

Build America Buy America: Strong Domestic Procurement Provisions in Infrastructure Bill Signal Increased Commitment to U.S. Manufactured Goods

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November 15, 2021

The historic infrastructure bill, now approved by the U.S. Congress and pending President Biden's signature, includes broad policy provisions designed to improve governmental sourcing from U.S. manufacturing sectors. These new statutory authorities aim to:

- Expand domestic preference procurement policies applicable to federal financial assistance programs for public works infrastructure;
- Increase the domestic component content requirements of products and construction materials sold to the Federal Government under the Buy American Act; and
- Provide transparency into governmental contracting decisions related to domestic sourcing.

Suppliers to public works projects and to the Federal government should assess these new statutory directives as they will impose new domestic origin requirements and standards for construction materials and products acquired for federally-aided public works infrastructure projects at the state and local levels, and impose new domestic component content standards for goods and construction materials acquired by the Federal Government.

BACKGROUND

On November 5, 2021 the U.S. House of Representatives passed a bipartisan \$1.2 trillion "physical" infrastructure bill, paving the way for enactment of a major component of President Biden's "Build Back Better" domestic infrastructure agenda. The Infrastructure Investment and Jobs Act (IIJA) H.R. 3684 – also known as the Bipartisan Infrastructure Deal – was passed by the House by a vote of 228-206, with 13 Republicans joining all but six Democrats in supporting the measure. The bill now awaits the President's signature, nearly three months after Senate passage.

The IIJA contains approximately \$550 billion in new infrastructure spending over current spending levels and covers roads and bridges, public transit, rail, safety and research programs that are typically included in five-year surface transportation reauthorizations. Additionally, the five-year bill makes major investments in drinking and wastewater infrastructure; ports and airports; broadband; grid security; and clean energy programs (e.g., electric vehicle infrastructure and carbon capture). The bill also includes major domestic procurement ("Buy America") requirements for infrastructure materials.

"BUILD AMERICA, BUY AMERICA"

Perhaps most significantly, the IIJA includes the *Build America, Buy America Act (BABA)*. The BABA statutorily directs the application of "Buy America" domestic preference policies to federal financial assistance programs for infrastructure, both to programs not subject to any such laws currently, as well as to those that are currently subject to Buy America laws that may be limited in scope to specific materials or products. In contrast to the Buy America requirement applied to the 2009 American Recovery and Reinvestment Act, the statutory authority provided by the BABA is not limited to the funds appropriated or authorized in the IIJA. Rather, the BABA directs the application of Buy America laws to federal-aid infrastructure programs that will have enduring, permanent impact.

In summary, the BABA would bar the award of federal financial assistance for infrastructure unless all of the iron, steel and manufactured products and construction materials used in the project are produced in the United States.^[1]

Waivers traditionally available under existing Buy America laws are authorized under the BABA where (1) applying the Buy America requirement would be inconsistent with the public interest; (2) where the iron, steel, manufactured products and construction material is not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; and (3) where inclusion of the domestic products or construction materials will increase the cost of the *overall project* by more than 25 percent. In addition, Congress directs that the BABA be applied in a manner consistent with U.S. trade agreement obligations related to government procurement.

Robust Origin Standards

The BABA imposes robust origin standards for the products and construction materials acquired for federally-assisted infrastructure projects. The bill defines "produced in the United States" to mean, "in the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States." Similar origin standards for iron and steel are currently imposed by regulation and agency guidance to federal-aid subject to existing Buy America laws, including those applicable to certain federal-aid transportation infrastructure programs as well as federal-aid clean and drinking water infrastructure programs.

The BABA will impose Buy America requirements on nonferrous construction materials – a break in precedent from existing Buy America laws applicable only to iron and steel. It identifies common construction materials as nonferrous metals, plastic and polymer-based products, glass (including optic fiber), lumber, and drywall. The BABA directs the imposition of similarly significant "all manufacturing processes" origin standards for non-ferrous construction materials. The OMB is required by the BABA to issue standards that define "all manufacturing processes" for construction materials.

Relative to the origin standard for manufactured products, the BABA is more explicit. Manufactured products will be deemed produced in the United States if: (1) the product was manufactured in the United States; and (2) the cost of the product's components mined, produced or manufactured in the United States exceeds 55 percent of the total cost of the product's components. This origin standard is consistent with the recently revised origin standard for domestic end products and construction materials under the federal BAA, but not reflective of changes to the BAA's origin standard imposed by another section of the IIJA.

Rapid Timeline for Implementation

The BABA imposes a rapid timeline for implementation.

Upon enactment: The Office of Management and Budget (OMB) is directed to issue guidance to Federal agencies to assist in identifying programs that have “deficient” Buy America coverage and to issue guidance to assist Federal agencies in applying new domestic content preferences.

The BABA deems as deficient those programs that are not currently subject to Buy America requirements at all, are subject to limited Buy America requirements, the scope of which does not include iron, steel, manufactured products *and* construction materials, or are subject to Buy America requirements that have been waived by generally-applicable and longstanding waivers. For example the Buy America requirement imposed by 23 U.S.C. § 313 is limited in application by the Agency’s implementation policy to iron and steel only. The Federal Highway Administration has estimated that the ferrous inputs account for less than 5 percent of the cost of a federally-aided highway project.

Within 60 Days of Enactment: Federal agencies will be required to submit to the OMB and appropriate congressional committees a report that identifies each Federal financial assistance program for infrastructure administered by the agency, identify the Buy America-type requirements applied thereto, if any, and assess the applicability of any existing domestic content procurement preference, including its purpose, scope, applicability and any exceptions or waivers of the requirement. The agency report must identify the deficient programs not subject to domestic procurement preferences required by the BABA.

Within 180 Days of Enactment: Federal agencies must begin applying Buy America preferences meeting the scope of products required by the BABA. By this time, OMB must issue standards satisfying the “all manufacturing processes” origin standard required by the BABA for “construction materials.”

“MAKE IT IN AMERICA”

The BABA also includes a “Make it in America” section, which directs changes to the BAA, paves the way for increased domestic component content standards, improves waiver processes and creates a Made in America Office. The “Make it in America” provisions of the BABA reflect many of the directives included in President Biden’s January 2021 Executive Order 14005 *Ensuring the Future Is Made in All of America by All of America’s Workers*.

Specifically, the “Make it in America” section of the BABA provides statutory authority for the establishment of the new Made in America Office within the OMB. It also includes language aimed at reducing the use of waivers and strengthened application of the BAA, which as noted above, applies to direct procurement by Federal agencies.

The BABA directs the Made in America Office to promulgate guidance to Federal agencies aimed at standardizing and simplifying how agencies comply with the BAA. The guidance is to include the criteria agencies utilize to grant “public interest” and “non-availability” waivers of the BAA, providing some framework to what has traditionally been very murky process. In the context of non-availability waivers the BABA identifies appropriate considerations contracting officers should base waiver determinations upon, including anticipated project delays as well as lack of substitutable articles, materials and supplies.

Similarly, the BABA directs agencies to avoid issuing public interest waivers that would result in decreased employment in the United States both among the entities that produce the product or construction material or that would result in a contract award that would decrease domestic

employment. It will also require for the first time that Federal agencies consider whether the cost advantage of a foreign product is the result of unfair trade practices such as dumping or subsidization.

Notably, the “Make it in America” section of the BABA includes a sense of Congress that BAA’s domestic component content standard should be amended by the Federal Acquisition Regulatory Council (FAR Council) upward from 55 percent currently to 75 percent. This sense of Congress is consistent with both the directives of EO 14005 and proposed changes to the Federal Acquisition Regulations (FAR) included in a notice of proposed rulemaking (NPRM) issued by the FAR Council in July of 2021. The July NPRM proposed graduated increases to the BAA’s component content standard from 55 percent currently to 75% over five years with a fallback mechanism at prior lower percentage standards in the event of no qualifying offers meeting the higher component content standards. The sense of Congress in the BABA also endorsed a fallback mechanism in the event of no qualifying offers. The BABA directs the FAR Council to amend the Part 25 of the FAR to provide a definition for an “end product manufactured in the United States,” which the FAR Council is poised to do with the current rulemaking.

TRADE AGREEMENT OBLIGATIONS PRESERVED; DIRECTED TO BE REVIEWED

The IIJA’s Buy America provisions are universally directed to be applied in manners consistent with United States obligations under international trade agreements applicable to government procurement. To that end, covered agency procurements at the federal and sub-federal levels of government that are open to the products and materials of other parties to these trade agreements, by virtue of the identity of the procuring entity and the value of the procurement, will continue to be.

Notably, the IIJA directs an assessment of the impacts of all United States free trade agreements, the World Trade Organization’s Government Procurement Agreement and federal permitting processes on the operation of Buy American laws. The required report is to be made public. While the assessment does not direct a change in policy, it could spur the Administration to reconsider how it interprets limitations on the scope of parties’ obligations embodied in these agreement texts as well as its construction and reliance on delineated reservations to its market access obligations under these agreements.

BUYAMERICA.GOV

The IIJA also includes the BuyAmerican.gov Act, which among other things, directs the establishment of the BuyAmerican.gov website, a publicly available and free to access website repository of information on all waivers and exceptions to the various Buy America laws.

Notably, the Director of the Made in America Office at OMB [issued late last month a memorandum](#) for senior federal procurement officials that provides specific guidance to Federal executive branch agencies on the use of a digital waiver portal to submit proposed waivers to the Made in America Office and posted on a new dedicated website [MadeInAmerica.gov](#).

CONSIDERATIONS FOR MANUFACTURERS

Opportunity exists for manufacturers of construction materials with U.S. manufacturing operations as well as for their upstream suppliers of essential inputs as origin standards for nonferrous materials are adopted and the BABA’s domestic preference procurement requirements are imposed on

federally-aided infrastructure spending.

Manufacturers of nonferrous products used in public works infrastructure projects are likely unfamiliar with the Buy America requirements applicable to certain federal-aid infrastructure programs. Federal agencies subject to existing Buy America laws applicable to iron and steel have, over the last nearly 40 years, adopted consistent standards construing “all manufacturing processes” that require the initial melting stage of steelmaking to occur in the United States. Manufacturers of nonferrous construction materials should take note of this precedent and consider what a comparably inclusive origin standard would look like for their industry sector.

Manufacturers should also assess how the BABA’s waiver transparency requirements and supplier scouting programs may be leveraged to identify gaps in domestic sourcing and inform capital investment planning.

[1] The BABA defines infrastructure as: 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; and buildings and real property.