



DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Temporary Waiver of Buy America Requirements for Construction Materials

ACTION: Notice.

SUMMARY: As the Biden-Harris Administration implements the historic Bipartisan Infrastructure Law (BIL), we seek to maximize the use of American made products and materials in all federally funded projects while also successfully delivering a wide range of critical infrastructure projects for States, local communities, counties, Tribal nations and farms, factories and businesses across the U.S. In order to deliver projects and meaningful results while ensuring robust adoption of Buy America standards, the U.S. Department of Transportation (“DOT” or “Department”) is establishing a temporary public interest waiver for construction materials for a period of 180 days beginning on May 14, 2022 and expiring on November 10, 2022. DOT is establishing this transitional waiver to prepare for compliance with the new Made in America standards for construction materials. During this time period, DOT expects States, industry, and other partners to begin developing procedures to document compliance. DOT will continue its engagement through the waiver period to help facilitate the creation of robust enforcement and compliance mechanisms and to rapidly encourage domestic sourcing of construction materials for transportation infrastructure improvements.

DATES: The waiver is applicable to awards that are obligated on or after May 14, 2022 and before November 10, 2022. Unless extended, the waiver expires on November 10, 2022.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Darren Timothy, DOT Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or at 202-366-4051. For legal questions, please contact Michael A. Smith, DOT Office of the General Counsel, 202-366-2917, or via e-mail at michael.a.smith@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

In January 2021, President Biden issued Executive Order (EO) 14005, titled “Ensuring the Future is Made in All of America by All of America’s Workers,” launching a whole-of-government initiative to strengthen Made in America standards.

The EO states that the United States Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” DOT is committed to ensuring strong and effective Buy America implementation consistent with EO 14005 and has a long track record of successfully applying Made in America standards to support American workers and businesses through its more than \$70 billion in grant programs and \$700 million in direct purchases in FY2020.

On November 15, 2021, President Biden signed the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, which includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, div. G §§ 70901-52. The BIL not only makes a historic investment in American transportation—from roads and bridges to rail to transit—but also greatly strengthens Made in America standards. Specifically, the Act expands the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. The Act requires that no later than May 14, 2022—180 days after the date of enactment—the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... 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.” BIL § 70914(a).

The Act provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. BIL § 70917(a)–(b). This provision allows Federal agencies to preserve existing Buy America policies and provisions that

meet or exceed the standards required by the Act, such as FHWA’s existing requirements for iron and steel.

One of the new Buy America preferences included under Section 70914 of the Act is for construction materials. By May 14, 2022, each covered Federal agency must ensure that all manufacturing processes for construction materials used in Federally assisted infrastructure projects occur in the United States. None of the specific statutes that apply particular Buy America¹ requirements to the Federal financial assistance programs administered by DOT’s Operating Administrations (OAs), including 49 U.S.C. 50101 (FAA); 23 U.S.C. 313 (FHWA); 49 U.S.C. 22905(a) (FRA); 49 U.S.C. 5323(j) (FTA); and 46 U.S.C. 54101(d)(2) (MARAD), specifically cover construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products.

In addition to establishing Buy America preferences, the Act also provides certain statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”). BIL §§ 70915(b) and 70923. MIAO was first established by Section 4 of EO 14005. MIAO’s authorities under the BIL include issuing guidance to assist in applying the Act’s requirements and issuing standards that define term “all manufacturing processes” in the case of construction materials. BIL § 70915.

On April 18, 2022, OMB issued memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (“Implementation Guidance”). Under section VIII of the Implementation Guidance, “Preliminary Guidance for Construction Materials,” “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:

¹ In this notice, references to “Buy America” include domestic preference laws called “Buy American” that apply to DOT financial assistance programs.

- 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.

Implementation Guidance at p. 13-14. The Implementation Guidance also states that “an article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories.” *Id.* at p. 6. The Implementation Guidance also explains that “items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.” *Id.* at p. 14. OMB characterizes its guidance on which materials are construction materials as “preliminary and non-binding guidance . . . so that agencies can begin applying Buy America requirements to those materials.” *Id.* at p. 13.

DOT is taking appropriate steps to ensure the definition of “construction material” specified in the Implementation Guidance applies to each award from a financial assistance program for infrastructure projects, including by incorporating that definition in terms and conditions incorporating a Buy America preference.

Section 70915(b) of the BIL requires OMB to issue standards that define “all manufacturing processes” for construction materials. Section VIII of the Implementation Guidance provides that, “[p]ending MIAO’s issuance of final standards on construction materials, and absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, agencies should consider ‘all manufacturing processes’ for

construction materials to mean the final manufacturing process and the immediately preceding manufacturing stage for the construction material.” Implementation Guidance at p. 14. After considering information received through stakeholder and industry outreach, MIAO will issue further guidance that identifies initial manufacturing process for each type of construction material that should be considered as part of “all manufacturing processes.” *Id.* Agencies are also directed to “consult with MIAO, as needed, to ensure that any waiver issued for construction materials is explicitly targeted and time-limited, in order to send a clear market signal that additional standards for ‘all manufacturing processes’ in the case of construction materials will be forthcoming.” *Id.*

The Implementation Guidance notes that a “waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act.” Implementation Guidance at p. 10. The guidance also recognizes several instances in which Federal agencies may consider issuing a public interest waiver and encourages agencies to consider an adjustment period where time limited waivers would allow recipients and agencies to transition to new Buy America preferences, rules, and processes. *Id.* at p. 11.

In bringing its Federal financial assistance programs for infrastructure into compliance with the Act’s requirement for construction materials, DOT must also ensure that these important Federal programs for transportation infrastructure investment are able to obligate funds and complete infrastructure projects in a timely manner. For example, the new construction materials requirement will apply to capital projects funded by formula and discretionary programs of the Federal Transit Administration, including projects under the new All Stations Accessibility Program, which will upgrade the accessibility of fixed guideway public transportation systems for people with disabilities.

Because construction materials have not previously been subject to Made in America rules as have iron and steel, there is a need to gather data on domestic sourcing capacity to

inform stronger standards. For example, while the exact impact on highway project construction is unknown, the Department believes that it could be significant. According to the current National Bridge Inventory, there are more than 62,588 bridges with wood or timber elements (including 16,909 bridges whose main span have wood or timber elements), 2,281 bridges with non-ferrous metal elements, and 19,562 bridges with polymer-based products elements. Additionally, construction materials are used in a wide variety of other applications, such as culverts, glass for retro-reflectivity in pavement markings, glass in fiber optics involved in utility relocations, non-ferrous metals in sign sheeting, and dry wall used in rest areas and other vertical construction applications. These are just a few examples of construction materials that may be found in highway projects.

The Department has heard from stakeholders regarding concerns about the implementation of Buy America requirements to construction materials, specifically how recipients of Federal funds will need to require contractors to source Buy America compliant construction materials and how industry will certify and demonstrate compliance. The Department recognizes both the importance of ensuring Buy America compliant construction materials and the need to implement the requirement in a way that is not overly burdensome.

Issuance of the Proposed Temporary Waiver and Discussion of Comments Received

In accordance with Section 70914(b)(1) of the Act, on April 28, 2022, DOT published a notice on its website seeking comment on whether to use its authority to provide a temporary waiver of the Buy America requirement for construction materials on DOT-assisted infrastructure projects, on the basis that applying the domestic content preference for these materials would be inconsistent with the public interest.² The notice explained that the waiver would be applicable to awards that are obligated on or after May 14, 2022. To maximize notice

² Because the application of Buy America to construction materials is required under BIL § 70914, the authority for this waiver is also based on BIL § 70914. Therefore, reference to, and reliance on, the waiver authority under specific Buy America provisions that are administered by the Department, such as 49 U.S.C. 50101 (FAA); 23 U.S.C. 313 (FHWA); 49 U.S.C. § 22905(a) (FRA); 49 U.S.C. § 5323(j) (FTA); and 46 U.S.C. 54101(d)(2)(MARAD), is unnecessary.

to affected stakeholders, the Department also announced the proposal on several email distribution lists related to the operating administrations' existing Buy America requirements.

The DOT received 83 separate comments in response to the publication from a wide array of stakeholders, including State transportation agencies, public transit agencies, airport operators, construction firms, manufacturers and suppliers, labor organizations, and individuals, as well as associations representing each of those groups. The vast majority of commenters supported DOT's proposal to issue a temporary waiver for construction materials. Comments opposing the waiver came from certain manufacturers and labor organizations; their key concerns relevant to the proposal are discussed in more detail below.

In the notice of proposed waiver, DOT asked whether a longer or shorter effective period than 180 days from May 14, 2022 would be warranted. Most commenters who addressed this question stated that this length of time would likely be inadequate to accomplish the goals of the transition waiver period and suggested that it be increased. Most of those commenters suggesting a longer waiver period specifically offered that it should have a duration of one year, but several others proposed even longer effective periods ranging from 18 months to 4 years. Several reasons were given for the commenters' belief that a longer period would be justified. For example, the Utah Department of Transportation described a series of steps that will need to be undertaken before the new requirements for construction materials can be implemented, including OMB issuing final standards for construction materials, as well as State DOTs updating standard specifications; establishing certification processes; working with and informing industry to demonstrate their products meet the standards; working with contractors and incorporating new contract provisions prescribing Buy America requirements; and reviewing and updating stewardship and oversight agreements with FHWA to address non-compliance with Made in America standards. The Alaska Department of Transportation and Public Facilities and the Pennsylvania Department of Transportation also noted that the 180-day period would overlap with the peak construction season in most States, and thus affect participation from the

contractors, suppliers, and agencies that are needed to develop new compliance processes for construction materials.

Other commenters, such as the Greater Orlando Aviation Authority, focused on the steps needed to investigate potential domestic sources of construction materials and to build up an adequate supply base to support federally funded transportation infrastructure projects. Several commenters, such as the Associated General Contractors of America, noted that current supply chain challenges in the materials industry and the resulting volatility in those markets make it “extremely difficult to determine at this time whether U.S. production for these newly covered materials can support the demand the IIJA’s increased funding levels will place on these markets, or whether there is sufficient or existing U.S. production at all for some of these goods.”

The Wyoming Department of Transportation, however, commented that it while it “believes the waiver may need to be extended, perhaps considerably,” it also “recognizes that DOT needs to move promptly to ensure at least the six-month period to minimize disruption to the current construction season,” and noted that while compliance procedures may not currently be in place, “the ability to certify materials will grow over time, so there should be a good faith certification process that can be refined over time.” While recognizing the challenges that commenters noted on the steps that will ultimately be required to fully implement the new Buy America provisions for construction materials and to achieve a robust, thriving domestic supply base, DOT agrees with Wyoming DOT on the importance of moving quickly with a short-term waiver and with an approach of refining processes over time, rather than delaying the application of the new requirements for an extended period of time until those processes and domestic supply bases can be perfected.

No commenters provided evidence of an existing certification process for construction materials that is already in use and could be immediately adopted by suppliers, contractors, and project sponsors. However, the Spring City Electrical Manufacturing Company, a manufacturer of aluminum lampposts, listed five products that it believes would qualify as construction

materials under the Act and noted that the aluminum production process is similar to that for iron and steel products, for which “DOT has previously determined the ‘material certification process has been adequate for determining compliance,’” as “contractors must provide certificates of origin to the project sponsor.” The commenter also stated that “notably for the [State] DOTs’ interests the aluminum lampposts and bases are covered by country of origin marking requirements in 19 U.S.C. 1304(e) that should aid in origin identification.” The Department will determine whether the company’s products would be considered construction materials once OMB has issued final standards, but DOT believes that this comment supports the conclusion that some types of construction materials may be readily addressed with new Buy America compliance procedures adapted from existing procedures elsewhere in use, and that the limited 180-day duration of the waiver as proposed is appropriate to enable that adaptation.

Some commenters, including the United Steelworkers Union (USW), the Municipal Castings Association (MCA), and the Alliance for American Manufacturing (AAM) questioned the duration of the period that the Department provided to comment on the proposed waiver. USW asserted that “BABA clearly states that agencies requesting general applicability public interests waivers allow for 30 days for public comments.” The Department disagrees with that description of the statute. Section 70914(c)(2) of the Act requires agencies to “provide a period of not less than 15 days for public comment on the proposed waiver.” Section 70914(d) is a separate provision that requires a comment period of “not less than 30 days” when an agency conducts a review of an existing general applicability waiver. That provision is not applicable to new general applicability waivers. Accordingly, the Department’s comment period satisfies the applicable statutory requirement. The Department chose not to extend the comment period beyond May 13, 2022, because the relevant Buy America requirements became effective on May 14, 2022. The Department determined that the interest in providing financial assistance recipients with certainty about applicable requirements outweighed the benefits of a longer comment

period. That determination is supported by the fact that 82 commenters, representing a diverse set of stakeholders, submitted comments in the time provided.

USW, MCA, and AAM, along with the Commercial Metals Company, also expressed concern about the Department's failure to propose the waiver before April 28, 2022. USW asserted that this undermines stakeholder's confidence in the Department's capacity to efficiently implement the Act. The Department's timing was responsive to the public availability of the Implementation Guidance. As explained above, that guidance was issued on April 18, 2022; the Department proposed the waiver 8 business days later. If the Department had proposed the waiver before OMB issued the Implementation Guidance, the public would have lacked important context to inform its comments and the Department would have been at risk of needing to withdraw and re-propose a waiver that complied with the Implementation Guidance. The Department and OMB anticipate providing additional opportunities for further stakeholder input on implementation of the Act, and, as described in the proposal and this notice, the Department will consider narrowing the breadth or shortening the duration of this waiver in response to information supporting the availability of demonstrably compliant categories of construction materials.

USW and AAM also raised concerns about the issuance of a temporary general applicability waiver for construction materials on the basis of public interest. Both parties acknowledged "that limited, narrow use of waiver authority may be necessary, including for those departments and agencies working to establish a Buy America policy for the first time." DOT agrees and notes that while its Operating Administrations have longstanding experience in applying Buy America preferences for iron and steel and for manufactured products, applying such policies to construction materials is a new exercise. USW also noted that "this Administration has stated clearly that public interest waivers be used sparingly, and reserved for truly exigent circumstances." DOT agrees that public interest waivers should be used sparingly and has concluded that avoiding the disruption to transportation infrastructure projects that

would occur without a period for deliberate development of processes needed to transition to the new requirements constitutes a rare and appropriate use of the authority. Both USW and AAM also expressed concern about public interest waivers being used to delay the application of Buy America preferences indefinitely. DOT's purpose in limiting the temporary waiver for construction materials to only 180 days avoids such an outcome and communicates that stakeholders need to rapidly adopt the necessary procedures to ensure compliance with the new requirements.

Several commenters requested that the Department expand the scope of the proposed waiver to include items that are not construction materials, as that term is defined in the Act and Section VIII of the Implementation Guidance. The Department considers those requests to be outside the scope of its current waiver action. Likewise, for the purpose of this waiver action, DOT considers out of scope the comments that were received addressing other types of public interest waivers that DOT could issue under the Act, the application of Buy America requirements to manufactured products and to iron and steel, and the importance of complying with cargo preference (a.k.a. Ship American) requirements when transporting foreign-made materials purchased pursuant to a Buy America waiver. However, DOT values the feedback received in those comments and will consider those requests and comments as it continues implementation of the Act, including its development of guidance and reviews of existing waivers of general applicability under section 70914(d) of the Act.

Finding on the Temporary Waiver

Based on all the information available to the Agency, DOT concludes that applying the domestic content preference for construction materials under Section 70914(a) of the Act on DOT-assisted infrastructure projects now, before adequate compliance processes are in place, would be inconsistent with the public interest, and that a temporary waiver of that requirement is thus appropriate under Section 70914(b)(1). This waiver is applicable only to awards obligated on or after May 14, 2022 and before November 10, 2022. For awards obligated during that 180-

day period, the waiver applies for the duration of the award. Unless extended, the waiver is inapplicable to any award obligated on or after November 10, 2022.

In issuing this temporary public interest waiver, DOT is not making a finding that any construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. Such a finding would require a separate waiver action under section 70194(b)(2).

Ramping Up Made in America Compliance and Ongoing Request for Comments

With the goal of advancing crucial infrastructure projects in a timely manner while implementing the new Buy America requirements, the DOT is providing this notice as its finding that a waiver of Buy America requirements for construction materials is appropriate at this time. DOT continues to encourage suppliers and other stakeholders to inform DOT of any procedures that may be developed or be in place to certify the compliance of construction materials with the domestic preference requirement in the Act. That information helps DOT rapidly encourage domestic sourcing and potentially shorten the effective period or narrow the applicability of the transitional waiver. The Department also encourages supplier and other stakeholders to identify categories of construction materials that currently have sufficient domestic availability to support DOT-assisted infrastructure projects, to assist contractors and project sponsors in incorporating compliant products in their projects and to help the Department focus its activities to benefit domestic manufacturers. Comments may be submitted to the U.S. Government electronic docket site at <http://www.regulations.gov/>, Docket: DOT-OST-2022-0047.

The temporary general waiver of the Buy America requirement for construction materials under the Act will provide sufficient time for DOT to: (i) seek information and feedback from State, local, industry, and other partners and stakeholders on challenges with and solutions for implementing the requirement; (ii) allow a reasonable adjustment period for recipients of DOT financial assistance, including States, local communities, Tribal nations, transit agencies, railroads, airports and ports and their industrial vendors to develop and transition to new

compliance and certification processes for construction materials; and (iii) gather data on the sourcing of the full range of construction materials used in Federally funded transportation projects and strategies for increasing domestic capacity to produce those materials.

During the waiver period, DOT expects that implementing partners will take rapid action to prepare for compliance with the new requirements, as they currently do for iron and steel, for example. Actions to prepare for compliance with the new requirements include:

1. Establishing certification processes by grantees to determine Buy America compliance for construction materials;
2. Working with industry to ensure that manufacturers are prepared to demonstrate that their products meet applicable Buy America standards;
3. Ensuring contractors and subcontractors are prepared to certify compliance with Buy America requirements for construction materials, and provide all relevant information, including contract provisions prescribing Buy America requirements;
4. Establishing appropriate diligence by State DOTs, contracting agencies, and other relevant agencies, including audits and reviews as appropriate; and
5. Providing further data and information to DOT on the domestic availability of construction materials, in particular, through comment by suppliers on construction materials that can be sourced in the U.S. currently.

During the waiver period, DOT will also work to prepare for implementation of new Made in America requirements for construction materials by:

1. Assessing existing Made in America processes such as questions and requirements for grantees and contractors to ensure processes for reviewing construction materials are aligned with standards already in place, such as for iron and steel, as appropriate;
2. Building new Made in America requirements into forthcoming Notice of Funding Opportunities, loan programs, and other resources provided by the Department, as appropriate;

3. Reviewing DOT's enforcement processes, including stewardship and oversight agreements with States, risk-based reviews, and compliance assessment program reviews for non-compliance with Made in America standards to ensure the enforcement processes for construction materials are effective and consistent with processes for products such as iron and steel, as appropriate;
4. Reviewing data, information, and comments provided by States, industry, and other partners to further assess opportunities, challenges, and the availability of domestically sourced construction materials. Stakeholders are encouraged to provide information to DOT in response to this notice, as well as to the OMB's Listening Sessions and Request for Information on the application of Made in America requirements to construction materials.

By the end of the waiver period, DOT expects State, industry, and other partners to establish an effective compliance process appropriate for construction materials, consistent with the BIL and relevant implementation guidance and standards. As explained above, the Department's implementation activities will continue during the waiver period. If DOT can determine, using all available information, including stakeholder comments and data, that there are currently sufficient compliance processes for certain categories of construction materials, DOT will consider shortening the period of the waiver overall, or for certain categories of product, to rapidly encourage domestic sourcing. In making any adjustments, DOT will follow the public input requirements of Section 70914(d), which provide for at least a 30-day comment period for DOT's conduct of a review of an existing general applicability waiver.

Issued in Washington, DC on: May 19, 2022.

Polly E. Trottenberg,

Deputy Secretary.