



OMB Issues Final Guidance on “Buy America” Domestic Preference Requirements

August 24, 2023

On August 14, 2023, the Office of Management and Budget (OMB) released a pre-publication internet version of its [final guidance](#) on the implementation of the Build America, Buy America (BABA) provisions contained in the Infrastructure Investment and Jobs Act (IIJA; P.L. 117-58). The IIJA required OMB to provide guidance to federal agencies on how to apply the “Buy America” domestic preference requirements to federal financial assistance for infrastructure projects. OMB’s [final guidance](#) was published in the *Federal Register* on August 23, 2023, and will become effective October 23, 2023.

Background and Overview of Domestic Preference Laws

Federal domestic preference laws seek to support U.S. manufacturing by requiring use of domestically sourced products in certain situations. The Buy American Act of 1933, the Berry Amendment, and several other laws require that some goods purchased directly by the federal government be manufactured in the United States. Separately, several statutes and regulations originating in the 1970s, collectively known as Buy America, require that states, municipalities, and other recipients of federal awards for transportation and other types of infrastructure ensure domestic goods are used in their projects. Prior to the IIJA, Buy America requirements attached to federal funds in the provision of highways, public transportation, intercity passenger rail (e.g., Amtrak), aviation, and water and sewage construction.

Enacted on November 15, 2021, the IIJA expanded Buy America coverage to other types of infrastructure projects funded by federal awards, such as electric power transmission facilities and broadband infrastructure. The law also broadened Buy America product coverage to “construction materials” including nonferrous metals (e.g., copper used in electric wiring), plastic- and polymer-based products, glass (including optical fiber), and other materials (e.g., lumber, drywall). To be considered “produced in the United States” under the IIJA, [manufactured goods](#) other than iron and steel must contain greater than 55% domestic content. Some Buy America requirements that existed prior to the IIJA have higher thresholds. For example, 70% of the cost of public transportation rolling stock must be domestically produced. Despite these requirements, waivers may be granted in certain circumstances, including (1) public interest, (2) nonavailability, and (3) unreasonable cost.

Congressional Research Service

<https://crsreports.congress.gov>

IN12230

On February 9, 2023, OMB issued [proposed guidance](#) to support implementation of various aspects of the IJA's BABA provisions. The final guidance is informed by approximately 2,000 public comments. As affirmed by the final guidance, BABA's domestic preference requirements are exclusive to nonfederal projects that are funded, in part or in whole, with federal awards. BABA requirements do not apply to direct federal procurement, nor do they overhaul preexisting Buy America regimes.

Selected Elements of the Final Guidance

The final guidance would create a new section in the *Code of Federal Regulations* (Title 2, Part 184) and includes the requirements for construction materials, iron and steel products, and manufactured products to be considered domestic in origin. Although OMB's final guidance clarifies several issues raised by public commenters, some issues remain unresolved. Some of the provisions are discussed below.

- **Construction Materials.** In general, prior domestic preference laws did not address construction materials. Thus, BABA requirements applicable to such materials are new. The final guidance updates the list of construction materials to include “engineered wood” and clarifies that “fiber optic cable” includes “drop cable.” The final guidance also confirms that “all manufacturing processes” for construction materials must occur in the United States. OMB's April 2022 [initial guidance](#) specified that at least the final and immediately preceding manufacturing processes were to occur in the United States. The final guidance also explains how the “all manufacturing processes” standard should be satisfied for each individual construction material. For example, for nonferrous metals, all manufacturing processes—from initial smelting or melting through final shaping, coating, and assembly—must occur in the United States. For optical fiber, from the initial preform fabrication stage through the completion of the draw must occur in the United States. Non-listed construction materials, such as hot mix asphalt or wet concrete brought to the worksite for incorporation, are not restricted. Precast concrete, however, comprises components processed into a specific shape or form and is in such state when brought to the worksite and thus is considered a manufactured product.
- **Iron and Steel Products.** BABA's iron and steel requirements apply to products that are “predominantly” iron and steel. The final guidance states that *predominantly* means the cost of the iron and steel exceeds 50% of the total cost of all components. For iron and steel products, all manufacturing processes—from the initial melting stage through the application of coatings—must occur in the United States. The guidance also provides examples of iron or steel products to include “bar, billet, slab, wire, plate, or sheet, castings, or forgings” used in the manufacture of the finished good.
- **Manufactured Products.** OMB's final guidance defines *manufactured products* as articles, materials, or supplies that have been “(i) processed into a specific form and shape; or (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.” For the cost of components test of manufactured products, the final guidance's definition closely aligns with the cost of components [definition](#) of the Federal Acquisition Regulation. However, the final guidance replaces the term *contractor* with *manufacturer* and the term *end product* with *manufactured product*.
- **Domestic Preference and International Agreements.** Some commenters requested that OMB clarify how BABA requirements interact with U.S. obligations under international agreements. In its final guidance, OMB indicated that U.S. obligations under international agreements generally extend only to direct federal procurement and not to obligations imposed on nonfederal entities (e.g., state and local governments) through

- conditions on federal awards. OMB, however, reaffirmed in its initial guidance that if “a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest.” OMB’s Made in America Office also issued a [fact sheet](#) that discusses how the Trade Agreements Act of 1979 applies to both direct federal procurement under the Federal Acquisition Regulation and domestic preferences for federal financial assistance.

Author Information

Christopher D. Watson
Analyst in Industrial Organization and Business

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS’s institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.