

Pay Attention to Details in the Infrastructure Investment Act

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The 2021 Infrastructure Investment and Jobs Act (IIJA) delivered good news to the construction industry, with an estimated \$1 trillion dollars to fund U.S. infrastructure and related projects.

However, with this good news comes a recommendation to read the fine print.

The IIJA (a.k.a. the Bipartisan Infrastructure Law) not only delivered significant funding, but also delivered a significant 'Buy America' provision that is important to every construction project manager and finance team.

First, more about the IIJA. In this case, "infrastructure" includes surface transportation programs, federal lands access and tribal transportation programs, as well as nationally significant freight and highway projects. It also includes (but is not limited to) roads and bridges, passenger and freight rail, public transit, ports and waterways, airports, water infrastructure, and power and grid reliability. Infrastructure is also defined by the IIJA as deployment of publicly accessible electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, and natural gas fueling infrastructure along designated alternative fuel corridors.

A provision in the IIJA - the Build America, Buy America Act - impacts all federally funded infrastructure projects located in the U.S. Many industry leaders are concerned about project delays or deferrals because of the Buy America requirements. It is important to be informed about the law's requirements and to work closely with federally funded clients to understand



how to best manage projects for successful outcomes.

REQUIREMENTS IN THE LATEST 'BUY AMERICA' LAW

The Buy America provision in the IIJA applies to all purchases made with federal funds awarded to eligible entities on or after May 14, 2022. It involves the purchase of goods, products, and materials for any form of construction, alteration, maintenance, or repair of U.S. infrastructure.

The requirements apply to an entire infrastructure project, even if the project is funded by both federal and non-federal funds under one or more awards. For infrastructure projects that receive federal assistance, the Buy America law requires iron, steel, construction materials, and manufactured products made in the U.S.

For manufactured products, the law requires (a) the product to be manufactured in the U.S.; and (b) the cost of the components of the manufactured product that are mined, produced, or manufactured in the U.S. is greater than 55% of the total cost of all components of the manufactured product. The 55% requirement stands unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

All construction, alteration, maintenance, or repair of infrastructure with federal financial assistance is subject to the Buy America requirements, unless an exemption applies. A waiver is granted to the federal agency that provides funding for the project.

Funding increments or amendments within a current budget year, supplements for new scope of work and renewal of funding awards from federal agencies will likely trigger the application of the Buy America provisions to a project that receives federal funding. The Administration continues to develop guidance on how to implement this provision.

WAIVERS TO 'BUY AMERICA' REQUIREMENTS

Many construction projects depend on components that are only manufactured outside of the United States. Eligible recipients of federal funding may request Buy America waivers for the components or products that are necessary for completion of their projects. Federal agencies are urging eligible funding recipients to focus their waiver requests on time-limited, targeted waivers to the greatest extent practicable.

Some waivers that are traditionally available under existing Buy America laws are authorized under the latest provision where (1) applying the Buy America requirement would be inconsistent with the public interest; (2) where the iron, steel, manufactured products, or construction material is not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality; and (3) where inclusion of the domestic products or construction materials will increase the cost of the overall project by more than 25%.


Federal agencies are responsible for processing and approving all waivers to this requirement, including waivers requested by recipients and on behalf of subrecipients. Several federal agencies elected to delay the application of the Buy America provision through granting a six month "adjustment period" using the public interest waiver authority.

For example, the U.S. Department of Transportation (DOT) released a temporary waiver noting: "In bringing its Federal financial assistance programs for infrastructure into compliance with the Act's requirement for construction materials, DOT must also ensure that these important Federal programs for transportation infrastructure investment are able to obligate funds and complete infrastructure projects in a timely manner...Because construction materials have not previously been subject to Made in America rules as have iron and steel, there is a need to gather data on domestic sourcing capacity to inform stronger standards." The DOT's temporary waiver expired in November.

The Federal Emergency Management Agency received approval for a general applicability public interest waiver that expires in December 2022, and the U.S. Department of the Interior issued a six-month general applicability waiver that was to expire on January 12, 2023.

NEXT STEPS

Project managers and finance teams are encouraged to work closely with their federally funded partners to fully understand how the Buy America requirements will affect shovel-ready or future projects. This includes:

- » Encourage entities that receive federal funding to work with their federal partners to learn if new approvals, certifications, or other actions are necessary to meet Buy America requirements.
- » Plan for the Buy America requirements in the IJA to delay and/or increase the cost of projects.
- » Identify if your project's federal funders require alternatives to foreign manufacturers.
- » Recommend to your eligible clients to seek waiver(s) through their federal partners for project-critical products that are manufactured outside of the U.S. 



About the Author

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