



AGC
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**Federal Agencies
Three-Year Outlook**
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Build America, Buy America (BABA) Final Rule Update

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Infrastructure Investment and Jobs Act; Build America, Buy America Act Title

- The “Made in America” provisions broaden application of domestic content preferences in infrastructure assistance and direct procurement by the Federal Government, including:
- **Build America, Buy America:** Requiring “Buy America” preferences for iron, steel, construction materials and manufactured products” on federal infrastructure assistance awards
- **Make it in America:** Amends the Buy American Act to increase domestic content requirements, improve waiver processes and creates Made in America Office
- **BuyAmerica.gov:** The establishment of a central and publicly available website related to “Buy American” waivers

Buy American as Opposed to Buy America and BABA

New DFARS Buy American Proposed Rule

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- FAR Council's issuance of a final rule on March 7, 2022, imposed significant increases to U.S. content requirements for federal procurements subject to the Buy American Act (BAA). However, the BAA requirements specifically applicable to the DoD, which existed prior to Executive Order 14005, remained at their existing levels of 55 percent, until now.
- On June 9, 2023, the DoD issued a proposed rule to amend the DFARS to supplement the FAR implementation of Executive Order 14005, addressing domestic preferences in DoD procurement.

- The proposed rule revises DFARS part 225 and clauses that incorporate the DoD-unique requirements (e.g., inclusion of qualifying countries).
- The proposed rule modifies definitions for domestic end product, qualifying country end product, and domestic construction material by increasing the domestic content threshold from 55% to 60% in calendar year 2023, then to 65% in calendar year 2024, and to 75% in calendar year 2029. This increase now aligns the increases to the domestic content thresholds percentages for the cost of components with those in the FAR.

- **Sec. 70914** government standard for federally funded infrastructure: “Not later than 180 days after the date of enactment of this Act, the head of each Federal agency shall ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, 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.”
- **Section 70912:** defines “produced in the United States” for each category. Waiver authority for (i) public interest, (ii) non-availability, and (iii) cost increase of overall project by 25 percent. **Like existing US DOT Buy America standards for domestic sourcing, however adds “construction materials” to list of covered items as a new category.**

- The procedural requirements under BABA, generally focused on “Buy America” implementation, include requirements for agencies to review existing Buy America preference requirements, submit reports to the Office of Management and Budget (OMB) and to Congress, review waivers of general applicability, and coordinate with the Made in America Office (MIAO) within OMB in the processing of waivers. See BABA Sections **70913(a)** and **(b)**; **70914(d)**; and **70923(b)**.
- OMB update to 2 C.F.R. Part 200 (**Sec. 70915**); Summary of E.O. 14005 agency reports provided to Congress (**Sec. 70923(e)**); Website (“BuyAmerican.gov”) to include information on all waivers (**Sec. 70936**); 15-day website notice and comment for waivers (**Sec. 70935**)
- **OMB Memo M-22-08** (Dec 20, 2021) Guidance on reports; Provides “infrastructure” definition; Calculates date of preference implementation as May 14, 2022; **OMB Memo M-22-11 (Apr. 18, 2022)** key guidance document

- Requirements of BABA apply to all new awards and new funding on current awards as of May 14, 2022. Applies to all “infrastructure” projects funded by “Federal financial assistance program[s] for infrastructure.” Extends to all portions of the project if a portion of the project is federally funded.
- Broad definition of “infrastructure”：“... At a minimum, the structures, facilities, and equipment for, in the [U.S.], 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, including drinking . . . and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.”

- Defines manufactured products and construction materials, deconstructing differences between the two categories.
- Provides waiver standards; states Federal Assistance agency heads retain the authority to issue waivers (generally with 15 days notice); and states existing compliant/consistent policies and waivers (issued in last five years) are still good.
- Clarifies BABA applies only to items/materials incorporated into the final infrastructure project, not things used in the course of completing the project (e.g., scaffolding not covered).

- Material Categories: All iron and steel – from initial melting stage through application of coatings must occur in the U.S. “Agencies should apply the iron and steel test to items that are predominantly iron or steel, unless another standard applies under law or regulation.” OMB Guidance, page 6.
- All manufactured products – both: Manufactured in the U.S. (see FAR for “manufactured in U.S.” definition); *and* Cost of components must be 55 percent “mined, produced, or manufactured in the U.S.” **“Manufactured in the U.S.” is defined under the Federal Acquisition Regulation as follows, through FAR Clause 52.225-18:** “*Place of manufacture* means the place where an end product is assembled out of components, or otherwise made or processed from raw materials into the finished product that is to be provided to the Government. If a product is disassembled and reassembled, the place of reassembly is not the place of manufacture.”
- Construction materials: includes an article, material, or supply — other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives — that is or consists primarily 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; or drywall. OMB has issued a new slightly different definition in its August 31, 2023 discussed below.

- According to OMB Memorandum M-22-11, an article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories.
- Pre-Existing “product-specific” general applicability waivers issued at least 180 days before Nov 15, 2021, grandfathered for five years;
- “Non-product-specific” general applicability waivers issued less than five years prior to Nov 15, 2022 (i.e., Nov 15, 2017) grandfathered until five-year mark after issuance;
- “Non-product-specific” general applicability waivers must be promptly reviewed, commencing no later than Nov 22, 2022. See FHWA announcement: which however missed that deadline: “Notice and Request for Comment on FHWA's Review of Its General Applicability Waiver of Buy America Requirements for Manufactured Products” published in Federal Register in March of 2023.

OMB New Proposed Rule Guidance for Grants and Agreements under BABA February 2023

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- OMB issued a Proposed Rule and Notification of Proposed Guidance to federal agencies earlier this year regarding the implementation of the Build America, Buy America Act (BABA) 88 FR 8374 (February 9, 2023). The Proposed Rule applies the BABA restrictions very broadly.
- To be considered “produced in the United States” under the Proposed Rule, materials must meet varying standards, depending on whether the material constitutes (i) iron/steel, (ii) a manufactured product, or (iii) construction material:
 - Iron/Steel: The use of iron and steel is compliant if “all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.”

OMB New Proposed Rule Guidance for Grants and Agreements under BABA (cont.)

- **Manufactured Products:** The use of manufactured products is compliant if they are: (i) “manufactured in the United States”; and (ii) **contain greater than 55% domestic components**, as measured by the total cost of components (“unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation”). **Basically, the Proposed Rule incorporates the “cost of components” test used under the Buy American Act (BAA) and codified at Federal Acquisition Regulation (FAR) 25.003.**
- **Construction Materials:** The use of construction materials is compliant if “all manufacturing processes for the construction material occurred in the United States.” The Proposed Rule at Section 184.6 of the Proposed Rule sets forth how the phrase “all manufacturing processes” applies to specific construction materials. The Proposed Rule outlines standards for eight categories of “construction materials,” including: non-ferrous materials, plastic and polymer-based products, composite building materials, glass, fiber optic cable, optical fiber, lumber and drywall.

- Provides a new definition of "manufactured products," which provides that they are articles, materials, or supplies that have been: "[p]rocessed into a specific form and shape" or "[c]ombined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies." The final guidance also clarifies that an item is not a manufactured product if it meets the definition of an iron or steel product, a construction material, or a "section 70917(c) material" (i.e., aggregate, its additives or binding agents, or cement or similar material)

- Clarifies that "iron or steel products" are "articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both." In this context, "predominantly of iron or steel or a combination of both" means "that the cost of the iron and steel content **exceeds 50 percent** of the total cost of all its components."
- Provides a new definition of "components," which provides that they are an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into a manufactured product, or an iron or steel product.

- Provides an expanded definition for "construction materials" that adds fiber optic cable (including drop cable), optical fiber, and engineered wood to the list of construction materials
- Provides a new definition of "all manufacturing processes" for construction materials, which provides that "all manufacturing processes for the construction material must occur in the United States" and provides detail regarding the stages of the manufacturing process that must occur in the United States for the material to be considered "produced in the United States."

- The final rule updates OMB's interim guidance issued on April 18, 2022 and the proposed guidance that OMB published in the Federal Register on February 9, 2023. The final guidance will become effective 60 days after being published in the Federal Register on October 23.
- The final guidance only applies to federal awards obligated on or after the effective date; projects under awards obligated on or after May 14, 2022, but before the effective date, are still subject to the April 2022 interim guidance.

- The final guidance also has a phase-in mechanism under which these types of prior awards can have additional federal funds obligated to the same infrastructure project for up to one year after the effective date and still only be subject to the April 2022 interim guidance; unless an agency determines that the new requirements should apply when significant design or planning changes are involved.
- Certain agencies, such as the Department of Transportation, however, have provided public interest waivers to allow recipients time to transition to the new rules.

- The final guidance explains that “the cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.
- To be considered produced in the United States, all manufacturing processes for the iron or steel, from the initial melting stage through the application of coatings, must occur in the United States. This definition of production is consistent with OMB's initial guidance in April 2022 and the proposed guidance in February 2023.

- (1) Articles, materials, or supplies that have been: (i) Processed into a specific form and shape; or (ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- (2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under § 184.4(e) and the definitions set forth in this section, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under § 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.

- There are four steps to determine whether the cost of the US components is greater than 55 percent of the total cost of all components, including: (1) determining the components of the item that are manufactured in the United States; (2) determining the cost of the components manufactured in the United States; (3) determining the cost of all components; and (4) dividing step 2 by step 3.

Final Rule Limits Construction Materials Definition

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- (1) Non-ferrous metals;
- (2) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- (3) Glass (including optic glass);
- (4) Fiber optic cable (including drop cable);
- (5) Optical fiber;
- (6) Lumber;
- (7) Engineered wood; and
- (8) Drywall.

Final Rule Construction Materials More Stringent

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- The preliminary construction material standards in the April 2022 interim guidance only covered "the final manufacturing process and the immediately preceding manufacturing stage."
- Now, the final guidance confirms that "all manufacturing processes for the construction material must occur in the United States" and provides detail regarding the stages of the manufacturing process for specific materials that must occur in the United States.

- BABA section 70917(c), carved out several materials from the category of "construction materials," including cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.
- OMB created a fourth category of items "section 70917(c) materials" that are treated as neither construction materials nor manufactured products by themselves.
- Therefore, these items by themselves do not need to be produced in the United States.

- However, if a section 70917(c) material is combined with another section 70917(c) material before arriving at a work site, such as precast concrete, the combination is considered a manufactured product or iron or steel product and must be produced in the United States and meet domestic content requirements.
- In contrast, wet concrete or hot mix asphalt that has not settled into a particular shape or form can be brought to a site and incorporated into a project without being considered a combination of 70917(c) materials.

- DOT already has similar Buy America requirements for many programs, but not extending to the new category “construction materials”. 87 Fed. Reg. 31931 (May 25, 2022)
- FHWA Bipartisan Infrastructure Law – Build America, Buy America Act Question and Answer regarding ER Funded Projects Questions and Answers very helpful.
https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba.cfm.
- BABA Section 70917(a) provides that the Buy America requirements under Section 70914 apply only to the extent that Federal agencies do not already apply a Buy America preference as described in Section 70914 to steel, iron, manufactured products, and construction materials. This provision clarifies that Section 70914 of the Act does not supplant FHWA’s existing Buy America policies and provisions that meet or exceed the standards required by the Act, such as its requirements for iron and steel under 23 U.S.C. 313.
- BABA Section 70914(d) also provides a process for reviewing existing waivers of general applicability, such as FHWA’s general waiver for manufactured products.

Questions?

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