

# Utility Relocation: Practical Challenges of Implementing Buy America

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# Overview of Discussion Items

- Obligations to be assumed by the utility.
- Statutory requirement.
- Overview of 49 CFR Part 661 analysis.
- Practical challenges in implementing the manufactured product analysis.
- Published guidance regarding application of manufactured product analysis to utility relocations.
- Recommendations and lessons learned from successful projects.

# Application to Utility Relocation; Obligations to be Assumed by Utility

- Any utility work that is part of the *scope of an-FTA funded project* must comply with Buy America requirements, unless a waiver is obtained.
  - FTA grantee must *flow-down* Buy America obligations to the utility company performing the relocation work.
  - Utility company must certify compliance with Buy America using the certification set forth in 49 C.F.R. § 661.6.
  - Utility company must retain documentation related to the utility work for three years after final payment is made.
- Utility supply chain contracts, prequalified vendor lists and product qualification processes were not historically established with domestic manufacturing traceability requirements in mind.

## 49 U.S.C. § 5223(j)(1)

*The Secretary may obligate an amount that may be appropriated to carry out this chapter for a project only if the steel, iron and manufactured goods used in the project are produced in the United States.*

# Review of 49 CFR Part 661

## Application to *Steel or Iron*

- Definition of Steel or Iron: Construction or building materials made primarily or exclusively from steel or iron including: (i) structural steel or iron; (ii) steel or iron beams and columns; (iii) steel or iron poles or towers that include a load-bearing, structural or support function; (iv) steel or iron running rail; and (v) steel or iron contact rail.
- Domestic Requirement: All manufacturing processes (things like smelting, rolling, extruding, machining, bending, grinding, cutting, drilling and coating) must take place in the United States, except metallurgical processes involving refinement of steel additives.

# Review of 49 CFR Part 661 Application to *Manufactured Goods/Products*

- Definition of Manufactured Product: Any item that undergoes an application or process that alters the form or function of materials or of elements of the product in a manner adding value or transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.
- Buy America Analysis: FTA approach looks at the manufactured products from a functional/system perspective, to identify manufactured end products. Each manufactured end product is then categorized into components and subcomponents.
- Domestic Requirement: (1) All of the manufacturing processes for the manufactured end product must occur in the U.S.; and (2) All of the components of the manufactured end product must have been manufactured in the U.S. - Foreign subcomponents are allowed.
- Application to Construction: FTA treats the procurement of a construction project as the procurement of one or more manufactured end products with final assembly of components deemed to occur at the construction site.

# Practical Challenges to Implementing the Manufactured Products Analysis

- Fact specific inquiry requiring a detailed understanding of the functionality of multiple products, the manufacturing process for products and subcomponents, and the construction plans.
- There are significant distinctions between a vendor in a procurement context and a utility in a relocation context.
- Limited leverage to compel utilities to meet schedule requirements.

# Published Guidance Re: Application to Communications Utilities

- Charlotte Area Transit System 8/8/13; Los Angeles County Metropolitan Transportation Authority 8/21/13:
  - Relocated communications system is the end product.
  - Poles, manholes, handholes, conduit, cable, pedestals and cabinets are components.
  - Subcomponents include connectors, clamps, fittings, washers, screws, nuts, bolts, etc.

# Published Guidance Re: Application to Electrical Utilities

- Southern California Edison 4/30/14:
  - Relocated transmission and distribution systems are the end products.
  - Loadbearing, structural or support steel poles are subject to the “steel” rule and are also components.
  - Poles, wires, cable, switches, vaults, cabinets, meters, reclosers, vaults and barometers are components.
  - Subcomponents include miscellaneous hardware, electronics, plates, crossarms, etc.



# Published Guidance Re: Application to Gas Transmission Utilities

- Sacramento Regional Transit District 7/10/2014:
  - Relocated gas transmission system and valve system lot are the end products.
  - Pipes and valves are components.
  - Elbows, caps, plugs, sockets are among the subcomponents.

# Differences in FHWA Requirements

- FTA and FHWA approaches to applying Buy America to manufactured products have significant differences:
  - FHWA nationwide waiver for manufactured products that are not: (i) steel or iron manufactured products; or (ii) steel or iron components of manufactured products.
- FTA and FHWA approaches to certification:
  - FTA requires the general certification form set forth in 49 U.S.C. § 661.6.
  - In my experience, there was not a standard form of compliance certificate, but many FHWA grantees used a step-certification process documenting each manufacturing process through manufacturer certifications and mill test reports (specific to a steel or iron product).
- FTA has a general public interest waiver for small purchases (now statutorily fixed at \$150,000); FHWA allows for foreign steel and iron less than (the greater of): (i) \$2,500; or (ii) 0.001 of contract value.

# Recommendations and Lessons Learned from Successful Projects

- Buy America discussions need to be part of the earliest work scoping and cost responsibility discussions.
- Don't assume that the utility understands the application of FTA Buy America rules like a transit vendor does.
- Invest time and resources to educate the utility on FTA Buy America rules during planning and scoping.
- Understand and stay engaged with the utility's portion of the project and be willing to provide technical support and assistance as necessary to source parts and address other utility concerns to certifying compliance.
- Do your own assessment of the utility's compliance plan.