



Questions and Answers from the Buy America Provisions and IIJA Webinar

This document addresses questions that NEMA members submitted prior to the Buy America Provisions and IIJA webinar hosted by NEMA on March 2, 2022. For questions answered by Celeste Drake, Director of the Made in America Office, her responses are attributed below. Answers to all other questions were prepared collaboratively with NEMA consultants at Lot Sixteen.

Please note that some answers are still unknown due to the lack of guidance from the Made in America Office. Many questions were similar, and in those instances, they have been combined into one question because the answer is the same. Please note that no answers should be taken as formal legal advice.

1. How will DOT balance domestic manufacturing reshoring goals with the reality of international supply chains for certain technologies?

Answer: Celeste Drake explained that each agency and the Made in America Office will try to balance their goals of reshoring domestic manufacturing and completing projects quickly by phasing in any increased requirements and by reforming the waiver process. In addition, the Administration has shown a willingness to pay higher prices for critical components if they are made domestically.

Specifically, according to Ms. Drake, the Made in America Office understands that not everything will meet Buy America(n) on day one, but not all the money is going out the door on day one either. The focus is to create a market for when domestic manufacturers “are ready.”

2. Currently, the Buy America requirements of the Federal Highway Administration (FHWA) do not apply to manufactured products that are not “predominantly” made of iron or steel. Will this carve-out continue to apply for FHWA projects that are Infrastructure Act-funded, or will manufactured products need to meet the 55% domestic content requirement?

Answer: Existing carve-outs and waivers will be reviewed and will be included in a public comment process in the future.

3. What is your perspective on 100% of manufacturing value added (MVA) being classified as domestic content? (FYI: Many of our members who procure components offshore perform integration, assembly, and testing in the US, and this should be

classified as adding domestic content to manufactured products and account for Buy America requirements.)

Answer: According to Ms. Drake, MVA requirements may change, but current rules require all iron and steel to be 100 percent manufactured in the US, and these rules are up for review as a part of the process led by the Made in America Office.

- 4. How far down into the equipment bill of materials do Buy America requirements apply? (FYI: We know that many of the subcomponents such as semiconductors, and chips are not made in the US. Ideally, the rules should avoid determining the origin of these subcomponents that are integrated into larger domestically manufactured components.)**

Answer: Ms. Drake replied that the Department of Transportation has mentioned that they did not know where the weak links were in the past. They are using IIJA as an opportunity for them to assess what needs to be made domestically.

- 5. Can you clarify which offices have to meet Buy America requirements and those who have to meet Buy American (i.e., ports) requirements? And what are the primary differences between the two differing requirements?**

Answer: Please refer to the NEMA Buy America vs Buy American Comparison Chart, which was sent in addition to this document.

- 6. How could the DOT/FHWA provide clear rules governing domestic content requirements, including guidelines across all funding and procurement programs? How could they then be applied across the various states?**

Answer: According to Ms Drake, DOT and the Made in America Office are collaborating on cohesive guidance that will be released later this year, likely in May.

- 7. In the calculating of domestic content, will the Made in America guidelines include both the cost of domestic components/materials and domestic labor?**

Answer: According to the Made in America Office, the current calculation for domestic content, which currently only includes the costs of domestic components, not the domestic labor cost associated with integrating components into final products, will be evaluated.

- 8. Given the limited waivers offered under the IIJA statute and absence of COTS, commercial IT, fire and safety exclusion, and most Trade Agreements Act allowances, what challenges does your office see in implementing the Buy America requirements across federal agencies given the proposed speed of implementation?**

Answer: The Made in America Office acknowledges that not everything will meet the new requirements from the start and points out that not all the funding will be distributed in the first year either. They explain that any new changes will be phased in over the funding years and

not all at once, allowing time for an efficient transition. An example of this can be found in the new Buy American federal procurement [announcement](#) made on Friday, March 4, which increases the requirements in three stages.

9. Are there any federal incentives available for companies that use American-made components in product development?

Answer: Incentives will not come from the Made In America Office but from other pieces of legislation such as the US Innovation and Competitiveness Act of 2021 and the Build Back Better Act, which include incentives for new domestic manufacturing. However, the IJJA provides some additional funding at DOE for certain types of domestic manufacturing. The Made in America Office is only responsible for making the domestic market attractive through the deployment of enhanced infrastructure.

10. When Buy American was announced, there was some initial discussion on “modernizing” international agreements (e.g., the WTO-GPA). Is this proceeding, or can we expect the existing requirements to remain in place?

Answer: The Bipartisan Infrastructure Law also directs the US Trade Representative, the Secretary of Commerce, and the Office of Management and Budget to assess the impact of the Agreement on Government Procurement (2012) and all US Foreign Trade Agreements on the operation of Buy America(n) laws, including their impact on the implementation of domestic procurement preferences. It further requires that their report, due by mid-April 2022, be made available to the public.

11. The WTO-GPA can supersede Buy American requirements in certain situations for certain agencies. Is the current structure of WTO-GPA applicable with any of the IJJA funding?

Answer: The IJJA’s most important provision relating to trade agreements is the requirement that its domestic preference be applied in a manner consistent with US obligations under international agreements. That means that the preference does not apply to infrastructure projects covered under agreements and that foreign firms can participate in projects covered under an agreement.

12. Are U.S.-Mexico-Canada Agreement countries considered domestic content in the current regulation?

Answer: Yes, the IJJA’s most important provision relating to trade agreements is the requirement that its domestic preference be applied in a manner consistent with US obligations under international agreements. That means that the preference does not apply to infrastructure projects covered under agreements and that foreign firms can participate in projects covered under an agreement.

13. Is the Made in America Office considering a product certification?

Answer: Currently, it is unclear if the Made in the America Office is considering product certification. To date, they have not made any public comments regarding the issue.

- 14. For funding that is allocated to states, where these requirements aren't mandatory, will your office provide guidance on Buy America(n) aspects so manufacturers can better support the goals of the IIJA (e.g., building one product will reduce costs and provide scalability, which is essential for market transformation)?**

Answer: According to Ms. Drake, The Made in America Office is providing guidance to states and to agencies on the funding allocated to states, and their goal is to make it clear for states and manufacturers.

- 15. How will the Buy America Provisions affect material or component suppliers?**

Answer: The rules apply all along the supply chain. If you are a supplier of components not made in America, your customer with an IIJA contract will have to evaluate how components you supply affect adherence to domestic content requirements.

- 16. Do you anticipate that the Office of Management and Budget will issue IIJA Buy America guidance regarding the issuance of waivers before May 14th?**

Answer: OMB will be working with each agency on their waivers and the process, including when waiver reviews go to the Federal Register for public comment. However, it is likely that each agency will be the final decision maker on each waiver.

- 17. With regard to issuing public interest waivers, how is OMB balancing the public interest in timely infrastructure investment with the preference for domestic content in manufactured goods?**

Answer: It is possible that OMB and the agencies will be more open to waivers in the short term, but they may limit their duration as the administration continues to push for more domestic manufacturing over time.

- 18. Over time, certain agencies have developed guidance on issuing waivers addressing the 25 percent cost increase threshold and waivers based on the lack of sufficient quantity or quality of parts and materials. Is OMB expecting that such guidance will continue to be issued by individual agencies, or will such guidance be centralized with OMB?**

Answer: Each agency will continue to oversee its own waiver process, but the IIJA requires the Made in America Office to review all existing waivers.

- 19. Many US companies rely upon parts and materials that are only manufactured overseas. How will implementation of the new Buy American requirements take into**

account the significant timelines that will be required for US manufacturing capabilities to be increased to supplement or replace such foreign supplies?

Answer: Ms Drake suggested that agencies will phase in any changes to the requirements over time to try to balance the need to build project now and bring domestic manufacturing back longer term.

20. Is there any expectation that a general public interest waiver will be issued that allows for a lower initial threshold with ramping up as there is documentation of US manufactured supplies being increased?

Answer: It is likely that waivers will be provided for critical components in the short term but then expire as domestic supplies become available.

21. Will the foregoing carve-out continue to apply for FHWA projects that are Infrastructure Act-funded, or will manufactured products need to meet the 55% domestic content requirement?

Answer: Waivers allowed under prior Buy America laws are also authorized under the IIJA, including where Buy America requirements would be inconsistent with public interest; products and materials are not domestically available in sufficient quantities and/or of satisfactory quality; and if the domestic products/materials raise the cost of the project by a specified threshold.

22. When a project requires Buy America FTA compliance, how does it relate to a specific piece of equipment being procured for the project?

Answer: The burden to comply with Buy American FTA guidelines falls on the grantee. A grantee must include in its bid or request for proposal (RFP) specification for procurement of steel, iron, or manufactured goods (including rolling stock) appropriate notice of the Buy America provision and require, as a condition of responsiveness, that the bidder or offeror submit with the bid or offer a completed Buy America certificate in accordance with 49 CFR §§661.6 or 661.12.

23. How will each agency develop its Made in America guidelines, and do they expect that to be harmonized for all agencies for the purpose of the IIJA funds?

Answer: Under IIJA, every agency is required to submit a report within 60 days of enactment listing all federal financial assistance programs for infrastructure administered by that agency. Within these reports, agencies are required to identify and provide a list of which of these programs are deemed “deficient” as defined by IIJA.

24. Given that some IIJA funds have already been released, how quickly can we expect to see the domestic content threshold requirements?

Answer: On March 4, the White House released a final rule on domestic content threshold requirements for federal procurement. Currently, federal procurement is subject to a 55% threshold. Under this new rule, that threshold will increase to 60%, 65% in 2024, and 75% in 2029. Additional requirements are likely to be made before May of 2022.

25. How will the Made in America Office address inconsistency across agency rulemaking?

Answer: The agency will assess the reports provided by other agencies, as directed by IIJA, and use this self-reported information to address inconsistencies within the way agencies deal with domestic content requirements and federal financial assistance for infrastructure projects. Every agency has 180 days after the enactment of IIJA to impose the directed domestic content requirement.

26. Will the Made in America Office provide training for contractors, agency personnel, and inspectors?

Answer: The office provides direct training at this time. Instead, the office is focused on working with states, agencies, and stakeholders to help them understand the new guidance.

27. How will the Made in America Office deal with the conflicting regulations since FTC does not allow a product to be marked “Made in USA” or “Made in America” unless all or virtually all labor and material are domestic?

Answer: It is unclear how the Made in America office will react because the IIJA did not mention the FTC, and the Made in America Office has not publicly mentioned this issue either.

28. Can you explain and highlight the variations between the Buy America Act and the Buy AmeriCAN Act?

Answer: The Buy American Act applies when the federal government directly assists the procurement of products or a federal facility is being constructed, and the value of materials or supplies exceeds the micro-purchase threshold, currently set at \$10,000. Under this statute, the goods or products are qualified as being domestic when they are 100% manufactured in the United States and with at least 50% domestic content.

The Buy America Act typically applies only to mass-transit procurements for state and local government projects, such as the construction of highways, railways, or rapid transit systems. The requirements of this statute are regulated by the Federal Transit Administration (FTA), previously known as the Urban Mass Transportation Administration, and the Federal Highway Administration (FHWA). FHWA was formed in 1967 to oversee federal funding used for construction and the maintenance of National Highway Systems. Under the Buy America

Act, end products must be 100% manufactured in the United States, and all steel and iron components **MUST** be mined, melted, and manufactured in the United States. However, there is one important exception; foreign-sourced materials may be allowed if they are valued at \$2,500 or 0.1% (whichever is greater) of the contract value. This is referred to as the minimal use amount.

29. With “data analytics and software-as-service” now included as Qualifying Investments under DOE’s smart grid investment matching grant programs, will OMB count the value of those services toward BABA domestic content requirements?

Answer: Yes because the grants are federal funds used for updating energy and communication infrastructure. However, DOE has not yet submitted its 60-day domestic content report, and once that has been submitted, more information will be available about how this will affect the grants program.

30. Are there changes to the way domestic content is calculated for federal procurement?

Answer: Yes, on March 7, 2022, the Federal Acquisition Regulatory Council (FAR Council) published a final rule increasing domestic content requirements based on recommendations from the Biden administration. Domestic content thresholds will gradually increase based on the timeline below.

- 55% threshold for items delivered until October 25, 2022
- 60% threshold for items delivered 2022-2023
- 65% threshold for items delivered 2024-2028
- 75% threshold for items delivered starting in 2029

31. Why will the life safety waiver no longer be applicable?

Answer: IIJA requires that the Made in America Office review all existing waivers and work with each agency to determine the future of each existing waiver. It is unclear at this time if the life safety waiver will continue in its current form.

32. We manufacture a product that is assembled in Houston but contains Lithium Batteries manufactured in Japan. By weight, volume, and component quantity, the batteries constitute 80% of the cabinet. Sheet metal, cables, and other circuitry constitute the other 20%. Per our compliance department this product did not qualify for the BAA because of the large content of Japan made batteries. Will the product qualify for Buy America(n), if not qualified for BAA?

Answer: The new guidelines and requirements for Buy America and Buy American are still in development, so your product may qualify in the future, depending on the new requirements. You may also want to consider a waiver application should your product continue not to qualify under the new requirements.

33. With regard to industrial controller systems that are assembled in America but have sub-components from other countries, what costs count as part of the “Buy American” cost calculation?

Answer: The cost of components is generally determined based upon certain costs incurred by the contractor in purchasing or manufacturing the components.

Specifically, for components purchased by the contractor, the cost of components includes the acquisition costs (including transportation costs to the place of incorporation into the end product) and any applicable duty (regardless of whether a duty-free certificate of entry is issued). For components manufactured by the contractor, the cost of components includes all costs associated with the manufacture of the component (including transportation costs), and allocable overhead costs but excludes profits and any costs associated with the manufacture of the end product.

Specific components generally need not be manufactured in the United States, so long as at least 50% of the costs of all components are mined, produced, or manufactured in the United States, or the end product is a commercial-off-the-shelf item. In general, anything that is not itself acquired as an end product is seen as a component, even if the agency could theoretically have purchased it as an end product.

34. Will the Made in America Office have oversight on implementing Buy America and Buy American requirements for grants/programs funded through the Bipartisan Infrastructure Law?

Answer: The Made in America Office’s role is similar to OMB; they provide oversight to create consistency but don’t grant waivers or do initial work to determine if waivers should be granted.

35. Regarding steel requirements: I have a product that is 99% plastic with two steel screws. Value of screws less than 1% of material and labor costs. Is there a waiver to avoid all the paperwork involved for \$0.02 of screws?

Answer: Yes. Under 23 CFR 635.410 (c)(1)(i), a waiver of Buy America requirements may be granted on a project-by-project basis if:

The application of Buy America provisions would be inconsistent with the public interest, or steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities of satisfactory quality. Also, FHWA regulations waive the applicability of Buy America when alternate bidding procedures are used, and lowest overall total bid based on using domestic steel is 25% more than the lowest overall total bid based on using foreign steel.

Per regulation, the FHWA’s minimum threshold for Buy America to apply is \$2,500 (the total amount of iron and steel products as delivered to the project) or 0.1% of the total contract amount, whichever is greater

36. If steel is from the US, but experiences a forming process in Mexico or Canada, then is brought back to the US, is it no longer considered domestic?

Answer: Buy America does not apply to iron/steel products shipped overseas strictly for physical assembly. Note that if any of the manufacturing process (bending, extruding, drilling, coating, etc.) occurs on the domestic iron/steel product while overseas, the resulting product becomes foreign and does not conform with Buy America requirements.

37. What is the FHWA's minimum threshold for Buy America to apply?

Answer: Per regulation, the FHWA's minimum threshold for Buy America to apply is \$2,500 (the total amount of iron and steel products as delivered to the project) or 0.1% of the total contract amount, whichever is greater.

Under the Buy America Act, end products must be 100% manufactured in the United States and all steel and iron components MUST be mined, melted, and manufactured in the United States. However, there is one important exception; foreign-sourced materials may be allowed if they are valued at \$2,500 or 0.1% (whichever is greater) of the contract value. This is referred to as the minimal use amount.