

TxDOT / UESI Information Exchange Session

June 21, 2021

Buy America Updates

Questions from Attendees

- Q:** Is there a definition for “predominantly” when it comes to steel products?
- A:** See Buy America: Frequently Asked Questions, Question number 2.
<https://ftp.txdot.gov/pub/txdot-info/row/buy-america-faq.pdf>
- Q:** Do the Buy America requirements still apply only to Federal-Aid funded TxDOT projects and just those utilities that are reimbursable with federal funds?
- A:** Buy America requirements apply to Federal-Aid and State funded projects where Utilities are eligible for reimbursement.
- Q:** Does the requirement for state-funded project with Buy America compliance (thus all TXDOT projects?) fall into the May 2022 grace period?
- A:** Yes, the requirement for compliance for the process of smelting to be domestic falls into the May 2022 grace period. All other requirements of Buy America Guidelines must comply.
- Q:** The Buy America guidelines say that in certain instances, the utility facility owner can provide a written certification for materials. Under what circumstance would that not work? Is there a limit to how much material a utility owner can document with the certification approach (i.e., without MTRs)?
- A:** When a MTR documentation is unavailable, but the vendor or manufacture can certify that the material is Buy America compliant. There is no limit on how much material a utility owner can document with the certification approach.
- Q:** Who can I submit Form 1818 for review and acceptance? Is there a process flowchart?
- A:** The utility can submit a complete Buy America package for review to their specific district. If the district needs additional assistance with compliance review, the district will submit to the utility specialist for a courtesy review.
- Q:** What if an item is not specifically identified as one of those listed in the Buy America Memo, but is utilized as one of the items listed.... how is this addressed?
- A:** The materials listed in the TxDOT Buy America Guidelines are “including but not limited to”. The utility owner is responsible for identifying domestically manufactured products that are composed of predominantly steel and/or iron within the cost estimate. Buy America items will be identified with an asterisk (*) on the cost estimate with a note

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indicating what the asterisk (*) is for. As a general practice, if the material fits within one of the categories outlined in the Buy America Guidelines, then the material should be compliant.

- Q:** On electric utility projects, some of the interpretations regarding the distinction between exempt vs. non-exempt materials are somewhat subjective, and may differ between TxDOT Districts or projects. Are there any future plans to provide more specific guidelines on these distinctions?
- A:** The goal for TxDOT is to standardize the interpretation and compliance of Buy America across the state. Buy America training resources has been created with training material, resources, and training videos. This material has been created to educate and be consistent with the information provided to everyone involved in a utility adjustment project across the State. TxDOT continuously reviews the standards and make appropriate changes when needed.
- Q:** What if a Utility Owner is reimbursable, but chooses not to seek reimbursement - does Buy America still apply? What if they are only 10% reimbursable? What if they relocate outside TxDOT ROW and still not seek reimbursement? How is this monitored/enforced?
- A:** Set forth in 23 US §313. Buy America (g) The requirements under this section shall apply to all contracts eligible for assistance under this chapter for a project carried out within the scope of the applicable finding, determination, or decision under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this title. If a utility owner is eligible for reimbursement and chooses not to seek reimbursement, they should still comply with Buy America requirements even if there will be no standard utility agreement in place.
- Q:** A city needs to relocate utility facilities and the relocation is included in the highway contract. The city has a shortlist of supplier companies that they use if they need to be Buy America compliant. Can the district include a special provision in the letting documents that requires the contractor to use one of those companies for the relocation of the city's facilities?
- A:** The city can include the shortlist of supplier companies in the special provisions with the letting documents, but it will be up to the highway contractor to use the most

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economical vendor with pricing for the project. The city would also have the option to purchase their own material and provide it to the contractor. If this option is selected then the city would be responsible for providing Buy America documentation.

Q: Will the Buy America requirements be waived in the event of long material lead times when there is an aggressive TxDOT project timeline? Can temporary items be used in the interim? Will TxDOT cover 100% of the cost of the temporary construction? How long does the Utility Owner have before they need to switch out the temporary parts with Buy America compliant parts?

A: FHWA HQ office (Washington, D.C.) has stated that they are not processing any Buy America waivers. This is because they have not been authorized to process any new waivers

Yes, temporary items can be used in interim.

The Utility should coordinate with TxDOT to determine if the cost of the temporary item and construction can be included in the standard utility agreement. The percentage of work and items is based on the Utility's property interest. If approved, an estimated timeframe should be identified of when the temporary installation will be replaced in the standard utility agreement. No reimbursement can be made until the completion of adjustment and verification of compliance has taken place.

Q: If a Utility cannot source an item that is identified as needing to comply with Buy America, are there variances / waivers and what is that process?

A: At this time, there is no variance or waivers being granted. For more information, see answer from previous question.

Q: The Form 1818 requires dates of signature and notary be the same; during work from home due to COVID, it was not always physically possible to be in-person for notary signature or sometimes not on the same day. Is there any exemption that can be provided for that?

A: No. A Texas notary who is not commissioned as an online notary may only perform notarial acts when the signer is present at the time the transaction takes place. Remember that the primary function of a Texas notary is to prevent fraud. Notaries do this in part by requiring the personal physical presence of the signer, making a positive identification of the signer, and placing the signer under oath or affirmation, or taking the acknowledgment of the signer that the document was signed willingly for the

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purposes stated in it. Often, forgeries occur because the notary fails to require the document signer to be present for the notarization. American Association of Notaries, FAQ, https://www.texasnotary.com/notary-faqs/Texas-Notary-Public-Duties-and-Practices#answer_3

- Q:** If a Utility Coordinator knows early in the PS&E (30%) that a utility relocation will be delayed due to material acquisition issues related to Buy America compliance, what could be done to avoid utility delay claims during construction?
- A:** Communicate early and often with all the stakeholders involved in the project. TxDOT and the Utility should be in constant communications to avoid or minimize impacts to the utility. If the facility has to be adjusted, then early planning may provide the utility with enough time to order and receive the materials to prevent delays. If delays are unavoidable, then communication for alternative solutions such as temporary installations should be held.
- Q:** Is it mandatory that the TxDOT project highway name be included in the Certification letter even though this information is already included on the signed and notarized form 1818 from the vendor/manufacturer?
- A:** Yes, the written certification will include the specific project information pertaining to the Standard Utility Agreement. This helps at audit to show the certification is for this project and not a general certification.
- Q:** Does steel casing pipe for crossings have to comply with Buy America? What other materials can be used as casing pipe for crossings outside of steel?
- A:** Yes, if the casing pipe is part of an eligible reimbursement project. Refer to the Texas Administrative Code for other acceptable casing materials.
- Q:** If there is no utility agreement, is the utility still required to be Buy America compliant?
- A:** If the utility is not eligible for reimbursement, the utility does not need to comply with Buy America.
- Q:** Is there going to be a copy of this meeting and presentation made available to attendees?
- A:** It will be available in the Utility Accommodation Toolkit.