

Summary: Initial IJJA Buy America Guidance

April 18, 2022

The White House Office of Management and Budget (OMB) April 18 issued [initial guidance](#) for federal agencies to implement Buy America provisions in the Infrastructure Investment & Jobs Act (IIJA). Of greatest interest to ARTBA members: what “construction materials” will now be covered by the law, and how the waiver process will change.

For many years, the Buy America law has required that steel, iron and manufactured products in federal-aid highway and transit projects be “produced in the United States,” with certain exceptions. In the IIJA’s “Build America, Buy America” title, Congress made several changes and additions to existing law because of its belief that previous domestic preferences for those items, as well as various construction materials, have been inadequate.

The OMB’s Made in America Office (MIAO), created by an [executive order](#) from President Biden in January 2021, is coordinating implementation of these new requirements with several federal agencies. Earlier in 2022, ARTBA met with officials from that office, including Director Celeste Drake, and later provided written comments as MIAO formulated its first edition of guidance for the new statute. ARTBA also attended a briefing with MIAO officials as they released the guidance.

ARTBA supports the rationale of strengthening American manufacturing through using domestic components on federal-aid highway and transit projects. As to Buy America’s practical application to projects, ARTBA’s primary concerns have been:

- Timeliness of the decision process for Buy America waivers. In recent years there appeared to be no standard parameters, process or timeline for considering waivers.
- Maintaining and clarifying a nationwide waiver for commercially-available off-the-shelf (COTS) products, to avoid costs and delays from certifying their compliance.
- Specificity in what “construction materials” will now be covered by Buy America, and ensuring the guidance includes the IIJA’s explicit exemption for aggregates and other pavement-related products.
- A preference for phasing in the new provisions’ requirements, especially given unprecedented cost increases and limited availability for key construction materials.
- Minimizing the potential that any of these new requirements will cause increases in project costs or delays.

The initial OMB guidance addresses each of these concerns – whether directly or indirectly – to some extent. The following are some notable contents of that document:

Scope and Timing

- The guidance applies to federal-aid and direct federal contract awards, renewals and amendments beginning May 14.
- Buy America now applies to steel, iron, manufactured products and certain construction materials in federal-aid highway and transit projects, as well as direct federal projects.
- It also applies to electric vehicle (EV) charging facilities.
- Buy America applies to an entire project which includes any federal dollars. (Congress first included this requirement in 2012's "Moving Ahead for Progress in the 21st Century Act" (MAP-21)).
- It applies to "articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project." It does **not** apply to tools, equipment, and supplies removed at or before the completion of the project. (This is similar to the longstanding application of Buy America to federal-aid highway projects.)
- Agencies like the Federal Highway Administration and Federal Transit Administration, which have applied Buy America to projects for decades, should "avoid unnecessary disruption" by using their existing rule as a baseline, then work to incorporate new requirements as necessary. They can pursue certain short-term waivers to get through this initial process if needed.
- The guidance does **not** apply to certain federal disaster relief funds and programs.
- OMB will be publishing a request for information on particular issues (referenced below) and will be issuing additional guidance as needed.

Which "Construction Materials" Are Covered

- In addition to steel, iron and manufactured products, Buy America now applies to "construction materials," although Congress did not list all of them specifically.
- OMB considers this as "preliminary and non-binding guidance" to assist agencies in determining which construction materials are covered.
- The initial list (referenced in the IIJA) includes non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); lumber; and drywall.
- As per the IIJA, cement and cementitious materials; aggregates such as stone, sand, or gravel; and aggregate binding agents or additives are **not** covered. (ARTBA and allies strongly advocated for this exemption in the legislation.)
- The IIJA provision also requires that all manufacturing processes for the covered construction materials occur in the United States. OMB is seeking additional stakeholder input on the specifics of this process before issuing further guidance.

Buy America Waivers

Scope

To the greatest extent practicable, waivers should be issued at the project level and be product-specific. They should be “time-limited, targeted and conditional.”

However, an agency may utilize a general applicability waiver, which can be “product-specific” (e.g., applies only to a product or category of products) or “non-product specific” (e.g., applies to all “manufactured products”).

The guidance notes, “General applicability waivers should be issued only when necessary to advance an agency’s missions and goals, consistent with IJJA, the Executive Order, and this guidance. For example, an agency might issue a general waiver for a product for which there are well-established domestic sourcing challenges.”

Generally, the Biden administration sees waivers as a “tool” to highlight shortcomings in domestic manufacturing capabilities, which can be subsequently addressed and improved.

Process

Once a federal agency decides to consider a waiver (either on its own initiative or at the request of the related state/local contracting agency), it must post detailed information on the waiver and take public comments for 15 days (or 30 days for a wider-ranging general applicability waiver described below).

As per President Biden’s executive order, the Made in America Office will review each proposed waiver after public comments close, using information provided by the agency. MIAO will advise if the waiver is consistent with “law and policy.” The guidance does not indicate a particular time limit for that review.

Under limited “unforeseen and exigent circumstances,” a federal agency can implement a waiver without public comments or MIAO review.

Types of Waivers

A federal agency can consider the following types of Buy America waivers:

- Public Interest Waiver – Applying the domestic content procurement preference would conflict with other important policy objectives.
- Nonavailability Waiver – Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

- Unreasonable Cost Waiver – The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent.

As to public interest waivers, agencies may consider them in these scenarios:

- Products under a de minimis threshold, such as up to a smaller percentage or dollar amount of the project. (ARTBA note: this could address concerns with treatment of commercially-available off-the-shelf (COTS) products.)
- Small grants or projects below an agency’s Simplified Acquisition Threshold.
- Non-domestically produced miscellaneous minor components comprising no more than 5 percent of an iron and steel product’s cost. (ARTBA note: Again, this may address concerns relating to certain less-expensive, commonly-used products on projects.)
- During the adjustment period as the new requirements take effect, to avoid undue increases in the time and cost of a project, or for projects awarded on/after May 14 where the budget for covered materials has already been set (including if materials have been ordered and construction has begun).
- To comply with international trade obligations.
- Other considerations such as sustainability, equity, accessibility and performance standards.

Agencies must review their public interest waivers at least every five years.

Conclusion

As noted, OMB will be requesting more input on aspects of this guidance, including specifics on what is considered “domestic manufacturing” for various types of construction materials. Federal agencies, such as the Federal Highway Administration and Federal Transit Administration, will also have an ongoing and important role in this process.

ARTBA will continue meeting and advocating with all these federal officials as the new Buy America guidance takes effect, including providing detailed responses to additional information requests. As always, we appreciate any and all feedback from our members and chapters.

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