



# FINANCIAL ASSISTANCE LETTER

This Financial Assistance Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA

**Subject: Buy America Requirement for Infrastructure Projects in Financial Assistance Awards**

**References:**

Infrastructure Investment and Jobs Act, Division G, Title IX, Pub. L. No. 117-58.

Office of Management and Budget, Memorandum M-22-11, dated April 18, 2022.

Executive Order 14017, America's Supply Chains, dated February 24, 2021

Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers, dated January 25, 2021

**When is this Financial Assistance Letter (FAL) effective?**

The guidance provided in this FAL is effective as of date issued.

**When does this FAL expire?**

This FAL remains in effect until canceled or superseded.

**Who is the point of contact?**

For DOE, contact the Contract and Financial Assistance Policy Division, Office of Policy in the Office of Acquisition Management at [DOE\\_oapmpolicy@hq.doe.gov](mailto:DOE_oapmpolicy@hq.doe.gov).

For NNSA, contact NNSA at (505) 845-4337.

**Who is the intended audience?**

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting and Grants Officers. Any reference in this guidance to Contracting Officer (CO) should be understood to include Grants Officer. Any reference in this guidance to the DOE should be understood to include the NNSA, unless otherwise indicated.

**What is the purpose?**

The purpose of this FAL is to provide information and guidance regarding the Department of Energy's (DOE or Department) implementation of the domestic content procurement preference requirement (Buy America Requirement) for infrastructure projects found in the Build America, Buy America Act (BABA), Title IX of Division G of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58.

**What types of actions are affected by this FAL?**

This FAL applies to all DOE funding opportunity announcements (FOAs) and financial assistance actions, whether or not funded through the Infrastructure Investment and Jobs Act (IIJA), where funds are appropriated or otherwise made available and used for financial assistance awards for public infrastructure projects—FOAs or financial assistance awards that include construction, alteration, maintenance, or repair of public infrastructure in the United States.

**What is the background?**

The Build America, Buy America Act, enacted under Division G, Title IX of the IIJA, applies a domestic content procurement preference requirement (Buy America Requirement) to federally funded public “infrastructure projects” with the goal of increasing a resilient domestic supply chain and manufacturing supply for critical materials both for emerging and existing industries in the United States. The IIJA supports the Administration’s priority to use terms and conditions of federal financial assistance awards to maximize use of domestically produced goods, products, and materials consistent with Executive Order 14005. Per Section 70914 of the IIJA, Agencies may not obligate funds for an “infrastructure project” unless all of the iron, steel, manufactured products, and construction materials used in the infrastructure project are produced in the United States.

The Office of Management and Budget (OMB) Memorandum M-22-11 provides Agency implementation guidance on the application of a Buy America Requirement in financial assistance programs and awards.

**What guidance is included in this FAL?****I. Definitions**

**Components** are defined as the articles, materials, or supplies incorporated directly into the end manufactured product(s).

**Construction Materials** are an article, material, or supply—other than an item primarily of 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 used in an infrastructure project and 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, drywall, coatings (paints and stains), optical fiber, clay brick; composite building materials; or engineered wood products.

**Covered** – for purposes of this guidance, “covered” means that it meets all the requirements necessary for the Domestic Content Procurement Preference Requirement to apply. For example, a “covered award” refers to an award which meets the requirements for application of the Domestic Content Procurement Preference Requirement.

**Domestic Content Procurement Preference Requirement** – means a requirement that no amounts made available through a program for federal financial assistance may be obligated for an infrastructure project unless—

- (A) all iron and steel used in the project are produced in the United States;
- (B) the manufactured products used in the project are produced in the United States; or
- (C) the construction materials used in the project are produced in the United States.

Also referred to as the **Buy America Requirement**.

**Infrastructure** includes, at a minimum, the structures, facilities, and equipment located in the United States, for: roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and generation, transportation, and distribution of energy -including electric vehicle (EV) charging.

The term “infrastructure” should be interpreted broadly, and the definition provided above should be considered as illustrative and not exhaustive.

**Manufactured Products** are items used for an infrastructure project made up of components that are not primarily of iron or steel; construction materials; cement and cementitious materials’ aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.

**Non-Federal Entity** includes States, Local Governments, Territories, Indian Tribes, Institutions of Higher Education (IHEs), and Non-Profit Organizations. **NOTE:** for purposes of this guidance, in accordance with guidance provided in by OMB in Memorandum M-22-11, For-Profit Entities are not included in this definition when applying the statutory Buy America Requirement to Prime Recipients of DOE awards. See Section II.B.3 Applicable Non-Federal Entities for more information.

**Primarily of iron or steel** means greater than 50% iron or steel, measured by cost.

**Project** means the construction, alteration, maintenance, or repair of infrastructure in the United States.

**Public** – For purposes of this guidance, infrastructure should be considered “public” if it is: (1) publicly owned or (2) privately owned but utilized primarily for a public purpose. Infrastructure should be considered to be “utilized primarily for a public purpose” if it is privately operated on behalf of the public or is a place of public accommodation. The Buy America Requirement does not apply to non-public infrastructure.

## II. Buy America Requirement

### A. REQUIREMENTS

The following information provides details on the Domestic Content Procurement Preference Requirement (Buy America Requirement) established in the Build America, Buy America Act (BABA) of the IIJA, with further implementation guidance provided to Agencies by the OMB in Memorandum M-22-11.

Effective for all DOE awards made or funded after May 14, 2022, “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.”

Subawards shall conform to the terms and conditions of the federal award from which they flow, regardless of the sub-awardee entity type.

DOE is responsible for processing and approving Buy America Requirement waiver requests submitted by the Prime Recipient in accordance with the process outlined in Section III and any guidance provided by OMB.

## **B. APPLICABILITY**

The Buy America Requirement is applicable to new and renewal awards made by DOE on or after May 14, 2022, that contain infrastructure projects, and to existing awards that contain infrastructure projects if additional funds are provided in a modification executed on or after May 14, 2022. These awards must contain the *Buy America Requirement for Infrastructure Projects* term and condition (see Section V) requiring use of domestically produced iron, steel, manufactured products, and construction materials in the infrastructure project.

Any funding modification (continuation award, supplemental award, or any other incremental or additional funding modification) made on or after May 14, 2022, to an existing award (those awards made prior to May 14, 2022, to applicable Non-Federal Entities) containing an infrastructure project must also incorporate the *Buy America Requirement for Infrastructure Projects* term and condition (see Section V, also referred to as the Buy America Requirement term and condition) into that award with that modification.

In accordance with OMB Memo M-22-11, For-Profit Entities are not considered a Non-Federal Entity when applying the Buy America Preference to prime awards and therefore are not statutorily required to have the Buy America Requirement term and condition included in their award for or containing infrastructure projects. However, when the Buy America Requirement term and condition is included in an award, the Buy America Requirement flows down to all sub-awards for work performed under the infrastructure project regardless of the sub-awardee's entity type, including For-Profit Entities. This means if a For-Profit Entity is a Prime Recipient, and its award does not contain the Buy America Requirement term and condition then there is no Buy America Requirement to flow down to sub-awardees. However, if the Prime Recipient is a Non-Profit Organization and its award contains the Buy America Requirement term and condition then the Buy America Requirement will flow down to all sub-awardees including For-Profit Entities.

All FOAs issued on or after May 14, 2022, must contain the *Buy America Requirement for Infrastructure Projects* provision (See Section IV, also referred to as the Buy America Requirement provision) to make applicants aware of the Buy America Requirement for infrastructure projects. Any FOAs issued between May 14, 2022 and the date the FAL was issued must be amended to add the Buy America Requirement provision.

The Buy America Requirement does not apply to expenditures for assistance authorized for Disaster Relief and Emergency Assistance. Consult your program's cognizant legal counsel if you think this exception might apply.

Also, if it is determined that no DOE or Recipient cost-share funds under an award will be used for an infrastructure project, the Buy America Requirement does not apply to that award. Similarly, the Buy America Requirement does not apply to non-infrastructure spending under an award that also includes an infrastructure project.

## **1. Award Types**

DOE award types that must have the Buy America Requirement include any of the following types of financial assistance awards that include construction, alteration, maintenance, or repair of infrastructure in the United States:

- Grants
- Cooperative agreements
- Non-cash contributions or donations of property
- Direct assistance
- Loans
- Loan guarantees
- Other types of financial assistance (Technology Investment Agreements)

**NOTE:** Section 70914 of the IIJA expanded the definition of federal financial assistance to include “all expenditures by a Federal agency to a non-Federal entity for an infrastructure project.”

When the Buy America Requirement term and condition is included in an award, the Buy America Requirement flows down to all sub-awards regardless of the sub-awardee's entity type, including For-Profit Entities. See 3. Applicable Entities below for more information.

## **2. Projects (Infrastructure Projects)**

The applicable projects are awards for, or awards that contain, construction, alteration, maintenance, or repair of public infrastructure in the United States. Infrastructure includes, at a minimum, the structures, facilities, and equipment located in the United States for:

- roads, highways, and bridges;
- public transportation;
- dams, ports, harbors, and other maritime facilities;
- intercity passenger and freight railroads;

- freight and intermodal facilities;
- airports;
- water systems, including drinking water and wastewater systems;
- electrical transmission facilities and systems;
- utilities;
- broadband infrastructure;
- buildings and real property; and
- generation, transportation, and distribution of energy - including electric vehicle (EV) charging.

The Buy America Requirement does not apply to non-public infrastructure. For purposes of this guidance, when determining if an infrastructure project is public, DOE must consider whether the infrastructure project is: (1) publicly owned or (2) privately owned but utilized primarily for a public purpose. Infrastructure should be considered to be “utilized primarily for a public purpose” if it is privately operated on behalf of the public or is a place of public accommodation.

The above must be considered when determining whether an infrastructure project is public as opposed to just considering if the infrastructure project is privately owned and not open to the public.

**NOTE:** The Buy America Requirement does not apply to non-public infrastructure therefore, projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project.

### 3. Applicable Non-Federal Entities

The Buy America Requirement is applicable to the following Non-Federal Entity Prime Recipients:

- States
- Local Governments
- Institutions of Higher Education (IHE)
- Nonprofit Organizations
- Territories of the US
- Indian Tribes

**NOTE:** Consultation with the Indian Tribe(s) is necessary before applying a Buy America Preference to a covered program, award or project that will affect the Indian Tribe(s).

- **For-Profit Entities**

**NOTE:** For the purposes of this guidance the Buy America Requirement does not statutorily apply to Prime Recipients that are For-Profit Entities and therefore the Buy America term and condition should not be included in an award to the For-Profit Entity. However, the Buy America Requirement is applicable to a For-Profit Entity if: (1) it is a sub-recipient or sub-awardee under an award that contains the Buy America Requirement term and condition, or (2) it is the Prime Recipient that voluntarily chooses to use domestically sourced iron, steel, manufactured products, and constructions materials by stating so in the proposed infrastructure project and its award contains a Buy America Requirement term and condition.

The Prime Recipient is responsible for flowing the Buy America Requirement down to the For-Profit in its subawards when the For-Profit Entity is a sub-recipient or sub-awardee under a covered award. The CO is responsible for including a Buy America Requirement term and condition in the prime award to the For-Profit Entity when the domestically sourced requirement for iron, steel, manufactured products, and constructions materials in the proposed infrastructure project was successfully negotiated into the award.

This guidance does not alter independent statutory authorities that DOE may have to include domestic content requirements in financial assistance awards issued to For-Profit Entities.

#### **4. Applicable Items**

The Buy America Requirement only applies to the iron, steel, manufactured products, and construction materials used for the construction, alteration, maintenance, or repair of public infrastructure in the United States under an applicable award when those items are consumed in, incorporated into, or permanently affixed to the infrastructure.

All iron and steel, manufactured products, and construction materials used in the infrastructure project must be produced in the United States.

#### **Produced in the United States:**

- a. For **iron and steel** this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- b. For **manufactured products** this means:
  - i. the manufactured product was manufactured in the United States;  
**and**



- ii. 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.
- c. For **construction materials** this means all manufacturing processes for the construction material occurred in the United States.

**NOTE:** The Buy America Requirement does not apply to non-infrastructure expenditures under an applicable award that also includes an infrastructure project, nor does it apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of or permanently affixed to the infrastructure.

It also does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project.

### **III. Buy America Requirement Waiver**

#### **A. Types of waivers**

DOE may waive the application of a Buy America Requirement under an infrastructure program or project/award in any case in which it determines that:

1. Applying the domestic content procurement preference would be inconsistent with the public interest ("**Public Interest waiver**");
2. The types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality ("**Non-Availability waiver**"); or
3. 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 ("**Unreasonable Cost waiver**").

#### **B. Request**

Recipient requests to waive the application of the Buy America Requirement must be submitted in writing to the CO in accordance with the terms and conditions of the award.

Waivers must be based on one of the following justifications:

1. **Public Interest** – Applying the Buy America Preference would be inconsistent with the public interest;
2. **Non-Availability** – The types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or
3. **Unreasonable Cost** – 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.

Written requests to waive the Buy America Preference must include the following:

- Waiver type (Public Interest, Non-Availability, or Unreasonable Cost);
- Recipient name and Unique Entity Identifier (UEI);
- Award information (Federal Award Identification Number, Assistance Listing number);
- A brief description of the project, its location, and the specific infrastructure involved;
- Total estimated project cost, with estimated federal share and Recipient cost share breakdowns;
- Total estimated infrastructure costs, with estimated federal share and Recipient cost share breakdowns;
- List and description of iron or steel item(s), manufactured goods, and/or construction material(s) the Recipient seeks to waive from the Buy America Requirement, including name, cost, quantity(ies), country(ies) of origin, and relevant Product Service Codes (PSC) and North American Industry Classification System (NAICS) codes for each;
- A detailed justification as to how the non-domestic item(s) is/are essential the project;
- A certification that the Recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and non-proprietary communications with potential suppliers;
- A justification statement—based on one of the applicable justifications outlined above—as to why the listed items cannot be procured domestically, including the due diligence performed (e.g., market research, industry outreach, cost analysis, cost-

benefit analysis) by the Recipient to attempt to avoid the need for a waiver. This justification may cite, if applicable, the absence of any Buy America-compliant bids received for domestic products in response to a solicitation; and

- Anticipated impact to the project if no waiver is issued.

The Recipient must consider using the following principles as minimum requirements contained in their waiver request:

- **Time-limited:** Consider a waiver constrained principally by a length of time, rather than by the specific project/award to which it applies. Waivers of this type may be appropriate, for example, when an item that is “non-available” is widely used in the project. When requesting such a waiver, the Recipient should identify a reasonable, definite time frame (e.g., no more than one to two years) designed so that the waiver is reviewed to ensure the condition for the waiver (“non-availability”) has not changed (e.g., domestic supplies have become more available).
- **Targeted:** Waiver requests should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) as necessary and justified. Waivers should not be overly broad as this will undermine domestic preference policies.
- **Conditional:** The Recipient may request a waiver with specific conditions that support the policies of IIJA/BABA and Executive Order 14017.

DOE may request, and the Recipient must provide, additional information for consideration of this waiver. DOE’s final determination regarding approval or rejection of the waiver request may not be appealed.

### C. Review

DOE must review the Recipient’s Buy America Requirement waiver request to determine whether to grant a project waiver for those covered items listed in the request. DOE may reject or grant waivers in whole or in part depending on its review, analysis, and/or feedback from OMB or the public. Waiver requests are subject to CO review, DOE Office of Contract Management, Field Assistance and Oversight Division’s Business Clearance review (BC or MA-621), OMB review, and a public comment period of no less than 15 calendar days. The waiver request review and public comment process can take up to 90 days.

For NNSA, contact NNSA at (505) 845-4337 to get information on how to submit NNSA Recipient waiver requests for NNSA review. NNSA waiver requests are subject to OMB review and a public comment period of no less than 15 calendar days.

## **1. CO Review**

The CO must review the Recipient's waiver request (including the market research, cost-benefit analysis, cost comparisons, PSCs and NAICS) to ensure that the Recipient provided all the information required by the term and condition of the award and that the information regarding the award and Recipient are correct.

The CO, in consultation with the Program Office, must create a Business Clearance Review (BCR) package (Waiver Package) that includes the Recipient's waiver request, the CO and Program Office's detailed description of their due diligence performed in reviewing the waiver request, and a recommendation for the waiver based on their due diligence. The description should provide the details on what market research and analysis the CO and Program Office performed on the requested waiver items and the Recipient's waiver justifications and certifications to support the request. In performance of their due diligence, the CO may request, and the Recipient must provide, additional information for consideration of this waiver.

Any questions the CO has regarding the contents of the BCR waiver package should be sent to the cognizant MA-621 analyst.

The CO must follow their local procedures for routing documents for BCR.

If, as a result of performing due diligence, the CO determines that DOE cannot recommend the waiver, the CO should promptly notify the Recipient of the rejected waiver request and provide the details of the due diligence to include any domestic sources found.

## **2. BC Initial Review - MIA SAO Initial Approval**

BC reviews the Waiver Package and requests the Made In America Senior Accountable Official's (MIA SAO) approval to submit it to OMB for its preliminary review.

BC must review the package and the due diligence performed by the CO and Program Office to ensure that sufficient information

and analysis has been provided and documented to support the waiver request and that it is consistent with the BABA laws and policy.

BC may request additional information from the CO regarding their review of the Waiver Package, including any due diligence they performed.

If BC determines that sufficient information has been provided and no additional information is needed, the package is forwarded to the MIA SAO to determine if it is consistent with the BABA law and policy.

If the MIA SAO determines that the package is consistent with the BABA law and policy, BC will submit the waiver to OMB for its preliminary review.

### **3. OMB Preliminary Review**

BC sends the waiver to OMB prior to posting for public comment for a preliminary policy review to ensure there is sufficient information in the waiver to determine if the waiver is consistent with BABA policy and if it has sufficient information provided in it for public comment.

When BC receives OMB's feedback, they will inform the CO if the waiver can be posted on the DOE BABA website for public comment or if OMB has comments and requests more information on the waiver request. The CO will work with BC to address any OMB comments or additional information requests.

The waiver cannot be posted for public comment on the DOE BABA website until OMB has made a determination on the content of the waiver.

### **4. Public Review and Comment Period**

Once OMB has performed a preliminary review and determines that the waiver is consistent with law and policy and contains enough information for public comment, the CO must post the waiver on the DOE BABA website located at <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests> for 15 calendar days to get public comment and feedback on the waiver request.

## **5. CO Adjudication of Comments**

The CO, in coordination with the Program Office and, if necessary, the Recipient, must prepare a summary of all public comments received and the adjudication of those comments.

The CO must prepare and submit to BC a Memo to the File (MTF) describing the results of the public comments. It must also include the CO/Program Office's changes, if necessary, to the waiver as a result of the adjudication and their recommendation (approval or dismissal) on the waiver.

## **6. BC Final Review**

BC must review the MTF to ensure the adjudication of public comments align with BABA law and policy, and support the recommendation provided by the CO/Program Office.

BC prepares the Waiver Package (to include the MTF) for the MIA SAO's final review and decision on the request.

If the due diligence, justifications, certifications, and adjudication of public comments support issuance of a waiver, the MIA SAO will approve the waiver request to be sent to OMB for their final policy/legal determination. BC will submit the waiver request and any supporting documents required to OMB.

If the due diligence, justifications, certifications, and mitigation of public comments does not support issuance of a waiver, MIA SAO will dismiss the waiver request. BC will promptly inform the CO of this decision so the CO can provide the specific details to the Recipient.

## **7. OMB Final Review**

BC must submit to OMB the proposed waiver for review after the public comment period has concluded. OMB will review the proposed waiver to determine if it is consistent with applicable law and policy and will notify BC/MIA SAO of its determination.

BC will promptly notify the CO if OMB requires additional information in its review of the waiver request.

**D. Issuance**

After OMB completes their final determination and does not object to the waiver request, the waiver becomes finalized, and BC notifies the CO.

The CO must notify the Recipient and modify the award to include the specific details of the approved waiver (waiver items, timeline, other details in the waiver). All waiver documentation must be included in the award file.

The waiver must be posted, and the status must be updated on the DOE BABA website <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests>.

**IV. Funding Opportunity Announcement Provision**

**Include the following Buy America Requirement provision in Section IV, Application and Submission Information:**

**Buy America Requirement for Infrastructure Projects**

Awards funded through this FOA that are for, or contain, construction, alteration, maintenance, or repair of public infrastructure in the United States undertaken by applicable recipient types, require that:

- All iron, steel, and manufactured products used in the infrastructure project are produced in the United States; and
- All construction materials used in the infrastructure project are manufactured in the United States.

Applicants should consult Appendix X of this FOA to determine whether the Buy America Requirement applies and if they should consider the application of the Buy America Requirement in the proposed project's budget and/or schedule.

**Include the following language in Technical Volume Content Requirements under Description for Project Objectives or Workplan:**

- Buy America Requirement for Infrastructure Projects: Within the first 2 pages of the proposed workplan or project description, include a short statement on whether the project will involve the construction, alteration, maintenance and/or repair of public infrastructure in the United States. See Appendix X for applicable definitions and other information regarding Infrastructure Projects and the Buy America Requirement.

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Include the following Buy America Requirement provision guidance/information as an Appendix to the FOA:

**APPENDIX X – BUY AMERICA REQUIREMENT FOR INFRASTRUCTURE PROJECTS**

**REQUIRED USE OF IRON, STEEL, MANUFACTURED PRODUCTS, AND CONSTRUCTION MATERIALS PRODUCED IN THE UNITED STATES**

**A. Definitions**

For purposes of the Buy America Requirement, the following definitions apply:

**Components** are defined as the articles, materials, or supplies incorporated directly into the end manufactured product(s).

**Construction Materials** are an article, material, or supply—other than an item primarily of 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 used in an infrastructure project and 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, drywall, coatings (paints and stains), optical fiber, clay brick; composite building materials; or engineered wood products.

**Domestic Content Procurement Preference Requirement** – means a requirement that no amounts made available through a program for federal financial assistance may be obligated for an infrastructure project unless—

- (A) all iron and steel used in the project are produced in the United States;
- (B) the manufactured products used in the project are produced in the United States; or
- (C) the construction materials used in the project are produced in the United States.

Also referred to as the **Buy America Requirement**.

**Infrastructure** includes, at a minimum, the structures, facilities, and equipment located in the United States, for: roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and generation, transportation, and distribution of energy—including electric vehicle (EV) charging.

The term “infrastructure” should be interpreted broadly, and the definition provided above should be considered as illustrative and not exhaustive.



**Manufactured Products** are items used for an infrastructure project made up of components that are not primarily of iron or steel; construction materials; cement and cementitious materials' aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.

**Primarily of iron or steel** means greater than 50% iron or steel, measured by cost.

**Project** – means the construction, alteration, maintenance, or repair of infrastructure in the United States.

**Public** – The Buy America Requirement does not apply to non-public infrastructure. For purposes of this guidance, infrastructure should be considered “public” if it is: (1) publicly owned or (2) privately owned but utilized primarily for a public purpose. Infrastructure should be considered to be “utilized primarily for a public purpose” if it is privately operated on behalf of the public or is a place of public accommodation.

### **B. Buy America Requirement for Infrastructure Projects (Buy America Requirement)**

None of the award funds (includes federal share and Recipient cost share) may be used for a project for infrastructure unless:

- (1) all iron and steel used in the project is 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 products 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; and
- (3) all construction materials<sup>1</sup> are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The Buy America Requirement only apply to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does the Buy America Requirement apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project.

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<sup>1</sup> Excludes cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

The Buy America Requirement does not statutorily apply to Prime Recipients that are For-Profit Entities. However, the Buy America Requirement is applicable to a For-Profit Entity if: (1) it is a sub-recipient or sub-awardee under an award that contains the Buy America Requirement term and condition, or (2) it is the Prime Recipient that voluntarily chooses to use domestically sourced iron, steel, manufactured products, and constructions materials by stating so in its proposed application containing an infrastructure project. If the For-Profit Entity specifically states that it will comply with the Buy America Requirements in its application and it is selected for award, its award will contain a *Buy America Requirement for Infrastructure Projects* term and condition.

The Prime Recipient is responsible for flowing the Buy America Requirement down to all sub-awards, all contracts, subcontracts, and purchase orders for work performed under the proposed infrastructure project, including to For-Profit Entities when the For-Profit Entity is a sub-recipient or sub-awardee.

Recipients must certify or provide equivalent documentation for proof of compliance that a good faith effort was made to solicit bids for domestic products used in the infrastructure project under this award.

Recipients must also maintain certifications or equivalent documentation for proof of compliance that those articles, materials, and supplies that are consumed in, incorporated into, affixed to, or otherwise used in the infrastructure project, not covered by a waiver or exemption, are produced in the United States. The certification or proof of compliance must be provided by the suppliers or manufacturers of the iron, steel, manufactured products and construction materials and flow up from all subawardees, contractors and vendors to the recipient. Recipients must keep these certifications with the award/project files and be able to produce them upon request from DOE, auditors or Office of Inspector General.

### **C. DOE Submission Requirements for Full Application**

Within the first two pages of the workplan or project description, applicants must provide a short statement on whether the project will involve the construction, alteration, maintenance and/or repair of infrastructure in the United States. The ultimate determination about whether a project includes infrastructure remains with DOE, but the applicant's statement will assist project planning and integration of the Buy America Requirement, which may impact the project's proposed budget and/or schedule.

### **D. Waivers**

In limited circumstances, DOE may waive the application of the Buy America Requirement in an award where DOE determines that:

- (1) applying the Buy America requirements would be inconsistent with the public interest (Public Interest);

(2) the types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (Non-Availability); or

(3) 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 (Unreasonable Cost).

DOE will only process waiver requests after an award has been made and for which the requests have been submitted in accordance with the term and conditions of the award. Waiver requests must be reviewed by DOE and the Office of Management and Budget's Made in America Office and are subject to a public comment period of no less than 15 calendar days.

DOE or OMB may request additional information for consideration of the waiver. DOE may reject or grant waivers in whole or in part depending on its review, analysis, and/or feedback from OMB or the public. DOE's final determination regarding approval or rejection of the waiver request may not be appealed by a Recipient.

Requests to waive the Buy America Requirement must include the following:

- Waiver type (Public Interest, Non-Availability, or Unreasonable Cost);
- Recipient name and Unique Entity Identifier (UEI);
- Award information (Federal Award Identification Number, Assistance Listing number);
- A brief description of the project, its location, and the specific infrastructure involved;
- Total estimated project cost, with estimated federal share and recipient cost share breakdowns;
- Total estimated infrastructure costs, with estimated federal share and recipient cost share breakdowns;
- List and description of iron or steel item(s), manufactured goods, and/or construction material(s) the recipient seeks to waive from the Buy America Requirement, including name, cost, quantity(ies), country(ies) of origin, and relevant Product Service Codes (PSC) and North American Industry Classification System (NAICS) codes for each;
- A detailed justification as to how the non-domestic item(s) is/are essential to the project;
- A certification that the recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and non-proprietary communications with potential suppliers;
- A justification statement—based on one of the applicable justifications outlined above—as to why the listed items cannot be procured domestically, including the due diligence performed (e.g., market research, industry outreach, cost analysis, cost-benefit analysis) by the recipient to attempt to avoid the need for a waiver. This justification may cite, if applicable, the absence of any Buy

America-compliant bids received for domestic products in response to a solicitation; and

- Anticipated impact to the project if no waiver is issued.

The following principles should be incorporated as minimum requirements in waiver request:

- Time-limited: Consider a waiver constrained principally by a length of time, rather than by the specific project/award to which it applies. Waivers of this type may be appropriate, for example, when an item that is “non-available” is widely used in the project. When requesting such a waiver, the recipient should identify a reasonable, definite time frame (e.g., no more than one to two years) designed so that the waiver is reviewed to ensure the condition for the waiver (“non-availability”) has not changed (e.g., domestic supplies have become more available).
- Targeted: Waiver requests should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) as necessary and justified. Waivers should not be overly broad as this will undermine domestic preference policies.
- Conditional: The recipient may request a waiver with specific conditions that support the policies of IIJA/BABA and Executive Order 14017.

## V. Award Term and Condition

### Prescription:

**This term must be included in awards that the program office has determined, or the applicant has stated, contain infrastructure projects or activities. This term should not be included in prime awards made to For-Profit Entities unless the For-Profit Entity, through its proposal or negotiation, has agreed to the Buy America Requirement.**

## Term XX. Buy American Requirement for Infrastructure Projects

### A. Definitions

**Components** are defined as the articles, materials, or supplies incorporated directly into the end manufactured product(s).

**Construction Materials** are an article, material, or supply—other than an item primarily of 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 used in an infrastructure project and 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, drywall, coatings (paints and stains), optical fiber, clay brick; composite building materials; or engineered wood products.

**Domestic Content Procurement Preference Requirement-** means a requirement that no amounts made available through a program for federal financial assistance may be obligated for an infrastructure project unless—

- (A) all iron and steel used in the project are produced in the United States;
- (B) the manufactured products used in the project are produced in the United States; or
- (C) the construction materials used in the project are produced in the United States.

Also referred to as the **Buy America Requirement**.

**Infrastructure** includes, at a minimum, the structures, facilities, and equipment located in the United States, for: roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and generation, transportation, and distribution of energy -including electric vehicle (EV) charging.

The term “infrastructure” should be interpreted broadly, and the definition provided above should be considered as illustrative and not exhaustive.

**Manufactured Products** are items used for an infrastructure project made up of components that are not primarily of iron or steel; construction materials; cement and cementitious materials’ aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.

**Primarily of iron or steel** means greater than 50% iron or steel, measured by cost.

**Project-** means the construction, alteration, maintenance, or repair of infrastructure in the United States.

**Public-** The Buy America Requirement does not apply to non-public infrastructure. For purposes of this guidance, infrastructure should be considered “public” if it is: (1) publicly owned or (2) privately owned but utilized primarily for a public purpose. Infrastructure should be considered to be “utilized primarily for a public purpose” if it is privately operated on behalf of the public or is a place of public accommodation.

#### **B. Buy America Requirement**

None of the funds provided under this award (federal share or recipient cost-share) may be used for a project for infrastructure unless:

1. All iron and steel used in the project is 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 products 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; and
3. All construction materials are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The Buy America Requirement only applies to articles, materials, and supplies that are consumed in, incorporated into, or permanently affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought into the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America Requirement apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project.

Recipients are responsible for administering their award in accordance with the terms and conditions, including the Buy America Requirement. The recipient must ensure that the Buy America Requirement flows down to all subawards and that the subawardees and subrecipients comply with the Buy America Requirement. The Buy America Requirement term and condition must be included all sub-awards, contracts, subcontracts, and purchase orders for work performed under the infrastructure project.

#### *C. Certification of Compliance*

Recipients must certify or provide equivalent documentation for proof of compliance that a good faith effort was made to solicit bids for domestic products used in the infrastructure project under this award.

Recipients must also maintain certifications or equivalent documentation for proof of compliance that those articles, materials, and supplies that are consumed in, incorporated into, affixed to, or otherwise used in the infrastructure project, not covered by a waiver or exemption, are produced in the United States. The certification or proof of compliance must be provided by the suppliers or manufacturers of the iron, steel, manufactured products and construction materials and flow up from all subawardees, contractors and vendors to the recipient. Recipients must keep these certifications with the award/project files and be able to produce them upon request from DOE, auditors or Office of Inspector General.

#### *D. Waivers*

When necessary, recipients may apply for, and DOE may grant, a waiver from the Buy America Requirement. Requests to waive the application of the Buy America Requirement must be in writing to the CO. Waiver requests are subject to review by DOE and the Office of Management and Budget, as well as a public comment period of no less than 15 calendar days.

Waivers must be based on one of the following justifications:

1. Public Interest- Applying the Buy America Requirement would be inconsistent with the public interest;
2. Non-Availability- The types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or
3. Unreasonable Cost- 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.

Requests to waive the Buy America Requirement must include the following:

- Waiver type (Public Interest, Non-Availability, or Unreasonable Cost);
- Recipient name and Unique Entity Identifier (UEI);
- Award information (Federal Award Identification Number, Assistance Listing number);
- A brief description of the project, its location, and the specific infrastructure involved;
- Total estimated project cost, with estimated federal share and recipient cost share breakdowns;
- Total estimated infrastructure costs, with estimated federal share and recipient cost share breakdowns;
- List and description of iron or steel item(s), manufactured goods, and/or construction material(s) the recipient seeks to waive from the Buy America Preference, including name, cost, quantity(ies), country(ies) of origin, and relevant Product Service Codes (PSC) and North American Industry Classification System (NAICS) codes for each;
- A detailed justification as to how the non-domestic item(s) is/are essential the project;
- A certification that the recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and non-proprietary communications with potential suppliers;
- A justification statement—based on one of the applicable justifications outlined above—as to why the listed items cannot be procured domestically, including the due diligence performed (e.g., market research, industry outreach, cost analysis, cost-benefit analysis) by the recipient to attempt to avoid the need for a waiver. This justification may cite, if applicable, the absence of any Buy America-compliant bids received for domestic products in response to a solicitation; and
- Anticipated impact to the project if no waiver is issued.

The recipient should consider using the following principles as minimum requirements contained in their waiver request:

- **Time-limited:** Consider a waiver constrained principally by a length of time, rather than by the specific project/award to which it applies. Waivers of this type may be appropriate, for example, when an item that is “non-available” is widely used in the project. When requesting such a waiver, the Recipient should identify a reasonable, definite time frame (e.g., no more than one to two years) designed so that the waiver is reviewed to ensure the condition for the waiver (“non-availability”) has not changed (e.g., domestic supplies have become more available).
- **Targeted:** Waiver requests should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) as necessary and justified. Waivers should not be overly broad as this will undermine domestic preference policies.
- **Conditional:** The recipient may request a waiver with specific conditions that support the policies of IIJA/BABA and Executive Order 14017.

DOE may request, and the recipient must provide, additional information for consideration of this waiver. DOE may reject or grant waivers in whole or in part depending on its review, analysis, and/or feedback from OMB or the public. DOE's final determination regarding approval or rejection of the waiver request may not be appealed. Waiver requests may take up to 90 calendar days to process.