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Avoid Buying Trouble: Understanding Domestic Preferences

Federal laws have long imposed domestic preference requirements for the procurement of materials on federal (or federally funded) construction projects. These laws share the common goal of prioritizing the spend of U.S. taxpayer money on American products made by American workers. Commonly referred to as “Buy American” and “Buy America” programs, historically no single statute applied across the board to all federal agencies. While not superseding earlier laws, the 2021 “Build America, Buy America Act” (“BABAA”) changed this approach by *extending domestic preference requirements across all federal agencies and all federally funded public works projects in the U.S.* Accordingly, understanding BABAA’s sweeping requirements is critical for all construction companies engaging in public works. The Made in America Office (“MIAO”) issued new guidance earlier this month regarding BABAA’s interpretation and enforcement.

August, 2023, BABAA Final Guidance

MIAO’s August 14, 2023 final guidance on BABAA (the “Final Guidance”) is found [HERE](#). A five-page summary of the Final Guidance’s key provisions is found [HERE](#). Among other things, the Final Guidance clarified the distinction between manufactured products (to which the domestic preference requirements apply) and exempted materials (such as aggregates and cement), and set forth a process for categorizing products based on their status at the time they are brought to the project site.

Compliance

To avoid potential damages, fines and penalties, construction companies performing public sector work must strictly comply with applicable domestic preference requirements. Furnishing non-compliant materials can result in an order requiring the contractor to replace the non-compliant materials with compliant materials at no additional cost to the government. This could mean ripping out installed construction materials on a completed project. Also, contractors who knowingly furnish non-compliant materials can be subject to suspension and debarment, termination for default, and False Claims Act liability. In one case, a Wisconsin construction company who admitted to repacking materials and falsifying documents to hide its use of Chinese and Italian materials on a transit project in Miami, Florida, paid over \$3.4 million in fines for violations. The firm was also barred from further consideration on federal contracts. *United States ex rel. King v. Novum Structures LLC, No. 12-CV-00860 (E.D. Wis. Jan. 5, 2016)*. Although centered on the firm’s violation of “Buy America” domestic preference requirements, similar results are possible (and likely) under BABAA.

Compliance Best Practices

Incorporating reasonable practices to ensure compliance with the web of potentially applicable domestic preference requirements, including but not limited to BABAA, is important to avoiding damages, fines and penalties. BBG recommends that project teams incorporate some or all of the following measures:

- Identify, review and understand the scope of domestic preference requirements that may apply to your project. This includes contacting the federal, state, or municipal agency with whom you are contracting to identify whether any agency-specific supplemental regulations apply.
- Discuss potentially applicable domestic content preferences with the project officer, including any price evaluation factors (used for determining whether “unreasonable cost” waivers may apply), and include the potential costs of domestic preference requirements in your bid. This ensures the contracting agency or entity is (1) aware of applicable requirements, and (2) appreciates the corresponding impacts on price and schedule.
- Designate a project team member responsible for identifying applicable domestic preference requirements and implementing internal control systems for compliance.
- Ensure subcontracts and purchase orders clearly and expressly flow down all applicable domestic preference requirements and require the subtrade to execute certifications of compliance.
- If necessary, seek post-award waiver of domestic preference requirements as soon as possible.

BBG stands ready to assist your team in understanding whether, and how, these domestic preference requirements apply to your project and navigating an efficient path towards compliance.

History of Federal Domestic Preference Requirements (Pre-BABAA)

An overview of “Buy American” and “Buy America” domestic preference programs is as follows:

Buy American Act of 1933 (“BANA”) prohibits *federal entities* from using foreign products in the *construction of public buildings and public works*, specifying requirements for domestic steel and construction materials while providing exceptions for commercially available off-the-shelf items (“COTS”) and other waivers. *See* 48 C.F.R § 52.225-9. BANA does not extend to projects constructed using federal agency grants or to purchases by non-federal entities using federal funds. 41 U.S.C. §§ 8301 *et seq.* The FAR Council recently issued new rules increasing the Act’s domestic preference threshold incrementally until 2029. *See* Exec. Order No. 14005, 86 Fed. Reg. 7475 (Jan. 25, 2021); *see also* 48 C.F.R. § 25.101-(a)(2)(i).

Trade Agreements Act of 1979 (“TAA”) provides that products manufactured by “Designated Countries,” such as those with a free trade agreement with the U.S. or those that meet certain criteria (such as “least developed countries”), are compliant under BANA-governed contracts. 19 U.S.C. § 2501 *et seq.* FAR provides a full list of compliant Designated Countries at 48 C.F.R. § 52.225-5(a).

Buy America Act of 1982 (“BAA”) mandates the use of American-made steel, iron, and manufactured products in the *construction of public transit systems and highway projects*. 49 U.S.C. § 5323-(j); *see also* 23 U.S.C. § 313. BAA is often confused with BANA because of the similarity of titles (*i.e.*, distinction between “American” and “America”). BAA extends to purchases made by third parties (*e.g.*, transportation agencies) using federal funds (*e.g.*, grants or loans) administered by the Federal Transit Administration and the Federal Highway Administration. *Id.* The exact requirements for compliance differ significantly from those under BANA, and only apply to iron and steel and manufactured materials. *Id.*

BAA was followed by a series of copycat “Buy America” regulations applicable to other agencies or projects, including the Federal Railroad Administration (49 U.S.C. § 24405), water pollution control projects (33 U.S.C. § 1388), and public water system projects (42 U.S.C. § 1452). Each of these copycat acts applied BAA’s requirements to *specific uses of funds by designated federal departments*, although the exact application varied depending on the agency.

2021 Build America, Buy America Act

BABAA, codified at 117 P.L. 58, §70901-52, represents a significant expansion of the scope and reach of “Buy America” requirements. Like BAA, BABAA applies to any “non-Federal entity” that receives funding from any Federal agency, such as state and local governments, territories, non-profits, and institutes of higher education (and not just those that receive funding under the Bipartisan Infrastructure Bill). Unlike BAA, BABAA broadly applies to all “infrastructure” projects, including *essentially all public works projects in the U.S.* *Id.* at §70912-(5) (and not limited to a particular agency’s primary activities). In other words, the sweeping scope of BABAA extends to all infrastructure projects for all federal agencies. *Id.* at §70912-(4)(a). Where existing domestic preference laws exist that meet or exceed its standards, BABAA only applies to the extent that those laws are not already in place. *Id.* at §70917.

BABAA imposes domestic preference requirements on three primary categories of materials:

- o Iron and Steel: All iron and steel products must be manufactured in the U.S., meaning all manufacturing processes, from the initial melting stage through the application of coatings, must occur in the U.S. *Id.* at §70912-(6)(A).
- o Manufactured Products: All manufactured products must be *both* manufactured in the U.S. and at least 55% of the total cost of the components of the manufactured product must be mined, produced, or manufactured in the U.S. *Id.* at §70912-(6)(B). The OMB’s February 9, 2023, revised guidelines brings the “cost of components” definition in line with the definition under FAR. Federal Register 8374 Vol. 88, No. 27.
- o Construction Materials: All manufacturing processes for construction materials (defined as any “non-ferrous metals, plastic and polymer-based products [including composite building materials and fiber optic cables], glass, lumber, or drywall”) must occur in the U.S. *Id.* at §70912-(6)(C); *see* OMB M-22-11 (VIII). Concrete and aggregate, along with other exempt materials, are explicitly excluded. BABAA, 117 P.L. 58, §70917. *See* MAIO’s Final Guidance for additional discussion of exempt materials.

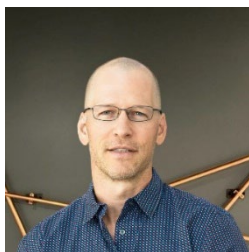
In general, BABAA discourages waivers. BABAA, 117 P.L. 58, §70921-(b)(1)(A). The MIAO’s Final Guidance notes, however, that transparent and targeted waivers will promote investment in the U.S. manufacturing base by highlighting gaps in domestic production and opportunities for new U.S. based producers. BABAA provides three grounds for waiver:

- (1) non-availability (*i.e.*, the product is not produced in the U.S. or the quality of available products is not adequate);
- (2) unreasonable cost (generally, where use of U.S. products would increase total project cost by more than 25%); and,
- (3) use of U.S. products is not in the public interest. *Id.* at §70914.

To receive a waiver, a recipient of federal funds must submit a detailed justification for using non-American goods, including cost information, public interest factors, and certification of a good faith effort to procure the goods from an American source. *Id.* at §70937-(c)(2)(A). Waivers are limited to specific projects, materials, and time periods, and are subject to an approval process that includes a period for public comment. *Id.* at §70914. Waiver requests are submitted to the financial assistance awarding officer in writing, are subject to public comment periods of no less than 15 days, and both the waiver request and approval (if any) are posted online (www.doi.gov/grants/buyamerica).

Final Thoughts

BABAA is the latest iteration in a series of regulations imposing domestic preference requirements on construction of federal infrastructure projects. In addition to BABAA and its predecessors (including BANA and BAA), several states and municipalities have also enacted laws contributing to the regulatory scheme governing procurement of construction-related materials. BBG stands ready to assist you in determining whether such regulations apply to your project and developing the best way to navigate and comply with these requirements.



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