



Oregon

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To: Area Managers
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Resident Engineers – Consultant Project
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From: Justin G. Moderie, P.E., G.E.
State Construction and Materials Engineer

Subject: Build America Buy America implementation of 2022 and revisions for 2023

The purpose of this memo is to provide guidance to meet expanded federal requirements requiring American made materials in construction contracts as required in the Build America Buy America (BABA) Act.

Background:

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), which includes the BABA Act (Pub. L. No. 117-58, Sections 70901-70941). While existing Buy America requirements previously applied to iron, steel, and certain manufactured products, BABA expands requirements to include all manufactured products and construction materials in construction contracts that include Federal funding.

The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered 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.” A 180-day transitional waiver was approved for USDOT to extend the implementation of BABA to November 10, 2022.

Included in BABA

- Construction materials are Non-ferrous metals, plastic and polymer-based products, glass, fiber optic cable, lumber, engineered wood, drywall.
- *Note: Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material. (Coatings and Glue) effective for contracts with federal construction authorization after **October 23, 2023.***
- BABA does not apply to temporary items, asphalt products, cement and cementitious products, aggregates, or aggregate additives. The BABA preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does

not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project.

- Manufactured products are defined as products consisting of at least two construction materials or other constituents that are produced or assembled off the Project Site. The existing 1983 FHWA waiver for manufactured products is being reviewed at the national level, as required by BABA. For now, manufactured products fall under the 1983 FHWA waiver.

The USDOT issued a Public Interest Waiver for De Minimis Costs and Small Grants. The final waiver can be viewed here: <https://www.federalregister.gov/documents/2023/08/16/2023-17602/waiver-of-buy-america-requirements-for-de-minimis-costs-and-small-grants> and this waiver applies to Materials covered by the Build America Buy America Act effective for contracts with federal construction authorization after August 16, 2023.

The public interest waiver is for manufactured products, and construction materials which:

- The total value of the non-compliant products** (foreign or unknown origin) is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project*; or
- The total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000.

*The total applicable costs for the project are understood to be the total cost of Materials that are subject to a domestic preference requirement such as construction materials covered under BABA (see above) and not Materials excluded from BABA like Materials covered under Buy America (iron and steel) or Materials such as Aggregates. Furthermore, this de minimis waiver does not apply to iron and steel subject to the requirements of 23 U.S.C. 313 on financial assistance administered by FHWA. The de minimis threshold in 23 CFR 635.410(b)(4) continues to apply for steel and iron. (See 00160.20(a).)

**The “total value of the non-compliant products” includes construction materials only. The “total applicable costs” includes construction materials, iron and steel, and manufactured products., The value of materials are the actual cost of the materials that the Contractor is responsible for reporting, not the anticipated cost of materials. Furthermore, this bullet does not apply to iron and steel subject to the requirements of 23 U.S.C. 313. The de minimis threshold in 23 CFR 635.410(b)(4) continues to apply for steel and iron (See 00160.20(a)).

Strict compliance is required, except to the extent the public interest waiver applies. The Contractor shall not incorporate construction materials in excess of this amount into the Project. All foreign origin construction Materials incorporated in the Project in excess of the amount indicated above shall be removed and replaced with domestic Construction Materials at the Contractor's expense.

Implementation:

Projects with federal funding going to bid after January 1, 2023 (PS&E after October 31, 2022) will include the specification 00160.20(d) Build America Buy America that implements the requirement in contracts.

Projects with federal funding during any phase, after the dates above, will be subject to the new BABA requirements. Unlike Buy America (standard specification 00160.20(a)),

Projects that have received construction authorization prior to November 10, 2022, but request additional funding after November 10, 2022, do not have to add the BABA requirements.

The BABA Material Classification Guide and the ODOT Qualified Products List (QPL) were reviewed to determine which items will require a Certificate of Material Origin (CMO) to meet the BABA requirements. The lists may be found at <https://www.oregon.gov/odot/Construction/Pages/Contract-Administration-Services.aspx>

The old CMO form ([Form 734-2126](#)) will continue to be used for iron and steel materials falling under Buy America (specification 00160.20(a)) requirements.

A CMO form ([Form 734-5378](#)) has been created specifically for BABA construction materials (Construction Materials CMO). This form is for projects with federal construction authorization between 11/10/2022 and 8/15/2023 and does not allow the use of any non-domestic Construction Material.

Special Note: a new form [734-5378b](#) has been created for the allowance of de minimis amounts of foreign Construction Materials for projects with federal construction authorization after August 16th, 2023.

Waivers:

FHWA may waive the BABA or Buy America requirements for a project construction material on a case-by-case basis, based on the following:

- (1) applying the domestic content procurement preference would be inconsistent with the public interest (a “public interest waiver”);
- (2) 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
- (3) the 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”).

Waivers for a specific construction material on a specific project must be coordinated through the project Transportation Project Manager (TPM) or Resident Engineer Consultant Projects (RECP) who will work with their FHWA area engineer for the review process. Expect waivers to take 6 months to 1 year for review time. There is no guarantee that waivers will be approved.

Action Requested:

- Please share and forward on to those in design and construction of federal aid projects.
- For those in project development, ensure construction materials used in design and specified to be used in the contract meet BABA requirements. If using a specific proprietary item, make sure it meets BABA requirements.
- For those in construction, ensure compliance with BABA and that required construction materials have necessary CMOs.

Resources:

IIJA: <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>

BABA: IIJA Division G, Title IX, Sections 70901-70941

Office of Management and Budget Memo MB-22-11: <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

Contact Information:

General Information & Certificate of Material Origin (CMO) Forms:

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Specifications:

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Qualified Products List (QPL)

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Cc: FHWA Oregon Division Office