



September 13, 2022

TO: WSDOT Project Development Engineers

FROM: Chris Christopher, Construction Division Director, State Construction Engineer 
Mark Gaines, Development Division Director, State Design Engineer 

SUBJECT: Project Delivery Memo #22-04 – Buy America

Purpose

The purpose of this Project Delivery Memo is to provide guidance for project teams to meet expanded federal requirements to include American made materials in construction contracts. New federal requirements described herein could create risk for projects such as inability to procure acceptable materials, increased project costs or schedule delays. Project teams may need to seek waivers on some requirements and submit them to Federal agencies for consideration.

Definitions

The Federal government has provided the following definitions of terms:

"Iron and steel" includes all iron or steel products permanently incorporated into the final product.

"Construction materials¹" includes an article, material, or supply—**other than** an item of primarily iron or steel, or a manufactured product. Construction materials are 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.

"Manufactured product" includes any item produced as a result of the manufacturing process. Items that consist of two or more of the listed construction 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.

Background

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), which includes the Build America, Buy America Act. While existing Buy America requirements previously applied to iron, steel, and certain manufactured goods, the IIJA expands requirements to include all manufactured products and construction materials in construction contracts that include Federal Aid funding in the construction phase.

¹ Cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents are not subject to IIJA requirements.

Key Aspects of IJA Requirements²:

1. All iron and steel used in the project are to be 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 products³ 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.
3. All construction materials are to be manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

Seeking Waivers on the above requirements

A waiver process has been established to the IJA Buy America requirements. Federal approving authorities can reject or grant waivers in whole or in part. See “Direction” section below for procedure to process waivers.

Direction

Continue to apply existing Buy America requirements associated with iron, steel, and certain manufactured goods per [WSDOT Plans Preparation Manual](#) 700.01(7) to projects with federal funding any phase (PE, RW, or CN). Apply the expanded IJA requirements associated with “construction materials”, as outlined above, to all projects with Federal Aid funding in the construction phase executed on or after November 10, 2022. Incorporate new standard specification language associated with the IJA requirements to affected projects (contact your Assistant State Construction Engineer for more information).

Determine if project bid items and materials are reasonably available that meet IJA requirements as early as possible in the project development process. For cases when it is not possible or reasonable to meet these requirements, request a waiver(s), which may be approved by the federal authority. Waivers can be submitted on a project specific basis or as a general applicability waiver (which covers all projects statewide). For both approaches, use the following waiver process:

1. **Determine which type of the three waivers applies.**
 - a. ***Public Interest Waiver:*** applying the domestic content procurement preference would be inconsistent with the public interest. A waiver in the public interest may be appropriate where the approving federal agency determines that other important policy goals cannot be achieved consistent with the IJA requirements, and the proposed waiver would not meet the requirements for a nonavailability or unreasonable cost waiver.

² Pre and post disaster or emergency response expenditures are exempt.

³ There is an existing waiver for all “manufactured products” used on Federal Aid Transportation projects. Although this waiver will be reassessed by the federal government at some point in the future, IJA requirements associated with manufactured products are not applicable until further notice.

- b. ***Nonavailability Waiver:*** for types of iron, steel, manufactured products, or construction materials that are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.
 - c. ***Unreasonable cost waiver:*** the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. Provide documentation that no domestic alternatives are available within this cost parameter. Document in the waiver 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 overall cost of the project with foreign-origin products.
2. **Prepare the waiver.** All waiver requests must be in writing and include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States and a certification that there was a good faith preconstruction effort by WSDOT to ascertain if domestic products are available. **Use the WSDOT Buy America Waiver template at the [Design Support website](#) (under the tools templates and link tab.)**
 3. **Submit waiver to the appropriate Federal agency.** Submit waivers to the Federal agency from which funds have been awarded. In the case of more than one Federal agency, submit waivers to the agency that awarded the most funds, defined as the “Cognizant Agency for Made in America.” Submit waivers to the cognizant agency as applicable.
 4. **The cognizant Federal agency submits the waiver to the Made in America Office.** All waivers have to be submitted by Federal agencies to the Made in America Office. Project specific waivers require a minimum of 15 calendar day public comment period. General applicability waivers are subject to a minimum 30 calendar day public comment period. Federal agencies are responsible for performing due diligence and approving or rejecting waivers.
 5. **Await response for waivers from the cognizant Federal agency.** Plan preconstruction schedules and advertisement dates accordingly.

If you have any questions, please contact your Assistant State Design Engineer for inquiries prior to contract award or the HQ Construction Office for contract compliance related inquiries.

Resources:

See the following memo for more details about Buy America and instruction on what details should be included in written waivers. <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

The WSDOT Buy America Waiver Template is available at the Design Support website, from the tools templates and links tab. <https://wsdot.wa.gov/engineering-standards/design-topics/design-tools-and-support>

To WSDOT PDEs
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