

Network for Success

Local Programs Workshop



**BREAKOUT SESSION – Group 1
Track B – Special Procurement
Opportunities**

Wednesday, September 25, 2013

1:00pm – 2:30pm

Network for Success

Local Programs Workshop



Special Procurement Opportunities

September 25, 2013

John Simmers

Moderator

VDOT Local Assistance Division

Special Procurement Opportunities

Topics

- **Non-Professional Services** (Jeff Rodgers – VDOT)
- **Sole-Source and Proprietary Products** (Lorenzo Casanova – FHWA)
- **Tied Bids** (Gerald “Jerry” Yakowenko – FHWA)

Session Format

- **Interactive Q&A – *be ready!***
- **Ask questions to engage the presenters**

Realize an uplifting and educational experience
(Have fun and learn something new!)

Network for Success

Local Programs Workshop



Non-Professional Services

September 25, 2013

Jeff Rodgers

Consultant Services Program Manager

VDOT Environmental

Who are you?

- **Government Employee**

- **Local**
- **State**
- **Federal**



- **Private Consulting Company Employee**

How many Government Employees in this room have ever participated on a consultant selection panel?



Professional Services



- **Code (VPPA*) defines 12 areas as professional:**
 - **Accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, economist, medicine, optometry, pharmacy and professional engineering.**
 - **Code of Virginia Section 2.2-4301**

*** VPPA = Virginia Public Procurement Act**



Pop Quiz

What is the name of the law that sets the rules for professional service procurement in federal government?

- A. The Bolling Act
- B. The Powers Act
- C. The Brooks Act
- D. The Engineering and Architecture Rule (EAR) Act

The Brooks Act of 1972

**Representative
Jack Brooks (D-TX)
Sponsor of the bill to
require federal agencies
of the United States
Government to select
engineering and
architectural firms based
solely upon their
qualifications.**



**Signed by Richard Nixon
on October 27, 1972.
The Brooks Act codified
a process that had
traditionally in use since
the Civil War.**

Examples of Professional Services

- **NEPA Environmental Studies**
- **Bridge safety and construction engineering inspection**
- **Hydrologic and hydraulic studies**
- **Right of way engineering**
- **Engineering and design related services directly related to a highway construction**

Non-Professional Services



- **Code (VPPA*) defines non-professional services as any services not specifically identified as professional services in the definition of professional services.**
- **Code of Virginia Section 2.2-4301**

*** VPPA = *Virginia Public Procurement Act***

Examples of Non-professional Services

- **Appraisal services**
- **Training**
- **Traffic Monitoring Systems**
- **Stream/Wetland Credits**
- **Meteorological Forecasting**
- **Hazardous Materials**
- **Cultural Resources**
- **Staff Augmentation**

Construction



- **The Code of Virginia defines construction as “building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property”**
- **Code of Virginia Section 2.2-4301**



Pop Quiz

Right-of-Way Appraisal Services are considered

- A. Professional
- B. Non-professional
- C. Construction



Pop Quiz

Installation of an oil/water separator at a locality owned vehicle service shop would be considered -

- A. Professional
- B. Non-professional
- C. Construction



Pop Quiz

Development of plans for the construction of a new ingress/egress point for the student parking lot at the local high school would be considered-

- A. Professional
- B. Non-professional
- C. Construction

Comparison of Professional and Non-professional Services



Manchester-Petersburg Turnpike Milestone 7: mid-1820s; Jefferson Davis Highway

What is the same for professional and non-professional services procurement?

- Both are qualifications based selections
- Both use Requests for Proposals
- Both use a selection committee or panel
- Both use weighted scoring criteria
 - Subjective, but based on facts as presented in the offeror's proposal

What are some differences between professional services and non-professional services procurement?

- **Price**
 - **Professional services - price is not evaluated. There is no scoring criteria for price.**
 - **Professional services - price is considered after one Offeror is selected**
 - **Non-professional services - price is evaluated for all proposals and price has a scoring weight in the selection criteria.**

What are some differences between professional services and non-professional services procurement?

- **Hourly Rates:**
 - **Professional – Actual Cost plus FAR overhead and Net fee are used to determine the hourly rates charges for services.**
 - **Non-professional – Fully Loaded Hourly Rates are proposed by the Offeror with no requirement to divulge the derivation of the rates.**
 - **Note: Travel and Other Direct Expenses are billed at actual cost for both contract procurement methods.**

What are some differences between professional services and non-professional services procurement?

- **SWAM/DBE**
 - Professional services - there is not a scoring criteria for SWAM/DBE participation. Goals are stated as a percentage of payment to DBE firms.
 - Non-professional services - SWAM/DBE is evaluated and has a scoring weight in the Offeror's proposal.

What are some differences between professional services and non-professional services procurement?

- **Award Document:**
 - **The Terms and Conditions are quite different**
 - **Professional Services - each agency is required to develop their contract format.**
 - **Non-professional Services - The Agency Procurement and Surplus Property Manual (APSPM) is very clear about the contract form and requirements for non-professional services.**

Non-professional Services and Federal Participation

How does the Federal Highway Administration view non-professional services on Federal-aid projects?

49 CFR – Part 18 – Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

Sec. 18.36 Procurement.

(a) States. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and sub-grantees will follow paragraphs (b) through (i) in this section.



Pop Quiz

Price is evaluated on Non-professional proposals...

- A. True
- B. False



Pop Quiz

SWAM/DBE participation/goal is not scored on Non-professional service proposals...

- A. True
- B. False

Take Away

- 1. There are three different contract tools available:**
 - A. Professional Services**
 - B. Non-professional Services**
 - C. Construction Services**
- 2. In Virginia there is a very clear definition of Professional Services and Construction Services, leaving any other types of services in the non-professional service category.**
- 3. Always work closely with your procurement professionals when procuring non-professional services**



Network for Success

Local Programs Workshop



Sole-Source and Proprietary Products

September 25, 2013

Lorenzo Casanova

LPA and Research Programs Manager

FHWA – Virginia Division



What is a Proprietary Product?

- a) A **product** that has a premium
- b) A **specification**
- c) A **process** that has a royalty cost associated with its value or use
- d) Any of the above



A Proprietary Product is...

- ✓ A **product**, **specification**, or **process** that has a premium or royalty cost associated with its value or use. Examples: 3M™, Tensar®
- ✓ The use of patented or proprietary products often involves making a sole-source selection within the contracting process





What is Sole Source?

- a) A very exclusionary specification
- b) When only one product is available in the market
- c) When only one company bid on the contract
- d) when a specification is written so narrowly that only a specific, single supplier or product is acceptable
- e) a comfortable shoe
- f) a) and d)



Sole Source is...

- ✓ when a specification is written so narrowly that only a specific, single supplier or product is acceptable
- ✓ In essence, eliminating any competition





Why consider the use of brand name products on your Federal-aid project?

- a) To effectively prohibit competing products by requiring a sole source, or by exclusively using a trade name product within the specifications
- b) To violate the basic principle of Federal-aid contracting for competitive awards
- c) To avoid fair competition on Federal-aid projects
- d) None of the above



Things to consider when using brand name products on Federal-aid project

- ✓ Normally, Federal funds eligibility applies to your entire project.
- ✓ The cost of each individual product is evaluated for eligibility for Federal funding



Brand Name Vs. Generic

“a Coke by Coca-Cola®”

Vs.

“a Coke by Coca-Cola®, Pepsi, Royal Crown Cola *or equal* cola beverage.”





Can Patented or Proprietary Products be used & be eligible for Federal funding?

- a) Yes 😊
- b) No ☹️
- c) Perhaps...
- d) Only in Emergencies?



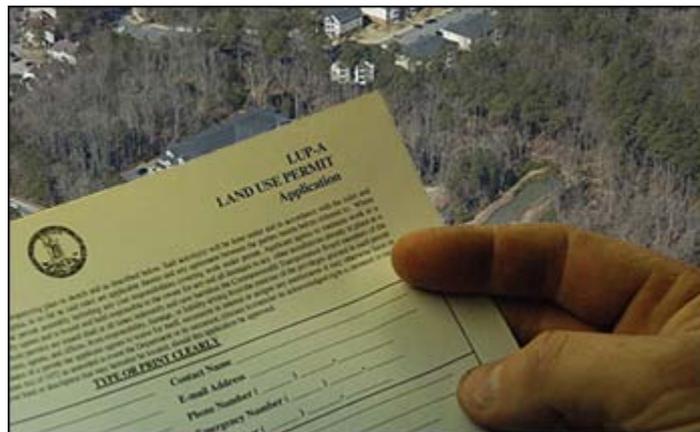
Patented or Proprietary (PP) Products may be eligible for Federal funding IF...

- ✓ one of three **non-competitive** options is used:
 1. product certification,
 2. experimental purposes, or
 3. public interest finding (PIF)



Option 1: **Product Certification**

- ✓ When a specific product **is needed** to build or operate the constructed project
- ✓ Locality writes and signs statement in advance of requiring the product in the contract specifications
- ✓ VDOT reviews and, if approves, issues a certification



1. Product Certification

- ✓ VDOT certifies that a particular patented or proprietary product is either
 - A. necessary for synchronization with existing facilities or
 - B. is a unique product
- ✓ for which there is no equally suitable alternative



1. Product Certification...cont.

✓ A certification statement should specifically address at least one of these factors:

- a) Function
- b) Aesthetics
- c) Logistics



1. Product Certification...cont.

a) **Function** – when product is necessary for the continued satisfactory operation of the existing facility. E.g., traffic signals: synchronization with existing system



1. Product Certification...cont.

b) **Aesthetics** – addresses when the product has consistent visual appearance and blends with existing features



1. Product Certification...cont.

c) **Logistics** – pertains to interchangeability with maintenance inventory and using products that provide ease of replacement and operation



Option 3: Public Interest Finding (PIF)

- ✓ When locality believes **there is good reason** to sole source a patented or proprietary product, it may request a PIF
- ✓ Must be submitted in writing
- ✓ Demonstrate why excluding acceptable alternatives is justified



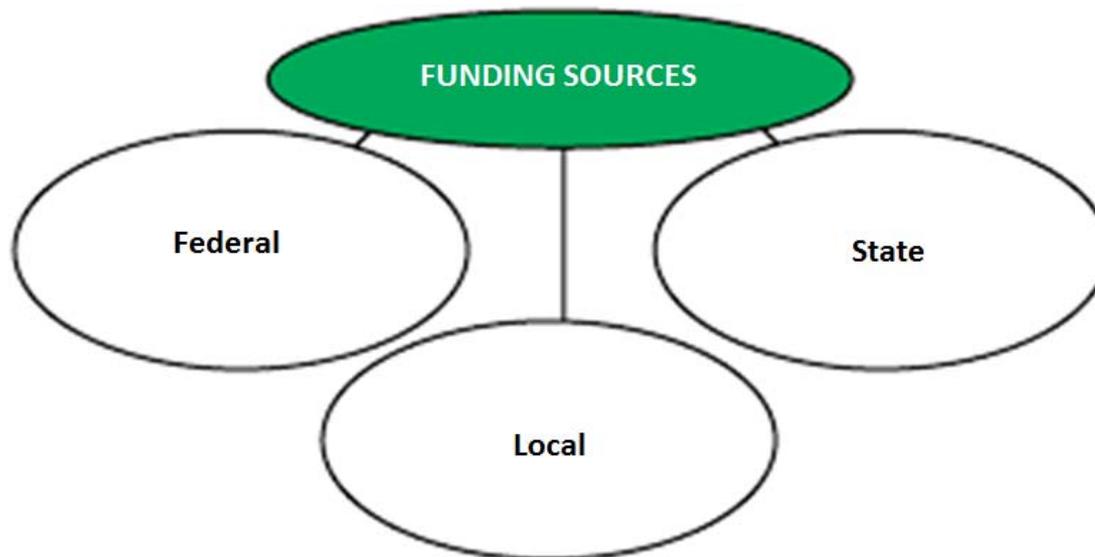
3. Public Interest Finding (PIF)

- ✓ VDOT has authority to issue a PIF when it concurs with request
- ✓ Support for PIF request could include:
 - ✓ Engineering and economic analyses,
 - ✓ Product availability or logistical concerns,
 - ✓ Unique safety performance, or
 - ✓ Other reasons



3. Public Interest Finding (PIF)

- ✓ Locality may use non-Federal or state funds
- ✓ This option exempts locality from compliance with the Federal-aid requirements for selecting specific patented or proprietary products



3. Public Interest Finding (PIF)

- ✓ **However**, the remaining project activities must comply with all other regulations to keep the project eligible for federal funding. E.g.: “Buy America”, “NEPA”, etc.



One Final Question...



...and One Final Answer.



What is the difference between a Product Certification Vs. a PIF?

- a) PIF is based on “benefits”
- b) Label “PIF” is shorter than “Product Certification”
- c) Product Certification is based on “needs”
- d) The spelling
- e) All of the above
- f) None of the above



Difference between a Product Certification and a PIF...

- ✓ **Certification**: product is either necessary for **synchronization** with existing facilities or is a **unique product** for which there is no equally suitable alternative - (need-based)
- ✓ **PIF**: When locality believes **there is good reason** to sole source a patented or proprietary product, it may request a PIF – (public benefit-based)
 - ✓ Benefits are typically economic, logistical or safety in nature

VDOT Perspective

- FHWA and VDOT met on September 5 to discuss Certification/PIF definitions and requirements
- FHWA initiating a process review with VDOT participation in October – planned conclusion by the end of 2013
- Based on the process review outcome, VDOT will issue process and applicability guidance for Certifications and PIF's in early 2014

More information

FHWA guidance on patented and proprietary products in Q & A format

<http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm>

Link to 23 CFR 635.411 covering material or product selection

<http://www.ecfr.gov/cgi/t/text/text->

[idx?c=ecfr&rgn=div5&view=text&node=23:1.0.1.7.23&idno=23#23:1.0.1.7.23.4.1.7](http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&rgn=div5&view=text&node=23:1.0.1.7.23&idno=23#23:1.0.1.7.23.4.1.7)

- FHWA's searchable database of examples of approved patented or proprietary items

<http://www.fhwa.dot.gov/construction/contracts/pnpapprovals/index.cfm>

Network for Success

Local Programs Workshop



Tied Bids

LPA Projects and FHWA Requirements

September 25, 2013

Gerald Yakowenko

Contract Administration Team Leader

FHWA – Headquarters

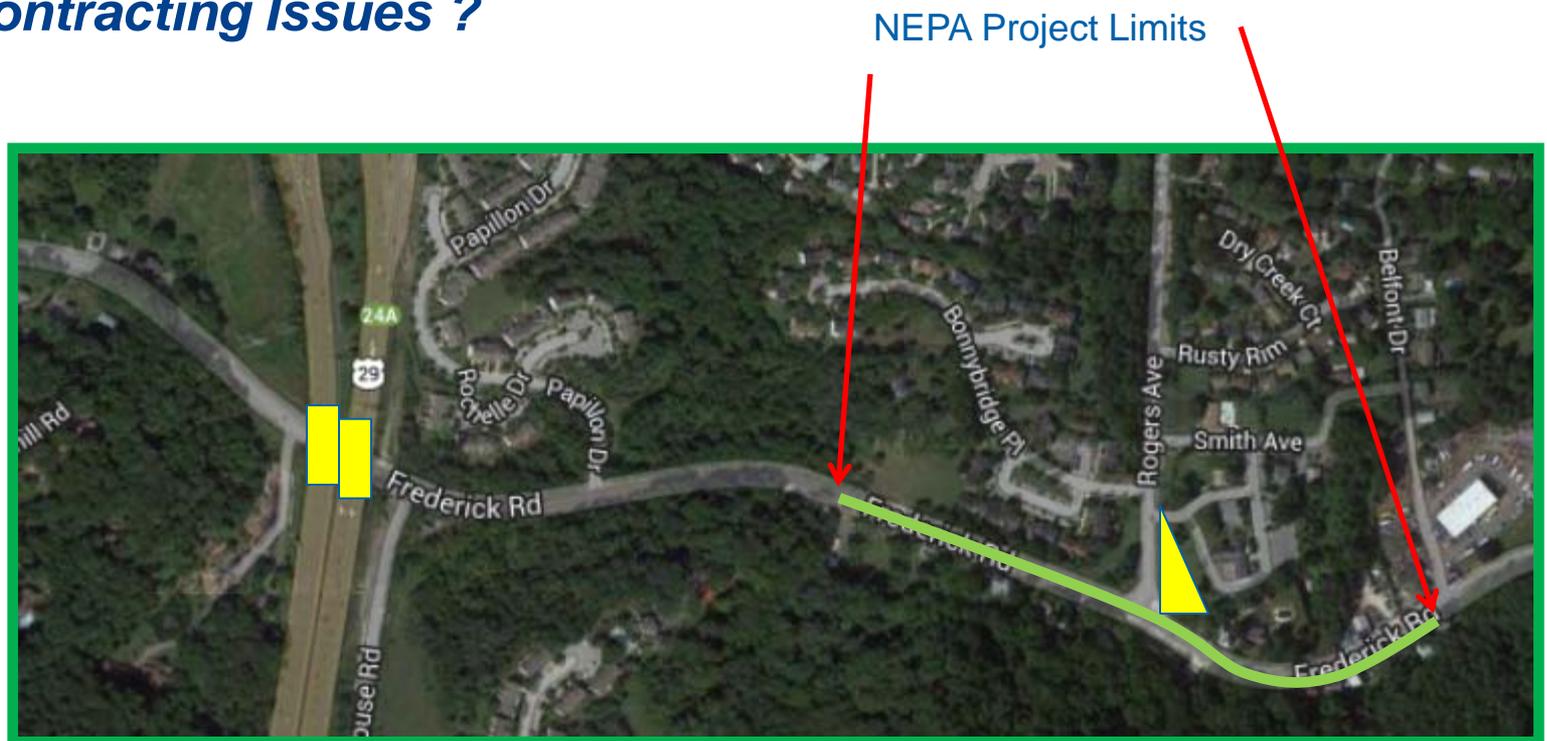


What is a “tied” bid?

- a) Mathematically equal bids from two or more construction contractors
- b) A contract including multiple projects which are tied for the bidding purposes to take advantage of bundling efficiencies (23 CFR 635.111)
- c) A contract including multiple sections / phases / participation limits some of which may be funded by FHWA
- d) All of the above

What are the issues related to the addition of work to a Federal-aid highway project?

- *NEPA issues ?*
- *Eligibility Issues ?*
- *Procurement Issues ?*
- *Contracting Issues ?*



National Environmental Policy Act (NEPA) Issues (23 CFR 771)

- **Is the additional work within the project limits described in the NEPA document?**
- **Is the environmental impact of the additional work consistent with the NEPA decision?**
- **If not, is there reason to revisit the NEPA decision?**



Tied Bids: After contract award, is it possible to add work by extending the construction contract limits?

- a) No
- b) Yes, if FHWA-VA and VDOT agree that:
 - The change is within the scope of the Federal-aid project agreement,
 - No changes are necessary to the TIP/STIP (or in rare cases, there is a valid reason to amend the TIP/STIP)

Eligibility Issues

- **Is the work authorized by statute?**
 - Bridge rehabilitation work – Highway Bridge Program funds; CMAQ related work – CMAQ funds
 - Preventive maintenance vs. routine maintenance
- **Will the costs be necessary, reasonable and allocable to a project?**



Tied Bids: If FHWA funds are used only for construction, are other FHWA requirements applicable (e.g. right-of-way acquisition)?

- a) No
- b) Yes, NEPA and Uniform Act requirements will apply if FHWA funding is used in any project.



Tied Bids: If I use FHWA funding for preliminary engineering, does that “Federalize” subsequent construction contracts?

- a) No, construction contracting requirements are contract specific
- b) No, construction contracting requirements are contract specific – except for Buy America requirements



Tied Bids: Is preventive maintenance work eligible for participation?

- a) No
- b) Yes, “preventive maintenance” is eligible; “routine maintenance” is not.

Eligibility of Maintenance Work

- Routine maintenance (snow removal, grass cutting, etc.) is not eligible
- Preventive maintenance activities are eligible if shown to be cost-effective
 - Preventive Maintenance Eligibility
Memo: <http://www.fhwa.dot.gov/PRESERVATION/100804.cfm>
 - Preventive maintenance Q&As:
<http://www.fhwa.dot.gov/PRESERVATION/100804qa.cfm>

Procurement Issues:

FHWA's Procurement Requirements for Federal-aid Projects

	Engineering Service Contracts	Construction	Other Types of Service Contracts	Experimental Projects
Reference	23 USC 112(b)(2) 23 CFR 172	23 USC 112(b)(1) 23 CFR 635 23 CFR 636	49 CFR 18.36	23 USC 502(b)
Basis for contract award	Qualifications-based selection	D-B-B – lowest responsive bid D-B – low bid or best value CM/GC – qualifications, experience or best value	State-Approved Procedures	SEP-14, SEP-15
Definitions	23 USC 112(b)(2)	23 USC 101(A)	N/A	N/A
Types of projects	Engineering and architectural services for a project	Highway construction within the right-of-way of a public highway	Operational services or non-highway construction (e.g. Trails, research contracts, operational contracts, etc.)	Varies

Tied Bids: Contracting Requirements: When and Where Do FHWA Construction Contracting Requirements Apply?

*The most frequent FHWA
response to questions . . .*

It depends !!!

- *It depends on . . .*
 - *Funding Source*
 - *Location of project*
 - *Participating / Non-Participating*
 - *Type of work / Scope*



Tied Bids:

True or False:

FHWA construction contracting requirements only apply to participating work.

- a) True - the requirements do not apply unless FHWA funding is used
- b) False - MAP-21 expanded the scope of Buy America coverage

MAP-21 S. 1518

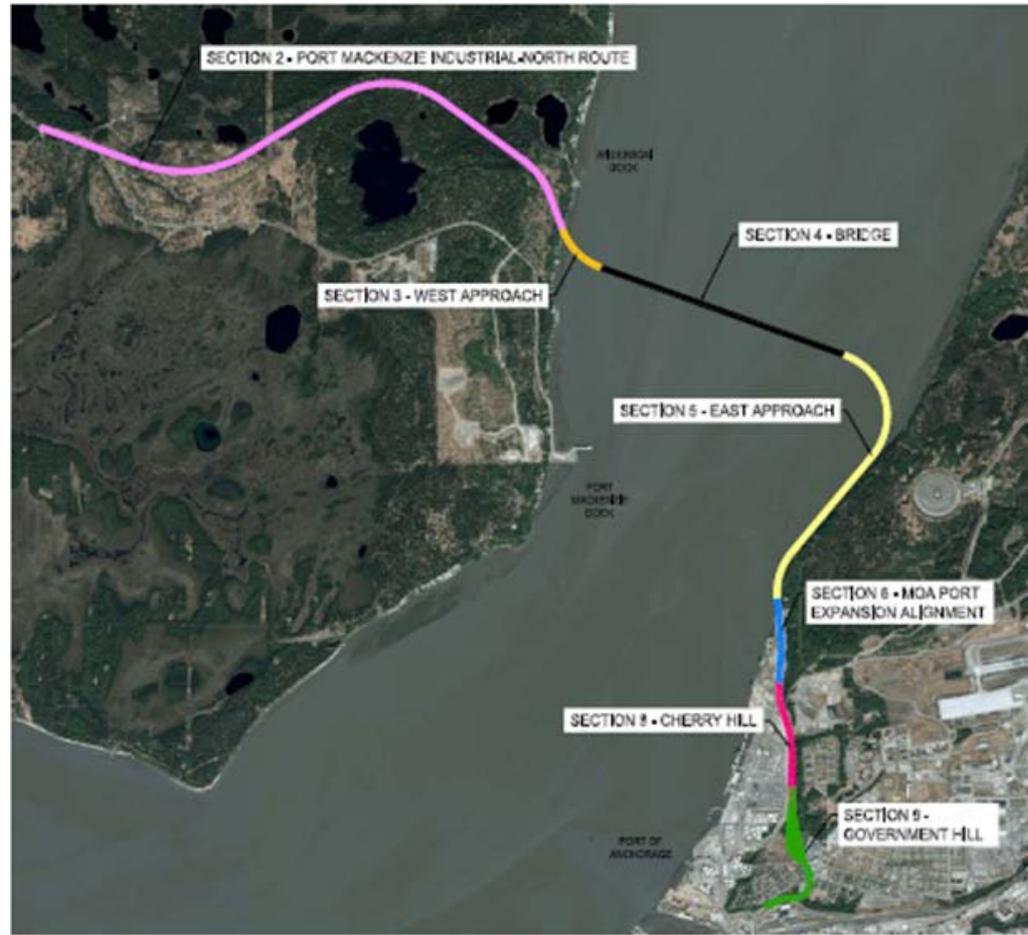
SEC. 1518. BUY AMERICA PROVISIONS.

Section 313 of title 23, United States Code, is amended by adding at the end the following:

“(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.”

Example: application of Buy America requirements to all contracts eligible for assistance within the scope of a NEPA document'

Knik Arm Crossing, Anchorage, AK



Typical FHWA Consolidated Guidance Web Page for Buy America

<http://www.fhwa.dot.gov/construction/cqit/>

Construction Program Guide

Buy America

The FHWA's policy for Buy America provides for:

- a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in any project funded under Title 23
- alternate bid provisions
- minimal usage criteria for non-domestic products
- a waiver process based on public interest or the availability of domestic products

On Tuesday, February 12, 2010, The United States Trade Representative's Office announced a [tentative agreement between the United States and Canada](#). The Agreement specific programs for coverage, however, it does not include the highway program. Thus, all Federal-aid highway projects, including those funded under the Recovery Act (grants, which are subject to section 1805 of the Recovery Act), administered by FHWA will continue to be subject to the Buy America provisions in Title 23 U.S.C. 313.

Authority/Legal Basis

1. Laws

- The [FHWA's statutory provisions for Buy America are found in Title 23 United States Code, Section 313](#).

2. Regulations

- [Title 23 C.F.R. 635.410](#) provides the FHWA's regulatory policy regarding Buy America. (Note: this regulation was last updated on November 25, 1983, and does not [stewardship, oversight, and applicability requirements](#) resulting from the 1991 ISTEA and the 1998 TEA-21. See the discussion in the FHWA Contract Administration Manual for current FHWA policy).

3. Rule Makings / Federal Register Notices

- [November 25, 1983 Final Rule Making Buy America Requirements](#) includes the preamble and regulatory narrative that form the basis for the FHWA's current Buy A policy.
- [July 21, 1993 Final Rule Making](#) implements the requirements of ISTEA Section 1041(a) that provide for a revision of FHWA's Buy America requirements to include a coating for steel or iron products.
- [February 9, 1994 Notice of a nationwide waiver of Buy America for ferryboat equipment and machinery](#) is the Federal Register notice which lists specific requireme nation-wide waiver.
- [March 24, 1995 Notice of a nationwide waiver of Buy America for pig iron and processed, pelletized, and reduced iron ore](#) is the Federal Register notice which lists s requirements for this nation-wide waiver.

4. Orders

- None

5. Policy

- The [FHWA Contract Administration Core Curriculum Manual](#) summarizes the FHWA's policies and provides general guidance for Buy America provisions.
- **Policy Memoranda**
 - [Headquarters memorandum dated December 21, 2012 provides a clarification of FHWA's position regarding the application of Buy America requirements to man products.](#) **NEW**



Tied Bids: Is non-participating work subject to FHWA's patented and proprietary product requirements?

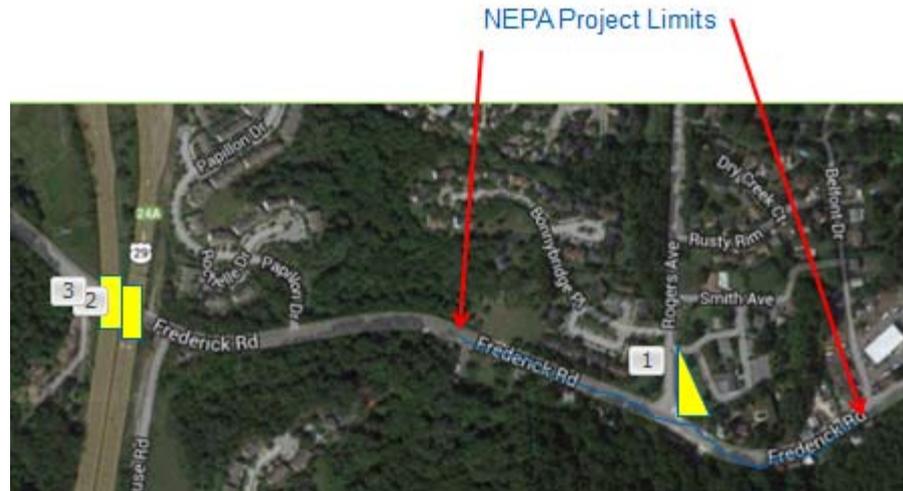
- a) No
- b) Yes

FHWA Policy for Patented/Proprietary Products

23 CFR 635.411 (c)

“A State transportation department may require a specific material or product when there are other acceptable materials and products, when such specific choice is approved by the Division Administrator as being in the public interest. When the Division Administrator's approval is not obtained, the item will be nonparticipating unless bidding procedures are used that establish the unit price of each acceptable alternative. In this case Federal-aid participation will be based on the lowest price so established.”

Is the additional work a “cardinal change”?



- A cardinal change is one which is not within the scope of the original contract.
- FHWA’s November 15, 1996 policy memo provides general guidance concerning the eligibility of cardinal changes:
 - <http://www.fhwa.dot.gov/programadmin/contracts/111596.cfm>



Tied Bids: Can my agency use our own forces to self-perform some of the work associated with a project?

- a) No
- b) Yes, if VDOT/FHWA approve a cost-effectiveness finding

Use of Public Agency Force Account

- **Excerpt from 23 USC 112(b)(1)**

“ . . . construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists.”

- **FWHA Order 5060.1 – “FHWA Policy on Agency Force Account Use”**

<http://www.fhwa.dot.gov/legsregs/directives/orders/50601.cfm>

Joint Use of FHWA and HUD Funding

The Conflict:

- *FHWA's Section 3 requires that preferential hiring be afforded to those individuals living in the project area*
- *FHWA regulations prohibit preferential hiring.*

The Solution:

- *FHWA's Experimental Program (SEP-14) allows agencies to evaluate the use of both FHWA and HUD funding sources in the same construction contract.*
- *<http://www.fhwa.dot.gov/construction/cqit/sep14livability.cfm>*



Tied Bids: Who has the authority to provide guidance for Federal-aid projects in Virginia?

- a) VDOT
- b) FHWA- Virginia Division
- c) FHWA- Headquarters

Session Contact Information

Jeff Rodgers

VDOT, Environmental Division

Email: Jeff.Rodgers@VDOT.Virginia.gov

Telephone: 804-371-6785

Lorenzo Casanova

FHWA, Virginia Division

Email: Lorenzo.Casanova@dot.gov

Telephone: 804-775-3361

Gerald (Jerry) Yakowenko

FHWA, Headquarters

Email: Gerald.Yakowenko@dot.gov

Telephone: 202-366-1562