



## **NORTHERN BORDER REGIONAL COMMISSION**

### **Build America Buy America Act (BABAA) Guidance**

The Build America, Buy America Act (hereafter "BABAA") – enacted on November 15, 2021 – sets forth a domestic content procurement preference ("Buy American Preference" hereafter referred to as "BAP") for infrastructure programs funded with Federal dollars. As the NBRC routinely funds infrastructure projects as part of its Catalyst grant program and anticipates funding infrastructure projects as part of its Bipartisan Infrastructure Legislation (BIL) programs beginning in FY'23, BABAA governs future Northern Border Regional Commission (NBRC) infrastructure investments.

Per guidance in M-22-11, "A Buy America preference...only applies to the iron and steel, manufactured products, and construction materials used for the infrastructure project under an award." As such, the NBRC will continue to move forward with the obligation of funds for projects awarded funds under the Catalyst, FEP, BIL, or other programs, which are not impacted by the preference.

Specifically, IIJA §70914(a) of Pub. L. 117-58, instructs Federal agencies to 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 product, and construction materials used in the project are produced in the United States."

M-22-11) encourages an expansive interpretation of "infrastructure<sup>1</sup>," and in some specific way the NBRC definition of "infrastructure" may not apply to BABAA applicability. For example, in 2023, the NBRC began to define "community" infrastructure as such (as "infrastructure") to ensure that projects such as childcare support were eligible for higher grant amounts, in recognition of these areas' critical role in supporting economic development. While some projects conceived within the community infrastructure classification would not conform to BABAA, others would.

Most NBRC "infrastructure" projects fall within BABAA, especially when considering the definition provided in M-22-11:

The IIJA's definition of "infrastructure" encompasses public infrastructure projects. Thus, the term "infrastructure" includes, at a minimum, the structures, facilities, and equipment for, in the United States, 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 water and wastewater systems; electrical

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<sup>1</sup> M-22-11, pg. 4: "Federal agencies should interpret the term 'infrastructure' broadly and consider the definition provided...as illustrative and not exhaustive."

transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. Agencies should treat structures, facilities, and equipment that generate, transport, and distribute energy -including electric vehicle (EV) charging -as infrastructure.

The types of grants issued by the NBRC are also subject to BABAA requirements, though the NBRC does not at present issue "renewal" or supplemental awards. An issue with this type of award is that a grant obligated prior to the effective date of BABAA (and therefore not subject to the provisions therein) would then be subject to BABAA if a renewal or supplemental award were provided.

Further, sub-awards by NBRC grantees, funded with NBRC funds, also fall within BABAA.

### **Materials Included in the BAP:**

Relevant materials are included in IIA §70914 and are listed below for convenience:

(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.

(3) All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

It is reasonable to seek more precision applied to terms like "manufacturing processes" and "construction materials." At this time, those terms are not completely defined, but OMB is working on them through a rulemaking process, and those will be updated shortly.

For now, vis a vis "construction materials," OMB requests that Agencies follow the below guidance, sourced from [Document 88 FR 8374](#), **Proposed Rule, § 184.6**:

The Buy America Preference applies to the following construction materials used in infrastructure projects. Each construction material is followed by a standard for the material to be considered "produced in the United States."

(a) *Non-ferrous metals*. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.

(b) *Plastic and polymer-based products*. All manufacturing processes, from initial combination of constituent, plastic or polymer-based inputs until the item is in a form in which it is delivered to the work site and incorporated into the project, occurred in the United States.

(c) *Composite building materials*. All manufacturing processes, from initial combination of constituent materials until the composite material is in a form in which it is delivered to the

work site and incorporated into the project, occurred in the United States.

(d) *Glass*. All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.

(e) *Fiber optic cable*. All manufacturing processes, from the initial preform fabrication stage through fiber stranding and jacketing, occurred in the United States.

(f) *Optical fiber*. All manufacturing processes, from the initial preform fabrication stage through fiber stranding, occurred in the United States.

(g) *Lumber*. All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.

(h) *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.

There remains the opportunity for the NBRC to provide waivers to specific projects, on a case-by-case basis.

IIJA §70914(c) authorizes the Federal Agency head (in the case of the NBRC, the Federal Co-Chair) to waive the application of a Buy America preference under an infrastructure program when:

1. Applying the domestic content procurement preference would be inconsistent with public interest ("public interest waiver");
2. The 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 ("nonavailability waiver");
3. 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 ("unreasonable cost waiver").

### **Requesting a waiver for consideration.**

With respect to the process for granting waivers, MIAO and OMB recommend that Agencies develop standard / consistent protocols for the issuance, public posting, and final approval of waivers.

In general, however, once NBRC program staff have identified that a waiver might apply to a specific project, the NBRC will draft a waiver in reference to that project and:

1. Make the waiver available on the NBRC's website for a minimum of 15 days in case of public comment.
2. Following the public review period, the NBRC must send the waiver to MIAO for final approval. This approval "finalizes" the waiver.

**Note: If a project is funded by multiple Federal entities, the entity representing the largest investment in the project is considered the "Cognizant Agency for Made in America," and should take responsibility for the coordination of any waivers produced.**

All waiver requests must include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included

in requests for proposals, contracts, and nonproprietary communications with potential suppliers.

In addition, at a minimum and to the greatest extent practicable, each proposed waiver submitted to MIAO should include the following information, as applicable:

- Waiver type (nonavailability, unreasonable cost, or public interest)
- Recipient name and Unique Entity Identifier (UEI)
- Federal awarding agency organizational information (e.g., Common Government-wide Accounting Classification (CGAC) Agency Code)
- Financial assistance listing name and number
- Federal financial assistance program name
- Federal Award Identification Number (FAIN) (if available)
- Federal financial assistance funding amount
- Total cost of infrastructure expenditures, including all Federal and non-Federal funds (to the extent known)
- Infrastructure project description and location (to the extent known)
- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies) of origin (if known), and relevant PSC and NAICS code for each.
- A certification that the Federal official or assistance recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.
- A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the Federal awarding agency and, and in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
- Anticipated impact if no waiver is issued.
- Any relevant comments received through the public comment period.