchor bolts,
 - BA criteria applies
- Bridge Expansion Joint,
 - Nuts, bolts fasteners
 - Exempted as “*miscellaneous steel or iron components*,”
 - BA typically would not apply
 - 90% rule applies as it is delivered to the site
 - BA may or may not apply
- Walls, regardless of type
 - Nuts, bolts fasteners
 - Exempted as “*miscellaneous steel or iron components*,”
 - BA typically would not apply
 - MSE straps or equivalent
 - BA criteria applies
 - Precast elements
 - See “*precast concrete products*” criteria

- Materials are subject to BA
 - Assembled on site
 - Materials as they are delivered to the jobsite,
 - BA criteria applies

The 90% rule applies to items that are manufactured offsite and delivered to the jobsite as a unit (except in the case of precast concrete where the point of manufacture is considered the jobsite.) Walls that are assembled on site are not considered a manufactured item and therefore are not subject to the 90% rule as a unit. The individual materials must meet buy America when they are delivered to the job site.

This FHWA memo does not require any change to current specification language concerning Buy America. This memo does not impact the requirement for materials permanently incorporated beyond the exemption of the noted minor items.

You may apply this clarification of the Buy America requirements to your current contracts. Consistent determinations of the application of Buy America are critical to our ability to enforce this requirement statewide. Therefore, if you have unusual items that do not lend themselves to the criteria, contact your Assistant State Construction Engineer for a determination.

Updates are being made to Construction Manual Chapter 9-4 Specific Requirements for Each Material, which will address the Buy America documentation requirements for material acceptance.

Please give this information wide distribution as appropriate.

If you have any questions, contact Craig McDaniel, 360 705 7823 or Mike Grigware 360 705 7831.

EJC/mgj

cc: Jay Alexander CPD&M 47325
Tim Smith-Terminal Engineering TB-32
Ahmer Nizam-Utilities 47329
Yvonne Medina Facilities 47328
Kurt Williams HQ Materials 47365
Anthony Sarhan-FHWA



January 24, 2013

TO: Region Construction Engineers

FROM: Kurt Williams *KW*
360-709-5410

SUBJECT: **Revision to Materials Documentation Requirements for Buy America.**

The recent changes to the application of Buy America by the FHWA in their December 21, 2012, memo and further clarification of this information by the State Construction office in the January 15, 2013, memo necessitates a change to the material documentation requirements in the Construction Manual. Due to the short lead time the current Construction Manual does not take into account the changes to the application of Buy America. In the interim this memo provides direction for materials documentation requirements for existing construction projects based upon the updated Buy America requirements.

Attached is an update to Construction Manual Section 9-1.2E Certification of Materials Origin, that has been revised to address what types of steel and iron products need to be documented by the Certificate of Materials Origin, (CMO), and what types of miscellaneous steel and iron products do not need to be documented by the CMO. This attachment can be used by Project Engineer Offices to determine if a CMO is required for the miscellaneous steel or iron components and subcomponents.

Chapter 9-4 Specific Requirements for Each Material of the Construction Manual and the Qualified Products List both specify material documentation requirements and are being updated to address the changes in Buy America for steel and iron products.

The clarification to Buy America by the FHWA will not change the Record of Materials (ROMs) requirements. If the contract has the "Buy America" special provision the ROM will indicate a CMO is required for any permanently installed material or product that may contain steel and iron. Each Project Engineer Office will need to determine if CMOs are required for the materials and products listed on the ROM based upon the materials submitted by the contractor and the attached update to Section 9-1.2E.

For ongoing construction projects that already have approved RAM's and QPL's that contain steel or iron, the Project Engineer Offices will also have to determine if CMOs are required for the materials and products listed on them based upon the updated Buy America requirements and the information in the attached update to Section 9-1.2E of the Construction Manual.

Region Construction Engineers
January 24, 2013
Page 2

Please distribute this information as appropriate within your Region.

When unusual items that are encountered that do not lend themselves to these criteria, or if you have any questions, please contact me at (360) 709-5410, Rob Molohon (360) 709-5441 or Pat Norton (360) 709-5443.

KW/rjm

cc:

Anthony Sarhan-FHWA
Jeff Carpenter
Dave Erickson
Craig McDaniel
Mike Grigware
Dave Mounts

Attachments: January 2013 Construction Manual Revision Section 9-1.2E Certification
of Materials Origin

9-1.2E Certification of Materials Origin

Projects that include Federal funding, or any project defined in the Federal Record of Decision under the National Environmental Policy Act (NEPA), must meet the requirements of “Buy America” (23 CFR 635.410, 23 USC 313). This provision, incorporated into the contract by General Special Provision, applies to all products containing steel or iron permanently incorporated into the project. The Contractor may choose to utilize minor quantities of foreign steel or iron, as described in the General Special Provision. Minor amounts of foreign steel and iron may be used in the project provided the cost of the foreign material used does not exceed one-tenth of one percent of the total contract cost or \$2,500.00, whichever is greater. Included in this amount ~~are~~ ~~is~~ state supplied materials, Proprietary items and Contractor provided materials.

~~The “Buy America” provision applies to products that are manufactured predominately of steel and iron if the product consists of at least 90 percent steel or iron content when it is delivered to the jobsite for installation. The 90 percent is a percentage of the total monetary value of the manufactured product.~~

~~To determine the 90 percent value, divide the raw steel or iron costs by the total manufactured product costs (without taxes, shipping, handling, or other fees applied), and if the percentage is equal to or greater than 90 percent of the final manufactured product costs, then the “Buy America” provision applies.~~

~~Determining whether a product is a steel or iron manufactured product, the jobsite includes the locations where any precast concrete products are manufactured. For example, in the specific case of “precast concrete products,” the casting yard/facility is considered part of the “jobsite.” Therefore, the iron and steel materials delivered to the precast yard/facility are subject to the “Buy America” provision.~~

The Contractor shall provide the completed and signed Certification of Materials Origin (CMO) to the Project Engineer prior to such items being incorporated into the permanent work. This certification may be supplied using DOT Form 350-109EF or another form containing all the same information as required by DOT Form 350-109EF. It is the responsibility of the Project Engineer to ensure the CMO is on file prior to placing or paying for products that are made of steel or iron. CMOs for domestic steel or iron from fabricated inspected items will be retained by the fabrication inspection office. The exception is 30 inch diameter or less concrete pipe (see Sections 9-4.16 and 9-4.21). The Project Engineer is required to ensure these CMOs are on file prior to placement and payment.

In all cases, Certification of Materials Origin (CMO) must be completed and signed prior to incorporation of the steel or iron materials into the project. It is the responsibility of the Project Office to ensure that the CMO is on file prior to placing or paying for steel or iron materials, as defined below.

Fabricated Items

- WSDOT Fabrications Inspection Offices will review the supporting documentation, i.e., Mill Certificates and CMOs prior to inspecting and Stamping/Tagging the fabricated material. The Fabricator/plant is required to supply the Fabrications Inspector the DOT Form 350-109EF completed and signed with each item prior to inspection.
- The project field inspector is required to document in the IDR, QPL Contractor Product Information Page, or Field Note Record (FNR) prior to placement that the fabricated material is identified with a “D” – Domestic or “F” – Foreign per [Section 9-1.5](#). Fabricated items bearing an “F” or not bearing any Stamp when delivered to the job site requires that the Project Engineer Office obtain the DOT Form 350-109EF from the Contractor and retain this form in the project records.

Non-Fabricated Items

- The Project Office is required to obtain, and place in the materials file, a completed Certification of Materials Origin for any materials containing iron or steel. This certification may be supplied using DOT Form 350-109EF or another form containing all the same information as required by DOT Form 350-109EF.

In summary, if a CMO is required, the Project Office is responsible for obtaining and filing the CMO prior to placement of or payment for the material unless the material is a fabricated item with a “D” stamp documented in the file.

~~Examples of products that are subject to “Buy America” provision include, but are not limited to the following:~~

- ~~• Steel or iron products used in pavements, bridges, tunnels or other structures, which include, but are not limited to the following: fabricated structural steel, reinforcing steel, piling, high strength bolts, anchor bolts, dowel bars, permanently incorporated sheet piling, bridge bearing, cable wire/strand, pre-stressing/post-tensioning wire, motor/machinery brakes and other equipment for moveable structures.~~
- ~~• Guardrail, guardrail posts, end sections, terminals, cable guardrail.~~
- ~~• Steel fencing material (fabric), fence post.~~
- ~~• Steel or iron pipe, conduit, grates, manhole covers, risers.~~
- ~~• Mast arms, poles, standards, trusses, or supporting structural members for signs, luminaires, or traffic control systems.~~
- ~~• Steel or iron components of precast concrete products, such as reinforcing steel, wire mesh and pre-stressing or post-tensioning strands or cables.~~

~~The miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct the above products (or manufactured products that are not predominantly steel or iron) are not subject to the “Buy America” provision. Examples include, but are not limited to the following:~~

- ~~• Materials listed under Section 9-1.3C—Low Risk Materials~~

- ~~Anchor Ferrules~~
- ~~Architecture miscellaneous items—doors, hinges, fixtures, faucets, shelves, etc.~~
- ~~Bollard and Components~~
- ~~Non-High-Strength Bolts, Washers, and Nuts~~
- ~~Clamps~~
- ~~Dobie/Mortar Blocks~~
- ~~Construction Aides—lifting hooks and inserts~~
- ~~Electrical Miscellaneous Fittings~~
- ~~Erosion Control Miscellaneous Hardware~~
- ~~Fence Miscellaneous Hardware~~
- ~~Gate Hardware (except for fabric and poles)~~
- ~~Gabion Miscellaneous Hardware (except for twisted and welded fabric)~~
- ~~Irrigation System Components and Hardware (except for steel or iron pipes and conduit)~~
- ~~Pipe Sleeves~~
- ~~Precast Concrete Traffic Barrier Pins~~
- ~~Rebar chair and Spacers~~
- ~~Screws~~
- ~~Shims~~
- ~~Slope Protection Miscellaneous Hardware~~
- ~~Utility Inserts~~
- ~~Welding Rods and Welding Wire~~
- ~~Weld Splices for Precast Concrete Girders~~