

Update to the Buy America Requirements for Highway Bridge Projects

by Dr. Timothy R. Wyatt, Esquire, Conner Gwyn Schenck PLLC

The Infrastructure Investment and Jobs Act (IIJA) enacted on November 15, 2021, contains a new Buy America requirement 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.”

At first glance, this appears similar to existing Buy America requirements for U.S. Department of Transportation (USDOT) agencies. Under the Federal Highway Administration (FHWA) Buy America provision codified at 23 U.S.C. §313, all iron, steel, and manufactured products used on federally assisted highway projects are to be manufactured in the United States, with FHWA authorized to issue waivers under certain circumstances (see the article in the Fall 2020 issue of *ASPIRE*®). However, in 1983, FHWA issued a permanent waiver for manufactured products, so the FHWA Buy America provision has almost always applied only to steel and iron. FHWA also issued regulations permitting a *de minimis* amount of nondomestic steel or iron, not to exceed 0.1% of the total contract price.

The main substantive change with the IIJA is the inclusion of “construction materials” as a new category of product subject to Buy America requirements. In guidance issued by the White House Office of Management and Budget (OMB) on April 18, 2022, under its authority under the IIJA, construction materials include products consisting “primarily” of nonferrous metals, plastic and polymer-based products, glass, lumber, and drywall. The OMB expressly excluded other manufactured products, predominantly steel or iron products, and certain paving materials (aggregate, cement, and binding agents) from the definition of construction materials. The new IIJA Buy America provision requires that “all manufacturing processes” for construction materials take place in the United States. FHWA has strictly enforced similar language for steel and iron under the FHWA Buy America provision. IIJA does not provide for a *de minimis* amount of nondomestic construction materials to be used on a project.

Most products falling under the new definition of construction materials were previously treated as manufactured products under the FHWA Buy America provision, and were thus exempt

from Buy America requirements due to FHWA’s manufactured products waiver. For example, in a November 1980 *Federal Register* notice previewing the manufactured products waiver, FHWA asserted that state highway agencies “urged caution” in imposing Buy America requirements on products such as aluminum and plastic.

With the manufactured products waiver in place, the main Buy America issue for FHWA in recent years has been the treatment of manufactured products that contain iron and steel components, including screws, bolts, nuts, and washers, for which it can be difficult, if not impossible, to determine the country of origin. FHWA has attempted to distinguish between predominantly steel and iron products, which are subject to Buy America requirements, and commercial off-the-shelf (COTS) products that contain iron and steel components, which would be eligible for the manufactured products waiver. However, as discussed in the Fall 2020 issue of *ASPIRE*, FHWA’s guidance distinguishing between those two categories has been largely withdrawn due to an adverse court ruling in 2015 and public opposition to rulemaking efforts in 2016. Since then, it has been largely left to the discretion of individual FHWA divisions to determine whether a given COTS product is predominantly steel or iron, and thus subject to Buy America requirements.

The April 18, 2022, OMB guidance provides that products may not be classified in more than one category: steel or iron product, manufactured product, or construction material. The IIJA further provides that its new Buy America provision only applies to the extent that there is not an existing Buy America requirement in place covering those three categories. Because the existing FHWA Buy America provision nominally applies to iron, steel, and manufactured products (even though FHWA has waived coverage for manufactured products), the new IIJA Buy America requirements arguably apply only to construction materials on FHWA projects.

The new IIJA Buy America requirements were to be effective within 180 days of enactment, which would have been May 14, 2022. However, on April 28, 2022, USDOT proposed a temporary waiver for construction materials, delaying implementation for 180 days, due to uncertainty regarding how the proposed extension of Buy America requirements

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to construction materials would impact FHWA projects. With regard to bridges, USDOT stated in support of the temporary waiver, "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." USDOT requested public comment on the proposed temporary waiver for construction materials.

Comments from groups representing public owners and contractors generally voiced unease about the new Buy America requirements for construction materials. Representing that its members own 38% of the nation's bridges, the National Association of Counties requested a longer waiver period. The American Association of State Highway and Transportation Officials echoed the request for a longer waiver period and also warned that products presently covered by FHWA's manufactured products waiver (such as plastic pipe, glass-fiber reinforcement, and aluminum products) will apparently be subject to Buy America requirements under the new IIJA provision covering construction materials. Similarly, noting that FHWA has long struggled with how to apply Buy America requirements to steel and iron components of COTS products, the American Road & Transportation Builders Association expressed concern that the struggle will intensify once Buy America requirements apply to products composed of aluminum, plastic, and glass, and urged FHWA to adopt a general waiver for COTS products.

However, comments received from manufacturing industry groups and organized labor (including the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers) generally voiced support for the new Buy America requirements for construction materials and encouraged robust enforcement with few waivers. The National Steel Bridge Alliance division of the American Institute of Steel Construction asserted that neither the new legislation nor the proposed waiver for construction materials should affect the existing strict FHWA Buy America requirements for iron and steel.

On May 25, 2022, USDOT issued the temporary waiver of Buy America requirements for construction materials. Although the waiver period is nominally only 180 days, it exempts Buy America requirements for construction materials on all awards of USDOT funds that are obligated between May 14, 2022, and November 15, 2022, with the waiver applying for the duration of those awarded projects. Because some of those projects may take years to complete, the construction materials waiver will provide relief for quite some time.

However, absent an extension of the waiver, Buy America requirements will apply to construction materials, including products consisting primarily of lumber, plastic, glass, or aluminum, on projects awarded after November 15, 2022. Where there is no domestic source for a specific product, FHWA can waive the Buy America requirements, using the same procedure by which FHWA has occasionally issued project-specific waivers in recent years for certain predominantly steel or iron products, including reinforcement used in specialty reinforced concrete products.

Although Congress expressly provided in the IIJA that the new Buy America requirements apply to all manufactured products in addition to iron, steel, and construction materials, it is possible that FHWA will maintain that its long-standing manufactured products waiver was not disturbed by the IIJA. That would allow certain COTS products to be used on future FHWA projects without regard to whether those products were manufactured in the United States, even if certain components of those products consist of materials otherwise subject to Buy America requirements (such as steel, iron, aluminum, wood, glass, plastic, or other polymers), as long as the product does not consist primarily or predominantly of such materials. The discretionary authority of FHWA divisions would presumably expand from simply determining whether a given COTS product is predominantly steel or iron to also include determining whether the product consists primarily of construction materials such as nonferrous metal, wood, glass, plastic, or other polymers.

If the construction materials waiver is allowed to expire, products consisting primarily of those construction materials will no longer be exempt from Buy America requirements on FHWA projects under the manufactured products waiver. The long-running controversy over what constitutes predominantly steel and iron products may foreshadow a larger forthcoming dispute over what constitutes products consisting primarily of construction materials. **A**

EDITOR'S NOTE

We thank Dr. Timothy R. Wyatt, Esquire, who is well versed in matters related to Buy America provisions, for providing this informative follow-up to his initial article on Buy America requirements, which appeared in the Fall 2020 issue of ASPIRE.