



FELDESMAN

BUILD AMERICA BUY AMERICA – CPD PROGRAMS

March 18, 2025

PERSPECTIVES AND RISKS AT VARIOUS LEVELS

ISSUE	STATE/LOCAL GOV'T (GRANTEE)	CONSTRUCTION CONTRACTOR (PRIME)	SUPPLIER (SUBS/SUPPLIERS)
Does BABA Apply?	Is my grant for "Infrastructure" (construction, alteration, maintenance, or repair) and not for emergency response?	Look to RFP and contract terms (but also be aware of whether "infrastructure")	N/A
General Waivers?	<ul style="list-style-type: none"> Exigent circumstances (public safety) Small grants (\$250k total project grants) <i>De Minimis</i> (up to 5% of covered materials cost, not exceeding \$1 million) 	First look to RFP, but possibly recommend invoking.	N/A
Implementation Approach	RFP and Contract Clauses (see, e.g., https://www.epa.gov/baba/build-america-buy-america-baba-epa-programs)	Seek certifications from subs/suppliers; Review materials delivered to construction site for any indication of	Furnish certification after reasonable evaluation
Practical Challenges	Expanded Cost or Lengthened Project Timeline	<ul style="list-style-type: none"> Managing supply chain Managing waiver requests in conjunction with grantee 	Actual evaluation of compliance for product (challenge: regimes vary)
Legal Risk	Disallowance of grant funds	Contract action by grantee; Civil False Claims	Contract action by prime contractor (albeit less so); Civil False Claims

CHALLENGE: DIFFERENCES IN REGIMES

FOR EXAMPLE:

PRODUCT TYPE	BABA	FTA	FHWA (Working to harmonize)
Iron / Steel	<p>Articles that consist predominately of iron/steel (iron/steel exceeds 50 percent content)</p> <p>From melting through application of coatings in US.</p>	<p>"Construction materials made primarily of steel or iron" (no specific percentage).</p> <p><i>Processed items are more likely to be considered a manufactured product.</i></p> <p>From melting through application of coatings in US.</p>	<p>Items that are "predominately" iron/steel (prospectively adopting BABA definition of 50 percent cost of components iron/steel standard).</p> <p>From melting through application of coatings in US.</p>
Manufactured Product	<p>Articles that have been processed into specific form or combined with other articles.</p> <p>Manufactured in US, from at least 60 percent cost of US-made components (disregard subcomponents)</p>	<p>Items produced through processes that alter the form or function of elements of the product in a manner that adds value and transforms the item into a new end-product.</p> <p>Manufactured in US, from 100 percent US components (but "end product" can be system) (disregard subcomponents)</p>	<p>Items produced through processes that alter the form or function of elements of the product in a manner that adds value and transforms the item into a new end-product.</p> <p>Broad waiver for decades, but all iron/steel materials within must be US-sourced.</p> <p>Waiver ending October 1, 2025, with sourcing requirement phased (assembly in US through Sep 30, 2026, then assembly plus 55 percent cost of US-made components).</p>
Construction Material	<p>Certain specified materials, including when have "minor additions." Does not include cementitious materials (unless pre-cast) and aggregates (such as gravel) per statutory exclusion.</p>	<p>Not covered (but often will be manufactured product)</p>	<p>Not covered but (but may be manufactured product)</p>

RESULTING KEY CONSIDERATIONS FOR GRANTEE JURISDICTIONS

Contract Solicitation Process

- Lead time for procurements
- Clear Buy America standards in RFPs, including information about *de minimis* waiver (up to lower of 5% of covered materials or \$1 million in covered materials)
- Consideration of alternative pricing for domestic/non-domestic sourcing in support of “unreasonable cost” waiver

Contract Management Process

- Compliance terms in agreements
- Guidance to prime contractor in performance regarding applicable standards
- Oversight of prime contractor compliance (checking their checks)

Data Collection and Record Retention

- Designed to demonstrate compliance to HUD (or other funders)

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