



Compliance with Buy America Requirements on Infrastructure Projects Receiving Federal Financial Assistance

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Effective May 14, 2022, most infrastructure projects receiving federal financial assistance will be subject to a “Buy America” domestic preference requirement. Infrastructure projects receiving funding from U.S. Department of Transportation (USDOT) agencies were already subject to “Buy America” requirements, but Congress acted through the Infrastructure Investment and Jobs Act (IIJA), often referred to as the Bipartisan Infrastructure Law (BIL), to mandate that other federal agencies likewise impose “Buy America” restrictions on infrastructure projects to which they provide financial assistance. The Buy America provisions of the IIJA were contained in a portion of the Act known as the “Build America, Buy America Act,” typically abbreviated as “BABA.”

This paper summarizes key aspects of BABA’s Buy America requirements as they currently exist. Please note, however, that the U.S. Office of Management and Budget (OMB) is in the process of updating its proposed implementation guidance regarding BABA, and individual federal agencies are continuing to consider and adopt their own public interest waivers of BABA requirements as they confront issues regarding the impact of the BABA requirements on new infrastructure programs. Thus, manufacturers should continue to monitor and track actions by OMB and individual federal agencies that may occur after the date of this paper that could impact BABA or Buy America requirements for infrastructure projects receiving federal financial assistance.

I. Summary of the BABA Requirements

- OMB is the federal agency responsible for issuing guidance to other federal agencies on how to implement BABA.
 - OMB Memorandum M-22-11, dated April 18, 2022 provided initial guidance to federal agencies on BABA implementation:
<https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
 - On February 9, 2023, OMB proposed updated guidance that would be incorporated into regulations at 2 C.F.R. Part 184:
<https://www.govinfo.gov/content/pkg/FR-2023-02-09/pdf/2023-02617.pdf>
 - OMB’s February 9, 2023 proposed regulations/guidance are subject to change based on public comments, so manufacturers should track whether and how that guidance may change in the future.

- **Basic BABA requirement:** none of the funds available for a federal financial assistance program for **infrastructure** may be obligated for a project unless **all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.**
 - Under BABA, an item incorporated into an infrastructure project will be classified within only one of three potential categories
 - 1) iron or steel product
 - 2) manufactured product
 - 3) construction material

- **Definitions of Key Terms¹:**
 - **“Infrastructure”:** defined broadly to include
 - 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; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.
 - Specifically includes EV charging stations.
 - If project involves construction, alteration, maintenance, or repair of facilities that are (or will be) publicly owned and operated, privately operated on behalf of the public, or a place of public accommodation, the project will be considered an “infrastructure project” under BABA.
 - **“Iron or steel products”:**
 - articles, materials, or supplies incorporated into an infrastructure project that consist wholly or predominantly of iron, steel, or both
 - As of the date of this paper, OMB has not yet established a definition of “predominantly of iron, steel, or both,” but that definition will be critical to determining whether products containing significant iron/steel content fall within the “iron or steel products” category or the “manufactured products” category.

¹ These definitions are drawn from OMB Memorandum M-22-11 and OMB’s proposed guidance issued on February 9, 2023. These definitions could be revised or refined by OMB as a result of public comment on its February 9, 2023 proposed guidance.

- **“Construction materials”:**
 - articles, materials, or supplies incorporated into an infrastructure project that consist of only one or more of the following materials” (and binding agents): (i) non-ferrous metals; (ii) plastic and polymer-based products (including PVC, composite building materials, and polymers used in fiber optic cables); (iii) glass (including optic glass); (iv) fiber optic cable; (v) optical fiber; (vi) lumber; or (vii) drywall.
- **“Manufactured products”:**
 - Articles, materials or supplies incorporated into an infrastructure project that (i) do not consist wholly or predominantly of iron or steel or both and (ii) are not categorized as a “construction material” [source: OMB proposed guidance of February 9, 2023]
 - Essentially, any item that does not fit the BABA definition of “iron or steel product” or “construction material” would fall into the “manufactured products” category by default.
- **BABA Standards for a Product to Be Considered “Produced in the United States”**
 - Standard varies based on category of product.
 - For **iron or steel products**:
 - **All manufacturing processes**, from the initial melting stage, through the application of coatings, **must have occurred in the United States**.
 - Any foreign manufacturing performed on an iron or steel product will prevent the iron or steel product from being considered domestic under BABA.
 - For **manufactured products**:
 - Product 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 percent of the total cost of all its components**.
 - OMB has not yet defined the term “manufactured in the United States” in the context of manufactured products
 - Under the Buy American Act, that phrase has been interpreted to mean “completion in the form required by the Government,” and to require more than minimal assembly operations in the United States.

- Manufacturers should monitor whether OMB includes in subsequent guidance a definition of “manufactured in the United States” as applied to the test for “manufactured products” to be considered “produced in the United States.”
- Under general BABA rules, there is not a requirement to trace the origin of iron or steel components of a **manufactured product** all the way back to a U.S. melt source. If a product is considered a “manufactured product” for BABA purposes, and not a “predominantly iron or steel product” then all that is relevant is where the component itself was manufactured—tracing the steel/iron back to the foundry is not necessary. If the iron/steel component is manufactured in the U.S., you would be able to treat its cost as domestic for the cost of components analysis, no matter the ultimate melt source of the iron/steel content.
 - **EXCEPTION:** An exception to this rule about not needing to trace the origin of steel/iron in a steel/iron component of a manufactured product is the FHWA. Under its current interpretation of its Buy America rules, FHWA requires all predominantly iron or steel components of a manufactured product to be traceable to 100% U.S. manufacture, from the melt stage through the application of a coating. Therefore, on a project subject to FHWA Buy America rules, you would need to ensure you can trace the origin of iron/steel components in a manufactured product, or determine that a waiver would allow the use of the iron/steel components whose origin you cannot trace to 100% U.S. melting/manufacturing.
 - Also, if you have a manufactured product that has significant iron/steel content, pay close attention to how OMB and the specific federal funding agency involved in your project define “predominantly iron or steel.” The definition ultimately adopted could put a product you would otherwise consider to be a “manufactured product” into the “iron or steel product” category, which requires tracing of iron/steel content to 100% U.S. melting/manufacture.

- For **construction materials**:
 - **All manufacturing processes** on the construction material **must have occurred in the United States**.
 - Definition of “all manufacturing processes” varies based on the specific type of construction material.
 - See **2 C.F.R. § 184.6** in OMB’s February 9, 2023 proposed guidance for details.
- **How to perform the “cost of components” analysis for “manufactured products” under BABA**
 - OMB is proposing to use the Buy American Act definition of “cost of components,” found at 48 C.F.R. § 25.003.
 - First step is to **identify the “components”** of the manufactured product being incorporated into the infrastructure project.
 - “Components” are articles, materials, or supplies incorporated directly into the manufactured product.
 - Not everything in your bill of materials will at the “component” level; lower-tier parts/assemblies may be subcomponents or sub-subcomponents that you manufacture into the “component” part/assembly.
 - Once you have identified the “components” of the manufactured product, **determine which type of component** it is: **purchased** or **manufactured**.
 - **Purchased components** are components you purchase from a supplier, rather than manufacture yourself.
 - **Manufactured components** are components that you manufacture yourself from lower-level parts.
 - Once you have determined which components are purchased and which are manufactured, **apply the definitions below to determine the cost of each component**.
 - The **cost of a purchased component** is defined as the acquisition cost, including transportation costs to the place of incorporation into the manufactured product, and any applicable duty (whether or not a duty-free entry certificate is issued). In simple terms, this is the purchase price you pay the supplier for the component, plus the cost (in terms of freight and duties) to get it to the location where you manufacture the end product.

- The **cost of a manufactured component** is defined as all costs associated with the manufacture of the component, including transportation costs to the place of incorporation into the manufactured product, plus allocable overhead costs, but excluding profit.
 - These costs would include the costs of lower-tier parts (subcomponents) you manufacture into the component.
 - If you are manufacturing a component yourself, the labor costs of manufacturing the component are included in the cost of that component.
 - However, you must distinguish the costs of manufacturing the component from the subsequent costs associated with manufacturing the end product out of its various components.
 - The cost of components analysis cannot include any costs associated with the manufacture of the end product.
- Once you have determined the cost of each component using the definitions above, add up (i) the cost of the U.S.-origin components and (ii) the cost of all components, and **determine whether the U.S.-origin components account for more than 55% of the total cost of all components.**

II. BABA Waivers and Agency-Specific Implementation

- While OMB issues guidance to all federal agencies on how to implement BABA's Buy America preference, each federal agency is responsible for implementing BABA for its own grants/financial assistance programs.
- As a result, there can be some variability from agency to agency, as agencies fill in gaps in the OMB guidance (such as offering their own definitions of terms that OMB has left undefined) or issue their own waivers of BABA applicable to the programs they are responsible for funding/administering.
- There are three potential bases for waiving BABA's Buy America preference requirements:
 - **Non-availability waiver**
 - When a domestic source is not available for a particular item or product
 - Request for a non-availability waiver must be supported by thorough market research showing efforts to identify domestic sources

- **Unreasonable Cost waiver**
 - Available if the inclusion of BABA-compliant materials would increase the cost of the overall project by more than 25%
- **Public Interest waiver**
 - Catch-all category permitting waiver when application of BABA requirements would be “inconsistent with the public interest”
 - Examples of public interest waivers agencies have adopted or proposed include:
 - Waivers for de minimis costs, small grants, or minor components
 - Temporary “adjustment period” waivers
- Many agencies have web pages for BABA implementation, and manufacturers should monitor the web pages for agencies with oversight over programs of interest to them.
 - The Made in America Office (MIAO) within OMB has a web page that provides links to several agency pages with waiver information: <https://www.madeinamerica.gov/waivers/financial-assistance/>
- USDOT agencies are generally continuing to apply their “legacy” Buy America rules, as BABA does not displace pre-existing Buy America requirements that are consistent with BABA
 - Rules for infrastructure projects funded by USDOT agencies—*e.g.*, Federal Transit Administration (FTA), Federal Highway Administration (FHWA), Federal Aviation Administration (FAA)—may differ in some respects from the BABA rules as implemented by OMB and other federal agencies
 - See slide presentation from February 22, 2023 for discussion of FTA, FHWA, and FAA Buy America requirements
 - USDOT agencies that did not have explicit rules governing “construction materials” are incorporating BABA rules regarding “construction materials” into their projects
- FHWA is in the process of reviewing its general waiver for manufactured products and may ultimately rescind or narrow that waiver based on feedback received from the public: <https://www.govinfo.gov/content/pkg/FR-2023-03-17/pdf/2023-05498.pdf>.

III. Buy America Compliance Pointers

- **Determine how your product fits into the BABA framework**
 - Is it a manufactured product, iron or steel product, or a construction material?
 - Is it a component of a manufactured product? A subcomponent?
 - Is your product delivered to the construction site for incorporation into the infrastructure project? Or is it delivered to a higher-tier manufacturer for incorporation into that manufacturer's product?
- **Determine which set of rules/waivers applies to a specific project**
 - Identify the federal agency that will be funding the projects you are most likely to bid on or supply products for, and assess whether there are any agency-specific nuances that affect Buy America requirements
 - Is this a USDOT agency with its own pre-existing Buy America rules (FTA, FHWA, FAA)?
 - Has the agency issued general applicability waivers of BABA/Buy America that might apply to your product or project?
 - If you do not know what agency's rules apply to a specific project, try to obtain the solicitation documents for the project, as they should include the operative BABA or Buy America requirement
- **Monitor the Federal Register and agency BABA websites for updates or revisions to BABA requirements/waivers**
 - Be on the lookout for revisions OMB may make to its February 9, 2023 proposed BABA guidance, based on public comments it received
- **Look for opportunities to provide your own input/perspective to help shape agency implementation of BABA**
 - Agencies are required to submit proposed waivers for public comment, giving a chance to weigh in (pro or con)
 - Some agencies have issued Requests for Information seeking information from industry on the domestic availability of certain products and/or whether a BABA waiver may be needed for certain programs
- **Don't confuse "Buy America" with "Buy American"**
 - As discussed in the slide presentation for the February 14, 2023 webinar, there are key differences between the BABA "Buy America" requirements and

the “Buy American” requirements applicable to direct federal procurements subject to the Buy American Act of 1933

- BABA/Buy America: state or local government project that receives federal financial assistance, such as a project for the construction of a new subway station that receives FTA funding
- Buy American Act: a U.S. government project that is solicited, contracted, and paid for by a federal agency, such as an infrastructure project on a U.S. Army base
- Make sure you are not applying Buy American Act compliance rules to a BABA project, as the rules are not the same, and confusing the two could result in supplying a product on a BABA project that is deemed non-domestic under BABA rules
- **Implement processes to assess and document your compliance with applicable Buy America requirements**
 - If your product is subject to the iron/steel sourcing requirements, ensure you can document that all of the manufacturing processes on the product were performed in the United States, including tracing the steel back to a U.S. foundry via mill certificates
 - Would mean requiring certificates from lower-tier suppliers to document where the steel was melted and that any operations performed on the steel occurred in the United States
 - If your product is a manufactured product subject to the 55% cost of components requirement, ensure that you are obtaining the necessary country-of-origin and cost information regarding the components of your product
 - Use the “cost of components” definitions that OMB has proposed at 2 C.F.R. § 184.5
 - Ensure sales/bidding team is educated on how to determine whether a project is subject to a Buy America requirement and, if so, what the applicable requirement is
 - Once Buy America requirements are identified for a project, make sure your bid/quote accounts for compliance
 - Flow down requirements to suppliers or subcontractors to ensure your product will meet any necessary Buy America requirements and that you will have the information necessary to demonstrate compliance if audited
 - Assess whether changes are needed to your sourcing and manufacturing processes to meet BABA or Buy America requirements