



Expires – Upon Issuance of LPP

## Modified Buy America Requirements

### I. BACKGROUND

Buy America requirements have been modified by the passage of the Build America Buy America Act (BABA) as part of the Infrastructure Investment and Jobs Act (IIJA) in November 2021. The new requirements will apply to all steel and iron products, and construction materials, supplied and permanently incorporated into a federal-aid project regardless of the funding source used to purchase the product and regardless of how the products were procured (i.e., agency furnished materials, materials added by change order, etc.).

These modified requirements were to take effect on May 14, 2022. However, a 180-day temporary waiver of the new Buy America requirements was granted for the addition of construction materials, extending the effective date to November 10, 2022. This Office Bulletin highlights the policy changes and provides guidance for implementation.

### II. POLICY

Once the temporary waiver expires on November 9, 2022, the Buy America requirements will be extended to construction materials in addition to the current steel and iron products. FHWA defines a construction material as an article, material, or supply that is considered 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 dry wall. Iron and steel used in precast concrete manufactured products must meet the Buy America requirements regardless of the amount used.

Specifically in California, iron and steel used in other manufactured products must meet the Buy America requirements if steel and iron components constitute 90 percent or more of the total weight of the manufactured product.

All projects authorized on or after November 10, 2022, must comply with the new Buy America requirements.

More information can be found at:

[https://admin.onramp.dot.ca.gov/downloads/admin/deputy\\_directives/DD-119.pdf](https://admin.onramp.dot.ca.gov/downloads/admin/deputy_directives/DD-119.pdf)

### III. PROCEDURE

Starting on November 10, 2022, Buy America requirements will apply to all steel and iron products, and construction materials supplied and permanently incorporated into a federal-aid project regardless of the funding source used to purchase the product and regardless of how the products were procured (i.e., agency furnished materials,



materials added by change order, etc.). While the new Buy America requirements on construction materials will not impact authorizations through November 9, 2022, it is strongly recommended that Local Public Agencies (LPAs) review the Office of Management and Budget Memorandum 22-11 (M-22-11) guidance to ensure compliance with the new Buy America requirements (downloadable at <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>).

LPAs that adopt Caltrans Standard Special Provisions (SSPs) must include a newly updated *SSP Section 6-1.04 BUY AMERICA* in their contracts reflecting the Buy America requirements on construction materials. LPAs that do not adopt Caltrans SSPs can use the language in Exhibit 12-G, Section 8 as guidance to update their current Buy America specifications.

**IV. APPLICABILITY / IMPACTS**

This Office Bulletin applies to all aspects of the Federal-aid program including, but not limited to, traffic operations, safety, geotechnical, and structural engineering. The following table lists the changes to the January 2022 LAPM and associated Exhibits that take effect with the publication of this Office Bulletin. Changes to the LAPM listed in the table will be incorporated into the January 2023 publication; changes to the Exhibit will be incorporated and released upon publication of this Office Bulletin.

Chapter Section / Exhibit	Changes that supersede current publications
<b>LAPM Chapter 12</b> Federal Contract Requirements	Section 12.8 Buy America revised language
<b>LAPM Chapter 16</b> Administer Construction Contracts	Section 16.11 Materials Requiring a Buy America Certification revised language
<b>Exhibit 12-G</b> Required Federal-Aid Contract Language	Section 8 – revised language.

Recommended: Original signature on file November 1, 2022  
 Kitae Nam, Policy Liaison Date

Approved: Original signature on file November 1, 2022  
 Tanzeeba Kishwar, Chief Date  
 Office of Guidance and Oversight

## Chapter 12 **Plans, Specifications & Estimate**

### **OFFICE BULLETIN #22-07**

## 12.8 Federal Contract Requirements

### Buy America

~~On all federal-aid construction projects, current regulations require that steel and iron used be made in the United States if federal dollars are used during any phase of the project (such as design, environmental, right-of-way or construction).~~

FHWA's policy for Buy America requires a domestic manufacturing process for all steel and iron products, and construction materials that are permanently incorporated in a federal-aid funded project. FHWA defines a construction material as an article, material, or supply that is considered 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. If one or more of these construction materials have been combined by a manufacturer with other materials through a manufacturing process, Buy America requirements do not apply unless otherwise specified.

Buy America provisions are also applicable to non-federal-aid funded projects, if:

- the non-federal-aid contract is included within the scope of the NEPA document, and
- at least one other contract within the scope of the same NEPA document is funded or will be funded with federal-aid funds. This includes any contract eligible for federal-aid assistance including but not limited to environmental, design, right-of-way, construction, etc.

When Buy America is applicable, the LPA must include Buy America provisions in their PS&E packages prior to advertising for bids and in its contracts. Awarding any such non-federal-aid highway contract, without applicable Buy America provisions would render all contracts within the scope of the NEPA document ineligible for federal-aid funds.

The Buy America provision also applies to all **foreign** steel and iron **materials** components of a manufactured product ~~regardless of the percentage of steel in the manufactured product~~ with at least 90 percent or more by weight of the product(s). Iron and steel used in precast concrete manufactured products must meet the Buy America requirements regardless of the amount used. All manufacturing processes involved in steel or iron products must occur within the United States. These processes include rolling, extruding, machining, bending, grinding, drilling, coating, welding and smelting. Domestically produced steel billets or iron ingots shipped overseas for any process and returned to the United States do not conform to this requirement.

Buy America provisions do not apply to:

- ~~Minimal use of all foreign material in which the total delivery cost to the project site is less than \$2500 or 0.1 percent of the contract amount, whichever is greater.~~
- Recycled steel.
- Raw materials, scrap temporary steel items such as sheet pilings, bridges, steel scaffolding and false work.
- Materials that remain in place at the contractor's convenience such as sheet pilings and forms.
- Pig iron and processed, pelletized, and reduced iron ore manufactured outside the United States.

Buy America requirements apply to all steel and iron products, and construction materials supplied and permanently incorporated into a federal-aid project regardless of the funding source used to purchase the product and regardless of how the products were procured (i.e., agency furnished materials, materials added by change order, etc.). The LPA must not list ~~an ineligible~~ non-domestic steel and iron products, or construction materials as nonparticipating in order to circumvent the Buy America requirements.

Typically, the need for Buy America waivers is identified during the early phases of the project. If the need for a waiver is identified during the design phase, the LPA must wait until the FHWA's Buy America waiver is approved before requesting PS&E approval. In the case of non-federally funded projects covered under the NEPA document, the LPA must wait for the FHWA's Buy America waiver approval to advertise the project for bids. If during construction, the LPA identifies the need for a Buy America waiver, the LPA must wait for FHWA's approval of the Buy America waiver to incorporate the material in the project. A request for a Buy America waiver does not guarantee FHWA's approval of the waiver request. The LPA must expeditiously contact their DLAE to discuss potential Buy America waivers.

~~A-~~The LPA may request a waiver of the Buy America requirement ~~by FHWA may be granted~~ for specific projects, ~~certain materials or specific~~ products, in specific geographical areas, or combinations of both if:

- Buy America is inconsistent with the public interest, or
- There is not a sufficient supply of domestic materials of satisfactory quality.

The LPA must submit their Buy America waiver request to the DLAE which will review the request and recommend to FHWA for further processing. The following supporting information must be provided by the LPA, but additional information may be requested during the waiver review period:

- Federal project number
- Project description
- Total construction project cost, including Federal, State, and Local share amounts
- Description of the waiver item(s)
- Cost of waiver item(s)
- Country of origin of the product(s) (if known at the time)
- Reasons for the waiver request
- A description of the efforts made by the LPA to locate domestically manufactured product(s)
- An analysis of re-design of the project using alternate or approved equal domestic product
- LPA's documentation of good faith efforts to maximize the use of domestic iron and steel products in accordance with U.S. President Executive Order 14005 Section 1 "Ensuring the Future is Made in All of America by All of America's Workers"

In addition to the Buy America waiver, the FHWA's Buy America policies allow the LPA to incorporate non-domestic steel or iron materials if any of the following methods is used:

- Minimal use of foreign steel and iron materials. If the cost of foreign steel and iron materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. The total cost of iron and steel includes the cost of the material plus the cost of transportation to the project site, but does not include labor costs involved in final assembly.
- Alternate bid provisions. The LPA elects to include alternate bid provisions for both, foreign and domestic steel and iron materials. The contract provisions must require all bidders to submit a bid based on furnishing domestic steel and iron materials, and clearly state that the contract will be awarded to the bidder who submits the lowest total bid based on furnishing domestic steel and iron materials unless such total bid is more than 25% higher than the total bid based on foreign steel or iron products. The comparison must be between the total lowest bid using domestic iron/steel product and the total lowest bid using foreign iron/steel product.

The LPA must coordinate with their DLAE prior to using the alternate bid provisions; the DLAE will coordinate with FHWA.

Approval authority for waiver of Buy America requirements has not been delegated from the FHWA to Caltrans, and therefore, is not delegated to the LPAs. The LPA should plan for a Buy America waiver request to take at least ~~six months~~ one year; however, longer timeframes for review and approval should be considered. Additionally, LPAs should be particularly careful not to specify, in the design process, items that are not Buy America compliant. Information on the Buy America waiver process can be found at: <http://www.fhwa.dot.gov/construction/contracts/waivers.cfm>.

After-the-fact discoveries of non-domestic materials incorporated in the project are not considered Buy America waivers. The LPA's failure to comply with Buy America provisions will result in the loss of federal funding for not only the applicable contract items, but likely all federal funding authorized for the construction phase of the project. In the event an after-the-fact discovery occurs, the LPA must expeditiously inform their DLAE, which will coordinate with FHWA to determine the appropriate resolution.

## Chapter 16 Administer Construction Contracts

### **OFFICE BULLETIN #22-07**

## 16.11 Quality Assurance Program

### Materials Requiring a Buy America Certification

Steel and iron products and construction materials permanently incorporated into the project must comply with Buy America requirements ~~of the~~ per 23 CFRs 635.410 and Section 70914 of the Build America, Buy America (BABA) Act. All steel and iron products must be delivered with a COC stating all manufacturing processes involved in the production of the products occurred within the United States. These processes include:

- Rolling
- Extruding
- Machining
- Bending
- Grinding
- Drilling
- Coating
- Welding
- Smelting

In addition to the COC requirements mentioned earlier in this section, a Buy America COC must also include the mill markings or heat numbers. All manufacturing processes for construction materials must occur in the United States. Contractors must provide certificates of compliance with each project delivery for all construction materials used for the projects. Manufacturer's certificate of compliance must identify where the construction material was manufactured and attest specifically to the Buy America compliance.

The Buy America requirements apply to the entire construction contract if any federal-aid money has been authorized for any phase of the project, not just the construction phase. This policy is applicable to all phases of a project (such as design, environmental, right-of-way or construction) covered under the National Environmental Policy Act (NEPA) document, regardless of the funding sources. Therefore, the LPA cannot circumvent the Buy America requirement by declaring that the material is being paid for with the non-federal portion of the funding.

Buy America does not apply to temporary materials not permanently incorporated into the project such as temporary steel ~~such as that~~ used in falsework, sheet piling or shoring. Buy America requirement does not apply to recycled steel nor pig iron and processed, pelletized, and reduced iron ore manufactured outside the United States. A minimal use of foreign iron and steel is allowed provided that ~~the total delivered cost to the project site is less than \$2,500.00 or 0.1 percent of the contract amount~~ the total cost of iron and steel products as delivered to the project site is less than \$2,500 or 0.1 percent of the total contract amount, whichever is greater. The LPA must track the amount of incorporated foreign steel and iron as the work proceeds to ensure that the minimal use threshold amount is not exceeded at any point in the contract. Once the cumulative value reaches the minimum threshold limit, then all additional installed materials must be of domestic origin. Supporting ~~invoices, including the cost of transportation,~~ documentation for this minimal use must be on file in the project records (i.e., invoices, including the cost of transportation).

After-the-fact discoveries of non-domestic materials incorporated in the project are not considered Buy America waivers. The LPA's failure to comply with Buy America provisions will result in the loss of federal funding for not only the applicable contract items, but likely will result in the loss of all federal funding authorized for the construction phase of the project. In the event an after-the-fact discovery occurs, the LPA must expeditiously inform their DLAE, who will coordinate with FHWA to determine the appropriate resolution.