



The Build America, Buy America Act (BABA): Applicability and Implications

Background of the Build America, Buy America Act (BABA)

As part of the Infrastructure Investment and Jobs Act passed by Congress on November 15, 2021, BABA established a domestic content preference for federal financial assistance obligated for infrastructure projects. The domestic content preference applies to three separate product categories: (i) iron or steel products, (ii) manufactured products, and (iii) construction materials.¹

Who Does BABA Apply to?

BABA applies to non-federal entities (e.g., state governments, local governments, Indian tribes, institutes of higher education) and all recipients of corresponding subawards and contracts, subcontracts, and purchase orders that construct, alter, maintain, or repair infrastructure in the United States.² Note that non-federal entities may apply to federal agencies for waivers. Waiver examples include nonavailability waivers, unreasonable cost waivers, and public interest waivers.³

The term *infrastructure* is broadly defined under BABA and includes roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads and freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.⁴

¹ “OMB 2 CFR Parts 184 and 200 Guidance for Grants and Agreements.” *Federal Register* 88, no. 162 (August 23, 2023, p. 57750). [2023-17724.pdf \(govinfo.gov\)](#)

² Section 70917 of BABA. Also see Section 70912(5) for relevant definitions.

³ OMB M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure,” dated 18 April 2022, pp. 6-13.

⁴ Section 70912(5) of BABA.

Important BABA Definitions

Iron or steel products are items that are predominantly iron or steel.⁵

Manufactured products are materials, articles, or supplies incorporated into an infrastructure project that are not iron or steel and not one of the listed construction materials.⁶

Construction materials include the following:

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

Note that cement and cementitious materials, aggregates (i.e., stone, sand, or gravel), and aggregate binding agents or additives are not included under the definition of construction materials.⁸

Details on the requirements of the three separate product categories include:

- *Iron or Steel Products*: All manufacturing processes, from the initial melting stage through the application of coatings, must take place in the United States.
- *Manufactured Products*: The end product must be manufactured in the United States, and more than 55% of the total cost of all components of the product must be of US origin.
- *Construction Materials*: All manufacturing processes for the construction materials must occur in the United States.⁹

What Does It Mean for Your Company?

Whether your company is a general contractor, subcontractor, or vendor, you will need to know whether the goods you use are sourced in the United States or from outside the country if performing work on an infrastructure project.

⁵ OMB M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure,” dated 18 April 2022, p. 6.

⁶ US Department of Housing and Urban Development, “Build America, Buy America Act.” Tribal Consultation Presentation at NCAI Mid-Year Conference, dated 7 June 2023, p. 14.

⁷ Section 70911(5) of BABA. Also see “OMB 2 CFR Parts 184 and 200 Guidance for Grants and Agreements.” *Federal Register* 88, no. 162 (August 23, 2023, pp. 57760-67). [2023-17724.pdf \(govinfo.gov\)](#)

⁸ Section 70917(c) of BABA.

⁹ Section 70912(6) of BABA.

Furthermore, if the goods you used on such projects in the past have normally been sourced from outside the country, you will need to determine whether there are viable alternatives in the United States for future infrastructure projects.

Additionally, it is important to maintain internal controls and processes that will help facilitate compliance with BABA requirements. At a minimum, we believe BABA requirements implicate these three business systems:

- Purchasing systems
- Estimating systems
- Accounting systems

We recommend considering the following when developing compliant business systems:

Purchasing Systems

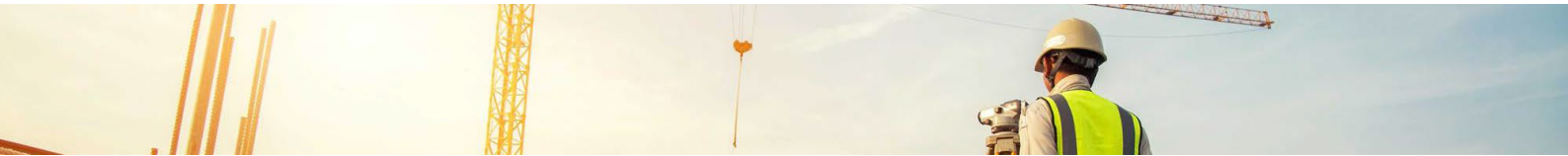
- Flow contract provisions from BABA down to vendors/subcontractors;
- Ensure vendors'/subcontractors' representations and certifications include provisions relevant to BABA (e.g., vendor is able to demonstrate that 55% of the total cost of all components of manufactured products are of US origin); and
- Ensure vendor/subcontractor accounting systems are established in a way that allows the vendor/subcontractor to demonstrate compliance with BABA provisions.

Estimating Systems

- Ensure costs included in estimates are reflective of costs associated with domestic content; and
- Identify sources that can deliver domestic content.

Accounting Systems

- Ensure the accounting system is set up to demonstrate that relevant costs incurred on infrastructure projects are from domestically sourced acquisitions.



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