

Final 'Buy America' Guidance For Infrastructure Is Here

By **Courtney Buble**

Law360 (August 14, 2023, 5:59 PM EDT) -- The White House issued final guidance Monday to promote the use of American-made materials in federal infrastructure projects, which will take effect in 60 days.

The guidance will help federal agencies comply with the Build America, Buy America Act — included in the \$1 trillion Bipartisan Infrastructure Law when it was enacted in November 2021 — which requires federally funded infrastructure projects to use iron, steel and other construction materials made in America, unless they are exempt. It applies to all federal financial assistance, not just that from the infrastructure bill.

The new guidance defines terms such as "manufactured products," "iron or steel products" and "construction materials." This will "provide a common system for federal agencies to distinguish between the product categories," the guidance said.

Next, the guidance helps agencies figure out the cost of components of manufactured products, of which 55% of the total cost must be produced in the U.S. for them to be considered manufactured in the United States.

"Using this approach for determining the cost of components of manufactured products in the context of federal financial assistance aims to provide a consistent approach for industry," the guidance says.

The Biden administration **has been working** to increase the domestic content threshold as part of its overall efforts to boost domestic manufacturing.

The guidance also goes over when waivers can be issued to the Buy America rules.

Waivers are permitted when an agency thinks using the domestic preference wouldn't be in line with the public interest, there would be an unreasonable cost — specifically, increasing the overall project cost by more than 25% — or the materials are not readily available in the U.S.

Back in the spring, attorneys from Akin Gump Strauss Hauer & Feld LLP **raised concerns** that the proposed guidance didn't include anything about the U.S.' international trade obligations.

"This omission may affect how states and their agencies enforce [the Build America, Buy America Act's] domestic-content requirements for federally funded infrastructure projects," they wrote.

On Monday, the White House said the Build America, Buy America Act is consistent with international agreements and pointed to a related fact sheet it issued last year.

While the Office of Management and Budget took "a step in the right direction in providing clarity, we are struck by the fact that despite numerous concerns raised from various commenters about the need for explicit clarification in the regulations that the United States will abide by its international treaty obligations," Stephen Kho, partner at Akin Gump, told Law360 on Monday. "OMB has still decided that no clarification and no affirmation of consistency with U.S. obligations are needed."

The final guidance was crafted based on listening sessions, a request for information put out in April 2022 and feedback from federal agencies, according to the White House.

Alliance for American Manufacturing President Scott Paul applauded the guidance. "Our national security, economic strength, and cleaner economy are all dependent on rebuilding supply chains and reducing our dependence on unreliable foreign sources," he said in a statement Monday.

The OMB released initial implementation guidance in April 2022 and then **draft final guidance** in February, after President Joe Biden previewed it during his State of the Union address.

"The Bipartisan Infrastructure Law, the Chips and Science Act, and the Inflation Reduction Act are spurring investments across the country," Livia Shmavonian, director of the Made in America Office, wrote Monday. "Thanks to the Build America, Buy America Act we're not simply buying those products, we're making them here at home."

--Additional reporting by Valentina Pasquali. Editing by Stephen Berg.

Update: This story has been updated with additional comment.