



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

BUY AMERICA OVERVIEW

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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)

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 (the date the Buy America construction materials requirement went into effect).
- 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
- Expired on November 10, 2022
- During this time period, USDOT expected States, industry, and other partners to begin developing procedures to document compliance with Made in America standards for construction materials.

What is a Construction Material?

According to the preliminary and non-binding guidance in 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.)

- 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 M-22-11:

- 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 this definition of the term 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.)

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).

New Proposed EV Charger Waiver

- Published in the Federal Register on August 31, 2022 (87 FR 53539) and closed on September 30, 2022.
- FHWA seeks to establish a waiver with phase-out periods that will ensure a sufficient and reliable supply of EV chargers are available for FHWA-funded programs, including the National Electric Vehicle Infrastructure (NEVI) program, to allow timely and strategic deployment of EV charging infrastructure across the United States.
- The proposed waiver and request for comments included:
 - Initial Blanket Waiver and Removal of EV Chargers from Manufactured Products General Waiver
 - Partial Phase-Out of Waiver
 - Proposed Meaning of EV Charger Under Waiver
 - Consideration of Use of Either Installation Date or Other Date for Waiver Effective Date and Phase-Out Dates
 - Consideration of Exclusion of Predominantly Steel and Iron Components from Coverage Under Waiver

USDOT Issues Two Proposed Waivers for Public Comment

On November 4, 2022, the Department took three concurrent actions:

- (1) USDOT is not extending its temporary waiver for construction materials, making that requirement applicable effective November 10, 2022;
- (2) in one notice, DOT is proposing a narrow waiver for de minimis costs, small grants, and minor components; and
- (3) in a second notice, DOT is proposing to take two actions to help transition to the new construction materials standard.

The comment period for the two proposed waivers ended on November 20, 2022.

New Proposed Waiver for De Minimis Costs, Small Grants, and Minor Components (87 FR 68576)

DOT is proposing to use its authority under Section 70914(b)(1) and waiver provisions in DOT Operating Administration-specific statutes, such as 23 U.S.C. 313, to waive the Act's Buy America preferences for iron and steel, manufactured products, and construction materials used in infrastructure 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 allowable costs under the Federal financial assistance award;
- The size of the Federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than 5% of the total material cost of an otherwise domestically produced iron or steel product.

New Proposed Waiver for Certain Contracts and Solicitations (87 FR 68572)

For DOT awards obligated on or after the effective date of the waiver, DOT proposes to issue a general public interest waiver of BABA's domestic preference for construction materials for:

- (1) Any contract entered into before November 10, 2022; and
- (2) Any contract entered into before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022.

Bipartisan Infrastructure Law – Build America, Buy America Act (BABA)

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- 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's Existing General Applicability Waivers

- Per BIL Section 70914(d), all existing general applicability waivers shall be reviewed in the Federal Register every 5 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

Manufactured Products

- FHWA currently has a general applicability waiver for manufactured products, so the 55% standard for manufactured products in BABA does not apply on projects funded under Title 23, U.S.C.

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.

References

- FHWA Buy America Construction Program Guide page: <https://www.fhwa.dot.gov/construction/cqit/buyam.cfm>
- OMB memo M-22-11; <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
- Proposed EV Charger Waiver: <https://www.federalregister.gov/documents/2022/08/31/2022-18831/notice-of-proposed-waiver-of-buy-america-requirements-for-electric-vehicle-chargers>
- Notice of Expiration of the DOT Construction Materials Waiver and Two New Proposed Waivers: <https://www.transportation.gov/office-policy/transportation-policy/made-in-america>

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Questions?

Thank you!

