

## **BUILD AMERICA, BUY AMERICA (BABA) REQUIREMENTS**

In accordance with OMB Memo M-24-02, dated October 25, 2023, 2 CFR Part 184, and the Build America Buy America Act, Pub. L. No. 117-58 §70901-52 (the “Act”), bidders are hereby notified that none of the funds provided under the resultant award may be used for permanently affixed objects in an infrastructure project unless:

- (1) all iron and steel used in the project are produced in the United States--this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- (2) all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and
- (3) all construction materials are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The Buy America 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. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project.

A permanently affixed article, material, or supply should only be classified into one of the following categories:

- (1) iron or steel;
- (2) a manufactured product;
- (3) a construction material; or
- (4) Section 70917(c) materials

For ease of administration, an article, material, or supply should not be considered to fall into multiple categories. The iron and steel test should be applied to items that are predominantly iron or steel, unless another standard applies under law or regulation.

## Definitions (2 CFR 184.3 “Definitions”)

1. Iron and Steel Test: The cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.
2. Manufactured Product Definition: Articles, materials, or supplies that have been: (a) Processed into a specific form and shape; or (b) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
3. “Construction Materials” includes an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of:
  - A. non-ferrous metals;
  - B. plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
  - C. glass (including optic glass);
  - D. fiber optic cable (including drop cable);
  - E. optical fiber;
  - F. lumber;
  - G. engineered wood; and
  - H. drywall.
4. Section 70917(c) materials encompass cement and cementitious materials, aggregates such as stone, sand, asphalt, or gravel; or aggregate binding agents or additives poured on site which are exempt from BABA requirements.<sup>1</sup>

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<sup>1</sup> Precast pavers are considered a Manufactured Product and not exempt under Section 70917(c)

## Waivers

When necessary, waivers from these requirements may be available from EPA. When EPA determines that one of the following exceptions applies, then the application of the domestic content procurement preference may be waived:

1. applying the domestic content procurement preference would be inconsistent with the public interest;
2. the 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; 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.

Waiver requests are subject to public comment periods of no less than 15 days, except in unforeseen and exigent circumstances, and must be approved by EPA and reviewed by Office of Management and Budget's Made in America Office. There may be instances where an award qualifies, in whole or in part, for an existing waiver.

Items valued up to 5% of the project cost, including planning and design costs, may be exempted under the De Minimus waiver requirements.

## Compliance

Contractors shall collect and maintain a file of BABA compliance certificates from suppliers documenting each BABA-applicable delivery (Iron and Steel, Manufactured Products, and Construction Materials).

1. Certificates shall include:
  - a. the associated project (name, project location, contract number)
  - b. product identity and category (iron and steel, construction material, or manufactured product) being supplied, quantity, and unit and total costs;
  - c. a statement attesting the products supplied are compliant with BABA requirements as defined in 2 CFR 184 "the certification"
  - d. location(s) of manufacturing being certified (city and state)
    - i. minimum: documenting final point of manufacturing in the United States;
  - e. signature of company representative making the certification (on company letterhead, signature can be electronic)
    - i. certifying statement affirms knowledge of manufacturing processes for the product(s) and attests that the project meets the BABA requirements.

2. Contractor shall sign and date each certificate upon delivery and maintain a compiled file on site subject to DOEE inspection during site visits
3. Contractor invoices shall include:
  - a. scanned certificates of incurred costs;
  - b. a summary log breaking out percentage of compliant and non-compliant costs organized by BABA category included in the invoice's period of performance and cumulatively. Denote any costs claimed under the 5% De Minimis waiver
  - c. a statement affirming sourcing information is true and correct as defined by 2 CFR 184.