




**Buy America Build America
Caltrans & FHWA Informational Webinar**

Buy America and Build America Buy America (BABA) Updates

Lismary Gavillán, P.E., DBIA
Construction Program Manager
Federal Highway Administration
California Division
May 31, 2023

Topics

- FHWA Buy America Policy
 - Use of non-domestic Materials and Products
 - FHWA Responsibilities
- Build America Buy America (BABA) Act Requirements
 - OMB Memo Initial Implementation Guidance, M-22-11
 - Issued and Proposed Buy America Waivers
 - Review of Existing General Applicability Buy America Waivers
 - Frequent Asked Questions on Implementation of BABA Requirements
 - Buy America Efforts
 - Available Guidance Issued by FHWA



This presentation focus on BABA implementation and it's tailored to local agencies in California. In the event there is a discrepancy, official guidance and publications will supersede the content on this Power Point presentation. The content presented is for informational purposes only and subject to change based on future guidance. Consult with Caltrans Division of Local Assistance for additional details or clarifications.

FHWA's Buy America Policies

Buy America (BA) 23 U.S.C. 313 – All steel, iron and manufactured products permanently incorporated in the project are 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.

Build America, Buy America Act (BABA) Sec. 70914 was included in the Infrastructure Investment and Jobs Act (“IIJA”) Pub. L. No. 117-58 extending BA requirements to Construction Materials.

- 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 term “*Buy America 2.0*” has been used in California to identify BABA.

FHWA's Buy America Policy

Buy America (BA) requirements are applicable to:

- All phases of a federally-funded project and...
- Non-federal-aid funded projects/phases, 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.

BA applicability to all contracts eligible for federal assistance under Title 23 was effective on October 1, 2012 through Moving Ahead for Progress in the 21st Century Act (MAP-21)



FHWA's Buy America Policy

- **Buy America applies to:**
 - Steel, iron, manufactured products (>90% steel and iron by weight) and construction materials **permanently** incorporated into the project regardless of how they were procured (separate contract, Agency furnished, change order, etc.)
- **Buy America does not apply:**
 - to temporary elements of the project such as falsework, temporary sheet piling, detour bridges, etc.
 - manufactured products with less than 90% steel or iron content by weight. See Buy America Waiver on Manufactured Products, 1983, and Caltrans Deputy Directive-119.
 - to recycled steel nor pig iron and processed, pelletized, and reduced iron ore manufactured outside the United States. See Buy America waiver for raw materials, 1995.
 - to items that are simply moved from one place to another within the same project.
 - when State law prohibits State DOTs from reimbursing utilities, 23 USC 123(a) prohibits Federal-aid participation. Therefore, such work is then not subject to Buy America requirements.

Use of Non-domestic Steel and Iron Products, and Construction Materials

Under Buy America (BA) 23 U.S.C. 313 (steel, iron, and manufactured products) there are 3 methods to incorporate non-domestic products subject to Buy America requirements:

1. Minimal use for non-domestic products (steel and iron only)
2. Alternate bid provisions (steel and iron only)
3. Buy America waiver process (steel, iron, and construction materials)

Use of Non-domestic Steel and Iron Products

1. Minimal usage (“de minimis”) criteria for non-domestic steel and iron products:

- Allows use to non-domestic products totaling \$2,500 or 0.1% of the total contract amount (whichever is greater)
- Once the maximum is reached, any future non-domestic use will require a BA waiver (unless rescope/redesign is possible)
- “*de minimis*” allowable maximum amount includes the total amount of iron and steel products as delivered to the project
- does not include labor costs involved in final assembly
- Agencies are responsible to document its use and ensure the maximum amount is not exceeded

Use of Non-domestic Steel and Iron Products

2. Alternate Bids Provisions

- It occurs during the project design and advertisement Phases.
- The project sponsor elects to include alternate bid provisions for both, domestic and non-domestic steel and iron materials.
- The contract provisions must:
 - 1) require all bidders to submit a bid based on furnishing domestic steel and iron materials, and
 - 2) clearly state that the contract will be awarded to the bidder who submits **the lowest bid** based on **furnishing domestic steel and iron materials** unless, such bid is at least 25% higher than the bid based on non-domestic steel or iron products.
- The comparison must be between the lowest total bid using domestic steel and iron materials and the lowest total bid using non-domestic steel and iron materials.
- The use of non-domestic products is justified if the lowest bid with domestic steel and iron materials is at least 25 percent more than the lowest bid with non-domestic steel and iron materials.
- The LPA must coordinate with their DLAE prior to using the alternate bid provisions.

Use of Non-domestic Steel and Iron Products, and Construction Materials

3. Buy America waiver

- This process is based on:
 1. public interest, or
 2. there is not a sufficient supply of domestic materials of satisfactory quality
- Lengthy process (>1-2 Years, approval is not guaranteed)
- Must be approved prior to:
 1. advertise the project for bids
 2. In the even the waiver need is identified during construction, prior to incorporate the material into the project

FHWA/Caltrans Stewardship and Oversight Agreement

APPENDIX A SOA: PROJECT ACTION RESPONSIBILITY MATRIX...		
CONSTRUCTION (Construction Phase)		
ACTION	AGENCY RESPONSIBLE	
	PROJECTS ON THE NHS	PROJECTS OFF THE NHS
Approve changes and extra work [23 CFR 635.120] <i>(All CCO regardless of amount or scope)</i>	STATE	STATE
Approve contract time extensions [23 CFR 635.120] <i>(All extensions regardless of duration)</i>	STATE	STATE
Concur in use of mandatory borrow/disposal sites [23 CFR 635.407]	STATE	STATE
Accept materials certification [23 CFR 637.207]	STATE	STATE
Concur in settlement of contract claims [23 CFR 635.124] <i>(All contract claims regardless of amount)</i>	STATE	STATE
Concur in termination of construction contracts [23 CFR 635.125]	STATE	STATE
Waive Buy America provisions [23 CFR 635.410] (Note: this action cannot be assumed by State)	FHWA	FHWA
Final inspection/acceptance of completed work [23 USC 114(a)]	STATE	STATE

Build America, Buy America Act (BABA)

New Buy America Requirements

- Executive Order (EO 14005) on Ensuring the Future Is Made in All of America by All of America's Workers
 - Requires agencies to “maximize” the use of goods, materials and products produced in the U.S.
 - Signed in January 2021
- Infrastructure Investments and Jobs Act (IIJA) was signed in November 2021
 - Includes the Build America, Buy America Act (BABA)
 - BABA required that no later than May 14, 2022 Federal Agencies ensure application of new Buy America requirements on infrastructure projects



OMB Implementation Guidance

On April 18, 2022, OMB issued memorandum M-22-11, *“Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”*

The Act requires the following Buy America preference by May 14, 2022:

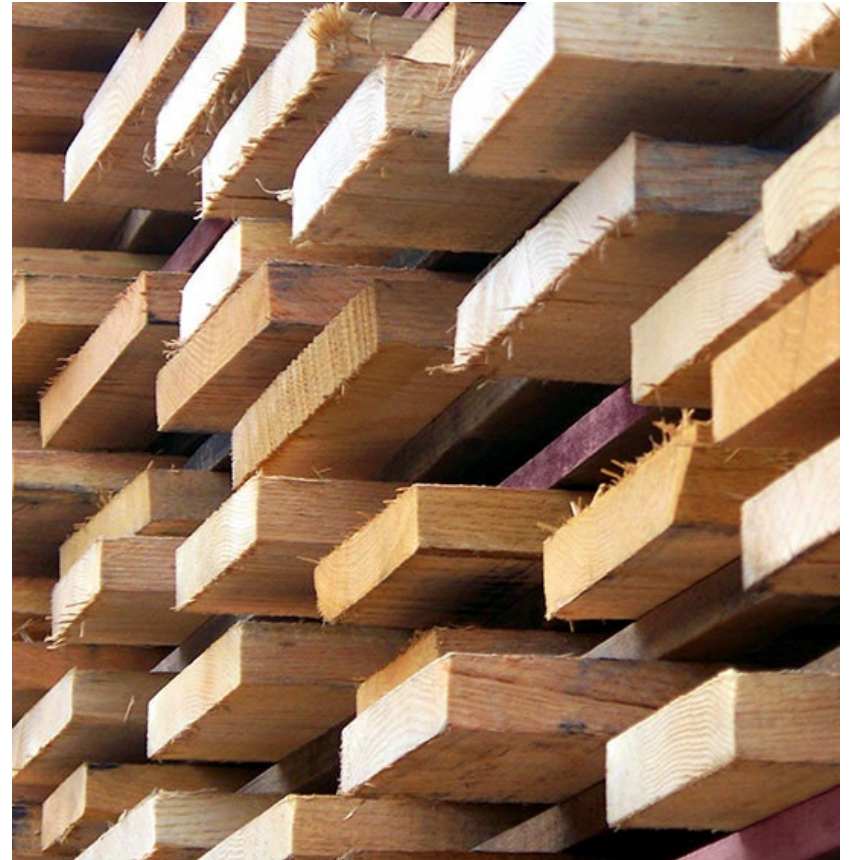
- 1) All **iron and steel** used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- ~~2) **All manufactured** products used in the project are produced in the United 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.~~
- 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.

OMB's Implementation Guidance: Preliminary Guidance for Construction Materials

IIJA defines **infrastructure** as:

includes, at a minimum, the structures, facilities, and equipment for, in the United States, **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.

Agencies should treat structures, facilities, and equipment that generate, transport, and distribute energy **-including electric vehicle (EV) charging** -as infrastructure.

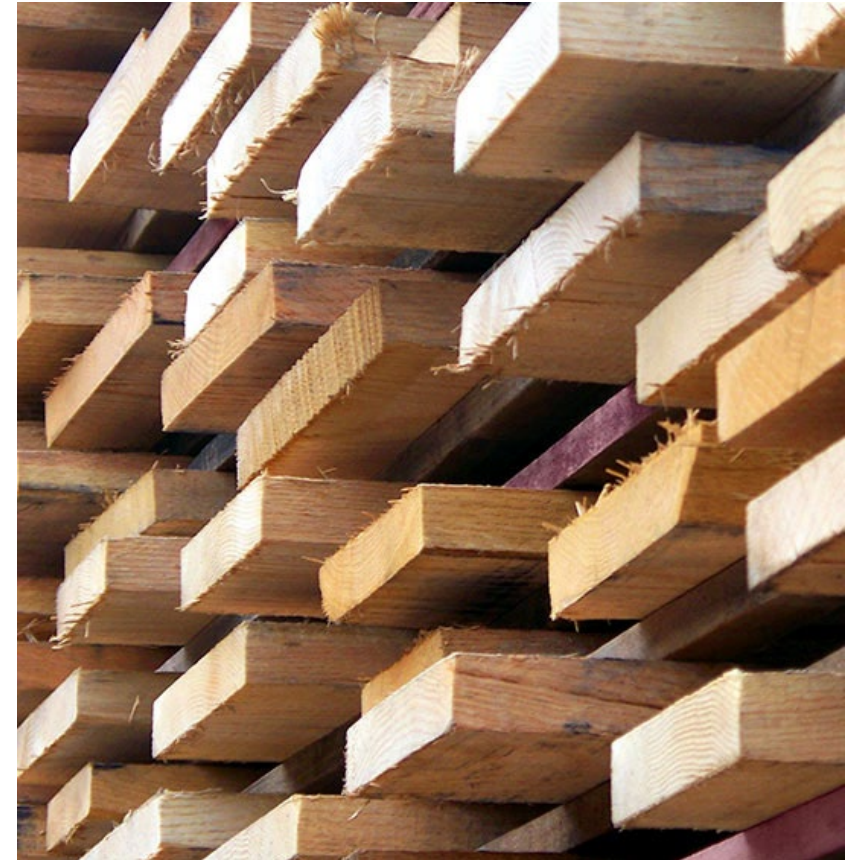


OMB's Implementation Guidance: Preliminary Guidance for Construction Materials

IIJA defines **construction materials** as:

An article, material, or supply—*other than an item of primarily 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 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.**

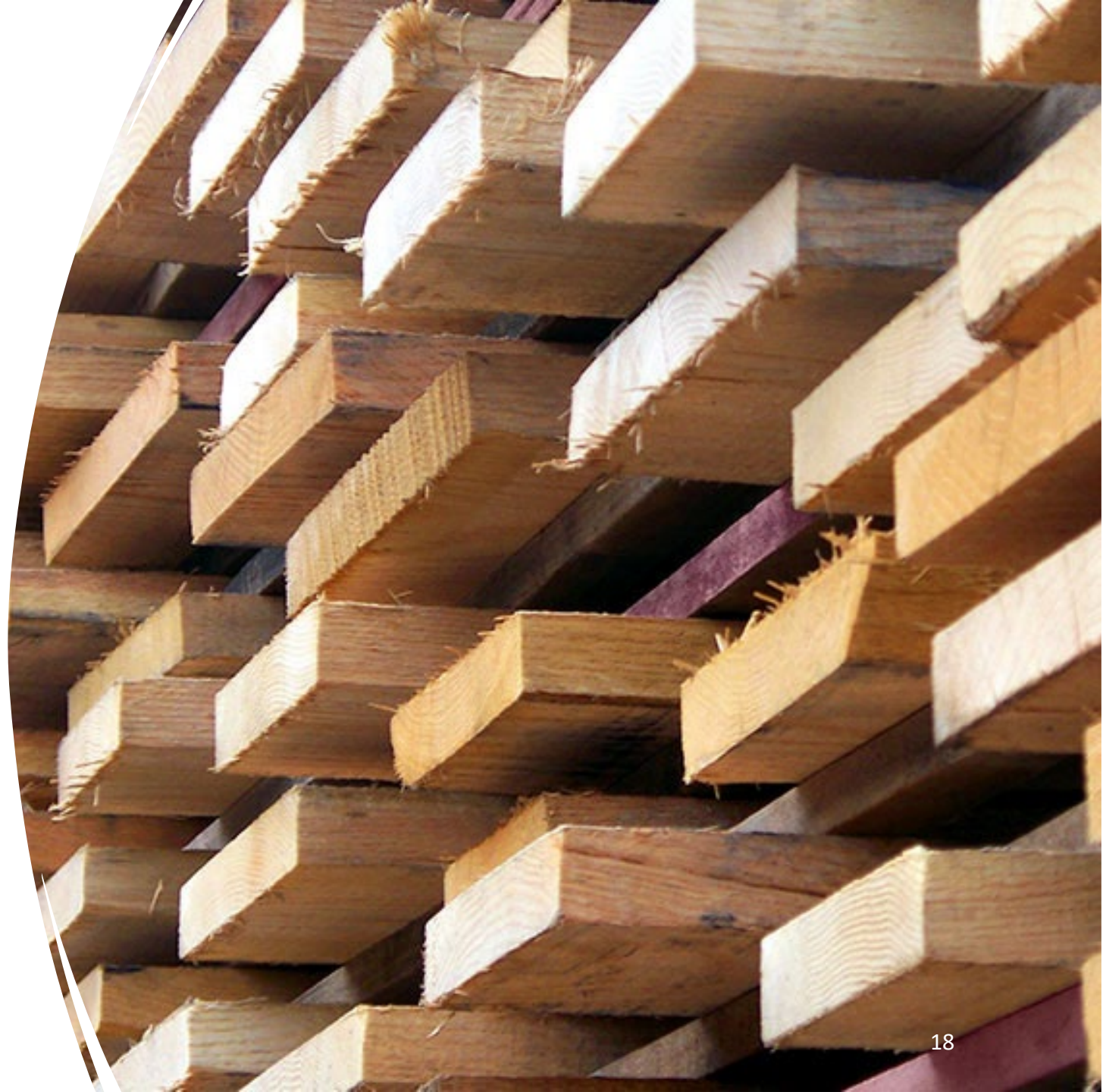


OMB's Implementation Guidance: Preliminary Guidance for Construction Materials

- An article, material, or supply should only be classified into one of the following categories:
 - (1) iron or steel;
 - (2) a manufactured product; or
 - (3) a construction material
- Items that should be treated as manufactured products, rather than as construction materials:
 - items that consist of two or more of the listed materials that have been combined together through a manufacturing process
 - items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process

OMB's Implementation Guidance: Preliminary Guidance for Construction Materials

- Pending OMB's issuance of final standards on construction materials, agencies should consider "***all manufacturing processes***" for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material.



Issued and Proposed Buy America Waivers

1. **Temporary Buy America Waiver for Construction Materials** – effective on May 14, 2022 and **expired November 9, 2022**
2. **Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitations – issued on 1/30/23**
 - <https://www.transportation.gov/mission/office-secretary/office-policy/transportation-policy/waiver-buy-america-requirements-for-construction-materials>
3. **Waiver of Buy America Requirements for Electric Vehicle Chargers – Issued on 2/21/2023**
 - <https://www.regulations.gov/document/FHWA-2022-0023-0095>
4. **Notice of Proposed Waiver of Buy America Requirements for *De Minimis* Costs, Small Grants, and Minor Components** – Notice. Request for comments. **Published on November 4, 2022**
 - Notice and comments: <https://www.regulations.gov/document/DOT-OST-2022-0124-0001>

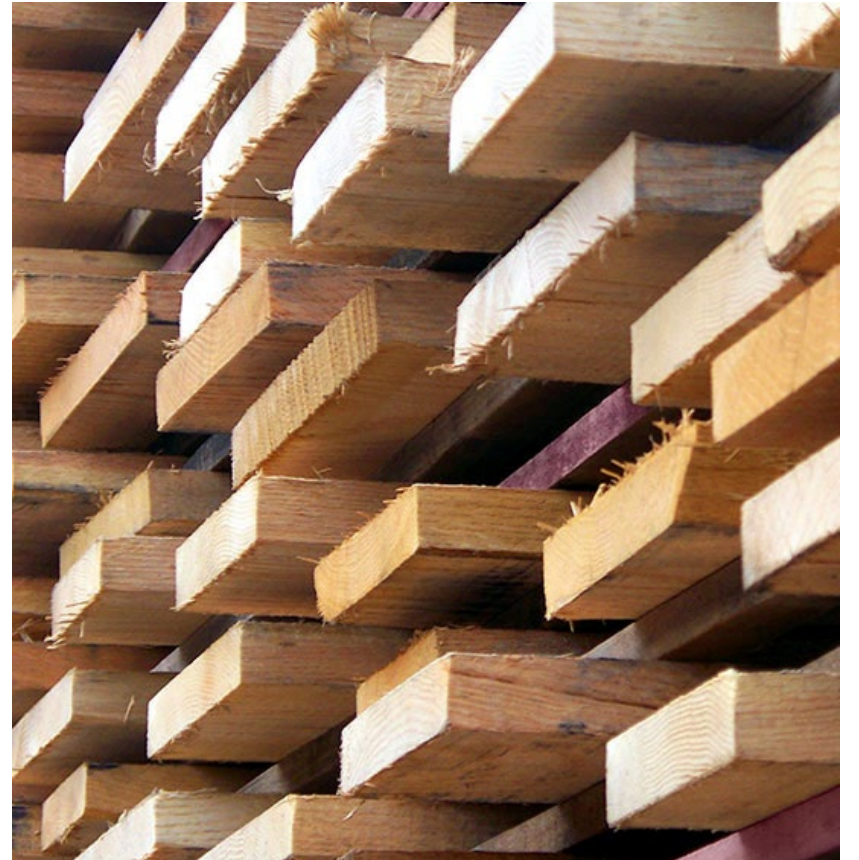
#1 Temporary Buy America Waiver for Construction Materials

- In May 2022, a **temporary** public interest **waiver for construction materials** was issued for a period of 180 days
- The temporary waiver on construction materials was not extended - **expired on November 9, 2022**
- Making Buy America requirements on construction materials applicable all projects or phases of a project authorized by FHWA (E-76) on/or after November 10, 2022.



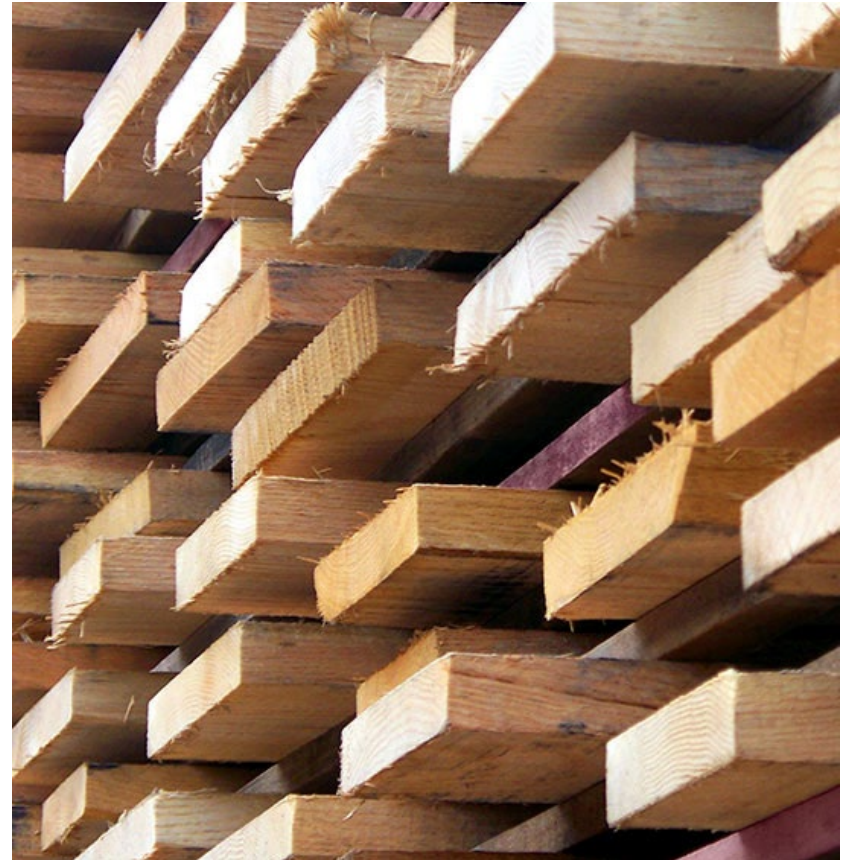
#2 Waiver of BA Requirements for Construction Materials for Certain Contracts and Solicitations

- Notice of proposed waivers published on November 4, 2022.
- Comments due on November 20, 2022.
- Waiver issued on 1/30/23.
- Waiver tailored to FTA projects, but FHWA could use if timeframes are met.



#2 Waiver of BA Requirements for Construction Materials for Certain Contracts and Solicitations

- Waives BA requirements on construction materials for any contracts authorized before November 10, 2022.
- Waives BA requirements on construction materials for any contracts entered into before March 10, 2023, that result from solicitations published before May 14, 2022.



#3 Waiver of Buy America Requirements for Electric Vehicle Chargers

- Notice; request for comments published on August 31, 2022
 - Comment period closed on September 30, 2022
- Waiver issued on February 21, 2023 and effective on March 23, 2023
- 2-phase BA Waiver issued



#3 Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers

- Short term temporary public interest waiver to waive Buy America requirements for:
 - steel, iron,
 - manufactured products, and
 - construction materials in electric vehicle (EV) chargers.
- Remove EV chargers from its existing general applicability waiver for manufactured products (1983).



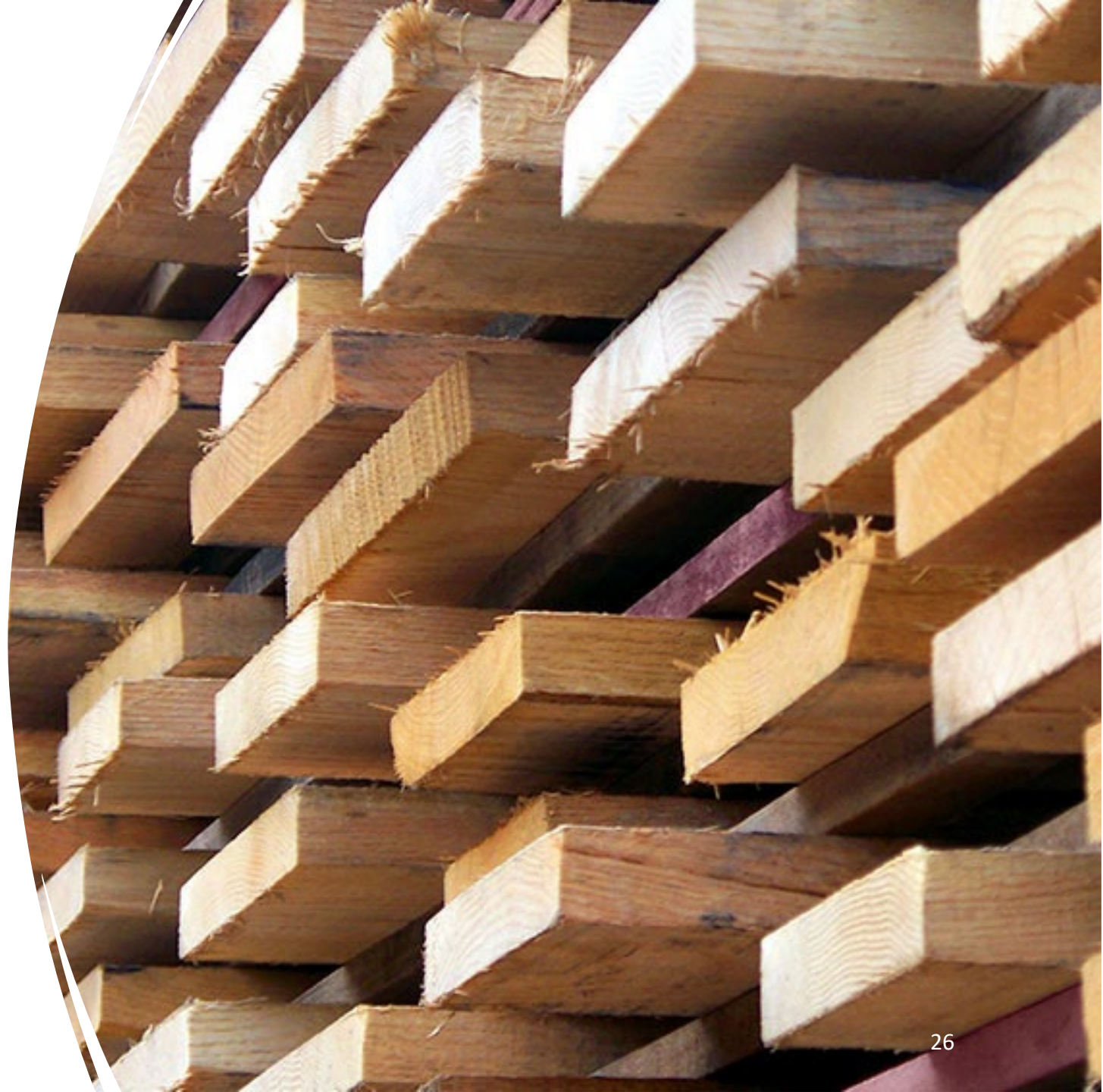
#3 Waiver of Buy America Requirements for Electric Vehicle Chargers

- **First Phase:** Apply to all EV chargers manufactured by July 1, 2024, whose final assembly occurs in the United States, and whose installation has begun by October 1, 2024
- **Second Phase:** Apply to all EV chargers manufactured on/or after July 1, 2024, **if:**
 - 1) final assembly occurs in the United States, and
 - 2) the cost of components manufactured in the United States **exceeds 55 percent** of the cost of all components.

For all phases, EV charger housing component (also known as its cabinet or enclosure) that are predominantly steel and iron are excluded from this waiver and must meet current Buy America requirements.

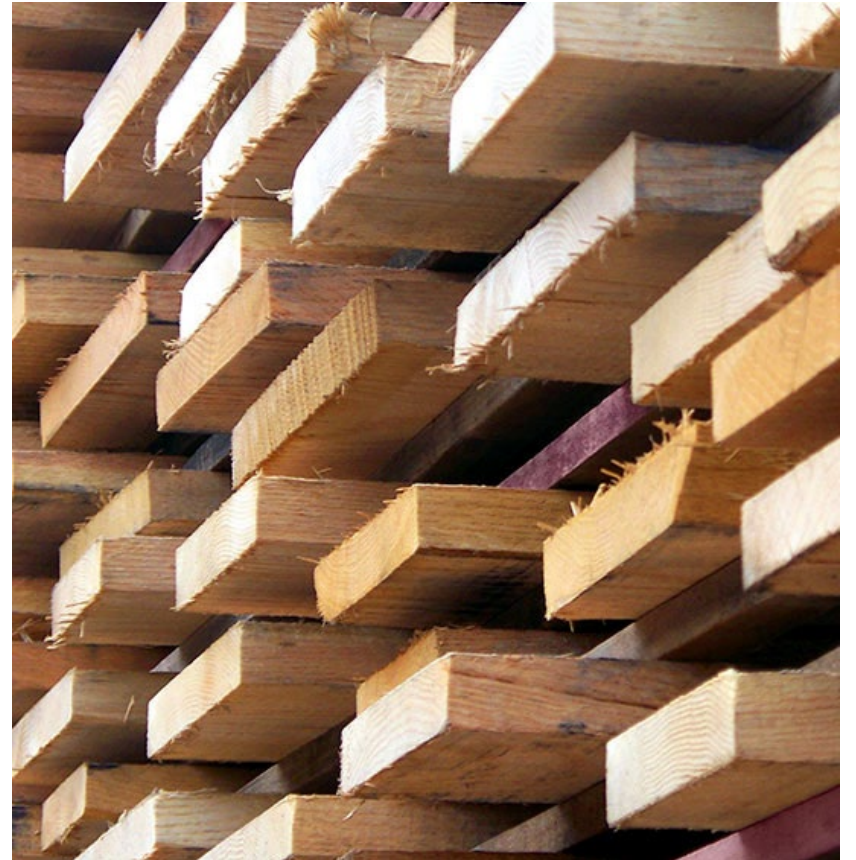
#4 Notice of Proposed Narrow Waiver De Minimis Costs, Small Grants, and Minor Components

- Notice of proposed waivers published on November 4, 2022
- Comments due on November 20, 2022
- Waiver under review by OST



#4 Notice of Proposed Narrow Waiver De Minimis Costs, Small Grants, and Minor Components

- As proposed, this would waive Buy America requirements for iron and steel, manufactured products, and construction materials for awards which:
 - a. De minimis:** The total value of non-domestic products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the Federal financial assistance award;
 - b. Small Grants:** The size of the Federal financial assistance award is below \$500,000; or
 - c. Minor components:** The non-domestically produced miscellaneous minor components comprise no more than 5% of the total material cost of an otherwise domestically produced iron or steel product.





Review of Existing General Applicability Waivers

- BABA required federal agencies to review general applicability BA waivers issued more than 5 years before November 15, 2021
- FHWA has 4 general applicability waivers meeting this criteria:
 - Manufactured products (1983) – review underway
 - Raw materials (1995)
 - Ferryboat parts (1994)
 - Concrete poles for Guam (2013)
- The 4 general applicability BA waivers remain valid during the Federal Register review process until a revised waiver is issued and made effective.

Review of Existing General Applicability Waivers – Manufactured Products (1983)

- Comment period closed - Original comment period (April 17th) extended to May 22, 2023
- Solicited information and suggestions regarding whether it should continue, discontinue, or modify the existing waiver
 - General Considerations
 - Compliance Standards for Manufactured Products
 - Manufactured Products With Steel and Iron Components
- Following review and consideration of comments, FHWA will determine whether to continue, discontinue, or modify the waiver.
- Federal Register notices and comments:
<https://www.regulations.gov/docket/FHWA-2022-0027/document>



Proposed Rulemaking: Guidance for Grants and Agreements

- Proposed rule; notification of proposed guidance published on 2/9/2023
- Comment period closed on 3/13/2023
- The proposed guidance revise OMB Guidance for Grants and Agreements to:
 - add new part 184 in 2 CFR Chapter to supporting BABA implementation and clarify existing requirements.
 - modify 2 CFR 200.322 to clarify existing requirements.
- Under review by OMB



FHWA/USDOT/OMB Buy America Efforts

- OMB to issue final rule for Guidance for Grants and Agreements
- USDOT/FHWA to issue final determination on proposed *de minimis* waiver notice
 - Waivers will take effect as of their implementation date
- FHWA review of general applicability waivers
 - Ongoing review of manufactured products waiver
 - Upcoming review of Raw Materials (1995) waiver
- OMB's issuance of final standards for construction materials
- FHWA California Division continue providing guidance and technical assistance related to Buy America requirements to Caltrans and local agencies



Quick Reminder: FHWA's Existing Buy America Policy

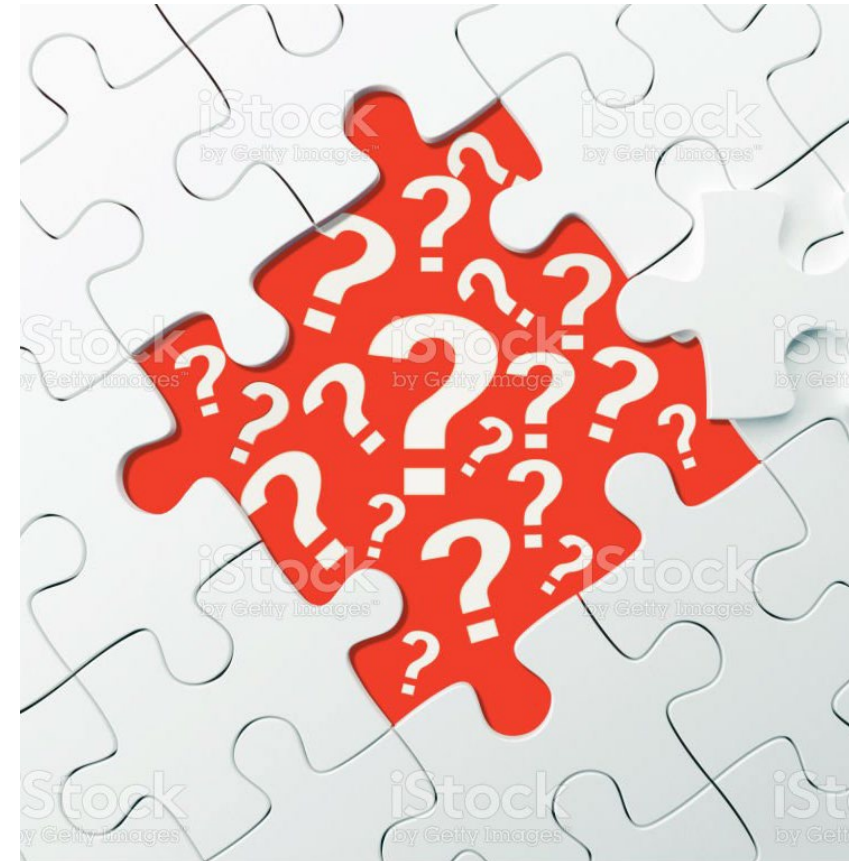
- FHWA's policy for iron, steel, and manufactured products implementing the requirements at 23 U.S.C. 313 **continue to apply** on FHWA projects.
 - 23 CFR Section 635.410 Buy America
- BABA extended BA requirements to the listed construction materials effective on November 10, 2022.



Frequently Asked Questions

1. Which projects are subject to Buy America requirements?

- All phases of a federally-funded project **and...**
- Non-federal-aid funded projects/phases, **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.



Frequently Asked Questions

2. Do FHWA's existing BA requirements for steel/iron items and manufactured products continue to apply?

Yes. BABA extended the application of Buy America requirements to a new category of products (construction materials).

3. My project has an approved E-76 prior to November 10, 2022, would BABA (BA requirements on construction materials) apply?

No. BABA only applies to contracts authorized on/or after November 10, 2022.

4. Would BABA requirements apply if the original E-76 is amended?

No. An E-76 modification to an original E-76 approved on/or before November 9, 2022 will not trigger BABA requirements.

5. My project has an original E-76 approved on/or after November 10, 2022, are BABA requirements applicable?

Yes. The Agency must ensure all projects subject to BABA requirements contained the appropriate updates to the Buy America provisions. (See DLA Office Bulletin 22-07 and Caltrans Standard Special Provision 6-1.04, "Buy America,"). The Agency must also ensure compliance of Buy America requirements.

6. Can I issue a contract change order to remove the Buy America requirements (including BABA)?

No.

Frequently Asked Questions

7. *If I issue a contract change order on/or after November 10, 2022, will I have to comply with BABA?*

It depends, if the project authorization was issued before November 10, 2022, BABA requirements do not apply to the change order work. If the projects was authorized on/or after November 10, 2022, BABA requirements apply to any change order issued on the project.

8. *Can I approve the use of non-domestic products that are subject to Buy America by issuing a contract change order?*

No. There are only 3 methods to incorporate non-domestic products into a contract subject to Buy America requirements (Minimal use for non-domestic products, Alternate bid provisions, Buy America waiver process).

9. *Can I incorporate non-domestic steel or iron, and construction materials products if they are donated by other agency or funded with non-federal funding?*

No. Buy America requirements apply to all steel and iron, manufactured products (>90% steel and iron by weight), and construction materials that are permanently incorporated into the project regardless of its procurement process or funding source.

10. *Can I use the steel and iron de minimis provision (0.1% of contract value or \$2,500, the greater) for construction materials?*

No. Minimal use provision only applies to steel and iron since at this time no *de minimis* has been approved for construction materials subject to Buy America requirements.

Available Guidance Issued by FHWA

BABA Questions and Answers – issued on 2/1/2023

- Addresses the implementation of Buy America requirements on construction materials
- https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba.cfm

FHWA's Buy America Q and A for Federal-aid Program – issued on 12/20/2012

- Addresses steel, iron, and manufactured products
- The Office of Program Administration posting these questions and answers so that FHWA Division Offices, State DOTs, and the general public will be aware of the FHWA's responses.
- https://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm

BA Issues to Consider for Utility Work on Projects - issued on 12/20/2012

- Addresses the applicability of Buy America requirements to utility work accomplished as part of a larger Federal-aid highway program funded project, as defined by the National Environmental Protection Act (NEPA)
- <https://www.fhwa.dot.gov/utilities/buyam.cfm>

Federal-Aid Essentials for Local Public Agencies

- Buy America Contract Requirements
- <https://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=27>

Questions?

