

## **Draft Findings for a Waiver of HB 3332 Buy America Requirements for Statewide Transportation Improvements Program (STIP) projects.**

Pursuant to HB3332 Section 2, subsection 2(c), the Director of ODOT may waive the requirements of HB 3332 upon a finding that:

- (i) the requirement is inconsistent with the public interest;
- (ii) steel, iron, coatings for steel and iron and manufactured products required for the public improvement or public works are not produced in the United States in sufficient and reasonably available quantities and with satisfactory quality; or,
- (iii) using steel, iron, coatings for steel and iron or manufactured products produced in the United States for the public improvement or the public works will increase the cost of the public improvement or public works by more than 25 percent.

Based upon a request for findings received from the ODOT program personnel, ODOT is proposing to use its authority under Section 2, above, to waive the HB 3332 Buy America preferences for iron, steel, coatings of iron and steel, and manufactured products for Statewide Transportation Improvement Projects ("STIP").

This document provides draft findings, as the basis for the waiver. As discussed below, ODOT understands the HB 3332 requirements to be inconsistent with the public interest for this class of public improvement projects (e.g. STIP projects) due to the administrative burden that would be imposed on ODOT to navigate and ensure compliance with the federal Buy America requirements and HB 3332 Buy America requirements, two similar, yet distinct Buy America programs, which ultimately share the same domestic procurement preference objective.

ODOT is seeking public comments on this draft findings document no later than December 20<sup>th</sup>, 2023. Following consideration of the public comments received, ODOT will determine whether to waive the requirements and will provide public notice of that determination.

### **HB 3332 applicability to STIP projects:**

HB 3332 subsection (2)(a) applies to public improvement contracts or contracts for public works, herein referred to as "projects", with an estimated contract price of \$250,000 or more. Thus, all STIP projects with an estimated contract value of \$250,000 or more are subject to the provisions of HB 3332.

### **STIP projects with \$500,000 or more in Federal Aid:**

For projects with \$500,000 or more in federal aid (and State-funded projects closely related to projects with \$500,000 in federal aid), ODOT is already obligated to comply with Section 635.410 of Title 23, Code of Federal Regulations, and the Intermodal Surface Transportation Efficiency Act, concerning the origin of steel, iron, or coatings for steel and iron (referred to as the federal "Buy America" program) for permanently incorporated materials on STIP projects with federal aid, and some state-Funded STIP projects (those closely related to other, parent project with federal aid).

To that end, for projects with \$500,000 or more in federal aid, the General Provisions of Oregon's Standard Specifications for Construction (used in all STIP construction projects) include a provision requiring contractors to comply with those federal regulations as follows:

- Section 00160.20(a) of the Oregon Standard Specifications for Construction (OSSC) for projects with \$500,000 or more in federal aid funds reads as follows:

**00160.20(a) Buy America** - *If \$500,000 or more of federal highway funds are involved on the Project, the Contractor shall limit the quantity of foreign Materials incorporated into the Work as follows. Section 635.410 of Title 23, Code of Federal Regulations, and the Intermodal Surface Transportation Efficiency Act require that all iron or steel manufacturing processes, including, without limitation, the casting of ingots, for iron or steel Materials permanently incorporated into the Project shall occur in the United States, unless the cost of foreign-origin iron or steel Materials does not exceed one-tenth of one percent (0.1%) of the Contract Amount or \$2,500, whichever is greater. 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). The Contractor shall not incorporate foreign-origin iron or steel Materials in excess of this amount into the Project. All foreign-origin iron or steel Materials incorporated in the Project in excess of the amount indicated above shall be removed and replaced with domestic iron or steel Materials at the Contractor's expense. For purposes of this Specification, the cost of foreign-origin iron or steel Materials shall be the value of the iron or steel products as of the date they are delivered to the Project Site.*

*Manufacturing processes include without limitation the casting of ingots and the application of coatings to finished iron or steel products or components. Coatings include epoxy coating, galvanizing, painting, and any other coating that protects or enhances the value of the steel or iron product or component. The Contractor shall provide the Engineer with a Certificate of Materials Origin, on a form furnished by the Engineer, before incorporating any iron or steel products into the Project. Unless a Certificate of Materials Origin has been provided to the Engineer, the Materials shall be considered of foreign origin.*

*The Contractor shall retain manufacturers' certificates verifying the origin of all domestic iron or steel Materials for 3 years after the date of final payment for the Project, and shall furnish copies to the Engineer upon request.*

*The Contractor shall include this provision in all subcontracts.*

#### **STIP projects with less than \$500,000 in Federal Aid:**

Based on a waiver from the US Department of Transportation (USDOT), issued August 16, 2023, the federal Buy America provisions are no longer applicable to projects with less than \$500,000 in federal aid.

For the relatively few STIP projects with less than \$500,000 in federal aid but more than \$250,000 estimated contract value, HB 3332 requirements (which are similar but slightly different from the federal Buy America requirements) would apply.

### **Exemption List:**

In 2016, ODOT developed a list of Commercially available Off-the-Shelf (COTS) products that form the basis for an ODOT Buy America Exempted list that Federal Highway Administration (FHWA) has agreed is consistent with the nationwide waiver for manufactured products as described in the November 25, 1983 final rule for Buy America (48FR 53099, 53102). This list includes COTS products that are either wholly steel or iron or contain steel or iron components, and are either small, incidental items, or complex manufactured items whose components are often not tracked or too cumbersome to track.

### **Discussion:**

Except for a few minor differences, the requirements of Section 00160.20(a) of the OSSC, for projects with \$500,000 or more of federal aid, which must comply with the federal Buy America program for iron or steel manufacturing processes, including the casting of ingots, and the application of coatings to the steel or iron, permanently incorporated into the project, *are already in compliance with HB 3332*. Those few minor differences include:

- HB 3332 specifically identifies “manufactured products” (pre-assembled items made of iron or steel) and requires 55% of the total cost of all components be mined, produced, or manufactured in the United States. The Buy America program provisions as required in 00160.20(a) of the OSSC, already apply whether the iron or steel incorporated into the public improvement is installed singularly or as a component of a manufactured product. For example, the current Buy America program already covers the incorporation of steel or iron components in manufactured products and is therefore more restrictive.
- While the federal Buy America program includes a provision that generally allows for the inclusion of de minimis amounts of foreign or unknown origin steel and iron in the amount of \$2,500 or 0.1% of the value of the Contract amount, whichever is greater, HB 3332 omits any provision for de minimis amounts.
- HB 3332 contains no provision to allow for the list of exempted items that FHWA has already agreed to. In coordination with the local branch of FHWA, ODOT has developed a list of commercially available, off-the-shelf products that are either wholly steel or iron or contain steel or iron components, that have been exempted from the Buy America program provisions. This list is intended to capture small, incidental items, whose origin is often not tracked or too cumbersome to track. HB 3332 includes no such provision to exempt commercially available, small, incidental type items or complex manufactured items whose components are difficult or impossible to track.

ODOT already has measures in place to accommodate the federal Buy America program. Implementing HB 3332 Buy America requirements combined with the federal Buy America requirements for all STIP projects with estimated contract value of \$250,000 or more is confusing and unduly burdensome, while not providing significant opportunity for new American supply chains, and thus is not in the public interest.

- The intent of HB 3332 is essentially already covered by the requirements of the federal Buy America program.
- By allowing both exempted items and de minimis amounts of steel and iron in the Buy America Program, FHWA has, in effect, determined that it is not in the public interest to require every single piece of steel or iron to be domestic. Implementing HB 3332 would countermand FHWA’s determination.

- Numerous changes to existing forms, documents, and procedures would be necessary to accommodate the implementation of HB 3332 on a small percentage of STIP projects (with less than \$500,000 in federal aid). Accommodating HB 3332 Buy America requirements combined with the federal Buy America requirements will result in additional and duplicate effort without a measurable increase in the use of domestic iron or steel.
- Contractors and ODOT delivery teams are familiar with the federal Buy America requirements and compliance would be less burdensome and confusing on the industry since they are already accustomed to following the federal Buy America requirements.

**Proposed Waiver:**

Based upon the findings and discussions above, due to the additional administrative burden that would be imposed on ODOT to successfully navigate and ensure compliance with both the federal and state Buy America programs for the vast majority of STIP projects, ODOT proposes to waive the requirements of HB 3332 requirements for all STIP projects with an estimated contract value of \$250,000 for a period of five years. If waived, all STIP projects with an estimated contract price of \$250,000 would be required to comply with the federal Buy America program requirements. ODOT believes it is appropriate to apply the waiver in this instance as it would reduce the administrative burden while still ensuring that Buy America domestic preferences are applied.

## **Draft Findings for a Partial Waiver of HB 3332 Requirements for Maintenance and Operations Projects Generally Using State Funds.**

Pursuant to HB3332 Section 2, subsection 2(c), the Director of ODOT may waive the requirements of HB 3332 upon a finding that:

- (i) the requirement is inconsistent with the public interest;
- (ii) steel, iron, coatings for steel and iron and manufactured products required for the public improvement or public works are not produced in the United States in sufficient and reasonably available quantities and with satisfactory quality; or,
- (iii) using steel, iron, coatings for steel and iron or manufactured products produced in the United States for the public improvement or the public works will increase the cost of the public improvement or public works by more than 25 percent.

Based upon a request for findings received from ODOT program personnel, ODOT is proposing to use its authority under Section 2, above, to partially waive the HB 3332 Buy America preferences for iron, steel, coatings of iron and steel, or manufactured products and public works contracts for emergency services for maintenance and operations projects.

This document provides draft findings, justifications, and supporting facts as the basis for the partial waiver of the requirements of HB 3332

ODOT is seeking public comments on this draft findings document no later than December 20<sup>th</sup>, 2023. Following consideration of the public comments received, ODOT will determine whether to waive the requirements and will provide public notice of that determination.

HB 3332 Section 2 requires any iron, steel, coatings for iron or steel, or manufactured product used in a public improvement contract or contract for public works, herein referred to as “project”, and that becomes part of a permanent structure, be produced in the United States on state-funded projects that meet the following requirements:

1. The project is a Public Improvement or Public Works contract, and
2. The estimated contract price is \$250,000 or more, and

Similar Buy America programs are already in place at the federal level. Many ODOT Maintenance projects are similar to other ODOT construction projects that use federal funds, using similar common construction materials and related supply chains. Therefore, ODOT Maintenance is likely complying with the principles of HB 3332 in many instances. However, there are activities and project elements within some areas of ODOT Maintenance that are expected to present a challenge to compliance with HB 3332 requirements. ODOT is therefore proposing a partial waiver from the HB 3332 requirements for emergency public works contracts and iron, steel, coatings for iron and steel, or manufactured products, which may be difficult to demonstrate origin.

The list presented below identifies the iron or steel products, coatings, or manufactured products that will be required to be produced in the United States in compliance with the HB 3332 requirements if used on non-emergency ODOT Maintenance public improvement or public works contracts:

- Piling;
- Rebar (excluding rebar contained in pre-fabricated communications shelters);
- Steel beams;
- Communications towers and hardware;
- Guardrail;
- Steel and reinforced concrete culverts;
- Cable barrier and hardware; and
- Propane tanks.

This list is intended to capture all the major items, which is primarily steel items, used in an ODOT Maintenance project whose origin can be tracked, and, ODOT proposes a waiver for those iron or steel products, coatings or manufactured products not listed above, which are generally small, incidental items, whose origin is often not tracked or too cumbersome to track, and, therefore, the requirements of HB 3332 are inconsistent with the public interest.

Emergency services should be waived for compliance with HB3332 due to the challenges it would present during emergency situations. ODOT Maintenance is responsible for the rapid repair and restoration of the state's highway systems during emergency situations. The ability to obtain materials as quickly as possible to restore roadways is the highest priority in the interest of the public.

Requiring every single piece of steel or iron, coatings or manufactured products on a maintenance project to be in compliance with HB 3332 would be inconsistent with the public interest, and supply chains on many of these relatively small items are unknown or lack diverse sources. It would be overly burdensome on contractors and ODOT to require a Certificate of Materials Origin on every single item particularly for items that are manufactured or assembled items. The above list of materials covers the major steel products utilized in ODOT Maintenance projects, therefore, meeting the intent of the legislation while balancing the administrative burden for ODOT and the contracting community. Additionally, emergency situations require a rapid response. If compliance with HB 3332 threatens to compromise the rapid restoration of highway infrastructure, a waiver would be in the best interest of the public.

### **Proposed Waiver**

Based upon the findings and discussions above, ODOT proposes to waive, for a period not to exceed five years, the HB 3332 requirements for emergency work public works contracts, and iron and steel products, coatings, or manufactured products not listed above involved in Maintenance public improvement or public works contracts with an estimated contract price of \$250,000.

## **Draft Findings and Partial Waiver for ODOT Facilities Projects (Building Construction).**

Pursuant to HB3332 Section 2, subsection 2(c), the Director of ODOT may waive the requirements of HB 3332 upon a finding that:

- (i) the requirement is inconsistent with the public interest;
- (ii) steel, iron, coatings for steel and iron and manufactured products required for the public improvement or public works are not produced in the United States in sufficient and reasonably available quantities and with satisfactory quality; or,
- (iii) using steel, iron, coatings for steel and iron or manufactured products produced in the United States for the public improvement or the public works will increase the cost of the public improvement or public works by more than 25 percent.

Based upon a request for findings received from ODOT program personnel, ODOT is proposing to use its authority under Section 2, above, to waive the HB 3332 Buy America preferences for iron, steel, coatings of iron and steel, and manufactured products used in ODOT Facilities Services Branch public improvement or public works contracts with an estimated contract price of \$250,000.

This document provides draft findings, justifications, and supporting facts as the basis for a partial waiver ODOT is seeking public comments on this draft findings document no later than December 20<sup>th</sup>, 2023. Following consideration of the public comments received, ODOT will determine whether to waive the requirements and will provide public notice of that determination.

HB 3332 Section 2 subsection (2)(a), requires that any steel or iron product be produced in the United States and be supplied on ODOT state-funded public improvement contracts or contracts for public works, herein referred to as “projects”, that meet the following requirements.

1. The project involves a Public Improvement or Public Works contract, and
2. The estimated contract price is \$250,000 or more, and
3. The cost of the steel components is 55% or more of the total cost of the entire component.

In order to verify iron or steel products, coatings, or manufactured products supplied to a project are produced in the United States, Facilities will require contractors to submit a Certificate of Materials Origin. Since HB 3332 does not specify what iron or steel products, coatings, or manufactured products are to be included in the program, it will be very hard, or nearly impossible, to track down the origin of every covered product included in a building.

Therefore, ODOT proposes a waiver from the HB 3332 requirements for iron and steel products, coatings for iron and steel products, or manufactured products not specifically identified in the list below.

The following iron or steel products, coatings, or manufactured products can be required to be produced in the United States in compliance with the requirements of HB 3332 and incorporated into the required projects:

- Piling;
- Rebar;
- Structural columns, beams, frames, bracing, “red iron”;
- Purlins, joists, trusses;
- Stairs (stringers/framing), railings, gratings;
- Studs, girts, light gauge metal framing;
- Siding, roofing, flashing, pan deck;
- Process piping (black pipe), galvanized piping;
- Ductile and cast-iron piping, fittings, valves, fire hydrants;
- Corrugated metal piping, catch basins, frames, grates;
- HVAC duct work (vents, ducting, plenum, etc.); and
- Bollards.

This list is intended to capture all the major items, primarily steel, used in a building project whose origin can be tracked, and not require the small, incidental items, whose origin is often not tracked or too cumbersome to track.

Requiring every single piece of steel or iron, coating or manufactured product on a building project to be domestic would be inconsistent with the public interest. It would be overly burdensome on contractors and ODOT to require a Certificate of Materials Origin on every single covered product in a building project. The above list of materials covers the major iron or steel products, coatings, or manufactured products in a building project, therefore, meeting the intent of the legislation, while balancing the administrative burden of the contracting community.

### **Proposed Waiver**

Based upon the findings and discussions above, ODOT proposes to waive, for a period not to exceed five years, the requirements of HB 3332 for iron, steel, coatings for iron and steel, and manufactured products not listed above used in Facility public improvement or public works contracts with an estimated contract price of \$250,000.

### **LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/20/2023 5:00 PM**

ODOT requests public comment on its Draft Findings and Partial Waiver of HB 3332 on whether other options should be considered for achieving the Bill's substantive goals while reducing negative economic impact of the Bill on business.

Please send all comments to:

Jim Doll

Region 2, Area 4 Project Leader

(541) 286-8358 - Email: [james.p.doll@odot.oregon.gov](mailto:james.p.doll@odot.oregon.gov) - Phone number: (541) 286-8358