

CONSTRUCTION PROCEDURES HANDBOOK

SECTION IV	SUBSECTION A-1	DATE
CONSTRUCTION CHANGES	FOREIGN MATERIAL REQUIREMENTS (BUY AMERICA)	12/05/2023

Foreign Material requirements are specified in Subsection 106.03 of the Standard Specifications. The requirements are defined differently for contracts which are State funded than for those that are Federally funded. A contract is Federally Funded if the Federal Government is paying for a portion of the Work. A contract is State funded if there are no Federal funds involved. The requirements for the two types of contracts are as follows:

- 1. State Funded Contracts** - The State requirements are established by N.J.S.A. 52:32-1 and N.J.S.A.52:33-1 et seq. The requirements prohibit the Contractor from using farm products and materials which are produced or manufactured outside of the United States. The statute is silent on the issue of components so it has been interpreted that it only applies to end products. This has led to some controversy on whether a given product is a component or an end product. To provide clarification of its position, the Department has made a determination that products that are delivered to a job site for permanent incorporation into the project must be produced or manufactured within the United States. For example, reinforcing steel to be used in a bridge deck, pre-cast concrete items, Portland cement concrete and permanent traffic signs, since they are delivered as a unit to be incorporated into a project, must all be manufactured in the United States. Some or all of the components in these items, however, may be manufactured outside of the United States. NAFTA has no affect these requirements.
- 2. Federal Funded Contracts** - The Federal requirements are established by 23 CFR 635.409 and 23 CFR 635.410. The "Buy America" requirement of 23 CFR 635.410 only applies to steel and iron materials and products and steel and iron coatings which are permanently incorporated into the project. This requirement does not apply to these products if they are intended for temporary use and are not required to be left in place by the Contract. All other products on Federally funded projects may be of foreign origin. Steel, iron products and their coatings, permanently incorporated into the project, are required to be manufactured in the United States from predominantly domestic components and their coatings applied in the United States. NAFTA does not affect these requirements either.

Additionally, the Federal requirements have been updated by the Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, which includes the Build America, Buy America Act ("the Act"). Pub. L. No. 117-58, §§ 70901-52 and implementing regulations, Which requires:

- a. Ensure all iron and steel used in the project are produced in the United States. Iron and steel products means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both. Ensure all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- b. Ensure all manufactured products are exempted from the Buy America requirements pursuant to 48 FR 50399 (1983) which excludes manufactured products from 23 CFR 635.410. Manufactured products means articles, materials, or supplies that have been processed into a specific form and shape; or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- c. Ensure all construction materials are manufactured in and manufacturing processes occurred in the United States. 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 of or a combination of non-ferrous metals, plastic and polymer-based products (including PVC, composite building materials, and polymers used in fiber optic cables), glass (including optic glass), fiber optic cable (including drop cable), optical fiber, lumber, engineered wood or drywall. Items that consist of two or more of the listed materials that have been combined through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.

Build America, Buy America requirements are waived for projects where the total value of non-compliant products is no more than the lesser of \$1,000,000.00 or 5% of total applicable costs for the project for other than iron and steel subject to the requirements 23 USC 313; or the total amount of Federal financial assistance, including change orders, applied to the project is below \$500,000.00. Refer to the August 16, 2023 Federal Register for USDOT's issuance of a Waiver of Buy America Requirements for De Minimis Costs and Small Grants at the following link: [Federal Register :: Waiver of Buy America Requirements for De Minimis Costs and Small Grants](#).

The Contractor may request a waiver of the use of the above Foreign Material requirements. If this happens, the following procedure is to be followed:

1. **State Funded Contracts**

- a. The Contractor must submit a written request to waive the requirements of N.J.S.A. 52:32-1 and N.J.S.A.52:33-1 et seq. The request must have a reason statement for it, such as insufficient availability of domestic

sources, unreasonable domestic costs, etc., with backup documentation from suppliers to support the statement.

- b. The RE will transmit requests to the Manager, Bureau of Materials for review and concurrence. **Note:** A request to increase the quantity of foreign material, for an already approved item from a prior request, must be resubmitted for approval.
- c. NJDOT's Bureau of Materials will determine if the request meets the criteria for a waiver and upon concurrence it will then be forwarded to the Commissioner for approval.
- d. Upon receipt of approval/disapproval, the Bureau of Materials will notify the RE with copies to the Regional Construction Engineer; the Director, Construction Services and Materials; the Manager of the, Bureau of Construction Management, the Project Manager and the Field Manager.
- e. The RE will create a Change Order incorporating any waivers approved into the Contract.

NOTE: If a material is found to repeatedly receive the Commissioner's waiver, the Bureau of Materials will seek a blanket approval for all contracts.

2. **Federally Funded Contracts** - Exceptions may be permitted with approval from the Federal Highway Administration. This process may take 3 to 4 months. The process for obtaining an exception is:
 - a. The Contractor must submit a written request to waive the Buy America requirements of Subsection 106.03 to the RE of the project. The request must have accompanying documentation supporting the reason for the request. The reasons, such as insufficient availability of domestic sources, unreasonable domestic costs, etc., must have the following information:
 1. The cost (delivered) of the steel or iron product.
 2. The total Contract cost.
 3. The intended use of the item, and whether it is for a permanent or temporary application
 4. The origin of the material.
 5. For steel sheet piling, the required section modulus must be given.
 - b. The RE will transmit requests to the Manager, Bureau of Materials for review and concurrence. **Note:** A request to increase the quantity of foreign material, for an already approved item from a prior request, must be resubmitted for approval.
 - c. The Bureau of Materials will determine whether or not the request meets the criteria for an exception, and upon concurrence, it will then be forwarded for approval to the FHWA.
 - d. Upon receipt of approval/disapproval, the Bureau of Materials will notify the RE and copy the Regional Construction Engineer; the Director, Construction Services and Materials; the Manager of the Bureau of Construction Management, the Project Manager and the Field Manager.

- e. The RE will create a Change Order to incorporate any approved waivers into the Contract.