

## The Legal Intelligencer

# Federal Infrastructure Projects and the Requirements of 'BABA'

By Paul A. Logan and Ryan M. Logan

July 31, 2023

When Congress passed the Infrastructure Investment and Jobs Act (IIJA), it was hailed by the White House as “a once-in-a-generation investment in our nation’s infrastructure and competitiveness.” Politicians lauded IIJA as the historic opportunity to repair the “one-in-five miles of our roadways and more than 45,000 bridges in the United States rated as ‘in poor condition.’” And like its predecessor federal funding packages (the American Recovery and Reinvestment Act), the IIJA attaches strings to the use of the funds, including those reflected in the Build America, Buy America Act (BABA).

BABA is the latest federal regulatory restriction on the use of “foreign” materials in public works projects. It is specifically intended 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 products, and construction materials used in the project are produced in the United States.” In *United Blower v. Lycoming County Water & Sewer Authority*, the Pennsylvania Supreme Court recently observed:

“The United States’ willingness to combat domestic economic concerns with protectionist measures dates to the earliest days of the republic. However, the modern trend of mandating the use of American-made products in public works projects dates to 1933 with the passage of the “Buy American Act,” which directs that ‘only ... articles, materials, and supplies



Courtesy photos

Paul Logan, left, and Ryan Logan, right, of Post & Schell.

that have been mined, produced, or manufactured in the United States ... shall be acquired for public use.” 41 U.S.C. Section 8302(a)(1).

The Buy American Act currently requires the cost of the components of the manufactured product to exceed 60% of the total cost of all components. But BABA became effective before the adoption of regulatory guidance, so there is a significant “catch-up” effort to provide guidance for BABA contracts, including those currently underway. In the Feb. 9, 2023, Federal Register, the Office of Management and Budget (OMB) requested public comment on the proposed guidance related to determination of BABA “cost of components.” “OMB is proposing a new part 184 in 2 CFR chapter I to support implementation of the Act and clarify existing requirements within 2

CFR 200.322. The proposed revisions are intended to improve uniformity and consistency in the implementation of ‘Build America, Buy America’ (BABA) requirements across the government.”

Public comments are particularly invited on:

**(1) Cost of components.** In determining the “cost of components” for manufactured products for purposes of this guidance, should OMB adopt a definition based on the definition provided in the FAR at 48 CFR 25.003?

The dearth of regulatory guidance has created uncertainty for federal project participants in many respects. We address below certain key questions and concerns that may be plaguing project participants.

### Does BABA Apply?

First, what is a project under BABA? BABA defines a “project” to mean the construction, alteration, maintenance, or repair of infrastructure in the United States.

Second—what does the term “infrastructure” entail? The term “infrastructure” has a sweeping definition beyond roads, highways, and bridges to include, among other things, 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 transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.

Finally, what is a “federal financial assistance program”? A federal financial assistance program for infrastructure is a program in which funds are used for an infrastructure project, regardless of whether infrastructure is the primary purpose of an award. However, there is significant nuance in determining applicability. If the agency determines no funds will be used for infrastructure, the Buy America preference does not apply. Similarly, the Buy America preference does not apply to non-infrastructure spending under an award. However, if the project relates to infrastructure, the Buy America preference applies to the entire project, even if it is funded by both federal and non-federal funds.

Keeping each of these definitions in mind, the next question is what portions of the project need to comply with BABA?

BABA requires and applies to the following:

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.

But what is “United States iron and steel”? In *Trojan Technologies v. Commonwealth of Pennsylvania*, the U.S. Court of Appeals for the Third Circuit observed “that as a matter of commercial practice it may not always be easy to find steel that satisfies the requirement of being manufactured in the United States.” *Trojan Techs. v. Pennsylvania*, 916 F.2d at 915. The court’s 1990 observation has not been ameliorated in the following decades. On June 1, 2023, the American Iron and Steel Institute announced the release of its 2022 Annual Statistical Report reporting that in 2022, shipments from domestic steel mills measured 89.5 million net tons, down 5.5% from the previous year and U.S. raw steel production was 94.7 million net tons in 2022, a 6.2% decrease from 2021.

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.

As described above, determination of “costs” remains subject to interpretation. At what “level” of the transaction should costs be calculated? “Cost” could mean the “cost” to the “owner” or the “cost” to the contractor. It could mean the supplier’s “costs” or the “costs” to the suppliers’ suppliers.

And what does it mean to be “manufactured in the United States”? Is it the location of the “last substantial transformation” or something different? Is a “manufactured product” composed of “foreign components” assembled in a United States factory or United States job site “manufactured in the United States”?

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.

Critically, though, these provisions apply only to articles, materials and supplies that are consumed in, incorporated into, or affixed to an infrastructure

project. Thus, “temporary” materials, such as tools, equipment and supplies (like temporary scaffolding) that is brought and then removed at or before the completion of the project does not implicate BABA. Similarly, the provisions do not apply to equipment and furnishings—like desks, portable equipment or chairs. Ultimately, the focus are those materials, articles and supplies which are integral to the structure or permanently affixed.

### Are There Waivers and Exceptions?

BABA does provide for waivers and exceptions. One exception allows the head of Federal agencies to waive the application of BABA requirements if the head of the federal agency finds that:

1. Applying the domestic content procurement preference would be inconsistent with the public interest.
2. Types of 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.
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%.

Similarly, fund recipients, contractors and suppliers may seek waivers and exceptions. The OMB has issued a 14-page “Waiver Request” form which requires detailed facts and substantial justification for a waiver and exception. However, before issuing a waiver, it must be made publicly available with a detailed explanation for the reason to issue waiver, while also providing, at minimum, a 15-day period for public comment. For waivers with broader applicability (referred to as “general applicability waivers), a minimum 30-day public comment period must be provided.

In all cases, though, each waiver request must show proper and sufficient justification for using goods and products from outside the United States, including a certification of a good faith effort to solicit bids for domestic products prior to applying for a waiver. (See OMB 2022 Memorandum at Section VII.)

### Key Takeaways

BABA has already begun reshaping the American infrastructure, and simultaneously, imposed

substantial obligations on contractors and suppliers. Indeed, BABA’s reach is vast; it affects all participants in projects funded in whole or in part by IIJA money, even if the contractor does not directly receive any of the money. For example, several state highway departments, including PennDOT, have required utilities to comply with requirements to relocate to facilitate a funded project even though the utilities receive no reimbursement of costs.

The obvious key takeaway is the collection and maintenance of documentation demonstrating compliance. Proof of steel, iron and construction materials’ domestic origin is essential because there are potentially severe consequences which may include the removal and replacement of the materials, termination of the contract, and in some egregious cases, suspension or debarment. Moreover, if fraudulent conduct was involved, criminal investigations are possible.

For many contractors, IIJA projects can provide tremendous financial benefits, but the strings that come with that funding include BABA compliance. As of now, the rules are still being developed but the legal landmines are already planted.

**Paul A. Logan** is a principal in Post & Schell’s construction and commercial litigation practice group and focuses his practice on the representation of contractors, and other businesses, that deal with local, state, and federal governments via General Services, OSHA, SEPTA, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHA), the Environmental Protection Agency (EPA), and state departments of transportation, among many others. He can be reached at [plogan@postschell.com](mailto:plogan@postschell.com).

**Ryan M. Logan** is a principal in Post & Schell’s construction and commercial litigation practice group. He counsels and represents property owners, general contractors, and subcontractors in matters related to construction projects and contracts and related claims and litigation. He can be reached at [rlogan@postschell.com](mailto:rlogan@postschell.com).

The authors would like to thank and acknowledge summer associate **Tomas Sanchez** for his contributions to this article.