

## Frequently Asked Questions Concerning Buy America Preference

**DISCLAIMER:** This document provides general guidance but will not be used as a substitute of applicable laws and or regulations (See generally 88 Fed. Reg. 57787 [Aug. 23, 2023]). Individual circumstances will be independently evaluated, and engineering judgement will be applied where appropriate.

Q. What are the additional construction materials covered by the new Buy America requirements from the Infrastructure Investment and Jobs Act (Nov. 2021) as modified by the Office of Management and Budgets final guidance published to the Federal Register (August 23, 2023)?

A. The identified additional construction materials are non-ferrous metals, plastic and polymer-based products, glass, fiber optic cable, optical fiber, lumber, engineered wood, and drywall. For applicable contracts, these contract provisions are in section 6-1.04E, "Construction Materials." These are in addition to steel and iron materials which remain covered under Buy America requirements (sections 6-1.04C and 6-1.04D) and the State-mandated requirements for crumb rubber (section 6-1.04B).

Q. Which manufactured products with iron or steel are subject to Buy America requirements?

A. Those iron and steel materials used in precast concrete products regardless of the amount of steel or iron used. For other manufactured products containing iron or steel, only when the amount of steel and iron materials is 90 percent or more by weight of the total manufactured product will the steel and iron materials need to be Buy America compliant. Reference section 6-1.04D, "Manufactured Products," of the applicable contract provisions.

Q. Does the previous minimum use allowance (nondomestic sources) for iron and steel still apply?

A. Yes, the greater of either 0.1 percent of total contract amount or \$2500, is the maximum value of nondomestic steel and iron that may be authorized in advance by the resident engineer for use during the construction project. The value of such material is based on the material value as delivered to the project. Note that this allowance is separate from any other project material or product that may have received an FHWA waiver, which would be identified in the contract provisions if applicable.

Q. Does the minimum use allowance (nondomestic sources) for iron and steel, extend to the additional construction materials (i.e., non-ferrous metals, plastic and polymer-based products, glass, fiber optic cable, optical fiber, lumber, engineered wood, and drywall)?

A. No, this allowance is exclusive to steel and iron only.

Q. Is there any contractual allowance for nondomestic sources for these additional construction materials (i.e., non-ferrous metals, plastic and polymer-based products, glass, fiber optic cable, optical fiber, lumber, engineered wood, and drywall)?

A. No. While the US DOT issued a waiver (August 16, 2023) concerning a de minimis allowance of construction materials, implementation and use of this waiver was left to the recipient of federal funds (e.g., state DOTs). The waiver itself identifies the burdensome nature of its implementation and documentation. Furthermore, there are multiple unresolved definitions associated with the waiver at this time that would result in additional federal-aid eligibility risk in implementation. Caltrans has determined that this waiver will not be incorporated into these contracts at this time.

Q. Section 6-1.04 lists materials and products covered by Buy America but does not list materials and products not subject to Buy America. If a material or product is not listed, is it exempt from Buy America?

A. Certain construction materials and products are exempt from Buy America requirements including cement, cementitious materials, aggregates, additives, or aggregate binding agents when delivered to the project as individual constituents or in plastic form (e.g., ready-mix concrete, hot mix asphalt, etc.). Unless the material or product itself has been identified within your contract specifications as needing to meet Buy America, the material or product may be procured from either domestic or nondomestic manufacturers or producers, subject to meeting other specified contract requirements.

Q. Section 6-1.04E, "Construction Materials," states that the construction materials must be produced in the United States. Does this mean that all raw materials must be sourced domestically, and all manufacturing processes must occur in the United States?

A. The contractual standards for determining whether a construction material meets produced in the United States are referenced in section 6-1.04E, "Construction Materials," and identified in 2 CFR 184.6 for each listed construction material. These are the same standards to which the manufacturer's/producer's certificate of compliance are to attest. The 2 CFR 184.6 standards cover all manufacturing processes as identified for the specific construction material. For example, the standard for non-ferrous metals states, "all manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States." These standards will identify whether the construction materials' raw materials must be sourced domestically if required. For example, the standard for lumber states, "all manufacturing processes, from initial debarking through treatment and planing, occurred in the United States." Therefore, nondomestic timber may be procured for domestic lumber production so long as its initial debarking occurs domestically along with other identified manufacturing processes. Review each individual construction material's standard in 2 CFR 184.6 for such requirements.

Q. Are surface treatments and coatings of construction materials in section 6-1.04E also subject to Buy America requirements?

A. Individual construction materials' standards in 2 CFR 184.6 identify the covered manufacturing processes for each material. Only in those cases where the standard identifies the surface treatments or coatings (e.g., non-ferrous metal standard above) will such operations be subject to Buy America. It is further understood that these operations are those that occur at the manufacturer's/producer's facilities and do not apply to field applied treatments or coatings of a construction material.

Q. If an individual construction material's 2 CFR 184.6 standard does not cover treatments or coatings of the material, is a manufacturer coated or treated construction material then considered a manufactured product for the purposes of Buy America coverage classification?

A. No, in such cases the product is still considered a construction material (section 6-1.04E), however the coating or surface treatment performed is not subject to Buy America requirements.

Q. How are "minor additions" of articles, materials, supplies, or binding agents to a construction material addressed in Buy America requirements?

A. Updated 2 CFR 184 addresses these minor additions within section 184.3. These minor additions do not change the categorization of the item as a construction material for Buy America coverage.

Q. What type of materials comprised of non-ferrous metals would be subject to Buy America requirements?

A. Common non-ferrous metals, such as aluminum, copper, lead, nickel, tin, titanium, zinc, brass, and bronze, are subject to Buy America if used as construction materials in various shapes, sizes, and gauges including, but not limited to sheets, channels, bars, pipe, couplers, fittings, bolts, nuts, etc. and products comprised predominately of the non-ferrous metal itself.

Q. What about an item that is primarily composed of a single non-ferrous metal, but includes other materials to complete its functional use?

A. If a non-ferrous metal item is combined with other dissimilar items during a manufacturing process, the product is then considered a manufactured product. For example, if a brass body is forged for use in a gauge valve application and combined with other items (e.g., valve stem, needle tip, nuts screws, etc.) of other material types, the resultant item is considered a manufactured product. Presently, only those manufactured products containing steel or iron in accordance with section 6-1.04D of applicable contract provisions are subject to Buy America requirements.

Q. What "lumber" construction materials will be subject to the new Buy America requirements?

A. Buy America requirements will apply to the conventional definition of lumber that includes solid wood boards, planks, and posts.

Q. Which engineered wood products will be subject to the new Buy America requirements?

A. The Office of Management and Budgets revised and published final guidance on Buy America requirements for construction materials to the Federal Register on August 23, 2023. This included the addition of engineered wood products such as plywood, oriented strand board, and glulam beams as construction materials (reference section 6-1.04E of applicable contract provisions).

Q. Based on the conventional definitions of lumber and engineered wood products, it appears there are other wood materials that do not fall within either category (e.g., timber signal poles, large beams, wood trusses, etc.). Are such outliers subject to Buy America requirements?

A. Wood products that do not fall within either the lumber or engineered wood product conventional definitions will not be subject to Buy America requirements. In addition, only those lumber and engineered wood materials that are permanently incorporated into the work are subject to Buy America requirements. For example, lumber or engineered wood used for constructing cast-in-place concrete elements are not subject to Buy America requirements, so long as the form materials are not permanently incorporated into the project.

Q. What glass construction materials are subject to Buy America requirements?

A. Buy America applies to those glass construction materials that are solely comprised of glass. These include glass panes that are incorporated into the work through assembly in the field. This does not include glass panes that have been incorporated into a manufactured product (e.g., window framed product) offsite, delivered to the project, and then incorporated into the work.

Q. Are fiberglass products subject to Buy America requirements?

A. If the fiberglass product is comprised solely of fiberglass, the product is subject to Buy America requirements. If other construction materials have been incorporated during the manufacturing process, excluding minor additions, the resultant is considered a manufactured product that is not subject to Buy America requirements.

Q. Are glass beads used for retro reflectivity on traffic paints, subject to Buy America requirements?

A. Glass beads are solely comprised of glass and are therefore subject to Buy America requirements.

Q. Which of the following types of glass (float, laminated, obscured, tempered, insulated, and low-E) are required to be Buy America compliant under the construction materials definition?

A. Laminated and insulated glass are examples of manufactured products that involve other dissimilar construction materials being added to glass construction materials to create a modified product. As such, both laminated and insulated glass are not covered under the construction material definition of Buy America. If the glass consists of a single construction material and has not been manufactured into a combined product such as a window (glass pane and frame), then the glass is subject to Buy America.

Q. What type of plastic or polymer-based items are considered construction materials and subject to Buy America requirements?

A. The material must be solely plastic or polymer to be considered a construction material. Plastics or polymers that are combined with other construction materials in a manufacturing process, excluding minor additions, are considered a manufactured product. Only those manufactured products containing steel or iron in accordance with section 6-1.04D of applicable contract provisions are subject to Buy America. A common example of polymer-based products subject to Buy America would be HDPE or PVC pipe and fittings.

Q. What about products that consist of two or more of the Buy America covered construction materials?

A. Once a construction material is combined with another construction material in a manufacturing process, excluding minor additions, it is considered a manufactured product. This general rule is superseded by those defined construction materials that consist of multiple construction materials, namely engineered wood, fiber optic cable, and optical fiber subcategories. Only those manufactured products containing steel or iron are currently covered under Buy America requirements in accordance with section 6-1.04D of applicable contract provisions. For example, a shielded electrical conductor is considered a manufactured product.

Q. How can engineered wood, fiber optic cable, and optical fiber be considered their own construction materials subcategories when they clearly consist of multiple construction materials?

A. The Office of Management and Budget's revised guidance has created three new subcategories of construction materials, namely engineered wood, fiber optic cable, and optical fiber. Their classification as construction materials that consist of multiple construction materials takes precedence over preliminary guidance provided by the Office of Management and Budgets.

Q. If I plan to use some of the identified construction materials in section 6-1.04E in temporary facilities or as a construction aid that will not ultimately be part of the permanent work, are such materials subject to Buy America requirements?

A. No, see section 6-1.04A of applicable contract provisions.

Q. For the additional construction materials subject to Buy America requirements as identified in section 6-1.04E, what documentation is required to show compliance and receive payment?

A. Pursuant to section 6-1.04E the Contractor must provide manufacturer certificates of compliance with each project delivery of such materials. These manufacturer certificates of compliance must identify where the construction material was manufactured and attest specifically to Buy America compliance (all manufacturing processes for these materials occurred in the United States) pursuant to its 2 CFR 184.6 standard. Compliant Buy America documentation is one of the prerequisites to payment eligibility of associated bid items.

Q. Does Buy America apply to construction materials that are relocated from an existing location in the project to another location on the project?

A. No, relocation of existing items falling under the construction material definition are not subject to Buy America requirements. For example, a non-ferrous metal article shown to be relocated on the plans would not be a new or added construction material to the project subject to Buy America requirements.