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Buy American? Buy America? Build America?

An Introduction to Domestic Procurement Preferences in Federal Financial Assistance for North Carolina's Counties and Municipalities

Connor Crews

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Connor Crews is an assistant professor at the School of Government specializing in local government finance law.

Many of North Carolina's local governments have been awash in federal funding since the onset of the COVID-19 pandemic.[1] Yet the complexity and quantity of rules applicable to the expenditure of those monies has not decreased since the pandemic began. Federal funds arrived in local government coffers, as they always have, with significant "strings attached."[2]

Since at least 1933, Congress has in most cases required the federal government to prefer the acquisition of American-made goods and materials over foreign-made items when it purchases goods or contracts for construction services.[3] Over time, Congress has tied a similar "string" to certain types of federal aid that the federal government offers to non-federal entities like state and local governments, requiring many recipients of federal financial assistance to make comparable procurement preferences when spending federal monies.[4] This bulletin introduces North Carolina's municipalities and counties to common types of these "domestic procurement preferences" that they may encounter when seeking federal aid.[5]

"Domestic procurement preferences" vary in their scope and application, but they all operate under the same basic premise: preferential treatment for domestically made goods and materials will increase demand for such items, an increase in demand will encourage investment in domestic manufacturing, and an investment in domestic manufacturing will encourage the creation of stable jobs in the United States.[6] This bulletin does not address whether that premise is sound or whether domestic procurement preferences make good public policy.[7] Instead, it

1. Under the American Rescue Plan Act of 2021, every municipality and county in North Carolina is entitled to receive distributions of federal financial assistance from the Coronavirus Local Fiscal Recovery Fund. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 603, 135 Stat. 4, 228 (2021) (ARPA). Allocations from the Local Fiscal Recovery Fund to units of local government in North Carolina have totaled approximately $3.4 billion. *See* N.C. Pandemic Recovery Off., Funding Totals: State and Local Fiscal Recovery Funds (last visited Jan. 10, 2023). Many units of local government have also received indirect allocations of federal aid under the American Rescue Plan Act through the North Carolina General Assembly's disbursal of monies from the $5.4 billion allocation that the State of North Carolina received from the Coronavirus State Fiscal Recovery Fund. *See* ARPA, § 602; S.L. 2021-25, § 2.1 (creating the State Fiscal Recovery Fund to maintain funds received from the Coronavirus State Fiscal Recovery Fund); S.L. 2021-180 (allocating portions of monies received from the Coronavirus State Fiscal Recovery Fund).

2. Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-in-Programs: Suggestions for Beneficiary Involvement*, 58 Va. L. Rev. 600, 601 (1972) ("Federal grants have strings attached; these strings are federal standards. They are devices for ensuring that the persons Congress intended to benefit from a grant program actually receive the benefits.").

3. *See* Pub. L. No. 72-428, ch. 212, tit. III, 47 Stat. 1489, 1520 (1933); *see also* Section I, *infra* (explaining requirements of the Buy American Act of 1933 and implementing regulations in the Federal Acquisition Regulation (FAR) (48 C.F.R. pt. 25)).

4. *See* Section II, *infra* (explaining types of "Buy America" preferences applicable to federally assisted procurement).

5. This bulletin uses the term "domestic procurement preference" to refer to any legislative or regulatory requirement that an entity prefer the purchase of items produced or manufactured in the United States over items produced or manufactured outside of the United States.

6. *See, e.g.*, Build America, Buy America Act, Pub. L. No. 117-58, div. G, tit. IX, subtit. A, pt. I, § 70911(11), 135 Stat. 429, 1296 (2021) (hereinafter BABAA) ("Buy America laws create demand for domestically produced goods, helping to sustain and grow domestic manufacturing and the millions of jobs domestic manufacturing supports throughout product supply chains.").

7. *Compare, e.g.*, Tori K. Smith, Heritage Foundation, *Issue Brief No. 604: Biden Administration's Approach to "Buy American" Will Harm Taxpayers* (Feb. 25, 2021) ("America's dozens of domestic content

seeks to outline current forms of domestic procurement preferences that exist in federal law and regulations and explain how municipalities and counties can prepare to implement these preferences when spending federal financial assistance.[8]

Section I of this bulletin summarizes the federal Buy American Act of 1933 (BAA), which imposes a domestic procurement preference upon the federal acquisition of goods and construction materials. The BAA does not apply to expenditures of federal financial assistance by non-federal entities, but its provisions have influenced similar provisions (known as "Buy America" preferences) that apply to the expenditure of federal financial assistance. Gaining some understanding of the BAA's provisions can assist local governments in deciphering similar Buy America preferences tied to federal aid. Section II of the bulletin introduces these Buy America preferences and, using a Federal Transit Administration grant as an example, details how these types of domestic procurement preferences apply to some types of federal aid provided to support public transportation.

Even when spending federal financial assistance, North Carolina's local governments remain bound by restrictions set out in state law. Section III of this bulletin addresses the legal authority of North Carolina counties and municipalities to comply with domestic procurement preferences attached to federal financial assistance. It concludes that these entities likely have broad authority to implement these preferences in their procurement processes when spending federal aid.

Section IV of the bulletin details two recent legislative and regulatory attempts at the federal level to expand the scope of domestic procurement preferences that apply to federal financial assistance. Although no current federal statutes or regulations apply a uniform domestic procurement preference to the expenditure of all forms of federal financial assistance, two recent, broadly applicable developments merit the attention of local governments that have accepted federal financial assistance since November 12, 2020, or will soon seek federal financial assistance: (1) the 2020 addition of a "soft" domestic procurement preference to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 C.F.R. part 200) (known as the "Uniform Guidance"), which applies to the expenditure of most federal grant funds that local governments receive; and (2) the enactment of the Buy America,

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requirements are incredibly complex and create additional, costly regulatory burdens for producers, ultimately resulting in less competition for government contracts and increased costs for taxpayers.") *with* Alliance for American Manufacturing, *Buy America Works: Longstanding United States Policy Enhances the Job Creating Effect of Government Spending* 2 (Feb. 2010) ("Including domestic sourcing requirements in job creating legislation would be the most effective way to ensure taxpayer dollars are used to create and maintain jobs and manufacturing capacity to the maximum extent possible").

8. Some states and localities have independently adopted domestic procurement preferences in their procurement practices, even where these entities are not spending federal funds, some of which have been declared unconstitutional. *See, e.g.*, Cal. Gov't Code § 4303; Mo. Ann. Stat. §§ 34.350–.363; N.J. Stat. Ann. §§ 52:33-2, -3; 40A:11-18; Ohio Rev. Code Ann. §§ 125.09(C), .11(B); 73 Pa. Cons. Stat. Ann. §§ 1881–1889. For more information regarding the results of litigation challenging the validity of some of these statutes, see James Lockhart, Annotation, *Validity, Construction, and Application of State "Buy American" Acts*, 107 A.L.R. 5th 673, §§ 3(a) –(b) (2003). This bulletin does not address these types of preferences. Unless required by the terms and conditions of a federal grant or loan, North Carolina law does not require or expressly authorize municipalities or counties to impose a preference for items produced or manufactured in the United States. *See* Section IV, *infra*. This bulletin also does not address "local" preferences (i.e., procurement preferences for goods or materials produced or manufactured in a particular state or within the jurisdiction of a particular unit of local government (e.g., a county)).

Build America Act within the Infrastructure Investment and Jobs Act of 2021, which extends a "hard" domestic procurement preference to all federal financial assistance programs for "infrastructure" projects.[9]

A local government that violates federal laws or regulations governing its expenditure of federal financial assistance can face consequences that range from disallowance of an improper expenditure to suspension or debarment from receiving future federal funding.[10] Therefore, local governments in North Carolina using federal financial assistance to purchase goods or materials must understand when and how applicable federal laws and regulations require them to "Buy American."[11] Learning more about the laws and regulations described in this bulletin can be a first step in gaining that understanding.

I. A Domestic Procurement Preference in Federal Acquisition: The Buy American Act of 1933

When the federal government purchases goods and materials from the private sector, should it "buy American"? President Biden answered that question affirmatively in his 2022 State of the Union Address, stating:

> There's been a law on the books for almost a century to make sure taxpayers' dollars support American jobs and businesses. Every Administration—Democrat and Republican—says they'll do it, but we're actually doing it. We will buy American to make sure everything from the deck of an aircraft carrier to the steel on highway guardrails is made in America from beginning to end. All of it. All of it."[12]

President Biden's address referenced, but did not actually name, the nearly century-old law that seeks to "make sure taxpayers' dollars support American jobs and businesses." That law is the Buy American Act of 1933 (BAA), and along with its implementing regulations in the Federal Acquisition Regulation (FAR) (48 C.F.R. part 25), it generally requires federal agencies to favor the acquisition of "end products" and "construction materials" that are produced or manufactured in the United States.[13] How it does so is complex.

9. Pub. L. No. 117-58, div. G, tit. IX, subtit. A, 135 Stat. 429, 1294–1309 (2021).

10. *See, e.g.*, 2 C.F.R. § 200.339 (authorizing federal awarding agencies and pass-through entities to, among other things, "[d]isallow . . . all or part of the cost of the activity or action not in compliance," "[w]holly or partly suspend or terminate the Federal award," or "[i]nitiate suspension or debarment proceedings as authorized under 2 CFR Part 180 and Federal awarding agency regulations" in the event of noncompliance by a non-federal entity).

11. This bulletin uses the term "federal financial assistance" consistently with its definition in 2 C.F.R. § 200.1 to include, among other things, grants, cooperative agreements, direct appropriations, and loans.

12. *See* Joseph R. Biden, Jr., U.S. President, Address Before a Joint Session of the Congress on the State of the Union, *in* Off. of the Fed. Reg., Nat'l Archives and Recs. Admin., Daily Compilation of Presidential Docs., 2022 DCPD No. 202200127 (Mar. 1, 2022).

13. *See* 41 U.S.C. §§ 8301–8305. For recent overviews of the Buy American Act, see Kate M. Manuel, Cong. Resch Serv., R43140, The Buy American Act—Preferences for "Domestic" Supplies: In Brief (2016); David H. Carpenter & Brandon J. Murrill, Cong. Rsch. Serv., R46748, The Buy American Act and Other Federal Domestic Content Restrictions (Nov. 8, 2022) (hereinafter 2022 CRS Report).

The BAA and its implementing regulations do not apply to recipients of federal financial assistance (e.g., federal grant monies). However, its provisions have influenced other federal statutes and regulations that require recipients of federal aid to impose domestic procurement preferences when spending federal funds.[14] For that reason, understanding the BAA and its implementing regulations can be helpful for non-federal entities that receive federal financial assistance.

The following sections explain the scope of the BAA and exceptions to its requirements. Readers can also consult Appendixes 1, 2, 3, and 4, which each illustrate the BAA and FAR restrictions in federal acquisition in flowchart form.

A. Scope of the Buy American Act: Domestic End Products and Domestic Construction Materials

The BAA applies when a federal agency seeks to (1) purchase "articles, supplies, and materials for public use"—items that the FAR defines more specifically as "end products"[15] or (2) contract "for the construction, alteration or repair of any public building or public work in the United States."[16] In the former case, a federal agency must purchase "*domestic* end products" in lieu of "*foreign* end products" unless an exception applies.[17] In the latter case, a federal agency must require its "contractor[s], subcontractor[s], material men, [and] suppliers" to only incorporate into the public building or work domestic "articles, materials, and supplies"—items that the FAR defines more specifically as "construction materials"[18]—in lieu of "*foreign* construction materials" unless an exception applies. Appendixes 1 and 2 illustrate the BAA and FAR restrictions applicable to the purchase of "end products," and Appendixes 3 and 4 illustrate the BAA and FAR restrictions applicable to the purchase of "construction materials."

The BAA does not use the term "domestic end product" or "domestic construction material." Instead, the FAR provides these terms when interpreting the BAA's statutory restrictions, which are contained in Table 1, below.

14. For a comprehensive, but slightly dated, overview of domestic content provisions in federal appropriations laws, see Kate M. Manuel et al., Cong. Rsch. Serv., R43354, Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law 16–22 (2016).

15. *See* FAR 25.003 ("End product means those articles, materials, and supplies to be acquired for public use."). The BAA defines "public use" to mean "use by . . . the Federal Government, the District of Columbia, Puerto Rico, American Samoa, and the Virgin Islands." 41 U.S.C. § 8301(1).

16. 41 U.S.C. § 8303(a).

17. *See* FAR 25.003 (defining "domestic end product").

18. *See id.* (defining "construction material").

Table 1. Buy American Act of 1933: Primary Domestic Procurement Preferences in Federal Acquisition

Acquisition Restrictions for "End Products" (41 U.S.C. § 8302(a))	Acquisition Restrictions for "Construction Materials" (41 U.S.C. § 8303(a))
Unless an exception applies,[a] the federal government may acquire *only*: • "unmanufactured articles, materials, and supplies that have been mined or produced in the United States" and • "manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States."	Unless an exception applies,[b] the federal government must require "contractor[s], subcontractors, material men, [and] suppliers" to use *only* the following items in the performance of their work: • "unmanufactured articles, materials, and supplies that have been mined or produced in the United States" and • "manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States."

a. *See* Section I.B, *infra.*
b. *See* Section I.B, *infra.*

The BAA does not identify the type or quantity of labor that must be performed upon an "end product" or "construction material" for it to be "*manufactured* in the United States," nor does it explain when "*substantially all*" of an end product or construction material's components have been "mined, produced, or manufactured in the United States."[19] Over time, however, judicial and administrative bodies have filled in the former gap, while the executive branch (through executive orders and detailed regulations in the FAR) has filled in the latter gap.[20] The following sections explain when (1) these items have been "manufactured" in the United States, and (2) "substantially all" of an item's components have been "mined, produced, or manufactured in the United States."

19. The BAA's seemingly simple provisions can present complex questions. For example, assume that a federal agency seeks to equip its Charlotte regional office with custom-made desks. Further assume that Custom Desk, Inc., a company incorporated in Delaware with corporate headquarters in Atlanta, (1) purchases North Carolina pine lumber from a timber producer in southeastern North Carolina; (2) ships these wood products to Honduras, where workers fashion the pine lumber into a desk tabletop and three cabinet drawers; (3) ships these completed, separate parts to a facility in Columbus, Georgia, where workers glue the tabletop and cabinet drawers into a single desk, affix metal handles and feet to the desk, and apply custom stains to the desk's exterior; and (4) delivers the desks to the federal agency's regional office in Charlotte. Has the desk been "manufactured" in the United States "substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States?"

20. *See* FAR 25.003 (defining "domestic end product").

1. When Is an End Product or Construction Material "Manufactured" under the BAA?

In the absence of a statutory or regulatory definition, federal courts and various boards of contract appeal (e.g., the Government Accountability Office (GAO)) have analyzed when end products and construction materials have been "manufactured in the United States" under the BAA.[21] In doing so, they have fashioned positive definitions (i.e., by explaining what manufacturing *is*) and negative definitions (i.e., by explaining what manufacturing is *not*).

Federal courts and the Comptroller General of the United States (as head of the GAO) have determined that an item is domestically "manufactured" for purposes of the BAA when labor performed in the United States upon foreign components creates "basically new material or result[s] in a substantial change in physical character."[22] For example, even where a firm's workers sorted, cut, inspected, blended, wrapped, and trimmed foreign horsehair and combined it with polypropylene in the United States to create brush filler for janitorial brushes, the firm did not "manufacture" the brush filler within the meaning of the BAA.[23] The labor did not "create basically new material or substantially change the physical character of the [foreign] horsehair"—and therefore did not constitute "manufacturing."[24]

Even though "minimal operations such as assembly of certain components may constitute manufacturing . . . where they are necessary for the product to meet the operational or performance requirements of [a] solicitation,"[25] domestic labor must in some way "transform or alter [an item's] essential nature" for an item to be considered "manufactured in the United

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21. *See* United States v. Rule Indus., Inc., 878 F.2d 535, 542 (1st Cir. 1989) ("Instead of providing a straightforward, widely applicable formula to determine domesticity, the [BAA] and the regulations call for a case-specific inquiry into the significance and severability of . . . domestic production processes."). *See also* 2022 CRS Report, *supra* note 13, at 4 nn. 21–26 (providing examples of judicial and administrative definitions of "manufactured" under the BAA). The Comptroller General of the United States, which as the head of the Government Accountability Office makes recommendations to federal agencies on the resolution of bid protests, likely has addressed this issue more than any other judicial or administrative body. *See generally* 2 George Thompson, Transnational Contracts § 94.5, "The Buy American Act – The Buy American Preference – Manufacture in the United States" (2022) (providing examples of the Comptroller General's definitions of "manufactured" under the BAA). The Buy America, Build America Act (BABAA) within the Infrastructure Investment and Jobs Act of 2021 required the Federal Acquisition Regulatory Council (hereinafter FAR Council), which assists in drafting the FAR, to amend the FAR to specifically define "end product manufactured in the United States." *See* BABAA, Pub. L. No. 117-58, div. G, tit. IX, subtit. A, pt. II, § 70921(d), 135 Stat. 429, 1301 (2021). Noting that "neither the Buy American Act, . . . nor Executive Orders that implement the BAA . . . define the term," the Office of Management and Budget, on behalf of the FAR Council, requested public feedback in April 2022 to inform the definition of "manufacturing" to be used in the FAR. *See* Off. of Mgmt. and Budget, Notice of Listening Sessions and Request for Information, 87 Fed. Reg. 23,888, 23,889 (Apr. 21, 2022).

22. A. Hirsh, Inc. v. United States, No. 90–2179, 1991 WL 102984, at *2 (E.D. Pa. June 11, 1991) (citing *Rule Indus., Inc.*, 878 F.2d 535). *See also* TRS Rsch., B-285514, 2000 CPD ¶ 128 (Comp. Gen. Aug. 7, 2000).

23. *A. Hirsh*, 1991 WL 102984, at *4.

24. *Id.* at *4.

25. *TRS Rsch.*, 2000 CPD ¶ 128 at *2. *See also* Gen. Kinetics, Inc., Cryptek Div., 70 Comp. Gen. 473, 476 (1991) (holding that the term "manufacture" contemplates "completion of [an] article in the form required for use by the government," *id.*).

States."[26] For example, where "disassembly, removal of a [fax machine's] circuit board and replacement of memory chips, and reassembly in the United States" did not change the "essential function of a basic fax machine" originally assembled in Japan, the Comptroller General determined that the fax machine was not "manufactured in the United States."[27]

The Comptroller General has ruled in separate cases that an item is not "manufactured in the United States" for purposes of the BAA merely because post-production acts like sterilization,[28] inspection or packaging,[29] or testing or evaluation operations[30] occur in the United States. These actions do not change an item's "essential nature" and therefore do not constitute "manufacturing" under the BAA.

2. When Has "Substantially All" of a Manufactured End Product or Construction Material Been "Mined, Produced, or Manufactured in the United States?"

To be considered a "*domestic* end product" or "*domestic* construction material," an "end product" or "construction material" that is "manufactured in the United States" also must be manufactured "*substantially all* from articles, materials, or supplies mined, produced, or manufactured in the United States."[31] Although the BAA has never precisely defined "substantially all," federal executive orders in effect between 1954 and 2019 declared that a manufactured item met this requirement when the cost of its domestically mined, produced, or manufactured "components" exceeded 50 percent of the total cost of all of its components.[32] But in July 2019, the Trump Administration issued an executive order (No. 13,881) that modified that long-standing executive interpretation of the BAA in two significant ways.[33]

First, Executive Order 13,881 directed the Federal Acquisition Regulatory Council (hereinafter FAR Council), which drafts and amends the FAR, to create a separate domestic content threshold for "iron and steel products" and, in doing so, to require that at least 95 percent of the cost of "iron and steel products"—whether end products or construction materials—be of domestic

26. *TRS Rsch.*, 2000 CPD ¶ 128 at *3. There, the Comptroller General held that "[r]eplacing wooden floors, side panels, or straightening dents . . . and repainting to comply with the RFQ requirements . . . do not constitute assembly of components or 'manufacturing' operations . . . since these refurbishing measures do not in any way transform or alter the essential nature of the containers being procured here." *Id.*

27. *Gen. Kinetics*, 70 Comp. Gen. at 479–80.

28. Marbex, Inc., B-225799, 87-1 CPD ¶ 468 (May 4, 1987).

29. To S.F. Durst & Co., 46 Comp. Gen. 784 (1967).

30. To Matzkin & Day, 48 Comp. Gen. 727 (1969).

31. 41 U.S.C. §§ 8302(a), 8303(a), respectively.

32. *See* Exec. Order No. 10,582, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act, 19 Fed. Reg. 8723, § 2(a) (Dec. 21, 1954). A "component" is an item that is "incorporated directly into an end product or construction material." FAR 25.003. Under the FAR, a manufactured item's "cost of components" differs based upon whether a contractor purchases or manufactures an item's components. FAR 25.101(a)(2)(i). The "cost of components" that a contractor *purchases* includes "the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material . . . and any applicable duty," while the "cost of components" that a contractor *manufactures* excludes costs of manufacturing the end product itself, but includes "all costs associated with the manufacture of the component, including transportation costs . . . plus allocable overhead costs, but excluding profit." FAR 25.003 (defining "cost of components").

33. *See* Exec. Order No. 13,881, Maximizing Use of American-Made Goods, Products, and Materials, 84 Fed. Reg. 34,257, § 2(a)(i) (July 15, 2019).

origin. That distinction had existed for many years in domestic procurement preferences that apply to federal financial assistance for transportation expenditures provided to non-federal entities, but it had not previously applied to federal acquisitions.[34]

Second, for all *other* manufactured end products (except for "commercially available off-the-shelf (COTS) items"[35]) and construction materials, Executive Order 13,881 directed the FAR Council to raise the long-standing domestic content threshold for non-iron and steel end products and construction materials from 50 percent to 55 percent.

The FAR Council implemented these changes in January 2021 by revising the FAR's definitions of "domestic end product" and "domestic construction material" to reflect the new 55 percent cost-of-components threshold for manufactured end products and manufactured construction materials.[36] The Biden Administration retained these thresholds and in a final rule issued in March 2022 mandated a further increase to the current threshold of 60 percent (as of October 25, 2022).[37] Under the rule, that percentage will increase to 65 percent for items delivered in calendar year 2024 and eventually to 75 percent for items delivered in calendar year 2029 and beyond.[38] Table 2, below, provides the FAR's current definitions of "domestic end product" and "domestic construction material."

34. *See* U.S. Dep't of Def., Gen. Servs. Admin., Nat'l Aeronautics and Space Admin., Federal Acquisition Regulation: Maximizing Use of American-Made Goods, Products, and Materials, 86 Fed. Reg. 6180, 6181 (Jan. 19, 2021) (hereinafter Jan. 2021 FAR Amendments) (noting that a distinct content threshold for "iron and steel products "has existed for many years in domestic preference requirements governing certain Federal grant programs, such as the Federal Transit Administration's Buy America regulations applicable to [its] grantees"). For more information on this distinction, see Section II, *infra*.

35. See footnote b to Table 2, *infra* note 43 (describing domestic content threshold exemption for "commercially available off-the-shelf items").

36. *See* Jan. 2021 FAR Amendments, *supra* note 34.

37. *See* U.S. Dep't of Def., Gen. Servs. Admin, Nat'l Aeronautics and Space Admin., Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12,780, 12,790 (Mar. 7, 2022).

38. *See id.* at 12,781 (noting that the "increase of the domestic content threshold ultimately to 75 percent is consistent with [Section 70921] of the Infrastructure Investment and Jobs Act," which "includes a 'sense of Congress' that the FAR be amended to increase the domestic content requirements for domestic end products and domestic construction material to 75 percent").

Table 2. Relevant Portions of FAR Definitions of "Domestic End Product" and "Domestic Construction Material"

"Domestic End Product"
(48 C.F.R. § 25.003)

"Domestic end product" means:
(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—
  (A) An unmanufactured end product mined or produced in the United States; or
  (B) An end product manufactured in the United States, if
    (i) The cost of its components mined, produced, or manufactured in the United States exceeds (a) for items delivered on or after Oct. 25, 2022, 60 percent of the cost of all its components; (b) for items delivered in calendar years 2024 through 2028, 65 percent of the cost of all its components; and (c) for items delivered in calendar years 2029 and beyond, 75 percent of the cost of all its components;[a] or
    (ii) The end product is a "commercially available off-the-shelf item."[b]
(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both—
  (A) An end product manufactured in the United States, if the cost of "foreign iron and steel"[c] constitutes less than 5 percent of the cost of all the components used in the end product.[d]

"Domestic Construction Material"
(48 C.F.R. § 25.003)

"Construction material" means:
(1) An article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work.

"Domestic construction material" means:
(A) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—
  (i) Unmanufactured construction material mined or produced in the United States;
  (ii) Manufactured construction material in the United States, if
    (a) The cost of its components mined, produced, or manufactured in the United States exceeds (1) for items delivered on or after Oct. 25, 2022, 60 percent of the cost of all its components; (2) for items delivered in calendar years 2024 through 2028, 65 percent of the cost of all its components; and (3) for items delivered in calendar years 2029 and beyond, 75 percent of the cost of all its components;[e] or
    (b) The construction material is a "commercially available off-the-shelf item."[f]
(B) For construction material that consists wholly or predominantly of iron or steel or a combination of both—
  (i) Construction material manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in such construction material.[g]

a. The FAR provides several additional interpretive rules to assist federal agencies in determining when an item's cost of components exceeds 55 percent of the cost of all of its components. *See* FAR 25.003 (defining "domestic end product" to note that "[c]omponents of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient quantities of a satisfactory quality are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic.").

b. A "commercially available off-the-shelf item" is also known as a "COTS item." *See* FAR 2.101 ("Commercially available off-the-shelf (COTS) item—(1) means any item of supply (including construction material) that is—(i) [a] commercial product (as defined in [FAR 2.101]); (ii) [s]old in substantial quantities in the commercial marketplace; and (iii) [o]ffered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and (2) [d]oes not include bulk cargo . . . such as agricultural products and petroleum products."). Federal law requires the FAR Council to "include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items." 41 U.S.C. § 1907(a)(1). For COTS items, the FAR Council has waived the domestic content threshold in 41 U.S.C. § 8302(a)(1), except for most iron and steel products specified in FAR 25.101(a)(2)(ii). *See* FAR 12.505(a)(1). To qualify as a "domestic end product," a COTS item need only be manufactured in the United States—the cost of its components mined, produced, or manufactured in the United States need not meet any particular percentage of the total cost of its components.

c. Under the FAR, "foreign iron and steel" means "iron or steel products not produced in the United States." An iron or steel product is "produced in the United States" when "all manufacturing processes of the iron or steel . . . take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives." FAR 25.003 (defining "foreign iron and steel"). The "origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign." *Id.*

d. Under the FAR, the "cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the end product and a good faith estimate of the cost of all foreign or steel components excluding COTS fasteners." FAR 25.003. Further, "[i]ron or steel components of unknown origin are treated as foreign." *Id.*

e. The FAR provides several additional interpretive rules to assist federal agencies in determining when the cost of components of construction material exceeds 55 percent of the cost of all of its components. *See* FAR 25.003 (defining "domestic construction material" to note that "[c]omponents of foreign origin of the same class or kind for which nonavailability determination have been made are treated as domestic" and that "[c]omponents of unknown origin are treated as foreign").

f. *See supra* note b to this table (defining "commercially available off-the-shelf item").

g. *See supra* note c to this table (explaining calculation cost of components for "foreign iron and steel").

B. Exceptions to the BAA's Domestic Procurement Preference: When May Federal Agencies Acquire "Foreign End Products" or "Foreign Construction Materials"?

The BAA does not always forbid federal agencies from acquiring "foreign end products" or "foreign construction materials." Instead, the BAA and the FAR permit acquisition of these items in some circumstances.[39] In particular, an agency may acquire "foreign end products" and "foreign construction materials" when

1. acquisition of a domestic item would be "inconsistent with the public interest";[40]
2. the cost of a domestic item would be "unreasonable";[41]
3. a domestic item, or components of a domestic item, are not sufficiently available;
4. an international trade agreement between the United States and a foreign country requires the federal government to treat a foreign item as a domestic item;
5. the cost of a foreign item is less than the micro-purchase threshold;
6. the federal government acquires information technology that is a "commercial product"; or
7. the federal government acquires the item for use outside of the United States.

This section discusses each of these exceptions.[42] Step 2 in Appendixes 1 and 2 illustrates exceptions to the BAA that permit acquisition of "foreign end products," and Step 2 in Appendixes 3 and 4 illustrates exceptions to the BAA that permit acquisition of "foreign construction materials."

1. Acquisition of Domestic Item Is Inconsistent with the Public Interest

Neither the BAA nor the FAR define all circumstances in which an agency's acquisition of domestic end products or a contractor's use of domestic construction materials may be "inconsistent with the public interest."[43] This exception *can* apply when a federal agency "has an agreement with a foreign government that provides a blanket exception."[44] For example, the Department of Defense (DOD) has entered into reciprocal procurement agreements with multiple foreign nations and determined that it would be "inconsistent" with the public interest to apply the BAA's domestic procurement preferences to DOD acquisition of items from these countries.[45] Agencies can also exercise the exception on an ad hoc basis.[46]

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39. This section draws heavily from the 2022 CRS Report, *supra* note 13.

40. 41 U.S.C. § 8302(a)(1) and FAR 25.103(a) (end products); 41 U.S.C. § 8303(b)(3) and FAR 25.202(a)(1) (construction materials).

41. 41 U.S.C. § 8302(a)(1) and FAR 25.103(c) (end products); 41 U.S.C. § 8303(b)(3) and FAR 25.204 (construction materials).

42. This bulletin does not address *all* exceptions to the BAA. For a more comprehensive listing of exceptions that permit the acquisition of foreign end products and foreign construction material, see 2022 CRS Report, *supra* note 13, at 6–12.

43. *See* note 40, *supra*.

44. *See* FAR 25.103(a); FAR 25.202(a)(1).

45. *See* U.S. Gov't Accountability Off., GAO-19-17, Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance (2019).

46. *See* 2022 CRS Report, *supra* note 13, at 6 n.47.

2. Cost of Domestic Item is Unreasonable

Agencies may acquire foreign end products or foreign construction materials when the cost of domestic items is "unreasonable." The BAA does not explain when the cost of domestic end products or domestic construction materials is "unreasonable," but the FAR does.[47] In doing so, it requires agencies to raise the prices of low foreign offers by specified factors when determining the lowest bid received.

Generally, when an agency receives a "domestic offer" that is *not* the lowest offer received, a federal contracting officer must, unless another agency-specific rule applies,[48] add (1) 20 percent to the cost of the low foreign offer if it is from a "large business concern" or (2) 30 percent to the low foreign offer if it is from a "small business concern."[49] The price of the domestic offer is reasonable and therefore does not qualify for the exception if, after addition of the price preference, the price of the domestic offer does not exceed the adjusted price of the low offer.[50]

As a simplified example, illustrated in Tables 3 and 4, below, assume that an agency receives a low foreign offer of $42 from ABC, Inc. and a lowest domestic offer of $60 from XYZ, Inc. To determine whether the cost of the domestic end product is "unreasonable," the agency contracting officer must add $8.40 (20 percent of $42) to ABC, Inc.'s bid price if XYZ is a large business concern and $12.60 (30 percent of $42) to ABC Inc.'s bid price if XYZ is a small business concern.

In either case, because the price of the lowest domestic offer ($60) still exceeds the evaluated price of the low offer after application of the preference, the agency can consider the price of the domestic offer to be unreasonable. Therefore, the BAA's domestic procurement preference does not apply, and the agency may proceed with the acquisition of foreign end products from ABC, Inc.[51]

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47. *See* FAR 25.106(b) (end products); FAR 25.204 (construction materials).

48. *See* FAR 25.106(a)(1). For example, Department of Defense acquisitions must apply an evaluation factor of 50 percent in lieu of the factors listed in FAR 25.106. *See* FAR 225.105(b).

49. *See* FAR 2.101 (defining "small business concern" as a "concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts and qualified as a small business under the criteria and size standards in 13 CFR Part 121"). A large business concern is a business other than a small business concern.

50. *See* FAR 25.106(b)(1)(ii).

51. Prior to February 2021, the FAR directed contracting officers to apply a price preference of 6 percent for large businesses and 12 percent for small businesses to the evaluation of lowest foreign offers. Acting pursuant to Section 2(a)(ii) of E.O. 13,881 (see *supra* note 33), the FAR Council in January 2021 raised these price-evaluation preferences to their current levels. *See* Jan. 2021 FAR Amendments, *supra* note 34 (amending FAR 25.105(b)(1) and (b)(2)). Shortly after the initial enactment of the BAA in 1933, the Treasury Department applied a 25 percent price preference to the evaluation of foreign offers. *See* Morton Pomerantz, *Toward a New Order in Government Procurement*, 11 L. & Pol'y Int'l Bus. 1263, 1268 (1979). President Eisenhower's 1954 executive order applied a 6 percent price preference. *See* Exec. Order No. 10,582, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act, 19 Fed. Reg. 8723, § 2(c)(1) (Dec. 17, 1954).

Table 3. Application of Evaluation Preference to Low Foreign Offer of Non-COTS and Non-Iron and -Steel Items When Lowest Domestic Offer Is from Large Business Concern

	Low Foreign Offer (ABC, Inc.)	Lowest Domestic Offer (XYZ, Inc.) *Large Business Concern*
Initial Offer	$42.00	$60.00
Plus Preference (add 20% of Price of Low Foreign Offer)	$8.40	–
Evaluation Price	$50.40	$60.00

Table 4. Application of Evaluation Preference to Low Foreign Offer of Non-COTS and Non-Iron and -Steel Items When Lowest Domestic Offer Is from Small Business Concern

	Low Foreign Offer (ABC, Inc.)	Lowest Domestic Offer (XYZ, Inc.) *Small Business Concern*
Initial Offer	$42.00	$60.00
Plus Preference (add 30% of Price of Low Foreign Offer Initial Offer)	$12.60	–
Evaluation Price	$54.60	$60.00

The FAR adopts a slightly different scheme for "construction materials." A contractor that proposes to use foreign construction materials may request agency permission to use foreign construction materials based upon the "unreasonable cost" of domestic construction materials. A contracting officer may grant such a request if the cost of domestic construction materials exceeds the cost of foreign construction materials by 20 percent.[52] Contractors must submit to an agency "adequate information" to enable the contracting officer to evaluate whether such a price differential actually exists (including, among other things, a reasonable survey of the market and a price comparison table that demonstrates differences in the costs of the relevant domestic construction materials and foreign construction materials).[53]

52. *See* FAR 25.204(b)(1); FAR 52.225-9(b)(3)(i) (permitting a contracting officer to allow the use of foreign construction materials when the cost of domestic construction materials exceeds the cost of foreign constructions material by 20 percent). Prior to February 2021, the FAR required use of an evaluation adjustment factor for foreign construction materials of 6 percent. *See* Jan. 2021 FAR Amendments, *supra* note 34.

53. *See* FAR 52.225-9(c).

3. Domestic Item, or Component of Domestic Item, Is Not Sufficiently Available

Federal agencies may acquire foreign end products and foreign construction materials when the relevant domestic end products or domestic construction materials (or, if applicable, the components from which such end products or construction materials are manufactured) are not "mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality."[54]

The FAR Council has determined that certain classes of items satisfy these criteria, and the FAR includes a list of these "non-available" items.[55] This list includes, among other things, articles ranging from "hemp yarn" to "mica."[56] Prior to acquiring foreign end products or foreign construction materials named in this list, an agency's contracting officer must conduct some market research to determine that an item is in fact not available domestically in sufficient quantities in the United States at the time of contracting.[57] If a contracting officer determines that an end product or construction material included on the list of "unavailable items" in the FAR *is* available domestically in sufficient and reasonable commercial quantities prior to receipt of bids or final offers, the official may not rely upon the exception to acquire a foreign item.[58]

Even if an item is not included in the FAR's list of "non-available" items, the head of a contracting agency may make an individual determination that an end product is not "mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality."[59] In such a case, the FAR directs an agency's contracting officer to submit a copy of the individual determination to either the Defense Acquisition Regulations Council or the Civilian Agency Acquisition Council for possible inclusion in the FAR's list of generally "non-available" items.[60]

4. International Trade Agreement Requires Treatment of Foreign Item as Domestic Item

Perhaps the broadest exception to the BAA stems from the United States' obligations under certain international trade agreements. The United States has entered into multilateral and bilateral international trade agreements with foreign countries that, among other things, prevent federal agencies from treating certain foreign goods less favorably than domestic goods in federal procurement processes.[61]

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54. FAR 25.103(b) (end products); FAR 25.202(a)(2) (construction materials).
55. *See* FAR 25.104.
56. *Id.*
57. FAR 25.103(b)(1)(ii).
58. *See* FAR 25.103(b)(1)(iii).
59. FAR 25.103(b)(2)(i).
60. FAR 25.103(b)(2)(ii).
61. *See, e.g.*, World Trade Org., Agreement on Government Procurement 2012, Art. IV (rev. Mar. 30, 2012) (hereinafter WTO GPA) ("With respect to any measure regarding covered procurement, each Party . . . shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party . . . accords to . . . domestic goods, services and suppliers; and goods, services and suppliers of any other Party."). Other selected free trade agreements to which the United States is a party include the North American Free Trade Agreement (NAFTA) (now known as the U.S.-Mexico-Canada Agreement) and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).

To enable the United States to fulfill its obligations under these trade agreements, the Trade Agreements Act of 1979, as amended (19 U.S.C. §§ 2501 *et seq.*) (TAA), authorizes the U.S. president to waive the BAA's requirements for "eligible products" sourced from countries that have signed trade agreements with the United States.[62] The president has delegated this waiver authority to the U.S. Trade Representative (USTR), and the USTR has waived the BAA's requirements[63] for acquisitions of covered "eligible products" from "designated countries" in amounts that exceed certain thresholds specified in the FAR.[64] "Eligible products," in general, include those specified in various trade agreements like the Revised World Trade Organization Agreement on Government Procurement (hereinafter WTO GPA) and the North American Free Trade Agreement (NAFTA).[65] "Designated countries" include signatories to the WTO GPA, other free trade agreements like NAFTA, certain "least developed countries" (e.g., Afghanistan, Haiti, and Siera Leone), and certain other countries in the Caribbean Basin.[66]

Where the USTR has waived the BAA's requirements, offers of "eligible products" from designated countries must receive equal consideration as domestic offers. For example, a federal agency could not apply the BAA's domestic content requirements or price preferences to evaluation of a foreign end product that is manufactured in Mexico, covered under NAFTA, and whose cost exceeds $92,319.[67] In that case, the item must be treated as a domestic end product and therefore as satisfying the requirements of the BAA.

5. Cost of Foreign Item Is Less Than Micro-Purchase Threshold

A federal agency may purchase foreign end products and foreign construction materials in amounts less than the applicable federal micro-purchase threshold.[68] In general, the micro-purchase threshold applicable to federal agency procurements is $10,000.[69]

6. Acquisition of Information Technology That Is a "Commercial Product"

The BAA's restrictions also do not apply to the purchase of information technology that qualifies as a "commercial product" under the FAR.[70] Commercial products include products "of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes" that have "been [or offered to have been] sold, leased, or licensed to the general public."[71]

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62. 19 U.S.C. § 2511(a). Under the TAA, an article is a "product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed." 19 U.S.C. § 2518(4)(B).

63. *See* FAR 25.402(a)(1).

64. *See* FAR 25.402(b).

65. *See* 19 U.S.C. § 2518(4)(A) (defining "eligible product" for purposes of the TAA). The FAR defines an "eligible product" as "a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment." FAR 25.003.

66. *See* FAR 25.003 (defining "designated country").

67. *See* FAR 25.402(b) (setting forth threshold of $92,319 for supply contracts of Mexican products covered by NAFTA).

68. 41 U.S.C. § 8302(a)(2)(C) (end products); *id.* § 8303(b)(1)(C) (construction materials).

69. *See* FAR 2.101.

70. *See* FAR 25.103(e).

71. FAR 2.101 (defining "commercial product").

7. Item Will Be Used Outside of the United States

A federal agency may purchase foreign end products or permit the incorporation of construction materials into public buildings or public works when the items are acquired "for use outside the United States."[72] For example, if the Department of State intends to purchase end products for use at a foreign embassy, the BAA's restrictions do not apply.

C. Implications for Local Governments Receiving Federal Financial Assistance

Neither the BAA nor the FAR applies to the procurement processes of local governments expending federal aid. However, because Congress has extended similar restrictions to the expenditure of many forms of federal financial assistance by local governments, understanding the terminology and framework of the BAA and its implementing regulations in the FAR can be helpful in understanding the types of domestic procurement preferences that do apply to a local government's expenditure of federal aid. Section II explains one of those preferences in more detail.

II. Domestic Procurement Preferences in Federal Financial Assistance: "Buy America" Preferences

Although the BAA's domestic procurement preferences apply only to federal acquisitions, Congress has also attached comparable domestic procurement preferences to some forms of federal financial assistance that local governments receive.[73] Unlike the BAA, though, no single federal statute or comprehensive set of regulations applies a uniform domestic procurement preference to all federal financial assistance used to purchase goods or construction services. Congress has instead enacted varying forms of domestic procurement preferences through distinct statutes that authorize agencies to provide federal financial assistance to non-federal entities. In turn, these agencies have promulgated distinct sets of regulations that implement the terms of those statutory preferences. These statutes and regulations together authorize and condition the non-federal expenditure of federal aid for a wide variety of programs ranging from the purchase of school lunches to the construction of water treatment facilities. Somewhat confusingly, they are popularly known as "Buy *America*" preferences rather than "Buy *American*" preferences.[74]

This section analyzes one Buy America preference that Congress has attached to a subset of grant funds provided by the Federal Transit Administration (FTA) through its Grants for Buses and Bus Facilities Program. In March 2022, the FTA awarded these funds to three North Carolina municipalities: (1) the City of Concord will receive approximately $3.9 million for bus replacement, (2) the City of Greensboro will receive approximately $3.0 million to replace diesel buses with zero-emission buses and other infrastructure, and (3) the City of Durham will receive approximately $10.8 million to renovate its municipal bus terminal (Durham Station).[75] The FTA

72. 41 U.S.C. § 8302(a)(2)(A) (end products); *id.* § 8303(b)(1)(A) (construction materials).

73. For an overview, see Manuel et al., *supra* note 14, at 16–22.

74. For a helpful listing of "Buy America" provisions found in federal statutes, see 2022 CRS Report, *supra* note 13, at Appendix.

75. *See* U.S. Dep't of Transp., Fed. Transit Admin., Announcement of Fiscal Year 2021 Grants for Buses and Bus Facilities Program Project Selections, 87 Fed. Reg. 15,489, 15,491 (Mar. 18, 2022).

grants will arrive with conditions placed on their expenditure—conditions that include, among other things, abiding by a domestic procurement preference when spending these funds. This section compares and contrasts the FTA's statutory "Buy America" preference and the FTA's implementing regulations with the "Buy American" preference under the BAA and the FAR. Even though many local governments in North Carolina do not regularly obtain grants from the FTA, a basic understanding of the FTA's Buy America preference can serve as an introduction to other types of Buy America preferences that they might encounter when receiving federal financial assistance.

A. FTA's Buy America Preference: 49 U.S.C. § 5323(j) and 49 C.F.R. Part 661

The FTA makes grants through its Grants for Buses and Bus Facilities Program to units of local government (like Concord, Greensboro, and Durham) that "operate fixed route bus service."[76] Recipients may use these grants to "assist in the financing of buses and bus facilities capital projects, including—(A) replacing, rehabilitating, purchasing, or leasing buses or related equipment; and (B) rehabilitating, purchasing, constructing, or leasing bus-related facilities."[77] When Congress appropriates funds to the FTA to carry out this program, FTA makes funding available to eligible recipients through a competitive application process.[78]

Like the BAA restricts federal acquisition of end products and construction materials, a separate federal statute, the "FTA Buy America Statute," prevents the FTA from obligating funds for public transportation projects unless "the steel, iron, and manufactured goods used in the project are produced in the United States."[79] When an FTA grantee accepts funds from the FTA, it agrees by contract (i.e., in a grant agreement) to follow the terms of the FTA Buy America Statute and the FTA's regulations that implement these restrictions.[80] In particular, a grantee agrees that unless an exception applies, it will not expend any FTA monies upon steel, iron, or manufactured goods that are not "produced in the United States."

Like the BAA, the FTA Buy America Statute does not explain the type or quality of labor that must be performed upon a good for it to be "manufactured," nor does it define when steel, iron, or manufactured goods have been "produced in the United States."[81] The FTA—like the FAR Council—has filled in these statutory gaps through detailed implementing regulations in 49 C.F.R. part 661.

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76. 49 U.S.C. § 5339(a)(4) (describing eligible recipients of grant funding).

77. 49 U.S.C. § 5339(b)(1).

78. *See, e.g.*, U.S. Dep't of Transp., Fed. Transit Admin., Fiscal Year 2021 Competitive Funding Opportunity; Grants for Buses and Bus Facilities Program, 86 Fed. Reg. 52,291 (Sept. 20, 2021) (announcing availability of FY2021 funding).

79. *See* 49 U.S.C. § 5323(j). Chapter 53 of Title 49 of the U.S. Code contains the federal statutes that permit the FTA to obligate funds for public transportation.

80. *See, e.g.*, U.S. Dep't of Transp., Fed. Transit Admin., Fiscal Year 2022 Master Agreement, § 15 (Feb. 7, 2022) ("Except as the Federal Government determines otherwise in writing, the Recipient agrees to comply with FTA's U.S. domestic preference requirements and follow federal guidance, including: (a) *Buy America*. The domestic preference procurement requirements of 49 U.S.C. § 5323(j), and FTA regulations, 'Buy America Requirements,' 49 CFR Part 661, to the extent consistent with 49 U.S.C. § 5323(j).").

81. The FTA Buy America Statute defines when steel and iron can be considered "produced in the United States"—but does so only by reference to the FTA's implementing regulations. *See* 49 U.S.C. § 5323(j)(12) ("Steel and iron meeting the requirements of section 661.5(b) of title 49, Code of Federal Regulations may be considered produced in the United States.").

The FTA Buy America Statute and the FTA's implementing regulations apply to the FTA's Grants for Buses and Bus Facilities Program.[82] The following sections provide an overview of these provisions and exceptions to their requirements.[83] Like the BAA, the FTA Buy America Statute and its implementing regulations do not always prohibit acquisition of items that contain foreign materials or are manufactured outside of the United States. Readers can consult Appendixes 5 and 6 to review flowchart illustrations of the restrictions in the FTA Buy America Statute and the FTA's implementing regulations.

1. When Are Steel, Iron, and Manufactured Goods "Produced in the United States?"

The FTA's implementing regulations specify when "manufactured products,"[84] "steel and iron," and "rolling stock" have been "produced in the United States." These regulations are detailed below.

a. Steel and Iron

No FTA funds may be obligated for a grantee's project unless all steel and iron used in the project are "produced in the United States."[85] This means that all manufacturing processes for construction materials made primarily of steel or iron that are used in grantee infrastructure projects (e.g., transit or maintenance facilities, rail lines, or bridges) must occur in the United States.[86] The FTA has identified "structural steel or iron, steel or iron beams and columns, [and] running rail and contact rail" as items that fall under these requirements but has exempted from these requirements steel or iron products used as components or subcomponents of other manufactured products.[87]

b. Manufactured Products

A "manufactured product" is considered "produced in the United States" only if (1) "[a]ll of the manufacturing processes for the product take place in the United States; and (2) [a]ll of the components of the product [are] of U.S. origin."[88] As one commentator has noted, these requirements appear to impose a "much stricter domestic content requirement than other federal Buy America provisions" by requiring that *all* components be of U.S. origin.[89] For example, the

82. *See* Fiscal Year 2021 Competitive Funding Opportunity; Grants for Buses and Bus Facilities Program, 86 Fed. Reg. at 52,296 ("All capital procurements must comply with FTA's Buy America requirement . . . , which require that all iron, steel, and manufactured products be produced in the United States, and imposes minimum domestic content and final assembly requirements for rolling stock.").

83. For an excellent, comprehensive overview of the FTA Buy America Statute and its implementing regulations, see Timothy R. Wyatt, Transit Cooperative Research Program, Legal Research Digest 49, *Updated Guide to Buy America Requirements—2015 Supplement* (May 2017) (hereinafter, Wyatt). This section draws heavily from this publication.

84. Despite the FTA Buy America Statute's use of the term "manufactured *goods*," the FTA's implementing regulations in 49 C.F.R. part 661 use the term "manufactured *products*." *See* 49 C.F.R. § 661.5(b).

85. 49 U.S.C. § 5323(j)(1); 49 C.F.R. § 661.5(a).

86. *See* 49 C.F.R. §§ 661.5(b)–(c).

87. For additional helpful discussion of iron and steel requirements in FTA-grant-funded projects, see Wyatt, *supra* note 83, at 24–25.

88. *See* 49 C.F.R. §§ 661.5(d)(1)–(2).

89. Wyatt, *supra* note 83, at 15.

BAA—even after the Biden Administration's most recent revisions to the FAR—deems an end product as "domestic" when the cost of its domestic components exceeds *60 percent* of the cost of all of its components.[90]

Upon close inspection, the FTA's implementing regulations do permit some incorporation of foreign materials in FTA-grant-funded procurements of manufactured products. A component of a manufactured product is "of U.S. origin if it is manufactured in the United States, *regardless of the origin of its subcomponents*."[91] FTA regulations do not provide a generally applicable definition of the term "subcomponent" but define a component as an "article, material, or supply . . . directly incorporated into [an] end product at the final assembly location."[92] In turn, a "manufacturing process" is "the application of processes to alter the form or function of materials or of elements of [a] product in a manner adding value and transforming those materials or elements so that they represent a new *end product* functionally different from that which would result from mere assembly of the elements or materials."[93] As long as a foreign subcomponent undergoes some alteration of its form or function in the United States prior to incorporation at the final assembly location, it can be considered a "domestic" component whose foreign origin is disregarded. By contrast, if a foreign subcomponent does not undergo any such alteration using domestic labor, it will not be considered "produced in the United States."[94]

2. Exceptions to the FTA Buy America Statute: When May FTA Grantees Purchase Steel, Iron, and Manufactured Goods That Are Not "Produced in the United States?"

Like the BAA, the FTA Buy America Statute and its implementing regulations do not always forbid recipients of FTA federal financial assistance from acquiring "foreign" products. Instead, the FTA Buy America Statute and associated regulations permit acquisition of these items in some circumstances. In some cases, the FTA has approved a "general" waiver (i.e., a waiver for all projects or contracts meeting specified criteria); in others, the FTA must approve a "project-specific" waiver (i.e., a waiver that applies only to a single FTA-funded project undertaken by a grantee). The following sections discuss waivers in more detail.

a. Acquisition of Domestic Item Is Inconsistent with the Public Interest

The restrictions in the FTA Buy America Statute may be waived on a general or project-specific basis when their application is "inconsistent with the public interest."[95] But like the BAA and the FAR, neither the FTA Buy America Statute nor the FTA's implementing regulations explain when the acquisition of domestic items may be "inconsistent with the public interest." The FTA Administrator has the ultimate legal authority to grant a waiver, and in doing so must (1) "consider all appropriate factors on a case-by-case basis" and (2) issue a detailed written statement justifying the waiver, with an accompanying notice of the waiver in the Federal

90. *See* Section I.A.2, *supra*.

91. 49 C.F.R. § 661.5(d)(2) (emphasis added).

92. 49 C.F.R. § 661.3.

93. *Id.* (emphasis added). Note that this definition approximates judicial and administrative characterizations of "manufacturing" under the BAA. *See* Section I.A.1, *supra* (explaining that manufacturing occurs when a process yields "basically new material or result[s] in a substantial change in physical character"). Simple assembly is insufficient—the process must yield something new.

94. For helpful examples of the FTA's application of these rules in practice, see Wyatt, *supra* note 83, at 16–18.

95. 49 U.S.C. § 5323(j)(2)(A); 49 C.F.R. § 661.7(b).

Register.[96] Neither the FTA Buy America Statute nor the FTA's implementing regulations detail what factors may be appropriate for the FTA administrator to consider,[97] but one commentator has noted that the FTA generally will not grant a public interest waiver for, among other things, "the low quality or high price of domestic products" sought by a grantee.[98]

The FTA has rarely issued generally applicable public-interest waivers but has done so broadly in two instances: (1) for "small purchases" (i.e., contracts to purchase goods, materials, or other items costing less than $150,000)[99] and (2) for the purchase of "microprocessors, computers, microcomputers, or software . . . used solely for the purpose of processing or storing data."[100]

b. Domestic Item Is Not Sufficiently Available

The FTA administrator may waive application of the FTA Buy America Statute's restrictions when it determines that the domestic items sought are not produced "in a sufficient and reasonably available amount or are not of a satisfactory quality."[101] The FTA administrator has made that determination, on a generally applicable basis, for items previously determined not to be sufficiently available or of a satisfactory quality for federal acquisitions subject to the BAA.[102] An FTA grantee may acquire these items, which are listed in the FAR, without regard to the Buy America Statute's restrictions.

If an FTA grantee wishes to acquire an item not contained within this list without regard to the FTA's Buy America Statute's restrictions, it must seek a specific waiver from the FTA. The FTA will presume that a non-availability waiver should be granted if "no responsive and responsible bid is received offering an item produced in the United States."[103] However, if only one bid is received (i.e., the acquisition constitutes a "sole source procurement"), the FTA will grant a non-availability waiver only if the grantee provides sufficient information indicating that (1) a sole-source procurement is proper or (2) the item "is not produced in sufficient and reasonably available quantities of a satisfactory quality in the United States."[104]

If a bidder in good faith certifies compliance with the FTA Buy America Statute's restrictions as part of the bidding process but later determines that it can no longer comply with the certification, the FTA will grant a non-availability waiver only if it receives evidence that (1) the original certification was made in good faith and (2) the item to be procured cannot now be obtained domestically due to commercial impossibility or impracticability.[105]

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96. 49 C.F.R. § 661.7(b).

97. For a more detailed treatment of the FTA's view on the public interest waiver, see Wyatt, *supra* note 83, at 36–38.

98. Wyatt, *supra* note 83, at 38.

99. *See* 49 U.S.C. § 5323(j)(13); 49 C.F.R. § 661.7, app. A(c). *See also* Ellen Partridge, Chief Counsel, U.S. Dep't of Transp., Fed. Transit Admin., "Dear Colleague" Letter (Sept. 16, 2016) (explaining eligibility for "small purchase" waiver).

100. *See* 49 C.F.R. § 661.7, app. A(b). *See also* Wyatt, *supra* note 83, at 30–31.

101. 49 U.S.C. § 5323(j)(2)(B); 49 C.F.R. § 661.7(c).

102. *See* 49 C.F.R. § 661.7, app. A(a); FAR 25.104(a).

103. 49 C.F.R. § 661.7(c)(1).

104. 49 C.F.R. § 661.7(c)(2). For examples of proper documentation and the difficulties that FTA grantees might face in obtaining a non-availability waiver, see Wyatt, *supra* note 83, at 33–34.

105. 49 C.F.R. § 661.7(c)(3).

c. Inclusion of Domestic Material Will Increase Cost of Overall Project By More Than 25 Percent

The FTA administrator may waive the FTA Buy America Statute's restrictions if "including domestic material will increase the cost of the overall project by more than 25 percent."[106] If the "lowest, responsive and responsible bid" does not comply with the Buy America Statute's restrictions, the administrator can grant a waiver and permit a grantee to select that bid if the amount of the bid, multiplied by a factor of 1.25, is still lower than the second-lowest responsive and responsible bid. Because the waiver applies to the entire cost of the "project" rather than to a particular portion of the project, this waiver does not apply to components or subcomponents of an end product.[107]

d. Acquisition of Rolling Stock

The FTA Buy America Statute and its implementing regulations establish an alternative set of domestic content requirements for grantee acquisition of "rolling stock" (including train control equipment, communication equipment, and traction power equipment).[108] They do so through the creation of a generally applicable waiver from the restrictions that otherwise govern procurement of steel, iron, and manufactured products under the Buy America Statute. Although "rolling stock" is statutorily undefined, the FTA's implementing regulations define the term to include "transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services."[109] At present, grantees that use FTA monies to acquire rolling stock must ensure that (1) the cost of components and subcomponents produced in the United States exceeds 70 percent of the cost of all components of the rolling stock and (2) final assembly of the rolling stock occurs in the United States.[110]

Like with "manufactured products," the primary challenge that grantees face in meeting the first requirement of these standards is ensuring proper characterization of items as "components" or "subcomponents" as opposed to "end products." Only then can a grantee establish the cost of an end product's components and subcomponents. Unlike for manufactured products, both the components *and* subcomponents of rolling stock must meet the minimum domestic content thresholds in the FTA Buy America Statute.[111] In general, the cost of a component or subcomponent is the price that a bidder must pay to a subcontractor or supplier for that component or subcomponent.[112]

106. 49 U.S.C. § 5323(j)(2)(D); 49 C.F.R. § 661.7(d).

107. *See* Wyatt, *supra* note 83, at 34. For examples of the difficulties that FTA grantees might face in obtaining this type of waiver, see *id.* at 35–36.

108. 49 U.S.C. § 5323(j)(2)(C); 49 C.F.R. § 661.11.

109. 49 C.F.R. § 661.3.

110. *See* 49 U.S.C. § 5323(j)(2)(C).

111. *Cf.* Section II.A.1.b, *supra*.

112. *See* 49 C.F.R. § 661.11(m)(1).

The FTA's implementing regulations contain lists of items that are typical components of buses[113] and rail rolling stock,[114] but they also contain representative lists of rolling stock end products (including train control equipment, communication equipment, and traction power equipment).[115] FTA grantees can use these lists when determining which items qualify as components, subcomponents, and end products.

The FTA has also provided representative examples of activities that constitute "final assembly" for both rail cars and buses.[116] In general, "final assembly" occurs when an end product is created "from individual elements brought together for that purpose through application of manufacturing processes."[117] Manufacturers may, but are not required to, request that the FTA determine that a particular process constitutes "final assembly."

3. FTA Grantee Obligations

When conducting procurement actions using FTA grant funds, FTA grantees must take several actions to implement the terms of the FTA Buy America Statute. First, a grantee must include in its bid specifications an "appropriate notice" of the FTA Buy America Statute.[118] Second, those specifications must "require, as a condition of responsiveness, that the bidder or offeror submit with the bid or offer a completed Buy America certificate."[119] Lastly, for grant-funded acquisitions of rolling stock, an FTA grant recipient must conduct pre-award and post-delivery audits of Buy America compliance.

a. Collecting Certificates of Buy America Compliance

The FTA's implementing regulations provide two forms of Buy America compliance certificates for steel, iron, or manufactured products, and two forms of compliance certificates for rolling stock.[120] In each case, bidders or offerors must certify during the bidding process that (1) they will comply with the FTA Buy America rules applicable to the type of item being procured or (2) they cannot comply with the Buy America rules applicable to the type of item being procured but may qualify for a waiver from those rules. When a grantee conducts a sealed bidding process, a bidder is generally not permitted to change its certification after the bids are opened.[121]

Under certain circumstances, federal law and the FTA regulations permit a bidder or offeror to correct a certain incomplete or incorrect certificate of compliance submitted to an FTA grantee.[122] A bidder or offeror that submits an incomplete or incorrect certificate of Buy America compliance as a result of an "inadvertent or clerical error" may submit to the FTA chief counsel

113. 49 C.F.R. § 661.11, app. B.
114. 49 C.F.R. § 661.11, app. C.
115. *See* 49 C.F.R. § 661.3, app. A(1) (rolling stock end products); 49 C.F.R. § 661.11(t) (train control equipment); 49 C.F.R. § 661.11(u) (communication equipment); 49 C.F.R. § 661.11(v) (traction power equipment).
116. 49 C.F.R. § 661.11, app. D.
117. 49 C.F.R. § 661.11(r).
118. 49 C.F.R. § 661.13(b); U.S. Dep't of Transp., Fed. Transit Admin., Best Practices Procurement & Lessons Learned Manual, FTA Report No. 0105, app. A-4 (Oct. 2016) (providing sample language for notification of Buy America applicability in bid documents).
119. 49 C.F.R. § 661.13(b)
120. *See* 49 C.F.R. § 661.6 (steel, iron, or manufactured products); *id.* § 661.12 (buses, other rolling stock and associated equipment).
121. 49 C.F.R. § 661.13(c).
122. *See* 49 U.S.C. § 5323(j)(10).

within ten days of the relevant bid opening a written explanation regarding the improper certification sworn under penalty of perjury.[123] "Inadvertent or clerical error[s]" do not include failures to sign a certificate, submissions of two certificates (i.e., compliance and noncompliance), failures to submit any certification, or certifications based upon ignorance of the proper application of Buy American requirements.[124] Except in limited circumstances, a grantee may not award a contract for which a bidder has submitted a request to the FTA chief counsel until the chief counsel decides whether the grantee may accept a revised certificate.[125]

b. Conducting Pre-Award and Post-Delivery Audits for Rolling Stock Procurement

Federal law and the FTA regulations require FTA grant recipients that purchase rolling stock with FTA grant money to obtain pre-award and post-delivery reviews of such purchases to ensure compliance with motor vehicle safety requirements, the FTA Buy America Statute's requirements, and grantee bid specifications.[126] Typically, third-party firms independent from manufacturers or suppliers provide these audits to FTA grantees, and a recipient may charge the cost of these audits against the FTA grant made for the procurement of rolling stock.[127]

A pre-award audit must be conducted before an FTA grantee enters into a contract to purchase rolling stock.[128] In connection with a pre-award audit, a recipient must keep on file a Buy America certification indicating that (1) the FTA has granted a waiver to the FTA Buy America Statute's requirements for rolling stock for the particular purchase or (2) the rolling stock otherwise meets applicable Buy America statutory requirements.[129] If the FTA has not granted a waiver, a third-party firm that is not a manufacturer or supplier of the items analyzed must prepare documentation indicating (1) component and subcomponent parts of the rolling stock to be purchased, identified by the manufacturer of the parts, their country of origin, and costs; and (2) the location of the final assembly point for the rolling stock.[130]

A post-delivery audit must be conducted before an FTA grantee takes title to rolling stock to be purchased using FTA grant funds.[131] In connection with a post-delivery audit, a recipient must keep on file a Buy America certification indicating that (1) the FTA has granted a waiver to the Buy America Statute's requirements for the rolling stock received or (2) the rolling stock otherwise meets applicable Buy America statutory requirements.[132] If the FTA has not granted a waiver, a third-party firm that is not a manufacturer or supplier of the rolling stock received must prepare documentation indicating (1) component and subcomponent parts of the rolling stock to be purchased, identified by the manufacturer of the parts, their country of origin, and costs; and (2) the actual location of the final assembly point for the rolling stock and the cost of the final assembly.[133]

123. 49 C.F.R. § 661.13(b)(1).
124. *See* 49 C.F.R. § 661.13(b)(1); *id.* § 661.13(b)(3).
125. 49 C.F.R. § 661.13(b)(1)(i).
126. 49 U.S.C. § 5323(m); 49 C.F.R. pt. 663.
127. 49 C.F.R. § 663.11.
128. 49 C.F.R. § 663.21.
129. 49 C.F.R. § 663.25.
130. 49 C.F.R. § 663.25(b)(2).
131. 49 C.F.R. § 663.31.
132. 49 C.F.R. § 663.35.
133. 49 C.F.R. § 663.35(b)(2).

4. Consequences for Noncompliance

FTA grantees, and contractors and subcontractors to FTA grantees, that fail to abide by the FTA Buy America Statute and the FTA's implementing regulations can face a range of adverse consequences.[134]

The FTA is not permitted to obligate funds for noncompliant projects unless a grantee has obtained a waiver,[135] and a grantee that proceeds with a noncompliant project without a waiver may forfeit its FTA funding. After a grantee has entered into a contract, a bidder that fails to comply with its Buy America certification is deemed to have breached the contract. To preserve FTA funding, a grantee must ensure that the bidder takes steps to correct its noncompliance, potentially by pursuing remedies provided under the contract (e.g., termination or damages for hiring a replacement contractor).[136] Otherwise, a grantee risks forfeiture of FTA funding. Contractors that willfully fail to abide by Buy America certifications may also face debarment or suspension by the FTA[137] or, in some cases, criminal penalties.[138]

III. Authority of North Carolina's Counties and Municipalities to Impose Domestic Procurement Preferences

North Carolina's local governments need to understand how they obtain authority under state law to implement domestic procurement preferences in their procurement processes. This section explores the legal authority of the state's municipalities and counties to impose domestic procurement preferences when expending federal financial assistance to which domestic procurement preferences attach under federal law or regulations.

Units of local governments in North Carolina derive their powers from delegations of authority made by the North Carolina General Assembly.[139] And although the General Assembly has broadly authorized municipalities and counties to "acquire and hold any property"[140] and enter into contracts "in order to carry out any public purpose" in which they may otherwise legally engage,[141] it also has restricted the manner in which these entities award certain contracts to purchase goods, materials, and construction services.

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134. For a helpful, more expansive discussion of the consequences discussed in this section, see Wyatt, *supra* note 83, at 45–48.

135. 49 C.F.R. § 661.5(a).

136. 49 C.F.R. § 661.17.

137. 49 C.F.R. § 661.19; 2 C.F.R. pt. 180.

138. 49 U.S.C. § 5323(l)(1).

139. *See* N.C. Const. art. VII, § 1 ("The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivision, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.").

140. *See* Chapter 153A, Section 11 of the North Carolina General Statutes (hereinafter G.S.) (counties); G.S. 160A-11 (municipalities).

141. *See* G.S. 153A-449(a) (counties); 160A-20.1(a) (municipalities).

A. When Awarding a "Covered Contract," May a Municipality or County Exclude from Consideration or Discriminate Against Offers of Foreign-Made Items?

Subject to limited exceptions, municipalities and counties in North Carolina must undertake competitive bidding processes prior to entering into contracts with expenditure amounts that equal or exceed $30,000 for (1) the purchase of "apparatus, supplies, materials, or equipment" (i.e., personal property) or (2) "construction or repair work."[142] In each case, state law requires that these units award these types of contracts ("covered contracts") to "the lowest responsible bidder . . . , taking into consideration quality, performance and the time specified in the proposals for the performance of the contract."[143]

North Carolina courts have held that this standard of award does not require an automatic award of a covered contract to a bidder that submits a bid with the lowest price.[144] Instead, a unit can evaluate factors other than cost when determining whether a bidder is "responsible"—including whether a bidder has the "skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability."[145] And while the state's General Statutes expressly allow a local government to consider qualitative factors (i.e., "quality, performance, and the time specified in the proposals for the performance of the contract") when awarding a covered contract, North Carolina courts have not analyzed the meanings of these terms in any depth. Consequently, it is not clear whether these evaluation factors permit a North Carolina local government to condition the award of a covered contract upon a vendor's or contractor's exclusive sale of domestically manufactured products or upon incorporation of domestic construction materials into a public work. An item's foreign origin or manufacture *might* affect its quality, performance, or time of delivery in some cases, but it is equally likely that an item's foreign manufacture does not affect these factors.

1. Judicial Analysis in Other Jurisdictions

Courts in New York and Texas have addressed whether, in the absence of express statutory authorization, public entities bound by standards of contract award similar to those in North Carolina law could exclude foreign-made items from statutory competitive solicitation processes.[146] In each case, these courts have invalidated attempts by state and local entities to exclude foreign-made products from consideration.

142. *See* G.S. 143-129(b); 143-131(a). North Carolina law also requires that counties and municipalities conduct a qualifications-based selection process for the procurement of architectural, engineering, and land surveying services. *See* G.S. 143-64.31 *et seq.* But these contracts are not likely to include the purchase of goods or materials.

143. G.S. 143-129(b); G.S. 143-131(a). Contracts for the "purchase of apparatus, supplies, materials, or equipment requiring an estimated expenditure of public money in an amount equal to or more than . . . $90,000 and "construction or repair work requiring the estimated expenditure of public money in an amount equal to or more than . . . $500,000" are subject to the "formal bidding" statute—G.S. 143-129. *See* G.S. 143-129(a). State law authorizes the rejection of "[p]roposals [for these contracts] for any reason determined by the board or governing body in the best interest of the unit." G.S. 143-129(b).

144. *See* Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 386 (1992).

145. *Id.* at 385.

146. *See* Am. Inst. for Imported Steel, Inc. v. Erie Cnty., 302 N.Y.S.2d 61 (App. Div. 1969); Am. Inst. for Imported Steel, Inc. v. Off. of Gen. Servs., 365 N.Y.S.2d 56 (App. Div. 1975), *aff'd* 348 N.E.2d 913 (N.Y. 1975); Tex. Highway Comm'n v. Tex. Ass'n of Steel Importers, Inc., 372 S.W.2d 525 (Tex. 1963).

For example, a New York intermediate appellate court held in 1975 that New York law did not authorize a state agency to require by specification that "all bids . . . be on domestic made commodities."[147] There, the New York statute at issue required state agencies to award procurement contracts "to the lowest responsible bidder, as will best promote the public interest, taking into consideration" five specified criteria: "[t]he reliability of the bidder, the qualities of the articles proposed to be supplied, their conformity with the specifications, the purposes for which required and the terms of delivery."[148] The court held that because the statute did not specifically include the origin of goods or materials as a factor in the list of permissible evaluation criteria, a specification that limited purchases to domestically made items was invalid. And although the New York legislature permitted the agency to consider whether a purchase would "promote the public interest," that provision was insufficiently detailed to justify "eliminating . . . an entire class of bidders" from consideration.[149] To hold otherwise, the court wrote, would "easily . . . neutralize[]" the "beneficial purpose" of the applicable competitive bidding statute—"to invite competition and thereby furnish the State with the best product at the lowest price practicable."[150]

Another division of New York's intermediate appellate court similarly invalidated a New York county's resolution requiring exclusive use of domestically manufactured steel in its capital improvement projects.[151] In that case, the applicable state statute required simply that "all contracts for public work . . . be awarded . . . to the lowest responsible bidder."[152] The court similarly noted that while "[t]here may be excellent reasons why United States industry and labor should be protected . . . from importation of foreign manufactured steel," the attempt to limit the county's purchase to domestically made steel would violate the stated purpose of the statute—to "assure the prudent and economical use of public moneys . . . and to facilitate the acquisition of facilities of maximum quality at the lowest possible cost."[153] The court rejected the county's "feebl[e]" contention that the restriction bore "some relationship to quality control of steel" and held that the resolution was in "fatal conflict" with the applicable competitive bidding law.[154]

Interpreting an even less detailed statute, the Texas Supreme Court held in 1963 that the Texas Highway Commission violated that state's competitive bidding law when it required contractors to provide only domestically manufactured steel in highway construction contracts.[155] There, the relevant competitive bidding statute simply required that the Commission submit all highway construction contracts or contracts to purchase materials for

147. *See Off. of Gen. Servs.*, 365 N.Y.S.2d at 57.
148. *Id.* at 58 (quoting State Finance Law § 174).
149. *Id.* at 58, 59.
150. *Id.* at 58.
151. *Erie Cnty.*, 302 N.Y.S.2d at 63.
152. *Id.* (quoting N.Y. Gen. Mun. Law § 103).
153. *Id.* at 64, 63 (quoting N.Y. Gen. Mun. Law § 100).
154. *Id.* at 63, 64.
155. Texas Highway Comm'n v. Tex. Ass'n of Steel Importers, Inc., 372 S.W.2d 525, 526 (Tex. 1963). The Texas Highway Commission's Minute Order No. 48,644 stated as follows: "All construction contracts, beginning with the January 1961 letting, shall include a provision that materials furnished under such contracts shall be manufactured in the United States, its territories and possessions. It is further understood and directed that where finished construction material is manufactured in a United States or territories mill it will be considered as a domestic product and will be acceptable under the terms of this Order provided all other requirements of the specifications are met." *Id.*

highway construction "to competitive bids."[156] The statute did not list particular criteria for the Commission to apply when evaluating bids received. Citing a prior decision describing the underlying purposes of competitive bidding in Texas, the court noted that "[t]here can be no competitive bidding in a legal sense where the terms of the letting of the contract prevent or restrict competition, favor a contractor or materialman, or increase the cost of the work or of the materials or other items going into the [project]."[157] The court stated that *unless* the restriction could be upheld as "relat[ing] to the quality of materials and convenience of the employees of the State Highway Department," it violated the applicable competitive bidding statute.[158] While noting that the Commission had unquestionable authority to "specify the physical and chemical standards for construction materials . . . to be used in Texas highway construction," the court suggested that "[m]atters of quality should be fixed by quality specifications and not by proscriptions as to localities of manufacture or fabrication."[159] By rejecting all foreign materials, regardless of their quality, the Commission exceeded its statutory authority under Texas law.[160]

2. Potential Results in North Carolina

Some state legislatures have expressly required or authorized their local governments to prefer or purchase only domestically made items (even where these entities are not spending federal funds),[161] but the North Carolina General Assembly has not codified any such provisions in North Carolina law.[162] In the absence of express statutory authority, a municipality or county might face a claim that a local decision to exclude foreign products from consideration or to otherwise give preference to domestic products (e.g., via a price-evaluation preference) violates the standard of award under North Carolina law and therefore constitutes an "abuse of discretion" *per se*. Although North Carolina courts generally have been unwilling to invalidate

156. *Id.* at 526. The court asked, rhetorically: "Why should not the term, 'steel, free from rust' be used instead of 'domestic steel' if that is the quality that is desired in re-enforcing materials used in highway [construction]?" *Id.*

157. *Id.* at 527.

158. *Id.* at 528.

159. *Id.* at 529.

160. The Texas Supreme Court emphasized that it dealt not with a *legislative* enactment but, instead, with an administrative requirement. *See Texas Highway Comm'n*, 372 S.W.2d at 527 (emphasis added) ("We are not here concerned with restrictions which could be imposed by the Congress of the United States or the Legislature of the State of Texas but with the order of an administrative authority which must act in accordance with and not contrary to the acts of the legislative branch of government. *Had the Legislature proscribed foreign materials, we would have an entirely different question*.").

161. Whether the General Assembly has authority to enact such a domestic procurement preference is beyond the scope of this article.

162. G.S. 143-59.1A requires the North Carolina Department of Administration and other state agencies to give preference to "products or services manufactured or produced in the United States" in limited cases. When purchasing "foods, supplies, materials, equipment, printing or services," the North Carolina Department of Administration and any state agency must "give preference as far as may be practicable to such products or services manufactured or produced in North Carolina or furnished by or through citizens of North Carolina." G.S. 143-59(a). But in the event that the Department of Administration or another state agency is unable to provide a North Carolina–specific preference, state law directs those entities to "give preference, as far as may be practicable and to the extent permitted by State law, federal law, and federal treaty, to products or services manufactured or produced in the United States." G.S. 143-59.1A. These provisions apply only to state agencies, not to units of local government.

awards of contracts covered by the competitive bidding statutes in the absence of "fraud or a palpable abuse of discretion,"[163] a North Carolina court that accepted the reasoning of the New York and Texas courts could invalidate an exclusion of foreign products or preference for domestic products in connection with the award of a covered contract where the exclusion or preference does not relate to permissible evaluation factors under North Carolina law (i.e., quality, performance, or the time for performance of a covered contract).

B. When Awarding a "Covered Contract," May a Municipality or County Exclude from Consideration or Discriminate Against Offers of Foreign-Made Items If Spending Federal Grant Funds That Impose Such a Requirement?

The New York and Texas courts mentioned in the subsections immediately above did not address the authority of public entities in those states to impose domestic procurement preferences when spending federal monies to which domestic procurement preferences in federal law or regulations might apply. As noted previously, the standard of award applicable to covered contracts under North Carolina law may not provide sufficient legal authority for a local government to exclude foreign-made products or to prefer domestic products in the award of a covered contract where the exclusion or preference relates only to the origin of the products and not to otherwise permissible evaluation factors under North Carolina law.

If federal grant conditions require a unit to exclude foreign products or to provide a price preference for domestic products in awarding a grant-funded covered contract, a county or municipality may need to identify an alternative source of legal authority that permits it to modify the generally applicable standard of award for covered contracts under North Carolina law. For example, assume that a North Carolina municipality has received a grant from the FTA's Grants for Buses and Bus Facilities Program to assist in the construction of a municipal bus terminal. As discussed in Section II, above, the FTA Buy America Statute and the FTA's implementing regulations require the municipality to ensure that all of the "steel, iron, and manufactured goods used in the [FTA-funded] project are produced in the United States." Would a municipality have legal authority to reject a low bid from an otherwise responsive, responsible bidder on a covered contract if the bidder fails to offer items that meet FTA standards?

1. Potential Sources of Legal Authority under North Carolina Law

The Spending Clause of the U.S. Constitution (Article I, Section 8, Clause 1) authorizes Congress to make grants to state and local governments and to place conditions upon the expenditure of those grants.[164] But the U.S. Constitution does not provide North Carolina's municipalities and counties with the legal authority to *accept* federal grant funds. Instead, these entities derive that power from a delegation of such authority made by the North Carolina General Assembly.[165]

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163. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 384 (1992) (quoting Mullen v. Town of Louisburg, 225 N.C. 53, 60 (1945)).

164. U.S. Const. art I, § 8, cl. 1 ("The Congress shall have Power . . . to . . . provide for the . . . general Welfare of the United States."). To constitute a valid exercise of the power under the Spending Clause, the Supreme Court has required that grant conditions (1) be related to the provision of the general welfare, (2) be unambiguous, (3) be reasonably related to the purpose of the expenditure, and (4) not violate any other independent constitutional provision. *See* New York v. United States, 505 U.S. 144, 167 (1992). Courts have not addressed whether domestic procurement preferences attached to federal grant funds violate these basic constitutional parameters that the Supreme Court has set forth, but is likely that they do not.

165. *See* N.C. Const. art. VII, § 1.

North Carolina law permits municipalities and counties to accept grant funds from the federal government for the purpose of "constructing, expanding, maintaining, and operating any project or facility, or performing any function, which such city or county may be authorized by general law or local act to provide or perform."[166] In doing so, G.S. 160A-17.1(a)(3) permits municipalities and counties to "[a]gree to and comply with any lawful and reasonable conditions . . . imposed upon such grants."[167]

With one exception, however, North Carolina law does not excuse municipalities or counties from abiding by generally applicable state competitive-bidding laws in the event of a conflict between state law and federal laws and regulations that regulate grantee procurement practices. The General Assembly has permitted "municipalities"[168] that receive federal funding for the "acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports" to comply with federal procurement standards in lieu of generally applicable state competitive-bidding laws when entering into "contracts for the acquisition, construction, improvement, enlargement, maintenance, equipment or operation" of airports that are "financed wholly or partly with federal moneys."[169] In such a case, a grantee local government may "let contracts in the manner prescribed by the federal authorities, acting under the laws of the United States and any rules or regulations made thereunder *notwithstanding any other State law to the contrary*."[170] For example, assume federal laws or regulations governing the use of federal grants for the construction of an airport control tower required that a local government grantee award a construction contract using a standard of award *other* than a lowest responsible bidder standard (e.g., upon a "best value" basis).[171] In that case, state law would allow the grantee local government to implement the alternative federal standard of award when awarding the contract.

But outside of the airport context, a unit must identify an independent source of legal authority to modify the generally applicable standard of award for covered contracts. That authority could stem from two places: (1) an independent provision of state law or (2) a federal grant condition's preemption of generally applicable state competitive-bidding law.

166. G.S. 160A-17.1(a).

167. G.S. 160A-17.1(a)(3).

168. A "municipality" includes "any county, city, or town . . . , and any other political subdivision, public corporation, authority, or district . . . which is or may be authorized by law to acquire, establish, construct, maintain, improve, and operate airports and other air navigation facilities." G.S. 63-1(a)(14).

169. G.S. 63-54(a).

170. G.S. § 63-54(c) (emphasis added). *See also* 2001 Amendments to Article 8 of Chapter 143, Op. N.C. Att'y Gen., 2002 WL 31995435, at *2 (Nov. 18, 2002) (emphasis added) (noting that "G.S. § 64-54(c) grants an entity discretionary authority [to let contracts] under state *or* federal law when federal moneys are involved").

171. The General Assembly has authorized units of local government to conduct "best-value" procurements in limited cases. *See, e.g.*, G.S. 143-135.9(a)(1) (defining a "Best Value procurement" as "[t]he selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor"); -129.8(b)(2) (permitting political subdivisions of the state to award contracts for certain "information technology" to the person or entity that submits the "best overall proposal").

2. G.S. 160A-17.1(a)(3a)—Authority to Impose Alternative Specifications?

No court has analyzed the extent to which a condition imposed upon a federal grant by federal statute or regulation might be "lawful and reasonable" under G.S. 160A-17.1(a)(3). But a court faced with such an issue of first impression could broadly construe a federal grant condition imposed on a North Carolina city or county as "lawful and reasonable" under G.S. 160A-17.1(a)(3) whenever (1) Congress or a federal grantor agency has requisite constitutional and statutory authority, respectively, to impose the condition and (2) the city or county already has independent statutory authority to engage in the relevant activity. In such a case, G.S. 160A-17.1(a)(3) might be read expansively to permit a municipality or county to comply with a federal law or regulation requiring the exclusion of a low bid of foreign materials. Such a reading would be consistent with current practice.

Although it is less likely, a court could read G.S. 160A-17.1(a)(3) more narrowly. For example, a statutory provision neighboring G.S. 160A-17.1(a)(3)—G.S. 160A-17.1(a)(3a)—specifically authorizes cities and counties to modify the standard of award for covered contracts funded by federal grants where accompanying grant conditions impose "minimum minority business enterprise participation requirements."[172] In such cases, G.S. 160A-17.1(a)(3a) provides express authority for cities and counties to include such requirements in their specifications for covered contracts and "award[] bids . . . to the lowest responsible bidder . . . meeting these and any other specifications."[173]

A domestic procurement preference is not a "minimum minority business enterprise participation requirement." Does this mean that a municipality or county *lacks* authority under North Carolina law to exclude foreign products from consideration or to otherwise give preference to domestic products (e.g., via a price-evaluation preference) even where federal statutes or regulations might impose such a requirement upon the expenditure of federal grant funds?

The General Assembly authorized cities and counties to comply with "minimum minority business participation requirements" applicable to federal grants nearly ten years after it gave those entities general authority to comply with "lawful and reasonable conditions."[174] And the specific grant of authority to comply with "minimum minority business participation requirements" might suggest that G.S. 160A-17.1(a)(3), standing on its own, does not provide sufficient authority for cities and counties to modify the generally applicable standard of award for covered contracts under North Carolina law.

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172. G.S. 160A-17.1(a)(3a).

173. *Id.* For example, recipients of FTA financial assistance for "planning, capital, and/or operating" purposes that award prime contracts whose cumulative value exceeds $250,000 in a fiscal year must establish a "disadvantaged business enterprise program" meeting the requirements of 49 C.F.R. part 26. *See* 49 C.F.R. § 26.21(a)(2). In these cases, a recipient must establish a percentage goal for participation by disadvantaged business enterprises and may award a covered contract "only to a bidder/offeror who makes good faith efforts to meet [the goal]." 49 C.F.R. § 26.53(a). In particular, a bidder must make "sufficient good faith efforts to meet the goal" in order to be considered "responsible and/or responsive." 49 C.F.R. pt. 26, app. A. These provisions apply to, among other programs, the FTA's Grants for Buses and Bus Facilities Program. *See* U.S. Dep't of Transp., Fed. Transit Admin., Fiscal Year 2021 Competitive Funding Opportunity; Grants for Buses and Bus Facilities Program, 86 Fed. Reg. 52,291, 52,296 (Sept. 20, 2021).

174. *Compare* S.L. 1981, ch. 827 *with* S.L. 1971, ch. 937.

3. Federal Preemption of Generally Applicable Competitive-Bidding Laws

If a court agreed with a narrow reading of G.S. 160A-17.1(a)(3), a city or county would need to identify a separate source of legal authority to justify the inclusion of a domestic procurement preference in a covered contract funded by a federal grant. In *S.J. Groves & Sons Co. v. Fulton County*, the Eleventh Circuit Court of Appeals considered a similar issue in the absence of a Georgia statute that expressly authorized a federal grantee-county to comply with the terms and conditions of a federal grant.[175] There, a Georgia county bound by that state's competitive-bidding statute rejected an otherwise acceptable "low bid" for an airport construction contract where, as required by U.S. Department of Transportation regulations attached to grant funding used by the county, the low bidder failed to make adequate "good faith efforts" to solicit minority business enterprise participation in the work.[176] Notably, the court explained that when a grantor agency promulgates a regulation pursuant to a valid delegation of congressional authority, those regulations can in fact *preempt* state law.[177]

Although it remanded the case and failed to directly address whether the regulations at issue were constitutional, the Eleventh Circuit's holding in *Groves* suggests that validly promulgated grant conditions *could* preempt otherwise generally applicable state law (including standards of award for public contracts) as long as the governing federal law and regulations that impose such a condition are constitutional. However, in light of the broad language in G.S. 160A-17.1(a)(3), it is unlikely that a court would need to consider whether a federal grant condition preempted otherwise applicable competitive-bidding laws in North Carolina.

IV. Recent Attempts to Broaden the Scope of Domestic Procurement Preferences Applicable to Federal Financial Assistance

No federal statute or comprehensive set of federal regulations applies a uniform domestic procurement preference to the expenditure of all forms of federal financial assistance. But two broadly applicable changes have recently expanded the scope of domestic procurement preferences in federal financial assistance and merit the attention of local governments that have accepted federal grant funds since November 12, 2020, or will soon seek federal grant funds.

The first significant change occurred in November 2020, when the Office of Management and Budget (OMB) incorporated a domestic procurement preference into a set of government-wide grant administration standards known as the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 C.F.R. pt. 200) (hereinafter Uniform Guidance), which apply to the expenditure of most federal grant funds. Among other things, the Uniform Guidance sets forth procurement standards that federal agencies typically impose upon non-federal entities that receive federal grants.[178] Unless OMB approves an exception to

175. 920 F.2d 752 (11th Cir. 1991).

176. *Id.* at 754–55. Because of the express authority contained in G.S. 160A-17.1(a)(3a), the specific issue that the Eleventh Circuit addressed in *Groves*—whether a bidder's failure to make adequate good faith efforts to solicit minority participation constitutes grounds for rejection of an otherwise low bid from a responsible bidder—likely would not arise for a North Carolina city or county.

177. *Groves*, 920 F.2d at 763 (internal citations omitted) ("Of course, when Congress acts pursuant to its delegated powers, conflicting state law must yield. Further, regulations promulgated pursuant to a congressional delegation of authority can also preempt state law.").

178. *See* 2 C.F.R. §§ 200.317–.327.

its requirements or another federal statute or regulation dictates otherwise, federal grantor agencies must implement the provisions of the Uniform Guidance when making federal grants to non-federal entities.[179]

A more significant change to domestic procurement preferences attached to federal financial assistance occurred in November 2021, when Congress enacted the Infrastructure Investment and Jobs Act of 2021 (hereinafter IIJA).[180] One portion of the IIJA, the Build America, Buy America Act (hereinafter BABAA), expanded the scope of domestic procurement preferences that apply to federally assisted infrastructure projects.[181]

This section details both of these changes, explains how these domestic procurement preferences differ from those contained in the BAA and the FTA Buy America Statute, and outlines how they might impact local government expenditures of federal financial assistance.

A. The UG Buy America Provision: 2 C.F.R. § 200.322

Acting upon its mandate to review and revise the Uniform Guidance every five years,[182] OMB in November 2020 added a new "Buy America" provision to the Uniform Guidance procurement standards: 2 C.F.R. § 200.322 (hereinafter UG Buy America Provision).[183] Unless OMB approves an exception or a superseding federal statute or regulation dictates otherwise, federal agencies must incorporate the UG Buy America Provision (reproduced in the sidebar) into the terms and conditions of federal financial assistance awards issued after November 12, 2020.[184]

In comparison to the detailed and precise regulations that implement the BAA and the FTA Buy America Statute, the UG Buy America Provision is broad and vague—and has left federal agencies and recipients of federal financial assistance with unanswered questions. For example, the new regulation does not make clear (1) when the imposition of a domestic procurement preference is "appropriate" or "consistent with law"; (2) whether OMB intended federal grantor agencies to apply a domestic procurement preference to *all* "goods, products, or materials" purchased using federal financial assistance or instead intended to limit the preference to "iron, aluminum, steel, cement, and other manufactured products [(as defined in the regulation)]"; (3) under what conditions the acquisition of foreign-made items with federal financial assistance is permissible; and (4) in cases where the UG Buy America Provision applies, how a grantee could document its compliance with its terms.

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179. *See* 2 C.F.R. § 200.101(a) ("The requirements established in this part apply to Federal agencies that make Federal awards to non-Federal entities."); 2 C.F.R. § 200.100(b) ("Subparts B through D of this part set forth the uniform requirements for grant and cooperative agreements, including . . . the requirements Federal awarding agencies may impose on non-Federal entities in the Federal award."); 2 C.F.R. § 200.106 ("Federal agencies making Federal awards to non-Federal entities must implement the language in subparts C through F of this part in codified regulations unless different provisions are required by Federal statute or are approved by OMB."); 2 C.F.R. § 200.102(a) ("With the exception of subpart F of this part, OMB may allow exceptions for classes of Federal awards or non-Federal entities subject to the requirements of this part when exceptions are not prohibited by statute.").

180. *See infra* note 204.

181. *See supra* note 9.

182. *See* 2 C.F.R. § 200.109.

183. *See* 85 Fed. Reg. 3766 (Jan. 22, 2020) (proposed rule); Off. of Mgmt. & Budget, Guidance for Grants and Agreements, 85 Fed. Reg. 49,506 (Aug. 13, 2020) (final rule).

184. 85 Fed. Reg. 49,506, 49,506 (noting that, with two exceptions, the revisions to the Uniform Guidance are effective November 12, 2020).

Commentors highlighted these problems in response to OMB's proposed rule containing an initial draft of the UG Buy America Provision, but OMB failed to address these issues in the final rule promulgating this new section. Two Trump Administration executive orders issued prior to the promulgation of the UG Buy America Provision help explain why.

The UG Buy America Provision—2 C.F.R. § 200.322[a]

(a) As appropriate, and to the extent consistent with law, the non-Federal entity **should**, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products or materials **produced in the United States** (including but not limited to iron, aluminum, steel, cement, and other **manufactured products**). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(b) For purposes of this section:

(1) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coating, occurred in the United States.

(2) "Manufactured products" means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; class, including optical fiber; and lumber.

Note: Emphasis added by author.

a. In OMB's initial set of proposed changes, the UG Buy America Provision was located in 2 C.F.R. § 200.321, not 2 C.F.R. § 200.322. *See* 85 Fed. Reg. 3766, 3799.

1. Predecessors to the UG Buy America Provision—Executive Orders 13,788 and 13,858: Lack of Statutory Authority

Executive Order (hereinafter E.O.) 13,788 (Buy American and Hire American) and E.O. 13,858 (Strengthening Buy-American Preferences for Infrastructure Projects) each sought to "maximize, consistent with law, through terms and conditions of Federal financial assistance awards . . . the use of goods, products, and materials produced in the United States."[185] In E.O. 13,788, the Trump Administration directed federal agencies to "develop and propose policies for their agencies to ensure that, to the extent permitted by law, Federal financial assistance awards . . . *maximize* the use of materials produced in the United States, including manufactured products; components of manufactured products; and materials such as steel, iron, aluminum, and cement."[186] In E.O. 13,858, the Trump Administration directed the heads of each executive department and agency "[to] *encourage* recipients of new Federal financial assistance awards" for certain infrastructure projects not already subject to a federal domestic procurement preference (e.g., the FTA Buy America Statute) "to use, to the greatest extent practicable, iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in every contract, subcontract, purchase order, or sub-award . . . chargeable against a Federal financial assistance award."[187]

185. Exec. Order No. 13,788, Buy American and Hire American, 82 Fed. Reg. 18,837, 18,837, § 2(a) (Apr. 18, 2017) (hereinafter E.O. 13,788); Exec. Order No. 13,858, Strengthening Buy-American Preferences for Infrastructure Projects, 84 Fed. Reg. 2039, 2040, § 1(a) (Feb. 5, 2019) (hereinafter E.O. 13,858).

186. E.O. 13,788, § 3(b)(iii) (emphasis added). In response to the executive order, OMB directed federal agencies to provide "ideas for strengthening and applying Buy American laws that may require statutory, executive, regulatory, or administrative action across the government." Off. of Mgmt. & Budget, OMB Memorandum M-17-27, Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws, § II(C) (June 30, 2017).

187. E.O. 13,858, § 3(a) (emphasis added). "Covered programs" under the executive order included federal financial assistance programs for certain "infrastructure projects" not already subject to a

These executive orders did not dictate *how* federal agencies should "maximize" or "encourage" a grantee's use of materials "produced in the United States." As a result, the executive orders generated little regulatory action or substantive modification of federal financial assistance award terms.[188] This lack of agency action can be attributed primarily to the absence of clear statutory authority for the executive branch to impose a universally applicable domestic procurement preference upon the expenditure of federal financial assistance. OMB nominally declined to explain *how* a non-federal entity should impose a domestic procurement preference under the UG Buy America Provision because it sought to "give[] Federal awarding agencies

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domestic procurement preference imposed by federal law or regulation. *See id.* § 2(a) (defining an "[i]nfrastructure project" as "a project to develop public or private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production, generation, and storage, including from fossil-fuels, renewable, nuclear, and hydroelectric sources; electricity transmission; gas, oil, and propane storage and transmission; electric, oil, natural gas, and propane distribution systems; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; cybersecurity; and any other sector designated through a notice published in the Federal Register by the Federal Permitting Improvement Steering Council."); § 2(e).

188. *See* David Gallacher & Bryce Chadwick, *"Buy American" Updates: Trump's Executive Orders, Government Reports, and Other Updates*, SheppardMullin Gov't Conts. & Investigations Blog (Feb. 27, 2019) (noting that as of February 27, 2019, agencies had taken "no public actions [in response to E.O. 13,788] in terms of rulemaking or public notice in the Federal Register"). Only one federal agency (the U.S. Department of Agriculture's Rural Utilities Service (hereinafter USDA-RUS)) appears to have imposed a new, substantive Buy America preference upon a grant made under a "covered program" in response to E.O. 13,858. *See* U.S. Dep't of Agriculture, Rural Broadband Loans, Loan/Grant Combinations, and Loan Guarantees, 85 Fed. Reg. 14,393 (Mar. 12, 2020). The USDA-RUS rule extended a pre-existing "Buy America" requirement contained in 7 C.F.R. part 1787 to (1) grant funds provided through its Rural Broadband Program and (2) grant funds provided through its Community Connect Program. *See* 7 C.F.R. § 1738.156 (applying Buy America requirement to grant funds provided under Rural Broadband Program); 7 C.F.R. § 1739.8 (applying Buy America requirements to grant funds provided under Community Connect Program). USDA-RUS has statutory authority to extend a domestic procurement preference to loans provided under the Rural Electrification Act of 1936 but does not appear to have specific statutory authority to extend such a preference to grants provided under that statute. *See* 7 U.S.C. § 903, statutory note, "Restrictions on Borrower" (emphasis added) ("In making ***loans*** pursuant to [the Rural Electrification Act of 1936 (Title 7, Chapter 31 of the U.S. Code)], the Secretary of Agriculture shall require that, to the extent practicable and the cost of which is not unreasonable, the ***borrower*** agree to use in connection with the expenditure of such funds only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States or in any eligible country, and only such manufactured articles, materials, and supplies as have been manufactured in the United States or in any eligible country, substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States or in any eligible country. For purposes of this section, an 'eligible country' is any country that applies with respect to the United States an agreement ensuring reciprocal access for United States products and services and United States suppliers to the markets of that country, as determined by the United States Trade Representative.") Despite amending the Rural Electrification Act of 1936 to permit the USDA to make grants for certain purposes (e.g., through the Community Connect Program), Congress has not amended this Buy America provision to apply specifically to ***grants*** or ***grantees***.

the flexibility to adjust their guidance accordingly."[189] But it likely avoided providing concrete guidance for the same reason that the Trump Administration provided little guidance in E.O. 13,788 and E.O. 13,858: no federal statute authorizes the executive branch to impose a blanket domestic procurement preference comparable to those found in the BAA or the FTA's Buy America statute upon all forms of federal financial assistance. In the absence of such an authorizing federal statute, OMB's authority to impose a domestic procurement preference is limited largely to encouragement.

2. Interpreting and Applying the UG Buy America Provision

In answering questions about the scope of the UG Buy America Provision, OMB has stated simply that a "recipient should review its Federal award terms and conditions to determine relevant requirements and consult with the Federal awarding agency."[190] But in many cases, federal agencies have failed to address the scope of the UG Buy America Provision in much depth.[191]

How, then, should North Carolina's counties and municipalities interpret and apply the provision? The following sections outline several steps that these entities should take if they have accepted federal financial assistance since November 12, 2020 (the effective date of the UG Buy America Provision), or will soon accept federal financial assistance.

a. Determine Whether the UG Buy America Provision (or Another Domestic Procurement Preference) Applies

First, a unit should determine whether the UG Buy America Provision applies to the expenditure of the federal financial assistance that they have received. In general, the UG Buy America Provision will apply to a non-federal entity's expenditure of federal grant monies awarded after November 12, 2020, where a federal grantor agency has (1) adopted the provisions of the Uniform Guidance[192] and (2) not otherwise promulgated a regulation that excepts the UG Buy America Provision from its adoption of the Uniform Guidance.

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189. Off. of Mgmt. & Budget, Guidance for Grants and Agreements, 85 Fed. Reg. 49,506, 49,513 (Aug. 13, 2020).

190. *See* Office of Mgmt. & Budget, U.S. Chief Financial Officers Council, 2 CFR Frequently Asked Questions, Q-72 (May 3, 2021).

191. For example, the U.S. Environmental Protection Agency (EPA) has stated that only "[r]ecipients must include a description of this domestic preference policy in all subawards, contracts, and purchase orders." EPA, Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements 14 (Nov. 2022). The Federal Emergency Management Agency (FEMA) has noted that a non-federal entity "should provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States" and has also stated that the "preference includes, but is not limited to iron, aluminum, steel, cement, and other manufactured products." U.S. Dep't of Homeland Sec., Fed. Emergency Mgmt. Agency, Procurement Disaster Assistance Team (PDAT) Field Manual: Procurement Information for FEMA Award Recipients and Subrecipients 10 (Oct. 2021). Other agencies, like the National Science Foundation, have provided even less guidance. *See* Nat'l Sci. Found., Grant General Conditions (GC-1), § 44 (eff. Oct. 4, 2021) ("The grantee is notified of the applicability of 2 CFR §200.322, entitled Domestic Preferences for Procurements.").

192. *See, e.g.*, 2 C.F.R. § 1500.2 ("[T]he Environmental Protection Agency adopts the Office of Management and Budget (OMB) guidance Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards to Non-Federal Entities (subparts A through F of 2 CFR part 200), as supplemented by this part, as the Environmental Protection Agency (EPA) policies and procedures for financial assistance administration."); 2 C.F.R. § 3474.1(a) ("The Department of Education adopts the Office of Management and Budget (OMB) Guidance in 2 CFR part 200, except for 2 CFR 200.102(a) and 2 CFR 200.207(a).").

A unit should also determine if the particular form of federal financial assistance is subject to the terms of a domestic procurement preference *other* than the UG Buy America Provision contained in federal law (e.g., the FTA Buy America Statute).[193] An agency likely will make clear in its financial assistance agreement (as some agencies, like FTA, have) that satisfying the terms and conditions of that alternative provision also satisfies the terms of the UG Buy America Provision.[194]

The American Rescue Plan Act of 2021 (ARPA), under which Congress appropriated Coronavirus State and Local Fiscal Recovery Funds (hereinafter Fiscal Recovery Funds) to states and units of local government across the country, did not impose a statutory domestic procurement preference upon the expenditure of Fiscal Recovery Funds by recipients and subrecipients of these monies.[195] But because the U.S. Department of the Treasury has applied the Uniform Guidance procurement standards to purchases of goods or services supported by Fiscal Recovery Funds and has not otherwise excepted the UG Buy America Provision by regulation,[196] the UG Buy America Provision applies to the expenditure of Fiscal Recovery Funds. Like other federal agencies, however, Treasury has not explained *how* recipients and subrecipients of Fiscal Recovery Funds should interpret or apply the UG Buy America Provision

193. For example, Congress and the U.S. Department of Agriculture have attached a domestic procurement preference to federal aid provided to local educational authorities under the National School Lunch Program. *See* 42 U.S.C. § 1760(n)(2)(A) ("[T]he Secretary [of Agriculture] shall require that a school food authority purchase, to the maximum extent practicable, domestic commodities or products."); 7 C.F.R. § 210.21(d)(2)(i) (requiring school food authority expending federal aid distributed by the National School Lunch Program to "purchase, to the maximum extent practicable, domestic commodities or products"); 7 C.F.R. § 210.21(d)(1) ((defining "domestic commodity or product" as "(i) [a]n agricultural commodity that is produced in the United States; and (ii) [a] food product that is processed in the United States substantially using agricultural commodities that are produced in the United States"). This domestic procurement preference would govern the expenditure of federal aid under this program.

194. *See, e.g.*, U.S. Dep't of Transp., Fed. Transit Admin., Fiscal Year 2022 Master Agreement, § 15(d) (Feb. 7, 2022) ("Compliance with FTA's Buy America requirements shall be deemed to satisfy 2 CFR § 200.322, 'Domestic Preferences for Procurements.'").

195. By contrast, with several exceptions, the American Reinvestment and Recovery Act of 2009 (ARRA) (the last pre-COVID era federal stimulus legislation) required recipients of ARRA monies using these funds for the "construction, alteration, or repair of a public building or public work" to ensure that all "iron, steel, and manufactured products" used in any ARRA-funded project were "produced in the United States." American Reinvestment and Recovery Act of 2009, Pub. L. No. 111-5, § 1605(a), 123 Stat. 115, 303. The exceptions to this requirement were similar to those contained under the FTA Buy America regulations. *See id.* § 1605(b) (stating that the domestic content preference in § 1605(a) shall not apply if the head of an executive department agency determines that (1) the application of such requirement "would be inconsistent with the public interest"; (2) "iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality"; or (3) "inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent."); § 1605(d) (requiring application of the "Buy America" preference "in a manner consistent with United States obligations under international trade agreements). OMB enacted comprehensive regulations interpreting ARRA's Buy America provisions for non-federal recipients of ARRA monies. *See* 2 C.F.R. pt. 176.

196. *See* Dep't of the Treas., Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786 (May 17, 2021); Dep't of the Treas., Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338 (Jan. 27, 2022); Dep't of the Treas., Coronavirus State and Local Fiscal Recovery Funds, Final Rule: Frequently Asked Questions (July 27, 2022) (hereinafter SLFRF FAQs).

when entering into procurement contracts funded by these monies.[197] The following section explains how these recipients, subrecipients, and other recipients of federal financial assistance to which the UG Buy America Provision applies can comply with its terms.

b. Comply with the "Mandatory" Portion: Draft a Contract Clause

The interpretive rules in the Uniform Guidance state that while the use of the word "must" indicates a "requirement," the use of the word "should" indicates a "best practice or recommended approach rather than a requirement and permits discretion."[198] Read in this light, subsection (a) of the UG Buy America Provision contains two substantive components, only one of which is mandatory.

The first substantive component of the UG Buy America Provision states that "[a]s appropriate, and to the extent consistent with law," a non-federal entity *should* "to the greatest extent practicable, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products)."[199] While that preference appears at first blush to be very broad (extending to "the purchase, acquisition, or use of [*all*] goods, products, or

197. Treasury has made clear that a unit of local government that uses federal financial assistance *other than* Fiscal Recovery Funds to pay for the cost of a contract may be required to abide by domestic content preferences found in federal statutes or regulations that apply to the other form of federal financial assistance. *See* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. at 4,431. *See also* SLFRF FAQs, *supra* note 196, at 6.19 ("SLFRF recipients may be otherwise subject to the Buy America Preference requirements when SLFRF award funds are used on an infrastructure project in conjunction with funds from other federal programs that require compliance with the Buy America Preference requirements.").

198. 2 C.F.R. § 200.101(b)(1) ("Throughout this part when the word 'must' is used it indicates a requirement. Whereas, use of the word "should" or "may" indicates a best practice or recommended approach rather than a requirement and permits discretion.").

199. OMB generated additional confusion in the UG Buy America provision when it repurposed imprecise definitions (e.g., "produced in the United States" and "manufactured products") from the Trump Administration's executive orders for use in the new regulation. For example, while the executive orders and the UG Buy America provision each explain when "iron or steel products" are "produced in the United States," they do not make clear when agencies can consider *other* types of "goods, products, and materials" (including manufactured products) to have been "produced in the United States." *See, e.g.*, E.O. 13,788, Buy American and Hire American, 82 Fed. Reg. 18,837, 18,837, § 1(b) (Apr. 18, 2017) (" 'Produced in the United States' means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States."). As this bulletin notes in Sections I.A.2 and II.A.1, *supra*, whether an item has been "produced in the United States" can be a complicated determination under other federal statutory and regulatory schemes (e.g., the BAA and the FTA Buy America provisions). For example, the FTA regulations consider a "manufactured product" to have been "produced in the United States" only if (1) all of its "manufacturing processes" occur in the United States and (2) all of its "components" are "of U.S. origin." *See* Section II.A.1, *supra*. Similarly, the BAA and the FAR only permit acquisition of a manufactured item (1) that is "manufactured in the United States" and (2) that has a cost of domestically mined, produced, or manufactured "components" that exceeds 55 percent of the total cost of all components. *See* Section I.A.2, *supra*. In each case, both the BAA, the FAR, and the FTA regulations permit exceptions to these general requirements. *See* Section I.B, *supra*; Section II.A.2, *supra*. It is not clear whether the Trump Administration or OMB intended to encourage federal agencies or their grantees to adopt domestic procurement preferences like those contained in other federal statutes or regulations, or to permit similar exceptions to those preferences. It is also unclear what legal authority, if any, federal agencies have to impose domestic procurement preferences upon awards of federal financial assistance in the absence of an authorizing federal statute.

materials"), the use of the word "should" rather than "must" indicates that imposition of a domestic content procurement preference is not in fact a requirement but is, rather, a suggested "best practice."

The UG Buy America Provision fails to make clear how a non-federal entity could demonstrate compliance with the preference.[200] Because neither OMB nor federal agencies have produced guidance indicating *how* a recipient should put a preference into practice,[201] it is difficult to understand how an agency or an auditor could find that a non-federal entity failed to comply with this first substantive component. The UG Buy America Provision simply lacks the detail of the FAR and the FTA Buy America implementing regulations—and OMB has failed to provide any guiding standards.

The second substantive component of the UG Buy America Provision contains the only clear requirement that local governments must follow. That component states that the "requirements" of this section "*must* be included in all contracts and purchase orders for work or for products under [an] award."[202] In other words, the only mandatory action that non-federal entities must take under the UG Buy America provision is to include a specific clause in each contract, subcontract, and subaward supported by a federal award to which the UG Buy America Provision applies (including those supported by Fiscal Recovery Funds) that *encourages* the contractor, subcontractor, and subrecipient to impose a domestic procurement preference.[203]

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200. In response to OMB's proposed rule implementing the Buy America Provision, commenters expressed uncertainty about how recipients of federal funds could demonstrate compliance with these provisions for audit purposes. *See, e.g.*, State of Oregon, Dep't of Fish & Wildlife, Fish Div., Comment on FR Doc # 2019-28524 (Mar. 23, 2020) ("If goods/services are not available from a US produced source, can we document and move on with project, or is there a procedure to document? We are curious how this will be applied and audited."); N. Cent. Tex. Council of Gov't's, Comment on FR Doc # 2019-28524 (Mar. 25, 2020) ("Please provide guidance on how recipients of federal funds can demonstrate compliance with these requirements."); Anonymous, Comment on FR Doc # 2019-28524 (Mar. 25, 2020) ("Position on Change: *There is no qualitative requirement that can be monitored to guarantee this is being followed.*"); Ass'n of Gov't Accts. (AGA), Comment on FR Doc # 2019-28524 (Mar. 25, 2020) ("How will this be tested under Single Audit? Is the Buy America Act required for all grants and cooperative agreements?").

201. For example, does the UG Buy America Provision permit a non-federal entity to proceed with the acquisition of foreign items using exceptions typically available under other domestic procurement preferences regimes (e.g., if a domestic item is not available or available only at an unreasonable cost)?

202. Commenters on the proposed rule containing the UG Buy America Provision expressed a desire for any required contract clauses to be noted not only in the UG Buy America Provision, but also in appendix II to 2 C.F.R. part 200 (Contract Provisions for Non-Federal Entity Contracts Under Federal Award). *See* Calli Price, University of California Santa Barbara Procurement Manager, Comment on FR Doc # 2019-28524 (Feb. 11, 2020) ("Because the proposed new Section 200.321 'Domestic preferences for procurements' includes the requirement that such term will be flowed down to all contracts and purchase orders, 200.321 MUST be ALSO included in Appendix II - Contract Provisions for Non-Federal Entity Contracts. If 200.321 is *not* included in Article II, Buyers and Contract Analysts across the country WILL miss the requirement."). OMB responded to this concern when it adopted the final revisions to the Uniform Guidance by amending appendix II to cross-reference 2 C.F.R. § 200.322. *See* Off. of Mgmt. & Budget, Guidance for Grants and Agreements, 85 Fed. Reg. 49,506, 49,577 (Aug. 13, 2020).

203. For a model clause, see Connor H. Crews, *Using the Coronavirus State and Local Fiscal Recovery Funds Model Addendum: Purpose, Usage, Questions and Answers,* Loc. Gov't Fin. Bull. No. 60 § XI (UNC School of Government Apr. 2022). Ultimately, the UG Buy America Provision fails to make clear (1) whether its definitions of "produced in the United States" and "manufactured products" apply to all types of procurements or instead limit the scope of the regulation to construction projects or (2) when

OMB has not provided any guidance for covered entities to follow regulatory schemes like those contained in the BAA, the FAR, the FTA Buy America Statute, or the FTA's implementing regulations when conducting procurement regulations. As a result, the UG Buy America Provision—untethered to a statutory basis—will have little practical effect at the local level. The UG Buy America Provision is likely satisfied as long as a local government "encourages" its contractors, subcontractors, and subrecipients (if any) to maximize the use of domestically manufactured goods and materials through the inclusion of a contract clause.

B. The Build America, Buy America Act (BABAA): What North Carolina's Counties and Municipalities Should Know

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act of 2021 (IIJA) into law.[204] The IIJA appropriated more than $1.2 trillion to a wide variety of infrastructure projects, but through its adoption of the Build America, Buy America Act (BABAA), it also significantly expanded the scope of domestic procurement preferences that apply to federally assisted infrastructure projects.[205] This section outlines key provisions of BABAA that might affect North Carolina's counties and municipalities and explains how BABAA's provisions more closely mirror the domestic procurement preferences contained in the BAA and the FTA Buy America Statute than those contained in the UG Buy America Provision.

1. A New, Broad Domestic Procurement Preference: The BABAA Preference

BABAA attached a new domestic procurement preference—the BABAA Preference—to all federal funds obligated under federal financial assistance programs for "infrastructure" projects, not just those for which the IIJA appropriates funds. In particular, subject to three primary exceptions, the BABAA Preference prohibits a federal agency from obligating any available funds—not only funds appropriated under the IIJA—on or after May 14, 2022, under a "*Federal financial assistance* program for [an] *infrastructure* . . . *project* unless all of the iron, steel, manufactured products, and *construction materials* used in the *project* are *produced in the United States*."[206]

"goods, products, and materials" (including manufactured products) other than "iron and steel products" have been "produced in the United States." Commenters expressed concerns about these issues in response to OMB's proposed rule amending the Uniform Guidance. *See* National Association of State Auditors, Comptrollers and Treasurers, Comment on FR Doc # 2019-28524 (Mar. 23, 2020) ("It is not clear if this new provision only applies to construction projects or for all procurements. . . . We do not support this provision as it is currently written because it is very vague in its application. The wording 'to the extent practicable' is vague and it is not clear how this would be documented and if documented would even be required or if this is just a best practice."); CliftonLarsonAllen LLP, Comment on FR Doc # 2019-28524 (Mar. 23, 2020) ("Section (a) states 'purchase, acquisition, or use of goods, products, or material produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products).[']However, the definition in (b) only addresses items such as iron, aluminum, steel, and cement. What about other manufactured products such as clothing, technology, etc.? Can the definition in (b) be expanded to include what is considered produced in the United States for items other [th]an iron, aluminum, steel, and cement?")

204. Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (2021).

205. Build America, Buy America Act, Pub. L. No. 117-58, div. G, tit. IX, §§ 70911–70953, 135 Stat. 429, 1294–1316 (2021) (hereinafter BABAA).

206. *Id.* § 70914(a) (emphasis added).

BABAA tasked OMB with assisting federal agencies in applying the new BABAA Preference.[207] In analyzing the BABAA Preference, OMB and other agencies have faced two primary questions: (1) does a particular program of federal financial assistance make funds available for "infrastructure" (as defined in BABAA) and (2) if so, what actions must agencies and recipients of federal financial assistance take to implement the BABAA Preference. OMB issued initial guidance (OMB Memorandum M-22-11) to federal agencies on these issues on April 18, 2022,[208] and federal agencies have subsequently grappled with these questions in separately issued guidance documents.[209] On February 9, 2023, OMB issued proposed regulations to support implementation of the BABAA Preference.[210] Although OMB requested comments on the proposed regulations by March 13, 2023, the date for the release of final regulations is not certain.[211]

The following two sections outline OMB's initial guidance to federal agencies on the applicability and implementation of the BABAA Preference and also provide selected examples of agency-specific guidance on these topics. Because the BABAA Preference applies to a wide variety of federal financial-assistance programs across federal agencies, this bulletin cannot address guidance materials released by every federal agency to date. Local governments that intend to seek federal financial assistance for capital improvement projects should become familiar with the BABAA Preference, OMB's initial guidance in OMB Memorandum M-22-11, and agency-specific regulations and guidance documents that implement the BABAA Preference. If and when OMB releases final regulations that implement the BABAA Preference (likely later in 2023), local governments should confirm the applicability of those regulations and, if necessary, follow those new requirements.

a. Applicability of the BABAA Preference: Funds Obligated on or After May 14, 2022, under a Program of Federal Financial Assistance for Infrastructure Projects

Using OMB's preliminary guidance in OMB Memorandum M-22-11, Chart 1, below, details the types of programs and projects to which the BABAA Preference applies. With limited exceptions, the BABAA Preference applies to federal funds obligated on or after May 14, 2022, under a program of federal financial assistance (including federal grants or loans) for infrastructure projects—as long as a comparable domestic procurement preference (e.g., the FTA Buy America Statute) does not already apply to the program. Recipients of federal financial assistance should note that, in general, the BABAA Preference can apply to a renewal of a previously existing federal financial-assistance award that occurs on or after May 14, 2022—even if the original notice of funding opportunity failed to reference a domestic procurement preference.[212]

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207. *Id.* § 70915(a)(1)(B).

208. Off. of Mgmt. & Budget, OMB Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (Apr. 18, 2022) (hereinafter OMB BABAA Memo).

209. *See, e.g.*, U.S. Env't Prot. Agency, Build America, Buy America (BABA) (Nov. 16, 2022); U.S. Dep't of Agric. (USDA), USDA's Implementation of the Build America, Buy America (BABA) Act (Sept. 13, 2022) (hereinafter USDA BABAA Implementation); U.S. Dep't of Homeland Sec., Fed. Emergency Mgmt. Agency, Buy America Preference in FEMA Financial Assistance Programs for Infrastructure, FEMA Interim Policy No. 207-22-0001 (Nov. 16, 2022).

210. *See* Off. of Mgmt. & Budget, Guidance for Grants and Agreements, 88 Fed. Reg. 8374 (Feb. 9, 2023) (hereinafter OMB Proposed Rule).

211. *See id.*

212. *See* OMB BABAA Memo at 5. OMB's recently proposed rule states that the BABAA Preference is applicable "only to the extent that a Buy America Preference meeting or exceeding the requirements of . . .

Chart 1. Applicability of the Build America, Buy America Act (BABAA) Preference

THE BABAA PREFERENCE APPLIES TO:	
Federal Financial Assistance	• Includes assistance that non-federal entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, and loan guarantees. • Does not include expenditures for assistance authorized under sections 402, 403, 404, 406, or 502 of the Stafford Act relating to a major disaster or emergency declared by the president under section 401 or 501 of that Act. **Infrastructure Investment and Jobs Act of 2021 (IIJA) § 70912(4).**
Obligated on or after May 14, 2022	• Applies to: (1) New awards made on or after May 14, 2022; (2) Renewal awards made on or after May 14, 2022; (3) Amendments of awards obligating additional funds on or after May 14, 2022. • OMB encouraged agencies to consider a public interest waiver of the BABAA Preference if any Notice of Funding Opportunity for any awards made on or after May 14, 2022, did not include a Buy America Preference. **OMB Memo M-22-11 (cited in full *supra* note 208), at § V.**
For "Infrastructure"	• Includes, at a minimum, the structures, facilities, and equipment for, in the United States (A) roads, highways, and bridges; (B) public transportation; (C) dams, ports, harbors, and other maritime facilities; (D) intercity passenger and freight railroads; (E) freight and intermodal facilities; (F) airports; (G) water systems, including drinking water and wastewater systems; (H) electrical transmission facilities and systems; (I) utilities; (J) broadband infrastructure; and (K) buildings and real property. **IIJA § 70912(5).** • Agencies should consider whether a project is one that will serve a public function, as opposed to being one that is privately owned and not open to the public. Projects in the former category have greater indicia of infrastructure, while projects in the latter category have fewer. **OMB Memo M-22-11, at § II.**
"Project"	• The term "project" means "construction, alteration, or repair of infrastructure in the United States." **IIJA § 70912(7).** • Applies to entire infrastructure project, even if funded by both Federal and non Federal funds under one or more awards. **OMB Memo M-22-11, at § VI.** • Only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. Does not apply to tools, equipment, and supplies (e.g., temporary scaffolding) brought to a construction site and removed at or before the completion of the infrastructure project. Does not 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 or affixed to the structure. **OMB Memo M-22-11, at § VI.**
If a Comparable, Preexisting Domestic Procurement Preference Does Not Apply	• If comparable, preexisting domestic content requirements already satisfy the BABAA Preference, an agency need not adopt a different standard. **IIJA § 70914.** **OMB Memo M-22-11, at § IV.**

The BABAA Preference applies only to federal financial-assistance programs that aid "projects" of "infrastructure." BABAA defined "infrastructure" to enumerate a number of specific items, including, among other things, "structures, facilities and equipment . . . for roads, highways, and bridges; . . . water systems . . . electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property."[213] A "project" includes any "construction, alteration, or repair" of "infrastructure" in the United States.[214] Where the BABAA Preference attaches to federal financial assistance, it applies to an entire "project"—not only the costs for the portion of the "project" that a non-federal entity charges against a covered federal award.[215] Therefore, a local government's use of federal financial assistance to which the BABAA Preference attaches can have significant consequences for a project containing multiple funding sources.

In response to OMB's preliminary guidance regarding the applicability of the BABAA Preference, many agencies have identified particular programs to which the BABAA Preference applies.[216] Of particular note, the BABAA Preference does not apply to at least two federal financial-assistance programs of critical importance to North Carolina's local governments: (1) Fiscal Recovery Funds received under the American Rescue Plan Act of 2021 and (2) grants received under the Public Assistance Program of the Federal Emergency Management Agency (FEMA). The two following sections provide additional information.

[BABAA] did not apply to iron, steel, manufactured products, and construction materials in the Federal financial assistance program under which the Federal award is provided *before November 15, 2021*." OMB Proposed Rule at 8377 (emphasis added). The text of BABAA states that "[n]ot later than 180 days after the date of enactment of this Act [(i.e., by May 14, 2022)], . . . each Federal agency shall ensure that none of the funds made available for a 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." *See* BABAA § 70914(a). Whether OMB is now intending to apply the BABAA Preference to federal financial assistance awarded between November 15, 2021, and May 14, 2022, is not clear but may be clarified in a final rule.

213. *See* BABAA § 70912(5); OMB BABAA Memo, *supra* note 208, at 3–4.

214. BABAA § 70912(7).

215. *See* Memorandum from Radhika Fox, Assistant Adm'r, to Env't Prot. Agency Reg'l Water Div. Dirs., Regions I–X, EPA Off. of Water Off. Dirs., Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs 9, Question 3.1 (Nov. 3, 2022) (hereinafter EPA BABAA Memo).

216. *See, e.g.*, U.S. Env't Prot. Agency, EPA's Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act (Nov. 23, 2022); U.S. Dep't of Homeland Sec., Fed. Emergency Mgmt. Agency, Programs and Definitions: Build America, Buy America Act, "FEMA Grant Programs, Subject to 'Buy America' Preference" (May 13, 2022); Dep't of Hous. & Urb. Dev., Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act, 87 Fed. Reg. 2894 (Jan. 19, 2022).

i. The BABAA Preference Does Not Apply to Fiscal Recovery Funds

The BABAA Preference does not apply to monies that North Carolina's local governments have received from Fiscal Recovery Funds created under the American Rescue Plan Act of 2021.[217] However, if a county or municipality uses other federal financial assistance to which the BABAA Preference does apply in order to finance an infrastructure project, a county or municipality may need to apply the BABAA Preference to the entire infrastructure project.[218]

ii. The BABAA Preference Does Not Apply to the Federal Emergency Management Agency Public Assistance Grants

BABAA specifically excluded from the BABAA Preference "expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act . . . relating to a disaster or emergency declared by the President under section 401 or 501, respectively, of such Act . . . or pre and post disaster or emergency response expenditures."[219] Category B of FEMA's Public Assistance Program, which is authorized under Section 502 of the Stafford Act and can reimburse local governments for a portion of the costs of taking emergency protective measures in response to a presidentially declared disaster, is therefore not subject to the BABAA Preference. Local governments should be aware, however, that many other federal financial-assistance programs provided by FEMA are subject to the BABAA Preference.[220]

b. Scope of the BABAA Preference

Assuming that the BABAA Preference does apply to a particular program of federal financial assistance, recipients of covered federal aid must determine how to comply with the preference in practice. The BABAA Preference only affects the acquisition of manufactured products, construction materials, and iron and steel that are "consumed in, incorporated into, or affixed to an infrastructure project."[221] It does not, for example, apply to "tools, equipment, and supplies . . . brought to the construction site and removed at or before the completion of the infrastructure project."[222] Agencies and recipients of federal financial assistance must ensure that either (1) items covered by the BABAA Preference have been "produced in the United States" or (2) an agency has waived the application of the BABAA Preference for the covered item.

Using OMB's preliminary guidance and selected agency implementations of that guidance to date, the following sections explain (1) when BABAA considers each class of covered item to be "produced in the United States" under BABAA and (2) potentially applicable waivers of the BABAA Preference under the IIJA. These sections also contain flowcharts providing further guidance on each issue.

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217. *See* SLFRF FAQs, *supra* note 196, at 6.18 ("Awards made under the SLFRF program are not subject to the Buy America Preference requirements set forth in Section 70914 of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act, Pub. L. 117-58.").

218. *See id.* at 6.19.

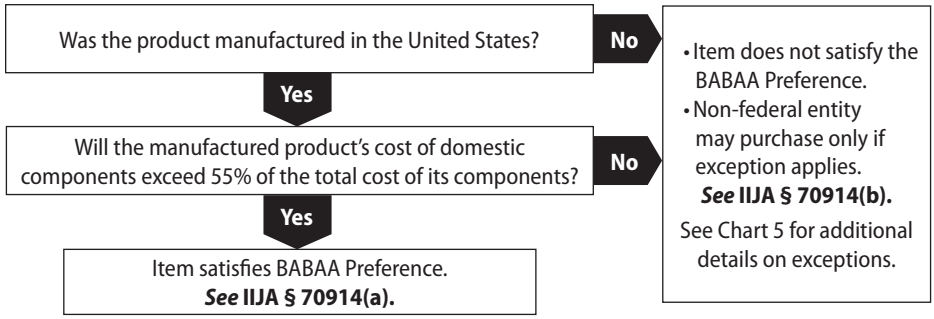
219. BABAA § 70912(4)(B).

220. *See, e.g.*, U.S. Dep't of Homeland Sec., Fed. Emergency Mgmt. Agency, Buy America Preference in FEMA Financial Assistance Programs for Infrastructure, *supra* note 209, at 14–15.

221. OMB BABAA Memo, *supra* note 208, at 5.

222. *Id.* Nor will it "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 or permanently affixed to the structure." *Id.* at 6.

Chart 2. BABAA Preference Applicable to Purchase of Manufactured Products (OMB Memorandum M-22-11)



i. Manufactured Products

The BABAA Preference for "manufactured products" largely mirrors preferences for "manufactured products" contained in the BAA and the FAR. To be considered "produced in the United States" and therefore meet the terms of the BABAA Preference, a "manufactured product" must be (1) manufactured in the United States and (2) have a cost of components that are mined, produced, or manufactured in the United States that is more than 55 percent of the total cost of its components, unless another applicable law or regulation (e.g., the FTA Buy America Statute) provides an alternative required minimum amount of domestic content.[223] Unlike the current provisions in the FAR (which escalate that percentage to as high as 75 percent by calendar year 2029[224]), the IIJA does not raise that percentage over the next several calendar years.

Neither BABAA nor OMB's preliminary guidance addresses (1) how non-federal entities should calculate a manufactured product's "cost of components" or (2) what type or how much labor must be performed upon a "manufactured product" for it to be "*manufactured* in the United States." Some federal agencies that have issued guidance on the BABAA Preference—including the USDA and FEMA—also have not addressed these issues in detail.[225]

OMB's proposed implementing regulations calculate a manufactured product's "cost of components" using comparable pre-existing definitions in the FAR—and it is reasonable to assume that OMB's final rule will take the same approach.[226] Non-federal entities may also wish to (1) deem a product as "manufactured in the United States" using standards from judicial and administrative interpretations of the BAA and (2) consider a product to be domestically "manufactured" when labor performed in the United States upon foreign components creates "basically new material or result[s] in a substantial change in physical character."[227]

223. BABAA § 70912(6)(B).

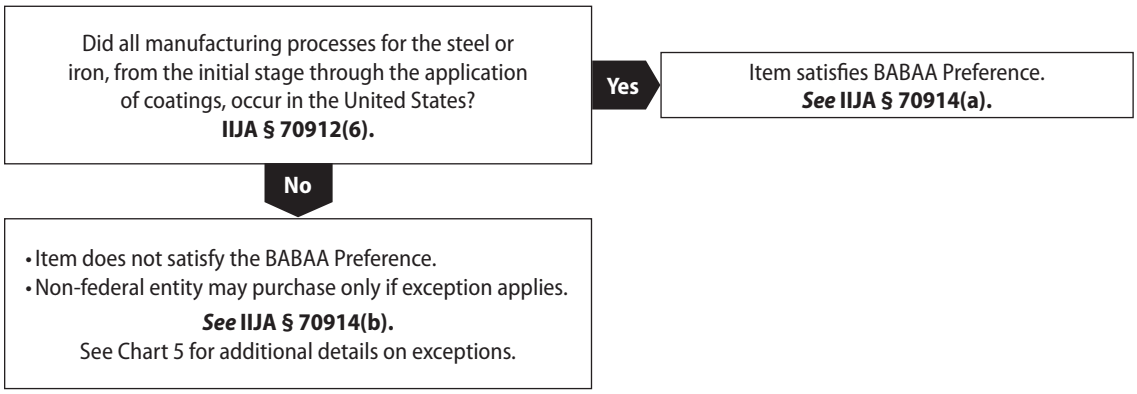
224. *See* Section I.A.2, *supra*.

225. *See, e.g.*, USDA BABAA Implementation, *supra* note 209; U.S. Dep't of Homeland Sec., Fed. Emergency Mgmt. Agency, Procurement Disaster Assistance Team, BABAA Best Practices: Documenting Compliance with Build America, Buy America Act (BABAA) Requirements (Jan. 2023) (hereinafter FEMA BABAA Best Practices).

226. *See* OMB Proposed Rule at 8377–8378 (defining "cost of components for manufactured products" in a manner consistent with FAR § 25.003).

227. *See supra* notes 21–22.

Chart 3. BABAA Preference Applicable to Purchase of Steel and Iron Products (OMB Memorandum M-22-11)



ii. Iron and Steel

The BABAA Preference also requires that all iron and steel used in a funded infrastructure project be "produced in the United States,"[228] meaning that "all manufacturing processes [for the iron and steel], from the initial melting stage through the application of coatings, [must occur] in the United States."[229] This standard is consistent with similar restrictions in the FTA Buy America Statute and the FTA's implementing regulations.[230]

In issuing guidance for certain covered programs, the Office of Water Federal Financial Assistance Programs of the Environmental Protection Agency (EPA) has noted that items covered under BABAA's iron and steel requirements would include products whose "material cost is made up of more than 50 percent iron and/or steel."[231] Although guidance may differ across agencies, other agencies are likely to issue similar interpretations in the coming months.

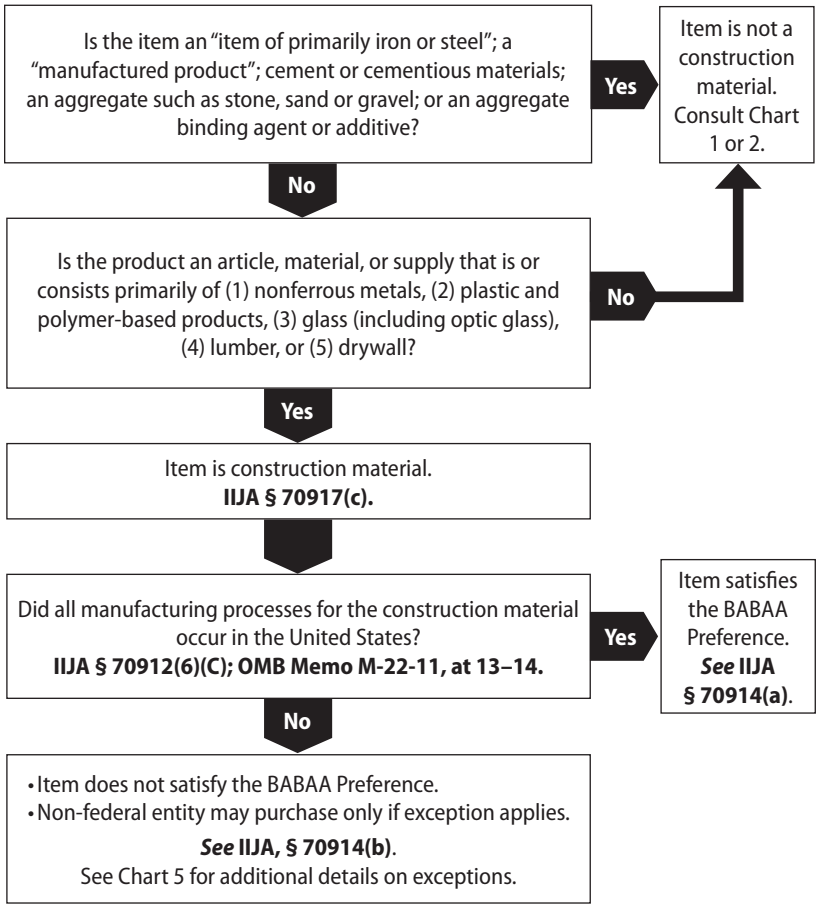
iii. Construction Materials

The BABAA Preference requires that all "construction materials" used in a project be "produced in the United States" but fails to comprehensively define what types of items constitute "construction materials." The IIJA only excludes from the term "cement and cementious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives"[232] and directs OMB to "issue standards that define the term 'all manufacturing processes' . . . [for] construction materials."[233]

OMB issued preliminary forms of those standards in OMB Memorandum M-22-11, stating that a "construction material" is an "article, material or supply—other than an item of primarily iron or steel [or the items mentioned in the immediately preceding paragraph] . . . that is or consists primarily of [(1)] non-ferrous metals; [(2)] plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic

228. BABAA § 70912(6)(A).
229. BABAA § 70912(6)(A).
230. *See* Section II.A.1.a, *supra*.
231. EPA BABAA Memo, *supra* note 215, at 5, Question 2.1.
232. BABAA §§ 70917(c)(1)–(2).
233. BABAA § 70915(b)(1).

Chart 4. BABAA Preference Applicable to Purchase of Construction Materials (OMB Memorandum M-22-11)



cables); [(3)] glass (including optic glass); [(4)] lumber; or [(5)] drywall.[234] OMB also noted that where a product combines two or more of these materials through a "manufacturing process," the completed product should be treated as a "manufactured product" rather than a "construction material."[235] OMB failed to comprehensively define what actions might constitute a "manufacturing process" in its preliminary guidance, but it directed agencies to include "at least the final manufacturing process and immediately preceding manufacturing stage" when defining the term on the agency level.[236] In its proposed regulations, OMB has issued definitions of "manufacturing process" for each type of construction material issued in its preliminary guidance and also for "fiber optic cable" and "optical fiber."[237]

234. OMB BABAA Memo, *supra* note 208, at 13–14.
235. *Id.* at 14.
236. *Id.*
237. *See* OMB Proposed Rule at 8378.

Chart 5. Potential BABAA Preference Waivers (OMB Memorandum M-22-11, at § VI)

If an item does not satisfy the BABAA Preference where it applies, a non-federal entity may purchase only if eligible for waiver of the BABAA Preference. ***See* IIJA § 70914(b).**
Acquisition of domestic manufactured product is inconsistent with the public interest **(IIJA § 70914(b)(1)).** • *De minimis*—for purchases below a *de minimis* threshold. • Small grants—for grants below the simplified acquisition threshold. • Minor components—for certain minor deviations in iron and steel products. • Adjustment period—a temporary delay to permit transition to new requirements. • International trade obligations—to permit non-federal entity to comply with treaty obligations. • Other considerations
Cost of domestically manufactured product increases overall project cost by 25 percent **(IIJA § 70914(b)(3)).**
Domestically manufactured product, or component of domestically manufactured product, is not sufficiently available **(IIJA § 70914(b)(2)).**

iv. Waivers

BABAA permits, but does not require, individual agencies to waive application of the BABAA Preference in three cases: (1) when the inclusion of iron, steel, manufactured products, or construction materials produced in the United States would increase the cost of the overall project by 25 percent; (2) when the types of iron, steel, manufactured products, or construction materials sought are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; and (3) when the application of the BABAA Preference would be inconsistent with the public interest.[238] OMB's preliminary guidance in OMB Memorandum M-22-11 outlined when agencies should consider the issuance of these discretionary waivers.[239]

Agencies may grant waivers on a general basis (i.e., applying to multiple programs) or on a project-specific basis (i.e., applying only to a particular project). Recipients of federal aid to which the BABAA Preference applies need not obtain specific approval for a waiver where an agency has issued an applicable waiver of general applicability.[240]

Before granting a project-specific waiver, an agency must (1) make publicly available on its website a written explanation for granting a waiver and (2) provide a comment period of fifteen days on the proposed waiver.[241] The process is more onerous for waivers of general applicability, requiring that an agency (1) publish a notice in the Federal Register explaining the justification for the waiver, (2) request public comments in a thirty-day period following such publication, and (3) publish a final waiver determination in the Federal Register that takes into account any comments received.[242] After the relevant comment period has expired, an agency must submit

238. BABAA § 70914(b).
239. *See also* OMB Proposed Rule at 8378 (outlining proposed regulations for grant of waiver).
240. OMB BABAA Memo at 12–13. *See also* FEMA BABAA Best Practices, *supra* note 225, at 8.
241. BABAA §§ 70914(c)(1)–(2).
242. BABAA § 70914(d)(2).

a proposed waiver to OMB's Made in America Office,[243] which will review the proposed waiver and notify the federal agency whether the proposed waiver is "consistent with applicable law and policy."[244]

(A) Increase of Overall Project Cost by 25 Percent

An agency may waive application of the BABAA Preference when the inclusion of iron, steel, manufactured products, or construction materials produced in the United States would increase the cost of the overall project by 25 percent. In considering such waivers, OMB directed agencies to "ensure [that] the recipient has provided adequate documentation that [there are] no domestic alternatives within this cost parameter."[245] OMB also required agencies to obtain in the written justification supporting such a waiver "a comparison of the cost of the domestic product to the cost of the foreign product or a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign-origin products."[246]

(B) Nonavailability Waiver

An agency also may waive application of the BABAA Preference when the types of iron, steel, manufactured products, or construction materials sought are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. OMB directed agencies considering such waivers to consider whether the recipient has "performed thorough market research" or "adequately considered . . . qualifying alternate items, products, or materials."[247] It also specified that "[w]aivers should describe . . . market research activities and methods to identify domestically manufactured items capable of satisfying [the BABAA Preference]."[248]

(C) Inconsistent with Public Interest

Lastly, an agency may waive the BABAA Preference when the agency finds that its application "would be inconsistent with the public interest." But like the BAA and the FTA Buy America Statute, the IIJA does not explain when such an application would meet this standard.

In its preliminary guidance, OMB noted that a public-interest waiver "may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the [IIJA] Buy America requirements . . . and the proposed waiver would not meet the requirements for a nonavailability or unreasonable cost waiver."[249] More helpfully, it provided several examples of potential public-interest waivers for agency consideration. These mirror similar waivers granted under the BAA and the FTA Buy America Statute.

OMB's examples include the following: (1) a "*de minimis*" waiver for infrastructure-project purchases below a certain threshold (e.g., 5 percent of project costs up to a maximum of $1,000,000); (2) a "small grants" waiver, exempting certain awards below the federal simplified acquisition threshold; (3) a "minor components" waiver, permitting "minor deviations for miscellaneous minor components within iron and steel products"; (4) an "adjustment period" waiver, waiving application of the BABAA Preference to afford agencies and recipients time

243. OMB BABAA Memo at 7.
244. *Id.*
245. *Id.* at 10.
246. *Id.*
247. *Id.* at 9–10.
248. *Id.* at 10.
249. *Id.* at 10.

to transition to the new domestic procurement-preference regime; (5) an "international trade obligation" waiver, permitting a state that has assumed obligations under an international trade agreement to afford non-discriminatory treatment to certain foreign products to honor those obligations; and (5) a waiver based upon other considerations, including, among other things, the value of the items in question, the potential domestic job impacts, and other policy considerations.[250]

c. Agency-Specific Guidance

Federal agencies have issued a range of guidance documents to date, outlining required compliance actions for recipients and subrecipients of federal financial assistance subject to the BABAA Preference.[251] For example, FEMA has stated that covered financial-assistance awards issued on or after January 2, 2023, must include a contract provision in contracts supported by covered federal financial assistance that both "explain[s] . . . BABAA requirements and [requires] self-certification [of] compliance with . . . BABAA."[252] The agency also has provided suggested language for such explanation and certification.[253] Similarly, the EPA's Office of Water Federal Financial Programs has provided sample language to include in construction contracts to which BABAA applies[254] and has also provided examples of items that constitute "manufactured products" and "iron and steel" products under BABAA.[255]

Agencies are not required to issue waivers based upon OMB's identified examples, but many have. In particular, a number of agencies delayed implementation of the BABAA Preference in federal financial-assistance programs to provide sufficient time for an "adjustment period."[256] Other agencies have granted general applicability waivers for certain *de minimis* projects and small grants,[257] and some have proposed waivers for the inclusion of "minor components" within iron and steel products. Additional waivers are likely to materialize in the coming months as agencies and recipients struggle to implement the BABAA Preference in practice. Local governments should remain mindful that OMB's final implementing rule may alter the way in which waivers are granted.

250. *Id.* at 11.

251. *See, e.g.*, FEMA BABAA Best Practices, *supra* note 223; EPA BABAA Memo, *supra* note 213, at app. 1.

252. FEMA BABAA Best Practices at 4.

253. *Id.*

254. *See* EPA BABAA Memo at app. 1.

255. *Id.* at 6–9.

256. *See, e.g.*, U.S. Dep't of Homeland Sec., Fed. Emergency Mgmt. Agency, Grant Programs Directorate, General Applicability of Build America, Buy America Act Provisions as Applied to Recipients and Subrecipients of FEMA Federal Financial Assistance Programs for Infrastructure (July 1, 2022) (granting a waiver of general applicability to delay implementation of the BABAA Preference to January 1, 2023); U.S. Dep't of Transp., Temporary Waiver of Buy America Requirements for Construction Materials, 87 Fed. Reg. 31,931 (May 25, 2022) (granting a temporary waiver of general applicability to delay implementation of the BABAA Preference for construction materials to November 10, 2022).

257. *See, e.g.*, Dep't of Hous. & Urb. Dev. (HUD), Public Interest De Minimis and Small Grants Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance, 87 Fed. Reg. 76,502 (Dec. 14, 2022) (waiving application of the BABAA Preference for infrastructure projects whose total cost is in an amount equal to or less than $250,000 or whose total level of federal financial assistance provided by HUD does not exceed $250,000).

C. How Should North Carolina's Counties and Municipalities Prepare to Implement the BABAA Preference?

Where it applies, the BABAA Preference restricts local government procurement actions much more significantly than the UG Buy America Provision. It is not merely encouragement to prefer the acquisition of domestically manufactured items. It is instead, like the FTA Buy America Statute, a specific prohibition on the acquisition of noncompliant products unless a waiver of general applicability or a project-specific waiver applies. As individual agencies have issued implementing guidance that is similar to the guidance contained in the FTA's implementing regulations, the roadmap for compliance has become clearer. But individual agency implementation of the guidance contained in OMB Memorandum M-22-11 and OMB's adoption of final implementing rules is still in flux, and recipients of federal financial assistance should be mindful that guidance will vary across agencies.

Local governments that will receive federal financial assistance for infrastructure projects in the coming months must (1) confirm whether the BABAA Preference applies to federal financial assistance sought or already obtained and (2) understand agency-specific guidance that will govern implementation of the BABAA Preference. Failure to take both steps could result in a violation of assistance-award terms and conditions and a disallowance of affected costs charged against the federal award.

1. Confirm Applicability of the BABAA Preference to Federal Financial Assistance and Analyze Potential Effects on "Project"

Because the BABAA Preference applies to the expenditure of funds for an entire "project" supported in whole or in part by federal financial assistance to which the BABAA Preference attaches, the application of the BABAA Preference can cause significant compliance and planning challenges for local governments. For example, contractors may not be able to obtain BABAA-compliant materials in a timely manner or, worse, at all.

At an early stage in planning capital-improvement projects funded by federal financial assistance, local governments should seek to confirm whether the BABAA Preference will apply and how an agency has interpreted its requirements. Doing so will enable the local government to (1) determine whether contractors may have difficulties or delays in obtaining BABAA-compliant materials and (2) anticipate delays in construction schedules or the need to apply for a project-specific waiver. Local governments should continue to monitor OMB's release of final implementing rules and consult with their grantor agencies to confirm how, if at all, their compliance obligations might change.

2. Understand Compliance Requirements in Agency-Specific Guidance

When seeking federal financial assistance for infrastructure projects to which the BABAA Preference applies, North Carolina's local governments should pay close attention to agency-specific BABAA compliance requirements (including required contract clauses, certifications, and document-retention requirements). They also should seek out information about possible waivers of the BABAA Preference from the federal agency providing funding.

Counties and municipalities should track BABAA compliance on a contract-by-contract basis to avoid the incorporation of non-compliant products into an infrastructure project. Although neither BABAA nor OMB's preliminary guidance requires the receipt of a BABAA compliance certification from a contractor or supplier, the EPA has suggested that receipt of a signed letter certifying that items provided are BABAA-compliant is "the most direct and effective form

of compliance documentation,"[258] and FEMA has required contractors and subcontractors of non-federal entities expending federal financial assistance to which the BABAA Preference applies to certify BABAA compliance for materials provided.[259] Counties and municipalities should retain these certifications for at least the minimum amount of time specified in applicable federal regulations.[260]

V. Conclusions for North Carolina Counties and Municipalities

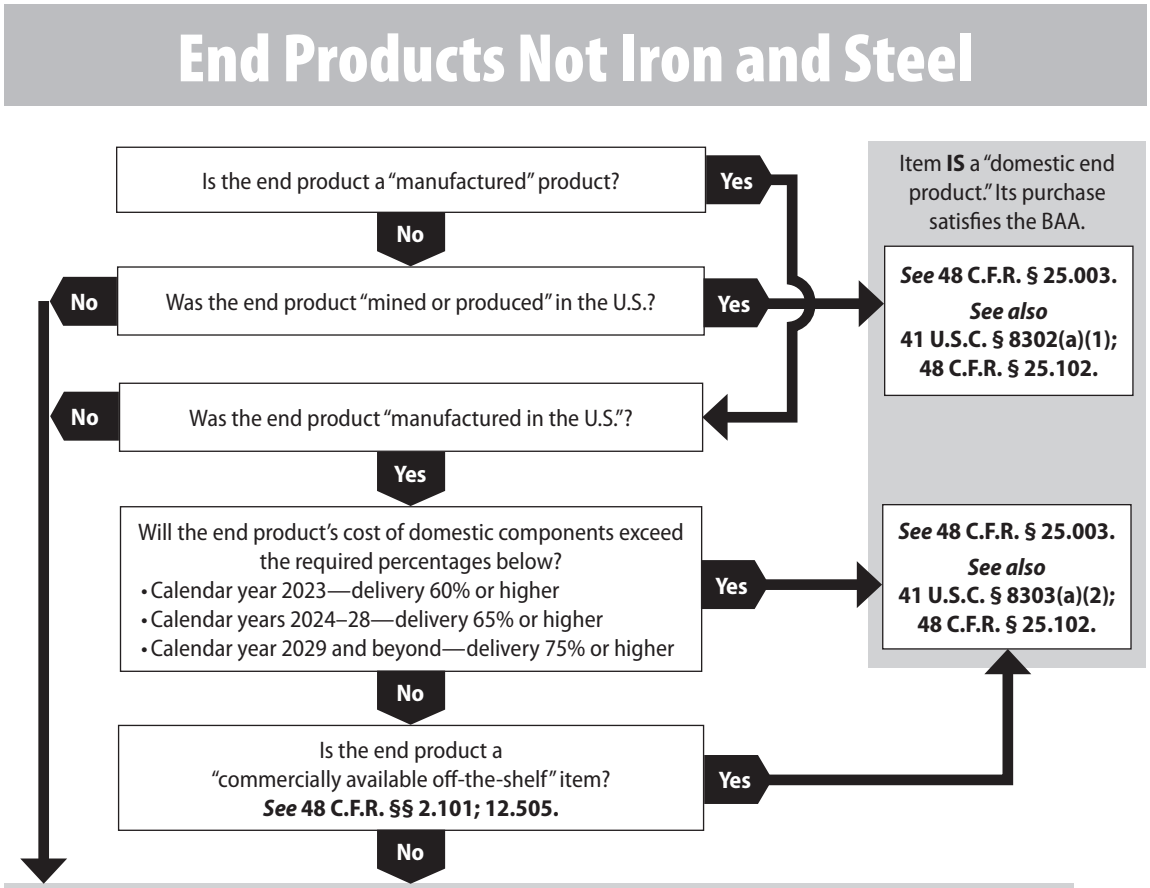
Although North Carolina law permits counties and municipalities to comply with "lawful and reasonable conditions" placed upon their expenditure of federal grants and loans, these entities also must understand *which* conditions in federal law and regulations affect those expenditures and *how* they do so. The Buy American Act of 1933 and its implementing regulations in the FAR do not apply to local government procurement actions supported by federal financial assistance, but similar "Buy America" preferences, like those contained in the FTA Buy America Statute, the UG Buy America Provision, and the BABAA Preference, might. Counties and municipalities that accept federal financial assistance in the coming months and years should be aware that these domestic procurement practices are complex in theory and in practice—and failure to follow their requirements can have significant adverse consequences.

258. *See* EPA BABAA Memo, *supra* note 213, at 9, Question 3.1.

259. *See* FEMA BABAA Best Practices, *supra* note 223, at 4–6.

260. In general, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 C.F.R. part 200) (Uniform Guidance) requires that recipients of federal financial assistance maintain all records pertaining to the award for a period of three years from the date of submission of the final expenditure report. *See* 2 C.F.R. § 200.334. A specific agency may have differing requirements.

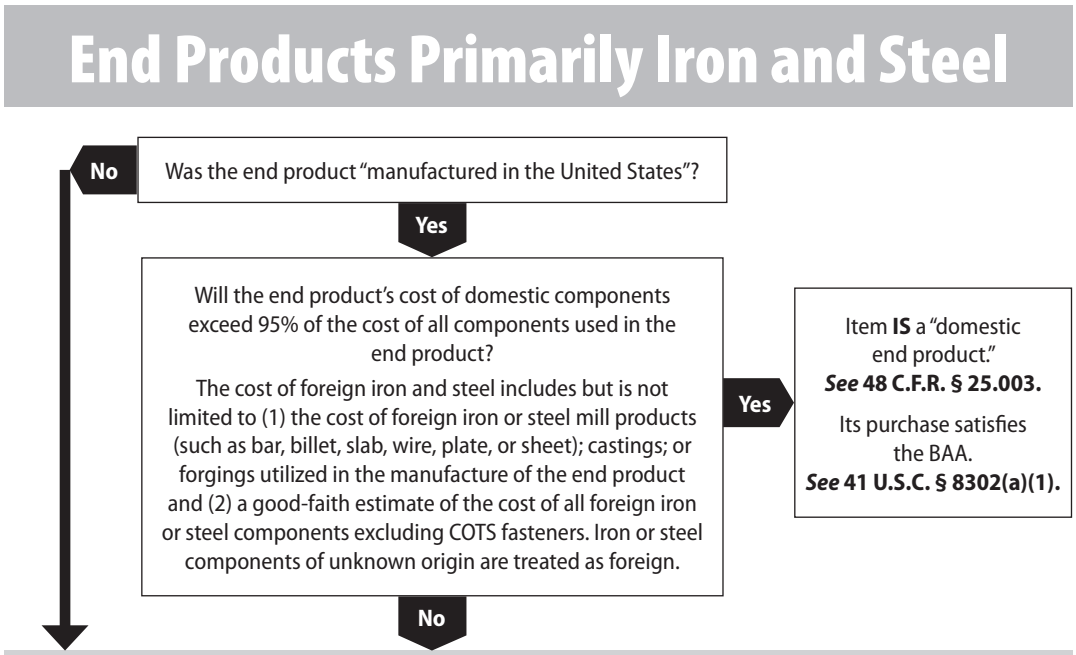
Appendix 1. BAA and FAR Restrictions Applicable to Purchase of "End Products" (Articles, Supplies, and Materials to Be Acquired for Public Use) Other Than "End Products" That Consist Primarily of Iron and Steel



Item is **NOT** a "domestic end product."
***See* 48 C.F.R. § 25.003.**
Agency may purchase ONLY if exception applies:

Acquisition of domestic end product is inconsistent with the public interest	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.103
Cost of domestic end product is "unreasonable"	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.105
End product, or component of end product, is not sufficiently available	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.103(b)
International trade agreement requires treatment of foreign end product as domestic end product	41 U.S.C. § 8302(b)(2)	48 C.F.R. § 25.400
Cost of end product is less than micro purchase threshold	41 U.S.C. § 8302(a)(2)(c)	48 C.F.R. § 2.101
Acquisition of information technology that is a "commercial product"		48 C.F.R. § 25.103(e)
End product will be used outside of the United States		41 U.S.C. § 8302(a)(2)(A)

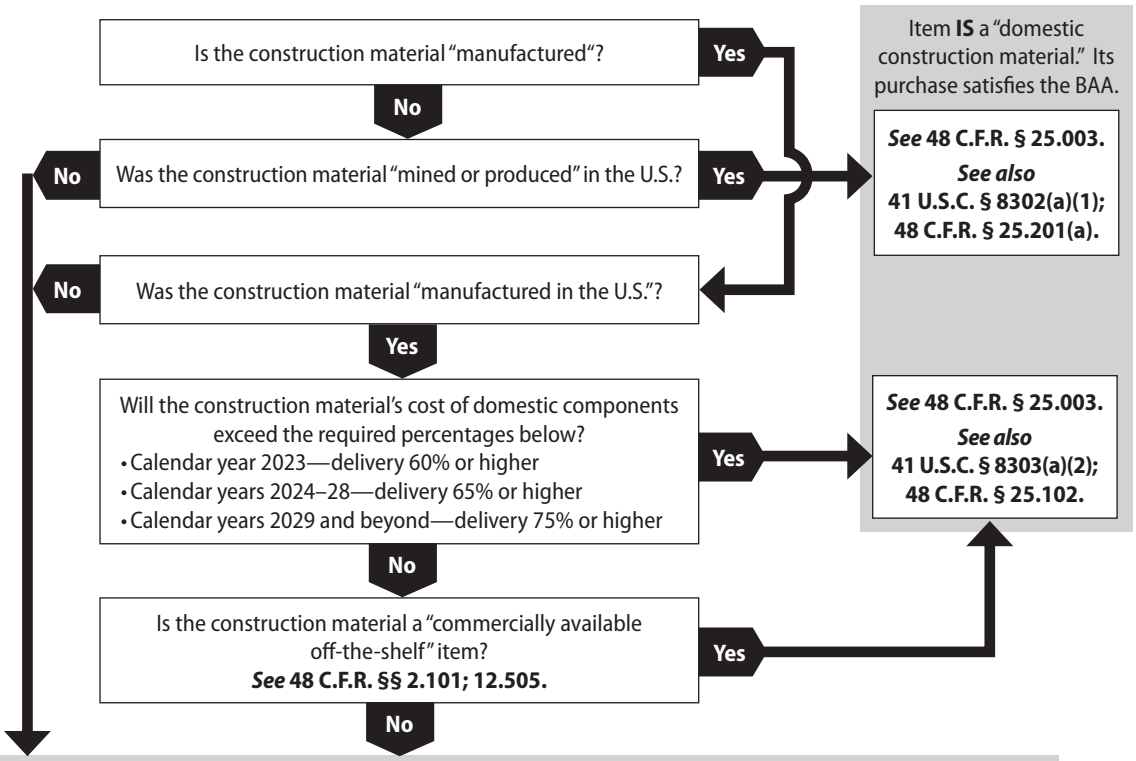
Appendix 2. BAA and FAR Restrictions Applicable to Purchase of "End Products" That Consist Primarily of Iron and Steel



Acquisition of domestic end product is inconsistent with the public interest	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.103
Cost of domestic end product is "unreasonable"	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.105
End product, or component of end product, is not sufficiently available	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.103(b)
International trade agreement requires treatment of foreign end product as domestic end product	41 U.S.C. § 8302(b)(2)	48 C.F.R. § 25.400
Cost of end product is less than micro purchase threshold	41 U.S.C. § 8302(a)(2)(c)	48 C.F.R. § 2.101
Acquisition of information technology that is a "commercial product"		48 C.F.R. § 25.103(e)
End product will be used outside of the United States		41 U.S.C. § 8302(a)(2)(A)

Appendix 3. BAA and FAR Restrictions Applicable to Purchase of "Construction Material" (Articles, Supplies, and Materials Incorporated Into a Public Building or Work) Other Than Construction Material That Consists Primarily of Iron or Steel

Construction Material Not Iron and Steel

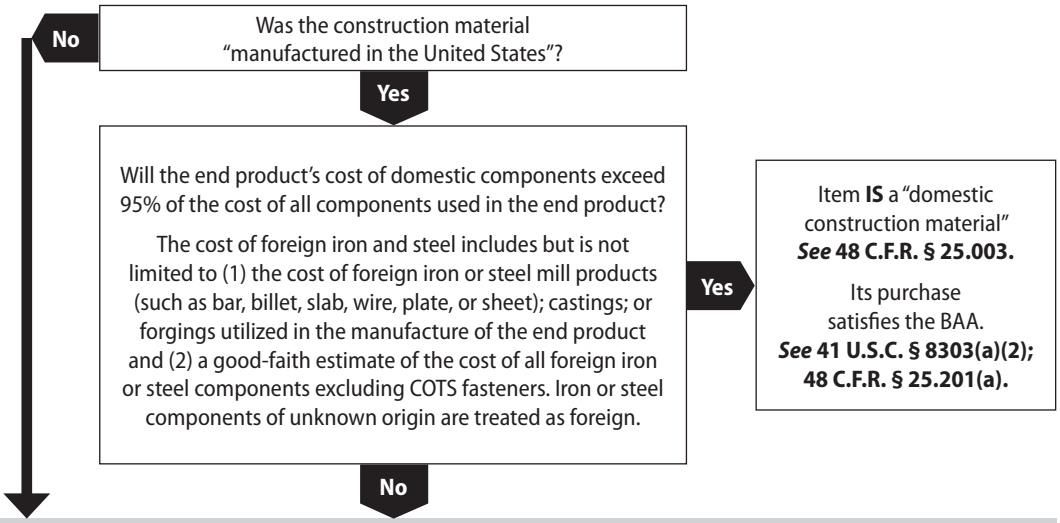


Item is **NOT** a "domestic construction material."
***See* 48 C.F.R. § 25.003.**
Contractor may incorporate ONLY if exception applies:

Acquisition of domestic construction material is inconsistent with the public interest	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.103
Cost of domestic construction material is "unreasonable"	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.105
Construction material is not sufficiently available	41 U.S.C. § 8302(a)(1)	48 C.F.R. § 25.103(b)
International trade agreement requires treatment of foreign construction material as domestic construction material	41 U.S.C. § 8302(b)(2)	48 C.F.R. § 25.400
Cost of construction material is less than micro purchase threshold	41 U.S.C. § 8302(a)(2)(C)	48 C.F.R. § 2.101
Acquisition of information technology that is a "commercial product"		48 C.F.R. § 25.103(e)
End product will be used outside of the United States		41 U.S.C. § 8302(a)(2)(A)

Appendix 4. BAA and FAR Restrictions Applicable to Purchase of "Construction Material" (Articles, Supplies, and Materials Incorporated Into a Public Building or Work) That Consist Primarily of Iron and Steel

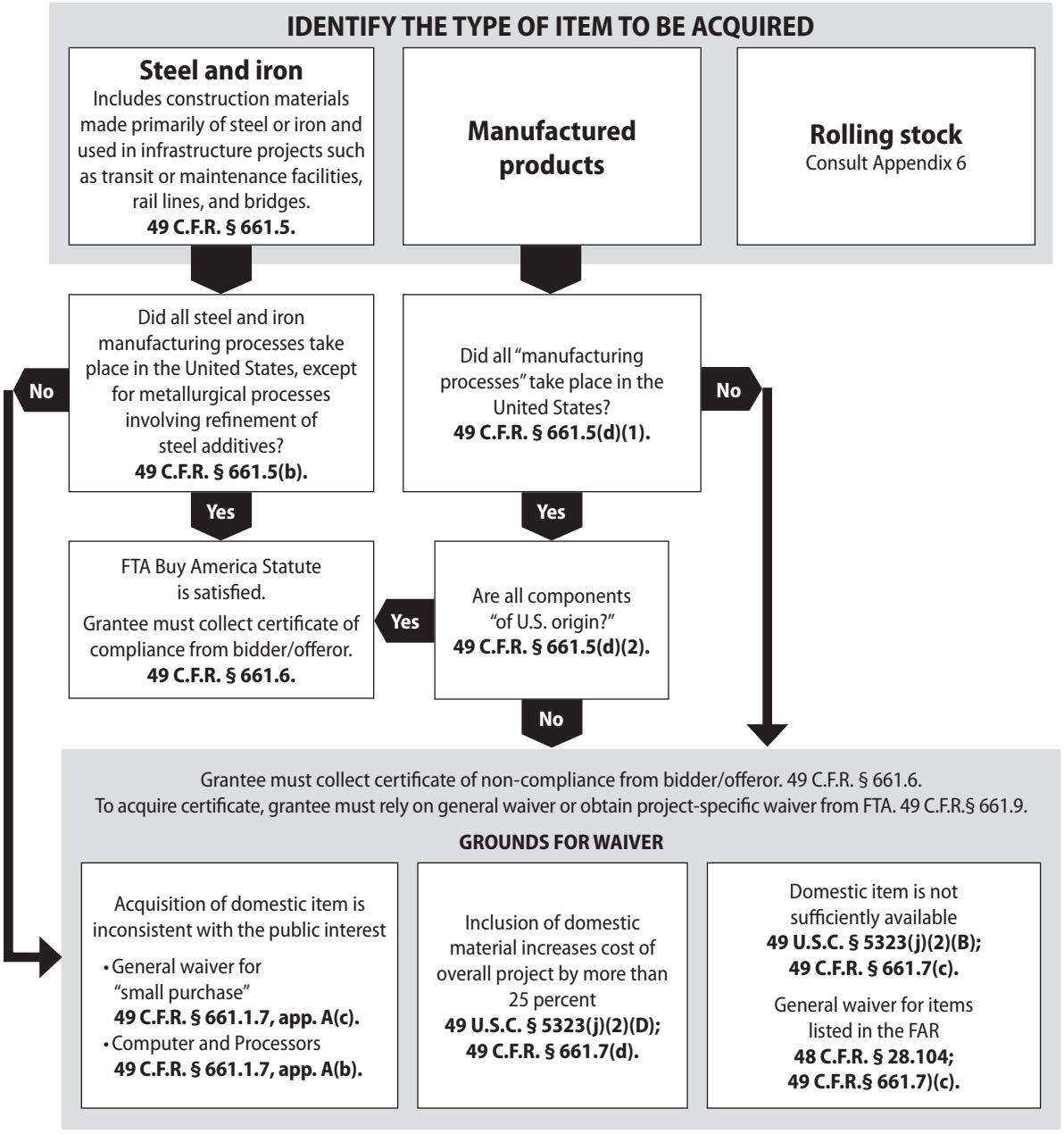
Construction Material Primarily Iron and Steel



Item is **NOT** a "domestic construction material."
***See* 48 C.F.R. § 25.003.**
Contractor may incorporate ONLY if exception applies:

Acquisition of domestic construction material is inconsistent with the public interest	41 U.S.C. § 8303(b)(3)	48 C.F.R. § 25.202(a)(1)
Cost of construction material is "unreasonable"	41 U.S.C. § 8303(b)(3)	48 C.F.R. § 25.202(a)(3)
Construction material, or component of construction material, is not sufficiently available	41 U.S.C. § 8303(b)(3)	48 C.F.R. § 25.202(a)(2)
International trade agreement requires treatment of foreign construction material as domestic construction material	41 U.S.C. § 8303(b)(1)(B)	48 C.F.R. § 25.400
Cost of construction material is less than micro purchase threshold	41 U.S.C. § 8302(b)(1)(C)	48 C.F.R. § 2.101
Acquisition of information technology that is a "commercial product"		48 C.F.R. § 25.202(a)(4)
End product will be used outside of the United States		41 U.S.C. § 8302(b)(1)(A)

Appendix 5. FTA Buy America Statute and FTA Implementing Regulations Applicable to Purchase of Steel, Iron, and Manufactured Products



Appendix 6. FTA Buy America Statute and FTA Implementing Regulations Applicable to Purchase of Rolling Stock