

# USDA's Implementation of the Build America, Buy America (BABA) Act

This document is designed to assist United States Department of Agriculture (USDA) award recipients by providing important information related to the Build America, Buy America provisions of the [“Infrastructure Investment and Jobs Act”](#) (IIJA; P.L. 117-58), where federal funding supports a project for infrastructure as defined at Section 70912 of the BABA Act.

*Note: The guidance provided on this webpage is subject to change if the Office of Management and Budget (OMB) guidance on the application of Buy America preference in Federal financial assistance programs for infrastructure is updated.*

## REQUIREMENTS

The following information provides details on the requirements of the IIJA and the (BABA Act, and standards provided by the White House Office of Management and Budget (OMB), [M-22-11](#),” Initial Implementation Guidance on the Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.”

1. No USDA funds made available on or after May 14, 2022, may be used for a project for infrastructure unless:
  - A. 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.
  - B. 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
  - C. All construction materials<sup>1</sup> are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

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<sup>1</sup> Excludes cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

2. The Build America, 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.

## EXCEPTIONS

The following information provides details on the exceptions to the IJJA, the BABA Act, and OMB M-22-11.

1. When necessary, award recipients may apply for, and USDA agency or staff office administrative level may approve, a waiver from these requirements. The USDA agency or staff office may waive the application of the domestic content procurement preference in any case in which it determines that one of the following exceptions applies:
  - A. **Public interest:** Applying the domestic content procurement preference would be inconsistent with the public interest.
  - B. **Nonavailability:** 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
  - C. **Unreasonable Cost:** 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.
2. This guidance does not apply to “expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.”<sup>2</sup>

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<sup>2</sup> IJJA § 70912(4)(B)

“[P]re and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are (1) authorized by statutes other than the Stafford Act, 42 U.S.C. §§ 5121 et seq., and (2) made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, id. § 5122(1), (2).

Awards made to support the construction or improvement of infrastructure to mitigate the damage that may be caused by a non-imminent future emergency or disaster, such as awards made under FEMA’s Flood Mitigation Assistance program<sup>3</sup>, do not qualify as “pre and post disaster or emergency response expenditures.”

3. For instructions on how to submit a USDA Build America, Buy America waiver, please refer to the following guidance provided on the *Build America, Buy America Act (BABA) Act* webpage:

- Guidance on USDA Waiver Review Process for USDA Agencies and Staff Offices
- Guidance for Submission of a USDA Waiver Request by Recipients and Subrecipients

## APPLICABILITY

New USDA financial assistance awards and funding amendments to existing awards made on or after May 14, 2022, will contain a term and condition incorporating a Buy America preference. The OMB Memorandum [M-22-11](#), *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, Appendix I, provides an Example of Award Term – Required Use of American, Iron, Steel, Manufactured Products, and Construction Materials.

## DEFINITIONS

The following information provides the definitions used in IJJA, BABA Act, and OMB Memorandum M-22-11.

**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<sup>4</sup>— that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- lumber; or

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<sup>3</sup> See 42 U.S.C. § 4104c

<sup>4</sup> IJJA § 70917(c)(1)

- drywall<sup>5</sup>.

To provide clarity to item, product, and material manufacturers and processors, we note that items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials. For example, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material.

**Domestic Content Procurement Preference** means all iron and steel used in the project are produced in the United States; the manufactured products used in the project are produced in the United States; or the construction materials used in the project are produced in the United States.

**Federal financial assistance** means assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance.

**Non-Federal entity** includes States, local governments, Indian tribes, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.

**Infrastructure** includes, at a minimum, the structures, facilities, and equipment for, in the United States, 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. Infrastructure includes facilities that generate, transport, and distribute energy.

**Produced in the United States** means:

1. 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.
2. In the case of manufactured products, that:
  - A. The manufactured product was manufactured in the United States; and
  - B. 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. In the case of construction materials, that all manufacturing processes for the construction material occurred in the United States.

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<sup>5</sup> IJIA § 70911(5)

**Project** means the construction, alteration, maintenance, or repair of infrastructure in the United States.