



Federal Infrastructure Contracting 2023 – Buy America(n) in Infrastructure Contracting

October 19, 2023

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Agenda

Fundamentals of the Buy American Act (BAA)
Fundamentals of the Trade Agreements Act (TAA)
BAA/TAA in DOD Construction/Infrastructure Contracts
Build America, Buy America (BABA) Requirements for
Federal Financial Assistance Projects for Infrastructure
Agency Application (and Waiver) of BABA Requirements

Fundamentals of the Buy American Act (BAA)

Policy – Construction Materials (FAR 25.201)

Applies to contracts for the construction, alteration, or repair of any public building or public work in the United States

Use only domestic construction materials in construction contracts performed in the U.S.

Construction material: an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work

Some Key Points

BAA statute written as a prohibition, but actually establishes preference for domestic end products delivered to the Government in competitive procurements for prime contracts
Except for COTS items – 2 Part Test: (1) Manufactured in the US; and (2) Cost of Domestic Components Must Exceed 60% of Cost of All Components (Increased in October 2022)

- Percentage will increase to 65% in CY 2024-2028, and then 75% starting in CY 2029

“Manufactured” is not defined

- Generally interpreted as the assembly necessary to form a completed end product that meets the Government’s requirements
- Simple assembly may be enough, but packaging is generally not enough

Domestic End Products

Domestic end products and construction materials include –

- Unmanufactured end products or construction materials mined or produced in the U.S., or end products or construction materials manufactured in U.S. that meet the Domestic End Product Two-Part Test

Two-Part Test for BAA Compliance

Two-part test for determining BAA compliance:

- Product or material is manufactured in the U.S. (FAR 25.101(a)(1)); *and*
- Except for an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 60 percent of the cost of all the components. (FAR 25.101(a)(2))
 - Component test is waived if supplying COTS (any item or supply, including construction material, that is a commercial item, sold in substantial quantities in the commercial place, and offered to the Government without modification in the same form in which it is sold in the marketplace (exclusive of bulk cargo, such as agricultural and petroleum products))
- For an end product that consists ***wholly or predominantly of iron or steel*** or a combination of both, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components used in the end product
 - This domestic content test of the Buy American statute has **NOT** been waived for acquisitions of COTS items in this category, except for COTS fasteners

Manufacture

“Manufacture” is not defined

- Generally interpreted as the assembly necessary to form a completed end product that meets the Government’s requirements
- Simple assembly may be enough, but packaging is generally not enough
- Standard is not as high as “substantially transformed” standard applied for TAA compliance (which usually looks for change in character or use)

Cost of Components

For components **purchased** by Contractor:

- Acquisition cost (including contractor's transportation costs to the place of incorporation into the end product); plus
- Any applicable duty

For components **manufactured** by Contractor:

- All costs associated with manufacture of components (including contractor's transportation costs to place of manufacture); plus
- Allocable overhead costs, but excluding profits

Cost of components does *not* include any costs associated with the manufacture of the end product

- *City Chemical LLC* (Jun. 17, 2005): Labor is not a component of an end product within the definition of FAR 25.003, because it is not an article, material, or supply incorporated directly into an end product

FAR 25.202 – Exceptions

When one of the following exceptions applies, the contracting officer may allow the contractor to acquire foreign construction materials without regard to the restrictions of the Buy American statute:

- Impracticable or inconsistent with public interest
- Nonavailability
- Unreasonable cost
- Information technology that is a commercial product
- Acquisitions under trade agreements

Public Interest Exception

Impracticable or inconsistent with public interest. The head of the agency may determine that application of the restrictions of the Buy American statute to a particular construction material would be impracticable or would be inconsistent with the public interest

Nonavailability Exception

Nonavailability. The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality

- A nonavailability determination is not required for construction materials listed in FAR 25.104(a)

Unreasonable Cost Exception

Unreasonable cost. The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.204.

- **FAR 25.204 – Evaluating Offers of Foreign Construction Material.** Unless the head of the agency specifies a higher percentage, the contracting officer must add to the offered price 20% of the cost of any foreign construction material proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost

Commercial IT Exception

Information technology that is a commercial product. The restriction on purchasing foreign construction material does not apply to the acquisition of information technology that is a commercial product

FAR 52.225-9, Buy American – Construction Materials (OCT 2022)

(b) Domestic preference.

(1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction materials, excluding COTS fasteners. (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

“Domestic Construction Material”

Domestic construction material means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An **unmanufactured construction material mined or produced in the United States**; or

(ii) **A construction material manufactured in the United States**, if—

(A) The cost of its components mined, produced, or manufactured in the United States **exceeds 60 percent of the cost of all its components**, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item

“Domestic Construction Material” (cont’d)

Domestic construction material means—

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, **a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all components used in such construction material.** The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of “cost of components”.

BAA Summary

Establishes preference for domestic end products/construction materials delivered to the Government

Preference is implemented through a “price preference” during evaluation of offers

BAA does not prohibit offerors from including foreign products in their offers; however, if offer with foreign products is the lowest, the contracting officer will use a price evaluation factor

Fundamentals of the Trade Agreements Act (TAA)

Trade Agreements Act (TAA) – Key Points

Allows agencies to acquire products, construction materials, and services from both the U.S. and other designated countries

In general, contracts with an estimated value in excess of the TAA threshold are exempt from the BAA and are instead subject to the country of origin requirements of the TAA

Thresholds – vary by agreement

- Not all goods/services covered
- Look at agreement Annex for coverage

Prohibition rather than preference – must supply U.S. or designated country end products (unless there are no offers for such products or the offers for those products are insufficient to fulfill the requirements)

Applicability

TAA applies to:

- Eligible products where the value of the acquisition is equal to or exceeds the applicable threshold

TAA does not apply to:

- Small business set asides
- Acquisition of arms, ammunition, or war materials or national security purposes (and other types of DoD purchases)
- End products for resale
- Federal Prison Industries and AbilityOne
- Sole source or other acquisitions not using full and open competition
- Goods and services specifically excluded under individual trade agreements

Tests

TAA test for compliance: Products

- Contractors must supply items which are either:
 - Wholly grown, produced, or manufactured in the U.S. or a designated country
 - Substantially transformed into new and different articles of commerce in the U.S. or a designated country

TAA test for compliance: Services

- Where the contractor is established

Manufactured v. Substantially Transformed

Like “manufacture” for the BAA, “substantially transformed” is not defined

- Generally consider whether a product has transformed into a new and different article with a name, character, or use distinct from the article(s) from which it was transformed
- Simple assembly is generally not sufficient (*e.g.*, fastening axe head on handle, packaging components, incorporating motherboard into computer, assembling gold links into chain)
- Analysis is highly fact dependent; look at factors such as the number of components and subassemblies, programming or customization defining the product, value of the assembly, precision and specialized tools, skill level for assembly, actual physical modification of components

Designated Countries

A World Trade Organization Government Procurement Agreement (WTO GPA) country (**Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”), Ukraine, or United Kingdom**);

A Free Trade Agreement (FTA) country (**Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore**);

A least developed country (**Afghanistan, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Co[^]te d’Ivoire, Democratic Republic of Congo, Djibouti,, Gambia, Ghana, Guinea, Guinea-Bissau, Haiti, Kiribati, Honduras, Kenya, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, Zambia, or Zimbabwe**);

A Caribbean Basin country (**Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines**)

Non-Designated Countries

To name a few...

- China
- India
- Indonesia
- Malaysia
- Philippines
- Thailand
- Vietnam

Applicable Thresholds

TAA applies to acquisitions when the value of the acquisition is equal to or exceeds a certain threshold

Value of the acquisition is a determining factor in the applicability of the trade agreements (FAR Subpart 25.4, Trade Agreements)

Most of these dollar thresholds are subject to revision by the U.S. Trade Representative approximately every 2 years

Trade Agreements - Construction

Acquisitions under trade agreements. For construction contracts with an estimated acquisition value of \$7,032,000 or more, see subpart 25.4, Trade Agreements.

- Subpart 25.4, Trade Agreements, identifies **\$7,032,000** as the lowest TAA threshold for construction contracts
- When the TAA applies, offerors proposing use of construction material from a designated country shall receive equal consideration with offers proposing use of domestic material

FAR 52.225-11, Buy American – Construction Materials Under Trade Agreements (DEC 2022)

(b) Construction materials.

(1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction material, excluding COTS fasteners. (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American restrictions are waived for designated country construction materials.

(2) The Contractor shall use only domestic or designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

Domestic Construction Material

Domestic construction material means—

(1) For construction **material that does not consist wholly or predominantly of iron or steel or a combination of both**—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029.

(B) The construction material is a COTS item; or

Domestic Construction Material (cont'd)

Domestic construction material means—

(2) For construction material **that consists wholly or predominantly of iron or steel or a combination of both**, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of “cost of components”.

“Designated Country” Construction Material

Designated country construction material means a construction material that is a WTO GPA country construction material, an FTA country construction material, a least developed country construction material, or a Caribbean Basin country construction material

WTO GPA country construction material means a construction material that—

- (1) Is **wholly** the growth, product, or manufacture of a WTO GPA country; or
- (2) In the case of a construction material that consists in whole or in part of materials from another country, has been **substantially transformed** in a WTO GPA country **into a new and different construction material distinct from the materials from which it was transformed.**

Similar definitions for FTA country, least developed country, or Caribbean Basin country construction material

BAA/TAA in DOD Construction/Infrastructure Contracts

DoD Two-Part Test

DFARS 225.101, General. For DoD, the following two-part test determines whether a manufactured end product is a domestic end product:

- (i) The end product is **manufactured in the United States; and**
- (ii)(A) The **cost of its U.S. and qualifying country components exceeds 55 percent of the cost of all its components.** This test is applied to end products only and not to individual components.
- (ii)(B) For an end product that consists wholly or predominantly of iron or steel or a combination of both, **the cost of iron and steel not produced in the United States or a qualifying country must constitute less than 5 percent of the cost of all the components used in the end product.** The domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for COTS fasteners.

Public Interest Exception

DFARS 225.103, Exceptions. Public interest exceptions for certain countries are in DFARS 225.872

DoD has specific approval levels for individual public interest exceptions:

- At a level above the contracting officer for acquisitions valued at or below the simplified acquisition threshold (SAT);
- By the head of the contracting activity for acquisitions with a value greater than the SAT but less than \$1.5 million; or
- By the agency head for acquisitions valued at \$1.5 million or more

Additional DoD Public Interest Exceptions

DFARS 225.872, Contracting with Qualifying Country Sources.

As a result of MOUs and other international agreements, DoD has determined it inconsistent with the public interest to apply restrictions of the BAA or Balance of Payments Program to the acquisition of qualifying country end products from the following countries:

- Australia
- Belgium
- Canada
- Czech Republic
- Denmark
- Egypt
- Estonia
- Federal Republic of Germany
- Finland
- France
- Greece
- Israel
- Italy
- Japan
- Latvia
- Luxembourg
- Netherlands
- Norway
- Poland
- Portugal
- Slovenia
- Spain
- Sweden
- Switzerland
- Turkey
- United Kingdom of Great Britain and Northern Ireland

Individual acquisitions of qualifying country end products from Austria may be exempted as well on a case-by-case basis

“Qualifying Country” and Construction Contracts

"Qualifying country" means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457

Qualifying Country exception applies to end products, not materials supplied under construction contracts

Additional DoD Public Interest Exceptions

For procurements **covered by the WTO GPA**, USD AT&L has determined that it is inconsistent with the public interest to apply the Buy American statute to end products that are substantially transformed in the United States

- End products that are substantially transformed in the U.S. are eligible end products under the Trade Agreements Act (TAA) and therefore, the BAA does not apply. DFARS 225.103(a)(i)(B)

Non-Availability Exception

A determination that an article, material, or supply is not reasonably available is required when domestic offers are insufficient to meet the requirement and award is to be made on other than a qualifying country or eligible end product. DFARS 225.103(b)

DOD Class Deviation – Requirements for Nonavailability Waiver Determinations Under the Buy American Statute

- Effective Nov. 16, 2021, all proposed individual nonavailability waiver determinations must be submitted to the Made in America Office
- Final decision to execute an individual nonavailability waiver determination will be approved in accordance with DFARS 225.103(b)(ii)

DoD Specific Exceptions

DoD Class Determinations. DoD has determined that the following articles are not reasonably available from domestic sources, and a separate determination as to whether the article is reasonably available is not required:

- Spare or replacement parts that must be acquired from the original foreign manufacturer or supplier
- Foreign drugs acquired by the Defense Supply Center, Philadelphia, when the Director, Pharmaceuticals Group, Directorate of Medical Materiel, determines that only the requested foreign drug will fulfill the requirements

DFARS 225.103(b)(iii)

Unreasonable Cost

Cost of a domestic end product is unreasonable if it is not the low evaluated offer when evaluated under subpart 225.5

- DFARS 225.103(c)

DoD uses an evaluation factor of 50%

- DFARS 225.105

DFARS 252.225-7001 – Buy American and Balance of Payments Program (JAN 2023)

(a) Definitions. As used in this clause—

Commercially available off-the-shelf (COTS) item—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Component means an article, material, or supply incorporated directly into an end product.

Domestic end product means—

(i) An unmanufactured end product that has been mined or produced in the United States; or

(ii) An end product manufactured in the United States if—

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(1) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(2) It is inconsistent with the public interest to apply the restrictions of the Buy American statute; or

(B) The end product is a COTS item.

DFARS 252.225-7001 – Buy American and Balance of Payments Program (JAN 2023)

End product means those articles, materials, and supplies to be acquired under this contract for public use.

Foreign end product means an end product other than a domestic end product.

Qualifying country means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. Accordingly, the following are qualifying countries:

Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland.

Qualifying country component means a component mined, produced, or manufactured in a qualifying country.

Qualifying country end product means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(1) Components mined, produced, or manufactured in a qualifying country.

(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

United States means the 50 States, the District of Columbia, and outlying areas.

DFARS 252.225-7001 – Buy American and Balance of Payments Program (JAN 2023)

(b) This clause implements Buy American. In accordance with 41 U.S.C. 1907, the component test of the Buy American statute is waived for an end product that is a COTS item (see section 12.505(a)(1) of the Federal Acquisition Regulation). Unless otherwise specified, this clause applies to all line items in the contract.

(c) The Contractor shall deliver only domestic end products unless, in its offer, it specified delivery of other end products in the Buy American—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product, the Contractor shall deliver a qualifying country end product or, at the Contractor's option, a domestic end product.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

Trade Agreements Act – DoD

DoD limits the applicability of the TAA to certain products, which are specifically identified in the regulations.

- **DFARS 225.401-70, End Products Subject to Trade Agreements.** Acquisitions of end products in the following **product service groups** (PSGs) are covered by trade agreements if the value of the acquisition is at or above the applicable trade agreement threshold and no exception applies. If an end product is not in one of the listed groups, the trade agreements do not apply.

DoD Product Service Groups

22, Railway equipment	40, Rope, cable, chain, and fittings	and scaffolding	(including firmware), software, supplies and support equipment	and packing supplies (except 8140)
23, Motor vehicles, trailers, and cycles (except 2305, 2350, and buses under 2310)	41, Refrigeration, air conditioning, and air circulating equipment	55, Lumber, millwork, plywood, and veneer	71, Furniture	83, Pins, needles, and sewing kits (only part of 8315) and flagstaves, flagpoles, and flagstaff trucks (only part of 8345)
24, Tractors	42, Firefighting, rescue, and safety equipment; and environmental protection equipment and materials	56, Construction and building materials	72, Household and commercial furnishings and appliances	84, Luggage (only 8460) - See FAR 25.003 for exclusion of luggage for Caribbean Basin countries
25, Vehicular equipment components	43, Pumps and compressors	61, Electric wire, and power and distribution equipment	73, Food preparation and serving equipment	85, Toiletries
26, Tires and tubes	44, Furnace, steam plant, and drying equipment (except 4470)	62, Lighting fixtures and lamps	74, Office machines, text processing systems and visible record equipment	87, Agricultural supplies
29, Engine accessories	45, Plumbing, heating, and waste disposal equipment	63, Alarm, signal and security detection systems	75, Office supplies and devices	88, Live animals
30, Mechanical power transmission equipment	46, Water purification and sewage treatment equipment	65, Medical, dental, and veterinary equipment and supplies	76, Books, maps, and other publications	89, Tobacco products (only 8975)
32, Woodworking machinery and equipment	47, Pipe, tubing, hose, and fittings	66, Instruments and laboratory equipment (except aircraft clocks under 6645) - See FAR 25.003 exclusion of certain watches and watch parts for certain Caribbean Basin countries	77, Musical instruments, phonographs, and home-type radios	91, Fuels, lubricants, oils, and waxes
34, Metalworking machinery	48, Valves	67, Photographic equipment	78, Recreational and athletic equipment	93, Nonmetallic fabricated materials
35, Service and trade equipment	49, Maintenance and repair shop equipment (except 4920-4927, 4931-4935, 4960, 4970)	68, Chemicals and chemical products	79, Cleaning equipment and supplies	94, Nonmetallic crude materials
36, Special industry machinery (except 3690)	53, Hardware and abrasives	69, Training aids and devices	80, Brushes, paints, sealers, and adhesives	96, Ores, minerals, and their primary products
37, Agricultural machinery and equipment	54, Prefabricated structures	70, Automatic data processing equipment	81, Containers, packaging,	99, Miscellaneous

DFARS 252.225-7021 – Trade Agreements (JAN 2023)

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only U.S.-made, qualifying country, or designated country end products unless -

(1) In its offer, the Contractor specified delivery of other nondesignated country end products in the Trade Agreements Certificate provision of the solicitation; and

(2)

(i) Offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government's requirements; or

(ii) A national interest waiver has been granted.

Build America, Buy America (BABA) Requirements for Federal Financial Assistance Projects for Infrastructure

Infrastructure Investment and Jobs Act (IIJA)

IIJA signed into law on November 15, 2021

\$1.2 trillion in funding for initiatives such as:

- Clean water (invest in water infrastructure and eliminate lead service pipes)
- Access to reliable high-speed internet
- Repair/rebuild roads and bridges
- Expand public transit options
- Upgrade airports/ports
- Invest in passenger rail

Infrastructure Investment and Jobs Act (IIJA)

- Build a national network of EV chargers
- Upgrade power infrastructure
- Make infrastructure resilient against impacts of climate change, cyber-attacks, and extreme weather events
- Tackle legacy pollution (Superfund, brownfield sites, abandoned mines, orphaned oil and gas wells)
- \$550 million to Energy Efficiency and Conservation Block Program

The Domestic Preference Sections: BABA

IIJA includes the **Build America, Buy America (BABA) Act**

Two key parts:

- ***Buy America Sourcing Requirements (for Federal financial assistance programs for infrastructure)***
- ***Make It In America – strengthens Buy American Act restrictions and waiver transparency***
 - Codifies many of the directives in Executive Order 14005 on Ensuring the Future Is Made in All of America by All of America's Workers – January 25, 2021

BABA Requirements

SEC. 70914(a), Application of Buy American Preference. – In General:

- Within 180 days of the bill's enactment, each Federal agency shall ensure that none of the funds made 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 infrastructure project are produced in the U.S.
- By mid-May 2022, all infrastructure projects funded by a Federal financial assistance program should have domestic preference restrictions at least as restrictive as those set forth in SEC. 70914 of the BABA

“Produced in the United States”

Iron or steel products: all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States

Manufactured products:

- (i) the manufactured 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, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation

Construction materials: all manufacturing processes for the construction material occurred in the United States

BAA/BABA

Procurements vs. Federal Financial Assistance

Federal Financial Assistance means assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, etc.

- BABA will apply to Federal Financial Assistance Awards

Procurement contracts should be used when the principal purpose is to acquire property or services for the direct benefit of the Government

- Buy American Act will apply to contracts with Federal agencies

Agency Application (and Waiver) of BABA Requirements

Waiver from BABA Requirements

SEC. 70914(b) – Waiver

- The head of a Federal agency that applies a domestic content procurement preference under this section may waive the application of that preference in any case in which the head of the Federal agency finds that:
 - (1) applying the domestic content procurement preference would be inconsistent with the public interest;
 - (2) 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; or
 - (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 percent

What Agencies Will Require Compliance With BABA?

To name a few...

- Department of Commerce
- Department of Health and Human Services
- Department of Homeland Security
- Department of Transportation (to include FAA, FHWA, FRA, FTA, etc.)
- Environmental Protection Agency
- And many more...

OMB April 18, 2022 Memo – Domestic Preference

All ***iron and steel*** used in an infrastructure project are produced in the United States – “***all manufacturing processes***, from the initial melting stage through the application of coatings”

All ***manufactured products*** used in a project, *i.e.*, an activity related to the construction, maintenance, or repair of infrastructure in the United States, are produced in the United States. This is satisfied if (1) the manufactured product is manufactured in the U.S., and (2) the cost of components is greater than 55 percent of the total cost of all components of the project, UNLESS another standard for determining the minimum amount of domestic content has been established by law or regulation

All ***construction materials*** are manufactured in the United States – ***all manufacturing processes*** for the construction material occurs in the United States. (Preliminary guidance: should include the final manufacturing process and the immediately preceding manufacturing stage)

OMB April 18, 2022 – Issuing Waivers – Key Points

Only the federal agency may process and approve a waiver

Waivers should be targeted to specific products or projects

The agency must publish on its website a detailed written explanation for the proposed waiver determination and provide at least 15 days for public comment (30 days for general applicability waivers)

The waiver must be cross-posted to a centralized waiver transparency website (www.madeinamerica.gov)

Agencies must consult with MIAO for proposed waivers with broader applicability before posting for public comment

All proposed waivers after public comment must be submitted to MIAO for review

All waiver requests from agencies must include a **certification** that there was a good faith effort to solicit bids for domestic products and a **statement of waiver justification**, describing all efforts made

The submission must include, among other things, a list of iron or steel items, manufactured products, and construction materials proposed for exception, the waiver type, the name, cost, and country of origin and the relevant PSC and NAICS code for each

OMB April 18, 2022 – Waiver Principles and Criteria

General

- Time-limited (no more than one to two years)
- Targeted (limited to project – or limited to the item, product or material necessary)
- Conditional (include conditions that support policies of BABA and Executive Order)

Nonavailability Waivers

Unreasonable Cost Waivers

Public Interest Waivers

- Suggests limited number of general applicability waivers: (de minimis; small grants (below SAT); minor iron or steel components; adjustment period; international trade obligations)

OMB April 18, 2022 – Construction Materials

Construction Materials – OMB issued preliminary, non-binding guidance to assist agencies in determining which materials are “construction materials” so that agencies can begin applying Buy America requirements to those materials

An article, material, or supply – **other than** (1) an item of primarily iron or steel; (2) a manufactured product; (3) cement and cementitious materials; (4) aggregates such as stone, sand, or gravel; or (5) aggregate binding agents or additives – **that is or consists primarily of**: (1) non-ferrous metals; (2) plastic and polymer-based products; (3) glass (including optic glass); (4) lumber; or (5) drywall

- Items that consist of 2 or more of the listed materials combined together through a manufacturing process, and items that include at least 1 of the listed materials, **should be treated as manufactured products and NOT construction materials**. (E.g., a plastic framed sliding window is a product and plate glass is a construction material)

Final Rule – August 23, 2023

On August 23, 2023, OMB issued a proposed rule that would revise the OMB Guidance for Grants and Agreements to implement BABA (effective October 23, 2023)

Creates a new part 184 in 2 CFR chapter I and revises 2 CFR 200.322, Domestic preferences for procurements, to implement the requirements in Section 70914

Generally aligns with OMB Memorandum M-22-11, will be updated to remove direct conflicts between M-22-11 and the Final Rule

NOT intended as “comprehensive guidance on all topics related to the implementation of BABA”

- “High-level coordinating guidance for Federal agencies to use in their own direct implementation of BABA”

Final Rule – Differences from Proposed Rule

Clarification of applicability of BABA to temporary vs. permanent products and supplies used on infrastructure projects

Revised definitions

- Component
- Construction material
- Manufactured products
- Predominantly of iron or steel
- Section 70917(c) materials

Final Rule – Applicability

Final Rule applies the Buy America Preference to “awards where funds are appropriated or otherwise made available for infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the award”

Term “infrastructure” should be interpreted broadly

Broad definition given to “infrastructure” does not limit agencies’ ability to impose BABA Act requirements on contractors

“Nontraditional” infrastructure contractors may be subject the BABA Act requirements if involved on a project covered by the Buy America preference

Final Rule – Construction Materials

OMB required to issue standards that define “all manufacturing processes” in the case of construction materials

OMB memorandum M–22–11 provides “preliminary and non-binding” guidance on the definition of construction materials

Final Rule includes OMB’s proposed standards for “all manufacturing processes” for the manufacture of construction materials

Practical Guidance

Pay Attention to the Solicitation/Contract Language

- Who is the customer? A Federal agency, a state agency, or a prime contractor?
- Review for BABA/BAA/TAA contract provisions and certification requirements
- If you have questions, consult the CO or legal counsel before submitting any certificate

Review products and supply chains for BABA/BAA compliance

- Identify the end product and apply the applicable requirement for “produced in the United States”
- Identify place of manufacture of the end product, and identify the components of the end product and cost of each component

Take advantage of opportunities to provide input on RFIs, Proposed Rules, etc.

Questions?



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