

STATE OF INDIANA

# Utility Reimbursement

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## Source Document

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This source document for highway utility relocation reimbursement will provide a single place for the utility coordinator to find federal regulations, Indiana state codes and other reference documents that contain the legal basis for appropriate reimbursement decisions for a variety of utility relocation scenarios.

## Reimbursement for Utility Relocation Source Document

### I. Introduction

This source document for highway utility relocation reimbursement will provide a single place for the utility coordinator to find federal regulations, Indiana state codes and other reference documents that contain the legal basis for appropriate reimbursement decisions for a variety of utility relocation scenarios.

### II. Applicability and Scope

This source document is available to utility coordinators on state highway improvement projects and LPA (local public agency) projects. Its scope is to collect and summarize state and federal codes, regulations, administrative codes and rules related to utility reimbursement for relocation on highway improvement projects. The document seeks to specifically address reimbursable positions with respect to addressing safety, property interests, extraordinary cost, unnecessary costs, interstate projects, the treatment of customer service lines and trail projects.

While not central to establishing reimbursable positions, compliance with Buy America provisions, use of contractors and consultants, reimbursement for preliminary engineering, betterment and reimbursement to INDOT for right of way purchased solely to accommodate utilities will also be addressed.

### III. History

INDOT and its predecessor agencies have reimbursed utilities to relocate facilities for a long time. Likewise, federal reimbursement to states for utility relocation has had a long existence. The legislative authority for these outlays have been developed more recently.

- A. The first federal policy covering reimbursement for utility adjustments came in May 1946 when GAM 300 was issued. GAM 300 required both written agreements between the state and the utility, and a detailed cost estimate. Reimbursement was based on the actual cost, per an audit. (1- P.7)
- B. The 1956 Federal Aid Highway Act gave statutory authority for the federal reimbursement of highway utility relocations. Many states then passed their own reimbursement legislation in conformance with the provisions of this Act.( 1-P.7)
- C. According to David A. Ripple in his History of the Interstate System in Indiana, utilities in Indiana on private easements have always been reimbursable if they had to relocate for highway construction. (2-P.343)
- D. However, the Utility Relocation Act of 1961 provided a legal basis for the State of Indiana to reimburse utilities for relocation on interstate projects. (2-P.343)

### IV. Commissioner's Order for relocation

Any reimbursable position of a utility is predicated upon the INDOT commissioner's authority to order a utility to relocate its facilities. IC 8-22-23-26-2 states, "If the department determines that the location of a utility's facilities will interfere with a planned highway or bridge construction project, the commissioner may order the utility to relocate the utility's facilities." (3) Once this condition has been established, the utility coordinator can explore the utility's reimbursable position.

**V. Reimbursable Positions**

Current federal utility reimbursement guidance derives from the Federal Codes of Title 23 especially CFR 645. (4-P.4). Indiana Code Title 8 provides legislation for reimbursable positions. Particular attention is given to safety, property interests, extraordinary costs, unnecessary costs, interstate projects and customer service lines.

**A. Property Interest**

IC 8-23-2-6 Section 6 "The department, through the commissioner or the commissioner's designee, may reimburse a utility to the extent that a relocation is a taking of property without just compensation." (3) IC 32-23-1 categorizes a prescriptive easement as a property interest that is less than fee simple and states "The right of way, air, light or other easement from, in, upon, or over land owned by a person may not be acquired by another person by adverse use unless the use is uninterrupted for at least twenty (20) years."

**B. Extraordinary Cost or Hardship**

IC 8-23-1-22 defines Extraordinary Cost as the cost to a utility to relocate that is either (1) more than 10% of the total operating revenue received by the utility during the utility's most recent full fiscal year; or (2) more than fifty percent (50%) of the total estimated cost of a proposed highway or bridge construction project." The authority for reimbursement under extraordinary cost comes from IC 8-23-2-6 Section 6 (a) 15 "The department, through the commissioner or the commissioner's designee, may do the following: reimburse a utility in whole or in part for extraordinary costs of relocation of facilities;" (5) IC 8-23-26-5 Section 5 further states that "The department may negotiate an agreement with a utility to reimburse the utility for extraordinary costs of facilities relocation caused by a highway or bridge construction or improvement project or a combination of highway or bridge construction or improvement projects." (3) These costs are eligible for federal participation.

**C. Unnecessary Cost**

Reimbursements relating to unnecessary costs may be classified as relocating when a project is not built within a given period of time or relocating more than once which has also been referred to a second time. IC 8-23-2-6 Section 6(a) 15 states " The department, through the commissioner or the commissioner's designee, may do the

following : reimburse a utility in whole for unnecessary relocations;” IC 8-23-26-7 “ The department shall reimburse a utility for the costs of an unnecessary relocation of facilities if, after the completion of the relocation of the facilities (1) within two (2) years after completion the department has not let the contract for the highway or bridge construction or improvement; or (2) the department alters the department’s plan of construction for the highway or bridge construction or improvement in a manner that would cause the utility to relocate the utility’s facilities for the same highway or bridge construction or improvement project.” IC 8-23-26-8 (a) “The reimbursement paid under section 8 of this chapter is limited to the cost of relocation (as defined in IC 8-1-9-2) to the utility.” (b) “The department may reimburse a utility for an unnecessary relocation under section 7 only if the relocation of the utility’s facilities was specifically requested by the department.” IC 8-23-26-9 “The commissioner must approve a reimbursement paid under section 7 of this chapter.” (3) These costs are not eligible for federal participation.

#### **D. Interstate**

IC 8-23-1-25 defines interstate system as “ the part of the national system of interstate and defense highways located within Indiana as officially designated by the department and approved by the United States Secretary of Commerce under 23 U.S.C. “ IC 8-1-9-1 Section 1 “ Recognizing that (a) part of the national system of interstate and defense highways located in Indiana are used by persons throughout Indiana and the United States for intrastate and interstate travel; (b) the cost of relocation of utility facilities necessitated by construction, reconstruction, change or modification of said highways is presently subject to being borne by utility rate payers only; and c) existing federal legislation makes available a substantial portion of the funds with which said highways will be constructed, reconstructed, changed or modified, it is hereby declared that it is inequitable for rate payers of utilities to bear the cost of relocation of utility facilities necessitated by said highway construction, reconstruction, change or modification and that such cost of relocation of utility facilities should constitute a cost of construction of all said highway projects in Indiana.” (5) IC 8-23-26-15 adds qualifications to reimbursement for interstates. “(a) This section does not apply to a relocation included in the national system of interstate highways if the placement of the facilities was made solely to cross the highway. (b) Whenever a utility locates new facilities on a highway included in the national system of interstate highways after June 30, 1991, the utility shall bear the cost of all future relocations and adjustment of the facilities caused by highway or bridge construction improvements.” (3) The following is a link to Indiana maps in the National Highway System:

[https://www.fhwa.dot.gov/planning/national\\_highway\\_system/nhs\\_maps/indiana/index.cfm](https://www.fhwa.dot.gov/planning/national_highway_system/nhs_maps/indiana/index.cfm)

Utilities relocating for a state or LPA highway improvement project are not reimbursable solely because the project crosses an interstate. For the utility to be reimbursable, the

utility relocation must be needed for the utility to be out of conflict with an interstate improvement project.

**E. Customer Service lines**

IC 8-23-26-10 “ If a highway or bridge construction or improvement project requires the relocation of customer service facilities, the utility providing service to the customer is responsible for arranging the relocation of the utility’s customer service facilities required to be relocated in accordance with this chapter.” IC 8-23-26-11 “If a highway or bridge construction or improvement project requires the acquisition of additional right of way and the relocation of customer service facilities that existed within the newly acquired right of way, the department is responsible for the cost of relocating those customer service facilities.” IC8-23-26-12 “ The following apply to a highway or bridge construction or improvement project that requires the relocation of customer service facilities located in a highway, street or road: (1) if the utility does not own the customer service facilities, the department is responsible for the cost of the relocation of those facilities, (2) if the utility owns the customer service facilities, the cost of relocation is the responsibility of the utility or the customer, as determined by the operating rules of the utility or by a contract between the utility or the customer.” (3)

**VI. Compliance Issues and some specific applications**

**A. Buy America**

Both the Code of Federal Regulations and the Indiana Code have legislation regarding iron and steel procurement.

1. 23 CFR 635.410 states that on Federal-aid highway construction projects “if steel or iron materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States.” (5)
2. Further clarification is provided in a December 12, 1997 memo FHWA defined the products to be included in Buy America: “Thus in order for a manufactured product to be considered subject to Buy America, the product must be manufactured predominantly of Steel or iron.” (6) Following this memo a letter from the California Division of FHWA noted these conditions for Buy America under MAP 21. “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 ..... 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 those contracts. 4. Buy America applies to all project construction contracts that executed on

or after October 1, 2012, and that includes 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 a project placed under a contract executed after October 1, 2012, ineligible for federal funds. This may be applied retroactively to October 1, 2012.” (7)

3. The Indiana Code also addresses Buy America. IC 5-16-8 covers steel procurement for public works project under IC 5-16-8. 1 (e) of the Indiana Code defines Steel Products. “ Steel Products means products rolled, formed, shaped, drawn, extruded, forged, cast fabricated or otherwise similarly processed, or processed by a combination of two (2) or more of such operation, from steel made in the United States by the open hearth, basic oxygen, electric furnace, Bessemer, or other steel making process. “ (5)Section 2 (a) lays the ground rules “Each public agency shall require that every contract for the construction, reconstruction, alteration, repair, improvement or maintenance of public works contain a provisions that, if any steel or foundry products are to be used or supplied in the performance of the contract or subcontract, only steel or foundry products made in the United States shall be used or supplied in the performance of the contract or any of the subcontracts unless the head of the public agency determines, in writing, that the cost of steel or foundry products is considered to be unreasonable.” Section 2 (b) explains what is meant by unreasonable. “The head of each public agency shall issue rules that , for the purpose of subsection (a), the bid or offered price of any steel or foundry products of domestic origin is not considered un reasonable if the price does not exceed the sum of: (1) the bid or offered price of like steel or foundry products of foreign origin (Including any applicable duty); plus (2) a differential of fifteen percent (15%) of the bid or offered price of the steel or foundry products of foreign origin. However, the fifteen percent (15%) differential provided by subdivision (2) may be increased to twenty-five percent (25%), if the head of the public agency determines that use of steel or foundry products of domestic origin would benefit the local or state economy through improved job security and employment opportunity. Whenever the head of a public agency determines that the differential should be increased above fifteen percent (15%) for a particular project, the head of the agency shall file a report with the governor and the legislative services agency detailing the reasons for such determination and the probable impact on the economy of the use of domestic steel or foundry castings in the project.” IC 5-16-8-4 adds, “This chapter does not apply if the head of the public agency determines in writing, that steel or foundry products are not produced in the United States in sufficient quantities to meet the requirements of the contract.” (3) If the iron and steel comprises less than or equal to 0.1% of the contract or less than or equal to \$2500.00 (whichever is the greater amount) then the Buy America requirements do not apply.

**B. Use of Contractors and Consultants**

1. Davis Bacon “Davis-Bacon wage rate and EEO Davis-Bacon wage rate and EEO requirements apply to state let contracts, but do not apply to utility led contracts.” (4-P.15)
2. The Brooks Bills does not apply to subcontracts. (4-P. 28)
3. Administration of Engineering and Design Contracts 23 CFR 645.109 states, “ The procedures in 23 CFR part 172, Administration of Engineering and Design Related Service Contracts, may be used as a guide for reviewing proposed consultant contracts.” (8-109 C, 9)

**C. Preliminary Engineering**

1. Under 23 CFR 645.108 (j) “ Federal funds are eligible to participate in the costs of preliminary engineering and allied services for utilities, the acquisition of replacement right of way for utilities, and the physical construction work associated with utility relocation. Such costs must be incurred by or on behalf of a utility after the date the work is included in an approved program and after the FHWA has authorized the state highway department to proceed in accordance with 23 CFR 630, Subpart A, Federal-Aid Programs Approval and Project Authorization.” (8-108)
2. Subsurface Utility Engineering “Federal-aid highway funds may be used to reimburse states for the use of subsurface Utility Engineering.” (4-P.27)

**D. Betterment**

1. 23 CFR 645.105 defines betterment, “Betterment – any upgrading of the facility being relocated that is not attributable to the highway construction and is made solely for the benefit of and at the election of the utility.”(8-105)
2. 23 CFR 645.117H states, “Credit to the highway project will be required for the cost of any betterments to the facility being replaced or adjusted, and for the salvage value of the materials removed.” ( 8-117H)
3. 23 CFR 645.107h states, “Federal funds may not participate in the cost of relocations of utility facilities made solely for the benefit or convenience of a utility, its contractor or a highway contractor.” (8-107H)

**E. Right of Way purchased for utility occupation**

**1. Uniform Act**

- a. “If a State or political subdivision of a state acquires replacement right of way, the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 apply.” (4-P.10)
- b. “If a utility acquires replacement right of way, the requirements of the uniform Act do not apply.” (4-P.10)

## **2. Replacement right of way**

23 CFR 645.111 states “federal participation may be approved for the cost of replacement right of way when an acquisition of right of way is made in the interest of project economy or is necessary to meet the requirements of the highway project.” (4- P.12)

## **F. LPA Participation**

### **1. Extraordinary Cost**

IC 8-23-26-5 Section 5 “The department may negotiate an agreement with a utility to reimburse the utility for extraordinary costs of facilities relocation caused by a highway or bridge construction or improvement project or a combination of highway or bridge construction or improvement projects.” (5) Since IC 8-1-9-2 states that “‘Highway’ when used in this chapter shall mean only those routes which are included within the national system of interstate and defense highways,” we do not assume that extraordinary costs would apply to LPA projects. (3)

### **2. Trail Projects**

IC 8-23-5-7 states (a) “ As a part of the state highway system, the department may lay out, construct, and maintain roadside parks and highways that connect a state highway within a state park, state forest reserve, state game preserve, or a state institution. A connecting highway constructed under this subsection shall be constructed in the same manner as a state highway. (b) Before a roadside park or connecting highway described in subsection may be constructed within the boundaries of a state institution, park, reserve or preserve, the board of trustees of the state institution, park, reserve, or preserve must adopt a resolution approving the construction. (c) The department may cooperate with a county highway authority having jurisdiction over a county highway that connects a state park, state forest reserve, state game preserve, or state recreation area with a state highway. The department shall undertake construction and maintenance responsibilities under this subsection upon the request of the department of natural resources if the request is approved by the governor. (d) Expenditures incurred by the department in carrying out this section shall be made from the motor vehicle highway account before distribution to local units of government. Before an expenditure may be made under this subsection, an appropriation authorizing the expenditure must be made.” (5) The Utility Accommodation Policy addresses projects under Federal Aid or Direct Federal projects which include trail projects under those programs. IC 8-23-2-6-(14) states the commissioner may “order a utility to relocate the utility’s facilities and coordinate the relocation of customer service lines if (a) the facilities are located in a highway, street or road and (b) the department determines that the facilities will interfere with a planned highway or bridge construction or improvement project funded by the department.” (3)

#### **G. Rehabilitation instead of replacement**

23 CFR 645.117E IV states “ The cost of rehabilitation rather than replacing existing facilities to meet the requirements of a project is reimbursable, provided this cost does not exceed replacement costs.” (8-117E)

#### **H. Spare Ducts, Conduits and Cables**

According to the Program Guide : Utility Relocation and Accommodation on Federal-Aid Highway Projects, “On an underground crossing of a freeway project, FHWA will participate in the cost of installing ducts or conduits to accommodate the utility facilities being relocated plus one spare duct or conduit. When a utility is crossing under a freeway with an underground cable, FHWA will participate in the cost of a spare cable provided the spare cable is not used for future expansion of utility services and provided the State and utility will follow this same practice on other freeway crossings.” (4)

#### **I. Safety**

“There are funds that can be used for highway safety. For example: For regular highway construction and reconstruction projects that happen to involve utility work, regular construction funds such as the National Highway System (NHS), Surface Transportation Program (STP) or Interstate Maintenance (IM) may be used and the federal pro rata share will be either 80% for non-interstate or 90% for interstate roadways.” (4-P.67)

#### **J. Gas Lost**

According to the Program Guide, “Federal-aid projects may participate (in reimbursement for lost gas) where it can be demonstrated that the bleeding of a gas can be demonstrated that the bleeding of a gas main is necessary to permit installation of the segment to be replaced and the gas lost to the atmosphere is considered to be an actual loss attributable to the highway construction.”

#### **K. Loss of Revenue**

According to the program Guide, loss of revenue “is not eligible for Federal-aid participation.”

## Reimbursement for Highway Utility Relocations References

1. Highway Utility Guide J. Thorne, D. Turner and J. Lindly  
Federal Highway Administration  
Publication No: FHWA-SA-93-049 (June 1993)
2. History of the Interstate System in Indiana Volume 2 Evolution of Policies and Standards  
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Joint Highway Research Project JHRP 75-27  
Purdue University, Indiana State Highway Commission (1975)
3. Indiana Code Title 8 Utilities and Transportation  
Current for 2015  
  
<https://iga.in.gov/legislative/laws/2015/ic/titles/008/>
4. Program Guide : Utility Relocation and Accommodation on Federal –Aid Highway Projects  
6<sup>th</sup> Edition (January, 2003)  
FHWA Office of Program Administration  
Publication No: FHWA-IF-03-014  
  
<http://www.fhwa.dot.gov/reports/utilguid/if03014.pdf>
5. Code of Federal Regulations 23 CFR 635.410  
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6. Memorandum FHWA “ Clarification of Manufactured Products under Buy America”  
John Baxter, Associate Administrator for Infrastructure (December 21, 2012)
7. Memorandum FHWA “ Clarification on the Application of Buy America in California”  
Matthew Schmiff for Vincent P. Mammano, California Division Administrator (July 12, 2013)
8. Code of Federal Regulations 23 CFR 645  
Utility Relocations, Adjustments and Reimbursement  
Current for 2015