



Build America, Buy America Act (BABA) 319 Nonpoint Source Management Program Update

May 2024

DISCLAIMER

- While we make every effort to convey complex subject matter in a clear, concise, and accurate manner, this presentation cannot change or contradict statute, guidance, and related documentation.
- If statements we make during this presentation conflict with your understanding of statute or guidance, please ask for clarification.
- Questions will be fielded and contact information is provided toward the end of the presentation for OW's BABA team.

BUILD AMERICA, BUY AMERICA (BABA) ACT

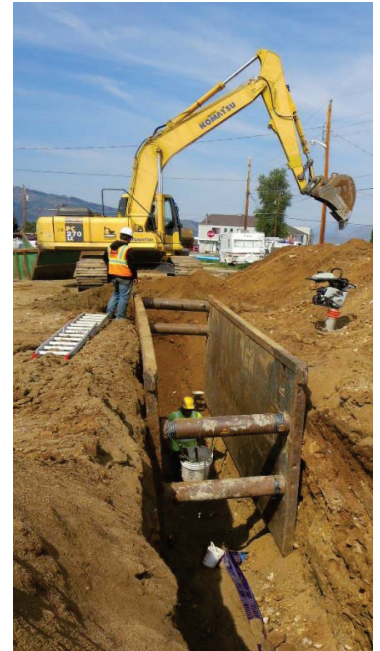
- Included in the Infrastructure Investment and Jobs Act
 - Public Law Number 117-58
 - Title IX, Subtitle A, Part I – Buy America Sourcing Requirements
 - BABA Sections 70911-70917
- Signed November 15, 2021
- Effective date 180 days after enactment: May 14, 2022
- <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>

WHAT IS BABA?

- “[N]one of the funds made available for a Federal financial assistance program for infrastructure...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.”
- “Project” means:
 - Any activity related to the construction, alteration, maintenance, or repair of infrastructure in the U.S.
 - “Infrastructure” means anything fixed, permanent, and that serves the public interest.
- BABA applies to all Federal financial assistance for infrastructure (not just BIL funding), unless covered by a waiver

BABA COVERED PRODUCTS

- Iron and steel + manufactured products + construction materials (non-ferrous)
- Items should only be classified into ONE of the three categories
- Applies to items consumed in, incorporated into, or affixed to an infrastructure project (aka permanently incorporated)
 - Does not apply to items brought to and removed from the construction site prior to the completion of the project (e.g., temporary scaffolding, trench boxes -->)
 - Does not apply to portable equipment and furnishings that are used at or within the finished project (e.g., movable chairs, desks, portable computer equipment)



BABA: IRON AND STEEL CATEGORY

- Items that are primarily (> 50 percent) iron or steel by material / component cost
- All manufacturing processes, from the initial melting stage through the application of coatings, must occur in the U.S.
- Covers a wide range of iron and steel items:
 - Pipes and fittings, tanks, reinforcement (rebar), structural steel, precast-reinforced concrete (vaults, etc.), municipal castings, valves, hydrants, etc.



BABA: MANUFACTURED PRODUCTS CATEGORY

- Final Manufacturing in the United States
- Cost of components that are mined, produced, or manufactured in the U.S. is greater than 55 percent of the total cost of all components of the manufactured product
- OMB provided final guidance (2 CFR 184) for the cost of components test (Aug 2023).
 - 2 CFR 184 addressed later in presentation



BABA: CONSTRUCTION MATERIALS (NON-FERROUS)

- Includes:
 - **Non-ferrous** metals
 - Plastic and polymer-based products (including PVC, HDPE piping, etc.)
 - Glass
 - Lumber
 - Drywall
 - Fiber Optic Cable / Optical fiber
 - Engineered Wood
- Excludes:
 - Iron and steel products, manufactured products, and temporary items
 - Cement and cementitious materials
 - Aggregates (stone, sand, gravel)
 - Aggregate binding agents / additives
 - Flora (plantings, landscaping)
 - Purposefully decomposing / degrading items (e.g., natural fiber mats, raw lumber shoring, etc.)

EPA'S BABA WAIVER AUTHORITY

- Pursuant to Section 70914(b) of BABA, EPA may waive BABA requirements where EPA finds that:
 - Applying the domestic content procurement preference would be inconsistent with the public interest (a “*public interest waiver*”);
 - Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “*nonavailability waiver*”); or
 - Inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “*unreasonable cost waiver*”)

APPROVED OW & EPA BABA WAIVERS

- “Adjustment Period” Waivers
 - For Selected OW programs: 6-month Waiver (expired Mar 1, 2023)
- *De Minimis* public interest waiver
 - Agency-wide: projects may use non-domestic up to 5% of project cost
- Small Project/Award Waiver
 - Agency-wide: waives projects when assistance agreement of award or subaward is less than \$250K

NPS BABA IMPLEMENTATION DRAFT FRAMEWORK

1. Is the federal funding of the assistance agreement for the project less than \$250K?
 - If “Yes,” project may be waived (Small Projects Waiver)
2. Are permanently incorporated products covered by BABA?
 - If “No” to all, project may not ‘implicate’ BABA (not covered)
 - Flora, sand, gravel, rocks, backfill, cement, cementitious, and aggregate materials brought/mixed onsite: not covered
 - Not permanent: temporary items used and removed during construction; purposefully decaying, temporary items (“shoring”)

NPS BABA IMPLEMENTATION DRAFT FRAMEWORK, CONT.

3. Are all project activities solely for the purchase, construction, maintenance, or improvement of a private project solely for non-public use?
 - If “Yes,” BABA may not be ‘implicated’
 - Public access or public use may implicate BABA
 - Coordinate with EPA if questions arise for specific projects
 - For example, installing fencing to restrict private livestock from access on private land would likely not implicate BABA

NPS BABA IMPLEMENTATION DRAFT FRAMEWORK, CONT.

4. Does BABA apply to projects that support Agricultural or Conservation Best Management Practices?

- BABA may not be ‘implicated,’ for example, if there are no covered products used in the practice
- HQ is examining if Ag and Conservation practices would reasonably be considered “infrastructure”
 - Developing descriptive list of BMPs to vet with grantees and experts
 - Coordinating with other Fed Agencies to ensure consistency

NPS BABA IMPLEMENTATION DRAFT FRAMEWORK, CONT.

5. If none of potential exceptions in Qs 1-4 apply to a project and it was not covered by the Adjustment Period waiver:

- The Agency-Wide *De Minimis* Waiver applies to all, allowing products to be waived up to 5 percent of total project cost
- Project Cost waiver could apply if complying with BABA increases project cost by more than 25 percent
- Project-specific waivers possible for unavailable products, in certain instances, which must be requested from EPA

WHAT TO DO IF BABA APPLIES TO YOUR NPS PROJECT

- Check the contract clauses and grant terms and conditions
 - Sample contract language available in OW Implementation Doc
- Coordinate with the project contractor regarding their understanding of BABA requirements (pre-construction meetings are key)
- Review EPA BABA implementation resources and trainings for manufacturers, suppliers, and distributors (ask us questions!):
 - <https://www.epa.gov/cwsrf/build-america-buy-america-baba-resources>
 - BABA-OW@epa.gov (hyphen!)

RECORDS TO KEEP

If BABA applies, recipient ensures project meets requirements through these steps:

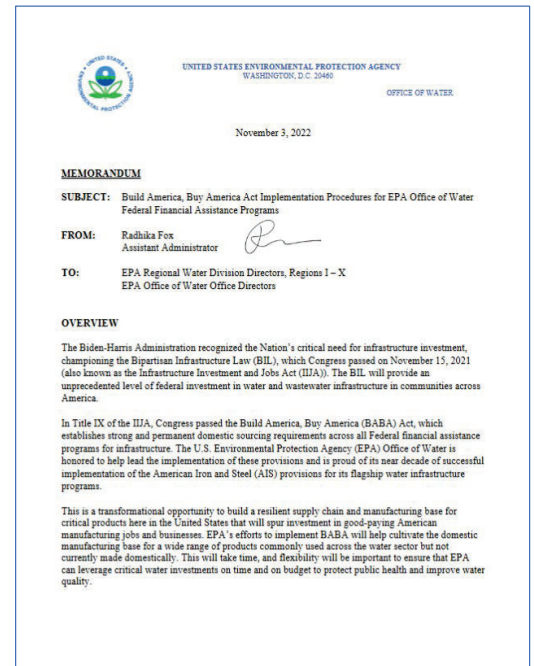
- Ensure construction contracts clearly identify the BABA requirements
- Contract and compliance docs retained for appropriate grant record retention period
- If *De Minimis* waiver used by project, construction manager (contractor) tracks items and their costs to ensure consistency with the waiver's simple requirements.

If BABA does not apply or was waived (e.g., Adjustment Period) at the project scale:

- Grant recipient (e.g., state NPS program) should ensure the following is in project file:
 - Total federal cost of the award or subaward if the Small Projects Waiver applies
 - Evaluation of the products and materials used if none are covered by BABA
 - Note to file if recipient is private entity and project has no public use or access

OW IMPLEMENTATION MEMO

- Released November 3, 2022
- “Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs”
- Supplemental to OMB guidance
- <https://www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf>



OMB MIAO – CODIFIED GUIDANCE – 2 CFR 184

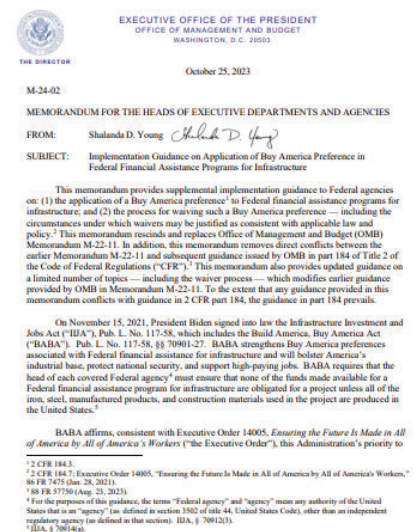
- Published August 23, 2023
- Final guidance for manufactured products component cost test, product categorization, and non-ferrous construction materials definitions
- Effective October 23, 2023
- Includes definitions of manufactured products and guidance on determining the cost of components
 - Definition of “cost of components” mirrors Federal Acquisition Regulation (FAR) with some changes/differences

OMB MIAO – FINAL 2 CFR 184.3, CONT. - CONSTRUCTION MATERIALS

Construction material	“Produced in the U.S.” means all manufacturing processes occurred in the U.S.
Non-ferrous metals	From initial smelting or melting through final shaping, coating, and assembly
Plastic and polymer-based products	From initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form
Glass	From initial batching and melting of raw materials through annealing, cooling, and cutting
Fiber optic cable	From the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States.
Optical fiber	From the initial preform fabrication stage through the completion of the draw
Lumber	From initial debarking through treatment and planing
Drywall	From initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels
Engineered wood	From the initial combination of constituent materials until the wood product is in its final form


OMB MIAO “FINAL” GUIDANCE MEMO

- Effective 10/25/23
- “Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”
- Revises OMB’s initial M-22-11 guidance
- Incorporates final guidance from the 2 CFR 184.
- <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>



BABA RESOURCES

- OMB Guidance:
 - <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
- EPA Websites:
 - www.epa.gov/cwsrf/build-america-buy-america-baba
- Email Inboxes:
 - BABA-OW@epa.gov (hyphen!)
 - Made in America Office: MBX.OMB.MadeInAmerica@omb.eop.gov



Questions and Discussion