

Bipartisan Infrastructure Law (BIL)

Build America, Buy America Act (BABA)

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ADOT Certification Acceptance Agency Guidance

What is Happening

- On November 15, 2021, President Biden signed the Bipartisan Infrastructure Law (BIL) into law, which includes the Build America, Buy America Act (BABA).
- BABA establishes a domestic content preference for Federal financial assistance obligated for infrastructure projects.
- Essentially a requirement to use certain domestically produced materials on Federally funded projects.

All federally funded projects
on or after October 23, 2023

Categories

BABA applies to three separate product categories:

- Iron or steel products (existing requirement)
- Manufactured products (new)
- Construction materials (new)

Bottom Line Up Front

- A lot more stuff needs to be certified as made in America.
- Approach: copy what ADOT does – gather material certs for all included materials just like you do for iron and steel now.
- Alternatively – have the contractor certify the entire project as a whole in one big cert, and still do ferrous metals separately.

Ferrous Metals

- Unchanged from what you have been doing for years.
- All manufacturing processes for steel and iron materials must take place in the US.

Initial smelting through final coating.

Manufactured Products

- Manufactured products - Manufactured products must be manufactured in the United States and the cost of components of a manufactured product that are manufactured in the United States must exceed 55 percent of the cost of all components.
- Must be made in the U.S.
- 55% of components by COST in the U.S.

FHWA General Waiver for Manufactured Products

- FHWA's general waiver for manufactured products is NO LONGER in effect. FHWA had an existing statutory requirement applicable to manufactured products. Now the BABA standard for manufactured products does apply. (We think)

Practitioner Notes

- You are not expected to figure out if a manufactured product is BABA compliant.
- You can (will be able to) rely on the manufacturer's certification.
- Some industries are not developed and nationwide groups (e.g. AASHTO) are working on waivers.

Practitioner Notes

- Almost all manufactured products ADOT is using have a certification process
- Pumps
- ‘Oddball’ items remain a challenge

Construction Materials

- Non-ferrous metals (Ex. Copper)
- Plastic and polymer-based products (including polyvinyl chloride, composite building materials, and polymers used in fiber optic cables)
- Glass (including optic glass)
- Fiber optic cable (including drop cable)
- Optical fiber
- Lumber*
- Engineered wood
- Drywall*

Practitioner's Notes

- You will need certifications on these things just like you already do on steel.
- Most industries do not have certification programs (exception drywall) and are having to develop them now.
- Most likely – copy what you do with ferrous metal for all other things.

Construction Materials

Do not include:

- Cement
- Cementitious materials
- Manufactured Products
- Iron and Steel
- Aggregates such as stone, sand, or gravel
- Aggregate binding agents
- Additives

Practitioner Notes

- Breathe a sigh of relief these products (which largely are made of dirt) are not included in BABA..... Yet.

Exceptions

De Minimis costs and small contracts:

- “...DOT finds that it is in the public interest to issue a waiver of BABA’s domestic preferences for iron and steel, manufactured products, and construction materials used in projects funded under DOT-administered financial assistance programs for iron, steel, manufactured products, and construction materials under a single financial assistance award for which:
 - ❖ The total value of the non-compliant products 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 sub-awards, is below \$500,000.”

Exceptions

NOT included in De Minimis:

- Non-domestically produced miscellaneous minor components [that] comprise no more than 5 percent of the total material cost of an otherwise domestically produced iron or steel product.

Exception(-ish)

Utility relocation – does BABA apply?

- Yes - if federally funded part of the project.
 - No - if non-prior rights utility relocated outside of the project.
 - Yes – if done by the contractor as part of the overall project whether federally funded or not (!!)
- This is big if you are touching local utilities in your project.

Exceptions

Separate product-specific waivers:

- Electric vehicle (EV) chargers.
- Mass-produced, unmodified non-ADA accessible vans and minivans.
- May be others in the future such as pumps (water, we think).

Waivers

A Federal awarding agency may waive the application of the Buy America Preference in any case in which it finds that:

- Applying the Buy America Preference would be inconsistent with the public interest (a “public interest waiver”);
- 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 “non-availability waiver”); or
- The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall infrastructure project by more than 25 percent (an “unreasonable cost waiver”).

Waivers (Cont.)

The head of a Federal agency may waive the application of a Buy America if:

- (1) Public interest waiver
- (2) Non availability waiver
- (3) Unreasonable cost waiver

Practitioner Notes

- Waivers are tough to get.
- Waivers take a lot of time.
- Most likely waivers will be nationwide or regional.
- Do not look to a waiver unless you really cannot do anything else.

Approaches to BABA

Contractor Certification

- Prime Contractor to sign and submit for each Federal Aid project.
- Pro: Simple, acceptable language is provided to the contractor, single form for entire project.
- Con: Higher risk to the contractor. (according to the DOT)

Approaches (cont'd)

Manufacturer or Supplier Certification

- Material manufacturer or supplier provides certification the material meets the applicable design and quality requirements of the contract.
- Each individual material would need documentation indicating domestic origin and manufacture.
- This is essentially what we do now for Ferrous metal, but for everything.

ADOT

The contractor shall furnish the Engineer with Certificates of Compliance, conforming to the requirements of Subsection 106.05 of the specifications, which shall state that the construction materials incorporated in the project meet the requirements specified herein. Certificates of Compliance shall also certify that all manufacturing processes to produce construction materials occurred in the United States.

Questions?

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