



Build America, Buy America:

What Suppliers, Distributors
& Manufacturers Should Know

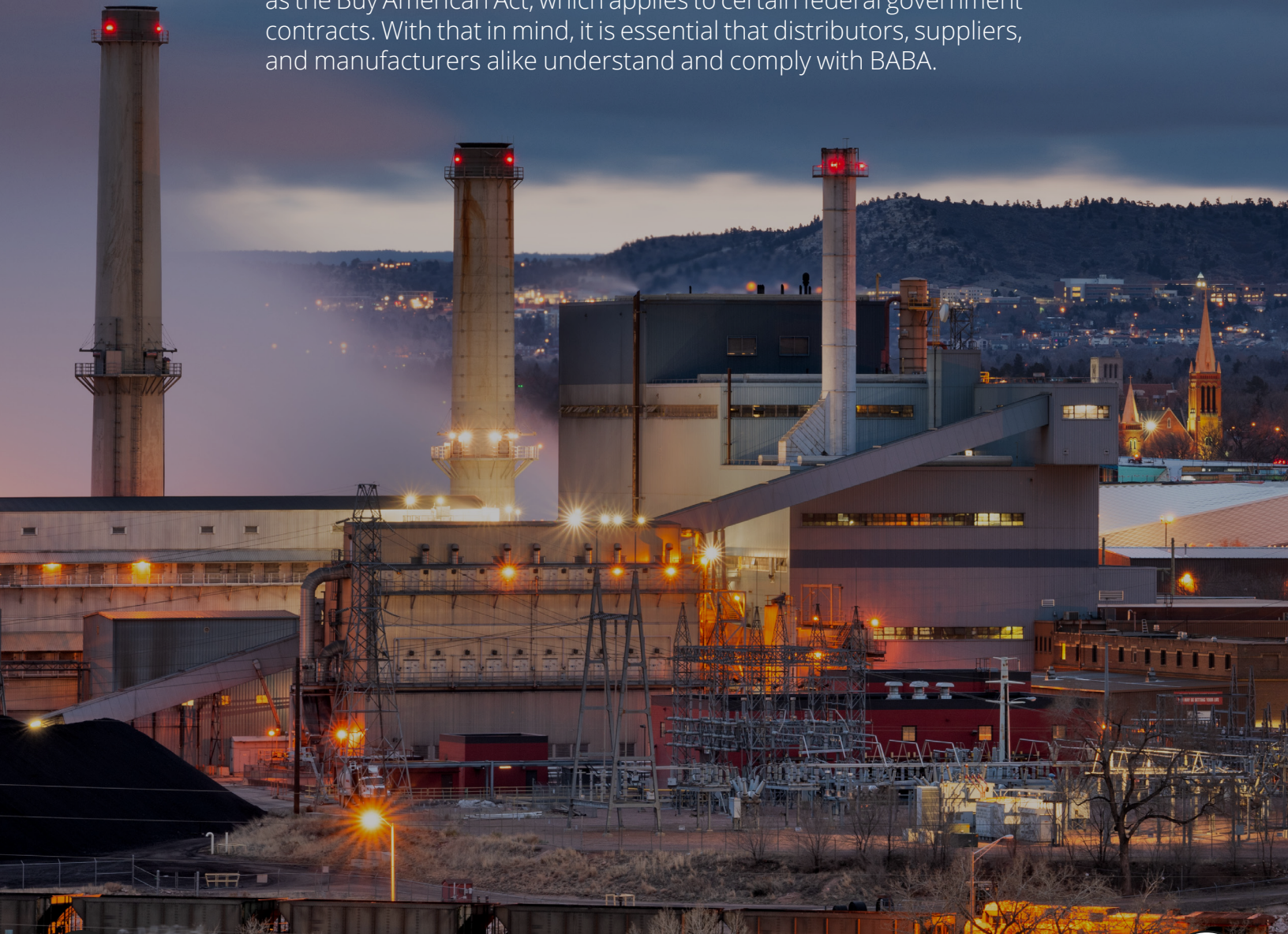
By Steven Koprince



If you are working to “Build America” by taking part in an infrastructure project financed, in whole or in part, by “federal financial assistance,” you may be required to “Buy America,” that is, buy products produced in the United States.

The so-called “Build America, Buy America” requirements, which were signed into law in 2021 and made effective via implementing regulations and guidance in 2023, impose new domestic sourcing restrictions on federally funded projects. Additionally, BABA—as it’s known colloquially—strengthened existing domestic sourcing requirements applicable to certain federally funded projects.

While BABA is new law, the federal government has not hesitated to impose severe penalties on those who have violated similar laws, such as the Buy American Act, which applies to certain federal government contracts. With that in mind, it is essential that distributors, suppliers, and manufacturers alike understand and comply with BABA.





I. The Infrastructure, Investment & Jobs Act of 2021

In 2020, the COVID-19 pandemic exploded worldwide. In addition to the pandemic's human cost, the pandemic dealt a severe blow to the global economy. In the United States, the stock market fell precipitously, unemployment rose, and the overall economy contracted by the greatest percentage since 1946—the year the country wound down most World War II spending.

The pandemic also highlighted supply chain vulnerabilities. Across industries, inventories shrunk, supplier delays increased, and consumer prices rose. Shortages in critical goods as diverse as microchips and medications made headlines.

Faced with an unprecedented crisis, the federal government undertook many drastic actions, including emergency financial and rental assistance for individuals and business-related programs like the Paycheck Protection Act. These initiatives included a massive infrastructure package originally known as the Bipartisan Infrastructure Law and later as the Infrastructure, Investment and Jobs Act, or IIJA.

The IIJA was signed into law in November 2021. It provided approximately \$1.2 trillion in total infrastructure spending, of which approximately \$550 billion was new spending. The new spending authorized by the IIJA included billions for surface transportation, bridges, railways, air transportation, broadband internet, and much more.

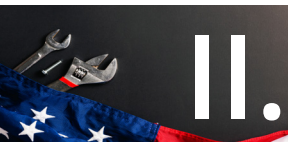
Congress negotiated the IIJA against a backdrop of supply chain disruptions and bipartisan initiatives throughout the federal government to address not only the short-term impact of these disruptions, but also strengthen domestic supplies to better guard against future disruptions.

For example, on Jan. 25, 2021, the President issued Executive Order 14005, known as the “Ensuring the Future is Made in All of America by All of America’s Workers” order. Among other things, Executive Order 14005 tightened certain existing restrictions in the Buy American Act and created a “Made in America” Office within the Office of Management and Budget to “provide centralized, strategic, and holistic management of domestic sourcing activities across Federal procurement, Federal financial assistance, and maritime policies.”

Executive Order 14005 was just one of several domestic sourcing initiatives undertaken in or around the peak of the COVID-19 pandemic and thereafter. For instance, both President Trump and President Biden invoked the Defense Production Act to obtain necessary goods from the private sector and to offer funding opportunities to private businesses to develop or expand domestic sources of certain high-priority products. Additionally, Congress has adopted several measures intended to reduce or eliminate the federal government's reliance on products from so-called "countries of concern," a list which notably includes China.

It was against this backdrop that Congress passed the IIJA. Unlike federal contract spending, which often is subject to domestic sourcing requirements like the Buy American Act, most funds allocated by the IIJA are to be awarded through grants and similar arrangements (collectively known as "federal financial assistance") with so-called "recipients," which primarily are state and local governments. While some federal financial assistance was already subject to domestic sourcing rules, those rules varied depending on the nature of the federal financial assistance, the entity receiving the assistance, and the federal agency responsible for awarding the assistance.

For this reason, Congress elected to include a powerful new domestic sourcing requirement in the IIJA. Known as Build America, Buy America, or BABA for short, this powerful new requirement significantly expanded and strengthened the domestic sourcing requirements applicable to federally funded projects.



Build America, Buy America

BABA is implemented primarily in regulations set forth in Part 184 of the Code of Federal Regulations. In October 2023, the Office of Management and Budget published a BABA compliance guide to supplement the regulations. The fundamental underlying premise of BABA is straightforward: When an infrastructure project is subject to BABA, certain products associated with the project must be produced in the United States.

BABA's application can be understood as a hierarchy consisting of three levels. First is the project level: that is, the question of whether a particular project is covered by BABA. Second is the contract level, which involves the question of whether BABA is included in a contract,

subcontract, or other contractual agreement stemming from the project, and the nature of the BABA-related requirements included in the contract. Third is the product level, in which the question is which products comply with BABA’s domestic sourcing requirements.

1. BABA Level One: Project Level

BABA broadly applies to “all federal financial assistance” where “funds are appropriated or otherwise made available and used for a project for infrastructure.” “Federal financial assistance,” in turn, means that non-Federal entities (known as “recipients”) “receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance.” Finally, an “infrastructure project” is broadly defined as “means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.”

Infrastructure encompasses public infrastructure projects in the United States, which includes, at a minimum, the structures, facilities, and equipment for 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; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.

BABA’s implementing regulations go on to say: Notably, BABA is not limited to infrastructure projects financed by IIJA funds. With the exception of certain projects identified in the regulations, BABA applies to any infrastructure project receiving federal financial assistance, even if the project’s funding is unrelated to the IIJA. BABA is here to stay, even after the IIJA’s funds are exhausted.

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