

Memorandum

Date: January 8, 2024
To: All holders of Standard Special Provisions
From: Shawn Yu, Standards and Specifications Unit Manager
Subject: New standard special provision: Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing Federal-Aid Highway Funding in the Amount Less Than \$500,000

As of January 8, 2024, this unit has issued the new standard special provision, "Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing Federal-Aid Highway Funding in the Amount Less Than \$500,000", with 8 pages, and dated January 8, 2024.

This standard special provision is to be used on all federal-aid highway (FHWA) funded (CDOT and Local Agency administered) Infrastructure projects that have a federal funding Construction Phase authorization date that has occurred on or after October 23, 2023, and that contains federal-aid funding, but the total federal-aid highway funding is less than \$500,000. The less than \$500,000 threshold is to be based on the aggregate (total amount) of federal aid funding used or to be used in all phases of the project including Construction and any preliminary engineering phases (e.g., Right-of-way, Utilities, Design, Environmental, or Miscellaneous).

Please note, the October 23rd date is a federal compliance date. It is not tied to the project advertisement date, but rather is tied to the federal funding obligation date for the construction phase of the project.

This provision revised subsections 101.02 and 106.11.

For those of you who keep a book of Standard Special Provisions, please include this revised standard special provision. For your convenience, this specification and the latest SSP Index are attached in the email. You can also find these in our Construction Specifications web pages: [Standard Special Provisions](#) and the [Recently Issued Special Provisions](#).

If you have any questions or comments, please contact this office.



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Notice

The Standard Special Provision (SSP) on the following page revises or modifies CDOT's *Standard Specifications for Road and Bridge Construction*. The Construction Engineering Services Branch has reviewed, approved, and issued it. Use as written without change. Do not use modified versions of it on CDOT construction projects. Do not use the following special provision on CDOT projects in a manner other than specified in the instructions without approval by CDOT's Standards and Specifications Unit. The instructions for use appear below.

Other agencies using the *Standard Specifications for Road and Bridge Construction* to administer construction projects may use this special provision appropriately and at their own risk.

Instructions for use on CDOT (and local agency-administered) construction projects:

Use this standard special provision on all federal-aid highway (FHWA) funded (CDOT and Local Agency administered) Infrastructure projects that have a federal funding Construction Phase authorization date that has occurred on or after October 23, 2023, and that contains federal-aid funding, but the total federal-aid highway funding is less than \$500,000. Design Project Managers should consult with their respective Region Business Office or HQ Business Office to determine the type and amount of federal-aid highway funding that has been or will be used in the projects. The less than \$500,000 threshold is to be based on the aggregate (total amount) of federal aid funding used or to be used in all phases of the project including Construction and any preliminary engineering phases (e.g., Right-of-way, Utilities, Design, Environmental, or Miscellaneous).

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Sections 101 and 106 of the Standard Specifications are hereby revised as follows:

Add the following to Subsection 101.02:

Build America, Buy America (BABA) Requirements: Division G, title IX, subtitle A, parts I-II, sections 70901 through 70927 of the Infrastructure Investment and Jobs Act (Pub. L. 117-58) and 2 CFR Parts 184 and 200. The “domestic content procurement preference” set forth in section 70914 of the Build America, Buy America Act, requires that all construction materials and manufactured products incorporated into the project are produced in the United States.

Buy America (BA) Requirements: FHWA Buy America statutory provisions are in 23 U.S.C. 313 and the regulatory provisions are in 23 CFR 635.410, which requires that all of the steel and iron incorporated into the project is produced in the United States. For other policy and guidance links, see the FHWA Construction Program Guide.

Buy America Preferences for Infrastructure Projects: Requirements for federal-aid funded highway projects as outlined and encompassed in 2 CFR Part 184.

Component: An article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: (i) a manufactured product; or, where applicable, (ii) an iron or steel product.

Construction Material: Includes an article, material, or supply that consist of only one of the following items listed means articles, materials, or supplies that consist of only one of the items listed in paragraph (1) of this definition, except as provided in paragraph (2). To the extent one of the items listed in paragraph (1) contains as inputs other items listed in paragraph (1), it is nonetheless a construction material.

(1) The listed items are:

- i. Non-ferrous metals;
- ii. Plastic and polymer-based products (including polyvinylchloride [PVC], composite building materials, and polymers used in fiber optic cables);
- iii. Glass (including optic glass);
- iv. Fiber optic cable (including drop cable);

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- v. Optical fiber;
 - vi. Lumber;
 - vii. Engineered wood; and
 - viii. Drywall.
- (2) Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

Cost of Components for Manufactured Products: In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following instructions:

- (i) or components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (ii) or components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (i) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product.

Infrastructure Project: Includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. Infrastructure includes facilities that generate, transport, and distribute energy.

Iron or Steel Product: Articles, materials, or supplies that consists wholly or predominantly of iron or steel or a combination of both. Typical iron and steel products subject to Buy America preferences include, but is not limited to, structural and reinforcing steel incorporated into pavements, bridges, and buildings (such as maintenance facilities); steel rail; and other equipment.

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Manufactured Product:

- (1) Articles, materials, or supplies that have been:
 - i. Processed into a specific form and shape; or
 - ii. Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- (2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under the definitions set forth in this section, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.

Manufacturer: The entity that performs the final manufacturing process that produces a manufactured product.

Predominantly of iron or steel or a combination of both: Means that the cost of the iron and steel content 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 and a good faith estimate of the cost of iron or steel components.

Produced in the United States:

- (1) Steel or Iron Products: All manufacturing processes, from the initial melting/smelting stage through the application of coatings, occurred in the United States.
- (2) Manufactured Products:
 - i. The product was manufactured in the United States; and
 - ii. The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product.

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(3) Construction materials: All manufacturing processes for the construction material occurred in the United States per 106.11(f) of this specification.

Section 70917(c) Materials: Cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. See section 70917(c) of the Build America, Buy America Act.

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Delete Section 106.11 of the Standard Specifications and replace with the following:

106.11 Buy America (BA) and Build America, Buy America (BABA) Requirements

- (a) *Contractual Documents*. This specification shall be used in conjunction with the applicable version of the Special Notice to Contractors Section of the CDOT Field Materials Manual (FMM), and the requirements therein, in effect at the time of bidding. The Special Notice to Contractors Section of the FMM, and the requirements therein, shall be considered a contractual document when this specification is included.
- (b) *Categorization of articles, materials, and supplies*.
- (1) An article, material, or supply should only be classified into one of the following categories:
 - i. Iron or steel products;
 - ii. Manufactured products;
 - iii. Construction materials; or
 - iv. Section 70917(c) materials.
 - (2) An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the categories listed in paragraph (b)(1) of this section. The classification of an article, material, or supply as falling into one of the categories listed in paragraph (b)(1) must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project. In general, the work site is the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated.
 - (3) An article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified.
- (c) *Steel or Iron Products*. All manufacturing processes, including the application of a coating, for all steel or iron products permanently incorporated in the work shall have occurred in the United States of America. All manufacturing processes include the processes that change the raw ore or scrap metal into a finished steel or iron product.

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The Contractor shall obtain and maintain on file Buy America certifications that every process from either the original smelting or melting operation, including the application of a coating, performed on steel or iron products either has or has not been carried out in the United States of America. These Buy America certifications apply to every steel and iron product that requires pre-inspection, pretesting, certified test results, or a certificate of compliance. Shipping invoices, bar lists, and mill test reports shall accompany the Buy America certifications. These Buy America certifications shall be obtained from each supplier, distributor, fabricator, and manufacturer that has handled each steel or iron product. These Buy America certifications shall create a chain of custody trail for every supplier, distributor, fabricator, and manufacturer that handled the steel or iron product and shall include certified mill test reports with heat numbers from either the original smelting or melting operation. Prior to the permanent incorporation or payment for the steel or iron products, the Contractor shall also provide a copy of these certifications to the Project Engineer. The Contractor shall allow the State, FHWA, and their representatives access to the Buy America certifications including supporting documentation upon request. The lack of these certifications will be justification for rejection of the steel or iron product.

Before the permanent incorporation into the project and before payment for steel or iron products, the Contractor shall also provide the following for every iron or steel product that is delivered:

- (i) *Contractor Compliance Certification.* The compliance certification document shall certify in writing that the Contractor has received and reviewed the Buy America certifications and supplied them to the Project Engineer; the certification(s) and supporting documentation is on file and complies with the Buy America requirements; and when requested, the Contractor has submitted the required documentation to FHWA or other CDOT representatives.
- (ii) *Monthly Summary of Buy America Certifications.* The Contractor shall also maintain a document that summarizes the date and quantity of all steel and iron material delivered to the project. This summary document shall include the pay item, quantity of material delivered to the project, delivered cost of the pay item, and the quantity of material installed by

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the monthly progress payment cutoff date. The summary document shall reconcile the pay item for the material delivered to the project to the Buy America certifications. The summary document shall also include the delivered cost of all foreign steel or iron delivered and permanently incorporated into the project, if applicable. The Contractor shall also submit a summary document for each month that no steel or iron products are incorporated into or delivered to the project. The Contractor shall submit the summary document to the Engineer by the monthly progress payment cutoff date.

The Contractor shall obtain and maintain on file Buy America certifications that every process from either the original smelting or melting operation, including the application of a coating, performed on steel or iron products either has or has not been carried out in the United States of America. These Buy America certifications apply to every steel and iron product that requires pre-inspection, pretesting, certified test results, or a certificate of compliance. Shipping invoices, bar lists, and mill test reports shall accompany the Buy America certifications. These Buy America certifications shall be obtained from each supplier, distributor, fabricator, and manufacturer that has handled each steel or iron product. These Buy America certifications shall create a chain of custody trail for every supplier, distributor, fabricator, and manufacturer that handled the steel or iron product and shall include certified mill test reports with heat numbers from either the original smelting or melting operation. Prior to the permanent incorporation or payment for the steel or iron products, the Contractor shall also provide a copy of these certifications to the Project Engineer. The Contractor shall allow the State, FHWA, and their representatives access to the Buy America certifications including supporting documentation upon request. The lack of these certifications will be justification for rejection of the steel or iron product.

This requirement will not prevent a minimal use of foreign steel or iron, provided the total cost, including delivery to the project, of all such steel and iron products does not exceed 1/10 of one percent (i.e., 0.1%) of the total contract cost or \$2,500, whichever is greater. When there is foreign steel or iron permanently incorporated into the project, the Contractor shall provide documentation of the project delivered cost of that foreign steel or iron to the

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Project Engineer.

- (d) *Manufactured Products.* The FHWA's 1983 Buy America Final Rule, (see <https://www.fhwa.dot.gov/programadmin/contracts/112583.cfm>) waive the application of Build America, Buy America requirements for manufactured products that do not include steel and iron components. However, Buy America requirements apply to steel or iron components of manufactured products (i.e. steel wire mesh or steel reinforcing components of precast reinforced concrete products).
- (e) *Glass Beads for Pavement Marking.* All post-consumer and industrial glass beads for pavement marking shall have been manufactured from North American glass waste streams in the United States of America. The bead manufacturer shall submit a COC in accordance with subsection 106.12 confirming that North American glass waste streams were used in the manufacture of the glass beads.
- (f) *Project Level Waivers.* The Federal Highway Administration is responsible for processing and approving all waivers, including waivers requested by recipients and on behalf of subrecipients. More information on Buy America waivers can be found in the Field Materials Manual Special Notice to Contractors.

If a Contractor desires to pursue a waiver they shall notify the CDOT Project Engineer in writing who will then submit it to the CDOT Materials & Geotechnical Services Unit, Pavement Design and Documentation Services Program. The Pavement Design and Documentation Services Program will review it and forward it to the FHWA Division Office for consideration.

A Contractor's decision to pursue any waivers on the project shall not waive or otherwise nullify any provisions of the Contract. In addition, the time to obtain a waiver shall be considered a non-excusable, non-compensable delay and Liquidated Damages (per Subsection 108.09) will be enforced should the Contract Time (original or as-amended) expire due to the approval or non-approval of a waiver.

The Contractor will not be entitled to an extension of contract time due to the approval or non-approval of a waiver and no such claim will be considered.

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