

# Buy America

Paul Juang-Korol

Attorney-Advisor

Pipeline and Hazardous Materials Safety  
Administration



- This presentation is intended to provide a general overview of Buy America requirements applicable to PHMSA grant programs.
- 2 C.F.R. Part 184 and OMB guidance memos may contain more information and may be more specific than this slide deck.
- Recipients should rely on the actual text of Part 184 and OMB guidance memos when making decisions.



# What is “Buy America?”

- “Buy America” refers to various loosely related statutes that provide for a domestic sourcing preference in Federal grant spending.
- Purpose is to benefit (or encourage the development of) domestic manufacturing capacity.
- Different statutes apply to each DOT Administration.
- The statute that applies to PHMSA is the Build America, Buy America Act (BABA) from the Infrastructure Investment and Jobs Act.



# Build America, Buy America Act (BABA)

- Infrastructure Investment and Jobs Act (IIJA) Sections 70901 through 70917.
- “[T]he head of each Federal agency shall ensure that none of the funds made available for a Federal financial assistance program for infrastructure . . . 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.”
- Implemented by 2 C.F.R. Part 184, Buy America Preferences for Infrastructure Projects.
- OMB Guidance Memo M-24-02.



# BABA, cont'd.

- BABA creates a “floor” for domestic preference requirements. It applies “only to the extent that a domestic content procurement preference . . . does not already apply”
- PHMSA’s implementation may be different than other DOT Administrations.



# What BABA does

- All of the products incorporated into an infrastructure project must be “produced in the United States.”
- Defines three categories of products: (1) iron/steel products; (2) manufactured products; (3) construction materials.
- Definition of “produced in the United States” is different for each product category.



# What BABA doesn't do

- It does not apply to products that are not permanently affixed to the infrastructure (tools, equipment, temporary scaffolding, movable furnishings, etc.).
  - Ex: BABA applies to a light fixture, but does not apply to the light bulb.
- It does not apply to cement, cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives (Section 70917(c) materials).



# Product Categories

- Iron/Steel Products
- Manufactured Products
- Construction Materials
- Different standard applies to each product category.
- **NOTE:**
  - A product is classified according to the form it is in when it is brought to the construction site.
  - A product can only fall into one category. Ex: A product cannot be both an iron/steel product and a manufactured product.





# Iron and Steel Products

- **Definition**: products that consist “predominantly” of iron, steel, or both.
  - A product consists “predominantly” of iron, steel, or both when the cost of the iron/steel content exceeds 50% of the cost of all components of the product.
- **Produced in the U.S. if**: All manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- **NOTE**: Only the iron and steel must be made in the U.S. No domestic preference applies to non-iron/steel components of an iron/steel product.



# Example

- City wants to install a new meter. The body of the meter is made of steel. The meter has a gauge that is made of glass and plastic. The meter also includes some internal components that are made of aluminum.
- The cost of the steel used in the meter is \$200. The glass costs \$30, the plastic costs \$20, and the aluminum costs \$100.
- The meter is classified as an iron/steel product because the cost of the steel used to make the meter is greater than 50% of the total cost of the components used in the meter ( $\$200/\$350 =$  about 57%).



# Example, cont'd.

- The ore used to make the steel for the meter is mined outside of the U.S. The ore is shipped to the U.S. where it is melted, processed, and cast into the parts for the meter. The glass, plastic, and aluminum used in the meter are produced wholly outside of the U.S.
- The meter is BABA compliant because all manufacturing processes for the steel (starting from the initial melting) were performed in the U.S.
- For iron/steel products, we don't care where the glass, plastic, or aluminum were made; the domestic preference applies only to the iron and steel used in the product.
- We also don't care where the raw materials are mined because the manufacturing process starts with initial melting.



# Manufactured Products

- **Definition**: products that are not predominantly iron or steel, and have been (1) processed into a specific form or shape, or (2) combined with other materials to create a product with different properties than the individual components.
- **Produced in the U.S. if:**
  - (1) the cost of components that are produced in the U.S. is greater than 55% of the total cost of all components used in the product; and
  - (2) the end product itself was manufactured in the U.S.
- **NOTE**: If the product meets the definition of an iron/steel product or a construction material, then it cannot be a manufactured product.



# Example

- City has decided the steel meter is too expensive. They want to install a different meter that has an aluminum body. This meter still has a gauge made from glass and plastic, and contains some internal parts made of steel.
- The aluminum used in this meter costs \$150. The glass costs \$30, the plastic costs \$20, and the steel costs \$50.
- This meter is a manufactured product. It consists of multiple types of materials (aluminum, glass, plastic, and steel) that have been combined to create a product with a different function than any of the components could have individually.
- The meter is not an iron/steel product because the cost of the steel only makes up 20% of the total cost of the components (\$50/\$250).



# Example, cont'd.

- The aluminum used in the meter is wholly produced in the U.S. The glass, plastic, and steel are wholly produced outside the U.S.
- The manufacturer of the meter is a U.S. company, however, its plant is located in Mexico. The manufacturer has the aluminum, glass, plastic, and steel shipped to Mexico for the final assembly of the meter.
- This meter is not BABA compliant. While the cost of the U.S.-made aluminum makes up 60% of the total cost of all components, the end product itself is finally assembled outside of the U.S. To be BABA compliant, the cost of the U.S.-made components must be greater than 55% AND the end product must be manufactured in the U.S.



# Construction Materials

- **Definition**: products that consist of only one of the materials listed in 2 C.F.R. 184.3, or only one material with minor additions.
  - Non-ferrous metals; plastic and polymer-based products; glass; fiber optic cable; optical fiber; lumber; engineered wood; drywall.
- **Produced in the U.S. if**: it meets the standard listed in Section 184.6. Each one of the listed materials has a different listed standard.





# Example

- Operator wants to install coated steel pipe. The coating will be applied at the construction site. The coating can be defined as a polymer-based product.
- The coating is a construction material because it is a polymer-based product, which is one of the materials listed in 2 C.F.R. 184.3. The coating may include minor additions that do not change the coating's fundamental properties or uses.





# Example, cont'd.

- The standard for “plastic and polymer-based products” is that all manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
- If all of these steps occurred within the U.S., the coating would be BABA compliant.



# Add'l. Notes on BABA

- For iron/steel products and manufactured products, cost of components are important.
  - Specific guidance for calculating the cost of components can be found in 2 C.F.R. 184.3 (iron/steel products) and 184.5 (manufactured products).
- Demonstrate compliance with BABA by collecting a certification from the manufacturer stating that the product complies with the applicable BABA standard.



# Waivers

- Nonavailability: the types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality.
- Unreasonable Cost: the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25%.
- Public Interest: Applying the Buy America preference would be inconsistent with the public interest.



# Submitting a Waiver Request

- Phone call with PHMSA to discuss possibility of a waiver.
- Conduct market research.
- Submit a written request to PHMSA with justification for the waiver.
- PHMSA drafts waiver text (in consultation with awardee).
- Waiver posted for public comment.
- PHMSA issues final waiver.



# Waiver Justification

- Letter or memo addressed to PHMSA.
- Highly fact-specific; content will depend on the type of waiver you are seeking and the results of your market research.
- Type of waiver you are seeking.
- Description of the products that need a waiver (including cost, country of origin if known).
- How do you know that a BABA-compliant alternative is not available?
- What is the impact if no waiver is issued?
- Include as much detail as possible.
  - Who conducted the market research, when was it conducted, what sources did you consult?



# Supplier Scouting

- NIST Manufacturing Extension Partnership (MEP).
- Can help with your market research by identifying potential domestic suppliers (or lack thereof) for a product.
- Submit a supplier scouting request at <https://meis.nist.gov/SupplierScouting/Submit>.
- More information: <https://www.nist.gov/mep/supplier-scouting>.



# DOT De Minimis Costs Waiver

- Automatically applies to all NGDISM projects.
- BABA waived where the total value of non-compliant products is no more than the lesser of \$1 million or 5% of total applicable costs for the project.
- “Total applicable costs” defined as the cost of all materials used in the project that are subject to BABA.

$$\frac{\text{Non-compliant products}}{\text{Total applicable costs} \times 0.05} = \leq 1$$



# Q&A

