1. Build america, buy america (BABA) [106] (revised 1-11-24)

Furnish construction materials manufactured in the United States. Construction materials include articles, materials, or supplies that are or consist 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).
* Fiber optic cable (including drop cable).
* Optical fiber.
* Lumber.
* Drywall, and
* Engineered wood.

Construction materials exclude cement and cementitious materials, aggregates including stone, sand, or gravel, or aggregate binding agents (e.g., asphalt binder) or additives
(e.g., polymer modifiers and admixtures).

Manufacturing processes for the construction material must occur in the United States. Manufacturing processes for each of the bulleted construction materials above are defined in
2 CFR 184.6 and are summarized below.

Non-ferrous metals: Initial smelting or melting through final shaping, coating, and assembly.

Plastics: Initial combination of plastic, polymer based, or composite materials until item is in its final form.

Glass: Initial batching and melting, annealing, cooling, and cutting.

Fiber Optic Cable: Initial ribboning, buffering, and fiber stranding and jacketing.

Optical Fiber: Initial preform fabrication through completion of draw.

Lumber: Initial debarking, treatment, and planing.

Drywall: Initial blending of gypsum, cutting, and drying of sandwiched panels.

Engineered Wood: Initial combination of constituents until item is in its final form.

BABA preference applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to a project. It does not apply to tools, equipment, and supplies brought to the construction site and removed at or before the completion of the project
(e.g., temporary aluminum scaffolding). Buy America preference does not apply to equipment and furnishings that are used at or within the finished infrastructure project but are not permanently affixed to the structure (e.g., movable chairs, desks, or computer equipment used at or within the project but are not integral or permanently affixed to a structure).

2 CFR 184 applies to all construction materials on projects receiving federal financial assistance funds. Submit Form MDT-MAT-407 “Manufacturer’s Certificate of Compliance” for every material identified as a construction material in the Department’s Materials Manual Section MT 601 furnished to the project. For all other materials, documentation will be required upon request. Do not incorporate construction materials into the project until all required documentation is submitted to the Department. Ensure that suppliers and manufacturers understand the BABA and contract requirements to supply the required documentation.

The Department will not accept items installed until all supporting documentation has been reviewed and is found to be in accordance with the contract requirements. Insufficient or unavailable documentation or documentation showing products containing construction materials of foreign origin are grounds for removal and replacement at the contractor’s expense.

The Department has designated contract materials as “construction materials” by their respective 9-digit material codes in section MT 601 of the Montana Materials Manual. However, the Department recognizes there will be situations where a product or material may not fit the designation indicated in section MT 601. In these cases, submit documentation demonstrating or justifying the supplier or manufacturer’s position that their specific item has been misclassified to the Project Manager at least 10 business days in advance of installation. the Department, in conjunction with FHWA, will review the submitted documentation and decide as to how that specific product or material will be classified. These determinations will be final and will require the appropriate necessary documentation as defined above.

The US DOT has found that it is in the public interest to issue a waiver of BABA’s domestic preferences in certain situations. For Construction Materials, the domestic preference may be waived if the total value of non-compliant material is under $1,000,000 or 5% of the total applicable project costs, whichever is less. Submit actual individual material costs, minus manufacturing costs outside the defined manufacturing processes outlined above, along with justification in the form of invoices, bills of lading, or other appropriate documents to the Department if requesting the waiver.

The above waiver does not apply to iron and steel and the existing de minimis standard for iron and steel under 23 CFR 635.410(b)(4) continues to apply.

Projects with a total contract value of $500,000 or less are exempt from all domestic preference regulations including steel and iron.