

Buy America Update

Construction Materials Waiver for Certain Contracts and Solicitations

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Overview

- BABA Construction Materials Domestic Preference Requirement
- DOT temporary waiver – Covers pre-November 10, 2022 obligations
- **New:** DOT waiver for certain contracts and solicitations

The contents of this presentation do not have the force and effect of law and are not meant to bind the public in any way. This presentation is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Construction Materials Requirement

- Taxpayers expect that their public works infrastructure will be **produced in the United States by American workers.**
- BABA **maximizes the use of American made materials** in all federally funded projects to help American businesses compete in strategic industries and help America's workers thrive, while at the same time **advancing crucial infrastructure projects** in the United States.



Construction Materials Requirement

- Statutory effective date: May 14, 2022
- DOT transition period: Temporary waiver delayed effect for funds obligated before November 10, 2022.
- All FTA grants obligated on or after November 10 have required construction materials produced in the United States.



Construction Materials Requirement (some more detail)

- **BABA (enacted as part of the Bipartisan Infrastructure Law) added a new construction materials requirement. IIJA 70914(a).**
- Applies based on date of grant obligation (Nov 10, 2022)
- Definition (IIJA 70911(5))
 - Non-ferrous (non-iron) metals
 - Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables)
 - Glass (including optic glass)
 - Lumber
 - Drywall
 - Does *not* include cement or cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives
- “Produced in the United States” (IIJA 70914(a))
 - OMB Memorandum M-22-11 (April 18, 2022), Initial Implementation Guidance
 - Awaiting final guidance
 - “Final manufacturing process and the immediately preceding manufacturing stage”

Current as of February 7, 2023. Subject to change pending final guidance from OMB



New, limited waiver for certain contracts and solicitations

- BABA applies based on the date a grant is obligated: on or after Nov 10, 2022.
- There are some transitional circumstances that required additional consideration.
 - FTA grantees frequently use pre-award authority or have long contracting lead times for complex construction projects.
 - FTA also funds multi-year projects through multiple grants, some before and some after Nov. 10, 2022.
- To complete infrastructure projects in a timely manner while implementing the new Buy America requirements, the Department of Transportation has now issued **two narrowly targeted waivers to transition preexisting projects** to full implementation of the construction materials requirement.



BABA Waiver – The “Safe Harbors”

- BABA applies based on the date a grant is obligated: **BABA applies** to construction materials covered by grants **obligated on or after Nov 10, 2022**.
- Under the transitional waivers, there are two relatively straightforward situations when the construction materials requirement does not apply:
 - **Scenario 1:** Projects with All Construction-Related Grants Obligated Before Nov 10, 2022
 - **Scenario 2:** Construction Materials Procured If:
 - »The grant is obligated on or after Jan 30, 2023, AND
 - »The contract was executed before May 14, 2022.

Other scenarios are more complicated, and you should consult your Regional Office.



BABA Construction Materials Requirements

Grant Obligation Date	Does Construction Materials Requirement Apply?	Category
Before November 10, 2022	NO	Category 1
On or after January 30, 2023	YES, unless the new waiver applies.	Category 2
November 10, 2022 - January 29, 2023	YES, with very limited exceptions in new waiver. Ask FTA.	Category 3

Category 1: Construction Activities Funded *Only* Through Grants Obligated Before November 10, 2022

- Construction Materials Requirements DO NOT apply, **regardless of the date the contract is executed.**
 - DOT's temporary waiver applied at the time of obligation and continues to apply.



Categories 2 and 3: New Contracts and Solicitations Waiver Summary

Key Factors

- Timing of grant obligation
- Timing of contract award
- Sometimes timing of solicitation
- Sometimes timing of construction material delivery

Benefits: Allows some previously awarded contracts and some previously published solicitations to move forward without changes or re-soliciting work

Made in **U.S.A.** is always the best answer!

Category 2:

FTA Grants Obligated On or After January 30, 2023

- January 30, 2023 is the effective date of DOT's contracts and solicitations waiver
- For grants obligated on or after January 30, 2023, the construction materials requirement is waived for:
 1. Any contract executed before May 14, 2022
 2. Any contract executed on or after May 14 and before November 10, 2022, but
 - ONLY for construction materials a contractor takes delivery of before October 1, 2024
 3. Any contract executed on or after November 10, 2022, and before March 10, 2023, but—
 - ONLY if the contract results from a solicitation published prior to May 14, 2022, *AND*
 - ONLY for construction materials a contractor takes delivery of before October 1, 2024.



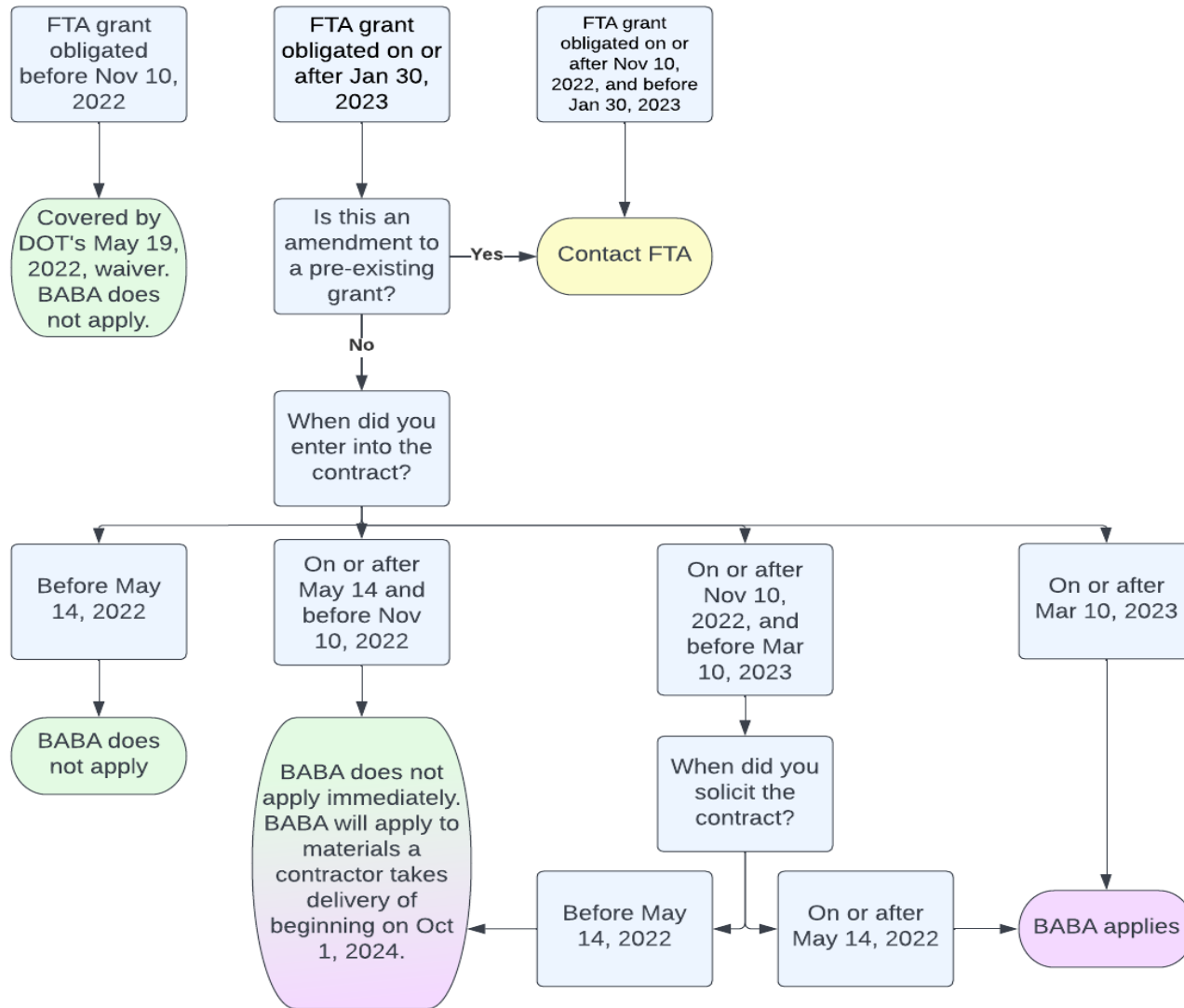
Category 3:

FTA Grants Obligated On or After November 10, 2022, and Before January 30, 2023

- These grants were awarded after the expiration of DOT's temporary waiver and before the publication of DOT's contracts and solicitations waiver.
- Presumptively, these grants must comply with the construction materials requirement. There are, however, narrow exceptions delineated in the waiver for certain contracts awarded after the effective date of the waiver.
- A grantee using such a grant to fund construction materials purchases should contact its FTA regional office for technical assistance.



Construction Materials Flowchart



Construction Materials Action Matrix

		Date of Grant(s) Obligated for Construction Activity		
		On or before Nov. 9, 2022	Nov. 10, 2022 – Jan. 29, 2023	Jan. 30, 2023 and Beyond
Date of Contract Execution for Construction Materials	On or before May 13, 2022	EXEMPT from BABA CM Requirement	Consult FTA	EXEMPT from BABA CM Requirement
	May 14, 2022 – Nov. 9, 2022			Special Rule (Consult FTA)
	Nov. 10, 2022 – Mar. 9, 2023			Special Rule (Consult FTA)
	Mar. 10, 2023 and Beyond		MUST COMPLY with BABA CM Requirement	



Special situations

- Construction costs funded by Category 2 or 3 grants
- Change Orders
- Contract Amendments
- Grant Amendments

In these and other special situations, please consult FTA.

URLs

- U.S. DOT waiver of BA for construction materials (expired):
<https://www.federalregister.gov/documents/2022/05/25/2022-11195/temporary-waiver-of-buy-america-requirements-for-construction-materials>
- Waiver full text: <https://www.transportation.gov/mission/office-secretary/office-policy/transportation-policy/waiver-buy-america-requirements-for-construction-materials>
- OMB Memorandum M-22-11, Initial Implementation Guidance:
<https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
- FTA page with links: <https://www.transportation.gov/regulations-fr/notices/2022-23198>



Key Dates

November 15, 2021	IIJA becomes law
May 14, 2022	Original, statutory date for federal agencies to begin applying construction materials requirement
November 10, 2022	Expiration of DOT's temporary waiver to ease transition period; expiration of window to complete certain contract awards
January 30, 2023	Publication date of DOT's contracts and solicitations waiver
March 10, 2023	Expiration of window to complete certain other contract awards
October 1, 2024	Construction materials deliveries under certain contracts must comply with construction materials requirement



Conclusion

- We know there will be questions during this transitional phase.
- When in doubt:
 1. Buy America
 2. Contact your FTA regional office

