

Virginia Lawyer

VOL. 72/NO. 4 • December 2023

VIRGINIA LAWYER REGISTER

The Official Publication of the Virginia State Bar



The Construction Law and Public Contracts Issue

Also: Private Cemeteries in Virginia
Use of Confidentiality and Non-Disparagement Agreements
and Bench-Bar Dinner Honors Diverse Judges

Also: Ski Patrol Lawyers

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About the cover: The Construction Law and Public Contracts Section Board of Governors photographed at the 44th Annual Construction Law and Public Contracts Seminar at the Boar's Head Resort in Charlottesville. Front row: Tara L. Chadbourn, Sarah Kathryn Stahling, Alison R. Mullins
Back row: Spencer M. Wiegard, vice chair; Chandra D. Lantz; Joshua C. Johnson; Jonathan R. Wright; Quinton B. Callahan; Jonathan J. Straw, chair; Jesse B. Gordon; Arnie B. Mason, treasurer; Mark A. Burgin; James R. Harvey III
Board Members not pictured: Lauren P. McLaughlin, secretary; and Joseph S. Guarino; Ex Officio: Hon. David W. Lannetti and Hon. Scott R. Geddes; YLC Liaisons: Zahra S. Abrams and Emma C. Greger. Photograph by Deirdre Norman. Post-production by Kaylin Bowen.

Build America, Buy America: Be Aware

by Daniel D. Rounds

For nearly a century, the federal government has supported domestic manufacturing through legislation favoring (and in many instances requiring) the purchase of materials and supplies manufactured in the United States. Perhaps the most famous example is the Buy American Act of 1933, 41 U.S.C. §§ 8301-8305, referred to as “Buy American,” which applies to federal supply and construction contracts. A group of statutes often referred to as “Buy America”¹ expanded the concept beyond direct federal procurement contracts and introduced domestic content requirements for projects funded through, among other things, Department of Transportation grants. Domestic preference in federal spending has been a particularly important topic in recent years, as both the Biden and Trump administrations issued executive orders intended to maximize the use of goods, products, and materials produced in the United States in federally-funded projects.²

The 2021 Infrastructure Investment and Jobs Act (“IIJA”)³ introduced a new domestic preference requirement through the Build America, Buy America Act (“BABA”).⁴ BABA generally requires that federal agencies ensure all iron, steel, manufactured products, and construction materials used in infrastructure projects funded through federal financial assistance (e.g., grants and cooperative agreements) are produced in the United States.⁵ This applies to federal financial assistance awarded by *any* federal agency, not just those agencies subject to specific Buy America statutes.

BABA empowered the Office of Management and Budget (“OMB”) to issue guidance to assist federal agencies in applying the BABA domestic preference requirement.⁶ On August 23, 2023, OMB issued the final BABA guidance, adding a new part 184 to Title 2 of the Code of Federal Regulations.⁷ 2 CFR Part 184 went into effect October 23, 2023.

2 CFR Part 184 confirms that BABA’s domestic content preference requirement, referred to in the guidance as the “Buy America Preference,” applies to infrastructure projects funded through federal financial assistance, regardless of whether infrastructure construction is the primary purpose of the funding

award.⁸ “Infrastructure” under BABA is to be interpreted broadly and includes, among other things, highway structures and facilities, dams, maritime facilities, drinking and wastewater systems, electrical transmission facilities, broadband infrastructure, and electrical vehicle charging facilities.⁹ An “infrastructure project” is “any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.”¹⁰ The BABA Buy America Preference must be included in all contracts and purchase orders issued under infrastructure projects subject to BABA.¹¹

BABA requires three categories of items to be produced in the United States: iron or steel products, manufactured products, and construction materials.¹² For each category, 2 CFR Part 184 provides a definition and a test for determining whether an item is produced in the United States. Helpfully, the guidance clarifies that an item should be classified as falling within only *one* of the categories when determining BABA compliance.¹³ The determination of which category an item falls into, and therefore which BABA domestic preference test applies, is to be made based on the item’s status at the time it is brought to the work site for incorporation into the project.¹⁴

“Infrastructure” under BABA is to be interpreted broadly and includes, among other things, highway projects, drinking and wastewater systems, electrical transmission facilities, broadband infrastructure, and electrical vehicle charging facilities.

An “iron or steel” product is an item that consists “wholly or predominantly of iron or steel or a combination of both.”¹⁵ Under the BABA guidance, an item is “predominantly of iron or steel” if “the cost of the iron and steel content exceeds 50 percent of the total cost of all its components.”¹⁶ “Component” is also a defined term, and it refers to an article, material, or supply “incorporated directly into” an iron or steel product or a manufac-

tured product.¹⁷ For items in which 50 percent or more of the components by cost are made of iron or steel or a combination of both, *all* manufacturing processes for the iron or steel in the item, “from the initial melting stage through the application of coatings,” must be performed in the United States to count as being “produced in the United States” for purposes of BABA compliance.¹⁸

States and localities can be federal financial award recipients, and contracts for infrastructure projects funded through these awards will likely carry with them the BABA Buy America Preference.

The BABA guidance includes a list of items classified as “construction materials.” The list includes, among other things, non-ferrous metals, glass, fiber optic cable, lumber, and drywall.¹⁹ Each listed construction material is subject to its own specific test to determine whether it is produced in the United States for purposes of BABA compliance.²⁰

A “manufactured product” is an item not otherwise classified as an “iron or steel product” or “construction material” which has been “processed into a specific form and shape” or has been “[c]ombined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.”²¹ For purposes of BABA compliance, a manufactured product is considered to have been produced in the United States only if it was manufactured in the United States *and* “[t]he 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.”²² 2 CFR § 184.5 provides guidance on how to calculate the value of components in a manufactured product.

BABA allows for several types of waivers to the Buy America Preference, including for non-availability, unreasonable cost (i.e., when inclusion of domestic products would increase the cost of the project by more than 25 percent), and public interest.²³ BABA requires completion of a justification process before

a waiver can be issued.²⁴ The availability of a waiver may depend on the agency awarding the financial assistance. For example, the Department of Transportation has issued a waiver for projects under small grants or featuring a de minimis amount of foreign steel, manufactured products, and construction materials.²⁵

Contractors can find themselves subject to the BABA Buy America Preference even if they never perform on projects for the federal government. States and localities can be federal financial award recipients, and contracts for infrastructure projects funded through these awards will likely carry with them the BABA Buy America Preference. Contractors should consider whether BABA applies before entering a contract on a local infrastructure project.

Further, contractors should be aware that BABA, Buy American, and Buy America are distinct regimes with different requirements. For example, a manufactured product might be considered domestic under BABA but non-domestic under Buy American because of the different thresholds applicable under the different regimes.²⁶ Moreover, trade agreements that might apply in a federal procurement context to allow the provision of non-domestic items to the federal government might not apply under BABA to a local government infrastructure project funded through a federal grant.²⁷ Similarly, Buy American recognizes certain exceptions for commercially available off-the-shelf items that are not currently recognized under BABA.²⁸ Further, BABA does not supersede Buy America statutes when the pre-existing domestic content requirements are as strict as or stricter than those required by BABA.²⁹ For example, contractors working on projects funded through awards from the Department of Transportation could find themselves subject to both BABA and a separate Buy America statute. **Domestic preference compliance can be a complicated matter for contractors, particularly in the current climate of ever changing and ever stricter requirements.** These restrictions are not going away any time soon, so domestic preference compliance remains a critically important area of focus for any contractor involved in public contracting, be it federal, state, or local. ✖

Endnotes

- 1 See, e.g., 49 U.S.C. § 5323(j) (Federal Transit Administration); 23 U.S.C. § 313 (Federal Highway Administration); 49 U.S.C. § 22905(a) (Federal Railroad Administration); 49 U.S.C. § 50101 (Federal Aviation Administration).
- 2 See, e.g., Executive Order 13881, “Maximizing Use of American-Made Goods, Products, and Materials,” July 15, 2019 (President Trump); Executive Order 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers,” Jan. 25, 2021 (President Biden).
- 3 Public Law 117-58, Nov. 15, 2021.
- 4 *Id.* at Title IX, §§ 70901-70927.
- 5 *Id.* at § 70914.
- 6 *Id.* at § 70915.
- 7 88 Federal Register 57750 (Aug. 23, 2023).
- 8 2 CFR §§ 184.1, 184.3, 184.4.
- 9 Public Law 117-58 at Title IX, §70912(5); 2 CFR § 184.4(c).
- 10 2 CFR § 184.3.
- 11 2 CFR § 184.4(b).
- 12 Public Law 117-58 at Title IX, §70914(a); 2 CFR § 184.1(b). Section 70917(c) of BABA references a fourth category of items, which includes cement and cementitious materials; aggregates such as stone, sand, or gravel; and aggregate binding agents or additives. These items on their own are not considered to be construction materials or manufactured products. However, such items can be considered components of manufactured products (e.g., when used to produce precast concrete that is then brought to the work site for incorporation into the project). See 88 Federal Register at 57770-74.
- 13 2 CFR § 184.4(e)-(f)
- 14 2 CFR § 184.4(e)(2). OMB clarified that a manufactured product purchased from a single manufacturer or supplier as a “kit” may be classified as a single manufactured product for purposes of BABA compliance analysis even if the components of the kit are brought to the site separately or at different times and assembled on site. OMB did not define “kit” in 2 CFR § 184, but it clarified in the preamble to the final guidance that a kit is “a product that is acquired for incorporation into an infrastructure project from a single manufacturer or supplier that is manufactured or assembled from constituent components on the work site by a contractor.” 88 CFR at 57776. OMB further clarified that the term kit should be interpreted as “limited to discrete products, machines, or devices performing a unified function. A more wide-ranging system of interconnected products, machines, or devices (such as a heating, ventilation, and air conditioning system for an entire building) should not be considered a kit.” *Id.* Different agencies might adopt differing approaches to applying the “kit” concept, particularly since the term is not defined or included in the body of the guidance.
- 15 2 CFR § 184.3.
- 16 *Id.*
- 17 *Id.*
- 18 Public Law 117-58, Title IX, §70912(6)(A); 2 CFR § 184.3. OMB explained in the preamble to the final guidance that “in the case of iron or steel products, the Buy America preference does not apply directly to non-iron or -steel components.” 88 FR at 57773. OMB further stated “in the case of iron and steel products,

there is no restriction on the place of production or manufacture of components or subcomponents that do not consist of iron or steel.” 88 FR at 57777.

- 19 2 CFR § 184.3.
- 20 Public Law 117-58, Title IX, §70912(6)(C); 2 CFR § 184.6. Generally, the addition of a binding agent to an item of construction material does not change its classification. 2 CFR § 184.3. The preamble to the final guidance includes an example to help demonstrate the difference between a “construction material” and a “manufactured product.” OMB noted that application of wax to engineered wood generally would not change the categorization of the wood from construction material to manufactured product. However, if the engineered wood were to be combined off-site with glass and other items to make a sliding window, then the sliding window brought to the work site for installation would be a manufactured product, with the engineered wood considered to be a component. 88 FR at 57767.
- 21 2 CFR § 184.3.
- 22 Public Law 117-58, Title IX, §70912(6)(B); 2 CFR § 184.3.
- 23 Public Law 117-58, Title IX, §70914; 2 CFR § 184.7.
- 24 *Id.*
- 25 88 Federal Register 55817 (Aug. 16, 2023). The DOT de minimis and small grants waiver applies when the total value of the noncompliant products is no more than the lesser of \$1,000,000 or 5 percent of total applicable costs for the project; or the total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000.
- 26 Buy American requires manufactured end products to be 60 percent or greater domestic content by cost (65 percent or greater starting in 2024). FAR 25.003. BABA’s threshold is only 55 percent. Public Law 117-58, Title IX, §70912(6)(B); 2 CFR § 184.3.
- 27 See 88 Federal Register at 57784-86.
- 28 88 Federal Register at 57768, 57784.
- 29 Public Law 117-58, Title IX, §70917; 2 CFR § 184.2(a).



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