

TYPES NOT MAPPED YET November 21, 2022 | TTR not mapped yet | Katie E. Kraft, Jane Sutter Starke, Jayna Marie Rust

The changing landscape of domestic preferences for federal infrastructure projects under BABA

On November 15, 2021, Congress enacted the Build America, Buy America Act (BABA Act), as part of the Infrastructure Investment and Jobs Act (IIJA), to strengthen Made in America laws consistent with President Biden's directive in Executive Order 14005, "Ensuring the Future is Made in America by All of America's Workers." In the BABA Act, Congress tasked the Federal Acquisition Regulatory Council with amending Federal Acquisition Regulation (FAR) for the Buy American Act and also imposed new "Buy America" requirements on federal infrastructure programs not covered by the FAR. This article focuses on the BABA Act's changes to domestic preference requirements for federal infrastructure programs, which became effective May 14, 2022.

The BABA Act domestic preference requirements

Broadly, the BABA Act requires the use of U.S.-produced iron and steel, manufactured products, and construction materials in federally-funded infrastructure projects:

- For iron and steel - all manufacturing processes for the iron and steel, from the initial melting stage through the application of coatings, occur in the United States.
- For manufactured products - the end product must be manufactured in the United States and more than 55% of the total cost of all components of the manufactured product must also be of U.S. origin.
- For construction materials - all manufacturing processes for the construction material occur in the United States (including both the final manufacturing step, as well the immediately preceding manufacturing stage for the construction material). ¹

Federal agencies are required to conform existing Buy America programs to the BABA Act's requirements, except where existing Buy America policies and provisions that meet or exceed the standards required by the BABA Act. The BABA Act sets a floor - not a ceiling - on domestic preferences in federally-funded infrastructure projects.

The BABA Act applies to all Federal financial assistance programs for infrastructure, ² whether or not such programs were subject to Buy America laws previously. ³ It is not limited to funds appropriated under the IIJA.

Addition of "construction materials" to Buy America landscape

Previous Buy America laws (which differ from the Buy American Act) only applied to iron and steel, and in some cases, manufactured products. ⁴ The BABA Act adds "construction materials" to the Buy America landscape. Specifically, it requires that articles, materials, or supplies that (i) consist of 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 ("*construction materials*") and (ii) are consumed in, incorporated into, or affixed to the infrastructure project be produced in the United States.

- The preference does not apply to tools, equipment, and supplies (i.e., temporary scaffolding) brought to the construction site and removed at or before completion of the project.
- It also does not apply to items that are not permanently affixed or an integral part of the structure (desks, chairs, etc.).

- If multiple construction materials are combined through a manufacturing process, or one construction material is combined with a non-construction material through a manufacturing process, the resulting product is treated as a manufactured product, not construction material (different standards will apply).
- Items made primarily of steel or iron, cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives are not construction material.

Waivers

Waivers may be available from the federal agency funding the project if the agency finds that:

1. applying the preference would be inconsistent with public interest,
2. the material is not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality, or
3. inclusion of compliant material will increase cost of overall project by more than 25 percent.

All waivers are required to go through the OMB Made In America Office for review and be cross-posted to a [centralized waiver site](#). For construction materials in particular, OMB guidance is that waivers for construction materials must be explicitly targeted and time-limited.

Implementation

Implementation of the BABA requirements will not be consistent across all federal agencies. The Federal Transit Administration (FTA), for example, has domestic preference requirements that exceed the minimum standards for iron, steel, and manufactured products set forth in the BABA Act, as well as a statutory waiver for rolling stock (a manufactured product) that continues to apply post-BABA. And each agency is responsible for deciding the extent and scope of any waivers (in consultation with OMB) of the preference requirements. The source of the federal funding and the particular requirements of the funding agency will determine what rules apply to the infrastructure project.

U.S. Department of Transportation

The U.S. Department of Transportation (DOT) temporarily delayed implementation of the new construction materials requirements under a transitional public interest waiver, in order to help the industry prepare for compliance with the new standards for construction materials. The transitional waiver expired on November 10, 2022. Subject to application of any new waivers, including the proposed waivers discussed below, the construction materials domestic preference requirement now applies to any infrastructure project funded by a DOT award obligated on or after November 10, 2022.

DOT recently announced two additional actions intended to help with the transition to the new standards.

First, DOT proposed a waiver of the construction materials requirement for two categories of contracts: (a) contracts entered into before November 10, 2022, without regard to the obligation date of grant funds supporting the contract; and (b) contracts entered into before March 10, 2023, that resulted from solicitations published before May 14, 2022. If issued, the waiver would apply to awards obligated on or after the effective date of the waiver. The comment period closed November 20, 2022 ([Docket](#) No. DOT-OST-2022-0123).

Second, DOT proposed a public interest waiver of the iron and steel, manufactured products, and construction materials requirements for de minimis costs, small grants, and minor components. Under this waiver, the domestic preference for iron and steel, manufactured products, and construction materials used in infrastructure projects would not apply under a single financial assistance award for which: (a) the total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the award (de minimis cost); (b) the size of the award is below \$500,000 (small grant); or (c) the foreign-produced miscellaneous minor components comprise no more than 5% of the total material cost of an otherwise domestically produced iron or steel product (minor components). The waiver would apply to program-specific domestic preference requirements as well as the BABA Act requirements and, if issued, would apply to awards obligated on or after the effective date of the waiver. The comment period closed November 20, 2022 ([Docket](#) No. DOT-OST-2022-0124).

These proposed waivers cut across all DOT modal administrations. FTA grantees and their contractors should pay particular attention to the recent FTA [Dear Colleague letter](#) on the BABA Act (Nov. 7, 2022). The letter confirms that:

- FTA awards obligated before November 10, 2022 are not subject to the BABA Act requirements.
- A contract for a project that will be funded by FTA solely by one or more awards obligated before November 10 need not comply with the new construction materials requirements, regardless of when the project sponsor executes the contract.
- FTA will apply the construction materials standards set forth in the April 2022 OMB Memorandum.

- FTA recommends that project sponsors follow FTA's Buy America certification requirements (49 C.F.R. 661.6) to ensure compliance with the new construction materials requirement.

Other federal grant-making agencies

For information on implementation at other federal grant-making agencies, please visit the following:

- U.S. Department of Housing and Urban Development - [proposed and currently effective waivers](#)
- U.S. Environmental Protection Agency - [general information, waivers open for public comment, and approved waivers](#)
- U.S. Department of Agriculture - [waiver requests and approved waivers](#)
- U.S. Department of Homeland Security, FEMA grant programs - [interpretation and waivers](#)
- U.S. Department of Interior, Bureau of Indian Affairs - [information on interagency tribal consultation](#)
- U.S. Department of Commerce - [pending and approved waivers](#)
- U.S. Department of Energy - [general applicability waiver](#)
- U.S. Department of Veterans Affairs - [general information and approved waivers](#)
- U.S. Department of Education - [FAQs, listing of infrastructure programs, and waivers opened for public comment, approved, or denied](#)

OMB's list of covered federal agencies can be found [here](#).

This is a developing area of the law. Check back for more updates!

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1. As interpreted by the Office of Management & Budget (OMB) in [guidance](#) issued April 18, 2022. [↩](#)
2. *Infrastructure* includes, at minimum, structures, facilities and equipment 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, utilities, broadband infrastructure, buildings, and real property. This also includes structures, facilities, and equipment that generate, transport, and distribute energy (including EV charging infrastructure). *Project* means the construction, alteration, maintenance, or repair of infrastructure. [↩](#)
3. Emergency response expenditures and Stafford Act expenditures (also related to major disasters and emergencies) are the main exception. [↩](#)
4. The Buy American Act of 1933, which generally applies to purchases made directly by the federal government, contains a domestic preference for construction materials. The Buy America provisions applicable to federal highway and transit-related projects (projects funded by the Federal Highway Administration and FTA) cover only iron and steel and manufactured products. [↩](#)

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