

Build America, Buy America: Agency-Specific Implementation

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Roadmap

- Quick recap of BABA
- BABA Waiver Process and Requirements
- Agency-Specific Implementation
 - EPA
 - USDOT Agencies
 - Department of Energy (DOE)
 - Department of Commerce (DOC)/NTIA
- Practice Pointers



Quick BABA Recap



BABA Recap

- BABA imposes a domestic sourcing requirement on infrastructure projects receiving federal financial assistance
- BABA domestic sourcing requirement applies to three categories of products: (1) iron or steel products, (2) manufactured products, and (3) construction materials
- BABA contains a “savings provision” that allows agencies to continue applying their existing domestic sourcing requirements to the extent they are consistent with the BABA requirements
 - Agencies with pre-BABA “Buy America” requirements are generally continuing to apply their existing rules or a hybrid of their prior rules and the BABA requirements



BABA Recap (continued)

- Federal agencies are charged with implementing the BABA domestic sourcing requirement for their programs/grants and have some leeway to adopt agency-specific approaches – particularly in the area of issuing waivers of BABA requirements
- Because the specific application of the BABA requirements may vary from agency to agency or even between different programs within an agency, it is important to keep track of waivers that may apply to specific programs/agencies



BABA Waivers: Process and Requirements



BABA Waivers

- OMB Memorandum M-22-11 provides guidance to agencies on BABA waivers
- OMB's February 9, 2023 Proposed Guidance also documents waiver types and procedures, at proposed 2 C.F.R. § 184.7
- Preference is for waivers to be project-specific (as opposed to applicable generally to all projects)
- General applicability waivers should be
 - **Time-limited** rather than open-ended (especially nonavailability waivers)
 - **Targeted** in scope rather than broad
 - **Conditional:** OMB encourages agencies to issue waivers with specific conditions that support Buy American policies



Three Potential Bases for BABA Waivers

- Three available types of justifications for BABA waivers
 - **Non-availability waiver**
 - When a domestic source is not available for a particular item or product
 - Must be supported by thorough market research showing efforts to identify domestic source
 - **Unreasonable Cost waiver**
 - Available if the inclusion of BABA-compliant materials would increase the **cost of the overall project** by more than 25%
 - An individual domestic product costing 25+% more than a foreign alternative is not enough— greater than 25% cost impact must be to **total project cost**
 - **Public Interest waiver**



BABA: Public Interest Waivers

- Agencies can waive BABA requirements if applying the BABA domestic sourcing requirements “would be inconsistent with the public interest.”
 - Affords leeway for agencies to issue general applicability waivers to reduce administrative burdens or limit disruption of adjusting to new requirements
 - Examples:
 - Waivers for de minimis costs, small grants, minor components
 - Temporary “adjustment period” waivers
 - FHWA phased temporary waiver of Buy America requirements for EV charging infrastructure given near-term lack of domestic sources and extraordinary immediate demand



BABA Waiver Process

- Waiver requests can be submitted to a federal agency, but the federal agency itself is responsible for actually proposing to issue a waiver
 - Requests generally are to be submitted by the grant recipient (state/local government entity), not an individual contractor or supplier
 - Means you would typically need to convince the project owner to submit the request to the federal agency, if you think one is needed/warranted
- All waiver requests must include a detailed justification for the use of non-U.S. products and a certification that there was a good faith effort to solicit bids for domestic products



BABA Waiver Process (continued)

- OMB's Proposed Guidance allows agencies to establish their own specific instructions as to waiver request submission, format, content and supporting materials: check agency guidance
- Waiver requests are subject to heightened scrutiny and public comment
- Federal agencies must make publicly available a written explanation for the determination to issue a waiver and provide at least 15 days for public comment on the waiver
 - General applicability waivers require a minimum 30-day public comment period
- Proposed waivers are routed through the new Made in America Office (MIAO) within OMB for approval prior to issuance



Existing or Proposed Public Interest Waivers

- Many agencies have adopted or proposed public interest waivers under BABA, in some cases just temporary waivers to allow time for industry to adjust to the new BABA rules
- Website providing links to agency pages with waiver information:
 - <https://www.madeinamerica.gov/waivers/financial-assistance/>
- Common waivers, proposed or already approved by multiple agencies, include public interest waivers for “de minimis” non-compliant content or for “miscellaneous minor components”
 - E.g., USDOT, EPA, USDA, HUD, Commerce, DOE



Common Types of Public Interest Waivers

- Three types of public interest waivers have been adopted or proposed by multiple agencies
 - **De Minimis Cost:** waives BABA compliance for a total value of non-compliant products that is no more than a designated “de minimis” threshold (typically, 5% of total allowable costs under the Federal financial assistance award);
 - **Small Grants:** BABA compliance not required if size of Federal financial assistance award is below a specific threshold (typically \$250,000);
 - **Minor Components:** BABA compliance waived for non-domestically produced miscellaneous minor components comprising no more than 5% of total material cost of an otherwise domestically produced iron/steel product.
- Check agency websites for specific terms of each agency’s waiver(s)



Review of Longstanding Waivers

- Agencies with existing non-product-specific general applicability waivers issued on or before November 15, 2016 are required to commence a review of those waivers to determine if the waiver remains justified.
 - Example: FHWA's general Buy America waiver for “manufactured products”
- Review is to be commenced via publication of notice in Federal Register
 - Agencies that find prior waiver is still justified are encouraged to look for ways to narrow waiver “in manner that would support supply chain resilience and boost incentives to manufacture key products domestically.”
- Could result in rescission or narrowing of longstanding waivers under “Buy America” programs that predated BABA



EPA Implementation of BABA



EPA Implementation of BABA: Waivers

- EPA website on BABA implementation:
<https://www.epa.gov/cwsrf/build-america-buy-america-baba>
- List/description of EPA's Approved BABA waivers:
<https://www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers>
 - **De Minimis Waiver** (allows up to 5% total project cost in non-compliant products; strictly a percentage basis, no NTE/“ceiling” dollar amount)
 - **Small Project Waiver** (waives BABA application to assistance awards or subawards under assistance agreement that are less than \$250,000)
 - **Adjustment Period Waiver** (for water infrastructure projects that initiated project design planning prior to May 14, 2022)



EPA Implementation of BABA: Adjustment Period Waivers

- Clean School Bus (CSB) Program
 - Program under BIL that provides \$5B in funding for FYs 2022-2026 to replace existing school buses with zero-emission and low-emission models
 - EPA solicited rebate applications for \$500M under CSB Program in 2022
 - <https://www.epa.gov/cleanschoolbus>
 - EPA granted public interest waiver of BABA requirements for 2022 CSB Program and 2022 Diesel Emissions Reduction Act state grants
 - <https://www.epa.gov/system/files/documents/2022-08/CSB%20Adj%20Period%20Waiver%20Decision%20Document.pdf>



EPA Implementation: CSB Program

- Adjustment period waiver approved for **2022** CSB Rebates Program
 - No waiver issued yet to cover 2023 and later year CSB rebates or grants
- EPA said that this time-limited adjustment period waiver for 2022 CSB rebates would allow EPA to conduct further market research in conjunction with USDOT and DOE to assess domestic sourcing of EV charging products
 - EPA could consider new FHWA Buy America approach to EV chargers under NEVI Program as potential model for applying BABA requirements to EV chargers under CSB Program



EPA Implementation: Proposed Waivers

- List/description of BABA waivers proposed by EPA, but not yet adopted: <https://www.epa.gov/cwsrf/build-america-buy-america-baba-waivers-open-public-comment>
 - Proposed waiver for Minor (Ferrous) Components of Iron/Steel Products
 - Would allow manufacturers of iron/steel products to use a small amount of non-domestic iron and steel components within otherwise domestically manufactured iron/steel products
 - Would allow iron/steel components of non-domestic or unknown origin to account for up to 5% of material cost of iron/steel item, and still treat that iron/steel item as BABA-compliant
 - Comment period closed on 2/3/2023, likely to be formally approved soon



EPA Guidance re BABA Implementation: Water Projects

- Water projects funded with federal financial assistance administered by EPA were already subject to an American Iron and Steel (AIS) requirement prior to BABA
- EPA guidance had excluded electrical and mechanical products from the AIS domestic iron/steel sourcing requirements
- EPA issued guidance implementing BABA for EPA-funded water projects on 11/3/2022:
 - <https://www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf>



EPA Guidance re BABA Implementation

- EPA's BABA guidance generally defines an iron/steel item as an item containing greater than 50% iron and steel by material cost, **BUT**...
- EPA categorizes several types of products, including mechanical/electrical equipment, as “manufactured products” for BABA purposes, **even if** those items are composed of more than 50% iron/steel content, by cost
- Under EPA's implementation of BABA, if a product was excluded from coverage under the AIS rules, it is not treated as “iron or steel product” under BABA
- NOTE: not clear whether the proposed OMB definition of “iron or steel product” at 2 CFR 184 would supersede EPA's treatment of mechanical/electrical equipment with greater than 50% iron/steel content as “manufactured products”



USDOT “Legacy” Buy America Requirements



USDOT “Legacy” Buy America Rules

- USDOT Agencies with pre-BABA Buy America requirements are generally continuing to apply their own Buy America rules, subject to some adjustments due to new BABA rules for “construction materials” or new public interest waivers inspired by BABA
- These pre-existing “Buy America” rules vary by agency and differ in some respects from the BABA requirements, though all impose strict iron/steel sourcing requirements that are consistent with the baseline BABA requirement for iron/steel
- Generally permit waiver under same circumstances as BABA (public interest, domestic non-availability, unreasonable cost)



Proposed USDOT Public Interest Waivers

- On November 4, 2022, USDOT proposed to adopt 3 public interest waivers of BABA requirements:
 - **De Minimis Costs:** would allow use of non-compliant products up to the lesser of \$1M in value or 5% of total allowable costs under the federal financial assistance award.
 - Note the \$1M cap; would mean less than a 5% allowance on projects where allowable costs under federal award are greater than \$20M
 - **Small Grants:** would make BABA requirements inapplicable to federal financial assistance awards in amounts less than \$500,000
 - USDOT calculated that this waiver would have applied to 48% of the total 19,000 grants in FY22, but only 1.4% of the \$83B in total grant amounts



Proposed USDOT Public Interest Waivers

- Third public interest waiver proposed by USDOT on November 4, 2022:
 - **Miscellaneous Minor Components:** would allow use of non-domestically produced miscellaneous minor components of iron/steel up to 5% of the total material cost of an otherwise domestically produced iron or steel product
 - USDOT's proposed waiver does not define "minor components," but these "minor component" waivers have typically been interpreted as covering fasteners and similar types of small iron/steel parts



Proposed USDOT Public Interest Waivers

- These 3 USDOT proposed waivers are not currently in effect; if these waivers are adopted, they would apply to federal financial assistance awards that are obligated on or after the effective date of the adopted waiver(s)
- If adopted, these waivers would apply to all USDOT agencies: FHWA, FTA, FAA, FRA



FHWA Buy America



FHWA Buy America

- Generally applies to bridge/highway projects
- Also governs many EV charging infrastructure projects
- Statutory Reference: 23 U.S.C. § 313
- FHWA Buy America Regulation: 23 C.F.R. § 635.410
- Applies to steel and iron products permanently incorporated in highway project
- Generally does not apply to other manufactured products, although FHWA does currently apply its steel/iron requirements to predominantly steel or iron components of manufactured products
 - FHWA waiver for manufactured products in 1983



FHWA Buy America

- Rules for iron/steel are essentially identical to BABA
 - All manufacturing processes from melting to coating must occur in U.S.; any process performed outside the U.S. means the steel/iron is considered foreign
- FHWA allows State DOTs to use “alternate bid procedures”
 - All bidders required to submit two sets of alternate bids, one relying on all domestic/Buy America-compliant iron and steel, and another that allows use of foreign iron/steel
 - State DOT authorized to select a foreign-steel offer if the lowest overall total bid based on domestic steel is 25% more than the lowest foreign-steel bid
 - FHWA considers this to be a substitute for the “unreasonable cost” waiver



FWHA Minimal Use Allowance

- Minimal Use Allowance
 - FHWA's existing Buy America regulations allow for a minimal amount of foreign steel or iron in a project
 - Amount permitted is up to the greater of **0.1%** of the total contract cost, or **\$2,500**
 - 0.1% equates to \$1,000 per \$1M of contract value
 - Allowance applies at the project level, so requires coordination with prime contractor/project owner



FHWA's Rules for EV Infrastructure

- FHWA is charged with administering the National Electric Vehicle Infrastructure (NEVI) Formula Program, a program under the IIJA/BIL to provide funding to states to strategically deploy EV charging infrastructure
- FHWA issued its final Buy America requirements for EV chargers on February 21, 2023, with an effective date of March 23, 2023:
<https://www.federalregister.gov/documents/2023/02/21/2023-03498/waiver-of-buy-america-requirements-for-electric-vehicle-chargers>
- FHWA's waiver removes EV chargers from FHWA's existing waiver for "manufactured products," and applies a new waiver specific to EV chargers based on imposing a Buy America requirement in two (escalating) phases



FHWA Buy America Rules for EV Chargers

- Final waiver for EV chargers differs in several respects from the waiver as originally proposed by FHWA on August 31, 2022
 - Fewer phases to the waiver, revised timelines and definitions
- Two Phases: (1) “Final Assembly” Phase, and (2) “55 Percent” Phase
- Which phase applies generally is established based on the **date of manufacture** of the EV charger
 - “Date of manufacture” is date on which EV charger has its final assembly occur and is in an operational state
 - Note, that EV chargers manufactured on or before July 1, 2024 must be installed by October 1, 2024 to be covered by the “Final Assembly” Phase instead of the “55 Percent Phase”



FHWA Buy America Rules for EV Chargers

- **Phase I: “Final Assembly” Phase**

- March 23, 2023 to June 30, 2024**
- Final assembly of EV charger must occur in the United States
- If EV charger’s housing/cabinet/enclosure is predominantly iron or steel, the iron/steel in the housing/cabinet must meet BABA standard for iron/steel (melted and completely manufactured in U.S.)

**FHWA may shorten this phase based on future RFI responses; also, the “Final Assembly” Phase applies to EV chargers manufactured on or before June 30, 2024 only if the recipient of NEVI funds begins installation of the EV chargers by October 1, 2024



FHWA Buy America Rules for EV Chargers

- **Phase 2: “55 Percent” Phase**

- Scheduled to start July 1, 2024**
- Final assembly of EV charger must occur in the United States
- Cost of components manufactured in the U.S. must exceed 55% of the total cost of components of the EV charger
- If EV charger’s housing/cabinet/enclosure is predominantly iron or steel, the iron/steel in the housing/cabinet must meet BABA standard for iron/steel (melted and completely manufactured in U.S.)

**FHWA may accelerate this start date based on future RFI responses



FHWA Buy America Rules for EV Chargers

- 55 Percent Phase is essentially a hybrid of BABA tests for iron/steel products and manufactured products
 - Overall content requirement (55% cost of components) tracks BABA manufactured products test, but FHWA is specifically applying iron/steel products test to EV charger housing (if it is predominantly iron/steel)
 - Cost of U.S.-produced steel/iron housing counts toward U.S. content under 55% cost-of-components test
- “Cost of components” is defined in same way as under Buy American Act (see slide 21 from prior webinar)
 - Two types of components: purchased or manufactured



FHWA Buy America Rules for EV Chargers

- Key Definitions

- “EV charger” means the EV charger unit itself and the equipment contained inside it
 - Much narrower definition than what FHWA originally proposed, which would have included associated payment systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems
- EV charger’s “housing” (also known as its cabinet or enclosure) means “the component of the EV charger that contains the electronics that convert electricity to direct current”



FHWA Review of EV Charger Waiver

- During the “Final Assembly” Phase, FHWA will conduct RFIs every six months to receive information on the state of the EV charger industry
 - FHWA could amend the waiver based on information received in response to those RFIs, such as by accelerating the start date of the “55 Percent” Phase if the FHWA determines that an adequate supply of EV chargers meeting the 55% cost-of-components test is available sooner than July 1, 2024
 - FHWA would provide public notice of intent to accelerate start of “55 Percent” Phase before any such amendment is effective
- FHWA will review the EV charger waiver within 5 years of its effective date (*i.e.*, by March 23, 2028), to determine if it is still needed



FTA Buy America



Federal Transit Administration (FTA)

- FTA Buy America applies to projects involving local (commuter) transit
 - In the infrastructure space, construction involving new rail lines, relocation of utilities adjacent to rail lines, construction of new bus or subway/commuter rail stations, etc.
 - Roughly 80% of state/local mass transit projects use FTA funding
- Statutory reference: 49 U.S.C. § 5323(j)
- FTA Buy America regulations: 49 C.F.R. Part 661
- FTA requirement: All iron, steel, and manufactured products used in the FTA-funded project must be produced in the United States.



FTA Buy America: Manufactured End Products

- Key to FTA compliance for non-steel/iron items is the manufactured product, component, subcomponent hierarchy
 - Manufactured Product
 - Components (one level below manufactured products)
 - Subcomponents (two levels below manufactured products and one level below components—in other words, the components of the “components”)



FTA Buy America: Components

- For infrastructure projects, the operative “manufactured product” is the facility itself or a major system within the facility
 - Examples of typical “manufactured end products” are listed in the FTA regulations in an Appendix to 49 C.F.R. § 661.3, and include:
 - Structures (terminals, depots, garages, and bus shelters)
 - Fare collection systems
 - Information systems
 - Security systems
- Because the infrastructure project, facility, or a major system within the facility is the operative “manufactured end product,” the individual items brought to the job site for incorporation into that “end product” would generally be considered “components” for FTA Buy America purposes



FTA Buy America Requirement

- For a “manufactured end product” to be considered “produced in the United States”:
 - 1) All of the manufacturing processes for the end product must take place in the United States; and
 - 2) All of the components of the end product must be of U.S. origin.
- A component is considered of U.S. origin under FTA Buy America rules if it is manufactured in the United States, regardless of the origin of its subcomponents.
- Thus, if you are providing a “component” (that is not an iron/steel product), U.S. manufacture is required, but there is no domestic content threshold for the parts used to manufacture the “component.”
 - In other words, “subcomponents” can come from anywhere, so long as the “component” is manufactured in the U.S.



FTA Buy America: Microprocessor Waiver

- FTA has issued a general waiver for “microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data.”
- The so-called “microprocessor waiver” does not extend to a product or device that merely contains a microprocessor or microcomputer
 - For example, while certain components of a fare collection system may be microcomputers subject to the microprocessor waiver, the waiver does not exempt the entire system from Buy America compliance
 - Items that do not process or store data, like a video monitor or a CCTV camera, are not subject to the waiver



FAA Buy American Preference



FAA Buy American Requirement

- FAA's Airport Improvement Program (AIP) has a "Buy American" requirement: https://www.faa.gov/airports/aip/buy_american/
- Requires steel to be 100% U.S. manufactured/produced (BABA standard)
- Manufactured products:
 - Baseline requirement is for manufactured product to be "wholly produced in America of 100% U.S. materials"
 - Difficult standard to meet, so compliance frequently established via a nationwide waiver ("Type III waiver") permitting some foreign content



FAA: Type III Waivers

- Type III waiver available if:
 - Final assembly occurs in U.S., and
 - 60% or more of the components and subcomponents (by cost) are of U.S. origin; “structural steel” components must be U.S. origin
- Documentation required of manufacturers to support “Type III” waiver requests
 - AIP website has links to FAA “Buy American Content Percentage Calculation Worksheet” (documenting cost of components test) and FAA “Final Assembly Questionnaire” (documenting processes involved in U.S.-based “final assembly”)



FAA Buy America: Total Facility vs. Equipment

- Compliance (or Type III waiver eligibility) determined at either the “equipment” level for equipment purchases, or at the “total facility” level for a facility project
 - Key distinction
 - In many infrastructure projects, the 60% domestic content test will be measured at the prime contract level, based on the costs of all construction material used on the facility project
 - May not need to meet the 60% domestic content standard with your own products
 - But, remember, all structural steel/iron must be domestic



DOE BABA Implementation



DOE BABA Implementation

- DOE's BABA website: <https://www.energy.gov/management/build-america-buy-america>
- Includes link to document describing DOE's Implementation of the Buy America requirement for infrastructure projects
 - DOE Implementation Guidance defines “primarily of iron or steel” as meaning “greater than 50% iron or steel, measured by cost”
 - Also provides instructions on required content for BABA waiver requests
- DOE website listing proposed/approved BABA waiver requests: <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests>



DOE BABA Waivers

- DOE has approved one public interest waiver of BABA
- Temporary adjustment period waiver of 180 days, waiving BABA requirements for awards signed between August 30, 2022 and February 28, 2023, for awards issued as a result of Funding Opportunity Announcements released before May 14, 2022
 - Waiver expires February 28, 2023
- Going-forward, DOE projects will presumably be subject to the DOE Implementation Guidance dated 11/2022 and linked on DOE's BABA website (see prior slide)



Commerce/NTIA Implementation



DOC's BABA Implementation

- BABA website for DOC: <https://www.commerce.gov/oam/build-america-buy-america>
 - Lists Approved Waivers and Proposed Waivers
- National Telecommunications and Information Administration (NTIA) is an agency within DOC that is responsible for administering some broadband infrastructure programs authorized under BIL/IIJA, including the Middle Mile Grant (MMG) Program
 - NTIA has proposed a limited non-availability waiver of BABA requirements for the MMG Program:
<https://www.commerce.gov/sites/default/files/2022-09/NTIA%20Middle%20Mile%20BABA%20Waiver.pdf>



Proposed Waiver: MMG Program

- If the proposed waiver is adopted, it would waive, for a 12-month period, the domestic content requirements under the MMG Program for several types of equipment/products, including:
 - Broadband routing equipment
 - Broadband access switching equipment
 - Broadband aggregation switching equipment
 - Microwave backhaul equipment
 - Broadband optical fiber transport equipment
 - Optical line terminal/remote optical line terminal solutions/components
 - Fixed test equipment
 - Telemetry routers/switches
 - Fiber optic cable



Practice Points



Know the Rules for Agencies/Programs That Fund Projects of Interest to You

- Because the rules, guidance, and waivers under BABA vary from agency to agency, make sure you stay current on the guidance/waivers issued by the federal agencies that are administering programs of interest to you
 - FHWA for EV infrastructure
 - EPA and USDA RUS for water infrastructure
 - NTIA for broadband infrastructure
- Monitor Federal Register announcements and agency “Buy America”/BABA websites for updates/guidance
- Engage with agencies of interest when they seek information on Buy America requirement impacts/practical issues (FHWA RFIs on EV chargers)



Track Status of BABA Waivers and Guidance

- Most federal agencies implementing BABA requirements have websites that address their implementation of BABA or the rules regarding specific BIL/IIJA programs they are implementing
- Made in America Office within OMB hosts links to various agency webpages with BABA guidance/waivers:
 - <https://www.madeinamerica.gov/waivers/financial-assistance/>
- Be on the lookout for additional BABA implementation guidance from OMB, when it finalizes the guidance it proposed on February 9, 2023 (<https://www.federalregister.gov/documents/2023/02/09/2023-02617/guidance-for-grants-and-agreements>)



Questions?



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