

[Michael P. Melaniphy, APTA](#) 07/15/2013

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Federal Highway Administration's (FHWA) notice concerning the California Department of Transportation's (Caltrans) request for a waiver of Buy America requirements related to utility relocation, published online on July 3, 2013.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

APTA speaks for its members. Its Board of Directors reiterated that fact on March 9, 2013, when it adopted the following statement: "While APTA encourages its members to provide specific examples or impacts in support of the association's positions, APTA crafts its comments to represent those of all APTA members. The association goes to great lengths to ensure its regulatory comments represent the consensus views of our members. Every APTA member has the opportunity to review drafts, participate in discussions, and assist in crafting those consensus comments. In short, we speak with a single voice and, when the rare instance occurs that we cannot reach consensus, we do not speak at all. APTA's comments are those of our more than 1,500 members. This consensus-based method of crafting regulatory comments is a factor underlying APTA's selection of one of Washington's most trusted brands in a broad survey conducted by the National Journal and we encourage all federal agencies to recognize the representative nature of the association's regulatory comments."

APTA SUPPORTS THE CALTRANS REQUEST

On June 28, 2013, APTA and nine of our partner organizations urged both outgoing Secretary LaHood and incoming Secretary Foxx to preclude delays in highway and public transportation projects across the country occasioned by the decision to apply Buy America requirements to utility relocation agreements. As explained in our joint letter, a copy of which is attached hereto, utility relocation has historically been treated as a real estate transaction rather than as a procurement contract. As such, Buy America was never held to apply to these transactions.

Faced with this substantial policy shift, and without clear guidance on how Buy America compliance will even be defined, both project sponsors and utilities are unable to certify, in good faith, that utility relocation work complies with the requirements.

Moreover, as part of this joint organization letter, we have requested consistent, Department-wide, policy, interpretation, and guidance, so utilities are not forced into inconsistent compliance models when looking at highway or transit projects.

Given the uncertainty of Buy America compliance requirements, the immense cost of project delays, and the need for broad based industry engagement before a workable solution is reached, we believe FHWA must approve this waiver. To deny the waiver would be to sacrifice thousands of known jobs for a handful of potential jobs and further delay and disillusion both highway and transit users.

We appreciate FHWA's consideration of our comments and the comments of our partner organization. For additional information, please contact James LaRusch, APTA's chief counsel and vice president-corporate affairs, at [\(202\) 496-4808](tel:2024964808) or jarusch@apta.com.



June 28, 2013

The Honorable Ray LaHood, Secretary
The Honorable Anthony Foxx, Secretary-Designate
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Re: Application of Buy America Requirements to Utility Relocations

Dear Secretary LaHood and Secretary-Designate Foxx:

We are writing to request your assistance in addressing an issue that has the potential to create substantial delays and increased costs for transportation projects across the country with attendant adverse effects on jobs and the economy – the application of Buy America requirements to materials used in utility relocation agreements. Your leadership is needed to resolve the uncertainty that has resulted from the decision by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) to begin applying Buy America requirements to utility relocation agreements.

Since utilities and the companies that make the materials used in utility relocation have not been subject to Buy America historically, we believe that a transition period is needed. During this transition period, the process of compliance for utility relocation can be clarified, waivers can be issued where appropriate, and education and training of affected industries can occur. Most importantly, transportation projects can move forward. We believe utility relocations should not be subject to Buy America requirements during this transition period.

At the outset, we would like to emphasize our support for the application of Buy America requirements to transportation projects. Buy America requirements help to promote American jobs by requiring the use of American-made iron, steel, and manufactured products in transportation facilities and vehicles built with federal funds. These requirements have been implemented effectively for many years through a strong cooperative relationship among transportation agencies and their construction contractors and suppliers. While the goal of Buy

America is to promote American jobs, a recent change in the U.S. Department of Transportation's (USDOT) implementation of the statute presents a substantial risk of having precisely the opposite effect.

Our concern involves the recent efforts by FHWA and FTA to begin applying Buy America requirements to materials used as part of utility relocation agreements. Utility relocation agreements arise when utility companies are required to move their existing infrastructure to accommodate construction of federally supported transportation projects.

Historically, FHWA and FTA applied Buy America requirements only to construction contracts – that is, to contracts in which a recipient of federal funds engages in a procurement process and selects a construction contractor to build a transportation facility. Buy America requirements were not applied to utility relocation agreements because those agreements were treated as the equivalent of compensation payments to affected property owners. Unlike State and local agencies, and any construction contractors who voluntarily bid to participate in such projects, utilities are essentially required by the State and local agencies to relocate their facilities to accommodate the work of such contractors. This longstanding interpretation is evidenced by the fact that FHWA and FTA do not mention utility relocations, even briefly, in their extensive Buy America regulations and guidance.

Within the past year, FHWA and FTA have made a policy change: they have begun to inform State and local transportation agencies that Buy America requirements do apply to utility relocation agreements. FHWA has acknowledged that this interpretation represents a shift in policy and has cited Section 1518 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) as the basis for the policy shift. FTA indicated that they do not believe there has been a change in policy, but rather has described its position as simply a heightened emphasis on enforcement of a long-standing requirement. Either way, the practical effect is the same: for the first time, State and local transportation agencies are being required to ensure that all utility relocation agreements comply with Buy America requirements. Under this policy, utilities have to comply with Buy America rules even in cases where the relocation is funded with non-federal dollars. Moreover, they are being asked immediately to comply with new requirements without the benefit of clear guidance and a rulemaking to explain how utilities will demonstrate Buy America compliance.

Currently, State and local transportation agencies are attempting to accommodate the uncertainty created by this policy change by working cooperatively with FHWA, FTA, and utilities to develop solutions that avoid major delays of transportation projects. For example, our understanding is that FHWA has provided some flexibility by permitting projects that were approved prior to the effective date of MAP-21 (October 1, 2012) to proceed. But these types of short-term solutions will help only some projects. Many other projects will be delayed because, at this time, utilities are not certain as to what Buy America compliance entails. Many materials used in utility relocation have long lead times and some are not domestically available. As a result, utilities are not able to certify that the materials used in relocation efforts necessary to facilitate transportation projects satisfy Buy America requirements at this time. The California Department of Transportation recently presented USDOT with information about the compliance challenges for utilities in that State and the multimillion-dollar projects that are likely to be

delayed as a result. These examples are not unique to California and illustrate how uncertainty about how to apply Buy America requirements to utility relocation agreements is affecting major projects, increasing costs and jeopardizing jobs.

If it is decided that Buy America requirements should be applied to utility relocation agreements, it will be necessary to provide a reasonable framework that allows utilities to comply without disrupting ongoing projects. We believe this framework needs to include several key elements and should:

- Clarify the requirements.
- Allow a transition period.
- Apply timely, streamlined waivers where appropriate.
- Establish consistent requirements for utility relocations across transportation modes.
- Provide training and education.

We briefly address each of these issues below. Until this framework is in place, we believe utility relocations should not be subject to Buy America requirements. Given that utility relocations are very small projects in comparison to the larger transportation projects at issue, the vast majority of the iron, steel and manufactured products that will be used in transportation projects in the interim will be Buy America-compliant.

Clarify the Buy America requirements for utility relocations. As noted above, utility relocations are not mentioned anywhere in FHWA and FTA’s existing Buy America regulations.¹ FHWA and FTA’s guidance documents on Buy America also do not mention utility relocations, except for a handful of “Buy America Questions and Answers” posted to FHWA’s website in December 2012.² As a result, transportation agencies and utilities do not have answers to important questions such as how FHWA’s exemption (set forth in a December 2012 memorandum) for manufactured products that are less than 90% steel or iron content applies to the various types of materials used in utility relocations; who is responsible for certifying compliance with Buy America requirements for utility relocations; what form that certification should take; and what happens if a utility relocation is later found to be non-compliant with Buy America requirements. This lack of information is exacerbated by the fact that the FHWA and FTA guidance differs – for example, FTA has not provided similar guidance on manufactured products and has yet to provide definitions for components and subcomponents of utility systems. We recommend that these issues be addressed initially through guidance and ultimately

¹ FHWA’s Buy America regulations are in 23 CFR 635.410, and FTA’s Buy America regulations are in 49 CFR Part 661. The word “utility” does not appear in either set of regulations. FHWA also has regulations on utility relocations in 23 CFR Part 645; those utility regulations do not contain a single reference to Buy America. USDOT’s regulation at 49 CFR Part 24, “Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs,” specifically discusses utility relocation in paragraph 306 without mention of Buy America or other third party contract provisions.

² FHWA’s Contract Administration Core Curriculum Manual (2006) includes detailed instructions for federal-aid highway construction contracts. Section II.B.1 of the manual discusses Buy America, but that section does not mention utility relocations. FTA’s Third-Party Contracting Guidance, Circular 4220.1F (March 2013) includes detailed instructions regarding FTA-funded construction contracts. Several sections of the Circular address Buy America requirements, but none of those sections mention utility relocations.

in regulations adopted through notice-and-comment rulemaking, during which the particular interests and concerns of utilities could be considered.

Allow a transition period for utilities to come into compliance. As a practical matter, a transition period is needed. First, the equipment used in utility relocation efforts is often project-specific and not fungible. Because lead times for utility equipment orders can be substantial, many projects that are ready for construction would grind to a halt while new, Buy America-compliant equipment and materials are ordered (if, indeed, they are ultimately found to be available). Second, utilities are in the process of reassessing and reconfiguring diverse supply chains, and adjusting their internal controls to account for domestic content. Many utilities will need to identify new suppliers and manufacturers (to the extent they are available), especially for specialized products that are either not currently manufactured in the United States or are produced here but not in full compliance with Buy America. For utilities, the products must not just meet domestic content standards, but must be interoperable with their existing infrastructure and meet standards for safety, effectiveness, and reliability. A transition period that allows for a sufficient time for new regulations and guidance to be developed, for training to occur, for new equipment to be ordered, and for utilities' supply chains and internal systems to be modified is needed.

Apply waivers where appropriate. Transportation agencies and their contractors have had decades of experience with Buy America requirements as applied to transportation construction contracts. This experience has enabled contractors to minimize the need for waivers by identifying and cultivating American suppliers for materials commonly used in transportation projects. By contrast, utilities have not been subject to Buy America requirements, so in the short run at least, utilities would likely have a significantly greater need for waivers. For example, electric and natural gas utilities use many specialized products, which are critical to the safety and stability of the transmission and distribution systems. Over time, it may be possible to develop domestic suppliers for these products. But in the near term, because of obtaining materials not currently made in the United States and the long lead times associated with obtaining specialized utility products, waivers are likely to be needed more frequently for utility relocations than for general construction activities typically included in transportation projects. Accordingly, we recommend that DOT establish clear procedures for obtaining waivers where necessary due to insufficient quantity, quality or timely availability. Moreover, since many utilities do business in multiple States and the same non-compliant materials are likely to resurface in multiple projects, we believe that establishing a streamlined procedure for waivers (including ensuring that utilities themselves may make such requests) and waivers that could be obtained for a particular material throughout the country (versus on a project by project basis) would be warranted.

Ensure that Buy America requirements for utility relocations are consistent. Under federal law, each USDOT modal administration is subject to a different Buy America statute, and each modal administration has implemented Buy America requirements through its own regulations and guidance. As a result, while the basic elements of Buy America requirements are similar across all modes, there are some important differences. For example, as noted above, FHWA has issued guidance clearly exempting some manufactured products; FTA has no such waiver. If utilities are required to comply with Buy America requirements, it would be extremely

inefficient to force them to follow different rules, develop different accounting protocols and seek out different suppliers depending on whether the utility relocation is associated with a highway project or a transit project. The same rules should apply to utilities, regardless of the type of project the relocation of utility equipment makes possible. Because of the substantially larger number of highway projects that are potentially impacted, we recommend that USDOT adopt the Buy America processes developed and administered by FHWA.

Provide appropriate training and education. The expansion of Buy America requirements to include utility relocations must be accompanied by a large-scale training and education effort. Hundreds of utilities across the country – as well as the accompanying network of suppliers and manufacturers – are faced with a steep learning curve as they become familiar with a complex set of legal requirements that previously have not applied to their activities. Non-compliance with those requirements could have serious consequences, both for the utilities and for State and local transportation agencies. Common sense suggests that implementation of these new requirements must include not only the development of new regulations and guidance, but also training programs to ensure the new requirements are well-understood and consistently applied and enforced throughout the utility industry.

In closing, we would like to emphasize our willingness to work cooperatively with you and with each of the modal administrations to achieve a constructive resolution that promotes the goals of the Buy America programs while also allowing transportation projects and the utility relocations associated with them to move forward without delays.

Sincerely,

American Association of State Highway and Transportation Officials
American Gas Association
American Public Power Association
American Public Transportation Association
Community Streetcar Coalition
Edison Electric Institute
Interstate Natural Gas Association of America
National Rural Electric Cooperative Association
NTCA-The Rural Broadband Association
New Starts Working Group
United States Telecom Association

cc: Administrator Victor M. Mendez, Federal Highway Administration
cc: Administrator Peter M. Rogoff, Federal Transit Administration