



PUBLIC
CONTRACTING
INSTITUTE

Country of Origin and Buy America Requirements

Session 4: Build America, Buy America (BABA) and Other Federal Grant Programs

David S. Gallacher, Kutak Rock LLP
Ariel E. Debin, Sheppard Mullin LLP

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Introductions



David Gallacher

+1 202.828.2437 | Washington, D.C.
David.Gallacher@KutakRock.com



Ariel Debin

+1 202.747.2646 | Washington, D.C.
adebin@sheppardmullin.com

Overview of the Series

- January 18: Buy American Act
- February 15: Trade Agreements Act
- March 21: Buy America Requirements under Federally-Funded Transportation Contracts and Programs
- April 18: Build America, Buy America (BABA) and Other Federal Grant Programs
- May 16: Customs and “Made in the USA” Labeling
- June 20: DOD: The Berry Amendment
- July 18: DOD: Specialty Metals Restrictions
- August 15: “Buy America” Round-Up: Additional Country of Origin Requirements
- September 19: Sanctions and Other Prohibited Sources

The “Country of Origin” Maze



The Buy American Act

The Trade Agreements Act

**Executive Orders –
Products + Pharmaceuticals**

**Buy America Act
(Infrastructure/
Transportation)**

DoD Specialty Metals

**The 2009
Recovery Act**

DHS Kissell Amendment

DoD Berry Amendment

DoD Photovoltaic Devices

**Build America,
Buy America**

And Many, Many More...

Today's Agenda: "Build America, Buy America" & Federal Grant Programs

1. Introduction to Federal Grant Domestic Preferences and "Build America, Buy America"
2. "Build America, Buy America" Key Concepts
3. Overlay of BABA and Agency Requirements



1. INTRODUCTION TO FEDERAL GRANT DOMESTIC PREFERENCES AND BUILD AMERICA, BUY AMERICA

2 C.F.R. § 200.322, Domestic Preferences for Procurements

§ 200.322 Domestic preferences for procurements.

- (a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.
- (b) For purposes of this section:
 - (1) “Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
 - (2) “Manufactured products” means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.
- (c) Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in [2 CFR part 184](#).

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All
Grants

Infrastructure

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Other Common “Buy America” Requirements



Buy America Act

- FTA, 49 C.F.R. Part 661
- FHWA, 23 C.F.R. § 635.410
- FAA, 49 U.S.C. § 50101
- FRA, 49 U.S.C. § 22905(a)
- Amtrak, 49 U.S.C. § 24305(f)

EPA American Iron and Steel (AIS)

- Clean Water State Revolving Fund (33 U.S.C. § 1388)
- Drinking Water State Revolving Fund (42 U.S.C. § 300j-12(a)(4))
- Water Infrastructure Finance and Innovation Act (Pub. L. No. 113-121, § 5035)



USDA Rural Utility Service/Broadband

- 7 U.S.C. § 7012
- 7 U.S.C. § 903 note + 7 C.F.R. Part 1787

USAID International Development Grant under the Foreign Assistance Act (22 C.F.R. 228.19)

- Agricultural products
- Motor vehicles
- Pharmaceuticals



2 C.F.R. § 200.322, Domestic Preferences for Procurements

(c) Federal agencies providing Federal financial assistance for **infrastructure projects** must implement the Buy America preferences set forth in 2 CFR part 184.

BABA Timeline

Jan 2021: Biden Issues E.O. 14005



Nov 2021: Biden Signs the Infrastructure Investment and Jobs Act (IIJA)



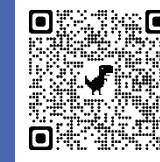
Apr 2022: OMB Issues Guidance (OMB M-22-11)



Feb 2023 + Aug 2023: OMB Issues BABA Grant Rules (new 2 CFR Part 184)



Oct 2023: OMB Issues Updated Guidance (M-24-02)



IIJA, Title IX – Build America, Buy America

- Pub. L. No. 117-58, §§ 70901-70953
- Requires federal **infrastructure programs** to provide for the use of materials “produced in the United States.”
 - "Infrastructure" generally, *not* limited to IIJA-funded Projects.
 - Projects awarded on or after November 10, 2022 (absent waiver)
- Requires Agencies to report to OMB and Congress identifying:
 - Federal programs for infrastructure administered by the Agency
 - Identifying applicable domestic content procurement preferences (potential back-fill)
 - Waivers
- OMB directed to promulgate final rules/guidance to standardize compliance

IIJA, Title IX – Build America, Buy America

Section 70912

(2) Domestic content procurement preference... means a requirement that no amounts made available through a program for Federal financial assistance may be obligated for a project unless –

- (A) all **iron and steel** [including products made wholly or predominantly of iron or steel] used in the project are produced in the United States;
- (B) the **manufactured products** used in the project are produced in the United States; or
- (C) the **construction materials** used in the project are produced in the United States.

2 C.F.R. Part 184

§ 184.1 Purpose and policy.

- (a) **Purpose.** This part provides **guidance** to Federal awarding agencies on the implementation of the Buy America Preference applicable to **Federal financial assistance** set forth in part I of subtitle A, Buy America Sourcing Preferences, of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. 117-58) at division G, title IX, subtitle A, part I, sections 70911 through 70917.
- (b) **Policy.** The head of each Federal agency must ensure that none of the funds made available for a Federal award for an **infrastructure project** may be obligated unless all of the **iron, steel, manufactured products**, and **construction materials** incorporated into the project are produced in the United States. See section 70914(a) of the Build America Buy America Act.

2 C.F.R. Part 184, Applicability

- ✓ Federal financial assistance
- ✓ Infrastructure
- ✓ Obligated on or after October 23, 2023
- ✓ Non-Federal Entities
- ✓ Commercially Available, Off-the-Shelf Items
- ✓ Commercial Information Technology
- ? For-Profit Companies
- X Buy America Preferences meeting or exceeding the requirements of Sec. 70914 of BABA

2. “BUILD AMERICA, BUY AMERICA” KEY CONCEPTS

“Infrastructure Project”

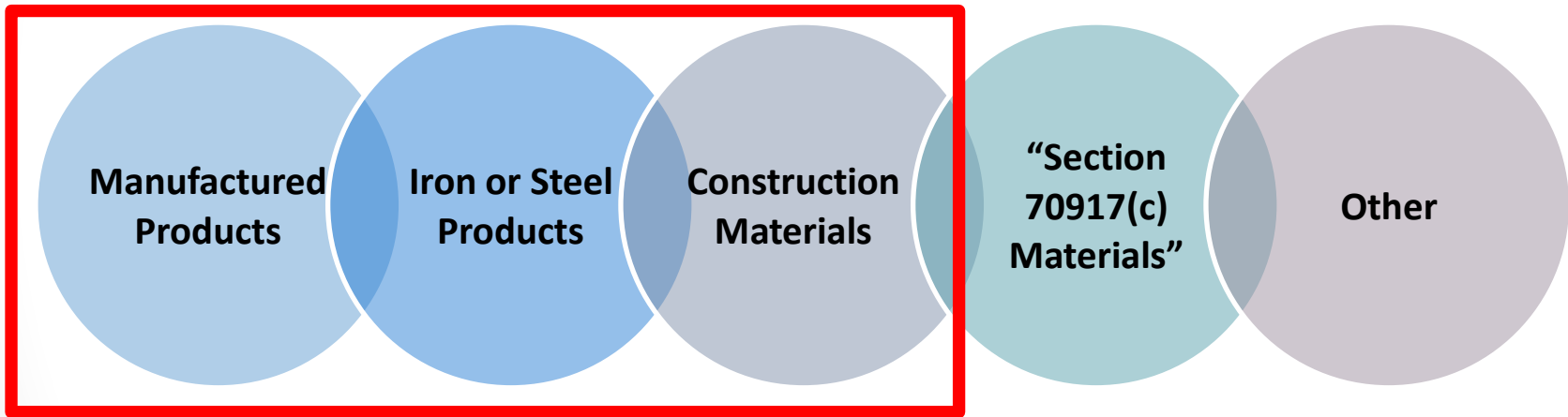
Infrastructure project means **any activity related to the construction, alteration, maintenance, or repair of infrastructure** in the United States regardless of whether infrastructure is the primary purpose of the project. *See also* paragraphs (c) and (d) of § 184.4.

— 2 C.F.R. 184.3

“Infrastructure Project” (cont’d)

- Public infrastructure projects *in the United States*
- Examples:
 - 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 (drink and wastewater);
 - Electrical transmission facilities and systems;
 - Utilities;
 - Broadband infrastructure;
 - Buildings and real property; and
 - Structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.
- “Infrastructure project” is *interpreted broadly*...

Categories of Products



**Generally subject to
BABA preferences**

Categories of Products (cont'd)

- Applicable to “articles, materials, or supplies” permanently affixed to an infrastructure project.
- An “article, material, or supply” only receives *one* categorization
- Determination made based on “its status at the time it is brought to the work site for incorporation into an infrastructure project.”

1. Iron or Steel Products

Iron or Steel Products

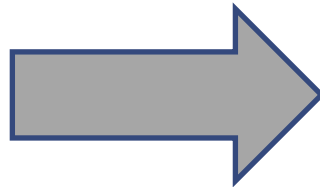


Articles, materials, or supplies that consist **wholly or predominantly of iron or steel** or a combination of both

- Cost of iron and steel content **> 50% total cost** all components
- Includes cost of iron or steel mill products (bar, billet, slab, wire, plate, sheet), castings, forgings

Iron and Steel Products, “Produced in the United States”

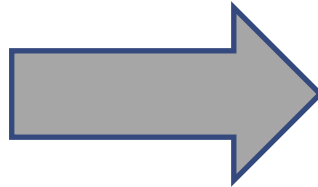
Iron and Steel
Products



All manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States

2. Manufactured Products

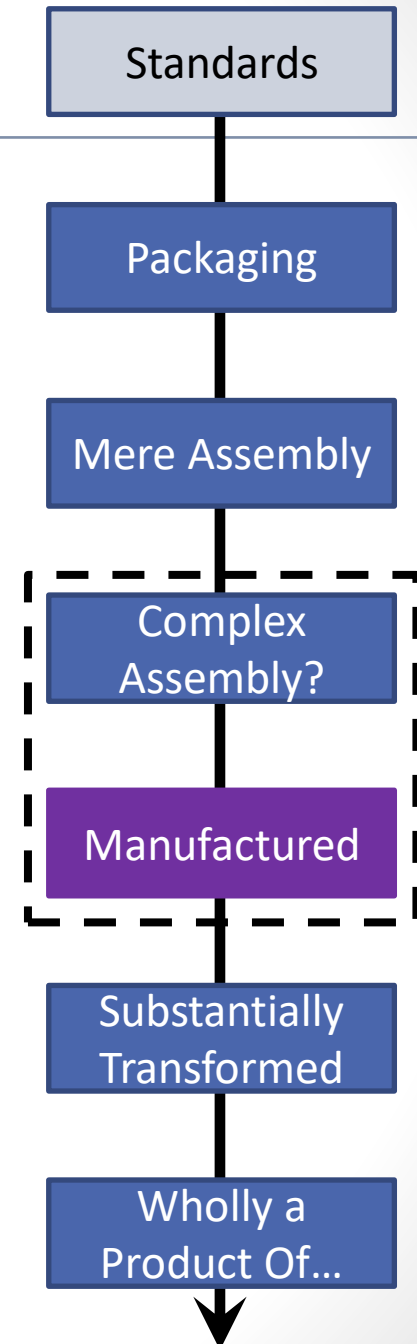
Manufactured
Products



1. Manufactured in the U.S.; and
2. Majority domestic content (55%)

Manufactured

- To qualify as a “manufactured product,”
 - Articles, materials, or supplies
 - Must be processed into a specific form or shape
 - Or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials or supplies.
- Key takeaways
 - “Manufacturing” requires more than mere U.S. packaging, but assembly of discrete items into a final form *may* be sufficient
 - **Highly fact-dependent**
 - Reassembly in the U.S. of a disassembled product is not enough
 - Does not necessarily require “substantial transformation” (which must be established under the TAA)



Components / Cost of Components

- Component = incorporated directly into a manufactured product or iron/steel product.
- Cost of components =

Components Purchased by Contractor	Acquisition Cost (incl. transportation + duties)
Components Mfr'd by Contractor	All costs associated with mfr'ing components, but NOT mfr'ing the end product

- Does not consider the source of sub-components
- Looks only at material costs – not manufacturing labor for the end-item
- If a component is not “domestic” (*i.e.*, manufactured in the U.S.), then it should be treated as “foreign”

3. Construction Materials

Construction Materials



Articles, materials, or supplies that consist *only* of the following:

- Non-ferrous metals
- Plastic and polymer-based products
- Glass (including optic glass)
- Fiber optic cable
- Optical fiber
- Lumber
- Drywall
- Engineered wood



Construction Materials, Required Mfr'ing

Non-Ferrous Metals	All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly
Plastic and Polymer-Based Products	All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or constituent composite materials, until the item is in its final form.
Glass	All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting
Fiber Optic Cable	All manufacturing processes, from the initial ribboning, through buffering, fiber stranding and jacketing.
Optical Fiber	All manufacturing processes, from initial debarking through treatment and planning.
Lumber	All manufacturing processes, from initial debarking through treatment and planning.
Drywall	All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels.
Engineered Wood	All manufacturing processes from initial combination of constituent materials until the wood product is in its final form.

4. Section 70917(c) Products

**Section
70917(c)**



Cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives

Section 70917(c) Products

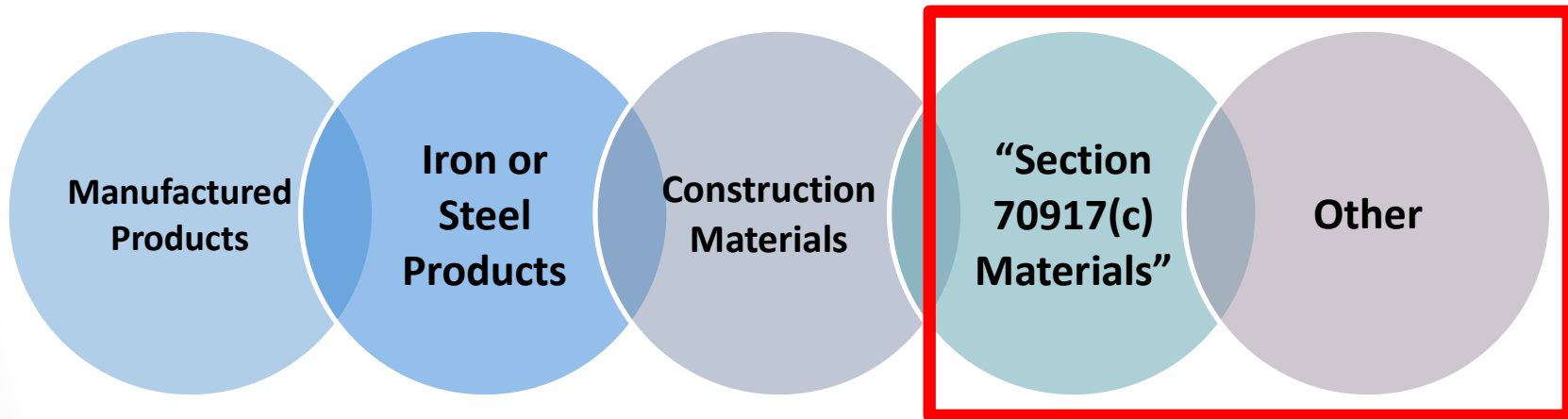
Section
70917(c)



Manufactured
Product

Construction
Material

Categories of Products



Not subject to BABA preferences

BABA Waivers

1. Inconsistent with public interest

- Small grants?
- De minimis cost/content?
- Adjustment period?
- Minor components?
- International trade obligations?

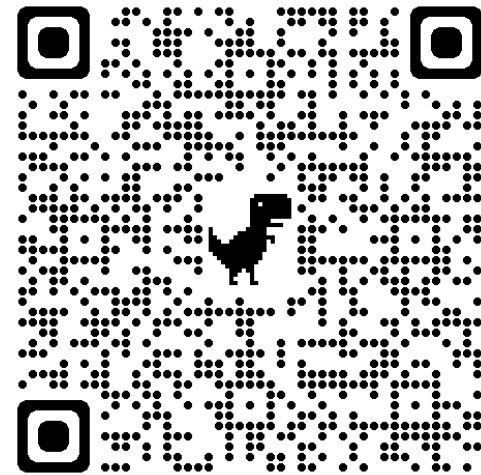
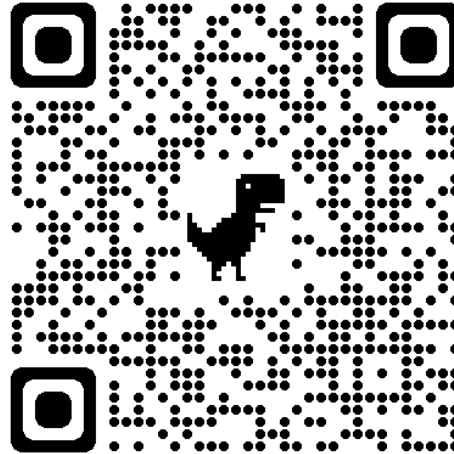
2. Nonavailability

- Quantity/quality

3. Unreasonable Cost

- Overall project cost increases by 25%

Existing Waivers (Partial List)



BABA Waiver Process



1. Recipient issues written request for waiver to [federal agency](#) providing the funding (**not** state/local entity receiving the grant).
2. Agency notifies the [Made in America Office \(MIAO\)](#) of proposed waiver.
3. Agency makes waiver publicly available on Agency's website (15/30 Day [Comment Period](#)).
4. Waiver cross-posted to [MadeInAmerica.gov](#).
5. After comment period, Agency sends proposed waiver to the MIAO.
6. MIAO reviews and makes determination as to whether waiver is consistent with law.
7. Waiver approved by Agency (in coordination with MIAO).

BABA Waivers: Contractor Responsibility

- Work with state/local grant recipients to submit waiver requests to the federal agency
- Provide a detailed justification for the waiver, including information regarding:
 - ✓ Waiver type
 - ✓ Recipient name
 - ✓ Federal awarding agency
 - ✓ Federal program name and number
 - ✓ Funding amount
 - ✓ Total cost of infrastructure expenditures
 - ✓ Project description
 - ✓ List of products proposed to be excepted from the requirements
 - ✓ Certification that the recipient has made a good faith effort to solicit bids from domestic suppliers
 - ✓ Waiver justification



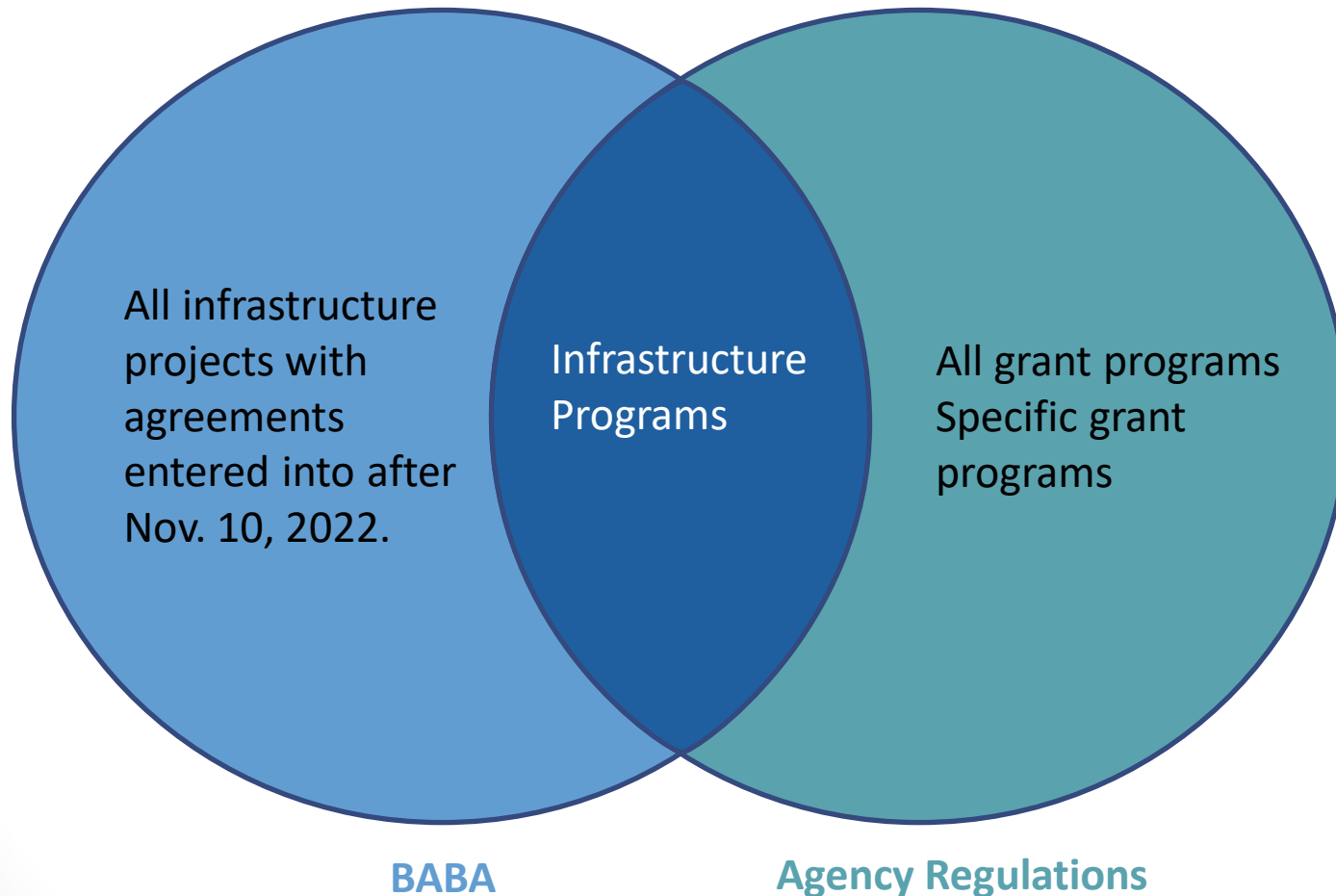
3. BABA VS. BUY AMERICAA VS. BUY AMERICAN

BABA and Other “Buy America” Requirements Are Not Perfectly Aligned

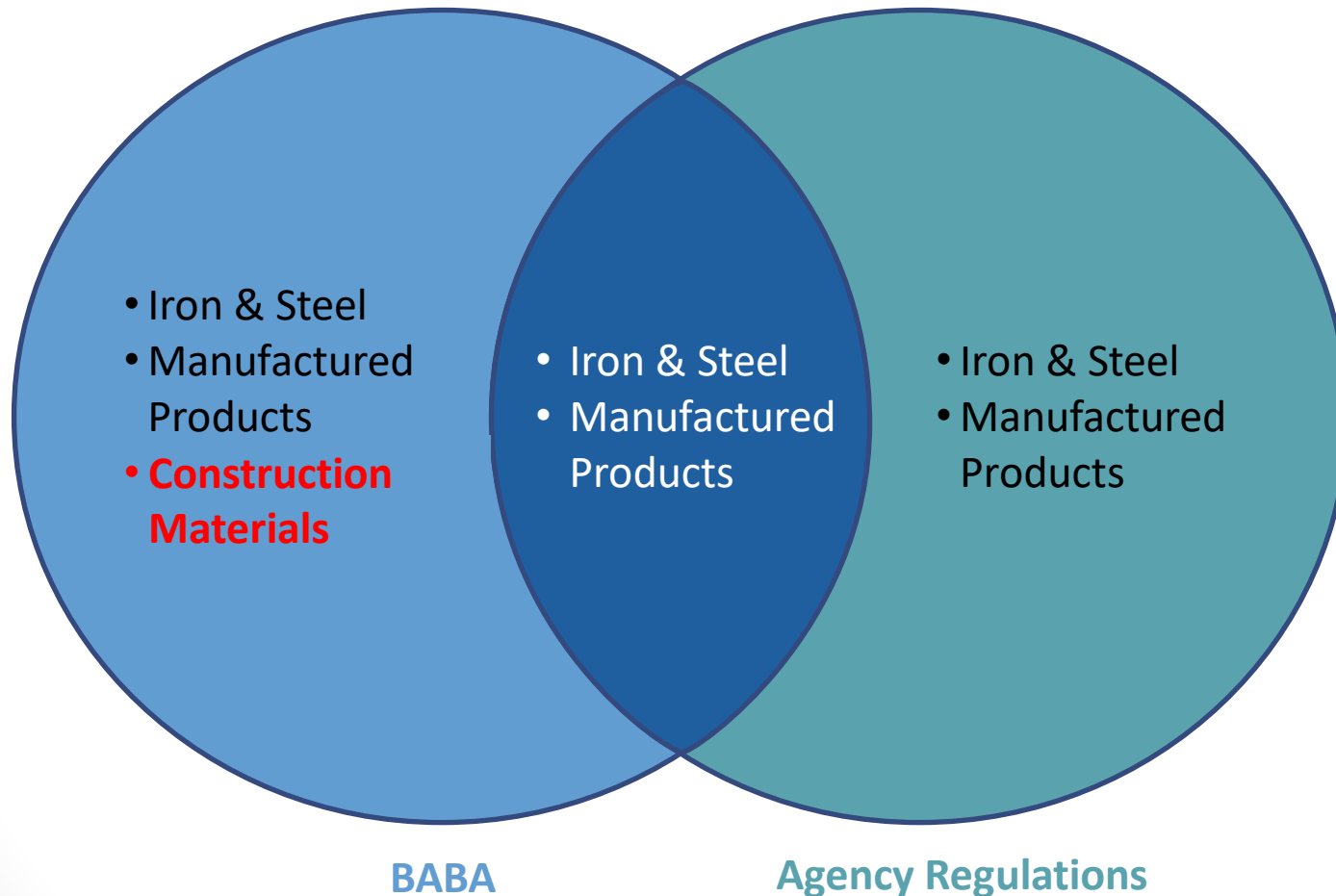


- For example:
 - ✓ Grants, generally
 - ✓ DOT/FTA
 - ✓ DOT/Amtrak

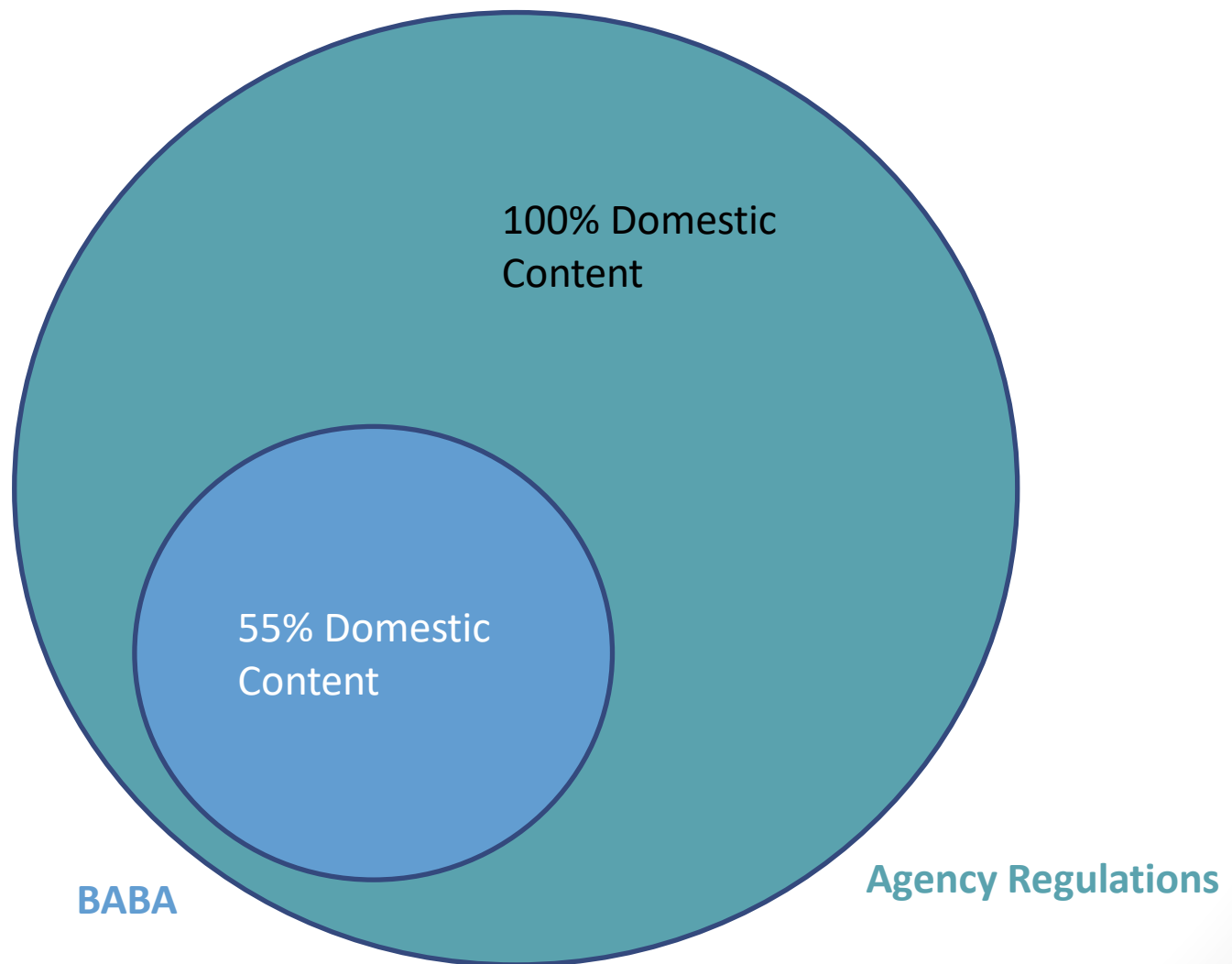
BABA vs. Agency Regulations, Generally



BABA vs. FTA “Buy America” Coverage



BABA vs. FTA “Buy America” Coverage (cont’d)



Applicability

BABA

- Infrastructure Programs
- Federal Financial Assistance

vs.

Buy American Act

- FAR/DFARS based procurement contracts

vs.

Buy America Laws

- Direct Financial Assistance
- Third Party Procurements under assistance programs

Processing Requirements

BABA

- “Produced in the United States” (with deviations)
- Manufacturing

vs.

Buy American Act

- Manufacturing

vs.

Buy America Laws

- “Produced in the United States”
- Manufacturing

Content/Component Threshold

BABA

- Steel/Iron: 100%
- Manufactured: 55%
- Construction: 100%

vs.

Buy American Act

- Steel/Iron: 95%
- Manufactured: 65%
- Construction: 65%

vs.

Buy America Laws

- Steel/Iron: 99.99-100%
- Manufactured: 55-100%
- **Construction: 100%**

Exemptions

BABA

- Section 70917(c) Products
- “Other” products

No Commercial IT Waiver
NO (Partial) COTS Waiver
NO TAA Waiver
For BABA

Buy America Laws

all
phases”

Waivers

BABA

- Unreasonable Cost (25%)
- Non-Availability
- Public Interest

vs.

Buy American Act

- Unreasonable Cost (20-30%)
- Non-Availability
- Public Interest
- Commissary Resale

vs.

Buy America Laws

- Unreasonable Cost (25%)
- Non-Availability
- Public Interest

CONCLUSION

BABA Overview



Build America, Buy America Act

- BABA sets “Buy America” **baseline** for federal infrastructure projects
 - Agencies may impose additional domestic preference
 - Some agencies (like FTA/FHWA) already impose higher requirements
 - But not all agencies cover all categories of products (like “construction materials”)
- **OMB rules** seek to harmonize some of these requirements.
- Key risk area for contractors is **disconnect/gap** between BABA and other agency requirements
- **READ YOUR CONTRACT!**

Summary Comparison Overview

	Buy American Act (BAA)	Trade Agreements Act (TAA)	FTA Buy America Regulations	Build America, Buy America (IIJA/BABA)
Applicability	<ul style="list-style-type: none"> Federal procurement contracts \$10,000 - \$174,000 	<ul style="list-style-type: none"> Federal procurement Contracts >\$174,000 	<ul style="list-style-type: none"> Funding provided by FTA (contract or grant) 	<ul style="list-style-type: none"> All infrastructure projects
Processing Requirements	<ul style="list-style-type: none"> “Manufacturing” 	<ul style="list-style-type: none"> “Substantial Transformation” and “Manufactured” (for US-made products) 	<ul style="list-style-type: none"> “Produced in the United States”/ “Manufacturing” 	<ul style="list-style-type: none"> “Produced in the United States”/ “Manufacturing”
Content/ Components	<ul style="list-style-type: none"> Steel & Iron: 95% domestic Manufactured Prods: 65% domestic content 	<ul style="list-style-type: none"> Usually irrelevant, so long as “substantially transformed” in a covered country. 	<ul style="list-style-type: none"> Steel & Iron: 100% domestic Manufactured Prods: 100% domestic components Construction materials: 100% domestic (per BABA) 	<ul style="list-style-type: none"> Steel & Iron: 100% domestic Manufactured Prods: 55% domestic Construction materials: 100% domestic
COTS/ Commercial Products	<ul style="list-style-type: none"> Partial COTS exception relating to “domestic content” requirement is available for <i>some</i>; not applicable to steel & iron 	<ul style="list-style-type: none"> Inapplicable 	<ul style="list-style-type: none"> Inapplicable 	<ul style="list-style-type: none"> Inapplicable
Types of Contract Deliverables	<ul style="list-style-type: none"> Manufactured Goods + Iron & Steel Does not apply to services 	<ul style="list-style-type: none"> Products + Services 	<ul style="list-style-type: none"> Manufactured Goods + Iron & Steel Construction Materials (per BABA) Does not apply to services 	<ul style="list-style-type: none"> Manufactured Goods + Construction Materials + Iron & Steel Does not apply to services

Questions?



Next Session on May 16, 2024

- Session 5: Customs and “Made in the USA” Labeling

