

APPALACHIAN REGIONAL COMMISSION

Interim Implementation Guidance on the Application of the Buy America Preference in ARC Grants for Infrastructure

On May 5, 2022, ARC notified the implementation of the domestic content procurement preference (Buy America) provided in the Build America, Buy America Act, starting on May 14, 2022. The new requirement in ARC grants for infrastructure projects means that, 1-all of the iron and steel in the project is produced in the United States, 2-the manufactured products used in the project are produced in the United States, and 3- the construction materials used in the project are produced in the United States. This interim guidance describes the type of projects subject to the Buy America requirements and the process to request waivers.

I. Applicability:

This guidance applies to all ARC grants whether or not funded through Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (IIJA)—where funds are made available and used in the infrastructure portion of all grants involving infrastructure. It will also apply to subawards made with ARC grants.

The Buy America preference applies to an entire infrastructure project, even if it is funded by both Federal and non-Federal funds under one or more awards. The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. It does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of or permanently affixed to the structure.

II. Definitions:

1. **Construction materials** includes 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.
2. **Domestic content procurement preference-** The term “domestic content procurement preference” means all iron and steel used in the project are produced in the United States; the manufactured products used in the project are produced in the United States; or the construction materials used in the project are produced in the United States.

3. **Infrastructure-** The term infrastructure encompasses public infrastructure projects. Thus, the term “infrastructure” 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.

In determining whether a particular construction project constitutes “infrastructure” for purposes of the Buy America requirement, the ARC will 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. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. If ARC determines that no funds from a particular grant will be used for infrastructure, a Buy America preference does not apply to that grant award.

4. **Produced in the United States-** The term produced in the United States means-
 - (A) in the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
 - (B) in the case of manufactured products, that (i) the manufactured 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 for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and
 - (C) in the case of construction materials, that all manufacturing processes for the construction material occurred in the United States.
5. **Project-** The term project means construction, alteration, maintenance, or repair of infrastructure.

III. Waivers

ARC may waive the application of the Buy America preference in any case in which the Federal Co-Chair finds that—

- (1) applying the domestic content procurement 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 “non-availability 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 project by more than 25 percent (an “unreasonable cost waiver”).

A. Non-availability Waivers

In considering a request for a non-availability waiver, ARC will assess whether the recipient or subrecipient performed a thorough market research and adequately considered, where appropriate, qualifying alternate items, products, or materials.

B. Unreasonable Cost Waivers

In considering a request for an unreasonable cost waiver, ARC will examine whether the recipient or subrecipient has provided adequate documentation that no domestic alternatives are available within the cost parameter. An unreasonable cost waiver is available if the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. The waiver justification must include, as applicable, a comparison of the cost of the domestic product to the cost of the foreign product or a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign-origin products. Publicly available cost comparison data may be provided in lieu of proprietary pricing information.

C. Public Interest Waivers

ARC may issue public interest waivers when it determines that its statutory mandate and policy goals cannot be achieved consistent with the Buy America requirements and the proposed waiver would not meet the requirements for a non-availability or unreasonable cost waiver. ARC may consider issuing general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients or subrecipients.

IV. Process to Request a Waiver

ARC sponsored construction projects administered by a Federal Basic Agency will follow the policies and procedures of the Federal Agency for Buy American waivers. ARC sponsored construction projects administered by a Registered State Basic Agency that follows the policies and procedures of a Federal agency in administering an ARC grant will follow the policies and procedures for Buy America waivers as determined by said Federal agency. Whenever a construction project is co-funded by a Federal agency and ARC, the grantee and subgrantee will follow the processes and procedures for Buy America waivers of the Federal agency. In the event that two or more Federal agencies participate in funding an infrastructure project, the grantee or subgrantee will follow the policies and procedures for Buy America of the Federal agency with the highest contribution of funds to the project.

The following process will apply in those circumstances not covered in the previous paragraph. ARC grant recipients and subrecipients will submit their request for Buy America waivers in writing (email) to the ARC project coordinator and the administering agency point of contact. All waiver requests must include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers.

The request for a Buy America waiver must include, at a minimum and to the greatest extent practicable, the following information:

- Waiver type (non-availability, unreasonable cost, or public interest)
- Recipient name and Unique Entity Identifier (UEI)
- ARC program name (POWER, INSPIRE, BWI, DCI)
- ARC Grant Award Identification Number
- ARC and Federal financial assistance (if applicable) funding amount
- Total cost of infrastructure expenditures, including all Federal and non-Federal funds (to the extent known)
- Infrastructure project description and location
- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, and country(ies) of origin (if known), and relevant Product and Service Code (PSC) and North American Industry Classification System (NAICS) code for each.
- A certification that the recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.
- A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
- Anticipated impact if no waiver is issued.

ARC will consider request for waivers on a case-by-case basis. The grantee or subgrantee must promptly submit the request for a Buy America waiver upon having the documentation to support the request for the waiver and not less than 60 days prior to the expected day for starting construction.

In issuing a waiver on Buy America, ARC will consider the statutory provisions of the Build America, Buy America Act, the Appalachian Regional Development Act of 1965, as amended, the Guidance of the U.S. Office of Management and Budget (OMB), and its mission and policy goals described in its Strategic Fiscal Plan for Fiscal Years 2022-2026. ARC Buy America waiver determinations will be notified to the grantees or subgrantees by the ARC project coordinator in writing.

V. Buy America Guidance Updates

ARC would be updating this Buy America guidance, that is applicable to the infrastructure portion of all grants involving infrastructure, as new guidelines are issued by the OMB and the Made in America Office, including but not limited to the final standards on construction material.