
Build America Buy America Act

Presented to Ohio Grants Summit
December 1, 2022

Scott S. Sheffler, Esq.
Partner, FTLF

Build America Buy America Act

Domestic Sourcing for *All* “Infrastructure” Supported with Federal Financial Assistance

Scott S. Sheffler
Feldesman Tucker Leifer Fidell LLP
ssheffler@ftlf.com
Last Revised 11.27.2022

AGENDA

1. Before Build America Buy America (“BABA”), Let’s look at DOT programs for a baseline
2. The BABA Revolution
3. Agency Implementation (EPA Example)
4. Recipient Implementation

BEFORE BABA

(DOT Programs as a Baseline)

BEFORE BABA

DOT IS A GOOD BASELINE FOR UNDERSTANDING

- Department of Transportation offers a great pre-BABA baseline for two reasons:
 - Congress imposed Buy America requirements in DOT programs
 - The BABA requirements are largely (though not entirely) similar
- DOT – Federal Highway Administration (FHWA)*
- DOT – Federal Transit Administration (FTA)*
- DOT – Federal Railway Administration (FRA)
- For our purposes, let's skip MARAD and the FAA
- Resource: *Identification of Federal Financial Assistance Infrastructure Programs Subject to the BABA Provisions of the IIJA (Jan. 2022)*, available at: <https://www.transportation.gov/office-policy/transportation-policy/made-in-America>.

FHWA PRE-BABA

Statutory Language:

§313. Buy America

(a) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.

(b) The provisions of subsection (a) of this section shall not apply where the Secretary finds-

(1) that their application would be inconsistent with the public interest;

(2) that such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) that inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.

Scope:

- Applies to steel, iron, and manufactured products.
- Exceptions for public interest, non-availability, or increase in project cost by more than 25 percent.

FHWA Interpretation and regulations:

- Apply public interest exception to assert two broad waivers:
 - Nationwide waiver to exclude non-steel/iron manufactured products entirely (since 1983, intentional reconsideration and retention in 2013)
 - Nationwide waiver for certain iron/steel components (pig iron/pelletized iron ore)
- Otherwise, waivers are case by case (generally for non-availability, after publication and opportunity for comment).

FTA PRE-BABA

Statutory Language (49 U.S.C. § 5323):

(j) BUY AMERICA.-

(1) IN GENERAL.-The Secretary may obligate an amount that may be appropriated to carry out this chapter for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States.

(2) WAIVER.-The Secretary may waive paragraph (1) of this subsection if the Secretary finds that-

(A) applying paragraph (1) would be inconsistent with the public interest;

(B) the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality;

(C) when procuring rolling stock (including train control, communication, traction power equipment, and rolling stock prototypes) under this chapter-

(i) the cost of components and subcomponents produced in the United States-

(I) for fiscal years 2016 and 2017, is more than 60 percent of the cost of all components of the rolling stock;

(II) for fiscal years 2018 and 2019, is more than 65 percent of the cost of all components of the rolling stock; and

(III) for fiscal year 2020 and each fiscal year thereafter, is more than 70 percent of the cost of all components of the rolling stock; and

Scope:

- Applies to steel, iron, and manufactured products.
- For manufactured products, two-part test:
 - All manufacturing processes for end product must take place in the United States; and
 - All components must be of U.S. origin (determined based upon location of manufacture of components, regardless of where subcomponents made) (except that for rolling stock, it is 70 percent of components)
- Exceptions for public interest, non-availability, or increase in project cost by more than 25 percent.

FTA PRE-BABA

FTA Regulations Implement: 49 CFR Part 661

FTA Waivers (codified in regulation):

- Requirements waived for certain microprocessors, computers, microcomputers, software and other data processing devices;
- “Small purchase” statutory waiver/exemption for all purchase of not more than \$150,000 (FAST Act) (previously followed SAT, now statutory \$150k).
- Otherwise, waivers are case-by-case (generally for non-availability, after publication for comment).

FRA PRE-BABA

Statutory Language (49 U.S.C. § 22905):

§22905. Grant conditions

- (a) BUY AMERICA.-(1) The Secretary of Transportation may obligate an amount that may be appropriated to carry out this chapter for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States.
- (2) The Secretary of Transportation may waive paragraph (1) of this subsection if the Secretary finds that-
- (A) applying paragraph (1) would be inconsistent with the public interest;
 - (B) the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality;
 - (C) rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time; or
 - (D) including domestic material will increase the cost of the overall project by more than 25 percent.

Scope:

- Applies to steel, iron, and manufactured products.
- For manufactured products, two-part test:
 - All manufacturing processes for end product must take place in the United States; and
 - All components must be of U.S. origin (determined based upon location of manufacture of components, regardless of where subcomponents made, following FTA rules)
- Exceptions for public interest, non-availability, or increase in project cost by more than 25 percent.

DOT FUNDING PRACTICAL IMPLEMENTATION

Big Picture:

- Evaluate scope of applicability based upon funding agency/operating division.
- Consider applicability of any general applicability waiver.
- If no waiver applies, incorporate obligations into funded contracts or work through case-by-case non-availability waiver (see below regarding cost-related waiver).

Incorporating Obligations Into Contracts:

- FTA Regulations at 49 CFR Part 661 provide useful guidance:
- Approach:
 - Procurement process-driven, shifting obligation to contractor through certification in competitive award process and associated contract clause (see next slide)
 - Alternative bidding also possible to show 25 percent price differential – Offerors can offer non-compliant materials, and if sufficiently low price, such offer can serve as the basis for the grantee to seek a waiver.

DOT FUNDING

PRACTICAL IMPLEMENTATION

§ 661.6 Certification requirements for procurement of steel or manufactured products.

If steel, iron, or manufactured products (as defined in §§ 661.3 and 661.5 of this part) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder or offeror in accordance with the requirement contained in § 661.13(b) of this part.

Certificate of Compliance with Buy America Requirements

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(1), and the applicable regulations in 49 CFR part 661.

Date _____
Signature _____
Company _____
Name _____
Title _____

Certificate of Non-Compliance with Buy America Requirements

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but it may qualify for an exception to the requirement pursuant to 49 U.S.C. 5323(j)(2), as amended, and the applicable regulations in 49 CFR 661.7.

Date _____
Signature _____
Company _____
Name _____
Title _____

THE BABA REVOLUTION

RECENT HISTORY

Background (Pre-2021)	E.O. 14005 (Jan 25, 2021)	OMB Memo M-21-26 (Jun 21)
<ul style="list-style-type: none"> ▪ Numerous independent statutes, largely in programs involving traditional infrastructure (roads, railways, etc.) <ul style="list-style-type: none"> - See CRS Rpt. R44266 (Jul 2, 2019), Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing ▪ 2 C.F.R. § 200.322 <ul style="list-style-type: none"> - Added effective Nov 12, 2020 - Soft preference (“should, to max extent practical”) - Goods/products/materials - Scope beyond infrastructure unclear, but appears to technically exist - Extends to State Gov’ts 	<ul style="list-style-type: none"> ▪ Sets policy standard for agencies: <ul style="list-style-type: none"> - “Should, consistent with applicable law, use T/C of Fed Fin. Asst. to maximize” - Goods/products/materials ▪ Creates OMB-level Made in America Office (“MIAO”) ▪ Calls for information gathering re “longstanding or nationwide waivers” via reports from agency heads <ul style="list-style-type: none"> - “Made in America Laws” - Waivers ▪ Intent to centralize waivers through OMB review process (15-day review) ▪ Reporting of all proposed waivers and whether granted via single website 	<ul style="list-style-type: none"> ▪ Commences Implementation of E.O. 14005 ▪ By Jul 24, Agency Heads to report on: <ul style="list-style-type: none"> - Use of Made in America Laws - List of waivers granted in 2020 - Description of any ongoing longstanding or national waivers and the consistency of such with E.O. policy statement ▪ Reports do not appear to be public

IIJA BABA LANGUAGE

Infrastructure Investment and Jobs Act, Pub. L. 117-58 (Nov. 15, 2021)

- Sec. 70914 sets government-wide baseline standard for fed-funded infrastructure:
 - “Not later than 180 days after the date of enactment of this Act, the head of each 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.”
 - Section 70912 defines “produced in the United States” for each category (OMB Memo reiterates)
 - Waiver authority for (i) public interest, (ii) non-availability, and (iii) cost increase of *overall project* by 25 percent
- Very similar to existing DOT Program (FTA, FRA, and FHWA) Buy America standards for domestic sourcing (both standard and waiver authority) but adds “construction materials” to list of covered items.
- Calls for OMB to update 2 C.F.R. Part 200 (Sec. 70915)
 - Unclear whether we should expect update to 2 C.F.R. § 200.322 or whether the OMB-recommend T&C will simply be incorporated into award documents per § 200.211. (Seems update needed for “manufactured product” definition)
- Made in America Office at OMB
 - Calls for new reports on use of Made in America Laws (due Jan 14, 2022, and to be published in the Federal Register) (Sec. 70913); Calls for summary of E.O. 14005 agency reports be provided to Congress (Sec. 70923(e))
 - Single website (GSA run “BuyAmerican.gov”) to include info on all waivers (Sec. 70936)
 - 15-day GSA-website notice and comment for waivers (Sec. 70935)
- OMB Memo M-22-08 (Dec 20, 2021)
 - Guidance on reports
 - Provides “infrastructure” definition and instructs to further construe broadly (*includes “buildings and real prop”*)
 - Calculates date of preference implementation as May 14, 2022

OMB ACTION

OMB Memo M-22-11 (Apr. 18, 2022)

- New requirements apply to all new awards and new funding on current awards as of May 14, 2022.
- Applies to all “infrastructure” projects funded by “Federal financial assistance program[s] for infrastructure.” Extends to all portions of the project if a portion of the project is federally funded.
- Clarifies that applies only to items/materials incorporated into the final infrastructure project, not things used in the course of completing the project (e.g., scaffolding not covered).
- Confirms broad definition of “infrastructure”:
 - “. . . At a minimum, the structures, facilities, and equipment for, in the [U.S.], 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 . . . and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.”
- Defines and “deconflicts” manufactured products and construction materials.
- Partially defines iron and steel to include items made “predominately” of iron and steel.
- Provides waiver standards; instructs that Federal Assistance agency heads retain the authority to issue waivers (generally with 15 days notice), but that the agency website publicizing the waiver must cross-link to the GSA waiver website; and instructs that existing compliant/consistent policies and waivers (issued in last five years) are still good.
- Provides standard award term to be incorporated into covered awards. Standard term contemplates recipients requesting project-specific waivers via funding agency.

COVERED MATERIALS

- Scope:

Applies to items incorporated into the project, regardless of whether paid for with federal funds or non-federal funds. Does not apply to items that are not incorporated into the project, regardless of funding source.

- Material Categories:

- All **iron and steel** – from initial melting stage through application of coatings must occur in the U.S.
 - OMB Guidance at p.6 states, “Agencies should apply the iron and steel test to items that are predominantly iron or steel, unless another standard applies under law or regulation.”
- All **manufactured products** – both:
 - Manufactured in the U.S. (see FAR for “manufactured in U.S.” definition); *and*
 - Cost of components must be 55 percent “mined, produced, or manufactured in the U.S.”
 - “Manufactured in the U.S.” is defined under the Federal Acquisition Regulation as follows, through FAR Clause 52.225-18:

“Place of manufacture means the place where an end product is assembled out of components, or otherwise made or processed from raw materials into the finished product that is to be provided to the Government. If a product is disassembled and reassembled, the place of reassembly is not the place of manufacture.”

OMB, MIAO: <https://www.whitehouse.gov/omb/management/made-in-america/>

COVERED MATERIALS

▪ Material Categories Cont.

- All **construction materials** – manufactured in the U.S., meaning “all manufacturing processes . . . occurred in the U.S.”
 - Current/Temporary Definition: Items that do not fall into the other categories that consist primarily of non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall.
 - Note that if it is a “manufactured product,” that designation overrides “construction material.” Note also that “all manufacturing processes” means all inputs (not clear regarding inputs to inputs . . .).
 - Statute specifically excludes “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.” Sec. 70917(c).
 - Unclear whether the statute may have intended for these items to be “manufactured products” but both DOT and EPA have treated them as simply excluded from coverage under BABA. For DOT, see 87 Fed. Reg. 68577, fn 3; For EPA, see Office of Water Implementation procedures discussion below.
- Note that § 200.322 provides a definition of “manufactured product”:

“[I]tems and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; *aggregates such as concrete[*]*; glass, including optical fiber; and lumber.”

OMB, MIAO: <https://www.whitehouse.gov/omb/management/made-in-america/>

OMB-SUGGESTED AWARD TERM

(ALSO PROVIDES DEFINITIONS AND BRIEF WAIVER GUIDANCE)

Recipients of an award of Federal financial assistance from a program for infrastructure are hereby notified that none of the funds provided under this award may be used for a project for infrastructure unless:

- (1) 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;
- (2) 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
- (3) all construction materials⁴⁴ are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The 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.

OMB MEMO M-22-11

WAIVERS

Bases for Waivers:

- Public interest
- Non-availability
- Overall project cost increase of more than 25 percent

Processes for Waivers:

- Case-by-Case Waivers (non-availability and project cost):
 - Publicize for 15 days for comment;
 - Then submit to MIAO for review;
 - Grantee must support waiver request to MIAO with:
 - Statement of waiver justification;
 - Certification that made “good faith effort to solicit bids for domestic products. . .”;
 - Statement of impact if waiver not granted
- Guiding Principles: Time-limited, Targeted, and Conditional

OMB MEMO M-22-11

WAIVERS

Non-Availability:

- Must explain market research

Project Cost:

- Must provide cost data, but can provide publicly available data rather than proprietary contractor data

Public Interest:

- Should be project-specific where can be
- Possible justifications include:
 - *De minimis* (encouragement for agencies to adopt agency-wide *de minimis* threshold of 5 percent of project costs, up to \$1 million);
 - Small grants (e.g., under the SAT);
 - Minor Components within iron and steel products (suggesting no more than 5 percent of total material cost)

OMB MEMO M-22-11

GENERAL APPLICABILITY WAIVERS

General Applicability Waivers

- Publish for 30 days for comment before sending to MIAO
- Reconsider at least every five years, including through renewed request for public comment

Pre-Existing Waivers

- “Product-specific” general applicability waivers issued at least 180 days before Nov 15, 2021, grandfathered for five years;
- “Non-product-specific” general applicability waivers issued less than five years prior to Nov 15, 2022 (*i.e.*, Nov 15, 2017) grandfathered until five-year mark after issuance;
- “Non-product-specific” general applicability waivers must be promptly reviewed, commencing no later than Nov 22, 2022.
- *Pre-existing Waiver Note*: DOT seems thus far to be simply presuming its existing waivers can and will continue. *E.g.*, Waiver for all manufactured products for FWHA awards . . . Interesting area of current ambiguity. Perhaps can do so, since already had Buy America laws in place that “crowd out” new BABA reqs.?

CURRENT AGENCY ACTIVITY (THROUGH NOVEMBER 27, 2022)

Agency	Approach	References
Department of Transportation***	<p>Issued implementation waiver for “construction materials” for grants awarded through Nov 10, 2022.</p> <p>As discussed above, already has similar Buy America requirements for many programs, but not extending to “construction materials” (new category).</p>	87 Fed. Reg. 31931 (May 25, 2022)
	Federal Highway Administration has also issued a proposed EV-charging-infrastructure specific wavier.	87 Fed. Reg. 53539 (Aug. 31, 2022)
	<p>Nov 15, DOT announced end of adjustment period waiver for “construction materials,” with continued exceptions for certain projects underway. Continued exceptions for:</p> <ul style="list-style-type: none"> • Proposes: Waiving “construction materials” requirement for contracts entered into before Nov 10, 2022 • Proposes: Waiving “construction materials” requirement for any contracts for which a solicitation was published before May 14, 2022, and the contract is executed before March 10, 2023 	87 Fed. Reg. 68572 (Nov. 15, 2022)
	<p>Nov 15, DOT issued general applicability waivers for:</p> <ul style="list-style-type: none"> • <i>De minimis costs</i> (total value of non-compliant products is no more than the lesser of 5% of total allowable costs or \$1 million) • <i>Small grants</i> (Award is below \$500,000) • <i>Minor components</i> (non-domestically produced components comprise no more than 5 percent of otherwise domestically produced iron or steel product; 5 percent of <i>product</i>) 	87 Fed. Reg. 68576 (Nov. 15, 2022)

CURRENT AGENCY ACTIVITY (THROUGH NOVEMBER 27, 2022)

Agency	Approach	References
Environmental Protection Agency***	<p>Defines “infrastructure” broadly, for broad application to EPA-funded projects. Implementing currently, but also granting waivers. Previously applicable BA requirements sporadic.</p> <p>Website shows general applicability waivers for:</p> <ul style="list-style-type: none"> • <i>De minimis</i> (total value of non-compliant products is no more than 5% of total project cost) • <i>Small grants</i> (Award is below SAT, currently \$250,000) • <i>Program-specific adjustment periods</i> 	<p>https://www.epa.gov/cwsrf/built-america-buy-america-baba#bil</p>
Department of Housing and Urban Development	<p>Defines “infrastructure” broadly, for broad application to HUD-funded projects. Few, if any, previously applicable BA requirements. Issued a 6-month general waiver to application on May 3, 2022, to assess impact of new requirements.</p> <p>On Nov 7, 2022, proposed agency-wide public interest waivers for:</p> <ul style="list-style-type: none"> • <i>De minimis / minor components</i> (No more than 5 percent of cost of iron, steel, manufactured product, or construction material used in the overall project, up to \$1 million; 5 percent of <i>project</i>) • <i>Small grants</i> (Based on SAT, currently \$250,000) • <i>Exigent circumstances</i> (separately issued notice, exigent circumstances undefined) <p>On Nov 9, 2022, extended the waiver for 90 days for all grants and covered materials, except for iron and steel funded by CDBG awards (on the theory of phased implementation).</p>	<p>https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo/fundingopps</p> <p>87 Fed. Reg. 26219 (May 3, 2022)</p> <p>87 Fed. Reg. 67051 (Nov. 7, 2022)</p> <p>87 Fed. Reg. 67709 (Nov 9, 2022)</p>

CURRENT AGENCY ACTIVITY (THROUGH NOVEMBER 27, 2022)

Agency	Approach	References
Department of Interior	Defines “infrastructure” broadly, for broad application to DOI-funded projects. Implementing currently, but also granting waivers. Few, if any, previously applicable BA requirements.	https://www.doi.gov/grants/infrastructure-programs
Department of Commerce	A few impacted programs (e.g., broadband infrastructure and economic development), and no prior BA requirements. Currently implementing.	https://www.commerce.gov/oa/policy/financial-assistance-policy
Department of Treasury	A few impacted programs (e.g., SLFRF and GCRTF awards), and no prior BA requirements. SLFRF “second tranche” funds are part of original pre-May awards, so not subject to new rules. Currently implementing.	87 Fed. Reg. 3385 (Jan. 21, 2022) https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-FAQ.pdf
National Science Foundation	Infrastructure in the form of major research instrumentation, mid-scale projects, and major facilities. No prior BA requirements except § 200.322.	87 Fed. Reg. 3365 (Jan. 21, 2022) https://beta.nsf.gov/funding/build-america-buy-america
Department of Health and Human Services	Defines narrowly (almost unbelievably) to assert that HHS does not fund “infrastructure” at all – BABA is for infrastructure that is “beyond the scope” of HHS construction support.	87 Fed. Reg. 8852 (Feb. 16, 2022)

AGENCY IMPLEMENTATION

EPA EXAMPLE

EPA APPROACH

- Key Resource: BABA Implementation Procedures, Office of Water Guide (<https://www.epa.gov/cwsrf/build-america-buy-america-baba>)
- Provides:
 - Clear discussion of “coverage;”
 - Waiver submission guidance;
 - Approach to compliance; and
 - Sample contract language for grantees
- General Scope of Coverage:
 - Entire project if any federal funding (not based upon what portion of a project the federal funds pay for)
- Product Coverage (and Deconflicting):
 - **Iron and Steel:** Item is “predominantly” iron or steel if it contains greater than 50 percent iron and steel by material cost (which would include most valves). (Pages 5-6)
 - **Manufactured Products:** Covers the majority of components of water infrastructure products, including pumps, motors, blowers, generators, instrumentation and control systems, etc. Provides comparative lists to deconflict between iron and steel and manufactured products. (Pages 5, 8-9).
 - **Construction Materials:** Adopts OMB Guidance standard, but clarifies that treats cementitious materials as completely excluded from coverage. (Pages 5-6, 9)

EPA APPROACH WAIVERS

Waiver Process:

- General Applicability (see above)
- Project-specific
 - Must be requested by grantee (suppliers cannot apply)
 - Should include:
 - Summary of project
 - Description of need
 - Summary of due diligence conducted prior to requesting waiver
 - Nature and quantity of materials/products at issue
 - Engineering specs and project design considerations
 - Approximate unit cost of items (both foreign and domestic), as well as cost of total project (Note: must demonstrate 25 percent differential, which can include increased admin costs, if requesting waiver on that basis)
 - Date products/materials needed on site to avoid delays
 - Any other pertinent information

EPA APPROACH COMPLIANCE ENFORCEMENT

Q5.2: When will the BABA requirements be assessed for compliance? Do assistance recipients need to have waivers for potential non-domestic products before assistance agreements are in place, at the time products are procured or products are incorporated into the project (i.e., used)?

- A5.2: Compliance is assessed where the domestic product is used (or installed) at the project site. Proper compliance documentation, whether it is a BABA certification letter or a waiver, should accompany a product prior to its “use”, in accordance with Section 70914(a) of IIJA. This may occur prior to assistance agreements being in place but is not necessary. Additionally, communication of BABA requirements through appropriate Terms and Conditions in financial assistance agreements and in project solicitation and contract documents is key in ensuring all parties involved are informed of the requirements for the project before construction is underway.

EPA APPROACH COMPLIANCE ENFORCEMENT

Q5.3: How can product compliance with the BABA requirements be demonstrated?

- A5.3: Assistance recipients and their representatives should ensure that the products delivered to the construction site are accompanied by proper documentation that demonstrate compliance with the law and be made available to the funding authority upon request. The documentation may be received and maintained in hard copy, electronically, or could be embedded in construction management software. The use of a signed certification letter for the project is the most direct and effective form of compliance documentation for ensuring products used on site are BABA-compliant prior to their installation; however, other forms of documentation are also acceptable as long as collectively, the following can be demonstrated:

... [Documentation linking product to project and including an attestation of compliance.] (Page 13).

In addition to compliance documentation, assistance recipients or their representatives should also conduct a visual inspection of the product when it arrives to the project site, especially for iron and steel products which are often stamped with the country of origin. (Note: A country of origin stamp alone is not sufficient verification of compliance with BABA and assistance receipts should not rely on it to ensure compliance.)

EPA APPROACH COMPLIANCE ENFORCEMENT

Q5.6: How will assistance recipients manage certification letters for hundreds, possibly thousands of products?

- A5.6: EPA recognizes that the new BABA requirements will cover most products used in typical water and wastewater infrastructure projects, and that the number of items which may require certification at large and/or complex projects may reach several hundred. EPA is concerned about the potential administrative burden that this would place on assistance recipients. EPA recommends that projects with a high number of potentially covered products meet with their funding authority about potential compliance strategies to minimize burden and streamline compliance activity. Assistance recipients should prepare contract bid solicitation documents with a statement for the consulting engineers and construction firms as follows: “By signing payment application and recommending payment, Contractor certifies they have reviewed documentation for all products and materials submitted for payment, and the documentation is sufficient to demonstrate compliance with Build America, Buy America Act requirements.” In most cases, the assistance recipient’s representatives may assume the responsibility for their clients to conduct due diligence on compliance with applicable domestic preference requirements.

EPA APPROACH COMPLIANCE ENFORCEMENT

Q5.7: Who is responsible for documenting the 55 percent content requirement for manufactured products under BABA? What if the final manufacturer cannot trace or verify domestic origin for all components?

- **A5.7: The manufacturer who signs a certification letter is responsible for documenting compliance with any of the three categories of products (iron and steel, manufactured products, or construction materials). For manufactured products, BABA requires that greater than 55 percent of the total cost of all components of the manufactured product be from domestic sources. EPA recommends that the certification letter for manufactured products document whether the item passes the content test in the final product along with a statement attesting to compliance with the BABA requirements for manufactured products.**

Q5.8: How do final product fabricators document compliance when the final step of manufacturing may be simply assembling components?

- **A5.8: It is acceptable, in many cases, especially for highly complex manufactured products that utilize many sub-components, for the final point of assembly to certify without using a “step certification” process. Multiple certifications (i.e., step certifications) or a singular certification can be used for a product, as long as the certifying official is willing to attest to the product’s compliance with BABA requirements at all stages of manufacturing.**

EPA APPROACH

SAMPLE CONTRACT LANGUAGE

The Contractor acknowledges to and for the benefit of the _____ (“Owner”) and the _____ (the “Funding Authority”) that it understands the goods and services under this Agreement are being funded with federal monies and have statutory requirements commonly known as “Build America, Buy America,” that requires all of the iron and steel, manufactured products, and construction materials used in the project to be produced in the United States (“Build America, Buy America Requirements”) including iron and steel, manufactured products, and construction materials provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner and Funding Authority (a) the Contractor has reviewed and understands the Build America, Buy America Requirements, (b) all of the iron and steel, manufactured products, and construction materials used in the project will be and/or have been produced in the United States in a manner that complies with the Build America, Buy America Requirements, unless a waiver of the requirements is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the Build America, Buy America Requirements, as may be requested by the Owner or the Funding Authority. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner or Funding Authority to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney’s fees) incurred by the Owner or Funding Authority resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the Funding Authority or any damages owed to the Funding Authority by the Owner). If the Contractor has no direct contractual privity with the Funding Authority, as a lender or awardee to the Owner for the funding of its project, the Owner and the Contractor agree that the Funding Authority is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the Funding Authority.

RECOMMENDED GRANTEE IMPLEMENTATION THOUGHT PROCESS

GRANTEE CONSIDERATIONS CHECKLIST

- ❑ What agency is funding?
- ❑ Does the agency have general applicability waivers in place?
- ❑ Does this program have pre-existing Buy America requirements – if so, how has the agency harmonized those with BABA (or has it determined the prior rules simply govern)?
- ❑ What are we building and which product categories does it implicate?
- ❑ Is there any component of my project that is not likely to be available as domestically produced? If we are not sure, are we doing an RFI in advance – and if so, perhaps we should include this question?
- ❑ Do we expect BABA to increase project cost by 25 percent? If so, do we want to use alternative bidding procedures to be able to prove that if needed?
- ❑ In prepping our RFP or IFB, include notice of BABA and of an intended compliance term in the contract.
- ❑ Require certifications with bids (see FTA example above).
- ❑ Include compliance clause in the contract, including an obligation to provide certifications at the product/material delivery level on an ongoing basis (see EPA guidance above).
- ❑ In overseeing work, require certifications of compliance at the product/material level to generate a robust catalogue of certifications for government review if needed.

QUESTIONS?

Scott S. Sheffler, Esq.

ssheffler@ftlf.com

Feldesman Tucker Leifer Fidell, LLP

1129 20th St. NW, 4th Floor

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

learning.ftlf.com