**Questions and Concerns of State DOTs regarding**

**Implementation of Buy America with respect to Utilities**

November 2013

1. Compliance requirements – In what situations must a utility comply with Buy America?
   1. Related to the project’s funding source:
      * Must utilities comply only when federal funding is used? Does this change if a utility pays for relocation itself? Does this change if only state funding is used?
   2. Related to the location of the utility:
      * Must utilities comply when they are in the state’s right of way by permit? Does this change if the utility is reimbursed/not reimbursed?
      * Must utilities comply when they are on their own easements and/or rights-of-way?
   3. Related to state laws regarding reimbursement:
      * Is it correct that Buy America does not apply to relocations where state law prohibits the use of highway funds to reimburse the utilities, regardless of the location of the utility or funding source used?
   4. Do railroads count as a “utility” and must they comply with Buy America?
   5. Are there other compliance situations states/utilities need to be aware of?
2. Legal language
   1. What legal language needs to be added to utility agreements to address the new Buy America requirements? Is there sample or “model” language?
   2. Can the risk of compliance be shared with the utility? Or can language be developed that puts the liability upon the utilities for corrective actions?
3. Certification process
   1. Who determines what certification process is used? Is there a recommended procedure for state transportation agencies to follow in determining compliance by utility companies and, if one is being developed, can states and utilities be involved in the development process?
   2. What steps does “certification” consist of, and what documentation is needed? How long must the documentation be retained? Does FHWA have a sample certification document?
   3. What are the expectations of the states and utilities with regard to inspection, oversight, and/or auditing to ensure that Buy America is met? Will a national process be developed?
4. Review/Approval of Certifications
   1. Is there a federal-level review and/or approval of the certifications or the certification process? Or is this a state function?
5. Inability to Certify
   1. How should states handle a situation where a utility declines or is unable to certify that their materials comply with Buy America?
   2. What recourse does a state have if a utility company refuses to sign the utility relocation agreement due to the Buy America provision?
   3. How will the issue of unavailability of domestic products which meet utility companies’ technical standards be resolved?
6. Non-compliance
   1. What are the penalties, responsibilities, and required remedies if an installation is found to be in non-compliance?
      * Will federal funding be revoked? Will installations need to be replaced?
      * Does a State DOT face penalties if it accepts a certification from a utility that turns out to be inaccurate? Who is ultimately responsible for an inaccurate certification by a utility?
7. Substantial compliance
   1. What is “substantial compliance”?
   2. Is the 90% rule still in effect and, if so, how is it calculated for any given material (weight, cost, volume, other)?
8. Industry-specific lists
   1. Can the list of items that are subject to (or not subject to) Buy America requirements be expanded and tailored to utilities?
9. Recycled materials
   1. If a utility recycles/refurbishes materials, certification may be difficult or impossible. Are recycled/refurbished components subject to Buy America? (i.e., can utility companies use recycled materials that originally were made in other countries then recycled in the U.S.?)
10. Waivers
    1. During this initial implementation period (and given that many utilities have stockpiled materials and established supply chains), will waivers be allowed for materials with significantly long lead-times for acquisition?
       * Could nationwide waivers for specific materials be granted, rather than project-based waivers, until such time as the materials are available from a domestic source?
       * Can utility companies directly request waivers? What specific documentation does the FHWA require from utility companies for a waiver?
       * If a waiver on specific items has been previously approved, can a utility/contractor claim that waiver and proceed? Or do they have to start the process from scratch?
11. Training
    1. Will training be developed and provided to local agencies and utilities for Buy America application and material certification?
12. Harmonization of federal agency requirements
    1. Has FHWA coordinated with FTA regarding their slightly-different Buy America requirements, especially with regard to multi-modal projects?
       * If there are differences, which regulations will govern?
    2. Are there also differences between Buy America provisions of FHWA and FRA?
13. De minimus
    1. The current threshold is based on economic conditions from 1983 (30 years old). What is the likelihood of an adjustment to the formula? Will the comments regarding De minimus submitted in the federal register be considered and adopted? If so, what is the anticipated schedule for a formal adjustment?
    2. Clarification is needed regarding the .1% of the total contract cost or $2500.  Does this “contract cost” refer to the entire Federal-aid construction project or is the contract cost referring to the utility portion of the project?