

“Buy America” and Country of Origin Requirements

Session 4: “Build America, Buy America” & Federal Grant Programs

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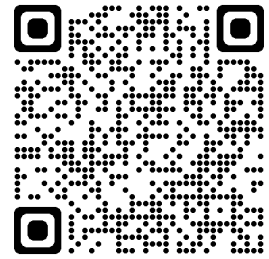
Sheppard Mullin | Supply Chain Management Team

February 22, 2023

Overview of the Series

- January 11: Buy American Act
- January 25: Trade Agreements Act
- February 8: Buy America Requirements under Federally-Funded Transportation Programs
- February 22: Country of Origin Requirements under Federal Grant Programs
- March 8: Customs and “Made in the USA” Labeling
- March 22: The Berry Amendment
- April 12: Specialty Metals Restrictions
- April 26: “Buy America” Round-Up
- May 10: 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**

DoD Berry Amendment

DoD Photovoltaic Devices

**Build America,
Buy America**

And Many, Many More...



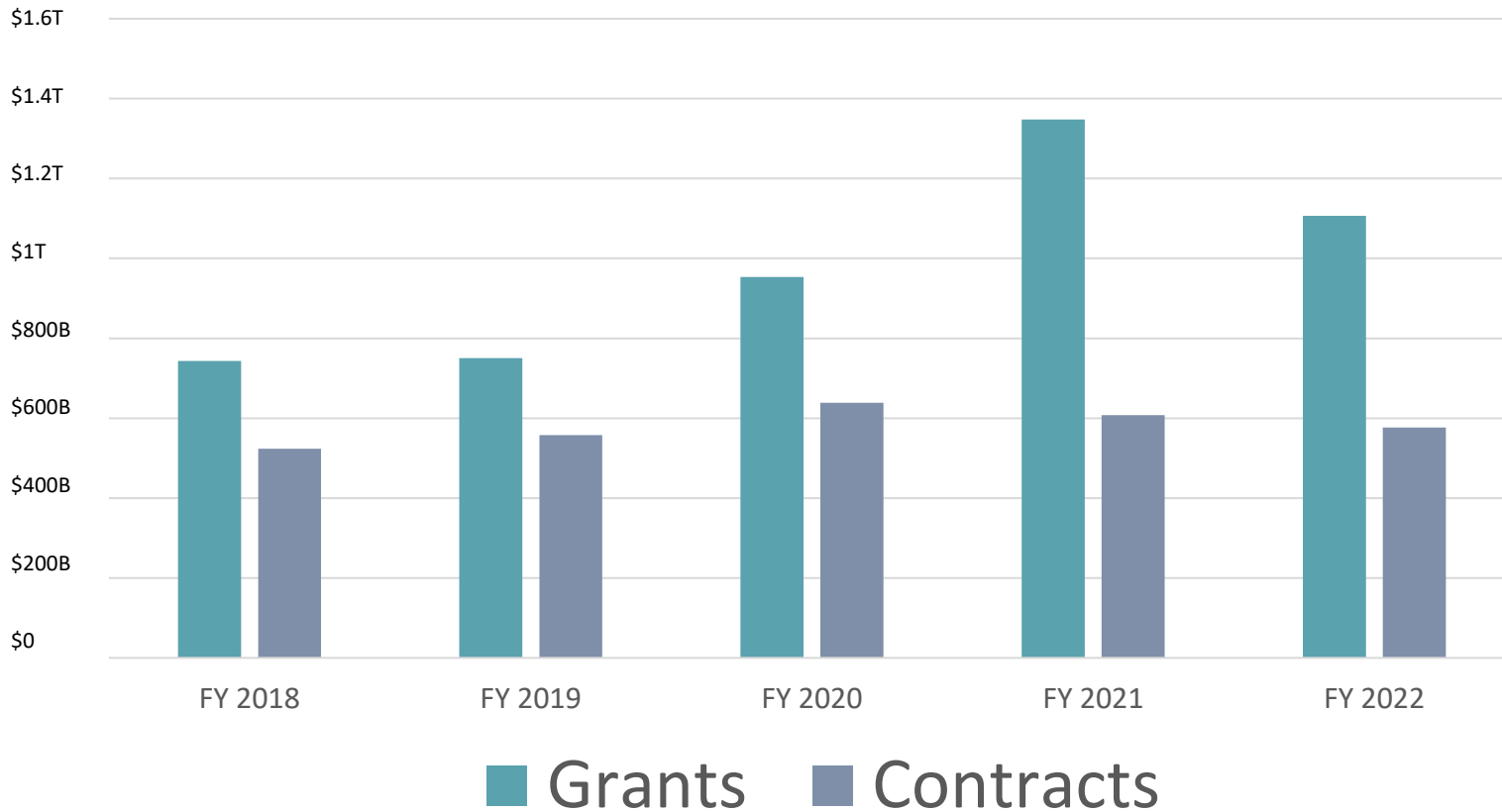
Today's Agenda: "Build America, Buy America" & Federal Grant Programs

1. Introduction to Federal Grant Program Requirements: Uniform Guidance + Agency-Specific Regulations
2. "Build America, Buy America": Overview
3. Overlay of BABA and Agency Requirements



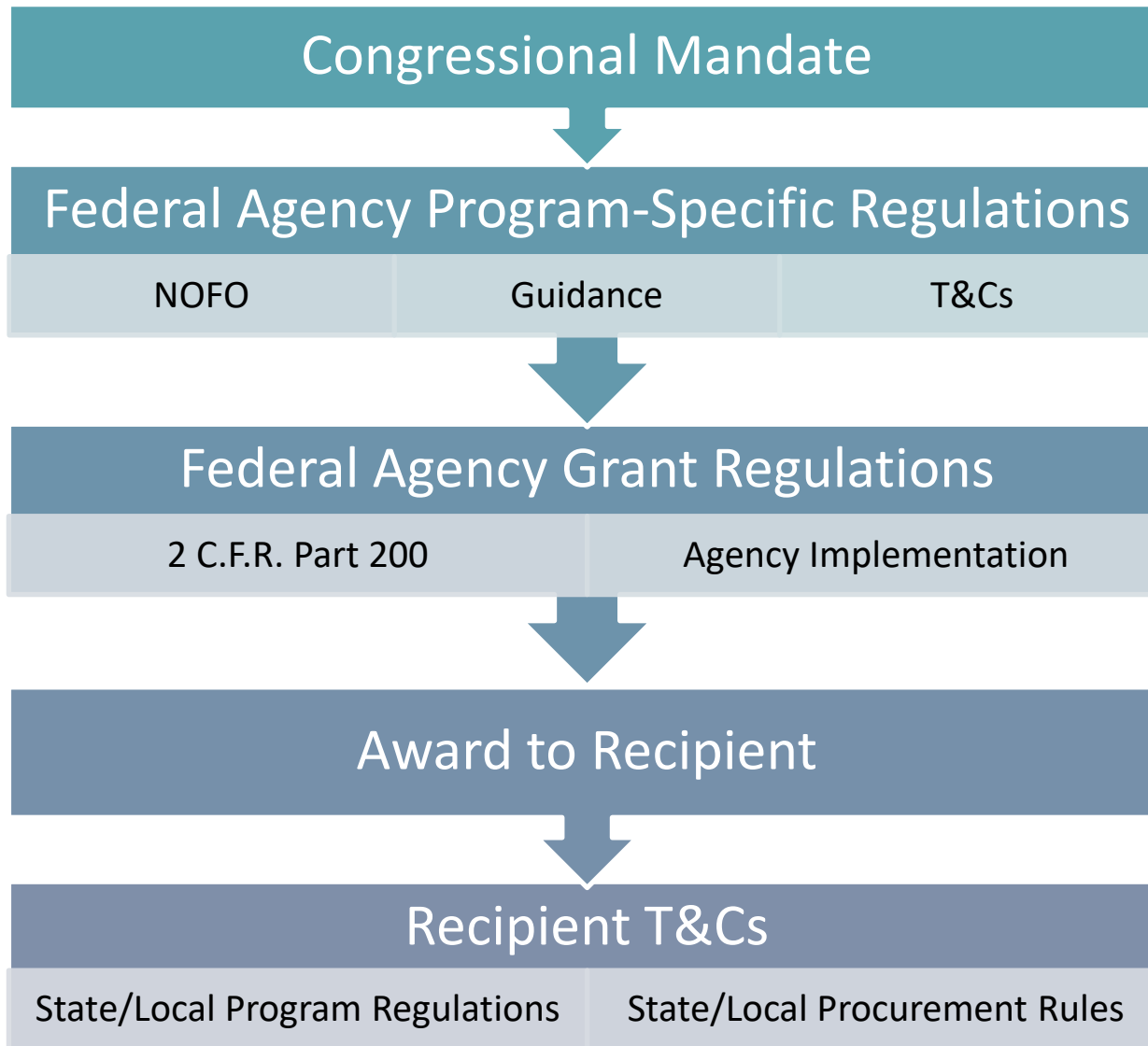
1. INTRODUCTION TO FEDERAL GRANT PROGRAM REQUIREMENTS: UNIFORM GUIDANCE + AGENCY-SPECIFIC REGULATIONS

Federal Government Spending



Data Source: USASpending.gov

A Whole New Regulatory Regime for Contractors



Grants Impose Unique Contractual Requirements

- ✓ Compliance
- ✓ Reporting
- ✓ Oversight
- ✓ Property Management /
Disposition
- ✓ Property Ownership
- ✓ Procurement
- ✓ Audits
- ✓ Cost Accounting
Principles / Standards

Title 2, Code of Federal Regulations

Subtitle A

- OMB [Government-Wide] Guidance for Grant Agreements
- Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 C.F.R. Part 200)

Subtitle B

- Federal Agency Regulations for Grants and Agreements

Uniform Guidance (2 CFR Part 200)

2 C.F.R. § 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.

Uniform Guidance (2 CFR Part 200)

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[Proposed] (c) Federal awarding agencies providing Federal financial assistance for infrastructure projects must comply with the Buy America Preferences set forth in 2 CFR part 184.

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. “BUILD AMERICA, BUY AMERICA”: OVERVIEW

BABA Timeline

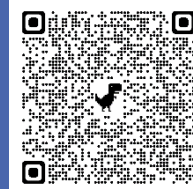
Jan 2021: Biden Issues E.O. 14005



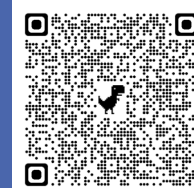
Nov 2021: Biden Signs the Infrastructure Investment and Jobs Act (IIJA)



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



Feb 2023: OMB Issues Proposed Rule (new 2 CFR Part 184)



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.

“Produced in the United States”

Iron or
Steel



“all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.”

“Produced in the United States”

Manufactured
Product



(1) Product manufactured in
the U.S.; AND
(2) Cost of components from
U.S.- sources > 55%

“Produced in the United States”

Construction
Materials



“all manufacturing processes
for the construction material
occurred in the United States”

BABA Waivers

1. Inconsistent with public interest

- Small grants?
- De minimis cost/content?
- Adjustment period (partial DOT waivers in place)

2. Nonavailability

- Quantity/quality

3. Unreasonable Cost

- Overall project cost increases by 25%

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).

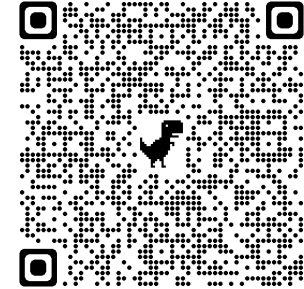
BABA Waivers: Contractor Responsibility

- 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



BABA: Proposed Rules/Requests for Comment

- Suggests borrowing familiar concepts from the Buy American Act:
 - "Iron and Steel" + "Predominantly from iron or steel"
 - "Cost of components"
 - "End product" + "component"
- Proposes greater granularity for "construction materials" (which must have all manufacturing processes take place in the U.S.):
 - ✓ Non-ferrous metals
 - ✓ Plastic and polymer-based products
 - ✓ Glass
 - ✓ Lumber
 - ✓ Drywall
 - ✓ Fiber optic cable
 - ✓ Optical fiber
 - ✓ Composite building materials
 - ✓ Other? (Industry input requested)
- Clarifies that binding agents, aggregates (stone/sand/gravel), and concrete are not "construction materials" (per § 70917(c)), but questions how they should be treated



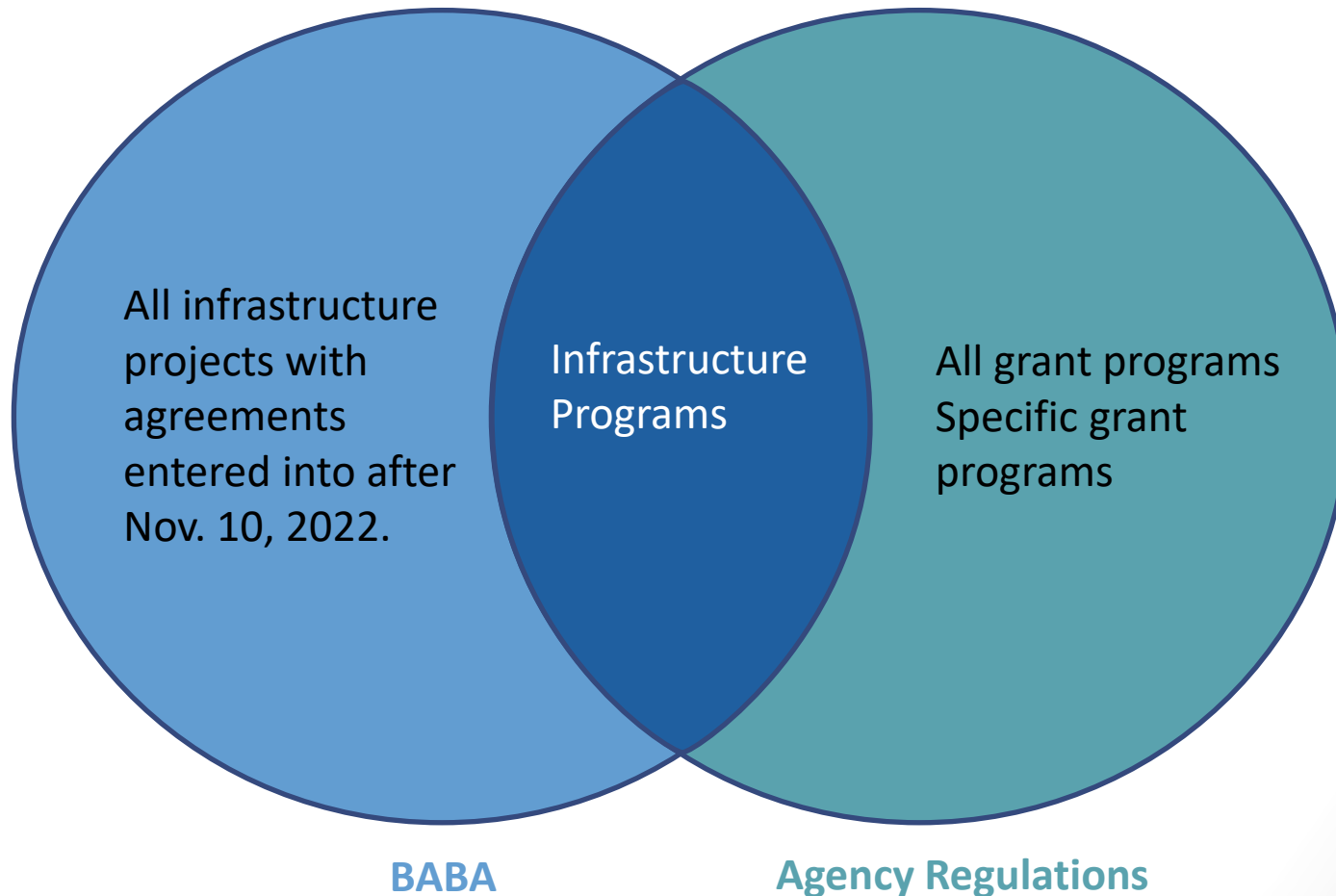
3. OVERLAY OF BABA AND AGENCY REQUIREMENTS

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

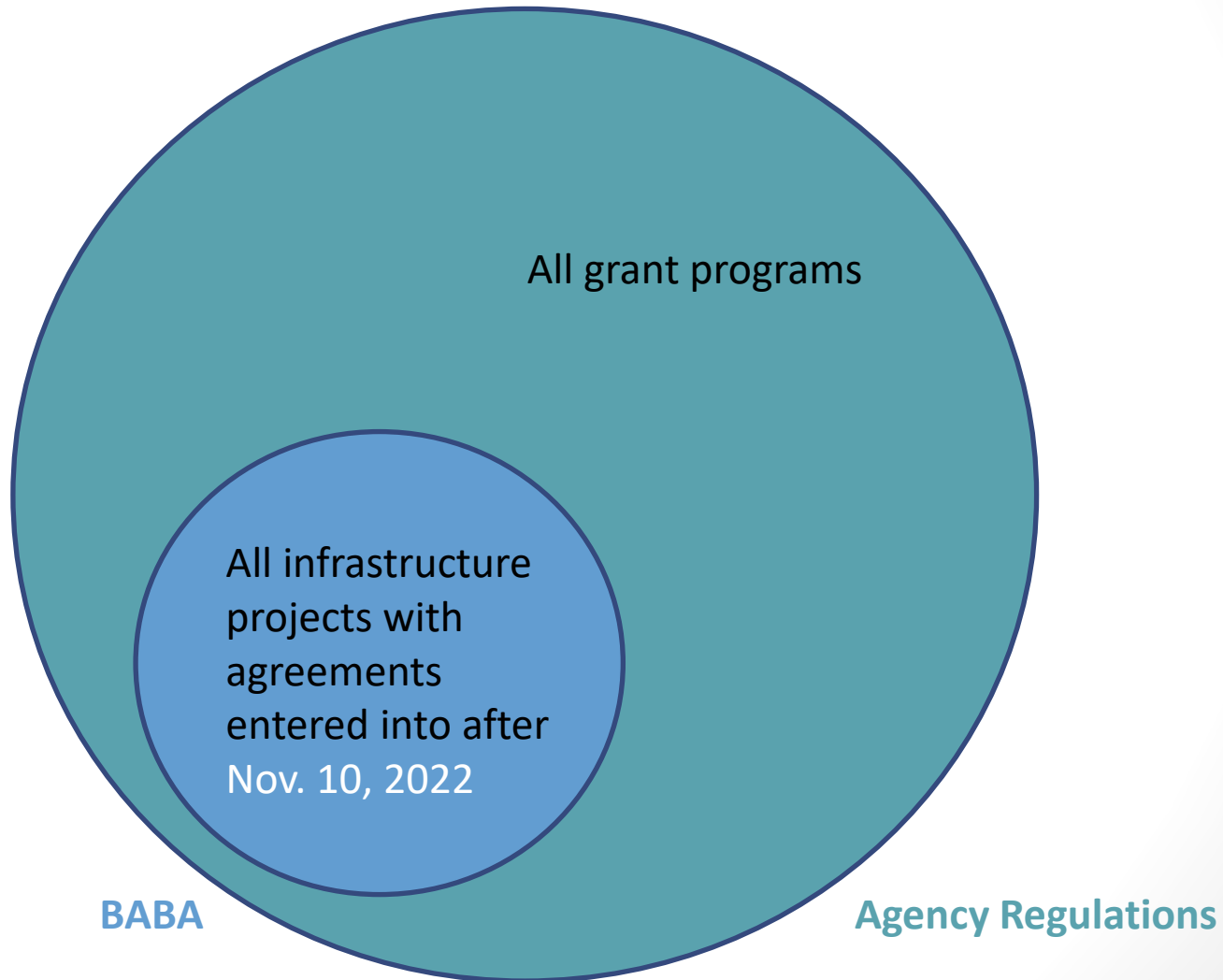


- For example:
 - ✓ Grants, generally
 - ✓ DOT/FTA
 - ✓ DOT/Amtrak

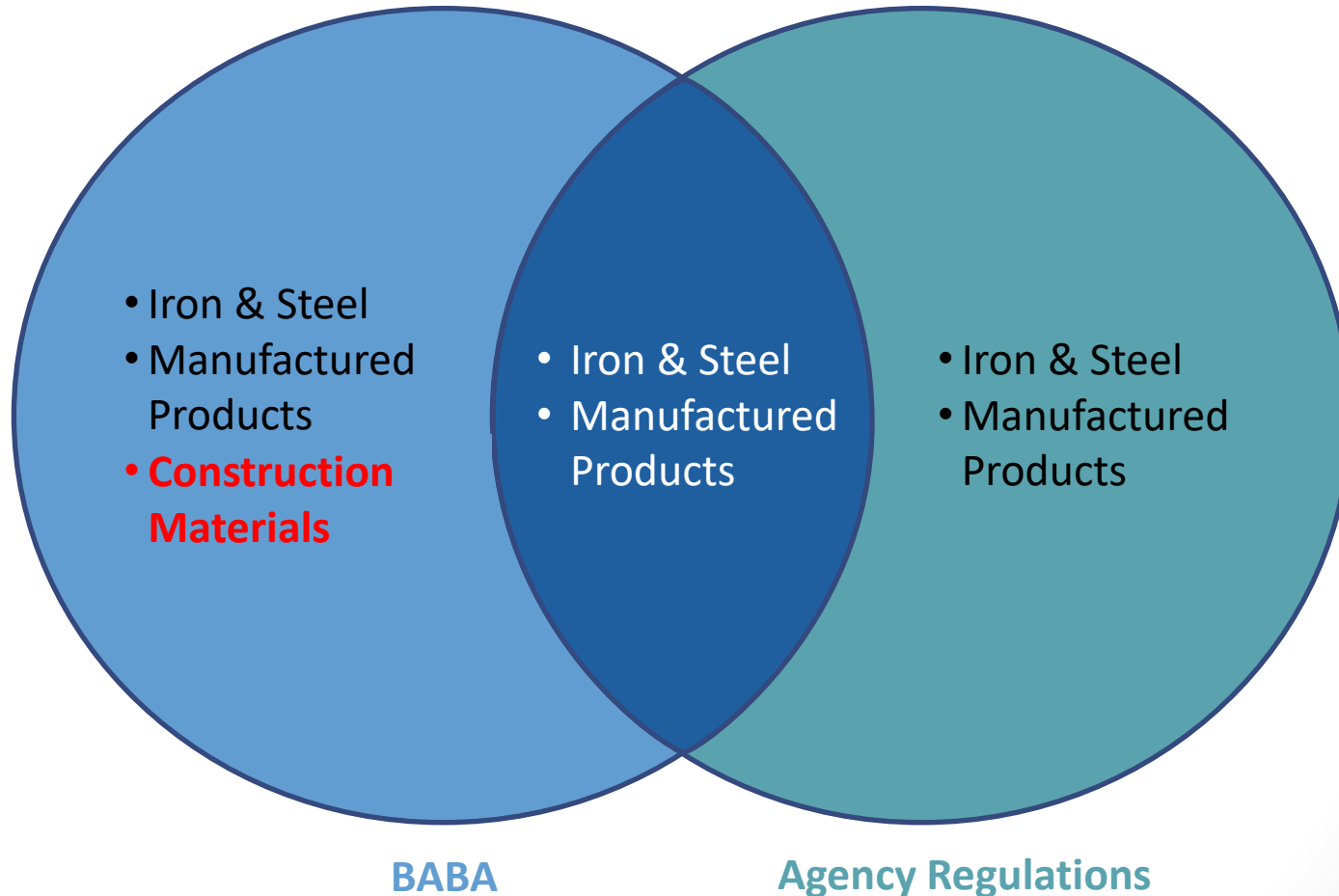
BABA vs. Agency Regulations, Generally



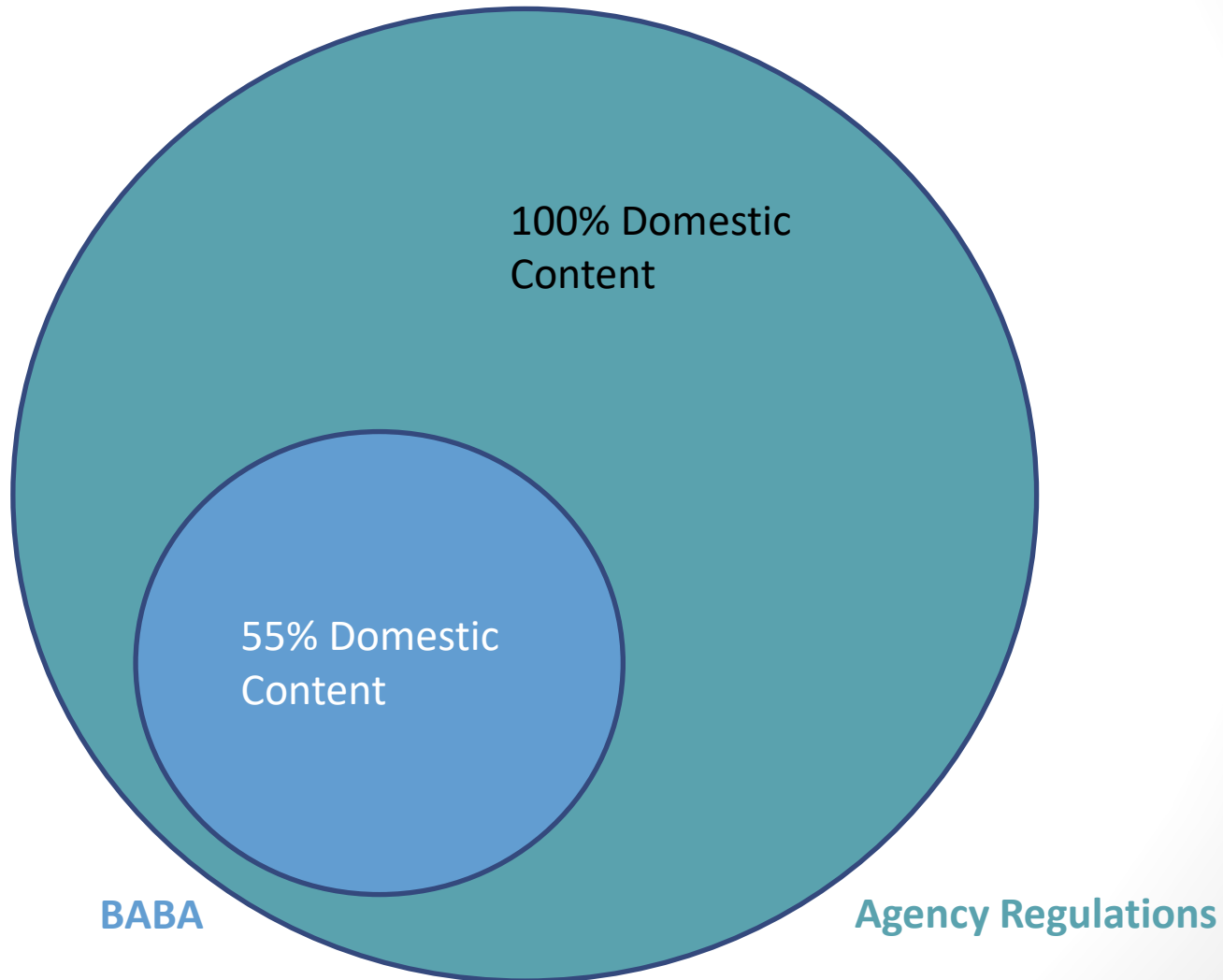
BABA vs. Agency Regulations, Generally (cont'd)



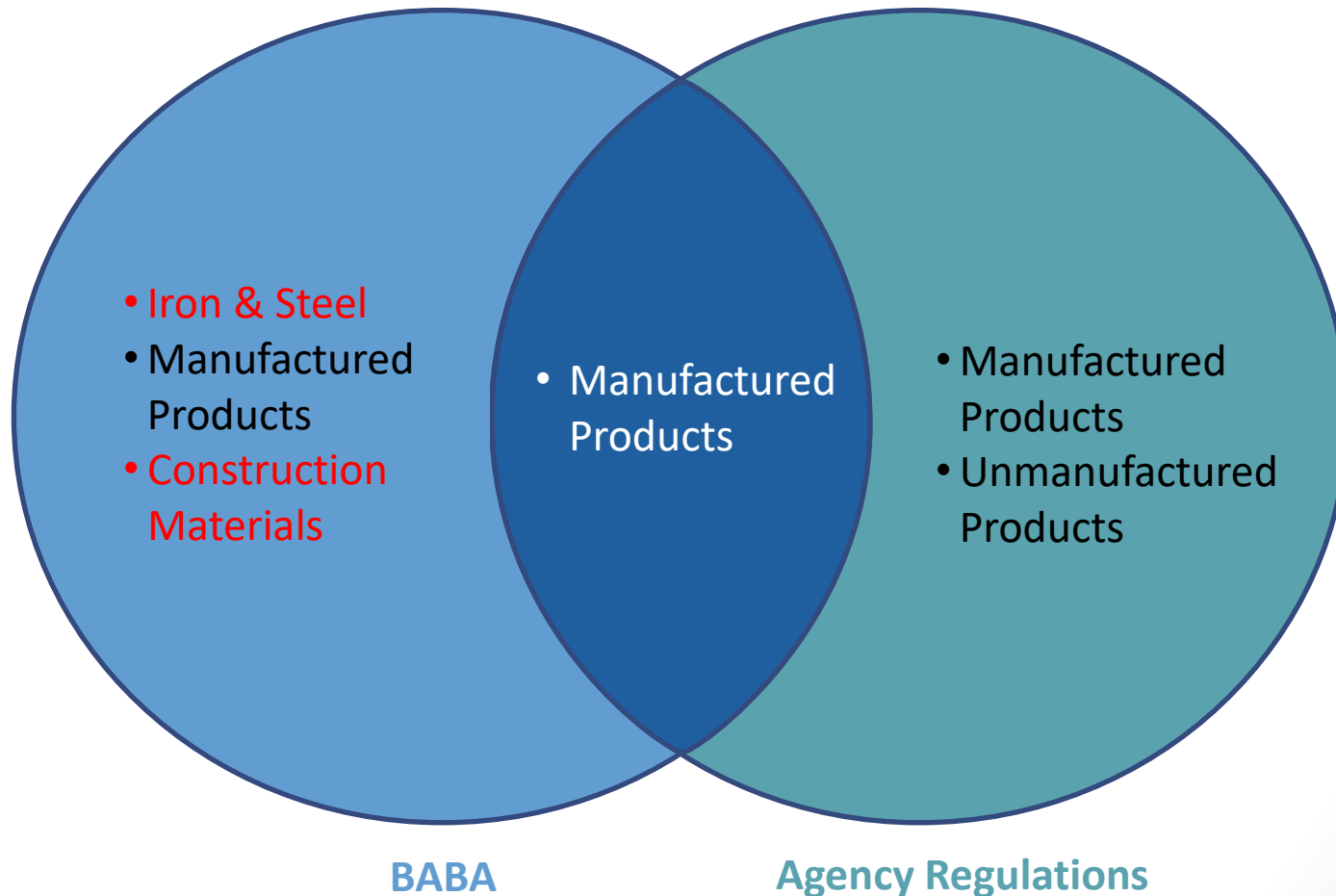
BABA vs. FTA “Buy America” Coverage



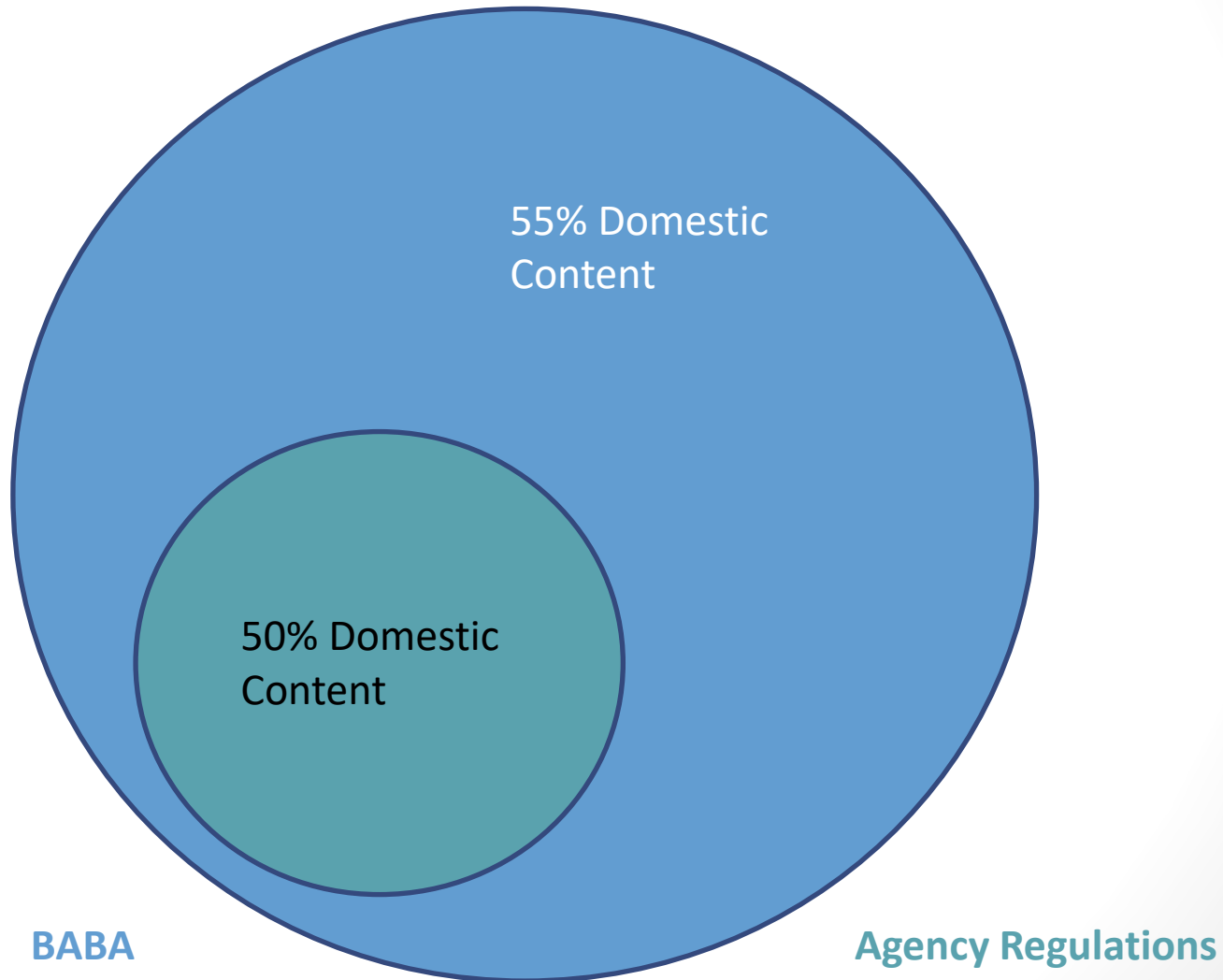
BABA vs. FTA “Buy America” Coverage (cont’d)



BABA vs. Amtrak “Buy America” Coverage



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



Differences Between BAA and BABA

	Buy American Act	Build America, Buy America
Processing Requirements	<ul style="list-style-type: none"> • “Manufacturing” 	<ul style="list-style-type: none"> • “Manufacturing” (for manufactured goods) • “All manufacturing processes” (for iron & steel + construction materials)
Content/Components	<ul style="list-style-type: none"> • Steel & Iron – 95% • Manufactured Products – 60% 	<ul style="list-style-type: none"> • Steel & Iron – 100% • Manufactured Products – > 55% • Construction materials – 100%
COTS/commercial item	<ul style="list-style-type: none"> • Partial COTS exception relating to “domestic content” requirement is available for <i>some</i> manufactured end-items 	<ul style="list-style-type: none"> • Inapplicable
Types of Contract Deliverables	<ul style="list-style-type: none"> • Applies to supplies + construction materials (which include iron & steel products) • Does not apply to services 	<ul style="list-style-type: none"> • Applies to iron & steel + manufactured goods + construction materials • Does not apply to services
Waivers	<ul style="list-style-type: none"> • “Unreasonable cost” measured at line-item level 	<ul style="list-style-type: none"> • “Unreasonable cost” measured at project level

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
- **Proposed OMB rules** should harmonize some of these requirements; comments open through March 13, 2023
- Key risk area for contractors is **disconnect/gap** between BABA and other agency requirements
- **READ YOUR CONTRACT!**

Questions?



Next Session on March 8, 2023

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

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