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Federal Highway Administration
1200 New Jersey Avenue, SE | Washington, DC 20590

Re: Buy America Nationwide Waiver Notification for Commercially Available Off-the-Shelf (COTS) Products with Steel or Iron Components and for Steel Tie Wire Permanently Incorporated in Precast Concrete Products

The American Gas Association (AGA), founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 72 million residential, commercial and industrial natural gas customers in the U.S., of which 94 percent — over 68 million customers — receive their gas from AGA members. Today, natural gas meets more than one-fourth of the United States’ energy needs.

AGA firmly supports the “Buy America” Act requirements that help to promote American jobs by requiring the use of American-made iron, steel, and manufactured products in transportation facilities and vehicles built with federal funds. AGA appreciates the opportunity to comment on the Federal Highway Administration’s (FHWA) notice of a nationwide waiver from the Buy America requirements for “Commercially Off The Shelf” (COTS) products with steel or iron components.¹ AGA’s comments do not cover the nationwide waiver for steel tie wire permanently incorporated into precast concrete products.

AGA supports FHWA utilizing nationwide waivers to improve the efficiency of highway and utility relocation projects by reducing the administrative burden faced by companies and regulators to comply with the Buy America Act.

Application of Buy America requirements on utility relocations associated with FHWA-funded highway projects

A natural gas utility becomes a stakeholder in an FHWA-funded highway project when a natural gas pipeline is required to be re-routed to accommodate the highway project. This “utility relocation” may involve the installation of a new pipeline and possibly other critical components such as valves and regulators, along with minor connecting components such as fittings. Utility relocation projects in general represent a small fraction of the cost of a highway project.

AGA’s Comments on Nationwide Waiver Notification on Commercially available off-the-shelf (COTS) products with Steel/Iron Components
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With regard to the Buy America requirements, the steel pipeline installed in the utility project would be the corollary to structural steel utilized for a highway structure. Under this analogy, steel pipe is considered a “covered material” under the Buy America requirements.

However, utility relocation projects may also require the installation of additional components, incidental to the steel pipe, including but not limited to steel valves, insulating joints, fabricated fittings/assemblies, and pressure regulators. These components are often purchased through general contracts, not specific to any one project. In addition, products such as valves and regulators are complex components relative to steel pipeline, and the subcomponents may be manufactured from numerous sources of steel, which makes compliance with Buy America for these types of products challenging, as will be explained further in the next section.

Utility-specific manufactured products that currently fall under Buy America requirements and result in unreasonable and impossible administrative burdens

Valves, regulators, odorizers, heaters and their associated assemblies are types of manufactured products that can be subject to Buy America requirements, but may be infeasible to procure domestically, or may contain multiple steel and non-steel subcomponents and connecting parts. These subcomponents may originate from multiple global suppliers and manufacturing processes, which would be almost impossible to track as required by the existing Buy America regulations.

In addition, manufactured valves, regulators and other components are used for a variety of utility construction projects, not just utility relocation projects. This means that during a utility relocation project it is not feasible to acquire specific Buy America parts through the normal utility stocking processes. The inability to acquire specific Buy America parts results in significant delays in FHWA projects. This was recently experienced in the Cordelia Highway Project in California and resulted in the need for the state to grant a waiver in order to allow the project to go forward.

With the aforementioned in mind, FHWA should clarify that the COTS waiver includes certain predominantly steel/iron utility components of utility relocation projects, including but not limited to valves, insulating joints, fabricated fittings (elbows, nuts, bolts, flanges), assemblies and pressure regulators etc. The FHWA should also revise the proposed COTS definition to allow the waivers to encompass certain uniformly manufactured and commonly available complex steel and iron components and subcomponents used in these projects.

FHWA should ensure that utility materials are not deemed to be “covered materials” solely because they are necessary for highway construction and are permanent once installed

In conjunction with the proposed nationwide waivers discussion, FHWA proposes categories of equipment that FHWA asserts have been and continue to be subject to the Buy America requirements.\(^2\) Although these categories and the discussion around these categories are focused on products and materials used in highway construction, AGA is concerned they could be interpreted as extending to manufactured

\(^2\) 81 Fed. Reg. 71,786.
products containing iron or steel that are used by utilities in relocation projects. FHWA should make clear in any final rule that these categories are not meant to cover all utility materials used in relocation projects, other than those pieces of equipment expressly listed in the preamble to the proposed waivers.

Specifically, FHWA should clarify that utility equipment is not “permanently incorporated” into a highway project and is not “necessary for construction.” FHWA notes that all “incidental” steel or iron items “that are not explicitly included in the contract documents, but are permanently incorporated” are covered or products containing some iron and steel. As discussed above, utility relocation projects often require the use of steel components. These products are necessary for the relocation of utility equipment that facilitates highway project construction. However, once they are installed, one could argue that they are “permanently incorporated” into the larger project. FHWA should make clear that utility relocation projects facilitating the construction of highway projects are not “necessary” for the construction of these highway projects or deemed “permanent” once installed.

**AGA response to FHWA questions on Nationwide Waivers**

AGA has provided responses that are numbered based on the numbering of the questions published in the Federal Register notice.

1. **Does the COTS definition provide a reasonable description of commercially available off-the-shelf steel or iron items?**

   **Answer:** No. As proposed in the Federal Register, the term COTS would mean “any manufactured product incorporating steel or iron components (excluding the covered materials discussed above, vehicles, or tie wire permanently incorporated in precast concrete) that:

   (1) Is available and sold to the public in the retail and wholesale market;

   (2) is offered to a contracting agency, under a contract or subcontract at any tier, without modification, and in the same form in which it is sold in the retail or wholesale market; and

   (3) is broadly used in the construction industry.”

   The FHWA goes on to describe COTS products as being “limited to manufactured products with steel or iron components, such as sinks, faucets, toilets, door hinges, electrical products, and ITS hardware that are not made specifically for highway projects but are incidental to such projects.”

   AGA believes that the proposed COTS definition may not include components utilized in Utility Relocation Projects. AGA has listed examples of the types of products that should be considered under the national waiver for COTS products above.

   The FHWA’s proposed COTS definition appears to be a three-part test. In regard to the first part, AGA is concerned that the phrase “sold to the public in the retail or wholesale market” could suggest that only products purchased by individuals in general public stores, such as Home Depot or Lowe’s, would qualify for the waiver. AGA does not believe that this is FHWA’s intent. In general, products used by the utility

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3 81 Fed. Reg. 71787
4 *Id* (emphasis added).
industry cannot be purchased by the public in general hardware stores and the definition as written would limit the applicability of the COTS waiver for utility relocation projects associated with FHWA-funded highway projects. AGA suggests removing the phrase “to the public” to ensure that the waiver is not unnecessarily narrowed and allow its use for utility relocation projects.

AGA is concerned that the second part of the test, that the product be offered “without modification” would not allow for modifications specific to the utility, as opposed to modifications specific to the project. For example, some natural gas utilities require a specific coating for large, high pressure valves. This technically could be considered a modification, but is superficial to the underlying valve being an “off the shelf” part. AGA encourages FHWA to remove the phrase “without modification.”

Finally, AGA encourages FHWA to clarify that in the third part of the definition, the phrase “is broadly used in the construction industry,” is interpreted as broadly used in any construction industry, not just road construction.

2. Are there COTS products that should be on the covered steel or iron materials list? If so, why?

Answer: No. In fact, AGA believes that the covered list is too broad and could inadvertently include manufactured utility products that are part of the utility relocation project. Utility products such as valves, regulators and fittings fall within the purpose of the COTS waiver, yet, as drafted, the covered product list could cover these products if they are viewed as permanently incorporated.

In addition, AGA is concerned that the COTS waiver may be read too narrowly and should be revised to ensure that utility products such as valves, regulators and fittings are included within the waiver.

For natural gas pipeline systems, aside from the steel pipe used, most “materials” utilized are uniformly available manufactured products with many components including but not limited to steel valves, insulating joints, fabricated fittings/assemblies, pressure regulators which would fall under the COTS definition. These items are not manufactured specifically for any particular project and are used interchangeably across utility operations as stock, or off-the-shelf items.

AGA supports the application of public interest waivers to such manufactured component-based products. As such, a clear distinction can be made between pure steel materials such as pipe and all manufactured/assembled/component based materials.

3. Should there be a per-item cost cap for COTS items? If so, what should the cap be?

Answer: No. AGA does not believe there should be a cap on a per-item cost. A large, high pressure valve could easily exceed a proposed cap and while it is possible to find a valve assembled in the United States, many of the valve casings and smaller component parts would be sourced from all over the world. Therefore, adding a cap could eliminate these valves from the COTS waiver and would be inconsistent with the purpose of the waiver, to eliminate unreasonable administrative burdens.

4. What is the burden, time, and cost associated with enforcing or complying with Buy America requirements for COTS items?

Answer: Based on information from AGA membership, the costs of enforcing/complying with Buy America requirements present a burden to utility ratepayers while adding no apparent value to public safety or system reliability.
5. *Are certifications and/or other documents available to allow owner agencies to trace and verify domestic melting and manufacturing processes for steel or iron products?*

**Answer:** For some items, such as pipe, documentation can be easily obtained. For more complex components, such as regulators or valves, documentation is difficult or impossible to obtain.

6. *Does your agency or company track costs associated with the administrative or compliance efforts associated with the Buy America requirements?*

**Answer:** Most of AGA’s members do not track the costs associated with the administrative or compliance efforts associated with the Buy America requirements.

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In conclusion, AGA supports the COTS waiver and other public-interest waivers, but suggests that FHWA revise the proposed definition of COTS to ensure that utility industry-specific items, outside of steel pipe, are included.

If you have any questions on these comments, please contact Christina Sames at csames@aga.org or Junaid Faruq at jfaruq@aga.org.

Yours truly,

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