

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 8

NUMBER 8

August 2022

Editor's Note: The Summer Reading Issue Victoria Prussen Spears	251
White House Shares Guidance on Buy America Preference in Federal Infrastructure Projects Andrew K. McAllister, Libby Bloxom and Mackenzie A. Zales	253
Proposed Legislation Bans U.S. Government Contractors Doing Business in Russia Jessica C. Abrahams, Dana B. Pashkoff and Michelle Y. Francois	258
Government Using Big Data and Agency Coordination in Reinvigorated Focus on Prosecuting Widespread Pandemic Fraud Bill Morrison, Neil Issar and Alexander Clark	261
Fourth Circuit's Decision Bolsters Trend Toward Objective Scierter Standard Under the False Claims Act David W. Ogden, Kevin Lamb and Spencer Todd	266
In the Courts Steven A. Meyerowitz	270

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

PABLO J. DAVIS

Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Partner Of Counsel, Dinsmore & Shohl LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

White House Shares Guidance on Buy America Preference in Federal Infrastructure Projects

*By Andrew K. McAllister, Libby Bloxom and Mackenzie A. Zales**

The White House has released long-awaited guidance on how federal agencies should implement the Infrastructure Investment and Jobs Act Buy America domestic preference requirements. The guidance outlines which types of funding and infrastructure projects will be subject to the domestic preference requirements and contains information regarding the requirements for and evaluation of waivers to the domestic preference rules. The authors of this article discuss the guidance.

The Infrastructure Investment and Jobs Act (“IIJA”),¹ which included the Build America, Buy America Act (the “Act”), was signed into law on November 15, 2021, and created a deadline of May 14, 2022, for federal agencies to ensure their funding of infrastructure projects are in line with the Act’s requirements. The White House has released guidance (the “WH Guidance”)² concerning how it will interpret, apply and grant waivers to the domestic preference requirements contained in the Act.

The WH Guidance has two stated goals: (1) explain the application of “Buy America” preference to federal financial assistance programs for infrastructure, and (2) provide a transparent process to waive such a preference, when necessary. This article is a guide to understanding how the WH Guidance may impact contractors’ businesses.

ENTITIES TO WHICH THE WH GUIDANCE APPLIES

The WH Guidance applies to “federal financial assistance,” the scope of which includes financial assistance—in any form—that non-federal entities (i.e., states, local governments, territories, tribes, institutions of higher education and nonprofit organizations) receive or administer. Non-federal entities do not include for-profit organizations; instead, agencies should continue to rely on independent statutory authorities for domestic content requirements for federal financial assistance issued to for-profit organizations.

* Andrew K. McAllister (andrew.mcallister@hkllaw.com), a partner at Holland & Knight LLP and a member of the firm’s International Trade Group and Foreign Corrupt Practices Act Team, focuses on export controls, sanctions, customs, antidumping and countervailing duties, anti-corruption and industrial security. Libby Bloxom (libby.bloxom@hkllaw.com) and Mackenzie A. Zales (mackenzie.zales@hkllaw.com) are associates at the firm and members of the firm’s International Trade Group.

¹ <https://www.congress.gov/bill/117th-congress/house-bill/3684/text>.

² <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

ENTITIES TO WHICH THE WH GUIDANCE AND ACT DOES NOT APPLY

There are a few noteworthy instances explained in the WH Guidance for when the Buy America preferences in the Act will not apply:

- The domestic preference requirements apply only to the extent that no other domestic content procurement preference does not already apply to iron, steel, manufactured products and construction materials. The intent of this carveout is to avoid disruption to current programs wherever possible. For a separate procurement preference to take priority over the Act, it must meet or exceed the domestic preference requirements set forth in Section 70914 of the Act, meaning certain domestic preference programs may have to adopt new standards (i.e., the Federal Highway Administration’s (“FHWA”) Buy America Act program likely will need to adopt specific provisions associated with manufactured products and construction materials).
- If an agency determines that no funds from a particular project under a covered program will be used for infrastructure, the Buy America preference does not apply.
- The Buy America preference applies only to the infrastructure itself. In other words, a Buy America preference does not apply to tools or supplies brought to the construction site and removed before completion of the project; furnishings such as chairs, desks and portable computer equipment; or any other equipment not an integral part of or permanently affixed to the structure.

INFRASTRUCTURE WITHIN THE ACT AND WH GUIDANCE

The guidance explains that infrastructure has the broad definition originally contained in Section 70912(5) of the Act and that, even with that broad definition, agencies should treat the statutory definition of “infrastructure” as illustrative and not exhaustive. To that end, the WH Guidance specifically mentions that “structures, facilities, and equipment that generate, transport, and distribute energy—including electric vehicle (“EV”) charging—[are] infrastructure.”

Further, 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.

ADDITIONAL INFORMATION REGARDING WAIVERS

The WH Guidance contains helpful information regarding the intended use of each available waiver and the criteria the agency will use to determine whether a waiver should be granted. The WH Guidance makes clear that

agencies must notify the Made in America Office (“MIAO”) before posting any proposed waiver for public comment; information regarding submission criteria and processes is included in the WH Guidance. In summary form, the three waivers available under the Act are the:

- Public interest waiver for when applying the domestic content preference would be inconsistent with the public interest;
- Nonavailability waiver for when the types of iron, steel, manufactured products or construction materials are not produced in the United States in sufficient quantity or satisfactory quality; and
- Unreasonable cost waiver for when the inclusion of items produced in the United States will increase the cost of the overall project by more than 25 percent.

Of note, the WH Guidance outlines standard criteria agencies must use to review waivers and requires agencies to either bring their evaluation criteria in line with the guidance or establish criteria. Granting waivers that are (1) time-limited; (2) targeted; and (3) conditional are framed as “minimum requirements for the use of waivers” within the WH Guidance.

PUBLIC INTEREST WAIVERS

While simultaneously stressing that agencies should issue waivers “judiciously,” the WH Guidance explains that public interest waivers “may have a variety of bases” and outlines several instances in which it may be advisable for an agency to seek a public interest waiver for a particular project. Namely:

- Federal agencies may consider whether a general applicability public interest waiver should apply to waive Buy America preference requirements for infrastructure project purchases below a de minimis threshold, awards below the Simplified Acquisition Threshold or for miscellaneous minor components within iron and steel products.
- The WH Guidance also contemplates what it calls adjustment period waivers. For example, a public interest waiver may be warranted if an award is issued on or after May 14, 2022, for a Notice of Funding Opportunity that preceded the deadline and did not include the Buy America preferences. Here, the public interest waiver may be necessary to avoid undue increases in the time and cost of a project.
- Public interest waivers also may be appropriate to allow states to comply with their international trade obligations, whether pursuant to the World Trade Organization (“WTO”) Government Procurement Agreement or other trade agreements.
- Generally speaking, the WH Guidance says that other considerations

that play into whether a public interest waiver may be appropriate include the resources available to the recipient, the value of the items, the potential domestic job impact and policy considerations such as sustainability, equity, accessibility and performance standards.

Beyond the justifications for public interest waivers, the WH Guidance provides a brief outline of the steps required before granting a public interest waiver:

- Applicants for public interest waivers must submit detailed written statements justifying why the requested waiver is in the public interest.
- The agency must, to the extent permitted by law, examine whether a significant source of the cost advantage associated with foreign-sourced products is the result of dumping or subsidies.
- The agency must integrate any findings regarding dumping and subsidies into its assessment of whether to grant the waiver.

NONAVAILABILITY WAIVERS

When reviewing applications for nonavailability waivers, the WH Guidance indicates that agencies should consider whether the applicant has conducted thorough market research and considered domestic alternatives. Both the timing of the research and conclusions reached on the availability should factor into whether an agency grants a nonavailability waiver request.

UNREASONABLE COST WAIVERS

The WH Guidance instructs agencies to focus on the adequacy of an applicant's pricing and cost documentation. In particular, the WH Guidance explains that unreasonable cost waiver requests need to contain a comparison between the cost of the domestic product and the cost of the foreign product or a comparison of the overall cost of the project with domestic versus foreign products.

Underscoring the guidance for all three types of waivers is an emphasis on narrowness, judicious use, and clear documentation and proof of the need for the waiver. Overall, the WH Guidance explains that one of the primary purposes of the MIAO is to bring increased transparency to waivers to send clear demand signals to domestic producers.

Notably, the WH Guidance does not address the existing regulatory waivers available for the agencies already subject to domestic preference requirements of the Buy America Act (e.g., the microprocessor waiver or the rolling stock waiver for procurements by the Federal Transit Administration).

PRELIMINARY GUIDANCE REGARDING CONSTRUCTION MATERIALS

With the caveat that the guidance is preliminary and non-binding, the WH Guidance included a much-anticipated clarification of what will constitute “all manufacturing processes” within the context of the requirement that all manufacturing processes of construction materials occur in the United States. After referring to the statutory definition of construction materials in the Act,³ the WH Guidance explains that “all manufacturing processes” should include at least the final manufacturing process and the immediately preceding manufacturing stage. The Office of Management and Budget sought additional stakeholder input on this definition.

³ Sections 70917(c)(1) and 70911(5).