

## Frequently Asked Questions about Build America, Buy America Act

The following addresses questions relating to the U.S. National Science Foundation's implementation of the "Infrastructure Investment and Jobs Act" (IIJA) and the "Build America, Buy America Act" (BABA). NSF will continue to update questions and answers as needed.

### Q: What are the Build America, Buy America provisions?

A: The Build America, Buy America provisions of the "Infrastructure Investment and Jobs Act" ensure that federal infrastructure programs use materials produced in the United States, increase the requirement for American-made content, and strengthen the waiver process associated with these provisions.

### Q: Why was the "Build America, Buy America Act" created?

A: The purpose of the act is to create demand for domestically produced goods, helping to sustain and grow domestic manufacturing and the millions of jobs it supports throughout product supply chains.

### Q: Do the Build America, Buy America provisions apply to all projects funded by NSF?

A: The Build America, Buy America provisions apply to all new NSF-funded financial assistance awards or ongoing awards that receive additional funding after May 14, 2022 that involve the construction, alteration, maintenance or repair of infrastructure in the United States.

### Q: If I have an existing award funded by NSF, what funding actions will trigger application of the Build America, Buy America provisions?

A: Any funding amendments, supplements for new scope of work, or renewal awards may initiate a revised set of Terms and Conditions. This action triggers the application of the Build America, Buy America provisions.

### Q: How do I know if my project falls into the definition of "infrastructure"?

A: See [2 C.F.R. §184.4, Applying the Buy America Preference to a Federal Award](#) and the Office of Management and Budget's [Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#). Based on that guidance, the term infrastructure includes, at a minimum, the structures, facilities and equipment in the United States 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; and structures, facilities, and equipment that generate transport, and distribute energy including electric vehicle (EV) charging.

Recipients should consult with their Program Officer or Grants and Agreement Officer when there are questions on applicability.



# BUILD AMERICA BUY AMERICA

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### **Q: Do the Build America, Buy America provisions apply to NSF-funded infrastructure projects in other countries?**

A: No; Build America, Buy America only applies to infrastructure projects located in the United States.

For example, the Daniel K. Inouye Solar Telescope located in Hawaii, would have to comply with Build America, Buy America. In contrast, the Rubin Observatory in Chile would not have to comply with Build America, Buy America because the construction site is not in the United States. However, any components for the Rubin Observatory built in the United States (for example, a steel chamber) and sent abroad to a construction site must comply with the Build America, Buy America requirements.

### **Q: Do the Build America, Buy America provisions apply to current active awards where funds have already been obligated?**

A: If you currently have an active NSF award which received new funding on or after May 14, 2022, and involves the purchase of goods, products and materials for any form of construction, alteration, maintenance or repair of infrastructure in the United States, then this provision applies to all purchases made with the new funds. If you have an awarded contract under an NSF financial assistance agreement in place prior to May 14, 2022, for such goods, products and materials, the provisions do not apply. Similarly, if a contract is awarded after May 14, 2022, but funded using money appropriated prior to May 14, 2022, the Build America, Buy America provisions do not apply.

### **Q: Do the Build America, Buy America provisions apply to all goods and services?**

A: No. The Build America, Buy America provisions apply to:

1. Iron and steel used in an infrastructure project in the United States.
2. All manufactured products used in an infrastructure project in the United States.
3. All construction materials used in an infrastructure project that are manufactured in the United States.

Note: the Build America, Buy America provisions do not apply to "Section 70917(c) materials". "Section 70917(c) materials" are defined as cement or cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. See Section 7019(c) of the Build America, Buy America Act.

### **Q: Do the Build America, Buy America provisions apply to a Federal Acquisition Regulations-based contract awarded by NSF?**

A: No. The Build America, Buy America provisions only apply to financial assistance awards. Contact your NSF contracting officer for questions concerning compliance with existing "Buy American Act" requirements.

### **Q: Do the Build America, Buy America provisions apply to equipment used for the purposes of construction?**

A: No. The requirements do not apply to tools, equipment and supplies brought to a construction site and removed at or before the completion of the project, as they are temporary in nature. The requirements also do not apply to portable equipment and furnishings used at or within the finished infrastructure project, but which are not an integral part of the structure or otherwise affixed to the project, such as movable chairs, desks and portable computer equipment.

For example, a crane used to lift items, or the hammers and scaffolding used on a construction site would not be considered covered by the Build America, Buy America provisions because they are not incorporated into the building or public work.

### Q: What is a “manufactured product”?

A: In accordance with 2 C.F.R. §184.3, “Manufactured Product” means:

Articles, materials, or supplies that have been:

- (i) Processed into a specific form and shape; or
- (ii) Combined with other articles, materials, or supplies to create a product with different properties than individual articles, materials or supplies.

A manufactured product is considered to be “produced in the United States” if:

- (i) The 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.

Reference [2 C.F.R. §184.5](#) for further information on determining the cost of components for manufactured products.

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### Q: Does scientific instrumentation count as a manufactured product?

A: No; since most scientific instrumentation on NSF-funded projects is considered outfitting of the facility and not integral to its construction — much like tables and chairs or other standard laboratory equipment — the Build America, Buy America provisions would not apply. Careful consideration should be given to the interfaces between scientific instrumentation and the base facility. Recipients should consult with their Program Officer or Grants and Agreement Officer when there are questions on applicability.

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### Q: How do you determine what constitutes a “Domestic Content Procurement Preference”?

A: Per Section 70912 of [Infrastructure Investment and Jobs Act](#), a domestic content procurement preference means: “a requirement that no amounts made available through a program for Federal financial assistance may be obligated for a project unless --

1. All iron and steel used in the project are produced in the United States.
2. The manufactured products used in the project are produced in the United States.
3. The construction materials used in the project are produced in the United States.”

For example, aluminum, copper, and lead used in a project are considered construction materials because they are non-ferrous metals and are incorporated into the building or public work. Similarly, prefabricated windows brought to a site for incorporation into a building would be covered by the Build America, Buy America provisions as they are construction materials made of glass, plastic, wood and metals.

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### Q: Is any change to NSF-funded infrastructure considered construction, alteration, maintenance or repair and would it therefore trigger the Build America, Buy America provisions? Or are minor changes that typically would not be considered a construction activity be excluded? If the latter is the case, what is the threshold?

A: Yes, any construction, alteration, maintenance or repair of infrastructure with NSF financial assistance funding is subject to the Build America, Buy America requirements, unless an exemption applies, and a waiver is granted. There is no threshold.



# BUILD AMERICA BUY AMERICA

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### Q: How do you determine what constitutes an “infrastructure project”?

A: 2 C.F.R. §184.3 defines an infrastructure project as “any activity related to the construction, alteration, maintenance or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.”

Examples of NSF infrastructure projects includes: the construction, repair, alteration or maintenance of a public building, laboratory, or research facility in the United States funded through a NSF financial assistance agreement.

### Q: How do you determine what constitutes “Construction Materials”?

A: 2 C.F.R. §184.3 defines construction materials as “articles, materials, or supplies that consist of only one of the items listed below (reference the definition in 2 C.F.R. §184.3 for further information and exceptions):

- Non-ferrous metals
- Plastic and polymer-based products (including polyvinylchloride, 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
- Drywall

Note: Minor additions of articles, materials, supplies, or binding agencies to a construction material do not change the categorization of the construction material.

### Q: My organization received financial assistance from NSF, and I have Build America, Buy America questions; who can I talk to?

A: You can send questions to your cognizant Program Officer and Grants and Agreements Officer.

### Q: Are there exceptions to the Build America, Buy America restrictions?

A: In certain circumstances, the NSF may waive the application of the Buy America Preference if:

1. Applying the domestic content procurement preference would be inconsistent with the public interest (a “**Public Interest Waiver**”).
2. The 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**”).
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% (an “**Unreasonable Cost Waiver**”).

### Q: I need to procure a manufactured product for an NSF funded project but cannot find a domestic manufacturer. What should I do?

A: You can send questions to your cognizant Program Officer and Grants and Agreements Officer. You may apply for a waiver, based on domestic nonavailability. Follow the instructions on the [NSF Build America, Buy America website](#).

**Q: I need to procure a manufactured product for an NSF-funded project, but the cost is above what was originally budgeted. What should I do?**

A: You may apply for a waiver if the cost increase for the **overall project** is greater than 25%. This is not the same as the cost of the manufactured good increasing over 25%, as it may be a very small part of the total project cost. If a waiver is not granted, NSF has mechanisms in place for handling cost increases on awards. You should consult with your Program Officer on the appropriate mechanism for addressing any cost increases. As of May 14, 2022, NSF recipients should be estimating future budgets with Build America, Buy America requirements in mind.

**Q: How do I apply for a waiver based on domestic nonavailability or unreasonable cost?**

A: Please refer to the Guidance on Submission of an NSF Waiver Request guidance document on the [NSF Build America, Buy America webpage](#) for step-by-step instructions. In addition, the Office of Management and Budget's [Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#), Section VI Issuing of Buy America Waivers, should be reviewed prior to waiver submission to ensure waivers contain all the required information. Please fill out the required information in a thorough and complete manner which will help to prevent delays in processing waiver requests. All waiver requests should be coordinated with your cognizant Program Officer and Grants and Agreements Officer and submitted via email.

**Q: What is the process for issuing domestic nonavailability waivers?**

A: Once you submit a waiver request to NSF, your cognizant Program Officer and Grants and Agreements Officer initiates a formal review of the request. NSF will post the waiver request on the NSF website for 15 days for public comments. NSF will then submit the agency's decision to the Office of Management and Budget's, Made in America Office to make a final determination. The NSF website will be updated, and you will be notified of the decision.

**Q: What market research must be included in a nonavailability waiver request?**

A: In accordance with the Office of Management and Budget's [Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#), Section VI Issuing of Buy America Waivers, "all waiver requests must include a detailed justification for items not available domestically and a certification there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, or non-proprietary communications with potential suppliers". In addition, each waiver for nonavailability must contain a description of the efforts made to avoid the need for a waiver. Market research should include relevant details such as:

1. Who performed the market research;
2. When the market research was conducted;
3. Sources that were used;
4. Methods used to conduct the research;
5. What were the results/response.

Waivers that are not sufficiently justified are subject to delays in processing or disapproval. For this reason, due diligence is recommended when conducting market research for a proposed waiver.



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**Q: Where will NSF post any nonavailability waivers?**

A: The complete list of waivers is available on the [NSF Waiver Requests webpage](#).

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**Q: For an unreasonable cost waiver of the Build America, Buy America provisions, is the cost increase threshold 25% of the specific product in question or of the entire project?**

A: Under Build America, Buy America, using domestic products must increase the cost of the **total project** by 25% to be eligible for a waiver.

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**Q: I am not sure if a product was made in America. What should I do to verify the manufacturing origins?**

A: You should contact the product's manufacturer, distributors and suppliers to determine the country of origin. Trade associations may also be a good source of information. For further assistance, refer to the [Office of Management and Budget's guidance](#).

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**Q: A foreign company opens a manufacturing plant in the United States. The components and subcomponents of the manufactured good come from all over the world. Would these be Build America, Buy America compliant?**

A: Possibly. For a manufactured product to be compliant, it must be manufactured in the United States and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all components of the manufactured product.

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**Q: A company imports a manufactured good from abroad, repackages it at their facility in the U.S., and sells it under a U.S. brand name. Is this product compliant with the Build America, Buy America provisions?**

A: No. The iron, steel or manufactured goods must be produced or manufactured in the United States. A simple repackaging or a basic assembly does not pass the test of substantial transformation and satisfy the definition of "manufacturing."

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**Q: A recipient wants to purchase equipment for a lab retrofit that is manufactured abroad by a prominent U.S. company and sold by a local foreign distributor using funds from an NSF award. Would this be compliant with the Build America, Buy America provisions?**

A: No. The products must be manufactured in the United States.

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**Q: If domestically available manufactured goods are substantially less energy efficient than foreign goods (such as glass), could a subrecipient seek a nonavailability waiver based on the substandard quality of the U.S.-made good?**

A: A waiver request may be submitted for a manufactured good that is not available in sufficient and reasonably available commercial quantities of a satisfactory quality. If you believe that a domestically available manufactured good is not of a satisfactory quality, you may decide to file a nonavailability waiver request. If you believe a foreign product is otherwise in the best interest of the public, or other administration policy goals, but does not otherwise meet the requirements of a non-availability or unreasonable cost waiver, a "public interest waiver" may be considered. Such waivers must be narrowly targeted to maximize the use of good, products, and materials produced in the United States. Public interest waivers must also be well supported and may be subject to increased scrutiny.





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**Q: Who is responsible for determining whether a product is subject to the Build America, Buy America provisions?**

A: The recipient is responsible. To assist in making these determinations, the Office of Management and Budget has issued [Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#).

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**Q: How do recipients document compliance with Build America, Buy America?**

A: NSF has issued guidance to help with determining and documenting compliance with the Build America, Buy America provisions, in the NSF's Implementation of the Act guidance document on the [NSF Build America, Buy America webpage](#).

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**Q: How do recipients ensure that their subrecipients, subcontracts and vendors comply with the Build America, Buy America provisions?**

A: The Build America, Buy America term and condition applicable to NSF-funded projects requires that the financial assistance recipient flow down the term and condition in any subaward or subcontract. Financial assistance recipients, sub-recipients and contractors must comply with the Build America, Buy America term and condition, and should take whatever measures they deem necessary to ensure that the Build America, Buy America requirements are adhered to by their respective vendors.

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**Q: What is the consequence of not complying with the Build America, Buy America provisions?**

A: Noncompliance with the Build America, Buy America provisions constitutes a violation of the terms and conditions of your financial assistance agreement. Corrective action for a violation may include identifying non-compliant products as unallowable costs, removing and replacing the improperly purchased foreign-manufactured goods, reducing the amount of the award, or even withholding future funds and terminating the award. In cases of fraud, it can lead to criminal investigation and prosecution.

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**Q: How do recipients ensure that a product is manufactured in the United States?**

A: NSF recipients should include the Build America, Buy America requirements in all solicitations, requests for proposals, agreements and sub-agreements. Recipients should expect contractors and vendors to verify their compliance with the Build America, Buy America provisions.

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**Q: How are the Build America, Buy America Act requirements applied to multinational projects where NSF is a partner with other international organizations?**

A: Generally, the NSF-funded scope will be subject to the Build America, Buy America provisions. Early communication with the cognizant Program Officer and Grants and Agreements Officer is recommended in these scenarios to help ensure proper application of Build America, Buy America Act requirements.

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**Q: What is the difference between the Build America, Buy America Act term and the Made in America term in the Cooperative Agreement Financial and Administrative Terms and Conditions?**

A: The Build America, Buy America term applies to iron and steel, construction materials, and manufactured products in accordance with IIJA, and has a mandatory waiver review process. The Made in America term states that "all Research Infrastructure implementation awards must retain appropriate documentation to substantiate any circumstance where the awardee has deemed a U.S. preference is not feasible in acquiring goods, products, or materials." The Made in America term has no waiver or review process; it is a requirement to document if a recipient of a Research Infrastructure implementation award does not comply with the implementation of 2 C.F.R. §200.322.



# **BUILD AMERICA BUY AMERICA**

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**Q: How does this apply to software packages or cyberinfrastructure for facilities?**

A: Software is not considered a manufactured product. However, components of a cyberinfrastructure backbone, such as hardware, fiberoptics and cabling, may fall under the Build America, Buy America provisions depending on the project.

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**Q: Is the purchase of semiconductors and chips considered construction materials?**

A: Semiconductors and chips would not be considered construction materials under the Build America, Buy America definitions.