

TEXAS WORKFORCE COMMISSION
Workforce Development Letter

ID/No:	WD 04-23
Date:	June 7, 2023
Keyword:	VR
Effective:	Immediately

To: Local Workforce Development Board Executive Directors
Commission Executive Offices
Integrated Service Area Managers



From: Courtney Arbour, Director, Workforce Development Division
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Subject: Build America, Buy America Act: Compliance under Vocational Rehabilitation Contracts with Local Workforce Development Boards

PURPOSE:

The purpose of this Workforce Development (WD) Letter is to provide Local Workforce Development Boards (Boards) with guidance on how the Build America, Buy America Act (BABAA) impacts new and existing Texas Workforce Commission-issued (TWC) Vocational Rehabilitation (VR) colocation (COL) contracts.

Specifically, this WD Letter:

- explains the applicability of the BABAA requirement that no funds available for a federal financial assistance program may be obligated for an infrastructure project in the United States (including the construction, alteration, maintenance, or repair of buildings and real property) unless all iron and steel, manufactured products, and construction materials that are consumed in, incorporated into, or affixed to the infrastructure project are produced in the United States;
- provides a required contract provision; and
- describes waiver request options and instructions.

Additionally, this WD Letter discusses how “infrastructure project” and “construction materials” are defined in BABAA, and addresses implementation and the effective date.

Note: VR COL contracts are service contracts. TWC is reviewing how BABAA applies to TWC-issued federal financial assistance grant awards under other programs.

RESCISSIONS:

None

BACKGROUND:

On November 15, 2021, President Joe Biden signed into law the Infrastructure Investment and Jobs Act (IIJA) (Public Law 117-58), which includes BABAA. The guidance in this WD Letter is based on the following:

- BABAA
- Office of Management and Budget (OMB) Memorandum M-22-11, issued April 18, 2022, and titled “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (M-22-11)
- Technical assistance guidance from the US Department of Education Rehabilitation Services Administration (RSA)

RSA instructed TWC that BABAA applies to the VR program, which includes the VR COL contracts that TWC uses to pay for VR’s share of local VR colocation costs.

BABAA’s Buy America Preference and Requirement

BABAA mandates a new Buy America preference sourcing requirement (formally a “domestic content procurement preference”) that applies to infrastructure project costs as defined in BABAA and M-22-11.

Per the BABAA provisions in IIJA §70912 and §70914(a) and M-22-11 (pages 2–3 and Appendix I), federal funds may not be obligated for an infrastructure project unless:

- all iron and steel used in the project are produced in the United States—this means that all manufacturing processes, from the initial melting stage through the application of coatings, must have occurred in the United States;
- all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and
- all construction materials used in the project are manufactured in the United States—this means that all manufacturing processes for the construction material must have occurred in the United States.

Infrastructure Project Costs

The BABAA Buy America preference covers iron and steel, manufactured products, and construction materials that are consumed in, incorporated into, or affixed to an infrastructure project in the United States. (IIJA §70914(a); and M-22-11, page 1 and Appendix I)

For this purpose, IIJA §70912 and M-22-11 define “infrastructure” and “project” as follows:

- Infrastructure includes, at a minimum, the structures, facilities, and equipment for the following, in the United States:
 - Roads, highways, and bridges

- Public transportation
- Dams, ports, harbors, and other maritime facilities
- Intercity passenger and freight railroads
- Freight and intermodal facilities
- Airports
- Water systems, including drinking water and wastewater systems
- Electrical transmission facilities and systems
- Utilities
- Broadband infrastructure
- Structures, facilities, and equipment that generate, transport, and distribute energy, including electric vehicle charging (See Note.)
- Buildings and real property
- Project means “the construction, alteration, maintenance, or repair of infrastructure in the United States.”

Note: Structures, facilities, and equipment that generate, transport, and distribute energy are included pursuant to M-22-11, page 4.

The definition of “infrastructure” in IJJA §70912 and M-22-11 is not exhaustive. Implementation guidance in M-22-11, page 4, states:

When determining if a program has infrastructure expenditures, federal agencies should interpret the term “infrastructure” broadly and consider the definition provided above as illustrative and not exhaustive. When determining if a particular construction project of a type not listed in the definition above constitutes “infrastructure,” [federal] agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project [under BABAA]. Federal agencies are strongly encouraged to consult with OMB when making such determinations.

M-22-11 (pages 5–6) also provides the following guidance on costs not covered by the BABAA Buy America preference:

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

The BABAA Buy America preference “applies to an entire infrastructure project, even if it is funded by both Federal and non-Federal funds under one or more awards.” (M-22-11, page 5)

Note: The BABAA definition of “infrastructure project costs” is separate and differs from how the term “infrastructure costs” is defined for use in identifying and funding the shared infrastructure costs of the one-stop delivery system under the Workforce Innovation and Opportunity Act (WIOA) §121. Refer to the WIOA Guide to Texas Workforce System Operations on TWC’s website for the definition of “infrastructure costs” that applies under WIOA §121.

Construction Materials

Per IIJA §70911(5) and §70917(c)(1) and M-22-11, pages 13–14, the following meaning of “construction materials” applies under the BABAA Buy America preference. M-22-11 states that the term “‘construction materials’ includes an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- lumber; or
- drywall.”

BABAA requires that all construction materials used in an infrastructure project be manufactured in the United States, meaning that “all manufacturing processes for the construction material occurred in the United States.” (IIJA §70912(6)(C); M-22-11, page 3)

Pursuant to BABAA, the phrase “all manufacturing processes” for construction materials has a defined meaning under BABAA. Specifically, as addressed in IIJA §70915(b) and M-22-11, page 13, BABAA requires OMB to:

- define “all manufacturing processes” in the case of construction materials; and
- “ensure that the standards require that each manufacturing process required for the manufacture of the construction material and the inputs of the construction material occurs in the United States.”

The standards must “take into consideration and seek to maximize the direct and indirect jobs benefited or created in the production of the construction material.” (IIJA §70915(b); M-22-11, page 13)

M-22-11 provides “preliminary and non-binding guidance to assist [federal] agencies in determining which materials are construction materials so that [federal] agencies can begin applying [BABAA] Buy America requirements to those materials,” which “addresses the [BABAA] requirements as set forth in section 70915(b) of the IIJA while providing sufficient time for OMB to receive additional stakeholder input.” (M-22-11, page 13)

The preliminary guidance that defines “all manufacturing processes,” in the case of construction materials, states:

To provide clarity to item, product, and material manufacturers and processors, we note that items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials. For example, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material.

Pending OMB’s issuance of final standards on construction materials, and absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, [federal] agencies should consider “all manufacturing processes” for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material. OMB is seeking additional stakeholder input before issuing further guidance identifying initial manufacturing processes for construction materials that should be considered as part of “all manufacturing processes.” (M-22-11, page 14)

If OMB later issues final standards on construction materials, those standards will supersede the preliminary construction materials guidance in M-22-11 and are incorporated by reference into this WD Letter.

Waiver Requests and Timeline

The US Department of Education’s online BABAA training module states that grant recipients, and their subrecipients and contractors, are responsible for determining whether a product in their infrastructure project is subject to BABAA. BABAA permits federal agencies, recipients, and subrecipients to request waivers in limited circumstances (IIJA §70914(b)–(d); M-22-11, pages 6–13). However, the process requires that waiver requests of a recipient’s subrecipients and contractors be submitted through the recipient.*

Federal agencies publish on their respective websites their active waivers and waiver requests that are under review. Refer to OMB’s [Build America, Buy America Act—Federal Financial Assistance web page](#) for information about federal agencies’ respective waivers and waiver requests. Refer to Attachment 2, Build America, Buy America Act Waiver Request Instructions for Boards, for information about the types of waivers that may be requested and for the justifications required for each waiver.

BABAA waiver requests require written justification (IIJA §70914(c); M-22-11, page 7). Attachment 2 provides instructions on how to request a waiver. The instructions are based on the guidance in M-22-11. Boards must submit waiver requests to TWC, and if TWC agrees with the request, TWC will forward the request to the appropriate federal agency. Federal agencies are responsible for approving all waivers. (M-22-11, page 6)

TWC may not approve a waiver until the request is approved by the appropriate federal agency.

TWC anticipates that federal review may require at least 30 calendar days or more because of the considerations, public notice requirements, and federal-level reviews that apply to federal agencies under BABAA, M-22-11, and Executive Order 14005, issued January 25, 2021, and titled “Ensuring the Future is Made in All of America by All of America’s Workers.”

Federal agencies may reject or approve waivers in whole or in part. (M-22-11, page 9) Approved waivers are most likely to contain specific conditions and to be project-specific, product- or cost-specific, and time-limited. (M-22-11, page 6 and page 9) Upon receiving the federal agency response, TWC will inform the Board whether the request was rejected or granted in whole or in part.

*Note: For purposes of VR COL contracts, TWC is the federal grant recipient, and Boards are contractors (vendors) of TWC (not subrecipients). However, under BABAA, TWC must require that all BABAA-defined infrastructure costs that a Board charges to a VR COL contract comply with BABAA. BABAA requirements also impact contracts that Boards have with contractors (vendors) of BABAA-defined infrastructure costs.

Applicability

Unless exempted by a federally approved BABAA waiver, the BABAA Buy America preference applies to all purchases made under VR COL contracts for iron or steel, manufactured products, and construction materials used in a BABAA-defined infrastructure project in the United States, including those that fall within the micro-purchase threshold and simplified acquisition threshold described in 2 CFR Part 200, as well as larger dollar purchases.

Implementation

Boards will use Attachment 1, Build America, Buy America Contract Provision for Vocational Rehabilitation Contracts as described in this WD Letter. Aside from the contractor representation that occurs through this contract provision, a means does not currently exist for TWC or Boards to efficiently validate that iron and steel, manufactured products, and construction materials used in an infrastructure project were produced in the United States.

Effective Date

BABAA is effective May 14, 2022. (IIJA §70914(a); M-22-11, page 1) However, the US Department of Education received an adjustment period waiver that postponed applicability to its awards until October 1, 2022. Under the waiver, BABAA applies to new, non-competing continuation, and supplemental grant awards issued by the US Department of Education on or after October 1, 2022 (not before). Therefore, BABAA will apply to Fiscal Year 2023 and subsequent years’ VR COL contracts as of October 1, 2022. For expediency, TWC is providing Boards with formal notice of applicability, and implementation guidance and deadlines by this WD Letter. TWC may later add provisions to VR COL contracts.

PROCEDURES:

No Local Flexibility (NLF): This rating indicates that Boards must comply with the federal and state laws, rules, policies, and required procedures set forth in this WD Letter and have no local flexibility in determining whether and/or how to comply. All information with an NLF rating is indicated by “must.”

Local Flexibility (LF): This rating indicates that Boards have local flexibility in determining whether and/or how to implement guidance or recommended practices set forth in this WD Letter. All information with an LF rating is indicated by “may” or “recommend.”

BABAA Buy America Requirement

NLF: Boards must comply with applicable federal BABAA requirements and guidance as described in this WD Letter.

Contract Provision

NLF: Boards must include the contract provision provided in Attachment 1 in procurement solicitations and contracts by the implementation deadlines described in Tables 1 and 2 in this WD Letter, to the extent that the procurement solicitation or contract involves BABAA-defined infrastructure project costs that will be financed in whole or in part under a VR COL contract.

Implementation Deadlines

NLF: Boards must begin using the contract provision in Attachment 1 as soon as practicable, but no later than 30 calendar days after the effective date of this WD Letter (30-day implementation deadline), for new procurement solicitations and contracts, and no later than 90 calendar days after the effective date of this WD Letter for amendments, as outlined in Tables 1 and 2 of this WD Letter.

Table 1: Scenarios for Issuance of Procurement Solicitations to Select a Contractor for a Contract for Infrastructure Project Costs Financed in Whole or in Part under a VR COL Contract

Solicitation Scenarios	Required Action	Deadline
Scenario 1: A Board issued a solicitation before the effective date of this WD Letter. A contract had not yet been executed as of the effective date of this WD Letter.	Amend the solicitation, if practical to do so. At a minimum, ensure that the contract includes the BABAA contract provision provided in Attachment 1.	Refer to the deadlines in Table 2 for the scenarios describing: <ul style="list-style-type: none">• contracts that start between the effective date of this WD Letter and the 30-day implementation deadline; and• contracts that start after the 30-day implementation deadline.

Solicitation Scenarios	Required Action	Deadline
Scenario 2: A Board issues a solicitation within the first 30 calendar days of the effective date of this WD Letter.	Include the BABAA contract provision provided in Attachment 1 in the solicitation, if practicable. If not practicable to include the BABAA provision in the solicitation when issued, amend the solicitation, if practical to do so. At a minimum, ensure that the contract includes the BABAA contract provision.	Refer to the deadlines in Table 2 for the scenarios describing: <ul style="list-style-type: none"> contracts that start between the effective date of this WD Letter and the 30-day implementation deadline; and contracts that start after the 30-day implementation deadline.
Scenario 3: A Board issues a solicitation after the 30-day implementation deadline for this WD Letter.	The solicitation must include the BABAA contract provision provided in Attachment 1.	The contract provision must be included in the solicitation on the solicitation issuance date.

Table 2: Scenarios for Contracts for Infrastructure Project Costs Financed in Whole or in Part under a VR COL Contract

Contract Scenarios	Required action	Deadline
Scenario 1: A contract starts between the effective date of this WD Letter and the 30-day implementation deadline.	Either issue the executed contract with the BABAA contract provision provided in Attachment 1, if practicable to do so, or amend the contract as soon as practicable, but no later than 90 calendar days after the effective date of this WD Letter.	If the contract was issued without the BABAA contract provision, amend the contract as soon as practicable, and complete the amendment no later than 90 calendar days after the effective date of this WD Letter.
Scenario 2: A contract starts after the 30-day implementation deadline.	When a contract for infrastructure project costs starts after the 30-day implementation deadline, the executed contract must be issued with the BABAA contract provision provided in Attachment 1.	The contract provision must be included in the contract upon contract execution.

Contract Scenarios	Required action	Deadline
Scenario 3: A contract started between October 1, 2022, and the effective date of this WD Letter.	If additional infrastructure project costs could occur under the contract, amend the contract to add the BABAA contract provision provided in Attachment 1 as soon as practicable. If it is not practical to amend the contract because all of the infrastructure project costs have already been completed or will be completed before the contract can be amended, include a written explanation in the contract file. An amendment must not be intentionally delayed in order to circumvent BABAA requirements.	Complete the amendments as soon as practicable, but no later than 90 calendar days after the effective date of this WD Letter.
Scenario 4: A contract started before October 1, 2022, and was renewed or extended on or before the end of the 30-day implementation deadline for this WD Letter.	Handle the scenario the same as amendments for contracts that started between October 1, 2022, and the effective date of this WD Letter.	Complete the amendments as soon as practicable, but no later than 90 calendar days after the effective date of this WD Letter.
Scenario 5: A contract that started before October 1, 2022, is renewed or extended after the 30-day implementation deadline for this WD Letter.	The renewal or extension must be executed with a BABAA contract provision if additional infrastructure project costs could occur under the contract. If the provision is omitted because there is no potential for additional infrastructure project costs under the contract, include a written explanation in the contract file.	Contracts in which a renewal or extension is initiated after the 30-day implementation deadline must include the BABAA contract provision at the time of the execution of the renewal and/or extension if additional infrastructure project costs could occur under that renewal and/or extension.

Waiver Request Instructions and Timeline

NLF: Boards must follow the instructions provided in Attachment 2 when requesting a waiver from the BABAA Buy America preference. No option exists to request a blanket waiver for all infrastructure project costs under a given COL contract. Waivers must be

requested and will be considered on a case-by-case basis. Each request must be supported by written justification as described in Attachment 2. TWC and federal agencies may require additional information upon request.

NLF: Boards that request a waiver must not obligate funds under the COL contract for the costs covered by the request unless they receive a response from TWC that the applicable federal agency approved the waiver request.

NLF: Boards must be aware that the final response to a Board’s waiver request may require 30 calendar days or more because of federal review requirements.

Other Domestic Preference, Buy America, and Buy American Requirements

NLF: Boards must continue to comply with any other domestic preference, Buy America, and Buy American requirements that apply to a VR COL contract.

INQUIRIES:

Send inquiries regarding this WD Letter to fiscal.ta@twc.state.tx.us.

ATTACHMENTS:

Attachment 1: Build America, Buy America Contract Provision for Vocational Rehabilitation Contracts

Attachment 2: Build America, Buy America Act Waiver Request Instructions for Boards

Attachment 3: Sample Steps for Identifying a Need for a Build America, Buy America Act Waiver Request for a Contract for Infrastructure Project Costs

REFERENCES:

Executive Order 14005, issued January 25, 2021, and titled “Ensuring the Future is Made in All of America by All of America’s Workers” (86 FR 7475)

Build America, Buy America Act (Public Law 117-58, §§70901–70952)

Office of Management and Budget Memorandum M-22-11, issued April 18, 2022, and titled “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”

Office of Management and Budget “Made In America” website

US Department of Education “Build America Buy America Waivers” website

US Department of Education “Frequently Asked Questions about the Build America, Buy America Act,” updated October 13, 2022

US Department of Education online training, dated January 2023 and titled “Build America, Buy America Act (BABAA): Buy America Sourcing Requirements”

US Department of Education Rehabilitation Services Administration “Build America, Buy America Act (BABAA) Update” to Vocational Rehabilitation State Directors, March 23, 2023