

BUY AMERICA PROVISIONS IN THE BIPARTISAN INFRASTRUCTURE INVESTMENT AND JOBS ACT

Questions for Canadian suppliers

- Do you currently participate in U.S. procurements (either as prime contractor or sub-contractor) which would qualify as infrastructure projects?
 - If yes, could you provide specific information on:
 - The type of product(s) provided;
 - The type of project(s) in which you are involved and the corresponding HS Code;
 - The entity(ies) undertaking such procurements (e.g. state or municipal government); and,
 - (If known), the U.S. federal agency providing funding for these procurements.
- Have you previously encountered barriers related to U.S. domestic content requirements in accessing U.S. procurement opportunities for infrastructure-related projects? If so, can you specify what were the requirements and the type of products/projects involved?
- Are there aspects of the proposed [U.S. bipartisan infrastructure package](#) (Infrastructure Investment and Jobs Act – IIJA) specifically related to Buy America requirements, which are of concern to you? If so, could you please elaborate, including details such as the extent to which your supply chains or your current access to the U.S. market may be negatively impacted. Under the IIJA, the product scope of Buy America would be expanded to include “construction materials”, which would include materials not traditionally covered by Buy America requirements, including inter alia: non-ferrous metals, plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables), glass (including optic glass), lumber and drywall.
- Have you heard any concerns from your U.S. partners (e.g. contractors, suppliers, sister firms, etc.) regarding the new proposed Buy America provisions in the infrastructure package? Are you aware of areas where the proposed provisions may have a negative impact on U.S. companies? (For instance where inputs for U.S. manufactured products are only available from Canadian partners).

See next section for backgrounder.

All responses to these questions should be directed to Pierre Mertiny, CACSMA President, at: pmertiny@ualberta.ca.

BUY AMERICA AND THE U.S. BIPARTISAN INFRASTRUCTURE PACKAGE

Existing Buy America Requirements

Buy America requirements are U.S. domestic content requirements for iron, steel and manufactured goods used in procurement projects carried out by sub-central U.S. governments (e.g. state and municipalities) with funds issued by specific U.S. federal departments and agencies (mainly the Department of Transportation (DoT) Agencies¹, and the Environmental Protection Agency (EPA)).

Buy America requirements have been in place since 1982, and create significant barriers for Canadian firms in accessing U.S. procurement opportunities, either as prime or sub-contractors.

The Infrastructure Investment and Jobs Act

The [Infrastructure Investment and Jobs Act](#) (IIJA) (commonly referred to as the U.S. bipartisan infrastructure package) was adopted by the U.S. Senate on August 10, 2021, as the result of weeks of negotiations among a bipartisan group of Senators. It represents the infrastructure component of President Biden's *American Jobs Plan*. The bill is currently being considered by the House of Representatives, and is scheduled for a vote on September 27, 2021.

The bill provides nearly US\$1 trillion in infrastructure-related spending over five years, including reauthorizations for existing programs, and US\$550 billion for new programs directed to roads, bridges, highways, water infrastructure, electric vehicle infrastructure, the electric grid and broadband infrastructure.

The bill contains a section entitled "Build America, Buy America", which if adopted, would expand current Buy America requirements in four main ways detailed below. These proposed changes would become permanent, remaining in place even once the funding provided in the IIJA has expired.

1. Expansion of Buy America to all infrastructure-related projects

While Buy America currently only applies to DoT Agencies and the EPA, the IIJA would require that all infrastructure-related federal financial assistance, provided by any federal agency, include domestic content preferences for iron, steel, manufactured products and construction materials. The IIJA's definition of what constitutes an "infrastructure" project is broad, including: 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; electrical transmission facilities and systems; utilities; broadband infrastructure; and, buildings and real property.

This proposed expansion could impact Canadian companies operating in sectors not historically targeted by Buy America requirements (e.g. community housing developments, broadband infrastructure).

¹ These include the Federal Highway Administration, the Federal Aviation Administration, the Federal Railroad Administration, the Federal Transit Administration and Amtrak.

2. Expansion of Buy America to include construction materials

For all infrastructure-related procurement and all agencies, the IIJA provides that no amounts made available through a federal financial assistance program may be obligated for a project unless the construction materials used in the project are produced in the U.S. The U.S. Office of Management and Budget would be mandated to define what “produced in the U.S.” entails for construction materials.

Certain current Buy America requirements apply to manufactured products, which may overlap with “construction materials”. However, the bill indicates that, for the purpose of its application, “construction materials” would include materials not traditionally covered by Buy America requirements, including *inter alia*: non-ferrous metals, plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables), glass (including optic glass), lumber and drywall. Cement, aggregates and aggregate binding agents would be excluded from the requirements.

3. Expansion of existing requirements for iron and steel

The IIJA requires that no funds under a federal financial assistance program for infrastructure may be obligated for a project unless, for iron and steel, “all manufacturing processes, from the initial melting stages through the application of coatings, occur in the U.S.”.

For most projects undertaken by DoT Agencies already applying Buy America requirements, this appears consistent with existing practices, and would not significantly change the situation for Canadian suppliers. However, it may expand current requirements for projects undertaken with funding from the EPA (such as for public water systems or treatment works), since that Agency currently only applies Buy America requirements to eleven products made primarily of iron and steel, but would now have to apply them to all iron and steel incorporated into its projects.

4. Expansion of existing requirements for manufactured products

Under the IIJA, no funds under a federal financial assistance program for infrastructure may be obligated unless, for manufactured products, the product is manufactured in the U.S., and the cost of its components that are mined, produced, or manufactured in the U.S. are greater than 55% of the total cost of all components, unless another standard for determining the minimum domestic content exists.

This proposed rule could have new impacts for Canadian suppliers of products generally used in sub-contracts in projects funded by the Federal Highway Administration (FHWA). This is because the FHWA would now have to move from applying Buy America requirements to manufactured products made predominantly of iron or steel to all manufactured products. It would also represent an expansion of domestic requirements applied to projects receiving EPA funding, which do not currently apply to manufactured products. The proposed rule is not, however, expected to have an impact on existing Buy America requirements for projects funded by the other DoT Agencies since they already apply restrictions on manufactured products.

The IJA also includes provisions related to the granting of waivers to the Buy America requirements. Most notably, it introduces a five-year review process for some existing waivers. Depending on how the waiver rules are implemented, this could have an impact on existing waivers (e.g. the FHWA waiver for ferryboat equipment and machinery parts, pig iron, iron ore and scrap). In addition, requests for waivers from Buy America requirements for specific projects would undergo additional scrutiny (including a public comment period) and may become even more difficult to obtain than is currently the case.