



FINANCIAL ASSISTANCE MEMORANDUM 2023-02

ACTION

MEMORANDUM FOR: DEPARTMENT OF COMMERCE GRANTS COUNCIL

FROM: Olivia J. Bradley
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: Procedures for Addressing the Applicability of Build America Buy America Act Requirements in Federal Financial Assistance Awards for Infrastructure

1. **Purpose.** Financial Assistance Memorandum (FAM) 2023-02 provides supplemental implementation guidance to Department of Commerce (DOC) Grants Officers on: (1) the application of a Buy America Preference¹ for Federal financial assistance awards for infrastructure; and (2) the process for waiving such a Buy America preference, consistent with applicable law and policy.² This guidance is consistent with Office of Management and Budget (OMB) M-24-02, *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (Attachment A). M-24-02 rescinds and replaces OMB M-22-11.³ Additionally, M-24-02 is intended to resolve conflicts between the earlier M-22-11 and subsequent guidance issued by OMB in part 184 of Title 2 of the Code of Federal Regulations (CFR).⁴ To the extent that any guidance provided in this memorandum conflicts with guidance in 2 CFR part 184, the guidance in part 184 prevails.

2. **Background.** 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 (BABA), Pub. L. No. 117-58, §§ 70901-27. BABA strengthens Buy America preferences associated with Federal financial assistance for infrastructure and will bolster America's industrial base, protect national security, and support high-paying jobs. BABA requires that the head of each covered Federal agency must ensure that none of the funds made available for a Federal financial assistance program for infrastructure are obligated for a project

¹ In accordance with 2 CFR 184.3, a "Buy America Preference means the "domestic content procurement preference" set forth in section 70914 of the Build America, Buy America Act, which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States..

² 2 CFR 184.7; Executive Order 14005, "Ensuring the Future is Made in All of America by All of America's Workers," 86 FR 7475 (Jan.28, 2021).

³ On April 18, 2022, OMB issued M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*. M-22-11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics.

⁴ 88 FR 57750 (Aug. 23, 2023).

unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.

Title 2 of the CFR was revised with the addition of a new part 184 (Buy America Preferences for Infrastructure Projects) and the revision of 2 CFR 200.322 (Domestic preferences for procurements) – both effective as of October 23, 2023. Part 184 provides guidance to Federal agencies on how to apply the “Buy America” preference set forth in BABA to Federal awards for infrastructure projects. As set forth in 2 CFR 184.3, an “infrastructure project” means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.⁵ Additionally, as provided in 2 CFR 184.4(a), the Buy America Preference applies to Federal awards where funds are appropriated or otherwise made available for infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the Federal award.

The revised 2 CFR 200.322 clarifies existing provisions within part 200 on domestic preferences for procurements made under Federal financial assistance awards and specifies that Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.

3. Applicability. DOC’s grant-making bureaus must include appropriate BABA terms and conditions in all awards for infrastructure projects in order to effectuate the requirements of BABA, 2 CFR part 184 and M-24-02 – see Appendix I to Attachment A, *Example of Award Term (Sample Language) — Required Use of American Iron, Steel, Manufactured Products, and Construction Materials*.⁶

In 2 CFR part 184, OMB identifies a limited set of infrastructure projects that will remain subject to certain requirements established in Memorandum M-22-11 – for specific details, see Appendix II to Attachment A, *Guidance for Projects Identified at 2 CFR 184.2(b)-(c) as Remaining Subject to OMB Memorandum M-22-11*.

4. Definitions. 2 CFR part 184 includes definitions for key terms, including infrastructure project, iron or steel products, manufactured products, construction materials, and materials identified in section 70917(c) of BABA (section 70917(c) materials). These definitions at 2 CFR 184.3 provide a common system for Federal agencies to distinguish between the product categories established under the statutory text in BABA. M-24-02 provides implementation guidance to assist in applying those definitions to financial assistance programs, projects, and awards.

5. Policy. The Economic Development Administration (EDA), National Institute of Standards and Technology (NIST), and National Oceanic and Atmospheric Administration (NOAA) grants offices are responsible for conferring with the appropriate program manager and the Federal Assistance Law Division (FALD) of the Department’s Office of the General Counsel regarding

⁵ See also 2 CFR 184.4(c) and (d).

⁶ See 2 CFR 184.4.

the applicability of BABA prior to making an award that may be considered a Federal financial assistance award for an infrastructure project.

6. Required Actions.

- a. Prior to issuing an award for activities that may be considered an infrastructure project, the Grants Office shall confer with the appropriate program manager and FALD to determine whether the BABA requirements apply.
- b. If the BABA requirements apply, the Grants Office shall incorporate a BABA award term into the terms and conditions of the award (*see* Appendix I to Attachment A, *Example of Award Term (Sample Language) — Required Use of American Iron, Steel, Manufactured Products, and Construction Materials*).
- c. If the BABA requirement applies and the program office believes that a waiver of the preference is appropriate, the waiver process outlined in Section 7 below shall be followed.

7. Waivers. BABA authorizes the head of a Federal agency to waive the BABA requirement when:

- a. Applying the Buy America preference would be inconsistent with the public interest (a “public interest waiver”);
- b. 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 (a “nonavailability waiver”); or
- c. The 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 25percent (an “unreasonable cost waiver”).⁷

See Attachment B, B1 and B2 for DOC’s BABA waiver process and applicable forms.

8. Contact. Questions regarding this FAM may be directed to John Geisen at jgeisen@doc.gov or (202) 482-0602.

9. Recission of FAM 2022-01. This FAM rescinds and replaces in its entirety FAM 2022-01, *Interim procedures for addressing the applicability of Build America Buy America Act requirements in Federal Financial Assistance Programs for Infrastructure*, dated May 06, 2022.

Attachments

A. OMB M-24-02

1. Appendix I: Example of Award Term (Sample Language) — Required Use of American Iron, Steel, Manufactured Products, and Construction Materials
2. Appendix II: Guidance for Projects Identified at 2 CFR 184.2(b)-(c) as Remaining Subject to OMB Memorandum M-22-11

B. DOC BABA Waiver Process

1. DOC BABA Waiver Process – Attachment B1 – Quick Steer
2. DOC BABA Waiver Process – Attachment B2 – FFA Waiver Submission Form

⁷ See 2 CFR 184.7.