

Showing the Way: OMB Issues Initial Guidance on New Buy America Requirements for Federally Funded Infrastructure Projects

Litigation Alert

04.28.2022

On April 18, 2022, the Office of Management and Budget (OMB) issued [preliminary guidance](#) (the Guidance) to federal agencies on the implementation of new "Buy America" domestic preference requirements enacted recently in the \$1.2 trillion [Infrastructure Investment and Jobs Act](#) (IIJA), Pub. L. No. 117-58, §§ 70901-52 (Nov. 15, 2021) (the Act). The Guidance is a must-read for any company looking to compete for federally funded infrastructure projects that are subject to Buy America requirements.

Background: President Biden's Made in America Initiative

In January 2021, President Biden signed Executive Order 14005, [Ensuring the Future is Made in All of America by All of America's Workers](#) (the Order, [discussed here](#)), which aimed "to maximize the use of goods, products, and materials produced in, and services offered in, the United States." The Order launched a government-wide initiative that soon produced significant changes to the Federal Acquisition Regulation (FAR) provisions implementing the Buy American Act in connection with federal procurement contracts ([discussed here](#) and [here](#)).

The Order also was the blueprint for new IIJA Buy America provisions applicable to non-procurement, federally funded infrastructure projects administered, for example, by the Department of Transportation (DOT). The IIJA's Buy America provisions (1) require all iron or steel products, manufactured products, and construction materials used in a federally funded infrastructure project to be "produced in the United States," and (2) establish the Made in America Office (MIAO) within OMB to manage Buy America waiver requests and enforce Made in America laws ([discussed here](#)).

Summary of OMB's Initial Buy America Guidance

The Guidance provides preliminary instruction on two subjects that are critical for any company looking to compete for federal infrastructure opportunities subject to the current panoply of Buy America requirements enforced by federal agencies:

It describes the Buy America manufacturing and domestic content standards that will apply to iron, steel, manufactured products, and construction materials used in federal infrastructure projects

It identifies the bases for obtaining Buy America waivers in connection with such projects

Buy America Requirements in Federal Financial Assistance Programs

Scope of the Act's Buy America Requirements

The Guidance reiterates that the new Buy America requirements stated in the IIJA will apply to *all* federal financial assistance programs (as defined in 2 CFR § 200.1) — whether or not funded through IIJA — when funds are appropriated or otherwise made available and used for an infrastructure project. This approach is broader than those adopted in previous infrastructure laws and makes the IIJA's Buy America requirements applicable to a far wider range of federally funded infrastructure projects.

Specifically, the Act's definition of "infrastructure" encompasses all public infrastructure projects including at a minimum: the structures, facilities, and equipment for 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 water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. The Guidance notes that agencies should also treat "structures, facilities, and equipment that generate, transport, and distribute energy — including electric vehicle (EV) charging — as infrastructure." According to the Guidance, when

determining if a particular project fits the definition of "infrastructure," agencies should consider whether the project will "serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public." Projects with these characteristics are more likely to qualify as an "infrastructure" project under the Act.

In the Guidance, OMB clarifies that if no funds from a particular award will be used for infrastructure, the Act's Buy America requirements do not apply to the award. Similarly, under a covered program, the Buy America requirements do not apply to a non-infrastructure project, even if the award also includes a covered project. However, "a Buy America preference applies to *an entire infrastructure project* even if it is funded by both Federal and non-Federal funds under one or more awards." The Guidance also explains that the Act's Buy America requirements only apply to materials that are "consumed in, incorporated into, or affixed to" the infrastructure project, not to tools, equipment, or supplies used for the completion of the infrastructure project. Similarly, the requirements do not 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 or permanently affixed to the structure."

OMB explains that an article, material, or supply should only be classified into one of the Buy America categories: (1) iron or steel, (2) manufactured products, or (3) construction material. On covered infrastructure projects, the Act requires each such item to be "produced in the United States." The phrase "produced in the United States" is defined as follows in each category:

- **Iron and Steel:** All iron and steel manufacturing processes, from the initial melting stage through the application of coatings, must occur in the U.S. Agencies are to apply this standard only to goods that "are predominantly iron or steel, unless another standard applies under law or regulation."
- **Manufactured Products:** The product must be: (1) manufactured in the U.S., and (2) the cost of the components of the manufactured product that are mined, produced, or manufactured in the U.S. must be greater than 55 percent of the total cost of all components in the manufactured product, unless another standard for determining the minimum amount of domestic content has been established under applicable law or regulation.
- **Construction Materials:** All manufacturing processes for the construction material must occur in the U.S.

The foregoing Buy America requirements go into effect on May 14, 2022, which means that no later than that day, all applicable programs must comply with the Act (subject to agency-specific determinations to impose more restrictive requirements, as discussed below). Agencies can comply with the Act by incorporating the Buy America preference in the terms and conditions of each award of a covered infrastructure project. This applies to new awards as well as renewal awards obligating additional funds to existing funds that are executed on or after May 14, 2022. Agencies are therefore required to include a Buy America preference in awards issued on or after May 14, 2022, "even if Notices of Funding Opportunities for those awards did not include a Buy America preference." However, agencies may consider a waiver to avoid undue increases in the time and cost of a project when the Notice of Funding Opportunities did not include the Buy America preference or if the budget for purchase of covered materials has already been agreed upon.

Consistent with the IIJA, and to avoid unnecessary disruptions to programs that already meet or exceed the Act's requirements, OMB advises agencies to consider whether their current domestic content requirements meet the standards of the Act and keep in place all policies and provisions that meet or exceed the standards required by the Act. For those programs that do not fully comply with the Act, however, the Guidance directs agencies to make necessary changes to come into compliance with all parts of the Buy America requirements of the Act. For example, if a program has standards in place that meet the requirements for iron and steel, it is required only to adopt new standards for manufactured products and construction materials.

Issuing Buy America Waivers

Most of the Guidance focuses on the Buy America waiver process. Pursuant to the Act, the head of a federal agency may waive the application of a Buy America requirement, if they find that:

- Applying the domestic content procurement preference would be inconsistent with the public interest (a "public interest waiver")
- Types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality (a "nonavailability waiver")
- The inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent (an "unreasonable cost waiver")

Prior to issuing a waiver, agencies must publicize on their website any proposed waivers they intend to grant and allow time for public comment. Such waivers also must be posted to a "centralized waiver transparency website" managed by the General Services Administration (GSA) no later than November 15, 2022.

According to the Guidance, agencies "should" notify the MIAO in advance of posting any proposed award or project-level waiver and "must" consult with the MIAO for proposed waivers "with broader applicability (such as a general applicability waiver) before posting them for public comment." To avoid duplicative waiver requests from entities that receive funding from multiple federal agencies for a single infrastructure project, the agency contributing the greatest amount of funds to the project "should be considered the 'Cognizant Agency for Made in America' and should take responsibility for coordinating with other Federal agencies."

Waiver Principles and Criteria

Under the Guidance, agencies must apply standard criteria in determining whether to grant a waiver. Agencies should review existing criteria to ensure that it is consistent with the requirements of the Act and update or establish criteria as necessary. OMB advises that federal agencies should consider the following minimum requirements in issuing Buy America waivers.

- **Is the waiver time-limited?** This type of waiver may be appropriate when an item is "non-available" but is widely used in projects funded by a particular program's awards. When issuing a time-limited waiver, the agency should identify a short, definite time frame designed to ensure that when domestic supply becomes available, domestic producers will have prompt access to the market created by the program.
- **Is the waiver targeted?** Waivers that are not limited to a particular project should apply only to the item, product, or material necessary. Broader waivers will receive greater scrutiny from MIAO.
- **Is the waiver conditional?** Federal agencies are encouraged to issue waivers with specific conditions that support the policies of the Act and the Order.

OMB provides guidance to agencies on the review and acceptance of waiver requests for each of the three categories of waivers listed in the Act:

- **Nonavailability Waiver:** Agencies will consider whether the recipient has performed thorough market research and considered qualifying alternate items, products, or materials. Waivers must describe the market research activities and methods to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on the availability of sources. Agencies may assist recipients in conducting the required market research.
- **Unreasonable Cost Waiver:** Agencies will ensure that the recipient has provided adequate documentation that no domestic alternatives are available within the cost parameter. Agencies may assist recipients in gathering this documentation. The waiver justification must include a comparison of the cost of the domestic product to the cost of the foreign product or a comparison of the overall cost of the project with domestic products to the over cost of the project with foreign-origin products.
- **Public Interest Waiver:** OMB advises that these waivers will be used judiciously and construed to ensure maximum utilization of

goods, products, and materials produced in the U.S. The Guidance provides examples of types of public interest waivers, agencies should consider issuing, including: *de minimis*, small grants, minor components, adjustment period, and international trade obligation.

General Applicability Waivers

The Guidance provides information about the use of "general applicability waivers." A "general applicability waiver" applies broadly across multiple awards. The waiver can be "product-specific," applying only to a product or category of products, or "non-product-specific," meaning it will apply to all "manufactured products." General waivers should be issued only when necessary to advance an agency's missions and goals, consistent with the IIJA, the Order, and the Guidance. For example, a general applicability waiver may be used when there are well-established domestic sourcing challenges in a particular industry or for a particular requirement.

When reviewing a proposed general applicability waiver, the head of a federal agency must publish in the Federal Register (1) a notice that describes the justification for the waiver and requests public comments on the continued need for the general applicability waiver at least 30 days, and (2) a determination on whether to continue or discontinue the waiver considering the comments received. This publishing requirement will not apply for a period of five years to product-specific waivers that were issued more than 180 days before the Act was passed. For non-product-specific waivers, agencies must publish the notice in the Federal Register no later than November 15, 2022. General applicability waivers, including public interest waivers, will be re-reviewed every five years by the awarding agency.

Preliminary Guidance for Construction Materials

OMB also issued preliminary and non-binding guidance on the standards that define the term "all manufacturing processes" for construction materials. Pending issuance of OMB final standards, agencies are directed to 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. OMB is seeking additional input from industry before issuing further guidance on this subject.

Takeaways

OMB's initial Guidance provides a solid roadmap for how the new Buy America requirements will be applied to federally funded infrastructure projects. Still, several questions remain.

First, it is still unclear how individual agencies may change (or not change) their existing domestic content requirements to align with the standards of the Act. The IIJA only requires agencies to meet the minimum Buy America standards stated in the Act and thus individual agencies can maintain or create new policies and provisions that require covered products or materials to exceed those IIJA standards.

Second, the Guidance does not mention an escalation of the domestic content threshold from 55 percent for manufactured products, like the scheduled escalation provision contained in the recently finalized Buy American Act FAR provisions. Still, it seems likely OMB will provide additional guidance on this subject in the future given the similarities between the Buy American provisions in the FAR and the Buy America test for manufactured products in the IIJA. Also, even if OMB does not issue general guidance in this regard, it appears individual agencies are free to adopt their own scheduled increases, provided those increases meet or exceed the IIJA minimum standards.

Third, the impact of the IIJA on the frequency and terms of Buy America waivers remains to be seen. Details and trends surely will emerge over time, however, and contractors will soon have access to agency and GSA websites that will allow them to track how Buy America waivers are being processed.

We will continue to monitor and report on the continued implementation of the IIJA's Buy America requirements. In the meantime, if you have any questions about the IIJA provisions or Buy America in general, please contact one of the Miller & Chevalier attorneys listed below:

Alex L. Sarria, asarria@milchev.com, 202-626-5822

Jason N. Workmaster, jworkmaster@milchev.com, 202-626-5893

Elizabeth J. Cappiello*

Alexandra S. Prime*

This alert was republished by the Coalition for Government Procurement.

**Former Miller & Chevalier attorney*

The information contained in this communication is not intended as legal advice or as an opinion on specific facts. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. For more information, please contact one of the senders or your existing Miller & Chevalier lawyer contact. The invitation to contact the firm and its lawyers is not to be construed as a solicitation for legal work. Any new lawyer-client relationship will be confirmed in writing.

This, and related communications, are protected by copyright laws and treaties. You may make a single copy for personal use. You may make copies for others, but not for commercial purposes. If you give a copy to anyone else, it must be in its original, unmodified form, and must include all attributions of authorship, copyright notices, and republication notices. Except as described above, it is unlawful to copy, republish, redistribute, and/or alter this presentation without prior written consent of the copyright holder.