



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

BUY AMERICA OVERVIEW

Edwin Okonkwo

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Office of Preconstruction,
Construction and Pavement



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Buy America Overview

Scope of Presentation

- Statutes and Regulations
- Recent statutory changes to the Buy America program
- Build America, Buy America Act (BABA) under Infrastructure Investment and Jobs Act (IIJA)/Bipartisan Infrastructure Law (BIL) (Pub. Law 117-58, Nov. 15, 2021)
- Coverage of Construction Materials
- Questions

Buy America

23 U.S.C. 313(a):

Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States. (emphasis added)

Buy America

23 U.S.C. 313(h) (established by MAP-21, Pub. L. 112-141, July 6, 2012)

Application to Highway Programs. – The requirements under this section shall apply to all contracts eligible for assistance under this chapter for a project carried out within the scope of the applicable finding, determination, or decision under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this title. (emphasis added)

FHWA's Buy America Regulatory Requirements

23 CFR 635.410

- Iron and steel materials and products only
 - 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

FHWA's Buy America Regulatory Requirements

23 CFR 635.410

- All manufacturing processes for steel and iron materials must take place in the US
- Expansion of the Federal-aid program
 - Transportation Enhancements (1991)
 - Congestion Mitigation and Air Quality Improvement Program (1998)
 - Transportation Alternatives (2012)

Application of Buy America Preference

- SEC. 70914 of the Bipartisan Infrastructure Law (BIL)

(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)

- 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 the Build America, Buy America Act, such as its requirements for iron and steel under 23 U.S.C. 313 and only extend coverage of Buy America to “construction materials.” (emphasis added on all bullets)

FHWA General Waiver for Manufactured Products

- FHWA's general waiver for manufactured products remains in effect. Because FHWA has an existing statutory requirement applicable to manufactured products, the BABA standard for manufactured products under Section 70912(6)(B) does not apply on Federal-aid highway projects.
- BABA Section 70914(d) provides a process for reviewing existing waivers of general applicability, such as FHWA's general waiver for manufactured products.

FHWA General Waiver for Manufactured Products (cont'd)

- Pursuant to BABA Section 70914(d), the FHWA must publish a notice in the Federal Register describing the justification for this general applicability waiver and requesting public comment on the continued need for this waiver.
- FHWA must publish in the Federal Register, a determination on whether to continue or discontinue the general applicability waiver, considering the comments received in response to the notice.

FHWA's Existing General Applicability Waivers

- Per OMB Memo M-22-11 of April 18, 2022, all existing, non-product specific general applicability waivers that were issued more than five years before passage of BIL must be reviewed via Federal Register by November 15, 2022.
- FHWA has four general applicability waivers:
 - Manufactured products
 - Raw materials
 - Ferryboat parts
 - Concrete poles for Guam

What is a Construction Material?

According to OMB Memorandum M-22-11, “Construction materials” includes an article, material, or supply — other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives — that is or consists primarily of:

- 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; or
- Drywall.

Construction Materials (cont'd.)

- The list of construction materials is an exclusive list. Most other items are to be treated as either steel/iron items or manufactured products.
- Pending issuance of final standards from OMB, agencies should consider “all manufacturing processes” for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material. See OMB Memorandum M-22-11 of April 18, 2022.

Construction Materials (cont'd.)

Items excluded from construction materials under OMB Memo M22-11:

- An item of primarily iron or steel
- A manufactured product
- 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 the term construction materials.

Temporary Waiver for Construction Materials

- On April 28, 2022, the USDOT posted a proposed transitional waiver concerning the application of Buy America to “construction materials” for a period of 180 days starting on May 14, 2022, unless extended.
- The waiver was open for public comment through May 13, 2022
- The waiver was published in FR (87 FR 31932 on May 25, 2022)
- Effective retroactively to May 14, 2022
- Expires on November 10, 2022
- During this time period, USDOT expects States, industry, and other partners to begin developing procedures to document compliance with Made in America standards for construction materials.

OMB Memo M-22-11

- Issued on April 18, 2022
- This Memo provides preliminary and non-binding guidance on the implementation of BABA, including preliminary guidance to define the term “all manufacturing processes” for construction materials.
- OMB requested additional stakeholder input before issuing further guidance identifying initial manufacturing processes for construction materials that should be considered as part of “all manufacturing processes.”
- OMB issued an RFI on this topic on April 21, 2022. 87 FR 23888 (Apr. 21, 2022).

OMB Memo M-22-11 (cont'd.)

OMB memo Sets Forth Waiver Principles and Criteria

- Nonavailability
- Unreasonable Cost
- Public Interest (examples that agencies may consider include):
 - De Minimis: example threshold is 5% of project costs up to a maximum of \$1M (our current threshold is 0.1% of the total project cost or \$2,500, whichever is greater)
 - Small Grants: below Simplified Acquisition Threshold
 - Adjustment Period: Time-limited waivers to allow recipients and agencies to transition to new rules and processes

OMB Memo M-22-11 (cont'd.)

Clarifies that an article, material, or supply should only be classified into one of the following categories:

- Iron or steel;
 - A manufactured product; or
 - A construction material.
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- Should any of the listed construction materials be combined with a second listed material or with a non-listed item, then the product should be considered a manufactured product (or steel/iron item, as appropriate).

Manufactured Products

- Manufactured products subject to BIL requirements must be manufactured in the United States and the cost of the components of the manufactured products mined, produced, or manufactured in the US is greater than 55% of the total cost of all components. See BIL 70912(6)(B).
- FHWA currently has a general applicability waiver for manufactured products, so the 55% standard for manufactured products does not apply on projects funded under Title 23 U.S.C.

References

- FHWA Buy America Q&As: https://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm
- FHWA Buy America Construction Program Guide page: <https://www.fhwa.dot.gov/construction/cqit/buyam.cfm>
- IIJA (BIL): <https://www.fhwa.dot.gov/bipartisan-infrastructure-law/>
- OMB memo M-22-11; <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
- Edwin Okonkwo, 202-366-1558
- Brian Hogge, 202-366-1562



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Questions!!!

Thank you!

