

HUSCH BLACKWELL



Build America, Buy America Act

REQUIREMENTS FOR FEDERALLY FUNDED PROJECTS

Hal Perloff, Esq.
Melissa Kirby, Esq.

Domestic Preferences

- Buy American Act of 1933
- No single set of “Buy America” rules (grants/federal assistance vs. contracts)
- Federal agencies have separate domestic preference regulations:



- State laws or State Agencies also have domestic preferences

Build America, Buy America Act (BABA)

- Enacted in Nov. 2021 as part of the Infrastructure Investment and Jobs Act (IIJA)
- Applies to all Federal financial assistance programs
- 2 CFR Part 184 & 200
- Agency specific guidance
- Does not replace stricter standards

Build America, Buy America Act

2 CFR § 184.1(B)

- Requires all **iron, steel, manufactured goods, and construction materials** incorporated in a Federally-funded infrastructure project to be manufactured domestically
- Infrastructure = alteration, maintenance, repair of infrastructure in the U.S.
 - Publicly-owned infrastructure
 - Privately-owned infrastructure primarily used for public purposes

Build America, Buy America Act

Items incorporated into infrastructure projects fall within one of three categories:



**IRON OR STEEL
PRODUCTS**



**CONSTRUCTION
MATERIALS**



**MANUFACTURED
PRODUCTS**

BUILD AMERICA, BUY AMERICA ACT

Iron or Steel Products



2 CFR § 184.3

- Article, material or supply consist “wholly or predominantly of iron or steel or a combination of both.”
- Iron and steel content >50% total cost of all its components.
- The cost of iron and steel is the cost of mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in manufacturing the product and a good faith estimate of the cost of iron or steel components.
- Unlike FAR standard which excludes COTS fasteners.
- “all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States”
- *Not the FAR 95% standard*

Construction Materials



2 CFR § 184.6

- each of the 8 types of construction materials has its own “manufacturing” standard
 - Only one standard applies per construction material
 - *No “component test”*
 - *No COTS exception*

1

NON-FERROUS
METALS

2

PLASTIC AND
POLYMER-BASED
PRODUCTS

3

GLASS
(INCLUDING OPTIC
GLASS)

4

FIBER OPTIC CABLE
(INCLUDING DROP
CABLE)

5

OPTICAL FIBER

6

LUMBER

7

ENGINEERED WOOD

8

DRYWALL

BUILD AMERICA, BUY AMERICA ACT

Manufactured Products



Articles, materials, or supplies:

- processed into a specific form and shape; or
- combined with other articles, materials or supplies to create a product with different properties –
- Is not an Iron or Steel Product or a Construction Material

TWO PART TEST

1. manufactured in US; **and**
2. cost of components mined, produced, or manufactured in the U.S. > 55% total cost of all components

Unless a law or regulation sets a *higher* standard

Cost of Components

2 CFR § 184.5

| COMPONENTS YOU BUY | COMPONENTS YOU MAKE |
|---|--|
| Acquisition costs, including transportation costs to the place of incorporation into the manufactured product, and any duties | All costs associated with manufacturing the components, including transportation costs, allocable overhead (not profit). Does not include the costs to make the manufactured product |

Waivers

2 CFR § 184.7

- Public interest
- Nonavailability
- Unreasonable cost—Increase overall project cost > 25%
- Proposed waivers published with comment period
- No Trade Agreements (but may apply on state level)
- Indefinite General Applicability waivers coming to an end

BUILD AMERICA, BUY AMERICA ACT

Non-Compliance

IF NO FRAUD SUSPECTED, THEN:

- Corrective action from contractor (cost to remove and replace)
- Contractual adjustment
- Possible termination, suspension or debarment

IF FRAUD SUSPECTED OR SERIOUS NONCOMPLIANCE:

- Terminate for default
- Report to Agency
Suspension and
Debarment Official
- Refer to appropriate agency officials for investigation
- Possible False Claims Act exposure

Compliance Strategies

- Know the source of the requirement
- Seek clarifications/waivers early
 - Before submission of offers!
- Establish a posture of compliance



Hypothetical #1

CITY OF BOSTON HIRES BEATTY CONSTRUCTION TO REPAIR, REHABILITATE OR REPLACE THEIR NATURAL GAS DISTRIBUTION PIPELINE SYSTEMS USING USDOT NATURAL GAS DISTRIBUTION INFRASTRUCTURE SAFETY AND MODERNIZATION (NGDISM) GRANT FUNDS AUTHORIZED BY THE IJA.

- Contract specifies new gas service risers
- Brand X assembles the gas service risers at a plant in North Carolina
- It is a standard model available at construction stores
- The cost of steel components is 60% of the total cost of components comprising the gas service riser
- 20% of the steel components come from China

IS THE GAS SERVICE RISER BABA COMPLIANT?

Hypothetical #2

BLACKWELL CONSTRUCTION IS BUILDING A GAS PIPELINE TO A NAVY BASE USING DEPARTMENT OF DEFENSE FUNDS

- Blackwell subcontracts with Underground Builders to install the pipe
- Underground Builders' construction plan proposes to use a Magic brand Mud Vac made in the US
- Underground Builders mobilize the comparable Staubsauger Müd Vak (made in Germany) instead
- Underground Builders can prove the rental cost for the Magic Mud Vac is 150% greater than the Staubsauger Müd Vak model

CAN UNDERGROUND BUILDERS USE THE STAUBSAUGER MÜD VAK?

Hypothetical #3

AP CONSTRUCTION IS REPAIRING A WASTEWATER TREATMENT PLANT FOR THE WATER AUTHORITY OF GREENE COUNTY (WAGC) USING EPA GRANT FUNDS.

- WAGC specifies an Evoqua sequencing batch reactor and AP confirms it is providing that model its shop drawings
- AP delivers and installs the Evoqua sequencing batch reactor
- During final QA/QC inspection, the inspector discovers a prominent “Made in China” stamp on the unit

CAN WAGC ACCEPT THE UNIT / WHAT SHOULD THEY DO?

Key Takeaways

- Domestic preference requirements vary by project. Check the contract!
- Even responsible and experienced suppliers misunderstand and misapply the rules. Don't rely on their analysis if it is not reasonable to do so.
- Domestic preference compliance cannot be addressed on a set-it-and-forget-it basis.
- Past compliance does not guarantee future success. BABA adds new domestic content requirements for construction materials. Subs and suppliers must produce **current** documentation demonstrating compliance.

Domestic Source Requirements in Federally-Funded Construction



Hal J. Perloff

Partner | Washington, D.C.

202.378.2354

hal.perloff@huschblackwell.com



Melissa M. Kirby

Senior Counsel | Chattanooga

429.757.5918

melissa.kirby@huschblackwell.com