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Navigating the Build America Act in 2024: Results, Pitfalls and Compliance Essentials for Contractors

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Paper Title: Navigating the Build America Act in 2024: Results, Pitfalls and Compliance Essentials for Contractors

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Understanding New Build America, Buy America Requirements

1. Introduction and Overview of Build America, Buy America Act

On November 15, 2021, President Joe Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), colloquially known as the Bipartisan Infrastructure Law, which provides unprecedented funding for broadly defined infrastructure projects across the United States. Funding for these projects will flow from federal to state and local governments, and at times directly to private entities. Funding may come in the form of formula and direct funding of federal projects, but also significant grants, loans, and incentives. The Inflation Reduction Act of 2022 (“IRA”) follows a similar pattern, albeit with more focus on combatting climate change and a particular focus on renewable energy and energy efficiency.

Included in the IIJA was the Build America, Buy America Act (“BABAA”) which is intended to bolster American industry, protect national security, and support high-paying manufacturing jobs. BABAA required that, no later than May 14, 2022, the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the *iron, steel, manufactured products, and construction materials* used in the project are produced in the United States.” Build America, Buy America Act, P.L. 117-58, Secs 70911 – 70917 (emphasis added). In short, BABAA requires that federal financial assistance for an infrastructure project cannot be provided unless the recipients of the assistance ensure that all iron, steel, manufactured products, and construction materials used in the project are produced in the U.S. within the meaning of the statute.

On April 18, 2022, the Office of Management and Budget’s (“OMB”) Made in America Office released its interim guidance for implementing the BABAA. This past August, the OMB released its final guidance for implementing BABAA, which became effective on October 23, 2023. Additionally, covered federal agencies have individually released guidance for implementing and complying with the BABAA for grantees, contractors, and manufacturers. For example, in November of 2022, the Environmental Protection Agency (“EPA”) released the “Build America, Buy America Act Implementation Procedures for EPA Office of Water Financial Assistance Programs.” (available at <https://www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf>).

2. New and Expanded Operational Requirements

As alluded to above, BABAA imposes new domestic manufacturing requirements upon iron and steel, manufactured products, and construction materials utilized on federally-funded projects. Once a contractor has determined that BABAA applies to a project or contract (as discussed in section 4), it must determine (1) what products are encompassed by these definitions; and (2) how to satisfy the domestic manufacturing requirement.

Again, a contractor’s first step is to determine which products to be incorporated into a project must comply with BABAA requirements. Materials covered by BABAA requirements include (1) iron and steel; (2) manufactured products; and (3) construction materials (non-ferrous). The OMB’s final guidance advises that “an article, material, or supply should only be classified

into one” of these categories, and “[f]or ease of administration, an article, material, or supply should not be considered to fall into multiple categories.” See OMB Mem. M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (Implementation Guide) (available at <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>).

The determination must be made at the time items are delivered to the job site. *Id.* at 15. Items consisting of two or more of the listed materials that have been combined together by manufacturing processes, or when at least one of the listed materials is combined with an unlisted material, such an item “should be treated as manufactured products, rather than as construction materials.” *Id.* at 20. It is also important to note that BABAA encompasses all items permanently incorporated into a project, whether consumed in, incorporated into, or affixed to the construction project *Id.* at 4. BABAA does not, however, apply to temporary works, or items brought to and removed from the construction site prior to completion of the project, such as temporary scaffolding. *Id.* BABAA also excludes equipment and furnishings used at or within the finished project and not permanently affixed, such as movable chairs, desks, portable computer equipment. *Id.*

Products falling under the “iron or steel product” definition are “articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.” *Id.* at 18. “Predominantly of iron or steel or a combination of both” is defined as:

[T]he cost of the iron and steel content exceeds 50% of the total cost of all of 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, forgings utilized in the manufacturer of the product in a good faith estimate of the cost of iron or steel components.

Id. at 19. Next, “manufactured products” are “(1) [a]rticles, materials, or supplies that have been: (i) processed into a specific form and shape; or (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.” *Id.* Its important to note that if an item is classified as another covered category then it is not a manufactured product, but a manufactured product may include components that fall under those definitions. *Id.*

The OMB guidance’s definition of “construction materials,” encompasses glass, lumber, drywall, and plastic and polymer-based products, such as PVC, composite building materials, and polymers used in fiber optic cables. *Id.* at 18. It further includes fiber optic cable, optical fiber, and engineered wood. *Id.* While this broad category serves as a limited catchall for eight types of listed materials that are not considered iron, steel, or manufactured products, the list conspicuously excludes cement and aggregate products. These products, known as “section 70917(c) materials,” for the section that exempts them, are not subject to BABAA requirements unless they comprise part of a manufactured product.

Once an item has been categorized, a contractor must then determine whether a product satisfies the domestic manufacturing requirement, or in other words, whether it is “produced in the United States.” Each category has different manufacturing requirements. For iron and steel, “all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.” *See* Pub. L. No. 117-58, §70912. Manufactured products must be manufactured in the United States, and the costs of any components that are mined, produced or manufactured in the United States must be greater than 55% of the total cost of all components of the manufactured product, unless other minimum domestic content requirements are identified elsewhere. *See id.* For construction materials, “all manufacturing processes for the construction material occurred in the United States.” *See id.* Recent OMB guidance also imposes the following individualized requirements for construction materials:

- (1) Non-ferrous metals. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
- (2) Plastic and polymer-based products. All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
- (3) Glass. All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
- (4) Fiber optic cable (including drop cable). All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
- (5) Optical fiber. All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
- (6) Lumber. All manufacturing processes, from initial debarking through treatment and planning, occurred in the United States.
- (7) Drywall. All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
- (8) Engineered wood. All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

Implementation Guide at 16-17. It will be key for a contractor to correctly categorize important materials early in the procurement process to ensure material suppliers comply with these requirements. For example, a contractor should not rely on a supplier’s physical location, rather it should track and confirm where the components that comprise the product itself originated from.

Further, as is true on any project, a contractor should meticulously maintain records of BABAA compliance in case of a federal audit or investigation.

Finally, if a contractor is having difficulty sourcing certain items, it may need to determine whether it can obtain a waiver of BABAA requirements for certain materials. Waivers of BABAA requirements are available but are applied for and granted on an agency-by-agency basis. *See, e.g.*, <https://www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers> (EPA approved waivers); <https://www.energy.gov/management/pf-2022-39-general-applicability-waiver-build-america-buy-america-requirements> (DOE general applicability waiver). The requirements of the BABAA may be waived by the head of the agency administering the funding. To grant a waiver, the agency head must find one of three reasons to waive the requirement, either (1) applying BABAA would violate public interest, (2) the material is unavailable in the United States, or (3) procuring BABAA-approved materials would result in unreasonable cost. *See* Pub. L. No. 117-58, §70914(b).

For the public interest waiver, the agency head must determine that applying the domestic content preference would be inconsistent with the public interest. *See id.* An agency head may also find that 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. *See id.* For the unreasonable cost waiver to apply, the agency head must find that 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. *See id.* For the non-availability waiver, the item must not be produced in sufficient and reasonably available quantities or of a satisfactory quality and require recipients to perform market research to determine whether domestic items are available. Implementation Guide at 10.

Waivers of the BABAA requirements are intended to be time-limited, and agencies are directed to identify a short and definitive time frame for their application. The OMB hopes that waivers will highlight gaps in domestic production and help create new opportunities for domestic producers. Broad waivers are discouraged, and the preference is for targeted waivers. Waivers should be sought as early as possible in the procurement process and before any materials are bought. According to the OMB, waivers will not apply to any items subject to BABAA before the effective date of the waiver, so any items purchased prior issuance of the waiver will not be covered. *Id.*

Contractors should also be aware of the availability of general applicability waivers. These are waivers that apply generally across multiple projects or awards for a single agency. These waivers can be “product specific” or “non-product specific” (i.e. applies to “manufactured products”). *Id.* at 13. These may be issued “only when necessary to advance an agency’s mission and goals, consistent with the IJJA, the Executive Order, and OMB guidance.” *Id.* Generally, federal agencies are required to go through the notice and comment period regulatory requirements. Further, agencies are required to review general applicability waivers within five years of the date of issuance, though they are encouraged to revisit them more often.

In sum, given the broad applicability of BABAA to any “infrastructure” funding, contractors need to become familiar with BABAA requirements. Since waivers are issued on an agency-by-agency basis, contractors will also need to know, before bidding, which agency is administering the funds for a particular project to review waivers that may apply, or, to apply for a waiver if one is needed. Contractors also need to understand the verification they may be requested to provide to show compliance with BABAA, either during the bidding process through a certification, or by obtaining certifications of BABAA compliance from material suppliers during the course of the work.

3. Strategies for Choosing Projects and Risks of Enhanced Material Requirements on New Projects

Frankly, in the early stages of the implementation of BABAA, assessing compliance will be difficult. Unlike projects being constructed under federal government contracts, there is no single government-wide regulatory framework, such as the FAR, nor agency-specific “supplements” of that framework, such as DFARS or DEAR, governing federal grants. Instead, federal grants tend to follow the releases of the government-wide “guidance” from the White House’s Office of Management and Budget (“OMB”), which is consolidated into a single document called the “Uniform Guidance.” *Id.* While the Uniform Guidance is theoretically *not binding* on any federal agency, agencies that stray from Uniform Guidance do so at their own peril. *Id.* Those agencies’ regulations, which are in many parts (but not all) identical to the Uniform Guidance, can be ones that govern the individual grants.

Thus, in the near future, it will be important for contractors to assess BABAA compliance with each individual agencies’ regulations rather than simply relying on the Uniform Guidance. For example, the fact that OMB guidance provides for issuance of waivers, for example, does not speak to whether a particular agency is likely to issue such waivers for any specific project. On the contrary, both the process and likelihood of obtaining a waiver is likely to vary from agency to agency at least in the short term. Further, there is a risk of inconsistent determinations on material certification requirements. Because of a lack of binding guidance, different owners will likely have different criteria for required certifications. For example, the Colorado Department of Transportation (“DOT”) requires the submission of certification forms, while the California DOT does not.

In addition to new compliance risks, BABAA also creates new concerns regarding enforcement and potential liabilities. Other than the rights that agencies have under assistance agreements themselves (e.g., suspension and debarment, various collection rights) to address an entity’s express non-compliance with the agreement, generally the most common tool for the government’s pursuit of entities violating domestic preference requirements has been the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.

The FCA imposes liability on any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for approval;” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” The FCA uses a very specific definition of knowledge, which applies not only to instances of “actual knowledge

of the information,” but also “acts in *deliberate ignorance* of the truth or falsity of the information” and “acts in *deliberate disregard* of the truth or falsity of the information.” (emphasis added)². It is also important to note that numerous states also have their own equivalent false claims acts. *See e.g.* O.C.G.A. § 23-3-120 et seq.; Fla. Stat. § 68.081 et seq.; Tenn. Code Ann. § 4-18-101 et seq.; Cal. Gov. Code § 12650 et seq.

Given those knowledge requirements for FCA violations and the scope of the government’s other tools, it is likely that until the guidance for the application of BABAA is finalized, the potential liability for and enforcement related to non-compliance with BABAA requirements is going to be limited to those entities explicitly violating terms of their agreements with federal agencies and affirmatively misrepresenting their submissions. To date, there have not been any cases, settlements, or indictments related to an entity’s non-compliance with the BABAA preferences. There are numerous analogous cases, however, related to entities’ violations of the requirements for other domestic preference programs.

Where these allegations do arise, it is not uncommon for them to occur after the material is already placed. *See U.S. ex rel. Kress v. Masonry Sols. Int’l, Inc.*, No. CIV.A. 12-2380, 2015 WL 3604760, at *1 (E.D. La. June 8, 2015) (addressing allegations that enhancement anchors that were already installed into the masonry walls on project sites violated the BAA because they were made from Chinese material); *see also Two Companies Agree to Pay \$1.24 Million to Resolve Allegations of Fraud in Whittier Bridge/I-95 Improvement Project*, available at: <https://www.justice.gov/usao-ma/pr/two-companies-agree-pay-124-million-resolve-allegations-fraud-whittier-bridge-i-95> (addressing a settlement with two entities accused of violating the Disadvantaged Business Enterprise (DBE) requirements on a project despite its completion).

The best approach for reducing risk of non-compliance in the meantime remains as usual: prepare and maintain detailed documentation of any decision making concerning the application of the BABAA requirements in real time, particularly if judgment calls are required (to establish good faith efforts at compliance), incorporate terms requiring subcontractors to ensure compliance with the BABAA requirements both at their level and that of any lower tier, retain records of any certifications, and require multiple levels of review for any certification that goes to the government.

4. Applicability to Projects

A preliminary consideration of contractors when determining BABAA compliance is whether it even applies to a particular project. This is a two-part analysis: (1) how is the project

² It is important to note, however, the risk of FCA claims against sureties related to their actual knowledge of an obligee’s compliance BABAA and similar statutes has recently increased. *Schutte* 143 S. Ct. 1391 (2023) (holding that a FCA defendant’s contemporaneous subjective understanding or beliefs about the lawlessness of its conduct are relevant to whether it “knowingly” violated the FCA); *United States ex rel. Scollick v. Narula*, No. 1:14-CV-01339-RCL, 2022 WL 3020936, at *12 (D.D.C. July 29, 2022) (“In the context of the [False Claims Act], knowledge requires either actual knowledge, acting in deliberate ignorance, or acting in reckless disregard. Actual knowledge is subjective knowledge, while deliberate ignorance is the kind of willful blindness from which subjective intent can be inferred, and reckless disregard is an extension of gross negligence or gross negligence-plus.”).

funded; and (2) is the project considered to be an “infrastructure project.” Both analyses are discussed below.

First, a contractor must determine if the project is federally funded. BABAA prohibits federal funding on an infrastructure project unless all material used is domestically produced:

[N]one of the funds made available for a Federal financial assistance program for infrastructure . . . may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.

Pub. L. No. 117-58, §70914. For example, if a contractor is executing a roadway project for a state, county, or local municipality, the BABAA requirements likely apply because those projects are typically federally funded. Notably, BABAA applies to *all* federal financial assistance for infrastructure, not just those utilizing IJA funding. This includes direct purchases by the federal government but also all forms of federal financial assistance. As alluded, BABAA covers federal grants to “non-Federal entities,” which include states, municipalities, territories, Indian tribes, Institutions of Higher Education, and nonprofits. For-profit entities are not included in this definition unless either (1) a federal agency chooses to voluntarily impose BABAA requirements; or (2) the for-profit entity is a subrecipient and the recipient is a governmental or non-profit entity. It is important to note that the latter requirement is required regardless in all funding grants; BABAA requirements must be flowed down to subcontractors, material suppliers, etc. working on a BABAA covered project.

Once a contractor has determined that the project satisfies the federal funding requirement, then it must determine whether the project is considered an “Infrastructure Project.” BABAA’s definition of infrastructure is broad and therefore encompasses almost any constructed structure or facility:

INFRASTRUCTURE.—The term “infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States—

- (A) roads, highways, and bridges;
- (B) public transportation;
- (C) dams, ports, harbors, and other maritime facilities;
- (D) intercity passenger and freight railroads;
- (E) freight and intermodal facilities;
- (F) airports;
- (G) water systems, including drinking water and wastewater systems;
- (H) electrical transmission facilities and systems;
- (I) utilities;
- (J) broadband infrastructure; and
- (K) buildings and real property.

Pub. L. No. 117-58, §70912(5). The term “Project” means “the construction, alteration, maintenance, or repair of infrastructure in the United States.” *Id.* at § 70912(7). Thus, any of the

facilities listed above that are constructed, maintained, etc. and receive federal funding will have to comply with the requirements of BABAA. There are a few caveats to these requirements that contractors should be aware of. First, BABAA applies to infrastructure projects that receive financial assistance regardless of whether infrastructure is the primary purpose of the award. And finally, BABAA *does not* apply to emergency funding made in anticipation of or in response to a natural or other kind of disaster.