

Build America, Buy America (BABA)

- Seeks to develop the American Manufacturing sector and Supply Chain
- The more you understand about how and when it applies, the more efficient we can be with our BIL and IRA execution activities
- Is and will be slightly in flux for a while as policies and best practices are sorted

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General Principles:

- Requires that all iron, steel, manufactured goods, and construction materials used in a Federally-funded “infrastructure project” are manufactured domestically.
- An infrastructure “project” is anything that involves the construction, alteration, maintenance, and/or repair of infrastructure in the United States.
- Infrastructure includes: 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 water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy, including EV charging.

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- Four key questions to determine applicability to a given project:
 1. Entity type: BABA applies to “non-federal entities” as defined in 2 C.F.R. 200—which does not include for profit entities by default.
 2. Whether the project involves the construction, alteration, maintenance, and/or repair of “infrastructure” as that term is defined by BABA.
 3. BABA only applies to “public” infrastructure, which OMB has defined as (a) publicly-owned infrastructure; or (b) privately-owned infrastructure that is primarily utilized for a public purpose.
 4. Whether the funding in question is considered “financial assistance” as that term is defined by the act (for purposes of BABA, the act expands the scope of funding considered FA, so in most cases this will be a yes).

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General Principles (continued)

- The Buy America Preference (aka the domestic procurement preference) only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project.
 - Does not include tools, equipment, or supplies
 - Does not apply to other items that are not an “integral part” of the infrastructure, or which are not permanently affixed to the structure.
- BABA applies to all Federal financial assistance—it is not limited to projects funded via the Infrastructure, Investment, and Jobs Act. Moreover, there is no sunset date. It is a permanent new requirement.

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Domestic Manufacture

- Iron and Steel: all manufacturing processes, from the initial melting stage through the application of coatings, must take place in the U.S.
- Manufactured products: Product was manufactured in the U.S., and the cost of the components of the product that are mined, produced, or manufactured in the U.S. is greater than 55% of the total cost of all components of the product.
- Construction materials: All manufacturing processes for the construction material occurred in the United States.
- Recipients will be required to obtain a certification from the manufacturer of an applicable item that the item meets the requirements above. (This may change somewhat as DOE continues to develop its BABA policy).

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Waivers

- Recipients can apply for project-specific waivers of the Buy America requirement, based on the following circumstances:
 - Nonavailability: the item(s) in question is not manufactured domestically in sufficient or reasonably available quantity or of a satisfactory quality
 - Unreasonable cost: the item(s) in question, if purchased from domestic sources, will increase the cost of the overall project by more than 25%
 - Public Interest: applying the Buy America preference is inconsistent with the public interest
- The Agency can develop and put into place “general applicability” waivers, which are basically just class waivers that may apply to a broad swath of awards that meet particular requirements.

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Additional Information

- Currently, the best source of BABA implementation information is OMB Memorandum M-22-11 “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.”
 - Can be found pretty easily by searching “OMB M-22-11” on the web.
- DOE BABA/Waiver page can be found here:
<https://www.energy.gov/management/build-america-buy-america>
- Please send specific BABA questions to me at adam.dedent@ee.doe.gov.