

# BUY AMERICA: RECENT U.S. FEDERAL POLICY CHANGES

DECEMBER 14, 2011



# Federal Buy American Policies: Substantial Activity in Recent Years

- Trump Administration Issued Three Executive Orders on Buy America(n) Policies
- Biden Administration's E.O. 14005, *Ensuring the Future Is Made in All of America by All of America's Workers*
- Presidential Directives Concerning Supply Chains, Renewable Energy Components, etc.
- Two Final Rules promulgated to make changes to Buy American Act
- Congressional enactment of *Infrastructure Investment and Jobs Act* and, with it, the *Build America, Buy America Act*
- Creation of domestic production tax credit incentives in *Inflation Reduction Act*



# BUY AMERICA 101

# There are Many “Buy America(n)” Laws

- A procurement contract’s “Buy America(n)” requirement can stem from any one of many such laws at the Federal and even state levels.
- At the Federal level alone, there is a large patchwork of Federal laws as well as agency regulations and policy guidance implement these laws.

41 U.S.C. Ch. 83  
23 U.S.C. § 313  
42 U.S.C. 300j-12(a)(4)  
49 U.S.C. § 5323(j)  
33 U.S.C. § 1388  
49 CFR Part 661  
23 CFR 635.410  
33 U.S.C. § 3914

# Types of “Buy America(n)” Requirements

- **Statutory Requirements**
  - e.g., 23 U.S.C. § 313 and 49 U.S.C. § 5323(j)
- **Regulatory Requirements**
  - e.g., 23 C.F.R. 635.410 and 49 C.F.R. Part 661
- **Appropriations Limitations (annual)**
  - e.g., American Iron and Steel (AIS) amendments

16        SEC. 746. (a)(1) No Federal funds made available for  
17 this fiscal year for the rural water, waste water, waste dis-  
18 posal, and solid waste management programs authorized  
19 by sections 306, 306A, 306C, 306D, 306E, and 310B of  
20 the Consolidated Farm and Rural Development Act (7  
21 U.S.C. 1926 et seq.) shall be used for a project for the  
22 construction, alteration, maintenance, or repair of a public  
23 water or wastewater system unless all of the iron and steel  
24 products used in the project are produced in the United  
25 States.

# Common Elements

1. General Requirement to Use/Acquire Good of U.S. Origin
2. Standard that Defines a Product's "United States" origin, e.g.:
  - "Manufacture"
  - "Substantial Transformation"
  - "Produced in the United States"
  - Domestic component content
3. Scope and Exception Limitations
  - Waivers Authorized by Statute and Regulation
  - Limitations Imposed by Other Statutes
  - Trade Agreement Applicability

# Pre-IIJA Federal-Aid Buy America Laws

AMTRAK 49 USC § 24305	FHWA 23 U.S.C. § 313 Pub. L. 97-424, title I, §165, 96 Stat. 2136	FTA 49 U.S.C. § 5323(j) Pub. L. 103-272, §1(d) 108 Stat. 823	Intercity Rail Passenger Corporation 49 U.S.C. § 22905	Federal Aviation Administration 49 U.S.C. §§ 50101-50105
(f) Domestic Buying Preferences. - (1) In this subsection, "United States" means the States, territories, and possessions of the United States and the District of Columbia. (2) Amtrak shall buy only - (A) unmanufactured articles, material,	(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	(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.	“(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.	(a) Preference. - The Secretary of Transportation may obligate an amount that may be appropriated to carry out section 106(k), 44502(a)(2), or 44509, subchapter I of chapter 471 (except section 47127), or chapter 481 (except sections 48102(e), 48106, 48107, and 48110) of this title for a project only if steel and manufactured goods used in the

Water Infrastructure Statutory Buy America Requirements		
<p><b>CWSRF</b> <b>33 U.S.C. § 1388</b> (CHAPTER 26-WATER POLLUTION PREVENTION AND CONTROL SUBCHAPTER VI-STATE WATER POLLUTION CONTROL REVOLVING FUNDS)  [Title VI – § 608 - of the Federal Water Pollution Control Act ]  128 STAT. 1326 Pub.L. 113-121, § 5004</p>	<p><b>WIFIA</b> <b>33 U.S.C. § 3914</b> (CHAPTER 52-WATER INFRASTRUCTURE FINANCE AND INNOVATION)  128 STAT. 1344 Pub.L. 113-121, § 5035</p>	<p><b>DWSRF</b> <b>42 USC 300j-12(a)(4)</b> (CHAPTER 6A-PUBLIC HEALTH SERVICE SUBCHAPTER XII-SAFETY OF PUBLIC WATER SYSTEMS)  [Section 1452(a) of the Safe Drinking Water Act]  130 STAT. 1730 PUBLIC LAW 114-322 § 2113 DEC. 16, 2016</p>
<p><b>§1388. Requirements</b> <b>(a) In general</b> Funds made available from a State water pollution control revolving fund</p>	<p><b>§3914. Requirements</b> <b>(a) In general</b> Except as provided in subsection (c), none of the amounts made available under this</p>	<p><b>(a) (4) American iron and steel products</b> <b>(A) In general</b> During fiscal years 2010 through 2022</p>

+ Various Appropriations provisions

**and now. . . The Build America, Buy America Act ....**

# DIRECT FEDERAL PROCUREMENT

CHANGES TO THE BUY AMERICAN ACT





# The Buy American Act

Preference since 1933 in federal procurement for U.S. mined or domestic end products

- **The Buy American Act Test**

- End product is considered domestic if it is:
  1. Mined, produced or manufactured in the USA; and
  2. The cost of its domestic components exceeds sixty percent of the cost of all of its components



# Buy American Act Rulemakings

## 2021: A Remarkable Year for Buy American Act Regulatory Changes

- Key standards untouched for decades
- Eisenhower-era Executive Order 10582 (December 17, 1954) set standards for domestic component content (50%+) and unreasonable price (6%)

### January 2021 BAA Final Rule (Trump-era)

- Final Rule Federal Acquisition Regulation: *Maximizing Use of American-Made Goods, Products, and Materials* (84 FR 34257)
- Implements changes to BAA's origin and cost differential waivers proposed in Trump EO 13881, *Maximizing Use of American-Made Goods, Products, and Materials* (July 2019)
- Changed solicitation terms and resultant contracts issued on or after February 22, 2021

### July 2021 Proposed Rule (Biden-era)

- Further changes to the Federal Acquisition Regulations (FAR) implementing the BAA were proposed in a July 30, 2021 notice of proposed rulemaking (NPRM)
  - Stems from Presidential Executive Order 14005, *Ensuring the Future is Made in All of America by All of America's Workers* (January 2021)
- Final rule published March 7, 2022



# January 2021 BAA Final Rule (Trump-era)

- Increased the price preference (differential) for domestic products, utilized to determine a bid's reasonableness, to:
  - 20% - from 6% - for large businesses; and
  - 30% - from 12% - for small businesses
- Increased the domestic content requirements for “domestic end products” and “domestic construction materials” to:
  - 95% U.S.-produced ferrous content for predominantly iron and steel products (excluding COTS fasteners); and
  - 55% for all other products and materials



# January 2021 BAA Final Rule (Trump-era)

- **“Predominantly Iron or Steel”**

- Defined using component cost-based standard (50%)

*“Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all 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, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.” 86 FR 6187.*

- **“Produced in the United States”**

- Imposes a robust origin standard for ferrous inputs to these iron and steel products

*“foreign iron and steel” to mean iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.” 86 FR 6187.*

# Biden Administration BAA Rule Changes (2022)

## Biden-Era BAA Final Rule (March 2022):

- Increases the current 55 percent domestic content threshold for end products or construction material to 60 percent as of October 25, 2022;
  - Further increases the domestic content threshold to 65 percent in calendar year 2024; and
  - Increases the threshold to 75 percent in calendar year 2029.
- The FAR amendment also:
    - Provides a fallback threshold to allow products meeting a 55 percent domestic content to qualify as a domestic product under certain circumstances; and
    - Establishes a framework for an enhanced price preference for domestic products considered to be “critical” or made up of “critical components” (to be defined in a subsequent rulemaking).



# INFRASTRUCTURE INVESTMENT AND JOBS ACT & BUILD AMERICA BUY AMERICA ACT



# Infrastructure Investment and Jobs Act

- \$1.2T investment over 5 years
- Largest ever federal investment in public transit
- Largest federal investment in passenger rail since Amtrak's creation
- Largest bridge investment since construction of the interstate highway system
- Largest investment in clean drinking water and wastewater infrastructure in U.S. history
- Largest investment in clean energy and EV infrastructure in history, including development of a resilient, clean electric grid
- Ensures every American has access to reliable high-speed internet



# IIJA Implementation Priorities

*Implementation of the Infrastructure Investment and Jobs Act, Executive Order 14052 of November 15, 2021*

- Avoid waste; focus on measurable outcomes
- Buy America; bolster manufacturing, and address supply chains
- Create job opportunities; higher labor standards and prevailing wages
- Promote equity; Justice 40 and disadvantaged communities
- Build infrastructure that is resilient and combats climate change
- Coordinate with state and local governments





# IIJA Build America, Buy America Title

- The “Made in America” provisions provide new statutory authorities to broaden application of various domestic content preferences in infrastructure assistance and direct procurement by the Federal Government, including:
  - Build America, Buy America: Requiring “Buy America” preferences for iron, steel, construction materials and manufactured products” on federal infrastructure assistance awards
  - Make it in America: Amends the Buy American Act to increase domestic content requirements, improve waiver processes and creates Made in America Office
  - BuyAmerica.gov: Directing the establishment of a central and publicly available website related to Buy American waivers
  - Manufacturing Extension Partnership Supplier Scouting



# IIJA Build America, Buy America Title

## *In sum...*

- Expands domestic preference procurement policies applicable to federal financial assistance programs for public works infrastructure;
- Endorses increased domestic component content requirements of products and construction materials sold to the Federal Government under the Buy American Act; and
- Provides transparency into governmental contracting decisions related to domestic sourcing



# Build America, Buy America Act (BABA)

## **SEC. 70914. APPLICATION OF BUY AMERICA PREFERENCE.**

(a) **IN GENERAL.**—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.

# Build America, Buy America Act (BABA)

- Statutorily directs the application of “Buy America” domestic preference policies to federal financial assistance programs for infrastructure
- Applies both to (1) programs not subject to any such laws currently, as well (2) as to “deficient programs”
  - *Deficient Programs:* Those (i) not currently subject to Buy America requirements at all, (ii) subject to limited Buy America requirements, the scope of which does not include iron, steel, manufactured products and construction materials, or (iii) subject to Buy America requirements that have been waived by generally-applicable and longstanding waivers
- In sum, BABA bars the award of federal financial assistance for infrastructure unless all of the iron, steel and manufactured products and construction materials used in the project are produced in the United States – subject to exceptions

# Build America, Buy America

## Contrast to 2009 ARRA (Sec. 1605)

- Buy America requirement applied to the 2009 American Recovery and Reinvestment Act was limited to funds appropriated in the ARRA
- BABA statutory authority not limited to the funds appropriated or authorized in the IIJA
- As crafted, BABA directs the application of Buy America laws to federal-aid infrastructure programs that will have enduring, permanent impact

# Build America, Buy America Act

- Structured consistent with existing Federal Aid Buy America laws / waivers
  - Waivers available under existing Buy America laws are authorized under the BABA where:
    - (1) inconsistent with the public interest;
    - (2) domestic products not available in sufficient and reasonably available quantities or of a satisfactory quality; and
    - (3) if domestic products will increase the cost of the overall project by more than 25 percent
- In addition, Congress directs that the BABA be applied in a manner consistent with U.S. trade agreement obligations related to government procurement

# Build America, Buy America Act

## Key Terms

- *Federal Financial Assistance* – (1) Assistance that non-Federal entities receive or administer in the form of (e.g.): Grants; Cooperative agreements (See 2 CFR 200.1)
- *Infrastructure* - illustrative (not exclusive) list of types of infrastructure including surface transportation, maritime, rail, intermodal, airport, water, electrical transmission, utilities, broadband, building and real property
- *Project* – construction, alteration, maintenance, or repair of infrastructure in the United States

# Build America, Buy America Act

## Applies to:

- Iron and Steel
- Manufactured Products
- Construction Materials

*Construction Materials:* Not defined in BABA but “Findings” Section contemplates: nonferrous metals, plastic and polymer-based products, glass (including optic fiber), lumber, and drywall

**Question for Administration:** What is “iron or steel” vs. construction material vs. “manufactured product”?





# Build America, Buy America Act

## Robust Origin Standards

- BABA imposes robust origin standards
- “Produced in the United States” means:
  - For iron and steel & for “construction materials”: *All manufacturing processes*
  - For “manufactured products”: (1) Manufacture in U.S., and (2) 55% domestic component content

# Build America, Buy America Act

## Robust Origin Standards Cont.

- Iron and Steel: Consistent with Federal-aid Buy America law standards
  - “In the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States”
- Construction materials: “all manufacturing processes”
  - OMB required to issue standards (within 180 days) that define “all manufacturing processes” for construction materials
- Manufactured Products: Two part test seemingly consistent with current FAR BAA test for domestic end products



# Build America, Buy America Act

## Congress *Directed* a Rapid Timeline for Implementation

- **Upon Enactment:** OMB required to issue guidance to Federal agencies to assist in identifying programs that have “deficient” Buy America coverage and to issue guidance to assist Federal agencies in applying new domestic content preferences
- **Within 60 Days of Enactment:** Federal agencies required to submit to the OMB and appropriate congressional committees a report that identifies each Federal financial assistance program for infrastructure administered by the agency, identify the Buy America-type requirements applied thereto, if any, and assess the applicability of any existing domestic content procurement preference, including its purpose, scope, applicability and any exceptions or waivers of the requirement
- Must identify the deficient programs not subject to domestic procurement preferences required by the BABA

# Build America, Buy America Act

## Congress *Directed* Rapid Timeline for Implementation

### Within 180 Days of Enactment:

- Federal agencies required to apply Buy America preferences meeting the scope of products required by the BABA
- OMB must issue standards satisfying the “all manufacturing processes” origin standard required by the BABA for “construction materials”

# Build America, Buy America Act Implementation

- OMB Guidance to Agencies
  - BABA applies to federal financial assistance for infrastructure, whether or not funded through the IIJA
  - Definition of “federal financial assistance programs for infrastructure” “ is comprehensive
  - Implementation questions remain, e.g., application of BABA to “construction materials”
  - Agencies provided with a menu of public interest waiver options as they work to implement the new law



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

April 18, 2022

M-22-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young  
Director

A handwritten signature in blue ink that reads "Shalanda D. Young".

SUBJECT: Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, §§ 70901-52. The Act strengthens Made in America Laws<sup>1</sup> and will bolster America’s industrial base, protect national security, and support high-paying jobs. The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered Federal agency<sup>2</sup> 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.”<sup>3</sup>

# Build America, Buy America Act Implementation

- Construction Materials
  - Under the BABA, “construction materials” include, among other things, “an article, material, or supply” that “is or consists primarily of” non-ferrous metals
  - OMB has issued a Request for Information seeking additional input to aid implementation
  - Pending any final standards, OMB guides that “agencies should consider ‘all manufacturing processes’ for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage”
- Manufactured Products
  - OMB guides that a construction material combined with one or more other materials through a manufacturing process should be treated as a “manufactured product”
  - For a “manufactured product” to be deemed “produced in the United States,” the BABA requires that it be (i) manufactured in the United States and (ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States be greater than 55 percent of the total cost of all components of the manufactured product



# Build America, Buy America Act Implementation

## Savings Clause

- BABA is *additive* to existing Buy America laws
  - ◆ Agencies should consider whether existing domestic content requirements meet the standards in the Act, as described in this memorandum. Agencies must make necessary changes to come into compliance with the Act's requirements, while preserving policies and provisions that already meet or exceed the standards required by the Act." OMB M-22-11
  - ◆ IIJA Section 70917:

**(b) SAVINGS PROVISION.—Nothing in this part affects a domestic content procurement preference for a Federal financial assistance program for infrastructure that is in effect and that meets the requirements of section 70914.**

# Build America, Buy America Act Implementation is Slow

- Agency implementation of BABA preferences is slowed by the Administration's policy development
- Despite May 2022 statutory deadlines, important implementation guidance is still yet to be published
  - Made in America Office has yet to issue:
    - ◆ Origin standards for "construction materials"
    - ◆ Guidance on origin calculations for "manufactured products"



# Build America, Buy America Act Implementation is Slow

- Agencies have relied on waivers to delay implementation
  - General “adjustment period” six month waivers
- Incremental implementation (category specific; project exclusions)
  - Wholesale delaying waivers giving rise to more tailored exceptions
- Agency overreach could create further delays to implementation
  - E.g., DOT *De Minimis* General Waiver attempts to modify existing Buy America policies that predate BABA
- Meanwhile... the Biden Administration recently announced that \$185 billion dollars had been released to fund infrastructure investments

# Enforcement Mechanisms

## Contracting Actions to Support Enforcement

- Pre-award by Federal Government or State/Local Grant Recipient
  - Disqualification
  - Price Preference
  - Bid Protests
- Post Award
  - Rework or Replace
  - Breach of Contract Actions – Contract or Subcontract
  - Termination for Default, Forfeiture
  - Whistleblowers
  - Audits



# Enforcement Mechanisms

## Civil Actions

- Civil False Claims Act
  - Product Substitution Claims
  - False Certifications
- Inspector General Investigations of Fraud, Waste and Abuse
- Suspension and Debarment
  - Procurement
  - Non-procurement
- Congressional Oversight

# Enforcement Mechanisms

## Criminal Prosecution

- Procurement Fraud
- Criminal False Claims
- False Statements



# INFLATION REDUCTION ACT & DOMESTIC CONTENT PROVISIONS



# IRA and Domestic Content Provisions

Inflation Reduction Act (enacted August 2022)

- Novel use of tax code to incentivize domestic production
  - New 45X Advanced Manufacturing Production Credit
  - Bonus Credits” accompanying certain clean energy tax credits
    - ◆ Domestic content requirements
      - Iron and steel (melt requirement)
      - Manufactured Products
  - IRS solicited public comment, will issue guidance



# IRA and Domestic Content Provisions

## Domestic Content “Bonus Credits”

- Production Tax Credit (a per-kWh tax credit)
  - Bonus of 10% of the credit amount
  - 2% if prevailing wage & apprenticeship requirements not met
- Investment Tax Credit (an up-front percentage credit)
  - Bonus of 10 percentage points
  - 2 percentage points if wage & apprenticeship requirements not met
- Also applicable to successor PTC and ITC credits
- Available for projects placed in service beginning January 1, 2023



# IRA and Domestic Content Provisions

Devil is in the details...

- IRA incorporates the FTA's Buy America regulatory standard for iron and steel products
  - Requires steel, iron and manufactured goods to be “produced in the United States”
    - ◆ Domestic melt requirement for iron and steel (structural and load bearing)
  - Separate standard for iron and steel components and subcomponents of “manufactured products”
    - ◆ Component content percentage standards
- Forthcoming guidance will clarify legislative ambiguities



# QUESTIONS?



**DUSTIN PAINTER**

DPainter@kelleydrye.com

(202) 342-8875