

## Build America, Buy American (BABA) Act Guidelines

The Build America, Buy America (BABA) Act may be applicable for projects funded under Section 319(h) of the Clean Water Act provided to Kentucky through the Environmental Protection Agency.

If your project is determined to be applicable under the BABA Act, the Subrecipient must be equipped to fully comply with all administrative requirements associated with the provisions of the BABA Act, Public Law No. 117-58, §§ 70901-27. Therefore, Subrecipients must prepare contracts and notices of award to include required BABA language (Appendix A). Subrecipients are also required to perform oversight duties associated with BABA provisions. Any request for payment must include a Build

America, Buy America Report of Compliance Form EEC-002 (Appendix B) signed by the subrecipient, the Contractor Certificate of Compliance with Build America, Buy America Form EEC-003 (Appendix C) signed by the applicable contractor or subcontractor and supporting documentation.

The BABA Act, enacted as part of the Infrastructure Investment and Jobs Act on November 15, 2021, established a domestic content procurement preference for all Federal financial assistance obligated for public infrastructure projects after May 14, 2022. The domestic content procurement preference requires that all iron, steel, manufactured products, and construction materials used in covered public infrastructure projects are produced in the United States; therefore, it must be determined on an individual basis if a given project meets the definition of “public infrastructure.” Public Infrastructure projects should include, 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 transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.

The term “infrastructure” is interpreted broadly and is considered in the description provided in the paragraph above as illustrative and not exhaustive.

There are two active general applicability waivers available for use:

### Small Grants Waiver

A grant award that does not exceed the Simplified Acquisition Threshold of currently \$250,000.00 (Federal Dollars) and is not anticipated to exceed the Simplified Acquisition Threshold for the life of the award is not subject to the provisions of Buy America.

### De Minimis Waiver

The Buy American preference for iron and steel, manufactured products, and construction materials is waived for infrastructure project purchases, totaling up to 5 percent of the total applicable project costs, up to a maximum of \$1,000,000.00. Applicable project costs are defined as material costs subject to the Buy America preference.

# Required Contract Language

Any contracts that may include a project for infrastructure, including subcontracts, shall include the following terms:

## **Buy America Domestic Procurement Preference:**

As required by Section 70914 of the Bipartisan Infrastructure Law (also known as the Infrastructure Investment and Jobs Act), P.L. 117-58, on or after May 14, 2022, none of the funds under a federal award that are part of 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, unless subject to an approved waiver. The requirements of this section must be included in all subawards, including all contracts and purchase orders for work or products under this program.

Recipients of an award of Federal financial assistance are hereby notified that none of the funds provided under this award may be used for a project for infrastructure unless:

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 that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and
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.

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project.

For further information on the Buy America preference, please visit the specific Federal funding agencies BABA website.

## **WAIVERS**

When necessary, recipients may apply for, and the Federal funding agency may grant, a waiver from these requirements, subject to review by the Made in America Office. The Federal funding agency may waive the application of the domestic content procurement preference in any case in which it is determined that one of the below circumstances applies:

1. Non-availability Waiver: the 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;

2. Unreasonable Cost Waiver: 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 25 percent; or
3. Public Interest Waiver: applying the domestic content procurement preference would be inconsistent with the public interest.

There may be instances where an award qualifies, in whole or in part, for an existing general applicability waiver. If the specific financial assistance agreement, infrastructure project, or non-domestic materials meets the criteria of an existing general applicability waiver within the limitations defined within the waiver, the recipient is not required to request a separate waiver for non-domestic materials.

If a general applicability waiver does not already apply, and a recipient believes that one of the above circumstances applies to an award, a request to waive the application of the domestic content procurement preference may be submitted to the financial assistance awarding officer in writing. Waiver requests shall include the below information. The waiver shall not include any Privacy Act information, sensitive data, or proprietary information within their waiver request. Waiver requests will be posted to the specific Federal funding agencies website and are subject to public comment periods of no less than 15 days. Waiver requests will also be reviewed by the Made in America Office.

1. Waiver type (public interest, non-availability, or unreasonable cost).
2. Recipient or subrecipient name and Unique Entity Identifier (UEI).
3. Federal agency who issued the award.
4. Federal financial assistance listing name and number.
5. Federal financial assistance title of project.
6. Federal Award Identification Number (FAIN).
7. Federal financial assistance funding amount.
8. Total estimated infrastructure expenditures, including all Federal and non-federal funds (to the extent known).
9. Infrastructure project description(s) and location(s) (to the extent known).
10. List of iron or steel item(s), manufactured goods, and construction material(s) the recipient seeks to waive from Buy America preference requirements. Include the name, cost, countries of origin (if known), and relevant PSC or NAICS code for each.
11. A certification that the 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.
12. A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach) 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.
13. Anticipated impact if no waiver is issued.

Approved waivers will be posted on the Federal funding agencies waivers website; recipients requesting a waiver will be notified of their waiver request determination by an awarding officer.

Questions pertaining to waivers should be directed to the financial assistance awarding officer.

## DEFINITIONS

“Construction materials” includes an article, material, or supply that consists of only one of these items:

- Non-ferrous metals;
- Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- Glass (including optic glass);
- Fiber optic cable (including drop cable);
- Optical fiber;
- Lumber;
- Engineered wood; and
- Drywall.

“Construction Materials” does **not** include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

“Domestic content procurement preference” means all iron and steel used in the project are produced in the United States; the manufactured products used in the project are produced in the United States; or the construction materials used in the project are produced in the United States.

“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 transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. Infrastructure includes facilities that generate, transport, and distribute energy.

“Project” means the construction, alteration, maintenance, or repair of infrastructure in the United States.

Contractors and subcontractors must submit the “EEC-003 – Contractor Certificate of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts” form, to the awarding entity. Contractors and subcontractors certify that no federal financial assistance funding for infrastructure projects will be provided unless all the iron, steel, manufactured projects, and construction materials used in the project are produced in the United States. Contractors and subcontractors shall also disclose any use of federal financial assistance for infrastructure projects that do not ensure compliance with BABA domestic preference requirement. Such disclosures shall be forwarded to the awarding entity who in turn will forward the disclosures to the Federal funding agency.”

# Subrecipient Report of Compliance with Build America, But America Provisions for Federally Assisted Contracts

*This form is to be submitted with each request for reimbursement of funding by the subrecipient and as requested by the Energy and Environment Cabinet.*

Subrecipient Name	
Contract Number	
Project Description	

Billing Period		To	
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## SUBRECIPIENT STATEMENT:

I confirm to the best of my knowledge and belief that we are in compliance with the requirements of Pub. L. No. 117-58, §§ 70901-27 as referenced in the following requirements of the Build America, Buy America (BABA) Act and the grant agreement between the Federal funding agency and the Commonwealth of Kentucky.

**Signature (Subrecipient Representative)**

**Title**

## Date

The Build America, Buy America Act, enacted under Division G, Title IX of the Infrastructure Investment and Jobs Act (IIJA), applies a domestic content procurement preference requirement (Buy America Requirement) to federally funded public “infrastructure projects.” Per Section 70914 of the IIJA funds may not be obligated for an “infrastructure project” unless all of the iron and steel, manufactured products, and construction materials used in the project was produced in the United States or an applicable a waiver to the domestic content procurement preference requirement is used.

## SUBRECIPIENT RESPONSIBILITY

The subrecipient is responsible for ensuring the Buy America Requirement flows down to all contracts, subcontracts, and purchase orders for work performed under the proposed infrastructure project. Subrecipients of awards containing the Buy America Requirement must ensure that absent a waiver none of the funds provided under their award may be used for a project for infrastructure unless:

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 that meets or exceeds this standard has been established

under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and

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.

The Buy America Requirement only applies to articles, materials, and supplies that are consumed in, incorporated into, or permanently affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies brought into the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America Requirement apply to equipment and furnishings that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project.

#### **COMPLIANCE VERIFICATION**

Buy America requirements must flow down to all contracts, subcontracts and purchase orders for work performed under the infrastructure project; therefore, subrecipients must maintain certifications or equivalent documentation for proof of compliance that those articles, materials, and supplies that are consumed in, incorporated into, affixed to, or otherwise used in the infrastructure project, not covered by a waiver or exemption, are produced in the United States.

The Certificate of Compliance form (Form EEC-003) must be provided by contractor and subcontractors from the suppliers or manufacturers of the iron and steel, manufactured products, and construction materials and flow up from all contractors and subcontractors to the subrecipient.

Subrecipients must keep these certifications with the award/project files and be able to produce upon request from the Federal funding agency, Energy and Environment Cabinet, auditors or Office of Inspector General. Copies of the Certificate of Compliance form (Form EEC-003) may be requested from the Energy and Environment Cabinet.

## Contractor Certificate of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts

*Prime Contractors and subcontractors should complete and sign a copy of this form and submit with each payment request to the Energy and Environment Cabinet (EEC). Prime contractors must also attach receipts and/or other documentation with this form showing evidence of Buy America compliance.*

Contractor Name			
Contractor Address			
Project Name			
Contract Number			
Contract Amount			
Invoice Period		To	

This certification is to be utilized by prime contractors and subcontractors who have been awarded contracts funded through the Energy and Environment Cabinet and subject to the Buy America provisions of the Infrastructure Investment and Jobs Act (Pub. L. No 117-27). Buy America provisions state:

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 that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and
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.

