



U.S. Department of Transportation
Federal Highway Administration
Office of Infrastructure

BUY AMERICA OVERVIEW

Construction Team HICP-20
FHWA Office of Infrastructure



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BUY AMERICA OVERVIEW

- **UPDATES:**

- Buy America waiver requests and waiver process
- OMB guideline: M-24-02 and 2 CFR part 184
- Review of manufactured product waiver

FHWA's Buy America Regulatory Requirements

23 CFR 635.410

- FHWA's requirements apply to iron and steel materials, predominantly iron or steel manufactured products, and predominantly iron or steel components of manufactured products.
 - **All manufacturing processes must take place domestically, including the application of a coating on these materials**
- Minimal use provision (greater of 0.1% of contract value or \$2,500)
- Optional alternate bid provision (25% differential)
- Waivers may be requested if:
 - Applying requirements would be inconsistent with the public interest; or
 - Domestically produced steel and iron are not produced in sufficient and reasonably available quantities which are of a satisfactory quality

Application of Buy America Preference

- SEC. 70914 of the Bipartisan Infrastructure Law (BIL) (Pub. L. No. 117-58)
(a) IN GENERAL. – Not later than 180 days after the date of enactment of this Act, the head of each Federal agency shall ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States. (emphasis added)

Bipartisan Infrastructure Law – Build America, Buy America Act (BABA) (BIL, div. G, § 70901-27)

- BABA Section 70914 includes a Buy America preference that all Federal agencies must apply to any Federal financial assistance program for infrastructure that is not already subject to existing Buy America requirements for the relevant categories.
- BABA Section 70917(a) provides that the Buy America requirements under Section 70914 apply only to the extent that Federal agencies do not already apply a Buy America preference to steel, iron, manufactured products, and construction materials.
 - This provision allows FHWA to preserve existing Buy America policies and provisions that meet or exceed the standards required by BABA, such as its requirements for iron and steel under 23 U.S.C. 313, and only extends coverage of Buy America to “construction materials.”

What is a Construction Material?

2 CFR 184.3 defines construction materials to mean, “articles, materials, or supplies that consist of only one of” the listed materials:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- fiber optic cable (including drop cable);
- optical fiber
- lumber;
- engineered wood; or
- drywall.

NOTE: Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

Construction Materials (cont'd.)

Items that should not be considered construction materials (2 CFR 184.4(e))

- Iron or steel products
- Manufactured products
- Cement and cementitious materials
- Aggregates such as stone, sand, or gravel
- Aggregate binding agents or additives

Asphalt concrete pavement mixes are typically composed of asphalt cement (a binding agent) and aggregates such as stone, sand, and gravel. Accordingly, asphalt is also excluded from this definition of the term construction materials.

OMB Final Guidance (2 CFR 184)

- On August 23, 2023, OMB published in the FR a final guidance; <https://www.federalregister.gov/public-inspection/2023-17724/guidance-for-grants-and-agreements> for Buy America Act provisions of the Infrastructure Investment and Jobs Act and to clarify existing provisions related to domestic preferences. Effective date was October 23, 2023 (2 CFR 184.2(b)).
- Provides provisions for determining the cost of components of manufactured products (2 CFR 184.5).
- Agencies/State DOTs to implement the Buy America preferences set forth in 2 CFR part 184, as required under section 70914(a) BABA, as of the effective date of the guidance, unless specified otherwise.

Effective dates for different awards

- Awards obligated on or after May 14, 2022, and before October 23, 2023 are subject to the requirements of OMB Memorandum M-22-11.
- Awards obligated on or after October 23, 2023, have to comply with 2 CFR part 184. Awards obligated on or after May 14, 2022, and before October 23, 2023 are subject to the requirements of OMB Memorandum M-22-11.
- And if a project that previously received an award obligated on or after May 14, 2022, but before October 23, 2023, receives an additional Federal award obligated within one year from October 23, 2023, the additional award is generally subject to OMB Memorandum M-22-11 (unless there are significant design or planning changes to the project).

OMB Final Guidance Continued

- **Section 184.4(e):** Categorization of Articles, Materials, and Supplies
 - Iron and steel products
 - Manufactured products
 - Construction materials
 - Section 70917(c) materials

Classification of an article, material, or supply as falling into one of the categories is based on the status at the time it is brought to work site for incorporation.

- **Section 184.6:** Construction material standards
 - **Non-ferrous metals:** All manufacturing process means initial smelting or melting through final shaping, coating and assembly occurred in U.S.

Construction Materials Standards Continued

- **Plastic and Polymer-based products:** All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
- **Glass:** All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
- **Fiber Optic Cable (including drop cable):** All manufacturing processes, from the ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for nonferrous metals, plastic and polymer-based products, or any others.
- **Optical Fiber:** All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.

Construction Materials Standards Continued

- **Lumber:** All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.
- **Drywall:** All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
- **Engineered Wood:** All manufacturing processes, from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

Waiver for De Minimis Costs, Small Grants, and Minor Components

On August 16, 2023, USDOT finalized the Public Interest Waiver for De Minimis Costs and Small Grants: <https://www.federalregister.gov/documents/2023/08/16/2023-17602/waiver-of-buy-america-requirements-for-de-minimis-costs-and-small-grants>.

The public interest waiver is for projects funded under DOT-administered financial assistance programs for iron, steel, manufactured products, and construction materials under a single financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project*; or
- The total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000.

* This bullet does not apply to iron and steel subject to the requirements of 23 U.S.C. 313 on financial assistance administered by FHWA. The de minimis threshold in 23 CFR 635.410(b)(4) continues to apply for steel and iron.

Waiver for De Minimis Costs, Small Grants, and Minor Components

- The waiver is applicable only to awards that are obligated or subawards that are made on or after the effective date of the waiver, August 16, 2023. The waiver is applicable to subawards only if the subawards are made by a pass-through entity for a specific project.
- For awards administered by FHWA that are subject to 23 U.S.C. 313, the waiver does not apply to Electric Vehicle (EV) chargers, which continue to be subject to the FHWA Buy America EV Charger Waiver.

FHWA General Waiver for Manufactured Products

- Pursuant to BABA Section 70914(d), the FHWA published a notice in the Federal Register on March 17, 2023, seeking comments on its existing general applicability waiver for manufactured products under its Buy America waiver authorities (88 FR 16517).
- The comment period was extended to end on May 22, 2023 (88 FR 24651). Over 9,400 comments were received.
- Following review and consideration of comments, FHWA will publish a determination on whether to continue, discontinue, or otherwise modify the waiver and will consider other actions related to the implementation of Buy America requirements for manufactured products.

FHWA's Existing General Applicability Waivers

- Per BABA Section 70914(d), all existing general applicability waivers shall be reviewed in the Federal Register every five years after the date on which the waiver is issued.
- FHWA has four general applicability waivers:
 - **Manufactured products**
 - Pig Iron and Processed, Pelletized, and Reduced Iron Ore
 - Ferryboat parts
 - Concrete poles for Guam

EV Charger Waiver (88 FR 10619)

- Published in the Federal Register on February 21, 2023; effective date was March 23, 2023.
- This short-term, temporary public-interest waiver enables EV charger acquisition and installation to immediately proceed while also ensuring the application of Buy America to EV chargers by the phasing out of the waiver over time.
- Starting on March 23, 2023, FHWA removed EV chargers from being covered by its Manufactured Products General Waiver.
 - Phase I: Waiver of 23 U.S.C. 313(b)(1), 23 CFR 635.410(c), and Section 70914(b) of BABA to EV chargers and all components of EV chargers if final assembly occurs in the U.S. for all chargers that are manufactured from the effective date of the waiver until June 30, 2024. Installation must begin by October 1, 2024.
 - Phase II: Starting on July 1, 2024, waiver will only cover EV chargers if final assembly occurs in the U.S. and if the cost of components manufactured in the U.S. exceeds 55% of the cost of all components.
- Both phases: All predominately steel and iron housing components are excluded from the waiver and must comply with FHWA's existing Buy America requirements for steel and iron.

EV Charger Waiver continued

- On November 8, 2023, the Federal Highway Administration published in the Federal Register a Biannual Request for Information on the status of the Electric Vehicle Charger Industry; [Request for Information \(RFI\)](#).
- While promulgating the [final waiver](#), FHWA announced that it would conduct biannual RFIs to receive information on the status of the EV charger industry. The comment period for this first RFI ends on December 26, 2023.

References

- FHWA Buy America Construction Program Guide page:
<https://www.fhwa.dot.gov/buyamerica/>
- OMB Guidance for Grants and Agreements:
<https://www.federalregister.gov/documents/2023/08/23/2023-17724/guidance-for-grants-and-agreements>
- OMB M-24-02:
<https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>
- De Minimis Costs and Small Grants Waiver:
<https://www.federalregister.gov/documents/2023/08/16/2023-17602/waiver-of-buy-america-requirements-for-de-minimis-costs-and-small-grants>

References

- Review of Manufactured Products Waiver:
<https://www.federalregister.gov/documents/2023/03/17/2023-05498/notice-and-request-for-comment-on-fhwas-review-of-its-general-applicability-waiver-of-buy-america>
- EV Charger Waiver:
<https://www.federalregister.gov/documents/2023/02/21/2023-03498/waiver-of-buy-america-requirements-for-electric-vehicle-chargers>
- BABA Implementation Plan to Enhance Buy America for EV Chargers Q&As posted on the FHWA website on July 11, 2023
(https://www.fhwa.dot.gov/construction/contracts/buyam_qaev/)

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Questions?

Thank you!

