

# Appendix A

## General Provisions and Procedures

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**NOTE:** Within this appendix, FHWA quotes and guidance are not in the same order when compared to the guidance document.

### I. Summary of Buy America Timeline

#### A. Preamble

##### [Buy America Policy Response \(12/22/1997\)](#)

Buy America" requirements that pertain to the Federal-aid highway program are found in 23 U.S.C. 101, or Section 165 of the Surface Transportation Assistance Act of 1982 (Public Law 97-424, as amended). Since 1982 there have been both legislative and regulatory amendments but the basic premise has remained the same -- that the steel and iron used for Federal-aid highway and transit work be predominately of U.S. domestic manufacture.

#### B. 1982

##### [United States District Court for the District of Columbia December 22, 2015 Opinion](#)

Section 165 of the 1982 Act expressly superseded Section 401 of the 1978 Act and provided that the "Secretary of Transportation shall not obligate any funds [for federal highway construction projects] unless steel, cement[1], and manufactured products used in such project are produced in the United States." 1982 Act § 165(a).

Similar to the 1978 Act, the 1982 Act authorized the Secretary to exempt products from the Buy America requirement where the policy's "application would be inconsistent with the public interest." 1982 Act § 165(b)(1). And, in the 1983 Regulations, the Secretary again invoked this authority, "find[ing] that it is in the public interest to waive the application of Buy America to manufactured products other than steel . . . manufactured products."

[Buy America Policy Response \(12/22/1997\)](#)

Based on the need to comply with the 1982 legislation, FHWA published an interim final rule (IFR) implementing the requirements of Section 165 in the January 17, 1983 Federal Register (48 FR 1946), effective January 6, 1983. In this IFR, FHWA determined that it was both in the public interest and consistent with the legislative intent to waive the Section 165 requirements for manufactured products other than cement and steel. A review of the Congressional Record pages pertaining to this legislation indicate that Congress' primary concern for Section 165 was to protect the domestic steel industry. The final rule, published on November 25, 1983 (48 FR 53099), retained the waiver for manufactured products other than cement and steel, and discussed the rationale behind the decision. Subsequent legislation modifying the Buy America coverage (cement dropped per Public Law 98-229, Section 10; and iron and coatings added per Public Law 102-240, Section 1041 and Section 1048(a)) has not modified this interpretation. Therefore, although 23 U.S.C. 101 includes manufactured products, the implementing regulations in 23 CFR 635.410 do not.

C. 1983

The following is based upon the final rule published on November 25, 1983 (48 FR 53099).

[Buy America Policy Response \(12/22/1997\)](#)

The FHWA considers a "manufactured product" to be any item that must undergo one or more manufacturing processes before the item can be used in a highway project. A manufactured product may be usable as a stand-alone product, or as a component within a more complex assembly which would also be considered a manufactured product. Some typical stand-alone products used in highway projects are steel in the form of rebar and structural steel; asphaltic cement; portland cement; and aggregates. Typical composite products include bridge bearings, signal heads, both asphaltic and portland cement concrete; and precast concrete items.

While FHWA does not apply Buy America requirements to "manufactured products," we do apply the requirements to specific components within those products. Case in point, if a bridge bearing was considered only as a manufactured product, it would be exempt from the Buy America requirements. However, FHWA policy has been that the steel components of a predominately steel product must be of domestic manufacture unless the value of the components is less than the minimal use threshold for the project.

[United States District Court for the District of Columbia December 22, 2015 Opinion](#)

The 1983 Regulations carried forward the broad exclusion for non-steel manufactured products from Buy America coverage. The 1983 Regulations' exemption for non-steel manufactured products was based on the fact that such products were made of "various materials" and were "difficult to trace."

D. 2001

[United States District Court for the District of Columbia December 22, 2015 Opinion](#)

The ISTEA extended the Buy America preference to domestically produced iron, id. § 1048(a), and the "coating of steel," id. § 1041(a)

E. 2005

[United States District Court for the District of Columbia December 22, 2015 Opinion](#)

And in 2005, the Buy America law was codified in its present form at 23 U.S.C. § 313, which reads:

Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.

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The 1997 Memorandum addressed the waiver of Buy America for non-steel “manufactured products,” as set forth in the 1983 Regulations. First, the 1997 Memorandum defined a manufactured product as “any item that must undergo one or more manufacturing processes before the item can be used in a highway project” and noted that such products “may be usable as a stand-alone product, or as a component within a more complex assembly which would also be considered a manufactured product.” *Id.* at 12. It then attempted to clarify how, in practice, the FHWA applies the manufactured products waiver. “While FHWA does not apply Buy America requirements to ‘manufactured products,’ [it] do[es] apply the requirements to specific components within those products.” *Id.* at 13. To provide an example, the 1997 Memorandum applied this policy to a bridge bearing, a component that typically provides a resting surface between bridge piers and the bridge deck:

[I]f a bridge bearing was considered only as a manufactured product, it would be exempt from the Buy America requirements. However, FHWA policy has been that the steel components of a predominately steel product must be of domestic manufacture unless the value of the components is less than the minimal use threshold<sup>4</sup> for the project.

In other words, pursuant to the 1997 Memorandum, if a manufactured product “predominately” consisted of steel, and the narrow, minimal use exception was inapplicable, its steel components were required to be produced in the United States. The 1997 Memorandum did not, however, define the word “predominately.”

Predominant means more than 50 percent.” *Hr’g Tr.* at 30:8-9. Predominately surely means more than 50 percent. But how much more—40 percentage points, according to the 2012 Memorandum—cannot reasonably be derived from the 1997 Memorandum.

[Application of Buy America to non FHWA-funded Utility Relocations \(07/11/2013\)](#)

In Section 1518 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress amended existing law to broaden the applicability of Buy America to non FHWA-funded utility relocations. For FHWA-funded projects, Buy America now applies to all contracts within the scope of a National Environmental Policy Act (NEPA) determination and eligible for assistance under title 23, United States Code, so long as one such contract is funded by FHWA. That is, if a project receives FHWA funding for any development or construction activities, including NEPA studies, right-of-way acquisition, preliminary engineering, or construction, Buy America applies to all contracts within the scope of the NEPA determination regardless of whether the contract uses FHWA funding.

II. Questions and Answers

A. Statutory provisions

[Buy America Questions and Answers \(12/20/2012\)](#)

**Q# 1.** Where can I find FHWA's Buy America policies?

**A# 1.** The FHWA Buy America statutory provisions are in [23 U.S.C.313](#) and the regulatory provisions are in [23 CFR 635.410](#). For other policy and guidance links, see the [Construction Program Guide](#).

B. Trade agreements

[Buy America Questions and Answers \(12/20/2012\)](#)

**Q# 35.** Do NAFTA, WTO Agreement on Government Procurement, or other international trade agreements affect the Buy America requirements applicable to the Federal-aid Highway Program?

**A# 35.** No. The NAFTA agreement expressly exempts grants, loans, cooperative agreements, and other forms of Federal financial assistance from its coverage. The WTO Agreement on Government Procurement, and most other free trade agreements, specifically exclude highway and mass transit projects from coverage. For U. S. international obligations see: <http://www.ustr.gov/trade-topics/government-procurement/us-obligations-under-international-agreements>

## C. Precedence over other Federal Code

The following citation is not found in the [Construction Program Guide](#).

[Buy America Issues to Consider for Utility Work on Projects - Principal Documents - Utility Program - Design - Federal Highway Administration \(dot.gov\)](#)

### **Do the Buy America requirements take precedence over the 23 CFR 645 requirements pertaining to the relocation or accommodation of utility facilities?**

Yes, based on the Buy America requirements being codified in Federal law (23 U.S.C. 313), these requirements take precedence over regulations pertaining to the accommodation or relocation of utility facilities on projects involving FAHP funding.

For example, the Buy America requirements take precedence over the regulations which allow utilities to furnish materials from company stock (as specified in 23 CFR 645.117(e)). This provision allows the utility owner to furnish materials from company stock only in the case where the supplied materials meet the Buy America requirements. Company stock materials that do not meet Buy America requirements may not be permanently incorporated into an FAHP funded project.

Another example where the Buy America requirements take precedence over utility requirements is the statement 'The utility shall not be required to change its existing standards for materials used in permanent changes to its facilities' (as specified in 23 CFR 645.117(e)). Once again, Buy America requirements take precedence over this utility regulation. Therefore, a utility is not required to change its existing standards for materials as long as the Buy America requirements are met.

[Buy America Questions and Answers \(12/20/2012\)](#)

**Q# 36.** Do Buy America provisions apply to Federal-aid construction projects that are not considered to be highway construction?

**A# 36.** Yes. All iron or steel products that are permanently incorporated in a Title 23-funded project are covered by Buy America requirements. The coverage for Title 23 eligible projects includes projects that may not have been historically considered to be highway construction (e.g. harbor cranes, bicycle racks, railroad stations, trains, motor vehicles, etc).

**Q# 43.** Does Buy America apply to work constructed by a railroad under a contract or agreement?

**A# 43.** Yes. MAP-21 Section 1518 requires the application of Buy America to all contracts eligible for assistance under the scope of NEPA project if Federal-aid funds were obligated after October 1, 2012 for any project (by contract or agreement) under the approved NEPA document. In that case, Buy America requirements will apply to railroad agreement/contract regardless of the funding source. The only exception is if the railroad work is ineligible for Federal-aid Highway Program funding.

**Q# 38.** When a project is jointly funded by FHWA and FTA, which Buy America provisions should be used by the contracting agency?

**A# 38.** When a project combines funding from both the FTA and the FHWA programs, an agency should transfer the project funds to whichever agency is serving as the lead agency. When FHWA funds are transferred to FTA for a transit project, then FTA Buy America requirements apply, and when FTA funds are transferred to the FHWA for a highway project, FHWA Buy America requirements apply. For joint funded projects involving other Federal agencies where there is no established lead agency, 23 USC 313 continues to apply to the FHWA funding and other agencies' requirements apply as well.

## D. Limitations on WisDOT requiring more stringent requirements

[Buy America Questions and Answers \(12/20/2012\)](#)

**Q# 11.** Can states have Buy America requirements that are more restrictive than FHWA's Buy America?

**A# 11.** Yes. Under 23 U.S.C. 313(d) and 23 CFR 635.410 (b) (2), State DOTs may establish standard contract provisions requiring the use of domestic materials or products to the same or greater extent than the FHWA Buy America requirements. However, State DOTs cannot establish less restrictive requirements for Federal-aid funded projects.

E. Buy America requirements for utility relocation work

[Buy America Questions and Answers \(12/20/2012\)](#)

**Q# 10.** In emergency situations, does FHWA offer any type of relief to Buy America policy?

**A# 10.** The Buy America requirements apply during emergency situations. However, when the responsible agency demonstrates that the application of Buy America requirements would be inconsistent with the public interest, or that the necessary steel or iron is not available domestically, the FHWA may grant a waiver.

**Q# 44.** Do Buy America requirements apply to an eligible utility contract/agreement being completed by the utility company under a State/Utility company relocation contract/agreement?

**A# 44.** Yes. MAP-21 Section 1518 requires the application of Buy America to all contracts eligible for assistance under the scope of NEPA project if Federal-aid funds were obligated after October 1, 2012 for any project (by contract or agreement) under the approved NEPA document. In that case, Buy America requirements will apply to utility agreement/contract regardless of the funding source (see Q&A #45 for an exception).

Additional Buy America utility guidance is located at <https://www.fhwa.dot.gov/utilities/buyam.cfm>

**Q# 17.** Does Buy America apply if a State DOT makes the cost of eligible iron and steel products Federal-aid non-participating in construction of a Federal-aid project?

**A# 17.** Yes. Buy America applies to all steel and iron products supplied and permanently incorporated into a Federal-aid project regardless of the funding source actually used to purchase the product.

**Q# 45.** Do the Buy America requirements apply to the relocation of utilities necessitated by a highway improvement project where State law, does not allow the State DOT to reimburse the utility for relocation costs?

**A# 45.** No. When State law prohibits State DOTs from reimbursing utilities, 23 USC 123(a) prohibits Federal-aid participation. Such work is then not subject to Buy America requirements.

Additional Buy America utility guidance is located at <https://www.fhwa.dot.gov/utilities/buyam.cfm>

**Q# 15.** Does Buy America apply to aluminum products (like aluminum light poles)?

**A# 15.** No. Buy America applies only to **iron and steel products**.

**Q# 31.** What Buy America requirements apply to projects funded with ARRA TIGER I funding?

**A# 31.** For TIGER I grant projects funded solely with TIGER I funds, ARRA Section 1605 applies. Title XII of the Recovery Act specifically provides that ARRA-funded highways are to be administered as if apportioned under chapter 1 of title 23, United States Code. Accordingly, ARRA-funded highway projects are administered in accordance with the requirements of title 23, United States Code, including the provisions of Buy America at 23 USC 313. The implementing regulations are in 2 CFR Part 176, Subpart B. For FHWA TIGER I grant projects funded with either Title 23 funds or regular apportioned ARRA funding, 23 USC 313 applies. The implementing regulations are in 23 CFR 635D. See PO-10 of the ARRA Q&As (<https://www.fhwa.dot.gov/economicrecovery/qandas.htm#a4>).

**Q# 32.** What Buy America requirements apply to projects funded with TIGER II funds?

**A# 32.** FHWA projects funded solely with TIGER II funds, or a combination of TIGER II and Title 23 funds, shall apply the 23 U.S.C. 313 requirements if the project is to construct or reconstruct a highway.

**Q# 33.** Are there differences between Buy America requirements of 23 U.S.C. 313 and Buy American requirements of 41 U.S.C. 10a - 10d?

**A# 33.** Yes. Buy America requirements apply to Federal-aid projects, while the Buy American requirements apply to direct Federal procurement contracts.

**Q# 34.** Can you apply Buy American provisions to Federal-aid projects?

**A# 34.** No. Buy American provisions do not apply to Federal-aid projects. It applies to direct Federal procurement contracts using Federal Acquisition Regulations. However, if a Federal agency is acting as the direct contracting entity for a project involving Federal-aid funding, such as an arrangement between a State DOT and a FHWA Federal Lands Division Office, the project will be procured pursuant to the FAR and Buy American will apply.

#### F. Buy America Waiver and Alternative Bidding

##### [Buy America Questions and Answers \(12/20/2012\)](#)

**Q# 2.** Can a waiver be granted for the Buy America requirements?

**A# 2.** Yes. Under 23 CFR 635.410 (c)(1)(i), a waiver of Buy America requirements may be granted on a **project-by-project** basis if:

The application of Buy America provisions would be inconsistent with the public interest, or

Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality. Also, FHWA regulations also waive the applicability of Buy America when alternate bidding procedures are used and lowest overall total bid based on using domestic steel is 25% more than the lowest overall total bid based on using foreign steel.

**Q# 26.** Is a waiver necessary for an item that would otherwise be non-participating?

**A# 26.** Yes. A Buy America waiver request is necessary for all foreign iron and steel products permanently incorporated into a Federal-aid project even if there is no Federal funding involved in the purchase of the iron and steel products.

**Q# 4.** May the FHWA issue a standing national or regional waiver?

**A# 4.** Yes. FHWA may issue a standing national or regional waiver if it is warranted.

**Q# 5.** On what basis may a nationwide waiver be granted?

**A# 5.** A nationwide waiver of a specific iron or steel product may be granted by the Secretary of Transportation if the product is not manufactured in the United States and the public rulemaking process demonstrates that non-domestic availability of the product would adversely impact the Federal-aid program in multiple states, specific region and/or nationwide.

**Q# 6.** Has FHWA granted any nationwide waivers?

**A# 6.** Yes. FHWA has granted two nationwide waivers, 1) on February 9, 1994 for ferryboat equipment and machinery parts, and 2) on March 24, 1995 for pig iron and processed, pelletized, and reduced iron ore. For more details, see <https://www.fhwa.dot.gov/programadmin/contracts/020994.cfm> and <https://www.fhwa.dot.gov/programadmin/contracts/032495.cfm>

**Q# 8.** How often does FHWA approve waivers based on public interest?

**A# 8.** Not very often. An example of when a public interest waiver may be considered could be during an emergency situation. Another example may be where a certain steel or iron product is to be evaluated on an experimental basis.

**Q# 20.** Can a State DOT transfer a Buy America waiver granted for an item from one Federal-aid project to another Federal-aid project (i.e. utilize an approved waiver on multiple projects)?

**A# 20.** No. Buy America waivers are approved on a **project-by-project basis** and they are not transferable. Therefore a waiver that is approved for one particular project cannot be used on another project. Only a nationwide waiver can be used for multiple projects.

**Q# 7.** Who may request a nationwide waiver?

**A# 7.** The LPAs/State DOTs may request a nationwide waiver.

**Q# 3.** Who may request a Buy America waiver?

**A# 3.** The (Local Public Agency (LPA)/State DOT) administering the Federal-aid project may request a project specific waiver.

**Q# 25.** What is the process for submitting a waiver request?

**A# 25.** The agency (State DOT/LPA) administering the Federal-aid project is responsible for submitting a waiver request to the FHWA Division Office for preliminary reviews and recommendations. The Division Office will then forward the request to the FHWA's Office of Program Administration for formal in-depth review and for a final decision.

**Q# 22.** What does the FHWA need in order to consider a project waiver request?

**A# 22.** The agency administering Federal-aid project submits the waiver request with supporting information to the FHWA Division Office. The Division Office is responsible for ensuring that the request includes the necessary information before the information is submitted to the Office of Program Administration. Relevant supporting information includes the following information:

- the project number,
- project description,
- project cost, waiver item,
- cost of waiver item,
- country of origin of the product (if known at the time),
- reasons for the waiver request,
- a description of the efforts made by the State to locate a domestically manufactured product, and
- an analysis of re-design of the project using alternate or approved equal domestic product.

**Q# 27.** What process does the FHWA follow once a waiver request has been submitted to the Office of Program Administration?

**A# 27.** FHWA's process for reviewing a Buy America waiver request is posted at <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm> in compliance with the Public Law 111.117 "Consolidated Appropriations Act, 2010" and SAFETEA-LU Technical Corrections Bill (Public Law No. 110-244, Section 117).

**Q# 23.** Has FHWA denied any waiver request?

**A# 23.** Yes. If FHWA discovers a domestic product during the review of waiver request, the request will be denied. See <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm> for Buy America waiver requests denied.

**Q# 24.** How often does FHWA receive and approve waivers based on non-availability?

**A# 24.** FHWA frequently receives Buy America waiver requests and conducts preliminary reviews on each to ensure that waiver request is warranted before they are formally processed. FHWA actually approves most waiver requests that are formally processed because they are usually thoroughly vetted before being submitted for approval.

**Q# 47.** In using the alternate bid procedure mentioned in 23 CFR 635.410(b)(3), is the comparison for the 25% differential based on the value of the total iron/steel products in each bid?

**A# 47.** No. The comparison must be between the total lowest bid using domestic iron/steel product and the total lowest bid using foreign iron/steel product. Note that if the state elects to use alternate bid provisions, all bidders must be required to submit a bid based on furnishing domestic iron/steel. The contract must be awarded to bidder who submits the lowest total bid based on furnishing domestic steel, unless this bid is more than 25% higher than the total bid based on foreign steel or iron products

## G. Types of items and guidance

### [Buy America Questions and Answers \(12/20/2012\)](#)

**Q# 12.** Do Buy America requirements apply to manufactured products?

**A# 12.** No. The FHWA's 1983 final Buy America regulations (see <https://www.fhwa.dot.gov/programadmin/contracts/112583.cfm>) waive the application of Buy America to manufactured products that do not include steel and iron components. However, Buy America requirements apply to any steel or iron component of a manufactured product regardless of the overall composition of the manufactured product (e.g. Buy America applies to the steel wire mesh or steel reinforcing components of a precast reinforced concrete pipe).

## III. Federal Code

### A. Sec. 313. Buy America

#### [23 USC 313 Buy America \(01/01/2014\)](#)

(a) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.

(b) The provisions of subsection (a) of this section shall not apply where the Secretary finds –

(1) that their application would be inconsistent with the public interest;

(2) that such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) that inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.

(c) For purposes of this section, in calculating components' costs, labor costs involved in final assembly shall not be included in the calculation.

(d) The Secretary of Transportation shall not impose any limitation or condition on assistance provided under the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title that restricts any State from imposing more stringent requirements than this section on the use of articles, materials, and supplies mined, produced, or manufactured in foreign countries in projects carried out with such assistance or restricts any recipient of such assistance from complying with such State imposed requirements.

(e) Intentional Violations. - If it has been determined by a court or Federal agency that any person intentionally –

(1) affixed a label bearing a "Made in America" inscription, or any inscription with the same meaning, to any product used in projects to which this section applies, sold in or shipped to the United States that was not made in the United States; or

(2) represented that any product used in projects to which this section applies, sold in or shipped to the United States that was not produced in the United States, was produced in the United States; that person shall be ineligible to receive any contract or subcontract made with funds authorized under the Intermodal Surface Transportation Efficiency Act of 1991 pursuant to the debarment, suspension, and ineligibility procedures in subpart 9.4 of chapter 1 of title 48, Code of Federal Regulations.

(f) Limitation on Applicability of Waivers to Products Produced in Certain Foreign Countries. - If the Secretary, in consultation with the United States Trade Representative, determines that -



(1) a foreign country is a party to an agreement with the United States and pursuant to that agreement the head of an agency of the United States has waived the requirements of this section, and

(2) the foreign country has violated the terms of the agreement by discriminating against products covered by this section that are produced in the United States and are covered by the agreement, the provisions of subsection (b) shall not apply to products produced in that foreign country.

(g) Application to Highway Programs. - 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.

## B. 23 CFR 635.410 Buy America requirements

### [23 CFR 635.410 Buy America requirements \(04/01/2013\)](#)

(a) The provisions of this section shall prevail and be given precedence over any requirements of this subpart which are contrary to this section. However, nothing in this section shall be construed to be contrary to the requirements of [§ 635.409\(a\)](#) of this subpart.

(b) No Federal-aid highway [construction](#) project is to be authorized for advertisement or otherwise authorized to proceed unless at least one of the following requirements is met:

(1) The project either: (i) Includes no permanently incorporated steel or iron materials, or (ii) if steel or iron [materials](#) are to be used, all manufacturing processes, including application of a coating, for these [materials](#) must occur in the United States. Coating includes all processes which protect or enhance the value of the [material](#) to which the coating is applied.

(2) The State has standard contract provisions that require the use of domestic [materials](#) and products, including steel and iron materials, to the same or greater extent as the provisions set forth in this section.

(3) The State elects to include alternate bid provisions for foreign and domestic steel and iron [materials](#) which comply with the following requirements. Any procedure for obtaining alternate bids based on furnishing foreign steel and iron [materials](#) which is acceptable to the Division Administrator may be used. The contract provisions must (i) require all bidders to submit a bid based on furnishing domestic steel and iron materials, and (ii) clearly state that the contract will be awarded to the bidder who submits the lowest total bid based on furnishing domestic steel and iron [materials](#) unless such total bid exceeds the lowest total bid based on furnishing foreign steel and iron [materials](#) by more than 25 percent.

(4) When steel and iron [materials](#) are used in a project, the requirements of this section do not prevent a minimal use of foreign steel and iron [materials](#), if the cost of such [materials](#) used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. For purposes of this paragraph, the cost is that shown to be the value of the steel and iron products as they are delivered to the project.

(c)

(1) A State may request a waiver of the provisions of this section if;

(i) The application of those provisions would be inconsistent with the public interest; or

(ii) Steel and iron [materials](#)/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality.

(2) A request for waiver, accompanied by supporting information, must be submitted in writing to the Regional Federal Highway Administrator (RFHWA) through the [FHWA Division Administrator](#). A request must be submitted sufficiently in advance of the need for the waiver in order to allow time for proper review and action on the request. The RFHWA will have approval authority on the request.

(3) Requests for waivers may be made for specific projects, or for certain [materials](#) or products in specific geographic areas, or for combinations of both, depending on the circumstances.

(4) The denial of the request by the RFHWA may be appealed by the State to the Federal Highway Administrator (Administrator), whose action on the request shall be considered administratively final.

(5) A request for a waiver which involves nationwide public interest or availability issues or more than one FHWA region may be submitted by the RFHWA to the Administrator for action.

(6) A request for waiver and an appeal from a denial of a request must include facts and justification to support the granting of the waiver. The FHWA response to a request or appeal will be in writing and made available to the public upon request. Any request for a nationwide waiver and FHWA's action on such a request may be published in the FEDERAL REGISTER for public comment.

(7) In determining whether the waivers described in [paragraph \(c\)\(1\)](#) of this section will be granted, the FHWA will consider all appropriate factors including, but not limited to, cost, administrative burden, and delay that would be imposed if the provision were not waived.

(d) Standard State and Federal-aid contract procedures may be used to assure compliance with the requirements of this section.

### C. SEC. 1041 Regulation

#### [23 CFR 635 Final Rule General Material Requirements \(07/21/1993\)](#)

Section 1041(a) of the ISTEA requires that existing 23 CFR 635.410 relating to Buy America requirements for the Federal-aid highway program be applied to coating. By its action, the Congress has clarified that the activity of coating is considered a manufacturing process. The material being applied as a coating is not covered under Buy America. Coating is interpreted to mean all processes that protect or enhance the value of a material or product to which it is applied, such as epoxy coatings, galvanizing or painting.

Although the subtitle for section 1041(a) addressed "coating of steel," the text of section 1041(a) refers to "coating" without limitation. The FHWA believes that the Congress intended that the Buy America provisions of 23 CFR 635.410 be applied to the process of coating whenever a material that is subject to Buy America is covered with a coating intended to protect or enhance the value of the material that is coated. Section 1048 of the ISTEA also amended the Buy America Program to add iron to steel as covered by the program. Accordingly, the FHWA is amending section 635.410 to include the process of applying a coating to either steel or iron.