Agenda

September 10, 2013
10:30 am – 12:30 pm

CALTRANS
1120 N Street, Room 4306A
Sacramento, CA 95814

Contact: Abhijit Bagde
(916) 654-3638

Telephone Number: (712) 432-1438
Participant Access Code: 932832#

Meeting called by: Muhaned Aljabiry
Facilitator: Abhijit Bagde
Recorder: Bruce Abanathie

Agenda Topics

Item	Description	Time	Presenter
1	Agenda	10:30	Abhijit Bagde
2	Ground Rules	10:35	Abhijit Bagde
3	Approval of 07/23/2013 meeting minutes	10:40	Abhijit Bagde
4	Announcements and updates: • CFPG Contact List – Gwyn Reese • Caltrans Federal Programming Office Staffing - Muhaned Aljabiry	10:45	All
5	**Follow-Up Items from last meeting:** 1. Rachel Falsetti will send a link to the FHWA's rule making and state activities for MAP-21 to Muhaned Aljabiry for distribution – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013) 2. Caltrans Federal Programming Office will send out the apportionments for FY 13-14 by next week (7/31/13) – Item completed (Information was sent by Gwyn Reese on 08/06/2013) 3. Dennis Wade, ARB, will send an email to Muhaned with the link to the ARB's website with the new calculations and factors for PM 2.5 and CMAQ cost effectiveness – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013) 4. MPOs will send comments on Buy America issues in the Federal Register to Bruce Abanathie, KCAG to be added as an addendum to the minutes. August 5th is the deadline for comments. 5. Gary Gutierrez, CT will provide the FHWA/Caltrans decision on the date that will be considered for the need to meet Buy America (e.g. the utility agreement execution date) – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013. Also additional information is included with the transmittal note for the meeting agenda) 6. Ted Matley to send FTA policy and guidance on Buy America – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013)	10:50	Abhijit Bagde
6	MAP 21 - Update	10:55	Rachel Falsetti
7	Toll Credits Policy (Handout No. 1)	11:20	Lima Huy

8	CMAQ and RSTP Apportionment Estimates for 2015 FTIP	11:30	Gwyn Reese
9	Apportionment Exchanges - MOUs	11:35	Gwyn Reese
10	• Follow-Up Items • Open Forum • Future Agenda Items	11:40	All
11	**Future meeting dates and locations:** • October 22, 2013 - MTC, Oakland (10:30 am – 12:30 pm)	11:45	All

California Federal Programming Group (CFPG)

Minutes for: September 10, 2013

1. Agenda:

Abhijit Bagde (CT Federal Programming Office) reviewed the agenda and noted the follow-up item attachments that were emailed as well. No changes requested.

2. Ground Rules:

- Since there are phone participants, everyone who speaks should state his/her name and agency.
- Keep comments as brief as possible.
- Stick to the current agenda item. Additional items not in the agenda will be added to the end and will be discussed if time permits.
- Turn off cell phones and limit interruptions.
- This is a forum to hear everyone's concerns, comments and suggestions. Please make sure your voice is heard.
- Facilitator to ask before moving on to the next item if anyone on the phone has any additional comments on the item, then pause for a few seconds.
- Respond to follow-up items and meeting notices by the deadlines.
- Except for follow-up items, the minutes will include discussions that take place during the meeting only. If you do not want what you say during the meeting included in the minutes, state "off the record."
- **When not speaking, phone participants to keep their phones on mute if possible.**
- **Do not place conference call on hold. Please hang up and redial if you must take another call.**
- Meeting minutes to be distributed to the group with 10 days after the meeting.

Bolded items were emphasized by Abhijit Bagde.

3. Minutes of the Last Meeting – Abhijit Bagde

The final minutes of the July 23, 2013 meeting were provided via email prior to the meeting. No comments – approved.

4. Announcements and Updates:

a. CFPG Contact List – Gwen Reese

Gwyn stated that the Programming Office has updated the state and federal agency contacts and is requesting that the MPOs look at the information and update their agency contacts.

b. CT Federal Programming Staffing – Muhaned Aljabiry.

Muhaned noted that Dennis Jacobs has completed his assignment out of the office and will return and the MPO assignments will be updated appropriately.

Mike Brady (Caltrans Environmental) announced the upcoming Statewide Conformity Working Group meeting. Abhijit asked that Mike forward the link to the information so the he could notify the group of the details.

Muhaned asked SCAG to update the group on Rosemary Ayala's retirement. Pablo Gutierrez (SCAG) stated that Rosemary's official retirement date was September 3, 2013, and that he is the interim manager until the new manager comes on board.

5. Follow-up Items from Last Meeting – Abhijit Bagde

a. Rachel Falsetti will send a link to the FHWA's rule making and state activities for MAP-21 to Muhaned Aljabiry for distribution – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013)

b. Caltrans Federal Programming Office will send out the apportionments for FY 13-14 by next week (7/31/13) – Item completed (Information was sent by Gwyn Reese on 08/06/2013)

c. Dennis Wade, ARB, will send an email to Muhaned with the link to the ARB's website with the new calculations and factors for PM 2.5 and CMAQ cost effectiveness – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013)

d. MPOs will send comments on Buy America issues in the Federal Register to Bruce Abanathie (KCAG) to be added as an addendum to the minutes. August 5th is the deadline for comments. – Item completed, No comments were received.

e. Gary Gutierrez, CT will provide the FHWA/Caltrans decision on the date that will be considered for the need to meet Buy America (e.g. the utility agreement execution date) – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013. Also additional information is included with the transmittal note for the meeting agenda)

f. Ted Matley to send FTA policy and guidance on Buy America – Item completed (Information was sent by Muhaned Aljabiry on 07/26/2013)

6. MAP 21 - Update – Rachel Falsetti

(NOTE: This item was taken out of sequence, but remains in sequence for the minutes)

Rachel Falsetti, Chief of Division of Transportation programming, provided an update on state activities to implement MAP-21.

FHWA is going through the performance measure rule making process. The first rules will be for safety, due the beginning of October and the planning rule. The remaining rules are expected around April 2015. *Rachel will send a link to the information.*

Rachel emphasized that even if you do not think that a particular rule applies to you, look at all of them because they can be interrelated and the rule for one subject can have effects on other rules.

After the NPRM are out, Caltrans will assemble groups to make comments on the proposed rules. After the rules are made, Caltrans will work with the regions to establish performance measures in CA that will make CA compliant. This must take place within 18 months of the final rule making.

FTA is posting Advanced NPRMs (or ANPRM) due to a difference in up front participation.

Caltrans and FHWA will be doing a workshop on performance measures and their application in CA. The subjects will be action plans, communication coordination, rule comments, and who needs to be in on setting the targets. This will be a working meeting that will be two-days and be held in Sacramento.

Rachel discussed the Transportation Alternatives program (TAP) and its merger into the Active Transportation Program (ATP). The legislation rolls five fund streams into the ATP (SR2S, BTA, EEM, TAP, and a portion of the HSIP). A portion of the ATP (40%) goes to MPOs over 200,000 for MPO administration of a program. The remaining 60% (with a 10% set aside for MPOs under 200,000) will go to the CTC to be administered. The CTC will set guidelines about March 2014 and project selected after that. The existing TE funds (FY 13/14) will be used as far as it goes and then TE projects programmed will be considered for other fund streams that they are eligible for – including State Highway Account.

Abhijit asked how the ATP funds would be distributed. Rachel stated that the decisions have not yet been reached. Rachel noted that there are no guidelines and no application process in place yet.

Jack (FHWA) mentioned that there is a possibility to move funds from one stream to another.

Joe (KCOG) stated that just getting the apportionment levels would allow the MPOs over 200,000 would be a good start to prepare their ATP programs. Rachel cautioned the TMA to read the legislation in order to understand all of the criteria included in the program (e.g. the EJ set asides).

Andrea (SANBAG) asked if the state had decided what fund source would be used to backfill the TE projects that had already been voted. Rachel stated that the current procedure is to use state AC dollars.

Barbara O'Keefe (Tehama) asked if the 10% was considered a set aside. Rachel affirmed.

7. Toll Credits Policy (Handout #1) - Lima Huy

Two handouts were sent out with the agenda, the newly adopted policy and an example of the calculation method..

Lima noted that since John Hoole of Local Assistance was present that he could provide the presentation.

John stated that the new toll credit allows the inclusion of on-system bridges and safety projects. Historically, the reason for not including these projects was in order to get the best possible bang for the buck. The matching can take place using other fund streams For example, a $100,000 HSIP project would normally be $90,000 HSIP/$10,000 local, but with this policy MPOs could apply $10,000 RSTP (or any other eligible federal funds) toll credits to replace the local funds. The project is 100% federally funded, but we still only use the 90-% safety money.

Lima then walked through example B on the second handout. Muhaned further clarified that federal funds cannot match federal funds. Each federal component is considered as 100% federally funded with the use of toll credits. Jose-Luis (SACOG) offered the SACOG phrasing that Toll credits waives the local match.

Abhijit added that it is necessary to note in the FTIP project description that the MPO is using the toll credit option.

Andrea Zureick (SANBAG) related a project example in which they were required to use 100% federal funding even though they had already programmed available local matching funds. John stated that the new policy does require an "all or nothing" toll credit match in order to use toll credits at all. DLA is not allowing the use of partial matching toll credits.

There was dissenting opinion about the appropriateness of this one-sided policy change. John

stated that it is a Local Assistance policy and that they own it and that is the policy. John stated that this is not the place to argue the change. Muhaned offered that Programming and Local Assistance should have a discussion about the policy and bring the discussion back to the group at a future meeting.

Andrea further noted that the toll credit option is an important project delivery tool and that to be required to use them where it is not necessary is a waste of toll credits.

Bruce Abanathie (KCAG) requested that this issue be brought back to both the CFPG and the RTPA groups for discussion. This all or nothing requirement was discussed in the first policy discussion and was soundly denounced by the regions.

Further discussion and options were offered, but Muhaned restated the need for an office-to-office discussion on the toll credits. Joe Stramaglia (KCOG) also noted that the results of these discussions need to filter to the Caltrans District Offices to smooth the obligation process.

8. CMAQ and RSTP Apportionments – Gwyn Reese

Gwyn completed an analysis of prior apportionments and the apportionments estimated in MAP-21. Since the amounts have been generally consistent, the estimated apportionment levels for the 2015 FSTIP will be the same across all four years.

9. Apportionment Exchanges, MOUs – Gwyn Reese

Gwyn requested that the MPOs that execute MOUs for apportionment exchanges make sure that the Programming Office gets a copy of the MOU and any updates to the MOU so that they can track apportionments across the state.

10a. Follow up Items

4. Mike Brady to send Abhijit the weblink for the Statewide Conformity Working Group meeting information, which Abhijit will send out to the group.

6. Rachel will send the ATP legislation to Abhijit for distribution to the group.

7. Programming Office and Local Assistance to discuss the toll credit policy change and return to the group.

8. Programming will send the MPOs the apportionments for the preparation of the 2015 FTIPs and post the tables on the Programming website.

10b. Open Forum

Michele Merrino (SANDAG) asked if the Programming Office had yet developed a schedule for the 2015 FTIP.

Ivan Garcia (BCAG) announced that they are looking to borrow $1.6 million of CMAQ funds and any MPO that would like to loan the funds contact Ivan.

Muhaned stated that the Programming Office was starting the process of developing the 2015 FTIP. Gwen will be coordinating the effort this year. The next item will be the FTIP workshop. Lima stated that she could send the previous workshop agenda to start the conversation. Muhaned asked anyone that had agenda items to send them to the Programming Office.

10c. Future Agenda Items

.None stated

11. Next Meetings:

October 22, 2013, MTC (10:30 am – 12:30 pm)

Handout No. 1 for Item No. 7 – Toll credits:

CALIFORNIA DEPARTMENT OF TRANSPORTATION
TOLL CREDIT USE POLICY

Background:
Section 1111(c) of the Transportation Equity Act for the 21st Century (TEA21), 23 U.S.C., Section 1044 of ISTEA under Section 120(j), and 23 U.S.C., Section 1508 of MAP-21 under Section 120(i) allows states to use certain toll revenue expenditures as a credit toward the non-federal matching share of programs authorized by Title 23 (except for the emergency relief programs) and for transit programs authorized by Chapter 53 of Title 49.

During Fiscal Year (FY) 1992 through FY 2006, California has collected approximately $18.2 billion in toll receipts, of which over $7.1 billion was invested to build and/or improve public highway facilities. Based on federal statutes, the State applied for approximately $5.7 billion in toll credits from investments during this time period. Now approved, these toll credits do not lapse until used by the state.

Effective Date and Duration:
These guidelines apply permanently to the $5.7 billion, which was conditionally approved by the FHWA for the State of California[1] along with any future toll credits which are received based on Caltrans maintenance of effort in conjunction with local toll collection and will remain in effect until rescinded or modified.

Guiding Principles for use of Toll Credits:
- Compliance with state and federal statutes,
- Maximize the use of federal funds,
- Toll credits should not result in the redirection of non-federal funds away from transportation.

Constraints/requirements:
- Use of toll credits does not generate additional federal funding and is limited to the non-federal match required for Apportionments and Obligational Authority (OA) available in any given year.
- All projects proposed to use toll-credits should be fully funded at the maximum allowable federal reimbursement rate.
- Use of toll credits will require amendments to current programming documents.
- FTIPs still need to be financially constrained.
- Toll credits may not be applied to projects funded with FHWA Emergency Relief funds or Appalachian Development Highway System (ADHS).
- The State must establish a special account to track toll credits.
- Processes for the tracking of toll credit usage must be established.

[1] On June 1, 2005, the Department received approval from FHWA for $104.026 million in toll credits from private entity expenditures on State Route 91. This $104.026 million will be kept separate for use within Orange County.

Distribution Process:

1. Toll credits will be made available statewide to the RTPAs and to the Department of Transportation for federal match to any eligible federal program. Local agencies may match the Highway Bridge Program for on federal-aid system projects, and local safety projects with any other type of federal funding, including the use of STIP shares, for which the project is eligible.
    a. RTPAs will provide the Department with an estimate of the total need for toll credits for the FTIP period by programming year.
    b. In order for the State to implement the usage of toll credits statewide, the RTPA must submit to the Department on or before October 1 of each federal fiscal year, a list of programmed FTIP projects that are planned to use the credits for the upcoming federal fiscal year (starting October 1).

2. Periodically, the policy will be re-evaluated and if necessary changes will be made to the methodology and process for the disbursement of toll credits to take effect in the federal fiscal year subsequent to adoption.

3. Further direction regarding toll credit policy for Planning and Federal Transit Administration can be found at:
http://www.dot.ca.gov/hq/tpp/offices/orip/owp/index_files/Final_2011_RPH.pdf
http://www.dot.ca.gov/hq/MassTrans/Docs-Pdfs/5311/transittollcreditsrev012611.pdf

Monitoring and Reporting of Toll Credit Usage and Balance

In accordance to the FHWA February 8, 2007, Memorandum on Tolling and Pricing Program, Caltrans will establish and maintain a special account to track the use and balance of toll credits for FHWA funded projects.

As a pre-condition for utilizing toll credits on FTA funded projects, RTPAs and local agencies shall develop and maintain a special account to track the use and balance of toll credits acceptable to FTA and FHWA. The obligations of funds through FTA constitute final use of toll credits as FTA funds are not de-obligated but are amended through the FTA.

APPROVED:

Steven D Keck — June 4, 2013

STEVEN KECK — Date
Acting Chief Financial Officer

TOLL CREDITS EXAMPLE

Scenario A – Traditional Project Funding with Match

For a Highway Safety Improvement (HSIP) project with a total cost of $100,000 including $10,000 of matching funds using a federal reimbursement rate of 90%, the funding plan would normally be as indicated in the following:

Total cost: $100,000

HSIP funds: $90,000

Non-Federal funds: $10,000

Toll Credits: $0.00

Scenario B – Toll Credit (TC) Funding

When toll credit is being applied to the project, local agencies may use other type of federal funding (CMAQ, RSTP or STIP shares) on eligible projects, that will be used as a credit toward the non-federal match share of $10,000. The funding plan would be as indicated in the following:

Total cost: $100,000

HSIP funds: $90,000 includes $9,000 in TC

Other Federal funds: $10,000 includes $1,147 in TC

Total project cost = $100,000 with $10,147 in TC

Additional information for the follow-up item no. 5-5:

State of California
DEPARTMENT OF TRANSPORTATION

California State Transportation Agency

Memorandum

Flex your power!
Be energy efficient!

To: DISTRICT DIRECTORS
DISTRICT DEPUTY DIRECTORS
DISTRICT RIGHT OF WAY MANAGERS
DISTRICT SINGLE FOCAL POINTS

Date: July 18, 2013

From: BRENT L. GREEN
Chief
Division of Right of Way and Land Surveys

Subject: **INSTRUCTIONS FOR IMPLEMENTING FEDERAL HIGHWAY'S JULY 11, 2013 MEMORANDUM REGARDING THE APPLICATION OF BUY AMERICA**

This memorandum provides guidance on the implementation of changes to the preparation and execution of Utility Agreements (UA) based on Federal Highway Administration's (FHWA) July 11, 2013 memorandum from Gloria Shepherd entitled, "*Application of Buy America to non FHWA-funded Utility Relocations.*" (Attached)

This change provides opportunities to remove many constraints for projects already in construction, and projects that have not yet gone to construction.

In addition, the FHWA California Division has also provided additional "*Clarification on the Application of Buy America in California.*" (Attached)

The Department of Transportation (Caltrans) is working closely with FHWA to ensure we have a common understanding of the July 11, 2013 memo's intent. Caltrans recognizes the urgency to move projects forward immediately. We are carefully reviewing how to handle the projects currently in construction, and those that have "Non-Compliant" Right of Way Certifications (RW Certs) which include the projects that went to the May and June California Transportation Commission (CTC) meeting that were not voted due to this issue, and may include Non-compliant RW Certs intended for the August CTC meeting.

Definition: *Non-Compliant Right of Way Certifications. "Non-Compliant" RW Certs are a term Caltrans defined to reflect a RW Cert that meets all the normal requirements for certification with the exception of not having utility agreements executed that included Buy America language. A Non-compliant RW Cert is not an official cert; it is simply a document that Caltrans used to process through the Division of Transportation Programming so that the project would be highlighted at the Commission meeting as being constrained due to Buy America. A non-compliant RW Cert does not meet the requirements of Ready to List (RTL) and RTL is a pre-requisite for a funds request.*

We also provide guidance on other projects in the pipeline where utility agreements are expected to be executed prior to December 31, 2013.

Below, is a guideline on the implementation of the July 11, 2013 memorandum in the following categories:

1. On-system Projects in Construction
2. Projects with Non-Compliant RW Certifications
3. Projects in the pipeline that have not yet certified but will have executed utility agreement prior to January 1, 2014

1. On-System Projects in Construction

For those projects in construction, FHWA's July 11, 2013 memo may eliminate the Buy America constraints on a few or all of these projects.

We are working with the Districts one-on-one to move these projects forward.

Scenario 1
Projects in construction where Federal Funds for utility agreements were not authorized or obligated should move forward immediately after outstanding utility agreements (without the Buy America Clause) are executed. This situation even applies to projects that use Federal Funds on other elements of the project, for example, in the construction phase.

Scenario 2
The July 11th, 2013 memo applies for non-Federally funded utility relocations. Therefore, the Districts must provide a funding plan demonstrating that only state or local funds will be used for the utility agreements. Once the funding plan is approved by the Division of Budgets and the Division of Transportation Programming then, the projects can be moved forward to construction.

2. Projects with Non-Compliant RW Certifications.

The projects that were presented at the May and June CTC meeting and were not allocated due to Buy America constraints did not achieve RW Certification or RTL. So, while the July 11, 2013 memo removes the necessity of having a Buy America clause in the utility agreements, the projects (like any other project) still require an approved R/W Certification to achieve Ready to List (RTL) status and subsequent processes to move them forward through the Division of Transportation Programming.

The following steps are required to move these previously Buy America constrained projects forward:

1. Prepare and execute new utility agreements without the Buy America clause. This applies only to those agreements which are non-Federally funded.

2. Prepare a new R/W Certification document signed by the District that includes copies of the executed utility agreements. If the R/W Certification is a Cert 3 or 3W, send it to HQ for review and approval by Headquarters Division of Right of Way and Land Surveys, and FHWA.
3. Process the approved R/W certification through Office Engineer and subsequent processes in the same manner as other projects.
4. Send an updated funds request with the updated information including the RTL.

3. Projects in the pipeline that have not yet certified but will have executed utility agreement prior to January 1, 2014.

All other projects that are not in construction, or do not already have non-compliant R/W Certifications must adhere to the information contained in the July 11, 2013 memo. For purposes of Right of Way certification, utility agreements executed prior to January 1, 2014 will not require compliance with Buy America or require a Buy America clause in the Utility Agreement provided they are not federally funded. It is important to assure that there are not Federal funds being used for the utility relocation work.

Effective January 1, 2014 all utility agreements must include the Buy America clause.

Denix Anbiah will be sending a separate letter for projects that are off the State Highway. (Note: Federal Highways July 11, 2013 applies to both on and off-system projects)

If you have any questions please contact Gary Gutierrez, at (916) 206-7144, or Jennifer Lowden at (916) 653-2129.

Attachment

c: Malcolm Dougherty, Director
Norma Ortega, Acting Chief Deputy Director
Karla Sutliff, Deputy Director, Project Delivery
Steven Keck, Acting Chief Financial Officer
Kome Ajise, Deputy Director, Planning and Modal Programs
Ronald Sheppard, Acting Chief, Division of Budgets
Rachel Falsetti, Chief, Division of Transportation Programming
James Davis, Chief, Division of Project Management
Denix Anbiah, Chief, Division of Local Assistance
Gary Gutierrez, Supervising Transportation Engineer, Division of Design

Memorandum

U.S. Department
of Transportation

Federal Highway Administration

Subject: Application of Buy America to non FHWA-funded Utility Relocations

Date: July 11, 2013

From: Gloria M. Shepherd
Acting Associate Administrator
for Infrastructure (HIF-1)

Reply to
Attn. of: HIPA-30

To: Division Administrators
Directors of Field Services

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.

The broadened application of Buy America has created implementation issues for the utility industry. Many utility companies are now revamping their supply chains to ensure that their steel and iron products comply with Buy America. Because highway construction projects are now being delayed or are threatened with delay, **for non-Federally funded utility relocations,** FHWA is providing utility companies a reasonable period of time, **through December 31, 2013,** to take the necessary steps to ensure that their steel and iron products used in relocation work as part of Federal-aid highway projects comply with Buy America. These necessary steps include, but are not limited to, making the necessary arrangements with vendors to obtain appropriate certifications with respect to Buy America compliance and taking necessary actions to review new Buy America compliant materials to ensure compatibility with company product specifications and standards. **This memorandum covers any project-specific utility agreements for non-Federally funded utility relocations executed on or before December 31, 2013**, and does not apply to master, area-wide, or state-wide utility agreements.

If you have any questions, please contact either Mr. Gerald Yakowenko at 202-366-1562 or Mr. Edwin Okonkwo at 202-366-1558.

U.S. Department of Transportation
Federal Highway Administration

California Division

650 Capitol Mall, Suite 4-100
Sacramento, CA 95814

(916) 498-5001
(916) 498-5008

July 12, 2013

In Reply Refer To:
HDA-CA

Mr. Malcolm Dougherty
Director, California Department of Transportation
1120 N Street, MS-49
Sacramento, CA 95814

Attention: Ms. Karla Sutliff, Deputy Director, Project Delivery
Mr. Brent Green, Chief, Division of Right of Way and Land Surveys
Mr. Denix Anbiah, Chief, Division of Local Assistance
Mr. Fardad Falakfarsa, Chief, Federal Resources Office

Subject: Clarification on the Application of Buy America in California

Dear Mr. Dougherty:

I am writing to provide policy clarification for the application of Buy America under the Moving Ahead for Progress in the 21st Century Act (MAP-21).

Application of Buy America and MAP-21

Implementation of MAP-21 has broadened how Buy America is applied to federally funded highway construction projects. As a result of MAP-21, application of the requirements of the Buy America under MAP-21 is determined by considering both the date that federal highway funds were/will be obligated to the project and the date of execution of construction contracts necessary to implement the project.

MAP-21 requires that all aspects of a highway construction project (as defined by the project's NEPA decision document) comply with Buy America if any federal highway funds are obligated to the project on or after October 1, 2012. As a result, compliance with Buy America may now be required for aspects of the project that are not reimbursed with federal highway funds.

In addition, contracts required to implement the highway project that are executed on or after October 1, 2012, also invoke the Buy America requirements of MAP-21. In this context, "contract" means a utility agreement, railroad agreement, or other construction contract that is necessary to implement the project and is eligible for federal highway funds.

Based on the above, application of Buy America under MAP-21 is determined by considering the following conditions:

1. All contracts that are necessary to implement the project and that have federal highway funds are subject to Buy America. This is true regardless of when those funds were obligated or when the contracts were executed.
2. All construction contracts, including utility and railroad agreements, executed before October 1, 2012, are not subject to Buy America unless federal highway funds will be used on those contracts.
3. Obligation of federal highway funds on or after October 1, 2012, on any activity necessary to implement the project invokes the Buy America requirements of MAP-21 to all project

construction activities that come under contract on or after October 1, 2012, regardless of the funding source for that work.

4. Buy America applies to all project construction contracts that executed on or after October 1, 2012, and that include work that is eligible for federal highway funds, regardless of the funding source for those contracts. Executing a contract (utility agreement, railroad agreement, or construction contract) after October 1, 2012, without Buy America compliance requirements renders all project activities placed under a contract executed after October 1, 2012, ineligible for federal funds. This may be applied retroactively to October 1, 2012.

To assist in applying the above conditions to practical situations, a table of sample scenarios is enclosed.

Transition Plan

Notwithstanding conditions 1-4 above, the Federal highway Administration (FHWA) has established a transition plan for the application of Buy America to utility relocations. During the transition plan, project-specific utility relocation agreements executed before January 1, 2014, that do not have federal funding, are not required to comply with Buy America. This exemption does not apply to master, area-wide, or state-wide utility agreements.

Items subject to Buy America

Buy America provisions are applicable to, but are not limited to, the following:

1. Steel or iron products used in pavements, bridges, tunnels or other structures, which include, but are not limited to, the following: fabricated structural steel, reinforcing steel, piling, high strength bolts, anchor bolts, dowel bars, permanently incorporated sheet piling, bridge bearings, cable wire/strand, pre-stressing/post-tensioning wire, motor/machinery brakes and other equipment for moveable structures;
2. Guardrail, guardrail posts, end sections, terminals, cable guardrail;
3. Steel fencing material, fence posts;
4. Steel or iron pipe, conduit, grates, manhole covers, risers;
5. Mast arms, poles, standards, trusses, or supporting structural members for signs, luminaries, or traffic control systems;
6. Steel or iron components of recast concrete products, such as reinforcing steel, wire mesh and pre-stressing or post-tensioning strands or cables; and
7. Steel transmission or distributions pole structures, predominately steel cross arms, anchors, steel or iron conduit, steel rebar to be furnished in conjunction with: concrete foundations,
8. concrete transmission or distribution pole structures, or any prefabricated concrete vaults or similar concrete structures, steel pipes for the transmission or distribution of gases or liquid fluids.

Exemptions from Buy America

We understand that, when Buy America is applicable to utility relocations, some utility companies may be reluctant to certify Buy America compliance due to difficulties in tracing the origin of their materials. The attached policy memorandum titled "Clarification of Manufactured Products under Buy America," dated December 21, 2012, includes exemptions for certain products. The following is a list of other exclusions associated with Buy America that are based on that memo and other FHWA policy documents:

1. Miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble

and construct the above components (or manufactured products that are not predominately steel or iron). Examples include, but are not limited to: cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, guy wires, transformers, insulators, cutouts, surge arrestors, switches, hardware, fasteners, brackets, base plates, conductor or other separately provided attachments to be ordered separately and thereafter affixed to the pole structures.

2. Items that are not 90% iron or steel (i.e., wood poles, copper wire, etc.)
3. Items that are in place in one location at the project site and are relocated to another part of the site.
4. Items or work that are not eligible for federal highway funds, including but not limited to work that is a betterment, spare items used for future replacement, items used for maintenance, etc.
5. Items that are not permanently incorporated into the project and are not a functional part of the project (i.e., scaffolding, sheet piles left in place after construction that are not an integral part of the finished product). This includes equipment that was placed in a temporary location to facilitate construction of the project.
6. Work for which the utility company cannot legally be reimbursed from federal funds.

Minimal Amounts of Foreign Iron and Steel

Minimal amounts of foreign iron and steel materials used on highway projects are not subject to Buy America. The minimal amount allowed is the greater of $2,500 or 0.1% of the contract value, calculated on a contract by contract basis. Calculations of 0.1% amount shall consider the following:

1. The value of iron and steel to be that are exempt from Buy America (i.e., exempted items listed above) may be excluded from the calculation.
2. Iron and steel products that are certified as compliant with Buy America may be excluded from the calculation.
3. The value of iron and steel shall include costs charged by the vendor/supplier that are necessary to prepare the item for use at the project site, including, assembly, testing, and transportation that are invoiced.

If you have any questions regarding our interpretation the applicability of MAP-21 as it relates to Buy America, please feel free to call Steve Pyburn, Construction Program Manager, at (916) 498-5057.

Sincerely,

Matthew A Schmitt

For Vincent P. Mammano
Division Administrator

Enclosure

cc: (email)

Karla Sutliff
Brent Green
Denix Anbiah
Fardad Falakfarsa

Federal Highway Administration, California Division
Sample Scenarios for Buy America under MAP-21
July 12, 2013

Action Before 10/1/2012[1]	Action After 10/1/2012[1,2]	Does Buy America Apply Does MAP-21 Apply
UA executed. UA has no federal funds. Federal funds obligated for construction contract.	No future contracts executed or federal funds obligations. Change order adds federal funds to the construction but not the UA.	**UA**: Buy America does not apply. **Construction contract**: Buy America applies. **MAP-21**: Does not apply.
UA1 Signed. UA1 has no federal funds.	Federal funds obligated for construction UA2 executed. UA2 has no federal funds.	**UA1**: Buy America does not apply. **Construction contract and UA2**: Buy America Applies. **MAP-21**: Applies. Construction, UA 2 and other project activities that come under contract after 10/1/2012 are subject to Buy America.
UA Signed. UA Has no federal funds.	Construction contract executed. Construction contract has no federal funds.	**UA**: Buy America does not apply. **Construction contract**: Buy America Applies. **MAP-21**: Applies. Construction, UA 2 and other project activities that come under contract after 10/1/2012 are subject to Buy America.
UA1 Signed. UA1 Has federal funds.	Construction contract executed. Construction contract has no federal funds. UA2 Signed. UA2 Has no federal funds.	**UA1**: Buy America applies. **Construction contract and UA2**: Buy America Applies. **MAP-21**: Applies. Construction, UA 2 and other project activities that come under contract after 10/1/2012 are subject to Buy America.
UA1 Signed. UA1 Has no federal funds. Construction contract executed. Construction contract has no federal funds.	UA2 Signed. UA2 Has no federal funds. No future federal highway fund obligations or additional project contracts planned.	**UA1**: Buy America does not apply. **Construction contract**: Buy America does not apply. **UA2**: Buy America Applies. **MAP-21**: Applies. Execution of UA2 triggers MAP-21 and project activities that come under contract after 10/1/2012 are subject to Buy America. If UA2 does not comply with Buy America, all project activities placed under a contract executed after 10/1/2012 are ineligible for federal funds. This may be irrelevant since no additional contracts are needed and no federal funds will be used on the project.
UA1 Signed. UA has no federal funds.	Preliminary design contract executed after January 1, 2013. Construction contract executed. Construction contract has no federal funds. UA2 executed. UA2 has no federal funds.	**UA1**: Buy America does not apply. **Construction contract and UA2**: Buy America Applies. **MAP-21**: Applies. Execution of the design contract triggers requirements of MAP-21. Construction, UA 2 and other project activities that come under contract after 10/1/2012 are subject to Buy America.

UA: Utility (or Railroad) Agreement

1. During a transition period established by FHWA on July 11, 2013, project-specific utility relocation agreements executed before January 1, 2014, that do not have federal funding, are not required to comply with Buy America.
2. Executing a contract (utility agreement, railroad agreement, or construction contract) after 10/1/2012 without Buy America compliance requirements renders all project activities placed under a contract executed after 10/1/2012 ineligible for federal funds. This may be applied retroactively to 10/1/2012.