

## **Congressional Notification**

OMB has concluded that the final guidance is not a “rule” within the meaning of 5 U.S.C. 804(3). Nevertheless, out of an abundance of caution, OMB is submitting it to each House of the Congress and to the Comptroller General consistent with the procedures set forth in 5 U.S.C. 801(a).

## **List of Subjects**

### **2 CFR Part 184**

Administration of Federal financial assistance, Administrative practice and procedure, Federal financial assistance programs

### **2 CFR Part 200**

Administration of Federal financial assistance, Administrative practice and procedure, Federal financial assistance programs

For the reasons stated in the preamble, the Office of Management and Budget amends 2 CFR subtitle A as follows:

1. Add part 184, consisting of §§ 184.1 through 184.8, to read as follows:

### **PART 184—BUY AMERICA PREFERENCES FOR INFRASTRUCTURE PROJECTS** **Sec.**

184.1 Purpose and policy.

184.2 Applicability, effective date, and severability.

184.3 Definitions.

184.4 Applying the Buy America Preference to a Federal award.

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184.7 Federal awarding agency’s issuance of a Buy America Preference waiver.

184.8 Exemptions to the Buy America Preference.

**Authority:** Pub. L. 117-58, 135 Stat. 429.

### **§ 184.1 Purpose and policy.**

- (a) **Purpose.** This part provides guidance to Federal awarding agencies on the implementation of the Buy America Preference applicable to Federal financial assistance set forth in Part I of Subtitle A, Buy America Sourcing Preferences, of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. 117-58) at division G, title IX, subtitle A, part I, sections 70911 through 70917.
- (b) **Policy.** The head of each Federal agency must ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States. *See* section 70914(a) of the Build America Buy America Act.

**§ 184.2 Applicability, effective date, and severability.**

- (a) **Non-applicability of this part to existing Buy America Preferences.** This part does not apply to a Buy America Preference meeting or exceeding the requirements of section 70914 of the Build America, Buy America Act applied by a Federal Awarding Agency to Federal awards for infrastructure projects before November 15, 2021.
- (b) **Effective date of this part.** The effective date of this part is [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Except as provided in paragraph (c), this part applies to Federal awards obligated on or after its effective date. Awards obligated on or after May 14, 2022, the effective date of the Build America, Buy America Act, and before the effective date of this part, are instead subject to OMB Memorandum M-22-11.

- (c) **Modified effective date of this part for certain infrastructure projects.** If an infrastructure project that has previously received a Federal award obligated on or after May 14, 2022, but before the effective date of this part receives an additional Federal award obligated within one year of the effective date of this part, the additional Federal award is subject to OMB Memorandum M-22-11. However, if significant design or planning changes are made to the infrastructure project, the Federal awarding agency may apply this part to the additional Federal award. Federal awards for an infrastructure project obligated after one year from the effective date of this part are subject to this part, regardless of whether this part applied to previous awards for the project.
- (d) **Severability.** The provisions of this part are separate and severable from one another. OMB intends that if a provision of this part is held to be invalid or unenforceable as applied to a particular person or circumstance, the provision should be construed so as to continue to give the maximum effect permitted by law as applied to other persons not similarly situated or to dissimilar circumstances. If any provision is determined to be wholly invalid and unenforceable, it should be severed from the remaining provisions of this part, which should remain in effect.

### **§ 184.3 Definitions.**

Acronyms used in this part have the same meaning as provided in § 200.0. Terms not defined in this part have the same meaning as provided in § 200.1. As used in this part:

**Build America, Buy America Act** means division G, title IX, subtitle A, parts I-II, sections 70901 through 70927 of the Infrastructure Investment and Jobs Act (Pub. L. 117-58).

**Buy America Preference** means the “domestic content procurement preference” set forth in section 70914 of the Build America, Buy America Act, which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States.

**Component** means an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: (i) a manufactured product; or, where applicable, (ii) an iron or steel product.

**Construction materials** means articles, materials, or supplies that consist of only one of the items listed in paragraph (1) of this definition, except as provided in paragraph (2). To the extent one of the items listed in paragraph (1) contains as inputs other items listed in paragraph (1), it is nonetheless a construction material.

(1) The listed items are:

- (i) Non-ferrous metals;
- (ii) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- (iii) Glass (including optic glass);

- (iv) Fiber optic cable (including drop cable);
- (v) Optical fiber;
- (vi) Lumber;
- (vii) Engineered wood; and
- (viii) Drywall.

(2) Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

**Infrastructure project** means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project. *See also* paragraphs (c) and (d) of § 184.4.

**Iron or steel products** means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.

**Manufactured products** means:

- (1) 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.
- (2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under § 184.4(e) and the definitions set forth in this section, then it is

not a manufactured product. However, an article, material, or supply classified as a manufactured product under § 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.

**Manufacturer** means the entity that performs the final manufacturing process that produces a manufactured product.

**Predominantly of iron or steel or a combination of both** means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.

**Produced in the United States** means:

- (1) In the case of iron or steel products, all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- (2) In the case of manufactured products:
  - (i) The 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

that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product. *See* § 184.2(a). The costs of components of a manufactured product are determined according to § 184.5.

- (3) In the case of construction materials, all manufacturing processes for the construction material occurred in the United States. *See* § 184.6 for more information on the meaning of “all manufacturing processes” for specific construction materials.

**Section 70917(c) materials** means cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. *See* section 70917(c) of the Build America, Buy America Act.

**§ 184.4 Applying the Buy America Preference to a Federal award.**

- (a) **Applicability of Buy America Preference to infrastructure projects.** The Buy America Preference applies to Federal awards where funds are appropriated or otherwise made available for infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the Federal award.
- (b) **Including the Buy America Preference in Federal awards.** All Federal awards with infrastructure projects must include the Buy America Preference in the terms and conditions. The Buy America Preference must be included in all subawards, contracts, and purchase orders for the work performed, or products supplied under the Federal award. The terms and conditions of a Federal award flow down to subawards

to subrecipients unless a particular section of the terms and conditions of the Federal award specifically indicate otherwise.

- (c) **Infrastructure in general.** Infrastructure encompasses public infrastructure projects in the United States, which includes, at a minimum, the structures, facilities, and equipment 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 structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.
- (d) **Interpretation of infrastructure.** The Federal awarding agency should interpret the term “infrastructure” broadly and consider the description provided in paragraph (c) of this section as illustrative and not exhaustive. When determining if a particular project of a type not listed in the description in paragraph (c) constitutes “infrastructure,” the Federal awarding agency should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public.
- (e) **Categorization of articles, materials, and supplies.** An article, material, or supply should only be classified into one of the following categories: (1) iron or steel



products; (2) manufactured products; (3) construction materials; or (4) section 70917(c) materials. An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the above-listed categories. The classification of an article, material, or supply as falling into one of the categories listed in this paragraph must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project. In general, the work site is the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated.

- (f) **Application of the Buy America Preference by category.** An article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified.

**§ 184.5 Determining the cost of components for manufactured products.**

In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following instructions:

- (a) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit.

Cost of components does not include any costs associated with the manufacture of the manufactured product.

**§ 184.6 Construction material standards.**

- (a) The Buy America Preference applies to the following construction materials incorporated into infrastructure projects. Each construction material is followed by a standard for the material to be considered “produced in the United States.”
- (1) **Non-ferrous metals:** All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
  - (2) **Plastic and polymer-based products:** All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
  - (3) **Glass:** All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
  - (4) **Fiber optic cable (including drop cable):** All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
  - (5) **Optical fiber:** All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.

- (6) **Lumber:** All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.
  - (7) **Drywall:** All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
  - (8) **Engineered wood:** All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.
- (b) Except as specifically provided, only a single standard under paragraph (a) should be applied to a single construction material.

**§ 184.7 Federal awarding agency’s issuance of a Buy America Preference waiver.**

- (a) **Justification of waivers.** A Federal awarding agency may waive the application of the Buy America Preference in any case in which it finds that:
- (1) Applying the Buy America Preference would be inconsistent with the public interest (a “public interest waiver”);
  - (2) 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 (a “nonavailability 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 infrastructure project by more than 25 percent (an “unreasonable cost waiver”).

- (b) **Requesting a waiver.** Recipients may request waivers from a Federal awarding agency if the recipient reasonably believes a waiver is justified under paragraph (a). A request from a recipient to waive the application of the Buy America Preference must be provided to the Federal awarding agency in writing. Federal awarding agencies must provide waiver request submission instructions and guidance on the format, contents, and supporting materials required for waiver requests from recipients.
- (c) **Before issuing a proposed waiver.** Before issuing a proposed waiver, the Federal awarding agency must prepare a detailed written explanation for the proposed determination to issue the waiver based on a justification listed under paragraph (a), including for waivers requested by a recipient.
- (d) **Before issuing a final waiver.** Before issuing a final waiver, the Federal awarding agency must:
- (1) Make the proposed waiver and the detailed written explanation publicly available in an easily accessible location on a website designated by the Federal awarding agency and the Office of Management and Budget;
  - (2) Except as provided in paragraph (e), provide a period of not less than 15 calendar days for public comment on the proposed waiver; and
  - (3) Unless the Director of OMB provides otherwise, submit the waiver determination to the Made in America Office in OMB for final review pursuant to Executive Order 14005 and section 70923(b) of the Build America, Buy America Act.
- (e) **Waivers of general applicability.** Waivers of general applicability mean waivers that apply generally across multiple Federal awards. A Federal agency must provide a period

of not less than 30 days for public comment on a proposal to modify or renew a waiver of general applicability.

**§ 184.8 Exemptions to the Buy America Preference.**

- (a) The Buy America Preference does not apply to “expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.”
- (b) “Pre and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are:
- (1) Authorized by statutes other than the Stafford Act, 42 U.S.C. §§ 5121 et seq., and
  - (2) Made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, 42 U.S.C. 5122(1), (2).

**PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS**

2. The authority citation for part 200 continues to read as follows:

**Authority:** [31 U.S.C. 503](#).

3. Amend § 200.322 by adding paragraph (c) to read as follows:

**§ 200.322 Domestic preferences for procurements.**

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(c) Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.

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