

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 1 of 9

Date: February 21, 2024

### 2024 New Build America, Buy America (BABA) Requirements

The purpose of this Bulletin is to provide information and instruction regarding revisions to Standard Specifications 101.02 and 106.11. Changes to the specifications were made to comply with the supplemental guidance issued by the Office of Management and Budget in Washington, D.C. as contained in [Memorandum M-24-02](#) released October 25, 2023, and based on the [Notification of Final Guidance/Final Rule](#) as published in the Code of Federal Regulations on August 23, 2023.

The guidance provided in this Bulletin should be followed if your project contains either of the Specifications below:

- \$500,000 or more of federal funding and a construction phase federal funding obligation date on or after October 23, 2023 - ([Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing \\$500,000 or More in Federal-Aid Highway Funding](#)):
  - o Specification will require full Buy America (BA) and Build America, Buy America (BABA) requirements apply for iron or steel, manufactured products, and construction materials.
- Between \$1 and \$499,999.99 of federal funding and a construction phase Federal Funding Authorization Date on or after October 23, 2023 - ([Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing Federal-Aid Highway Funding in the Amount Less Than \\$500,000](#)):
  - o Full Buy America (BA) compliance required for iron or steel. BABA requirements for manufactured products do apply, but BABA requirements for construction materials do not apply.

### Timeline of Buy America and Build America, Buy America Requirements

- **Projects advertised prior to 11/10/2022**
  - o Buy America requirements for Iron and Steel Apply
  - o Build America, Buy America requirements do not apply
  - o Follow the applicable Standards and Specifications 106.11 Buy America requirements as included on the project based on the advertisement date and the applicable Field Materials Manual Special Notice to Contractors
- **Projects advertised on or after 11/10/2022 but with a federal funding authorization date prior to 10/23/2023**
  - o Buy America requirements for Iron and Steel Apply
  - o Preliminary Build America, Buy America requirements Apply

# CONSTRUCTION BULLETIN

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 2 of 9

Date: February 21, 2024

- Follow 2022 Standards and Specification and XX Field Materials Manual Special Notice to Contractors
- **Projects advertised on or after 10/23/2023 with the following specifications included:**
  - [Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing \\$500,000 or More in Federal-Aid Highway Funding](#)
  - [Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing Federal-Aid Highway Funding in the Amount Less Than \\$500,000](#)
  - Buy America requirements for Iron and Steel apply
  - Final Build America, Buy America requirements apply

### Preliminary Build America, Buy America Background and Guidance

(For projects that advertised on or after November 10, 2022, but with a federal funding obligation date prior to October 23, 2023)

With the passage of the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America (BABA) Act Pub. L. No. 117-58, §§ 70901-52 and 2 CFR Parts 184 and 200: All manufacturing processes on eligible construction materials and manufactured products permanently incorporated into the work must have occurred in the United States.

Construction materials listed in the preliminary guidance include:

- Non-ferrous metals;
- Plastic and polymer-based products (including polyvinyl chloride [PVC]);
- Glass;
- Lumber; and
- Drywall.

Items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.

The federal Office of Management and Budget (OMB) issued preliminary guidance to federal agencies (including the Federal Highway Administration) via Memo M-22-11 on April 18, 2022. This preliminary guidance expanded the previous steel and iron Buy America (BA)

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 3 of 9

Date: February 21, 2024

requirements to additional materials including manufactured products and construction materials. The [FHWA's 1983 Buy America Final Rule](#), waives the application of Build America, Buy America to manufactured products that do not include steel and iron. However, Buy America requirements apply to steel or iron in components of manufactured products (i.e. steel wire mesh or steel reinforcing components of precast reinforced concrete products).

The Contractor shall obtain and supply to the Project Engineer upon delivery, a certification from the supplier of each manufactured product that the iron/steel used in the manufactured product has been produced in the United States.

CDOT issued a specification to be used on projects with federal funding that advertised on or after November 10, 2022. Along with the specification, the Special Notice to Contractors section of the Field Materials Manual (FMM) was revised to include BABA guidance related to the preliminary guidance in M-22-11.

**Note:** The preliminary guidance does not allow for any non-compliant construction materials or manufactured products (also known as de minimis).

### Final Build America, Buy America Guidance and Background

**For projects with a federal funding authorization date on or after October 23, 2023**

The OMB published final guidance on BABA requirements on October 25, 2023 via [Memo M-24-02](#), which refers to [2 CFR 184.02](#) for applicability dates.

With the passage of the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. No. 117-58, which includes the Build America, Buy America (BABA) Act Pub. L. No. 117-58, §§ 70901-52 and 2 CFR Parts 184 and 200: All manufacturing processes on eligible construction materials and manufactured products permanently incorporated into the work must have occurred in the United States.

### *Categorization of articles, materials, and supplies.*

1. An article, material, or supply should only be classified into one of the following categories:
  - i. Iron or steel products;
  - ii. Manufactured products;

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 4 of 9

Date: February 21, 2024

- iii. Construction materials; or
  - iv. Section 7091(c) materials.
2. An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the categories listed 1. of this section. The classification of an article, material, or supply as falling into one of the categories listed in paragraph 1. must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project. In general, the work site is the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated.
3. An article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified.

### *Construction Materials*

Build America, Buy America (BABA) requirements apply to the following construction materials incorporated into infrastructure projects. Each listed construction material is followed by material-specific manufacturing process criteria that is necessary to be considered “produced in the United States.”

- Non-ferrous metals. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States;
- Plastic and polymer-based products (including polyvinylchloride [PVC], composite building materials, and polymers used in fiber optic cables). 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;
- Glass (including optic glass). All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States. See section 106.11(d) of the CDOT Specifications for additional requirements related to glass beads for pavement marking;
- 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;
- Optical fiber. All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States
- Lumber. All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States;

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 5 of 9

Date: February 21, 2024

- 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; and
- 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.

**Note 1:** Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

**Note 2:** Items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.

**Please note that the new Build America, Buy America guidance for construction materials and manufactured products does not alter or change the current Buy America documentation requirements for iron and steel per CDOT Specifications Section 106.11.**

### *Manufactured Products*

The FHWA's 1983 Buy America Final Rule (see <https://www.fhwa.dot.gov/programadmin/contracts/112583.cfm>) waive the application of Build America, Buy America requirements for manufactured products that do not include steel and iron components. However, Buy America requirements apply to steel or iron components of manufactured products (i.e. steel wire mesh or steel reinforcing components of precast reinforced concrete products).

### *Section 70917(c) Materials*

Raw materials such as cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives are considered Section 7091(c) materials and are excluded from Build America, Buy America requirements.

### *Documentation*

Before the permanent incorporation into the project and before payment for all eligible construction materials, the Prime Contractor shall obtain a certification from each supplier, distributor, fabricator, and manufacturer that has handled the construction material and submit it to the Project Engineer. This certification shall identify that every material-specific manufacturing process as listed in Section 6.1 of the Field Materials Manual Special

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 6 of 9

Date: February 21, 2024

Notice to Contractors either has or has not been carried out in the United States of America and shall attest specifically to Build America, Buy America compliance.

In the case that eligible construction materials are permanently incorporated into the project, the Prime Contractor shall maintain and submit on a monthly basis, a new CDOT Form #1600, Prime Contractor's Certificate of Compliance summarizing the Item Description, CDOT Bid Item Number, Manufacturer Name, Date and Quantity delivered, Bid Item Unit, Bid Item Unit Cost, and total cost of all eligible construction materials, manufactured products, and iron or steel. The completed Form #1600(s) shall be kept in the project files and shall be submitted as part of the material final documentation package.

In the case that no eligible construction materials are permanently incorporated into the project, the Prime Contractor shall maintain and submit on a monthly basis, a new CDOT Form #1610, Non-Applicable Projects: Build America, Buy America (BABA), certifying that no construction materials subject to Build America, Buy America requirements as defined in this section will be permanently incorporated into the project. The completed Form #1610(s) shall be kept in the project files and shall be submitted as part of the material final documentation package.

Form #1600 or Form #1610 does not relieve the Prime Contractor of providing the necessary Build America, Buy America supplier certifications prior to permanent incorporation into the project or before payment for the material. The Prime Contractor shall allow the State, FHWA, and their representatives access to the Buy America and Build America, Buy America certifications and supporting documentation upon request. The lack of these certifications will be justification for rejection of the construction material.

### *FHWA General Applicability Waivers*

On August 16, 2023, CDOT was notified by FHWA of two approved waivers related to BABA requirements. These waivers include:

1. Small Grants - Less than \$500K in federal funding - BABA requirements for Manufactured products and construction materials do not apply - became effective on August 16, 2023
2. De Minimis - Allowance for some foreign construction materials/manufactured products to be incorporated in the project - became effective for projects with federal funding authorization date on or after August 16, 2023.

### *Waiver 1 - Small Grants:*



# CONSTRUCTION BULLETIN

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 7 of 9

Date: February 21, 2024

The OMB final BABA requirements apply to projects that contain \$500,000 or more in federal-aid highway funding.

Design Project Managers should consult with their respective Region Business Office or HQ Business Office to determine the type and amount of federal-aid highway funding that has been or will be used in the projects. The \$500,000 threshold is to be based on the aggregate (total amount) of federal aid funding used or to be used in all phases of the project including Construction and any preliminary engineering phases (e.g., Right-of-way, Utilities, Design, Environmental, or Miscellaneous).

Projects with \$500,000 or greater in federal-aid highway funding:

- Buy America for iron or steel AND Build America, Buy America requirements apply

Projects with less than \$500,000 in federal-aid highway funding:

- Buy America for iron or steel requirements apply

### *Waiver 2 - De Minimis:*

The BABA requirements will not prevent a minimal use of foreign construction materials, provided the total cost of non-compliant materials, including delivery to the project, of all such construction materials does not exceed \$1,000,000 or five percent (5%) of the total applicable project costs, whichever is lesser.

Total applicable project costs are defined as the cost of materials (including the cost of any manufactured products) used in the project that are subject to Buy America and/or Build America, Buy America requirements. When there are foreign construction materials permanently incorporated into the project, the Contractor shall provide documentation of the project delivered cost of the non-compliant materials to the Project Engineer before permanent incorporation or payment. Form #1600 shall be used to track the total applicable project cost of all materials subject to Buy America and/or Build America, Buy America requirements. The foreign construction material minimal use threshold percentage of five percent shall not be exceeded in any given month.

### *Project Level Waivers*

The Federal Highway Administration is responsible for processing and approving all waivers, including waivers requested by recipients and on behalf of subrecipients. More information on Buy America waivers can be found in the Field Materials Manual Special Notice to Contractors.

# CONSTRUCTION BULLETIN

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 8 of 9

Date: February 21, 2024

If a Contractor desires to pursue a waiver they shall notify the CDOT Project Engineer in writing who will then submit it to the CDOT Materials & Geotechnical Services Unit, Pavement Design and Documentation Services Program. The Pavement Design and Documentation Services Program will review it and forward it to the FHWA Division Office for consideration.

A Contractor's decision to pursue any waivers on the project shall not waive or otherwise nullify any provisions of the Contract. In addition, the time to obtain a waiver shall be considered a non-excusable, non-compensable delay and Liquidated Damages (per Subsection 108.09) will be enforced should the Contract Time (original or as amended) expire due to the approval or non-approval of a waiver.

The Contractor will not be entitled to an extension of contract time due to the approval or non-approval of a waiver and no such claim will be considered.

### Funding Types and Amounts

Project design managers will also have to determine the types and amounts of federal funding by consulting with their respective Business Office. They will need to determine the total amount of federal funding in the project to determine the level of compliance necessary. This is the sum of ALL Phases (RUDEM through Construction).

- \$500,000 or more of federal funding ([Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing \\$500,000 or More in Federal-Aid Highway Funding](#)):
  - o Full Buy America (BA) and Build America, Buy America (BABA) requirements apply for iron or steel, manufactured projects, and construction materials.
- Between \$1 and \$499,000 of federal funding ([Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements for Projects Containing Federal-Aid Highway Funding in the Amount Less Than \\$500,000](#)):
  - o Full Buy America (BA) compliance required for iron or steel. BABA requirements do not apply.
- \$0 of federal funding ([Revision of Sections 101 and 106 - Buy America and Build America, Buy America Requirements - No-Federal Aid](#)):
  - o No Buy America (BA) or Build America, Buy America (BABA) requirements apply.



# CONSTRUCTION BULLETIN

## 2024 New Build America, Buy America (BABA) Requirements

2024 Number 1, Page 9 of 9

Date: February 21, 2024

- Note: the domestic source of glass beads requirement still applies and the project could have the Country of Origin specification included if the project budget is greater than \$500,000 and is exclusively state-funded.

Level of compliance for final BA/BABA guidance will be addressed by which of the three specifications is used.

### Questions and links

CDOT Buy America webpage where updated the Specification and Special Notice to Contractors will be posted:

<https://www.codot.gov/business/designsupport/buy-america-requirements>

For more information on these requirements and for examples of Form 1600 and 1610, please see the applicable version of the CDOT Field Materials Manual Special Notice to Contractors.

Please contact the CDOT Pavement Design and Documentation Unit with any related questions, concerns, or suggestions at

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