

APPENDIX A

DOMESTIC MATERIALS PREFERENCE PROVISION. On projects using federal-aid funds the COMPANY shall ensure all Iron and Steel Products, Manufactured Products, and Construction Materials, permanently incorporated into the project are produced in the United States, as required by 23 C.F.R. 635.410-Buy America requirements (Iron, Steel, and Manufactured Products), and 2 C.F.R. 184-Buy America Preferences for Infrastructure Projects (Construction Materials).

Domestic Material requirements apply when articles, materials, or supplies are permanently incorporated into the work. Domestic Materials requirements do not apply to articles, materials, or supplies 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 materials or products used by the COMPANY which remain in place at the COMPANY's convenience.

An article, material, or supply shall only be classified as an iron or steel product, a manufactured product, a construction material, or other material. An article, material, or supply shall not be considered to fall into multiple categories.† The classification of an article, material, or supply as falling into one of the categories listed must be made based on its status at the time it is brought to the work site for incorporation into the project. The work site is the location of the project at which the article, material, or supply will be incorporated.

† As addressed in paragraph 3) below, 23 C.F.R. 635.410(c)(2) creates an exception to the single category requirement regarding precast concrete products (Precast Concrete) and intelligent transportation systems (ITS) and other electronic hardware systems cabinets and other enclosures.

DOMESTIC MATERIAL CATEGORIES:

- 1. IRON OR STEEL PRODUCTS (23 C.F.R. 635.410).** Defined as articles, materials, or supplies that consist wholly or predominantly of iron and steel or a combination of both. To be classified as domestic, all manufacturing processes, from the initial melting stage through the application of coatings, must occur in the United States.

If the cost of the iron and steel content of an article, material, or supply exceeds 50 percent of the total cost of all components, the iron and steel must meet the Domestic Materials requirements of the Iron and Steel Products of this provision. The remaining components are then exempt from any domestic procurement requirement.

The cost of iron or steel is the cost of the iron and 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. Buy America requirements do not apply to iron ore, pig iron, and processed, pelletized and reduced iron ore.

Iron and Steel Minimal Use:

All wholly or predominantly iron and steel, or a combination of both, products incorporated into the work, shall be manufactured in the United States. Minimal amounts of iron and steel products of foreign or unknown manufacture may be used, provided the aggregate cost of such does not exceed one-tenth of one percent (0.001) of the total contract amount (established at award), or \$2,500, whichever is greater. For the purposes of this paragraph, the cost is the value of the products as they are delivered to the Project, including shipping.

- 2. CONSTRUCTION MATERIALS (2 C.F.R. 184).** Defined as the articles, materials, or supplies that consist of only one of the items listed. Each material has a specific standard to be considered in compliance with Domestic Materials requirements. The items are:
- a. Non-ferrous metals. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
 - b. Plastic and Polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiberoptic cables). 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.
 - c. Glass (including optic glass). All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
 - d. 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.
 - e. Optical Fiber. All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
 - f. Lumber. All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.
 - g. 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.
 - h. 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 a Construction Material contains, as minor additions, other 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.

- 3. MANUFACTURED PRODUCTS (23 C.F.R. 635.410).** Defined as 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. Manufactured products are acceptable under this provision if the product was manufactured in the United States. For the purposes of this provision, “manufactured in the United States” means that the final assembly of the product occurred in the United States.

For Precast Concrete and ITS and other electronic hardware systems cabinets and other enclosures that are classified as manufactured products, the components that are predominantly steel or iron or a combination of both must comply with the Domestic Materials requirements of the Iron and Steel Products in paragraph 1) above.

Declare all manufactured products on form 25D-62B-U regardless of their exemption.

De Minimis Waiver: Notwithstanding the Domestic Materials requirements outlined in this section regarding Manufactured Products and Construction Materials, USDOT has adopted a limited, non-domestic content waiver regarding articles, materials, and supplies used in the project. As applicable here, USDOT has determined that it is in the public interest to waive the Domestic Material requirements for Manufactured Products and Construction Materials for which:

- “Total value of the non-compliant products” does not include the value of those products subject to a separate Buy America waiver.
- “Total applicable Project costs” (as defined by the NEPA finding, determination, or decision and referenced in form 25D-60B-U) include the cost of materials used in the project that are subject to a domestic preference requirement, including materials that are within the scope of an existing waiver.

$$\frac{(\text{"Total value of non-compliant products" (Construction Materials + Manufactured Products)})}{(\text{"Total applicable project costs" (Iron + Steel + Manufactured Products + Construction Materials)})} \times 100$$

4. **OTHER MATERIALS.** Defined as articles, materials, or supplies that do not meet the definition of Iron and Steel Products, Manufactured Products, or Construction Materials. These materials do not have any requirements for domestic sourcing. This includes the following items that are specifically categorized as other (excluded) materials per Build America, Buy America (BABA) Section 70917(c) of the Infrastructure Investment and Jobs Act of 2021.

- a. cement and cementitious materials
- b. aggregates such as stone, sand, or gravel
- c. aggregate binding agents or additives

The COMPANY shall ensure that all Iron and Steel Products and Construction Materials permanently incorporated in the project are “produced in the United States”, (see 2 C.F.R. §184.3 for definition), and all Manufactured Products are “manufactured in the United States, (see 23 C.F.R. 635.410), unless the DEPARTMENT has obtained a waiver on the COMPANY’s behalf, or has given the COMPANY permission to use materials that fall within the Minimal Use or De Minimis thresholds for the Project. If an Iron and Steel Product or Construction Material is not "produced in the United States", it is considered non-domestic. If final assembly of a Manufactured Product does not occur in the United States, it is considered non-domestic.

The United States, Mexico, Canada Agreement (USMCA) does not apply to the Domestic Material requirements.

The COMPANY shall complete, retain, and provide to the DEPARTMENT a Non-Compliant Minimal Use & De Minimis Register (form 25D-60B-U). This form constitutes a comprehensive list of all non-compliant materials permanently incorporated into the COMPANY’s relocation work for the project and is accurate as of the date the COMPANY signs this Agreement. Upon receiving Authority to Proceed, if the COMPANY becomes aware of any required changes, or errors in, a previously submitted form

25D-60B-U, the COMPANY shall complete, retain, and provide to the DEPARTMENT an updated form 25D-60B-U.

The COMPANY shall complete, retain, and provide to the DEPARTMENT a Certificate of Domestic Materials Compliance (form 25D-62B-U). This form constitutes a comprehensive list of all materials permanently incorporated into the COMPANY's relocation work for the project and is accurate as of the date COMPANY signs this Agreement. Upon receiving Authority to Proceed, the COMPANY becomes aware of any required changes, or errors in, a previously submitted form 25D-62B-U, the COMPANY shall complete, retain, and provide to the DEPARTMENT an updated form 25D-62B-U.

COMPANIES unwilling to certify and manage Domestic Material compliance in accordance with the applicable utility agreement form may incorporate their utility relocations into the DEPARTMENT's construction contract. In such cases, the parties may execute a simplified utility agreement limited to inspection activities only. The utility may be liable for certain costs in a DEPARTMENT-directed relocation in accordance with AS 19.25.020, AS 19.59.001(4), AS 02.15.104, and AS 35.10.220.

The DEPARTMENT will make every reasonable effort to work with the COMPANY to identify a compliance path that is both federally acceptable and mutually workable. COMPANIES that are unwilling to certify and manage Domestic Material compliance in accordance with the applicable utility agreement form and are also unwilling to include their relocation work within the DEPARTMENT's construction contract, will have their permits revoked and must relocate their facilities at their own expense in accordance with AS 19.25.020.

The DEPARTMENT will not allow installation of, nor pay for, items that must comply with Domestic Material requirements until the COMPANY has completed and provided acceptable forms 25D-60B-U and 25D-62B-U.

The COMPANY is responsible for quantifying, estimating, categorizing, and tracking all materials used in the completion of its relocation work. The DEPARTMENT is responsible for tracking the overall project use of Minimal Use and De Minimis materials, and to review and approve the COMPANY's proposed usage of the allowance amounts. Failure by the COMPANY to exercise due care in the quantification, estimation, and categorization of non-compliant materials or to provide the DEPARTMENT with updated forms 25D-60B-U and 25D-62B-U prior to installation of non-compliant materials may subject the COMPANY to non-reimbursement.

The DEPARTMENT will be responsible for seeking and obtaining a waiver on the COMPANY's behalf for use of any non-compliant materials, as needed. The COMPANY will support the waiver application as needed, by providing information about its efforts to obtain domestically sourced materials.

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-62B-U or form 25D-60B-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 comply with Domestic Material

requirements, 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 Domestic Material requirements. 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-60B-U or 25D-62B-U, as the Project proceeds.

The entity certifying form 25D-62B-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 C.F.R. Part 184. The COMPANY shall also certify form 25D-62B-U and retain all certifications and backup documentation supporting the provided categorizations and costs applied, and shall make such documentation available upon request.. False statements may result in criminal penalties prescribed under AS 36.30.687 and Title 18 US Code Section 1001 and 1020.

TERMINATION OR DELAY DUE TO INABILITY TO COMPLY WITH DOMESTIC MATERIAL REQUIREMENTS. The parties acknowledge that at the time of entering the Utility Agreement the total value of the Project (as defined by the NEPA finding, determination, or decision and referenced in form 25D-60B-U), and the total contract amount (established at award), and therefore the total De Minimis and Minimal Use allowance 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 Domestic Material requirements, 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 forty-five (45) days of receipt of the termination cost bill.

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 DEPARTMENT resources, e.g., the Alaska Utilities Manual, this document prevails.

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