

SPECIAL ATTENTION

BUILD AMERICA, BUY AMERICA

On November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) was signed into law (the Bipartisan Infrastructure Law, or BIL), which includes the Build America, Buy America Act (BABA) (Pub. L. No. 117-58). BABA strengthens existing Buy America regulations and specifically states that no Federal funds made available for infrastructure may be obligated for a project unless all the iron, steel, and Construction Materials permanently incorporated into the project are produced in the United States. Any project within the scope of a finding, determination, or decision under the National Environmental Policy Act (NEPA), regardless of the funding source for the individual project, are subject to BABA regulations if at least one contract within the scope of the NEPA decision is funded Federally.

This project is subject to BABA and will require certification of compliance from the Contractor in the following item categories (an item, article, material, or supply shall only be classified into one of the categories below):

1. **Iron and Steel:** All iron and steel permanently incorporated into the project must be produced in the United States. The only exception to this requirement is the production of pig iron and the processing, pelletizing, and reduction of iron ore, which may occur in another country. This means all manufacturing processes, from the initial melting stage through the application of coatings, must occur in the United States.
 - Steel products include, but are not limited to, structural steel, piles, reinforcing steel, structural plate, steel culverts, guardrail, steel supports for signs, signals (mast arms), and luminaires.
 - Iron products include, but are not limited to, cast iron frames, grates, and detectable warning devices.

Existing De Minimis Use Exemption for Iron and Steel: The requirements of the law and regulations do not prevent a minimal use of foreign steel and iron materials if the cost of such materials used does not exceed one-tenth of one percent (0.1%) of the total construction contract price or \$2,500.00, whichever is greater.

2. **Construction Materials:** Items, articles, materials, or supplies that consist of only one of the items listed below:
 - i. Non-ferrous metals;
 - ii. Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
 - iii. Glass (including optic glass);
 - iv. Fiber optic cable;
 - v. Optical fiber;
 - vi. Lumber;
 - vii. Engineered wood; and
 - viii. Drywall.

Note: Minor additions of articles, materials, supplies, or binding agents to a Construction Material do not change the categorization of the Construction Material.

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All Construction Materials permanently incorporated into the project must be produced in the United States. For the Construction Material to be considered “produced in the United States,” it must meet the following standards:

- i. Non-ferrous metals. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
- ii. Plastic and polymer-based products. 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.
- iii. Glass. All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
- iv. Fiber optic cable (including drop cable). All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding, and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic, and polymer-based products, or any others.
- v. Optical fiber. All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
- vi. Lumber. All manufacturing processes, from the initial debarking through treatment and planing, occurred in the United States.
- vii. Drywall. All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
- viii. Engineered wood. All manufacturing processes, from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

A Certificate of Compliance, conforming to the requirements of Section 106.04, shall be furnished for all above materials.

For iron and steel materials and for Manufactured Products produced predominantly of iron or steel or a combination of both*, records to be maintained by the Contractor for compliance with this Special Attention shall include a signed mill test report and a signed certification by each supplier, distributor, fabricator, and manufacturer that has handled the materials affirming that every process, including the application of a coating, performed on the iron or steel has been carried out in the United States of America, except as allowed by the de minimis use exemption and this Special Attention. The lack of these certifications will be justification for rejection of the material provided.

**Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50% of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products, castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of the iron or steel components.*

For Construction Materials, the manufacturer’s or producer’s certificate of compliance must identify where the Construction Material was produced and attest specifically to compliance with BABA.

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Upon completion of the project, the Contractor shall certify in writing as to compliance with BABA and provide the total project delivered cost of all foreign steel and iron or Construction Materials provided under this requirement that are permanently incorporated into the project. The form for this certification is entitled “Build America, Buy America Certificate of Compliance” and can be found on the NHDOT website (www.dot.nh.gov/doing-business-nhdot/contractors).

Manufactured Products

FHWA has a longstanding Buy America nationwide General Applicability Waiver for Manufactured Products. Manufactured Products are defined as items, articles, materials, or supplies that have been: (1) processed into a specific form and shape; or (2) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. As of the date of this Special Attention, FHWA has not modified the waiver, and the waiver continues to apply to Manufactured Products that are not predominantly of iron or steel or a combination of both (see note above (*) for clarification regarding this statement).

Public Interest Waiver of Buy America Requirements for De Minimis Costs and Small Grants

The US Department of Transportation issued a public interest Waiver of Buy America Requirements for De Minimis Costs and Small Grants. The waiver is intended to ensure that state DOTs make efficient use of resources by focusing domestic sourcing efforts on products that provide the greatest manufacturing opportunities for American workers and firms. The waiver is applicable to contracts advertised on or after August 16, 2023, and applies to Manufactured Products and Construction Materials. The “De Minimis Costs” portion of the waiver (first bullet below) does not apply to iron and steel, which are already subject to a separate de minimis use exemption as detailed herein. The Waiver for De Minimis Costs and Small Grants exempts Manufactured Products and Construction Materials produced outside the United States for which:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project (De Minimis Cost portion); or
- The total amount of Federal financial assistance applied to the Contract, through awards or subawards, is below \$500,000 (Small Grants portion).

De Minimis Cost Clarification: The obligation to track costs throughout the life of the contract is the Contractor’s responsibility. The term “total applicable costs” is defined as the total actual final material cost of the compliant and non-compliant iron and steel, Manufactured Products, and Construction Materials. Tracking applicable costs is critical to compliance, especially when non-compliant materials are being used, as actual costs change throughout the life of a contract due to change orders, quantity adjustments, material overruns and underruns, etc. NHDOT will compare the declared value (total actual final material cost) of non-compliant Construction Materials to the total actual final material cost of the project upon submission of the required declaration at the end of the project.

Small Grants Clarification: Tracking is also very important as it pertains to the Small Grants portion of the waiver. This portion of the waiver utilizes the total actual final construction cost (materials, equipment, labor, etc.) of the project, including adjustments and change orders that occur throughout construction, to determine whether the project is eligible for exemption. At the onset, the awarded contract value will be used to determine applicability. The Contractor is required to track costs throughout construction to ensure eligibility for the exemption of BABA requirements continues for the life of the contract.