



# INDIANA DEPARTMENT OF TRANSPORTATION

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**Eric Holcomb, Governor**  
**Michael Smith, Commissioner**

January 25, 2023

## CONSTRUCTION MEMORANDUM 22-09 **(REVISED)**

TO: District Deputy Commissioners  
District Construction Directors  
District Technical Services Directors  
District Area Engineers, Project Engineers/Supervisors  
District Project Management Director, Project Management Director  
District Traffic Engineers, District Testing Engineers  
District LPA Coordinators, Field Engineers, Division of Materials and Tests

FROM: Gregory G. Pankow, P.E., Director   
Division of Construction Management and District Support

SUBJECT: Infrastructure Investment and Jobs Act - Build America, Buy America

With the issuance of the Infrastructure Investment and Jobs Act (IIJA, [Public Law 117-58](#), Title IX-Build America, Buy America, div. G §§ 70901-52) on November 15, 2021, and Federal Memorandum [M-22-11](#), the procedures of Buy America have been expanded. The expansion comprises of the Build America, Buy America Act (the Act). This new process is intended to strengthen current Made in America Laws. The Act requires that funds made available for Federal financial assistance programs for infrastructure may not be obligated for a project unless all iron, steel, manufactured products, and construction materials permanently incorporated into the project are produced within the United States. This provision only applies to Federal assistance programs for infrastructure. This revised process will be effective beginning November 10, 2022, and will apply to all contracts let on or after the Department's November 16, 2022 letting. The Act allows for waivers to be granted by Federal agencies, FHWA inclusive, based on specific requirements described below. Waivers may only be approved by Federal agencies.

### Terms

1. **Infrastructure** - includes, at a minimum, the structures, facilities, and equipment for United States roads, highways, bridges, public transportation, dams, maritime facilities, intercity and freight railroads, freight and intermodal facilities, airports, water systems including drinking and wastewater facilities, electrical transmission facilities and systems, utilities, broadband infrastructure, and buildings and real property. The term "infrastructure" should be applied to projects serving a public function rather than privately owned facilities not open to the public.

2. **Project** - any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States.
3. **MIAO** – Made in America Office
4. **OMB** – Office of Management and Budget
5. **Manufactured Products** - items consisting of:
  - one or more applicable Construction Materials, listed below, that have been combined through a manufacturing process, and
  - at least one applicable Construction Material, listed below, combined with a material not listed as a Construction Material through a manufacturing process.

For example, a plastic framed sliding window should be treated as a Manufactured Product, while plate glass should be treated as a Construction Material.

6. **Construction Materials** – do include an article, material, or supply consisting primarily of:
  - non-ferrous metals,
  - plastic and polymer-based products,
  - glass,
  - lumber, and
  - drywall.

Construction materials do not include:

- items made primarily of iron or steel,
- manufactured products,
- cement and cementitious materials,
- aggregates such as stone and gravel, or
- aggregate binding agents or additives.

7. **Waiver** – A Federal agencies' responsibility involving the intentional relinquishment of a specific requirement of the Build America, Buy America Act based on the defined criteria.

### **Act Requirements**

The Act establishes the following requirements with any article, material, or supply being classified into only one of the three categories listed below:

1. **Iron or Steel** - All iron and steel used in the project shall be produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, has occurred in the United States. This process remains the same as the Buy America process described in the Code of Federal Regulations 23 CFR 635.410.
2. **Manufactured Product (New)** - All manufactured products used in the project shall be produced in the United States. This means the manufactured product has been manufactured in the United States, and the cost of the components of the manufactured product mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product. The 55 percent designation is intentional and establishes the

Department's predominant percentage of the total cost of the manufactured component for the product.

Currently, the Manufactured Products requirement has a federal waiver imposed which effectively excludes this portion of Build America/Buy America from enactment. This waiver is reviewed at regular intervals and may be revoked, based on public comment, upon a future review.

3. **Construction Material (New)** - All construction materials shall be manufactured in the United States. This means that all manufacturing processes for the construction material has occurred in the United States.

The provisions of Buy America do not apply to tools, equipment, and supplies brought to the construction site and removed at or before the completion of the infrastructure project. Additionally, Buy America does not apply to equipment and furnishings such as movable chairs, desks, and portable computer equipment used at or within the infrastructure project and not an integral part of the permanent work.

### **Waivers**

Federal agencies are responsible for processing and approving all waivers. Waivers may be granted by the Federal Highway Administration if findings indicate that:

1. **Public Interest Waiver** – applying the domestic content procurement preference would be inconsistent with the public interest,
2. **Nonavailability Waiver** – types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonable available quantities or of a satisfactory quality, or
3. **Unreasonable Cost Waiver** – the inclusion of iron, steel, manufactured products, or construction materials produced within the United States will increase the cost of the overall project by more than 25 percent.

All waiver requests must contain a detailed justification for the use of goods, products and materials mined, produced, or manufactured outside the United States. They must contain a certification that there was good faith effort to solicit bids for domestic products with those efforts being supported with the requests for proposals, contracts, and communications with potential suppliers. A list of information to be submitted with a proposed waiver is included in Part VII of Memorandum M-22-11.

### **Public Interest Waivers**

Public interest waivers may be appropriate when it is determined that important policy goals cannot be achieved consistent with the established Buy America requirements. The following are examples of public interest waivers that may be considered:

- **De Minimis** – Waivers that pertain to a threshold value of 5 percent of the project value up to a maximum of \$1,000,000.
- **Small Grants** – These waivers may be considered for contract awards below \$250,000.
- **Minor Components** - These waivers would consider allowing minor deviations within iron and steel products. A minor components waiver may allow non-domestically produced miscellaneous

components comprising of no greater than 5 percent of the total cost of an otherwise domestically produced iron and steel product to be used.

- **Adjustment Period** – These waivers may be considered when brief and time limited waivers would be appropriate to allow for transition to new requirements and processes.
- **International Trade Obligations** - These waivers should be considered when the State has procurement obligations pursuant to the Government Procurement Agreement or any other such trade agreement.
- **Other Considerations** – These waivers may be considered when a particular waiver may be in the public interest in one situation, but not in another situation.

Any public interest waiver request must include a detailed written statement addressing all appropriate factors including the potential obligations under international agreements and justification of why the waiver request is in the public interest.

### **Non-availability Waivers**

Non-availability waiver requests must be supported by market research and adequate consideration of qualifying alternatives, products, or materials. Requests should describe the market research activities and methods used to identify potential domestic manufactured items, including the timing of the research and the conclusions reached.

### **Unreasonable Cost Waivers**

Unreasonable cost waiver requests will be considered if the inclusion of iron, steel, manufactured products, or construction materials in the construction project will increase the cost of the overall project by 25 percent. Adequate documentation supporting the request that no domestic alternatives are available within the cost parameter must be submitted. The documentation must include a comparison of the cost of the domestic product to that of the foreign product. Alternatively, the documentation may include the overall cost of the project with domestic products to that with foreign products.

### **General Applicability Waivers**

Currently, and pending public comment, an additional category of potential waivers includes General Applicability. These waivers apply generally across multiple contracts. They may be product-specific, applying to a specific product or product category, or they may be non-product specific and apply to all manufactured products. For example, a Federal agency may issue a general applicability waiver for a product having an established domestic sourcing challenge. These waivers are issued only when necessary to advance the goals of the IIJA.

Before issuing a waiver, the Federal agency must make publicly available on the agency's website a detailed written explanation for the proposed determination to issue the waiver. There will be a minimum 15-day public comment period on the proposed waiver. General applicability waivers are subject to a 30-day public comment period.

The Federal agency must submit the proposed waiver to the MIAO for review after the comment period has concluded. The MIAO will review the proposed waiver to determine if it is consistent with applicable law and policy.

Waivers may be rejected or granted in whole or in part. Waivers should be issued at the project level and be product specific. Federal agencies will use the following principles before issuing any type of waiver:

- 1. Time-limited** – A Federal agency may determine a waiver should be held to a definite length of time rather than by specific projects. This process is designed to allow domestic producers will have prompt access to the market as domestic supply becomes available.
- 2. Targeted** – Waivers not limited to projects should apply only to the items, products, materials, categories of items, products, or materials necessary. Broad waivers will receive greater scrutiny from MIAO.
- 3. Conditional** – Federal agencies should issue waivers with specific conditions that support the Act.

### **Guidance for Construction Materials**

The OMB has provided preliminary guidance to help agencies determine which materials are considered construction materials so they can begin applying the new requirements to those products. These guidelines are presented in the Terms definitions, point 6 listed above. These standards will require each manufacturing process for a Construction Material to occur within the United States.

Questions on the new Build America/Buy America process should be directed to your District's Construction Management Field Engineer.

GGP/KAP