
Build America Buy America Act

Domestic Sourcing for *All* “Infrastructure” Supported with Federal Financial Assistance

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BACKGROUND / RECENT HISTORY

Background (Pre-2021)	E.O. 14005 (Jan 25, 2021)	OMB Memo M-21-26 (Jun 21)
<ul style="list-style-type: none">▪ Numerous independent statutes, largely in programs involving traditional infrastructure (roads, railways, etc.)<ul style="list-style-type: none">- See CRS Rpt. R44266 (Jul 2, 2019), Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing▪ 2 C.F.R. § 200.322<ul style="list-style-type: none">- Added effective Nov 12, 2020- Soft preference (“should, to max extent practical”)- Goods/products/materials- Scope beyond infrastructure unclear, but appears to technically exist- Extends to State Gov’ts	<ul style="list-style-type: none">▪ Sets policy standard for agencies:<ul style="list-style-type: none">- “Should, consistent with applicable law, use T/C of Fed Fin. Asst. to maximize”- Goods/products/materials▪ Creates OMB-level Made in America Office (“MIAO”)▪ Calls for information gathering re “longstanding or nationwide waivers” via reports from agency heads<ul style="list-style-type: none">- “Made in America Laws”- Waivers▪ Intent to centralize waivers through OMB review process (15-day review)▪ Reporting of all proposed waivers and whether granted via single website	<ul style="list-style-type: none">▪ Commences Implementation of E.O. 14005▪ By Jul 24, Agency Heads to report on:<ul style="list-style-type: none">- Use of Made in America Laws- List of waivers granted in 2020- Description of any ongoing longstanding or national waivers and the consistency of such with E.O. policy statement▪ Reports do not appear to be public

IIJA LANGUAGE

Infrastructure Investment and Jobs Act, Pub. L. 117-58 (Nov. 15, 2021)

- Sec. 70914 sets government-wide baseline standard for fed-funded infrastructure:
 - “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.”
 - Section 70912 defines “produced in the United States” for each category (OMB Memo reiterates)
 - Waiver authority for (i) public interest, (ii) nonavailability, and (iii) cost increase of *overall project* by 25 percent
- Very similar to 23 U.S.C. § 313 standard for U.S. sourcing in surface transportation projects (both standard and waiver authority) but adds “construction materials.”
- Domestic sourcing rules have also applied historically for water treatment facility infrastructure funded by EPA.
- Calls for OMB to update 2 C.F.R. Part 200 (Sec. 70915)
 - Unclear whether we should expect update to 2 C.F.R. § 200.322 or whether the OMB-recommend T&C will simply be incorporated into award documents per § 200.211.
- Made in America Office at OMB
 - Calls for new reports on use of Made in America Laws (due Jan 14, 2022, and to be published in the Federal Register) (Sec. 70913); Calls for summary of E.O. 14005 agency reports be provided to Congress (Sec. 70923(e))
 - Single website (GSA run “BuyAmerican.gov”) to include info on all waivers (Sec. 70936)
 - 15-day GSA-website notice and comment for waivers (Sec. 70935)
- OMB Memo M-22-08 (Dec 20, 2021)
 - Guidance on reports
 - Provides “infrastructure” definition and instructs to further construe broadly (*includes “buildings and real prop”*)
 - Calculates date of preference implementation as May 14, 2022

OMB ACTION

OMB Memo 22-11 (Apr. 18, 2022)

- New requirements apply to all new awards and new funding on current awards as of May 14, 2022.
- Applies to all “infrastructure” projects funded by “Federal financial assistance program[s] for infrastructure.” Extends to all portions of the project if a portion of the project is federally funded.
- Clarifies that applies only to items/materials incorporated into the final infrastructure project, not things used in the course of completing the project (*e.g.*, scaffolding not covered).
- Confirms broad definition of “infrastructure”:
“. . . At a minimum, the structures, facilities, and equipment for, in the [U.S.], roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking . . . and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.”
- Defines and “deconflicts” manufactured products and construction materials.
- Provides waiver standards; instructs that Federal Assistance agency heads retain the authority to issue waivers (generally with 15 days notice), but that the agency website publicizing the waiver must cross-link to the GSA waiver website; and instructs that existing compliant/consistent policies and waivers (issued in last five years) are still good.
- Provides standard award term to be incorporated into covered awards. Standard term contemplates recipients requesting project-specific waivers via funding agency.

COVERED MATERIALS

OMB Memo M-22-11 (largely based on statutory definitions):

- All iron and steel (incorporated into the build) – from initial melting stage through application of coatings must occur in the U.S.
- All manufactured products (incorporated into the build) - both:
 - Manufactured in the U.S. (see FAR for “manufactured in U.S.” definition); *and*
 - Cost of components must be 55 percent “mined, produced, or manufactured in the U.S.”
- All “construction materials” (incorporated into the build) – manufactured in the U.S., meaning “all manufacturing processes . . . occurred in the U.S.”
 - Current/Temporary Definition: Items that do not fall into the other categories that consist primarily of non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall.
 - Note that if it is a “manufactured product,” that designation overrides “construction material.”
- Relevant § 200.322 definition of “manufactured product”:
 - “[I]tems and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.”

OMB, MIAO: <https://www.whitehouse.gov/omb/management/made-in-america/>

COVERED MATERIALS

“Manufactured in the U.S.” is defined under the Federal Acquisition Regulation as follows, through FAR Clause 52.225-18:

“Place of manufacture means the place where an end product is assembled out of components, or otherwise made or processed from raw materials into the finished product that is to be provided to the Government. If a product is disassembled and reassembled, the place of reassembly is not the place of manufacture.”

CURRENT AGENCY ACTIVITY (THROUGH SEPTEMBER 7, 2022)

Agency	Approach	References
Department of Transportation***	Already has similar Buy America requirements for many programs, but not extending to “construction materials” (new category). Issued implementation waiver for grants awarded through Nov 10, 2022. [Federal Highway Administration has also issued a proposed EV-charging-infrastructure specific wavier, and is currently seeking comments.]	87 Fed. Reg. 31931 (May 25, 2022) 87 Fed. Reg. 53539 (Aug. 31, 2022) (FHWA, EV charging)
Environmental Protection Agency	Defines “infrastructure” broadly, for broad application to EPA-funded projects. Implementing currently, but also granting waivers. Previously applicable BA requirements sporadic.	https://www.epa.gov/cwsrf/build-america-buy-america-baba#bil
Department of Interior	Defines “infrastructure” broadly, for broad application to DOI-funded projects. Implementing currently, but also granting waivers. Few, if any, previously applicable BA requirements.	https://www.doi.gov/grants/infrast ructure-programs
Department of Housing and Urban Development	Defines “infrastructure” broadly, for broad application to HUD-funded projects. Few, if any, previously applicable BA requirements. Issued a 6-month general waiver to application on May 3, 2022 to assess impact of new requirements.	https://www.hud.gov/program_offi ces/spm/gmomgmt/grantsinfo/fun dingopps 87 Fed. Reg. 26219 (May 3, 2022)
Department of Commerce	A few impacted programs (e.g., broadband infrastructure and economic development), and no prior BA requirements. Currently implementing.	https://www.commerce.gov/oam/p olicy/financial-assistance-policy
Department of Treasury	A few impacted programs (e.g., SLFRF and GCRTF awards), and no prior BA requirements. SLFRF “second tranche” funds are part of original pre-May awards, so not subject to new rules. Currently implementing.	87 Fed. Reg. 3385 (Jan. 21, 2022) https://home.treasury.gov/system/ files/136/SLFRF-Final-Rule-FAQ.pdf
National Science Foundation	Infrastructure in the form of major research instrumentation, mid-scale projects, and major facilities. No prior BA requirements except § 200.322.	87 Fed. Reg. 3365 (Jan. 21, 2022)
Department of Health and Human Services	Defines narrowly (almost unbelievably) to assert that HHS does not fund “infrastructure” at all – BABA is for infrastructure that is “beyond the scope” of HHS construction support.	87 Fed. Reg. 8852 (Feb. 16, 2022)

OMB-SUGGESTED AWARD TERM

(ALSO PROVIDES DEFINITIONS AND BRIEF WAIVER GUIDANCE)

Recipients of an award of Federal financial assistance from a program for infrastructure are hereby notified that none of the funds provided under this award may be used for a project for infrastructure unless:

- (1) all iron and steel used in the project are produced in the United States--this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- (2) all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and
- (3) all construction materials⁴⁴ are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.