

APPENDIX A

DOMESTIC PREFERENCE PROVISION. Two separate domestic preference laws apply to this Project:

The first is the Buy America Act (Buy America), codified at 23 U.S.C. §313 and implemented through regulations found at 23 C.F.R. §635.410. The Buy America Act applies to iron and steel material used on FHWA-funded projects.

The second is the Build America, Buy America Act (BABA), adopted in Title IX of the Infrastructure Investment and Jobs Act, Public Law No. 117-58 (IIJA) and implemented through 2 C.F.R. Part 184. On FHWA-funded projects, BABA governs use of “construction materials,” as that term is defined in 2 C.F.R. §184.3.

BABA also addresses use of “manufactured products” (defined in 2 C.F.R. §184.3) on federally funded projects. However, on FHWA-funded projects, unique rules apply to manufactured products. These rules include the following:

- (1) Due to a general waiver concerning manufactured products that FHWA issued before adoption of BABA, FHWA does not currently enforce domestic preference requirements on manufactured products as a class.
- (2) However, there is an exception to the rule stated in subparagraph (1). That is, if (a) a manufactured product is “predominantly of iron or steel or a combination of both” (Predominantly Iron/Steel) (defined in 2 C.F.R. §184.3) or (b) component(s) of a manufactured product that does not fall within the scope of subparagraph (2)(a) but is Predominantly Iron/Steel in and of itself, then Buy America’s domestic preference applies to the manufactured product or to the component(s) of the manufactured product, as the case may be. For further information, see 89 FR 17789, “Buy America Requirements for Manufactured Products.”
- (3) Despite the waiver referenced in subparagraph (1), the DEPARTMENT requires the COMPANY to identify manufactured products used on a project. As noted below, the cost of manufactured products is a factor used in determining BABA’s non-domestic content allowance on a given project.

Notwithstanding Buy America’s and BABA’s domestic preference mandates, each of these laws provides a small non-domestic content allowance.

Buy America provides a minimal use allowance for non-domestic steel and iron, so long as the cost of such materials used does not exceed one-tenth of one percent (0.1%) of the total contract cost or \$2,500, whichever is greater.

BABA permits de minimis use of non-domestic construction materials, where the permitted amount is the lesser of \$1,000,000 or 5% of total applicable costs for the project. The 5% threshold is based on the following formula:

$$\frac{(total\ value\ of\ non-compliant\ construction\ materials\ used\ in\ the\ project)}{\left(\frac{total\ applicable\ project\ costs}{(steel, iron, manufactured products, and construction materials)} \right)}$$

This threshold is based on the actual cost of the steel, iron, manufactured products, and construction materials, not just the anticipated cost of those materials.

The COMPANY's Scope of Work, described in the Utility Agreement, is part of a larger transportation improvement project undertaken by the DEPARTMENT and funded by the U.S. Department of Transportation. That project is described herein as the "Project." All work performed by the COMPANY pursuant to the Utility Agreement is the "Scope of Work."

BUY AMERICA MINIMAL USE. For purposes of this document and the COMPANY's Utility Agreement, "Project Minimal Use" refers to Buy America's non-domestic steel and iron content allowance for the entire Project. The parties agree and understand that as of the date of the Utility Agreement the exact amount of the Project Minimal Use is unknown.

For purposes of this document and the COMPANY's Utility Agreement, "Scope of Work Minimal Use" refers to Buy America's non-domestic steel and iron content allowance only when calculated using the total cost of performance of the Scope of Work pursuant to the Utility Agreement. Consistent with Buy America, the COMPANY shall ensure that all iron and steel, including Predominantly Iron/Steel manufactured products, iron/steel components of manufactured products, and construction materials permanently incorporated into the Scope of Work, are "produced in the United States" (see 2 C.F.R. § 184.3 for definition), unless the DEPARTMENT has obtained a waiver on the COMPANY's behalf or has otherwise given the COMPANY express prior written permission to use said materials. If an item is not "produced in the United States" then it is non-domestic. For the avoidance of doubt, the COMPANY will not permanently incorporate any non-domestic materials into the Scope of Work without the prior written permission of DEPARTMENT.

A preliminary Non-Domestic Minimal Use & De Minimis Register, form 25D-60-U, describing all non-domestic materials to be incorporated into the Scope of Work known by the COMPANY at the time the COMPANY signs the Utility Agreement, is attached to the Utility Agreement. The parties agree and understand that this form will be supplemented and amended as needed by the COMPANY following execution of the Utility Agreement.

The parties agree and understand that the total value of all non-domestic products and materials described in the form 25D-60-U, as amended, submitted by the COMPANY may not exceed the COMPANY's Scope of Work Minimal Use absent express prior written approval by the DEPARTMENT. However, the parties further agree and understand that so long as the overall Project Minimal Use remains within the Buy America non-domestic steel and iron content allowance, the Project will remain compliant with Buy America requirements. The DEPARTMENT will therefore track all costs of non-domestic steel and/or iron content to be integrated into the Project to ensure that the overall Project Minimal Use is not exceeded.

BABA DE MINIMIS. For purposes of this document and the COMPANY's Utility Agreement, "Project De Minimis" refers to BABA's non-domestic construction materials content allowance for the entire

Project. The parties agree and understand that as of the date of the Utility Agreement the exact amount of the Project De Minimis is unknown.

For purposes of this document and the COMPANY's Utility Agreement, "Scope of Work De Minimis" refers to BABA's non-domestic construction materials content allowance only when calculated using the COMPANY's cost estimate of applicable materials necessary for its Scope of Work. Consistent with BABA on FHWA-funded projects, the COMPANY shall ensure that all iron and steel, including Predominantly Iron/Steel manufactured products, iron/steel components of manufactured products, and construction materials permanently incorporated into the Scope of Work are "produced in the United States" (see 2 C.F.R. §184.3 for definition), unless the DEPARTMENT has obtained a waiver on the COMPANY's behalf, or has given the COMPANY express prior written permission to use said materials. If an item is not "produced in the United States," then it is non-domestic.

A preliminary Certificate of Buy America Act Compliance form 25D-62-U, describing all non-domestic materials to be incorporated into the Scope of Work known by the COMPANY at the time the COMPANY signs the Utility Agreement, is attached to the Utility Agreement. The parties agree and understand that this form will be supplemented and amended as needed by the COMPANY following execution of the Utility Agreement.

The entity certifying form 25D-62-U may be the manufacturer, fabricator, vendor, or supplier; provided they have sufficient control and knowledge of the manufacturing process to accept responsibility and certify full and complete conformance with 23 C.F.R. § 635.410 and 2 CFR Part 184. In lieu of manufacturer, fabricator, vendor, or supplier certification on form 25D-62-U, COMPANY may provide other documentation of compliance with 23 C.F.R. § 635.410 and 2 CFR Part 184. The COMPANY shall also certify form 25D-62-U and retain additional certifications and backup documentation to signed form 25D-62-U. False statements may result in criminal penalties prescribed under AS 36.30.687 and Title 18 U.S. Code Section 1001 and 1020.

The parties agree and understand that the total value of all non-domestic products and materials described in the form 25D-62-U, as amended, submitted by the COMPANY may not exceed the COMPANY's Scope of Work De Minimis absent express prior written approval by the DEPARTMENT. However, the parties further agree that so long as the overall Project De Minimis remains within the BABA non-domestic construction materials allowance, the Project will remain compliant with BABA. The DEPARTMENT will therefore track all costs of non-domestic construction materials to be integrated into the Project to ensure that the overall Project De Minimis is not exceeded.

MISC. The COMPANY may not rely on a waiver being granted. However, at the COMPANY's request, and if the DEPARTMENT deems it reasonable and practicable, the DEPARTMENT will be responsible for seeking and obtaining a waiver on the COMPANY's behalf for use of any non-domestic materials. The COMPANY will support the waiver application by providing information about its efforts to obtain domestically sourced materials.

The United States, Mexico, Canada Agreement (USMCA) does not apply to the Buy America requirement.

Buy America does not apply to construction materials or iron or steel products that the COMPANY has brought temporarily to the construction site and removed at or before the completion of the project. Further, it does not apply to any materials which remain in place at the COMPANY's convenience. Buy America does not apply to iron ore, pig iron, and processed, pelletized and reduced iron ore.

The following materials are exempt from BABA requirements per Section 70917(c) of P.L. 117-58:

1. cement and cementitious materials
2. aggregates such as stone, sand, or gravel
3. aggregate binding agents or additives

Note: The law regarding domestic preferences is rapidly evolving. This document is intended to reflect the state of the law at the time of contracting. In the event the content of this document conflicts with other DEPARTMENT resources, e.g., the Alaska Utilities Manual, this document prevails.

PURCHASE OF NON-DOMESTIC MATERIALS. In order to facilitate the overall Project, the DEPARTMENT may authorize the purchase of agreed to non-domestic products and materials listed on the COMPANY's form 25D-62-U or form 25D-60-U immediately upon execution of the Utility Agreement to avoid later cost-increases, unavailability, or other issues. At all times, the COMPANY and the DEPARTMENT will work closely together to minimize the necessary purchase of non-domestic products and materials through all reasonable means. To further compliance with Buy America and BABA, the DEPARTMENT will also work with the COMPANY on the re-use of existing materials, as necessary. The DEPARTMENT will work with the COMPANY on issues of storage of materials purchased in advance for the Project as needed. In an effort to avoid changes that would impact the COMPANY's Scope of Work, the DEPARTMENT will consult with the COMPANY on any Project change orders that may impact the COMPANY's Scope of Work to ensure overall Project compliance with Buy America and BABA. The Parties will use their best efforts to anticipate changes in the Project and technology that may impact the COMPANY'S Scope of Work and will regularly discuss these types of changes, including impacts on materials declared on forms 25D-60-U or 25D-62-U, as the Project proceeds.

TERMINATION OR DELAY DUE TO INABILITY TO COMPLY WITH BUY AMERICA AND/OR BABA. The parties acknowledge that at the time of entering the Utility Agreement the total value of the Project, and therefore the total minimal use and de minimis allowances under both Buy America and BABA, are not known by the parties. In the event that the DEPARTMENT determines that it will be impossible for the Project to proceed in compliance with either Buy America or BABA, the DEPARTMENT may delay the project until such time as compliance is possible or terminate the Utility Agreement for its convenience, both of which will be without the fault of the COMPANY. If the DEPARTMENT delays the Project or terminates the Utility Agreement for convenience, the COMPANY will not be liable for any penalties or other costs resulting from any project delays or cancellation relating to compliance with Buy America and BABA requirements. Following termination of the Utility Agreement for convenience, the COMPANY shall deliver to the DEPARTMENT a cost bill within thirty (30) days of notice of the termination, detailing all costs incurred by the COMPANY up to the date of termination and not yet reimbursed, including costs reasonably related to the termination of the Utility Agreement. The DEPARTMENT shall submit final payment to the COMPANY within thirty (30) days of receipt of the termination cost bill.

DEFINITION OF PREDOMINANTLY STEEL OR IRON PRODUCTS. Products and materials where the cost of the iron and steel, or a combination of both, exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product, or a good faith estimate of the cost of iron or steel components.

To be classified as domestic, all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

IRON AND STEEL MINIMAL USE. All predominantly steel and iron, or a combination of both, products incorporated into the work, shall be manufactured in the United States except that minor amounts of steel and iron products of foreign manufacture may be used, provided the aggregate cost of such does not exceed one-tenth of one percent (0.001) of the total Project amount, or \$2,500, whichever is greater. For this purpose, the cost is the value of the products as they are delivered to the Project, including shipping.

CONSTRUCTION MATERIALS. The following list contains the categories of construction materials, and the requirements for domestic origin (see 2 C.R.F. §184.3). Construction materials are an article, material, or supply that is:

1. Non-ferrous metals. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
2. Plastic and Polymer-based products. All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
3. Glass. All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
4. Fiber Optic Cable (including drop cable). All manufacturing processes, from the initial ribboning, if applicable, through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
5. Optical Fiber. All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
6. Lumber. All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.
7. Drywall. All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.

8. Engineered Wood. All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

If one construction material contains as inputs other construction materials, it remains classified as a construction material for the purposes of this section. Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

MANUFACTURED PRODUCTS. Articles, materials, or supplies that have been processed into a specific form and shape or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

If an item is classified as an iron or steel product, a construction material, or an exempted material per Section 70917(c) of P.L. 117-58 then it is not a manufactured product.

An article, material, or supply classified as a manufactured product may include components that are construction materials, iron or steel products, or an exempted material per Section 70917(c) of P.L. 117-58.

REFERENCED LINKS



23 U.S.C. §313



23 C.F.R. §635.410



Infrastructure Investment and Jobs Act,
Public Law No. 117-58 (IIJA)



2 C.F.R. Part 184



89 Federal Register 17789