

FAA Buy American Preference Updates

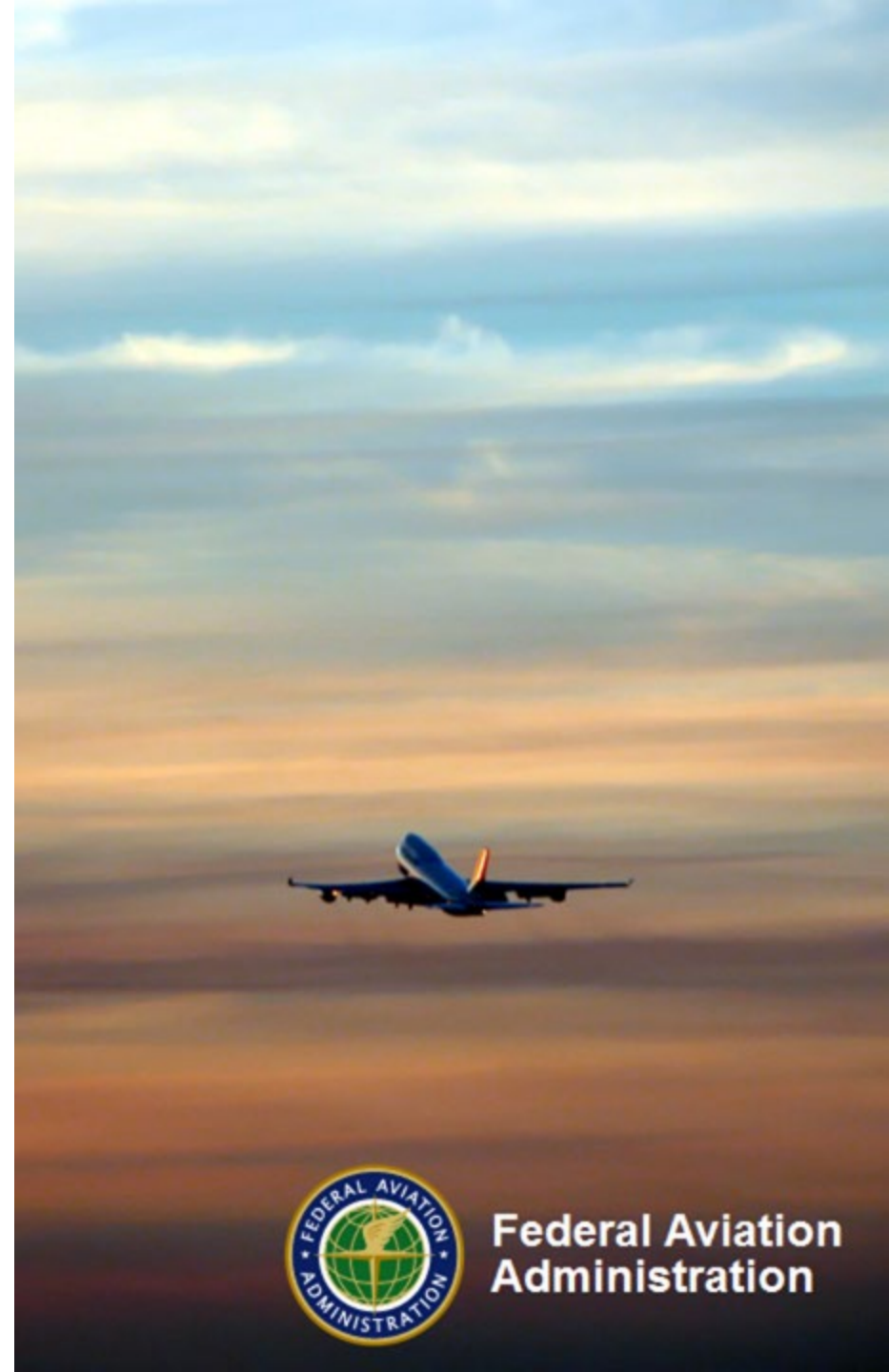
Presented to: National Consultant Workshop

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Date: January 24, 2024



**Federal Aviation
Administration**



Topics

- Buy American Requirements
- 2 CFR 200 Revisions & DOT Waivers
- FAA Waiver Performance
- Applying for FAA Waivers
- FAA Resources

49 U.S.C. § 50101 - Buying goods produced in the United States

- Requires use of 100% domestic steel and manufactured goods;
Provides 4 Types of waivers
 - Public interest
 - Insufficient quantity or quality of domestic steel or manufactured goods (Nonavailability)
 - More than 60 percent of the cost of all components of the facility or equipment procured in the U.S. and final assembly of the facility or equipment has occurred in the U.S.
 - Including domestic material increases cost of project by more than 25 percent (Unreasonable Costs)

FAA Reauthorization of 2018

- **Approved Waivers made available on FAA website,** including justification and ...
- Informal public notice and comment opportunity
- Annual report to Congress
- Reauthorization occurs Every five years
- Policies continue if not revoked/terminated

Executive Order 14005 (1/25/2021)

- Directs Policy to : “maximize the use of goods, products, and materials produced in the U.S.
- Creates “Made in America” office in Office of Management & Budget (OMB).
- Centralizes waiver review
- Requires advance OMB determination (30 days) and reports.
- Consultation with NIST/ Manufacturing Extension Partnership (MEP) required. § 70916(c)

Infrastructure Investment & Jobs Act (IIJA)

- Introduced the Build America Buy America Act
- Requires documentation of all Non-U.S. Materials
- New preferences apply to all **iron, steel, manufactured products** and **construction materials**. Apply to all federal agencies.
- Excludes cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives

IIJA Continued

- Provides only 3 Waivers
 1. Public Interest
 2. Nonavailability
 3. Unreasonable Costs
- New preferences apply to all **iron, steel, manufactured products** and **construction materials**. Apply to all federal agencies.
- At least 15 days for public comment on the proposed project specific waivers

Build America Buy America Act

- BABA **preserves** FAA's requirements under § 50101
- Must report non-domestic origin
- Intends to strengthen domestic place of manufacture requirement to **require at least 55%** of cost of all components.
(Note: This is less than FAA Type III req.)
- Requires justification for the use of Non-domestic construction materials *(FAA will use MEP)*
- Ensure no domestic alternatives are available within this cost parameter

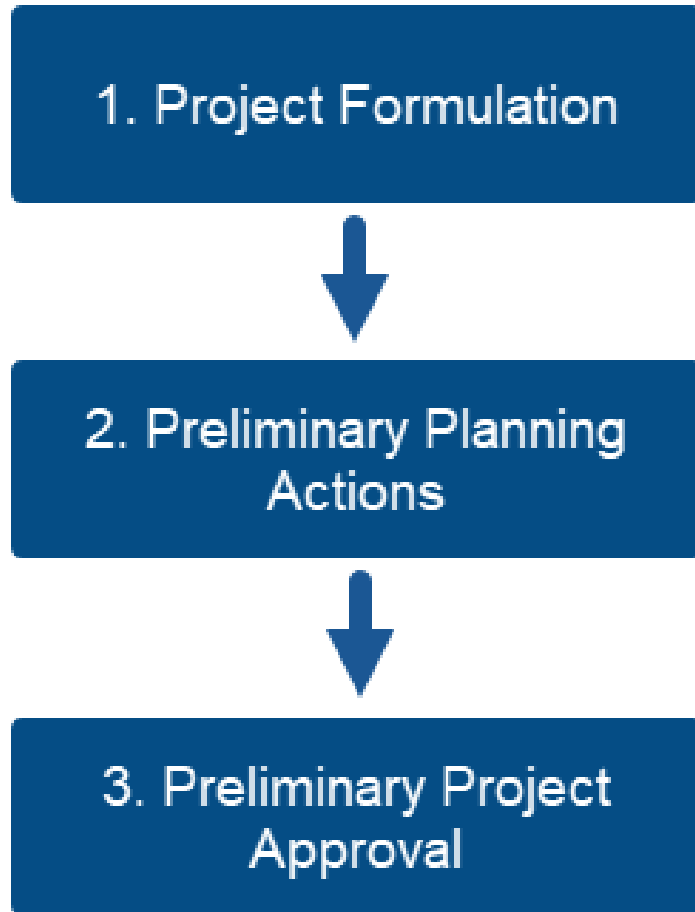
2 CFR Parts 184 and 200 Highlights

- Implements guidance in the implementation of the requirements of the Build America, Buy America Act (BABA)
- Defines construction materials, manufactured goods
- BABA states that “[n]othing in this part affects a [BABA preference] for a Federal financial assistance program for infrastructure that is in effect and that meets the requirements of section 70914” (e.g., FAA Type III Waivers)
- Leaves Federal agencies with discretion on how best to ensure proper application of the Buy America preference to the entire infrastructure project receiving a Federal award

DOT Limited Waivers

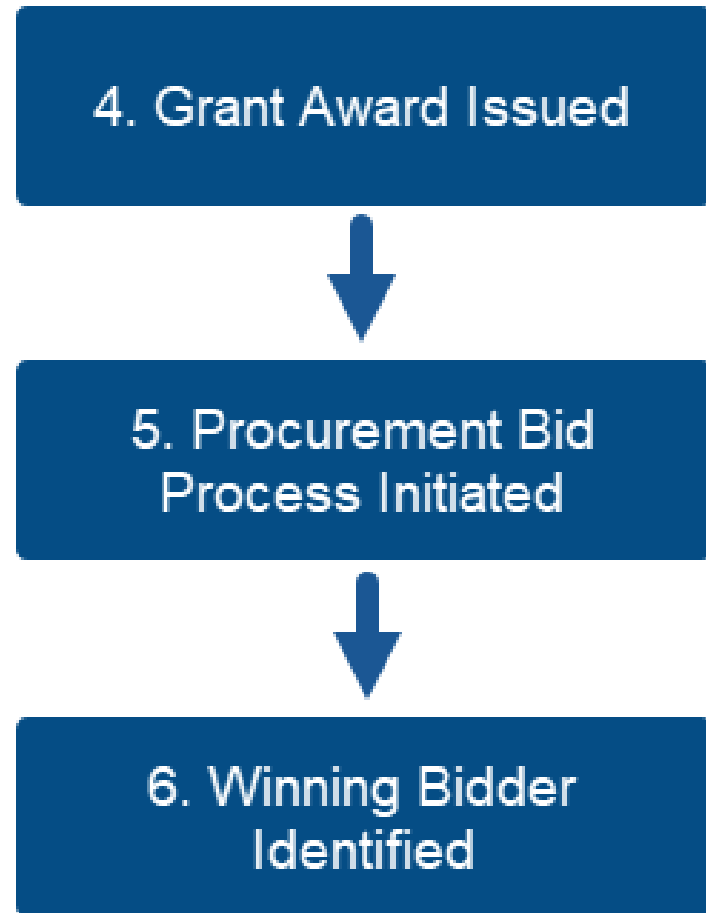
- **De Minimis Costs and Small Grants**
 - Must meet at least 55% domestic costs
 - Focused on eligible projects for bulk material acquisition
 - Does not lessen FAAs *more than 60% requirement* for Type III waiver
 - **Can't maximize with reduced requirements**
 - Not useful for FAA due to capacity of the Type III. Maybe useful for Type I, II or IV after prerequisites are met

Projects-to-Waiver Process: Preliminary Actions



- The project formulation, preliminary planning actions, and preliminary project approvals are guided by statutory requirements and/or other Federal policies.
- It is a best practice to begin during this stage to determine if the project can be completed entirely with 100% domestic materials or will likely need a Buy American waiver.

Projects-to-Waiver Process: Grant Award



- The next stages in the project to waiver process include a grant award number, procurement bid, and a winning bidder or offeror is determined by the sponsor.
- Procurement bids should follow guidelines in 2 CFR 200 Procurement provisions, local airport sponsor (i.e., local gov't) procurement rules and contract agreement terms to meet Buy American requirements.

Projects-to-Waiver Process: Waiver

7. Bidder Submits Buy American Waiver Application

- Compliance to Buy American requirements is a matter of bid responsiveness and Federal requirements.
- Waivers must be approved prior to grant execution, unless for unusual circumstances of alternative delivery methods of procurements is approved by the FAA.

Bidder's Waiver Submission

- Winning Bidder/Offeror Contacts the FAA:
 - Content Percentage Worksheet
 - Final Assembly Questionnaire (FAQ)
 - Signed Federal Contract Provisions
- Visit AIP Buy [American Preference Requirements](#) web page

Buy American Application Responsible Parties

- The typical airport development project involves the following parties:
 - Prime Contractor/Manufacturer
 - Subcontractor
 - Supplier
- Each has responsibilities for the project to receive a waiver.

Buy American Application Responsibilities:

Prime Contractor/Manufacturer

- Coordinates completion of FAA forms 5100-136 - Content Percentage Worksheet and 5100-137 Final Assembly Questionnaire.
- Records costs from sub or supplier costs as "cost of doing business" onto forms.
- Excludes labor costs and retail markup for completing final project.
- Submits final documents to FAA, including signed Buy American Federal Contract Provisions.
- May submit proprietary information directly to the FAA.

Buy American Application Responsibilities:

Subcontractor

- Provides materials and costs to prime contractor for entry onto FAA Form 5100-136.
- Alternatively, may submit proprietary information directly to the FAA and inform prime.
- Costs for material components/subcomponent include labor and retail markup.

Buy American Application Responsibilities:

Supplier

- Provides materials, costs to the prime contractor for entry onto FAA Form 5100-136
- Alternatively, may submit proprietary information directly to FAA and inform prime
- Costs for material components/subcomponent include labor and retail markup

FAA Project Component Structures

Final Project / product Material level 0	Vehicles	Buildings	Equipment	Runways, Taxiways, Aprons, Roads
Manufactured components (material level 1)	Engine Chassis Transmission Cab	Structural steel Walls Roofing Electrical wiring HVAC Elevator	Power System Control System Frame	Rebar
Manufactured subcomponents (material level 2)	Windows Steps Electrical wiring Radio Seats	Windows Doors Insulation Paint Toilets		Marking paint Lighting
Materials below level 2	* Spark plugs * Screws ** Mats			

* Eligible material may be included/counted within the component(s) or subcomponents.

** Ineligible/excluded items such as services or exempted by Federal Acquisition Regulation (FAR) 25.104 are excluded.

How to Complete Form 136 - 1

- Cumulative application submitted by Prime Contractor or Submission to FAA to protect proprietary.
- Enter the date of the waiver application.
- Enter the business entity name of the winning bidder/offendor.
- Select which best describes the winning bidder/offendor.
- Enter the first and last name of the offeror/bidder POC/Signatory.
- Enter the email address and phone Info of the POC/Signatory.
- Enter the FAA Eligible Project, also called the standard description. Ask FAA.
- Enter the Airport Sponsor's name and Location Identifier (LOCID)
- Enter the FAA Award I. For confirmation, contact the FAA office. Nationwide waivers do not have specific award.
- FAA Item K available from related Advisory Circulars.
- Enter the **Total Material Cost** match from the level "0" on the completed worksheet.

How to Complete Form 136 - 2

FAA Buy American Preference (including Buy American Build American) Compliance

Does this project include any iron, steel or any of the following construction materials, not 100% produced in the United States?

☐ Yes ☐ No

If "Yes," indicate the cost and percentage of the project below.

Steel (e.g., structural steel, rebar)	Cost: <input type="text"/>	Percentage: <input type="text"/> %
Iron	Cost: <input type="text"/>	Percentage: <input type="text"/> %
Non-ferrous metals	Cost: <input type="text"/>	Percentage: <input type="text"/> %
Plastic and polymer-based products	Cost: <input type="text"/>	Percentage: <input type="text"/> %
Glass (including optic glass)	Cost: <input type="text"/>	Percentage: <input type="text"/> %
Lumber	Cost: <input type="text"/>	Percentage: <input type="text"/> %
Drywall	Cost: <input type="text"/>	Percentage: <input type="text"/> %

Use of Non-Domestic Construction Materials Justification

Provide a description of your efforts to locate and secure a domestic source for those "construction materials" or final manufactured goods that are not 100% produced in the U.S., including use of the Manufacturing Extension Partnership (MEP) and market research.

- The “**Buy American Preference**” section applies to a Type I, II, or IV waiver.
- Use the bottom “**Justification**” section to provide a description of the market analysis performed and justification for the use of non-domestic materials/and final project.

How to complete form 136 - 3

[illegible]

- **The first data table row** is used to provide a summary of the completed project. E.g., Terminal Expansion/# Ft Terminal Expansion, etc.) The total material cost will not match the bid amount. The total material cost does not include labor or retail markup.
- **Beginning at the next row**, list the components of the project. For example: a building project may consider listing the *structural* steel, reinforcement rebar, and the anticipated quantity. Omit excluded items, e.g., tires, rubber-based items.

How to complete form 136 - 4

[illegible]

- **Enter the remaining components & subcomponents** of the final project.
 - For example: A building has windows, doors, roofing, etc. Costs of subcomponents may be included within the component item.
 - For example: Nails and brads may be included in the roofing component. Components of different sizes, dimensions, uses may be listed as separate components.
 - For example: Bus seating package A, instead of seats.

How to complete form 136 - 5

[illegible]

- **Enter unit of measure** used for the component. It is preferred that "lump Sum" be avoided.
- **Enter the total price** for the unit of measure in the project. Next enter the price of the U.S. portion of the qty and then the non-U.S. portion. Indicate the country of origin of non-U.S. costs only.
- The "**Price/Unit of Measure**" column is the total of the U.S. Origin Cost and Non-U.S. Cost.

How to Complete Form 136: Signature & FAA Areas

Certification

The undersigned certifies that this information is true and accurate to the best of their knowledge. A false certification represents a violation of 18 U.S.C § 1001 and 49 U.S.C § 47126. Signatory has the burden of proof to establish compliance.

Signature: Date:

Name:

Title:

FOR FAA USE ONLY

(Mark the appropriate Waiver Type & Scope)

Applicable FAA Waiver Type

☐ Type I Public Interest (HQ Only)

☐ Type II Nonavailability (HQ Only)

☐ Type III More than 60% and Final Assembly within the U.S.

☐ Type IV Unreasonable Cost (Requires MEP/requires HQ coordination)

☐ BABA Iron, Steel, or Construction Material (requires justification) (Apply BABA Flag)

Applicable FAA Waiver Scope

☐ Project Specific

☐ Nationwide – (General Applicability) (For HQ Only)

Justifications

☐ Manufacturing Extension Partnership (MEP) Coordinated

FAA Official's Signature:

End of FAA-Use Only Section

- In the top “Certification” area, apply the signature of the applicant POC/Signatory and date. Enter the POC/Signatory’s first and last name and title.
- The FAA will use the bottom area to identify the Type and Scope, and if any additional justifications were coordinated before applying an electronic signature.

How to complete form 137

U.S. Department of Transportation
Federal Aviation Administration

OMB CONTROL NUMBER: 2120-0569
EXPIRATION DATE: 6/30/2023

— CONFIDENTIAL —
NOT SUBJECT TO DISCLOSURE UNDER EXEMPTION # 4
OF THE FREEDOM OF INFORMATION ACT

Buy American Preferences – Final Assembly Questionnaire

To assist the Federal Aviation Administration (FAA) in making the determination of whether final assembly of the product occurs in the United States, please complete and submit this questionnaire when requesting a Buy American Waiver under 49 USC § 50101(b)(3)(A).

Company Name: _____ Date: _____
FAA Eligible Item: _____ FAA Item Number (if applicable): _____
Address of Final Assembly Location: _____

1. Provide a description of the assembly process occurring at the specified final location in the United States.

a. Describe the final assembly process and its various operations.

b. How long does the final assembly process take to complete?

2. Provide a description of the resources used to conduct the assembly of the product at the specified location in the United States.

a. How many employees are involved in the final assembly process and what is the general skill level of those employees?

b. What type of equipment is used during the final assembly process?

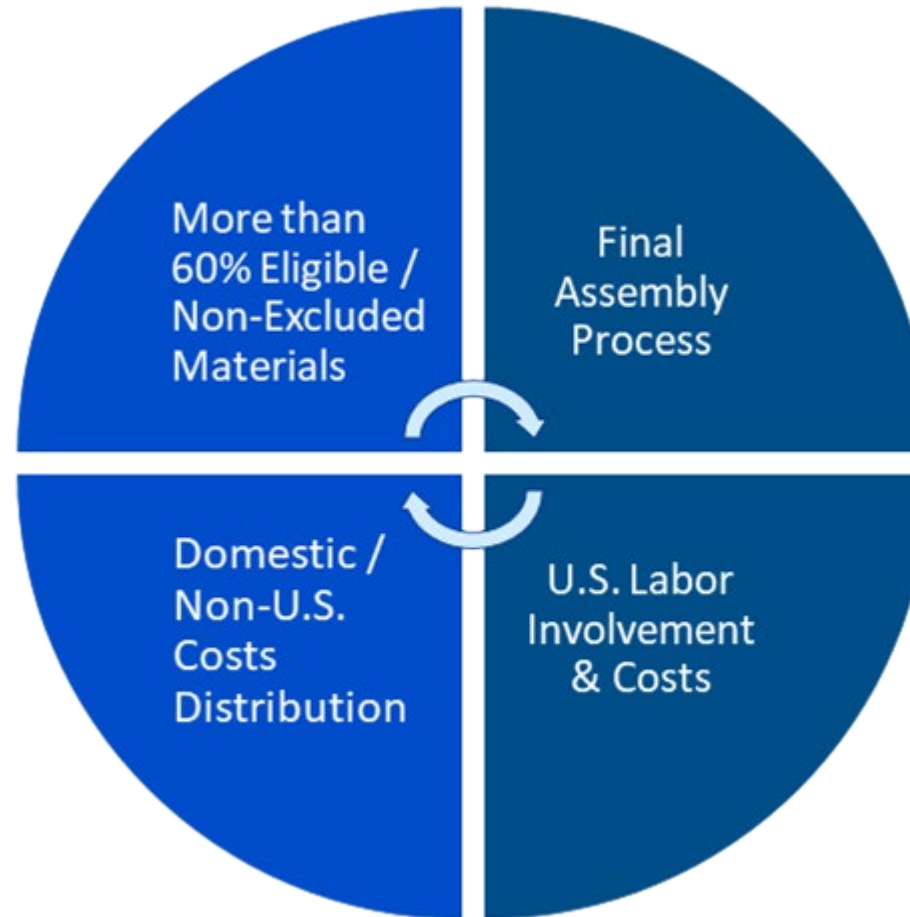
c. What is a rough estimate of the associated cost to conduct final assembly of the product at the specified location in the United States?

The undersigned certifies that this information is true and accurate to the best of their knowledge. A false certification represents a violation of 18 U.S.C § 1001 and 49 U.S.C § 47126. Signatory has the burden of proof to establish compliance.

Signature: _____
Name: _____

- This **questionnaire** describes the final assembly (substantial transformation of the materials/ components/subcomponents). Also describes the use of American workforce and labor cost.
- Enter the same **Eligible Project Title** from form 136 and FAA Item Number if applicable.
- Enter the **Final Assembly Location** as the place at which the final project becomes useable as intended for the project.
- Enter the **rough estimate of the labor costs** to complete the final assembly.

Type III Waiver Review



Content Percentage Worksheet (5100-136)

- Illustrates Project's Structure
- Material levels:
 - Final Project: 0
 - Component: 1
 - Subcomponent: 2
- Excludes Labor & Retail Markups on the Final Project

Final Assembly Questionnaire (5100-137)

- Demonstrates Manufacture within U.S.
- American Workers Involvement
- Shows Labor Costs to Final Project

Type of Waivers in FY 2023

- 100% of all waivers in FY23 were for projects of more than 60% domestic material and U.S. Final Assembly.
- FY23 Waivers are reflective of FAA projects.

Protecting Proprietary Interests

- Freedom of Information Act Exemption 4 protection

-- CONFIDENTIAL --
NOT SUBJECT TO DISCLOSURE UNDER EXEMPTION # 4
OF THE FREEDOM OF INFORMATION ACT

- Waiver information may be sent directly to the FAA.
(Make sure to notify sponsor/prime).
- FAA issues non-disclosure approvals.
- FAA will **not** sign Non-Disclosure Agreements.

When Buy American Requirements Apply

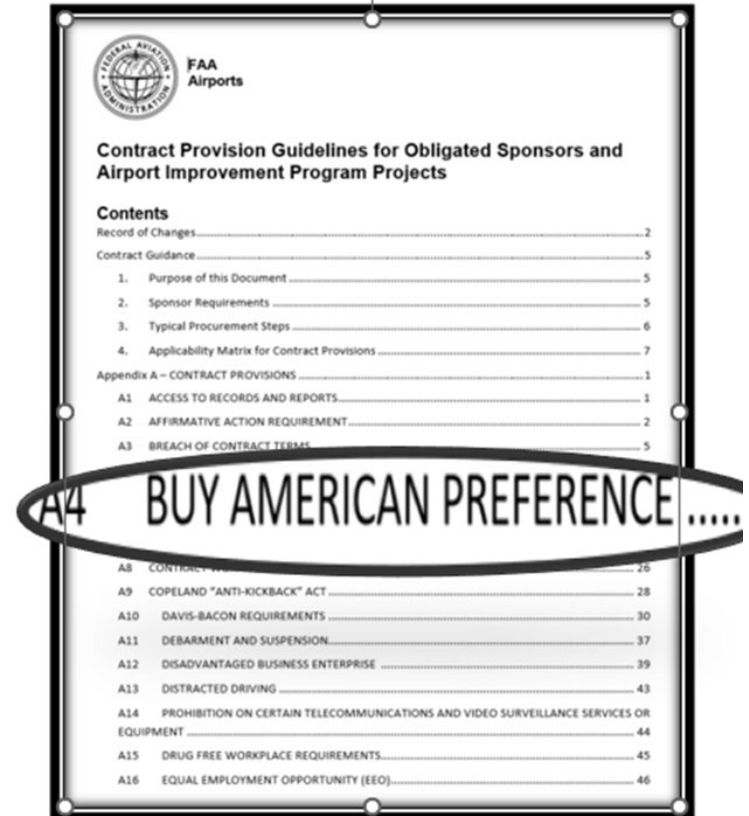
Nothing new here!

- Federal Funds Only
- Federal Funds + Cost Share
- Federal Funds + Revenue
- When the useable unit of work is inclusive of steel, iron, or a manufactured good
- Applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project.

Unless Waived

FAA Buy American Federal Contract Provisions

- Updated 5/24/2023!
- Outlines Expanded Buy American Authority
 - A. 49 USC 50101
 - B. IIJA (BABA)
 - C. Executive Order 14005
- Certify the project is 100% domestically sourced **or request a waiver**



FAA Airports	
Contract Provision Guidelines for Obligated Sponsors and Airport Improvement Program Projects	
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Project Specific Approval Letter

- Informs the parties:
 - Airport Sponsor
 - Prime Contractor (Offer/Bidder)
 - Third Party Supplier
- States that the bidder's project meets FAAs Buy American Preference.
- Does not provide proprietary information

How to Write a

Waiver Approval Notice

FAA
Office of Airports Planning and Programming

[Date] Sample Template

Type III Project Specific Waiver Approval Letter

[POC]
[Manufacturer]
[Address]
[City, State] [Zip Code]
[\[EMAIL\]](#)

[POC]
[Airport Sponsor]
[Address]
[City, State] [Zip Code]
[\[EMAIL\]](#)

Instructions:

1. Use this sample template for Type III Project Specific Waivers.
2. Send the completed approval letter ONLY to the waiver applicant and to the airport sponsor.
3. Combine (PDF) to this letter the completed content percentage worksheet (Form 136 or 143) and final assembly questionnaire (Form 137).
4. Submit the combined documents to the Buy American KSN.
5. DO NOT SEND COMPLETED FORMS to Airport Sponsors, Consultants, or any other party.

RE: Request for FAA Nationwide Buy American Preference Waiver for *[Insert the FAA Eligible Item; [Insert model/type]]* for use on Airport Improvement Program Grant Award [Award Number].

Dear [POC]:

Thank you for your interest in the Federal Aviation Administration (FAA) Buy American Preference.

The FAA has completed its review and analysis of the Product Content Percentage Worksheet and Product Final Assembly Questionnaire in consideration of your request for a Type III Buy American waiver for the *[Insert manufacturer's name]* [FAA eligible Item [model/type]] under 49 U.S.C. §50101(b)(3) for use on AIP award *[Insert AIP award number]*.

Based on the documents you submitted, it appears that the cost of components and subcomponents produced in the United States (U.S.) is more than 60% of the cost of all the product's components and final assembly occurs in the U.S. } *No need to provide percentages from the manufacturer's form. Instead, use the statutory language. This language protects the manufacturer's private information under FOIA exemption 4.*

The FAA approves a project specific Type III waiver for *[Insert manufacturer's name]* *[Insert FAA eligible Item [Insert model/type]]*. Be advised that this waiver is limited to this specific product for this AIP airport development project.

Approval under Alternative Procurements Methods

- CMAR, Design Build Considerations –
- Features delayed list of materials and costs.
- Send signed certification from the Federal Contract Provisions before beginning.
- Sponsor, prime, and FAA track materials until a list complete.
- Make determination as quickly as possible.

Alternative Procurement Methods Project Specific
Type III Waiver Approval Letter Template

Date:

Airport Sponsor POC
Airport Name
City, State, Zip Code
Airport Sponsor POC Email Address

Manufacturer/Prime Contractor POC
Manufacturer/Prime Contractor Business Name
Manufacturer/Prime Contractor City, State, Zip Code
Manufacturer/Prime Contractor POC Email Address

Dear [Manufacturer/Prime Contractor POC],

Thank you for your interest in the Federal Aviation Administration (FAA) Buy American Preference.

In accordance with the FAA's prior approval for use of a [Design Build/CMAR, etc.] alternative procurement method on [enter month, day, year], and contract provision certification that the project is not 100% produced from materials within the United States, the FAA has completed its review and analysis of the Content Percentage Worksheet(s) FAA and Final Assembly Questionnaire.

Based on the documents you submitted, the cost of components and subcomponents produced in the United States (U.S.) is more than 60% of the cost of all the product's components and final assembly occurs in the U.S.

The FAA approves a project specific Type III waiver for the [eligible project] at [airport name (LOCID)] under FAA award # [X-XX-XX-XXXX] under 49 U.S.C. §50101(b)(3).

Be advised that this waiver is limited to this specific project only, is not transferable, expires at the when this grant is closed by the FAA, and is subject to additional review if necessary.

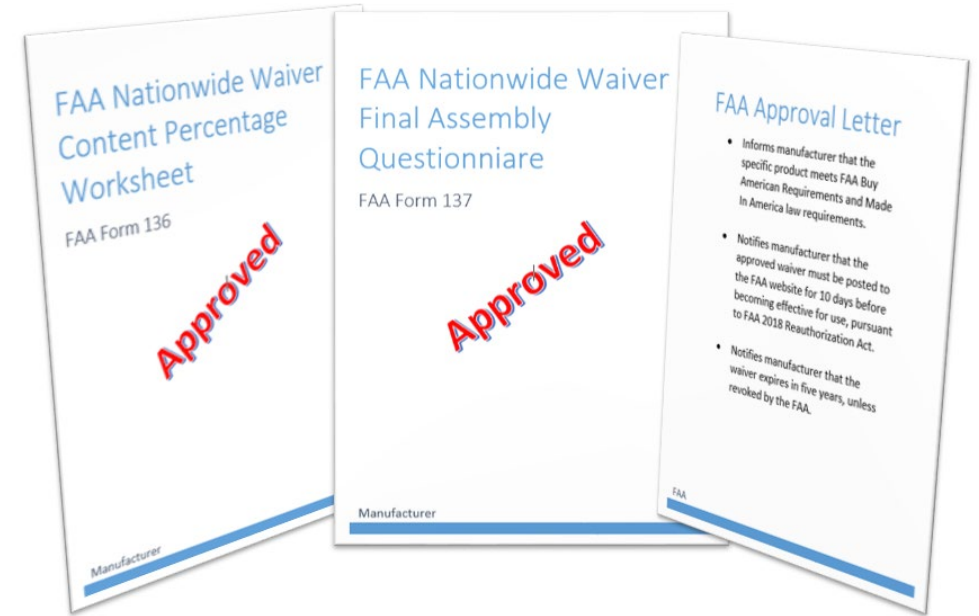
This approved waiver is scheduled for publication on the FAA Buy American webpage, where it shall be open ten days for public comment, then added to the list of approved project specific waivers and become effective for use by the airport sponsor for allowable reimbursement.

Please contact me should you have any additional questions.

[FAA Regional/Airport District Office POC]

The Nationwide Waiver

- Follows similar process as project specific waivers.
- New application required every 5 years.
- Available for use as component or project after procurement bid.



Prohibited Telecommunications and Video Surveillance Services and Equipment

National Defense Authorization Act [Public Law 115-232 § 889(f)(1)] and 2 CFR § 200.216 prohibit use of certain telecommunications and video surveillance services or equipment:

- A. Telecommunications equipment produced by *Huawei Technologies Company* or *ZTE Corporation* (or any subsidiary or affiliate of such entities)
- B. For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by *Hytera Communications Corporation*, *Hangzhou Hikvision Digital Technology Company*, or *Dahua Technology Company* (or any subsidiary or affiliate of such entities)

§ 200.216 Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

- a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:
 - 1) Procure or obtain
 - 2) Extend or renew a contract to procure or obtain or
 - 3) Enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system
- See 2 CFR 200.216 for more details

Buy American Preference Requirements Web Page

https://www.faa.gov/airports/aip/buy_american

- Outlines the Four Waivers Available
- Implementation Fact Sheets
- AIP Handbook (Eligibility Guidance)
- Federal Contract Provisions
- Waivers Issued
- Waivers Open For Comment
- Procurement and Contracting Guidance
- Required Forms
 - 5100-136 Content Percentage Calculation Worksheet
 - 5100-137 – Final Assembly Questionnaire

Buy American Requirements: The Game Plan



- Touch base with sponsors/FAA during the project formulation stage.
- Buy American requirements attached to Federal dollars.
- Ensure sponsors use the current Buy American Federal Contract Provisions and other forms.

Buy American Requirements: The Game Plan - 2

- Alternative procurement methods require tracking eligible components and subcomponents
- Avoid old copies of signatures on documents. Submit e-signatures or updated signature
- Explain how the components & subcomponents result in the final project



Available FAA Resources

- Courtesy Reviews with HQ
- Buy American Preference Fact Sheet
- BABA Implementation Fact Sheet
- Updated downloads from FAA Webpage
- Subscription to FAA Waivers Webpage
- Presentations, Meetings, etc.